

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 96B173

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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MITCH DELGADO,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.  
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Hearing was held on February 14, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Mary Dugan and was represented by Michael E. King, Assistant Attorney General. Complainant appeared and was represented by Luis A. Corchado, Attorney at Law.

Respondent called the following witnesses: Mitchell Delgado, complainant (adverse); Mary Dugan, Equal Employment Opportunity Representative; David Miller, Design Engineer; and Kenneth Conyers, Regional Transportation Director for Region 2, Colorado Department of Transportation.

Complainant testified on his own behalf and called as adverse witnesses Robert Torres, Preconstruction Engineer, Colorado Department of Transportation, and Mary Dugan.

Exhibits 1 through 9, 11, 12, 13, 18 through 23 and 25 were stipulated into evidence.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment for not having a valid Colorado driver's license. For the reasons set forth below, respondent's action is affirmed.

**ISSUES**

1. Whether respondent's action in terminating complainant's

employment was arbitrary, capricious or contrary to rule or law.

2. Whether complainant was treated differently from similarly situated employees.

### **PRELIMINARY MATTERS**

The hearing commenced on July 10, 1996. Assistant Attorney General Michael King appeared in person for respondent. Catherine Garcia, Member Services Representative for the Colorado Federation of Public Employees, appeared by telephone for complainant. Ms. Garcia is not a lawyer. The parties stipulated that a settlement agreement had been reached.

On July 30, 1996, respondent filed a motion for enforcement of the purported settlement agreement, indicating that complainant had retained counsel and intended to pursue the appeal. Relying on *Cross v. District Court*, 643 P.2d 39 (Colo. 1982) and *Houston Construction Co. V. District Court*, 632 P.2d 563 (Colo. 1981), this judge denied respondent's motion for lack of express authority on the part of the union representative to bind complainant to a proposed settlement. Respondent's subsequent motion to reconsider was also denied. At the hearing on February 14, 1997, respondent renewed its objection to going forward with the proceeding on the grounds stated in its earlier motions.

As the result of the untimely filing of his prehearing statement, complainant's evidence was limited to his own testimony and the witnesses and exhibits endorsed by respondent. *Weiss v. Department of Public Safety*, 847 P.2d 197 (Colo. App. 1992).

Upon complainant's request, the witnesses were sequestered from the hearing room unless testifying and were instructed to not discuss their testimony with anyone except counsel. Complainant and Mary Dugan, respondent's advisory witness, were excluded from the sequestration order.

### **STIPULATIONS OF FACT<sup>1</sup>**

1. At the time of complainant's October 1994 DUI arrest, he held the position of Technician III.

2. At the time of complainant's termination from employment,

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<sup>1</sup> Stipulated facts are conclusive upon the parties and the tribunal. *Faught v. State*, 162 Ind. App. 436, 440-1, 319 N.E.2d 843, 846-47 (1974).

he held the position of Project Manager II.

3. Complainant's job responsibilities did not change when he became a Project Manager II.

### **FINDINGS OF FACT**

1. Complainant, Mitch Delgado, commenced employment with respondent, the Colorado Department of Transportation (CDOT), in January 1980 as an Engineering Aide A in Denver. He had worked his way up to Technician III when he transferred to CDOT Region 2 in Pueblo in late 1992 or early 1993. He subsequently became a Project Manager II.

2. CDOT Region 2 encompasses thirteen counties. It borders Monument Hill on the north, halfway between Colorado Springs and Salida on the west, the Kansas state line on the east and the New Mexico state line on the south.

3. On October 20, 1994, while attending a three-day training session in Denver, Delgado was arrested for driving under the influence of alcohol (DUI). He was driving a state-owned vehicle.

4. A Rule R8-3-3 meeting relative to the October incident was held on November 14, 1994. In addition to Delgado and Ken Conyers, the appointing authority for Region 2, the meeting was attended by David Miller and Robert Torres, Delgado's first and second line supervisors, respectively, and by Mary Dugan, the agency's EEO representative and human resources specialist.

5. At the November 1994 meeting, Delgado stated that the incident was out of character for him and left the impression that he was a first-time DUI offender. Torres knew of a previous DUI arrest when he supervised Delgado in Denver in 1987/88, but he did not mention this at the meeting. Delgado said that he was in possession of a 60-day temporary driver's license. He stated that he was contesting the revocation of his license and that his attorney had advised him that he had a good chance of winning the appeal on grounds that he had a medical statement indicating that he was not physically able to blow into the breathalyzer with sufficient pressure to provide a reading.

6. Delgado's driver's license was revoked for one year, until December 19, 1995, following a motor vehicle hearing on December 20, 1994. Delgado's alleged refusal to take a breath test was upheld, resulting in the one-year revocation.

7. Conyers was informed of the license revocation but was

not told of its duration. He assumed that it was the "standard" revocation of 90 days or six months. Dugan assumed the revocation was for 90 days.

8. As the appointing authority for Region 2, Conyers follows a policy of trying to accommodate employees who lose their driving privileges for short periods of time, especially for a first offense. Based upon the information given to him, Delgado's loss of driver's license was not an issue in this instance. The issue for Conyers was to determine the appropriate penalty for driving a state vehicle while intoxicated.

9. On January 18, 1995, Conyers took disciplinary action against Delgado for driving a state vehicle while under the influence of alcohol. (Exhibit 12.)

10. On April 7, 1995, Delgado entered a plea of guilty to the lesser charge of Driving While Ability Impaired (DWAI) stemming from the October 1994 DUI arrest. This was his third DWAI conviction.

11. As a result of three alcohol-related driving convictions, Delgado's driver's licence was revoked for an additional two years, effective April 25, 1995 until April 24, 1997. The revocation order of the Motor Vehicle Division provided that the additional revocation would take effect after the expiration of any revocation currently in effect. Consequently, Delgado is not eligible to apply for reinstatement of his driver's license until December 18, 1997. (Exhibits 1 and 3.)

12. Delgado did not tell anyone in the chain of command of the additional two-year revocation. He told David Miller, his supervisor, that he had pled guilty, was sentenced to probation and would not have to serve jail time. Miller knew that he did not have a driver's license during 1995 but did not inform Conyers. Conyers saw Delgado waiting for a ride and knew that he was attending alcohol-related classes.

13. Delgado had a valid driver's license when he became a Technician III. The job announcement for the Project Manager II position contained a driver's license requirement. Although there may be some Project Manager II positions elsewhere in the state which do not require a valid driving permit, that is not the case in Region 2. All Project Manager IIs in Region 2 are required to maintain a valid Colorado driver's license.

14. On January 29, 1996, CDOT Executive Director Guillermo Vidal issued a directive to appointing authorities to verify that

employees who were required to drive as part of their job were in possession of a valid driving permit. Attached to the directive was a report prepared by the Center for Human Resources Management showing the names of certain employees, one of whom was Delgado, who had either lost their license for a period of time or were currently without a license.

15. In response to the executive director's request, Mary Dugan obtained a copy of Delgado's Motor Vehicle Record (Exhibit 1) and learned for the first time that his driver's license had been revoked until December 18, 1997. She conveyed this information to Ken Conyers, who scheduled a Rule R8-3-3 meeting "in reference to the status" of Delgado's driver's license. (Exhibit 2.)

16. The R8-3-3 meeting was held on March 22, 1996. Delgado was present and was represented by Cathy Garcia of the Colorado Federation of Public Employees. Also in attendance were Conyers, Dugan, David Miller and Robert Torres, all of whom had attended the 1994 R8-3-3 meeting.

17. Conyers concluded that Delgado could not perform his job duties without a driver's license because of the need to visit project sites throughout thirteen counties in southeastern Colorado in order to develop plans and monitor activities, attend training in Colorado Springs and Denver, coordinate with consultants in Colorado Springs and Denver, and attend meetings and project site workshops. He considered that for the past year Delgado had been working mainly on projects in Pueblo where it is much easier to get around than in remote areas, and he was assigned to projects like resurfacing that did not require on-site visits. Conyers did not feel that it was fair to others or feasible to confine Delgado's duties to Pueblo. A project Delgado was currently assigned to was on Colorado Highway 115 between Colorado Springs and Penrose, where it was essential to be able to drive. Conyers took into account that a valid driver's license was a job requirement for the position, that he would not knowingly hire anyone into the position unless they possessed a license, and that Delgado would not have a driver's license at least until December 18, 1997.

18. In order for a revoked driver's license to be reinstated, the applicant must take a test, show proof of insurance and pay a \$40.00 reinstatement fee.

19. By letter dated May 9, 1996, the appointing authority terminated complainant's employment effective May 31, 1996, for inability to comply with standards of efficient service because he did not have a driver's license and, therefore, could not drive. (Exhibit 6.)

20. Delgado began a new job on February 3, 1997 at a salary of \$3,200.00 per month. His ending salary at CDOT was \$4,384.00 per month.

## **DISCUSSION**

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S.

### A. Contentions

The essential facts of this case are not in dispute. Complainant's main contention is that he was punished twice for the same offense in violation of Policy 8-3-(A), 4 Code Colo. Reg. 801-1, which provides that a state employee may not be disciplined more than once for a single specific act. Complainant submits that the "extended" two-year revocation of his driver's license was a continuation of the October 1994 DUI arrest for which he was disciplined on January 18, 1995. He argues that respondent waived its right to discipline him for loss of his license on the grounds that his immediate supervisor knew he was without a license in 1995 and that the appointing authority should have known because Ken Conyers saw him waiting for a ride and knew he was taking alcohol classes. He further submits that he relied on already having been disciplined when he pled guilty to DWAI on April 7, 1995.

Complainant also contends that he cannot be dismissed for failure to meet standards of efficient service because he was successfully performing his job. There were no complaints about his actual job performance. Furthermore, according to complainant, a driver's license is not essential for his position.

In addition to reinstatement, back pay and benefits, complainant seeks an award of attorney fees and costs on grounds that it is so clear that there was only one violation as to, presumably, constitute bad faith on the part of respondent.

Respondent contends that complainant was disciplined for two separate incidents, the October 1994 DUI arrest while driving a state vehicle and the loss of his driver's license until December

18, 1997. Respondent submits that complainant withheld information concerning the status of his driver's license and led the appointing authority to believe that the length of the revocation would be a short period of time. According to respondent, the appointing authority was willing to accommodate the loss of license for three or six months for a first time offender, but not three years. When the appointing authority became aware in February 1996 of the extended loss of license, he immediately took action.

Respondent argues that the specific job that complainant held cannot be carried out without a driver's license and, consequently, complainant cannot efficiently fulfill his job responsibilities, and that the status of complainant's license when he worked in the Denver region is irrelevant. Respondent submits that an estoppel argument is inapplicable in this situation because any reliance complainant placed on the first discipline was based upon facts that only he knew.

#### B. Analysis

Complainant's driver's license was revoked in December 1994 because of his refusal to submit to a breath test. His license was revoked for an additional two years in April 1995 because of a third DWAI conviction. These are separate events. When the appointing authority imposed discipline in January 1995, he could not have known of the revocation that was to take place three months hence. If there had not been a third DWAI conviction in April, there would not have been an additional revocation. This was an event separate from the original revocation. The April 1995 revocation order provides that the two-year revocation becomes effective *after* the expiration of any revocation orders presently in effect, indicating that the second revocation was not merely an extension of the first. If nothing had changed after complainant was disciplined in January 1995, his name probably would not have shown up on the list that ultimately led to the second discipline.

He at least would have had the defense of his license having been reinstated, assuming he took the necessary steps to do so. If the appointing authority had had before him in January 1995 the issue of a three-year license revocation, the evidence suggests that not only would he have imposed discipline for the loss of license, but also that the discipline imposed would have been termination.

Complainant's argument that respondent waived its right to discipline him for the loss of license or is somehow estopped from disciplining him further might have some merit if he had lost his driving privileges only for the year 1995. It is impossible on this record to charge the appointing authority with knowledge in 1995 that complainant would not have a driver's license for the

years 1996 and 1997. When that information came to him, the appointing authority took appropriate action. This is not a case where the appointing authority knowingly sat on his hands.

Substantial evidence is probative evidence that would warrant a reasonable person to believe in the existence of the facts necessary to support a particular conclusion. There is substantial evidence in this record to support a finding that a Project Manager II in CDOT Region 2 must have a driver's license in order to efficiently perform his duties. The fact that complainant was able to get by for a period of time without a license is not the standard by which to judge the need for a license for this particular job, the description of which includes a mandatory driver's license requirement, as did the vacancy announcement. There is a history behind this requirement; it is not something that was recently made up for no reason. The appointing authority testified to the reasons for the requirement and that he would not hire anyone into the position who did not have a driver's license.

It is ultimately for the employer, not the employee, to define the essential functions of a job. It is for the appointing authority, not the administrative law judge, to exercise the responsibilities of personnel management, absent an abuse of discretion. *Chiappe v. State Personnel Board*, 622 P.2d 527, 534 (Colo. 1981). This record does not reflect that the appointing authority abused his discretion.

Given the outcome of the case, complainant is not entitled to an award of attorney fees and costs. Respondent did not request a fee award.

#### **CONCLUSIONS OF LAW**

1. Respondent's action in terminating complainant's employment was not arbitrary, capricious or contrary to rule or law.

2. No evidence was presented to show that complainant was treated differently from similarly situated employees.

**ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
March, 1997, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of March, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Luis A. Corchado  
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and in the interagency mail, addressed as follows:

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