

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B149(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARILYN HALVERSON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter was heard on June 11, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Coleman Connolly, Assistant Attorney General. Complainant appeared in person and was represented by Peter Stuart Blood, Attorney at Law.

The ALJ heard testimony from respondent's witnesses Karen Coleman, Personnel Liaison; Mary Smith, Associate Warden; and Ernest Pyle, Warden, San Carlos Correctional Facility and Pueblo Minimum Centers.

Complainant testified in her own behalf and called Maureen McCarroll, Administrative Assistant.

Respondent's Exhibits 1 through 8, and Complainant's Exhibits C, D, E, J and K, were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals the disciplinary termination of her employment and a corrective action. For the reasons set forth below, respondent's actions are affirmed.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether complainant was discriminated against on the basis of disability;
4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Neither party wished to have the witnesses sequestered, obviating the need for respondent to designate an advisory witness.

FINDINGS OF FACT

The ALJ considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Marilyn Halverson, became an employee of the Department of Corrections (DOC) in November 1989. In November 1996, she transferred from Pueblo Minimum Centers to the San Carlos Correctional Facility (SCCF) in Pueblo as an Administrative Assistant III.

2. Karen Coleman became the Personnel Liaison, or Program Assistant II, for SCCF and complainant's immediate supervisor in February 1999. Complainant felt that she should have become Personnel Liaison instead of Coleman, and she filed a grievance to that effect.
3. Complainant was the back-up switchboard operator. Coleman received complaints from other staff persons that complainant would not take some calls and was sarcastic and rude with people when she transferred calls. In response to these and other complaints about complainant's negative treatment of others, Coleman issued a performance improvement plan on May 24, 1999, mandating more positive behavior from complainant. (Ex. 3.)
4. Complaints about complainant's behavior continued, including not putting calls through, being rude on the phone, and monitoring other staff as they came and went from the facility.
5. Coleman engaged in several informal discussions with complainant pertaining to the need for improvement in attitude and behavior, with reference to the staff complaints about her.
6. Concerned that there had been no improvement vis-à-vis complainant's performance plan, Coleman discussed the matter with Warden Pyle. On September 22, 1999, Pyle conducted a predisciplinary meeting with Halverson concerning her "behavior and interaction with fellow staff." Concluding that Halverson failed to comply with standards of efficient service by violating DOC Administrative Regulation 1450-1, Staff Code of Conduct, pertaining to professional relationships with colleagues and verbal or physical altercations in the workplace, Pyle issued a fourteen-point corrective

action plan on October 8 removing from Halverson the supervision of the Administrative Assistant II who was assigned to the switchboard, and detailing corrections that must be made in accord with her performance improvement plan of May 24. (Ex. 4.)

7. During November and December, Coleman continued to receive complaints about complainant's behavior. When she counseled Halverson in this regard, Halverson denied the alleged confrontations with staff and accused Coleman of looking for people to say derogatory things about her.
8. Complainant's Performance Review Form for the period April through November 1999 reflected a rating of Needs Improvement in the area of Interpersonal Relations with the notation that she needed to improve her interpersonal relations with staff and co-workers both within the facility and in other departments. She received a Needs Improvement rating in the area of Organizational Commitment with the notation that she needed to adopt better leave practices and improve her time management. She received an overall rating of low-Competent. (Ex. 5.)
9. On January 17, 2000, Coleman talked to complainant about a January 14 complaint from a co-worker that she and another co-worker were verbally attacked and harassed by complainant, who asked one of them to provide written information about her job duties so complainant could show it to her attorney. (Ex. 6.)
10. On January 20, 2000, Coleman met with complainant and a co-worker concerning an incident in which complainant falsely told the co-worker's supervisor that the co-worker was not in the facility that day.

11. In a January meeting, complainant asked Coleman if the staff knew that she had a mental illness. Coleman responded that she did not know, and it was none of the staff's business. Coleman, herself, only knew what complainant told her, that she had a mental illness.
12. By letter dated January 26, 2000, and addressed to Coleman, complainant's attorney advised the agency that complainant had a disability (clinical depression), which qualified as a disability under the Americans With Disabilities Act (ADA). As reasonable accommodations, complainant requested: 1) "that DOC staff who interact with her be given training in how to relate to co-workers with mental illnesses or emotional conditions"; 2) "that all duties outside the essential functions of her actual job description be performed by others"; 3) "that before any formal or informal counseling or 'write-ups' for behavior or attitude by her, DOC consult with a mental health professional to determine to what degree the alleged behavior or attitude could be the unintended consequence of Ms. Halverson's disability." (Ex. C.) Coleman does not recall the date she received this letter.
13. On January 28, 2000, Coleman sent a memo to Halverson together with a January 27 memo to Coleman from an administrative assistant who alleged that she and a co-worker had been verbally attacked by Halverson over one of their job duties. Coleman made reference to the corrective action of October 8, 1999, as well as AR 1450-5, Unlawful Employment Practices: Policy Prohibiting Workplace Discrimination/Harassment. (Ex. 6.)
14. Complainant would not discuss the memo with Coleman, saying that she wanted to talk to her attorney. At first she refused to sign the

memo as having been received, but she eventually did so, feeling that she was under duress.

15. Coleman discussed this incident with her supervisor, Mary Smith, who was serving in the capacity of Acting Warden while Warden Pyle was out of the country, telling her that Halverson would not talk to her and wanted to do everything through her attorney. Smith responded by saying that it was against regulations and insubordination for complainant to refuse to talk to her supervisor.
16. Smith, knowing that complainant was in her office, telephoned her, but she would not answer the phone. Then, Coleman and Smith went to complainant's office where Smith asked Halverson to come to her office to discuss the situation. Complainant told Smith that she would not talk to her, and that they could talk to her attorney. Complainant stood up and pointed her finger at both Smith and Coleman, saying that she would not talk to either one of them. Smith advised complainant that she was the appointing authority and directed her to come to her office to discuss the situation. Halverson again refused.
17. Smith returned to her office and directed Coleman to place Halverson on administrative suspension. (Ex. 7.) She had never seen any documentation of complainant having a mental illness. She knew that Halverson would come to her, as Associate Warden, or go to the warden, "every time there was something she didn't like."
18. By letter dated January 31, 2000, addressed to Halverson, Brad Rockwell introduced himself as the agency's ADA Coordinator and requested all pertinent information in order to process her request, including the specific accommodations she was asking for. (Ex. D.)

19. Also on January 31, 2000, complainant's attorney addressed a letter to Warden Pyle decrying complainant's January 28 suspension in view of her clinical depression. (Ex. K.)
20. On February 25, 2000, complainant, through her attorney, transmitted to Brad Rockwell the information he requested, asking for accommodations as follows: "Ms. Halverson requests that her depression be accommodated by training all staff who may interact with her at her place of work in issues related to mental illness and that any complaints made by co-workers or supervisors which relate to her attitude, ability to relate to co-workers, facial expressions, tone of voice or other claims involving her emotional or mental condition be referred to a psychologist or psychiatrist before any supervisor is to evaluate the merit of the complaint. Only after receiving the input of the mental health professional shall Ms. Halverson's supervisors be free to impose discipline or counseling on Ms. Halverson." (Ex. J.)
21. Warden Pyle conducted a predisciplinary meeting with complainant and her attorney on March 22, 2000, the meeting having originally been scheduled for March 10, concerning the incident of January 28 and complainant's compliance with the October 8, 1999 corrective action.
22. Pyle concluded that complainant's inappropriate conduct had escalated, rather than improved since the October 8 corrective action, resulting in a violation of the corrective action. The events of January 28 were especially significant to him, as he found that complainant had violated AR 1450-1, "Failure to obey any lawfully issued order by a supervisor staff, or any disrespectful, mutinous, insolent, or abusive language or actions toward a supervisor staff is deemed to be

insubordination.” The ADA Coordinator had advised him that the accommodation requests were unreasonable.

23. On May 17, 2000, taking into account all performance documentation and complainant’s personnel file, the appointing authority terminated the employment of Marilyn Halverson on the grounds of willful misconduct and failure to comply with standards of efficient service. (Ex. 8.)
24. Complainant filed a timely appeal of her dismissal on May 26, 2000. The termination case was consolidated with her grievance of the corrective action on August 1, 2000.

DISCUSSION

I. Legal Standard

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 warranted the termination of complainant’s employment. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent’s decision only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency’s decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion; if not, the agency did not abuse its discretion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999). In an appeal of an administrative action, in this case a corrective action, the burden of proof by a preponderance of the evidence rests with the complainant to show that respondent’s action was arbitrary, capricious or

contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991). It is also complainant's burden to prove that she was intentionally discriminated against.

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

II. Arguments

Respondent argues that its actions were not arbitrary, capricious or contrary to rule or law since complainant's inappropriate conduct went on at least from 1998 until her suspension on January 28, 2000, she was verbally counseled consistently during that time, and she was given written performance documentation including a corrective action. Yet her performance did not improve. Finally, according to respondent, her insubordinate acts of January 28 warranted termination.

Respondent stipulates that complainant was being treated for depression and was taking prescribed medication, but argues that there is nothing in the record that shows a doctor saying that the agency should accommodate that. The real problem, respondent asserts, is that complainant wanted Coleman's job and was angry over not receiving it. As to complainant's accommodation requests, respondent contends that it is plainly unreasonable to expect DOC to train all of complainant's co-workers in the effects of depression and to consult complainant's treatment provider prior to talking to her about her job performance.

Complainant submits that she was unable to comply with her performance plan as well as the terms of the corrective action because she was depressed, and the ignorance of other people regarding depression was part of the problem. She argues that her accommodation requests were reasonable, and DOC was required to grant them. With these reasonable accommodations, complainant asserts, she would have been able to perform the essential functions of her position.

III. Analysis

When complainant refused to talk to her supervisors, in violation of DOC regulations, she demanded that they talk to her attorney, not to her health care provider. Never did she proffer a medical report or physician's recommendation in terms of accommodating her depression. Rather, she simply thought that if her co-workers understood her better they would not complain about her job performance, and if her supervisors were more empathetic they would be nicer to her and not give her written documentation of deficient performance.

Blatantly refusing to discuss her job performance with her supervisors, one of whom was the acting warden, and to insist that they instead go through her attorney, constitutes insubordination pursuant to DOC regulations. This record does not support complainant's assertion that she could not improve her behavior on the job for the reason that she was depressed. There is a dearth of medical evidence to sustain the proposition that everyone who is taking medication for depression must necessarily act as she did.

Without citing legal authority or precedent, complainant contends that it was reasonable for the agency to train her co-workers about depression and for her supervisors to always contact her health care professional before discussing her job performance with her. Reasonable accommodations for individuals with disabilities include making existing facilities used by employees readily

accessible to and usable by individuals with disabilities, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, the provision of qualified readers or interpreters, and other similar accommodations. Such accommodations are necessarily designed to enable persons with disabilities to perform the essential functions of their jobs. In this case, however, complainant's requests were not meant to change *her* behavior, but rather to change the behavior of *others* in relation to her. There is no evidence that the requested accommodations would have enabled her to perform the essential functions of her position. Thus, complainant's requests were unreasonable and would not have served the intended purpose of reasonable accommodations. Transferring an employee away from co-workers is not a reasonable accommodation for an employee's depression and anxiety-related disorders. *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576 (3rd Cir. 1998). The employee bears the burden of describing the accommodations that he or she needs. *Gonzagowski v. Widnall*, 115 F. 3rd 744 (10th Cir. 1997).

Complainant failed to meet her burden to demonstrate by preponderant evidence that she was discriminated against on the basis of disability. There is substantial evidence to sustain the issuance of a corrective action to "correct and improve performance or behavior." R-6-8. There have been no due process violations. The principle of progressive discipline was followed. See R-6-2. There has been no showing of an abuse of discretion by the appointing authority. See Rules R-1-6, R-6-2, R-6-6, R-6-9, and R-6-10, 4 C.C.R. 801. See also *Wildwood Child & Adult Care Program, supra*. Respondent carried its burden to prove that there was just cause for the termination. See *Kinchen, supra*.

This is not a proper case for the award of attorney fees and costs under §24-50-125.5, C.R.S., of the State Personnel System Act. See also R-8-38, 4 C.C.R. 801.

CONCLUSIONS OF LAW

1. Respondent's actions were not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. Complainant was not discriminated against on the basis of disability.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of July, 2001, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of July, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Peter S. Blood
Attorney at Law
315 Colorado Avenue, Suite B
Pueblo, CO 81004

And through interagency mail:

Coleman Connolly
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203