

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARY SCOTT FILSON,
Complainant,

vs.

COLORADO STATE UNIVERSITY, HUMAN RESOURCES SERVICES,
Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on May 24, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Melanie Sedlak represented Respondent. Respondent's advisory witness was William Liley, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED and PROCEDURAL HISTORY

Complainant, Mary Scott Filson ("Complainant" or "Filson") appeals her employment being terminated by Respondent, Colorado State University, Human Resources Services ("Respondent" or "CSU") and alleges age discrimination. Complainant seeks reinstatement, back pay and benefits. At the end of the combined presentation of Complainant's response to Respondent's case-in-chief and Complainant's presentation of her case-in-chief on her age discrimination claim, Respondent moved to dismiss Complainant's age discrimination claim. Respondent's motion was granted and Complainant's age discrimination claim was dismissed based upon her failure to present evidence of a *prima facie* case of age discrimination. Given the dismissal of the age discrimination claim, this Initial Decision solely addresses Filson's appeal claim concerning her termination.

For the reasons set forth below, Respondent's action is **affirmed.**

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Beginning on February 23, 1998, Complainant was employed by CSU as an Accounting Technician I with Business and Financial Services (“BFS”), CSU’s accounting department, which handles payments to vendors and travel reimbursements.
2. Vendors, one of the functions handled by Business and Financial Services, is entering data regarding CSU’s vendors. This information is then used by Business and Financial Services’ Accounts Payable Unit to make payments to vendors. The data includes information on how to pay a vendor (address or bank routing numbers) and information, such as a vendor’s EIN, needed to complete certain reporting requirements.
3. Errors in the input of the vendor data could result in liability for CSU, including the imposition of IRS penalties. Because of the importance of the vendor information, CSU required that those doing the data entry maintain a 95% accuracy level. Prior to Complainant taking the primary vendors duties, others in the position had maintained accuracy rates of between 90 – 95%.
4. During the late Spring of 2002, Complainant was doing backup vendors and Kim Vetter was the primary vendors person. Vetter left that position in May 2003 and Complainant became the primary vendors person. A new backup vendors person was not hired because of budgetary issues.
5. There is no difference in the type of work performed by the primary vendors person and the backup vendors person. The only difference is the volume of work performed by each person, with the primary vendors person completing most of the workload.
6. At the time that Complainant was assigned primary vendors duties she was given written guidelines for those duties. In addition, Kathy Krell, her supervisor, gave her one-on-one training and was available to answer any of Complainant questions.
7. In July 2003, Complainant’s supervisors offered Complainant a chance to go to keyboarding classes. Complainant turned it down, stating that she did not need the help.
8. Maggie Glick is the Manager for the Accounts Payable Unit, overseeing the employees who handled payment to vendors and, therefore, utilized the vendor data that Complainant had entered. Glick also assisted Krell with overseeing Complainant’s work. Alan Mertens supervised Complainant during a portion of 2002 and 2003. William Liley was CSU’s Director of Human Resources and the delegated appointing authority for all disciplinary actions at CSU.

Complainant's Prior Performance Evaluations

9. In February 2001, Complainant received a midyear performance evaluation rating her "needs improvement." She received a low rating in the areas of volume, accuracy and customer service.
10. In May 2001, Complainant received an end of year performance evaluation rating her "needs improvement." She again received a low rating in the areas of volume, accuracy and customer service.
11. In May 2002, Complainant received an end of year performance evaluation from Vetter rating her "satisfactory." She received a low rating in the areas of volume and accuracy.
12. In February 2003, Complainant received a midyear performance evaluation from Mertens, rating her "satisfactory." She again received a low rating in the areas of volume and accuracy.
13. On May 29, 2003, Complainant received an end of year performance evaluation from Mertens rating her "needs improvement." She received a low rating in the areas of volume, accuracy and customer service. There is a notation by Mertens that Complainant's Position Description Questionnaire ("PDQ") needs to be updated, and that will occur when she is given her Performance Improvement Plan.
14. After receiving the two evaluations in 2003, Complainant's accuracy improved but continued to be erratic. Her accuracy rate averaged 83.86% from May 29, 2003 to July 10, 2003.
15. Complainant also had continuing problems with her work hours, often arriving late and then staying late in order to complete her work assignment. Mertens, Krell and Glick all spoke with her about her timeliness, explaining that given the nature of her position she needed to arrive at work in a timely fashion. In addition, because she was a non-exempt employee, CSU had to pay her overtime if she worked late, something for which they did not have a budget. Despite these discussions with Mertens, Krell and Glick, Complainant's attendance did not improve.
16. On July 18, 2003, a Performance Improvement Plan for Complainant was outlined in a memo from Krell and Glick (the "PIP Memo"). The PIP Memo was signed on July 22, 2003 and references revisions to Complainant's PDQ. It also addresses Complainant's May 2003 "needs improvement" rating and her need to improve her timeliness, work quality, adherence to the work hours of 8:00 a.m. to 4:30 p.m., communication with her supervisor and her lack of motivation. The PIP Memo further states that, if Complainant fails to improve in these areas, it may result in corrective actions and/or disciplinary actions.
17. On July 22, 2003, Complainant signed both the PIP Memo and the revised PDQ, indicating her receipt and review of both documents.

August 2003 Corrective Actions

18. On August 29, 2003, Complainant received two corrective actions, both issued by Krell and Glick. The first corrective action was for failing to achieve an accuracy rate of 95% or higher, reflecting that her accuracy dates from July 22, 2003 to August 27, 2003 had averaged 87.18%. This corrective action stated that her accuracy must improve to 95% within two weeks.
19. The second August 29th corrective action was for failing to meet work attendance requirements, reflecting that Complainant from July 28, 2004 to August 29, 2003 arrived at work after 8:00 a.m. on seventeen of twenty-five work days.
20. After the August 29th corrective actions, Complainant's accuracy did not improve. Her attendance improved to the extent that she arrived at 8:00 a.m., however, she was staying after 4:30 p.m., which resulted in overtime costs that Business and Financial Services could not afford to pay.
21. Complainant did not appeal either of the corrective actions.

Complainant's Two-Day Suspension

22. On September 23, 2003, Liley sent Complainant a notice of a R-6-10 meeting set for October 1, 2003 to discuss Complainant continued inaccuracy, her attendance and a post-trip/travel voucher data entry.
23. After the October 1, 2003 R-6-10 meeting, Complainant received a disciplinary action of a two day suspension without pay for failing to comply with the mandates of the August 29, 2003 corrective actions, including improving her accuracy or her timeliness. She was also informed that her accuracy rates would be monitored for the week of October 13 – 17, 2004 and, if she did not achieve an accuracy rate of 95%, she would face further disciplinary action, including the possibility of termination.
24. The October 2003 disciplinary action also noted in the disciplinary action that given Complainant's eligibility for overtime she was not to stay later than 4:30 p.m. unless Krell or Glick approved it. Finally, it was noted that if her accuracy and/or timeliness did not improve to an acceptable level Complainant would face further discipline, including possible termination.
25. Complainant did not appeal her disciplinary suspension.

R-6-10 Meeting and Disciplinary Action

26. On October 20, 2003, Liley held an R-6-10 meeting with Complainant to discuss her continued inaccuracy in entering vendoring information for the week of October 13, 2004. During that week, Complainant's accuracy rate was 92% on one day, 85% on three days and

below 85% on a fifth day for an average, at best, of 86.2%.

27. At the October 20th meeting, Complainant and Liley discussed Complainant's data entry inaccuracies on various documents. In addition, Complainant told Liley that the department was intentionally trying to have her fail.
28. Prior to imposing discipline, Liley considered Complainant's statements at the October 20th R-6-10 meeting, his interviews with Krell and Glick, a review of Complainant's personnel file (including past performance evaluations), her prior corrective actions and her two-day suspension.
29. On November 4, 2003, Complainant received a disciplinary action terminating her employment with Respondent.
30. Complainant timely filed an appeal of the termination of her employment with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 includes, among other things, "failure to comply with standards of efficient service or competence."

A. Burden of Proof

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

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Respondent disciplined Complainant for failing to improve her accuracy level to a 95% accuracy rate after her two-day suspension in October 2003. The substantial evidence established that Complainant, at best, averaged 86.2% accuracy for this time period. Complainant committed the acts for which she was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawler v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent established a reasonable basis for requiring a 95% accuracy rate and that Complainant, at a minimum, after receiving her July 2003 Performance Improvement Plan, was fully aware of this standard. Complainant argues that her PDQ was not current and that it did not accurately reflected her duties. However, given that she received, reviewed and signed off on her PDQ in July 2003, prior to receiving any type of discipline, negates this argument. There was no evidence that Complainant, until this appeal, ever contested her July 2003 PDQ or the duties outlined therein.

Instead, the credible evidence established that Complainant was given training in the vendoring duties, that when she became the primary vendoring person the duties were not new for her and, that she was offered additional training in keyboarding in July 2003 after receiving a needs improvement rating and a performance improvement plan requiring her to improve her keyboarding skills.

The credible evidence also established that Liley adequately investigated the allegations of Complainant's poor performance and considered all of the relevant evidence by meeting with Complainant, reviewing Complainant's personnel file and discussing the matter with her direct supervisors. Given the statistical information regarding Complainant's accuracy rate, Respondent acted reasonably in arriving at its decision to discipline Complainant.

Respondent met its burden of establishing that it did not act arbitrarily or capriciously or contrary to rule or law in disciplining Complainant for failure to perform her duties competently.

C. The discipline imposed was within the range of reasonable alternatives

Prior to disciplining Complainant, Respondent was required to take into consideration the totality of Complainant's actions, her prior behavior, her prior corrective or disciplinary actions, her prior performance evaluations and any mitigating circumstances. Board Rule R-6-6, 4 CCR 801. Complainant had at least a three-year history of poor performance. However, even if that history were ignored and only the time period from July 2003 until November 2003 were considered, the decision to terminate Complainant's employment was reasonable.

After receiving a “needs improvement” rating, Complainant was given two documents that provided her with clear guidelines of how she was expected to perform. The first document was the July 2003 PDQ that clearly identified that one of her primary duties was to do the entering of vendor data. The second document was the Performance Improvement Plan, which outlined that she was expected to maintain a 95% accuracy rate in entering vendoring data or face possible disciplinary action.

In late August 2003, one month after receiving these two documents, Complainant was given two corrective actions, one of which addressed her failure to improve her accuracy rate and again warned her to improve that rate or face possible disciplinary action. She did not grieve the corrective actions. In mid-October 2003, six weeks after receiving the corrective actions, Complainant was suspended for two days for still not improving her accuracy rate. Complainant did not appeal the suspension. Despite the provision of vendoring guidelines, one-on-one training by Krell, a performance improvement plan, two corrective actions and a two-day suspension, Complainant continued to fail to achieve the necessary accuracy rate.

Certified employees must be subjected to progressive discipline unless their conduct is so egregious as to necessitate immediate disciplinary action. Board Rule R-6-2, 4 CCR 801. Complainant’s poor performance does not immediately fall within the realm of egregious behavior. However, her continued poor performance and the steadily escalating, but ultimately unsuccessful, efforts to correct her poor performance are a good example of progressive discipline. It is only after moving from written notice of performance expectations and training to corrective actions to correct her behavior to a two-day suspension that Respondent resorts to termination of Complainant’s employment. Respondent followed a logical progression of discipline in an attempt to correct Complainant’s performance. Given Complainant’s lack of improvement, termination was a reasonable choice for discipline.

The credible evidence demonstrates that Respondent arrived at its decision to terminate Complainant’s employment with due regard for the circumstances of the situation as well as Complainant’s individual circumstances.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent’s action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this 8th day of July, 2004.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or 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 the Board does not receive a written notice of appeal 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 1/4 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.

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of July, 2004, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mary Scott Filson
300 N. Roosevelt Avenue
Fort Collins, Colorado 80521

and in the interagency mail, to:

Melanie Sedlak
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Jane F. Sprague