

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B066

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KAREN PISTORA,

Complainant,

vs.

DEPARTMENT OF PERSONNEL,
DIVISION OF CENTRAL SERVICES,

Respondent.

This case came before administrative law judge Mary Ann Whiteside on Friday, February 16, 1996 for commencement of hearing, rulings on outstanding motions and rescheduling of the evidentiary hearing. The evidentiary hearing was held on April 10, 11, 12, and on May 6 and 7, 1996. The parties filed written closing statements on May 21, 1996. Complainant filed an objection to respondent's written closing on May 31. Respondent moved to strike the objection on June 6 and complainant filed a response on June 12. The hearing concluded on June 14, 1996 with the issuance of an order denying the motion to strike.

Complainant was present and was represented by Joel W. Cantrick, attorney at law. Respondent appeared through Laurie Rottersman, Assistant Attorney General, State Services Section, and by Penny Adkins, administrative supervisor.

Respondent called Penny Adkins; Jon Goldstein, manager of Central Collections; Jack Keene, director of the Division of Central Services; and, Jesse Rodriguez as witnesses. Complainant called Shirley Jiminez, Michael DeGrange, Sharron Payton, Bonnie Freeman and Jeffrey Hampton as witnesses. Complainant also testified in her own behalf.

Respondent's exhibits 3 through 10, 14, 33 and 34 were offered by joint stipulation of the parties. Respondent's exhibits 11 and 13 were admitted.

Complainant's exhibits B, C, E, F, G, H, I, J, K, L, M, N, P, R, T, U, V, W, Y, Z, AA through EE, HH, OO, RR, TT, WW, ZZ, AAA, and EEE were admitted. Complainant's exhibits A, II, JJ, KK, LL, MM, and NN were admitted over objection. Exhibit S was admitted with the stipulation that the notes were not to be considered part of the exhibit. Complainant's exhibit UU was not admitted.

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Complainant's exhibit QQ was withdrawn.

MATTER APPEALED

Complainant appeals a disciplinary demotion based on allegations of willful misconduct: transferring eight add-on accounts to a collector (her husband, Byron Pistora) other than the one originally assigned; and, abuse of the incentive program by allowing collectors to transfer credit for collections to collectors who had not yet reached their maximum bonus award amount.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed.
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law.
3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent made a motion in limine at the beginning of the evidentiary hearing to prohibit the use of certain exhibits regarding corrective/disciplinary actions taken by the appointing authority based on allegations of willful misconduct as evidence to show lack of consistent treatment. These exhibits were produced under the February 21, 1996, order to provide copies of corrective and disciplinary actions taken by the appointing authority Jack Keene from January, 1990 to February 21, 1996 on the basis of willful misconduct. Respondent argued that these instances were not sufficiently similar to be relevant to be used in determining the consistent treatment of employees. The motion was denied on the grounds that to be relevant to inconsistent treatment the factual instances alleged must be comparable, they need not be exact. Relevance and comparability must be determined on facts as introduced through testimony.

Upon the request of the complainant, with concurrence by the respondent, a sequestration order was entered. Witnesses were excluded from the hearing room unless testifying and were directed that until this initial decision is issued they were not to discuss their testimony other than with counsel. Penny Adkins was allowed to remain in the hearing room as the respondent's advisory

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witness.

Respondent argued that complainant's counsel had admitted at the February 16 hearing that his client had engaged in the conduct. Upon review of the tape, it was found that complainant's counsel did not concede that his client had improperly transferred accounts.

A motion for directed verdict at the close of respondent's case in chief was denied.

FINDINGS OF FACT

1. The central collections ("CC") section of the Division of Central Services, Department of Personnel (General Support Services) is the repository of delinquent debts owed to state agencies, e.g., Department of Revenue, Division of Unemployment Insurance. The CC section handles about \$60 million in delinquent debts each year and receives about \$11 million a year in payments on those debts. Jon Goldstein is the manager of the section which currently has 10 collectors, 1 supervisor and 7 administrative staff. At the times relevant to this case, Goldstein was complainant Karen Pistora's supervisor. Goldstein reports directly to Jack Keene, the director of the Division of Central Services, and the appointing authority in this case.

2. Karen Pistora (formerly Karen Cook) began working for CC in 1990 as a collector. In January, 1994, she became the collection supervisor. In this role she supervised collections and was required to ensure that the collection work was done in accordance with the section's established policies and procedures. After she became collection supervisor in 1994 she made changes in the collection function and collections increased. She received commendable performance evaluations and various performance awards. (exhibit A).

3. Byron Pistora began work at Central Collections in about 1990. He and the complainant began dating and eventually moved in together in late 1992 - early 1993. They were married in June, 1995. It was common knowledge within the section and division that they were living together, and later that they had been married. After the marriage in June, 1995, Goldstein altered the supervisory relationship by having Byron Pistora report directly to him rather than to the complainant.

4. The central collections section does not have a quota per se in collecting debts owed the state. Rather, an overall collection goal is established in conjunction with the State Controllers' office. Each collector is assigned to handle debts owed to

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specific agencies and/or types of accounts. The individual goal for each collector is set based upon the size of the collector's debt portfolio, the frequency of assignments and the historical pattern of collections for that debt portfolio. Each collector receives a base salary and may collect a bonus of 1% of base salary for each 1% of the monthly goal they exceed, up to a maximum bonus of 25%.

5. Central Collections maintains a computer system for processing delinquent accounts. When a delinquent account is received, it is logged into the computer system, usually by tape, and assigned to a collection representative or "desk". The computer system deals accounts to the desk assigned those types of accounts and does so by bands of dollar amounts in order to equalize the amounts assigned for collection. That desk is responsible for pursuing collection of that delinquent account. Date and time notations, if done, are computer generated. Desk assignments may be generated either by computer or manually.

6. Some individuals generate more than one delinquent account. An additional delinquent account is known as an "add-on" account.

7. Complainant was responsible as collection supervisor for assigning add-on accounts. Until November 1, 1995, there was no written policy or procedure for the assignment of add-on accounts to collectors. (exhibit W). Under the current written policy if a debt comes in and the individual debtor is already assigned to a desk, then the additional debts are assigned to that desk regardless of the collector's agency assignment.

8. The CC computer system makes a record of the assignment of all accounts, including add-on accounts. There are at least two ways to make changes to an account file without generating a note on the account showing who transferred the account: Alter and EXT. To the best of the parties knowledge, only Karen Pistora and Penny Adkins, the administrative supervisor, were trained on the use of Alter. Karen Pistora sometimes had the other collectors use the EXT process to transfer accounts to save her time when many accounts needed to be transferred or added.

9. A desk assignment may be changed without generating computer notes. Thus, the computer account record showing the last desk assigned does not necessarily indicate when the debt was assigned or transferred, i.e., line 102 of exhibit U, a list of alter items, indicates that the desk ("A=10; D=215") was changed on an account record on August 17 of 1994.

10. A desk assignment may be changed at any time with no certain date corresponding to the actual date of change. For example, the computer records for exhibit T indicate that the debts were assigned to desk 215. However, line 35 of the computer notes on

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exhibit T indicate that "BF" (Bonnie Freeman) worked the account in March, 1994. Respondent contends that the complainant ("KCC") transferred the account to desk 215 on May 3, 1994. However, lines 47 and 58 of exhibit T indicate that the debts were added to Bonnie Freeman's tickler after the date the debts were allegedly transferred from Freeman's desk 206 to Byron Pistora's desk 215.

11. Other than the change in Byron Pistora's reporting directly to Jon Goldstein, no changes were made to his current assignment. As part of her duties, Karen Pistora continued to assign add-on accounts to collectors' desks, including Byron Pistora's.

12. Byron Pistora was assigned to desk 215. He collected delinquent taxes for DOLE and business revenue accounts. Byron Pistora was not designated as a collector of personal income tax debts for the Department of Revenue. He consistently met his monthly goals and consistently received the maximum bonus.

13. Collectors review the debts assigned to them on a computer screen. A collector "works an account" by various actions, pulling information from the Department of Labor and Employment files to determine where the debtor may be working, mailing collection notices, trying to set up a voluntary repayment program. As collectors work the account they type in notes that become the permanent record of that debtor. The computer notes the date and time the collector records the working account data.

14. Collectors get daily payment sheets and receive credit for recoveries on a monthly basis. Collectors routinely review on computer screen the activity on debts assigned to them to determine further necessary action and to monitor payment and subsequent credit due them.

15. Bonnie Freeman, also a collector within the section, was assigned desk 206. In September, 1995, she brought a first set of 10 accounts to Jack Keene's attention. She indicated that she was concerned that Karen Pistora was improperly transferring add on accounts to her husband and that Byron Pistora was receiving credit for collection efforts done by other collectors. Shortly after this, in late September, Jack Keene met with Jon Goldstein about these ten accounts. Goldstein had Penny Adkins, who was more familiar than he with the computer system, review this set of accounts.

16. Penny Adkins determined that 7 or 8 of the accounts were assigned to Byron Pistora's desk as a result of the computer program. Byron had worked DOLE accounts of those individuals and other delinquent debts of those individuals were assigned by the computer when the additional debts came in. Adkins was unable to determine how 2 - 3 of the accounts were assigned. Penny Adkins

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determined there was no problem with the way the accounts had been assigned to Byron Pistora. Penny Adkins also was asked to pull at random 10 add-on Revenue accounts from Byron Pistora's desk to determine how they had been assigned to his desk. Ms. Adkins had much the same experience with these accounts, 7 or 8 were determined to have been assigned by computer and she was unable to determine how the remainder had been assigned.

17. Karen Pistora approached Jon Goldstein in late September, visibly upset that Bonnie Freeman seemed to be reviewing accounts in reference to her and her husband, intimating that some improper action had occurred. Goldstein and Keene met with Karen Pistora and shared the allegations that Bonnie Freeman had made. Penny Adkins joined them later to explain to the complainant what review she was doing.

18. In late September, 1995, Keene was ready to determine that there was no problem and close the investigation. Keene was to meet with Freeman on October 3 to let her know why he was not going forward with the investigation. He was to then meet to discuss this with the complainant.

19. On October 3, Freeman brought in a third set of accounts occurring between December 22, 1993 and June 6, 1994. (exhibits 3 -10, and 33 - 34). These accounts bear the notation at the top of the page that they were printed out on September 28, 1995. The notes in these accounts contain notations "assigned by KCC" (Karen Pistora's initials prior to her marriage in June, 1995. These initials were automatically generated by the computer system when notes were added or actions taken on specific dates.)

20. Freeman was dismissed from the October 3 meeting and complainant was asked to join Goldstein, Keene, and Adkins. Adkins made copies of the third set of accounts that Freeman had just presented and gave these to Karen Pistora. Keene gave the complainant several hours that afternoon to review the hard copy and to access the computer prior to reconvening the meeting that afternoon. The hard copies of the account contained notes made by Bonnie Freeman indicating that this seemed to be a "computer crime".

21. The meeting reconvened in the afternoon of October 3. Present were Keene, Goldstein, Adkins, Byron and Karen Pistora and Sharron Payton, human resources officer for the department. Karen Pistora was visibly upset and was crying. In regard to the notations "input by KCC", Karen Pistora said that "it didn't look good" and admitted that it seemed that she had input the transactions. In response, Sharron Payton advised the complainant that she could resign. Complainant refused to resign. Jack Keene and Jon Goldstein took complainant's comments and upset state as admissions or confessions of improper conduct.

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22. Both Karen and Byron Pistora were put on administrative leave while the appointing authority investigated further. Karen Pistora did not have access to the computer system while on leave.

23. After investigation, Adkins reported that 8 of the ten (exhibits 3-10) had been manually input by Karen Pistora, 1 (exhibit 33) had been input by Shirley Jiminez, and 1 (exhibit 34) had not been manually input.

24. An 8-3-3 meeting was held on October 18. At this meeting the complainant explained that she had not been able to review the accounts because she had been on administrative leave and had not had access to the computer system. The issue of collectors who had made their maximum bonus transferring credits or accounts to other collectors who had not was briefly discussed. Karen Pistora said that she had not personally done that but that she had become aware that some of the collectors may engage in that behavior. The meeting was recessed until October 27 to allow Karen Pistora to review the accounts and have access to the computer files.

25. Karen Pistora asked to have purged accounts inspected to see if they contained similar transfers to desks other than 215. The comparison was not made.

26. On November 7, 1995, Keene issued a letter containing his decision and imposing a disciplinary demotion based on allegations of willful misconduct - transferring eight add-on accounts to Byron Pistora rather than the collector originally assigned and abuse of the incentive program by allowing collectors to transfer credit for collections to collectors who had not yet reached their maximum bonus award amount. Karen Pistora was demoted from a collections supervisor at grade 81, step 3 at a salary of \$2,584 a month to a collector at grade 65, step 3 at a salary of \$1,750 per month. Her supervisory duties were also removed.

27. The 8 accounts at issue were part of over 44,000 accounts assigned by the Department of Revenue, or less than .02% of the Revenue accounts assigned for collection. No other improper accounts were offered.

28. Complainant filed a timely appeal of the disciplinary action.

DISCUSSION

This is an appeal of a disciplinary action affecting a certified employee's pay. The burden of proof, therefore, is upon the respondent to prove by a preponderance of the evidence that the complainant committed the acts alleged. Department of

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Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

This case turns in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). Among the factors considered in judging credibility, the ALJ weighed the witnesses' means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; and their manner or demeanor upon the witness stand.

Based upon these factors, the ALJ determines that the testimony of complainant's witnesses is more credible than that of the respondent's witnesses and is consequently given substantial weight. Jack Keene testified that he based his decision on the information provided by Goldstein and Adkins. He further testified that if the facts were different from what he had been told by Goldstein and Adkins then his decision would have been mistaken. Complainant's witnesses, Jon Goldstein and Penny Adkins, testified differently as to the attributes of the computer processing system than the facts to which Jack Keene testified he understood from them and on which he based the demotion decision.

The testimony indicates that the transfer of the 8 accounts may have been done by some one other than Karen Pistora and/or the transfers may have occurred after the final payment was posted, i.e., the desk was changed after payments had already been received and credited to the originally assigned collector. By changing the desk assignment at the heading of the account file, it would appear that last desk listed had received credit for amounts collected.

As noted in the findings, there were over 44,000 Revenue accounts assigned for collection during the same time frame as the 8 accounts at issue. The transfer of the 8 accounts did not result in any credit to Byron Pistora, he exceeded his goal and bonus limit each month in question without the monies at issue. There was no financial reason for Karen Pistora to have wilfully transferred any of these accounts to Byron Pistora. The testimony did not support allegations that the complainant transferred accounts to allow all collectors to achieve the maximum bonus. Nor, did the testimony support the allegation that she was aware of any widespread abuses by other collectors of the bonus program for any significant time prior to the meeting in late September, 1995.

Respondent relies heavily on claimed admissions by Karen Pistora. It is not clear that the statements offered were in fact any sort of confession. The statement and actions offered as

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admissions are open to numerous interpretations.

Even assuming for the sake of argument that the evidence offered by respondent were found to be more credible than that offered by complainant, the discipline imposed was inconsistent with that imposed in other similar instances. In other instances either no action was taken or only corrective action was taken. For example, a mistake in transfer of debts by another employee in central collections did not result in any action, either corrective or disciplinary. In two instances in March, 1993, in which corrective actions was taken, the facts were not at issue, as they are here and there were written policies in place at the time, which was not the case here.¹

CONCLUSIONS OF LAW

1. Respondent did not meet its burden of proof to show by preponderant evidence that the complainant had committed the actions alleged.
2. The disciplinary action taken was therefore arbitrary, capricious and contrary to rule or law.
3. Respondent did not act in bad faith in its imposition of discipline.
4. Complainant is not entitled to an award of her attorney fees and costs pursuant to section 24-50-125.5, C.R.S.

ORDER

Complainant is reinstated to the position she held previously and her supervisory duties are to be returned to her. Further, complainant is entitled to back pay and benefits from the date of her demotion to the date of her reinstatement.

¹ Shirley Jiminez made two mistakes on assignments of accounts and no corrective or disciplinary action was taken. In regard to the other two instances, see, exhibit B (division of Central Services Manual, specifically page 8) and exhibit F.

DATED this _____ day of
July, 1996, at
Denver, Colorado.

Mary Ann Whiteside
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on this _____ day of July, 1996, I placed true copies of the foregoing in the United States mail, postage prepaid, addressed as follows:

Joel W. Cantrick
Gary M. Clexton
Pendleton, Friedberg, Wilson, Hennessey & Meyer, P.C.
303 East 17th Ave., Suite 1000
Denver, CO 80203

and in the interagency mail, addressed as follows:

Laurie Rottersman
Department of Law
State Services Section
1525 Sherman St., 5th Floor
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), 10A C.R.S. (1993 Cum. Supp.). 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), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. 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).

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RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. 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 should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

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 R10-10-5, 4 CCR 801-1.

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 R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. 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.

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