

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B057

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MANMOHAN SINGH,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
COLORADO STUDENT LOAN PROGRAM,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson on February 16 and April 19-20, 1999. Respondent was represented initially by Assistant Attorney General Robin Rossenfeld and then, commencing the second day of hearing, by Assistant Attorney General Coleman Connolly. Complainant was represented by Barry Roseman, Attorney at Law.

Respondent called nine witnesses in its case-in-chief, including Irma Barthle, who was certified as an expert in industrial hygiene. Complainant testified on his own behalf and called Virginia Labre, who was certified as an expert in vocational rehabilitation.

Admitted into evidence without objection were Respondent's Exhibits 1-6, 9-32, 34, 35, 38-43 and 45 and Complainant's Exhibits B-E and K. Exhibits 8, 36, 37 and F were admitted over objection.

MATTER APPEALED

Complainant appeals his November 20, 1998 disciplinary termination of employment. For the reasons set forth herein, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of available alternatives;
3. Whether the indexing standard used by respondent was reasonable;
4. Whether it was reasonably possible for complainant to meet the indexing standard;
5. Whether complainant was retaliated against as the result of a prior, successful appeal;
6. Whether either party is entitled to an award of attorney fees and costs.

STIPULATION

Complainant's prior appeal has no application to this case. The present appeal involves a different job and different factual issues than did the earlier one.

FINDINGS OF FACT

1. In July 1994, Manmohan Singh, complainant, was dismissed from employment as a Data Entry Operator I with the Colorado Student Loan Program (CSLP), respondent. Singh appealed his dismissal to the State Personnel Board and was successful in having the agency's decision overturned. On May 27, 1997, nearly three years later, Singh was reinstated to the position of Data Entry Operator I.

2. Singh was assigned the duties of indexing in the records department. The duties and qualifications were consistent with the duties and qualifications of a Data Entry Operator I, but Singh was new to indexing.

3. The records department processes incoming documents regarding student loans and promissory notes. There are five types of documents, all of which are microfilmed. Singh's job was to index the information contained in the microfilm into the computer. Indexing requires the use of two computer monitors, one to read the microfilm and one for inputting the information. Various employees have done indexing in the records department in the past. Singh's position was the only one designated as a full-time indexing position at the time. There was a backlog of microfilm to be indexed, and the intent of the department was to get caught up.

4. JoAnn Marfil, the office manager of the records department, met Singh for the first time when he came under her supervision on May 27, 1997. On that first day, they discussed the required duties and training. Marfil explained to the new employee that the training period was 30 days and she would work with him one-on-one. After 30 days, his productivity would be measured against the established standard of 207 microfilm frames per hour.

5. The indexing standard was developed and implemented by Jacque Johnson, Manager of Records and Marfil's supervisor, in February 1995, employing a method she learned in her years as a records manager in private industry, where a team of efficiency experts was brought in to attain a productivity standard for the process of indexing. She utilized three full-time employees over a period of 30 days and tallied the number of items they processed and the amount of time that it took them to do so. By dividing the number of items processed by the total amount of time, she deduced an indexing standard of 207. While the private industry methodology called for an addition of 20% to the calculated standard, she did not make this upward adjustment, deciding that the process would be more fair by simply expecting each employee to achieve the average. The daily average was based on less than an eight-hour day, taking out the time the employee was away from the desk for such purposes as exercise time, lunch breaks and staff meetings. (Exhibit 33.)

6. During the initial 30-day training period, Marfil sat at Singh's desk five to six hours per day almost every day. She observed that his computer and keyboarding skills were deficient, and he was unable to operate a ten-key calculator by touch. Consequently, his indexing was slow. Several times he was tardy for work and was almost always late returning from breaks. His training period was extended for ten days because he went on vacation. (Exhibit 2.)

7. Marfil realized that Singh would need basic computer training in order to be able to meet the productivity standard. At agency expense, Singh attended a one-day class titled "Computers Made Easy" on July 19, 1997. He attended Emily Griffith Opportunity School from July 15 through October 24, 1997, two hours each day, for a 45-hour course in calculating machines and a 60-hour

keyboarding class. CSLP funded the tuition and continued paying Singh his full salary.

8. Marfil continued to work closely with Singh, who did not seem to understand her instructions or remember what she said from day to day. He did not seem to be trying. He had trouble with the microfilm reader and a couple of times loaded the microfilm cartridge the wrong way causing the microfilm to be scratched and ruined.

9. Michael Hunt, who did microfilming and whose desk faced Singh four feet away, answered Singh's questions and provided assistance on an ongoing basis over a period of several months. From week to week he would help Singh do such things as access the proper screen. He also observed others sitting with Singh assisting him with his job. The backlog of microfilm increased. The work environment did not hamper Hunt's job performance, and it seemed to have no negative impact on the performance of others who had occupied Singh's workstation.

10. Bernadette Baca, a data entry operator, also assisted Singh from time to time. She often observed Marfil training Singh one-on-one for the entire day. The time that Marfil usually sat next to a new employee was maybe two hours. Baca was trained as a back-up to Singh and learned indexing in about an hour. She was able to meet the performance standard of 207 frames per hour in one week. She has never been trained outside the agency.

11. Singh had difficulty preparing the Individual Accounting Form (IACF), a log sheet of what the employee accomplished during the day. Singh was generally unable to complete this form within the allotted fifteen minutes. It normally takes an employee five

minutes because the calculations are done by the computer.

12. After four months of one-on-one training (May 27-September 24), Marfil decided to wait until Singh finished his training at Emily Griffith and then allow 30 days before evaluating Singh's production. She met with him one-on-one at least weekly to review his progress and the expectations of the department. She had trained approximately 20 people to do indexing, and most learned it in a week or less. A few temporary workers were unable to pick it up in a week and were let go. All permanent employees who were trained in indexing were proficient within a month. No one, except a few temporary employees, failed to meet the standard. A number of employees in the department knew how to do indexing and did so when necessary, including one who indexed full-time for six months prior to Singh's arrival.

13. The amount of training provided to Singh exceeded the training provided for any other new employee. It was not the usual practice to send a new employee to Emily Griffith Opportunity School or for the supervisor to spend as much time with a new employee as Marfil did with Singh. The funds expended on Singh's training exceeded the agency's funds allotted for the training of an individual employee.

14. The first evaluation period turned out to be from December 16, 1997 through January 31, 1998, more than six months after Singh's entrance on duty. Acceptable quantity effectiveness was deemed 100% of the standard, based on approximately 6.6 working hours in a day. Singh's quantity effectiveness from December 16 through December 31 was 43% of standard. His quantity effectiveness from January 1-31 was 39%. Marfil advised him that his quantity effectiveness was below standard and must improve during the month

of February. (Exhibit 10.)

15. Singh's quantity effectiveness for February 1998 was 46% of the standard. Marfil advised him in person and in writing that a corrective action would be issued if his performance did not improve in March. (Exhibits 11, 12.)

16. Marfil reduced Singh's responsibilities to solely indexing correspondence, which was the simplest of all of the documents to index because there were fewer tasks and less to remember. With his duties thus limited, she expected to see an improvement in his productivity.

17. On April 28, 1998, Marfil issued a corrective action to Singh because his quantity effectiveness for the month of March was only 60% of the required standard. She advised him that if his performance did not improve in April he would be subject to further corrective or disciplinary action. (Exhibit 15.) Singh told her that he needed more training.

18. On May 15, 1998, Singh filed a grievance alleging that Marfil was miscalculating his productivity, that the furniture he used was bad, his seating arrangement distracted him and his equipment was too old to work efficiently. (Exhibit G.) During the grievance process, he was afforded the opportunity to move to a workstation in a corner where there might be fewer distractions, but he declined the opportunity because he did not like that workstation, either. The grievance was denied at Step 4 on October 2, 1998. (Exhibit 29.)

19. Singh's quantity effectiveness for April 1998 was 56% of standard. Marfil continued to meet individually with Singh weekly.

20. By memo dated July 7, 1998, Marfil asked Robert Fomer, the agency director, to take disciplinary action against Singh for his failure to adequately perform his job. (Exhibit 17.)

21. For the period July 1, 1997 through June 30, 1998, Singh was rated overall Needs Improvement on his performance evaluation. In addition to his poor job performance, Marfil took note of Singh's excessive tardiness. (Exhibit 18.)

22. In mid-July, 1998, an ergonomic evaluation of Singh's workstation was conducted by Christina Barthle, an industrial hygienist for the Colorado Compensation Insurance Authority. She provided Singh with suggestions to reduce workplace risk factors. She adjusted the height and the back of his chair. The computer monitors were at a good height for him. (Exhibit 19.)

23. On August 7, 1998, Marfil made a second request for disciplinary action against Singh based on the following, unacceptable productivity measurements: May=50%, June=66%, July=61%. (Exhibit 24.)

24. Marfil requested disciplinary action again in September based on Singh's August effectiveness of 47% of standard and in October based on a September effectiveness of 48%. (Exhibits 28, 30.)

25. Singh's productivity was measured the same way as was the performance of other employees. Marfil had nothing to do with the institution of the productivity standard. Singh's inability to meet the standard resulted in an increase of the backlog of microfilm to be indexed. Singh's workload remained limited to indexing correspondence.

26. Charles Heim, CSLP Associate Director for Legal Affairs and the delegated appointing authority, conducted a predisciplinary meeting with Singh on November 6, 1998. Singh appeared with Cheryl Atkinson of AFSCME.

27. At the R8-3-3 meeting, Singh stated that the indexing quantity standard was unrealistic, the training he had received was unsatisfactory, the work location distracted him, the computer terminal was slow and outmoded, his computer keyboard was situated on an unstable stand and Marfil altered his daily performance reports. During the meeting, Heim, Atkinson and Singh went to the workstation to observe Singh in the performance of his duties. Heim did not notice anything out of the ordinary with the work environment. Occasional pedestrian traffic occurred officewide. It was curious to him that Atkinson showed Singh how to retrieve certain information when Singh, himself, did not know how to do so.

28. Heim reviewed numerous documents, investigated each of Singh's responses and sought additional information before concluding that Singh would never be able to perform his job in a satisfactory manner and that his responses were mere excuses and without merit.

29. In a detailed, six-page letter of explanation, the appointing authority terminated the employment of Manmohan Singh effective November 20, 1998 for failure to comply with standards of efficient service or competence and for his inability to satisfactorily perform assigned duties. (Exhibit 38.)

30. Bernadette Baca took over Singh's job, working with the same equipment at the same workstation as he did, and found the work environment suitable. She prefers to work at this location rather than other stations she has worked at because it is easy to slide

or adjust the keyboard and monitors.

DISCUSSION

Both parties state that the main issue for determination is whether the productivity standard of 207 frames per hour was reasonable. It is undisputed that complainant's job performance was deficient according to the standard. If the standard was unreasonable, complainant argues, then the termination action was arbitrary and capricious and he should be reinstated.

To support his contention that the reason he could not meet the standard was that it was unrealistically high, complainant put on a vocational rehabilitation consultant who opined that a reasonable indexing standard would be 131 frames per hour, as opposed to 207.

The consultant testified that, in February 1999, she contacted by telephone three private companies she found in the yellow pages that sold indexing services on the open market. Speaking with someone at each company, she learned that the indexing productivity standard of these businesses was measured in keystrokes and ranged between 6,000 and 10,000 keystrokes per hour. All three used a split computer screen rather than two monitors as did CSLP. The consultant picked the lowest standard, 6,000, and subjectively reduced it by 30% to account for "degradation" due to the necessary "visual shift" between monitors compared to using a split-screen monitor. In this way, she arrived at 4,200 keystrokes, which translated into 131 microfilm frames per hour. With a productivity standard of 131, conveniently, complainant's productivity would have been 92% of the standard over a period of seven months, though still not standard. The consultant did not formulate an independent judgment of CSLP's standard through evaluating the work of CSLP employees.

In contrast to complainant's evidence, respondent showed that the productivity standard of 207 was developed by observing and measuring the performance of actual CSLP employees doing the actual job with agency equipment. In reality, complainant's performance was not compared to the performance of workers in private industry, but rather, his work was evaluated against a backdrop of other state employees doing the real job under identical conditions using the same equipment. CSLP's productivity standard has been tested for four years and found to be a reasonable, fair and effective measurement of the work productivity of its employees. Grounded in experience, the standard is not hypothetical, imaginary or unrealistic.

Complainant did not introduce evidence of any employee other than himself who had difficulty achieving the standard, and he did not come close. His productivity ranged from a low of 39% to a high of 66% between December 16, 1997 and October 1998. He was trained heavily on the job and outside the agency. His productivity was not evaluated until six months after he started, when the norm is to begin evaluating a new employee after 30 days. To help him meet the standard, his supervisor took away the most complex tasks and gave him only the simplest of documents to index. Thus, after reviewing complainant's job performance and training between June 1997 and November 1998, the appointing authority exercised the judgment of a reasonable and prudent administrator in concluding that complainant failed to comply with standards of efficient service and that he was unable to satisfactorily perform his assigned duties.

The evidence is incomplete in offering an explanation of why complainant was assigned the duties of indexing when he was reinstated, except that there was a need for an indexer in the

records department. Nonetheless, credible testimony established that the work of indexing is consistent with the job description and necessary qualifications of a Data Entry Operator I.

Complainant's various excuses for his poor productivity are without merit. His testimony that Hunt, Baca and Marfil all lied on the stand is, itself, incredible. His testimony that he lost his ability to type between 1994 and 1997, when he was not employed as a data entry operator, is viewed as another excuse.

There is no evidence of a conspiracy or an effort to deprive complainant of his job. He was given more than a reasonable chance to succeed. His duties were consistent with the qualifications for his classification.

The record is devoid of credible evidence that complainant was retaliated against by anyone as a result of his prior appeal. To simply show that his supervisor was aware that he had worked for the agency at another time is insufficient to prove retaliation, especially in light of his poor job performance.

On this record, respondent proved by a preponderance of the evidence that there was just cause for the termination of complainant's employment. See *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The discipline imposed was reasonable under the circumstances. Neither party is entitled to an award of fees and costs under §24-50-125.5, C.R.S., of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of available alternatives.
3. The indexing standard used by respondent was reasonable.
4. It was reasonably possible for complainant to meet the indexing standard.
5. Complainant was not retaliated against as the result of a prior, successful appeal.
6. Neither party is entitled to an award of attorney's fees and costs.

ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
May, 1999, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

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 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) 866-3244.

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 ½ 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 May, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Barry D. Roseman
Attorney at Law
899 Logan Street, Suite 203
Denver, CO 80203

and in the interagency mail, addressed as follows:

Coleman Connolly
Assistant Attorney General
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1525 Sherman Street, 5th Floor
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