

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B064

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENNIS BRYAN,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
AURARIA HIGHER EDUCATION CENTER,

Respondent.

This eight-day hearing was held on the following days before Administrative Law Judge Robert W. Thompson, Jr.: March 16, 22 and 23, April 5 and 6, and June 14, 15 and 22, 1999. Respondent was represented by Assistant Attorney General Toni Jo Gray. Complainant was represented by John Mosby, Attorney at Law.

Respondent presented eight witnesses and 166 exhibits. Complainant called seventeen witnesses, inclusive of himself, and introduced nineteen exhibits. The witnesses were sequestered except for Barbara Weiske, respondent's advisory witness, and complainant.

MATTER APPEALED

Complainant appeals the December 11, 1998 termination of his employment under Rule 8-2-5(A). For the reasons set forth herein, respondent's action is rescinded.

ISSUES

99B064

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 complainant failed to mitigate his damages;
4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Dennis Bryan, was employed as a Game Room Supervisor (Administrative Programs Specialist II) for the Tivoli Student Union of the Auraria Higher Education Center (AHEC), respondent, from July 1993 until July 1997. In July 1997, he accepted a lateral transfer to the position of Programs & Conference Operations Manager (Administrative Programs Specialist II), supervising the conference and meeting space services operation of the Tivoli. (Ex. 82, PDQ). This was a new position, the duties and responsibilities having been previously exercised by Jeff Stamper, who was Operations Manager and is currently Assistant Director of the Tivoli Student Union. As the assistant director, Stamper was Bryan's immediate supervisor.

2. Stamper reports directly to Barbara Weiske, Director of the Tivoli Student Union & Campus Auxiliary Services, who supervised Bryan for the four years he worked as Game Room Supervisor. Weiske rated Bryan Commendable on his performance appraisals.

3. The Tivoli serves all three AHEC campuses: University of Colorado at Denver (UCD), Metropolitan State College of Denver (MSC or Metro), Community College of Denver (CCD). Approximately 15,000 room reservations are made at the Tivoli annually. As Conference Services Manager, Bryan oversaw the process of scheduling events and setting up the rooms in compliance with the customer's requests for chairs, tables, audio/visual equipment, etc.

4. On March 12, 1998, Stamper issued Bryan a written "Performance Warning" in which Bryan was instructed to improve his performance in such areas as communication, management and supervision. (Ex. A.) Bryan responded with a memo pledging to make improvements in communication with staff, supervision and management of the program. (Ex. C-3.)

5. Stamper rated Bryan overall Needs Improvement for the performance period August 1, 1997 to July 31, 1998. Specifically, Bryan was rated as needing improvement in the factors of Management, Occupational/Professional Competence, Supervision/Human Resource Management, Problem Analysis and Decision Making, Planning, Organizing and Coordinating and Interpersonal Relations. He was rated Commendable in the area of Organizational Commitment and Adaptability and Good in the factor of Communications and of Quality Management. The appraisal form did not contain a specific factor headed Customer Service, but customer service was addressed by Stamper under the factor of Interpersonal Relations. (Ex. 81.)

6. In conjunction with his annual performance evaluation, Bryan was issued a Corrective Action/Performance Improvement Plan calling for "Immediate, consistent and continuous improvement" in the areas of Management, Professional Competence, Supervision, Problem Analysis, Planning, Organizing and Coordinating and Interpersonal

Relations." Bryan was to be re-evaluated on October 5, 1998.
(Ex.80.)

7. Bryan filed a grievance over the performance rating, the corrective action, and the performance plan for the period of the corrective action, requesting the following relief: "1) Create a win/win situation for the good of the operation of Tivoli Conference Services and the employee, Dennis Bryan. 2) Adjust the evaluation to the lowest score of good, 251 points. 3) Create a Performance Planning Narrative that is more specific, understandable, and measurable. 4) Hold in abeyance all deadlines until the grievance process is complete at which time, initiate deadlines with the same amount of time allocated for improvement."
(Ex. 51.)

8. Stamper heard the grievance at Step 1, then Weiske denied relief at Step 2. (Ex. 45.) Step 3 was heard by Curt Wiedeman, Division Director of Auxiliary & Business Services. On September 17, 1998, Wiedeman advised Bryan of his findings as follows:

1. That the performance appraisal completed on July 28, 1998, will be included in your personnel file.

2. In addition to the actions required in the July 28, 1998, performance improvement plan, that you will work with your supervisor to develop a specific, understandable and measurable performance plan for the appraisal period August 1, 1998, to November 30, 1998. A successful plan will require you to undertake the following actions in order to effect a win/win situation for the good of the operation of the Programs and Conference Operations program:

- a. You work with your supervisor to develop a mission statement for the Programs and Conference Operations program. The mission statement shall be consistent with the mission statements for the Tivoli Student Union and the Auraria Higher Education Center.

- b. You work with your supervisor to assure that

the program mission statement shall contain no less than three goals the program is expected to achieve.

c. You work with your supervisor to assure that each goal shall have no less than three performance objectives.

d. You work with your supervisor to assure that the mission statement, goals, and objectives are approved by the Director of the Tivoli Student Union.

e. You review and revise the performance plans for each employee in the Programs and Conference Operations program in order to conform to the goals and objectives of the program.

3. That the corrective action be amended to cover the time period of August 1, 1998, to November 30, 1998.

Your performance under this amended corrective action will be evaluated by your supervisor on November 30, 1998.

(Ex. 40.)

9. Bryan accepted the Step 3 decision and did not pursue his grievance further. The original requirements of the performance plan remained in effect in addition to the corrective action.

10. One of Stamper's concerns was that too many errors were occurring in making reservations, inclusive of incomplete or inaccurate information on invoices, and in booking information. By memo dated October 16, 1998, Stamper ordered Bryan to provide his plan "to effectively eliminate these kinds of oversights and errors" by October 19. Bryan responded with a plan to help the staff make fewer errors. He wrote a memo to staff members pointing out the types of errors that were occurring in making room reservations and developed a "Reservation Checklist" to be used by staff in obtaining the necessary information and recording it accurately. (Ex. P; Ex. 32.) Stamper was encouraged by the checklist, but he felt that more should have been done.

11. For the evaluation period August 1, 1998 to November 30, 1998, Stamper rated Bryan overall Needs Improvement for the second time. In addition to the factors of Management, Competence, Supervision and Problem Analysis, Stamper rated Bryan Needs Improvement in Customer Service, which was not a delineated factor in the previous appraisal. (Ex. 4.) Customer Service was added to this PACE (Performance Appraisal for Colorado Employees) as the result of an agency mandate that all PACEs include the factor of Customer Service.

12. In listing the employee's strengths, Stamper wrote: "Dennis is very committed to the Tivoli. He has worked very hard himself and has demonstrated great flexibility and commitment to work." Stamper then provided a typewritten narrative regarding the areas where improvement was needed. (Ex. 4.)

13. Stamper saw Bryan as deficient in improving the performance of his staff. In regard to Bryan's supervision of John Zamparelli, who was in charge of setting up the rooms for events and meetings, and Bryan's interactions with a poorly performing student reservationist named Dennis Gettens, Stamper was especially dissatisfied with Bryan's performance. Stamper, himself, had supervised Zamparelli for nine years and experienced job performance problems with him. He did not take corrective or disciplinary action against Zamparelli and always rated him Good on his performance appraisals. In attempting to meet this situation, Bryan issued Zamparelli a performance warning and a corrective action and gave him the lowest point total he had ever received on his PACE. Stamper apparently felt that more should have been done and that the PACE rating was too high. He thought that Bryan made poor decisions about managing his staff, as exemplified by his neglect to note areas needing improvement in the narrative section

of Zamparelli's PACE. (Ex. 4, p. 20; Ex. 26.)

14. Zamparelli's job performance had improved after he received a corrective action. Communication between Bryan and Zamparelli also improved.

15. In the case of Dennis Gettens, Bryan issued a corrective action, allowed a period of time for improvement and then dismissed him. Stamper made the judgment that Bryan was too slow in taking action.

16. General conclusions drawn by Stamper were that Bryan had not provided sufficient training materials for the staff, too many mistakes were being made in the reservations and event-planning process and in setting up the rooms for events, mistakes were being made in billing customers and Bryan was not good in dealing with the customers and in customer service.

17. One example Stamper used to demonstrate Bryan's inefficiency in dealing with customers and interpersonal relations was Rebecca Salinas, Director of Assessment & Specialized Testing for Metropolitan State College, who booked rooms to administer such tests as the MCAT and the GRE. Stamper faulted Bryan for his handling of a situation in which the room Salinas had intended to use was double-booked and last minute arrangements had to be made to accommodate both customers. Salinas did not fault Bryan. At hearing, she praised him. She felt that Bryan took care of the situation with professionalism and respect. Bryan was always responsive to her needs and remained in close contact with her in planning and setting up events. She found Bryan consistently helpful and quick to adapt to changes when needed. He always returned her phone calls.

18. Felicia Sykes, as Director of Student Life at CCD, scheduled events at the Tivoli at least 30 times per year. She disagreed with Bryan's enforcement of a policy governing the size of banners that were allowed, but she believed he was following the rules. She found Bryan responsive to her event needs. He never failed to return a phone call and provided "great" service in general.

19. As a coordinator of student activities at MSC, Khufhman Dadabhoye scheduled six events weekly at the Tivoli beginning in October 1996. She met with Bryan on a daily basis in planning the events. There was almost always a need for last minute changes, and Bryan and his staff responded very well. In her opinion, conference services improved under Bryan.

20. Kari Tutwiler, Associate Director of Student Activities at MSC, has been booking events at the Tivoli for the benefit of more than 100 student organizations since September 1994, when the Tivoli opened. It was her experience that Bryan did the "extras" as Conference Services Manager. He was visible and accessible. He stopped in to see her before and after events to see how things were going. Never was there a time when he was unresponsive.

21. One instance of Bryan's management and customer relations skills being criticized by Stamper and Weiske occurred approximately one month after he became Conference Services Manager in 1997. Zav Dadabhoye, Director of Student Activities at Metro, uses the Tivoli's conference services more than 200 times every academic year. On this occasion, he complained directly to Weiske because Bryan removed certain large banners that did not adhere to the Tivoli's size requirements. Bryan had insisted on compliance with the established policy. Weiske waived the banner rule to

please the upset customer. Both Weiske and Stamper thought that Bryan's performance was deficient, believing that he should have modified his stance in favor of the customer. In Dadabhoye's mind, this incident caused his relationship with Bryan to get off to a "rocky start," but the relationship improved as time went on. At the end, December 1998, Bryan was doing a "fabulous job" in Dadabhoye's view. Bryan understood and was responsive to Metro's needs.

22. Stamper blamed Bryan for staff turnover. A number of custodians left, among others. The reason for staff turnover was not always known. Some left for higher paying jobs. One staff person, a customer service representative, was demoralized after Bryan was dismissed and resigned her position because of it, feeling that the Tivoli's mission statement had been violated.

23. Stamper directed Bryan to develop a cleaning checklist for the custodians, which Bryan and Zamparelli put together. (Ex. C-1; Ex.65.) Stamper did not explicitly ask to see this document, although Zamparelli showed it to him at some point in time. Stamper just expected the document to be put into use, which it was. The checklist was distributed to the custodial staff. In evaluating Bryan's performance, Stamper assumed that this directive of his had not been followed. Bryan's accomplishments also included a plan for custodial training, as directed by Stamper.

24. Stamper assigned Bryan such tasks as developing a plan (map) to zone off certain sections of the building, to find all of the circuit breakers in this 100+ year-old building that had been remodeled more than once and to mark all of the audio/visual equipment. Bryan took steps, either directly or indirectly through staff, to carry out the assignments he was given. Stamper was

rarely, if ever, satisfied with the progress or results of Bryan's efforts.

25. Bryan substantially complied with the terms of the corrective action, including the review and revision of the performance plans of the custodial staff. (Ex. M.)

26. Weiske, while acknowledging that the mission statement project required by the Step 3 grievance response had been completed, believed that Bryan failed to present it to her in a timely manner. (Ex. 32.) It was Stamper who was in possession of the mission statement and gave it to Weiske after the deadline that she had set for receiving it.

27. As the result of two consecutive overall Needs Improvement ratings, Barbara Weiske, the appointing authority, conducted a predisciplinary meeting with Bryan on December 3, 1998. In a five-page letter to Bryan dated December 11, 1998, Weiske terminated his employment for a failure to comply with standards of efficient service and a failure or inability to perform duties assigned, concluding:

Based upon my investigative findings, including but not limited to the above information, I conclude that your overall performance is needs improvement and my decision in this matter is that your conduct constitutes a failure to comply with standards of efficient or competent service and/or a willful failure or inability to perform assigned duties. Either your failure to comply with standards of efficient or competent service or your willful failure or inability to perform your assigned duties would alone merit the discipline set forth below.

As we discussed, therefore, under the provisions of Rule 8-2-5(A), I considered the available options of either demotion or termination. Within our department, we currently have vacancies in entry level positions only,

and it is my reasoned opinion that these would not be appropriate positions for you to be demoted into. In accordance with State Personnel Rule 8-3-3(A) and Rule 8-2-5(A), therefore, I am terminating your employment effective the close of business on Friday, December 11, 1998.

Ex. 1.

28. Complainant Dennis Bryan filed a timely appeal of his dismissal on December 16, 1998.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). 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 trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent, urging that complainant did not accept the responsibilities of management, too many mistakes were made, complainant was poor in customer relations and failed to carry out the tasks assigned by his supervisor, submits that two consecutive PACE ratings of Needs Improvement mandated the termination of complainant's employment pursuant to R8-2-5(A), 4 Code Colo. Reg. 801-1, which has since been rescinded. See Personnel Board Rules, 4 Code Colo. Reg. 801, effective December 31, 1998. Complainant

made improvements in his performance, respondent acknowledges, but not enough.

R8-2-5(A) provided in full:

An evaluation of overall unacceptable or needs improvement performance shall include a formal performance improvement plan or a corrective action. A performance improvement plan is not a corrective action. The employee shall be afforded a reasonable period of time to improve performance. If when evaluated under a corrective action, the employee's evaluation is still needs improvement or unacceptable, such evaluation is the basis for disciplinary action. Following a R8-3-3 meeting to consider disciplinary action based on this evaluation, absent extraordinary circumstances, the employee shall be dismissed or, at the discretion of the appointing authority, demoted if the employee has demonstrated competence at a lower level.

Complainant was not perfect, and respondent proved it. Nonetheless, respondent failed to prove by preponderant evidence that complainant's conduct constituted "a failure to comply with standards of efficient or competent service and/or willful failure or inability to perform assigned duties." (Ex. 1.) Implicitly, the conclusion is drawn that the two consecutive Needs Improvement ratings were unjustified. For the appointing authority's decision to impose discipline under R8-2-5(A) does not override a certified state employee's constitutional and statutory right to be disciplined only for cause. *Kinchen, supra*.

Respondent's case rests largely on the testimony of complainant's immediate supervisor, Jeff Stamper, who happened to be impossible to please and was never satisfied. The evidence suggests that Stamper held complainant accountable for a PACE rating of Outstanding, and if he did not fit into that category, then he

deserved a rating of Needs Improvement, as if the categories of Good and Commendable did not exist except in rare instances. Stamper unfairly blamed complainant for practically everything that was not perfect with the organization and gave him credit for virtually nothing that was right. Nevertheless, complainant's dedication, commitment and work ethic were not questioned. He was willing to come in early and stay late. He attended events in the evenings and on weekends to see if there were any problems with event arrangements. He did not neglect his managerial responsibilities. He took action in the capacity of manager as circumstances dictated.

The standard to which complainant was held would make it nearly impossible for most state employees to avoid a rating of Needs Improvement. Based on the evidence as presented, complainant proved that he provided efficient and competent service and did not willfully fail and was not unable to perform the duties of his position.

Stamper's testimony that complainant did not return telephone calls and was not responsive to the needs of the customers was contradicted by the weight of the credible evidence. If Stamper perceived that a customer was unhappy with complainant, even if complainant was following established policy, Stamper erroneously concluded that complainant was inefficient or incompetent in the field of customer relations. Three customers (Salinas, Sykes, Zav Dadabhoye) whom Stamper believed to be dissatisfied with the services provided by complainant testified to the opposite at hearing.

Many of respondent's exhibits are Stamper's notes made after the first Needs Improvement rating supporting his unbending negative

view of complainant's job performance. Other exhibits are examples of errors made by unidentified staff members on such documents as invoices. These are not persuasive evidence of just cause for complainant's dismissal. Errors and omissions occurred when Stamper was the manager, and human errors will happen in the future. Complainant did not ignore the problem of mistakes being made, whatever they turned out to be. Again, Stamper seemed to be saying that if you do not rate Outstanding, or if everything is not perfect in the organization, then your PACE rating must be Needs Improvement. He did not distinguish the rating categories in setting his standard for Needs Improvement.

Complainant worked with the members of his staff to improve the performance of all and to upgrade the delivery of services. Were mistakes made? Yes. Did every scheduled event go off without a hitch? No. But more is needed to warrant the disciplinary termination of the employment of a state employee, especially in view of this record where the credible evidence of complainant's satisfactory performance weighs against respondent's allegations of incompetence and failure. The subjective judgments of complainant's supervisor could easily become positive pronouncements under a different supervisor given the same facts.

Complainant makes two arguments that are without merit and will be addressed briefly. The first states that the factor of Customer Service was not specifically included in the first evaluation and should not be considered in the second. Yet complainant always understood that providing good customer service was an integral part of his job and would be considered in appraising his performance. Besides, if the factor were deleted from his second appraisal the overall rating would be the same. The other meritless contention says that the supervisor, Stamper, did not

hold a required pre-evaluation meeting with the employee, Bryan. Again, there is no consequence. While the supervisor's signature is dated July 28, 1998, a meeting was held on July 29 enabling the employee to make comments and suggest changes. The appraisal had not yet been seen by the reviewer and, technically, was not final.

Even though complainant prevailed on the merits of this case, he is not entitled to an award of attorney fees and costs under § 24-50-125.5, C.R.S., of the State Personnel System Act. On this record, a finding cannot be made that the personnel action was instituted frivolously, in bad faith, maliciously, was a means of harassment or was otherwise groundless. See R8-38, 4 Code Colo. Reg. 801. Respondent introduced extensive documentary and testimonial evidence. Complainant proffered no evidence to show that the personnel action was brought in bad faith, was malicious or was used as a means of harassment. Both attorneys did an excellent job of presenting their case.

No evidence was proffered to prove that complainant failed to mitigate his damages.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary and capricious.
2. The discipline imposed was not within the range of available alternatives.
3. Complainant did not fail to mitigate his damages.
4. Neither party is entitled to an award of fees and costs.

ORDER

Respondent's action is rescinded. Complainant shall be reinstated to his former position with full back pay and service benefits, less any income he would not have earned but for the termination.

DATED this _____ day of
July, 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. 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 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 July, 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:

John Mosby
Attorney at Law
730 17th Street, Suite 750
Denver, CO 80202

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
