

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 94B135C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GAYLENE MARTINEZ,

Complainant,

v.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

The hearing in this matter was convened on June 7, 1995, and concluded on August 23, 1995, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Kathleen Butler Denman, Assistant Attorney General. Complainant, Gaylene Martinez, was present at the hearing and represented by Benjamin Sachs, attorney at law.

Complainant testified in her own behalf and called the following employees of the Department of Labor and Employment ("Department") as witnesses to testify at hearing: Rosemary Asbec; Marvin Wojahn; William LaGrange; Ben Garcia; William Anderson; and David Larsen. Complainant also called Helen Nopin, an employee of Central Services Section, as a witness at hearing.

Respondent called the following Department employees to testify at hearing: Kevin Nele; Mary Ford; David Chapman; Alex Chapman; Alexandra Hale; and Stephen Calvert.

Complainant's exhibits A through E, G and H were admitted into evidence by stipulation of the parties. Complainant's exhibits F, I, J and L through T were admitted into evidence without objection. Complainant's exhibit K was admitted into evidence over objection. Respondent did not offer exhibits into evidence at hearing.

MATTER APPEALED

In case no: 94G100, Complainant grieved the terms and conditions of her employment alleging that she was the victim of sexual discrimination.

In case no: 94B135, Complainant appeals the termination of her employment during probation.

The appeals were consolidated under case no. 94B135(C) for the

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purposes of the administrative hearing and the initial decision.

PRELIMINARY MATTERS

1. On April 25, 1994, Complainant appealed the termination of her employment during employment probation. Complainant alleged discrimination on the basis of sex. On May 6, 1994, the matter was referred to the Colorado Civil Rights Division. Complainant failed to timely file a charge of discrimination. Thus, on September 26, 1994, Complainant was provided notice that she waived an investigation and the parties were given notice of preliminary review.

Following submission of the parties' information sheets, on March 25, 1995, the State Personnel Board ordered a hearing in this matter.

2. At the conclusion of Complainant's case in chief, Respondent moved to dismiss Complainant's claim of discrimination for failure to establish a prima facie case. Respondent's motion was denied.

ISSUES

1. Whether Complainant engaged in the acts for which discipline was imposed.

2. Whether Complainant's conduct constituted unsatisfactory job performance.

3. Whether the decision to terminate Complainant's employment was based on her unsatisfactory job performance or was arbitrary, capricious, contrary to rule or law, or discriminatory on the basis of Complainant's sex.

4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Gaylene Martinez ("Martinez"), was employed by the Department of Labor and Employment from December 1, 1993, to April 15, 1994, as an economist intern. Martinez was terminated from employment while serving employment probation.

2. Martinez worked in the Labor Market Section under the supervision of Ben Garcia ("Garcia"), an economist III. Marvin Wojahn was the second level supervisor and William LaGrange is the director of Labor Market Information and the appointing authority for Martinez' position.

3. Labor Market Information under LaGrange's supervision consist

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of three units. The Labor Market Section, Employment Security 202

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and Current Employment Statistics. The employees of Labor Market Information are primarily classified as economist or statistical analyst.

4. Prior to Martinez' employment by the Department, she received a bachelor's degree from Eastern Montana College. She received a master's degree in economics from the University of Colorado in 1989. Following graduation from the University of Colorado, Martinez worked as a senior research economist and as a business consultant.

5. Martinez and Garcia were the only professional employees assigned to work in the Labor Market Section. Prior to Martinez' employment, Garcia worked in this section alone, performing all necessary duties. Rosemary Asbec, an administrative assistant, provided clerical support to the Labor Market Section. Asbec was assigned to spend 30% of her time providing clerical support to the Labor Market Section.

6. The clerical functions of the Labor Market Section exceeded the amount of time provided by Rosemary Asbec. Prior to Martinez' employment, when Asbec was not available to perform clerical duties, Garcia performed the clerical duties. After Martinez' employment, she was frequently assigned to perform these duties.

7. The PC-8 job description for the economist intern position provides, as follows:

- . . . Employee is charged with labor market information support activities which include assisting in the development, analysis, presentation, or update of selected economic data relating to Colorado and its population. This information impacts public and private policy on a statewide, regional and local basis.

The position is under the direct supervision of the head of Planning Information (PI) Unit within LMI. Work is performed under the review and direction of a higher level economist or statistical analyst.

15%Assists in developing labor market information (including historical, current and projected data) for the Agency's Job Service and each Service Delivery Area under the Job Training Act Partnership.

With direction from a senior economist data and information produced under this program is analyzed, written and formatted by the employee for inclusion in the LMI Section's Annual Planning Information Report and other

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publications.

25% Assist senior economist to develop and enhance programs to produce current occupational supply/demand, occupational outlook, and occupational wage information. Performs analysis of collected data to maintain standards of reliability and interprets generated statistics in terms of economic impacts, conclusions, etc.

Assist in the compilation and presentation of data for both the Section's Occupational Supply/Demand Report and Occupational Employment Outlook booklet.

30% Handles special requests for economic analysis, operations research, or labor market information as directed by a senior economist. Requests may involve the analysis of a special economic question, the complete design of a new operations report, special economic analyses for publication in one of the Department's core products, or oral presentations on particular elements of labor market information.

25% Produces and assists in the production of monthly or annual industry employment and earnings estimates within the Section's Current Employment Statistics (CES) program as needed.

Participates in employer solicitation and reporter delinquency control activities within the CES program when necessary.

May assist in the collection and compilation of data from employer's participating in the Section's Occupational Employment Statistics (OES) survey.

5% Performs other tasks as assigned to support unit/section/agency goals and objectives.

8. Shortly after Martinez' employment in December, 1993, Garcia and Martinez met to prepare a job performance plan. The performance plan did not describe clerical duties as a primary job function.

9. On April 12, 1994, Garcia was working on a project for the Department's executive director. He was pressed for time to

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complete the project. On April 12, the Labor Market section was responsible for disseminating the Occupational Supply and Demand Report ("the report"). during the afternoon, Garcia directed Martinez to start preparing the report for mailing.

10. On April 12, Asbec was also given copies of the report and was asked to prepare them for mailing. Asbec prepared the mailing labels for the project, but because she was participating in computer training, she was unable to work on the mailing project.

11. At 4:30 p.m. on April 12, Garcia checked with Martinez and discovered that she had not begun the mass mailing project. Martinez told Garcia that she was being assigned too many clerical duties and that mass mailing and labelling was not a part of her job duties. Martinez told Garcia that she would complete the mass mailing project, only if Garcia assisted her.

12. Martinez and Garcia had a heated exchange. At some point during the argument, Martinez understood that Garcia fired her. However, as she packed her belongings, Garcia told her that a decision to leave work would be her own. He did not intend to fire her.

13. On April 12, Garcia warned Martinez that her refusal to perform assigned work was insubordination and was considered to be a serious offense. Garcia promised that they would meet with Wojahn and LaGrange the following day to discuss Martinez' refusal to perform assigned duties.

14. During the confrontation with Garcia on April 12, Martinez did not mention that she believed that she was being discriminated against on the basis of her sex. Nor did she mention that she believed it was more cost effective to do mass mailing through the State's Central Services.

15. On April 13, 1994, Martinez arrived at work expecting to meet with Wojahn and LaGrange. Garcia advised Martinez that the meeting would be held in the afternoon. Garcia instructed Martinez to complete the mass mailing. Martinez again refused to complete this project without Garcia's assistance.

16. Garcia placed Martinez on administrative leave until the meeting that was held at 1:00 p.m. on April 13. LaGrange, Garcia and Martinez met to discuss the assignment of duties to Martinez. During the meeting, Martinez appeared to LaGrange and Garcia to be combative and abusive. She continued to assert that she would not complete the mass mailing assignment unless Garcia assisted her.

17. During this meeting, Martinez did not raise the issue that

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she believed that she was being discriminated against on the basis of her sex. Martinez also did not raise the issue that she believed that Central Services could complete a mass mailing more efficiently than she could.

18. Following the April 13 meeting, LaGrange decided to meet with Martinez for an R8-3-3 meeting. This meeting was held on April 15, 1994. Notice of this meeting was given to Martinez on April 13. On April 13, 1994, Martinez filed a notice of a step I grievance with the State Personnel Board. In the notice, Martinez alleged that her grievance was due to sex discrimination.

19. At the April 15, R8-3-3 meeting, LaGrange asked Martinez if she was willing to perform reasonable assignments without placing conditions on her performance. Martinez responded that she could not make such a commitment. During this meeting, Martinez raised the issue of sex discrimination for the first time.

20. On April 15, prior to the termination of Martinez' employment, Martinez gave LaGrange a step II grievance alleging that she was subjected to discriminatory and abusive employment practices. The grievance stated that Garcia violated state and federal rules and regulations by:

1. assigning clerical duties inconsistent with the job description of Economist Intern as set out by The State of Colorado, Department of Personnel;
2. failing to listen to or consider alternative solutions which may have remedied the situation;
3. misrepresenting Department of Personnel and Department of Labor policy regarding certification/ classification, length of probationary period, and the attainment of certification/classification before professional development training and skills training can be undertaken;
4. allowing the supervisor/employee relationship to break down as a result of improper and abusive communication practices; and
5. retaliating by sending notice of an 8-3-3 meeting when resistance and complaints were voiced over improper assignments.

21. On April 15, 1994, without further consideration of Martinez' grievance, LaGrange decided to terminate her employment. LaGrange concluded that Martinez' conduct was combative and abusive. LaGrange believed that Garcia made a reasonable request of Martinez to begin the mass mailing project on April 12, 1994.

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LaGrange concluded that with the scarce resources in the Department, it was not unreasonable to ask Martinez to perform clerical functions, and that her refusal to comply with this request constituted unsatisfactory job performance.

22. Economists and statistical analysts in Labor Market Information are required to perform clerical duties. However, these employees generally perform clerical duties in order to complete a primary duty or to assist a co-worker in completing a primary duty. Thus, they perform clerical duties when they have time, unlike Martinez who was directed on April 12 by her supervisor to perform clerical duties.

DISCUSSION

A probationary employee may appeal a disciplinary action. However, they have no right to a mandatory hearing to review any disciplinary action taken against them based on their unsatisfactory job performance. The term "unsatisfactory performance" includes, but is not limited to, failure to comply with standards of efficient service or competence, wilful misconduct on the job, wilful failure to perform the duties of the job, and any other conduct that adversely affects the ability to perform the duties on the job. Board Rule, R10-5-1(B).

Complainant has the burden of proving by a preponderance of the evidence that she was terminated from employment for reasons other than poor job performance. The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Complainant asserts that the termination of her employment was arbitrary, capricious and discriminatory on the basis of sex. Complainant asserts that it was improper to terminate her employment because she raised question about the assignment of a job duty. Complainant contends that the assignment of the mass mailing was not only a duty which was not within her job description, but was also a job duty that no male economist or statistical analyst was required to perform. Complainant asserts that she should be reinstated and awarded attorney fees and costs because of LaGrange's improper and illegal termination of her employment.

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Respondent contends that the decision to terminate Complainant's employment should be sustained because it was neither arbitrary, capricious or contrary to rule or law. Respondent argues that Complainant was directed by Garcia to perform a necessary and essential job duty and that her refusal to do so constituted insubordination. Respondent further contends that Complainant's demand to condition her performance of reasonable job duties on whether she deemed them to be within her job description was not a satisfactory approach to management of Labor Market Information.

Respondent contended that it presented evidence to establish that professional employees of Labor Market Information are called upon to perform clerical duties outside the scope of their job descriptions. Respondent further contends that these employees testified that, in the spirit of teamwork, they perform any duty necessary to carry out the mission of Labor Market Information.

Respondent contends that the decision to assign Complainant clerical duties and the decision to terminate her employment were not because of her sex. Respondent argues that the evidence established that, not even Complainant believed that Garcia or LaGrange's actions were motivated by discriminatory intent, until after she had been thoroughly unreasonable and was aware disciplinary action was being contemplated. Respondent contends that it was at this time that Complainant began to threaten her charge of discrimination and raised the question whether Central Services could do the mass mailing more efficiently.

Complainant failed to establish that her termination was for reasons other than poor job performance. Complainant's contention that she should not be disciplined for her refusal to perform job duties which are not described in her position description is initially appealing. However, upon further inquiry about the staffing, mission, tasks assigned and management of Labor Market Information, it is apparent that the performance of clerical duties is routine in this section by all staff members.

Complainant's arguments that she was directed to perform clerical duties while her male co-workers could elected to perform clerical duties as their schedules permitted was not persuasive. The facts established at hearing showed that Complainant was the least senior economist, who was on probation and was in training under Garcia's direction. It was not unreasonable, while Garcia completed an assignment for the Department Director, to direct Complainant to do a mass mailing.

The economist intern position description provided that Complainant would be assigned other tasks "to support the unit/section/agency goals and objectives". The publication that Garcia requested Complainant mail out was a publication routinely disseminated by the Department. It was not shown to be

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unreasonable or discriminatory to call upon her to assist in this task. It was evidence of poor job performance, warranting termination of Complainant's employment, for her to refuse to perform this task.

The evidence presented at hearing did not provide a basis for an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant engaged in the acts for which discipline was imposed.
2. Complainant's acts constituted unsatisfactory job performance.
3. Complainant failed to establish that the decision to terminate her employment was arbitrary, capricious, contrary to rule or law or discriminatory on the basis of Complainant's sex.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this 10th day of
October, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 10th day of October, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Benjamin Sachs
Attorney at Law
733 East 8th Ave.
Denver, CO 80203

and through inter-office mail, addressed as follows,

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Kathleen Butler Denman
Assistant Attorney General
1525 Sherman St., 3rd Floor
Denver, CO 80203

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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 and advance the cost therefor. 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).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - 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. The estimated cost to prepare the record on appeal in this case with a transcript is \$1242.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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

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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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