

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B121

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARAH A. COVINGTON,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
COLORADO STUDENT LOAN PROGRAM,

Respondent.

This hearing came before Administrative Law Judge Mary S. McClatchey on May 17, 2000. Complainant appeared pro Se. Respondent was represented by Coleman M. Connolly, Assistant Attorney General, Office of the Colorado Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant Sarah A. Covington ("Complainant") called only herself.

Respondent Colorado Student Loan Program ("CSLP") called Connie Butler, Accounting Technician III, CSLP, and Charles W. Heim, Associate Director for Legal Affairs, CSLP.

Exhibits.

Complainant's Exhibits A through H were admitted without objection.

Respondent's Exhibit 1 was admitted without objection.

MATTER APPEALED

Complainant appeals her disciplinary suspension for 21 work days during the month of May, 1999. For the reasons set for below, respondent's action is affirmed.

ISSUES

1. Whether Complainant engaged in the acts for which she was disciplined;

2. Whether the discipline was within the range of reasonable alternatives available to the appointing authority;

3. Whether the actions of the Respondent were arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. Complainant holds the position of Accounting Technician I in the Accounts Payable/Payroll section at CSLP.

2. Connie Butler, Supervisor, Accounts Payable/Payroll, was Complainant's immediate supervisor at all times relevant.

3. Complainant appeals disciplinary action imposed on April 27, 1999, consisting of a suspension for 21 working days without pay in May 1999.

Recent History of Corrective Actions

4. On December 29, 1998, Butler imposed a formal corrective action against Complainant in part for her inappropriate attitude that Butler was responsible for handling her work during her vacation, and for her inappropriate manner of addressing Butler. The letter stated, in part, "On Friday, December 18, 1998, you came to my cubicle and were upset because I had not done a payment voucher while you were on vacation. . . . I don't feel that you have a right to tell me what to do or speak to me in the manner that you spoke to me in. I also do not appreciate the comments under your breath as you left my cubicle about me as a supervisor. If this insubordinate nature continues, I will have no alternative but to do another corrective/disciplinary action."

5. On March 11, 1999, Complainant received another formal corrective action for a number of incidents, including her failure to follow orders and her failure to treat others in a courteous manner. They included the following:

A. Complainant refused to make deposits in a new manner, after being informed of how to do them by Ms. Butler. The letter stated in part, "You told me that you knew [the new way to make deposits] and that you didn't choose to do it that way Effective immediately, deposits will continue to be completed following the new procedures, and I expect professional response when any new procedures are implemented." Complainant did make the next deposit correctly.

B. On February 22 and 23, Complainant's tone of voice with vendors was "not conducive to someone who was offering good customer service to vendors. From this day forward, please put forth an extra effort to be respectful and courteous to vendors, as well as anyone you come into contact with. If I must speak to you again regarding this type of behavior I may be forced to issue you a corrective/disciplinary action. The agency has a code of conduct that I feel must be followed by all employees and I will not tolerate any disrespectful, discourteous behavior to anyone, including myself."

C. On February 22, Complainant received a call about an urgent matter involving a check that had to be sent immediately. Complainant never responded to the call.

D. On March 3 Butler asked Complainant to put her statistics on the computer by the next day. Complainant responded that this was impossible. Butler stated, "I find that you are very uncooperative when you are asked to do something at the last minute. I expect this to be done on a daily basis from now on. Again, if you think you have higher priorities than the task that is required, you need to discuss that with me."

6. The record does not reveal whether Complainant contested any of these corrective actions. The corrective actions were introduced into evidence by Complainant, and she made no effort to contest any of the contents thereof at hearing.

April 1999 Requests for Disciplinary Action

7. On April 1, 1999, Butler wrote a request for disciplinary action to Robert Fomer, Director, CSLP, regarding a number of new incidents. The letter cited three incidents, all of which concerned actions or attitudes of Complainant for which she had just been corrected in the December 1998 and March 1999 corrective actions. The letter cited the following:

A. On Friday, March 19, 1999, Kevin Reese was taken to Complainant's cube by Butler to address an accounts payable problem. Complainant was "very rude and blunt" towards Reese, and she told him to see Robb about it, despite the fact Reese told her Robb had sent him to her for assistance. The letter stated, "This is the second time that she has been very rude to Kevin and was unwilling to assist him. She was asked to apologize to Kevin in November over a separate issue and she refused to do that. In her corrective action of March 11, 1999, it was brought to her attention that she was very rude to vendors and not offering good customer service and required her to be respectful and courteous to anyone she came in contact with."

B. On March 23, 1999, Complainant was given a rush payment to process which she did not complete until March 25. This resulted in the borrower retaining an attorney to assist in obtaining her money. "The same type of problem happened in February and she was informed that this kind of action would not be tolerated in the corrective action dated March 11, 1999."

C. On March 15, Butler asked Complainant to pack up files and send them to the records department. Complainant responded, "I'm not going to do it, as I still use them." On March 30, Butler ordered Complainant to pack and move the documents by April 2. Complainant then went over Butler's head and corresponded with her boss about it. The letter stated in part, "She did not answer me and went again to Bill . . . I believe, Sarah has the right to discuss issues with higher level management, but I believe her direct refusal to do the work with no discussion is another example of insubordination, which was addressed with Sarah in the corrective action dated 12/29/98."

8. On April 1, 1999, Butler executed a Performance Documentation Form regarding Complainant's absence from work for a training session, for which she never received prior authorization from Butler, and about which she never informed Butler.

9. On April 2, 1999, Butler wrote a second letter to Fomer requesting disciplinary action against Complainant. She cited the failure to request authorization to attend the training class as “another example of her insubordination.” She noted that Complainant was made aware of the policy requiring advance authorization at a January 1999 meeting. Butler also cited Complainant’s failure to send a return e-mail acknowledging receipt of e-mails on March 31 and April 1. This violated the Accounting Department’s policy to have all e-mail and telephone messages returned (but not necessarily taken care of) by the end of the same business day.

10. On April 5, 1999, Butler made a third written request for disciplinary action against Complainant. This letter cited Complainant for insubordination in refusing to pack up the boxes by the April 2 deadline (which had not yet arrived as of the April 1 request for discipline), and insubordination in her e-mails sent to her supervisors regarding her refusal to follow their directive. Those e-mails reveal that in response to a direct order to pack up the boxes by April 2 by Thomas Kingsolver, System Manager of Accounting, Complainant responded, in part, “What you see as refusal, I see as a problematic criterion, which could have been handled differently on all parties part.” When Kingsolver responded by asking her to clarify her other work priorities so that he and Butler could decide if they agreed with them, Complainant responded, “What part of my previous e-mail was not comprehensible in regards to the delay of packing the FY98 PV’s?” (Complainant had earlier cited “a training on Monday, a appointment on Tuesday and in await of boxes” (sic) as reasons for her refusal.)

11. On April 13, Butler made a fourth request for disciplinary action against Complainant, citing her rudeness to and refusal to assist Jodie Crow in filling out a reimbursement document.

Appointing Authority Investigation and Decision

12. Pursuant to a delegation of authority, Charles W. Heim, Associate Director for Legal Affairs, conducted the investigation and made the decision regarding disciplinary action against Complainant. Prior to conducting his investigation, Heim contacted Complainant to set up a Rule R-6-1 0 meeting in order to get her side of the story. They met on April 13, 1999, to discuss all four requests for discipline.¹

13. At the two and a half hour meeting, Complainant did not deny her conduct as alleged in Butler’s requests for disciplinary action. She discussed issues unrelated to the disciplinary action. In addressing the incidents leading to the disciplinary action, she focused on a characterization of her behavior, but did not deny that she had been abrupt. She also discussed her supervisors’ failure to make good decisions. Regarding the Reese incident, she admitted being “a little abrupt” with him, and sending him to Robb, despite the fact Robb had sent Reese to her. Regarding the “rush” incident on March 23, she admitted that she did not check her in box until March 25, and questioned whether it was a true “rush” situation. Regarding the order to pack boxes of documents by April 2, she stated that since she was not consulted on the decision, “as a matter of principle” she disagreed with the

¹ Heim gave Complainant the option of meeting at a later date on the April 13 request for disciplinary action; she declined the offer and stated that she would like to include it in their meeting on that day.

decision. She also disagreed with it since she believed she would need occasional access to some of the documents. She admitted that she was informed that there were enough available boxes at the worksite to use to accomplish the task, and was directed to use them, but indicated they were not the type of box she liked to use. Regarding her unexcused absence for training, she stated that she “forgot” to request prior authorization from Butler, and acknowledged her awareness of the policy requiring it. Regarding Ms. Crow, she admitted that they had “an exchange of words.”

14. Heim’s investigation included multiple interviews with each person involved in the incidents with Complainant. They all provided significant detail, and confirmed the contents of Butler’s written requests for discipline. He also reviewed Complainant’s supplemental written response, submitted on April 22, 1999.

15. Heim found that Complainant had committed the actions complained of by Butler. Among his findings were: Complainant’s e-mails on the packing issue were “rude, hostile, disrespectful, unnecessary and insubordinate”; and the nature of her conduct towards Butler and Kingsolver is such that she “resent[s] their authority” and will “seize upon any excuse to resist that authority, in an inappropriate fashion and ‘as a matter of principle,’ if that authority is exercised in a manner unacceptable to you for any reason. That attitude is totally unacceptable because it is inimical to best interests of CSLP and its employees.”

16. Heim further cited Complainant’s history of disciplinary and corrective action as well as negative PACE evaluations for hostile, abusive, disrespectful, or insubordinate behavior and language. These actions occurred in 1990 and 1991. Two separate disciplinary actions in 1991 resulted in a demotion and a two-week suspension. The negative evaluations were from 1989 - 1995.

17. Heim did not review the December 1989 and March 1999 corrective actions Butler gave to Complainant, for unknown reasons.

18. Heim considered termination, but elected instead to suspend Complainant for 21 working days because of her three-year period of good to commendable evaluations from 1996 to 1998.

19. At hearing, Complainant claimed that she was never provided any notice by Butler that the issues for which she was disciplined were a problem, and therefore had no opportunity to correct the problem. She stated that it is unfair to discipline her for issues that have never been brought to her attention.

20. A brief summary of Complainant’s testimony on the various incidents follows:

A. Regarding the rush order, she admitted not checking her in box a second time on March 23 or at all on March 24, so she did not discover it until March 25. She contended that Butler should have handed it to her personally if it was so important, and that it was Butler’s responsibility to check back with her to assure the order was processed;

B. Regarding Reese, she stated, “I did very abruptly ask him what he wanted. My abruptness was just that; I am unceremonious.” She confirmed that there had been a

prior incident with him in which he perceived she was rude to him,² and for which she refused to apologize, because it was “not sane” to pursue the issue after he had dropped it;

C. Regarding her refusal to pack the boxes by April 2, she stated that she felt it was a “personal attack” by her supervisors because of the documents remaining in the other areas on her floor, and “not a valid managerial directive.” She admitted “it was a power play. Tom was bent on proving his point. I have to admit I was bent on proving mine.” She further admitted that Bill Schlaufman, Accounting Department Manager, directed her to use the 20 boxes outside a co-worker’s office, but that she didn’t because she did not like them. When asked why she didn’t use the available boxes, she testified, “I’ve always had my own. I know that doesn’t make sense. I just didn’t use the boxes.”

D. Regarding the Jody Crow incident, she admitted that she did get “defensive” with her, and stated, “I did rattle it [the proper code numbers for the form] off really fast. I did. She took offense, got up from her desk, and walked off.” Complainant contended that Crow’s version of events was not true, however.

21. The rush order on March 23 was on a yellow post-it note, stating, “Please rush refund.” The reason for the rush was that the CSLP had improperly seized a portion of an IRS refund from a borrower, because of the timing of the borrower’s payment to CSLP. CSLP was subject to potential legal liability for a delay in making this refund.

22. Bill Schlaufman did agree to order new boxes for Complainant for future packing of documents, but made it clear to Complainant that she had to use the 20 boxes available on site by April 2. Complainant later claimed, incorrectly, that this approval to order new boxes relieved her of having to use the boxes available on site at that time.

23. It is found that Complainant did commit the acts for which she was disciplined.

24. Complainant seeks to have the disciplinary action rescinded.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated or disciplined for just cause. Department of Institutions v. Kitchen, 886 P. 2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 (1999), and generally includes: (1) failure to perform competently; (2) willful misconduct or violation of the State Personnel Board’s rules or the rules of the agency of employment; (3) willful failure to perform; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on Respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. Kitchen,

² Reese had asked her to hurry up and open the mail bag so he could get his paycheck; she had stated to him that perhaps he shouldn’t take a vacation if it caused him such a financial inconvenience. This was a rude statement.

886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995). The Board cannot reverse or modify an action of an appointing authority unless it finds the action to have been arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. (1999); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Respondent has met its burden.

1. Did Complainant commit the acts for which she was disciplined?

The evidence presented at hearing demonstrates conclusively that Complainant committed the acts for which she was disciplined. In fact, even the Complainant admits to her infractions. Her testimony at hearing focused primarily on characterizing her own conduct as being “abrupt” rather than rude, and on justifying her conduct. She also questioned the motivations and decisions of her supervisors, and expressed the opinion that they were in part responsible for her own failures to complete assigned tasks.

2. Was the discipline imposed within the range of alternatives available to the appointing authority?

Complainant argues that she received no prior notice that the conduct for which she was disciplined was in any way inappropriate. However, she was corrected twice prior to receiving discipline, for actions involving failure to respond correctly to a rush situation, failure to utilize an appropriate tone of voice with vendors, and failure to respect the authority of her supervisor.

These situations are all analogous to those giving rise to the disciplinary action at issue. The corrective actions of December 1998 and March 1999 put Complainant on specific notice that she was to respond promptly to rush situations, treat all individuals with whom she comes into contact in a courteous manner, and respect the authority of her supervisor. Her claim that she was never put on notice of the need to improve in these performance areas is therefore without merit.³ Further, her 1990 and 1991 corrective and serious disciplinary actions for the same conduct, and her negative PACE evaluations from 1989 through 1995 for this conduct, also put her on notice that she was prohibited from being discourteous on the job.

Complainant’s demeanor and testimony at hearing evinced an attitude that she believes she is entitled to set her own priorities at work, even if her supervisors disagree with her. To this day, she believes it was Butler’s responsibility to assure that the rush order was taken care of in a timely fashion. Complainant appears to be unwilling to take responsibility for assuring that work properly placed in her in box is accomplished. This is an inappropriate attitude in any work setting; however, when the return of improperly obtained funds is at issue, as here, the timeliness of acting on such a task is of paramount

³ These corrective actions serve primarily to rebut Complainant’s assertion that she received no notice that certain behavior was problematic. It is noted that Complainant had just three months to improve after the December 1998 corrective action, and less than three weeks to improve after the March 11, 1999 corrective action.

importance. Complainant knew that she was responsible for processing rush refund orders; she therefore was dutybound to check her in box at least once a day to assure that she was on top of such potential situations.

At hearing, Complainant also made it clear that she has no appreciation for the inappropriateness of the "power struggle" she engaged in over the packing of boxes. She testified, "I was not insubordinate." She does not take this incident seriously. Clearing out the work area was a priority for her supervisors. Complainant's outright refusal to follow the orders of Butler, then of Butler's supervisors, demonstrates a shocking lack of respect for their authority and constitutes willful failure to perform under R-6-9(4). When Kingsolver requested a list of her work priorities, she simply refused to provide it, while also refusing to perform the ordered task. Her response to his request for her priorities, asking him what part of her prior e-mail was not comprehensible, was insubordinate in the extreme and is intolerable.

Lastly, Complainant's statements to Heim at the R-6-10 meeting, and her testimony at hearing, make it clear that she expects others to simply accept her verbally "abrupt" style. Complainant is unwilling to accept the fact that her behavior is perceived by others as being rude, disrespectful, and demeaning, and that she therefore needs to modify it. The ten-year history of corrective and disciplinary actions and negative evaluations on this issue should have made it clear that she absolutely must treat others with dignity and respect. This disciplinary action serves the purpose of once again educating her in this regard.

Board Rule R-6-2 provides that corrective action must occur before disciplinary action is imposed "unless the act is so flagrant or serious that immediate discipline is proper." Even in the absence of prior corrective action, Complainant's actions were so flagrant and serious that disciplinary action was fully justified. Her actions and attitudes were completely unacceptable. She must learn to respect the authority of her supervisors and to treat all others with courtesy and respect. Suspension, while a harsh mode of discipline, was clearly called for in this situation.

CONCLUSIONS OF LAW

1. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

The action of Respondent is affirmed. This case is dismissed with prejudice.

DATED this ____ day of
May, 2000, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, Colorado 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), 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 1/2 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, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Sarah A. Covington
1910 E. 24th Avenue
Denver, Colorado 80205

and via interoffice mail to:

Coleman M. Connolly
Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
