

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JANICE S. THORPE,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on April 8-9, 2002. Elvira Strehle-Henson, Senior Assistant University Counsel, represented respondent. Complainant appeared in-person and was represented by Alexander Halpern, Attorney at Law.

MATTER APPEALED

Complainant appeals her disciplinary termination of employment. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of available alternatives;

4. Whether complainant was denied required due process at the pre-termination stage;
5. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Janice S. Thorpe, worked in the laboratory (lab) at the Wardenburg Health Center (WHC) of respondent, the University of Colorado at Boulder (CU), from September 1989 until her dismissal on November 30, 2001. She began as a Medical Technologist I (Lab Tech I) and, in the summer of 2001, became a lead worker, or Medical Technologist III (Lab Tech III). As a lead worker, she oversaw the daily activities of the lab.
2. Complainant's supervisor for the duration of her employment at CU was Diane Robison, Manager of Diagnostic Services, who has been employed at WHC for 25 years. Initially, they enjoyed a good working relationship, but as time went on their relationship deteriorated.
3. At a staff meeting on February 12, 2001, Robison yelled at complainant and insinuated that if she could not handle the changes that were being made in the computer system then she should not be working there. Complainant felt that she was being targeted for abuse. Their relationship never recovered from that incident.

4. Complainant expressed her humiliation in writing to Robert Cranny, WHC Director. She also said to him, "I hate that bitch, I hate that bitch," and, "... if I go down, Diane is coming down with me."
5. Cranny issued Robison a Letter of Expectation in which he advised her of the inappropriateness of her behavior and the need to control her temper. At Cranny's behest, Robison wrote a letter of apology to complainant.
6. Over the next several months, Cranny checked in with complainant from time to time to ask how things were going for her, and she responded that everything was okay.
7. On October 9, 2001, Robison talked to complainant about the winter vacation work schedule. Complainant thought she was being treated unfairly because the staff had discussed the schedule while she was on funeral leave, and she had been assigned to work December 26. The discussion became heated, so Robison began to walk away. As she did, she noticed that complainant gave her the finger, also known as "flipping the bird" or "flipping off." She turned around and told complainant to do that to her face, and she did. Robison took this body language to mean, "Fuck you." Complainant was red-faced and angry.
8. Cranny met with complainant in his office that same day. Complainant confirmed that she gave Robison the finger, telling Cranny, "Yes, I flipped her off, and I'd do it again and smack her in the face with it." He later drafted a Letter of Expectation that advised complainant that such behavior was inappropriate and that any similar conduct in the future might result in corrective or disciplinary action up to and including suspension or termination. He intended to issue this letter

and discuss the matter further with complainant on October 19, but that particular meeting never took place.

9. Ten days later, on October 19, Robison and complainant began arguing loudly. Robison agreed to work in place of complainant on December 26, but the argument continued to escalate. Robison turned and walked away, but complainant followed, stomping her feet. When Robison stopped and turned around, complainant grabbed hold of her wrist and said, "Let's take this out to the parking lot and finish it once and for all" in front of several staff members, who were stunned and considered complainant's words threatening. Robison jerked free and left, only to meet Cranny, who had been called out of a meeting to deal with the disturbance.
10. Later that day, Cranny, the appointing authority, placed complainant on administrative leave for purposes of investigating her conduct of October 9 and October 19.
11. On November 7, 2001, following a predisciplinary meeting that was held on November 1, Cranny imposed a disciplinary demotion from Lab Tech III to Lab Tech II, effective November 15. The disciplinary action included a number of directives, such as displaying positive attitudes and behavior and contributing to a friendly and healthy work environment. Complainant was directed to remain on administrative leave until November 26 but to attend meetings in the meantime that were designed to make preparations for her return and to prepare her new job description and performance plan.
12. On November 14, complainant met with Cranny to discuss the implementation of the disciplinary action. During that meeting, complainant stated to Cranny: "Like I told you before, Bob, now I know

why people go postal.” Cranny remembered that complainant had said that to him back in February. It did not raise a red flag for him then because complainant was frustrated and did not have a history of violent expressions or acts during his one and one-half years as Director. This time, the reference to “going postal” made him fear for the safety of the staff, since the statement was being repeated and because complainant had since demonstrated aggressive behavior, including physical contact. Complainant had also said at the meeting, “She hates me, and I hate her,” referring to Robison.

13. Cranny provided written notice of a predisciplinary meeting to address complainant’s statements of November 14. He advised complainant that he was concerned about a possibly unsafe work environment and that corrective or disciplinary action was possible. This R-6-10 meeting was held on November 26, 2001.
14. At the predisciplinary meeting on November 26, complainant stated that she had never had physical contact with Robison. Cranny confirmed with her that this was what she said. At the earlier R-6-10 meeting, she had admitted to having physical contact and demonstrated it. There had also been several eyewitnesses to the incident. Cranny felt a negative influence from her denial because now, in his mind, he was dealing not only with someone he perceived as capable of violence, but also someone who was willing to lie.
15. Cranny concluded that complainant had created a hostile work environment and that the “going postal” statement of November 14 was a threat constituting willful misconduct. Believing that she presented an unsafe environment for staff, and potentially for the students, he terminated her employment. In determining dismissal to be the appropriate discipline, he took into account complainant’s

increasingly aggressive behavior and comments since the previous February. It appeared to him that she had not learned anything from the prior disciplinary action and that nothing had changed with respect to her violent tendencies. He did not use the words “willful misconduct” in the termination letter.

16. Janice S. Thorpe filed a timely appeal of the disciplinary termination on December 13, 2001.

DISCUSSION

I.

Relying on *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532 (1985), complainant argues that she was denied constitutional due process because she was entitled to receive a pre-termination, as well as post-termination, “hearing,” and that adequate notice means that she must have been specifically notified in writing that termination of her employment was a possibility.

Although the letter notifying complainant of the November 26 R-6-10 meeting did not reference the word “termination,” it specifically advised her that “further corrective or disciplinary action” was a possibility. Under the state personnel rules, disciplinary actions may include, but are not limited to, an adjustment of base pay, demotion, suspension or dismissal. See R-6-9, 4 CCR 801. The State Personnel Board has never required that the notice letter specifically say that the pre-disciplinary meeting is a pre-termination meeting, since the purpose of the meeting is to exchange information with the type of discipline, if any, to be determined later. It would be a violation of the rules for an appointing authority to decide in advance that the outcome would necessarily be termination.

In *Calhoun v. Gaines*, 982 F.2d 1470 (10th Cir. 1992), cited by complainant, the inferred reason for the meeting was to discuss modifications to the employee's contract and did not encompass the subject of possible termination of employment, a situation unlike the predisciplinary meeting that was held for this complainant. Here, the purpose of the meeting was to exchange information and determine whether discipline was warranted, of which complainant was duly informed.

There is no evidence in this record to suggest that complainant was unaware that termination was a possibility, or that her presentation to the appointing authority was hampered by a lack of knowledge that her dismissal was a possibility. She was not prejudiced in any way. At the meeting, the appointing authority delineated the reasons for potential discipline, particularly the "going postal" statement, and provided complainant with the opportunity to add to, refute or explain the information that had come to his attention. He thus complied fully with Rule R-6-10, 4 CCR 801.

Complainant was not denied due process at the R-6-10 meeting. Predisciplinary meetings are informal and are not of record; an appointing authority is not required to present any evidence against the employee. *Kinchen v. Dep't. of Institutions*, 867 P.2d 8 (Colo. App. 1993), *aff'd*, *Dep't. of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This process is sustainable because complainant had the opportunity for a post-disciplinary evidentiary hearing before a neutral third-party. *Kinchen v. Dep't. of Institutions*, *supra* at 11.

Loudermill, *supra*, mandates that "some kind of hearing" be held prior to discharge, and that the employee be given some "opportunity ... to present his side of the case." The pretermination hearing "need not be elaborate" and may be less than a full evidentiary hearing. *Loudermill*, 470 U.S. at 545. The rules of the State Personnel Board incorporate these precepts of *Loudermill*. The R-6-10 meeting provides the employee with an opportunity to be heard prior to

discharge, yet this complainant seems to be arguing that she has a constitutional right to have it called a “hearing.” As the *Loudermill* Court said at 545-46, “Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” (Citation omitted.) Complainant points to no abuse of process.

II.

Complainant next argues that she was denied due process on the ground that the appointing authority was not an impartial decisionmaker, that is, he was a witness to the conduct that led to her dismissal. Citing *Langley v. Adams County*, 987 F.2d 1473 (10th Cir. 1993), complainant submits that pre-termination due process requires that the employee be afforded an opportunity to be heard by “an impartial tribunal,” and that Cranny was not impartial because he was a witness to complainant’s statement about “going postal.”

There is nothing in the State Personnel Board Rules, or the Colorado Constitution, or the Colorado statutes that precludes an appointing authority from making a disciplinary decision even if he was a witness to the conduct being reviewed. Moreover, there is no evidence in this record demonstrating that Cranny was not “an impartial tribunal,” only that he was the one to whom complainant expressed her understanding of why people “go postal.” Complainant does not dispute the fact that she said it not once, but twice. There is no showing that the appointing authority was unduly prejudiced against complainant because he heard her make the statement rather than being told by someone else she so commented and admitted that she did so.

The appointing authority’s bias or partiality is not self-evident, as complainant suggests. It would be illogical, if not senseless, to disqualify the appointing

authority from fulfilling the duties and responsibilities of his office under the circumstances of this case.

III.

Lastly, complainant contends that she was dismissed for the same reason she was demoted, contrary to R-6-5, 4 CCR 801, which provides that an employee may be corrected or disciplined only once for a single incident, and that the appointing authority committed error by not specifically using the words “willful misconduct” in the termination letter. These contentions are without merit.

Complainant was dismissed for the “going postal” statement, an act that was committed after she had been demoted. In arriving at his termination decision, however, the appointing authority properly considered “the frequency of previous unsatisfactory behavior or acts,” as required by R-6-6, 4 CCR 801.

Rule R-6-9, 4 CCR 801, lists a number of proper reasons for discipline, one of which is “willful misconduct.” Conduct is “willful” when the actor is aware of what he or she is doing, that is, that his or her actions are deliberate and not inadvertent or accidental. *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge*, 972 P.2d 707 (Colo. App. 1998), citing *People v. Fullop*, 837 P.2d 215 (Colo. App. 1992). Complainant thus committed willful misconduct with the threatening and inappropriate remark of “going postal.” It is not required that an appointing authority specifically put those words in a termination letter, as long as substantial evidence proves such to be the case.

In *Barrett v. University of Colorado Health Sciences Center*, 851 P.2d 258 (Colo. App. 1993), a state classified employee was disciplined for the willful misconduct of making discriminatory and disparaging remarks about job applicants she had interviewed. In upholding the discipline, the court of appeals ruled that it is not

necessary to violate a specific written rule or policy of the agency in order to commit “willful misconduct.” The court said at 262:

Here, it is undisputed that no written or stated policy specifically prohibited complainant from making the statements at issue. A finding of “willful misconduct,” however, is not limited to a violation of specific rules or standards. (Citation omitted.)

Also, in the context of construing the phrase “willful misconduct” in an unemployment compensation case, our supreme court in *Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) confirmed there need not be actual intent to wrong the employer. A reckless disregard of the employee’s duty to his employer is sufficient.

Substantial evidence supports the findings and conclusions of the appointing authority. Respondent’s action was not arbitrary, capricious or contrary to rule or law. Respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. See *Dep’t of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

IV.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended “frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless.” This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. See Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.
2. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of available alternatives.
4. Complainant was not denied required due process at the pre-termination stage.
5. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of May, 2002, 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 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 SERVICE

This is to certify that on the ____ day of May, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

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