

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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KEVIN HUCK,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,  
REGENTS OF THE UNIVERSITY OF COLORADO  
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

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Hearing was held on January 9, 2002 before Administrative Law Judge Mary S. McClatchey at 1120 Lincoln St., Suite 1400, Denver, Colorado. Complainant appeared pro se and was present for the evidentiary proceedings. Respondent was represented by Elvira Strehle-Henson, Office of University Counsel, University of Colorado at Boulder.

**MATTER APPEALED**

Complainant, Kevin Huck ("Complainant" or "Huck") appeals his disciplinary termination by the University of Colorado at Boulder ("UCB" or "Respondent").

For the reasons set forth below, the actions of Respondent are **affirmed**.

**ISSUES**

The issues presented herein are as follows:

1. Whether Complainant committed the acts for which he was terminated;
2. Whether Respondent's termination of Complainant was within the range of reasonable alternatives available to the appointing authority;
3. Whether Respondent's termination of Complainant was arbitrary, capricious, or contrary to rule or law;
4. Whether the Respondent is entitled to attorney fees and costs under section 24-50-125.5, C.R.S.

## FINDINGS OF FACT

1. Complainant worked at UCB as a housekeeper for nearly eighteen (18) years. He worked the day shift, 7:30 a.m. to 4:00 p.m.
2. Complainant was the Housekeeping Supervisor for the Williams Village residence halls at all times relevant. As unit supervisor, he was expected to provide leadership over the housekeeping staff, including the daily assignment of duties at the beginning of each day. If Complainant was late to work, it put the unit into disarray and delayed the commencement of the housekeeping staff's work.
3. During the first twelve years of his employment, UCB considered Huck to be a dedicated employee. But beginning in 1995, Huck began to violate important employer policies.
4. During the years 1995-2001, Huck's attendance and punctuality violations became so frequent that they constituted a pattern of abuse ultimately resulting in his termination.
5. The UCD Department of Housing, Housekeeping unit, had a policy requiring that "All housekeeping personnel who are unable to report to work must call the appropriate number listed above at the times specified. This includes persons who need emergency vacation or are sick or late to work." The time specified was 7:00 a.m. to 7:30 a.m.
6. Complainant was absent from work on two days in September 1995, without providing any notice to the Housekeeping department. On September 18, 1995, Respondent issued Complainant an "informational letter" following employee counseling, for being absent from work on two days without notifying the Housekeeping department. The letter warned that corrective action might follow if the problem occurred again.
7. In early 1996, Complainant's pattern of abuse of leave policies worsened. On March 11, 1996, Respondent issued Complainant another "informational letter" following employee counseling, for not calling in about an absence in a timely manner and for attendance irregularities on 12 of 31 days, as shown on Complainant's time cards. The letter stated, "any occurrence of these infractions in the future may result in corrective action."
8. In June 1996, Complainant arrived two hours late for work smelling of alcohol. On June 17, 1996, Respondent issued Complainant a Corrective Action for that incident. Complainant had called in to state he would be

late “by an hour or so.” When Complainant arrived, he spoke with his supervisor, John Clark, to whom he admitted “consuming a lot of liquor the evening before.” Clark decided to send Complainant home. Later, Complainant stated that he understood why he was sent home. The CA stated, “[i]t is unacceptable for you to be in an altered state of consciousness, or appear to be in such state, and work in our facilities. To do so would place your health and safety, and the safety of others, at risk, and it is a terrible public relations image to project to our customers.” In conclusion, the letter warned Complainant that “future misconduct may subject you to further corrective and/or disciplinary action.”

9. Complainant's pattern of arriving to work late continued in 1996. On August 7, 1996, Respondent issued Complainant a letter for “a clear pattern of abuse relative to work attendance and work tardiness.”
10. On August 29, 1996, Respondent issued Complainant a memorandum for a “continuation of work attendance abuse.” This letter initiated a requirement that Complainant provide a doctor’s excuse when he must miss work due to illness.
11. In April 1997, Complainant arrived two hours late for work and had not called in to report the absence. On April 7, 1997, Respondent issued Complainant an “informational letter” for the unexcused, unreported absence from work. The letter stated that Complainant was payroll deducted for the two-hour absence and that any occurrence of this infraction in the future could result in corrective action.
12. Complainant did not report to work on January 12, 1998. At 10 a.m., he called in to report that he was taking sick leave for the day. But because he could not provide a doctor’s excuse, his pay was deducted for the absence. His failure to call in to report the absence between 7:00 a.m. and 7:30 a.m. violated department rule. On January 13, 1998, Respondent issued Complainant an “informational letter” following employee counseling, for the unexcused, unreported absence from work.
13. On or about April 1, 1998, Complainant arrived at work 2.5 hours late without calling in between 7 and 7:30 a.m. On April 1, 1998, Respondent issued Complainant an “informational letter” (following employee counseling) for that infraction.
14. On July 7, 1998, Complainant called in to request the day off, and to use sick leave therefor. However, he never provided a doctor's verification of illness. On July 8, 1998, Respondent issued Complainant an “informational letter” for this infraction.
15. On May 7, 8, 18, and 21, 2001, Complainant failed to report for work and

- failed to call in regarding his absence.
16. On May 29, 2001, Respondent issued Complainant a Notice of R-6-10 Meeting to give Complainant the opportunity to discuss and explain the four absences. At the May 30, 2001 pre-disciplinary meeting, Complainant did not deny having failed to call in and failing to report for work on any the four days. He stated that personal circumstances and stressors were causing him to experience difficulty outside of the workplace. He admitted that he "had no excuse" and stated "it won't happen again."
  17. Respondent offered him the services of the employee assistance program, and offered to allow him to take leave time to deal with his personal problems. Complainant did not take advantage of those offers.
  18. On June 14, 2001, Respondent issued Complainant a second Corrective Action for his unexcused and unreported absences in May 2001. The CA stated that "future failure to perform duties as assigned, including misconduct or unprofessional behavior, will subject you to further corrective and/or disciplinary action."
  19. On June 18 and 21, Complainant was late for work by several hours and failed to call in to report the tardiness.
  20. On July 11, 2001, Complainant failed to report to work and failed to call in to report his anticipated absence.
  21. On July 12<sup>th</sup>, Paula Bland, Residence Life Coordinator for Student Leadership Development, sent an email to Darren Gist, Manager of Housing Housekeeping (among others). Ms. Bland stated that Complainant's absences made it difficult for staff to keep buildings clean and ready for scheduled events (because of other employees' previously scheduled vacations).
  22. On July 19, 2001, Respondent sent Complainant a Notice of R-6-10 Meeting to give Complainant the opportunity to discuss and explain his recent unreported absence and tardiness. Complainant attended the meeting, and indicated he was still experiencing personal problems. He again neglected to take advantage of Respondent's offers of assistance.
  23. On July 24, 2001, Respondent imposed a disciplinary suspension for three days without pay. The letter states in part,

"[i]t is very hard for the housekeeping staff in Williams Village to achieve performance objectives when the supervisor for Williams housekeeping operations is not present and has not called in to

report his absence. It is doubly difficult to achieve housekeeping levels of service when your unreported absences are during the very busy summer conference season in Williams Village.”

“I am concerned that your absences continue after the Corrective Action you received on June 14, 2001, specifically concerning unreported absences from work.”

24. On August 13, Complainant called into work and reported that he would not come to work because he wanted to be with his friend visiting from out of town. On August 14, he called in and indicated he would be late for work because he could not locate his friend's car keys. On August 15, he called in and indicated he would not be into work because his friend's car would not start.
25. This was the week before students returned to school, and was therefore critical to the housekeeping department.
26. On September 13 and 14, 2001, Complainant was absent and did not report that he would not be at work on those days.
27. On September 17, 2001, Respondent issued a “Notice of R-6-10 Meeting” to give Complainant the opportunity to discuss and explain his unauthorized absences on August 13<sup>th</sup> and 15<sup>th</sup> and unreported absences on September 13<sup>th</sup> and 14<sup>th</sup>.
28. In this pre-disciplinary meeting, and in every meeting referenced above, Complainant did not deny having violated company policy or having committed the acts that constituted leave policy violations. He always stated that he would not do it again.
29. On October 4, 2001, Respondent terminated Complainant's employment. Thomas Carson, Assistant Director of Housing, made the termination decision. Carson reviewed Complainant's personnel file, including all letters, corrective actions, and the disciplinary action cited above.
30. Carson also considered Complainant's performance evaluations. Complainant's performance evaluations during the 1995 - 2001 period demonstrate that he was a solid performer, routinely receiving good to commendable ratings in all categories except attendance and punctuality.
31. Carson also considered the effect that retaining Complainant would have on the motivation and morale of Complainant's co-workers in the Housekeeping department and in the institution. He believed that if he were lax in responding to the pattern of abusing the leave policy, especially after Complainant had been repeatedly warned about the

specific behavior in the past, other employees would feel that the administration tolerated unexcused absences and tardiness.

32. Carson concluded that Complainant's frequent violations of agency policy could no longer serve as an example for other employees. As a supervisor, Carson expected Complainant's behavior to have a positive impact on those he supervised; it did not. He also believed that to condone Complainant's misconduct would denigrate the contributions of others at UCB.
33. Carson notified Complainant by letter dated October 4<sup>th</sup> 2001, indicating that Complainant's behavior constituted willful misconduct.
34. At hearing, Complainant testified that he had often been absent because of swelling in his knee. However, on cross-examination, he admitted that he had never informed any of his supervisors about a knee problem.
35. Complainant seeks reinstatement, back pay, and benefits.

## **DISCUSSION**

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 (2001) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; 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 the appointing authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed to warrant discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

### **I. Complainant committed the acts for which he was disciplined.**

Complainant admitted at the pre-disciplinary and counseling meetings that he did engage in the misconduct alleged. At hearing, he did not contest any of the conduct for which he was disciplined. Because Complainant does not dispute the actual occurrence of the events upon which his termination was based, his defense hinges on the justification of the termination. Complainant asserts that the outcome of "termination" was not justified on the basis of the aforementioned events.

Complainant did commit the acts for which he was disciplined, namely, abuse of leave policies over a six-year period beginning in 1995.

**II. Termination was within the range of reasonable alternatives available to the appointing authority.**

Complainant argues that his 18-year history as a classified employee should mitigate against termination. He appears to contend that his long tenure entitles him to greater lenience than other employees. To the contrary, the same standards apply to all classified employees, regardless of tenure.

Complainant has a long track record of "Good" or "Fully Competent" level and above performance in all areas exclusive of attendance and punctuality, and this is a strong mitigating factor in reviewing his performance history. However, Complainant's attendance and punctuality violations increased markedly at the end of his tenure, severely disrupting the Housekeeping unit's ability to function smoothly. In the end, Complainant's employment became a destructive influence on the unit, rather than a productive one.

Complainant contends that termination was too drastic a response to his transgressions. However, in view of the flagrant nature of his conduct, after having been warned or corrected over ten separate times for engaging in the same behavior, Respondent was under no obligation to give Complainant a "fresh start" again. The long history of memos and corrective actions demonstrates that Respondent hoped that Complainant would get through the rough spot in his personal life and eventually get back on track. Respondent in fact had a rather muted response to a serious problem over a long period of time, prior to finally terminating Complainant's employment. Respondent bent over backwards to accommodate Complainant; its ultimate decision was eminently reasonable.

**III. The appointing authority's action was not arbitrary, capricious or contrary to rule or law.**

Arbitrary and capricious agency action has been defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. 55 P.2d at 705.

*Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936); *Lawley v. Dep't of Higher Education*, \_\_\_\_\_ P.3d \_\_\_\_\_ (Colo. No. 00SC473, December 3, 2001), slip opinion page 31, n.15. Complainant introduced no evidence demonstrating that Respondent's action was arbitrary, capricious, or contrary to rule or law.

Board Rule R-6-2, 4 CCR 801 (2001) provides that a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. It provides that:

The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Board Rule R-6-6, 4 CCR 801 (2001) provides, in part:

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omissions, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances.

When Complainant made the decision to "call in" twice in the same week to report that he would not be coming to work for a non-illness related reason, he made a willful decision to abuse the leave policy. When Complainant decided not to come to work on August 13<sup>th</sup> and 15<sup>th</sup>, less than one month after he had been disciplined for the same behavior, he engaged in a flagrant act of defiance.

Respondent utilized progressive discipline in addressing Complainant's performance issue, in accordance with all applicable rules. Respondent had good cause to terminate Complainant's employment.

#### **IV. Attorney Fees.**

Respondent requests attorney fees and costs. Section 24-50-125.5, C.R.S. (2001), states in part,

"Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency. . . taking such personnel action shall be liable for any attorney fees and other costs

incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate."

Under Board Rule R-8-38, a frivolous action is one for which no rational argument based on the evidence or the law is presented. A groundless action is one in which a party fails to offer or produce any competent evidence to support such an action or defense.

While Complainant was unable to present much of a defense at hearing, the exhibits demonstrating his strong performance evaluation history constitutes sufficient mitigating evidence to defeat a claim that his appeal was either frivolous or groundless. His track record as a solid "Good" or "Fully Competent" or above employee in all areas other than attendance and punctuality reveals why he believed, in good faith, that perhaps he should be given one last chance, and thus appealed his termination. Therefore, attorney fees will not be rewarded in this action.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.
2. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.
3. The actions of the Respondent were not arbitrary, capricious, and/or contrary to rule or law.
4. The Respondent is not entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (2001).

### **INITIAL DECISION**

The action of the Respondent is affirmed.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2002

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Mary S. McClatchey  
Administrative Law Judge  
State Personnel Board  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203

**Certificate of Service**

This is to certify that on the \_\_\_\_ day of \_\_\_\_\_, 2002, I placed a true copy of the foregoing **Initial Decision of the Administrative Law Judge and Notice of Appeal Rights** in the United States mail, postage prepaid, addressed as follows:

Kevin Huck  
330 Colgate Street  
Boulder, Colorado 80305

Elvira Strehle-Henson  
Office of the University Counsel  
University of Colorado at Boulder  
13 UCB  
203 Regent Administrative Center  
Boulder, Colorado 80309-0013