

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B142

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN SANDOVAL,

Complainant,

vs.

DEPARTMENT OF REGULATORY AGENCIES,
COLORADO CIVIL RIGHTS DIVISION,

Respondent.

The hearing in this matter was held on September 9 and 10, November 18 and 19, 1996, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Michael P. Serruto, assistant attorney general. Complainant, John Sandoval, was present at the hearing and represented by James R. Gilsdorf, attorney at law.

Respondent called the following employees of the Department of Regulatory Agencies, Colorado Civil Rights Division (CCRD), to testify at hearing: Jack Lang y Marquez; Dr. Faye Thompson; and Wendy Miller. Complainant testified in his own behalf and called the following employees of CCRD as witnesses to testify at hearing: Brian Kellogg; Manuel Gonzales; Joseph Salazar; and Georgia Roberts. Complainant also called Damani Camara as a witness to testify at hearing.

Respondent's exhibits 1 through 11, 13 through 15, and 17 were admitted into evidence without objection. Respondent's exhibits 20 and 21 were admitted into evidence over objection. Respondent's exhibit 16 was marked but was not offered into evidence at hearing.

Complainant's exhibits A, B1-5, C1-4, D through I, and K through M were admitted into evidence without objection. Complainant's exhibit J was not admitted into evidence at hearing.

MATTER APPEALED

Complainant appeals the imposition of a six month disciplinary demotion from civil rights specialist II to civil rights specialist I and a corrective action.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.
2. Whether the decision to impose discipline was reasonable.
3. Whether the discipline imposed was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

1. The parties agreed to use the deposition of Dr. Faye Thompson as substantive evidence because of Dr. Thompson's unavailability to appear at the September, 1996, hearing.
2. The parties agreed that at the hearing in this matter individuals or companies involved in cases filed with CCRD would be referred to by name. The party arranging for a transcription of these proceedings shall be responsible for insuring compliance with the provisions of section 24-34-306, C.R.S. (1988 Repl. Vol. 10A).

FINDINGS OF FACT

1. Complainant, John Sandoval (Sandoval), is employed by the Department of Regulatory Agencies, Colorado Civil Rights Division, as a civil rights specialist I, also known as an investigator. Sandoval began his employment with CCRD in 1976.
2. As a civil rights specialist, Sandoval was assigned to investigate complaints filed by individuals alleging discrimination. Following an investigation of allegations of discrimination, civil rights specialists are required to prepare a letter of determination, which is a recommended finding to the executive director of CCRD.
3. In 1995 and 1996, the time relevant to this appeal, Sandoval's immediate supervisor was Dr. Faye Thompson (Thompson), the director of compliance. Jack Lang y Marquez (Lang y Marquez) is the executive director of CCRD and the appointing authority

for Sandoval's position.

4. Eleven civil rights specialists are under Thompson's supervision in the Denver office. Performance standards are established for all civil rights specialists which address the quantity of work that must be completed during a rating period and the deadlines for completion of that work. (Exhibit 2.)

5. The civil rights specialists' investigation and letter of determination are reviewed by the director of compliance and the executive director. The executive director may adopt the letter of determination as his own and provide the findings to the parties.

6. CCRD handles cases involving discrimination in housing, public accommodation, and employment. In public accommodation and employment cases where discrimination is alleged, CCRD has 270 days of jurisdiction. The 270 days of jurisdiction is a limit established by state law. When the 270 days of jurisdiction has lapsed, CCRD has no legal authority to handle the case.

7. Civil rights specialists are required to complete their investigation of a case and prepare the letter of determination for review by the executive director within 160 days. The investigation of housing discrimination cases should not exceed 45 days.

8. Procedures established at CCRD, and made known to the civil rights specialists, require that cases be turned into the director of compliance and executive director with no fewer than 60 days of jurisdiction left. In the event a case is turned into the managers with less than 60 days of jurisdiction remaining, the investigator is expected to place the case in a red folder which signals urgent handling of the case. An investigator who submits a case to Thompson with less than 60 days of jurisdiction remaining is expected to talk with her about the case on or prior to the 60th day.

9. In cases involving allegations of discrimination in public accommodation and employment, an extension of CCRD's jurisdiction may be granted by the parties to the case. Each side may grant an extension of time up to 90 days. Whenever an extension is necessary, it is the investigator's responsibility to obtain the extension of time from the parties.

10. In housing cases, CCRD has 100 days of jurisdiction. The internal guideline requires that the investigation be completed within 45 days. Extensions can be granted up to 270 days. However, the Department of Housing and Urban Development discourages CCRD from seeking extensions.

11. Failure on the part of the investigator to complete the investigation within the required time period can have ramifications administratively and for the charging party. The executive director reviews 700 to 800 cases per year. Timely submission of the cases by investigators provides him adequate time to complete his review.

12. In a case in which the executive director makes a determination favorable to the charging party, failure to serve the parties with the finding with sufficient jurisdictional time remaining can result in a loss of due process rights for the charging party. The parties may be deprived of the opportunity for a conciliation conference and the case may not be considered by the Colorado Civil Rights Commission (CCRC) for a determination whether a hearing should be held.

13. In a case in which a determination is made by the executive director which is not favorable to the charging party and the investigation is not completed in a timely manner, the charging party may be denied the opportunity to appeal the case to CCRC and to have the case reviewed by the Equal Employment Opportunity Commission.

14. In any case in which jurisdiction is lost, the charging party is deprived of his or her due process rights. The parties do not have benefit of the executive director's letter of determination and any due process rights which flow from that determination.

15. A case status sheet is produced on a monthly basis to assist CCRD personnel in tracking cases. The status sheet is produced for each investigator. It identifies the case name and number, when the case was assigned to the investigator and when the case was submitted.

16. On three occasions during a twelve month period, Sandoval was assigned cases to investigate in which he allowed jurisdiction to lapse or submitted the case for consideration by the managers with so little jurisdictional time remaining that the charging party was deprived of due process rights.

17. On January 13, 1995, Sandoval lost jurisdiction of a case assigned to him for investigation involving an allegation of employment discrimination. This occurred in CCRC case #E94DR393. (Exhibit 10.)

18. Sandoval was assigned this case on April 21, 1994. On December 13, 1994, Sandoval contacted the charging party to obtain an extension of time in which to complete the investigation. However, the charging party elected not to sign and return the requested extension. Sandoval did not notice that he had not received the extension until after jurisdiction expired.

19. Sandoval advised Thompson that jurisdiction was lost on the case. Thompson advised the executive director. The executive director, after reviewing Sandoval's explanation for the loss of jurisdiction, and after speaking to the charging party, issued a corrective action to Sandoval dated March 2, 1995. (Exhibit 3.)

20. In the corrective action, Lang y Marquez found that Sandoval's handling of the case lacked professionalism. The charging party complained that Sandoval did not return her telephone calls and that as a result of Sandoval's unresponsiveness she decided not to pursue her charge of discrimination with CCRD.

21. Lang y Marquez warned Sandoval in the corrective action that any further losses of jurisdiction within a twelve month period would result in the imposition of disciplinary action. Sandoval did not grieve the March 2, 1995, corrective action.

22. Approximately one month after the March 2, 1995, corrective action, Sandoval lost jurisdiction for a second time in a case involving an allegation of employment discrimination. The loss of jurisdiction occurred in CCRC case #E94DR494.

23. Sandoval was assigned CCRC case #E94DR494 on July 8, 1994. (Exhibit 11.) On February 16, 1995, the charging party was contacted by Sandoval for the purpose of obtaining an extension of time of the jurisdictional time limit. Sandoval completed his investigation and submitted the case to Thompson for review on February 28, 1995. Sandoval failed to notice that the requested extension of time was not received from the charging party. Jurisdiction was lost on March 25, 1995.

24. As a result of Sandoval's failure to timely process case #E94DR494, a R8-3-3 meeting was held with Sandoval on April 11,

1995. Sandoval's explanation for the loss of jurisdiction was the same in this case as it had been in the previous case a month earlier. Lang y Marquez was concerned that following the March 2, 1995, corrective action, Sandoval did not review the cases assigned to him to ensure that loss of jurisdiction did not occur in another case.

25. On April 17, 1995, Lang y Marquez imposed a one month one step disciplinary demotion and a corrective action. (Exhibit 4.) The corrective action instructed Sandoval to meet with Thompson and review his caseload to ascertain whether the parties' rights were in jeopardy because of the age of any case. Sandoval was directed to submit to Lang y Marquez a written action plan to ensure that the rights of the parties in cases assigned to him were preserved. Sandoval did not appeal this action.

26. In August, 1995, Sandoval received a job performance evaluation rating his overall performance as "good". (Exhibit 1.) The performance rating was prepared by Thompson encompassing Sandoval's job performance from July, 1994, to June, 1995. It noted that Sandoval performed at an "unacceptable" level in his failure to meet levels of timeliness for assignments, his failure to set priorities, schedules, and deadlines to avert crisis, and his failure to meet agency goals for percentage of total caseload resolved through mediation.

27. In December, 1995, Sandoval submitted a CCRC case #H95DR053 to Thompson for review with six days of jurisdiction remaining. This case was initially submitted to the director of compliance for review on August 17, 1995. It was returned to Sandoval on August 21, 1995, to obtain an extension of time of the jurisdictional time limits. The case was returned to Sandoval again on September 2, 1995, to correct the signature page on the final investigative report. The case was again returned to Sandoval on September 30, 1995, with direction that Sandoval was to discuss the case with Thompson. Thompson and Sandoval met on October 10, 1995, to discuss the fact that Sandoval needed to obtain comparative data in order to complete the investigation. The case was resubmitted for review on December 11, 1995. The case was again returned to Sandoval on December 14, 1995, with a request that Sandoval secure the documents into the file.

28. When the case was finally submitted to Thompson for review, there was six days of jurisdiction remaining. The case was not placed in a red file folder and Sandoval did not talk to Thompson about the age of the case.

29. The executive director made a "no probable cause" finding in

this case. However, jurisdiction lapsed on December 18, 1995, and no further extensions could be obtained from the parties. Thus, there was inadequate jurisdictional time remaining to allow the charging party to exercise his right to appeal the "no probable cause" determination to CCRC.

30. On January 29, 1996, Thompson wrote Sandoval recounting the facts surrounding CCRC case #H95DR053. She explained in the January 29 communication to Sandoval that she would refer the matter to Lang y Marquez for consideration of possible corrective or disciplinary action. (Exhibit 6.)¹

31. On February 22, 1996, Thompson provided Sandoval with a semi-annual progress review. Thompson rated Sandoval's performance at the "good" level in the area of productivity. Sandoval was rated "needs improvement" in the area of timeliness. Thompson noted that of the 37 cases Sandoval submitted during the first two quarters, 14 cases were submitted beyond the time limit for completing investigations. Sandoval failed to discuss any of these cases with Thompson or to offer explanation for their untimeliness. Sandoval resolved through mediation 27% of the cases submitted which was slightly below the established agency standard of 30% to 35%.

32. The semi-annual progress review further noted that one case was submitted with six days of jurisdiction remaining. This is the case referenced in Thompson's January 29, 1996, memorandum mentioned above.

33. On March 13, 1996, as a result of Sandoval's failure to timely submit CCRC case #H95DR053, Sandoval met with the executive director for an R8-3-3 meeting. At the meeting, Sandoval did not deny that he submitted the case with less than six days of jurisdiction remaining. Sandoval maintained that Lang y Marquez singled him out for different treatment because of personal animosity. Sandoval explained that he did not discuss this case with Thompson because he decided to work on his caseload instead of meeting with his supervisor to discuss late cases. Sandoval maintained that many of his cases were only late by a few days.

¹This CCRC charge is referred to by CCRC case # H96DR053 in Thompson's January 29, 1996, memorandum, exhibit 6. However, in the supporting documentation contained in exhibit 9, the CCRC case number is H95DR053.

Additionally, Sandoval mentioned that he intended to report to Lang y Marquez' supervisor, Joseph Garcia, the director of the Department of Regulatory Agencies, the fact that Lang y Marquez delayed in handling a charge of discrimination filed by Sandoval's son against the Department of Natural Resources.

34. Following a R8-3-3 meeting, the executive director decided to impose another disciplinary action on Sandoval. Lang y Marquez concluded that Sandoval's failure to properly process the case resulted in the August to December, 1995, delay. This delay caused the loss of the charging party's right to appeal the "no probable cause" ruling to CCRC.

35. Following consideration of the mitigating and aggravating circumstances, Lang y Marquez decided to demote Sandoval for a six month period from a civil rights specialist II to a civil rights specialist I, grade 88 step 7 to grade 82 step 7. Sandoval appeals this disciplinary action.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). 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; or 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Veegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

Respondent contends that it sustained its burden of proof to establish that complainant engaged in the acts for which discipline was imposed, that discipline was warranted and that

the discipline imposed was within the range available to a reasonable and prudent administrator.

Complainant contends that he established that he was singled out for different treatment because of Lang y Marquez' personal animosity toward him. He maintains that the evidence established that even his co-workers observed instances of Lang y Marquez' different treatment of complainant. Complainant further maintains that because of this personal animosity, he was dealt with more harshly in connection with the handling of cases.

Complainant further contends that the workload assigned civil rights specialists is very heavy and that it is difficult to meet the deadlines set by management. Complainant contends that the requirement that civil rights specialists meet with Thompson is difficult to comply with because Thompson is not readily available to the staff. Complainant further contends that two office moves during 1994 and 1995 caused delays in the processing of his assigned caseload.

Complainant's allegation that the discipline imposed was the result of Lang y Marquez' personal animosity was not supported by the evidence. Nor was the allegation that other employees were treated with greater leniency found to have merit. The evidence established that reasonable standards of performance were established, were known to Sandoval and were applied with reasonable consistency. Sandoval was counseled by his supervisor about his performance on a repeated basis and corrective and disciplinary action was imposed at appropriate intervals.

The evidence established that Lang y Marquez and complainant did not get along with each other. However strained their personal relationship, the evidence did not establish that this animosity spilled over into Lang y Marquez' judgment about the appropriate discipline to impose in this case. Complainant's evidence concerning other employees who allowed jurisdiction to lapse and their treatment did not provide support for the conclusion that complainant was not treated fairly.

The evidence established that when complainant's co-workers lost jurisdiction of a case, Lang y Marquez imposed progressive discipline consistent with agency policy. There was evidence that all employees were subject to progressive discipline for loss of jurisdiction. Even Thompson, the director of compliance, and Lang y Marquez' secretary were subject to corrective action when they were responsible for the loss of jurisdiction.

Examples of civil rights specialists who were treated differently

under, what complainant contended was similar circumstances, was not supported by the evidence. The evidence established that CCRD operates in a high pressure atmosphere where the workload carried by all staff members is extraordinary. The evidence further established that because of the complexity of the agency's statutorily imposed responsibility, the problems that arise in the day to day work of the staff do not come in cookie cutter consistency. The appointing authority is called upon to review each circumstance individually. The evidence established that there was no other employee who handled their cases in the same manner as had complainant during a twelve month period.

Complainant alleged that when Lang y Marquez dislikes an individual he uses his position of authority with CCRD to cause problems for that person. Complainant offered evidence that there was an instance where Lang y Marquez treated former civil right specialist, Dolores Conde, with animosity when she dealt with CCRD staff in her role as counsel for the Regional Transportation District. However, the evidence was unclear on this point and could not be used to conclude that because of the executive director's animosity toward complainant, he used his authority to harm complainant.

Further, complainant's witnesses testified about instances when it was believed that Lang y Marquez handled cases improperly causing jurisdiction to be lost. However, these instances were not supported by the evidence or a plausible explanation of the handling of the cases was offered on rebuttal.

Complainant devoted a significant portion of his case to an incident involving his son's charge of discrimination against the Department of Natural Resources. The ALJ considered the evidence presented on this point and could not conclude that this incident by itself or in conjunction with the other evidence warranted a finding that the appointing authority's action in this case was arbitrary or capricious.

Complainant and his witnesses testified about innumerable instances when it was perceived that Lang y Marquez slighted complainant. There was testimony about an instance where Thompson, who was viewed by complainant and some of his witnesses as Lang y Marquez' pawn, failed to appoint complainant as investigator in charge of the office in Thompson's absence. There was also testimony about Lang y Marquez' lack of enthusiasm for complainant's award as the employee of the year in 1994 or 1995 and there was testimony about a lack of warmth between the men during casual office exchanges. These examples under the appropriate circumstance could provide circumstantial support for a claim of arbitrary and capricious

action. However, in this case where there was clear and unambiguous evidence that complainant failed to comply with established standards on three occasions in a 12 month period, this evidence is not probative.

The appointing authority imposed progressive disciplinary measures which included corrective actions and two disciplinary actions. The evidence established that the discipline imposed was reasonable in light of complainant's employment record and the conduct proven to have occurred.

Neither party presented evidence to support an award of attorney fees and costs under section 24-50.5-125 C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that complainant engaged in the acts for which discipline was imposed.
2. The evidence established that the decision to impose discipline was reasonable.
3. The decision of the appointing authority to impose a six month disciplinary demotion from civil rights specialist II to civil rights specialist I was neither arbitrary, capricious or contrary to rule or law.
4. Neither party is entitled to an award of attorney fees.

Dated this 3rd day
of January, 1997.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of January, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan St., Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Michael P. Serruto
Office of the Attorney General
1525 Sherman St., 5th Floor
Denver, CO 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), 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 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 should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

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

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.