

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B055

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ELIZABETH JEAN LOPEZ,

Complainant,

vs.

DEPARTMENT OF REGULATORY AGENCIES,
OFFICE OF OUTFITTERS REGISTRATION,

Respondent.

The hearing in this matter was held on May 29, 1997, in Denver before Margot W. Jones, Administrative Law Judge. Respondent appeared at hearing through Jill Gallett, Assistant Attorney General. Complainant, Elizabeth Jean Lopez, 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 (DORA) as witnesses to testify at hearing: Cathy Wells; Fran Armstrong; and Deborah Ford. Complainant testified in her own behalf and called no other witnesses to testify at hearing. Respondent's exhibits 1 through 7 were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals the imposition of a six month disciplinary demotion.

ISSUES

1. Whether complainant engaged in the conduct for which discipline was imposed.
2. Whether the conduct proven to have occurred constitutes violation of State Personnel Board rules.
3. Whether the discipline imposed was arbitrary, capricious, or contrary to rule or law.

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

FINDINGS OF FACT

1. Complainant Elizabeth Jean Lopez (Lopez) was employed by the Department of Regulatory Agencies for the Barbers and Cosmetologist Board (BCB) and the Office of Outfitters Registration (OOR). Lopez began her employment with BCB on the out of state desk in May, 1995. Lopez was classified as an Administrative Assistant III. Lopez began her employment with the State Of Colorado in December, 1986.

2. The Director of BCB and OOR is Cathy Wells (Wells). She is the delegated appointing authority for Lopez' position. When Lopez began her employment, she was supervised by Jacque Chastain. In February, 1996, Chastain was replaced by Deborah Ford (Ford), Office Manager for the BCB and OOR. Ford was Lopez' direct supervisor.

3. The BCB and OOR have a small staff. Eight employees work for the BCB and one employee works for the OOR. The BCB regulates the barber and cosmetologist industry in Colorado and the OOR regulates individuals who provide services for hunters and fishermen such as guides, cooking, and transportation.

4. Alma Melendez (Melendez) was also employed at the BCB and OOR. When Lopez began her employment in May, 1995, Melendez was already employed in the Board offices working at the OOR desk. Prior to Melendez' assignment at the OOR desk, she worked as the receptionist in the BCB.

5. Melendez and Lopez became friendly with each other. They frequently took breaks and lunch together. They sometimes communicated in Spanish. Their friendship did not extend beyond the work place.

6. Melendez is a tall woman who projected herself as being tough. Following the weekends, she frequently appeared at work with cuts and bruises. She bragged that she had been in fights during the weekend. She was viewed by Wells and Ford as a manipulative personality who frequently lied. She lied about her skill and knowledge of the job.

7. By contrast, Lopez is a small framed quiet woman. Following her May, 1995, employment with the BCB, she went on maternity leave. She remained on leave from approximately the first week of December to the first week of February, 1996. Lopez' new job and

new infant consumed her attention. She was not as attentive to Melendez as she might have been under different circumstances.

8. Lopez frequently turned to Melendez for answers to questions about her job. Lopez did not receive any formal period of training at the BCB out of state desk. Jacque Chastain, her immediate supervisor in May, 1995, was frequently absent from work. Wells sometimes offered Lopez training and direction. Melendez claimed knowledge of how tasks were done at the out of state desk. Melendez and Lopez were seated directly across from each other, making Melendez a quick reference source.

9. In April, 1996, Melendez and Lopez switched positions. Lopez was assigned to the OOR desk and Melendez was assigned to the BCB out of state desk. They continued their friendly relationship. Melendez continued to answer Lopez' work related questions.

10. Following Ford's employment as office manager in February, 1996, she was displeased with Melendez' job performance. Ford monitored Melendez' work. Melendez was angered by Ford's oversight. If Melendez accumulated a back log at the desk to which she was assigned, she hid, misfiled or destroyed the files in order to avoid detection by Ford. Documents maintained in the files assigned to Melendez often contained irreplaceable documents. Melendez' practices caused havoc in the office.

11. Applicants for licenses whose files or documents from their files were being hidden or destroyed were constantly calling the office to demand service. They were frequently outraged by the loss of their documents. They spoke harshly to the office staff for their apparent incompetence. The applicants were frequently precluded from pursuing their occupations because of the protracted delays in licensing due to Melendez' antics.

12. Occasionally, the whole office would be required to stop what they were doing to search for a file or a document. Sometimes after these searches, Melendez would locate the missing file pretending to retrieve the file from a location that had already been searched.

13. In fact, Melendez maintained a pendaflex folder of BCB files which she carried about or hid in her office. When assigned to the OOR desk, she continued to secret the folder of BCB files in various locations around the office. She told Lopez that she needed to keep the files because she had not completed filing records in the file.

14. Lopez was aware that Melendez sometimes advised Spanish speaking applicants in the BCB office about how to beat the system with regard to licensing procedures. She did so in Spanish.

15. Assigned to work in OOR, Melendez altered forms filling in the information herself or asking Lopez to complete documents needed by applicants for registration. Two or three times between May, 1995, and July, 1996, Melendez asked Lopez to complete an OOR form indicating the game management units. The game management units pertained to the type of game that could be hunted in certain areas of the state by outfitters. Melendez explained that she had the applicant on the phone, had obtained the information from the applicant, and wanted it inserted on the form so the outfitter did not have to have his application delayed. Melendez explained that she wanted Lopez to insert the information because she did not want Ford to notice her handwriting on the form.

16. There was no policy in the BCB or OOR on shredding documents. There was a shredding machine located in a copy room not far from the boards' main office. It was in a copy room shared with other state offices. On two occasions, Melendez sought Wells' permission at a staff meeting to shred documents. At the first staff meeting, Wells told Melendez and the staff that they should not shred documents. Melendez pushed the point at another staff meeting. She explained to Wells that occasionally the staff spent long periods of time in the copy room reproducing documents. With the shredder in the copy room, Melendez explained that it would be easy to shred documents while copying.

17. Wells agreed the staff could shred documents when they were in the copy room on other business. Wells even directed the staff to shred certain documents which needed to be disposed of that remained in the office in boxes.

18. Lopez past the copy room containing the shredder as she exited the office. Occasionally, Melendez asked Lopez to do her a favor and shred documents as she left the office for the day. Lopez routinely did this if requested by Melendez. She did not question this request and assumed she was performing a simple clerical task for her friend. She never inspected the documents she was given.

19. By mid 1996, Lopez was cognizant that Melendez conducted her business at the BCB and OOR offices in a strange manner. However, Melendez was a strange person. Lopez continued to maintain a cordial relationship with her not wanting to get on the wrong side of such a troublesome co-worker. During the fall of 1996, Lopez was assigned to work on the receptionist desk. For the first time, Lopez received the irate telephone calls from members of the public

whose documents and files were being destroyed or misfiled by Melendez. She was shocked by their angry tones. Lopez was startled out of her complacency. She realized that there was a connection between Melendez' strange behavior, the complaining calls from the public and the office wide searches for files and documents. Lopez realized that she may have unwittingly assisted Melendez in her misconduct.

20. Lopez was extremely disturbed by her discovery. She was not sure how to advise Wells and Ford. Lopez was intimidated by Melendez. Lopez feared that if she reported her suspicions about Melendez, Melendez would be told or would guess who reported her. She feared Melendez would deny the allegations of wrongdoing and attempt to harm her or her work.

21. In April, 1996, Lopez was given an annual job performance rating. She received an overall rating of "good". In her prior positions, she received higher performance ratings and she believed that she deserved a higher rating in April, 1996. Lopez disputed the rating. Lopez, Ford, and Wells met and communicated in writing about Lopez' rating. Ultimately, the rating was adjusted upward because it had been miscalculated.

22. As an extension of the April, 1996, rating discussions, on October 16, 1996, Lopez, Ford, and Wells met to discuss additional measurements by which Lopez' job performance would be judged during the next rating period. During this meeting, Lopez told Wells and Ford that she suspected that Melendez was responsible for altering, hiding, misfiling, and destroying BCB documents.

23. Lopez believed that she had been duped into participating in altering and destroying documents. However, she advised Ford and Wells that she thought she altered and shredded documents for Melendez, but she did so out of friendship. Ford and Wells understood Lopez to admit to knowing participating in this activity with Melendez. Lopez was not able to give Wells much detail about Melendez' actions. She reported about the collection of BCB files Melendez kept in a separate folder, about Melendez' misfiling of BCB documents, and about filling in the game management units on OOR forms. She reported her suspicions about the destruction of files.

24. Wells had not confronted such a problem in the past. On October 16 and 17, 1996, she consulted with her immediate supervisor, DORA's director, and the director of human resources. This group agreed that Wells lacked the necessary information to determine the proper course of action. Wells was encouraged to get additional information.

25. Without gathering further information, on Friday, October 18, 1996, Melendez was confronted with the allegations of misconduct in a meeting with Ford and Wells. She was advised that she could resign or an investigation would be undertaken that might lead to disciplinary action. Wells gave Melendez until Monday, October 21, 1996, to make a decision. Melendez decided to resign Friday, October 18.

26. Melendez was escorted from the building by Ford. Lopez was advised that Melendez had been confronted about the allegations of misconduct and resigned her position. Lopez expressed fear for her safety. Lopez was advised that she could leave work at anytime, that Ford would accompany her to her bus, and that thereafter she could vary her work schedule in order to avoid contact with Melendez during her commute to work.

27. In October, 1996, Melendez' resignation was coded "do not rehire". However, shortly thereafter, the code was removed from Melendez' personnel file when human resource personnel were instructed that this designation had to be removed from all files. Melendez' file was then coded with the number "70" which indicated that there was a negotiated resignation.

28. Within thirty days of her resignation, Melendez was rehired by another state agency. At or around the time of the administrative hearing in this matter, Melendez was working for a temporary agency. Fran Armstrong, the DORA human resources director, was recently contacted about a state position Melendez was applying for and Armstrong provided a neutral reference.

29. On October 23, 1996, Lopez was advised that an R8-3-3 meeting would be held with her on October 24, 1996, to consider whether disciplinary action should be imposed on her as a result of Lopez' "admitted participation in the destruction, misfiling, and alteration of government documents." Prior to this meeting, Lopez consulted with Fran Armstrong. On the subject of representation at the R8-3-3 meeting, Armstrong advised Lopez that having an attorney present at the R8-3-3 meeting could escalate matters. Lopez appeared at the R8-3-3 meeting with a friend who was present for morale support and as a character witness.

30. At the R8-3-3 meeting, Lopez told Wells that she assisted Melendez because she was a friend and because she feared Melendez. Lopez asked that a corrective action be imposed which would be removed from her record after a specified time period. Lopez also asked that if Wells decided to impose disciplinary action that she provide her the same opportunity to resign her position as Melendez was provided. Wells agreed to this proposal.

31. On October 30, 1996, Wells advised Lopez that she would impose a six month disciplinary demotion, demoting her from an administrative assistant III to an administrative assistant II. This resulted in a loss of pay of \$297.00 per month. Lopez opted not to resign her position. However, prior to completion of the six month disciplinary demotion, she transferred to an administrative assistant II position in another agency. Lopez believed that she could not receive fair treatment at the BCB or OOR.

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; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden of proof by establishing that complainant admitted to altering, destroying and misfiling government documents. Respondent further contends that because of complainant's admissions its action imposing a temporary disciplinary demotion were neither arbitrary, capricious, nor contrary to rule or law.

Complainant contends that the disciplinary demotion was too severe a discipline in light of the roll she played in the misconduct. Complainant further contends that she was extremely nervous during her meetings with Ford and Wells on October 16 and 24, 1996. She maintains that she did not represent herself well at these meetings. She asserts that the evidence established that she was not a knowing or willing participant in a scheme with Melendez to destroy or alter government documents. She contends that she was as disturbed as anyone when she realized what Melendez had been doing. She maintains that the fact that she was concerned about Melendez' conduct is what brought her to Wells and Ford in October in the first place. Complainant believed that she did the BCB and

OOR a service by sharing her suspicions with her supervisor. She contends that in the absence of this revelation, Melendez would probably still be at the respondent's offices doing harm.

It seems like everyone in this case was asleep at the switch, except Alma Melendez, who was at the switch turning it on and off like a strobe light. The evidence did not establish that complainant knowingly altered and destroyed government documents. At worse, complainant failed to be attentive to the conduct and the request made of her by Melendez. But, it looks like Wells and Ford were also not fully attentive. The evidence established that the whole office hunted for files only to have them materialize through Melendez. And, this action did not draw suspicions toward Melendez. The evidence further established that Melendez at two staff meeting was seeking permission to shred documents, in an office where shredding did not appear to be a primary duty among the support staff. And, still no one questioned Melendez. As a matter of fact, Wells had no memory of Melendez' shredding requests. Wells was reminded of these requests by her staff on the evening of the first day of hearing in this matter.

Melendez reported to complainant that Ford was on her back. Ford testified that she was monitoring Melendez' work. Yet, Ford's monitoring proved fruitless in terms of bringing attention to Melendez' conduct. Ford and Wells testified that Melendez was a strange manipulative character. Yet, these opinions did not cause them to suspect her of this misconduct. Ford and Wells, who felt fully responsible for the office problems, never were alerted to the fact that Melendez was their problem. Therefore, it is not so startling to learn that complainant too did not realize just how far Melendez was taking things until it had been going on for some period of time.

Respondent points to complainant's admission at the October 16 and 24, meetings to support the conclusion that she engaged in the conduct for which discipline was imposed. However, the ALJ, having observed the demeanor of complainant, concludes she is a timid soft spoken individual who apparently was not capable of making the point during the October meetings which she made at the hearing with the assistance of counsel. That point being that she did not willingly or knowingly destroy or alter documents. That she came forward to assist the BCB and OOR as soon as she had the opportunity to do so, which was during the October 16 meeting about performance standards.

Based on the information available to Wells in October, 1996, complainant's conduct should have been rewarded. If not rewarded, at least it should not have resulted in complainant having imposed

on her more severe action than was imposed on the culprit.

The evidence in this case took one and a half days to present. Complainant was her only witness and at that she only testified briefly. Much of this hearing was devoted to painstaking detail about the mission of the BCB and OOR, the duties of the staff, and Wells' actions taken after complainant came forward with allegations against Melendez. Twice Wells met with her managers and the human resources director. But these meetings only concluded that Wells did not have enough information and she needed to get some questions answered. Instead of getting the questions answered, Wells met with Melendez, confronted her with the allegation of misconduct, and offered her the chance to resign or be investigated.

Melendez elected to resign, but no investigation occurred. Maybe there should have been an investigation before the offer was made to Melendez to resign. Maybe an investigation should have occurred even though Melendez was given the option to resign. Ultimately, Wells and Ford believed based only on the October 16 conversation with complainant, during which she reported Melendez' conduct, that complainant was a "co-conspirator". Thus, Wells determined that a R8-3-3 meeting should be held with complainant. Complainant's next opportunity to explain her involvement in Melendez' conduct occurred at this meeting where complainant was threatened with disciplinary action, and no doubt, startled by the turn of events which flowed from her efforts to assist the agency by reporting Melendez' misconduct.

Ford testified that complainant was "poker face" during their meetings. This meant to Ford that complainant appeared tough and emotionless. Complainant testified that she remains "poker face" to disguise her emotions which are close to the surface. She presented herself in this manner at hearing, sitting "poker face" at counsel table through respondent's case and then appearing close to tears throughout her own testimony. Even advising her own attorney that his questions of her were intimidating.

There was no explanation for why Ford and Wells were eager to discipline complainant instead of ascertaining exactly what happened regarding Melendez' conduct. Arbitrary and capricious action can be established by showing that the appointing authority neglected to procure evidence. Wells received information from an employee who performed her job duties well and acted responsibly with regard to her allegations against Melendez. Wells responded to

this by giving the real culprit the chance to resign and coming down harshly on the informant. This does not make sense and makes the action taken arbitrary, capricious, and unsustainable.

The evidence did not establish that complainant is entitled to an award of attorney fees under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B). It cannot be concluded that respondent's action was groundless. It is concluded that the action from which this appeal arose lacked adequate grounds.

CONCLUSIONS OF LAW

1. Respondent failed to establish by preponderant evidence that complainant engaged in the conduct for which discipline was imposed.
2. There was no evidence that complainant violated State Personnel Board rules.
3. The decision to impose a six month disciplinary demotion was arbitrary and capricious.
4. Neither party is entitled to an award of attorney fees and cost.

ORDER

1. Respondent is directed to rescind the disciplinary demotion.
2. Complainant is awarded all back pay and benefits as a result of the imposition of the disciplinary demotion from the date the discipline was imposed to the date complainant resigned her position with respondent.

DATED this _____ day of
June, 1997, at
Denver, Colorado.

Margot W. Jones
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), 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 ½ 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.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 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. #420
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Jill Gallett
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80203
