

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B081

EEOC Charge No.

CCRD Charge No.

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARY W. MORELAND,

Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, FORMERLY THE
DEPARTMENT OF HEALTH,
DIVISION OF ADMINISTRATIVE SERVICES,

Respondent.

Hearing in this matter was convened on June 26, 1995, and concluded on September 19, 1995, in Denver before Administrative Law Judge ("ALJ") Margot W. Jones. Respondent appeared at hearing through Wade Livingston, First Assistant Attorney General. Complainant, Mary W. Moreland, was present at the hearing and represented by A. Thomas Elliott, Attorney at Law.

Respondent called Complainant to testify at hearing and called the following employees of the Department of Public Health and Environment ("Department"), formerly known as the Department of Health, to testify at hearing: Lee Robert Joseph; Robert O'Neill; and Lee Thielen.

Complainant testified in her own behalf and called the following witnesses to testify at hearing: Shirley Collins, a Department employee, and Julia Watson, a pastoral counselor and ordained minister.

Respondent's exhibits 1 through 26, 28 through 30, 32 through 35, and 37 were admitted into evidence without objection.

Complainant's exhibits A through G were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals the termination of her employment.

ISSUES

1. Whether Complainant engaged in the conduct for which discipline was imposed.

2. Whether the conduct proven to have occurred constitutes grounds for disciplinary action.

3. Whether the decision to terminate Complainant's employment was arbitrary, capricious, contrary to rule or law, or discriminatory on the basis of Complainant's race and age.

4. Whether either party is entitled to an award of attorney fees and cost.

PRELIMINARY MATTERS

Complainant moved to have the "probable cause" determination of the Colorado Civil Rights Division incorporated herein as fact as provided under section 24-50-125.3, C.R.S. (1994 Repl. Vol 10B). The ALJ ruled that the "probable cause" determination need not be accepted as fact and would not be accepted as fact in these proceedings. Complainant was directed that she would be required to meet her burden of proof to establish a prima facie case of age and race discrimination.

FINDINGS OF FACT

1. Mary Moreland ("Moreland"), the Complainant, was employed by the Department as an administrative clerk in the purchasing unit. Moreland was hired on December 1, 1991, by Robert O'Neill, the director of the purchasing unit. O'Neill was Moreland's immediate supervisor and Lee Thielen, associate director of the Department, was the appointing authority for Moreland's position.

2. In December, 1991, the purchasing unit was responsible for purchasing equipment, services and supplies for the Department. The unit had limited purchasing authority. The purchasing process was not fully computerized.

3. In or around June, 1992, the purchasing unit became a fully delegated purchasing authority. This meant that the unit had authority to make all necessary purchasing decisions for the Department. At this time, the unit became fully computerized.

4. O'Neill interviewed six candidates for the position before selecting Moreland. O'Neill conducted two interviews with Moreland before hiring her. During the two interviews, O'Neill explained to Moreland that the position of administrative clerk in the purchasing unit involved primarily providing clerical support to the unit. O'Neill advised Moreland that the position required a lot of typing.

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5. Moreland was told during the interview that initially the typing would be done on a typewriter. O'Neill explained that the unit would switch to a computerized system in the near future and then the duties of the position would require a significant amount of work to be done by computer.

6. During the job interview, Moreland told O'Neill that she might be rusty on the typewriter because she was currently using a computer. Moreland did not express concern over the use of the computer in the position in the future.

7. Moreland was employed at the patient business office at the University of Colorado Health Sciences Center. In that position, she used computers to input documents and obtain information.

8. Moreland represented to O'Neill that she could perform the duties of the position. She gave O'Neill a typing certificate showing that in 1989, she typed 47 words per minute with two errors.

9. O'Neill selected Moreland for the position because she had the qualifications to perform the duties of the position and she was the best candidate for the position. Moreland accepted a demotion to take the position in the purchasing unit.

10. Moreland is a 52 year old Black female. She was the only non-White employee in the purchasing unit. She is a high school graduate.

11. Moreland's administrative clerk typist position in the purchasing unit was position number 0238. The PC-8, position description, was prepared in September, 1990, and provided the following description of duties:

Under close supervision and guidance from the Supervising
Supply Officer:

50% of time spent

Types all Field Purchase Orders and State Purchase requisitions for the Purchasing Section. This includes reviewing purchase request for accurate information; i.e., correct address, GL account, vendor terms, state award, editing requisition for applicable information and formatting FPO/regular req. to established formats. Proofreads and logs FPOs and regular reqs. prior to mailing.

30% of time spent

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Types miscellaneous forms and letters as required. Prepares monthly FPO Statistical Report to State Purchasing. Is responsible for the distribution prepay of checks received by the Purchasing Section. As directed by supervisor, updates two sets of state contract award books. This includes requesting catalogs from vendors, copying and purging expired awards and obsolete catalogs. Responsible for answering phones, coping. (sic)

10% of time spent

Confirms orders for program personnel for state vehicles with the State Motor Pool. Types motor pool request forms and forwards to program persone. (sic) Answers general inquiries regarding state motor pool. Responsible for backing-up switchboard. Works closely with mail room and switchboard to avoid scheduling conflicts.

10% of time spent

As directed by supervisor.

12. The position description, described typing as an important duty which the incumbent spent 50% of her time doing. It also described the equipment to be used in the position as a "typewriter", "PBX" and "10 Kay". (sic)

13. Moreland assumed the duties of the position on December 1, 1991. On March 18, 1992, Moreland and O'Neill met and prepared a performance plan. The performance plan covered the period from December 1, 1991, to June 30, 1992.

14. O'Neill stated in the March 18, 1992, performance plan, in the performance planning narrative that,

This position requires basic PC knowledge. The majority of this position is taken up with typing. The typing needs to be accurate due to the nature of the Purchase Orders. The typist must proofread there (sic) work to insure accuracy before sending out Purchase Orders.

A goal, in this position, should be to improve speed due to the volume of Purchase Orders.

With the imminent implementation of Full Delegated Purchasing Authority, typing workload will increase which will

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require greater speed.

15. The factors upon which Moreland's job performance was rated and the weights afforded those factors were, as follows:

Factor Titles	Weights
Occupational/Professional Competence	45
Problem Analysis	10
Organizational Commitment	25
Communication	10
Interpersonal Relation	10

16. Ideally, the factors and weights in the performance plan are reached by agreement between supervisor and employee. In March, 1992, and thereafter, Moreland did not express objection to the factors and weights, but she did not believe that they were reached by agreement.

17. From December 1, 1991, to March 18, 1992, Moreland performed her job duties satisfactorily. O'Neill expected the first 90 days to be a learning period when Moreland would not perform her duties to perfection.

18. On or around July 31, 1992, O'Neill evaluated Moreland's job performance for the period from December 1, 1991, to June 30, 1992. He rated her performance as "needs improvement". Moreland's job performance needed improvement in the area of Occupational/Professional Competence. Her job performance was rated as "good" or "commendable" in the other factors.

19. O'Neill commented on the "needs improvement" rating,

Occupational and Professional Competence falls into the needs improvement category. The typing is not up to the standard in the job description. Mary needs to increase her typing speed and efficiency.

20. Moreland expressed her disagreement with the rating. She replied, in the employee comments section of the rating form,

In response to the above statement. I will put forth an effort to improve my typing however I have improved in quantity and timeliness. An overall rating of Good would have at least indicated I was making an effort. At present time all work is current and within deadlines.

21. With the "needs improvement" performance rating, Moreland received a corrective action, dated July 31, 1992. The corrective action advised Moreland that she needed to improve her job

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performance in the area of the speed and accuracy of her typing and the proofreading of purchase requests and purchase orders.

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22. Moreland's failure to accurately process the purchase orders had the potential to cause serious ramifications for the Department. An incorrectly prepared purchase order could result in the wrong products being ordered, incorrect quantities ordered or could cause the Department to be responsible for payment for items it did not want.

23. On July 30, 1992, O'Neill and Moreland prepared another performance plan to cover a one year period. This performance plan had the same factors and weights. Moreland signed this performance plan reflecting her agreement with the plan.

24. During the one year period, from July, 1992, to July, 1993, Moreland's job performance continued to need improvement. During this period, Moreland and O'Neill failed to communicate verbally. O'Neill believed that Moreland did not understand his instructions when he gave them verbally. O'Neill resorted to written communication. O'Neill repeatedly wrote to Moreland pointing out errors that she made and instructing her how to correct her mistakes. O'Neill became frustrated with the errors made by Moreland. Moreland became defensive and felt she was being picked on.

25. O'Neill offered Moreland opportunities to participate in training to improve her job skills. Moreland attended a class to improve her computer skills at Gove School. It was an eight week class that she attended one night per week for two hours. She also attended a proofreading class. The class was approximately one day in length. She attended a one day class on the computer keyboard.

26. O'Neill planned to review Moreland's job performance on October 31, 1992. Since Moreland was in the process of attending training classes, which O'Neill hoped would improve her job performance, he waited until January 29, 1993, to give Moreland an interim performance rating.

27. The January 29, 1993, interim rating reflected that Moreland's performance needed improvement in the areas of occupational/ professional competence and organizational commitment. Moreland signed the performance rating indicating that she did not agree with the rating.

28. This performance rating indicated that Moreland made mistakes in typing purchase orders. She had typographical errors in the purchase orders and letters that she typed. The quantity and quality of Moreland's work was inadequate. Moreland lacked commitment to her job.

29. With the "needs improvement" interim performance rating, on January 29, 1993, O'Neill gave Moreland another corrective action.

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This corrective action referenced the earlier imposed corrective action dated July 31, 1992. O'Neill directed Moreland to improve her job performance in the areas specified in that action within 45 days. The corrective action further provided that if Moreland complied with the terms of the corrective action, it would be removed from her personnel file.

30. On February 1, 1993, Moreland and O'Neill met to review a new performance plan. The new performance plan contained the same factors and weights included in the earlier plans. The performance planning narrative provided that,

During the next 45 days, there needs to be a dramatic improvement in overall performance. Professional knowledge and quality must improve.

There must also be a decrease in the amount of personal business being conducted in the office.

31. Moreland grieved the performance plan because it required her to prepare the purchase orders with no errors. O'Neill denied relief. She grieved to O'Neill's supervisor, Tom Hadden. Hadden granted Moreland the relief she requested. He agreed that the performance standard which required that Moreland prepare error free purchase orders was too strict a standard. He revised the standard to give Moreland greater flexibility.

32. Moreland's job performance continued to fail to meet the established standards. O'Neill's dissatisfaction with Moreland's performance continued.

33. On April 5, 1993, O'Neill prepared a performance review and submitted it to Thielen, the appointing authority. O'Neill advised Thielen that he planned to give Moreland a fourth "needs improvement" rating. On April 9, 1993, O'Neill presented the "needs improvement" rating to Moreland. This rating reflected that Moreland needed improvement in occupational/professional competence, problem analysis, organizational commitment and communication.

34. On April 9, 1993, O'Neill notified Thielen that Moreland was given the "needs improvement" rating and he requested that Thielen hold a Board Rule, R8-3-3 meeting with Moreland to determine whether her employment should be terminated. O'Neill recommended to Thielen that she terminate Moreland's employment.

35. On April 30, 1993, Thielen met with Moreland for a R8-3-3 meeting. Following the meeting, Thielen decided not to terminate Moreland's employment. Thielen decided to transfer Moreland to another section of the Department for a brief period.

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36. Thielen transferred Moreland to the hazardous waste unit. Moreland was assigned to this unit to perform clerical duties which were not as exacting as the duties she performed in the purchasing unit. Thielen hoped that Moreland's job performance would improve in the purchasing unit if she took a break from the pressures of the unit and regain her self esteem by successfully performing work in the hazardous waste unit.

37. In the hazardous waste unit, Moreland's salary continued to be paid by the purchasing unit. Moreland successfully performed the duties assigned to her in the hazardous waste unit.

38. A temporary employee was hired to perform Moreland's duties in the purchasing unit. A new position description was prepared for the temporary position which described the use of a computer as a primary job duty.

39. After three weeks in the hazardous waste unit, Moreland returned to her position in the purchasing unit. Thielen placed Moreland under the supervision of Lee Joseph. Joseph was an employee of the purchasing unit who had worked under the supervision of Robert O'Neill. While Joseph supervised Moreland, he reported to Thielen. Thielen hoped that by taking Moreland from under O'Neill's supervision, she could alleviate some of the friction between Moreland and O'Neill. Thielen also wanted an unbiased judgment about Moreland's job performance in the purchasing unit.

40. Joseph began his supervision of Moreland on September 20, 1993. He met with Moreland on a weekly basis and discussed her performance. Moreland failed to meet performance standards during the period that Joseph supervised her.

41. On November 10, 1993, Moreland received a "needs improvement" job performance rating. Joseph concluded that Moreland lacked commitment to her work. Joseph noted that during Moreland's absence from the position, while she was temporarily assigned to the hazardous waste unit, the temporary employee assigned to her position in the purchasing unit did not make any mistakes in her performance of Moreland's job duties.

42. Thielen met with Moreland for another R8-3-3 meeting on November 12, 1993. Thielen determined based on the information she gathered from Joseph and O'Neill that Moreland could not perform the duties of the position. Thielen considered Moreland's concern that she was called on in her position in the purchasing unit to use a computer while her position description did not require the use of a computer in the performance of her job duties. Thielen concluded that technology in the work place was changing all the time, and the staff was expected to update their

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skills as necessary to perform duties as assigned.

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43. Thielen concluded that despite Moreland's years of service for the state her employment should be terminated. Thielen believed that effort had been made to assist Moreland in the performance of her duties and that despite these efforts she did not perform her duties competently.

44. Following the termination of Moreland's employment, she was replaced in the purchasing unit by an employee whose job performance plan was different from the one used to evaluate Moreland's performance. The employee who replaced Moreland was anglo. She was given a performance plan which weighted her professional competence at 20%.

45. Moreland's job performance plan in the area of professional competence was weighted at 45%. This was the area in which Moreland was consistently rated as "needs improvement". Because it was weighted so heavily, Moreland's failure to meet performance standards in this area resulted in a significant lowering of her overall rating.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on the agency in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that 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.2d 703, 705 (Colo. 1936).

Board Rule 8-2-5(A), provides,

Employees performing at an overall level of Needs Improvement shall be given a corrective action for the initial needs improvement rating and afforded a period of time to improve performance as provided in R8-3-2(B). If, when reevaluated, the employee's rating is Needs Improvement or Unacceptable, such rating is the basis for disciplinary action. Following an R8-3-3 meeting, absent extraordinary circumstances, the employee shall

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be dismissed or, at the discretion of the appointing authority, demoted if the employee has demonstrated competence at a lower level.

Respondent contends that it has sustained its burden of proof to establish that Complainant engaged in the acts for which discipline was imposed and that the decision to terminate her employment was neither arbitrary, capricious or contrary to rule or law.

Complainant contends that it was arbitrary and capricious for Respondent to terminate her employment for poor job performance. Complainant contends that the job performance evaluations did not reflect her ability to perform the duties of the position. Complainant further contends that her performance plans and reviews should have been based on the position description. Complainant asserts that since the position description did not reference computer usage, she should not have been rated, and ultimately terminated, for her inability to competently perform her duties in this area.

Complainant further asserts that O'Neill wanted her terminate from her position. Complainant points to the fact that O'Neill requested that Complainant be terminated and that the request was ultimately granted by Thielen. Complainant maintains that since Joseph was supervised by O'Neill, he did not have an unbiased view of her job performance. Complainant further maintains that Joseph's November 10, 1993, "needs improvement" job performance rating was done at O'Neill's direction and therefore reflected the biases that O'Neill's ratings reflected.

Complainant contends that Thielen's decision to terminate her employment was discriminatory based on race and age. Complainant asserts that her treatment and performance evaluations under the supervision of O'Neill and Joseph were due to the fact that she is a Black female over the age of 40 years.

The ALJ can find no basis in the record to support Complainant's claims for relief. The evidence presented at hearing established that Complainant was given every opportunity to improve her job performance and failed to do so. Complainant received four "needs improvement" job performance ratings during the period from December 1, 1991, to November 4, 1993. There was no evidence that Complainant's treatment was due to her race or age.

Complainant's assertion that she could not be terminated from employment because of her failure to competently use office equipment which was not described in her job description was considered by the ALJ and rejected. Thielen's conclusion that Complainant could be expected to competently use a computer, even though the computer was not specifically described in the position

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description is correct. This is particularly true in light of the fact that Complainant was advised at the time she was interviewed for the job that the unit would soon become fully computerized and because Complainant advised O'Neill at this time that she knew how to use a computer.

Further, the evidence established that O'Neill and Complainant discussed the performance plans. The evidence established that Complainant did not challenge O'Neill's decision to heavily weight her job performance in the area of professional competence. The evidence further established that Complainant grieved a February, 1993, performance plan on another point and received the relief requested from O'Neill's supervisor, Tom Hadden.

Complainant's arguments with regard to the different treatment of her successor to the position have been considered and determined not to support her claim of discrimination. This evidence cannot be found to support a finding of discrimination because Complainant had opportunities to negotiate the terms of her performance plan and did negotiate its terms with regard to some aspects of the plan.

There was no evidence presented at hearing to support a finding that either party is entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent established by a preponderance of the evidence that Complainant engaged in the conduct for which discipline was imposed.
2. Under R8-2-5, Complainant's failure to perform competently during the period from December, 1991, to November, 1993, was grounds for disciplinary action.
3. The decision to terminate Complainant's employment was neither arbitrary, capricious, contrary to rule or law or discriminatory on the basis of race or age.
4. Neither party is entitled to an award of attorney fees.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of _____

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October, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this _____ day of October, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

A. Thomas Elliott, Jr.
Attorney at Law
1816 Race Street
Denver, CO 80206

and in the interagency mail, addressed as follows:

Wade Livingston
First Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ADJ").
2. To appeal the decision of the ADJ to the State Personnel Board ("Board"). To appeal the decision of the ADJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ADJ is mailed to the parties and advance the cost therefor. 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 ADJ 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 ADJ, then the decision of the ADJ 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 ADJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$1,603.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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 Code of Colo. Reg. 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 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

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PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ADJ must be filed within 5 calendar days after receipt of the decision of the ADJ. The petition for reconsideration must allege an oversight or misapprehension by the ADJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 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.

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