

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 94B140

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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R. LYNN HEATH,

Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, f/k/a,  
DEPARTMENT OF HEALTH,  
OFFICE OF EXTERNAL RELATIONS,

Respondent.  
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By stipulation of the parties, hearing commenced on January 19, 1995. The hearing reconvened on February 8, 1995, before Administrative Law Judge ("ALJ") Mary Ann Whiteside. The Complainant, R. Lynn Heath, represented herself. Respondent appeared through Kenneth Mesch and was represented by Joyce K. Herr, senior assistant attorney general.

Complainant testified in her own behalf.

Respondent called the following witnesses: Lynette Schick, an administrative program specialist, Kenneth Mesch, the appointing authority, Les Canges, human resources director, and Cathy Raevsky, formerly a supervisor of the complainant at the Colorado Department of Public Health and Environment.

Respondent's exhibits 1 through 11 were admitted without objection. Respondent's exhibit 12 was not admitted.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of her employment for unsatisfactory job performance prior to the end of her probationary period.

**ISSUES**

1. Whether Complainant proved by a preponderance of the evidence that she had performed satisfactorily in her job;
2. Whether the action of Respondent was arbitrary, capricious or contrary to rule or law;

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3. Whether either party is entitled to an award of attorney's fees and costs.

#### **FINDINGS OF FACT**

1. Complainant became a probationary employee of the Department of Public Health and Environment on May 1, 1993. Initially she worked in the executive office performing administrative clerk and receptionist duties. Her work in the executive office was considered to be that of a non-typing administrative clerk.

2. During most of the time Ms. Heath worked in the executive office her supervisor was Lynette Schick. (Exhibit 3.)

3. The work hours for the executive office were 8:30 a.m. to 5:00 p.m. Often Ms. Heath was late in arriving at work. Also, at times she was not at her desk during those hours. There is conflicting evidence as to whether Ms. Heath was doing approved duties at some other location or if she was engaged in work. Further, some tasks assigned to her were not finished.

4. In July, 1993, Ms. Heath was transferred to the Information Center in the Office of External Affairs. The Office of External Affairs performs legislative, public and public health agency relations. Kenneth Mesch is the head of this office and as the appointing authority had authority to do performance evaluations.

5. The Information Center was created in response to the Governor's actions decentralizing the citizen advocate function from the Governor's office to individual agencies. People call or come in to the Information Center with inquiries about public health issues. The work hours for the Information Center are 8:00 a.m. to 5:00 p.m. The Governor's office expects the agency advocacy offices, like the Information Center, to keep records on the number and types of inquiries received and the responses given.

6. Documents and publications of the Department of Public Health and Environment were moved to the Information Center to be readily accessible to the public. These documents needed to be catalogued. This duty was assigned to Lynn Heath.

7. Ms. Heath was also to keep track of the number and types of complaints or inquiries, the responses or resolution of those inquiries and the time spent on responding to the inquiries.

8. Alex Galant, a temporary employee and acting director of the

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Information Center, acted as the work leader of the unit.

9. On July 19, 1993, Cathy Raevsky became Heath's supervisor. (Exhibit 4.) Raevsky drafted a performance plan for Heath. (Exhibit 5.) This plan listed the factors to be evaluated and the weight to be accorded those factors as follows:

Occupational/Professional Competence	10
Problem Analysis and Decision Making	15
Organizational Commitment and Adaptability	25
Interpersonal Relationships	5
Reception	5
Recordkeeping and Maintenance	25
Data and Records Maintenance	15

Individual Performance Objectives were written for most of the above factors.

10. Raevsky was Lynn Heath's supervisor in the Information Center from July to September, 1993. Raevsky worked part time in the Information Center and part time in Administration as assistant to the Assistant Director. Her hours in the Information Center were from approximately 7:30 a.m. to 11:30 a.m.

11. Cathy Raevsky wrote notes at home at night about problems she noticed during the day with Ms. Heath's performance. These included tardiness, numerous and lengthy breaks, disappearance or not being at her desk during the assigned hours, and failure to finish some of the work assigned. She later typed up these notes. (Exhibit 9.)

12. When Cathy Raevsky left the Information Center in September, 1993, she recommended to Ken Mesch that Lynn Heath's employment should be terminated. Ms. Raevsky gave Ken Mesch copies of her notes, which he considered in his evaluation of Heath's performance.

13. Mesch also talked to Alex Galant who confided his concern about Heath's job performance. Alex Galant also gave Mesch copies of his notes. (Exhibits 7 and 10.) Mesch relied on these notes and the phone conversation with Galant when doing Lynn Heath's performance evaluation, which led to the termination of her employment.

14. Mesch's management style is to give only positive reinforcement. Therefore, he did not discuss the concerns about Heath's performance with her. However, Cathy Raevsky did discuss

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some of her concerns with Lynn Heath.

15. Ken Mesch changed the factors and weights from Heath's performance plan when doing her evaluation. He wanted to consider factors other than those listed in performance plan and felt that the current job Heath was performing focused more on communication, rather than on data entry as the plan indicated. On the factor added to the evaluation, Communication, Mesch rated Heath's performance as "good". Mesch also decided not to rate Heath on computer skills because her performance in that area was unsatisfactory and he felt that her job in the Information Center focused more on communication.

16. Ken Mesch considered the following factors and weights in his evaluation:

Occupational/Professional Competence	20
Problem Analysis and Decision Making	20
Organizational Commitment and Adaptability	20
Communications	20
Interpersonal Relationships	20

Mesch wrote the following narrative comments:

Competence - Frequent mistakes were made in referrals.

- Fails to ask for help on problems and then spends excessive time on tasks.
- Has not made significant improvement in computer skills
- Messages are lost or given to people after a delay.
- Work done for other offices is reported to be of poor quality
- Fails to adequately use guidance and policy documents.

Problem Analysis - again - mistakes made on referrals

Organizational Commitment and Adaptability

- Refuses to perform work if not in agreement with the office director
- Gets unhappy when circumstances occur that require more work.
- Inappropriate use of a state vehicle.
- Frequently abused leave policies
- "Never" came in on time, left at normal quitting time.
- Not respectful of the scheduling needs of the director. Delayed returns from breaks despite knowing ahead of time of scheduling.

Interpersonal Relations -

- work performance and abuse of leave policies have led to morale problems in the department.

(Exhibit 6)

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17. Lynn Heath's employment was terminated on April 27, 1994.
18. Heath filed a petition for hearing on May 6, 1994. Respondent failed to file a timely Information Sheet.
19. A preliminary recommendation was issued on September 29, 1994, recommending that the State Personnel Board grant the petition for hearing.
20. On October 21, 1994, the State Personnel Board issued an order accepting the preliminary recommendation and granting the petition for hearing.

### DISCUSSION

Complainant Lynn Heath challenges the termination of her employment during her probationary period for poor job performance. The burden of proof is upon the complainant to prove by a preponderance of the evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Cf., Kinchen v. Department of Institutions, 867 P.2d 8 (Colo. App. 1993), affirmed, \_\_\_\_\_ P.2d \_\_\_\_\_, Supreme Court No. 93SC414 (December 21, 1994). See also, Colorado Association of Public Employees v. Department of Highways, 809 P.2d 988 (Colo. 1991).

The personnel system's laws, rules and guidelines envision that performance evaluations are to be done using the factors and weights set in the performance plan. That was not done in this case. Although it is understandable that an appointing authority might prefer to give only positive feedback to his employees, an essential responsibility of a manager is to ensure that the employees under his supervision receive sufficient feedback to perform their assigned duties in a competent manner. This may involve critical comments.

It is distressing to see how poorly the performance planning and evaluation process was handled in this case. It is disturbing that there is no clear evidence that the substantial performance problems noted were adequately discussed with the complainant. It is disconcerting that any agency would tolerate poor job performance for an extended time such as the respondent has alleged as to Lynn Heath's performance during her probationary year.

However, the personnel rules do not require a probationary employee be given an opportunity to improve performance. Further, in this case the burden of proof is on the complainant to show by preponderant evidence that her job performance was satisfactory.

The overall question in this case is performance. The testimony

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is conflicting on the issue of Lynn Heath's performance. Complainant Heath argues that her job performance was good, while the respondent argues that it was not. Even considering the irregular and inept evaluation procedures used by the agency, the complainant has not established that her overall performance was satisfactory.

When there is conflicting testimony, as here, the credibility of the 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. App. 1987). To sustain a finding in her favor, the complainant, as a probationary employee, must do more than put the mind of the trier of fact in a state of equilibrium.

It has been stated that:

[The B]urden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the party who has the burden of persuasion on the particular issue in question.

Johnson v. Barton, 251 Fed. Supp. 474, 476 (W.D. Va. 1966).

If the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. People v. Taylor, 618 P.2d 1127 (Colo. 1980). See also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

Therefore, because the complainant had the burden in this case, a burden she did not meet, the action of the appointing authority is upheld.

#### CONCLUSIONS OF LAW

1. Complainant did not establish by a preponderance of the evidence that her job performance was satisfactory.
2. Respondent did not act arbitrarily, capriciously or contrary to rule or law.
3. Neither side is entitled to an award of attorney fees or costs.

#### ORDER

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

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DATED this \_\_\_\_ day of  
March, 1995, at  
Denver, Colorado.

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Mary Ann Whiteside  
Administrative Law Judge

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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 ("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 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 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 - 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 **\$300.00**. 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 may not 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 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 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.*

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of March, 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:

R. Lynn Heath  
7671 Leyden Lane  
Commerce City, CO 80022

and in the interagency mail, addressed as follows:

Joyce K. Herr  
Senior Assistant Attorney General  
Department of Law  
Human Resources Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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