

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B066

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CLARENCE VIGIL,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
PUEBLO REGIONAL CENTER,

Respondent.

Hearing was held in Pueblo, Colorado on January 20, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Toni Jo Gray, Assistant Attorney General. Complainant appeared in person and was represented by Carol Iten, Attorney at Law.

Respondent's witnesses were Maggie Mosley, Senior Developmental Disabilities Technician; Ed Santoyo, Senior Developmental Disabilities Technician; and Larry Dalton, Assistant Director, Pueblo Regional Center. Complainant testified in his own behalf.

Respondent's Exhibits 1 through 15 and Complainant's Exhibits A through H were stipulated into evidence. Respondent's Exhibits 16, 17 and 18 were admitted in rebuttal over objection.

MATTER APPEALED

Complainant appeals a disciplinary termination.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the predisciplinary meeting was properly conducted;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether Complainant failed to mitigate his damages;
5. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. Complainant, Clarence Vigil, was a certified Developmental Disabilities Technician (DDT) for Respondent Pueblo Regional Center (PRC). PRC consists of twelve residential facilities for developmentally disabled individuals. As a DDT, Vigil was responsible for the care of these individuals within the residential setting, inclusive of meal preparation, administration of medication, and cleaning of the home.

2. In September 1993 Vigil transferred to PRC from a position with the Department of Institutions in Wheat Ridge. He was interviewed by Maggie Mosley, supervisor of the Maher Home (Maher), and by Ed Santoyo, supervisor of the Bayfield Home (Bayfield). Both Mosley and Santoyo were impressed with Vigil's background and qualifications, and each offered him a position. Vigil chose to work at Maher.

3. At Maher, Vigil was deficient in completing the tasks assigned to him. Overall, it is Mosley's view that Vigil performed "quite poorly" compared to other staff members at the home.

4. On December 31, 1993, Vigil was administered a corrective action for holding two paychecks and a personal check of a client since October, having been instructed to open a bank account for the client. (Respondent's Exhibit 15; Complainant's Exhibit E.) The corrective action letter was given to Vigil at 7:00 a.m. and required him to turn the checks over to the finance office by 5:00 p.m. that day. It is undisputed that the checks were ultimately turned in, but it is not altogether clear as to when. Mosley testified that Vigil turned in the checks around 3:00 p.m. on the day of the corrective action. Vigil testified that he had actually turned in the checks a week before the corrective action was issued. PRC records indicate that one of the checks was received in the finance office in December and the other two were received on January 6, 1994. (Respondent's Exhibits 16, 17 and 18.)

5. The December 31 corrective action also required Vigil to handle all client monies in a timely manner in the future and to not hold such funds for longer than one calendar week. There is no evidence of non-compliance with this part of the corrective action.

6. The December 31 corrective action letter did not advise the employee of the grievance procedures or that he could submit a written explanation to the appointing authority. Mosley testified that, although she has access to the personnel rules, she was a new supervisor at the time and did not know that she was supposed to put that in the corrective action.

7. The December 31 corrective action letter contained a statement that it would remain in the employee's personnel file "indefinitely" and did not otherwise state the time allotted for the employee to make the correction with respect to part two, which Mosley intended to be "ongoing". Vigil disagreed with the corrective action and refused to sign it. He neither grieved the corrective action nor submitted a written explanation to the appointing authority.

8. On January 13, 1994, Mosley issued a memorandum to Vigil detailing certain performance deficiencies, i.e., not cleaning the garage or taking out the trash, not being punctual, and being slow in doing the laundry for a particular client. (Respondent's Exhibit 11.) This memorandum was not characterized as a corrective action.

9. On February 7, 1994, Mosley met with Vigil to address deficiencies in his job performance. This discussion was tape recorded and subsequently transcribed. (Respondent's Exhibit 10.)

10. According to Mosley, Vigil was "automatically" certified in the position of DDT II on April 1, 1994. Mosley did not sign any personnel forms to effect the certification.

11. In April 1994, Vigil asked to be transferred to the Bayfield Home. His request was granted within a couple of days.

12. On June 7, 1994, Mosley completed Vigil's Performance Appraisal for Colorado Employees (PACE) for the period November 17, 1993 through April 25, 1994, in which she assigned him an overall rating of "Good". Vigil disagreed with the appraisal. (Respondent's Exhibit 13; Complainant's Exhibit B.)

13. Vigil worked the 3:30 p.m. - 7:30 a.m. shift at Bayfield. Bayfield houses eight residents, four men and four women. Two of the women are non-verbal. One of the men is non-ambulatory, one has no sight or speech. Three of the residents go out on work assignments. For the most part, the residents eat on their own.

14. Vigil did well his first day at Bayfield. After that, his job performance deteriorated with respect to completing assigned tasks.

15. On May 4, 1994, Ed Santoyo issued Vigil a "counseling note" pertaining to not following the designated menu in preparing meals

for the residents, personal use of the Bayfield van, and generally not sharing the workload with other staff members. This counseling note was not characterized as a corrective action but contained a statement that it would remain in Vigil's file for 60 days. (Respondent's Exhibit 9; Complainant's Exhibit H.)

16. On June 22, 1994, Santoyo administered a formal corrective action to Vigil for not following the menu or assuring that the residents were fed adequately, and for not completing his work assignments in the home. The letter contained a statement that the employee had 30 days to improve his job performance, or "further action will be warranted." (Respondent's Exhibit 14; Complainant's Exhibit F.) Vigil testified that he did not agree with the corrective action but signed it, anyway, because Santoyo said it was to help him.

17. The June 22 corrective action did not contain a statement that the employee may submit a written explanation to the appointing authority or a statement advising the employee of the grievance procedures. Santoyo, who has been a supervisor for 25 years and maintains a copy of the personnel rules at Bayfield, believed that orally advising Vigil that he had a right to "complain or protest" was sufficient notification; he did not know that he had to "put it in writing."

18. Vigil did not grieve the June 22 corrective action or submit a written explanation to the appointing authority.

19. On June 30, 1994, eight days following the corrective action, Santoyo completed Vigil's PACE, assigning the employee an overall rating of "Good". (Respondent's Exhibit 12; Complainant's Exhibit A.)

20. On August 8, 1994, Santoyo talked to Vigil about administering medications without signing for them and not cleaning bedrooms or

furniture, as he was required to do.

21. On August 14 Santoyo talked to Vigil again about not completing his work assignments, particularly cleaning the van and the furniture.

22. On August 25 Santoyo instructed Vigil on emptying the dishwasher by the end of his shift and taking clothes out of the dryer.

23. On September 9 Santoyo talked to Vigil about the furniture still needing to be cleaned.

24. On October 6, 1994, Santoyo arrived at Bayfield at 7:10 a.m. and discovered that Vigil, whose shift was to end at 7:30, had not completed his assigned tasks. It appeared that only three residents had eaten breakfast. Some areas of the house had not been cleaned. One resident was still wearing pajamas. A female client, whom Vigil had previously been instructed to closely supervise, was still in the shower and had numerous unnecessary items with her, including an excess of towels and wash cloths, cups, clothes, and stuffed animals. Vigil stated that he had been sick all night and was not able to get his work done.

25. After Vigil left the home on October 6, Santoyo discovered that the male resident with no sight or speech was lying in bed, wet with urine. It was never determined how long the client had been in that condition. Vigil denied responsibility for it.

26. The next day, October 7, at about 4:00 p.m., Santoyo delivered to Vigil at the home a memorandum advising Vigil that Santoyo was going to recommend that disciplinary action be taken for Vigil's failure to follow the corrective action of June 22, 1994, based upon the October 6 incident. (Respondent's Exhibit 2; Complainant's Exhibit G.) Vigil wrote on the back of the memo that

he was sick and unable to complete his shift on the date the letter was written, and that he disagreed with the letter.

27. Vigil went to the doctor on October 7 and took sick leave for the next six days. When he returned to work, he gave Santoyo a doctor's note dated October 7, 1994.

28. Larry Dalton, PRC Assistant Director, has been delegated appointing authority for personnel actions by Director James Duff. Upon receipt of Santoyo's October 7 recommendation of disciplinary action, Dalton scheduled a Rule R8-3-3 meeting with Vigil pertaining to "the information included in the 10/7/94 memo". (Respondent's Exhibit 3.) Dalton did not investigate the matter prior to the meeting and did nothing in preparation for it.

29. The R8-3-3 meeting was held on October 26, 1994. Complainant, appearing with a representative, denied Santoyo's allegations and claimed to be a good employee.

30. Subsequent to the predisciplinary meeting, Dalton telephoned Maggie Mosley and was told of the problems Mosley had had with Vigil at the Maher Home. He telephoned Vigil's former supervisor in Wheat Ridge and was told that Vigil got along fine there. Dalton considered Vigil's performance appraisals, the corrective actions and the May 4 "counseling note" together with other notes he received from Santoyo. Dalton "didn't even think about" the fact that the corrective action letters did not include an advisement of the employee's rights.

31. Dalton concluded that Vigil's acts and omissions resulted in client neglect and constituted failure to comply with standards of efficient service or competence.

32. Dalton held a second meeting with Complainant on October 31 to discuss the additional problems he had learned about from Maggie

Mosley. He then advised Clarence Vigil that his employment with PRC would be terminated at the close of business on the following day unless he chose to resign in the meantime.

33. By letter dated November 2, 1994, dismissing Complainant, Dalton set forth the reasons for termination as follows:

You have received two corrective actions and numerous counseling sessions from your supervisors in two different homes over the past ten months. You have not complied with the requests for you to complete your work assignments in a timely manner and you have continued to neglect those persons living in the houses where you have been assigned. You have not cooperated with repeated attempts to improve your work performance by your supervisors. Therefore, it is my decision that you be terminated from PRC.

(Respondent's Exhibit 1.)

34. During the period of his unemployment, Vigil has applied for other jobs within the state personnel system and elsewhere. He was found eligible to receive unemployment compensation benefits.

35. Complainant filed a timely appeal of the disciplinary termination on November 9, 1994.

DISCUSSION

Because certified state employees have a constitutionally protected property interest in their employment, the burden is on the agency in a disciplinary proceeding to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Kinchen v. Department of Institutions, 867 P.2d 8 (Colo. App. 1993), aff'd, ___ P.2d ___, Supreme Court No. 93SC414 (December 19, 1994), 24 The Colorado Lawyer 476 (Feb. 1995). The State Personnel Board may reverse Respondent's action only if the action is found arbitrary,

capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

Respondent relies on the concept of progressive discipline to find just cause for the dismissal of Complainant, who "received two corrective actions and numerous counseling sessions" over a period of ten months. Complainant contends that Respondent's action was arbitrary, capricious and contrary to rule or law because the corrective actions were procedurally defective, and that the action must be reversed for this "blatant disregard of the rights of employees".

The purpose of a corrective action is to correct an employee's job performance in a formal, systematic manner. Rule R8-3-2, 4 Code Colo. Reg. 801-1. Unless the employee's conduct is "so flagrant or serious" as to warrant immediate disciplinary action, an allegation not made here, corrective action must be imposed before resorting to disciplinary action. Rule R8-3-1(C), 4 Code Colo. Reg. 801-1.

The procedures for administering corrective actions are found in Rule R8-3-2(B), 4 Code Colo. Reg. 801-1, which provides:

A corrective action shall be in writing and shall contain the following information:

- (1) The area(s) of needed improvement.
- (2) The corrective actions the employee must take.
- (3) The time allotted to the employee to make the correction. The time shall be reasonable and in accordance with the nature of the problem.
- (4) The consequences the employee will face if he fails to make the necessary corrections.
- (5) A statement that the employee may submit a written explanation to the appointing authority. The statement shall be attached to and kept with each copy of the corrective action.

(6) A statement advising the employee of the grievance procedures as provided in Chapter 10 of the Rules.

The December 31 corrective action issued by Maggie Mosley omitted the requirements of paragraphs (5) and (6) above. The time allotted for the employee to make the correction with respect to part two of the corrective action was not stated. Thus, Complainant could be charged with violating the corrective action ten or more years hence, not a reasonable time. Moreover, the record supports a finding that Complainant substantially complied with the corrective action as written.

The June 22 corrective action issued by Ed Santoyo also omitted the requirements of paragraphs (5) and (6) of the rule. The time allotted to make the corrections was set at 30 days, and Complainant apparently made the corrections during that time frame. Yet this same corrective action served as the basis for the November 2 termination. It is questionable whether the phrase "or further action will be warranted" is sufficiently specific to fulfill the requirement that the corrective action contain the "consequences the employee will face".

The defects in the corrective actions are more than procedural; they are substantive as well. The rules implementing corrective actions are not mere technicalities. The rules define the substance of a corrective action in order to effectuate the intent, goals and objectives of the state classified personnel system. The omissions of the rights to grieve and to submit a written explanation, alone, would be enough to compel reversal of the agency's termination action, especially in a case where the employee did not evince an understanding of his rights by exercising them in spite of the lack of a written advisement.

Respondent would have the administrative law judge overlook the rule violations, arguing that Complainant had plenty of notice that

his job performance was deficient. In effect, Respondent asks that R8-3-1(C) be construed as if it concluded with the phrase, "except when the employee otherwise receives notice." Respondent does not allege, and it was not proven, that any single act of Complainant justified immediate termination.

To preserve the integrity of the system, it is necessary that corrective actions on which disciplinary action is predicated be written in compliance with R8-3-2(B). It is no less important for supervisors and appointing authorities to follow the rules, policies and procedures of this constitutionally mandated personnel system than it is for subordinate employees to do so. In the present matter, Respondent did not even substantially comply.

Although Complainant raised the issue of the propriety of the predisciplinary meeting, no evidence was introduced to suggest that the meeting was not properly conducted.

An award of back pay must be offset by amounts received as unemployment compensation. Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984). But see, Technical Computer Services, Inc. v. Buckley, 844 P.2d 1249, 1255 (Colo. App. 1992), cert denied (1993) (unemployment compensation benefits not deductible by employer in mitigation of damages in employment contract action as a matter of public policy).

Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously or as a means of harassment, or was otherwise groundless. When requesting an award of fees, the moving party bears the burden to prove by preponderant evidence that it is entitled to the award. Board of Commissioners v. Auslaender, 745 P.2d 999 (Colo. 1987). A losing position is not necessarily

groundless. Federal Land Bank v. Jost, 761 P.2d 270 (Colo. App. 1988).

Respondent was negligent. However, on this record, it cannot be found that the personnel action was instituted frivolously, in bad faith, maliciously or as a means of harassment, or was otherwise groundless.

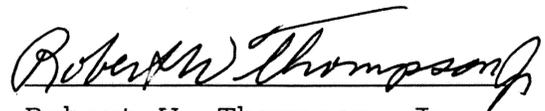
CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious and contrary to rule or law.
2. The predisciplinary meeting was properly conducted.
3. The discipline imposed was not within the range of alternatives available to the appointing authority.
4. Complainant did not fail to mitigate his damages.
5. Neither party is entitled to an award of attorney fees.

ORDER

Respondent's action is rescinded. Complainant shall be reinstated to his former position with full back pay and benefits as of the date of termination with an offset for any substitute earnings or unemployment compensation benefits.

DATED this 9 day of
February, 1995, at
Denver, Colorado.


Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 13 day of February, 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:

Carol M. Iten
Attorney at Law
789 Sherman Street, #640
Denver, CO 80203

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

Pat Quintana

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 \$710. 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.

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.