

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B165

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES R. ENGELSMAN,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing commenced in this matter by telephone conference on August 2, 1995. The evidentiary hearing was held on September 21, 1995. Complainant represented himself. Respondent appeared through Laurence Warner, Regional Transportation Director for Region VI, and was represented by Steve Chavez, Assistant Attorney General.

Respondent called Celina Benavidez, director of Human Resources and Administration for the Colorado Department of Transportation ("CDOT"), and Lawrence Warner as witnesses. Complainant testified on his own behalf.

Respondent's exhibits 1, 2, 6 and 8 were admitted without objection. Respondent's exhibit 13 was not admitted due to insufficient foundation. Respondent's exhibit 15 was withdrawn.

MATTER APPEALED

Complainant appeals a disciplinary one step reduction in pay for a period of four months.

ISSUE

1. Whether complainant treated Ben Vialpando, a worker under his supervision, differently than other highway maintenance workers, and if so, whether such different treatment was due to Mr. Vialpando's national origin (Hispanic).
2. Whether respondent's action, reducing complainant's pay by one step for a four month period, was arbitrary, capricious or contrary to rule or law.

95B165

FINDINGS OF FACT

1. Complainant is employed as a Highway Supervisor II with CDOT in region VI, commonly referred to as the "Mary" region, which covers the Denver metropolitan area. Regions are divided up geographically into areas known as patrols. A patrol is headed by a highway maintenance worker II, who is responsible for completion of assigned projects. As a highway supervisor II, the complainant is responsible for ensuring that the patrols are provided with adequate resources, equipment and staffing to complete assigned projects. The complainant was also responsible to ensure that the workers under his supervision in the Mary region received adequate training opportunities.

2. As a highway supervisor II, the complainant assigned projects, workers and equipment to each patrol. Projects are prioritized based on weather, geographic area, staffing and equipment available. The patrols are given latitude to work together to complete work assignments. There is a significant need for patrols to work together and share equipment.

3. Ben Vialpando, a highway maintenance worker II in the Mary region, is an hispanic male and the only member of a protected class in the region at the time these incidents arose. Vialpando was the supervisor of patrol 13.

4. The appropriate equipment is essential in performing assigned duties and projects. Not all patrols are staffed for all potentially necessary equipment. It is common that a patrol will have only basic equipment and must arrange to borrow other need items. A patrol usually will have either a one ton pickup or sign truck assigned as basic equipment. Patrol 13 was not assigned either piece of equipment. Prior to Vialpando joining patrol 13, the patrol's assigned one ton pick up had been damaged and was never replaced. Vialpando requested the complainant to provide either a one ton pick up or a sign truck to patrol 13. The equipment was never replaced. No other patrol supervisor had the same problem with lack of basic equipment. All others had the necessary equipment assigned.

5. Vialpando needed to ask other patrols for the necessary equipment to complete patrol 13's projects; however, because these were viewed as necessary it was difficult to borrow them. Other highway maintenance workers in the Mary region reported retaliation by the complainant when they assisted Vialpando. The retaliation consisted of denial of requests for additional equipment, reassignments, and verbal intimidation.

95B165

6. PACE evaluations are based on whether patrol projects were completed. If a patrol is assigned low ranking projects, it is hard to get assistance from other patrols to get projects finished. Vialpando's projects, although important, were ranked as low priority. This meant that he had difficulty in obtaining workers and equipment to assist his patrol in completing projects.

This, in turn, would affect his PACE evaluations.

7. It is important for promotional opportunities in the highway maintenance series to have had training and experience as acting foreman. Candidates for promotional openings are evaluated on their supervisory abilities and participation in training. Promotional opportunities are filled contingent upon how an applicant has performed as an acting foreman. Vialpando, who had been in the Mary region for 13 years, had difficulty in receiving acting foreman duties. Other white males who had less time on the job were given more opportunities to work as acting foreman.

8. Vialpando also had difficulty in obtaining training, a difficulty not experienced by other white male workers. In addition, Vialpando did not receive information on a foreman examination. Other white males in the region did.

9. CDOT issues written materials on appropriate behaviors in the work area. The department also conducts training on sexual and racial harassment. The complainant received both the materials and the training.

10. On January 26, 1995, Vialpando filed a grievance alleging discriminatory treatment and harassing behavior by the complainant, James Engelsman. The matter was investigated by CDOT's Center for Equal Opportunity and a finding of probable cause was made. (exhibit 8).

11. Laurence Warner, the Regional Transportation Director for Region VI, is the complainant's appointing authority.

12. After receiving the findings of the EEO investigation, Warner scheduled a rule R8-3-3 meeting with the complainant. The meeting was held on April 14, 1995. The complainant denied that he had discriminated against Vialpando or that he had created a hostile working environment.

13. After the meeting, Warner interviewed three other individuals about the allegations. Based on the EEO investigation, the information supplied by the complainant, his interviews with the three individuals, his interview with Vialpando and a review of the complainant's employment history, Warner decided disciplinary action against the complainant was appropriate.

14. On May 12, 1995, Warner issued a letter containing his

95B165

decision and imposing a disciplinary one step reduction in pay for a period of four months. (exhibit 1).

15. May 19, 1995, the complainant filed a timely appeal of the disciplinary action.

DISCUSSION

This is an appeal of a disciplinary action affecting a certified employee's pay. The burden of proof, therefore, is upon the respondent to prove by a preponderance of the evidence that the complainant committed the acts alleged. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

This case turns in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). Among the factors considered in judging credibility, this administrative law judge weighed the witnesses' means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; and their manner or demeanor upon the witness stand. The conclusion is drawn that respondent's witnesses are worthy of belief and, accordingly, their testimony is given substantial weight.

Hearsay testimony was also used in this case. Hearsay evidence may constitute substantial evidence to support an administrative determination as long as the hearsay is sufficiently reliable and trustworthy and possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13 (Colo. 1989). Applying the analysis factors listed in Flower Stop, it is concluded that the hearsay evidence presented was reliable, trustworthy and probative.

Respondent has met its burden in this case. The evidence supports the conclusions of the appointing authority. The discipline imposed was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.

CONCLUSIONS OF LAW

95B165

1. Complainant committed the act for which discipline was imposed.
2. Respondent's action was not arbitrary, capricious and contrary to law.
3. Neither side is entitled to an award of attorney fees or costs.

ORDER

Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
October, 1995, at
Denver, Colorado.

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 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 \$200. 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

95B165

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.

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:

*James R. Engelsman
231 South Jay Street
Lakewood, CO 80226*

and in the interagency mail, addressed as follows:

*Steven Chavez
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203*

95B165

95B165