

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 95B090

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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GREGG A. PETERS,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
REGENTS OF THE UNIVERSITY OF COLORADO,  
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.  
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The hearing in this matter was convened on January 2, 1996, and concluded on July 2, 1996, in Denver before Margot W. Jones, administrative law judge. Respondent appeared at hearing through Elvira Strehle Henson, assistant university counsel. Complainant, Gregg Peters, appeared at hearing and was represented by Richard Lucas, attorney at law.

Respondent called the following employees of the University of Colorado at Boulder to testify at hearing: Laurie Sampsel; Dean James Williams; Dr. Nancy Carter; Dallas Marshall; Leah Riddick; and Anita Cochran. Complainant testified in his own behalf and called the following witnesses to testify at hearing: Harriet Rebuldula; Jamie Kearney; and Professor Donald Sanford.

The parties stipulated to the admission into evidence of respondent's exhibits 9 through 13, 17, 18, 26 through 31, 33 through 35, 38, 40, 42 through 47, 49, 51, 52, 55 through 58, 66 through 77, 80 and 83. Respondent's exhibits 1, 4 through 7, 14 through 16, 20, 21, 59 through 64, 79, 81, 82, 84, 86 and 89 were admitted into evidence without objection. Respondent's exhibits 8, 22, 23, 36, 37, and 39 were admitted into evidence over objection.

Respondent's exhibits 2 and 3 were offered into evidence but were not admitted. Respondent's exhibit 65 was marked and later withdrawn.

Complainant's exhibits D, H, L and O were admitted into evidence without objection. Complainant's exhibit B was admitted into evidence over objection. Exhibits F and P were marked but were not offered into evidence.

95B090

## **MATTER APPEALED**

Complainant appeals the termination of his employment on the grounds that this action was arbitrary, capricious, contrary to rule and law and discriminatory based on race and sex.

## **ISSUES**

1. Whether complainant engaged in the acts for which discipline was imposed.
2. Whether the conduct proven to have occurred constituted grounds for the imposition of 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 race or sex.

## **FINDINGS OF FACT**

1. Gregg Peters (Peters), the complainant, was employed by the University of Colorado (University) in the Music Library as a library technician II. Peters began his employment with the University in 1979. He is a black male.
2. As a library technician II, the type of duties assigned Peters required the use of judgment. He was expected to set priorities in his work, solve problems related to the processing of library materials, recommend procedure changes to remedy processing problems, determine work methods and make exceptions to policies, fees and fines. Peters had work leader responsibility over student assistants in the Music Library.
3. Peters was also expected to conduct the basic circulation desk routines, answer reference questions, teach patrons how to use the card catalog, on-line catalog, CD rom, and other indexes and library tools, locate missing library materials and process and maintain the reserve collections.
4. Anita Cochran (Cochran) worked in the Music Library from 1982 to 1993. For eight years from 1985 to 1993, she was Peters' supervisor in the Music Library. Cochran was assigned to evaluate Peters' job performance.
5. During the eight years that Cochran supervised Peters, she found his job performance to be deficient. Cochran found that on a weekly or bi-weekly basis, Peters engaged in inappropriate behavior in the work place and failed to perform his job duties in a competent manner. Peters failed to communicate appropriately with staff members and student assistants, he lacked adequate reference skills to locate materials in the Music Library or to

**95B090**

assist patrons, he failed to appear for work at the appointed time and once arriving at work failed to work as scheduled, he failed to communicate with the staff and his supervisors concerning his whereabouts during the work day and he failed to maintain accurate leave records.

6. Cochran made consistent attempts to counsel and work with Peters about his poor job performance. She spoke to him directly and wrote memorandums and performance documentation. From 1983 to 1988, Cochran's interim and overall ratings of Peters' job performance seesawed from standard ratings to below standard ratings. From 1988 to 1993, Cochran consistently gave Peters "standard" job performance ratings.

7. Cochran was lead to believe that her supervisor, Karl Kroeger, the Music Librarian, did not want her to rock the boat by giving Peters less than standard ratings. Cochran understood that she would be rated down on her job performance evaluations if Kroeger was required to become involved with time consuming meetings and hearings related to any personnel action given to Peters.

8. During Cochran's supervision of Peters, his reference skills were so deficient that she encouraged him to get additional training. She also provided Peters with reference practice questions that she requested he respond to in order to improve his reference skills. Peters would not answer the practice questions.

9. During this period, Peters was routinely counselled about not making unwanted sexual advances toward the student assistants and patrons using the Music Library. He failed to comply with his supervisors' directions in this regard.

10. Dr. Nancy Carter was employed in the Music Library from 1981 to 1992 as head of cataloguing and technical services. During a period in 1989 when Karl Kroeger was on sabbatical from his position with the Music Library, Dr. Carter was assigned as the acting head of the Music Library.

11. In March, 1989, Dr. Carter reviewed Peters' performance rating and approved Cochran's "standard" performance rating for the period from March, 1988, to March, 1989. Despite Dr. Carter's approval of the "standard" performance rating for this period, she observed that Peters was not punctual, was not reliable, failed to communicate with staff or supervisors and engaged in inappropriate behavior in connection with his contact with female patrons and student assistants.

12. In 1994, Karl Kroeger retired as head of the Music Library. Laurie Sampsel (Sampsel) was appointed as the acting head of the library and Peters' second level supervisor. Leah Riddick

95B090

(Riddick) was assigned as Peters' immediate supervisor from November, 1993, to July, 1994.

13. On June 14, 1994, Riddick gave Peters an interim performance rating of "unacceptable". In this performance rating, Riddick noted that Peters needed development in the areas of his reference skills, seeking input from his supervisor, communications, setting a good example for the student assistants, appearing and acting in a professional manner, controlling his temper when dealing with patrons and staff and his inappropriate behavior with female patrons and student assistants.

14. James Williams (Williams) is the Dean of the University Libraries. He was Peters' appointing authority in December, 1994. When Sampsel took over as the acting head of the Music Library, she routinely communicated to Williams her concerns about Peters' failure to perform his job. Following the June 14, 1994, interim performance rating of "unacceptable", Williams imposed a corrective action on Peters. The corrective action addressed complaints about Peters' inappropriate conduct with patrons and student assistants and his failure to competently perform his job duties. The corrective action warned Peters that he was required to improve his job performance in the next 45 days or Williams would consider taking disciplinary action against him.

15. On August 1, 1994, Riddick took an extended leave of absence from her position at the library. On July 29, 1994, prior to her departure, she again rated Peters' job performance. She observed some improvement in Peters' job performance and rated his overall job performance as "needs improvement". She noted that Peters failed to perform his assigned work which included the preparation of a manual that described his job duties and he failed to trace library materials.

16. Peters was advised on July 28, 1994, that because of Riddick's leave of absence, Laurie Sampsel would become his immediate supervisor. A replacement for Riddick was hired; however, because of Peters' on going job performance problems, the new employee was not assigned as Peters' supervisor.

17. As Peters' immediate supervisor, Sampsel observed many of the same job performance problems which were previously noted by Riddick, Cochran and Carter. Sampsel questioned Peters' ability in the area of referencing. Peters maintained that he possessed adequate skill in this area and did not need additional training.

18. In order to determine Peters' ability to answer reference questions competently and as a training tool, Sampsel gave Peters reference tests. The tests consisted of a number of questions commonly asked of a library technician II at the Music Library. Peters was not able to successfully complete the tests.

95B090

19. At the end of the corrective action period imposed by Williams on September 6, 1994, Sampsel rated Peters' job performance as "unacceptable" for the period from September, 1993, to July, 1994. Sampsel rated Peters job performance as needs improvement or unacceptable in almost all factors. She concluded that he continued to need development in the areas of reference skills, job documentation, communication, setting an example for student assistants, punctuality, acting in a professional manner and in his contacts with female patrons and student assistants.

20. Williams reviewed the September 6, 1994, annual performance rating and decided to hold an R8-3-3 meeting with Peters on September 14, 1994. Following the R8-3-3 meeting, Williams imposed another corrective action on Peters. Williams noted that Peters made little or no improvement in the areas of preparation of the job manual, reference service, time management and communication with his supervisor. Williams advised Peters that there would be a 45 day corrective period during which Peters was required to improve his job performance. Peters was further advised that if he failed to make considerable improvement in his job performance in the interim rating following this corrective period, Williams would consider taking disciplinary action against him.

21. On November 17, 1994, an interim performance rating was prepared by Sampsel rating Peters' overall job performance as "unacceptable". Peters failed to perform the quantity and quality of work required of a library technician II.

22. Williams again reviewed the performance rating and held a R8-3-3 meeting with Peters on December 12, 1994. Following the R8-3-3 meeting with Peters, Williams considered the information which he was made aware of as a result of his involvement since June, 1994. He also reviewed Peters' personnel file considering letters of commendation, performance ratings and corrective actions.

23. Williams concluded that Peters failed to accept any responsibility for his job performance. During the R8-3-3 meetings with Peters, Williams observed that he consistently pointed to other things or people as the reason for his poor job performance. Williams also weighed heavily the fact that Peters had been employed by the University for a long time.

24. Due to Peters' protracted failure to perform his job duties in a competent manner, Williams decided to terminate Peters' employment with the Music Library effective December 19, 1994.

#### **DISCUSSION**

Certified state employees have a protected property interest in

**95B090**

their employment and 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).

State Personnel Board Rule, R8-2-5(A), provides that,

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 the R8-3-3 meeting, absent extraordinary circumstances, the employee shall be dismissed or, at the discretion of the appointing authority, demoted if the employee has demonstrated competence at a lower level.

State Personnel Board Rule, R8-2-5(B), provides that,

Employees performing at an overall level of Unacceptable shall be given a corrective action for the initial Unacceptable rating and afforded a period of time to improve performance as provided in R8-3-2(B) unless, in the judgment of the appointing authority, the employee's level of performance is such that immediate disciplinary action is warranted. If an employee is subsequently evaluated and rated Needs Improvement or Unacceptable, such rating is the basis for disciplinary action. Following a R8-3-3 meeting, absent extraordinary circumstance, the employee shall 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 sustained its burden of proof to establish that complainant engaged in the acts for which discipline was imposed, that the actions proven to have occurred constituted grounds for disciplinary action and that the discipline imposed is within the range available to a reasonable and prudent administrator. Respondent contends that there was no

95B090

evidence presented that complainant's termination was based on his race or sex. Respondent argues alternately that even if it is determined that complainant made a prima facie case of race or sex discrimination that the evidence presented established that complainant's poor job performance was justification for the termination of his employment.

Complainant contends that over a 14 year period he was lead to believe that he performed his job duties in a competent manner. He maintains that it was not until Leah Riddick was assigned as his supervisor in November, 1993, and Laurie Sampsel took over as his supervisor in August, 1994, when Riddick took a leave of absence, that he began to have problems. Complainant contends that it was unfair to lead him to believe that he performed his job competently for so many years and when new supervisors were assigned to terminate his employment after a mere 11 month period of corrective actions and unacceptable performance ratings.

Complainant contends that he was a black man in a primarily white female environment. It appears to be complainant's contention that his actions were misunderstood. He contends that his conduct was closely scrutinized and he was held to a different standard than the other employees in the Music Library. He maintains that he did not sexually harass student assistants and female patrons.

Complainant points to the fact that he was required to take reference tests in order to measure his reference ability as evidence of his different treatment. He also points to the fact that he was expected to complete a job manual.

The only issue of note in this case is that it took the library managers so long to terminate complainant's employment. The evidence in the record is replete with examples of the efforts made by library managers to correct and document complainant's poor job performance beginning as early as 1987. Complainant's failure to perform in a competent manner appeared to remain constant throughout the period from 1987 to 1994. The evidence established that he maintained poor communication with his supervisor, conducted himself in an inappropriate manner with staff, student assistants and patrons, failed to perform job duties related to tracing books and providing reference assistance and failed to complete assignments as instructed.

Complainant's poor job performance as reflected in the performance ratings, interim performance ratings and corrective actions during the period from June, 1994, to November, 1994, provided adequate basis to conclude that his employment should be terminated. Complainant's inability or unwillingness to perform the assigned duties was thoroughly documented throughout his employment. Thus, complainant cannot now complain that he was lead to believe that he performed competently until Riddick's and Sampsel's supervision

95B090

began.

Complainant presented no evidence that the decision to terminate him was due to his race or sex. And even if one is to believe that complainant's two examples of different treatment constitutes a prima facie showing of discrimination, Respondent's explanation for its actions states a legitimate business purpose for its actions.

Respondent's witnesses, Williams and Riddick, testified that complainant failed to perform the assigned task of preparing a job manual. They further testified that the job manual continued to be worked on by complainant's replacement. The witnesses explained that the Music Library was being converted to a new computer system. The witnesses further testified that since use of the new computer system needed to be reflected in the job manual, the manual remained unfinished while that conversion process was completed. Williams testified that the conversion to the new computerized system was completed at some time after January, 1995.

With regard to complainant's claims that he was unfairly required to take reference tests, Sampsel testified that she required complainant to complete reference tests in order to improve his reference skills and to determine whether he had the competence which he claimed. Sampsel testified that complainant failed to assist patrons with reference questions and co-workers complained that complainant did not properly respond to reference questions.

Sampsel testified that she offered complainant additional training which he refused. Sampsel further testified that complainant dismissed the issue of his competence. She testified that she discussed this problem with complainant and Williams concluding that the best solution was to test complainant's skills.

#### **CONCLUSIONS OF LAW**

1. Respondent established that complainant engaged in the conduct for which discipline was imposed.
2. The conduct proven to have occurred constituted a protracted failure to perform assigned duties following issuance of three job performance ratings of "unacceptable".
3. The decision to terminate complainant's employment was neither arbitrary, capricious nor contrary to rule or law.
4. There was no evidence presented at hearing that complainant's termination from employment was due to his race or sex.

#### **ORDER**

**95B090**

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

DATED this \_\_\_\_\_ day of  
August, 1996, at  
Denver, Colorado.

\_\_\_\_\_  
Margot W. Jones  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on this \_\_\_\_\_ day of August, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Richard M. Lucas  
Attorney at Law  
2323 S. Wadsworth Blvd., Suite 100  
Lakewood, CO 80227

and in the interagency mail, addressed as follows:

Elvira Strehle Henson  
Office of University Counsel  
University of Colorado at Boulder  
Campus Box 13, Regent Hall #203  
Boulder, CO 80309-0013

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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. 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 estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. 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

**95B090**

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 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.

95B090