STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B112

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CECILIA M. DURAN,

Complainant,

vs.

DEPARTMENT OF REVENUE,
DIVISION OF MOTOR VEHICLES,

Respondent.

An evidentiary hearing was held on April 18, 1996, before Administrative Law Judge Mary Ann Whiteside. Complainant represented herself. Respondent Department of Revenue, Division of Motor Vehicles ("DMV") appeared through John A. Duncan, Deputy Director of Driver Services, and was represented by Mark Garganoff, Assistant Attorney General.

Respondent called the following witnesses: Victoria White, Administrative Program Specialist II and the complainant's immediate supervisor, Donald L. Burton, Program Administrator for the Drivers License Services Section of the DMV, and John A. Duncan, deputy director and chief of staff of the division.

Complainant testified in her own behalf. She called no other witnesses.

Respondent's exhibits 1 through 5 were admitted with no objection.

MATTER APPEALED

The complainant appeals the disciplinary termination of her employment for poor job performance.

ISSUES

1. Whether the respondent proved by a preponderance of the evidence that the complainant committed the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of

alternatives available to the respondent;

3. Whether the action of the respondent was arbitrary, capricious or contrary to rule or law;

PRELIMINARY MATTERS AND RULINGS ON MOTIONS

Complainant alleged in her notice of appeal that she was unlawfully discriminated against based on her age. However, she failed to appeal the opinion of no probable cause on this issue and the allegation was deemed abandoned.

Complainant never filed a prehearing statement with the State Personnel Board. However, she did mail a copy of her prehearing statement to the respondent about a week before the hearing stating that she did not intend to call any witnesses, offer any exhibits, nor would she testify herself. Respondent objected to any testimony offered by the complainant on the basis of surprise. The ALJ allowed the complainant to testify but limited her presentation to the issues as raised in respondent's case in chief and to exhibits already tendered by the respondent.

FINDINGS OF FACT

1. Complainant Cecilia M. Duran was employed by the State of Colorado for approximately six years. At the time her employment was terminated, she worked part time as an administrative assistant II with the Department of Revenue, Division of Motor Vehicles ("DMV") in its Lakewood office. Victoria White was her supervisor at the times relevant to this appeal.

2. The DMV has offices statewide at which applicants test for, and are issued, Colorado state driver's licenses. Individuals may also apply for a Colorado state identification card at these offices.

3. Initially the complainant's job duties involved some computer work. However, in 1994, the DMV application process for driver's licenses and identification cards became more computerized as the photos for the license or identification card were done by a digitalized imaging process. At that time Miss Duran's job duties changed to include verifying an applicant's verification documents, grading an applicant's test, finger printing an applicant, taking
the applicant's photo and issuing the final document.

4. The DMV provided training to all its office workers on the new processes. However, Miss Duran experienced problems in performing her assigned duties.

5. She experienced problems in the photo process. For example, she was unable to accurately verify the demographic information on the computer screen (i.e, name, address) and correlate it with the appropriate person's picture. That is, she would issue a driver's license with demographic information belonging to one person with the photo of another. A license might be issued for a "John Smith" with "Jean Jones" photo.

6. She also on occasion issued the wrong documents. In one instance, she issued a person applying for and entitled to driver's license a learner's permit.

7. She was frequently confused at work. She became confused in working with the machines, often making mistakes affecting the thermal printer resulting in long waits for documents to be reproduced. She gave incorrect information, i.e., wrong directions to the office in response to a telephone inquiry, scheduling applications for unnecessary testing.

8. Miss Duran had problems relating with her coworkers. She had frequent outbursts and spoke loudly in front of members of the public that the office was bugged by drug dealers.

9. Jackie Tucker, a part-time administrative assistant II in the Lakewood office, had the same duties and training as that initially given to Miss Duran on the new processes in 1994. Ms. Tucker and the complainant overlapped several hours on their shifts. Ms. Tucker had none of the problems experienced by Miss Duran.

10. Veronica White evaluated the complainant in July, 1994 with an overall rating of needs improvement. (exhibit 1). Ms. White drafted a performance improvement plan which was to extend over 6 months (exhibit 2) with progress reviews every 30 days (exhibit 3). As part of this performance improvement plan, the complainant was given additional training. During the six month period, Miss Duran was given documentation of performance problems as they occurred. These problems were also reviewed at the 30 day reviews.

11. The complainant never objected to the evaluation or the performance improvement plan.

12. At the end of the six month period, Veronica White discussed Miss Duran's performance with Donald Burton, the program administrator for licensing services. Ms. White expressed her

concern that there had been no improvement in Miss Duran's performance.

13. Don Burton met with his supervisor, John Duncan, the deputy director of the division and the chief of staff, and gave him copies of exhibits 1 through 3.

14. John Duncan scheduled a meeting with the complainant pursuant to rule R8-3-3. (exhibit 4). At the meeting the complainant was represented by Chuck Williams of the Colorado Association of Public Employees. At the end of the meeting, Miss Duran was given time to submit a written statement in response to the allegations. She never did.

15. John Duncan issued a letter terminating the complainant's employment for poor job performance on February 13, 1995, effective February 28, 1995. (exhibit 5.) Miss Duran was placed on administrative leave with pay until the effective date of the termination.

16. The complainant filed a timely appeal of her termination alleging discrimination based on age. The charge was investigated by the Department of Personnel. The Executive Director of the Department of Personnel issued a finding of no probable cause on the issue of age discrimination. Miss Duran did not appeal the finding of no probable cause.

DISCUSSION

In this disciplinary proceeding, the burden is on the agency 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 imposition of the discipline. Kinchen v. Department of Institutions, 886 P.2d 700 (Colo. 1994).

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). In making credibility determinations, the administrative law judge has considered the factors set forth in Colorado Jury Instruction 3:16: 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; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect credibility.

In applying the above factors to each witness, the conclusion is drawn that respondent's witnesses are worthy of belief and, accordingly, their testimony is given substantial weight. The

testimony of Complainant Cecilia Duran is disregarded for the reasons explained below.

The evidence clearly indicates that Miss Duran had knowledge of the many instances of poor job performance cited. Her explanations of these problems were not supported by the evidence. The presentation of her case and her testimony was disorganized and her articulation of her thoughts was fragmented.

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.

Neither party requested an award of attorney fees.

CONCLUSIONS OF LAW

1. Respondent proved by a preponderance of the evidence that complainant committed the acts for which discipline was imposed;

2. The discipline imposed was within the range of alternatives available to the appointing authority;

3. Respondent's action in terminating complainant's employment was not arbitrary, capricious or contrary to rule or law.

ORDER

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

DATED this _____ day of
April, 1996, at
Denver, Colorado.

Mary Ann Whiteside
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of April, 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:

Cecilia M. Duran
1385 Meade Street
Denver, CO 80204

and to the respondent's representative in the interagency mail, addressed as follows:

Mark Garganoff
Assistant Attorney General
Department of Law
State Services Section
1525 Sherman St., Fifth Floor
Denver, CO 80203

_____

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 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.