

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B117

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JANE WOOD,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Hearing was convened on May 22, 1995, and concluded on September 26, 1995, in Denver before Administrative Law Judge (ALJ) Margot W. Jones. Respondent appeared at the hearing through L. Louise Romero, Associate University Counsel. Complainant, Jane Wood, was present at the hearing and represented by Dennis L. Blewitt, Attorney at Law.

Respondent called Complainant to testify at hearing and called the following employees of the University of Colorado to testify at hearing: Charles Middleton; Jeri Hale; Pam Lingenfelter; Joyce Nielsen; Rolf Kjolseth; Miriam Zahar; and Detective Paul Epps.

Complainant testified in her own behalf and called Michelle Fahey and Rhonda Dibert, who were graduate students at the University of Colorado at Boulder at the time relevant to this appeal. Complainant also called as a witness at hearing Allison Roberts, who was a student at the University employed in the Sociology Department at the time relevant to this appeal.

Respondent's exhibits 1 through 8 were admitted into evidence by stipulation of the parties. Respondent's exhibit 10, pages 876 and 877 were admitted into evidence without objection. Respondent's exhibit 10, pages 878 through 883, were admitted into evidence over objection.

Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals the termination of her employment with the University of Colorado at Boulder as a senior secretary in the Sociology Department.

95B117

ISSUES

1. Whether Complainant engaged in the acts for which discipline was imposed.
2. Whether Complainant's acts constituted wilful misconduct and wilful failure or inability to perform assigned duties.
3. Whether the decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. Complainant, Jane Wood, began her employment with the University of Colorado at Boulder (University) fifteen years ago in the Sociology Department (Department). At the time relevant to this appeal, from 1990 to 1994, Wood worked in the Department as a senior secretary. Wood was the undergraduate secretary in the Department.
2. As the undergraduate secretary Wood's primary responsibilities were, as follows: to advise undergraduate students about core curriculum and major requirements; to assist students with registration and schedule adjustments; to assist students with filling out paperwork involved in independent study and internship courses; to prepare course schedules and input them into the Student Information System; to distribute and collect final grade forms, change of record forms and special action forms, insuring that the information on these forms was complete and correct, and the necessary signatures were obtained; and to collect final grades.
3. The Student Information System (SIS) is a computer program used by the University to compile all student information. It is a secured system which requires the user to log on with an identifying number and password. Varying degrees of access to the system are permitted by those authorized by the Registrar's Office to use it. Wood was responsible for making clerical entries into the system, such as, registering students in classes, dropping students from classes, adding them to classes, entering the Department's schedule of classes and assigning students the grades given by instructors.
4. Wood's job duties were ministerial and clerical in nature. Wood had no authority to assign student grades, she had no authority to decide the content of independent study courses or the credit to be given to students for those courses, she did not have authority to assign students to professors for independent

95B117

studies

95B117

without the prior approval of the professor and she did not have signature authority for professors in the Department without specific prior approval of the professor.

5. Wood was supervised by Pam Lingenfelter, a program assistant in the Department. Lingenfelter supervised Wood for three years prior to Wood's termination from employment. Lingenfelter was supervised by Joyce Nielsen, the associate chairperson of the Department. Nielsen, as the associate chairperson, reported to the Dean of the College of Arts and Sciences, Charles Middleton. Middleton reported to the Vice Chancellor for Academic Affairs, who reported to the Chancellor. Middleton has appointing authority for Wood's position.

6. Seventy percent of the students enrolled at the University are enrolled in the College of Arts and Sciences. The College has 700 faculty members, 2000 staff members and 14,000 students. The College has a \$70 million budget. There are 500 undergraduate students and 70 graduate students in the Department.

7. Initially, following Lingenfelter's employment in the Department, she allowed Wood to perform her duties with little supervision. Lingenfelter believed that Wood was employed in the Department longer than she had been employed there, and Wood appeared to be performing her job duties competently.

8. Lingenfelter's opinion of Wood's job performance changed. As Lingenfelter became more familiar with the Department and Wood's duties, she observed that Wood's job performance was inconsistent. Lingenfelter counseled Wood about job performance issues, Wood's job performance improved for short periods of time and then job performance problems reoccurred. Prior to October 1993, the job performance problems that concerned Lingenfelter did not relate to Wood's involvement in the independent study program.

9. In the Department, Wood held herself out as the expert in independent study. Wood maintained notebooks and catalogs containing information about procedures to be followed to enroll students in classes. Wood maintained and was familiar with a 1984 memorandum from Middleton when he was Associate Dean of the College of Arts and Sciences. (Exhibit 8, page 010116.) This memorandum defined specific instances in which independent study credit should not be given to students. The memorandum also directed department heads and program chairs to advise him of the procedures that their departments and programs used to insure independent study accountability.

10. Wood also maintained on her desk and was familiar with the Boulder Course Catalog which outlined University policies with regard to independent study. (Exhibit 8, pages 010117, 010118.)

95B117

11. Wood maintained an information sheet on her desk with other University and College policies and procedures. This information sheet was boldly entitled "A & S: INDEPENDENT STUDY". (Exhibit 8, page 010115.) It gave directions to students about when and how independent study credit could be obtained. This document advised that the independent study had to be arranged by the student with a professor. It provided that in order to get credit for an independent study, the student had to satisfactorily complete all the paperwork the professor and the Department required. Consistent with the University and College policies and procedures on independent study credit, this information sheet provided, in pertinent part:

There are some general rules to be followed in doing an independent study:

1. A maximum of 16 hours of independent study may be counted toward graduation.
2. No more than 8 hours may be earned from a single department, and no more than 8 hours may be earned in your major. .
. .
3. No more than 8 hours may be earned in a given semester.
4. Registration for independent study may be done only during the drop/add period of each semester.
5. Independent study cannot be used for Area Requirements (i.e., "College List"), nor can it be used for Core Curriculum (i.e., "Content Areas").

12. Miriam Zahar was the graduate secretary in the Department. She worked in close proximity to Wood. She began her employment in the Department in 1990. Wood trained her in the performance of her job duties. Wood instructed Zahar about the proper way to handle independent study credits.

13. As early as 1990 or 1991, Zahar was concerned about the way Wood performed her job. During this time period, Wood told Zahar that she was involved in some kind of mysterious conduct. Wood said that she was going to quit her job, but before she quit she wanted to tell someone what she had done.

14. During 1992 through 1993, Zahar became increasingly concerned that Wood was not following the procedures that Wood instructed her to follow in handling independent studies. Zahar observed that in Wood's absence, undergraduate students would request that Zahar process their request for independent study without the necessary paperwork. Zahar understood that it was the students' expectation that the necessary paperwork was not required. Zahar

95B117

learned that Wood allowed undergraduates to enroll in guided research courses for credit which were reserved for graduate students.

15. Zahar also observed that Wood would approach graduate students and ask that they sponsor independent studies for undergraduates. Wood would assure the graduate students that they would not have to do anymore than assign a final grade.

16. Zahar had additional concerns when she observed the following behavior or transactions: students would come into the Department office and speak to Wood in low tones; Wood used a surreptitious manner when she received phone calls; students would leave Wood's desk after talking with her in low tones, saying, "Oh Jane, you're a lifesaver. Thanks so much."; students insisted that they could only speak to Wood about enrolling in classes; and all irregular contacts with students in the Department appeared to revolve around the issue of independent study.

17. Zahar's concerns were further heightened when a student called the Department office and was angry because the student did not receive a grade for an independent study, indicating that Jane had promised the student an "A". On another occasion, a student contacted the Department office and wanted credit for course work completed in the prior semester. When the student was told that retroactive credit was not permitted, the student replied that Jane permitted it.

18. In 1991, Nielsen, the Acting Chair of the Department, discussed with Wood an independent study request made by a student to work in a safehouse for battered women. In the context of the student's request, Nielsen discussed with Wood the circumstances under which undergraduate students could be granted permission to do independent study.

19. During the summer of 1993, Nielsen observed on Wood's desk in the Department's office an independent study summer enrollment sheet which listed Nielsen as the sponsor for 6 to 12 students. Nielsen inquired of Wood about the enrollment sheets. Wood explained that Rhonda Dibert, a graduate student, was sponsoring the students in independent study. Nielsen explained to Wood at this time that it was inappropriate to use a faculty members name in this manner.

20. Lingenfelter discovered that during the fall semester of 1993, Wood assigned 72 students to Associate Professor Rolf Kjolseth for independent study. No more than one to three students are normally assigned to a professor for independent study during one semester, therefore the assignment of 72 students to a professor was alarming.

95B117

21. Lingenfelter advised Nielsen of her discovery. It was determined that Kjolseth had no knowledge of the fact that students were assigned to him for independent study.

22. Nielsen and Lingenfelter decided to take this information to Charles Middleton, Dean of the College of Arts and Sciences. They did not discuss their discovery with Wood. Middleton reviewed the information and, on January 31, 1994, he gave Wood notice that the University Police Department was conducting a review of the Department's independent study records. Middleton advised Wood that she was on administrative suspension pending the outcome of the review.

23. On February 28, 1994, University managers and legal counsel met with Middleton and a University auditor. Middleton requested an audit of the Department's independent studies. The auditor in attendance at the February 28 meeting was Jeri Hale. Hale is an employee of the University's internal audit department. This department is an independent auditing group which reports to the Board of Regents.

24. Hale conducted an audit of the Department over a six month period. She concluded that Wood's conduct was the most egregious misuse of University resources and abuse of authority that she had ever encountered. The documentation was voluminous. (Exhibit 8.) Hale provided a report to an Assistant University Counsel on August 5, 1994, detailing her findings.

25. From the fall of 1992 to the spring of 1994, Wood assigned 271 independent studies to professors without the professors' knowledge. Wood accomplished this without discovery by following these steps: she completed the independent study agreement and signed the professor's name without the professor's knowledge; using SIS, she enrolled students in the independent study; she withheld the independent study roster from the professors; she completed the grade roster and signed the professor's name to the grade roster; and she withheld the grade confirmation roster from the professor.

26. The names of professors who were dead or retired were used as sponsors for independent study. Other individuals who were not authorized to sponsor independent studies were also named as sponsors, such as, graduate students and instructors.

27. During the period from the fall of 1992 to the spring of 1994, Wood allowed students to substitute independent study credit for required sociology courses. Wood allowed a student to get six hours of independent study credit for one day of volunteer work. The professor identified as the sponsor of this independent study had no knowledge of this arrangement. Wood allowed sociology credit to be given for independent study completed in other

95B117

academic departments. Wood gave independent study credit for work done at not for profit organizations, businesses, and the University recreation center and the health center.

28. Wood allowed students to earn more than the maximum number of independent study hours permitted by University policy by enrolling students in graduate level guided research. She also gave students more credit for independent study than was approved on their independent study agreement.

29. Wood failed to maintain accurate records of the independent studies. She neglected to obtain signatures, dates, addresses course hours, and descriptions on the independent study agreements. There were discrepancies in the names on the independent study agreements and the names entered into SIS. Independent studies were created without any documentation.

30. Wood assigned grades to 104 of the independent studies from the fall of 1992 to the Fall of 1993. A fourth of these grades were entered on the grade roster by Wood, who signed the professors' name without initialling the signature. Wood routinely changed student grades. She gave a student a "B" grade, when the athletic department requested that the student be given an "IW" because the student was ill and unable to complete the course. Wood also assigned grades to students enrolled in independent studies based on the grade they received in the regular sociology course. Wood attempted to change a student's grade from an "IF" to an "A" without authorization.

31. Wood signed professors' names to change of record forms without authorization and she reused change of record forms which contained the professors' actual signature. The change of record form was required to be completed before changes in a student's record were made on the SIS. Wood also used SIS to change the students' grading status from graded to "pass/fail". Wood repeatedly indicated "administrative error" was the reason for changing student grades in SIS.

32. Wood used SIS "ADD function" to bypass controls in the system to enroll students in classes for which the students did not meet the course prerequisites, to cause students to exceed the permissible credit hour limit and to enroll students in classes which were full. Wood used the "ADD function" in SIS in this manner despite instructions from the Registrar's office to advisors on how to properly use the "ADD function".

33. Middleton reviewed the information which was supplied by the University auditor and decided to hold an R8-3-3 meeting with Wood. By notice dated September 27, 1994, Wood was advised that an R8-3-3 meeting would be held with her on October 10, 1994. At the October 10, 1994, meeting, Middleton provided Wood with the

95B117

findings of the University auditor with regard to her handling of independent study. Middleton and Wood discussed the allegations of misconduct at this meeting. Middleton asked Wood to review and respond to the auditor's findings.

34. Wood responded to Middleton's October 10 letter in a letter dated November 7, 1994. Middleton reviewed her response and met with Wood on January 10, 1995. Wood appeared at the October 10, 1994, and January 10, 1995, meeting with counsel. Based on the information provided by Wood, Middleton concluded that some of the allegations contained in the auditor's report were sustainable and others were not.

35. Middleton concluded that Wood should be terminated from her employment with the Department. In reaching this decision, Middleton concluded that the number and extent of the instances of Wood's misconduct provided sufficient justification for her termination from employment. Middleton concluded that Wood's actions undermined the integrity of the University because it called into question the value of the credits given to students at the University. Middleton believed that there were other individuals in the Department who were also culpable for the actions taken with regard to the independent study credit. However, Middleton viewed Wood as being at the hub of the improper activities and he held her responsible for her actions.

DISCUSSION

A certified state employee can only be terminated for just cause as specified in Article XII, Section 13 (8) of the Colorado Constitution. Colorado Association of Public Employees v. Department of Highways, et.al., 809 P.2nd 988 (Colo. 1991). The burden of proving by a preponderance of the evidence that just cause exist for the discipline rests with the appointing authority. 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).

Respondent argued that it sustained its burden to establish that Complainant engaged in the conduct for which discipline was imposed and that the decision to terminate her employment was neither arbitrary, capricious or contrary to rule or law.

95B117

Respondent contends that the action of the agency should be affirmed and the appeal dismissed with prejudice.

Complainant's contention is that she was not responsible for her actions and that the decision to terminate her employment should not be sustained. Complainant contends that professors and Department chairs knew or should have known that she was not following University procedure in administering the independent studies. She maintains that the Department managers' failure to stop her from misusing the process provided justification for her actions. Complainant contends that she should not have been terminated because she and graduate students, Michelle Fahey and Rhonda Dibert, were simply filling a void created by a faculty who did not want to teach undergraduate students.

Complainant's contentions were considered by the ALJ and deemed to be without merit. The testimony of Complainant and her witnesses, Fahey and Dibert, was not credible.

This is a simple and straightforward case. Respondent established that Complainant misused her position and exceeded her authority to cause injury to the University and those it serves.

The logical question arises why there were no safeguards in place to prevent this type of abuse. However, the absence of safeguards is not a mitigating factor such that it can be concluded that Complainant's termination is not sustainable. Complainant cannot abuse her authority to the extent shown here and then point to her supervisors' failure to check up on her as justification for her actions.

Respondent sustained its burden to establish that Complainant engaged in the conduct for which discipline was imposed. Respondent conducted a thorough and impartial investigation into Complainant's conduct, and the surrounding circumstances. Complainant was given a full and fair opportunity to respond to the allegations of misconduct. The choice of discipline imposed was within the range of sanctions available to a reasonable and prudent administrator.

The evidence presented at hearing did not provide a basis for an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant engaged in the acts for which discipline was imposed.
2. Complainant's acts constitute wilful misconduct.

95B117

3. Respondent's decision to terminate Complainant's employment was neither arbitrary, capricious nor contrary to rule or law.

4. Neither party is entitled to an award of attorney fees and cost.

ORDER

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

DATED this 13th day of
November, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

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

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95B117

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 **\$3,155.00**. 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 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

**95B117
95B117**

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.