

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B046

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRENT DICKMAN,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
BOARD OF TRUSTEES OF THE COLORADO SCHOOL OF MINES,
COLORADO SCHOOL OF MINES,

Respondent.

The hearing in this matter was held on January 9 and 22, 1996, in Denver, CO before Margot W. Jones, Administrative Law Judge. Respondent appeared at hearing through Elizabeth Weishaupl, Assistant Attorney General. Complainant, Brent Dickman, was present at the hearing and represented by Christopher Payne, Attorney at Law.

Respondent called the following employees of the Colorado School of Mines (CSM) to testify at hearing: Brent Dickman, the Complainant; Police Chief David McAllister; Gary Martin; Edward Kennedy; Diana Lewis; Robert Moore; Police Officer Richard Lewis; and Debbie Lane.

Respondent's exhibits 1, 3, 6, 8, 10 and 17 through 25 were admitted into evidence without objection. Respondent's exhibits 2, 4, 5, 7, 9, 11 through 16 and 26 through 28 were admitted into evidence over objection.

Complainant testified in his own behalf and called the following CSM employees to testify at hearing: Robert L. Sage; Michael McCarthy; Debbie Lane; Edward Liberatore; and Diana Lewis. Complainant's exhibits A through D and G were offered into evidence but were not admitted.

MATTER APPEALED

Complainant appeals the imposition of a five day disciplinary suspension.

ISSUES

1. Whether Complainant engaged in the acts for which discipline was imposed.

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2. Whether the conduct proven to have occurred constituted a failure to comply with standards of efficient service and competency and wilful misconduct.

3. Whether the appointing authority's decision to imposed a five day disciplinary suspension was arbitrary, capricious or contrary to rule or law.

4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Brent Dickman (Dickman), is employed by CSM as a custodian. Dickman began his employment with CSM in July, 1990.

2. Dickman works with Diana Lewis (Diana). Diana is also classified as a custodian. Diana started work as a custodian in June, 1995. Although Dickman is not Diana's leadworker or supervisor, when Diana was first employed at CSM, Dickman offered her direction in the performance her job duties. However, Teresa Hall and Robert Sage are the custodial supervisors.

3. As custodians, Dickman and Diana are required to clean and maintain the buildings on the CSM campus. Custodians begin work a 5:00 a.m. and are frequently assigned to work alone in vacant buildings.

4. Diana is married to Richard Lewis (Richard) who is a CSM police officer. During the period relevant to this appeal, in August and September, 1995, Richard was assigned to the 8 a.m. to 4 p.m. shift. As a CSM police officer, Richard has full police power to enforce CSM policies and regulations, as well as the City of Golden municipal ordinances on CSM campus.

5. In 1993, CSM adopted a parking policy which required all CSM staff members and students to register with the CSM police department any motor vehicle brought on campus. The policy permits staff and students to seek a waiver of this policy if they do not bring a motor vehicle on campus. The vehicle registration charge is \$25.00.

6. Dickman drives his automobile to work on a daily basis. Occasionally, he parks off campus and walks into work and at other times he parks on campus. In 1993, Dickman complied with the policy and registered his vehicle. Thereafter, Dickman did not register his vehicle, and he continued to park on campus and drive through the campus.

7. From 1993 to August 1995, Dickman had conversations with CSM officials about his opposition to the parking policy. It became

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well known to police department personnel that Dickman did not comply with the parking policy. Dickman believed that CSM did not have the right to regulate parking on public streets that ran through CSM's campus. Dickman received at least one written warning from the police department for his failure to comply with the parking policy. During Dickman's conversations with police department personnel, he was allowed to express his opinion about the parking policy and police personnel repeatedly emphasized that he was required to comply with the policy.

8. Dickman and Diana maintained a working relationship when she first began her employment in June, 1995, as a custodian. However, shortly thereafter, Diana felt that Dickman was criticizing her work. Frequently, custodians meet on a park bench on campus during their break time. During these breaks, Diana felt that Dickman criticized her work. He lead her to believe that she might be terminated from employment if she did not complete her assigned tasks or was absent from work.

9. Diana complained to her supervisor, Teresa Hall about Dickman's conduct. Hall assured Diana that Dickman was not her supervisor and could not affect her employment. Hall encouraged Diana to tell Dickman to leave her alone. Diana complied with Hall's instructions and asked Dickman not to bother her. However, Hall did not instruct Dickman that Diana was annoyed by his conduct.

10. During the custodial break times at the park bench, starting soon after Diana was hired at CSM, Dickman regularly complained about the parking policy. Dickman knew that Diana's husband was a CSM police officer. Dickman directed his comments and irritation about the parking policy toward Diana.

11. In early August, 1995, Diana confronted Dickman during a break. She firmly told him that she did not want to hear anymore about his opposition to the parking policy. Diana complained to her husband shortly after her conversation with Dickman. She told Richard that Dickman kept complaining about the policy and she told him to stop, since she has no power to enforce or change the policy.

12. The same day Diana spoke to Dickman about his complaints, Richard sought out Dickman and reiterated Diana's instructions to leave her alone about the parking policy.

13. On August 22, 1995, Richard observed Dickman's vehicle on the CSM campus without the required parking permit. Richard cited Dickman for failure to display a valid parking permit. The citation penalty was \$10.00.

14. Dickman was angered by the ticket. He felt that Diana and

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Richard were working together to cause him problems. He believed that Diana directed her husband to give him the ticket.

15. Dickman contacted Police Chief McAllister, Richard's supervisor, and complained that Richard was abusing his authority. Dickman also complained to Diana's supervisor, Teresa Hall, that Diana encouraged her husband to give him a parking ticket because she was angry with him about comments he made during break time at work.

16. Chief McAllister promised Dickman that he would look into his complaint. McAllister spoke with Richard and determined that there had been no abuse of authority on his part. He so advised Dickman.

17. On September 6, 1995, during the custodial break time, Diana and Dickman had another confrontation. Three other custodians were present during the confrontation. Dickman raised the question of the parking policy again because there was a recent newspaper article about the policy. Diana was irritated because she learned that Dickman complained to her and Richard's supervisors about the August 22nd ticket.

18. Tempers flare between Diana and Dickman during this conversation. During the course of the exchange of words, Dickman threaten Diana that she had better be careful. Dickman's voice was loud and he leaned toward her in a threatening manner.

19. Diana feared for her safety after this confrontation. She believed that Dickman is hot headed. She felt that he was out to get her and Richard, in light of his reports to their supervisors. She felt insecure, since she arrived at work alone, before dawn, and often worked alone in large empty buildings.

20. Diana reported her concerns to management personnel. Robert Moore, Vice President of Business Affairs, is the appointing authority for Dickman's position. Based on the information moore received about Dickman's conduct on September 6, 1995, he decided to meet with Dickman on September 21, 1995, for an R8-3-3 meeting. During this meeting, Dickman admitted that he told Diana that she had better be careful. Dickman maintained that his words were not intended as a threat.

21. Following the R8-3-3 meeting, Moore met with Diana and reviewed statements prepared by other custodial staff members who were present during the altercation on September 6, 1995. Diana told Moore that she felt threatened by Dickman's words and actions.

22. Diana explained to Moore that the remarks, in conjunction with his body language and his overall demeanor, caused her to feel threatened.

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23. Moore concluded that Dickman should be disciplined as a result of his threatening actions toward Diana. Moore decided to impose a five day disciplinary suspension and require Dickman to register his automobile in compliance with the parking policy. Notice of the disciplinary action was provided to Dickman by letter dated October 2, 1995.

24. As of the date of the hearing in this matter, Dickman had not complied with the parking policy by registering his automobile with CSM.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions 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).

Where there is conflicting evidence, the credibility of the 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).

Respondent contends that it established by preponderant evidence that Complainant engaged in the acts for which discipline was imposed, that Complainant's conduct was shown to be grounds for disciplinary action and that the discipline imposed was neither arbitrary, capricious nor contrary to rule or law.

Complainant contends that Respondent's decision to imposed a disciplinary suspension was arbitrary, capricious and contrary to rule and law. Complainant argues that the evidence failed to establish that Complainant threatened Diana. Complainant contends that Moore did not determine whether Diana acted reasonably in responding to Complainant's words by feeling threatened. Complainant argues that Moore simply found that Diana felt

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threatened by his words therefore Moore concluded that Complainant should be held responsible for the results of his actions.

It is Complainant's contention that the inquiry which should have been made by Moore was to determine whether under the circumstances it was reasonable for Diana to feel threatened by Complainant's words. Complainant contends that it was not reasonable for her to feel threatened by his words. Complainant argues that on September 6, 1995, Diana was seated at a picnic table on break with Complainant and other custodians. Complainant contends that Diana was being as argumentative and aggressive as he when they discussed the parking policy, Complainant's citation and Complainant's protests lodged with Richard and Diana's supervisors.

Viewing the evidence in its totality, it was established that Complainant threatened Diana on September 6, 1995, and he engaged in a course of conduct during Diana's employment which could reasonably lead her to conclude that he intended to threaten her on September 6.

Complainant's threatening behavior on September 6, 1995, was shown to constitute failure to comply with standards of efficient service and competence and wilful misconduct, in violation of Board Rule R8-3-3(C)(1) and (2). Complainant argues that since he maintains that he did not intend his actions to be threatening, it cannot be concluded that he engaged in wilful misconduct. However, the evidence established the contrary.

The evidence established that since the beginning of Diana's employment Complainant engaged in threatening behavior. First, he repeatedly raised questions about her performance of her job duties and then he questioned whether her employment would be continued because she was frequently ill.

The evidence further established that Complainant was relentless in his opposition to the parking policy and that he belabored the subject with all his co-workers during break time. It was shown that Diana became the focus of Complainant's complaints about the parking policy because he was aware that her husband is a police officer and enforces the policy. Based on the testimony of Diana, Richard and Complainant's co-workers, it was established that Complainant's behavior became increasing antagonistic toward Diana and that she acted reasonably in feeling threatened by Complainant and in reporting her concerns to management.

Complainant's contention that the discipline imposed was too severe was considered and determined to be without merit. The imposition of a five day disciplinary suspension is found to be a sanction within the range available to a reasonable and prudent administrator.

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The evidence presented at hearing did not provide a basis to determine that either party is entitled to an award of attorney fees and cost.

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that Complainant engaged in the conduct for which discipline was imposed.
2. Complainant's conduct was shown to constitute violation of R8-3-3(C)(1) and (2).
3. The decision to impose a five day disciplinary suspension was neither arbitrary, capricious nor contrary to rule or law.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

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

Dated the 6th day of
February, 1996.

Margot W. Jones
Administrative Law Judge

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CERTIFICATE OF MAILING

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

Christopher W. Payne
370 Seventeenth St., 26th Floor
Denver, CO 80202-5626

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

Elizabeth Weishaupl
Assistant Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

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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 date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must

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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.

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