

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B130

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

WALLY DIEDE,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

The hearing in this matter was convened on May 1, 1996, and concluded on July 15, 1996, in Denver before Margot W. Jones, administrative law judge. Respondent appeared at hearing through John Baird, assistant attorney general. Complainant, Wally Diede, was present at the hearing and represented by Carol Iten, attorney at law.

Respondent called the following employees of the Department of Labor and Employment as witnesses to testify at hearing: Thomas Looft, Job Service Center manager; Thomas Ivory, Job Service Center director; and Connie Eckerman, labor and employment specialist. Respondent's exhibits 1 through 11 and 14 through 21 were admitted into evidence without objection. Respondent's exhibits 12 and 13 were admitted into evidence over objection.

Complainant testified in his own behalf and called no other witnesses. Complainant did not offer exhibits into evidence at hearing.

PRELIMINARY MATTERS

1. Complainant's request to sequester the witnesses from the hearing was granted.
2. Respondent withdrew its July 2, 1996, motion to dismiss complainant's appeal.

MATTER APPEALED

Complainant appeals the termination of his employment.

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 wilful misconduct in violation of State Personnel Board Rule, R8-3-3(C) (2).

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 under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

FINDINGS OF FACT

1. Complainant Wally Diede (Diede) was employed by the Department of Labor and Employment for 26 years. At the time relevant to this appeal, in 1995, Diede was a labor and employment specialist II working at a job service center (JSC) in Durango.

2. Thomas Ivory is a field director and is the delegated appointing authority for Diede's position. There are three field directors in the Department of Labor and Employment. The field directors supervise the staff and the activities at 43 job service centers throughout the state. There are 9 to 12 job service managers. The job service managers are the first line supervisors to the employees who staff job service centers.

3. In 1993, organizational changes began to provide better customer service by implementing a team management approach at job service centers. In January, 1995, the team management plan was implemented. Under the new management structure, field directors are responsible for strategic planning, setting goals and determining the direction the job service centers will take. The job service center managers work at the operational level. The managers are expected to implement the plan established by the directors. Employment specialists, like Diede, are employed in the job service centers where they provide service to the public by registering them with the job service center, by finding employment which matches the skills they possess and by referring applicants for positions.

4. The organizational changes are intended to create a system which is less bureaucratic and provides faster service to the public.

5. In or around June, 1995, Diede registered a complaint with Thomas Ivory. Diede advised Ivory he did not believe he was being treated fairly at the Durango job service center. Diede identified Maxine Maestas as the individual who was treating him unfairly.

6. Maxine Maestas is one of the JSC managers. Prior to the

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organizational changes in January, 1995, she was assigned to

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supervise employees in the Cortez and Durango areas. After January, 1995, she worked with the JSC managers' team to supervise all job service centers.

7. In order to address Diede's complaint, Thomas Ivory sent two job service managers from the Fort Collins and Glenwood Springs, Tom Looft and Bob McGill, to investigate. The investigators interviewed all employees in the Durango office over several days to determine whether a problem existed.

8. The investigators determined that Diede was treated fairly by his supervisor. The supervisor, Maxine Maestas, was described by all those in the Durango office under her supervision, with the exception of Diede, as a competent and fair manager.

9. The investigators discovered several issues existed in connection with the JSC team in the Durango office. The following information was provided to all field directors in a report dated August 18, 1995:

- 1) The Durango JSC Team is constantly covering for, and correcting errors made by Mr. Diede.
- 2) The Durango JSC Team has to provide Mr. Diede with re-training on a variety of office procedures, as well as automated systems usage.
- 3) Mr. Diede is continually resistive to authority, whether that authority is from the Team, or JSC Director Maxine Maestas.
- 4) Mr. Diede continually lies to cover up mistakes that he has made.
- 5) Mr. Diede has very limited technical ability regarding use of automated systems. He has received training on these systems on numerous occasions.
- 6) The Durango JSC Team has a complete lack of trust in Mr. Diede, based upon his past performance; lies he has made to cover-up mistakes; and his history of going outside the Team to resolve issues.
- 7) Mr. Diede is unwilling to resolve issues within the Team, unless the resolution is satisfactory to himself. When the Team decides a course of action opposed by Mr. Diede, he has had a propensity to go outside the Team in order to bolster his position.

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8) Mr. Diede's performance and behavior have created a tense and stressful work environment. These issues have had a cumulative effect on staff, and have created an atmosphere where staff no longer enjoy coming to work.

10. It was the recommendation of the investigators that Diede be removed from the Durango office, either through transfer to another job service center or through termination of his employment.

11. Efforts were made to locate another job service center to which Diede could be transferred. Diede wanted to transfer to the Montrose, CO job service center. However, the team at that site felt that Diede's presence in their work place would be too disruptive.

12. Three job service center locations were willing to accept Diede as a transfer. These centers were located at the Lakewood and Lamar job service centers, and in the unemployment insurance section of the Denver office. Diede was not interested in accepting a transfer to any of these locations.

13. As a result of the information received during the investigation of Diede's complaints, a corrective action was imposed on October 4, 1995. The corrective action was imposed by Tom Looft, JSC manager. The terms of the corrective action, provided the following:

- 1) You will recognize the authority of the Durango Job Service Center team, fully accepting and carrying out decisions that are made, even if those decisions are in opposition to your individual views.
- 2) You will take all issues you have regarding Durango Job Service Center Team operations directly to the Team for resolution. Bypassing the Team to gain support for your particular position is unacceptable, and will no longer be tolerated. Please review "SYSM" message #480703 from Scot Simons, entitled "Team Issue Resolution," for insight regarding the proper procedure for dealing with issues of this type.
- 3) You will participate as an equal member of the Durango Job Service Center Team, sharing in all office duties as so directed by the entire team.
- 4) The Durango Job Service Center Team, as well as yourself, have expressed that your skills relative to office automation (ODDS and Job Match) are deficient. Between yourself and the team, expectations regarding

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appropriate skill level are to be established, and training is to be arranged to correct those areas where you are deficient.

- 5) You will strive to build a relationship of trust between yourself and the other members of the Durango Job Service Center Team. This requires you to accurately complete tasks you are assigned in a timely fashion, and accept responsibility for the outcome of those assignments.
- 6) The Durango Job Service Center Team will have primary responsibility for monitoring your progress relative to this action plan. Should you fail to comply with this plan, upon the request for further assistance from the Durango Job Service Center Team, the Job Service Center Director's Team, may request that an 8-3-3 meeting be convened.

14. Diede and Tom Looft met with the Durango Job Service Center team to discuss the October 4, 1995, corrective action and plans for its implementation. It was concluded that Diede would assess his automated systems deficiencies and provide the team a report on October 20, 1995. It was further concluded that the team would come to a mutual agreement about Diede's automated systems deficiencies by October 27, 1995, and determine a course of training to correct these deficiencies.

15. The Durango Job Service Center team normally meets two times each month. It was decided that one meeting per month would be devoted exclusively to discussing Diede's progress relative to the corrective action. Following each meeting, the Durango JSC team and Diede were required to submit a report to Tom Looft.

16. Finally, it was determined that the corrective action would not have a specific end date. Diede was expected to comply with the corrective action. The corrective action would end when the team's reports reflected that Diede was performing his job duties in a competent manner.

17. In November and December, 1995, Diede failed to comply with the corrective action to the extent that he failed to timely submit his monthly report. Each month, Looft had to contact Diede in order to obtain the required report. Diede submitted a report in December, 1995, but it failed to comply with the corrective action. Instead of merely providing a report of his efforts to improve his job performance and to comply with the corrective action, Diede responded to the Durango JSC team's report about his job performance. Diede attempted to refute the points made by the team.

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18. Looft reminded Diede in an e-mail message that he was expected to file timely reports as required by the corrective action. Diede responded to Looft's e-mail advising him that he would not be rushed or intimidated.

19. The Durango JSC team's December 13, 1995, report indicated Diede had sabotaged the team's efforts to meet to discuss the corrective action and he refused to provide his self evaluation to the team. The team reported Diede failed to comply with the corrective action by recognizing the authority of the team. Specifically, the team reported Diede refused to stop taking clients to his desk and to the job board. The team further reported Diede failed to comply with the established working hours, refused to discuss issues with the team and continued to circumvent the team. Diede failed to provide any information about his computer skills and advised the team that he expected them to come up with the information about his deficiencies and a plan for his improvement and training. The team noted Diede continued to make mistakes related to use of the computer system. The team reported Diede continued to take action that eroded their confidence in him.

20. On January 16, 1996, Tom Looft advised the field directors that Diede failed to meet the terms of the corrective action. Tom Looft advised the field directors that Diede wasted time collecting information about errors made by employment specialists at job service centers statewide, that he took no action to increase the trust of his team members and that he did not timely provide the assessments of his progress required by the corrective action.

21. In the January 16 memorandum to the field directors, Tom Looft recommended that since Diede had a history of job performance problems, disciplinary action should be considered.

22. At the end of January, 1996, the Durango JSC team prepared a report of Diede's progress in complying with the corrective action. Diede was described by the team as performing at a below average level in the areas of recognizing the team's authority, sharing equally in office duties, obtaining computer training and building trust with the team. The team reported Diede was performing at an average level in the area of taking work related issues to the team.

23. In January, 1996, Diede timely filed a report with Tom Looft concerning his view of his progress complying with the corrective action. Despite earlier instruction, Diede continued to respond and rebut the Durango JSC team's evaluation. He also provided a monthly report of his view of his progress. He indicated in his evaluation that he performed average or above in all the areas in which he was evaluated by the team.

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24. In an undated letter to Diede, the field directors advised him that a R8-3-3 meeting would be held with him on February 8, 1996, to consider the allegations of misconduct referenced in Tom Looft's January 16 memorandum. At Diede's request the R8-3-3 meeting was rescheduled to February 13, 1996. Diede appeared at the meeting with a union representative.

25. At the R8-3-3 meeting, Diede responded to the issues raised in January 16, 1996, memorandum. He maintained that despite the repeated communications with him about the requirements of the corrective action, he was not clear about the expectations of the field director, JSC managers or the Durango JSC team. He claimed that the evaluation process was subjective, invalid and served no purpose.

26. Following the R8-3-3 meeting the field directors, who acted jointly as the appointing authority, decided to terminate Diede's employment. In reaching this decision, the field directors took Diede's prior employment history into consideration. In reviewing that record, it was determined that Diede was corrected or disciplined previously for misconduct similar to that shown to have occurred here. It was found that corrective actions had been imposed in August, 1992, October, 1992, and again in October, 1995. It was further found that corrective and disciplinary actions were imposed in June, 1994, when Diede was demoted for the misuse of state property and for other performance issues.

27. The field directors noted that because Diede failed to take responsibility for his job performance, it was not likely that he could be rehabilitated. It was found that Diede tended to blame others for the problems which occurred in the work place. It was concluded that Diede engaged in wilful misconduct and that his employment should be terminated effective March 8, 1996.

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 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

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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 contends that it sustained its burden of proof by establishing that complainant engaged in the conduct for which discipline was imposed, that the decision to impose discipline was warranted and that the discipline imposed was within the range available to a reasonable and prudent administrator.

Complainant was not a credible witness. In closing it was argued he should not have been terminated because he was not advised how quickly his job performance had to improve and he was not provided a reasonable time in which to make improvements. Complainant further points to a performance rating in 1995 where he was given an overall rating of "good". He maintains that this should be considered as evidence that he was capable of doing the job and that he simply needed a reasonable time in which to improve his performance.

The evidence presented at hearing amply supports the conclusion that complainant's employment should be terminated. Complainant appeared to be an incorrigible figure on the Durango JSC team. The evidence established that he was counselled verbally on repeated occasions. The evidence further established that he received clear and concise instructions in writing about the managers' and the Durango JSC team's expectations of him.

Respondent's witnesses testified that the corrective action did not have a specific end date. Complainant was expected to comply with its terms and make progress toward improving his job performance. The evidence presented at hearing established that from October, 1995, through January, 1996, complainant made little or no progress toward complying with the corrective action. He remained obstinate and recalcitrant.

Complainant's employment history included other corrective and disciplinary actions. Complainant's conduct proven here, in conjunction with his employment history, justified termination of his employment.

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 wilful misconduct.
3. The decision to terminate complainant's employment was neither arbitrary, capricious nor contrary to rule or law.

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

ORDER

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

DATED this 29th day of
August, 1996, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ 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:

Carol Iten
Attorney at Law
789 Sherman St., Ste 640
Denver, CO 80203

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

John Baird
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80202

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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

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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.