

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B133

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GEORGIA A. TOZER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT PAROLE SUPERVISION,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on May 30, 1996. Respondent was represented by Diane Marie Michaud, Assistant Attorney General. An advisory witness did not appear. Complainant was represented by Lawrence Katz, Attorney at Law. Complainant did not appear.

The evidence consisted of Respondent's Exhibit 1 and three stipulated facts. Respondent's Exhibit 2 was offered but not admitted over complainant's objections of lack of foundation, lack of notice and hearsay. There was no testimony.¹

¹ Respondent called complainant to the stand. Complainant was not present and had not been placed under a legal obligation via subpoena. The administrative law judge rejected respondent's contention that it had a right to rely on complainant voluntarily appearing in person.

MATTER APPEALED

Complainant appeals her disciplinary termination of March 18, 1996 and her suspension without pay from February 27 until the termination date. For the reasons set forth herein, the personnel actions are rescinded.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action in terminating complainant's employment was arbitrary, capricious or contrary to rule or law;
3. Whether respondent's action in suspending complainant without pay was arbitrary, capricious or contrary to rule or law;
4. Whether complainant is entitled to an award of attorney fees and costs.²

PRELIMINARY MATTERS

On May 23, 1996, respondent filed a Motion to Dismiss alleging that the appeal was moot because the appointing authority "has determined that the Rule 8-3-3 meeting concerning Complainant should be recommenced to consider and discuss additional information with Complainant." (File tab 15.) Attached to the motion was a copy of the May 22 written notice to complainant, who had not been an employee of respondent for over two months when the appointing authority directed her to appear for another R8-3-3 meeting. Respondent's motion was denied on May 28, 1996.

² Respondent specifically does not request an attorney fee award.

At hearing, respondent moved to dismiss the appeal on grounds that respondent was willing to reinstate the complainant with back pay. Complainant objected, however, because of respondent's apparent intent to reconvene the R8-3-3 meeting and continue to pursue an action against complainant based on the same facts as gave rise to the present appeal. Respondent first contended that dismissal of the appeal with prejudice would not preclude further action on the same facts, then objected to a dismissal with prejudice and argued unpersuasively that the State Personnel Board lost jurisdiction over the appeal when respondent offered to rescind the action, albeit with the intent of "recommencing" the predisciplinary meeting. Respondent did not elaborate on its purpose in reconvening the R8-3-3 meeting or the "additional information" to be considered.

Respondent's motion to dismiss without prejudice was not granted. Respondent's three subsequent motions for a continuance on grounds that it was not prepared to put on evidence were denied for lack of a showing of good cause. See Rule R10-8-3, 4 Code Colo. Reg. 801-1.

FINDINGS OF FACT

1. The following facts were stipulated into evidence:

a) Complainant entered into the Adams County Adult Diversion Program as an alternative to prosecution.

b) Complainant was not charged with a criminal offense, either misdemeanor or felony.

c) The incident giving rise to complainant's entrance into the diversion program was the alleged prescription fraud referred to in Exhibit 1.

2. On March 18, 1996, Thomas E. Coogan, Director of the Division of Adult Parole Supervision, terminated complainant's employment for alleged violation of Rule R8-3-3(C)(1), failure to comply with standards of efficient service or competence, and Rule R8-3-3(C)(2), willful misconduct. (Exhibit 1.)

3. Coogan's action was based upon allegations that complainant had fraudulently altered a prescription for a controlled substance.

4. On March 20, 1996, complainant filed an appeal alleging that she had been illegally placed on administrative suspension without pay on February 27, 1996, pending an investigation into her conduct and an R8-3-3 meeting, and that she had not received written notice of the suspension. (Notice of Appeal, file tab 1.)

5. On March 21, 1996, complainant filed an appeal of the termination, alleging that she was terminated "for actions which occurred during nonworking hours while not at work or in the course and scope of employment." (Notice of Appeal, file tab 1.) The appeals were consolidated on March 27, and the case was set for hearing.

DISCUSSION

In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Respondent proffered no evidence and presented no argument or denial pertaining to complainant's allegation of having been administratively suspended without pay prior to the predisciplinary meeting.

Rule R8-3-4(C), 4 Code Colo. Reg. 801-1, provides that an employee may be administratively suspended with pay during an investigation of the employee's conduct, that the appointing authority shall give written notice to the suspended employee, and that the employee shall be compensated in full during the suspension period. Respondent's flagrant violation of this rule of procedure and of complainant's rights under the rule, without explanation or justification, is action which is arbitrary, capricious and contrary to rule, as well as an act of bad faith. The rule does not require interpretation. Compliance simply requires some regard for the rights of state employees and for the state personnel system itself. The suspension was imposed for disciplinary reasons without the benefit of an information exchange meeting and cannot stand. R8-3-3(D), 4 Code Colo. Reg. 801-1.

Respondent submits with respect to the termination that the March 18 disciplinary letter (Exhibit 1) was not rebutted by complainant and, therefore, the conclusions of the appointing authority stated in the letter should be taken as dispositive of the case. However, as a factfinder and neutral third party, the administrative law judge is called upon to make an independent judgment of whether certain acts occurred so to provide just cause for the disciplinary termination. This incomplete record furnishes an insufficient basis for the judge to determine that respondent met its burden of proof. Consequently, respondent did not meet its burden of proof. There is not even any evidence of the actual conduct that gave rise to this proceeding. What happened, when and where? The judge does not know and is not obliged to adopt the conclusions of the appointing authority, without more.

Complainant is not compelled to rebut or disprove respondent's case. The burden of going forward with the evidence and the burden of persuasion rest with the respondent. Those burdens were not satisfied in the first instance. Additionally, at hearing, the complainant was denied her right to cross-examine any of the

witnesses against her. See §24-4-105(7), C.R.S.

Respondent's failure to come forward with admissible and credible evidence of complainant's conduct renders the action groundless. This, together with a blatant rule violation, and respondent's effort to delay the proceedings in order to "recommence" the predisciplinary meeting without disclosing the reason or purpose demonstrating a need to do so more than two months after termination, save the vague assertion "to consider and discuss additional information", are found to be acts of bad faith. See, e.g. Western United Realty, Inc. v. Isaacs, 679 P.2d 1063 (Colo. 1984). Complainant is thus entitled to an award of her attorney fees and costs under §24-50-125.5, C.R.S. of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent did not prove by preponderant evidence that complainant committed the acts for which discipline was imposed.
2. Respondent's action in terminating complainant's employment was arbitrary, capricious or contrary to rule or law.
3. Respondent's action in suspending complainant without pay was arbitrary, capricious or contrary to rule or law.
4. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are rescinded. Complainant shall be reinstated to her former position with full back pay, service benefits and interest at the statutory rate, less any substitute income or unemployment compensation, from February 27, 1996 to the

date of reinstatement. Respondent shall pay to complainant her reasonable attorney fees and costs in accord with §24-50-125.5, C.R.S.

DATED this 13 day of
June, 1996, at
Denver, Colorado.



Administrative Law Judge

CERTIFICATE OF MAILING

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

Lawrence Katz
Attorney at Law
1100 Trinity Place
1801 Broadway
Denver, CO 80202

and in the interagency mail, addressed as follows:

Diane Marie Michaud
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th 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.