

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B200

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES F. ROWLAND,

Complainant,

vs.

COLORADO DEPARTMENT OF REVENUE,

Respondent.

The hearing in this matter was held on January 21, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Carolyn Lievers, assistant attorney general. Complainant, James F. Rowland, appeared at the hearing pro se.

Respondent called William Buckner and James Davis, employees of the Department of Revenue, to testify at hearing. Complainant testified in his own behalf and called no other witnesses.

Respondent's exhibits 1, 2, 4, 5, 6 and 6a were admitted into evidence without objection. Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals the termination of his employment from the Department of Revenue as an administrative assistant for wilful misconduct and an inability to perform duties assigned.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed;
2. Whether the conduct proven to have occurred constituted wilful misconduct or an inability to perform assigned duties;

3. Whether complainant was denied predisciplinary due process;
4. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.

PRELIMINARY MATTERS

Respondent moved to quash subpoenas served by complainant on witnesses to appear and give testimony at hearing. Complainant served three witnesses who are employees of the Department of Revenue on January 17, 1997, less than 48 hours prior to the hearing. Complainant also did not include witness fees or mileage with the subpoenas. Respondent contended that the motion to quash should be granted since complainant failed to comply with Colorado Rule of Civil Procedure (C.R.C.P.) 45 (c).

Complainant contended that on January 16, 1997, he received direction from a staff member of the State Personnel Board. He maintains that he contacted the Board offices to inquire about obtaining subpoenas. Complainant contended that he obtained the subpoenas following his conversation with the Board staff member and had them served on the witnesses by a friend. He offered no explanation for why he waited until January 17, 1997, to serve the subpoenas.

Respondent's motion to quash was granted. It was determined that complainant filed his appeal on June 28, 1996, and waited until the Friday before the hearing, January 17, 1997, to serve the subpoenas on the witnesses he wished to call at hearing. Complainant's service of the subpoenas was determined to be untimely and complainant failed to show good cause for the delay. Thus, complainant failed to comply with the requirements of C.R.C.P. 45(c).

FINDINGS OF FACT

1. Complainant, James R. Rowland (Rowland), was employed by the Department of Revenue (department) as an administrative assistant. He was employed by the department for 14 years. The appointing authority for Rowland's position is James R. Davis (Davis), the director of the division of taxpayer services.

2. As an administrative assistant, Rowland was the receptionist in the taxpayer services division of the department. He greeted the public and directed them to the appropriate department personnel to serve them. He responded to taxpayer questions and had access to the department's confidential files. He reviewed applications for tax exempt status for contractors.

3. On May 15, 1996, Rowland pled guilty to a felony. He pled guilty to knowingly receiving a package through the United States mail containing two video tapes using minors under the age of 18 years engaged in sexually explicit conduct. Rowland's actions violated federal law.

4. Rowland came to the attention of the U.S. Postal Service in 1993 when he answered an advertisement. Rowland completed a questionnaire indicating an interest in incest, pedophilia, and transvestites. In February 1996, Rowland was sent a letter by undercover Postal Inspectors advertising a sex line for forbidden life styles. After receiving this letter, Rowland called a hotline telephone number in the advertisement stating that he was particularly interested in child pornography, videos, books, magazines and possible meetings.

5. In response to Rowland's telephone message, Rowland was sent by mail an advertisement on February 13, 1996, for sexually explicit video tapes of minors. The advertisement gave a detailed explanation of the contents of the videos and offered the videos for sale at various prices.

6. On February 14, 1996, Rowland sent \$125.00 to purchase the two videos. A transmitter was placed in the package to allow postal inspectors to determine if and when the package was opened.

7. Rowland picked up the videos from his postal mail drop on March 8, 1996. He returned to his office at the Department of Revenue. He placed the videos in his desk. At some time prior to his departure from work, he opened the videos, thus setting off the alarm and alerting postal inspectors, who had followed him from his postal mail drop to his office at the department.

8. A warrant to search Rowland's home was also obtained by postal inspectors where additional child pornography was seized.

9. Postal inspectors advised William Buckner, the director of compliance and criminal investigations at the department, of the sting operation. Buckner reported this information to Jim Davis, the appointing authority. Davis was advised that Rowland was under investigation for criminal activity involving child pornography. Davis placed Rowland on administrative suspension with pay. The suspension prohibited Rowland's return to the workplace during the period of his suspension. Davis advised division personnel that Rowland was barred from the workplace.

10. On March 19, 1996, Rowland was indicted by the Grand Jury with of knowingly receiving child pornography through the United States mails. On May 17, 1996, Rowland entered into a plea agreement in which he pled guilty to the charges. He was sentenced to a prison term which was to begin on December 31, 1996. He was permitted to post bond on appeal of his conviction. On appeal, he challenges an adverse decision on a motion to suppress a warrant to search his residence.

11. Davis was advised of the plea agreement. He decided to hold an R8-3-3 meeting with Rowland, his attorney, William Buckner, and Assistant Attorney General Carolyn Liewers on June 14, 1996. At the meeting, Rowland admitted that he ordered and received the video tapes containing child pornography, that he brought the tapes to his place of employment, opened the package containing the video tapes while at work and stored the tapes in his desk at his job.

12. Rowland pointed out that his performance as an administrative assistant has been good during his employment with the State and he values his job. Rowland further offered as mitigation the fact that the conviction against him is based upon an anticipatory search warrant which Rowland is attacking on appeal. Rowland contends that the conviction is not final until resolution of the appeal.

13. Davis considered the information that he received concerning Rowland's conviction, his job performance record with the department, and the information offered at the R8-3-3 meeting. Davis concluded that Rowland's employment should be terminated. Rowland's employment was terminated effective June 24, 1996. Davis concluded that Rowland's conduct constituted an inability to perform duties assigned and wilful misconduct.

14. Davis found that Rowland's actions in ordering and receiving video tapes containing child pornography, opening the tapes while at work, and storing the tapes in his desk at work was evidence of extremely poor judgment. Davis found that Rowland's conduct in being charged and convicted of a felony in this case caused him to be unfit to perform the duties of his position. Davis considered the fact that the department has enforcement authority and therefore is considered a law enforcement agency. Davis concluded that Rowland's conviction of a felony made him unsuitable as an employee in a law enforcement agency.

15. Davis also had concern about the numerous confidential records maintained by the department. Davis concluded that the department had a duty to the public to maintain the integrity of

the confidential records. Davis believed that employing an individual who had been convicted of a felony and who had been convicted of a crime involving moral turpitude would undermine the integrity of the department and place in jeopardy the confidential records that the department is entrusted to maintain.

16. Finally, Davis concluded that he did not have a location within the department where Rowland could be placed where he would not come into contact with children or other members of the public. Davis has an obligation to the employees of the department and the public served by the department, both of whom bring their children into the workplace. Davis' obligation to these groups required that he not permit Rowland's continued employment.

DISCUSSION

Certified state employees have a protected property interest in their employment. 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 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 established by preponderant evidence that complainant engaged in the acts for which discipline was imposed, that complainant's conduct constituted violation of State Personnel Board rules, and that the decision to terminate his employment was neither arbitrary, capricious nor contrary to rule or law.

Respondent further contends that the evidence presented at hearing established that complainant's actions constituted evidence that he was charged with a felony involving moral

turpitude which adversely affected his ability to perform his job duties. Respondent argued that the evidence established that complainant violated Rule R8-3-3(C) (3).

Respondent's final argument is in response to complainant's contention that another employee was treated more leniently for the same conduct. Respondent responds that the conduct was not the same because the other employee was not engaged in illegal activity, was not charged with a crime, and did not plead guilty to a felony. Respondent maintains that the decision of the appointing authority should be affirmed.

Complainant argues that the evidence presented at hearing does not support the conclusion that complainant violated Rule R8-3-3(C) (3). Complainant contends that he is capable of performing the duties of the administrative assistant position despite the fact that he engaged in the conduct proven to have occurred. He maintains that he performed his duties competently prior to the charge and plea of guilty. He contends that if the department did not trust him to come into contact with members of the public then he could be transferred to a position where he does not have contact with the public. Complainant also contends that the crime to which he pled guilty is not a crime involving moral turpitude.

Complainant further argues that because he entered a conditional guilty plea, which is not final until resolution of his appeal, he cannot be terminated from employment under Rule R8-3-3(C) (4) during the pendency of the appeal.

Complainant further argues that a co-worker was accused of selling pornographic photographs and was not disciplined. To the contrary, complainant maintains he was permitted to increase his work hours from part time to full time.

Complainant argues that the letter of termination was based on matters never brought to complainant's attention. He contends that he was denied due process in that he was not aware that the appointing authority would consider the information received about his plea of guilty to a felony for purposes of determining whether this conviction had an adverse affect on his ability to perform his job duties. Complainant contends that the notice of the predisciplinary meeting failed to inform him that this would be an area of consideration by the appointing authority.

The evidence presented at hearing established that complainant was convicted of a crime involving moral turpitude and that as a result of his conviction he was no longer fit to

perform the duties of his position. The evidence further established that complainant, in the performance of his job duties for the department, came in contact with co-workers' and taxpayers' children. The evidence established that it would be a breach of the public's trust to continue in its employ an individual who admitted to the felonious activity of purchasing child pornography through the United States mails.

The State Personnel Board upheld the termination of an employee where it concluded that the employee's criminal conviction had an adverse impact on the agency. Martinez v. Department of Institutions, 889-B-123. In the Martinez case, the employee pled guilty to a felony sixteen years after the felony was committed and the employee had engaged in personal rehabilitation since the time of the commission of the crime. And, in State Personnel Board case, Olsynski v. Department of Corrections, 845-B-35, an employee's termination was upheld on the grounds that the employee's conviction for felony menacing constituted a crime involving moral turpitude having an adverse affect on the agency.

Complainant's claim that he was treated differently than similarly situated employees is not supported by the evidence. The one example complainant offers in support of his contention that other employees were treated differently is not comparable.

The evidence established that the employee with whom complainant compares himself was not engaged in illegal activity, was not charged with a felony, and did not admit involvement in any criminal activity.

Respondent's concern about keeping complainant in its employ relates, not only to complainant's contact with the public, but also with his access to confidential information and documents. Respondent presented evidence that there are no positions to which complainant could be transferred where he would not have contact with the public or have access to confidential records. Complainant presented no contrary evidence except the bald assertion that there was a position which only required contact with the public by phone.

With regard to complainant's contention that he was denied due process, Board rule, R8-3-3, requires an appointing authority to meet with an employee when information indicates the possible need to administer disciplinary action. An employee must be provided with advance notice of the R8-3-3 meeting. Although the notice need not be in writing, it is the common and best practice to do so, and that appears to be what occurred here. Complainant did not offer into evidence the notice of the R8-3-3 meeting.

However, complainant did not argue that there was a denial due process based on the absence of a notice of the R8-3-3.

The rule further provides that notice should advise the employee of the purpose of the meeting and that he has the right to have a representative present. During the meeting, the appointing authority is required to present the information to the employee which gives rise to the appointing authority's decision to consider disciplinary action and to give the employee an opportunity to admit or refute the information or to present information in mitigation.

Since the letter notifying complainant of the R8-3-3 was not made a part of the record, the nature and extent of the notice provided complainant cannot be ascertained. However, it appears from the transcript of the R8-3-3 meeting (Respondent's Exhibit 6) that complainant was given a full opportunity to provide information concerning the charges brought against him and his plea of guilty.

It was only after review of this information that the appointing authority determined that complainant's conduct adversely affected his ability to perform his assigned duties. This conclusion could not and should not have been reached prior to the R8-3-3 meeting. It was only after the collection and review of the relevant information that the appointing authority could determine whether there was violation of the State Personnel Board rules.

Based on the transcript of the R8-3-3 meeting, it is apparent that complainant was sufficiently informed of the general nature of the facts leading to the disciplinary proceeding as to satisfy due process requirements for the informal meeting contemplated under rule, R8-3-3. Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984).

The appointing authority is found to have acted properly in terminating complainant's employment, in light of the serious nature of the offense proven to have occurred. The fact that complainant entered a conditional plea and was appealing his conviction does not persuade the undersigned that complainant's employment should not be terminated. Under Rule R8-3-3 (2)(b), the appointing authority may impose disciplinary action when an employee violates a law in a manner which materially affects that employees ability to perform his job. Complainant's admission of guilt to the crime of receiving child pornography in the United States mails materially affects his ability to perform his job duties. He cannot be trusted to exercise proper judgment in the

performance of his duties where he has access to confidential records and comes into contact with children. Furthermore, complainant's conviction of a crime involving moral turpitude provides grounds for disciplinary action under rule R8-3-3(C)(4).

Termination of complainant's employment is a sanction within the range available to a reasonable and prudent administrator. Despite the fact that complainant performed his job duties competently, his admission to the conduct proven here is grounds for termination of his employment.

CONCLUSIONS OF LAW

1. Complainant engaged in the acts for which discipline was imposed.
2. Complainant's conduct constituted violation of Rule, R8-3-3, in that complainant engaged in wilful misconduct and is unable to perform his assigned duties.
3. The evidence failed to establish that complainant was denied due process.
4. The decision to terminate complainant's employment is neither arbitrary, capricious nor contrary to rule or law.

ORDER

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

DATED this _____ day of
February, 1997, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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 fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). 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 ½ 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.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of February, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James F. Rowland
595 S. Forest St. Apt. 301
Glendale, CO 80222

and through inter agency mail, addressed as follows:

Carolyn Lievers
Assistant Attorney General
1525 Sherman St.
Denver, CO 80203
