

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B125

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GERALD BERUMEN,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
ARKANSAS VALLEY CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on July 17, 1997, in Denver before Administrative Law Judge (ALJ) Margot W. Jones. Respondent appeared at the hearing through Diane Michaud, Assistant Attorney General. Complainant appeared at the hearing pro se.

Complainant testified in his own behalf and called the following employees of the Department of Corrections (the department) to testify at hearing: Steve Miell, Stationary Engineer; Benito Muniz, Stationary Engineer; Leroy Sandoval, Correctional Officer I; Bill Siegel, HVAC Supervisor I; Richard Mar, Superintendent of the Arkansas Valley Correctional Facility; John Hadley, Associate Superintendent of the Arkansas Valley Correctional Facility; Gordon Wallace; and Marilyn Mullay, Human Resources Specialist. Complainant's exhibits A, D, F, G, H, J, K, L, P, Q, T, and U were admitted into evidence without objection. Complainant's exhibit V was admitted into evidence over objection. Complainant's exhibits E and Y were not admitted into evidence.

Respondent did not call witnesses to testify at hearing and did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals his lay off and he alleges he was subjected to discriminatory treatment and harassment.

ISSUES

The following issues were raised by the parties at hearing:

1. whether Complainant sustained his burden to establish that the

decision to lay him off was arbitrary, capricious, or contrary to rule or law; and

2. whether Complainant presented evidence that he was subjected to discriminatory treatment and harassment.

PRELIMINARY MATTERS

1. Respondent's request to sequester the witnesses from the hearing room was granted.

2. Respondent sought clarification of the issues to be considered by the undersigned in light of ALJ Robert Thompson's orders of March 24 and April 18, 1997, in this matter. It was ruled that the issues to be considered at hearing are, whether Complainant established by preponderant evidence that the lay off decision was arbitrary, capricious, or contrary to rule or law, and whether Complainant established that he was subjected to discriminatory treatment and harassment.

3. Respondent moved to strike claims raised in a 1995 grievance. Respondent contended that Complainant was precluded from raising claims of discrimination pertaining to events occurring in 1995. Respondent contended that Complainant previously raised these claims in a grievance, did not appeal the grievance decision, and, therefore, waived the right to again raise these claims.

It was ruled that evidence pertaining to the allegations contained in the 1995 grievance would be admissible at hearing. The evidence was received for the purpose of determining whether Complainant established evidence of discrimination and harassment.

4. At the conclusion of Complainant's case in chief, Respondent moved for entry of judgment in its favor on the grounds that Complainant failed to sustain its burden of proof with regard to allegations of discrimination, harassment, and arbitrary and capricious action. Respondent motion is granted. For reasons set forth below, it is determined that judgment should be entered for Respondent. Complainant failed to present any evidence that the decision to lay him off was arbitrary, capricious, or contrary to rule or law. Nor was evidence presented that Complainant was subjected to discriminatory treatment or harassment.

FINDINGS OF FACT

1. Complainant, Gerald Berumen (Berumen), was employed by the Arkansas Valley Correctional Facility (AVCF) as a Correctional Support Electrical Supervisor from May, 1988, to April 26, 1997.

Berumen was responsible for maintenance of the AVCF electronics system during his employment with the Department.

2. In October, 1996, Berumen's position was submitted for audit and reclassification. After a review of the position description questionnaire and audit, a recommendation was made to reallocate the position to the classification of Correctional Support Electrical Supervisor II.

3. On November 20, 1996, the new position of Correctional Support Electrical Supervisor II was posted to announce the opening of the position. Applications for the position were accepted through November 26, 1996. A copy of the announcement was received at AVCF at this same time. AVCF managers realized that Berumen did not possess one of the minimum qualifications for the newly announced position of Correctional Support Electrical Supervisor II. Berumen did not possess a journeyman electrician's license.

4. Berumen's immediate supervisor, Gordon Wallace, requested that the Department's Human Resource Specialist, Marilyn Mullay, cancel the reallocation. This request was made because Berumen lacked the minimum qualifications for the position. The announcement was canceled. Marilyn Mullay rewrote the position description placing the position in the job classification of Telecommunications Electronics Specialist II.

5. On November 26, 1996, the position description questionnaire for the Telecommunications Electronics Specialist II position was signed by Berumen indicating that the position description questionnaire accurately reflected the duties assigned to the position. The PDQ was sent to the personnel department on December 5, 1996.

6. On January 9, 1997, a position classification report was issued allocating the position to the class of Telecommunications Electronics Specialist II. This position required lead work experience. On January 13, 1997, Berumen supervisor, John Hadley, the AVCF Associate Superintendent, presented the classification report to Berumen for review and signature. Berumen refused to sign the class placement report.

7. The position classification report provided an explanation of the process for appealing the classification decision. Berumen did not grieve or appeal the classification decision.

8. The announcement for Berumen's position as a Telecommunications Electronics Specialist II was made on January 20, 1997. The announcement provided that applications for the

position would be accepted through January 25, 1997. Berumen did not apply for the position.

9. Berumen did not apply for the position because he did not believe that he would be selected. He felt that his treatment in the Department was discriminatory and that the reallocation decisions were being made to eliminate him from the work place. Berumen also believed that he did not possess the minimum qualifications for the position. Berumen had lead worker responsibility over three inmates and one classified state employee. In or around 1995, Berumen's lead work responsibility was removed. He was no longer regularly assigned inmates or classified employees to assist him in the performance of his duties.

10. On February 11, 1997, the time period for applying for the position expired and Berumen failed to apply. An application for the position was faxed to him for completion and submission. The personnel department reopened the application process in order to provide Berumen additional time in which to make application for the position. Berumen again did not apply for the position.

11. On February 26, 1997, Marilyn Mullan, the Department's Human Resource Specialist, sent Berumen a memorandum. The memorandum advised Berumen that his application for the position had not been received following the second posting of the position. The memorandum further advised that he had been given ten days from the January 14, 1997, reallocation decision to appeal that decision, which he had not done, and, therefore, the position would be posted as a promotional opportunity. Mullan advised Berumen that applications for the position would be accepted through March 7, 1997. Mullan warned Berumen that if he failed to apply for the position he would be advised of his lay off and bumping rights.

12. Berumen did not apply for the Telecommunications Electronics Specialist II position and a lay off resulted. On March 12, 1997, Berumen was provided written notice that he would be laid off from his position effective April 26, 1997. Berumen's name was placed on the reemployment list for a one year period.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden of proof is on Complainant in a case involving his layoff to establish that the agency's decision was improper. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); 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).

Complainant also had the burden to establish that Respondent's actions were discriminatory and harassing. A prima facie case of employment discrimination is established through the following facts: 1) that the Complainant belongs to a protected class; 2) that he was qualified for and applied for a position for which the agency was seeking applicants; 3) that Complainant was rejected for the position; and 4) that the agency filled the position with an applicant not a member of the protected group. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Many different articulations of the prima facie case of practices proscribed by Board Policy 11-1 exist, varying with the context of the employment decision and the type of proscribed practice involved. The essence of the prima facie case is that the employee presents circumstantial evidence sufficient to generate a reasonable inference by the fact finder that the employer used prohibited criteria in making an adverse decision about the employee. Thus, the unifying themes of the various manifestations of the prima facie case are that the employee is a member of a protected group and that the employer treated that employee differently from other members outside that protected group under the same or similar circumstances, to the employee's detriment.

Complainant contends that Respondent acted improperly in forcing him out of his position and that the Department's actions were racially discriminatory. Complainant maintains that in January, 1997, Respondent acted improperly in its decision to remove his telecommunications duties. Complainant contends that the removal of these duties and other adverse actions taken by Respondent were intended to result in his lay off. Complainant contends that he protested the reallocation decision by not applying for the Telecommunications Electronics Specialist II position. Complainant maintains that, instead of appealing the classification decision to the State Personnel Director, he wants the State Personnel Board to determine the propriety of the Respondent's actions.

Complainant urges the undersigned to find that he established that the Department's actions with regard to the reclassification of his position and his lay off were arbitrary, capricious, and contrary to rule and law. As evidence in support of Complainant's contentions, he points to the conflicts he had with his supervisor during his employment, allegedly unfounded complaints lodged by the communications director about the quality of Complainant's work, and the fact that following his layoff, he was instructed not to enter AVCF.

Finally, Complainant contended that because he filed a complaint in December, 1995, about work place harassment, lack of fire protection safety at AVCF, and lack of staff or inmate support for the completion of assignments, he was retaliated against in the terms and conditions of employment and through the decision to lay him off.

Respondent moved to dismiss the appeal at the completion of Complainant's case in chief. Respondent contended that Complainant failed to present any evidence that the lay off was arbitrary, capricious, or contrary to rule or law. Respondent further contended that Complainant failed to present evidence of discrimination, harassment, or retaliation.

The presentation of Complainant's case in chief took approximately seven hours, from 9:00 a.m. to 6:30 p.m. During this time, Complainant testified in his own behalf and called numerous witnesses to testify at hearing. Despite the volume of evidence presented, Complainant failed to present any evidence from which it could be concluded that the lay off decision was arbitrary, capricious, or contrary to rule or law. Nor was there evidence of discrimination, harassment, or retaliation. To the contrary, the evidence established that Respondent made effort to ensure the position was reclassified at a level for which Complainant possessed the minimum qualifications and then took extraordinary steps to encourage Complainant to apply for the reallocated position.

The evidence established that Complainant and his immediate supervisor had interpersonal difficulties because of Complainant's refusal to take direction and to respond positively to criticism. There was no evidence that these conflicts arose because of harassment, race discrimination, or arbitrary action.

The evidence presented by Complainant established that in 1995 Complainant lodged a complaint pertaining to work place harassment and facility safety. A panel was convened by AVCF's superintendent to consider the allegations. Some of Complainant's allegations

were sustained by the panel and recommendations for correcting Complainant's working conditions were implemented.

At hearing, Complainant presented no evidence from which it could be concluded that there was a connection between the filing of the 1995 grievance and the decisions made with regard to his position in 1997.

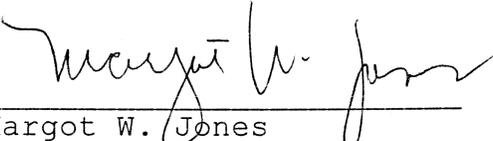
CONCLUSIONS OF LAW

1. Complainant failed to establish that Respondent's decision to lay him off was arbitrary, capricious, or contrary to rule or law.
2. Complainant failed to present any evidence that he was subjected to discriminatory treatment, retaliation, or harassment.

ORDER

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

DATED this 2nd day of
September, 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 2nd day of September, 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:

Gerald Berumen
701 S. 9th
Rocky Ford, CO 81067

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

Diane Michaud
Assistant Attorney General
Department of Law
1525 Sherman St., 5th Floor
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