

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B153

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EUGENE GENO GEBININE,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
OFFICE OF YOUTH SERVICES,
MOUNT VIEW YOUTH SERVICES CENTER,

Respondent.

THIS MATTER came on for hearing on January 29, 1998 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Diane Marie Michaud, Assistant Attorney General. Complainant appeared and was represented by Paul A. Baca, Attorney at Law.

Respondent's witnesses were Lakewood Police Agent David Mowery and Maurice Williams, formerly Assistant Director of Mount View Youth Services Center.

Complainant testified on his own behalf.

Respondent's Exhibits 1 through 4 and Complainant's Exhibit D were stipulated into evidence.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, a disciplinary suspension is substituted for the termination.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether either party is entitled to an award of attorney fees and costs.

STIPULATED FACTS¹

1. On March 13, 1997, complainant was arrested by the West Metro Drug Task Force, which operates out of the Lakewood Police Department. Complainant was charged with Possession of a Controlled Substance with Intent to Distribute.
2. On March 13, 1997, complainant was placed on administrative suspension with pay, effective the same date.
3. Complainant was advised by letter that he had been scheduled for a predisciplinary meeting on April 3, 1997, which was later rescheduled to April 8, 1997.
4. Two meetings were held in conjunction with Rule 8-3-3. On advice of counsel, complainant did not address impending issues at the April 8 meeting because of pending criminal charges against him.

¹ Stipulated facts are conclusive upon the parties and the tribunal. *Faught v. State*, 319 N.E.2d 843, 846-47 (Ind. App. 1974).

5. At the Rule 8-3-3 meeting held on May 6, 1997, the complainant admitted to having a substance abuse problem with cocaine for the past four years.

6. The complainant did not seek assistance to address his substance abuse problem until mid-April 1997.

7. Complainant's position was Security Services Officer at Mount View Youth Services Center.

8. The address of Mount View Youth Services Center is 3900 South Carr in Lakewood.

FINDINGS OF FACT

1. Complainant, Eugene Geno Gebinine, was employed by respondent, Department of Human Services, Division of Youth Corrections (formerly Office of Youth Services), Mount View Youth Services Center (MVYSC or Mount View), from February 27, 1984 until he has dismissed from employment on May 15, 1997.

2. MVYSC is a detention facility for juveniles from ten to eighteen years of age. All have been charged with illegal activity. Many have been involved in the use of drugs or alcohol.

3. As a Security Services Officer I, Gebinine provided safety and security for the residents of Mount View. His duties, which did not change throughout the duration of his employment, were essentially to escort the residents from place to place within the facility and keep track of their whereabouts. He did not have any counseling functions and was not rated on his counseling skills in his performance evaluations.

4. Gebinine worked three days per week. He worked an eight-hour shift on Mondays beginning at 7:00 a.m. and a sixteen-hour shift each on Tuesdays and Thursdays beginning at 3:00 p.m.

5. During his thirteen years of employment at MVYSC, Gebinine received ratings of either Commendable or Outstanding on his annual performance appraisals. Approximately five years ago he was named Employee of the Year at Mount View. There have been no prior corrective or disciplinary actions taken against him.

6. On March 13, 1997, at 2:30 a.m., Gebinine was arrested at the Cuckoo's Nest, a Lakewood bar, for the possession of cocaine with intent to distribute. The Cuckoo's Nest is two to three miles from Mount View.

7. An officer at the Lakewood Police Department contacted Mount View with information that a Mount View employee had been arrested.

8. As the assistant director of MVYSC from October 1996 until April 1997, Maurice Williams was delegated the appointing authority to impose disciplinary actions. In order to ensure continuity, Williams acted in this capacity beyond his employment at Mount View.

9. Williams gave Gebinine written notice of a predisciplinary meeting for April 3 to address "information that you were involved with the Possession of, and Selling of Controlled Substances." (Exhibit 3.) The meeting was rescheduled twice and finally held on May 6, 1997.

10. On April 28, 1997, following a drug treatment evaluation, Gebinine entered a drug treatment program at Bethesda Hospital. The program consisted of daily group and individual therapy from 8:30 a.m. to 4:30 p.m. until May 9. He then enrolled in a ten-week program at Presbyterian/St. Luke's Hospital where he attended therapy sessions three times per week. Next, he entered a 20-week after-care program involving therapy one night per week. There are four sessions remaining in the after-care program.

11. At the R8-3-3 meeting, Gebinine admitted to the possession of cocaine on March 13 and to having used cocaine for the past four years. He denied intending to distribute or distributing

the drug. He told Williams that he had never used cocaine on the job and had not sought treatment for his addiction because of his personal denial that he had a problem. He informed Williams that he was currently in drug treatment.

12. Williams decided that he had no alternative but to terminate Gebinine's employment. He concluded that Gebinine could not work effectively with the Mount View residents when he, himself, had engaged in illegal activity involving drugs. The decision was based upon the possession and use of a controlled substance, and not the distribution or intent to distribute drugs. Williams also felt that Gebinine's continued employment would lower the morale of other staff members and damage the public's image of the agency.

13. Gebinine neither sold cocaine nor evinced an intent to sell.

14. Effective May 15, 1997, the appointing authority terminated complainant's employment, finding a violation of Rule 8-3-3(C)(1), "Failure to comply with standards of efficient service or competence," and Rule 8-3-3(C)(iii), "Inability to perform duties assigned includes being charged with a felony or any other offense involving moral turpitude, when such action or offense adversely affects the employee's ability or fitness to perform duties assigned or has an adverse effect on the agency should the employee continue such employment." (Exhibit 4.)

15. Gebinine subsequently accepted a plea bargain in which he pled guilty to the possession of eight ounces of marijuana, a class 5 felony. On November 13, 1997, he was sentenced to three years of probation and 100 hours of community service.

16. In other circumstances, MVYSC has employed persons convicted of a felony.

DISCUSSION

In this disciplinary proceeding, the burden is on respondent to prove by preponderant

evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). When the evidence weighs evenly on both sides of a controversy, the fact finder must resolve the question against the party who has the burden of proof. *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980).

I.

Complainant first argues that the disciplinary action should be rescinded because the appointing authority had decided to dismiss him long before the predisciplinary meeting was held. While there is evidence to suggest that the appointing authority predetermined the outcome of the R8-3-3 meeting, predisciplinary meetings lack due process by their very nature. They are information-exchange meetings, not formal hearings. For instance, the appointing authority is not constitutionally required to present all of the evidence. Addressing this issue, the Colorado Court of Appeals held:

Such due process deficiency is sustainable only if there is an opportunity for a post-termination evidentiary hearing before a neutral third party, at which the authority must present and support its case.

Kinchen v. Department of Institutions, 867 P.2d 8 (Colo. App. 1993), *aff'd*, 886 P.2d 700 (Colo. 1994).

Complainant received a post-termination evidentiary hearing before a neutral third party. The judge heard and considered testimony and argument from both parties. Complainant received his constitutional due process at this hearing. As a result, there was no due process violation.

II.

Complainant next contends that, under this case scenario, the imposition of the maximum penalty possible is arbitrary and capricious and that respondent, as well as complainant, comes out a loser.

Complainant was dismissed for failure to comply with standards of efficient service or competence and for inability to perform assigned duties due to being charged with a felony. With respect to the former, respondent asserts that a person who deals with juveniles, such as the Mount View residents, serves as a role model and should not be allowed to use cocaine.

Unlike a case in which an employee is disciplined for the final conviction of a felony under Rule 8-3-3(C)(4), 4 Code Colo. Reg. 801-1, where the agency only has to prove that the conduct *could* adversely affect the employee's ability to perform the job, an employee may be disciplined under Rule 8-3-3(C)(3)(iii), 4 Code Colo. Reg. 801-1, for being charged with a felony, as here, *only when* the employee's conduct actually has such effect.

This case centers on off-duty conduct. There are no allegations that complainant ever used or possessed an illegal substance at work. There are no allegations that his use of cocaine adversely affected his job performance. He has an exemplary thirteen-year employment record with the agency. As a security officer, he escorted, but did not counsel, the Mount View residents. There is a lack of substantial evidence to prove that the conduct for which he was disciplined prevents him from performing his job as efficiently and effectively as ever. Additionally, the incidents of his arrest and plea were not publicized.

The appointing authority's main concern was the impropriety of a drug user being involved with juveniles, many of whom were incarcerated for drug-related activity. Lip-service directed by counsel to the contrary, the appointing authority's overall testimony infers that, because of his pre-conceived notions, he never seriously considered an alternative to termination, and will not do so in future cases. Yet there was no evidence of the existence of any agency rule or regulation that would call for complainant's immediate dismissal or that advised him of such a prospect.

Although there was no credible evidence that the Mount View residents would necessarily find out about complainant's conviction, respondent presumes that, if they did, they would think, "If he can do it, then so can I." But he cannot do it. He was punished by society. A juvenile could just as easily take a positive view, thinking that life is not over just because of a mistake and that there is still a chance to lead a productive life. By analogy, as the appointing authority testified on cross-examination, a former drug user can become a good drug counselor.

The appointing authority failed to candidly consider the alternatives to termination with the governing factors set forth in Rule 8-3-1, 4 Code Colo. Reg. 801-1. The grounds relied upon for immediate dismissal were insufficient in the totality of the circumstances.

Complainant has a lengthy record of commendable or better job performance. Inasmuch as past behavior is the best predictor of future behavior, it can reasonably be expected that his high level of satisfactory performance will continue. He was not charged with acts of violence; the only known victim is himself. At the same time, his use of an illegal substance should not be implicitly condoned. Accordingly, taking into account the seven factors governing the decision of whether to correct or discipline an employee, I conclude that some discipline is warranted, but short of termination. *See* Rule 8-3-1, *supra*.

This is, and needs to be, a case-by-case determination. An unspecified practice calling for the automatic termination of a state employee under these circumstances is not justified and is not to the benefit of the employer.

Pursuant to Rule 8-3-4(A)(1), 4 Code Colo. Reg. 801-1, a disciplinary suspension to the date of this decision will be substituted for the dismissal. The period of suspension may not exceed 135 days. *Rose v. Department of Institutions*, 826 P.2d 379 (Colo. App. 1991). This decision presumes that complainant is a non-exempt employee as defined by the Fair Labor Standards Act and that the order consequently is in compliance with Rule 8-3-3(A)(1), 4 Code Colo. Reg. 801-1. Evidence on this subject was not introduced at hearing.

III.

Respondent submits as a subsequent ground for termination complainant's felony conviction which, pursuant to Rule 8-3-3(C)(4), may, but does not automatically, serve as the basis for a dismissal. Relying on *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 510 (Colo. 1997)(Mullarkey, J., dissenting), respondent argues that the application of the after-acquired evidence doctrine results in the termination of complainant's employment.

In *Crawford, supra*, the Colorado Supreme Court recognized the after-acquired evidence doctrine for the first time. The court limited its holding to cases involving resume fraud, *i.e.*, pre-hire conduct, in cases of private employment. The issue of post-hire misconduct was not resolved. The *Crawford* decision does not address issues surrounding the application of the after-acquired evidence doctrine to public employment cases, where the employee possesses a constitutional property interest in continued employment giving rise to such due process rights as written notice of charges, a predisciplinary meeting and opportunity to be heard before discipline is imposed.

The after-acquired evidence doctrine either shields the employer from liability altogether or limits the relief available to the employee when, after termination, the employer learns about employee wrongdoing that would have caused the employer to dismiss the employee. If the employee's conduct consists of resume fraud, the doctrine gives the employer a defense if the employer would not have hired the employee had it known of the fraud.

The *Crawford* court held that after-acquired evidence of resume fraud is an absolute defense to an employee's claims of breach of contract or promissory estoppel. In addition to the after-acquired evidence doctrine, the court relied on the common law principles of fraud in the inducement of a contract, rescission and the equitable theory of unclean hands. The court found that its decision was not governed by *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S.Ct. 879 (1995), in which the U.S. Supreme Court ruled that after-acquired evidence of post-hire misconduct is only a partial defense to federal discrimination claims in private employment. *McKennon* was distinguished on the ground that public policies underlying federal discrimination

laws were not present in *Crawford*.

Crawford was decided in the context of employment at will. Under the employment-at-will doctrine, the law of Colorado, an employee who is hired for an indefinite period of time is an “at will” employee, “whose employment may be terminated by either party without cause and without notice, and whose termination does not give rise to a cause of action.” *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987). In contrast to complainant Gebinine, plaintiff Weissman was an “at will” employee.

In adopting the after-acquired evidence doctrine for cases of resume fraud involving claims for breach of implied contract and promissory estoppel, the *Crawford* court explicitly did not reach the scope of the application of the doctrine to wrongful discharge claims.

In sum, under the current state of the law, the after-acquired evidence doctrine has no application to this case.

IV.

C.R.S. § 24-50-125.5 of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceedings arose, or the appeal of such action, was instituted frivolously, in bad faith, maliciously or as a means of harassment, or was otherwise groundless. In the present matter, an award of fees and costs is not warranted.

CONCLUSIONS OF LAW

1. Respondent’s action was arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was not within the range of alternatives available to the appointing authority.

3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

The action of the appointing authority is rescinded. A disciplinary suspension is substituted from the date of termination through the date of this decision, not to exceed 135 days. Complainant shall be reinstated with full back pay and benefits except for the period of suspension and less any income he would not have earned or received but for the termination.

DATED this ____ day of
March, 1998, at
Denver, Colorado.

Robert W. Thompson, Jr,
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Paul A. Baca
Attorney at Law
1900 Grant Street, Suite 610

Denver, CO 80203

and in the interagency mail, addressed as follows:

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