

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B004

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DONNA J. PENDRY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
TRUSTEES OF THE UNIVERSITY OF NORTHERN COLORADO,
UNIVERSITY OF NORTHERN COLORADO,

Respondent.

The hearing in this matter was held on January 27 and 28, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Robin Rossenfeld, assistant attorney general. Complainant, Donna J. Pendry, was present at the hearing and represented by Richard K. Blundell, attorney at law.

The following employees of the University of Northern Colorado (UNC) were called as witnesses at hearing: Beth Hellwig Olson; Dennis Hazlett; and Wade Frary. Respondent also called the complainant, Donna Pendry, to testify at hearing. Complainant testified in her own behalf and called Cheryl Jackson and Trudy Higgins, UNC employees, to testify at hearing. Complainant's witness, Bill Hughes, testified by telephone.

The parties stipulated to the admission of respondent's exhibits 3, and 7 through 22. Respondent's exhibits 1, 2, 4, 5, and 6 were admitted into evidence without objection. Complainant's exhibit A was admitted into evidence over objection. Complainant's exhibit B was admitted into evidence on the administrative law judge's (ALJ) motion.

MATTER APPEALED

Complainant's consolidated appeal pertains to a two week disciplinary suspension and corrective action, and termination of her employment for wilful misconduct and insubordination.

ISSUES

1. Whether complainant engaged in the conduct for which discipline was imposed;
2. Whether the conduct proven to have occurred constitutes wilful misconduct and insubordination;
3. Whether the decision to impose a two week suspension and corrective action and 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 and costs.

PRELIMINARY MATTERS

1. On January 24, 1997, complainant moved to take an evidentiary deposition of Lynn Settje or to continue the evidentiary hearing. Complainant moved to take the witness' deposition because the witness was not available to appear at the evidentiary hearing. On January 24, 1997, respondent moved to quash subpoenas served on witnesses to appear at hearing. Respondent contended that the subpoenas should be quashed because complainant failed to endorse the witnesses in the prehearing statement.

Complainant's January 24, motion to take evidentiary deposition or to continue the hearing was denied. Respondent's January 24, motion to quash was deemed to be a motion to strike witnesses not endorsed in complainant's prehearing statement. The motion was granted. Complainant was not permitted to call in its case in chief witnesses not previously endorsed in complainant's prehearing statement.

FINDINGS OF FACT

1. Donna Pendry (Pendry), the complainant, worked at UNC for 23 years. At the time relevant to this appeal, from 1993 to 1996, Pendry worked as an administrative assistant III in the student activities office. Pendry worked in the student activities office since January, 1988.

2. Beginning in 1992, Beth Hellwig Olson (Hellwig Olson) was the director of the student activities office. Pendry was supervised on a daily basis by Hellwig Olson. Dennis Hazlett (Hazlett), the personnel director for UNC, is the appointing authority for Pendry's position.

3. The positions in the student activities office are assigned wide ranging duties and responsibilities. The employees who work there are frequently placed under stress by the demands of their positions. The office serves the needs of the students who attend UNC and is funded by student fees. The fees are allocated to this office on the basis of a vote of the student body.

4. During Pendry's 23 years of employment with UNC, she received job performance ratings, with overall ratings of "outstanding". Pendry was the first employee supervised by Hellwig Olson who was a part of the state classified system. Hellwig Olson was not familiar with the performance planning and appraisal process. During her supervision of Pendry, Hellwig Olson had concern about her job performance. Pendry's technical performance of her job duties were accomplished in an outstanding manner. However, her interpersonal skills were lacking. Using the weights in the performance planning and appraisal form (PACE) that were established by Hellwig Olson's predecessor, Hellwig Olson consistently rated Pendry's job performance as "outstanding". However, each year, beginning in 1994, Hellwig Olson made comment in the narrative portion of the PACE, noting the need for Pendry to develop her interpersonal skills.

5. The rating covering the period from July, 1993, to July, 1994, noted, "Phone skills could be improved. I would like to see more participation from Donna in our staff meetings. I believe she is a bit introverted and so it is difficult to speak out." In the rating covering the period from August, 1994, to August, 1995, Hellwig Olson noted the following about Pendry job performance, "Problems sharing work. Attitude is not consistent - mood swings change daily. Not always customer service oriented. Needs to cross train with other secretary in the office to provide coverage when out ill or on leave." In the final PACE rating, before Pendry's employment was terminated, Hellwig Olson noted, "I believe Donna could use stress management to help her cope with this very stressful job. Donna is working diligently on interpersonal communications and I see improvement. I appreciate her willingness to work on areas I've identified in the past few months."

6. Pendry resented Hellwig Olson's supervision of her. Pendry did not believe that Hellwig Olson had the skill necessary to supervise her. Pendry was frustrated by the fact that Hellwig Olson was required to attend many meetings and was not readily available to Pendry in the office. Hellwig Olson lacked the skills needed to operate the computer system used in the student activities office. Pendry resented being called on by Hellwig Olson to assist her in operating the computer or in accessing documents.

7. Beginning as early as 1993, Hellwig Olson requested that Pendry and all support staff in the student activities office provide her with passwords to their computers. Hellwig Olson wanted to make sure that the information maintained by the student activities office was accessible to the office staff at all times.

The other members of the staff of the student affairs office routinely provided Hellwig Olson with passwords to their computers, but Pendry refused to do so.

8. Beginning in 1993, Hellwig Olson requested that Pendry provide her with keys to the offices and desks in the student activities office. Pendry refused to provide the keys. Hellwig Olson requested that Pendry provide her with the password to access the voice mail systems for the phones for which Pendry was responsible.

Pendry refused to provide the voice mail passwords to the message lines to the student affairs office, student activities office and the legal aide office.

9. On six occasions during the sixteen months preceding the April, 1995, Hellwig Olson met with Pendry to discuss her job performance concerns. In April, 1995, Hellwig Olson had exhausted all avenues for encouraging Pendry to improve her job performance in the area of interpersonal relationship. She wrote Dennis Hazlett to request that corrective action be imposed on Pendry.

10. In an April 14, 1995, memorandum to Hazlett, Hellwig Olson cited numerous job performance problems to support her request for corrective action. Pendry was insubordinate to Hellwig Olson on numerous occasion, advising Hellwig Olson that she hates her job and she hates Hellwig Olson. Hellwig Olson further advised Hazlett that Pendry breached confidentiality, was rude to students and staff, did personal work for students during working hours, sabotaged projects she did not want to work on, refused to share information and to cross train co-workers, and refused to provided necessary work related information.

11. Hazlett met with Pendry on April 18, 1995, to discuss Hellwig Olson's concerns about her job performance. Following the meeting, on May 2, 1995, Hazlett imposed a corrective action. He concluded that Pendry needed to correct her job performance and that she was insubordinate in her relations with Hellwig Olson. Hazlett placed Pendry on a corrective action for a 30 day period. The corrective action specified that Pendry must show improvement in the following area:

A. You must perform all duties, jobs, and assignments given you by your supervisor including requests for information and access to supplies, materials, references, and computer systems.

B. Properly observe and follow all University, Student Affairs and Student Activities procedures, directives, rules and regulations, including your PACE performance planning factors, in the performance of your duties and your interactions with the public, students and all other university employees.

12. Pendry's job performance improved for a period immediately following imposition of the April, 1995, corrective action. Thereafter, it deteriorated. Pendry persisted in her refusal to provide Hellwig Olson with the passwords and keys.

13. On May 18, 1995, Hellwig-Olson reviewed Pendry's job performance. In a memorandum of that date, Hellwig-Olson noted her performance expectations for Pendry and noted areas that Hellwig-Olson would improve on. She noted that Pendry was courteous to most people in the student activities office and was using diligence to execute her job duties. Hellwig Olson requested that certain performance objectives be completed by August 10, 1995. She asked that Pendry attend three workshops at the employer's expense, she requested the password to Pendry's computer at the close of business on May 18, 1995, she asked Pendry to identify six areas for cross training of the office staff, she requested the keys to the modular office furniture in the student activities office by June 10, 1995, she also requested the keys to the office cabinets, and she moved Pendry's office to the Off Campus Housing Office where Pendry would have less distractions.

14. During the summer of 1995, Pendry's mother had a stroke and required a lot of care and attention from Pendry. Pendry was not able to meet the deadlines required by her work. Nonetheless in August, 1995, Hellwig-Olson gave her a job performance rating of "outstanding".

15. Pendry persisted in some of her negative uncooperative behavior. She turned over to Hellwig-Olson a password to a computer she used. However, the password expired shortly thereafter and Pendry refused to turn over the new passwords to Hellwig Olson. Pendry was asked to cross train staff members in the student activities office. She refused to do so. She also did not provide the keys to the modular furniture, Pendry's desk, or to the offices in the student activities office.

16. In February, 1996, when a secretary resigned her position in the student activities office, Pendry moved from the Off Campus Housing Office back to the student activities office. The vacant secretarial position was filled by another secretary. Pendry refused to speak to the new secretary. Hellwig Olson attempted to mediate the dispute between Pendry and the new secretary. But, when Hellwig Olson set up a meeting with them, Pendry refused to attend the meeting.

17. Pendry made disparaging remarks about Hellwig Olson and the assistant director of student activities, Wade Frary. Pendry made these remarks in the open area where students, members of the public and staff could overhear her.

18. In May, 1996, numerous positions were abolished on the UNC campus in order to reduce costs. Pendry's position was one of those abolished. Pendry received notice of the abolishment of her position on May 31, 1996. Pendry did not appeal the abolishment of her position. Pendry was offered a position to which she had bumping rights at the Marcus Garvey House.

19. In response to information that positions would be abolished in the student activities office, on May 27, and June 3, 1996, Pendry wrote a memorandum to Hazlett, Hellwig Olson, Wade Frary and other UNC personnel complaining of fiscal waste and work related stress in the student activities office. In the June 3, 1996, memo from Pendry, she indicated that she would accept the position in the Marcus Garvey House.

20. Pendry was not performing her job in the student activities office in a satisfactory manner in June, 1996. Proceeding on the belief that Pendry would accept the position and remain in the student activities office position for only 45 more days, on June 6, 1996, Hellwig Olson wrote to Pendry advising her of her expectations related to her job performance during the remaining period of time.

21. In the June 6 letter to Pendry, Hellwig Olson advised her of the proper way to request leave and asked that she comply with the procedure. She requested that Pendry prepare a transition notebook which would clarify the duties of Pendry's position. Hellwig Olson reiterated her request to receive the keys to cabinets and offices and passwords to Pendry's computer and office phone lines. Hellwig Olson attempted to give the June 6 letter to Pendry. However, Pendry refused to accept the letter.

22. On June 10, 1996, Pendry advised Hazlett that she would not accept the position at the Marcus Garvey House. She indicated that

she would accept a 10 month position in the student activities office as an administrative assistant.

23. On June 11, 1996, Hellwig Olson wrote to Hazlett advising him of continued job performance problems with Pendry. Hellwig Olson requested that Hazlett consider terminating Pendry's employment. Hellwig Olson reported to Hazlett the following information: that Pendry deleted all files from the student activities office computer regarding the student representative council and the greek system; Pendry claimed that she deleted these computer files because she did not need the files anymore; Pendry refused to provide her with a list of the deleted files by June 7, 1996; and Pendry continued to make disparaging remarks about her job and Hellwig Olson to staff, students, and members of the public.

24. On June 14, 1996, Pendry wrote back to Hellwig Olson. She responded to Hellwig Olson's June 6 letter in which Hellwig Olson advised her of her expectation with regard to Pendry's job performance. The tone of the June 14 memorandum was defiant and obstructionist.

25. Hazlett met with Pendry for a Board Rule, R8-3-3 meeting on June 14, 1996. At this meeting, Pendry explained that Hellwig Olson is incompetent as a manager, that Pendry did not withhold information from Hellwig Olson, and that she was performing her job competently.

26. Following a R8-3-3 meeting, on June 20, 1996, Hazlett decided to impose a 2 week disciplinary suspension. Hazlett determined that Pendry sabotaged the student activities office computer files, that she engaged in wilful misconduct and insubordination. The suspension was served from June 22, to July 5, 1996.

27. On June 21, Wade Frary served Pendry with a letter from Hellwig Olson. Hellwig Olson was out of town on June 21. The letter asked Pendry to provide Frary with the keys to her desk and to take the remainder of June 21 off from work. Before leaving the office to serve the suspension, on June 21, 1996, Pendry cleared her office area of files and equipment belonging to UNC. Pendry advised a staff member who was assisting her in taking out the files that the files would not be returned to UNC.

28. On June 21, Pendry became hysterical and showed the letter notifying her of the disciplinary suspension to students and staff in the student activities office. Pendry advised Wade Frary that she would leave the office after she killed someone. She further advised Frary that the job was so horrible that she would never return to the position.

29. On June 26, 1996, Pendry called the student activities office and advised a staff member that she had taken UNC files home to organize them. Pendry was asked for the password for the phone message system. Pendry said that the password was not needed because Pendry was picking up the messages from home.

30. An interim secretary was hired to fill in during Pendry's disciplinary suspension. The secretary could not access the computer system, it was locked with a key and there was no password access. Pendry did not leave the password to her phone, the key to the supply cabinet or the key to her desk.

31. The student activities office was required to pay information services personnel to access the computer. The student activities office had to obtain a new password for the computer and phones.

32. As a result of Pendry actions on June 21, 1996, Hellwig Olson asked Hazlett to again consider disciplinary action against Pendry. Pendry returned from disciplinary suspension on July 9, 1996. On that date, Hazlett held a R8-3-3 meeting with Pendry. At the R8-3-3 meeting, Pendry explained that she took UNC property home because some files were disorganized and Pendry wanted to organize the files. Pendry further claimed that one of the staff members of the student activities office had the keys to the office and the temporary employee was given the password to the computer. Pendry claimed that she is not an extrovert, that she likes to do her work and go home. Pendry claimed the Hellwig Olson was grasping at straws in her effort to get Pendry's employment terminated.

33. Following the R8-3-3 meeting with Pendry, Hazlett placed Pendry on administrative suspension with pay. Hazlett investigated the allegations against Pendry further by speaking to current and former employees of the student activities office. Hazlett determined that Pendry did not give the keys or password to anyone in the office. He further determined that Pendry left UNC on disciplinary suspension with UNC property and she did intend to return the property.

34. Hazlett decided to terminate Pendry's employment effective July 19, 1996. Hazlett determined that Pendry's conduct on June 21, 1996, and thereafter, constituted serious acts of wilful misconduct and insubordination justifying dismissal.

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).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

Respondent contends that it proved by preponderant evidence that complainant engaged in wilful misconduct and insubordination and that, in light of her employment record, the two day disciplinary suspension and the termination of her employment was justified.

Complainant contends that her job performance was rated as outstanding during her 23 years of employment with UNC. She contends that Hellwig Olson was an incompetent manager who could not admit her mistakes. Complainant further contends that the allegations of misconduct are not factual, but were fabricated by Hellwig Olson as an excuse to terminate her employment.

The evidence presented at the hearing amply supports the conclusion that complainant engaged in the acts for which discipline was imposed, that the conduct proven to have occurred constituted wilful misconduct and insubordination, and that the decision to terminate complainant's employment was neither arbitrary, capricious, or contrary to rule or law. Complainant was not found to be a credible witness. The testimony of her witnesses was given little or no weight because the witnesses appeared to have little knowledge of the incidents giving rise to disciplinary action or they were biased witnesses.

Despite complainant's job performance ratings, it is concluded that the discipline taken in response to her actions in sabotaging

the office files, refusing to provide passwords and keys, refusing to prepare a transition manual, and being uncooperative and insubordinate was warranted. Complainant cannot hide behind employment ratings that failed to accurately rate her job performance. Particularly, when the record is replete with evidence that the problems with complainant's job performance were brought to her attention, discussed with her repeatedly, and that she failed to make the necessary improvements.

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that complainant engaged in the conduct giving rise the disciplinary actions.
2. Respondent established that complainant's conduct constituted wilful misconduct and insubordination.
3. Respondent's decision to impose a two week disciplinary suspension and to terminate complainant's employment was neither arbitrary, capricious or contrary to rule or law.
4. Neither party is entitled to an award of attorney fees and cost.

ORDER

The actions of the agency are affirmed. The appeals are 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 this _____ 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:

Richard K. Blundell
800 - 8th Ave., Suite 202
Greeley, CO 80631

and in the interagency mail, addressed as follows:

Robin Rossenfeld
Office of the Attorney General
State Services Section
1525 Sherman St., 5th Floor
Denver, CO 80203
