

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 97B062

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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DEBBIE EGLESTON,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
REGENTS OF THE UNIVERSITY OF COLORADO,  
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.  
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Hearing in this matter convened on March 5, 1997, and concluded on May 8, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Robert S. Chichester, Senior Assistant University Counsel. Complainant, Debbie Egleston, was present at the hearing and represented by Carol Iten, Attorney at Law.

Respondent called the following employees of the University of Colorado at Boulder ( the University) to testify at hearing: Jane Lesh; Randall Stevens; Donald Diebert; Bobbie Lee Atkinson; Paul Hindman; and Alethea Litz. Complainant testified in her own behalf and called no other witnesses to testify at hearing.

Respondent's exhibits 1 through 9, 11, 13, 14, 16 through 29, 31, 34 through 39, 41, and 42 were admitted into evidence without objection. Respondent's exhibits 10, 40, and 43 were admitted into evidence over objection. Complainant's exhibits A and G were moved into evidence by Respondent. Complainant's exhibits B through F, I, K, and L through M were admitted into evidence without objection. Complainant's exhibit N was admitted into evidence over objection.

**MATTER APPEALED**

Complainant appeals her termination from employment.

## **ISSUES**

1. Whether Complainant's job performance warranted action under State Personnel Board Rule, R8-2-5.
2. Whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law.
3. Whether evidence obtained after the date of Complainant's termination was admissible at hearing to provide justification for Complainant's termination, precludes Complainant's reinstatement to her position, or stops any back pay award.
4. Whether Complainant is entitled to an award of attorney fees and costs under §24-50-125.5 C.R.S. (1988 Repl. Vol. 10B)

## **PRELIMINARY MATTERS**

1. On February 28, 1997, during a telephone conference with the parties' representatives, Complainant stipulated that the appeal does not raise issues under the Americans with Disabilities Act (ADA) or the Family Medical Leave Act (FMLA).
2. On February 26, 1997, Complainant moved to compel discovery of information relating to the investigation that led to Complainant's termination from employment. During a telephone conference held on February 28, 1997, the parties stated their positions with regard to Complainant's Motion to Compel. Respondent contended that Complainant's discovery request was not timely made nineteen days prior to hearing. Respondent further contended that Complainant sought discovery of privileged and confidential information. Respondent maintained that Complainant was attempting to discover information concerning conversations between the appointing authority and University counsel. Finally, Respondent contended that Complainant was seeking information relevant to proving a claim under the ADA and FMLA. Respondent maintained that ADA and FMLA claims were not raised by Complainant and therefore should not be discoverable.

Complainant conceded that she waived the right to raise any claims under the ADA or FMLA. Complainant contended that she entitled to discover information pertinent to the decision to terminate her employment. It was Complainant's contention that she could not properly defend herself against the action taken without this information. Complainant contended that she was not attempting to invade the attorney-client privilege through her discovery request.

Complainant's motion to Compel discovery was granted. Respondent was directed to provide the requested information on or before March 4, 1997.

3. Respondent was precluded at hearing from presenting evidence of conduct occurring after the date Complainant's employment was terminated. Respondent contended that under *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), it was entitled to present evidence of Complainant's conduct discovered after the date of termination to support the termination decision, to preclude an award of back pay, and to preclude reinstatement to her position with the University. Complainant opposed Respondent's efforts to present this evidence.

Complainant, a public employee with a protected property interest in her continued employment, is entitled to pretermination due process under *Loudermil v. Cleveland Board of Education*, 470 U.S. 532 (1985). For respondent to be permitted to use evidence acquired after the date of termination to support the termination decision denies Complainant her right to due process.

#### **FINDINGS OF FACT**

1. Debbie Egleston (Egleston), the Complainant, began her employment with the University in September, 1989. She was employed as an administrative assistant III until the date of her termination on November 11, 1996. Egleston worked in the University's Office of Human Resources Information Management and Compensation Services.

2. The appointing authority for Egleston's position was Donald Diebert (Diebert), the Director of the Office of Human Resources Information Management. Jane Lesh (Lesh) is the office manager for that office. Egleston worked under Lesh's supervision throughout her employment at the University. Donald Diebert and Lesh prepared Egleston's performance ratings during her tenure with the University.

3. Egleston began her employment with the Human Resources Office in 1989 as a Word Processor A. During the job performance evaluation period from October, 1989, to March 31, 1990, Lesh evaluated Egleston's job performance. Egleston received an overall rating of "commendable". This performance rating was dated May 29, 1990. It indicates that it is not an "annual" rating, but an "interim" rating completed for the purpose of Egleston's early certification to the position.

4. One year later, Egleston received an annual job performance rating in the position of Word Processor B. This rating is dated May 29, 1991. The rating covered the period from February, 1991, to May, 1991. Lesh gave Egleston an overall rating of "outstanding".

5. The following year, Egleston received an annual performance rating for her job performance in the position of Word Processor B covering the period May, 1991, to May, 1992. The rating dated June 25, 1992, gave Egleston an overall rating of "outstanding".

6. Two years later, Egleston received an annual performance rating covering the period from May, 1993, to April, 1994.<sup>1</sup> Egleston's job classification during this rating period was Administrative Assistant II. In the rating dated April 11, 1994, Egleston's job performance was rated as "outstanding".

7. In a job performance rating, dated August 8, 1995, Egleston received an annual job performance rating of "commendable". This rating covered the period from April, 1994, to May, 1995. The rating was for Egleston's job performance as an Administrative Assistant II.

8. From August, 1995, to November 11, 1996, the date of Egleston's termination from employment, she was classified as an Administrative Assistant III. In this position, Egleston was responsible for the supervision of a student worker and one classified employee. Egleston was responsible for the reception area of the Human Resources Office, Payroll and Benefits Section. Egleston, individually or through those that she supervised, was responsible for answering questions from the public or University personnel, directing members of the public to various personnel in the Payroll and Benefits Section, and keeping stocked a myriad of forms and brochures used and distributed by the section. She was expected to assist University employees in making changes to their benefit plans. She was expected to administer COBRA to ensure compliance with University, State and Federal regulations. She was also expected to maintain supplies for the daily maintenance of the Compensation Services Department.

9. In September, 1995, Egleston's father died. In 1995, Egleston was cited for driving while under the influence of alcohol. She lost her license for a period of time and was required to car pool

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<sup>1</sup>A performance rating covering the period from May, 1992, to May, 1993, was not made apart of the record by the parties at hearing

to work with a co-worker. Lesh was aware of these events. Lesh believed that she accommodated Egleston during the grieving period.

10. Lesh failed to prepare a job performance plan to cover the period from May, 1995, to January, 1996. Under the Director's Procedures, in the absence of a performance plan, Egleston received a job performance rating of "commendable" for the period from May 1, 1995, to January 23, 1996. .

11. For the period January 24, 1996, to May 1, 1996, Lesh rated Egleston's job performance as "needs improvement". Following the May, 1996, "needs improvement" rating, a corrective action was imposed on Egleston warning her of the need to correct and improve her job performance.

12. Egleston's job performance was negatively affected by the death of her father. Around the death of Egleston's father, her attendance became erratic. Thereafter, she drank alcohol excessively which also negatively affected her job performance.

13. In May, 1996, Diebert and Lesh were concerned about Egleston's health and her ability to perform her job duties because of excessive absenteeism and her erratic behavior. Egleston was directed to have her physician complete a medical certification form, certifying her ability to perform her assigned duties. On May 17, 1996, Egleston returned the medical certification form from her physician certifying that she had no medical conditions requiring treatment or medication.

14. Despite the doctor's certification to Egleston's ability to perform her job duties, Egleston continue to have job performance problems. On two occasions, Egleston contacted co-workers after working hours at their homes while she was under the influence of alcohol. During these conversations, she made inappropriate remarks, gossiping about co-workers and complaining about her working conditions. This occurred the first time in February, 1996, and again in June, 1996. Egleston was counseled about contacting her co-workers at home following the February, 1996, incident. In June, 1996, Egleston again contacted a co-worker at her home. Egleston had an ongoing personal relationship with this employee, but the relationship was strained by Egleston's behavior in the office. A six day disciplinary suspension was imposed on Egleston as a result of the June, 1996, incident.

15. From September, 1995, September, 1996, Egleston frequently violated the University's leave policy by failing to properly

contact her supervisor to advise her of her absence from work and by using excessive amounts of sick leave, annual leave, or leave without pay. Egleston also was not punctual.

16. During this same period, Egleston annoyed her co-workers by talking too loudly in the work place. Paul Hindman who sat in close proximity to Egleston found it difficult to concentrate because of Egleston's constant loud voice.

17. Egleston addressed her co-workers and University employees who came to the Payroll and Benefits Section inappropriately. She questioned the accuracy of the information provided to University employees by Payroll and Benefits Section staff. She also provided inaccurate or unclear information to University employees causing, in at least one instance, for the employee to become highly agitated.

18. Egleston's conduct in the reception area was inappropriate. On one occasion, she encouraged her co-workers to dance and sometimes ate food at her desk.

19. Prior to September, 1996, Egleston was repeatedly counseled and advised in writing about her job performance by Lesh and Diebert. In September, 1996, when Egleston's job performance continued to be unsatisfactory, she was given another job performance rating of "needs improvement". This was an interim job performance rating which covered the period from May, 1996, through September, 1996.

20. Under State Personnel Board Rule, R8-2-5, Diebert decided to hold another R8-3-3 meeting to consider disciplinary action. It was Diebert's position that since Egleston received two "needs improvement" ratings, this provided the basis for disciplinary action. Notice of an R8-3-3 meeting was provided on October 15, 1996. An R8-3-3 meeting was held on October 18, 1996. At this R8-3-3 meeting removal from Egleston's record of the June, 1996, performance evaluation was discussed. Diebert refused to remove or revise the performance rating.

21. On October 22, 1996, Egleston wrote Diebert requesting reasonable accommodation for an "existing illness". Diebert met with Egleston and her supervisors, Lesh and Alethea Litz on October 22. Egleston explained that she has a drinking problem and was participating in an outpatient rehabilitation program. Egleston requested that her work week be reduced from 40 hours to 32 hours so that she could attend doctor's appointments, rehabilitation sessions, and to reduce the stress she experienced while on the job. Egleston's request for accommodation was denied.

22. The R8-3-3 meeting was reconvened on October 25, 1996. Egleston requested that the R8-3-3 meeting be delayed while she was in treatment for alcohol dependency and to provide her time to seek a job transfer. This request was denied. On November 11, 1996, Diebert provided Egleston with notice that her employment was terminated under R8-2-5 because she received two consecutive "needs improvement" job performance ratings.

### 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 that 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).

Board Rule, R8-3-1(B), speaks to those factors which should be considered in imposing discipline on an employee. The rule provides:

The decision to correct or discipline an employee shall be governed by the nature, extent, seriousness and effect of the act, error or omission committed; the type and frequency of previous undesirable behavior; the period of time that has elapsed since a prior offensive act; the previous performance evaluation of the employee; an assessment of information obtained from the employee; any mitigating circumstances; and the necessity of impartiality in relations with employees.

Board Rule, R8-2-5(A), relied on by Donald Diebert in deciding to terminate Complainant, provides,

Employees performing at an overall level of Needs Improvement shall be given a corrective action for the initial needs improvement rating and afforded a period of time to improve

performance as provided in R8-3-2(B). If, when reevaluated, the employee's rating is Needs Improvement or Unacceptable, such rating is the basis for disciplinary action. Following the R8-3-3 meeting, absent extraordinary circumstances, the employee shall be dismissed or, at the discretion of the appointing authority, demoted if the employee has demonstrated competence at a lower level.

Respondent contends that this is not an ADA case or a case dealing with the provisions of FMLA and thus the only issue for determination is whether Respondent acted arbitrarily, capriciously, or contrary to rule or law in its application of R8-2-5. Respondent contends that it acted in a reasonable manner consistent with the provisions of R8-2-5. Respondent maintains that Complainant performed her job in an unsatisfactory manner and as a consequence received a "needs improvement" rating in June and September, 1996. Respondent further contends that Complainant received a corrective action in June, 1996, as a result of the June "needs improvement" performance rating and that she also received a six day disciplinary suspension in June, 1996. Respondent maintains that with this employment record, in September, 1996, when Complainant received a second "needs improvement" job performance rating, it was appropriate to initiate disciplinary action to terminate her employment.

Complainant contends that R8-2-5 was not properly applied to Complainant who received "commendable" and "outstanding" ratings from 1989 to 1995, experienced the death of a parent, abused alcohol for a period of time before entering rehabilitation, and suffered performance deficiencies for a nine month period from January, 1996, to September, 1996. Complainant contends that R8-2-5 should not be applied when the performance ratings relied on occur in less than a twelve month period, such as in this case where the performance ratings are dated June and September, 1996. Complainant maintains that it is arbitrary and capricious action to terminate the employment of an employee who proved to be productive and effective for six years when that employee encounters personal difficulties during a brief nine month period.

This case is similar to a State Personnel Board case number 95B026, entitled *Robert Workman v. Colorado Department of Corrections*, decided August 23, 1996. In that case, the Board affirmed an initial decision in which the termination of an employee was overturned under much the same circumstances as exist here. The employee in that case had a long history of good performance, he divorced his wife, gained custody of five children, became distracted and stressed, allowed his job performance to decline, received two "needs improvement" job performance rating in less

than a twelve month period, and was fired under R8-2-5. Also, present in that case, was the undercurrent involved in a personal conflict with his supervisor after having enjoyed years of a positive work relationship.

This case is cluttered with reams of documentation supporting the actions taken by Respondent. Three days of hearing was consumed in detailed testimony about the communications exchanged between Complainant and her supervisors. Whittled down to its simplest state, this case concerns an employee who went through a difficult period after having performed her job commendably and outstandingly for a six year period. Complainant obviously had a problem. She testified that she was reticent to come forward and admit to a drinking problem because she was embarrassed and fearful that the admission would cause her to be treated more harshly. Complainant and Lesh got along very well for at least six years, but they ceased to have a good working relationship around the time of Complainant's father's death when her attendance was erratic and thereafter when the effects of the drinking problem surfaced in the work place. The exchange of written communication suggest an unworkable relationship between them with Complainant's every move documented by Lesh, Diebert, Alethea Litz, another employee in Egleston's supervisory chain, and University counsel.

Complainant stipulated as a preliminary matter that there is no claim of disability based on alcohol dependency raised in this case. Under the facts present here such a claim would not shield Complainant from disciplinary action anyway. Employers may discipline employees for misconduct, even if the misconduct is related to the disability. See, *Maddox v. University of Tennessee*, 62 F3d 43 (6th Cir. 1995); *Ferby v. United States Postal Service*, Case No. 95-5792 1995 U.S. App. LEXIS 37079. However, in this case the facts do not support the termination. There is no doubt that Complainant experienced significant job performance problems from January to September, 1996. Yet, her exemplary six years of service with Respondent necessitates, under R8-3-1, that Complainant be provided an additional period of time in which to correct and improve her job performance, seek rehabilitation for her emotional or physical problems, seek a transfer away from the supervision of the Payroll and Benefits Unit, or take whatever further action might salvage her career in State employment.

There was no evidence that Complainant is entitled to an award of attorney's fees and cost under §24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

**CONCLUSIONS OF LAW**

1. Complainant's conduct does not warrant disciplinary action in the nature of termination under R8-2-5.
2. The decision to terminate Complainant's employment was arbitrary and capricious because it reflects the exercise of discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion.
3. Respondent may not utilize evidence acquired after the date of termination of Complainant's employment to justify her termination, to preclude her reinstatement, or to stop the award of back pay.
4. Complainant is not entitled to an award of attorney fees and costs under §24-50-125.5

**ORDER**

Respondent is directed to reinstate Complainant to her position held at the time of her termination with full back pay and benefits from the date of termination to the date of reinstatement.

DATED this \_\_\_\_\_ day of  
June, 1997, at  
Denver, CO

\_\_\_\_\_  
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 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:

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