

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 056

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CLAYTON L. KLINE,

Complainant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on March 19, 1998 at 1525 Sherman Street, B-65, Denver, CO. Respondent was represented by Assistant Attorney General Michael King. Complainant appeared and was represented by Nora V. Kelly, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary suspension without pay for a period of one (1) month and a reduction in pay grade of one (1) step for a period of six (6) months. For the reasons set forth below, Respondent's actions are upheld.

PRELIMINARY MATTERS

1. Exhibits

Admitted by stipulation were Respondent's Exhibits 1 through 4 and Complainant's Exhibits A through M.

2. Witnesses

Respondent called the following witness: Regional Transportation Director (Region 2) Mr. Ken Conyers.

Complainant testified on his own behalf and, through Counsel, called the following character witnesses: Mr. John Stacey, Complainant's senior supervisor and Mr. Warren Lowe, Complainant's supervisor.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the actions of Complainant warranted disciplinary action;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to attorneys fees and costs.

FINDINGS OF FACT

1. Complainant Clayton L. Kline has been employed by respondent Colorado Department of Transportation (CDOT) since 1974 . He is presently a Maintenance II worker, a/k/a an "M2".

2. As an M2, Complainant supervises five (5) M1s (Maintenance I workers). Complainant assigns as well as performs various duties, including driving heavy equipment and traffic control. These are "safety-sensitive" functions.

3. CDOT Procedural Directive 1245.1 applies to Complainant and prohibits "Reporting for duty to perform safety-sensitive functions with an alcohol concentration of .04 or greater."

4. On October 16, 1997, Complainant tested positive for alcohol in a random breathalyser testing, with a reported Blood Alcohol Content (BAC) of .095 .

5. A Rule R833 meeting was held on October 20, 1998 in which Complainant admitted consuming alcohol the night before the random test.

6. Complainant was drinking alcohol the night before the random breathalyser test. He consumed alcohol until sometime after midnight. Then he reported to work at approximately 6:15 A.M. to heat oil needed for the day's road repair work assignments.

7. Mr. Conyers, the appointing authority, considered Complainant's statements, Complainant's job duties, including the duty to set a standard for those whom he supervises, his work history, including positive evaluations, the results of the random breathalyser test, CDOT's Procedural Directive 1245.1, a similar incident involving another employee and the risk of danger to Complainant, his co-workers and the general public with a violation of this type.

8. The pay reduction, including one month suspension without pay totaled approximately \$4,100.00 (Four Thousand One Hundred dollars and no cents).

9. Complainant filed a timely appeal of the disciplinary action .

DISCUSSION

The burden is upon respondent to prove by a preponderance of the evidence that the acts 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). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act occurred and 2.) whether just cause warrants the discipline imposed. Respondent presented evidence in the form of Mr. Conyer's testimony and Exhibits 1 through 4, which indicate that the breathalyser equipment was properly calibrated and in working order for this test, procedural directive 1245.1 applied to Complainant and proper procedures for a Rule R833 meeting and disciplinary action were followed by the appointing authority.

Complainant testified that he had consumed alcohol the night before the random test but, through his attorney, at hearing he challenged the reliability of the breathalyser results. However, no alternate explanation was given for the high BAC level indicated by the breathalyser equipment and Complainant failed to present any evidence that the results were not reliable other than to argue there were no other indications of intoxication.

Substantial evidence, including Respondent's Exhibit 1 and Complainant's own testimony, demonstrate convincingly that the act occurred.

Complainant challenged whether just cause warranted the discipline imposed by calling character witnesses who testified that Complainant is a good employee with a large crew and responsibility for a "tough area" of the interstate highway that gets "some of the worst weather in the region" and that Complainant is "more than qualified" for his position. Complainant presented his past evaluations (Complainant's Exhibits C through M) showing a steady improvement in his

work with the most recent ratings “commendable”. Complainant testified he would never do anything to jeopardize safety at work, he was aware of the directive and surprised by the results.

Respondent presented significant evidence in the form of Mr. Conyers’ testimony at hearing and Respondent’s Exhibits 1 and 4 to support Respondent’s argument that just cause warrants the discipline imposed. Mr. Conyers agreed that Complainant was a good employee. Nonetheless, the issue here is one of safety, worker safety and public safety. To put Complainant’s BAC level in perspective: A **.05 BAC**, or under, is considered by Colorado statute, Section 42-4-1301, C.R.S., to be Driving While Ability Impaired (DWAI). A **.10 BAC** or under (but higher than .05 BAC) is Driving Under the Influence (DUI). Complainant’s BAC at approximately 10:30 A.M. on October 16, 1997 was **.095** and, by his own admission *he drove* to the test. Further, in this condition, Complainant was supervising work with hot oil on the interstate highway.

Given these circumstances just cause warranted disciplinary action, i.e. there was both a factual basis (random test results) and a legal basis (CDOT Procedural Directive 1245.1) for the appointing authority’s decision. CDOT Procedural Directive 12245.1 allows for “management/supervisor intervention that may result in referral to mandatory treatment and/or corrective or disciplinary actions up to and including termination” when a violation occurs. The appointing authority testified that he did not fire Complainant because he did not see this violation as a recurring problem. Mr. Conyers chose a reasonable alternative from those provided by CDOT Procedural Directive 1245.1. The disciplinary action taken in this case is, therefore, reasonable and supported by fact and law. It is neither arbitrary nor capricious.

CONCLUSIONS OF LAW

1. Complainant reported to work for the Colorado Department of Transportation on October 16, 1997 with a Blood Alcohol Concentration of greater than .04 in violation of CDOT Procedural Directive 1245.1.
2. Respondent’s action was not arbitrary, capricious or contrary to rule or law, i.e. there was a factual basis, the act occurred, and the discipline imposed was both reasonable and within the range of alternatives available.
3. Complainant is not entitled to an award of attorney’s fees and costs.

ORDER

The action of the respondent is affirmed. Complainant’s appeal is dismissed with prejudice.

Dated this 3rd
day of April 1998
at Denver, CO

Michael Gallegos
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 April, 1998, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
Nora V. Kelly, P.C.
1776 Lincoln St., Suite 418
Denver, CO 80203

and in the interoffice mail to:

Mr. Michael E. King
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
