

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 98B057

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SANTIAGO RUBALCABA,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
FACILITIES MANAGEMENT,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on February 25-26, 1998. Respondent was represented by Wade Livingston, First Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent called the following witnesses: Glennis Bond, Program Assistant; Jay Wheeler, Western District Housing Supervisor; and Michael Guthrie, Facilities Manager for the Northeast District, Division of Facilities Management, Department of Human Services. Complainant testified on his own behalf.

Respondent's Exhibits 1 through 51 and complainant's Exhibits A, B and C were admitted into evidence by stipulation of the parties.

Administrative notice was taken of Respondent's Motion to Dismiss in *Rubalcaba v. Department of Human Services, Facilities Management*, State Personnel Board Case No. 98B020.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, the action of the respondent is affirmed.

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 there was just cause for the termination;
4. Whether complainant was disciplined more than once for the same acts;
5. Whether complainant was afforded a proper R8-3-3 meeting;
6. Whether complainant was disciplined by the proper appointing authority;
7. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Santiago Rubalcaba worked for twelve years for respondent Department of Human Services, Facilities Management, at the Grand Junction Regional Center. He began as a Food Service Worker. On July 1, 1986, he transferred to the custodial department as a Custodian I, the position from which he was dismissed on November 10, 1997.

2. Rubalcaba received PACE ratings of "Good" or higher from 1987 through 1996. In 1993, 1995 and 1996, his evaluations included comments to the effect that he needed to improve in being on time for work, attendance, following policies and procedures and work habits. In 1997, he received a rating of "Needs Improvement" in all of the factors in his performance appraisal.

3. Rubalcaba received seven corrective actions from 1994 to 1997 for such reasons as inappropriate behavior, being late for work, failure to complete work assignments and failure to follow established procedures.

4. On August 8, 1997, Rubalcaba's employment was terminated for reasons of chronic tardiness, unwillingness to perform essential job functions and on-going insubordination.

5. Apparently because of a procedural error, the disciplinary action was rescinded and Rubalcaba was reinstated to his position with full back pay effective September 25, 1997.

6. A corrective action was substituted for the disciplinary action. The corrective action established a 30-day plan in which Rubalcaba was to demonstrate improvement. The focus was on

timeliness and following required procedures.

7. The 30-day plan, beginning on September 26, 1997 and ending on October 24, 1997, was a strict regimen of custodial duties which were to be accomplished in a particular order. Some flexibility was built into the routine to account for such circumstances as a bathroom not being accessible at the specific time it was scheduled to be cleaned. The plan included nothing different from Rubalcaba's previous performance plans. (Exhibit 9.) The issues of adhering to established procedures, following the supervisor's instructions and being on time for work and meetings had been addressed many times before.

8. The corrective action plan was monitored on a daily basis by both Rubalcaba's immediate supervisor and the lead worker. The results of each day were discussed with him. (See Exhibit 19, daily monitoring forms.)

9. There were seventeen work days during the 30-day period.

10. Jay Wheeler, Housing Supervisor for the Western District, whose office is located at the Grand Junction Regional Center, was familiar with Rubalcaba's situation and was kept apprised of the progress of the 30-day plan.

11. Glennis Bond, with 26 years of experience in housekeeping as a state employee, was asked by Wheeler to conduct a time study of Rubalcaba's job performance. She was instructed to observe how Rubalcaba managed his time and to suggest ways in which his time management skills might be enhanced.

12. Bonds conducted the time study on October 8, 1997. She

observed Rubalcaba's behavior from the time that he punched in until the conclusion of the shift. She did not talk to him except on a break and wrote down everything he did.

13. Bonds concluded that Rubalcaba was competent and was capable of completing all of his assigned tasks easily within the allotted time. He had sufficient time and equipment to perform all of his duties. She recommended the use of a locking "maid's cart" and a back pack vacuum for high dusting in order to save time and get better results. (Exhibits 48, 49.)

14. During October, Rubalcaba received seven memoranda from Jay Wheeler relative to performance deficiencies and Rubalcaba's untimeliness in arriving at work and meetings. (Exhibits 20, 21, 23, 24, 25, 26, 28.)

15. The results of the 30-day corrective action plan reflected Rubalcaba's past record of tardiness, inclusive of not calling in sick before the start of the shift, and unnecessary deviation from the scheduled routine. He was rated as "Unacceptable" or "Needs Improvement" in all six categories judged, namely: "Occupational and Professional Competence," "Work Habits," "Attendance," "Customer Service," "Policy and Procedure" and "IPO." (Exhibit 11.)

16. Michael Guthrie, Facilities Manager for the Northeast District, was delegated the appointing authority in this matter by the Director of the Division of Facilities Management. (Exhibits 2, 3, 4.) At Wheeler's request, Guthrie scheduled a predisciplinary meeting with Rubalcaba for 9:00 a.m. on November 4, 1997. (Exhibit 5.)

17. The R8-3-3 meeting convened as scheduled at 9:00 a.m. on November 4. Present were Guthrie, Wheeler and CAPE Representative Bill Bever. The three awaited the arrival of Rubalcaba, and at 9:15 Bever contacted Rubalcaba by telephone at home. He arrived at the meeting about ten minutes later.

18. Following the R8-3-3 meeting, Guthrie reviewed all of the pertinent documents and talked to Rubalcaba's supervisor and lead worker. He investigated the time clock procedures and whether Rubalcaba had been furnished with the necessary equipment and supplies. He concluded that Rubalcaba was tardy far more often than any other employee and that his equipment had nothing to do with his deficient performance.

19. In consideration of Rubalcaba's ten years of experience as a custodian, Guthrie found that Rubalcaba had the ability, but not the willingness, to achieve satisfactory performance. Guthrie chose the sanction of dismissal based upon Rubalcaba's performance deficiencies during the 30-day corrective action period. In choosing this penalty, Guthrie took into account the employee's performance history.

20. In a four-page, single-spaced letter detailing his reasons, the appointing authority terminated complainant's employment effective November 10, 1997, for willful failure to comply with standards of efficient service or competence and willful failure to perform assigned duties, citing Board Rule 8-3-3(C). (Exhibit 1.)

21. Complainant filed a timely appeal of the disciplinary action on November 18, 1997.

DISCUSSION

Complainant first argues that he was disciplined twice for the same conduct, which is prohibited by Policy 8-3-(A). Respondent counters that Rubalcaba was disciplined for his failure to comply with the 30-day corrective action plan, and that his performance history was properly taken into account in determining the appropriate penalty.

Policy 8-3-(A), 4 Code Colo. Reg. 801-1, provides in pertinent part:

An employee may not be corrected or disciplined more than once for a single specific act or violation. However, he may be corrected or disciplined for each additional act or violation of the same or similar nature.

If complainant's first disciplinary action had gone to hearing, and the complainant had prevailed as a result of a procedural error on the part of respondent, that matter would have ended there. Respondent would not have been allowed to correct its error and try again based upon the same act or series of acts. Policy 8-3-(A) does not allow "overs." The elements of due process protect an employee from being indefinitely hounded by the agency.

There must be an end as well as a beginning. In the present case, respondent would not have been permitted to redo the initial discipline which it had rescinded. In the absence of the corrective action, or if complainant had successfully completed the plan, there would have been no further discipline to litigate.

Based upon the corrective action, not complainant's prior acts, the appointing authority decided to impose discipline. In doing so, he was required to weigh all of the factors governing the

decision to correct or discipline an employee found in Rule 8-3-1(B), 4 Code Colo. Reg. 801-1. He would have been remiss in his duties by ignoring complainant's employment record. It would have been impossible for him to fulfill his obligation while pretending that nothing had gone on before.

The range of possible penalties includes dismissal, demotion, suspension or reduction in pay. Rule 8-3-3(A), 4 Code Colo. Reg. 801-1. As stated above, Rule 8-3-1(B) sets out the criteria to be used in the decision-making process. By its terms, Policy 8-3-(A) does not preclude an appointing authority from disciplining an employee for the same type of behavior when such behavior results in separate acts of misconduct. The fact that an employee is disciplined once for tardiness, for example, does not mean that the employee can never be disciplined for tardiness again.

Next, complainant offers a variety of excuses for his unsatisfactory job performance during the corrective action period. The 30-day period was too short. His time card did not work on a day when he was only one minute late. He had not worked in the particular dormitory for a long time and was denied a pre-shift walk-through. The building is old and dilapidated and is hot in the winter and humid in the summer. He testified that the disabled residents were known to throw trash around, and that there were blood, feces and urine on the floor. He complains that the daily performance ratings were not raised when he told the supervisor that he disagreed with them.

Overall, complainant's testimony was vague, evasive, frequently off the point and is given little weight.

Complainant knew, or reasonably should have known, that he was

in a "do or die" situation. The fact that he could not even be on time for his predisciplinary meeting, and had to be called by his representative, is noteworthy in this respect. Ultimately, he was disciplined for poor performance, in spite of his acknowledged ability to get the job done. There is no credible evidence that anyone had anything personal against him.

In the termination letter (Exhibit 1), the appointing authority said:

Three facts are very clear to me. Your history of poor performance is unquestioned. You have habitually been late, failed to follow instructions, policies and procedures, used time poorly, and performed assignments at an unacceptable level. You have frequently been informed by your supervisors of these problems. Second, you consistently blame everyone and everything else for your problems, instead of taking responsibility for your own poor performance. Third, your supervisors have been even more patient with your failures than I believe to be reasonable. You have had every chance to succeed, including during the thirty day corrective period.

After a considered review of the entire record, I agree with the appointing authority's assessment.

No evidence was introduced to show that the R8-3-3 meeting was not conducted properly or that the appointing authority was illegally delegated.

An award of attorney fees and costs is not justified under C.R.S. §24-50-125.5 of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. There was just cause for the termination.
4. Complainant was not disciplined more than once for the same acts.
5. Complainant was afforded a proper R8-3-3 meeting.
6. Complainant was disciplined by the proper appointing authority.
7. Neither party is entitled to an award of fees and costs.

ORDER

Complainant's appeal is dismissed with prejudice.

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:

James R. Gilsdorf
Attorney at Law
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Wade Livingston
First Assistant Attorney General
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1525 Sherman Street, 5th Floor
Denver, CO 80203
