

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98B114

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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BRADLEY ANDERSON,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,  
DIVISION OF YOUTH CORRECTIONS,  
MOUNT VIEW YOUTH SERVICES CENTER,

Respondent.

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This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on January 19, 1999. Respondent was represented by Jennifer Dechtman, Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent called two witnesses: Penny Brown, Director of Mount View Youth Services Center, and Maurice Williams, Denver Regional Director for the Division of Youth Corrections.

Complainant testified in his own behalf.

Respondent's Exhibits 1-5 and Complainant's Exhibits A, C, D, E, F and G were stipulated into evidence. Exhibit 7 was not admitted.

The witnesses were sequestered except for complainant and respondent's advisory witness, Penny Brown.

**MATTER APPEALED**

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 For the reasons set forth below, the disciplinary action is rescinded.

## **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the realm of alternatives available to the appointing authority;
3. Whether complainant failed to mitigate his damages;
4. Whether just cause warranted the discipline imposed;
5. Whether complainant was discriminated against on the basis of disability.

## **FINDINGS OF FACT**

1. Bradley Anderson, complainant, was certified in the position of Safety and Security Officer (SSO) I with Mount View Youth Services Center (Mount View) within the Division of Youth Services, respondent, when his employment was terminated on January 6, 1997. In a subsequent appeal of the dismissal, following an evidentiary hearing, an administrative law judge upheld the disciplinary action. The State Personnel Board reversed the administrative law judge on December 4, 1997 in Case No. 97B096 and ordered the reinstatement of complainant to his former position. It was not until January 26, 1998 that the appointing authority notified complainant in writing that he was reinstated effective February 11, 1998 at 2:30 p.m. (Exhibit E.) Enclosed with the notice of reinstatement was a letter advising complainant that a predisciplinary meeting with the appointing authority was scheduled for 3:00 p.m. on February 11, 30 minutes after the effectiveness of his reinstatement, "based on your admission that you lied to the appointing authority during your R8-3-3 meeting with Maurice Williams on December 9, 1996 and your admission that you used illegal drugs (cocaine) which you stated compromised the safety of the youth and staff at Mount View." (Exhibit 1.) When he reported for the R8-3-3 meeting on February 11, Mount View Director and appointing authority Penny Brown presented complainant with a letter of administrative suspension and postponing the predisciplinary meeting to February 18, 1998. (Exhibit F.)

2. The January 6, 1997 termination was based on complainant's failure to report an alleged child abuse incident. Complainant's record of excessive absences, though not the reason for his dismissal, was also an issue with respect to his job performance. At the predisciplinary meeting, held on December 9, 1996 with Maurice Williams serving as appointing authority, complainant gave

several reasons for his 22 absences over a ten-month period, namely: lack of transportation, diabetic and other health-related problems, and depression.

3. Complainant was on annual leave for the two weeks immediately prior to January 6, 1997. On January 6, a Monday, complainant telephoned Maurice Williams to say that he would be 30 minutes late for his shift, which began at 2:30 p.m. Williams advised him to report directly to his, Williams', office. At the office of Maurice Williams, complainant divulged that he had a problem with cocaine. Williams gave him the telephone number of C-SEAP (Colorado State Employees Assistance Program) and handed him a letter terminating his employment. Complainant was an eight-year state employee with a good employment history.

4. Williams advised Director Brown of complainant's admission of cocaine usage, and she told him to write a memo for the file. He did. (Exhibit A.) Brown did not take further action because Bradley Anderson was no longer an employee of the agency.

5. Brown placed complainant on administrative leave immediately upon reinstatement because his prior use of cocaine made her nervous over the possible risk posed by complainant being around the juvenile residents.

6. The issues addressed at the R8-3-3 meeting of February 18, 1998, at which complainant appeared with a union representative, centered around his sworn testimony at the evidentiary hearing in which he testified that one of the reasons for his frequent absences was the use of cocaine. Complainant's representative asserted that complainant's employment was protected by the Americans with Disabilities Act (ADA) because he had successfully completed a drug treatment program and was no longer using illegal drugs.

7. Brown did not refer the disability question to the agency's ADA coordinator for investigation. She did not believe that a legitimate ADA issue had been raised.

8. Brown characterized complainant's omission of cocaine as a reason for his absences as lying during an investigation.

9. Complainant presented Brown with a certificate of completion of a 21-day in-patient drug treatment program, verifying that he completed the program on February 21, 1997. (Exhibit C.)

10. Brown considered a 21-day program "a good start" but inadequate to fully address a drug problem.

11. Complainant was a cocaine user from September 1995 to

December 1996, the period in which he was undergoing a divorce and child custody issues. He has been drug-free since that time. Brown did not request that complainant take a drug test or otherwise confirm that he was presently drug-free, but she was concerned that if he was not, he might compromise the safety and security of the facility.

12. Brown believes that any Mount View employee who uses drugs, whether on or off the job, should be terminated. She believed that complainant's past use of cocaine rendered him incapable of performing his job on February 18, 1998.

13. One of complainant's absences is directly attributable to his use of cocaine. Another absence is indirectly related, that is, first he called in sick and then he got high. He never used cocaine while on the job, and none of his co-workers was aware of his cocaine use. The safety and security of the facility was compromised not by his use of the drug, but rather by his absence because the facility was short-staffed. All of the various reasons he gave for his absences were true.

14. Division of Youth Services Policy 3.5 (Exhibit 4) declares that the agency is a drug-free workplace. Policy 3.5 does not mandate the dismissal of an employee who uses drugs. The agency is required to "support the rehabilitation of the employee, wherever possible." Policy 3.5(III)(E).

15. The appointing authority concluded that Anderson violated Policy 3.5 by not acting as an appropriate role model for the juvenile residents of Mount View resulting from his past use of cocaine. She concluded also that he violated the Governor's Executive Order relative to integrity in government by not disclosing his cocaine use as a reason for his absences. She terminated his employment effective February 23, 1998 for "failure to comply with standards of efficient service or competence" and for willful misconduct pursuant to Rules 8-3-3(C)(1) and 8-3-3(C)(2), 4 Code Colo. Reg. 801-1. (Exhibit 2.)

16. Complainant Bradley Anderson filed a timely appeal of the disciplinary action.

## DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). A corrective action is to be imposed prior to disciplinary action unless the employee's conduct "is so flagrant or serious that immediate disciplinary action is appropriate,...." Rule 8-3-1(C), 4 Code Colo. Reg. 801-1.<sup>1</sup> In deciding whether to correct or discipline an employee, an appointing authority must take into account the following factors: 1) the nature, extent, seriousness and effect of the act, error or omission; 2) the type and frequency of previous undesirable behavior; 3) the period of time that has elapsed since a prior offensive act; 4) the employee's previous performance evaluation; 5) an assessment of information obtained from the employee; 6) mitigating circumstances; 7) impartiality in relations with employees. Rule 8-3-1(B), 4 Code Colo. Reg. 801-1.

### Contentions of the Parties

Respondent essentially asserts that the termination of complainant's employment was warranted because he engaged in the use of an illegal substance while an employee of the Division of Youth Services and he lied during an agency investigation. Respondent argues that the ADA does not protect complainant's employment since there was no medical testimony that complainant is currently drug-free and because complainant was dismissed for his conduct, not for his disability.

Complainant would have the ADA apply, arguing that he is a "protected person" under the act because he had completed a drug treatment program and was drug-free at the time of his dismissal. Apart from the ADA, complainant argues that the disciplinary action should be set aside as arbitrary, capricious or contrary to rule or law on several grounds: 1) The outcome was a foregone conclusion due to the appointing authority's belief that any employee who uses drugs should be terminated; 2) The appointing authority disregarded the factors governing the decision whether to correct or discipline

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<sup>1</sup> On October 20, 1998, the Rules of the State Personnel Board were repealed and replaced by new rules which were made effective for actions commencing on or after December 31, 1998.

an employee, as set out in R8-3-1, cited above; 3) The appointing authority disregarded the provisions of Policy 3.5 with respect to assistance for a drug addicted employee; 4) the appointing authority wrongfully failed to investigate complainant's ADA claim; 5) Complainant was disciplined twice for the same conduct in contravention of Policy 8-3-A, 4 Code Colo. Reg. 801-1, because complainant's absences had been previously addressed; and 6) Complainant's omission of a fact does not constitute a lie, and even if it does, it was not "so flagrant or serious" as to make immediate disciplinary action appropriate pursuant to R8-3-1(C), *supra*.

### Analysis

The Americans with Disabilities Act, 42 U.S.C. §§ 12102-12213, defines "disability" as: a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. 42 U.S.C. § 12111(8). A former drug addict may be considered disabled, while a current drug user is not. Complainant does not allege that respondent failed to reasonably accommodate his disability. Rather, he asserts that he should not have been dismissed because he was in "protected status" covered by the ADA on the day he was disciplined. However, the ADA does not stand for the proposition that a person with a disability cannot be dismissed for violation of the rules of the agency or the rules of the State Personnel Board. A disabled person is not protected from his own misconduct. The ADA does not offer protection for complainant during the time that he was using cocaine. His past drug use was the reason for the termination. The ADA has no bearing on the question of whether complainant lied.

A drug user is not necessarily addicted, and only former drug addicts may be protected under the ADA since it is an addiction, and not mere drug use that may be considered a substantially limiting impairment. *Hartman v. City of Petaluma*, 841 F. Supp. 946, 949 N.D. Cal. 1994). Respondent does not dispute that complainant is a former addict, taking no steps to verify or confirm his present drug-free state. Respondent did not dispute complainant's testimony that he was drug-free except to argue that medical testimony was necessary as a matter of proof.

This record is insufficient to determine that complainant was fired because of a disability. For instance, complainant did not show persuasively that the agency made its decision on the basis of complainant being a former addict. He was dismissed from employment for his past use of illegal substances. The dispositive issue is whether respondent's action was arbitrary, capricious or

contrary to rule or law. It was.

Complainant correctly points out that the appointing authority failed to follow Rule 13-1-4, 4 Code Colo. Reg. 801-1, when she ignored the disability issue and took no action upon the issue being raised at the predisciplinary meeting. R 13-1-4, as applicable to this action, provides:

Claims of Discrimination Under ADA Involving Potential Adverse Action. At any time during a meeting being held to determine if disciplinary action or any other adverse action should be taken against an employee and a claim of discrimination on the basis of disability is raised, the appointing authority shall refer the claim of discrimination on the basis of disability to the departmental ADA coordinator for investigation. Any applicable time limits shall be waived to allow the investigation to be completed. The appointing authority shall take no action on the matter until after receiving the results of the ADA investigation.

The appointing authority thus did not have the discretion to decide on her own that complainant was not a disabled person under the presumption that his past drug use rendered him incapable of performing the essential functions of the position at the present moment. To simply conclude, as she did, that an investigation was not necessary because complainant's behavior, not his disability, was at issue is an abuse of authority. The issue was raised at the predisciplinary meeting, and it should have been dealt with prior to the imposition of disciplinary action. If the ADA coordinator had determined that complainant was a disabled person and that he should not be dismissed for past drug use that could be attributed to his current disability, the appointing authority may have made a different decision. Whatever the determination of the ADA coordinator might have been, the appointing authority was obligated to wait for it.

Complainant never had a chance of continuing his employment. Although the appointing authority went through the motions of a predisciplinary meeting, the outcome was never in doubt. It did not matter that complainant had been drug-free for over a year. She believed that any employee who used drugs should be fired, and that was that. No evidence was introduced that demonstrates how the agency is harmed by employing a rehabilitated drug user. Policy 3.5 does not require immediate dismissal. In fact, Policy 3.5 is supportive of attempts at rehabilitation. The appointing authority approached the subject as if complainant were a current drug user and made her decision on that basis. She did not fairly

and candidly consider the factors governing the decision of whether to correct or discipline an employee as found in Rule 8-3-1.

Complainant's argument that he was disciplined twice for the same conduct is unpersuasive. He was not disciplined for excessive absences, but rather for not being truthful about the reasons for his absences.

To conclude that complainant's omission of a reason for his absences is "so flagrant or serious" as to justify immediate dismissal is a stretch. The reasons he gave were true. He just left one out. Perhaps a corrective action advising complainant that similar omissions in the future would be construed as outright lies and worthy of discipline might have been in order, but this one episode cannot deprive a certified employee of his constitutional and statutory right to be disciplined only for just cause. *Kinchen, supra*. Moreover, he voluntarily made the disclosure on the day of his original dismissal. The appointing authority did not gain the information for the first time at the subsequent evidentiary hearing. Because the letter terminating complainant's employment was already prepared, the appointing authority made the decision on January 6, 1997 to take no further action, save providing complainant with the telephone number of an agency that serves state employees only.

Complainant seeks an award of attorney fees and costs that were incurred in pursuing this litigation. Such an award is proper. The appointing authority's disregard of the state personnel rules and her predetermination of the outcome are deemed acts of bad faith. The action terminating complainant's employment immediately was groundless. See *Coffey v. Colorado School of Mines*, 870 P.2d 650 (Colo. App. 1993); § 24-50-125.5, C.R.S.

#### **CONCLUSIONS OF LAW**

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was not within the realm of available alternatives.
3. No evidence was introduced to show that complainant failed to mitigate his damages.
4. Just cause did not warrant the discipline imposed.
5. The record is insufficient to determine that complainant was discriminated against on the basis of disability.

**ORDER**

The disciplinary action is rescinded. Complainant shall be reinstated to his former position with full back pay and benefits, less the appropriate offset, if any. Respondent shall pay to complainant the reasonable attorney fees and costs incurred in pursuing this action.

DATED this \_\_\_\_\_ day of  
March, 1999, at  
Denver, Colorado.

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Robert W. Thompson, Jr.  
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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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).

**PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may 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. 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.

**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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

**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 R-8-64, 4 CCR 801.

**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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of March, 1999, 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  
1145 Bannock Street  
Denver, CO 80204

and in the interagency mail, addressed as follows:

Jennifer M. Dechtman  
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