

State Personnel Board, State of Colorado

Case No. 98 B 152

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GERALD JACKSON,

Complainant,

v.

DEPT. OF HIGHER EDUCATION, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,

Respondent.

Hearing on this matter was held October 22, 1998, before Administrative Law Judge G. Charles Robertson at 1525 Sherman Street, Room B-65, Denver, CO 80203.

MATTER APPEALED

Complainant appeals the disciplinary reduction in pay of three (3) steps in pay grade for a period of five (5) months.

Complainant committed the acts for which discipline was imposed. The discipline imposed was within the range or reasonable alternatives and Respondent's actions were not arbitrary, capricious or contrary to rule or law. Therefore, Respondent's imposition of a five month, three step, reduction in pay is **UPHELD**.

PRELIMINARY MATTERS

Respondent, University of Colorado Health Sciences Center ("UCHSC" or "Respondent") was represented by Daniel J. Wilkerson, Associate University Counsel, 4200 East Ninth Avenue, Campus Box A-077, Denver, CO 80262. Complainant, Gerald Jackson ("Complainant" or "Jackson") represented himself, *pro se*.

1. Procedural History

Complainant filed a Notice of Appeal of his disciplinary reduction in pay on May 15, 1998. Complainant appealed the decision to reduce his grade by three steps for a period of five months. Prehearing statements in this matter were to be filed no later than June 19, 1998. Respondent timely filed its prehearing statement. Complainant failed to file a prehearing statement. Subsequent to a Motion to Dismiss by Respondent, sanctions were imposed against Complainant for failure to comply with a prehearing order and failure to file a prehearing statement. Complainant was barred from calling any witnesses, except for himself, but would have the opportunity to cross-examine any of Respondent's witnesses.

Respondent renewed its Motion to Dismiss this matter, arguing Complainant continuously failed to comply with the ALJ's orders, and that he was grossly negligent or flagrant in his failure to comply with the ALJ's orders. That motion was denied, in part, on September 17, 1998.

At the time of hearing, Complainant indicated he only wanted to participate in the hearing by making a statement and that was always his intent. However, Complainant did not want to withdraw his appeal. As a result, given that Respondent had the burden of proof in this hearing as a result of imposing discipline, the hearing proceeded.

2. Witnesses

Respondent called the following witnesses during its case-in-chief including: (1) Romona Jackson-Jones, Mgr. Of Distribution, Central Supply, UCHSC, Denver, CO; (2) Janet Burda, Purchasing Mgr., UCHSC, Denver, CO; and (3) Candis O'Rourke, of Human Resources, UCHSC, Denver, CO.

During Complainant's case-in-chief, Complainant testified on his own behalf.

3. Exhibits

With regard to Respondent's exhibits, Respondent moved to admit Respondent's Exhibits 1 through 25. Complainant objected to the admission of the exhibits based only on relevancy. Respondent's motion was granted, over objection by Complainant. It was determined that the exhibits were relevant to the matter in order to address the issue of the level of discipline imposed upon Complainant. No issues as to authenticity existed.

Complainant proffered no exhibits.

ISSUES

1. Whether Complainant engaged in the acts for which discipline was imposed;
2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority; and
3. Whether the actions of Respondent were otherwise arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

I. Employer and Employee Background

1. UCHSC is a state agency which provides medical care and services to a number of patients. Such services include orthopedics, cancer treatment, day surgery, dermatology and pharmacology services.
2. In providing services, UCHSC maintains a staff of employees in its Central Supply Department ("CSD"). Complainant's job responsibilities have been with CSD for ten years.
3. During the course of his employment with UCHSC, Complainant received the following *overall* job evaluations:

Date	Position	Overall Rating and Relevant Comment
12/89 to 12/90 (Exhibit 11)	Stock Clerk	Needs Improvement Employee Strengths: Technical Job Performance Areas of Development: Interpersonal skills and communication skills
5/93 date of evaluation (no other reference date was incorporated) (Exhibit 18)	Stock Clerk	Commendable Employee Strengths: Organizational skills and accuracy, dependable Areas of Development: None
4/93 to 4/94 (Exhibit 20)	Storekeeper I	Good Employee Strengths: Dependable and good organization Areas of Development: Phone Etiquette
4/29/96 (Exhibit 25)	Storekeeper I	Good Employee Strengths: Dependability Areas of Development: Openness to new structure and organization; interpersonal skills

4. Included in the Complainant's Performance Planning and Appraisal forms were the following narrative comments:

- Strength: "Technical Job performance" (Exhibit 11).
- Weakness: "Interpersonal Skills and communication skills (Exhibit 11).
- "Organization skills and concern for a job being done correctly. He is dependable and prompt. Also very knowledgeable about product." (Exhibit 18).
- "Dependable" (Exhibit 20).
- Weak "phone etiquette" (Exhibit 20).
- "Dependability" (Exhibit 25).
- Weakness and need to keep working on "interpersonal relations" (Exhibit 25).

5. In addition to the above listed performance appraisals, Complainant received the following:

Date	Type of Document	Relevant Comments/Action
10/31/97 (Exhibit 2)	Disciplinary Action (2 step reduction in pay for 3 months).	Issued based upon derogatory remarks made towards workers at UCHSC. Matter was appealed to State Personnel Board and ALJ ruled in favor of Respondent. (Exhibit 3).
12/15/95 (Exhibit 24)	Disciplinary Action (1 step reduction in pay for 3 months).	Issued based on finding of inappropriate interpersonal behavior including intimidation, comments regarding another employee, and telephone etiquette.
10/25/95 (Exhibit 22)	Inter-Office Communication	Complainant ignoring Smoking Policy; Complainant approached others in intimidating manner.
10/16/95 (Exhibit 22)	Memos	Reporting "certain hospitalities".
4/17/95 (Exhibit 21)	Inter-departmental Communication	Report of rudeness by Complainant to co-worker.
9/4/92 (Exhibit 17)	Letter of Appreciation	Letter nominating Complainant for Service Excellence in attitude.
2/6/92 (Exhibit 16)	Corrective Action	Issued directing Complainant to eliminate derogatory remarks to coworkers; need for sensitivity to patients.
2/15/91 (Exhibit 13)	Memorandum	Compliments Complainant on positive attitude.
1/11/91 (Exhibit 12)	Corrective Action	Issued directing Complainant to work on interpersonal skills, that he has offended nursing unit administrators, co-workers, and patients; that he should cease and desist use of profane language.
July 1990 (Exhibit 10)	Interdepartmental Problem/Incident Form	Based upon incident in which Complainant was accused of

		<p>failing to cooperate with staff.</p> <p>Complainant responded to Form by indicating it was other person that was rude.</p>
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6. On May 25, 1994, Complainant was provided notice of UCHSC's "Face to Face" and "Telephone Standards" policies. He acknowledged receiving the policies on May 26, 1994. The telephone standards policy stated that its purpose was "to give personal, prompt and courteous attention to those seeking to utilize the services of University Hospital. . . ."
7. The telephone and voice mail policy specifically referenced telephone operations at UCHSC.
8. In a work-related injury to his back, occurring prior to the events of this matter and pursuant to UCHSC's worker's compensation insurance coverage, Complainant utilized the services of Dr. Mueller.

II. Events of March/April 1998

9. As of October 1, 1996, and subsequent to Complainant's previous worker's compensation claim, and as part of UCHSC's worker's compensation insurance program, all employees injured on the job were required to obtain an evaluation and seek medical treatment at Gates Clinic, the Designated Medical Provider.
10. Romona Jackson-Jones, Manager of Distribution, Central Supply, UCHSC, is Complainant's supervisor. Jan Burda, Purchasing Manager, UCHSC, is Complainant's appointing authority.
11. On March 31, 1998, Complainant contacted Ms. Jackson-Jones and requested to be able to leave a few minutes early for a medical appointment. Ms. Jackson-Jones granted that request.
12. Complainant visited Dr. Mueller. Dr. Mueller provided Complainant with a prescription medication and suggested that Complainant take a few days off from work. The physician also provided a completed Work Status Report indicating that Complainant had some work restrictions. (Exhibit 4).
13. At some point immediately subsequent to the issuance of the release from Dr. Mueller, Complainant and Ms. Jackson-Jones met. At this time Ms. Jackson-Jones discovered that Complainant had visited Dr. Mueller and stated he may have suffered an injury during work. Contemporaneously, Ms. Jackson-Jones received a telephone call from Candice O'Rourke, of University Hospital

Compensation, in which Ms. O'Rourke indicated that Complainant had been mistakenly seen in the Occupational Health Clinic for a job-related injury. At such time both Ms. Jackson-Jones and Ms. O'Rourke requested that Complainant obtain an evaluation from the Gates Clinic pursuant to Ms. O'Rourke's instructions. (Exhibit 5).

14. During that conversation, Complainant strongly expressed that Dr. Mueller was his doctor and that he was not going to the Gates Clinic. Complainant's tone was "loud and snotty." Nevertheless, Complainant went to Gates Clinic on April 1, 1998.
15. A Physician's Initial Report (the "Report") was issued by Gates Clinic in which Complainant was to be assigned light duty as a result of lower back pain. The Report did not release Complainant from work. Rather, the Report specifically stated Complainant could return to work and it provided "light duty" restrictions. Complainant signed the Report. (Exhibit 7).
16. Complainant did not go to work after finishing at Gates Clinic. Instead, he returned home and took prescribed medications.
17. On April 2, 1998, Ms. Jackson-Jones spoke, via telephone, with Complainant and notified him that a copy of the Report had been received and that when he reported for work on April 4 and 5, 1998 (a weekend), he would be on light duty restriction. In addition, Ms. Jackson-Jones notified Complainant that he needed to complete some worker's compensation related documentation, that it needed to be witnessed by a manager, and that because of his absence on 3/31/98 and 4/1/98, it would be necessary to execute the documentation immediately. (Exhibit 8).
18. Additionally on April 2, 1998, Ms. Jackson-Jones consulted with Candice O'Rourke with regard to the application of worker's compensation, the ability to modify Complainant's duties to reflect "light duty," and in order to adequately complete the appropriate paperwork. (Exhibit 8).
19. Contemporaneously, after having consulted with an attorney, Complainant telephoned Ms. Jackson-Jones' office and indicated he would not be reporting to work on 4/4/98 or 4/5/98. The attorney subsequently called and indicated that Complainant would like not to have to report to work on 4/4/98 or 4/5/98. Ms. Jackson-Jones communicated to Complainant that the time off would be treated as sick time. (Exhibit 8).
20. Upon notifying Ms. O'Rourke of this development, Ms. Jackson-Jones was told that because of the previous work release from Gates Clinic, Complainant would again need to visit Gates Clinic to obtain authorization from a physician for time

off.

21. Ms. Jackson-Jones then again contacted Complainant by telephone. She proceeded to update Complainant of the need for him to return to Gates Clinic for an authorized release from work and that would be the only way he could be compensated for the time off.
22. Mr. Jackson responded by stating "I am tired of this shit" and "You tell that bitch (referring to Candice O'Rourke) that if she has something to talk about, she needs to call me."
23. At the end of the day, Complainant called to apologize. Ms. Jackson-Jones indicated that such behavior was not acceptable.
24. On April 3, 1998, Complainant voluntarily reported to Ms. Jackson-Jones' office to complete the necessary worker's compensation paperwork. He again apologized for his outburst on the phone the day before.
25. On April 20, 1998, a notice of a Rule R8-3-3 meeting ("Notice") was sent to Complainant. The Notice provided that the reasons for the meeting were (1) the use of profane language and demonstrating inappropriate behavior toward a supervisor; and, (2) failure to comply with established procedures and failure to return to work following a worker's compensation claim. (Exhibit 9).
26. On April 23, 1998, an R8-3-3 meeting was held in which Complainant, his representative and Ms. Burda were present. During the meeting, Complainant made admissions equivalent to "I blew it" and that he had hung-up on Ms. Jackson-Jones on April 2, 1998. (Exhibit 1). At the time of the R8-3-3 meeting, Complainant failed to proffer any reasons for his behavior.
27. A Notice of Disciplinary Action was issued on April 30, 1998 in which Complainant was to receive a reduction of three steps in pay grade for a period of five months. The discipline was imposed as a result of Complainant's behavior with his supervisor and Ms. O'Rourke, and not the result of failing to follow worker's compensation claim procedures.
28. The appointing authority reviewed the previous work history as well as considered the admissions and reasons proffered by Complainant during the R8-3-3 meeting.
29. Subsequently, Complainant has admitted to and received behavioral support for coping with stress.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

Respondent contends that the discipline imposed upon Complainant was not arbitrary and capricious or contrary to rule or law. Respondent argues that Complainant's actions were unacceptable and cannot be condoned, despite the apology subsequently made. Respondent contends this is reinforced by the pattern of behavior by Complainant during his work history with UCHSC and by Complainant's own admissions. Finally, Respondent argues that it complied with all State Personnel Board rules and administered the appropriate level of disciplinary action.

Complainant simply argues that while he did make inappropriate remarks to Ms. Jackson-Jones, the level of discipline imposed was not reasonable. He argues that he was under stress which caused his inappropriate actions. In addition, he argues that Respondent should not have contacted him at home while he was sick and that such contact constituted harassment.

I.

The Acts for Which Discipline was Imposed

It is clear that Complainant committed the acts for which discipline was imposed. First and foremost, Complainant admits to the behavior. In his testimony, he admits

using profanity and slamming down the phone. In addition, Complainant's own testimony is supported by the testimony of his supervisor, Ms. Jackson-Jones and the testimony of Ms. O'Rourke. Mr. Jackson-Jones kept a comprehensive set of notes in which she tracked the events and behavior. Her testimony corroborates the facts listed in her notes and further supports her credibility. Ms. O'Rourke's testimony further supports the inappropriate behavior of Complainant. Given the admissions made by Complainant during the R8-3-3 meeting, and Complainant's own testimony during the hearing, there is no doubt that the acts for which discipline was imposed occurred.

II.

Level of Discipline

The discipline imposed was within the range of reasonable alternatives available to the appointing authority. In determining the level of discipline to be imposed, a number of elements must be considered. State Personnel Board Rule R8-3-1, 4 CCR 801-1 encourages progressive discipline. The rule provides that the decision to correct or discipline an employee shall be governed by (1) the nature, extent, seriousness and effect of the act, error or omission committed; (2) the type and frequency of the previous undesirable behavior; (3) the period of time that has elapsed since a prior offensive act; (4) the previous performance evaluation of the employee; (5) an assessment of information obtained from the employee; (6) any mitigating circumstances; and (7) the necessity of impartiality in relations with employees. The rule further states that unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action. The imposition of the level of discipline is also a matter to be determined by the appointing authority and the appointing authority is presumed to make such decisions regularly and appropriately. See: *Chiappe v. State Personnel Board*, 622 P.2d 527, 532-533 (Colo. 1981), *State Personnel Board v. District Court In and For City and County of Denver*, 637 P.2d 333 (Colo. 1981).

In this matter, Complainant admitted his actions. He used profanity, demonstrated inappropriate behavior, and was generally uncooperative. While Complainant argues that some of his behavior is the result of taking pain medication as prescribed, he also admits he committed the acts. In this instance, it is clear that Complainant has a history of poor interpersonal relations. A review of his past performance appraisals, and disciplinary history, indicates Complainant has had difficulty in developing and maintaining appropriate standards of behavior vis-à-vis interpersonal relations. The fact that Complainant was on medication at the time of his outbursts may mitigate but does not excuse his behavior. Nor does the fact that Complainant was under stress due to personal reasons *completely negate* his behavior. Rather, his history with interpersonal relations demonstrates that it is more likely than not that his poor interpersonal behavior is not unusual.

In the context of Complainant's prior work history, an appointing authority can interpret Complainant's behavior as being serious and extensive. It is this type of behavior that, if condoned, can cause future interpersonal relationships to fester and grow. It is appropriate to hold this employee responsible for such outbursts given the prior history of interpersonal relationships. This is especially reinforced by the fact that Complainant received a disciplinary action in late October 1997 for inappropriate interpersonal relations conduct. It is clear that the behavior occurred relatively frequently and repeatedly. It is also clear that the appointing authority appropriately administered progressive discipline after having considered the previous appraisal history and the personnel file.

Given the elements outlined above, the appointing authority complied with State Personnel Board Rule R8-3-1 regarding progressive discipline and the discipline imposed was within the reasonable range of alternatives.

III.

Arbitrary, Capricious or Contrary to Rule or Law Actions

No evidence was received which would support Complainant's argument that Respondent's actions of imposing discipline were arbitrary, capricious, or contrary to rule or law. While Complainant argues that he was harassed by various telephone calls, such an argument is not persuasive. In order for Respondent to comply with the appropriate worker's compensation laws, and in order to adequately advise Complainant of the worker's compensation issues, thereby effectively protecting Complainant, Respondent had to initiate telephone contact with Complainant despite his absence from the work place. This cannot be characterized as harassment.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed. Such acts demonstrate willful misconduct in violation of State Personnel Board Rule R8-3-3(C)(2), 4 CCR 801-1.
2. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.
3. The actions of Respondent were not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's action of a three step reduction in pay for a five month period is **UPHELD**.

Dated this 2nd day
Of December, 1998
At Denver, Colorado

G. Charles Robertson
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 2 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 December, 1998, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Gerald Jackson
4681 Enid Way
Denver, CO 80203

and in the interagency mail, addressed as follows:

Daniel J. Wilkerson
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4200 East 9th Ave., Campus Box A-007
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