

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B071

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ALMA N. MELENDEZ,

Complainant,

vs.

DEPARTMENT OF REVENUE,
MOTOR VEHICLE DIVISION,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on March 15 and March 30, 1999. Respondent was represented by Assistant Attorney General Carolyn Livers. Complainant appeared and was represented by Wayne Vaden, Attorney at Law.

Respondent called four witnesses: Lori Loyd, Office Manager I; Karl Trump, Criminal Investigator; Larry Porter, Chief Criminal Investigator; and John A. Duncan, the delegated appointing authority.

In addition to herself, complainant called as a witness Gilbert Martinez.

Respondent's Exhibits 1, 3, 5 and 7 through 15 were stipulated into evidence. Exhibits 2, 4, 5, 6, 16A, 16C and 16D were admitted without objection. Exhibits 16B, 16E and 16F were admitted over objection. Exhibit 3 was not admitted.

Complainant's Exhibits D, G, H and I were admitted over objection.

MATTER APPEALED

Complainant appeals the December 14, 1998 disciplinary termination of her employment. For the reasons set forth below, respondent's action is upheld.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether complainant was discriminated against on the basis of race or nationality.

PRELIMINARY MATTERS

Complainant's renewed motion to continue was denied. Complainant's motion to sequester the witnesses was granted. Excepted from the sequestration order were complainant and respondent's advisory witness, John Duncan.

FINDINGS OF FACT

1. Complainant, Alma N. Melendez, began employment with the Department of Revenue, Motor Vehicle Division, respondent, as an Administrative Assistant I in March 1998. She was promoted to the position of Administrative Assistant II in July 1998. She was

certified on August 1, 1998.

2. Complainant worked at the Lakewood Express Driver's License Office, which is a limited service office. The office administers eye tests and written tests, but not road tests.

3. Complainant worked at the counter servicing applicants for a driver's license. She would take information from the client, enter it into the computer and print it out as a "declaration sheet." Complainant was to request and review two documents of identification, such as a driver's license, birth certificate or an immigration card. If the applicant produced an out-of-state license, the procedure was to take the out-of-state license and issue a Colorado license without requiring a written exam. The \$15.00 fee was collected at the counter and put in a cash drawer. Complainant processed 60 to 70 customers on a busy day.

4. Lori Loyd became the manager of the Lakewood express office and complainant's supervisor on September 3, 1998. In addition to Loyd, there were 2.5 employees in the office. Complainant was the only one fluent in Spanish and was occasionally called over to assist in serving Spanish-speaking customers.

5. On September 17, 1998, Loyd's attention was directed to complainant when she noticed complainant and her godfather, Gilbert Martinez, whispering back and forth to each other. Loyd thought they looked suspicious because they would glance at her and quickly look away and because of their low voices. Whispering was out of the norm for the office. Loyd recognized Martinez, who was with a customer, because complainant had recently introduced him to her as her godfather. He was known to bring Spanish-speaking persons into the office and interpret for them. He always did the talking, even

though complainant spoke Spanish and was capable of communicating directly with the license applicant. On this day, Loyd went over to talk to complainant, looking over her shoulder to see what had been entered into the computer. Loyd asked what an I-155 document was. Complainant replied that it was an immigration document. Loyd responded that she did not see it. She knew that an I-551 was a proper immigration document, but that an I-155 was not, and she expected complainant to say that the numbers had been transposed instead of saying that an I-155 was a legitimate document.

6. Approximately one month after the September 17 occurrence, Martinez brought in another customer and went directly to complainant. Whispering between the two and their glances once again caught Loyd's attention. Loyd observed that complainant had a birth certificate and a social security card in front of her. Complainant printed out the declaration sheet showing that the customer had surrendered a Texas driver's license, which Loyd did not believe because she had seen only a birth certificate and a social security card. Loyd searched the box where out-of-state licenses are kept and could not find the Texas license purportedly surrendered by this customer.

7. The next morning, a Saturday, Loyd confronted complainant by saying that she could not find the Texas driver's license. Complainant responded that it must be somewhere, or that it was lost.

8. Through the chain of command, the delegated appointing authority, John Duncan, was advised of suspicious activity at the Lakewood express office. Concerned for the integrity of the system, he ordered an investigation.

9. The investigation was conducted by Larry Porter, Chief

Criminal Investigator for the Department of Revenue, and Karl Trump, Criminal Investigator. They reviewed the documents in question and 25-30 declaration sheets, selected at random, prepared by complainant for a one-month period during September and October 1998. They contacted the United States Department of Immigration and other state offices to confirm or deny the truth of information asserted in the declaration sheets. Vasquez and Rubio, the two customers brought in by Martinez in September and October, respectively, were personally interviewed.

10. The declaration sheet for Vasquez showed that he surrendered a New Mexico driver's license to complainant. The state of New Mexico had no record of a driver's license being issued to that person. Vasquez confirmed that he never held a New Mexico license, and he insisted that he paid \$25.00 for his Colorado license rather than the standard fee of \$15.00. He was not required to take any tests to receive his Colorado permit.

11. There was no record of Rubio ever being issued a Texas driver's license. The social security number shown in the declaration sheet belonged to someone else. Rubio confirmed that he did not surrender a Texas license in order to receive a Colorado permit, but he did give complainant a fraudulent Texas birth certificate and a fraudulent social security number. He admitted that he was an illegal alien in the United States. He stated that he paid the standard fee for his Colorado permit.

12. In the declaration sheets of four other customers serviced by complainant, immigration documents were shown to have been used for identification. No immigration documents had been issued to any of these individuals. In three of the cases, the immigration document was identified as an I-155. There is no such document.

13. A predisciplinary meeting was held on November 16, 1998. Complainant asserted that whenever she used "I-155" to identify an immigration document it was a typographical error. She denied virtually all knowledge of Martinez, stating that she and he had a distant relationship. Duncan questioned why Martinez was necessary once the customer arrived at the office, since complainant could conquer the language barrier on her own. With respect to the Texas driver's license, she said that it must be lost.

14. Duncan concluded that complainant was giving preferential treatment to certain customers and had a conflicting interest by issuing driver's licenses to individuals who were not eligible to receive them. He based his ultimate decision on four specific cases but took into consideration other incidents that demonstrated a pattern of document fabrication. He also concluded that complainant was the cause of a hostile work environment, which was created by the confrontation between complainant and her supervisor. This was but a small factor in his reasoning and did not tip the scale. The absence of documents declared to exist was impossible for him to overcome in making the termination decision.

15. By letter dated December 16, 1998, the appointing authority terminated the employment of Alma N. Melendez for issuing licenses without proper documentation, failure to examine documents properly, making false entries into the record and creating a hostile work atmosphere. (Exhibit 1.)

16. An Anglo female license examiner was recently prosecuted for fraudulently issuing driver's licenses. At least one Anglo male has been dismissed from employment for the same offense.

17. Complainant 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 warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an administrative agency's decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 506 (Colo. App. 1992).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

In making credibility determinations, the administrative law judge is guided by the factors set out in CJI 3:16, which include: the witness' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been

contradicted, any bias, prejudice or interest, and their manner or demeanor on the witness stand.

With regard for the above standards, respondent's witnesses are deemed wholly credible. Their testimony was internally and externally consistent and deserving of substantial weight. Complainant's testimony was self-serving and frequently off the point. Her testimony that she had dealt with Martinez a total of three times in view of his testimony that he brought in customers three or four times per week is incredible. She tried to cast doubt on the declaration sheets having been prepared by her by testifying that since they were linked to her by her initials appearing on the document and it is possible that she was merely the last person to print the document, such as having made a correction to a declaration sheet originally inputted by someone else in which event her initials would appear, but she provided no examples or cited any instances of this ever having happened. It is more likely than not that all of the declaration sheets attributed to her were, in fact, originally prepared and entered into the computer by her.

There is substantial record evidence to sustain the conclusions of the appointing authority except for his deduction that a hostile work environment was created by the disagreement between Melendez and Loyd. Correctly, however, the determination did not weigh heavily in his decisionmaking process, and the outcome would have been the same without it.

Complainant argues that she was targeted by the agency and set up for failure because she is a Spanish-speaking individual. There is no evidence whatsoever to support that claim. Indeed, the opposite is true. She was an especially valuable employee because of her

Spanish-speaking ability. The evidence shows not a hint of an improper motive on the part of her supervisor or the appointing authority. Both had legitimate concerns and took appropriate measures to alleviate those concerns. The inference is drawn that the result would have been identical under these facts and circumstances no matter the language spoken by complainant. Complainant was not persuasive in arguing otherwise. The facts that led to her dismissal were investigated and were supported by evidence presented at hearing. Her argument that she was not properly trained is found totally lacking in merit.

Neither party is entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.
2. Respondent's action was not arbitrary, capricious or contrary to rule or law.
3. Complainant was not discriminated against on the basis of race or nationality.

ORDER

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

DATED this _____ day of
April, 1999, at
Denver, Colorado.

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 April, 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:

Wayne E. Vaden
Vaden & Evans, LLC
3333 Quebec Street, Suite 6100
Denver, CO 80203

and in the interagency mail, addressed as follows:

Carolyn Lievers
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203