

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B094

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GEORGIANNA ARMSTRONG-BEY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO AT DENVER,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson on April 13, 1999. Respondent was represented by Rosemary Augustine, Associate University Counsel. Complainant represented herself.

Because of the disposition of this case, Kenneth M. Tagawa, Director of the Department of Human Resources, was the sole witness.

Admitted into evidence by stipulation of the parties were Respondent's Exhibits 4, 10-18 and 20-27 and Complainant's Exhibits A-I.

MATTER APPEALED

Complainant appeals a disciplinary adjustment of pay, characterized by respondent as a "demotion in pay." For the reasons set forth

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herein, respondent's action is rescinded.

ISSUE

Whether respondent's action was arbitrary, capricious or contrary to rule or law.

PRELIMINARY MATTERS

Respondent's motion to strike complainant's amended prehearing statement as untimely was granted. Respondent's motion to strike complainant's request for a promotion was granted on grounds that the issue was not properly raised before the Board. Respondent's motion to quash a subpoena was ruled moot because the subpoena had not been served upon the witness and the witness was consequently not under a legal obligation to appear at hearing.

FINDINGS OF FACT

1. Complainant, Georgianna Armstrong-Bey, is certified in the position of General Professional I with respondent, the University of Colorado at Denver.
2. On May 11, 1998, Armstrong-Bey was issued a corrective action for claiming overtime without having previously received permission to work overtime. There were no other overtime issues after the date of the corrective action.
3. On December 15, 1998, Armstrong-Bey was issued a corrective action for failure to provide a timely report of employee history information for Vice Chancellor Ken Herman. With respect to future

action, the corrective action stated:

As an employee of the Center for Human Resources, I expect you to provide customer service which is the first goal of our office (appendix G). While employed in the Center for Human Resources you are to provide information when requested and to keep the individual or office that originated the request informed. If you are unable to provide accurate and timely customer service, it will be followed by further progressive discipline, including possible disciplinary action.

(Exhibit 17.)

4. The December 15 corrective action did not set out a performance plan other than recited above and did not otherwise refer to the report that was the subject of the corrective action.

5. Also on December 15, 1998, Kenneth Tagawa, Director of the Center for Human Resources, gave notice to Armstrong-Bey of a predisciplinary meeting "to discuss information regarding your employment in the Center for Human Resources." The notice letter provided no other information of the factual basis for the meeting.

(Exhibit 18.)

6. By letter dated February 16, 1999, Director Tagawa imposed upon complainant the disciplinary penalty of a three-week demotion of one step in pay for claiming unauthorized overtime and for failure to complete a work assignment in a timely manner. In justification of the disciplinary action, Tagawa went over the facts that resulted in each of the previously issued corrective actions and then set a March 9, 1999 deadline for the completion of the report for which the December 15 corrective action had been administered. (Exhibit 21.)

DISCUSSION

At the conclusion of respondent's opening statement, it appeared that there would be no evidence of wrongful conduct on the part of complainant except for the allegations which led to the respective corrective actions. It thus appearing that the employee had been improperly corrected or disciplined twice for the same acts, the administrative law judge queried respondent as to whether the evidence would show additional conduct which resulted in the disciplinary action.

Respondent argued that additional conduct was not necessary because complainant had received two corrective actions in a twelve-month period, relying on former Policy 8-3-(A), 4 Code Colo. Reg. 801-1, which provided, in part, that: "Normally, no more than 2 corrective actions may be administered to an employee in any 12-month period. Thereafter, a disciplinary action shall be considered."

Respondent incorrectly construed Policy 8-3-(A), which was repealed and not replaced effective December 31, 1998, to mean that a disciplinary action was appropriate based upon the corrective actions themselves and that additional wrongful conduct was not required. The policy, in actuality, contemplated a future third act, in which event the appointing authority should consider disciplinary action rather than a third corrective action. Nonetheless, the policy was not in effect on February 16, 1999, the date of the disciplinary action against Armstrong-Bey.

Respondent argued also that the December 15 corrective action and the February 16 disciplinary action were issued concurrently, while

conceding that "concurrent" means "at the same time." It is found that a corrective action imposed on December 15, 1998 and a disciplinary action imposed on February 16, 1999 were not issued concurrently.

Following a recess requested by counsel to confer with her client, Tagawa took the stand briefly to testify that he meant to convey in the corrective action letter that if complainant did not complete the current assignment in a timely manner, there would be "further progressive discipline." But he did not say that, instead referring to "accurate timely customer service" in the future. A specific corrective action plan was not given until the disciplinary letter. A corrective action necessarily includes the steps an employee must implement in order to correct or improve her performance. R-6-8, 4 Code Colo. Reg. 801-1. Furthermore, the letter serving notice on complainant of a predisciplinary meeting provided not a hint of any factual allegations to be discussed at the meeting.

Tagawa did not set a time frame for the completion of the subject assignment as part of the corrective action. There was no specific performance plan to guide complainant with respect to her future behavior, only generalizations, with which she complied. She committed no other acts of untimeliness between December 15 and February 16.

Tagawa testified that he took disciplinary action because of the two corrective actions, and, "the rules say you can give a disciplinary action after two corrective actions in twelve months."

The rules did not say so on February 16, 1999, and Tagawa misinterpreted the policy to which he referred, besides. As to the overtime issue, he admitted that there were no allegations to be

addressed by the disciplinary action other than those addressed by the May 11, 1998 corrective action.

Former Policy 8-3-(A) provided that: "An employee may not be corrected or disciplined more than once for a single specific act or violation." This provision, repealed effective December 31, 1998, was replaced by Rule R-6-5, 4 Code Colo. Reg. 801-1, which states in full:

An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.

There is no doubt that complainant was corrected or disciplined more than once for requesting unauthorized overtime pay, in violation of R-6-5. A slightly closer question is whether she was corrected or disciplined twice for failure to complete a particular work assignment, in view of respondent's contention (an apparent afterthought) that the discipline was imposed because the assignment still was not completed. Yet, Tagawa testified that he included the overtime issue in the disciplinary action so he would have two corrective actions in a twelve-month period as grounds for the imposition of discipline. Nevertheless, the December 15 corrective action was not set up that way. The corrective action inferred future assignments, and there were no other assignments which complainant failed to complete in a timely manner. There were no additional acts or incidents of employee misconduct, as contemplated by R-6-5, in order to justify further corrective or disciplinary action. Consequently, complainant was corrected or disciplined more than once for failure to complete the report intended for Vice Chancellor Herman.

Because respondent's offer of proof demonstrated that the

disciplinary action contravened R-6-5 and the complainant was entitled to judgment as a matter of law, the disciplinary action was ordered rescinded contingent upon the issuance of a corresponding initial decision. No further testimony was necessary.

CONCLUSIONS OF LAW

Respondent's action was arbitrary, capricious or contrary to rule or law.

ORDER

The disciplinary action is rescinded. Complainant shall be reinstated to her former grade and step with full back pay and benefits.

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:

Georgianna Armstrong-Bey
3300 Forest Street
Denver, CO 80207

and in the interagency mail, addressed as follows:

Rosemary Augustine
Associate University Counsel
University of Colorado
1380 Lawrence Street, Suite 525
Denver, CO 80202
