

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES CONKLETON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO WOMEN'S CORRECTIONAL FACILITY,

Respondent.

Hearing was held on January 5, 2001 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by Assistant Attorney General Carol Caesar. Complainant represented himself.

PRELIMINARY MATTERS

Complainant testified on his own behalf and called no other witnesses.

Complainant's Exhibits C and D were admitted by stipulation. Exhibits E and G were admitted over objection. Exhibit B was offered but not admitted.

Respondent's Exhibits 1, 2 and 4 - 15 were admitted by stipulation.

Procedural Matters

After this case was set for hearing, Complainant failed to file a Prehearing Statement. Respondent filed a motion for order to show cause. After Complainant filed no response, Respondent filed a motion to dismiss for failure to prosecute the case. At the hearing on the motions on November 16, 2000, Complainant, appearing pro so, stated that he had moved and failed to inform the Board of his new address. He therefore had not received the Prehearing Order and other subsequent pleadings. Complainant further indicated that he had not yet exercised his right to conduct discovery and requested the opportunity to do so.

The ALJ determined that it was in the interests of justice to commence the hearing on November 16, 2000, provide Complainant with a new copy of the Prehearing Order, provide Complainant with time to conduct discovery, and re-set the hearing. Respondent's motions were denied. Hearing was ultimately set for January 5, 2001.

At hearing, Complainant appeared pro se. In the course of presenting his case, he stated that he was unclear about how to proceed and what was necessary to present his case. Complainant stated that he had expected that the documents from the Colorado Civil Rights Division ("CCRD") case would be automatically included in the Board record. The ALJ asked Complainant what documents from the CCRD file would be helpful to him. Complainant stated that he sought the Respondent's documents, so that he could rebut them. The ALJ pointed out that all of the Respondent's documents regarding Complainant's unsatisfactory performance had been stipulated into this record, and were therefore available to him to rebut. Complainant further argued that he sought documents relating to the misconduct of another employee.

The ALJ ruled that the Prehearing Order made it clear it was Complainant's burden to bring all documents to hearing he sought to introduce as exhibits, and to call all witnesses he deemed necessary to his case. Complainant had elected to list no witnesses, but had listed five exhibits, on his Prehearing Statement. He therefore did understand his burden at hearing. Further, Complainant had been provided a second opportunity to conduct discovery already. After hearing Complainant's statements, the ALJ considered and rejected the possibility of stopping the hearing and continuing it to another day, concluding that Complainant had been afforded full procedural due process.

At the close of Complainant's case, Respondent moved to dismiss the case under C.R.C.P. 41(b). For the reasons set forth below, the motion was granted.

MATTER APPEALED

Complainant, a probationary employee, appeals his disciplinary termination, claiming Respondent discriminated against him on the basis of race and his participation in the National Guard. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Respondent discriminated against Complainant on the basis of race and his participation in the National Guard.

FINDINGS OF FACT

1. Complainant, James Conkleton, commenced employment with DOC as a Correctional Security Services Officer I on April 1, 1999.
2. On July 4, 1999, Complainant was late to work by 1 1/2 hours without prior notice.
3. On July 13, Lt. Stephen James sent Complainant a Confirming Memorandum regarding his tardiness on July 4. The memo noted that Complainant had been provided the proper number he must call if he anticipated he would be late for work again in the future. Complainant signed the memo acknowledging having discussed the importance of being on time and receiving the number to call.
4. On July 23, 1999, one of Complainant's supervisors drafted a memo to Lt. Stephen James, another of his supervisors, regarding Complainant's request for military training leave and his statement that he might need to go to Hungary. The memo points out that only permanent employees are entitled to certain military leave under Director's Procedure P-5-19. Complainant was still a probationary employee.
5. On July 27, 1999, Complainant was ten minutes late for roll call without giving prior notice.
6. On August 31, 1999, Complainant was five minutes late to work without prior giving notice.
7. On September 18, 1999, Lt. Dennis Nix issued Complainant a letter of counseling regarding his being late for work on July 4, 27, and August 31, 1999. The letter noted the importance of being on time in the corrections field. It further stated that when Complainant is late, his job is affected, and he puts himself as well as others at risk due to the corrections nature of his job.
8. On September 19, 1999, Respondent's supervisor sent Complainant a Confirming Memorandum regarding his tardiness on July 4 and 27, 1999.
9. On August 30, 1999, Complainant failed to complete his assigned duties, resulting in his being ordered to remain on duty after his shift to complete

them.

10. On September 26 and 27, 1999, Complainant reacted negatively to a reassignment to a different post, in a manner Respondent deemed to be inappropriate.
11. On September 28, 1999, Complainant smoked in a non-smoking area of the facility. Others may have also smoked in this area.
12. Respondent gave Complainant a "Needs Improvement" performance rating for the period April 1 through September 30, 1999. Complainant refused to sign it. The evaluation noted: Complainant had been repeatedly late for work; did not meet expectations of accuracy, thoroughness and professionalism; had stated that he did not want to work with female offenders; had difficulties communicating with female offenders; and had a bad general attitude.
13. One of the female inmates with whom Complainant was cited for having an altercation appealed his treatment of her. She lost her appeal and was found guilty of Disobeying a Lawful Order.
14. On September 28, 1999, Respondent sent Complainant a letter scheduling an R-6-10 pre-disciplinary meeting.
15. In September 1999, Complainant requested three days of military training leave for National Guard participation, for September 14, 17, and 18, 1999.
16. On September 28, 1999, Warden James E. Abbott granted the request by letter. He explained that under state personnel rules, Complainant was entitled to up to 15 days in a calendar year of paid leave for military training, which can also be used for military leave. In Complainant's case, Complainant had exhausted his 15 days of military leave on September 12. Warden Abbott therefore awarded Complainant Leave Without Pay for two and a half of the days, and used Complainant's 3.38 hours of compensatory time for the remaining time. Complainant had sought to avoid using his compensatory time.
17. On October 4, 1999, Warden Abbott sent Complainant a letter terminating his employment. Abbott stated he had reviewed the confirming memoranda, the letter of counseling, statements from witnesses, and had made personal observations. He concluded that Complainant had failed to comply with standards of efficient service, had engaged in willful misconduct by

establishing a pattern of tardiness with no notice even after counseling sessions, and had violated rules and procedures regarding smoking and the staff code of conduct.

18. Complainant seeks rescission of the termination, back pay and benefits, and a transfer to a different facility.

DISCUSSION

Complainant was a probationary employee at the time of his termination. He therefore is not entitled to a hearing on the issue of unsatisfactory performance. Colo. Const. Art. XII, Section 13(10); Sections 24-50-115(6) and 125(5), C.R.S.; Williams v. Department of Corrections, 926 P.2d 110, 112 (Colo. App. 1996).

The only issues over which the Board has jurisdiction in this matter are Complainant's contentions that he was terminated because of his race and his participation in the National Guard.

Respondent did not Terminate Complainant on the Basis of Race

To demonstrate a prima facie case of discrimination under the Colorado Anti-Discrimination Act, section 24-34-101 et seq., C.R.S., Complainant must demonstrate: A. he belongs to a protected class (here, African American); B. he was qualified for the job at issue; C. he suffered an adverse employment action; and D. that the circumstances give rise to an inference of unlawful discrimination. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 400-401 (Colo. 1997). Once Complainant establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. If the employer meets this burden, the burden shifts back to Complainant to prove that "the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." Id. See also Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1315-16 (10th Cir. 1999).

Complainant has failed to make a prima facie case of discrimination. He is a member of a protected class; he was qualified for his position; and he suffered an adverse employment action. However, the facts of this case do not give rise to an inference of unlawful discrimination.

At hearing, Complainant denied none of the conduct for which he received the confirming memoranda, the corrective action, and the "Needs Improvement" evaluation. The only exception was his testimony regarding Finding of Fact #13, which relates to his treatment of only one female inmate, and which does not serve to rebut the evaluation's critique of his

attitude towards working with female inmates in general. He also failed to rebut the evaluation statement regarding his communication problems with female inmates in general.

Even assuming that Complainant had presented a prima facie case of race discrimination, he offered no evidence that Respondent's reasons for terminating him were a pretext for discrimination. Pretext may be demonstrated by establishing that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Bullington, 186 F.3d at 1317. There is no evidence in this record demonstrating that Respondent's reasons for terminating Complainant were unworthy of credence or that discrimination more likely motivated Respondent here.

Respondent did not Terminate Complainant for Participating in the National Guard.

Complainant asserts that he was terminated because of his participation in the National Guard.

Director's Procedure P-5-18 states as follows:

"Military training leave provides up to 15 work days in a calendar year of paid leave to employees who are members of the National Guard or military reserves. It is granted to attend the annual encampment or equivalent training. The employee must present proper military orders. This leave is not a break in service and military pay is not turned over to agencies."

Director's Procedure P-5-19 states in part:

"Military leave provides unpaid leave to permanent employees who are called to active service, including training or declared emergencies."

Respondent granted Complainant his full 15 days of military training leave, and gave him two and a half days of additional leave without pay. Complainant argues that the fact Warden Abbott used his three hours of compensatory time evinces a bias against his National Guard participation. Warden Abbott's decision to use Complainant's compensatory time was entirely within his discretion. Viewed in the light of Complainant's short duration as a DOC employee (less than six months) and the fact that Complainant had already exceeded his annual 15-day limit on military training leave, Warden Abbott's decision appears devoid of retaliatory motive.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant on the basis of race

or participation in the National Guard.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
February, 2001, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

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. The notice of appeal must be received by the Board no later than the 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) 894-2136.

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 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 February, 2001, 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 K. Conkleton
3617 Manchester Street
Colorado Springs, CO 80907-4825

and in the interagency mail, addressed as follows:

Carol Caesar
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1525 Sherman Street, Fifth Floor
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