

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B086

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TONY BELMONTE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
BUENA VISTA CORRECTIONAL COMPLEX,

Respondent.

Hearing was held on November 6, 2000, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Joseph Lynch, Assistant Attorney General. Complainant appeared in person and was represented by Kenneth Scott, Attorney at Law.

Respondent called the following witnesses: Tony Belmonte, complainant; Charles Campton, Criminal Investigator; Sherry Pearce, Correctional Support Supervisor II; Kenneth Stolba, Correctional Support Supervisor II; Davis Seals, Correctional Support Supervisor IV; and Bobby Hickox, Warden, Buena Vista Correctional Complex.

In addition to testifying on his own behalf, complainant called Kim Belmonte.

Respondent's Exhibits 5, 6, 7, 8, 9, 12, 13, 14 and 16 were

2000B086

admitted into evidence without objection. Exhibit 11 was excluded. Complainant's Exhibits A and C were admitted without objection.

MATTER APPEALED

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 For the reasons set forth below, respondent's action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

By Order dated July 24, 2000, the State Personnel Board adopted the Preliminary Recommendation of the Administrative Law Judge and granted complainant's Petition for Hearing. On November 2, 2000, complainant filed a motion to preclude evidence of his unsatisfactory job performance as irrelevant and unduly prejudicial. At hearing on November 6, complainant's motion was denied on the ground that the Preliminary Recommendation, which was adopted *in toto* by the Board, specifically provided for the introduction by respondent of evidence of complainant's unsatisfactory job performance.

Although complainant was a probationary employee, the burden of proof was placed on respondent because the allegation pursuant to which a hearing was granted was that complainant was dismissed for disciplinary reasons not related to unsatisfactory performance. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Respondent was thus required to show just cause for the termination while, at the same time, being allowed to prove that complainant was, in fact, dismissed for unsatisfactory performance.

The October 23, 2000 Order granting complainant's motion to take testimony by telephone was deemed moot because the proposed witness had been released from prison.

Per respondent's request, the witnesses were excluded from the hearing room unless testifying, with the exceptions of complainant and respondent's advisory witness, Davis Seals.

Upon an indication from respondent that it intended to offer after-acquired evidence in support of its termination decision, complainant moved to preclude the introduction of after-acquired evidence. The motion was granted on the following grounds:

In *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997)(Mullarkey, J., dissenting), the Colorado Supreme Court recognized the after-acquired evidence doctrine for the first time. The court limited its holding to cases involving resume fraud, *i.e.*, pre-hire conduct, in cases of private employment. The issue of post-hire misconduct was not resolved. The *Crawford* decision does not address issues

surrounding the application of the after-acquired evidence doctrine to public employment cases, where the employee possesses a constitutional property interest in continued employment giving rise to such due process rights as written notice of charges, a predisciplinary meeting and opportunity to be heard before discipline is imposed.

The after-acquired evidence doctrine either shields the employer from liability altogether or limits the relief available to the employee when, after termination, the employer learns about employee wrongdoing that would have caused the employer to dismiss the employee. If the employee's conduct consists of resume fraud, the doctrine gives the employer a defense if the employer would not have hired the employee had it known of the fraud.

The *Crawford* court held that after-acquired evidence of resume fraud is an absolute defense to an employee's claims of breach of contract or promissory estoppel. In addition to the after-acquired evidence doctrine, the court relied on the common law principles of fraud in the inducement of a contract, rescission and the equitable theory of unclean hands. The court found that its decision was not governed by *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879 (1995), in which the U.S. Supreme Court ruled that after-acquired evidence of post-hire misconduct is only a partial defense to federal discrimination claims in private employment. *McKennon* was distinguished on the ground that public policies underlying federal discrimination laws were not present in *Crawford*.

Crawford was decided in the context of employment at will. Under the employment-at-will doctrine, which is the law of Colorado, an employee who is hired for an indefinite period of time is an "at will" employee, "whose employment may be terminated by either party without cause and without notice, and whose termination does not give rise to a cause of action." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987). Plaintiff Weissman was an at will employee.

In adopting the after-acquired evidence doctrine for cases of resume fraud involving claims for breach of implied contract and promissory estoppel, the *Crawford* court explicitly did not reach the scope of the application of the doctrine to wrongful discharge claims.

In sum, the after-acquired evidence doctrine has no application to this case.

FINDINGS OF FACT

1. Complainant Tony Belmonte was first employed as a temporary Food Service Supervisor by respondent the Department of Corrections (DOC) at the Buena Vista Correctional Complex (BVCC) in May 1999. His duties involved supervising inmate employees working in the kitchen.

2. On September 1, 1999, Belmonte became a permanent, probationary employee.

3. On May 4, 1999, prior to taking the exam for a Correctional

Officer position, Belmonte signed an "Examination Willingness Form," in which he answered yes to the question, "Are you willing to follow prescribed procedures and policies even if they may conflict with your personal preferences, religion or philosophy?" The form contained a clause saying that failure to comply would be cause for termination. (Ex. 16.)

4. On October 30, 1999, Belmonte was issued a corrective action for failing to sign in his radio before leaving a shift. (Ex. 5.) He had returned the radio to its proper place, but he forgot to sign the log saying he did so.

5. On November 9, 1999, Belmonte received a letter of commendation from his supervisor, Sherry Pearce, for performing at peak performer standards during a food services audit in October. (Ex, A.)

6. On December 15, 1999, Belmonte was issued a corrective action for releasing an inmate from his shift without making sure the inmate checked in a Class B tool that had been assigned to him. (Ex. 6.) The tool not checked in was a dough cutter. According to Belmonte's supervisor, this incident was not sufficient cause for his dismissal.

7. On December 21, 1999, Major Davis Seals, Support Services Supervisor for the facility's food services operation, was instructed by Warden Hickox to have Belmonte report to work the following day for the 8:00 a.m. to 4:00 p.m. shift because administration wanted to talk to him. At approximately 4:30 p.m., Fields conveyed this information to Sherry Pearce.

8. December 22 was a regularly scheduled day off for Belmonte. Schedules are made out in the early part of the month.

9. Pearce told Belmonte that Seals had told her to have him come in the next day from 8:00 a.m. to 4:00 p.m. to be available for administration to talk to him about an ongoing investigation. Belmonte responded that the next day was his regularly scheduled day off, and he could not come in because he had plans involving his family.

10. Pearce reported Belmonte's response to Seals, and Seals directed her to go back and tell Belmonte that he had to come in to be available to talk about the investigation, that he would be paid overtime because it was his day off, and he might not have to stay all day.

11. Belmonte again said he could not come in because he had plans. Hearing that, Seals directed Pearce to put Belmonte on the schedule for 8:00 a.m. to 4:00 p.m. the next day, which she did around 5:00 p.m.

12. Belmonte told Pearce that he would be able to come in for a short time if administration called him at home. (See Ex. 9.)

13. When Belmonte went home, he told his wife that he may be called in to work the next day, so they discussed how they would arrange child care in that event, since Mrs. Belmonte was planning to be at her own job.

14. Belmonte did not report for work on December 22.

15. Belmonte did not receive a telephone call from the facility on December 22.

16. As warden, Bobby Hickox was the appointing authority for BVCC. He gave the order for complainant to come to work on his day off because a DOC investigation had implicated Belmonte in illegal activity with inmates and, if there was "something to it," it impacted the safety and security of the facility because a delay would give Belmonte a chance to cover his tracks with the inmates. He wanted Belmonte to be available for an interview with the investigator. If, after the interview, it appeared that there was something to the implication, it was Hickox's intention to place Belmonte on administrative leave with pay pending the outcome. No specific time was set for the interview.

17. On December 22, 1999, when Belmonte did not report for duty, Hickox wrote a letter to Belmonte in which he referenced Belmonte's failure to report and then terminated his employment as follows: "*As a result of your Willful failure to perform the Duties of the Job as assigned, which I consider to be gross insubordination, your employment with the Colorado Department of Corrections, Buena Vista Correctional Complex, is terminated effective 8:00 a.m. December 22, 1999.*" (Emphasis in original.)

(Ex. 7.)

18. The termination letter advised Belmonte that, as a probationary employee, he did not have a right to a mandatory hearing to review a disciplinary action based upon unsatisfactory performance. (Ex. 7.)

19. In Hickox's estimation, Belmonte's failure to report for work on December 22 constituted a willful failure to perform the duties of the job.

20. Hickox believed that Belmonte violated several sections of DOC Administrative Regulation (AR) 1450-01, Staff Code of Conduct (Ex. 14) as follows:

IV(C): Staff will not exchange special treatment or favors, or make threats for information from offenders.

IV(D): Staff may not have communication with inmates outside the scope of employment.

IV(F): Staff shall not discuss their personal life with offenders.

IV(N): Staff may not perform any action that casts doubt on the integrity or security of the Department.

IV(EE): Staff are required to report to work at the time scheduled unless prior arrangements are made with their supervisor.

21. Hickox tried to sort out the investigation because it had not yet been completed, but some of it figured in, he believed, as to Belmonte's refusal to come in.

22. Hickox also concluded that Belmonte committed insubordination by failing to obey or comply with lawful orders given by a supervisor, pursuant to AR 1150-04, III(F) (Ex. 13).

23. Believing that an employee should "work now, grieve later," Hickox dismissed Belmonte for unsatisfactory performance because he was directed to report for work and did not, constituting

insubordination.

24. Hickox had not considered dismissing Belmonte for unsatisfactory performance prior to this failure to report on December 22. The purpose for having Belmonte come in was to meet with the investigator. Belmonte might have been required to work the full shift; he was told to plan on it.

25. Hickox was not aware that Belmonte had indicated to his supervisor that if they wanted him to come in, they could call him at home. (See Ex. 9.)

26. Hickox did not review the Executive Order on work-related family issues, which appears as Addendum L in the DOC employee handbook. (Ex. C.)

27. With respect to the rights of a DOC employee who is under internal investigation, AR 1150-04, V(C)(7), provides in full: "Unless justifiable cause exists, or at the request of the staff member, the interviews will be conducted during the employee's normal work hours and at the employee's work place. If at all possible, the interview will be conducted in a private meeting."
(Ex. 13.)

28. On January 3, 2000, twelve days after Belmonte's dismissal, Pearce completed his close-out evaluation reflecting his overall performance as needs improvement at the time of his termination. Belmonte did not sign the evaluation form. (Ex. 8.)

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). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. A reviewing court may reverse an agency's determination if the court finds that the agency acted arbitrarily and capriciously, that the determination is unsupported by the evidence in the record, or that the agency erroneously interpreted the law. See *Ohlson v. Weil*, 953 P.2d 939 (Colo. App. 1997). 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).

Probationary employees may be dismissed for unsatisfactory performance during the probationary period without right of appeal. Colo. Const. Art. XII, Section 13(10); *Williams v. Colorado Dept. Of Corrections*, 926 P.2d 110, 112 (Colo. App. 1996.) If a probationary employee is dismissed for reasons other than unsatisfactory performance, the employee is entitled to challenge the dismissal. *Williams, supra*.

It is respondent's position that Belmonte was a probationary employee who was dismissed for unsatisfactory performance, contending that the appointing authority was aware of Belmonte's employment record and relied upon it, at least in part, in making his decision. Respondent contends that it was very important for Belmonte to show up for work on December 22 so

some resolution could be reached with respect to the investigation; complainant's refusal to report for work implicated the safety and security of the facility.

Respondent argues further that the Examination Willingness Form (Ex. 16), in which Belmonte agreed to "follow prescribed procedures and policies even if they may conflict with your personal preferences, religion or philosophy" obligated him to report for work on December 22 because it was a condition of his employment. Respondent argues that Belmonte violated various provisions of ARs 1450-01 and 1150-4, as testified to by the appointing authority.

Contrary to the thinking of respondent, complainant contends that this case is not about job performance, but rather is all about the incident of December 22, referring to the appointing authority's testimony that he had no intention of terminating Belmonte's employment on December 21. Complainant argues that the disciplinary letter does not indicate that prior performance had anything to do with the termination. Complainant asserts that failure to appear for work on his scheduled day off is not a violation of anything. Besides, he was willing to go to the facility for the time necessary to be interviewed if asked to do so. Complainant argues further that the appointing authority should have taken into consideration the Executive Order on work-related family issues contained in the employee handbook.

Complainant argues that the AR provisions alleged to have been violated have nothing to do with Belmonte's conduct, asserting that the applicable AR in this instance is 1150-04(C)(7), which provides that investigative interviews will be conducted during

the employee's normal work hours.

Except for his assertion that the appointing authority should have considered the Executive Order, which is found inapplicable to the situation under review, complainant's argument is persuasive.

Rule R-8-45, 4 Code Colo. Reg. 801, provides in pertinent part:

Probationary employees shall not have the right to appeal discipline for unsatisfactory performance unless the employee alleges violation of law or that the action was for reasons other than those defined in Rule R-6-9.

Substantial evidence supports a conclusion that the purported reason for termination, the failure to report incident, does not constitute a valid reason for discipline pursuant to Rule R-6-9, 4 Code Colo. Reg. 801, such as failure to perform competently, failure to perform or willful misconduct.

Although the appointing authority testified that he took into account the whole of Belmonte's performance during his probationary period, the termination letter (Ex. 7) references unsatisfactory performance only in relation to Belmonte's alleged insubordination of December 22, 1999. Because a valid issue was created as to whether Belmonte actually committed a Rule 6-9 offense, he was entitled to a hearing. Because his conduct did not fall within the parameters of R-6-9, he is entitled to a reversal of the appointing authority's decision to terminate his employment.

December 22 had been a scheduled day off since early in the

month. Belmonte was not put on the schedule for the 8:00 a.m. to 4:00 p.m. shift for that day until near or at the end of his shift on December 21. To then claim that he refused to work on his scheduled day is mere gamesmanship. The Examination Willingness Form, which Belmonte had to sign in order to be eligible for the merit examination, is no justification for compelling Belmonte to report for work under these circumstances. Paragraph 5, relied upon by respondent, has no bearing on the facts of this case. The record evidence is insufficient to support a finding that complainant's failure to report on December 22 compromised the safety and security of the facility.

The regulation violations alleged by the appointing authority (Finding #20) have no relationship to Belmonte's conduct as evidenced by this record. Perhaps the appointing authority was thinking about the allegations of the investigation, but they were not the reason for the action he took. The only cited AR that might have some application is AR 1450-01, IV(EE), which requires employees to report to work at the scheduled time. Nonetheless, it can hardly be said that Belmonte was fairly and honestly scheduled to work on December 22. He was not needed at work; the staff for that day was complete. There was no emergency reason for him to be there. The purpose of having him come in was to be interviewed by the investigator. Apparently no effort was made to schedule a particular time for the interview; it was enough to require Belmonte to work a full shift on his day off in order to make himself available. Belmonte's supervisor and his wife both corroborated his testimony that he was willing to report to the facility on his day off when they wanted to talk to him.

The AR that is most applicable to this case is AR 1150-04, V(C)(7), which advises DOC employees that, when under internal investigation, they can expect to be interviewed during their normal work hours. Apparently no effort was made by respondent to comply with this provision. The appointing authority's bald testimony that he did not want to give complainant a chance to cover his tracks is not reasonably justifiable cause for terminating his employment for not reporting for work on December 22, 1999.

Respondent's action of terminating complainant's employment was groundless and frivolous. An award of attorney fees and costs is required under section 24-50-125.5, C.R.S., of the State Personnel System Act ("shall be liable"). See R-8-38, 4 C.C.R. 801 for definitions. See *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993) (awarding fees and costs for "groundlessness").

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is rescinded. Complainant shall be reinstated to his former position with full back pay and

benefits. Complainant's probationary period is stayed from December 22, 1999 to the date of this decision. Respondent shall pay to complainant his attorney fees and costs incurred in pursuing this litigation.

DATED this _____ day of
December, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, #1420
Denver, CO 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 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 December, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Kenneth Scott
Attorney at Law
P.O. Box 4046
Buena Vista, CO 81211

and in the interagency mail, addressed as follows:

Joseph Q. Lynch
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

