

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARTIN S. MORTENSON,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

This matter was heard on September 17, 2001, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Laurie Rottersman, Assistant Attorney General. Complainant represented himself.

Respondent called the following witnesses: Darlene Thompson, Benefits Manager; Michael Cullen, Operations Manager; Stephanie Cullen, Training Supervisor; and Donald Peitersen, Director of Unemployment Insurance for the Colorado Department of Labor and Employment.

Complainant testified in his own behalf.

Respondent's Exhibits 1 through 19 were stipulated into evidence. Complainant's proffered exhibit A was excluded.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment on March 22, 2000. For the reasons set forth below, respondent's action is affirmed.

ISSUE

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

PRELIMINARY MATTERS

Per complainant's request, an order sequestering the witnesses was entered, with the exceptions of complainant and respondent's advisory witness, Donald Peitersen.

Administrative notice was taken of the State Personnel Board case file.

FINDINGS OF FACT

The Administrative Law Judge (ALJ) considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. In 1992, Complainant Martin S. Mortenson, was hired by respondent Department of Labor and Employment (DOLE) as a Labor and Employment Specialist (L & E) in the unemployment insurance (UI) unit processing UI claims.

2. In February 1996, twelve teams of ten L & Es each were established. The duties of the L & Es were expanded to include telephone adjudications (decision-making), which Mortenson did not have to do before. Two supervisors were assigned to every three teams. Mortenson's supervisors were Darlene Thompson, Benefits Manager, and Cathy Hurd, L & E IV.

3. Mortenson had had difficulty performing his adjudication duties and was given personal assistance by Thompson for about a year before being placed on a 30-day corrective action plan. The plan was extended from 30 to 60 days upon the suggestion of Mortenson's team members, who wanted to provide additional assistance for him. Mortenson successfully completed this corrective action plan.
4. After a year of improved performance, Thompson began to get complaints from UI claimants and employers regarding Mortenson's level of performance. In September 1999, Thompson and Hurd met with him for an interim review of his performance plan and advised him that he was not meeting minimal departmental standards, especially in the areas of adjudication and customer service.
5. From September 27, 1999 through October 1, 1999, Mortenson attended a week-long training session on the federal standards for quality adjudication, which included fact-finding (questions to ask and the like).
6. On October 28, 1999, Thompson and Hurd issued Mortenson a 30-day corrective action mandating that he improve his fact-finding skills and raise the level of his decision-making and customer service to meet federal guidelines and departmental standards. (Exh. 3.) During this period, Mortenson received weekly printouts showing his mistakes, which his supervisors discussed with him every Friday for one-half to two hours. He suggested that it would be more cost-effective to leave him alone and just let him retire in two years. He stated to them that he did not have time to review the material they gave him. He never went to his supervisors for assistance during the week. He was consistently unprepared to discuss the feedback regarding his performance or steps he was taking to improve his performance.

7. The agency's policy is to conduct telephone evaluations of the L & Es. Two phone conversations per day are recorded at random and then evaluated on the kinds of questions asked, such as the reason for the absence that led to dismissal or why the claimant quit his job. The purpose of these evaluations is to ensure that the agency gets sufficient information up front to make a decision and does not have to make follow-up phone calls to either the UI claimant or the employer to obtain additional information. A standard form is used to make the necessary calculations to determine whether the federal guidelines have been met, which require that 75% of the claims that are evaluated must have a score of 81% or better. (Exh. 2.)

8. Mortenson was told by his supervisors that his telephone evaluations needed to improve because his documentation was poor— information was missing, he did not say who he was talking to, and the basis for his adjudications was unclear because it was difficult to determine where the information came from.

9. Shortly after the October 28 corrective action was issued, Mortenson went to see Mike Cullen, who was Chief of UI Benefits Operations, and asked to be transferred to another team with different supervisors because of his concern that he was not being evaluated fairly as the result of a personality conflict with Cathy Hurd, which dated back to before she became one of his current supervisors. Cullen responded to the request by explaining that it was his management policy not to transfer someone just because he did not get along with his supervisor, especially when the employee was working under a corrective action for unsatisfactory performance. The same standards applied to all of the teams. However, Cullen advised Mortenson that

he would transfer him to another team when he brought his job performance up to an acceptable level.

10. On December 2, 1999, Thompson and Hurd gave Mortenson another 30-day corrective action for his continued failure to meet the performance expectations of his position. This corrective action required him to bring up to standard his fact-finding, quality of decision-making, claims processing, and customer service, as well as to actively participate in the corrective action process by reviewing the feedback he was given and communicating with his supervisors about ways to correct his performance. (Exh. 5.)
11. Based on the corrective actions of October 28 and December 2 and a continued failure to meet minimal departmental standards, Mike Cullen, after talking to Thompson and Hurd, requested that the appointing authority hold a predisciplinary meeting with Mortenson. (Exh. 8.)
12. A Rule R-6-10 meeting was conducted on January 21, 2000, by Donald Peitersen, Director of Unemployment Insurance and the appointing authority.
13. On January 28, 2000, Peitersen imposed upon Mortenson the disciplinary action of demotion to the classification of Labor and Employment Specialist Intern, which is the classification for new employees, and transferred him to the training unit where he would receive intensive training under a new supervisor. Additionally, he was put on a third corrective action plan, this time for 45 days, from February 1 through March 15, 2000. (Exh. 15; Exh. 12.)

14. Stephanie Cullen, manager of the training unit, was Mortenson's supervisor for this period of retraining. She assigned Michelle Halstead to be his individual trainer. Halstead provided one-on-one training for Mortenson for 40 days. For the final five days of the corrective action period, Mortenson worked on his own, but was closely monitored. All of his telephone calls (20) were recorded, for instance.
15. At the end of this corrective action period, Mortenson met the standard for customer service with a rating of 68%, the standard being 67% and the average being 88%. He failed to meet the standards for fact-finding, quality of decisions, and adjudications. (See Exhs. 9, 11, and 16.)
16. On March 17, 2000, having received and reviewed all of the weekly and final reports of Mortenson's progress, Director Peitersen held another R-6-10 meeting. It appeared that Mortenson had not successfully completed the corrective action plan. Mortenson's stance at the meeting was that the evaluations did not accurately represent his job performance. Subsequent to the meeting, Mortenson provided Peitersen with a memo suggesting that the corrective action would not have come about if his request to transfer to another team had been granted, and that it would be more cost-effective to allow him to keep his job for a year and one-half until he retired than to train a new person to take his place. (Exh. 17.)
17. Peitersen concluded that Mortenson had not met the conditions of the corrective action for the period February 1 through March 16, 2000. He took into account that Mortenson had been issued three recent corrective actions and a disciplinary action for the same performance issues, had received 45 days of extensive individual training, and still

was deficient in the areas of fact-finding, decision quality, and phone evaluations, and barely met the minimal standard for customer service. He believed that Mortenson was not motivated to do his job and that it would not be a good management practice to go along with his unsatisfactory performance for one and one-half to two years waiting for him to retire.

18. On March 22, 2000, the appointing authority terminated the employment of Martin S. Mortenson for failure to achieve the minimum performance standards for his position. (Exh. 18.)
19. Complainant filed a timely appeal of the disciplinary termination on March 31, 2000.

DISCUSSION

In a disciplinary proceeding, in this case termination of employment, the burden of proof by a preponderance of the evidence rests with the respondent to show that there was just cause for the discipline imposed. *See Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions). 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. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999). If there is conflicting testimony, the credibility of witnesses, as well as the weight to be given their testimony, is within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). *See Barrett v. University of Colorado*, 851 P. 2d 258, 261 (Colo. App. 1993).

Complainant Mortenson, conceding that he was told he would be transferred to another team if his job performance rose to a satisfactory level, argues that he should have been transferred in order to see whether it made any difference, and that other transfers have been made based on a personality conflict. He contends that his supervisors were biased against him, even if subconsciously, and the fact that he had to attend Friday meetings detracted from his performance. He argues that his length of service (eight years) and his plans to retire within two years should have been taken into consideration when the termination decision was made.

Complainant's arguments are without merit. The power to transfer employees and make job assignments is within the discretion of the appointing authority. See R-1-6 and P-4-5, 4 CCR 801. There is no evidence of a team member being transferred while he was under a corrective action for poor job performance. The meetings were the result of his unsatisfactory performance, not the cause of it. His poor performance was fully documented; he did not meet the minimum standards. The appointing authority considered complainant's years of service and retirement plans and reasonably concluded that neither of those factors was sufficiently mitigating to overcome complainant's inability or unwillingness to satisfy the minimal departmental standards for job performance. The concept of progressive discipline was followed, and complainant was given six weeks of re-training besides.

Complainant presented no credible evidence to show that respondent's action was arbitrary, capricious or contrary to rule or law. See *Wildwood Child & Adult Care Program, Inc., supra*.

Substantial evidence supports a finding that respondent satisfied its burden to prove that there was just cause for the termination. See *Kinchen, supra*.

CONCLUSIONS OF LAW

Respondent's action was not arbitrary, capricious or contrary to rule or law.

ORDER

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

DATED this ___ day
of October, 2001, 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. 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 1/2 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 SERVICE

This is to certify that on the ____ day of October, 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:

Martin S. Mortenson
2450 South Ivanhoe
Denver, CO 80222

And by courier pick-up, to:

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