

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B112

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SANDRA M. RIGGENBACH,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

This matter was heard on June 6-7, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Jill M. M. Gallett, Assistant Attorney General. Complainant appeared in person and was represented by Nora V. Kelly, Attorney at Law.

The ALJ heard testimony from respondent's witnesses James Chastain, Information Technology Professional; John Wilson, Criminal Investigator; Rosemary Pettus, Regional Director; Thomas Ivory, Director of Employment and Training Programs; and Diane Dobrovolny, Labor & Employment Specialist II.

Complainant testified on her own behalf and called as witnesses Maxine Maestas, Director of Southwest Colorado Work Force (ret.); Margaret Arnett, Program Coordinator, Department of Corrections; Georgia Grantham, Dean of Extended Campus, Adams State College; Lester Alway, Labor & Employment Specialist II (ret.); Barbara Peshlakai (f/k/a Barbara McBride), former Human Resources Manager for Monarch Ski Area; and William Davis, Field Director (ret.).

Respondent's Exhibits 1 through 8 were admitted into evidence without objection. Exhibit 9 was admitted over objection.

Complainant's Exhibits A, F, U, V, W and Z were admitted without objection. Exhibit P was admitted over objection. Exhibit Q was excluded.

MATTER APPEALED

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 For the reasons set forth below, respondent's action is rescinded.

ISSUE

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

PRELIMINARY MATTERS

Complainant's motion to take telephone testimony was granted without objection.

Per complainant's request, the witnesses were sequestered except for complainant and respondent's advisory witness, Thomas Ivory.

Complainant withdrew her issue of age discrimination.

FINDINGS OF FACT

The 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. Complainant, Sandra M. Riggerbach, worked for the Colorado Department of Labor and Employment (DOLE) for almost 19 years. She was a Job Service Representative III, or Labor & Employment Specialist III, when her employment was terminated on February 22, 2000.
2. She worked at the Job Service Center in Salida until sometime in 1999, when she was transferred to the Job Service Center in Canon City, the result of a corrective action.¹
3. Riggerbach's supervisor at the time of her dismissal was Rosemary Pettus, Regional Director. Pettus was not an on-site supervisor. Of Riggerbach's five supervisors over the years, only one was an on-site supervisor.
4. Rosemary Pettus is Regional Director for three of DOLE's eighteen regions. She is one of three directors for the region, who work as a team overseeing the Work Force Centers.²
5. In January 1998, Pettus gained responsibility for the Upper Arkansas Region, which includes Salida.
6. Thomas Ivory, then-Field Director, was the direct-line supervisor of the regional directors and was the delegated appointing authority for this action.
7. Riggerbach's performance evaluations with DOLE reflect performance ratings of Above-Standard, Commendable, and Outstanding. She was well-respected in the community as a representative of the Colorado Job Service

¹ The corrective action was not related to the matters that lead to her dismissal. Neither party presented evidence of the corrective action, except that it resulted in her transfer to Canon City.

² "Job Service Centers" have been technically called "Work Force Centers" since 1998, but the terms were at times used interchangeably during testimony.

Center, participating on various boards and commissions. Maxine Maestas, a former director of the Upper Arkansas Region, described her as, "a very hard worker, very professional, and very community-oriented." By letter dated August 25, 2000, six months after her dismissal, Governor Owens commended Riggerbach for her participation on the School-to-Career Region 3 Council. (Ex. A, last page.) She conducted job fairs at local high schools. She worked with local entities in establishing a one-stop job service center. From sometime in 1996 through most of 1998, she worked with recruits of the Department of Corrections (DOC) Boot Camp to help the recruits find jobs after leaving this 90-day program. DOC's coordinator for the program, Margaret Arnett, felt that the program was very successful, but Pettus was opposed to it because she felt it was inappropriate and took up too much of Riggerbach's time. Pettus spoke very negatively about Riggerbach to Arnett and others in the community, leaving the impression that she intended to get rid of Riggerbach. Georgia Grantham, as Assistant Superintendent of the school district, worked closely with Riggerbach for six years helping students gain employment. In the spring of 1998, Pettus expressed clear negative feelings to Grantham about these efforts and questioned whether she and Riggerbach were doing what they said they were doing.

8. For approximately ten years there was an agreement between Monarch Ski Area and the Salida office to provide job services for Monarch, Riggerbach being Monarch's primary contact at the Job Service Center. Riggerbach would conduct an annual job fair at Monarch Ski Area and two job fairs at high schools, whereby the job service would refer applicants from the office or take partial applications at the job fair. The job service advertised the job fairs on radio and in the newspaper. Monarch delivered its application forms to the job service office. Monarch would send a monthly list of hires to the job service office, and the staff would verify the referrals from the computer and take credit for the placements. The hire list was not specifically addressed to

Riggenbach. Riggenbach was not the director of the office. Any one of the three staff members, all Labor & Employment Specialists, would verify that a referral was made from the job service before taking credit for the placement.

9. Lester Alway worked at the job fairs with Riggenbach. The office's supervisors knew about the Monarch agreement. One director, Ross Vigil, spent over two hours reviewing a Monarch hire list before complimenting the staff on their accomplishments. Barbara McBride, Human Resources Manager for Monarch Ski Area, worked closely with Riggenbach as Monarch's representative and held "the highest respect for her." This was an open business relationship. Pettus spoke negatively about Riggenbach and made it obvious to McBride that she wanted Riggenbach "out of there."
10. On behalf of Monarch, and making reference to the "partnership you have established with Ski Monarch LLC over the past several years," McBride acknowledged that Riggenbach "made an enormous contribution toward furnishing us with the flow of applicants necessary to meet our hiring requirements for the '98-'99 ski season." (Ex. W.)
11. Riggenbach believed that the agreement with Monarch constituted an "exclusive" employer arrangement, where the employer only hires applicants who are referred by the job service. However, Monarch also hired job seekers who were not referred by the job service.
12. Riggenbach was never told that what she was doing was incorrect. She received no personal gain, favors, or benefits of any kind, save job satisfaction for performing this employment service. She was known generally to be diligent and cooperative.

13. In October 1998, Pettus approved: 1) Riggerbach representing the Salida Job Service regarding all employment needs for Ski Monarch; 2) Riggerbach keeping the rest of the job service staff updated on Monarch's needs so they could answer questions from clients in Riggerbach's absence; 3) Riggerbach attending Monarch's October job fair and providing the same level of support as in the past; 4) acknowledgement that Monarch was the customer and that the job center would do whatever it could to support the customer. (Ex. V.)
14. Chris Tuma was a Department of Social Services employee who was temporarily assigned to work in the Salida office and whose job duties required entering data into the computer. Tuma input information from the Monarch hire lists. (Ex. 3, p. 52.) It usually took from two to four weeks for a new employee to be assigned an individualized computer user identification (ID) from the central office. Riggerbach let Tuma use her user ID to access the computer due to Tuma's temporary employment status of approximately one month. This had been done in the past in the training of temporary employees.
15. In late March or early April 1999, Pettus was in the Salida office on a regular visit. Riggerbach had been transferred to the Canon City office by this time. During her visit, Pettus came upon a Monarch hire list. She accessed the computer and found a number of applicant registrations, referrals, and placements that were put into the computer on the same day, which would normally be a rare occurrence.
16. Pettus sent out a survey letter to each person on the Monarch list, four of whom responded with indications that they had not received the job via the job fair or the Salida Work Force Center. Two responded by not answering the question of whether they got the job through either the job fair or the Work

Force Center but indicating they were satisfied with the services that they had received from the Work Force Center. (Ex. 3, pp. 42-47.)

17. These responses caused concern for Pettus because they indicated to her that the job seekers had never used the job service and that the job service had not made the job match and referral to the employer, which is required by regulation and policy in order for the Work Force Center to take credit for having made a job placement.
18. On June 2, 1999, Pettus met with Field Director Tom Ivory, and they decided to have the matter investigated.
19. John Wilson, Chief Criminal Investigator for the Colorado Department of Labor and Employment, began his investigation on June 3, 1999, the allegation being, "that the number of job placements reported by the Salida Job Service Center staff is inflated." (Ex. 3.)
20. In his investigation, Wilson and his staff started with a placement list showing 322 placements made by the Salida job service from July 1998 until June 3, 1999, 222 of which were credited to Riggerbach. They telephoned every fourth applicant on the placement list to ask whether that applicant had obtained the job through the Salida staff. A total of 103 applicants were reached. Twenty-five applicants who had been reported as having been placed by Riggerbach denied getting their job through the job service or the Monarch job fair. (Ex. 3.)
21. Wilson concluded in his August 5, 1999 report that Riggerbach had violated agency policy, which requires that every placed applicant be registered at the job service and be referred to the employer by the job service. He also

concluded that Riggerbach violated agency policy by allowing Chris Tuma to use her computer access code. (Ex. 3)

22. One of the applicants who denied receiving job services, Ruthanne Schoeffield, asked Riggerbach at the job fair to provide a reference for her.
23. The computer security access system is designed to prevent unauthorized personnel from gaining access to the agency's computer system.
24. A "Q" number is a top secret ID which is set up for access by a specific person to a particular computer. Anyone who has been assigned a Q number is an authorized user. Chris Tuma was assigned a Q number, but she never used it.
25. With the benefit of Wilson's investigative report, Ivory held a predisciplinary meeting with Riggerbach on October 20, 1999, to discuss three allegations: a) Riggerbach fraudulently recorded placements; b) false reporting has occurred for years; c) Riggerbach violated the agency's computer policy. (Ex. 1.)
26. Ivory considered the false reporting of placements a very serious matter because it affected the integrity of the agency, since job placements are the cornerstone of the agency. Violation of the federal guidelines concerning the accurate reporting of placements could conceivably have a negative impact on the amount of funds received from the federal government to fund the state agency.
27. Violation of the agency's computer access policy was serious to Ivory because of a loss of accountability for data that's going into the system; it

could be put in by anybody. Riggerbach did not deny having knowledge of the policies.

28. By letter dated February 22, 2000, Ivory terminated the employment of Sandra Riggerbach for violating Department policies regarding the accurate reporting of placements and computer access. (Ex. 1.) The delay between the time of the R-6-10 meeting and the date of the termination letter had been mutually agreed upon in order to have settlement discussions.

DISCUSSION

I. Legal Standard

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 termination of complainant's employment. *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. 2000. 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). It is for the administrative law judge, as the finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

II. Credibility

In making credibility determinations, the ALJ is guided by the factors set out in CJI 3:16, which include: the witnesses' 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. Pursuant to these factors, substantial weight is given to the testimony of complainant and complainant's witnesses. None of complainant's witnesses currently has a connection to this case or a personal interest in the outcome. They testified straightforwardly, spontaneously, and without a showing of bias. Respondent's witnesses hedged some of their answers and were defensive for the most part. Pettus, particularly, demonstrated a bias against Riggerbach. She testified that she "found" a Monarch hiring list while implying that it was hidden. She testified that no staff person knew anything about the list because Riggerbach handled everything concerning Monarch, which is contrary to the weight of the evidence. At least as of October 1998, she had full knowledge of and gave approval to the Monarch relationship. (See Ex. V.) She testified that a computer ID was never created for Chris Tuma, yet James Chastain testified on cross-examination that Tuma was, in fact, assigned a computer ID at some point; this makes a difference as to whether complainant allowed access to her computer system by an "unauthorized" user.

III. Discipline

Complainant denies knowingly falsely taking credit for a placement. She suggests that the referrals for some applicants may not have been put into the computer, or, they were not entered in a timely manner such that the computer would show that the referral and hire were made on the same day. She remembers being asked for a reference at the Monarch job fair by one of the employees who denied receiving job services. Still, it is true that complainant believed that Monarch was an "exclusive" employer, when, in fact, Monarch also hired employees from other sources, though relying heavily on such job services as radio and newspaper advertising and the taking of applications. Whatever the circumstances, it is concluded from this record that complainant's actions do not constitute willful misconduct. None of the six reasons for discipline apply to complainant's actions. See R-6-9.

Complainant's actions absolutely were not fraudulent. Fraud requires, "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Black's Law Dictionary* at 670 (7th ed. 1999). This complainant neither committed fraud nor knowingly falsified any record or report. She performed her job enthusiastically and diligently for almost nineteen years. None of her actions with respect to Monarch were secretive. This is not a case where discipline was warranted. At the most, a corrective action might have been used "to correct or improve performance or behavior...." See R-6-8. In fact, in this instance, a corrective action, which would have clarified the situation, was required before imposing discipline. See R-6-2. Yet, at the time of the investigation, Riggerbach had been transferred to Canon City and her dealings with Monarch had been severed.

In 1974, it was respondent's policy to immediately terminate the employment of any employee who took credit for a placement not actually made, without exception. (Ex. 4.) In 1987, this policy was modified to substitute the word "discipline" for "termination," as follows: "People will make honest mistakes, but a mistake cannot be condoned with regard to the proper recording of placements. It is the policy of the Division of Employment and Training to discipline any employee who takes credit for placements not actually made. There are no exceptions to this policy." (Ex. 5.) Albeit the appointing authority did not testify that he relied on this policy in determining the sanction, this policy violates both the spirit and intent of the State Personnel Board Rules, including R-6-2, R-6-6 (factors to be considered in administering corrective or disciplinary action), and R-6-10 (requiring the exchange of information before making a final decision). In the present matter, the appointing authority did not properly account for the mitigating factors of complainant's long history of proven dedicated service, extensive community involvement to further the purposes of the agency, and utter lack of any improper or selfish motive. See R-6-6.

Complainant's act of letting a temporary job service employee use her computer access code to input job service information into the computer is hardly worthy of discipline. There is no evidence of harm to the agency or the computer system. There was no lack of accountability for the inputted information. The employee only used the computer to conduct state business. She, herself, qualified for authorization to use a job services computer. A corrective action might conceivably have been warranted, but certainly not discipline. In fact, a corrective action was necessary before imposing discipline. R-6-2.

Respondent thus failed to meet its burden under *Kinchen, supra*.

This is not a proper case for the award of attorney fees and costs, which neither party requested, under §24-50-125.5, C.R.S., of the State Personnel System Act. See also R-8-38, 4 C.C.R. 801.

CONCLUSIONS OF LAW

Respondent's action in terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's termination action is rescinded. Complainant is reinstated to her former position with full back pay and benefits.

DATED this ____ day
of July, 2001, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, Suite 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 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 MAILING

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

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