

State Personnel Board, State of Colorado

Case No. 2000 B 151

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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GERALD LANGE,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,  
TRUSTEES OF THE STATE COLLEGES IN COLORADO  
MESA STATE COLLEGE,

Respondent.

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Hearing was held on August 17, 2000 before Administrative Law Judge Mary S. McClatchey at the Colorado State University offices at 110 16<sup>th</sup> Street, Denver, Colorado. The record in this matter remained open until September 7, 2000, for the purpose of receiving the parties' written closing arguments.

**MATTER APPEALED**

Complainant, Gerald Lange ("Complainant" or "Lange") appeals his disciplinary termination by Mesa State College ("MSC" or "Respondent").

For the reasons set forth below, the actions of Respondent are **affirmed**.

**PRELIMINARY MATTERS**

Respondent was represented by Stacy L. Worthington, Assistant Attorney General, 1525 Sherman Street, 5<sup>th</sup> Floor, Denver, CO. Respondent's Advisory Witness for the proceedings was John Fitzgibbon, Vice President of Finance and Administrative Services, MSC.

Complainant was represented by Vonda Hall, Colorado Association of Public Employees, 1145 Bannock Street, Denver, Colorado 80204. Complainant was present for the evidentiary proceedings.

## **PROCEDURAL MATTERS**

### **A. Video Conferencing.**

Respondent filed a motion to take testimony by videoconferencing, on grounds that the parties' witnesses work and reside in Grand Junction. The motion was granted. The hearing was held in the video conferencing room in the Denver offices of Colorado State University, 110 16<sup>th</sup> Street, Denver, Colorado. With the exception of the Complainant and the appointing authority, who appeared in person, all witnesses testified via video. This enabled each witness in Grand Junction to see the attorney in Denver conducting the examination. It also enabled the ALJ, the parties, and counsel in Denver to see each witness in Grand Junction. There were no technical difficulties associated with the video conferencing, and utilization of this resource proved to be very effective.

## **ISSUES**

The issues presented herein are as follows:

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's termination of Complainant was within the range of reasonable alternatives available to the appointing authority;
3. Whether Respondent's termination of Complainant was arbitrary, capricious, or contrary to rule or law;
4. Whether either party is entitled to attorney fees and costs under section 24-50-125.5, C.R.S.

## **FINDINGS OF FACT**

1. Complainant has worked at MSC as a custodian for over twenty-seven (27) years. He worked the swing shift, 3:30 p.m. to midnight.
2. Complainant and his co-workers normally took two breaks during the shift: one from 5:30 - 6 p.m. (in place of two 15-minute breaks), and a 30-minute meal break later in the evening, usually at around 7:30 p.m.
3. On April 20, 2000, MSC celebrated its 75<sup>th</sup> anniversary with a party on the campus lawn. When Complainant reported to work, he learned that he and the other custodians had to help clean up after the party by folding up chairs and tables and returning them to storage.

4. After completing the clean-up tasks from the party, Complainant and the others on his shift returned to the building they customarily cleaned.
5. Complainant and the other custodians began their break around 5:30. Complainant was present for the majority of the break, but left near the end of it, at approximately 5:55 p.m., to see his supervisor, David Geer, regarding a previously scheduled 6 p.m. performance review. Geer informed Complainant that he was too busy to meet at that time.
6. Complainant then went back to work.
7. Some time around 10:00 p.m., Carolyn Murphy, another custodian, needed help changing a light bulb. She knew where Complainant should be from having worked the same shift with him for years. She and Complainant also shared responsibility for cleaning the first floor.
8. Murphy began to look for Complainant, searching the first and third floors in the areas he was assigned to clean.
9. After looking for at least twenty minutes, Murphy could not find Complainant anywhere. She finally asked Lee Nash, the lead custodian, to help her change the light bulb, which he did.
10. After changing the light bulb for Murphy, Nash started to look for Complainant. He too searched the first and third floors, in the areas Complainant was assigned to clean, but did not find him.
11. Nash noticed that the observatory deck door was unlocked. It was normally kept locked. He exited the building through that door, which led him to the rooftop. He crossed the rooftop, and approached a small storage room. This storage room cannot be accessed from the inside of any building. It is only accessible from the rooftop, outdoors.
12. Nash unlocked the storage room and found Complainant there, sitting on a stool, slumped over, with the lights off. Complainant sat up slowly.
13. Nash believed that Complainant was sleeping on the stool. He wrote up a report at approximately 10:30 p.m. and submitted it up the chain of command.
14. At hearing, Complainant admitted that he went into the small storage room, never turned on the lights, sat on the stool, and that it was a "perfect hiding place." He admitted it would have been "hard to find me where I was." He further admitted that although he and his supervisor could have communicated via radios they carried, he never informed his supervisor of his whereabouts.

15. Complainant attended a pre-disciplinary meeting with John Fitzgibbon, Vice President of Finance and Administrative Services. At that meeting, Complainant admitted to having been resting in the storage room.
16. At the pre-disciplinary meeting, Complainant presented Fitzgibbon with a letter stating that he took the late break in the storage room to make up for having missed a break earlier in his shift.
17. Fitzgibbon followed up on this by asking Jeanne Durr, Human Resources Director, to find out if Complainant had taken an earlier break. She investigated and reported back to him that he had taken an earlier break, but no one was sure what time he took it.
18. Fitzgibbon reviewed Complainant's personnel file, which contained eight corrective actions ("CA's"), one disciplinary action, and numerous memos regarding performance problems.
19. In deciding to terminate Complainant, Fitzgibbon placed primary emphasis on four corrective actions which were for conduct identical to that for which he was terminated (as well as for other problems).
20. Complainant's personnel file contained the following corrective and disciplinary actions:
  - A. A March 21, 1980 Corrective Action for watching a basketball game on TV for at least 45 minutes while on duty.
  - B. A November 1, 1989 Corrective Action for being late and failing to perform assigned duties.
  - C. An April 15, 1991 Corrective Action for receiving an overall "Needs Improvement" rating on his interim evaluation. The CA reported that faculty had stated "they have found you in the offices with the lights out and the door locked." It further stated that one of his supervisors began looking for him to assign duties and found him "in one of the offices with the door locked and lights out, taking an unauthorized break."
  - D. A July 23, 1992 Corrective Action for a "Needs Improvement" rating on his interim performance evaluation. His poor performance included the following: on April 1, 1992, Dave Rambo found him in a room with the door shut and locked. Complainant claimed to be waiting for the handball courts to close, but he did not have any cleaning equipment with him. On June 18, 1992, Complainant wrote on his timesheet that he worked the entire day, when in fact he spent an hour and a half at

the rodeo during work hours. When called on this, he lied and said he had changed his work hours, when in fact he had not.

- E. An August 11, 1995 Corrective Action for willful misconduct. He was found "in a locked room with the lights out." His statement that he was experiencing discomfort from paint fumes and had decided to take an early lunch was found not credible. The letter stated that in the event he was found behind a locked door during his shift it would be deemed a willful failure to perform his duties.
  - F. A May 7, 1996 Corrective Action for "Failure to Follow Agency Rules." This CA was for "lying on the floor in a locked room with the lights out." It noted that Complainant's explanation of being overcome by exhaust fumes was found to lack credibility. It stated, "future violations of this nature will be dealt with swiftly and severely."
  - G. A September 23, 1996 Corrective Action for an overall rating of "Needs Improvement" on his annual evaluation for 1995-1996. He was given interim evaluations every 3 months for the following 12 months.
  - H. A September 23, 1996 Disciplinary Action accompanying the above Corrective Action, resulting in a three-month reduction in pay.
21. Fitzgibbon also considered Complainant's overall performance history and additional documentation, including two written reports concerning Complainant's performance in the past year. These included the following:
- A. A January 19, 2000 Incident Report that Lee Nash, Complainant's supervisor, wrote on him. The report commences, "Jerry Lange hasn't been doing his work for sometime. David has talked to him and I have to[o]. To get him to do things I have to just go up to him & tell him to go clean that bathroom or marker-board or do that floor. He has a bad attitude problem towards his job. He conveys this to Joy & Carolyn causing problems with them too. This has gone on until I can no longer ignore it. He spends a lot of time on computers. Every time I go looking for [him] I usually find him on a computer in a class-room somewhere." The report related that on that day's shift, he checked Complainant's work, found it to be poor, and Complainant argued with him and attacked Nash's work. Complainant never received a copy of this and did not have the opportunity to respond to it.
  - B. An October 26, 1999 written warning that faculty members had

made a formal complaint about his unauthorized use of computers in their labs and offices during his work shift.

- C. An April 4, 1997 memo to Complainant regarding not performing his work up to standard and requiring him to submit daily summary sheets outlining work accomplished.
  - D. A 1994/1995 Progress Review by supervisor Dave Rambo documenting the following: on December 5, 1994, he witnessed Complainant enter a dark room and not exit until 50 minutes later. On January 20 and 23, 1995 Complainant was found in the computer room with the door locked and the hall lights out; he stated that he had been cleaning the room but he had no equipment or cleaning supplies with him. On July 10, 1995, Complainant was found in a classroom lying on the floor with the lights out and the door locked.
22. Complainant admitted at hearing that after receiving the May 7, 1996 corrective action, he knew it was generally unacceptable to be in a dark room with the lights out during his shift. This CA stated that any time he was found in a room with the lights out in the future it would be "construed, per se, as willful misconduct and a direct violation of agency rules. Violation will result in your immediate suspension, with pay, pending the outcome of a pre-disciplinary (8-3-3) meeting."
23. Fitzgibbon also reviewed Complainant's performance history. His 1992/1993 and 1993/1994 evaluations were "Commendable." His 1995/1996 performance evaluation was "Needs Improvement." The remainder were "Good."
23. Fitzgibbon considered the effect that retaining Complainant would have on the motivation and morale of Complainant's co-workers in the custodial area and in the institution. He believed that if he was lax in responding to this transgression, especially after he had been repeatedly warned about the specific behavior in the past, workers would feel that the administration didn't care about the quality of their work - they would question "why should we be motivated?" He also believed that to condone Complainant's misconduct would denigrate the contributions of others at MSC.
24. Complainant's own witness, Joyce Redding, another custodian, who has worked with Lange since 1981, testified on direct examination that Complainant's reputation for helping other custodians was that he "needs to be prompted to do his job, he's burnt out." She also stated that he helps out when asked.

25. Fitzgibbon elected to terminate Complainant's employment by letter dated May 18, 2000. The letter cited Complainant's "repeated disregard of prior corrective actions, several of which specifically addressed the same issue," recited four of them verbatim, and stated that Complainant's behavior constituted willful misconduct and willful failure to perform his job duties.
26. Complainant seeks reinstatement, back pay and benefits, and attorney fees.

## **DISCUSSION**

### **I.**

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 (1999) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the appointing authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed to warrant discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994 ).

### **Credibility**

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge, Inc.*, 972 P.2d 707 (Colo. App. 1999).

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or

contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

Here, the record is replete with instances of Complainant lying to his supervisors when caught not doing his job. Complainant falsified a time sheet in 1992, claiming he had worked while he spent an hour and a half at the rodeo. He claimed he had been overcome by paint fumes and exhaust fumes on two separate occasions after being caught lying down in darkened rooms. He twice claimed to have been cleaning a room he was in, when he had no equipment available to clean with. Complainant's excuses were repeatedly found to lack credibility.

When questioned by a reporter for the Grand Junction Daily Sentinel in June, 2000 regarding this case, Complainant stated that he believed he had not received any personnel actions since 1992. In fact, he had received numerous corrective actions, one disciplinary action, and numerous written reprimands during that period of time. Complainant did not offer any explanation for this statement to the reporter at hearing. It is inconceivable that he could have forgotten these adverse personnel actions during that interview. The only reasonable conclusion is that he lied to the reporter in an attempt to gain an advantage in this case.

The record in this case reveals a long pattern of deceit by Complainant. Complainant is found not to be credible.

## II.

### **Complainant committed the acts for which he was disciplined.**

Complainant has essentially two factual defenses, both of which hinge on his credibility and are therefore rejected. First, he claims that he was in the storage room for only 5-10 minutes; and second, he argues that he was entitled to this break as a make-up for having missed the earlier 5:30 - 6:00 p.m. break.

Complainant admitted at the pre-disciplinary meeting and at hearing that he was resting in the storage room when Nash found him. Complainant was missing for a long period of time, during which both Murphy and Nash looked for him on two floors, and Nash changed a light bulb. Complainant argues that their testimony is not credible, since the specific times they gave at hearing did not match up with the 10:30 p.m. time on Nash's report of the incident. However, it is common for witnesses to neglect to note the time at which events are occurring, and even more common for them to be unable to accurately recollect times months later at hearing. The critical information, that both Murphy and Nash searched for Complainant and could not find him, and also changed the light bulb, is highly credible. Based on that testimony, Complainant was missing in action for at least 30-40 minutes. Again, Complainant's testimony that he was in the storage room for only five to ten minutes has no weight.

Even if Complainant had been in the storage room for only 5-10 minutes, was he justified in taking his break in the storage room with the lights off, as opposed to being in a public area where his supervisors could monitor him? This ALJ finds that he was not. Complainant had a long history not only of taking unauthorized breaks in dark rooms and offices, but of lying to supervisors about his misconduct when caught. It would be impossible for a supervisor to monitor Complainant if he were allowed to take breaks in dark rooms at his whim. Because Complainant could not be trusted, this prohibition was reasonable and necessary.

Section 24-50-116, C.R.S., provides, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with **specific standards prescribed by law, rule of the board, or any appointing authority.**"

The long history of corrective actions prohibiting Complainant from taking breaks in darkened rooms constituted such a "specific standard prescribed by the appointing authority." By entering the dark storage room on April 20, 2000 and resting there, Complainant willfully violated this specific standard prescribed by MSC. The fact that the break policy does not prohibit this conduct is irrelevant because the appointing authority's CA's overrode this policy.

Complainant's claim that the late break was a make-up for having missed the early break is also rejected on credibility grounds. Two of Respondent's witnesses testified that Complainant was present for the majority of the 5:30 - 6:00 p.m. break. Complainant's testimony that he bypassed this break to go straight to work, and then to meet with his supervisor, has no weight.

Complainant did commit the acts for which he was disciplined, namely, taking an unauthorized break for 30 - 40 minutes in a darkened room without advising his supervisor of his location.

**Termination was within the range of reasonable alternatives available to the appointing authority.**

Board Rule R-6-2, 4 CCR 801 (1999) provides that a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. It provides that:

The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Board Rule R-6-6, 4 CCR 801 (1999) provides, in part:

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omissions, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances.

Respondent has demonstrated that it had just cause to terminate Complainant's employment following the April 20 incident. Complainant argues that termination was too drastic a response to Complainant's transgression, which he characterizes as "not serious." However, in view of the flagrant nature of his transgression, after being corrected four separate times for **repeatedly** engaging in this behavior, Respondent was under no obligation within the personnel system to give Complainant a "fresh start" again, to correct and then discipline him for the same transgressions.

When Complainant made the decision to exit the building he was assigned to clean, walk across the roof of that building, enter the small storage room, and rest there in the dark, in "the perfect hiding place," he made a willful decision to defy what he knew to be a rule that his employer applied to him specifically. He engaged in a flagrant act of defiance.

To require Respondent to either correct or discipline Complainant a **fifth time for the exact same behavior** would eviscerate Respondent's authority to impose and enforce standards of performance. It would make a mockery of the four previous corrective actions and the great leniency Respondent had shown Complainant in years past.

Complainant points out in mitigation that his last corrective action for resting in a darkened room occurred many years ago. However, the fact that the corrective actions gave him a specific period of time within which to improve does

not nullify the fact that he was aware he was prohibited from taking breaks in dark rooms. He admitted he knew he was subject to this prohibition at hearing on cross examination.

Further, a review of Complainant's job history at MSC reveals that he had a consistent pattern of falling into "slumps" for long periods during which his performance was poor, resulting in numerous interim "needs improvement" evaluations. Only after being either corrected or disciplined did he improve for a relatively short period. Complainant's personnel file contained not just the four corrective actions in which resting in dark rooms was an issue, but four additional corrective actions and one disciplinary action, plus numerous memos regarding unacceptable behavior. He had a long history of performance problems. Complainant's own witness testified that he had to be "prompted to do his job," and that he was "burnt out."

**The appointing authority's action was not arbitrary, capricious or contrary to rule or law.**

Agency action is arbitrary or capricious if a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Dept. of Social Services, 895 P.2d 1188, 1192 (Colo. App. 1995). It was reasonable for the appointing authority to consider Complainant's eight previous corrective actions, one disciplinary action, the memos in his file regarding additional performance problems, Complainant's "repeated disregard" of the rule against taking breaks in dark rooms, and the cyclical nature of Complainant's job performance, and to conclude that termination was an appropriate response to this situation, rather than to endure another cycle of unacceptable performance.

Complainant argues that his 27-year history as a classified employee should mitigate against termination. He appears to contend that his long tenure entitles him to greater lenience than other employees. To the contrary, the same standards apply to all classified employees, regardless of tenure.

Complainant asserts that the pre-disciplinary meeting, which lasted only five minutes, deprived him of due process. However, Complainant testified that he said everything he had to say at that meeting, that he gave Fitzgibbon his written response to the allegations, and that he had his representative present. The purpose of the pre-disciplinary meeting, pursuant to Board Rule R-6-10, was clearly met here: Complainant was given a full opportunity to present his side of the story. The fact that Fitzgibbon did not read the letter until after the meeting did not deprive Complainant of due process. Fitzgibbon followed up on it by ascertaining whether or not Complainant had indeed taken an earlier break.

Complainant presented evidence at hearing that other custodial staff regularly took unscheduled breaks to either smoke or socialize. Nash confirmed

that the custodial staff sometimes socializes together, taking short unscheduled breaks to do so. He distinguished between this socializing on the job and Complainant's conduct by stating that it isn't acceptable to sleep in a dark room. This makes sense: the central issue is accountability and supervision. As noted above, a supervisor can account for employees' behavior if they are openly socializing for a few minutes. But when an employee finds a hiding place to sleep or rest, the supervisor has no means of monitoring his conduct, and is therefore deprived of the ability to supervise the employee. Complainant intentionally defied his supervisor by hiding in the storage room on April 20, depriving him of the ability to monitor him. It is appropriate to treat this behavior differently than normal socializing on the job.

Complainant also argues that Complainant did not violate the break policy, which states in part, "Take your breaks when scheduled unless you are in the middle of a project and cannot leave it." He argues that since this policy was not enforced with respect to the other custodians, it cannot justly be applied to him. First, it has been found that Complainant took almost the entirety of his early break. He was not entitled to another full break, and it has been found that he was resting for between thirty and forty minutes. Second, as stated above, the enforcement of this policy as it relates to other employees is irrelevant, because the appointing authority made it clear that Complainant was prohibited from taking breaks in dark rooms, period.

Complainant lastly contends that Fitzgibbon conducted an inadequate investigation, and that he therefore failed to consider or place any weight on "factors which were favorable to the Complainant," citing Van de Vegt v. Board of Com'rs of Larimer County, 55 P.2d 703 (Colo. 1936)(arbitrary and capricious action arises by neglecting or refusing to use due diligence and care to procure evidence authorized by law to be considered; by failing to give honest and candid consideration of evidence; and by acting upon the evidence in a manner that a reasonable person would fairly and honestly reach a different conclusion). However, the evidence demonstrates that Fitzgibbon considered all relevant factors. He reviewed Complainant's personnel file and performance history, the type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, the period of time since a prior offense, and mitigating circumstances. The strongest aggravating factor was Complainant's "repeated disregard" of the four previous corrective actions concerning the exact same conduct. As discussed above, it was eminently reasonable for Fitzgibbon to conclude that he had no duty to give Complainant a fifth bite at the same apple.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.
2. The discipline imposed was within the range of reasonable alternatives

available to the appointing authority.

3. The actions of the Respondent were not arbitrary, capricious, and/or contrary to rule or law.
4. Neither party is entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999).

### ORDER

The actions of the Respondent are affirmed.

Dated this 29th day of  
September, 2000

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Mary S. McClatchey  
Administrative Law Judge  
State Personnel Board  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203

### Certificate of Service

This is to certify that on the \_\_\_\_ day of \_\_\_\_\_, 2000, I placed a true copy of the foregoing **Initial Decision of the Administrative Law Judge and Notice of Appeal Rights** in the United States mail, postage prepaid, addressed as follows:

Vonda Hall  
1145 Bannock Street  
Denver, Colorado 80204

and by interdepartmental mail to:

Stacy L. Worthington  
Assistant Attorney General  
1525 Sherman Street, 5<sup>th</sup> Floor  
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