

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B031(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHELLE K. LEE,

Complainant,

vs.

DEPARTMENT OF LAW,

Respondent.

This matter was heard on December 5, 2000, and February 12 and 13, 2001, before Administrative Law Judge (ALJ) Robert W. Thompson, Jr. Respondent was represented by Cathy Havener Greer, Attorney at Law. Complainant appeared in person and was represented by Vonda G. Hall, Attorney at Law.

The ALJ heard testimony from respondent's witnesses Renny Fagan, Deputy Attorney General, Business and Licensing Section; Mary Malatesta, Assistant Attorney General; Paul Wolff, Assistant Attorney General; Patricia Robbins, Office Manager; and Beth Lipscomb, Personnel Administrator.

Complainant testified on her own behalf and called as witnesses Leslie Olivett, Administrative Assistant II, and Vicky Mandell, Assistant Attorney General.

Respondent's Exhibits 1-6, 9-11, 16-18, 20-23, 26-35, 37 and 39 (sealed) were admitted into evidence without objection. Exhibits 15, 19 and 24 were admitted over objection.

Complainant's Exhibits A (sealed), F, I, K, M, N, P and V-Z were admitted without objection. Exhibit G was admitted over objection. Exhibit AA was withdrawn.

MATTER APPEALED

Complainant appeals the disciplinary termination of her employment and two corrective actions. Filed separately, the three appeals were consolidated on October 5, 2000. For the reasons set forth below, respondent's actions are affirmed.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;
2. Whether there was just cause for the termination;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent's motion to dismiss complainant's allegation of discrimination on grounds that she did not allege discrimination in the original appeals, but rather raised it for the first time in her prehearing statement, was granted, complainant conceding that the discrimination issue was not raised in a timely manner.

A ruling on respondent's motion for a protective order was reserved pending the testimony of respondent's witnesses. Exhibits A and 39, the basis for the motion, were

ordered kept under seal temporarily. At the close of the evidence, Exhibits A and 39 were ordered sealed permanently, good cause having been shown. The exhibits remain accessible by the State Personnel Board and any reviewing court.

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

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. In December 1995, complainant Michelle Lee was hired as an Administrative Assistant III by the Department of Law, Capital Crimes Unit, which was legislatively created in 1994 to provide assistance for all 22 Colorado district attorneys in handling capital criminal cases. The staff consisted of two assistant attorneys general, Mary Malatesta and Paul Wolff, and complainant.
2. Complainant was instructed by the assistant attorneys general regarding the importance of maintaining confidentiality in communications between the Department of Law and the district attorneys, and was told that district attorneys should be treated as clients in that respect. They emphasized that certain documents must be kept confidential, and they sometimes referred to district attorneys as clients.
3. Capital cases go on for as long as ten years, including appeals; confidentiality does not end when the trial concludes.

4. In the interest of confidentiality, only the staff of the Capital Crimes Unit had access to the Unit's forms directory in the computer. Complainant's forms directory included a fax transmission sheet containing language that the facsimile transmission was "legally privileged and/or confidential" (Exs. 16 and 17), and a fax transmission sheet with no such confidentiality language (Ex. 18).
5. On September 28, 1998, Malatesta instructed complainant to fax a document to the 22 district attorneys in Colorado by writing on yellow post-its what should be typed on the fax cover sheet and leaving it in complainant's cubicle, since complainant was not there. (Ex. 39.) When complainant returned to her desk, Malatesta told her that it was a confidential fax.
6. The fax cover sheet gave and requested information about a named psychologist who was listed as a possible expert witness in a Jefferson County capital case. The cover sheet contained the following language, in capital letters:

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMISSION IS LEGALLY PRIVILEGED AND/OR CONFIDENTIAL. IT IS INTENDED ONLY FOR THE USE OF THE NAMED INDIVIDUAL OR ENTITY, AND MAY BE SUBJECT TO THE ATTORNEY/CLIENT PRIVILEGE AND/OR ATTORNEY WORK PRODUCT PRIVILEGE AND TRANSMISSION IS NOT A WAIVER OF ANY PRIVILEGE RECOGNIZED IN LAW. IF YOU ARE NOT THE INTENDED RECIPIENT, ANY DISSEMINATION OR COPYING OF THIS TRANSMISSION IS **STRICTLY PROHIBITED**. IF YOU HAVE RECEIVED THIS TRANSMISSION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY CALLING THE NUMBER LISTED BELOW AND DESTROY THE ORIGINAL TRANSMISSION. THANK YOU.

(Ex. A.) (Emphasis in original.)

7. In October 1998, Malatesta and Wolff talked to complainant about her use of sick leave and compensatory time. On October 16, complainant gave Malatesta and Wolff each a memo further explaining her position regarding the comp time issue. She wrote that she stayed until 5:35 p.m. on September 28 working on the fax that Malatesta had requested. She attached copies of e-mails. She did not attach a copy of the September 28 fax cover sheet. (Ex. 15.)
8. On the day that she sent the confidential fax, complainant faxed a document without the confidential language. (Ex. 21.) She also faxed documents without the confidential language on other occasions. (Exs. 20 and 22.)
9. In December 1998, complainant went on sick leave, maternity leave, and short-term disability leave, and did not return to the Capital Crimes Unit.
10. On June 1, 1999, through an internal transfer, complainant became employed as an Administrative Assistant II by the Department of Law, Business and Licensing Section, where Deputy Attorney General Renny Fagan was in charge.
11. There were 45 attorneys and six paralegals working in the Business and Licensing Section. Complainant was assigned to assist 11 attorneys and the paralegals. Her duties included filing documents with courts, sending pleadings to parties, and some typing.
12. In complainant's mid-year progress review of January 7, 2000, her supervisor, Pat Robbins, advised her that she must demonstrate marked improvements within two months in the areas of absenteeism, tardiness, and excessive time away from her desk for lunch hours and breaks, or the result might be a formal corrective action. (Ex. 31.)

13. Noting that complainant was absent for all or part of 16 out of 23 work days and 81.25 work hours out of a possible 184 since the mid-year review, Robbins issued a formal corrective action on February 15, 2000. The corrective action, signed by Renny Fagan as appointing authority, addressed the unauthorized use of leave without pay and required complainant to arrive on time for work or take leave without pay for tardiness, get advance approval for all leave, report to her supervisor when she went to lunch and returned, and report upon leaving and returning from break periods. (Ex. 32.) Complainant had exhausted all accrued paid leave and was in LWOP status for her absences. (See Ex. 37, supervisor's documentation.)
14. During this time frame, complainant was given a corrective action for sending out a certificate of mailing without her signature on it. Fagan rescinded the corrective action and replaced it with a memo to the file.
15. Complainant filed a grievance of the February 15 corrective action. The grievance was upheld at the agency level on April 18, 2000, Fagan emphasizing that the issue was not the legitimate use of sick and annual leave, but rather the excessive use of non-FMLA (Family and Medical Leave Act) LWOP and consistently being in LWOP status. (Ex. 28.) Not all of her leave without pay qualified as leave under the FMLA.
16. Complainant appealed the denial of her grievance to the State Personnel Board on April 28, 2000, alleging that her absences were the result of the legitimate use of sick leave or qualified for protection under the FMLA. (Ex. I.)
17. On May 2, 2000, complainant was issued a corrective action stemming from her absence the morning of April 28 for which she did not request leave in advance and the requested leave without pay was for non-sick and non-

- FMLA reasons. The corrective action required her to make attendance at work her top priority and reiterated that all non-sick and non-FMLA absences must be approved in advance. (Ex. 34.) The reason she did not come to work until 11:30 was that she had to take her child to school for testing, which she had known about for over a month but which she had forgotten and, consequently, did not request leave in advance. She had no accrued leave.
18. Complainant grieved the May 2 corrective action, and it was upheld. (See Exs. 35 and K.)
 19. On July 19, 2000, complainant appealed the denial of this grievance to the State Personnel Board, alleging that the corrective action was unwarranted and was issued for purposes of harassment and intimidation. (Ex. M.)
 20. In a document responding to respondent's reply to a motion, complainant submitted a copy of the September 28, 1998 confidential fax transmittal sheet that she had typed for Mary Malatesta in the Capital Crimes Unit. (See Ex. A.) The Assistant Attorney General representing the respondent noticed it and brought its disclosure to the attention of both Fagan and Malatesta.
 21. Apparently the fax cover sheet was meant to show that complainant worked until 5:30 p.m. on that day, but it did not reflect any time.
 22. Malatesta was outraged upon hearing that a confidential document from her unit had appeared in a public file. She did not know that complainant had taken documents with her when she left and would not have authorized such removal of a document.
 23. Concerned over a breach of confidentiality, Malatesta discussed the matter with Fagan, requesting that the document be kept confidential and that

complainant return any other documents from the Capital Crimes Unit that she had in her possession.

24. On July 24, Fagan gave complainant written notice of a predisciplinary meeting to discuss two issues, namely: "1. Public disclosure of a document from the Department of Law files marked as a privileged Attorney-Client communication; 2. Inability to perform your duties as assigned due to your non-FMLA absences from the office." (Ex. 1.)
25. Also on July 24, Fagan requested of complainant more complete medical documentation for her absences. (Ex. 2.)
26. In April, the agency had asked complainant to provide a physician's statement of her chronic medical conditions that qualified for FMLA leave but received no additional information until after the July notice.
27. On July 31, by e-mail, Fagan directed complainant to give to him by the end of the day all documents or copies from the Capital Crimes Unit that she had in her possession. (Ex. 4.) None was turned in.
28. By e-mail to complainant on August 15, Fagan removed the issue of non-FMLA leave from the agenda of the R-6-10 meeting because complainant's July absences had been certified as FMLA leave. (See Exs. 3, 4 and 5; see Ex. V.)
29. At the R-6-10 meeting, held on August 17, 2000, with complainant, CAPE representative Chuck Williams, Fagan, and Personnel Administrator Beth Lipscomb in attendance, complainant defended her disclosure of the fax transmittal sheet by saying that it was part of her personnel file and that she did not think it was privileged.

30. The fax transmittal sheet was never a part of complainant's personnel file, but rather was part of her personal leave records that she kept at her home.
31. By e-mail on August 18, complainant stated that Mary Malatesta and Paul Wolff were both aware that she had the document and that she had attached it to her October 16, 1998 memo to them. Malatesta and Wolff did not know that complainant had the fax cover sheet and told Fagan that it was not attached to the October 16 memo. Wolff found the original memo in his files, and the fax cover sheet was not attached. (Ex. 9.)
32. Complainant told Fagan that the "blurb" (statement of confidentiality) was a blanket statement that appeared on all fax communications from the Capital Crimes Unit and, consequently, did not mean anything to her with respect to privilege or confidentiality. (Ex. 6.) It is not true that the Unit did not distinguish between confidential and non-confidential fax communications. (See Findings 4 and 8.)
33. Fagan questioned complainant's judgment in releasing a confidential document of the Department of Law, in taking the document with her when she left the Capital Crimes Unit, in deciding for herself that a document was not privileged, as well as in deciding that it did not matter because the trial with which the fax was concerned had been over for a year. The case was on appeal, and still is.
34. Fagan developed concerns over complainant's apparent lack of trustworthiness and honesty, which he was beginning to notice in her responses to the issue of the fax transmittal sheet. Viewing the picture as a whole, he did not believe that dishonesty and untrustworthiness could be remedied, and he began considering termination.

35. On August 22, between 5:30 and 6:00 p.m., Fagan returned to his office from an out-of-town trip and found in his chair a copy of the note that Mary Malatesta had written providing instruction for complainant of what to type on the confidential fax transmittal sheet of September 28, 1998, which had been put there by complainant. (Ex. 39.) As a document from the Capital Crimes Unit, it should have been given to him three weeks earlier, in Fagan's view, in accord with his directive. And this still was not the original handwritten note. Fagan felt that this was the same type of behavior, failure to follow a directive, that resulted in complainant's corrective action of May 2, 2000.
36. Complainant's administrative skills were good. Her job performance problems were caused by her frequent absences, especially with little or no notice, and her tardiness, which also created a hardship for the agency because she could not be counted on to accomplish necessary tasks, and others would have to increase their workload by taking up the slack. (See Exs. N, W, X, Y and Z.)
37. Much of complainant's use of leave resulted from the health and other needs of her three children. While sympathetic, Fagan asked her to make her job a higher priority and to make other arrangements instead of consistently taking off work. He emphasized that the grant or denial of leave without pay was discretionary with the appointing authority, and it would not be automatically approved.
38. In a detailed letter questioning complainant's judgment and trustworthiness and centering on her public disclosure of a confidential Department of Law document, and taking into account the surrounding circumstances, Fagan placed Michelle Lee on administrative leave on August 28 and terminated her employment effective August 31, 2000, for failure to perform competently and

willful misconduct or violation of agency rules, pursuant to Board Rule R-6-9. (Ex. 27.)

39. Complainant Michelle Lee filed a timely appeal of the disciplinary termination of her employment on September 9, 2000.

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. In an appeal of an administrative action, in this case two corrective actions, the burden of proof by a preponderance of the evidence rests with the complainant to show that respondent's action was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991), C.R.S.

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. The Corrective Actions

In her mid-year progress review of January 7, 2000, complainant was warned that if she did not show marked improvement in the areas of absenteeism, tardiness, and excessive time away from her desk within two months, a formal corrective action was possible. Then, on February 15, the corrective action became a reality. Complainant contends that this action of respondent was arbitrary and capricious because it happened in less than two months. Complainant's contention would be more persuasive if the mid-year review were, itself, a corrective action that allotted a specific period of time in which to correct her behavior before the possible imposition of discipline. Yet, the mid-year review was not a corrective action; it was an advisement. Given the circumstances of complainant being absent for all or part of 16 out of 23 work days and 81.25 of 184 work hours, it was not unreasonable to issue a corrective action on February 15. The language, "within two months," was a guide by which complainant could judge her behavior. It was not a strictly binding commitment, as a corrective action might be. By February 15, it had become obvious to the supervisor that there was not going to be a marked improvement within two months, and the supervisor was not obligated to wait three weeks longer before taking formal action.

Complainant concedes that she took a lot of leave but argues that the corrective action punished her for a legitimate use of sick leave, and that the agency unjustifiably put her in the position of, "Do it our way or no way." The credible evidence does not support this proposition. The issue was not the legitimate use of sick leave, but rather, the issues concerned taking leave without notice, tardiness, time away from her desk, and the abuse of LWOP. Leave without pay is discretionary with the appointing authority. P-5-10. This was an appropriate implementation of a corrective action, the purpose being, "to correct and improve performance and behavior...." R-6-8, 4 C.C.R. 801. Complainant did not prove by a preponderance of the evidence that respondent's action in issuing this corrective action was arbitrary, capricious or contrary to rule or law.

In a like manner, complainant failed to prove that the corrective action of May 2, 2000, was issued arbitrarily, capriciously or contrary to rule or law. There is no credible evidence of the corrective action being issued as a means of harassment and intimidation, as alleged in complainant's notice of appeal to the State Personnel Board. This corrective action resulted from a direct violation of the February 15 corrective action, which required complainant to seek prior approval for leave without pay. Instead of giving advance notice, complainant simply called in and said she would not be at work until 11:30 a.m. because she had to take her child to school for testing, a situation she had known about for a month but which she forgot until the evening before. It is not improper to use a corrective action in an attempt to correct the behavior of an employee by highlighting her need to take personal responsibility for her actions.

III. The Termination

Complainant submits that the termination was unwarranted and arbitrary, capricious or contrary to rule or law because she just made one mistake, the disclosure was inadvertent, the fax cover sheet was not a privileged document as a matter of law, and the appointing authority did not conduct an investigation or review complainant's past performance appraisals.

Substantial evidence sustains the findings and conclusions of the appointing authority.

Complainant intentionally disclosed a confidential document of the Department of Law, which she obtained in her capacity as an employee of the Department. The rule of confidentiality applied to her. Whether the document was, in fact, legally privileged is irrelevant. The fax cover sheet, which complainant typed, plainly states that it is confidential and that, "DISSEMINATION OR COPYING OF THIS TRANSMISSION IS **STRICTLY PROHIBITED.**" (Ex. A.) The cover sheet contained confidential information pertaining to a potential expert witness in a capital case. It was beyond complainant's authority to decide for herself that it was not really confidential or that the confidentiality

had expired. The evidence suggests, however, that she did not ponder the confidentiality issue, but rather included the document in a public filing because she felt that it personally benefited her to do so. She thus breached her obligation of confidentiality.

Although serious, the act of disclosing Exhibit A would not, in isolation, justify the termination of complainant's employment. Nevertheless, it was appropriate for the appointing authority to take under review all of the circumstances in connection with the disclosure and complainant's actions up until the termination decision was made. For instance, the appointing authority reasonably determined that complainant had been untruthful on more than one occasion during this process. (See Findings 28, 29, 30, 31.) She ignored his July 31 directive to immediately turn over all other Capital Crimes Unit documents that were in her possession and instead gave a copy, not the original, of the Malatesta note to him three weeks later. In a series of e-mails, complainant supplied additional information, explained her position on all issues, and received responses from the appointing authority. (Exs. 3, 4, 5, 6, 9.) When deciding on the appropriate sanction, it was also proper for the appointing authority to take into account the fact that complainant was working under two corrective actions. R-6-6, 4 C.C.R. 801.

It is true that the appointing authority testified on cross-examination that he did not review complainant's performance plan or personnel file. This is not fatal to his termination action. He was familiar with complainant's duties and performance, and he consulted with complainant's supervisor and the agency's personnel director. He was receptive to considering everything complainant had to say in person or via e-mail. His review was thorough; there was no lack of an investigation and there was no suggestion that he talk to anyone whom he did not. In considering all of the evidence in this case, the ALJ examined complainant's performance appraisals (Exs. N, W, X, Y and Z) and found that they do not present cause for altering the termination decision. All related matters, such as the appointing authority's conclusions that complainant was not truthful

or failed to follow his directive, were fairly heard and considered. There have been no due process violations. There has been no showing of an abuse of discretion by the appointing authority. See Rules R-1-6, R-6-2, R-6-6, R-6-9, and R-6-10, 4 C.C.R. 801. Respondent carried its burden to prove that there was just cause for the termination. See *Kinchen, supra*.

This is not a proper case for the award of attorney fees and costs 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

1. Respondent's actions were not arbitrary, capricious or contrary to rule or law.
2. There was just cause for the termination.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of March, 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 March, 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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