

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. **2001B098**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD S. GIBBS,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing was held on May 31, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado.

MATTER APPEALED

Complainant, Richard S. Gibbs ("Complainant" or "Gibbs") appeals his fourteen day suspension without pay by Respondent, Department of Transportation ("Respondent" or "DOT").

For the reasons set forth below, Respondent's action is **affirmed**.

PRELIMINARY MATTERS

Coleman Connolly, Assistant Attorney General, 1525 Sherman Street, 7th Floor, Denver, Colorado represented respondent. Respondent's Advisory Witness for the proceedings was Jeff Kullman, Complainant's appointing authority and Region Transportation Director for Respondent.

Complainant represented himself and was present for the evidentiary proceedings. Complainant appealed the disciplinary action imposed but does not contest that he committed the act for which he was disciplined.

PROCEDURAL MATTERS

A. Witnesses

Respondent called two witnesses: Edward James Stieber, Highway Supervisor for DOT and Jeff Kullman, Region Transportation Director for DOT. Complainant testified on his own behalf.

B. Exhibits

The parties stipulated to the admission of Respondent's Exhibits 1 to 5, 7 and 8.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether attorney fees are warranted.

FINDINGS OF FACT

Findings of fact are followed by an italicized citation to the witness or exhibit upon which, at least in part, that finding of fact is based.

Exchange between Townsend and Complainant on March 6, 2001

1. Matt Townsend is a DOT employee who works in the same work group as Complainant. *Stieber*
2. Robert Maes is a DOT employee who is the lead worker for Complainant's work group. *Stieber*
3. On March 6, 2001, with Complainant present, Townsend told Maes that he (Townsend) had picked up 25 bags of trash and Complainant had picked up 35 bags of trash. *Exhibits 2 and 3*
4. Complainant disagreed with Townsend's statement and when he and Townsend were alone, he told Townsend that in the future he should not include Complainant in his (Townsend's) lies. *Exhibits 2 and 3*
5. The conversation between the two men continued with Complainant telling

Townsend that he did not appreciate Townsend's tone and Townsend cursing at Complainant. *Exhibits 2 and 3*

6. When Townsend cursed at Complainant, Complainant asked him if he wanted to go out back and settle it. *Exhibits 2 and 3.*
7. Townsend replied that he did not want to lose his job and both Complainant and Townsend returned to doing their work. *Complainant and Exhibits 2 and 3*
8. During the conversation, Complainant never got closer than 10 to 12 feet to Townsend. *Complainant*
9. At no time did Complainant clench his fists or make a movement towards Townsend. *Complainant*
10. Townsend reported the incident to Maes, stating that he perceived the comments made by Complainant as physically threatening. *Exhibit 4*
11. Upon reporting the matter to his supervisor, Maes was instructed to separate Townsend and Complainant for the remainder of the day. *Exhibit 4*
12. The other employees in Gibbs' work group were apprehensive as to what would happen after the exchange between Townsend and the Complainant. *Stieber*

Investigation and Disciplinary Action

13. On the day of the incident, Complainant's supervisor, Edward James Stieber, was not at work. *Stieber*
14. Stieber's supervisor called Stieber at home after the incident and told him to investigate it when Stieber came back to work the next day. *Stieber*
15. While investigating the incident, Stieber spoke first to Maes, the lead worker who supervises Complainant, then to Townsend and then to Complainant. *Stieber*
16. Maes did not see the incident but prepared a report of what he knew of it (Exhibit 4). *Stieber*
17. After talking to Stieber, Townsend and Complainant, both participants in the incident, prepared written statements of the incident. (Exhibits 2 and 3). *Stieber*
18. After talking to Complainant, Maes and Townsend, Stieber filled out DOT's Violence Report Form, submitted it to the next person in the chain of command, Kandace Claybrook, and concluded his investigation. *Stieber*

19. Prior to March 6, 2001, Stieber had not had any problems with Complainant.
Stieber
20. During the investigation and prior to the R-6-10 meeting on March 12th, 2001, Complainant was put on leave with pay. *Kullman*
21. Kullman, Complainant's appointing authority, conducted the R-6-10 meeting.
Kullman
22. During the R-6-10 meeting, the Complainant stated that he was aware of DOT's Policy Directive 10.0 on workplace violence. *Kullman*
23. After the R-6-10 meeting, Kullman interviewed Stieber, Townsend and Maes concurrently. *Kullman*
24. Townsend felt intimidated and threatened by Gibbs. *Stieber and Kullman*
25. Prior to imposing discipline, Kullman reviewed the Complainant's file, the investigative interviews and statements, the information provided by the Complainant during his R-6-10 meeting and Complainant's prior corrective action. *Kullman*
26. Kullman imposed a disciplinary action, on March 19, 2001, in the form of a fourteen day suspension and required Complainant to attend a seminar on anger management. *Kullman and Exhibit 8*
27. Kullman decided to impose disciplinary action because a corrective action had been imposed previously when Complainant had used similar language and therefore, under progressive discipline, disciplinary action was warranted.
Kullman

Prior Disciplinary Action

28. On April 12, 1999, as a result of an incident with a fellow employee, Complainant was given a corrective action, involving a training course in Work Place violence, Anger Management and Conflict Resolution. *Exhibit 7*
29. In the April 1999 incident Complainant responded with profanity when asked to assist a fellow employee. *Exhibit 7*
30. During a meeting with his supervisors to discuss the April 1999 incident, Complainant admitted that he had responded to his co-worker as stated but that he did not know that it was wrong and he stated to his supervisors "if a co-worker had a problem with [the Complainant], [the Complainant] and the co-worker should go out back and settle it the old way." *Exhibit 7*

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31. Complainant's terminology in the March 2001 incident was similar to the terminology that he used in the April 1999 incident. *Kullman*
32. The April 1999 letter imposing the corrective action states that Complainant's supervisor at the time, Charles Loerwald, had had other meetings with Complainant prior to the corrective action to discuss Complainant's "attitude, threatening demeanor and the uses of profanity." *Exhibit 7*
33. The April 1999 corrective action letter warns Complainant that any future violation of DOT's Workplace Violence policy will result in a corrective action and/or disciplinary action, including termination and advises him that he may protest the corrective action by initiating the grievance process. *Exhibit 7*
34. Complainant did not file a grievance on the April 1999 corrective action. *Complainant and Kullman*
35. During the Complainant's R-6-10 involving the March 2001 incident, the Complainant stated that the April 1999 incident had not occurred. *Kullman*

Department Policy on Workplace Violence

36. All employees within DOT receive annual workplace violence training. *Kullman*
37. DOT has a zero tolerance policy for workplace violence. *Kullman*
38. The stated purpose of DOT's Workplace Violence Policy Directive is "[t]o formally acknowledge that the Colorado Department of Transportation (CDOT) does not tolerate workplace violence." *Exhibit 5*
39. DOT's Workplace Violence Policy Directive defines workplace violence as "conduct . . . involving . . . (2) veiled or direct verbal threats, profanity or vicious statements that are meant to harm and/or create a hostile environment; . . . (4) any other acts that are threatening or intended to injure or convey hostility." *Exhibit 5*
40. DOT's Workplace Violence Policy Directive states that "[a]ny employee who commits an act of violence at work will be subject to corrective and/or disciplinary action . . ." *Exhibit 5*
41. DOT's Workplace Violence Policy Directive states that "[s]upervisors receiving reports of threats or violent acts are expected to respond appropriately." *Exhibit 5*

Remedy Sought

42. Complainant seeks back pay and benefits and removal of the March 2001 disciplinary action and the April 1999 corrective action from his personnel file. *Notice of Appeal*
43. Respondent seeks dismissal of this action and an award of attorney fees and costs. *Respondent's Prehearing Statement*

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; 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 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.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeck v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

B. Credibility

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). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. United States v. Cueto, 628 P.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

II. HEARING ISSUES

A. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

The Respondent presented credible evidence that DOT does not tolerate any type of workplace violence. The stated purpose of the agency's policy supports this philosophy by stating that the policy "formally acknowledges that the [DOT] does not tolerate workplace violence." An act of workplace violence, as defined by the policy, includes either physical acts against persons or verbal threats that are meant to harm and/or create a hostile environment. This definition recognizes that workplace violence is not limited to actions alone but may be conveyed through a person's verbiage. DOT reinforces its policy by providing annual workplace violence training to its employees. Finally, no evidence was presented that employees similarly situated are not disciplined in a similar manner.

Having established that DOT has a policy and that policy is both consistently reinforced and disseminated through employee and manager training, it must be analysed whether or not the Complainant violated DOT's policy. The Respondent argued that, in addition to Townsend, the work group was apprehensive about Complainant's behavior, thus Complainant created a hostile environment. The Complainant argued that he did not intend to harm or intimidate Townsend and that his physical size and actions should not have been interpreted as intending such harm. He also argued that profanity is part of DOT's workplace culture. Finally, Complainant argued that he was simply inviting Townsend to resolve their differences and that it was up to Townsend whether or not he accepted the invitation.

Whether Complainant's statement to Townsend was a direct or veiled threat, it was clearly an invitation to engage in a physical altercation. If the "invitation" had been accepted there may have been a fight – an incident that would have certainly been a workplace violence act. While the "invitation" was not accepted credible evidence was presented that not just Townsend was apprehensive about Complainant's statement. Complainant's work group was also apprehensive. This apprehension was reasonable in light of the language used by Complainant. Therefore, despite Complainant's intentions and the lack of a physical altercation, Complainant's statement created a hostile environment for Townsend and Complainant's fellow employees. By creating such an environment, Complainant violated DOT's policy.

Applying the arbitrary, capricious or contrary to rule or law, as outlined in McPeck, the evidence supports the conclusion that a reasonable person, considering the entire record would not be compelled to reach a different conclusion from that reached by the appointing authority, that Complainant violated DOT's workplace violence policy.

B. The discipline imposed was within the range of reasonable alternatives

Complainant's disciplinary action was based, in part, on the fact that he had previously received a corrective action for similar behavior. Complainant argues that the prior corrective action was based upon false facts and that he wishes the appointing authority to reinvestigate that corrective action. However, the Complainant did not appeal that action through the grievance process nor did he submit a written explanation of the matter for inclusion in his personnel file. He was notified of both of these rights in the corrective action letter but he chose not to exercise those rights at that time. If an employee wishes to file a grievance, he must do so within ten days of the agency's action. Board Rule R-8-8(1), 4 CCR 801. Because the Complainant did not initiate the grievance process within the ten day period and receive a final agency decision on the matter, the Board does not have jurisdiction to review the April 1999 corrective action. § 24-50.5-125.4, C.R.S.

The credible evidence demonstrates that the appointing authority arrived at his decision after investigating the March 2001 incident and reviewing the Complainant's disciplinary history. Complainant, prior to the April 1999 incident, had had discussions with his supervisors about his interpersonal relations with co-workers. In April 1999, he received a corrective action for a workplace violence problem with a fellow employee. During the meeting with his supervisors regarding that incident he used almost identical language to that he used in the March 2001 incident. As a result of that corrective action, Complainant attended anger management classes. In addition, Complainant has received training, along with all of DOT's other employees, on DOT's workplace violence policy. Taking Complainant's prior disciplinary history and training into account and under the auspices of progressive discipline, the appointing authority went to the next level of discipline, a disciplinary action of a two week suspension without pay. Given Complainant's disciplinary and training history, it was appropriate to impose a more severe action for a subsequent and similar incident.

The appointing authority gave due regard for the circumstances of the situation as well as complainant's individual circumstances and history. The appointing authority did not abuse his discretion in deciding to suspend the Complainant for two weeks without pay. See Board Rules R-1-6, R-6-2, R-6-6, R-6-9 and R-6-10, 4 CCR 801.

C. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Neither party presented any evidence supporting any of these alternative grounds for awarding attorneys fees. Therefore, given the above findings of fact, an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
2. The discipline imposed was within the range of reasonable alternatives.
3. Attorney's fees are not warranted.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 16th day of July, 2001.



Kristin F. Rozansky
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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or 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 the Board does not receive a written notice of appeal 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 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 ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Richard S. Gibbs
1195 South Norfolk Street
Aurora, Colorado 80017

and in the interagency mail, to:

Coleman M. Connolly
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
