

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL TAYLOR,

Complainant,

v.

DEPARTMENT OF PERSONNEL, GENERAL SUPPORT
SERVICES, DIVISION OF CENTRAL SERVICES,

Respondent.

This matter came on for hearing on February 21, 2002 before Administrative Law Judge, Bennett S. Aisenberg, at the Division of Administrative Hearings, 1120 Lincoln Street, Suite 1400, Denver, Colorado. Mark A. Schwane represented the Complainant. Melissa Mequi, Assistant Attorney General, represented the Respondent.

MATTER APPEALED

Complainant appeals the corrective action notice issued by Respondent on February 27, 2001.

Complainant had filed a grievance dated January 8, 2001 against his supervisor, Verneeda White, for harassment and intimidation. Respondent appointed an independent investigator to investigate Complainant's charges. As a result of the investigation, Richard Malinowski, Division Director, issued corrective action notices against both Complainant and Ms. White. It is his corrective action notice from which Complainant appeals.

For the reasons set forth below, Respondent's action is rescinded in part, affirmed in part and ordered to be removed from Complainant's Personnel Record.

PROCEDURAL HISTORY

In December, 2000, the Complainant was placed on administrative leave, with pay, pending an investigation of allegations of violence in the work place by his supervisor, Verneeda White, Manager of Collection Services. An investigation was conducted and the charges were found to be unsubstantiated. Complainant was returned to work. Thereafter, Complainant filed a grievance against White, relating to the allegations of violence in the work place, as well as other matters. The grievance contained allegations of harassment, retaliation, and whistleblowing pertaining to White. Malinowski requested that Sabrina Hicks from the Office of Performance Improvement, Human Resources, conduct an independent investigation into the allegations made by Complainant. Ms. Hicks interviewed 22 individuals and made factual findings¹. As a result of these factual findings and her oral discussions with Malinowski in which she stated her conclusions, Malinowski issued a corrective action against Complainant on February 27, 2001, the pertinent portions of which will be set forth at this time for convenience:

1. Your work hours are 8:00 a.m. until 5:00 p.m., Monday, Wednesday, Thursday and Friday. You will take a one-hour lunch period, from noon until one p.m. on Tuesdays, your assigned hours are from 9:00 a.m. until 6:00 p.m. with a one hour lunch from 2:00 p.m. until 3:00 p.m. You will not deviate from these assigned work hours unless you receive verbal permission to do so from your supervisor directly. You are not to use voice mail or e-mail to request permission to be absent from the office unless an emergency situation exists. Any unexcused time from the office will be recorded as leave without pay.

¹ Ms. Hicks' report was received in evidence without objection.

2. I expect you to behave professionally in the office. Specifically, you are expected to keep your voice at a businesslike volume and not attempt to intimidate anyone verbally or with your body language. You are expected to speak and listen in a courteous fashion. If someone says something with which you disagree, I expect you to act professionally even if someone disagrees with what you say or if a customer or debtor talks to you in an aggressive manner.
3. With respect to your interactions with the management of the Central Collections unit, I expect you to conduct yourself professionally. I expect you to follow the office policies as directed. If you disagree with those policies, I expect you to voice your disagreement in a businesslike fashion and should those actions be upheld, to follow them as you are directed to do so.
4. You are not a representative of the employees in the office. You will not be recognized as an official spokesperson, nor are you to intervene on another person's behalf, whether a permanent employee or a temporary worker unless a physical emergency exists. If you have a question about an office policy or the way an issue has been handled, you are to ask your supervisor for an explanation. The State will not be discussing personnel matters of other employees with you.
5. I will expect you, at state expense, to take the following classes within the next six months.
 - a. How to Deal with Difficult People
 - b. A class on organizational skills
6. While I cannot direct you to do so, if you are willing to take a Dale Carnegie class in Human Relations. The state will pay for the class, assuming the requisite number of classes are taken. This class is designed specifically to improve interpersonal skills, an area of improvement you would benefit from.
7. Part of this investigation included issues of workplace violence. As part of your corrective action, I will personally cover our department's policy on workplace violence with you to make sure you understand its applicability to you and the department.
8. Finally, the state of Colorado offers employees assistance programs specifically CSEAP. If you should wish to avail yourself of this program, please notify your supervisor who will grant you the necessary time off to do so.

ISSUES

1. Did Complainant engage in the conduct which resulted in the corrective action?

2. Was the action of Respondent in issuing the Corrective Action Notice arbitrary, capricious, or contrary to rule or law?

FINDINGS OF FACT

1. Complainant had been employed by Respondent as a collector for the past 12 ½ years.

2. White was Complainant's supervisor. She had been hired by Respondent 2 ½ years previously.

3. White possessed poor interoffice and interpersonal skills as a supervisor. A number of witnesses testified that White would yell and scream at Complainant and other employees. When employees attempted to speak to her, on occasion, she would raise her hand in their faces and cut them off. She was, at times, unwilling to listen to other employees or answer their questions. One witness described her as erratic, unprofessional, and unsupportive. One witness described her as rude and not very polite.

4. Complainant approached White about an unemployment compensation claim which he could not bring up on his computer because it had been paid. He raised the matter with White but White said he should still collect it. Complainant was concerned about this and went to Malinowski. Malinowski overrode White and sided with Complainant.

5. Complainant discovered that school debts were outstanding under White's name. He made a hand copy reflecting the debts and took it in to White.

6. At times White was in the office sporadically. Complainant told her people were looking for her while she was gone.

7. White called Complainant a fraud based upon his coaching activities which allowed him to leave ½ hour early. White accused Complainant of being a gangster and said she feared for her life.

8. Over Respondent's objection, the Administrative Law Judge received employee performance evaluations for Complainant which extended from September 1999 to June 2000 and from September 2000 to June 2001. On overall performance rating, Complainant was rated as fully competent in both performance evaluations. Both White and Malinowski participated in the evaluations.

9. There had been complaints early in the year 2000 or thereabouts to Malinowski by three employees regarding Complainant's personal dealings with other employees. These

complaints dealt with the Complainant's raising his voice, interrupting and not listening, lack of professional skills and standing in a manner so as to constitute an imposing presence. No action was taken with regard to these complaints.

10. In discussing problems, on at least one occasion, Complainant stated he was not speaking just for himself but for others.

11. Malinowski removed the corrective action from White's file because he believed she was making significant progress. He monitored her for compliance and felt it was appropriate to rescind the corrective action. He did not take any action with regard to Complainant.

12. On one occasion, Greg Mechem, a supervisor of collectors during this period, believed that the Complainant was unprofessional in several group settings. Mechem found he exhibited loud, aggressive behavior. On another occasion, Complainant and another employee spoke in loud voices and were asked to calm down.

13. Complainant had taken up an issue for another employee at a group meeting and was told it was not relevant to do so.

14. The investigative report issued by Sabrina Hicks, with the exception of the Complainant and White, set forth conclusory opinions as to the relationship between White and

Complainant and as to Complainant's conduct in the work place, but set forth no specific incidents of aggression, intimidation or threats made by Complainant.

15. Complainant complied with paragraph 5 and 6 of the Corrective Action Notice regarding classes, although not in the time frame specified.

16. Since the Corrective Action Notice was issued, Complainant's performance has been satisfactory.

17. Malinowski based the Corrective Action on Hicks report and discussions with her, the Complainant's background which he was aware of and written complaints regarding Complainant in early 2000. He did no independent investigation, nor did he interview Complainant, White or any of the other employees Hicks spoke to.

DISCUSSION AND CONCLUSIONS OF LAW

The pertinent statutory and Personnel Board Rules will be set forth at this point for convenience.

C.R.S. 24-50-116 Standards of Performance and Conduct. 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.

Personnel Board Rules

Corrective and Disciplinary Actions

R-6-5. An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.

R-6-6. The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, periods of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

R-6-7. Corrective and disciplinary actions are subject to the “Dispute Resolution” chapter. An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. When resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal.

R-6-9. Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure. It shall be a written statement that includes the areas for improvement, the actions to take, a reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and, a statement advising the employee of the right to grieve and the right to attach a written explanation. It may also contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance. A removed corrective notice cannot be considered for any subsequent personnel action.

It is clear that a corrective action is not disciplinary in nature and is intended to correct and improve unsatisfactory performance or behavior.

Complainant maintains that Respondent’s issuance of the corrective action was arbitrary and capricious. In *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936), the Colorado Supreme Court defined arbitrary and capricious agency action

as: (a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner, after a consideration of evidence before it, as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. This standard was reaffirmed in *Lawley v. Department of Higher Education*, _____ P.3d _____ (Colo. No. 00 SC 473, December 3, 2001). In applying this standard, the Administrative Law Judge has examined the reasons behind Respondent's actions, i.e., the knowledge of Complainant's work history, prior complaints and the investigative report.

Corrective action is based on the nature, extent, seriousness and effect of the act, 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. Personnel Board Rule R-6-6. In reviewing the evidence presented at the administrative hearing, the Administrative Law Judge concludes that there is no basis for certain of the directives set forth in the corrective action. Directive 1 states as follows:

1. Your work hours are 8:00 a.m. until 5:00 p.m., Monday, Wednesday, Thursday and Friday. You will take a one-hour lunch period, from noon until one p.m. on Tuesdays, your assigned hours are from 9:00 a.m. until 6:00 p.m. with a one hour lunch from 2:00 p.m. until 3:00 p.m. You will not deviate from these assigned work hours unless you receive verbal permission to do so from your supervisor directly. You are not to use voice mail or e-mail to request permission to be absent from the office unless an emergency situation exists. Any unexcused time from the office will be recorded as leave without pay.

The Administrative Law Judge concludes there was no evidence introduced upon which this directive is based. None of the witnesses nor the investigative report implicated Complainant's attendance. It is fundamental that some type of unsatisfactory conduct must be exhibited before a corrective action is issued. As such, the Administrative Law Judge concludes that the Department's act in issuing a directive on this was arbitrary and capricious and not supported by the evidence.

7. Part of this investigation included issues of workplace violence. As part of your corrective action, I will personally cover our department's policy on workplace violence with you to make sure you understand its applicability to you and the department.

The Administrative Law Judge concludes that there was no evidence introduced at the hearing which raised the issue of workplace violence. Yet, the inference from this directive is that Complainant's violence in the workplace was of concern. The Administrative Law Judge concludes that the corrective action directed toward workplace violence had no foundation and was arbitrary and capricious.

The remaining directives will be set forth

2. I expect you to behave professionally in the office. Specifically, you are expected to keep your voice at a businesslike volume and not attempt to intimidate anyone verbally or with your body language. You are expected to speak and listen in a courteous fashion. If someone says something with which you disagree, I expect you to act professionally even if someone disagrees with what you say or if a customer or debtor talks to you in an aggressive manner.

3. With respect to your interactions with the management of the Central Collections unit, I expect you to conduct yourself professionally. I expect you to follow the office policies as directed. If you disagree with those policies, I expect you to voice your disagreement in a

businesslike fashion and should those actions be upheld, to follow them as you are directed to do so.

4. You are not a representative of the employees in the office. You will not be recognized as an official spokesperson, nor are you to intervene on another person's behalf, whether a permanent employee or a temporary worker unless a physical emergency exists. If you have a question about an office policy or the way an issue has been handled, you are to ask your supervisor for an explanation. The State will not be discussing personnel matters of other employees with you.

5. I will expect you, at state expense, to take the following classes within the next six months.

- a. How to Deal with Difficult People
- b. A class on organizational skills

6. While I cannot direct you to do so, if you are willing to take a Dale Carnegie class in Human Relations. The state will pay for the class, assuming the requisite number of classes are taken. This class is designed specifically to improve interpersonal skills, an area of improvement you would benefit from.

8. Finally, the state of Colorado offers employees assistance programs specifically CSEAP. If you should wish to avail yourself of this program, please notify your supervisor who will grant you the necessary time off to do so.

Corrective action is intended to correct and improve performance or behavior. Personnel Board Rule R-6-8. It is not disciplinary action. The issue the Administrative Law Judge must determine is, whether, based on the evidence produced at the hearing, the Respondent acted in an arbitrary or capricious manner in issuing the Corrective Action Notice. A number of witnesses called by Complainant were critical of White's supervisory skills. Much of the information provided in the investigative report of Hicks contained conclusory opinions of the witnesses interviewed but no specific incidents. With the exception of Mechem, Respondent produced no witnesses who testified to first hand knowledge of Complainant's unsatisfactory performance or behavior. On the other hand, Mechem, who was interviewed and testified at the hearing, stated that during several group settings the Complainant was unprofessional, and that he exhibited

loud aggressive behavior on more than one occasion. One employee did move away from the Complainant during one of these sessions. On another occasion, the Complainant and another employee were addressing each other in loud voices and were asked to calm down. Further, on yet another occasion the Complainant had taken up an issue for another employee. Mechem testified it was not appropriate for the Complainant to act in this fashion.

The Administrative Law Judge concludes, under this testimony, that the Respondent did present sufficient evidence at the hearing based on the testimony of Mechem to allow the Administrative Law Judge to conclude that Respondent was authorized to exercise its discretion and that by its efforts in requiring an independent investigation from outside of the department, it did use reasonable diligence and care to procure the necessary evidence on which to exercise its discretion. As such, the Administrative Law Judge concludes that directives 2 and 3 are not arbitrary or capricious. Further, directive 4 is within the scope of those matters authorized by C.R.S. 24-50-116 and therefore was an appropriate matter upon which to issue a corrective action.

The Administrative Law Judge is concerned that Respondent did not act earlier to issue a verbal warning when faced with complaints and thus may have permitted an atmosphere to exist within the Agency that fostered somewhat loud and unprofessional behavior. On the other hand, corrective action is appropriate, albeit somewhat delayed, to correct and improve continued unsatisfactory performance or behavior.

Personnel Board Rule R-6-8 permits a corrective action notice to contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance and that a removed corrective action cannot be considered for any subsequent personnel action. Because of various considerations including the fact that White's satisfactory performance caused the Respondent to rescind the Corrective Action Notice issued to her and because Complainant's performance has also been satisfactory, the Administrative Law Judge concludes that Respondent abused its discretion by not placing a time limitation as to when the corrective action, although not rescinded, should be removed from the official personnel records. The Administrative Law Judge concludes that this would have been appropriate in the present case, considering all the circumstances, and that the Respondent acted in an arbitrary or capricious manner in not so doing.

With regard to directives 5, 6 and 8, Complainant has either complied with these directives or was under no obligation to do so.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

It is the initial decision of the Administrative Law Judge as follows:

1. With respect to directives 1 and 7 there was no evidence introduced on which the corrective action was based. Therefore, Respondent's actions were arbitrary and capricious and must be rescinded.

2. With regard to directives 2, 3, and 4, the Respondent's actions were not arbitrary or capricious. However, the Respondent's failure to state a time period within which the Corrective Action would be removed, based on satisfactory performance, was arbitrary and capricious. It is the initial decision of the Administrative Law Judge that the corrective action be removed from the Complainant's personnel file, based on his satisfactory performance since February 27, 2001.

3. Even though directive 5 has been complied with, it should be removed from Complainant's personnel file.

4. With regard to directives 6, and 8 they are not mandatory and thus no action need be taken with regard to them.

Dated this ____ day of March, 2002, at Denver, Colorado.

Bennett S. Aisenberg
Administrative Law Judge
1600 Broadway, Suite 2350
Denver, Colorado 80202
303-861-2500

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March 2001, a true and correct copy of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE was sent via first class mail, postage prepaid to the following:

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