

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B080

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TONY BELMONTE,

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,
BUENA VISTA CORRECTIONAL COMPLEX,**

Respondent.

Hearing was held on April 25, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Respondent was represented by Assistant Attorney General Joseph Q. Lynch. Complainant appeared and was represented by Kenneth Scott.

MATTER APPEALED

Complainant, Tony Belmonte (“Complainant” or “Belmonte”) appeals his termination by Department of Corrections (“Respondent” or “DOC”).

For the reasons set forth below, Respondent’s action is **rescinded**.

PRELIMINARY MATTERS

Respondent was represented by Joseph Q. Lynch, Assistant Attorney General, 1525 Sherman Street, 7th Floor, Denver, Colorado. Respondent’s Advisory Witness for the proceedings was Tony D. Reid, Warden of Buena Vista Correctional Complex (“BVCC”), for Respondent.

Complainant was represented by Kenneth Scott. Complainant was present for the evidentiary proceedings.

PROCEDURAL MATTERS

A. Witnesses

Respondent called the following witnesses:

1. Lt. Sherry Pearce, BVCC
2. Lt. Kenneth S. Stolba, BVCC
3. Warden Tony D. Reid, BVCC

Complainant called the following witnesses:

1. Simon J. Dennwalt, Supervisor I, BVCC
2. Sgt. Thomas I. Haye, BVCC
3. Complainant testified on his own behalf

B. Exhibits

Respondent's Exhibits 1 and 6 to 10 were admitted by stipulation. Exhibit 5 was admitted without objection. Exhibits 2 to 4 and 11 were admitted over objection.

Complainant's Exhibits A, B, C and D were admitted by stipulation.

C. Judicial Notice of Previous Personnel Action

During the hearing, Complainant requested that judicial notice be taken of his prior personnel action. CRE 201(b) provides:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A court can take judicial notice of its own records and files. Sakal v. Donnelly, 494 P.2d 1316 (Colo. 1972). Judicial notice should be used cautiously. Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Colo. 1983). The timing of various filings of pleadings and the conclusion of the Initial Decision in the previous personnel action are appropriate for judicial notice as they are capable of ready determination. However, the tenor of hearing and/or deposition testimony and the basis for the ALJ's decision in the previous personnel action are not, under CRE 201(b), appropriate for judicial notice. See People v. Phillips, 732 P.2d 1226 (Colo. App. 1986) and 9 J. Wigmore *Evidence* § 2579.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether attorney fees are warranted.

FINDINGS OF FACT

Findings of fact contain italicized citations which cite the witness or exhibit upon which, at least in part, that finding of fact is based.

General Background

1. Complainant worked as a temporary food services employee for the Respondent at its Buena Vista Correctional Center ("BVCC") from May 1, 1999 to August 31, 1999. *Complainant*
2. On September 1, 1999, Complainant was appointed as a permanent, probationary employee. *Complainant*
3. Complainant seeks reinstatement to his former position, back pay and benefits, seniority, certification and attorney fees. *Complainant's prehearing statements*

Complainant's Performance Evaluations

4. Sherry Pearce was Complainant's supervisor the entire time he was employed at BVCC. *Pearce*
5. On Complainant's three month evaluation as a temporary employee, prepared by Pearce and covering the time period of 5/1/99 to 7/31/99, he received a "needs improvement" rating in the areas of quantity and quality of work, communication and interpersonal relations, and a "competent" rating in the area of organizational commitment. *Pearce and Exhibit 4*
6. On Complainant's close-out evaluation as a temporary employee, covering the time period of 5/1/99 to 8/31/99, he received a "needs improvement" rating in the areas of quantity and quality of work and communication and a "commendable" rating in the areas of interpersonal relations and organizational commitment. *Pearce and Exhibit 5*
7. The overall narrative justification section of the close-out evaluation included explanations of each area's rating and a comment stating "[d]espite his overall rating of needs improvement I feel Mr. Belmonte is a good candidate for the FTE

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Position effective Sept. 1, 1999. He has a good understanding of [food service], a good attitude towards his job and is working toward improving all factors of his performance.” *Exhibit 5*

8. Complainant signed his close-out evaluation and indicated that he agreed with the evaluation. *Exhibit 5*
9. It is not uncommon for temporary employees to make mistakes or to have “needs improvement” ratings during their temporary employment. *Pearce*
10. On October 30, 1999, when the Complainant failed to sign in a radio at the end of his shift, Lt. Kenneth S. Stolba, a food services supervisor at BVCC, gave him a performance documentation form with a “needs improvement” rating in the areas of communications and organizational commitment. *Stolba and Exhibit 6.*
11. Stolba located the radio but had to document Complainant’s failure to check it in properly. *Stolba*
12. Stolba viewed Complainant as someone who would learn from his mistakes but had a pattern of then making a mistake in a different area. *Stolba*
13. On November 9, 1999, Complainant, along with all of the kitchen staff, was given a “peak performer” rating in the areas of quantity and quality of work, communication, interpersonal relations and organizational commitment in connection with a kitchen audit by an internal team of D.O.C. auditors. *Pearce and Exhibit A*
14. On December 15, 1999, Complainant received a performance documentation with a “needs improvement” rating for failing to check in a Class B tool, a dough cutter, when he released an inmate from his shift early. *Pearce and Exhibit 7*
15. Complainant released the inmate because the inmate asked to go to the medical department for an insulin shot. *Complainant*
16. The performance documentation was given as a one time documentation to correct Complainant’s behavior and because it came soon after tool control training. *Pearce*
17. In Pearce’s experience, a probationary employee had not been terminated based upon such a performance documentation. *Pearce*
18. On January 3, 2000 Complainant was given a close-out evaluation prepared by Pearce covering his probationary employment from 9/1/99 to 12/22/99 with a “needs improvement” rating in quantity and quality of work, communication and interpersonal relations and a “commendable” rating in organizational commitment

and the sole comment of “Mr. Belmonte was separated from BVCC and D.O.C. on December 22, 1999. At the time of his termination his overall performance reflected a needs improvement.” *Pearce and Exhibit 8*

19. Complainant did not initiate any grievances with regards to his two evaluations as a temporary employee or his one evaluation as a probationary employee. *Pearce and Complainant*

Complainant’s Previous Personnel Action

20. Warden Hickox terminated Complainant on December 22, 1999. *Reid*

21. While discussing with Complainant his employment termination, Hickox stated that he had consulted with Assistant Wardens Strobridge and Reid before making his decision but that Hickox himself had been the one who made the decision. *Complainant*

22. Reid does not think that Hickox discussed Complainant’s termination with him. *Reid*

23. The Complainant filed a request for a discretionary hearing on his employment termination (the “Complainant’s Previous Personnel Action”). *State Personnel Board Case No. 2000B086*

24. The Board granted a hearing. *State Personnel Board Case No. 2000B086.*

25. Warden Reid became warden and appointing authority of BVCC after Complainant filed his Previous Personnel Action and prior to the initial decision in that action. *Reid*

26. Reid was aware of Complainant’s Previous Personnel Action. *Reid*

27. On December 20, 2000, in Complainant’s Previous Personnel Action, the ALJ issued an Initial Decision reinstating Complainant to his former position with full back pay and benefits, staying Complainant’s probationary period from December 22, 1999 to the date of the Initial Decision and awarding Complainant his attorney fees and costs. *State Personnel Board Case No. 2000B086*

28. On January 9, 2001, the Respondent filed its Designation of Record in the Complainant’s Previous Personnel Action. *State Personnel Board Case No. 2000B086.*

29. On January 19, 2001, the Respondent filed its Notice of Appeal of the Initial Decision. *State Personnel Board Case No. 2000B086*

30. At its May, 2001 meeting, the Board adopted the findings of fact of the Initial Decision in the Complainant's Previous Personnel Action, but reversed the conclusions of law. *State Personnel Board Case No. 2000B086*

Complainant's Termination

31. When Reid received the Initial Decision reinstating Complainant, he had an Inspector General's ("IG") report on his desk regarding allegations made by an inmate against Complainant. *Reid*

32. It is part of Reid's duties as warden to review IG reports. *Reid*

33. The IG's investigation had not been completed prior to Complainant's December 22, 1999 employment termination. *Reid*

34. Reid was concerned about the reinstatement because Complainant's job had been filled and, because there were no vacant positions, there would be bumping if he reinstated Complainant. *Reid*

35. Reid did not disagree with the Initial Decision. *Reid*

36. Reid scheduled a meeting on January 16, 2000 to discuss the IG's report with Complainant before Complainant returned to work. *Reid*

37. Present at the meeting were Reid, Complainant and Madeline Sabel of DOC's Human Resources. *Reid*

38. During the meeting, only the inmate allegations were discussed. The Complainant's job performance was not discussed. *Complainant*

39. After the meeting Reid decided that there was not enough to warrant charging Complainant on the basis of the inmate allegations and doing an R-6-10 meeting. *Reid*

40. Reid did not conduct an R-6-10 meeting with Complainant. *Reid*

41. After the January 16, 2001 meeting, Reid reviewed Complainant's file because he wanted to look at what Complainant's performance had been in the past. *Reid*

42. Reid's review of Complainant's file was not part of a systematic review of all BVCC employees' files. *Reid*

43. Reid did not obtain any information from Complainant with regards to his

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performance evaluations. *Reid*

44. Reid reviewed Complainant's evaluations as both a temporary and permanent employee and his commendation on the kitchen audit. *Reid*
45. From January 1, 2001 to January 31, 2001 Complainant was reinstated with BVCC but was not assigned to a shift, therefore he was, technically, considered to be on leave with pay. *Reid and Complainant*
46. After Complainant's reinstatement, while discussing a shortage of staff and whether Complainant would be returning, Pearce speculated to a group of food service workers that Complainant might have been certified but was terminated because of the inmate allegations. *Denwalt and Hays*
47. By letter dated January 30, 2001 and effective January 31, 2001, Complainant was terminated by Warden Reid, based upon his three month and six month evaluations, for unsatisfactory performance. *Exhibit 1*
48. Reid originally included a reference to the inmate allegations but after consulting with Madeline SaBell in Human Resources, he deleted the reference because it was not an actual basis for the termination. *Reid*

Respondent's Past Practices with Probationary Employees

49. Prior to Complainant's termination in January 2001, Pearce is unaware of any other probationary employees who have been terminated because of a "needs improvement" evaluation. *Pearce*
50. Pearce has worked with at least fifteen probationary employees while at BVCC. *Pearce*
51. When preparing evaluations, Pearce compares each employee to a set standard rather than to other employees. *Pearce*
52. Stolba, would not expect a probationary employee making normal mistakes to be terminated. *Stolba*
53. Hays works in the food service area at BVCC and mentors, but does not supervise, some probationary employees. *Hays*
54. Hays worked with Complainant a number of times while he was at BVCC. *Hays*
55. Complainant's job performance was comparable to other employees. *Hays*

56. Because the job is a learning process, it is not unusual for a probationary employee to have a “needs improvement” rating. *Haye*
57. Haye has worked with approximately twenty to twenty-five probationary employees, most of whom have had a “needs improvement” rating on their job evaluations. *Haye*
58. Often, as part of the corrective action process, an employee will be sent to DOC’s Training Academy for retraining. *Haye*
59. Complainant was not ever sent to DOC’s Training Academy as part of the corrective action process. *Complainant*
60. In response to interrogatories promulgated by the Complainant, Respondent stated that in the past ten years at BVCC, no other probationary employee had been terminated based upon a finding that one or both of the employee’s first two performance review evaluations reflected “Needs Improvement.” *Exhibit C*

DISCUSSION

I. GENERAL

In this action, Complainant alleges his termination from employment was retaliation for his previous personnel action and/or inmate allegations. Respondent argues Complainant, a probationary employee, was terminated for unsatisfactory job performance.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and 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). 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).

If a probationary employee is dismissed for reasons other than unsatisfactory performance, the employee is entitled to challenge the dismissal. Williams v. Colorado Dept of Corrections, 926 P.2d 110, 112 (Colo. App. 1996).

II. HEARING ISSUES

A. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

In this action, the Complainant is alleging that the Respondent terminated him in retaliation for Complainant's successful personnel action and/or unproven allegations by an inmate. The Respondent is alleging that Complainant was terminated for his unsatisfactory performance, a three and six month review of "needs improvement." Substantial evidence supports a conclusion that the purported reason for termination, the unsatisfactory performance, was a pretext for terminating Complainant and that but for his successful personnel action and/or the allegations of an inmate, Complainant would not have been terminated.

1. Consideration of Complainant's temporary employment

Complainant has no right to appeal discharge for unsatisfactory performance "during" the probationary period. However, in the Complainant's termination letter, Warden Reid, the Appointing Authority, clearly states that he considered an evaluation from the Complainant's temporary employment period. Temporary employees are not considered as part of the state personnel system and are not subject to probationary terms. § 24-50-114(3), C.R.S., Board Rule R-4-9 and Director's Procedures P-4-19 and P-4-20, 4 CCR 801. Probationary status applies to and commences with initial permanent appointments. § 24-50-115(5), C.R.S. and Board Rule R-4-9, 4 CCR 801. Regardless of whether or not Respondent retaliated against Complainant, Respondent considered performance outside of Complainant's probationary employment. This is directly contrary to Colorado statutes, Board Rules and Director's Procedures. Therefore, the appointing authority acted contrary to rule or law.

2. Retaliation for Complainant's Personnel Action

In order to prove retaliation, the Complainant must show by a preponderance of evidence that his activities fall within the protection of a constitutional right, he suffered an adverse employment decision and there is a causal connection between his protected activity and the decision to terminate his employment. If the Complainant meets this burden, the Respondent may avoid liability by demonstrating by a preponderance of the evidence that it would have reached the same decision as to the Complainant's employment even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (retaliation against employee for exercise of free speech rights); Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996) (retaliation against employee for exercise of Title VII rights); and Kemp v. State Bd. Of Agriculture, 803 P.2d 498 (Colo. 1990) (retaliation against employee for exercise of free speech rights).

As a probationary state employee, Complainant has a fundamental right of petition or access to the state personnel system's appeals process, a protected activity. § 24-50-125(5), C.R.S., Board Rules R-8-5, R-8-45 and R-8-52, 4 CCR 801. If such an activity is chilled because of fear of retaliation, then the entire state personnel system, state agencies, managers, employees and, ultimately, Colorado citizens would suffer a loss. In this matter, Complainant availed himself of the discretionary hearing process and exercised his rights to participate in that process. Complainant, after availing himself of this process, suffered an adverse employment decision when the Respondent terminated his employment.

The remaining issue of a causal connection is reflected in the close proximity in time between the ALJ's decision and the Respondent's decision to terminate Respondent. Within forty-one days of the issuance of the Initial Decision, the Complainant's employment was terminated. In between those two dates the Respondent filed its Notice of Appeal of the Initial Decision and designated the record for purposes of its appeal. It is true that upon appeal to the Board, the Board affirmed the ALJ's findings of fact but reversed the ALJ's conclusions of law, which resulted in affirming the original termination of Complainant's employment by the Appointing Authority. However, within six weeks of the ALJ's decision, four months prior to the Board's ruling and, without even placing the Complainant on the work schedule, the Respondent terminated the Complainant for a different reason from his prior termination.

The Respondent argues that it terminated the Complainant for unsatisfactory performance. The Board is without jurisdiction to explore whether or not the Complainant's performance was unsatisfactory. Williams v. Dept. of Corrections, 926 P.2d 110 (Colo. App. 1996). However, the Board does have the jurisdiction to determine whether the Respondent was retaliating against Complainant and whether the Respondent would have terminated the Complainant but for the ALJ's decision to reinstate Complainant. Given the evidence in the record presented by the Respondent's own employees, it is difficult to believe that the Respondent would have terminated Complainant's probationary employment within four months, if he had not, prior to the Board's May Order, successfully maintained a personnel action against the Respondent.

In its response to interrogatories, Respondent stated that in the past ten years no other probationary employee had been terminated for a "Needs Improvement" rating on one or both of the employee's first two performance evaluations. In addition, there was testimony by a number of Respondent's employees that a "Needs Improvement" evaluation was normal for probationary employees and was part of the learning process. At least two witnesses, one of whom was Complainant's own supervisor, stated that a "needs improvement" evaluation had not prior to Complainant's termination ever resulted in a probationary employee's termination. Finally, there was testimony that employees were usually sent to DOC's Training Academy as part of the corrective action process. Complainant was not sent for such training.

Given that it is normal for probationary employees to receive “Needs Improvement” ratings on their performance evaluations and that, for the past ten years, no other probationary employee has been terminated for such a rating on one or both of their first evaluations, the Respondent has retaliated against Complainant and acted arbitrarily, capriciously and contrary to rule or law.

B. Remedy

Complainant is entitled to reinstatement to his position and to back pay and benefits, minus any income he has earned since January 31, 2001. When an employee is wrongfully terminated, he is entitled to a remedy which will make him whole. Lanes v. O’Brien, 746 P.2d 1366, 1373 (Colo. App. 1987). The remedy should be equal to the wrong sustained by the employee. Dept. of Health v. Donahue, 690 P.2d 243, 250 (Colo. 1984). Such an employee is not entitled to any windfall. Id.

Complainant requests that the Board return him to work as a certified employee thereby allowing him to bypass the remainder of his probationary term. The Colorado Constitution mandates that prior to certification, all probationary employees must “complete” a probationary period. It states, “[a]fter satisfactory completion of any such [probationary] period, the person shall be certified. . . .” Colo. Const. Art. XII, Section 13(10). Complainant has not yet satisfactorily completed his probationary period. While Respondent’s wrongful termination caused him separation from employment, interrupting his probationary service, it would constitute a windfall to excuse Complainant from completing the remainder of his probationary term. Therefore, Complainant is to be reinstated as a probationary employee, with his probationary period remaining equivalent to the two hundred and twenty-one (221) days (365 days minus the time from September 1, 1999 to December 22, 1999 and from January 1, 2001 to January 31, 2001).

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. Both sides provided competent evidence in litigating the action. Given the above findings of fact an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent’s action was arbitrary, capricious, or contrary to rule or law.
2. Attorney’s fees are not warranted.

ORDER

Respondent's action is rescinded. Complainant is reinstated with full back pay and benefits minus any income he has earned since January 31, 2001. Complainant shall be reinstated as a probationary employee, with two hundred and twenty-one (221) days remaining in his probation period. Attorney fees and costs are not awarded.

Dated this 11th day of June, 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 June, 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:

Kenneth Scott
Scott Law Offices
301 E. Main Street
P.O. Box 4046
Buena Vista, Colorado 81211

and in the interagency mail, to:

Joseph Q. Lynch
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

any income he has earned since January 31, 2001.