

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORI J. TUCKER,

Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT,

Respondent.

This matter was heard by Administrative Law Judge Robert W. Thompson, Jr. on November 19, 20 and 21, 2001, and January 22 and 23, 2002. Respondent was represented by Joseph Lynch and Melissa Mequi, Assistant Attorneys General. Complainant appeared in-person and was represented by John Mosby, Attorney at Law.

MATTER APPEALED

Complainant appeals the June 21, 2001 disciplinary termination of her employment, effective June 29, 2001. For the reasons set forth below, respondent's action is affirmed.

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 available alternatives;

3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On the first day of hearing, November 19, 2001, complainant withdrew her grievance case, *Tucker v. Dep't. of Public Health & Environment*, Case No. 2001G055. Upon this withdrawal, Case No. 2001G055 was, and is, dismissed with prejudice. Consequently, discrimination is not an issue in the instant case. Respondent's motion to continue the hearing, founded primarily upon the discrimination issue of complainant's grievance, was denied for failure to show good cause.

Exhibit 43 was offered into evidence by respondent on November 21. Complainant objected to its admission on the ground of relevance. Ruling was reserved pending the further presentation of evidence. Exhibit 43 is now admitted.

FINDINGS OF FACT

The Administrative Law Judge 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. Lori C. Tucker, complainant, commenced employment with the Department of Public Health & Environment (DPH), respondent, in August 1990. She became an Environmental Protection Specialist in 1992. She was an Environmental Protection Specialist III when her employment was terminated.

2. Tucker inspected and issued permits to facilities for the beneficial use of biosolids, which are treated residuals from wastewater. She was responsible for inspecting land sites to ensure that biosolids were applied to the land in accord with state and federal regulations, e.g., that the biosolids were incorporated into the soil properly and left no offensive odors. Tucker was the “staff authority” on the biosolids program.
3. Biosolids are a material that is created in the wastewater treatment process. Biosolids are used as a fertilizer, i.e., they are applied to the land to enhance the soil.
4. The regulatory procedures of the biosolids program are governed by Colorado’s Biosolids Regulation 64.
5. On March 9, 2001, Associate DPH Director Sandy Blaylock received a telephone call from Monte Torres, the director for Southeastern Land & Environment in Prowers County, Lamar, Colorado. Torres expressed concerns over Tucker’s management of the biosolids program. He alleged that Tucker had falsified information in her Prowers County inspection reports. He believed that the false information supplied by Tucker was preventing him from gaining a contract from DPH to conduct biosolids inspections. He alleged that Tucker’s incompetence reflected negatively on the impression of Colorado held by the rural community and contradicted the state’s strategic plans.
6. At the suggestion of Torres, Blaylock telephoned Wayne Schultz and Mike Sharp of Parker Ag Services (Parker Ag) for their perceptions of Tucker’s performance. Parker Ag is a company that applies biosolids to Colorado farmland as fertilizer and has offices in Limon and Lamar. Schultz is project manager for Parker Ag in Lamar. Sharp is the

director of program development. They substantiated the complaints of Torres.

7. Blaylock contacted Susan Nachtrieb, Tucker's supervisor, for a copy of the particular inspection reports questioned by Torres, plus any copies of inspection reports that Tucker had on file for Prowers County for the past three years. In reviewing the reports, Blaylock noticed that the amount of time spent on each inspection was unrealistically low.
8. On March 22, 2001, Blaylock met with the director of environmental programs for DPH and representatives of Parker Ag Services, at Parker Ag's request, concerning a Notice of Violation against Parker Ag that had been pending for more than a year. Subsequent to this meeting, Blaylock requested and received authorization from Executive Director Jane Norton to conduct an internal investigation into the allegations made against Tucker.
9. On April 3 and 4, 2001, Blaylock went to Limon and Lamar in furtherance of the investigation. She was accompanied by Tucker's supervisor, Nachtrieb, and Francile Beights, the internal auditor, to audit Parker Ag's files in Limon and Lamar.
10. On April 4, the three investigators met with Parker Ag representatives in Lamar and reviewed Parker Ag's files, which included copies of inspection reports that Tucker had completed over the past three years in Prowers County for Parker Ag biosolid applications. They also reviewed copies of inspection reports from DPH files which Nachtrieb had brought along. It became apparent to Blaylock that there were discrepancies between what Tucker had reported and what actually occurred vis-à-vis the location of sites, when the inspections took

place, what biosolids activities had been performed, and who was present with Tucker during the inspections.

11. Blaylock and Nachtrieb went out to the sites where the inspections were to have occurred in order to verify the information contained in the inspection reports. They found that a number of the reports prepared by Tucker contained incorrect information. They concluded that it was impossible to perform the inspections within the time frames shown on the reports, given the size of the sites and the distance between them. Specifics such as the terrain of the land did not match the information reported.
12. One of the inspection reports indicated that Tucker had completed an inspection in Lamar with Wayne Schultz on April 1, 1998, a day on which Schultz was not in Lamar.
13. Blaylock concluded that Tucker may have fabricated the information in the reports and did not actually conduct the inspections, or that Tucker may have lacked the required biosolids expertise. She was certain that Tucker had submitted inspection reports that were not representative of valid inspections and contained inaccurate and false information.
14. Based upon this investigation, Blaylock concluded that Tucker had failed to comply with Biosolids Regulation 64, which set the regulatory time frames for processing applications for the use and distribution of biosolids, and that Tucker had falsified state records.
15. On May 5, 2001, Blaylock sent a memo to Executive Director Jane Norton recommending that Tucker be given the opportunity to respond

to the findings of the investigation and that a determination be made as to whether disciplinary action was warranted.

16. DPH inspection reports are subject to auditing by the Environmental Protection Agency (EPA), as well as by state auditors, and they are open to the public.
17. What is reported to the EPA is the number of inspections completed. It was reported to the EPA that Tucker completed thirteen inspection reports during the subject fiscal year (1999), presumably valid and accurate.
18. After receiving the results of the investigation and discussing the issues with Blaylock, David Holm, Director of the Water Control Division and Tucker's appointing authority, placed Tucker on administrative leave effective May 7, 2001, "in order ... to investigate [Tucker's] activities and performance related to conducting Inspections pertaining to Biosolids and reporting the results of these inspections to the Environmental Protection Agency."
19. Holm gave Tucker written notice of a Rule R-6-10 meeting "based upon allegations that you have written false or inaccurate inspection reports, failed to comply with regulatory deadlines, and engaged in unprofessional conduct." The notice stated that the meeting was to include "any other issues that may arise prior to the meeting."
20. The predisciplinary meeting was held on June 8, 2001, and was attended by Tucker and counsel, Holm, and Shirley Collins, the agency's Director of Human Resources.

21. Prior to the R-6-10 meeting, after Tucker had been placed on administrative leave, two pornographic e-mail film clips were discovered on Tucker's computer. Each was about fifteen seconds long and depicted a sexual act. Holm was shocked by this information.
22. These e-mail messages were sent to Tucker by an employee of another division of DPH. This employee was verbally reprimanded for his conduct. Tucker had not requested the e-mails and did not discuss them with the sender. Though the e-mails were accessible via an icon on the main screen of her computer, Tucker testified that she had never opened them.
23. Susan Nachtrieb saw a draft of the termination letter before the predisciplinary meeting was held.
24. At the R-6-10 meeting, Tucker was shown four or five representative inspection reports she had completed. She had difficulty both in locating the sites on a map and in reconciling her inspection notations with the characteristics of the actual site location. She stated that she had to recreate some of the reports because the originals had become lost. This was the first time Holm had heard that some inspection reports were not original copies but rather had been recreated. There was no facial indication that the reports were not originals. Holm would ultimately conclude that Tucker did not actually inspect all of the sites that she filed inspection reports on.
25. Tucker suggested that some of the site numbers, identifying a particular site, were incorrect, admitting that it was not possible to travel 25 miles from one site to another in seven minutes.

26. Tucker requested copies of certain documents for her review, but they were not provided to her
27. Holm did not directly ask Tucker about the pornographic film clips found on her computer. He took their inappropriateness into consideration in taking disciplinary action without having solicited a direct response from her.
28. One of Tucker's inspection reports indicated that biosolids had been applied to a certain Parker Ag site, but the company had never applied biosolids to that site.
29. One of Tucker's inspection reports wrongly indicated the time the inspection was done, the person who accompanied her on the inspection, and the type of biosolids application.
30. Parker Ag had no record of a particular site being inspected as shown by a Tucker report, and the report incorrectly described the characteristics of the land.
31. One site was described in a report by Tucker as sloped, but the ground was flat and biosolids had never been applied to that site. One site was described as having sunflowers on it, but there never were any sunflowers growing on it.
32. One of Tucker's inspection reports indicated that it had been two days since biosolids were applied to the land, but it had actually been seventeen days. In another case, biosolids were not applied to the land until four months subsequent to the date of Tucker's inspection report.

33. A number of similar kinds of misinformation appeared in Tucker's reports. Based on the designated times the inspections were conducted, she had traveled eleven miles between sites in one minute, seventeen miles in 22 minutes over mostly gravel roads, thirteen miles in six minutes, and twenty-five miles in seven minutes.
34. In fourteen of fifteen cases checked, Tucker violated Biosolids Regulation 64 by failing to respond to Parker Ag's application to apply biosolids within the required 30-day period. In ten of 24 other cases, Tucker failed to respond within 30 days.
35. In arriving at the decision to terminate, Holm took into account corrective actions which had been issued to Tucker in October 2000 and May 2001, respectively. He also considered the fact that Tucker had gained a reputation for being argumentative and uncooperative. Twenty-three inspection reports were evaluated.
36. Tucker had knowledge of all pertinent rules and regulations pertaining to the biosolids program.
37. Following the R-6-10 meeting, Holm held meetings with Shirley Collins, Susan Nachtrieb, and his manager, David Akers. He reviewed and evaluated the information before him, concluding that Tucker's reports were riddled with errors, and that Tucker had submitted inspection reports for inspections that had not been made. He spent eighteen hours expanding the termination letter to eighteen pages from the original eleven-page draft.
38. Via an eighteen-page letter dated June 21, 2001, Holm, the appointing authority, terminated the employment of Lori C. Tucker, complainant, effective June 29, 2001, for failure to perform her job competently,

willful misconduct, and willful failure to perform the duties of her position.

39. Tucker filed a timely appeal of her dismissal on June 29, 2001.

DISCUSSION

I.

In a disciplinary proceeding, in this case termination of employment, the burden of proof by a preponderance of the evidence rests with the respondent to show that there was just cause for the discipline imposed. See *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions). 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 determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999).

II.

Complainant argues that she was denied due process because the termination letter was written before the predisciplinary meeting was held, complainant did not receive the documents that she requested at the predisciplinary meeting, the appointing authority told complainant she was "required" to answer his questions, and the discipline was based partially on the e-mail film clips to which she was given no opportunity to respond.

Complainant was not denied due process at the R-6-10 meeting. Predisciplinary meetings are informal and are not of record; an appointing authority is not required to present any evidence against the employee. *Kinchen v. Dep't. of Institutions*, 867 P.2d 8 (Colo. App. 1993), *aff'd*, *Dep't. of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This due process violation is sustainable because complainant had the opportunity for a post-disciplinary evidentiary hearing before a neutral third-party. *Kinchen v. Dep't. of Institutions*, *supra* at 11. Additionally, though the appointing authority began a draft of the termination letter before the predisciplinary meeting was held, he spent a considerable amount of time on the letter following the meeting, considering complainant's responses and making his final determination.

Nevertheless, an employee must be provided with notice of the purpose of the predisciplinary meeting and the matters to be discussed. *Bourie v. Dep't of Higher Education*, 929 P.2d 18, 22 (Colo. App. 1996). The employee must be given an opportunity to respond. Rule R-6-10, 4 CCR 801. In the present matter, complainant was given no notice that the e-mail film clips were under consideration, and she was not afforded the opportunity of a direct response. Yet, the e-mails figured into the appointing authority's decision, albeit not significantly. For purposes of this Initial Decision, the e-mail messages are not taken into account in upholding the appointing authority's action.

III.

Complainant also argues that her dismissal was arbitrary or capricious because there was no evidence that the results of her inspection reports were submitted to a federal agency. While the letter placing her on administrative leave stated as an area for investigation, "reporting the results of these inspections to the Environmental Protection Agency," such was not the basis for the termination. Rather, the termination was founded upon false written reports of biosolids site inspections. Substantial credible evidence supports the findings and conclusions

of Blaylock's investigation report and the findings and conclusions of the appointing authority.

The appointing authority did not abuse his discretion. Under these circumstances, respondent's action was not arbitrary, capricious or contrary to rule or law. Respondent proved by a preponderance of the evidence that there was just cause for the termination of complainant's employment. See *Kinchen, supra*.

IV.

It cannot be found that the personnel action was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." Accordingly, there are no grounds for an award of attorney fees and costs. See C.R.S. §24-50-125.5. See also Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent's action of terminating complainant's employment was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of available alternatives.
3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

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

Robert W. Thompson, Jr.
Administrative Law Judge

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 SERVICE

This is to certify that on the ____ day of March, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

John Mosby
Attorney at Law
730 17th Street, Suite 750
Denver, CO 80202

And by courier pick-up, to:

Joseph Q. Lynch
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