

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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KENNETH E. WILLIS,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
COLORADO STATE UNIVERSITY,  
FACILITIES MANAGEMENT,

Respondent.

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This matter was heard on January 9, 2002, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Hollyce Farrell, Assistant Attorney General. Complainant appeared in-person and was represented by Randall R. Meyers, Attorney at Law.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment on October 3, 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 complainant failed to mitigate his damages;
3. Whether either party is entitled to an award of attorney fees and costs.

## **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. Complainant Kenneth E. Willis was employed by Colorado State University, Facilities Management, located in Fort Collins, as a Pipe/Mechanical Trades II from June 1, 1995 until he was dismissed on October 3, 2001. He was a pipefitter and welder. His supervisor for the entire period of his employment was Al Cervanyk.
2. On his performance evaluation for the years 1995/96, 1997/98, and 1998/99, complainant received a rating of Needs Improvement in the area of leave practices and being on time for work. Cervanyk discussed with him the problem of his tardiness and the fact that he needed to report for work on time every day. Each time, complainant's punctuality improved for a month or two, but then returned to a pattern of tardiness. On the average, complainant was tardy once a week.
3. Complainant's start time was 7:00 a.m. His tardiness ranged from five to fifteen minutes. There were occasions when he was twenty minutes late.
4. On April 27, 2000, Cervanyk issued complainant a "PACE Progress Review" in which he listed his expectations in areas needing improvement that were reflected on complainant's last performance appraisal, inclusive of: meeting a level of quantity and timeliness, reporting to work on time, and interpersonal relations. He advised complainant that he was consistently late for work, that he was

required to be at work at 7:00 a.m. and report directly to Cervanyk, and that if complainant's tardiness was not corrected Cervanyk would proceed with a corrective action.

5. Also on April 27, 2000, Cervanyk issued a corrective action to complainant concerning an April 17 misuse of a state vehicle. He instructed complainant to follow all work rules and regulations and to be at the work site at 7:00 a.m.
6. On June 16, 2000, Cervanyk wrote a memo to complainant in which he referred to a recent fifteen-minute tardiness. Complainant had also been three hours late one day, but that tardiness was excused because he had an excusable reason for his absence. Cervanyk emphasized again that tardiness was not acceptable and stated that continued tardiness would result in disciplinary action.
7. Cervanyk met with his supervisor, Steve Hultin, several times to discuss the matter of complainant's tardiness. Hultin agreed with Cervanyk that complainant's tardiness was a problem and should be corrected.
8. On November 6, 2000, Cervanyk wrote a memo to John Morris, Manager of Facilities Operations and the appointing authority for attendance issues, in which he informed Morris that complainant had been between five and fifteen minutes late five times between August 21 and October 16.
9. On December 22, 2000, Morris imposed the disciplinary action of a three-day suspension for tardiness. Complainant appealed his suspension to the State Personnel Board. In settlement of the case, the disciplinary suspension was reduced to two days.

10. Following the December 22 suspension, complainant's tardiness improved for a short time. He was gone from the job on injury leave from February 19, 2001 through July 6, 2001.
11. On July 12, 2001, Cervanyk issued a "Letter of Corrective Action/Written Warning" to address complainant's "failure to improve upon work performance behaviors over the past fiscal year." Among other things, the corrective action required complainant to arrive at work on time daily and report directly to his supervisor. Arriving to work on time was the top issue. Complainant was advised that failure to comply with the terms of the corrective action might lead to further corrective or disciplinary action.
12. On September 6, 2001, Cervanyk wrote complainant a memo titled, "Corrective Action/Written Warning Signed 7/12/01." In this memo, Cervanyk noted that complainant was tardy on August 13, 2001, that complainant had not generally met the terms of the July 12 corrective action, and that Cervanyk intended to recommend further disciplinary action.
13. Complainant's ongoing tardiness concerned Cervanyk because an employee being late for work affects task assignments and setting priorities, wastes time, and has a negative impact on morale.
14. Two other employees complained about complainant being late. Cervanyk reprimanded three other employees for being late for work and issued a corrective action to one. Over a four and one-half month period, complainant was late for work 30 times.

15. Complainant resides two miles south of the Wyoming state line, an hour's drive from Fort Collins. The general reason for his lateness for work was slow traffic on U. S. 287.
16. Lateness for work is a violation of work rules and guidelines as set out in the "Policies and Procedures Manual" of the Facilities Management Department, which is distributed to all employees.
17. Tardiness is excused if the reason for it is inclement weather.
18. Most Facilities Management employees have arrived late for work. None possesses a record of tardiness to match complainant's.
19. A predisciplinary meeting was held, and on October 3, 2001, appointing authority Morris terminated the employment of Kenneth E. Willis for violating the corrective action of April 27, 2000, and the disciplinary action of December 22, 2000. The triggering factor was the August 13 tardy. In making the decision to terminate, Morris took into consideration the facts that complainant had received Needs Improvement performance ratings for his tardiness, written and verbal warnings, two corrective actions and a prior disciplinary action. Having instituted progressive discipline, he felt that termination was now the appropriate sanction.
20. Since his dismissal, complainant has applied unsuccessfully for a job at most of the 25 to 30 welding shops in Fort Collins.

## 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.

Determining work hours is within the discretion of the appointing authority. Rule R-1-6, 4 CCR 801. In the present matter, complainant was given ample notice that he was required to arrive at work the same time everyday, almost from the very beginning of his employment. The agency followed the concept of progressive discipline. Rule R-6-2, 4 CCR 801. The appointing authority did not abuse his discretion. Under these circumstances, respondent's action was not arbitrary, capricious or contrary to rule or law. Through credible evidence, respondent proved by a preponderance that there was just cause for the termination of complainant's employment. See *Kinchen, supra*.

III.

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. Complainant did not fail to mitigate his damages.
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 February, 2002, at  
Denver, Colorado.

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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 February, 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:

Randall R. Meyers  
Attorney at Law  
Opera Galleria Building, Suite 230  
123 North College Avenue  
Fort Collins, CO 80524

And by courier pick-up, to:

Hollyce Farrell  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203

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