

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2002B144

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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MICHAEL FOWLER,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
WESTERN STATE COLLEGE,

Respondent.

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Administrative Law Judge Robert W. Thompson, Jr. heard this matter on December 9, 2002. Hollyce Farrell, Assistant Attorney General, represented respondent. Complainant appeared in-person and was represented by Susan Tyburski, Attorney at Law.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, the disciplinary action is rescinded.

**ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether complainant was subjected to disparate treatment.

## **FINDINGS OF FACT**

The Administrative Law Judge has considered the exhibits and testimony, assessed the credibility of the witnesses, and makes the following findings of fact, which were established by a preponderance of the evidence.

1. As a student at respondent Western State College (WSC) in Gunnison from 1991 to 1995, complainant Michael Fowler was employed 20 hours per week as a student-custodian. He worked 40 hours per week during the summers. Upon graduation with a major in history, he became a full-time custodian for the college. He was promoted to Custodian II in early 2001.
2. As Custodian II, Fowler was a lead worker and supervised student-custodians.
3. On Wednesday, April 29, 2002, Fowler arrived at work at 3:00 p.m. His work hours were 3:00 to 11:00 p.m. Student-custodian Brent Fahrberger arrived at work at 9:00 p.m. They worked together until they clocked out and left the building at the same time.
4. The electric timeclock used by complainant was not keeping time accurately. The clock ran fast by four to eight minutes. According to the timeclock, Fowler clocked out at 11:18 p.m. Linda Crouse, WSC Human Resources Director, who conducted an investigation for the appointing authority, estimated the actual clock-out time to be 11:13 p.m. This is the time used by the appointing authority in making his disciplinary decision.

5. Upon leaving the building, Fowler and Fahrberger went to Fahrberger's pickup truck where they looked at the fish Fahrberger had caught during the day and some fishing lures. At the pickup, Fahrberger brought out a 40-ounce bottle of malt liquor and two cups. Fowler drank most of the malt liquor, Fahrberger having just a few sips. They were there for a little less than ten minutes.
6. Neither Fowler nor Fahrberger drank alcohol on the job.
7. As they departed at approximately 11:20 p.m., Fahrberger said to Fowler, "Keep up with my Nissan," and sped away. Following the Nissan, Fowler looked down at his radio and failed to notice that Fahrberger had suddenly slowed down, colliding with the rear of the Nissan and causing it to hit a tree and land on its side. Fowler got out, checked on Fahrberger, and dialed 911.
8. Gunnison police officers arrived, summoned an ambulance, and Fahrberger was transported to the hospital.
9. The police began an investigation of the accident. Fowler denied that he had been drinking, hoping that he would turn out to be under the legal limit for driving under the influence.
10. Fowler was given a roadside sobriety test and displayed indicators of intoxication. At 12:35 a.m., he was administered a breathalyzer test that registered .089 for blood-alcohol content (BAC). (The legal limit for driving under the influence is .10.) He was charged with Driving While Ability Impaired (DWAI) and taken to jail.
11. At 2:15 a.m., Fowler was administered a second breathalyzer test, which registered a .054 BAC.

12. Fahrberger was given a blood test at the hospital and showed a negative BAC, .00.
13. At the request of the Gunnison police department, a highway patrol trooper estimated complainant's speed at 67 mph, based on the skid marks.
14. Norman Sunstad was the Vice President for Finance and Administration for Western State College and the appointing authority in this matter. On April 30, 2002, the morning following the accident, Sunstad talked to the campus security officer, who had telephoned him shortly after the accident occurred. He asked the human resources director, Linda Crouse, to investigate the matter and report back to him.
15. Fearing the possibility of getting into trouble with the police, but mainly afraid of being expelled from school, Fahrberger untruthfully stated to Crouse that he and Fowler had split two twelve-ounce 3.2 beers. The truth was that they drank a 40-ounce bottle of malt liquor, which has an alcohol content of 4.4% or 4.5%.
16. There is 23% more alcohol in 4.4 malt liquor than there is in 3.6 beer. Complainant would have had to consume approximately 37 ounces of 4.4 beer in order to register a .089 BAC at 12:35 a.m. This is about how much he had to drink.
17. Sunstad conducted a predisciplinary meeting with Fowler on May 20, 2002, to consider the possibility of Fowler's "drinking alcohol on the job and/or on college premises with a student under your supervision and related matters."

18. Fowler consistently stated that he did not drink on the job.
19. On May 21, the day after the R-6-10 meeting, Sunstad telephoned Officer King of the Gunnison Police Department in an effort to ascertain whether Fowler had been drinking during work hours. Based on the premise that Fowler had “split” a 40-ounce bottle of beer with Fahrberger, interpreting Fowler’s use of the term “split” at the R-6-10 meeting to mean 50-50, King speculated that Fowler had been drinking prior to 11:13 p.m. and had to have consumed more than one-half of 40 ounces of beer in order to attain the blood-alcohol levels demonstrated by the breathalyzer tests.
20. Sunstad concluded that dismissal was warranted because Fowler had been drinking at work, suffered from impaired judgment, engaged a student-employee he supervised, speeded through the campus, and the student-employee came close to being killed or injured.
21. Fowler had received no prior corrective or disciplinary actions. He possessed a good work record. His direct supervisor did not want to see him dismissed from employment.
22. By letter dated May 24, 2002, the appointing authority terminated the employment of Michael Fowler because Fowler’s actions of April 29 “constitute a violation of the State’s Substance Abuse Policy, State Personnel Rule R-6-9 - Willful Misconduct, and violation of generally accepted performance standards for a State employee.”
23. The State’s Substance Abuse Policy applies to employees who are impaired by alcohol or other drugs “during work hours.”

24. There is no policy prohibiting beer drinking in the parking lot by employees; it has happened occasionally in the past.
25. There is no policy that prohibits a supervisor from fraternizing with a subordinate after work hours. Respondent presented no evidence of what constitutes “generally accepted performance standards” with respect to off-duty conduct.
26. Fowler and Fahrberger were friends.
27. The school year ended shortly after the April 29 incident, and Fahrberger did not return to work.
28. Complainant filed a timely appeal of the disciplinary action on June 5, 2002.

## **DISCUSSION**

### I.

Respondent bears the burden to prove by preponderant evidence that the complainant committed the acts for which discipline was imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Here, the respondent failed to meet that burden.

Complainant could not have violated the substance abuse policy, since he did not consume alcohol “during work hours.” The only two eyewitnesses testified consistently that the alcohol was consumed after work.

Respondent’s evidence consists solely of pure speculation as to the amount of beer that would need to be consumed in order to reach a certain BAC, and that complainant could not have consumed that much beer unless he had been drinking on the job. Speculation is not proof. Furthermore, the speculation was based on inaccurate information, i.e., that complainant drank

20 ounces of beer when, in fact, he drank almost all of a 40-ounce bottle of malt liquor, which is higher in alcohol content than beer. Fowler denied all along that he ever drank on the job, and there never was any evidence to the contrary. Fahrberger's testimony that he drank only "a few sips" is corroborated by the fact that he registered a .00 BAC. Complainant drank the rest in a very short period of time. The evidence suggests that he indeed could have registered the BACs that he did.

The action of an appointing authority is necessarily arbitrary and capricious when the employee did not commit the acts for which discipline was imposed. In the present matter, complainant's acts took place while he was off-duty. No evidence was presented to justify termination of employment for complainant's off-duty conduct. Thus, respondent failed to show that there was just cause to warrant the termination of complainant's employment, as mandated by *Kinchen, supra*. The disciplinary action had no foundation in fact.

While complainant raised the issue of disparate treatment, he did not introduce evidence of like situations that would tend to show a disparity by comparison.

## II.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is *mandatory* if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record sustains a finding that the action taken by respondent was "otherwise groundless." When the agency has no grounds for the particular disciplinary action taken, an award of attorney fees is mandated. *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), *cert. denied*. See *Hartley v. Department of Corrections*, 937 P.2d 913 (Colo. App. 1997).

### **CONCLUSIONS OF LAW**

1. Complainant did not commit the acts for which discipline was imposed.
2. Respondent's action was arbitrary, capricious or contrary to rule or law.
3. Complainant was not subjected to disparate treatment.
4. Complainant is entitled to an award of attorney fees and costs.

### **ORDER**

The disciplinary termination is rescinded. Complainant shall be reinstated to his former Custodian II position with back pay and benefits, less the appropriate offsets. Respondent shall pay to complainant the amount of his attorney fees and costs incurred in the pursuit of his appeal.

DATED this \_\_\_\_ day  
of January, 2003, 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 January, 2003, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Susan Tyburski  
Attorney at Law  
1439 Court Place  
Denver, CO 80202

And through the interagency mail to:

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