

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KATHLEEN JACKSON,

Complainant,

vs.

COMMUNITY COLLEGES OF COLORADO, ARAPAHOE COMMUNITY COLLEGE,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on March 31, 2003 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorneys General Danielle Moore and Monica Ramunda represented Respondent. Respondent's advisory witness was David Castro, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Kathleen Jackson ("Complainant" or "Jackson") appeals her termination by Respondent, Community Colleges of Colorado, Arapahoe Community College ("Respondent"). Complainant seeks reinstatement, back pay and lost sick leave.

For the reasons set forth below, Respondent's action is **affirmed**.

PROCEDURAL HISTORY

Complainant timely filed her termination. At the hearing, during the presentation of its case, Respondent presented witnesses and exhibits in support of its disciplinary action. Complainant did not present any witnesses or exhibits which were admitted into evidence.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the available range of reasonable alternatives.

FINDINGS OF FACT

General Background

1. Complainant was a Custodian I at Arapahoe Community College (“ACC”) who worked on the evening shift. Complainant’s demeanor is typically quiet and her speech, while quiet, is clear and enunciated.
2. At all times relevant to this action, Arapahoe Community College has had a drug free workplace policy and a drug and alcohol prevention program. At all times relevant to this action, Complainant was aware of both the policy and program.
3. Complainant’s day-to-day supervisor is Jess Ortega. Mr. Ortega reports to Ernest Herrera, Superintendent of Housekeeping, who, in turn, reports to Ron Putt, Director of Plant Facilities. David Castro, Director of Human Resources, was Complainant’s appointing authority.
4. There are twelve Custodian Is on the evening shift. Each of them is assigned to and responsible for cleaning a 20,000 square foot area. Their duties include cleaning all floors (vacuuming, stripping and/or polishing), polishing furniture, dusting, emptying trash receptacles, disinfecting fountains and bathrooms and replenishing various consumables – towels, toilet paper and cleaning supplies.
5. Custodian Is operate many pieces of heavy equipment, including buffers, extractors, upholstery cleaners, vacuums and K-vac units (a machine which is worn on the custodian’s back as it sprays cleaning fluid and water on a bathroom’s ceramic surfaces). When operating the buffers, the custodial staff person must be mentally alert and well balanced as the machines have a forceful pull.
6. Complainant’s position was a safety sensitive position as she had to operate heavy electrical equipment, often close to water, and used harsh chemicals in concentrated cleaning solutions. The chemicals often had to be diluted prior to being used. If they were not, then they could cause serious damage to a person’s skin and/or eyes.
7. At the beginning of each evening shift, Herrera briefs the Custodian Is and their supervisors. The Custodian Is are then given their keys and sent to their assigned areas to complete their assigned duties while their first line supervisors circulate through the various areas to check oversee the Custodian Is. When a Custodian I is unable to work, for any reason, his or her first line supervisor must complete the assigned duties in the Custodian I’s assigned area.

Prior Disciplinary History

8. Prior to Herrera being hired as the Superintendent, Mike Lesh was supervising Complainant. On occasion, he and Ortega found Complainant sleeping on a couch during her shift. Lesh would admonish her but did not ever discipline her in any way for these incidences.

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9. Complainant received a corrective action on July 31, 1996 because she was intoxicated when she reported to work. On that occasion Complainant's speech was slurred and she had difficulty keeping her balance. Complainant's supervisor had decided she was incapable of performing her job duties and drove her home.
10. On November 19, 1997, Corporal Gary Schock from ACC's campus police department was asked by Complainant's supervisor to drive Complainant home because she was intoxicated. While Schock was with Complainant, he observed that her speech was slurred, her balance was poor, her eyes were red and there was an odor of alcohol on her breath.
11. Schock has received extensive training throughout his law enforcement career on observing and determining whether or not individuals are intoxicated.
12. Complainant had a pre-disciplinary meeting with Judith Zewe, Director of Human Resources regarding the November 19, 1997 incident. During that meeting, Complainant admitted that she had reported to work intoxicated and unable to perform her duties and explained that it was due to several recently experienced personal problems. Zewe sent Complainant a letter saying that no disciplinary action would be taken against Complainant and strongly encouraging her to contact C-SEAP for individual counseling on her recent problems. In addition, Zewe stated that the C-SEAP counselor would need to contact Complainant's supervisor to inform him that Complainant and the counselor had met.
13. In August 2001, Complainant was given a verbal warning for reporting to work under the influence of alcohol. During that incident, Complainant was loud, her speech was slurred and she had a strong odor of alcohol.
14. On September 17, 2001, Complainant was given a written warning for reporting to work under the influence of alcohol. The written warning also contained a strong recommendation that Complainant participate in an alcohol treatment program. On that occasion her face was flushed, her speech was slurred and she smelled of alcohol. When Herrera and Ortega discussed the matter with her, Complainant denied she was drunk and cried, explaining that it was a "death anniversary."
15. On November 11, 2001, Complainant received a corrective action for reporting to work under the influence of alcohol on November 7, 2001. Under the corrective action, Complainant was required to attend an alcohol treatment program. On that occasion, Complainant's speech was loud and slurred.
16. When Herrera met with Complainant, prior to imposing discipline, to discuss the November 7, 2001 incident, Complainant denied that she had been intoxicated, explaining that she has a perfume that smells like alcohol. Herrera recommended that Complainant go to C-SEAP and/or Alcoholics Anonymous. He also gave her copies of ACC's Drug Free policy and the Substance Abuse Policy for Colorado State employees. After the corrective action was imposed, ACC's

Human Resources department provided Complainant with documentation on how to seek help for alcohol abuse.

17. At no time has Complainant attended any type of alcohol treatment program.
18. Apart from Complainant's disciplinary history involving alcohol, her work performance is good.

November 25, 2002 Incident

19. On November 25, 2002, Complainant reported to work intoxicated. Her breath smelled like alcohol, her speech was slurred, her eyes were bloodshot, her face was flushed and she was swaying and having trouble keeping balance but she was not stumbling.
20. Ortega and Herrera told Complainant that they were sending her home because she was intoxicated but, given her condition, ACC's campus police department arrange for her to be driven home.
21. Complainant was taken to Corporal Schock I ACC's campus police department. Complainant, when asked by Schock if she had had a drink, denied it and told him she had had a throat lozenge. However, she was unable to locate a wrapper for the lozenge. Schock drove Complainant to a neighbor's house and then wrote an incident report.

R-6-10 Meeting and Disciplinary Action

22. The R-6-10 meeting was held on December 11, 2002. Present were Complainant, Castro (Complainant's appointing authority and the Director of Human Resources), Terry Clark (Castro's assistant) and a friend of Complainant's.
23. Prior to the R-6-10 meeting, Castro reviewed Complainant's personnel file, Herrera's memo concerning the November 25, 2002 incident and Schock's incident report.
24. During the R-6-10 meeting, Complainant denied being intoxicated on November 25, 2002 and told Castro that she had attended one meeting on alcohol dependency and abuse and did not think she needed to attend anymore.
25. Prior to imposing discipline, Castro reviewed Complainant's statements during the R-6-10 meeting and the written statements by Herrera and Schock, both of whom had witnessed Complainant's behavior on November 25, 2002 and considered Complainant's past disciplinary history, the lack of any evidence that Complainant had ever attended any type of alcohol treatment program, Complainant's length of employment with ACC and that there had been three other reported incidences of intoxication in a fifteen month period..
26. Castro terminated Complainant effective December 17, 2002.

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27. Complainant is seeking reinstatement, back pay and benefits.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

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 the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

The unrefuted evidence of two witnesses, one of whom was trained in observing and determining whether individuals are intoxicated, shows that Complainant did report to work intoxicated on November 25, 2002. In addition, the reports of Complainant's behavior that evening were consistent with her behavior on prior occasions when she is intoxicated – her speech is loud and slurred, her eyes are bloodshot, she has an odor of alcohol and she has trouble keeping her balance. Complainant committed the act for which she was disciplined.

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B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by 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) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by 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. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Prior to imposing discipline against Complainant, Castro reviewed the written statements of witnesses and interviewed Complainant. There was no evidence presented that Castro ignored any evidence or refused to consider anything with which Complainant presented him. There was a fair amount of evidence in the three 2001 incidences regarding Complainant's behavior when intoxicated. There is a consistent pattern to Complainant's behavior when she is intoxicated – her speech is loud and slurred, her eyes are bloodshot, she has an odor of alcohol and she has trouble keeping her balance. Given the descriptions of Complainant's behavior in the past when it was determined that she was intoxicated and the consistency of those reports with the reports of her behavior on November 25, 2002, Castro reasonably concluded that Complainant was intoxicated on November 25, 2002.

When Complainant reports to work intoxicated, it has a detrimental impact on her co-workers and supervisors. Given the tools and chemicals that Custodian Is utilize in fulfilling their job responsibilities, Complainant, when intoxicated, presents a hazard to her co-workers. When she is sent home for intoxication, her supervisors must cover her job duties.

Given the credible evidence demonstrating Complainant's refusal to complete a voluntary alcohol treatment program, her repeated assertions that she was not intoxicated, her history of reporting to work intoxicated and the detrimental impact of her intoxication on her co-workers and her supervisors, Castro, as Complainant's appointing authority, reasonably exercised his discretion in disciplining Complainant.

C. The discipline imposed was within the range of reasonable alternatives

In determining the level of discipline to impose, an appointing authority must take into consideration the aggravating and mitigating factors of an individual case. Board Rule R-6-6, 4 CCR 801.

Complainant has a history of reporting to work intoxicated. On five separate occasions in the past six years she has either been warned or given a corrective action regarding her intoxication when reporting to work. On three of those occasions she was referred to a voluntary alcohol

treatment program. In both the November 1997 and September 2001 incidences Complainant received strong written recommendations that she attend such a program. In the November 2001 corrective action Complainant was required to attend a voluntary treatment program.

Despite the steadily increased pressure for Complainant to attend a voluntary treatment program, Complainant attended only one meeting and then decided that she didn't need it any more. In addition, in both the November 2001 and November 2002, despite strong evidence to the contrary, Complainant refused to admit that she was intoxicated.

The credible evidence demonstrates that Castro considered the aforementioned aggravating factors, as well as the mitigating factors of Complainant's employment longevity and her performance when she was not intoxicated. In doing so, Castro weighed Complainant's individual circumstances prior to determining the level of discipline he should impose. Given Complainant's refusal to deal with her alcohol abuse, her denial of being intoxicated and the detrimental effect of her intoxication on her co-workers and supervisors, Castro pursued his decision to terminate Complainant thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this 5th day of May, 2003.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

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 1/4 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.

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of May, 2003, 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:

Kathleen Jackson
8651 W. Brittany Place
Littleton, Colorado 80123

and in the interagency mail, to:

Danielle Moore and Monica Ramunda
Assistants Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods