

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FAYETTE AUGILLARD,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION, COLORADO STUDENT LOAN PROGRAM,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on December 11, 2003 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Christian Ricciardiello represented Respondent. Respondent's advisory witness was Charles Heim, the appointing authority. Complainant appeared and was represented by Lee Judd.

MATTER APPEALED

Complainant, Fayette Augillard ("Complainant" or "Augillard") appeals her five-day suspension without pay by Respondent, Department of Higher Education, Colorado Student Loan Program ("Respondent" or "CSLP"). Complainant seeks back pay and removal of the personnel action from her personnel file.

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

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's disciplinary action against Complainant was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant, at the time of the disciplinary action, was an Office Manager I for CSLP, overseeing a unit within the Loan Servicing Division. She reported to Carol Danford who in turn reported to Mark Putman, Director of CSLP's Loan Servicing Division.
2. Complainant's unit was responsible solely for inputting the loans onto CSLP's system, processing the transfer of loans to Nelnet and insuring that the amounts on the loans transferred to Nelnet were accurate.
3. Charles Heim is General Counsel for CSLP and was delegated appointing authority responsibility by Jeanne Adkins, CSLP's Director, in 2003.
4. CSLP is a statutorily created state agency that works with lenders to provide educational loans to Colorado residents and/or students. It also partners with loan servicing companies to provide a blend of loan servicing. Federal regulations set out criteria pertaining to disbursements of such loans, loan deferments and forbearance of loans. Lenders will often contract with third parties, referred to as loan servicers, to ensure compliance with these regulations.
5. Nelnet is a loan servicer that works under a contract with CSLP. While student borrowers are enrolled in school and for six months after they either graduate or drop out of school, there is a grace period during which they need not make payments on their loans. CSLP provides loan servicing from the time of loan disbursement until the fourth month of the six-month grace period, when CSLP transfers loans to Nelnet for loan repayment servicing for the remainder of the life of the loans.
6. CollegeInvest is a lender that works under a contract with CSLP. When students apply for loans, there are a variety of options as to the lenders from whom they may borrow funds. CollegeInvest is the largest or second largest lender working with CSLP. CollegeInvest loans comprise 35% of CSLP's portfolio.
7. If a borrower defaults for more than two hundred and seventy (270) days, the loan is sent to collection at which point a repayment plan is established. If the borrower makes a certain number of loan payments under the repayment plan, then the loan is deemed a rehabilitated loan.
8. Under CSLP's contract with Nelnet, Nelnet does not service rehabilitated loans and bankruptcy loans for the remaining life of the loan after bankruptcy or rehabilitation. Instead, they are serviced by CSLP.

CSLP's Computer Problems

9. Nelnet developed a software program to handle the servicing of loans by CSLP and Nelnet and provided that program to CSLP (the "Loan Servicing Program").
10. In November 2002, CSLP went through a computer system conversion to the Loan Servicing Program. At the time of the conversion, Putman informed all of his managers that if anything about the conversion impacted CSLP's contracts with lenders or loan servicers, including fiscal impacts, that he was to be immediately informed. Complainant would have learned of this directive either through attendance at the weekly managers meetings or through the minutes of those meetings.
11. In December 2002, there was a transfer of CollegeInvest loans to Nelnet. There were problems with the transfer, resulting from the system conversion. As a result, in January 2003, there was no transfer of CollegeInvest loans. During this time, Complainant and Danford discussed the Loan Servicing Program's problems, in particular that the Loan Servicing Program could not segregate the bankruptcy and rehabilitated loans and was transferring those loans along with all other loans transferred to Nelnet.
12. When bankruptcy and rehabilitated loans were transferred to Nelnet, CSLP lost a small amount, approximately \$100, of its monthly income of \$300,000 to \$400,000.
13. Transferring bankruptcy and rehabilitated loans violates the terms of CSLP's agreement with Nelnet.
14. CSLP submitted a request to Nelnet in January 2003 to fix the computer problems with the bankruptcy and rehabilitated loan transfers.
15. Without any direction from her supervisors, Complainant suspended the transfers of all loans to Nelnet for February, March, April and May of 2003.
16. The suspension of the loan transfers violated the terms of CSLP's agreement with Nelnet and CollegeInvest regarding the timing of loan transfers.
17. At no time did Complainant notify her supervisors, Danford and Putman, that she had suspended the transfer of all loans to Nelnet. Both Danford and Putman, however, were aware of the Loan Servicing Program's problems with the transfer of the bankruptcy and rehabilitated loans.
18. From February 2003 to June 2003, Complainant communicated with Nelnet about the non-transfer of the loans from February 2003 to June 2003. However, given that they created the Loan Servicing Program, Nelnet did not at any time lodge a complaint with CSLP or discuss with Putman Nelnet's loss of revenue from not servicing CollegeInvest loans from February 2003 to June 2003.

19. Complainant's subordinate staff within her unit was aware that she had suspended the transfer of all loans to Nelnet.
20. In February or March 2003, Danford asked Complainant whether loan transfers were proceeding and Complainant replied that they were, without mentioning the non-transfer of the CollegeINvest Loans to Nelnet. Danford did not ask Complainant specifically about the transfer of CollegeInvest loans but more generally about all loans. At the time of Danford's inquiry, all non-CollegeInvest loans were being transferred.
21. In May 2003, the computer issues regarding the transfer of the bankruptcy and rehabilitated loans were resolved and the transfer of the CollegeInvest loans to Nelnet re-commenced in June 2003.
22. During a conference in July 2003, Putman was approached by a CollegeInvest senior manager, informed that there had been complaints made to CollegeInvest by borrowers regarding changes to borrowers' payment amounts after transfer of the loans. The CollegeInvest senior manager told Putman that CollegeInvest would be sending CSLP a letter stating their concerns with CSLP's loan servicing of CollegeInvest's loans.
23. After the conference, Putman had his managers investigate the specific CollegeInvest loans and the payment amounts that CollegeInvest had cited as problematic.
24. On August 9, 2003, Debra DeMuth, Director of CollegeInvest sent a letter to Nelnet and CSLP setting out CollegeInvest's concerns with the transfer of the loans to Nelnet, stating that loan payments were being adjusted in such a fashion that borrowers were paying, in total, more on their loans. She requested that CSLP and Nelnet suspend any further transfers until the issues concerning monthly loan payment amounts were resolved.
25. DeMuth's letter also mentioned that there had been no loan transfers from November 2002 (the time of the computer system conversion) until June 2003.
26. Upon receipt of DeMuth's letter, Putman investigated the matter and learned, for the first time, that there had been no transfers on CollegeInvest loans from February 2003 until June 2003 and that Complainant had made the decision to suspend the transfers. Putnam also learned that CollegeInvest was exploring alternate loan service providers.
27. If CSLP lost CollegeInvest's business (35% of CSLP's loan-servicing portfolio), it would most likely result in a number of layoffs at CSLP
28. Putman then sent a letter to Jeanne Adkins, Director of CSLP, requesting that disciplinary action be taken against Complainant. Putman's request was forwarded to Heim, the delegated appointing authority.

R-6-10 Meeting and Disciplinary Action

29. On August 29, 2003, Heim held an R-6-10 meeting with Complainant. No one, other than the two of them, was present.
30. During the R-6-10 meeting, Complainant told Heim that she had suspended the transfers, that she wasn't sure whether or not she had notified her supervisors of the suspension and that her Position Description Questionnaire ("PDQ") allowed her to make the decision to suspend transfers. In particular, Complainant cited to that portion of her PDQ which stated that she "[d]etermines when all required criteria are met and schedules actual conversions."
31. After the R-6-10 meeting, Complainant provided Heim with a series of emails between Complainant, Nelnet employees and other CSLP employees. The emails discuss the Loan Servicing Programs problems but, until a mid-May 2003 email, there is no mention of the suspension of the CollegeInvest loan transfers.
32. Danford was cc'ed on the mid-May 2003 email, which states, in part, that the first transfer of the CollegeInvest loans will occur on June 1, 2003.
33. After the R-6-10 meeting, Heim conducted an investigation into Complainant's actions. He interviewed Putman and Danford. Both of them told him that Complainant had not notified them of the suspension of the transfers.
34. Heim also interviewed Linda Mayer, one of Complainant's subordinates, who informed him that she had been directed by Complainant to suspend the transfers.
35. In mitigation of Complainant's actions, Heim considered her exemplary record while working for CSLP and that, as evidenced by the emails, she had continually tried to resolve the Loan Servicing Programs problems with Nelnet.
36. In aggravation of Complainant's actions, Heim considered Complainant's failure to discuss the suspensions with her supervisors or obtain their approval for those suspensions, the length of time for the suspensions of the transfers (four months), and the fact that the suspension of the transfers put CSLP in direct breach of its agreements with CollegeInvest and Nelnet which, in turn, caused considerable embarrassment for CSLP especially in its relationship with CollegeInvest.
37. On September 5, 2003, Heim notified Complainant that he was imposing a disciplinary action against her of a five-day suspension without pay, for failing to perform competently, in violation of Board Rule R-6-9, 4 CCR 801. Heim found that she had, without notice to her supervisors or the authority to take such action, suspended the transfer of CollegeInvest loans to Nelnet for four months, resulting in CSLP breaching its agreements with Nelnet and CollegeInvest.

38. Heim determined that a suspension, rather than lesser action or a termination, was appropriate given the aggravating and mitigating factors.

39. Danford received a corrective action for the suspension of the transfers because she was Complainant's supervisor at the time that the suspensions occurred.

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 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.

Complainant was disciplined for failing to perform competently, in violation of Board Rule R-6-9, 4 CCR 801, on the grounds that she did not have the authority to suspend the Nelnet transfers; had not notified her supervisors of her actions; and her actions had resulted in CSLP

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breaching contractual agreements. The crux of this issue is whether Complainant had the authority to suspend the loan transfers and whether she notified her supervisors of her actions.

Complainant has countered Respondent's allegations by citing to that portion of her PDQ which states that she "[d]etermines when all required criteria are met and schedules actual conversions." In addition, she has stated that her supervisors were aware of the problems with the Loan Servicing Program and, therefore, were well aware of the suspensions.

The credible evidence establishes that Complainant neither had the authority to suspend the transfers nor did she give notice to her supervisors of the suspensions. There was no testimony, other than Complainant's, nor any written documentation presented which established that Complainant had such authority over loan transfers. The cited portion of Complainant's PDQ merely sets out an administrative scope to her duties regarding transfers. It does not establish that she had the level of authority to make such a serious decision. The credible evidence established that such a suspension, especially for a four-month period, was a serious breach of CSLP's agreements. Such a breach would be a serious step for CSLP to take, one which, at a minimum, would involve input from senior level managers, and, possibly, some type of amendment to the contractual agreements between the involved parties.

Complainant's supervisors were unaware of the suspensions. They were, by their own admission, aware of the problems with the Loan Servicing Program. And Complainant, to her credit, and as stated by Heim in the disciplinary action letter, was working on resolving those issues. However, there was no credible evidence, either in testimony or exhibits, which demonstrated that Complainant's supervisors were "on notice" of her actions, from the beginning of the first suspension in February 2003 until the final suspension at the beginning of May 2003. The emails that Complainant supplied to Heim during the R-6-10 process established that Complainant was working on the computer issues, not that she had, as a remedy or stopgap measure, suspended the CollegeInvest transfers. At best, Danford was notified of the suspensions, in mid-May, but only after all four of the suspensions had occurred. Even if Danford had promptly acted upon receipt of Complainant's mid-May email, the damage had already been done.

Complainant committed the acts for which she was disciplined.

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

As the Colorado Supreme Court has stated, arbitrary or capricious exercise of discretion by an appointing authority 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 a 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*.

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The credible evidence establishes that Heim conducted a diligent investigation. Before interviewing anyone else, he met with Complainant, in the R-6-10 meeting. In addition, after the meeting, he provided her with the opportunity to present him with additional documentation in support of her statements. She provided him with the emails referred to earlier. It should be noted that Complainant presented additional emails at the Board hearing to establish that she provided her supervisors with notice of the suspensions. However, she did not, when given the opportunity, provide those emails to Heim, for his consideration. In addition, it is not clear from those emails that they provided either of Complainant's supervisors, Danford or Putman, with notice of the suspension of transfers of CollegeInvests loans.

Heim also interviewed both of Complainant's supervisors and the subordinate whom Complainant had directed to suspend the transfers. There was no credible evidence presented of anyone who Heim failed to interview; documents that he was aware existed and failed to obtain; or that once he conducted those interviews and obtained those documents he ignored their contents. In fact, Heim considered many of those documents when determining the level of discipline to impose.

Given the information which Heim obtained, it was reasonable for him to determine that Complainant had acted without authority and without notice to her supervisors. As set forth above, Complainant committed the acts for which she was disciplined. Given those actions and the seriousness of their consequences, it was reasonable for Heim to take disciplinary action against Complainant.

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

Heim considered various levels of discipline and, based upon the mitigating and aggravating factors, determined that Complainant should be suspended for five days. Given the serious consequences of Complainant's actions, a corrective action would not have been appropriate. However, given her exemplary record and her continued work on the computer issues, both cited by Heim as mitigating factors, termination would not have been reasonable. The credible evidence demonstrates that Heim pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

D. 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. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted to either party. Respondent presented rational arguments and competent evidence to support its imposition of a personnel action against Complainant. In addition, there was no evidence which would lead to the

conclusion that Complainant pursued her constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth nor was there evidence which would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth .

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.
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 26th day of January, 2004.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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 1/2 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.

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CERTIFICATE OF SERVICE

This is to certify that on the ____ day of January, 2004, 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:

Lee T. Judd
Law Firm of Andrew T. Brake, P.C.
777 East Girard Avenue, #200
Englewood, Colorado 80110-2767

and in the interagency mail, to:

Christian Ricciardiello
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods