

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERTA WEGMAN,

Complainant,

vs.

DEPARTMENT OF STATE, SECRETARY OF STATE,

Respondent.

Administrative Law Judge Kristin F. Rozansky commenced this matter on January 27, 2004 and held the evidentiary hearing in this matter on March 23, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Monica Ramunda represented Respondent. Respondent's advisory witness was William Hobbs, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Roberta Wegman ("Complainant" or "Wegman") appeals her suspension without pay for two weeks by Respondent, Department of State, Secretary of State ("Respondent" or "SOS"). Complainant seeks reimbursement for the two weeks of suspension without pay.

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 action was arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant is certified as an Administrative Assistant II at the Department of State, Secretary of State's office. Judy Orblom currently supervises Complainant. Previously, Tena Garding and Peggy D'Orio supervised Complainant.
2. Orblom is an Office Manager I who supervises sixteen employees and two temporary employees in SOS's Business Unit. Wegman works within the Business Unit, in the Mail Center, with four other employees and two temporary employees.
3. The Mail Center employees sort incoming documents that have been filed with the SOS by business entities and individuals. Incoming documents and money are sorted by entity and then sorted into groups of fifty.
4. One of the primary functions of the SOS' office is the acceptance and filing of documents by business entities and individuals. Those documents are then public records of, among other things, security interests and formation of entities.

Complainant's Disciplinary History

a. Complainant's June 10, 2002 Corrective Action

5. On June 10, 2002, DeOrio issued a corrective action against Complainant regarding her interpersonal relations with her co-workers and several complainants and grievances that those co-workers had filed regarding Complainant's behavior.
6. Under the June 10th Corrective Action, Complainant was required to develop more professional skills with regards to courtesy and respect towards her co-workers. In addition, she was warned that failure to comply with the corrective action could result in further corrective and/or disciplinary action.
7. Complainant did not grieve the June 10th corrective action.

b. Complainant's January 21, 2003 Corrective Action

8. On January 21, 2003, Garding issued a second corrective action against Complainant. The January 21st Corrective Action again addressed Complainant's interpersonal relations with her co-workers (complaints were still being filed by co-workers). It also addressed her refusal to process any more documents than what she deemed to be her "fair share," and her improper rejection and untimely handling of various documents.

9. With regards to Complainant's handling of documents filed with the SOS, the January 21st corrective action noted that Complainant was insisting on evenly dividing the number of documents filed each day with her co-workers and only processing those documents which were her "fair share," refusing to process any part of those which she deemed her co-workers' "fair share" even when those co-workers were on leave. In addition, Complainant was improperly rejecting or untimely processing various documents filed with the SOS.
10. Under the January 21st Corrective Action, Complainant was required to treat her co-workers with courtesy and respect and to properly process all filed documents. The January 21st Corrective Action also stated that failure to comply with the corrective action could result in a further corrective and/or disciplinary action.
11. Complainant did not grieve the January 21st corrective action.

c. Complainant's June 20, 2003 Corrective Action

12. On June 20, 2003, Orblum issued a third corrective action against Complainant. The June 20th Corrective Action addressed Complainant's interpersonal relations with her co-workers and one co-worker, Carrie London, in particular. It also addressed Complainant's improper handling of documents filed with the SOS, her lack of attention to her work and her inappropriate use of state resources.
13. The June 20th corrective action addresses a series of incidences in which Complainant was rude and physically aggressive to London, referred to London as a "Negro," was instructed by Orblum that this was not acceptable and was considered discrimination, and, subsequently, when responding to an offer of assistance by another African American co-worker referred to the co-worker as a "damn Negroid."
14. The June 20th corrective action also refers to an incident when Complainant asked a male co-worker if he was "trying to give everyone a thrill with [his] see-through shirt."
15. The June 20th corrective action addresses concerns that Orblum has with Complainant's handling of documents, Complainant's watching the TV in the lobby when she was supposed to be working, and her requests of the IT technicians for assistance in making personal searches on the internet.
16. Finally, the June 20th corrective action discussed Complainant's recent performance evaluation, which reviewed Complainant's interpersonal problems with her co-workers. The corrective action noted that Complainant had signed the evaluation, noting her agreement with its contents.
17. Under the June 20th Corrective Action, Complainant was required to treat her co-workers with courtesy and respect, not to refer to African American co-workers as "Negro" or "Negroid," and keep her attention on her work. The June 20th Corrective Action also stated that failure to

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comply with the corrective action could result in a further corrective and/or disciplinary action.

18. Complainant did not grieve the June 20th Corrective Action.

d. Complainant's August 25, 2003 Corrective Action

19. On August 25, 2003, Orblum issued a fourth corrective action against Complainant. The August 25th Corrective Action addressed Complainant's interpersonal relations with her co-workers and also addressed her improper handling of documents filed with the SOS.

20. The complaints from Complainant's co-workers included complaints that Complainant was becoming more and more physically aggressive in her delivery and receipt of documents from co-workers, throwing documents at or grabbing documents from those co-workers, and that co-workers were becoming fearful of working with her.

21. Complainant was improperly handling documents in that she was altering filings with the SOS, not timely processing filings and processing fewer documents than her co-workers.

22. Under the August 25th Corrective Action, Complainant was required to treat her co-workers with courtesy and respect, at the end of each day appropriately handle documents which had not been processed, not alter documents which had been submitted for filing, stop inflating her document counts and file such counts weekly. She was also provided detailed instructions on how to handle documents in certain situations.

23. Complainant did not grieve the August 25th Corrective Action.

R-6-10 Meeting and Disciplinary Action

24. After the August 25th Corrective Action, William Hobbs, the Deputy Secretary of State and the delegated appointing authority for Complainant, received a report that Complainant had been having ongoing interpersonal problems with co-workers.

25. Because of this report, on September 9, 2003, Hobbs held an R-6-10 meeting with the Complainant. Sybil Lausen, the head of SOS' Human Resources, was also present and taped the meeting.

26. At the September 9th meeting, Hobbs discussed with Complainant the allegations that she had substandard performance and problems with her co-workers.

27. Complainant responded verbally to the allegations that she was having interpersonal problems with co-workers, stating that she does not "tattle" on others but they "tattle" on her. She also submitted to Hobbs a written response to the allegations.

28. Complainant's written response to the allegations primarily addressed the corrective action

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she had received on August 25, 2003. She defended her document count and stated that she had never purposely held up a document from being processed; that London insisted on interactions when Complainant would prefer London to simply to place documents in Complainant's basket; that Kinsella resents having Complainant assigned to assist her; and that she was open to suggestions as to her reactions to others.

29. After the September 9th meeting with Complainant, Hobbs met with Orblum who reviewed with him the method by which Complainant was counting the number of documents she was processing. Complainant's method resulted in a double count of her processed documents.
30. Prior to issuing a disciplinary action against Complainant, Hobbs reviewed Complainant's past four corrective actions, her personnel file and her past performance evaluations.
31. Hobbs also considered the efforts by Complainant's supervisors in the past to resolve the interpersonal problems with her co-workers by reconfiguring her work areas and reassigning her to new work units.
32. On October 22, 2003, Hobbs issued a written notice of disciplinary action against Complainant, suspending her without pay for two weeks, based upon her lack of improvement in her interpersonal relations with her co-workers and her handling of documents filed with the SOS.
33. In the October 22nd notice Hobbs noted that Complainant has ongoing interpersonal issues with her co-workers, a history of not responding to corrective actions addressing these issues, and performance problems with her handling of documents filed with the SOS. He also noted that Complainant's behavior had escalated to the point that there was a concern on the part of her supervisors and co-workers that she was a potential danger to her co-workers. Finally, he noted that SOS' efforts to progressively discipline Complainant had been unsuccessful and, therefore, disciplinary action was now appropriate.
34. Complainant timely filed with the Board an appeal of the October 22nd disciplinary action.

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

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- 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 interpersonal problems with co-workers and poor work performance. Respondent presented substantial evidence demonstrating that Complainant has a long-standing history of interpersonal conflicts with co-workers and improper handling of documents filed with the SOS. 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.

Arbitrary or capricious exercise of discretion can arise in 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).

Hobbs, as Complainant's appointing authority, handled the investigation of Complainant's behavior. In conducting that investigation he reviewed Complainant's personnel file, held an R-6-10 meeting with Complainant and discussed the allegations with her current supervisor, Orblum. There is no indication that Hobbs did not attempt to gather all of the necessary evidence or, having

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gathered that evidence that he refused to consider any part of it.

In reviewing the information before him, Hobbs was faced with four corrective actions against Complainant, all covering the same issues. These four corrective actions reflected a fifteen month history of behavior which, despite warnings, workspace reconfigurations, work reassignments and detailed document handling instructions, remained unchecked. In fact, Complainant's behavior was becoming more physically aggressive and co-workers were becoming more fearful of working with her. Some of the corrective actions cover a history of Complainant's mishandling and untimely processing of public filings with the SOS. These filings are an important aspect of the SOS functions. Complainant, despite corrective measures and detailed instructions, continued to mishandle those documents.

Under Board Rule R-6-9(1), an employee may be disciplined for failure to perform competently. In light of Complainant's history of poor behavior towards co-workers and her continued mishandling of documents, Hobbs decision to discipline Complainant for failure to perform competently was a reasonable conclusion for him to reach.

Respondent's imposition of a disciplinary action was not arbitrary and capricious or contrary to rule or law.

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

When imposing discipline, appointing authorities must take into account various pieces of information, including the circumstances of the employee's situation, mitigating factors, the type and frequency of previous unsatisfactory behavior and prior corrective actions. Board Rule R-6-6, 4 CCR 801. In addition, certified employees must be subjected to progressive discipline, except when they engage in such flagrant or serious misconduct that they must be disciplined immediately. Board Rule R-6-2, 4 CCR 801. Such a requirement provides an employee with an opportunity to correct his or her performance prior to being disciplined.

In Complainant's case she has been provided ample notice, via four corrective actions in a fifteen-month period, that she has ongoing interpersonal problems with a number of co-workers and is mishandling documents. She was given repeated opportunities to correct her poor performance. In addition, Respondent tried to address these problems through workspace reconfigurations and work reassignments. Her supervisors have also given her detailed instructions on how to handle documents.

Despite all of these efforts, Complainant's behavior has not improved and, in some areas, has worsened. Respondent has complied with the Board's rule on progressive discipline. It is appropriate, in light of Complainant's continued poor performance and behavior and after four corrective actions all dealing with the same type of behavior, to now impose discipline. A suspension without pay is one of the lower levels of discipline that may be imposed and, in this case, was within the range of reasonable alternatives for discipline.

Therefore, the credible evidence demonstrates that the appointing authority gave due regard to Complainant's circumstances and choose an appropriate level of discipline. Board Rule R-6-6, 4 CCR 801.

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 ___ day of May, 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 1/4 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 ____ day of May, 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:

Roberta Wegman
4150 East Iowa Avenue #410
Denver, Colorado 80222

and in the interagency mail, to:

Monica Ramunda
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Denver, Colorado 80203

Andrea C. Woods