STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 99B049

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LARDRICK A. ALEXANDER,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
COMMUNITY COLLEGE OF AURORA,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on December 15, 1998. Respondent was represented by Assistant Attorney General Toni Jo Gray. Complainant represented himself.

Respondent called five witnesses: Arthur Oakeley, Custodian; Denise Oakeley, Computer Records Specialist; Lawrence Steele, Director of Facilities; Bobby Williams, Telecommunications Coordinator; and Ronald Ross, Personnel Director, Community College of Aurora.

Complainant testified in his own behalf and called no other witness.

Respondent's Exhibits 1 through 6, 8 and 9 were stipulated into evidence, as was Complainant's Exhibit D. Exhibits 7, 10 and 11 were not offered. Exhibits A and E were excluded.

MATTER APPEALED

Complainant appeals an eight-hour disciplinary suspension. For the reasons set forth below, respondent's action is rescinded.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;

2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of available alternatives.

PRELIMINARY MATTERS

The witnesses were sequestered per respondent's motion.

Respondent moved to reconsider the December 7, 1998 order denying its motion to dismiss the appeal. Respondent contended that the October 29 disciplinary action was withdrawn and substituted by a November 11 disciplinary action which was not appealed, while conceding that the disciplinary actions were identical except for a correction of the address of the State Personnel Board and some of the language contained in the notice of appeal rights.

Complainant asserted that he was told by the appointing authority that the notice of disciplinary action was changed to correct the address of the State Personnel Board and that it was not necessary to file another appeal.

Because the two disciplinary actions are substantively identical, the modifications were procedural in nature and complainant was not prejudiced and did not complain, the motion for reconsideration, founded upon a technicality, was denied. Complainant's appeal was timely.

At the outset of the hearing, complainant was advised of his right to be represented by an attorney at his own expense. Complainant chose to proceed without counsel. About thirty minutes into the hearing, complainant changed his mind and asked for a continuance to retain counsel because he was "in too deep" and would feel more comfortable with an attorney at his side. Respondent opposed the motion on grounds of having subpoenaed three witnesses, two of whom were present, and that respondent would be seriously inconvenienced and consequently prejudiced if the hearing were continued.

Complainant's motion to continue was denied as lacking a sufficient legal basis under the circumstances. Complainant was given assurances from the bench that the judge would guide him

through hearing procedures but that the judge would not serve the role of an advocate. Jennifer Lesmeister, who accompanied complainant to the hearing, was allowed to sit at complainant's table as an assistant but was instructed that she could not act as a representative.

FINDINGS OF FACT

1. Complainant, Lardrick A. Alexander, classified as a Media Specialist, has the working title of Site Monitor with respondent, the Community College of Aurora (CCA). He was initially hired in 1994, transferred to the Higher Education and Advanced Technology Center (HEAT) in July 1995 and returned to CCA in 1996.

2. As one of the site monitors at the college, complainant is responsible for on-campus safety and security. He works an eight-hour shift during the evening hours. Another site monitor is Willis Small.

3. The site monitors' office is a small room, approximately 120 square feet, located just inside the main entrance of the administration building. The office is furnished with two desks, a "lost and found" file, a mailbox for the site monitors, a television set and a lamp. Approximately one-half of the space is occupied by furniture. A window, equipped with a Venetian blind, faces the parking lot. The overhead light is often turned off to facilitate surveillance of the parking lot by looking out the window. The door to the office is a half-door, the top half being open space.

4. Art Oakeley, a custodian, had been employed by CCA for about a year and a half when, on Wednesday, September 23, 1998 at around 8:30 p.m., while working near the site monitors' office, Oakeley saw two young women standing in the middle of the office. They put their hands to their chest area. Other than that, he could not tell what they were doing. They were fully clothed. The room was dark. The half-door was closed. It was difficult for Oakeley to see into the room. Prior to Oakeley eyeing the women, Willis Small called out from the room asking Oakeley if he wanted to be a stripper for them, to which he responded: "No."

5. Oakeley continued with his floor work, using a scrubbing machine. He went to the other side of the building. He may have been in partial view of the office, but he was not watching the office all of the time he was working.

6. Oakeley did not see complainant inside the office, even though he wrote to the appointing authority a week later that he

had. (Exhibit 2.) He saw complainant for the first time exiting the office at approximately 9:05 p.m. He did not see the two women leave the office, but they were gone by the time complainant emerged. Small came out, and the room was empty of people.

7. The next day, shortly before his shift began at 5:00 p.m., Oakeley went to the office of Larry Steele, the Director of Facilities, to report the incident he had seen the night before. Steele is not Oakeley's direct supervisor. Oakeley told Steele that two women had been stripping in the site monitors' office and that he believed the behavior was inappropriate. He told Steele that complainant and another site monitor, Willis Small, had each said to him as they separately came out of the office: "Don't tell anybody; the girls are stripping for us."

8. Steele met individually with Small and complainant. Small denied that the women had done any stripping. He stated that one of the women was planning a birthday party for herself and asked him if he knew how to find a male stripper to perform at her party. Complainant said essentially the same thing, adding that there was some discussion about Small being the stripper.

9. Neither complainant nor Small had a reason to anticipate the meeting with Steele and were kept apart so they could not collaborate on their respective accounts of the event.

10. The two women were students at CCA. Complainant was present when the women arrived at the site monitors' office asking if they could look for an item which they had lost. Willis Small was also present. Complainant opened the lost and found cabinet for them, but the item was not there. He then left to go to the restroom. When he returned, the two women were talking to Small about having a male stripper at a birthday party. He did not take part in the conversation. Small, himself, was known to be a male stripper as an outside job, and there was discussion about him performing at the party. Upon leaving to do site monitor duties, complainant told Oakeley that Willis was going to do a strip show for the two ladies.

11. Denise Oakeley, Computer Records Specialist and spouse of Art Oakeley, was working at the registration counter on September 24 when complainant said as he strolled past the counter: "Tell your husband he's on my hit list." She was concerned by the statement because complainant and her husband worked together every day. She knew they were friends. She had never known of any tension between them.

12. The comment was not made in a threatening manner.

13. Hearing of complainant's comment from his wife, Art Oakeley approached complainant the same day and asked what he meant by those words. Complainant said that he did not mean anything, and he apologized. The two shook hands in friendship.

14. Art Oakeley and complainant have been good friends since Oakeley began working at CCA. Their relationship has included going to lunch with each other and once attending a party together. They are still friends, albeit slightly more distant than before. There have never been any threats against or intimidation of Oakeley by complainant, or the slightest hint of harm.

15. Bobby Williams is the Telecommunications Coordinator at CCA. On September 28, while walking towards his office, a young woman approached him from behind and asked: "What is it about this strip business?"

"Excuse me?" Williams replied.

"Oh, I thought you were Willis," she said.

16. Upset at being mistaken for someone else, Williams told Larry Steele that he wanted "to get some supervision on that level."

17. Ron Ross, Personnel Director and the appointing authority for disciplinary actions, heard about the September 23 incident from Larry Steele. He was informed of the "hit list" comment by Denise Oakeley's supervisor.

18. Ross conducted a predisciplinary meeting with complainant on October 6, 1998. Complainant told Ross that there had been no stripping at the office and that the two females were talking to Willis Small about doing a strip act. He stated that his comment to Denise Oakeley was meant as a joke.

19. Complainant offered Ross the name, address and telephone number of each of the two subject females and asked Ross to contact them because they could provide information that was critical in determining the truth of what transpired the evening of September 23. Students, they were usually on campus. Ross responded that he did not want to get students involved and that he would not talk to them.

20. Complainant went to the CCA president, provided the necessary information and requested that the two students be contacted. Like Ross, the president stated that he did not want to involve the students.

21. The appointing authority imposed upon complainant a disciplinary suspension of eight hours for the conversation that

took place in the office on September 23 and for the "belligerent" remark he made to Denise Oakeley (Exhibit 1), taking into consideration a corrective action for leaving the workplace early received by complainant a year prior.

22. Willis Small was not corrected or disciplined.

23. The site monitors' office has been the scene of conversations about practically every topic.

24. Lardrick A. Alexander is a good employee.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency 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 credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

The Conversation

The appointing authority's failure to attempt to obtain information from the two female students is fatal to respondent's case. Without their input, the record is insufficient to satisfy respondent's burden to prove that complainant's conduct was wrongful and warranted immediate disciplinary action.

Art Oakeley was not a credible witness. His testimony was vague as to what he saw and heard, which was little. He did not, in fact, hear the conversation. He did not see complainant inside the room. While he testified that he believed he would have seen complainant leave and come back, as complainant testified, he did not see the students leave. He was performing his custodial duties and did not stay in one place. He contradicted himself by writing a statement saying that he had noticed complainant and Small in the room (Exhibit 2) and then testifying on cross-examination that he did not actually see complainant. He did not hear him, either. His testimony that complainant told him that the girls were stripping is incredible and totally unsupported. There is not the slightest bit of evidence that would sustain a finding that there was stripping going on in the office. If there was no stripping,

as is found, then there could have been no such statement made by complainant, who steadfastly denied making it. Moreover, the women were not even there at the time of the alleged statement.

The inference is drawn that Art Oakeley was confused. Complainant, by contrast, testified straightforwardly and without hesitation. His testimony was internally and externally consistent and deserves substantial weight.

Even though complainant was disciplined for the conversation, only he and Small were interviewed with respect to it. No one implicated complainant in any significant way so as to justify a disciplinary action. The testimony of Bobby Williams implicated only Small.

The two women were available and should have been asked questions in order to determine who said what to whom and when. Without their input, the appointing authority did not possess an adequate foundation for imposing discipline.

The Colorado Supreme Court ruled long ago that arbitrary and capricious action by an administrative board (agency) occurs when the agency neglects or refuses to exercise "reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it." *Van de Vegt v. Board of Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Respondent failed to use due diligence in seeking the truth concerning complainant's conduct. The appointing authority's preference to reach a conclusion adverse to complainant without contacting two crucial and available witnesses does not override a certified employee's constitutional and statutory right to be disciplined only for cause. *Kinchen, supra.*

<u>The Comment</u>

The "hit list" comment was overblown in importance. It was not "belligerent," as characterized by the appointing authority. While the words, taken out of context, have a threatening connotation, there is nothing in complainant's history or in the delivery of the remark that indicates that the remark was meant as a threat or was intended to be taken seriously. Complainant apologized to Art Oakeley and extended his hand in friendship. He testified that, as far as he was concerned, the matter ended with the handshake. The record supports a finding that there was no more to it than that. Art Oakeley and Denise Oakeley overreacted.

Complainant conceded on the stand that the "hit list" comment

was inappropriate because it made Art Oakeley and Denise Oakeley feel uncomfortable. Perhaps a corrective action or counseling letter pertaining to the use of language in the workplace was in order, but the remark was not "so flagrant or serious" as to warrant immediate disciplinary action. *See* R8-3-3(C), 4 Code Colo. Reg. 801-1.[1]

A corrective action for leaving the workplace early a year prior does not satisfy the requirement of progressive discipline in this instance. Nor does it fulfill the need for progressive discipline vis-a-vis the conversation. A corrective action is intended to give notice to the employee of a particular performance deficiency, and in order for it to be progressive, it must address similar conduct as that which gave rise to the disciplinary action. *See* R8-3-2, 4 Code Colo. Reg. 801-1.[2]

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. The discipline imposed was not within the range of alternatives available to the appointing authority.

ORDER

The disciplinary action is rescinded. Complainant shall be reinstated to his position during the period of suspension with back pay and benefits.

DATED this _____ day of January, 1999, at

_____
Robert W. Thompson, Jr.

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[1] On October 20, 1998, the State Personnel Board Rules were repealed and replaced by new rules made effective for actions commencing on or after December 31, 1998.

[2] See Footnote 1.

Denver, Colorado. 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. 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 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) 866-3244.

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 ½ 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 MAILING

This is to certify that on the ____ day of January, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Lardrick A. Alexander
1697-C South Blackhawk Way
Aurora, CO 80012

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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