STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000G094

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

NONDAS BELLOS,

Complainant,

vs.

DEPARTMENT OF REGULATORY AGENCIES,
OFFICE OF POLICY AND RESEARCH,

Respondent.

This matter was heard on March 12-13 and June 27, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Susan J. Trout, Assistant Attorney General. Complainant appeared *pro se*.

The ALJ heard testimony from respondent's witness Mary Michael ("Michael") Cooke, Executive Director of the Department of Regulatory Agencies, and complainant's witnesses Frances Armstrong, Human Resources Administrator; Diane Reimer, Legislative Liaison; H. Rene Ramirez, former Director of the Office of Policy and Research; Bruce Harrelson, Director of the Office of Policy and Research; Bruce Douglas, Director of the Division of Registrations; and Mary Michael Cooke, Executive Director, Department of Regulatory Agencies. Complainant testified in his own behalf.

Respondent's Exhibits 1 through 4, 7, 8 and 20 were admitted into evidence without objection. Exhibit 10 was admitted over objection. Exhibit 17 was excluded. Complainant's Exhibits B, C, D, E, F, G (audio tape and transcript), J, K, L, R, W and Z were stipulated into evidence. Exhibit P was admitted over objection. Exhibits N, M, AA, BB and CC were excluded.

MATTER APPEALED

Complainant appeals the denial of his grievance of a corrective action. For the reasons set forth below, respondent's action is modified.

ISSUES

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

2. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On September 19, 2000, the State Personnel Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge to grant complainant's petition for hearing.

On January 21, 2001, the hearing commenced with both parties present. Complainant moved for dismissal of respondent's action on grounds that the agency did not issue its final decision on his grievance within the 30-day time period provided for by Rule R-8-8. The motion was denied because R-8-8 enables an employee to appeal directly to the Board if the agency does not rule on his grievance in a timely manner, the purpose being to prevent an agency from denying an employee's appeal to the Board by refusing to rule on the grievance. In this way, an employee cannot be denied his right to seek Board review. R-8-8 is not grounds for dismissal. As it turned out, the testimony indicated that the 30-day time limit was waived. In any event, a final agency decision was rendered, and complainant properly filed a petition for hearing, which was granted.

Also at the January 22, 2000 commencement, complainant moved for dismissal of respondent's action on grounds that the corrective action did not set a definite time period in which to improve his performance, relying on Rule R-6-8. Ruling on this motion was reserved until the close of the evidence and the issuance of the Initial Decision. The parties then jointly requested a continuance of the hearing in order to pursue settlement negotiations.

The witnesses were sequestered unless testifying, with the exceptions of complainant and respondent's advisory witness, Michael Cooke, the appointing authority.

FINDINGS OF FACT

The ALJ considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant Nondas Bellos has been a policy analyst for the Office of Policy and Research (OPR) of the Department of Regulatory Agencies (DORA) for approximately two and one-half years. His duties include research, report writing, and presenting information to the General Assembly.

2. On Monday, March 6, 2000, OPR was scheduled to provide testimony in the afternoon about House Bill 1258, the Sunset extension bill concerning the State Board of Accountancy. The hearing was set for 1:30 p.m., although other agencies were also on the agenda. Complainant had attended legislative hearings before and had testified at least once.

3. Bruce Harrelson, OPR Director and complainant's direct supervisor, was expected to be the one to give testimony on behalf of the agency at the March 6 hearing. However, during mid-morning, he went home ill. Walking to his car, he called complainant on his cell phone because complainant authored the report upon which testimony was to be given, and the plan had been for complainant to attend the hearing with him and provide assistance. Unable to reach Executive Director Cooke, whom he contacted later, Harrelson phoned Rene Ramirez to say that he would not be able to attend the legislative hearing.

4. Rene Ramirez was transitioning from the position of OPR Director to the position of Director of the Colorado Civil Rights Division. For a two-week period he worked half-days at each job. After being informed of Harrelson's illness, he met with Cooke, with Bruce Douglas, Director of the Division of Registrations, on the speakerphone, and they decided that Douglas would be the testifying witness. He then advised complainant in-person that Douglas would be providing the testimony and that complainant was not to testify unless he, the executive director, or Diane Reimer told him to.

5. Diane Reimer, Legislative Liaison (lobbyist) for the Department of Regulatory Agencies, runs the legislative program for the agency. She reports to the executive director. On March 6, at the State Capitol shortly before 1:30 p.m., she told complainant that he would be at the hearing to answer questions only because Douglas would be testifying for the agency. Being there for questions only means that the witness is present in case a legislator has a question in a particular area of which the witness has specific knowledge. The witness who is designated to testify is the one to provide overall information for the legislators.

6. Mary Michael Cooke, who goes by Michael Cooke, is DORA's executive director. At the March 6, 2000 legislative hearing, outside the hearing room, complainant approached her and asked her to reconsider her decision to have Douglas testify. She responded that Douglas was going to be the testifying witness, and she would not reconsider her decision. She had been informed that Ramirez and Reimer had already told complainant that Douglas would testify and was upset when complainant continually interrupted her and argued with her by asking if she was sure and questioning whether Douglas would be the best witness. He clearly did not want Douglas to testify. Cooke finally stated to complainant that if they needed his testimony, she would give him a signal.

7. Douglas began testifying late in the afternoon. During his testimony, without notice, complainant sat down at the witness table, put some notes in front of Douglas and whispered in his ear. Disrupted, Douglas had to ask a senator to repeat the question. He was surprised and interrupted by complainant's unwelcome appearance and wished for him to go away; complainant was not being helpful. It goes against legislative protocol to go to the witness table without being called by the Committee Chair. While this was going on, Douglas referred to complainant as, "a gentleman from our Department." (See Exh. G, transcript.)

8. At the conclusion of Douglas' testimony, the Chair called complainant's name from the witness list. Complainant introduced himself as the principal analyst on the Sunset Review Bill and stated that he was there to testify about it. The Chair indicated that they did not need to discuss that anymore. (Exh. G.)

9. The next day, March 7, complainant confronted Douglas in Douglas' office and called him "unprofessional" for not referring to him by name at the legislative hearing. Douglas was offended at being accused of being unprofessional. In his mind, he was interrupted; complainant was not asked to join him at the table and should not have even been there, which is how he responded to complainant's accusation.

10. When Harrelson returned to work on March 8, he asked complainant to tell him what happened at the hearing. He asked the same question of Ramirez, Reimer, Cooke, and Douglas. He was disturbed to learn that two people had told complainant not to testify and then he argued with the executive director about the decision to have Douglas testify. Douglas told Harrelson that complainant had been "disruptive" by joining him at the table. Douglas also told him about the "unprofessional" comment.

11. With this information, which included the statements of complainant, and the knowledge that complainant was known to argue with management staff after an issue had been decided and had been informally counseled regarding this behavior, issued a four-point corrective action plan on March 14, 2000, requiring Nondas Bellos to: 1) "…not attend legislative hearings until directed by the Executive Director, the Legislative Liaison, or the Office Director"; 2) "…when attending hearings, you will respond to questions or testify only if directed by DORA management or asked directly by a legislator"; 3) "… not meet with senior management outside of EDO management unless pre-authorized by the Director of Policy and Research" (referring to the confrontation with Douglas); and 4) "…accept and implement management decisions without argumentative resistance." (Exh. 1.)

12. The corrective action letter warned Bellos that failure to comply with these directives could result in disciplinary action. He was given "a reasonable amount of time" to improve his performance. No definite time limit was established. (Exh 1.) Harrelson testified that a complete legislative cycle, one year, would constitute a reasonable amount of time.

13. Complainant responded to the corrective action with a March 22 letter to Harrelson in which he disputed most of the factual allegations on which the corrective action was based. (Exh. 2.)

14. On March 28, 2000, Harrelson and complainant met with each other to discuss the corrective action letter and complainant's written response, which was accepted as a grievance. Nothing was resolved by this meeting. (Exh. 3.)

15. On April 18, complainant met with the appointing authority, Cooke, as the final step of the grievance process. On April 27, Cooke denied the grievance and upheld the corrective action, determining that Harrelson had been fair and did not act arbitrarily or capriciously in issuing the corrective action. (Exhs. 8, F.)

DISCUSSION

In an appeal of an administrative action, in this case the denial of a grievance of a corrective action, the burden of proof by a preponderance of the evidence rests with the complainant to show that respondent's action was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P. 2d 797 (Colo. 1991). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency's decision was arbitrary or capricious, it must be

determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion; if not, the agency did not abuse its discretion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999).

If there is conflicting testimony, the credibility of witnesses and the weight to be given their testimony is 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 finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant argues that respondent's action of imposing a corrective action and then denying his grievance was arbitrary, capricious or contrary to rule or law because: a) the corrective action was not imposed for a proper purpose pursuant to Rule R-6-8; b) there was no prior discussion and respondent refused to consider his March 22, 2000 response to the corrective action letter, in violation of Rule R-6-6; c) respondent did not cite a specific policy that was violated; d) this was a first-time action not worthy of a corrective action; e) everybody else is lying; and f) the corrective action did not specify a time period. These arguments will be discussed in the above sequence.

Harrelson testified that he issued the corrective action in order to "grab his [complainant's] attention." It is this statement upon which complainant founds his assertion that the corrective action was issued for an improper purpose, because the purpose of a corrective action is to, "correct or improve performance or behavior," not simply to grab one's attention. Yet, the reason Harrelson intended to "grab his attention" was to "correct or improve his performance or behavior" pursuant to R-6-8, since he had been counseled in the past about arguing with management after a decision had already been made. Harrelson's testimony

was an explanation of why he felt the circumstances of March 6, 2000 created the need for a corrective action. Almost every corrective action is meant to grab the employee's attention by advising the employee that the situation under review is a serious matter. This is a proper purpose.

A predisciplinary meeting is not required before issuing a corrective action. *See* R-6-10 ("When considering discipline,…"). Nonetheless, some appointing authorities hold an R-6-10 meeting prior to the issuance of a corrective action for the reason that they are not sure if the situation calls for a disciplinary action or a corrective action, or neither one. In the present matter, Harrelson did not believe that a disciplinary action was warranted. He listened to complainant's version of events before talking to the others who were involved. He gathered all the information he could, considered the need for the agency to follow legislative protocol as well as the importance of systematically providing testimony before the legislature, and he took into account complainant's reluctance to accept management decisions of which he was not in full agreement. Only then did he go forward with the corrective action. Complainant's March 22 written response, together with his oral statements, was fully and fairly considered by the executive director in denying the grievance.

It is not necessary for an employee to violate a specific rule or policy in order to be appropriately disciplined or corrected. *See Barrett v. University of Colorado Health Sciences Center*, 851 P. 2d 258, 262 (Colo. App. 1993). *See also Bishop v. Department of Institutions*, 831 P.2d 506 (Colo. App. 1992).

Overall, respondent presented sufficient evidence to show that a corrective action was justified, even though it is complainant's burden to prove that it was not. Substantial evidence supports findings that three different people instructed complainant not to testify, that he continued to argue with the executive director in a last-ditch effort to convince her to change her mind, that he had exhibited this type of confrontational behavior in the past, that he violated legislative

protocol by approaching the witness table unannounced and interrupting the testifying witness, that he later introduced himself as a witness and attempted to provide testimony which the legislative committee no longer wanted, and that the next day he directly confronted a division director with the unfounded allegation of acting unprofessionally. Credible evidence establishes these as important matters. There was no abuse of discretion in issuing a corrective action under these circumstances. *See Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990) (abuse of agency discretion occurs when the decision under review is not reasonably supported by any competent evidence).

From complainant's vantage point, he did not argue, he was justified in going to the witness table, and his dispute with Douglas was of a personal nature. While this perception of events may be understandable, though self-serving, it is difficult to accept complainant's proposition that everyone else is lying. There was no evidence of a motive to fabricate. See *Barrett, supra* at 261. Cooke, Reimer, Ramirez, Harrelson, and Douglas, who were called to the stand by complainant, all testified unhesitatingly and adamantly, in spite of complainant's cross-examination-style questioning. No bias or personal interest was shown. Cooke was especially persuasive in her depiction of complainant arguing with her outside the legislative hearing room. Douglas, too, was steadfast in his depiction of occurrences. There is no basis for discounting their testimonies.

Board Rule R-6-8 provides that a corrective action, "shall be a written statement that includes the areas for improvement, the actions to take, a reasonable amount of time, if appropriate, to make corrections;…." Complainant asserts that the open-ended corrective action he received can go on forever and provides no notice of his ever having complied with its terms. Without a specified time period, he argues, he will never be able to conclude that he was in full compliance. There is some merit to this argument. While the corrective action letter provides only for "a reasonable amount of time" in which to improve performance, Harrelson testified that, to him, the completion of one legislative cycle, or one

year, would be a reasonable amount of time. In this instance, it would have been appropriate to put that in the corrective action. Respondent concedes that a legislative cycle has been completed and one year has passed. Consequently, the corrective action should be modified to specify that a reasonable amount of time would be one year. The corrective action may contain a statement that it will be removed from the official personnel records after a period of satisfactory compliance, but such a statement is not required. R-6-8.

This is not a proper case for the award of attorney fees and costs under §24-50-125.5, C.R.S., of the State Personnel System Act. *See also* R-8-38, 4 C.C.R. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law, except that the corrective action should have specified that a reasonable amount of time was one year.

2. Neither party is entitled to an award of attorney fees and costs.

ORDER

The corrective action is modified to include a provision saying that a reasonable amount of time is one year. With that modification, respondent's action is affirmed, and complainant's appeal is dismissed with prejudice.

DATED this ___ day
of July, 2001, at
Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, C0 80203

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 MAILING

This is to certify that on the ____ day of July, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Nondas Bellos
625 South Forest, #311
Glendale, CO 80246

And through interagency mail:

Susan J. Troutt
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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