STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2002B044

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION

SCOTT R. DEVEREAUX,

Complainant,

vs.

DEPARTMENT OF REVENUE,
MOTOR VEHICLE DIVISION, DRIVERS SERVICES,

Respondent.

THIS MATTER is before the Board on Respondent's Motion for Summary Judgment. Having reviewed the motion and attachments thereto, Complainant's Response, and the applicable law, the administrative law judge enters the following order.

FINDINGS OF FACT

1. In September 2000, Complainant was hired by the Department of Revenue ("DOR") as an Administrative Assistant II in the Motor Vehicle Business Group.

2. In late October 2001, Complainant's first line supervisor brought issues relating to Complainant's computer use of pornography and/or violent material to the attention of Dianne Primavera, Director of Operations, Titles and Registration, Motor Vehicle Business Group, DOR. Primavera was Complainant's appointing authority.

3. Primavera was informed that Complainant's computer had two icons and numerous folders and files containing pornographic and/or violent material. None of the material was related to his job duties.

4. Primavera concluded that disciplinary action against Complainant might be warranted, and she sent Complainant a letter scheduling an R-6-10 pre-disciplinary meeting.

5. The letter notifying Complainant of the R-6-10 meeting stated in part, "the purpose of this letter is to inform you that a meeting has been scheduled pursuant to State Personnel Rule 6-10. You are requested to attend this meeting, the purpose of which shall be to discuss information that indicates your misuse of state equipment, violation of the DOR/IT Security Standards and Policies and the DOR Sexual Harassment Policy. I am also concerned that your use of the Internet has interfered with your job performance. This information provides reasons for potential corrective and disciplinary action that may be taken against you. . . You have the right to bring a representative of your choice to this meeting."

6. At the November 1, 2001 R-6-10 meeting, Primavera raised the issue of pornographic and/or violent material saved on Complainant's computer. Complainant admitted that he not only knew of the Department's policy prohibiting use of the computer in that manner, but admitted he abused the Internet access in violation of the policies against misuse of state equipment and sexual harassment.

7. Complainant further stated that he accessed and downloaded the objectionable material as a way to "retaliate" against his supervisor.

8. During the 6-10 meeting, Complainant pointed out his ability to sabotage the workplace. He stated his ability to "put something in the coffee" at work, and commented that on the day of the 6-10 meeting he purposely entered the building through a coded entrance to see if he had "the power" to make the Department change the codes.

9. Primavera determined that Complainant had violated DOR's Security Standards Policy, Sexual Harassment Policy, and Workplace Violence Policy.

10. Based on Complainant's admitted conduct, as well as his statements made at the R-6-10 meeting, Primavera determined that she would terminate Complainant's employment.

11. The termination letter stated in part as follows:

    "You admitted that you had, in fact violated the Security Standards and Policies agreement and had regularly used the Internet to visit sites of a pornographic and shocking nature. You admitted that you had created the directory on your hard drive identified as 'C://windows/favorites/spank' and that you had placed 'bookmarks' for web sites in this directory. I have included a copy of the print-out of this directory, which includes such sites as 'Best Mother Son Incest Sites,' Family-Incest.org,' 'Free Mother Son Incest Sex Pics.' You also admitted that displaying these sites on your computer

monitor violated the DOR Sexual Harassment Policy. Another site you accessed implicated violent behavior, such as 'Brutal incest sex' and 'Father raped small daughter.'

"I am concerned by your statement that since 'day two on the job' you were unhappy. You felt that your supervisor had mistreated you, yet you acknowledged that you did not speak to her about it, nor any other supervisor, or me. Instead, you stated that you accessed these sites as a way to 'retaliate' against your supervisor and the Department. You also stated that you used these and other Internet sites as a way to reward yourself for meeting a certain level of production, for 'entertainment' and to answer 'curious questions.' You admitted, with regard to your use of the Internet, 'I abused it - plain and simple.'

"You also stated that you 'hated your job' and that you only stayed for 'spite.' You repeatedly stated that you were in 'retaliation mode' against MVBG. You spoke about a desire to 'sabotage' the workplace. You also indicated that you had frequently come into the office early to make coffee, and if you had chosen to, that you could have 'put something into the coffee.' I am concerned about the effect your attitude has on the work environment, and what other actions you may have decided to take to retaliate against or sabotage the workplace, your supervisor, or co-workers."

"You also made a reference to the fact that you accessed the building on the day of your R-6-10 meeting from the south door of 1881 Pierce to test if 'you had the power' to cause the general access code to be changed. Your meeting was scheduled to be in Room 1000, which is most easily accessed from the main entrance 'A.' You indicated that you had been in the break room that morning, which was not authorized by me."

12. The transcript of the R-6-10 meeting confirms that Complainant made the statements attributed to him in the termination letter.

13. DOR Security Standards & Policies states in part, "Internet access is to be used for business purposes only. . . . [it] should never be used in a way that would detract from our efficiency or create an appearance of impropriety. Violations of this policy will be cause for corrective or disciplinary action up to and including termination. . . ."

14. On October 11, 2001, Complainant signed the Statement of Compliance Form, DOR Information Security Standards and Policies, indicating that he had received and read a copy of the policy, and understood and acknowledged his responsibilities thereunder.

15. DOR's Sexual Harassment Policy states in part, "Unwelcome words, actions

or displays of a sexual nature interfere with the ability of a person to perform his or her job. A hostile work environment may be created by sexual pictures, calendars, graffiti or by offensive language, jokes, gestures or comments."

16. On September 14, 2000, Complainant signed a form indicating he had received a copy of the DOR sexual harassment policy. On January 24, 2001, he signed a form acknowledging that he had participated in the sexual harassment training and that he had read and understood the sexual harassment policy.

17. The State of Colorado Executive Order regarding Workplace Violence states in part as follows: "The state will not tolerate violent behavior or the threat of violent behavior directed by anyone toward state employees, customers, clients, state property or facilities . . . Violent behavior is defined as any act or threat of physical, verbal, or psychological aggression or the destruction or abuse of property by an individual. Threats may include veiled, conditional or direct threats in verbal or written form, resulting in intimidation, harassment, harm or endangerment of the safety of another person or property."

18. Primavera considered the following in deciding to impose disciplinary action against Complainant: the nature, extent, seriousness, and effect of Devereaux's acts, his personnel history, the type and frequency of prior unsatisfactory behavior or acts, the period of time since prior offenses, mitigation information provided, the credibility of Complainant and other witnesses, and the need for impartiality in dealing with employees.

19. Primavera concluded that Complainant had violated DOR's Security and Standards Policies, Sexual Harassment Policy, and Workplace Violence policy.

DISCUSSION

I. Standard of Review on Summary Judgment.

Summary judgment is appropriate when the undisputed material facts show that the moving party is entitled to judgment as a matter of law. David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996). The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Hicks v. City of Watonga,

Okla., 942 F.2d 737, 743 (10th Cir. 1991).

Once the moving party has met its burden, the nonmoving party must demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

The nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. Id. A factual issue is genuine if the evidence is such that a reasonable jury [or administrative tribunal] could return a verdict for the nonmoving party. Marks v. U.S. West Direct, 988 F.Supp. 1371, 1373 (D.Colo. 1998).

The record has been viewed in the light most favorable to Complainant. Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995). Complainant, who failed to rebut any of the sworn testimony submitted by Respondent, has failed to set forth specific facts demonstrating that there is a genuine issue of fact for hearing.

II. Complainant committed the acts for which he was disciplined.

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 Board may reverse or modify Respondent's decision only if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

Respondent has proven by preponderant evidence that the acts or omissions upon which discipline was based occurred and that just cause warranted the discipline imposed. Primavera's affidavit and Complainant's admissions at the R-6-10 meeting (contained in the transcript thereof, Exhibit 2 to the motion for summary judgment) establish that Complainant committed the acts for which he was terminated. See Findings of Fact 6, 7, 8, and 11.

Complainant created a directory on his hard drive identified as "C://windows/favorites/spank" and placed "bookmarks" for web sites in this directory. The directory included sites such as "Best Mother Son Incest Sites," "Family-Incest.org," and "Free Mother Son Incest Sex Pics." Complainant accessed sites implicating violent behavior, such as "Brutal incest sex" and "Father raped small daughter."

Complainant admitted, with regard to his use of the Internet, 'I abused it - plain and simple.' Complainant stated repeatedly to Primavera that he was in "retaliation mode" against his employer. He made allusions to his ability to "put something in the coffee" when he made coffee prior to others' arrival in the morning.

Complainant's response to the motion for summary judgment contests none of the sworn facts contained in Primavera's affidavit. Further, it fails to contest the accuracy of the transcript of the R-6-10 meeting. Therefore, the Board must accept the allegations in the affidavit and the contents of the transcript of the pre-disciplinary meeting as established facts. Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Respondent provided copies of the policies it contends Complainant violated, as well as Complainant's signed acknowledgements of receipt of those policies. Complainant's actions violated the Security Standards and Policies policy, as well as the Sexual Harassment policy. Without further evidence, it is unclear as to whether he in fact violated the workplace violence policy.

III. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

The Colorado Supreme Court recently clarified the standard to be applied in determining whether agency action is arbitrary or capricious. *Lawley v. Dep't of Higher Education*, ____ P.3d ____ (Colo. No. 00SC473, December 3, 2001). The Court stated, "we make clear that the principles we annunciated in *Van DeVegt* continue to apply to administrative actions." *Id*. at page 31, n.15. In *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936), the Court defined arbitrary and capricious agency action as:

> (a) 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) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) 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. 55 P.2d at 705.

Complainant filed no Prehearing Statement or Amended Prehearing Statement, in violation of the Board's November 29, 2001 Prehearing Order. These pre-hearing disclosure documents provide the forum for the appealing party to raise legal issues challenging the agency's action. Complainant's failure to file either document demonstrates that he did not intend to present any evidence at hearing on the issue of whether Respondent's action was arbitrary, capricious or contrary to rule or law. In addition, Complainant has not presented any such argument in his response to the motion for summary judgment.

Even in the absence of any such legal issues raised by Complainant, it is concluded that based on the evidence available to the appointing authority, her decision

to terminate Complainant was not arbitrary, capricious, or contrary to rule or law. Complainant's conduct constituted willful misconduct and violation of agency rules under Board Rule R-6-9(2), 4 CCR 801, thereby subjecting him to disciplinary action.

IV. Respondent's action was within the range of alternatives available to the Appointing Authority.

In view of the evidence available to Primavera, her decision to terminate Complainant's employment was a reasonable one, within the range of alternatives available to her. Complainant admitted to intentionally violating DOR's internet policy by accessing offensive pornographic material during work hours. At the R-6-10 meeting, he demonstrated no remorse for his actions. To the contrary, he explained that he had abused the internet policy in retaliation against his supervisor, and that he was still in retaliation mode against his employer. He further explained that he had hated his job since the first week of employment. Complainant's conduct demonstrated clearly to Primavera that he had no desire to retain his employment with DOR.

INITIAL DECISION

WHEREFORE, Respondent's motion for summary judgment is granted, and this case is dismissed with prejudice.

Dated this 13th day
of **February, 2002**, at

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1400
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. 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 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 **February, 2002**, I placed true copies of the foregoing **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Scott Devereaux
3130 South Corona Street
Denver, Colorado 80110

Scott Devereaux
P.O. Box 13973
Denver, Colorado 80201

and in the interagency mail, to:

Melissa Mequi
Assistant Attorney General
Office of the Attorney General
Employment Section
1525 Sherman, 5th Floor
Denver, CO 80203

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