

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B120

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIMOTHY J. LARSEN,
Complainant,

v.

DEPARTMENT OF AGRICULTURE, MARKETS DIVISION,
Respondent.

Senior Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on July 15, 2013, at the State Personnel Board. The record was closed on that date. Assistant Attorney General Davin W. Dahl represented Respondent Department of Agriculture (CDOA or Respondent). Complainant appeared and represented himself. Respondent's advisory witness was Ron Carleton, Deputy Commissioner of the Department of Agriculture, and Complainant's appointing authority.

MATTER APPEALED

Complainant, Timothy J. Larsen, appeals a disciplinary action requiring him to repay \$162.83 in labor costs incurred by the State, in connection with his hiring an intern without prior authorization. Complainant seeks rescission of the action. For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts upon which discipline was based;
2. Whether Respondent's disciplinary action was arbitrary, capricious, or contrary to rule or law; and,
3. Whether the imposed disciplinary action was within the range of reasonable alternatives.

FINDINGS OF FACT

1. Complainant began working for the CDOA in October 1980. In 2005, he was promoted to General Professional V. His current title is Senior International Marketing Specialist within the Markets Division.
2. The Western United States Agricultural Trade Association (WUSATA) is an important partner of the CDOA. It develops and enhances international markets for Colorado's food and agricultural products, and directly funds membership organizations to achieve those goals.

3. The CDOA is a member of WUSATA and annually receives funding in the range of \$79,000. A significant portion of Complainant's work was as the Project Manager for WUSATA trade shows and projects to promote international trade.

Memorandum of Agreement (MOA)

4. The CDOA and WUSATA work together in accordance with a Memorandum of Agreement, signed annually by the directors of both programs. John Salazar, Commissioner of CDOA, and Andrew Anderson, WUSATA Executive Director, signed the MOA on behalf of their respective organizations in 2013. The MOA governs how CDOA manages six specific Market Access Program (MAP) projects that are funded by WUSATA. The MOA lists the projects by activity code, budgeted amount, and participating states.
5. The MOA does not mention or govern the WUSATA intern program, which is funded separately by WUSATA.
6. The MOA contains a provision that "With the understanding that MAP funded projects are governed by a myriad of federal and state laws in addition to the MAP program rules and regulations for which all parties are liable, State is not liable for violation of a requirement or policy or guidance specific to the MAP Generic Program that is not posted on the WUSATA website. State is not liable retroactively for changes in FAS policy or directives."

WUSATA Intern Program

7. WUSATA funds college interns to perform work in the states. CDOA participates in this program. Under the intern program, WUSATA pays the interns directly as contractors.
8. Complainant is responsible for selecting and hiring the interns. Each intern selected by Complainant must be approved by WUSATA prior to execution of the work agreement.
9. Once WUSATA approves an intern for hire, a WUSATA staff member fills out a work agreement and signs it, then submits it to Complainant. Complainant obtains the intern's signature.
10. The only parties to the intern work agreements are the intern and WUSATA. CDOA is not a party to the intern contracts.
11. On February 2, 2011, Janet Kenefsky, International Marketing Director for WUSATA, sent a memorandum via email to Complainant informing him of the details of the 2011 intern process. The memo stated in part, "It is important that your intern (sic) only work once they have signed the WUSATA work agreement (which will be provided once all attached documents are filled out and submitted) and it has been logged in the WUSATA office."
12. On December 28, 2011, Ms. Kenefsky sent Complainant another memo via email concerning the 2012 internship program. The memo stated in part,

"Once you have completed the search and have a recommended hire, please forward all the intern paperwork electronically to Janet Kenefsky

BEFORE your intern starts working in your office. It is important that your intern only work once they (sic) have signed the WUSATA work agreement (which will be provided once all attached documents are filled out and submitted) and it has been logged in the WUSATA office.” (Emphasis in original)

Hiring of “AH”

13. In early 2013, there was some question as to whether funds would be available for interns. Therefore, Ms. Kenefsky did not issue her annual email concerning the intern program.
14. Once funding for interns had been approved, Complainant selected AH to work as the WUSATA intern in 2013.
15. Complainant did not obtain prior approval from WUSATA to hire AH.
16. Complainant did not submit the work agreement to WUSATA to hire AH before her first day of work.
17. AH started work at CDOA on February 1, 2013. On that same day, Complainant submitted the paperwork on AH to Ms. Kenefsky at WUSATA, for approval and signature.
18. Complainant did not inform Ms. Kenefsky that AH had started work on February 1, 2013.
19. AH worked at CDOA on February 1, 4, and 6, 2013.
20. On February 6, 2013, Jennifer Gurr, Chief Administrative Officer, CDOA, was at a conference in Washington, D.C., having a casual conversation with Ms. Kenefsky. During their conversation, the subject of the new intern came up, and Ms. Kenefsky was surprised because WUSATA had not hired a new intern.
21. Ms. Gurr contacted the Denver office and confirmed that AH had in fact been hired without the prior approval of WUSATA. The intern was sent home.
22. The WUSATA leadership was not happy with the situation and decided that WUSATA would not pay for the time the intern had worked prior to signing the contract with AH.
23. On February 7, 2013, Ms. Hart, the WUSATA representative, signed the work agreement for AH and returned it to Complainant.
24. On February 11, 2013, WUSATA Executive Director Anderson sent a letter to John Salazar, Commissioner, CDOA, regarding Complainant. The letter informed Mr. Salazar that WUSATA had concluded that effectively immediately it would no longer permit Complainant to conduct any work on WUSATA activities or association business. The letter outlined several areas of deficient performance by Complainant, mostly in the area of poor communication, and contained attached documents detailing the problems.
25. One of the problems listed in the February 11, 2013 letter was the premature hiring of the intern. Mr. Anderson attached an Incident Report which reviewed the facts

surrounding Complainant's failure to disclose the fact the intern had already started working at the time he sent the work agreement to WUSATA staff on February 1, 2013.

26. WUSATA refused to pay for the intern's work performed on the three days prior to the execution of the work agreement, February 1, 4, and 6, 2013. Therefore, CDOA was forced to incur the cost itself, or to pressure WUSATA to pay for it anyway. CDOA elected not to push the issue with WUSATA.
27. Colorado Revised Statute, section 24-30-202(1), states in part, "No disbursements shall be made in payment of any liability incurred on behalf of the state, other than from petty cash or by any alternative means of payment approved by fiscal rule promulgated by the controller, unless there has been previously filed with the office of the state controller a commitment voucher. . . Any state contract involving the payment of money by the state shall contain a clause providing that the contract shall not be deemed valid until it has been approved by the controller or such assistant as he may designate. . ." Section 24-30-202(3) expressly prohibits any person from incurring any obligation against the state unless expressly authorized by the statute or the Controller, and states, "every person incurring or ordering or voting for the incurrence of such obligation and his surety shall be jointly and severally liable therefor."

Controller Ratification of Payment to Intern

28. On March 6, 2013, Jeff Stalter, Director of Budget and Business Operations at CDOA, wrote a letter to Jennifer Henry, Statewide Internal Audit Manager, Office of the State Controller. He advised her of the situation, stating in part, "An employee of the Department authorized work for an intern without proper approvals or a commitment voucher as required pursuant to 24-30-202. Attached is the formal memo explaining the situation and the request to ratify."
29. On March 7, 2013, Ms. Henry informed CDOA by letter that the Controller's office ratified payment to the intern for the 12.5 hours she worked on February 1, 4, and 6, 2013, in the amount of \$162.83. In the memo, Ms. Henry stated in part,

"As a reminder, statutory violations not ratified by the State Controller shall be the personal obligation of the person(s) who ordered the goods or services and/or incurred the obligation. See CRS § 24-30-202(3).

As discussed in the ratification request, the Department believes that the responsible employee acted in bad faith. Additionally, based on the information provided, the responsible employee has placed the state at risk for violating Personnel Rules, particularly where the person was asked to work on site at the Department, under the supervision of a Department employee. These two factors resulted in an employee-employer relationship, rather than an independent contractor. This places the State at even greater risk of tax and PERA violations since the person would be deemed an employee under IRS rules and therefore the State would be liable for not withhold Medicare Taxes (sic) as well as unemployment and PERA. Therefore, we would strongly encourage the Department to take the necessary corrective actions and if deemed necessary, disciplinary actions allowable under the State Personnel Rules, to prevent future occurrences."

30. Ron P. Carleton, Deputy Commissioner of CDOA, was the delegated appointing authority over Complainant. He reviewed the February 11, 2013 letter from Anderson at WUSATA, the March 7, 2013 letter from the Controller's office, and additional information concerning the hiring of the intern. He had also received information about Complainant's personal website soliciting business on the basis of his experience at CDOA. Mr. Carleton decided to hold a predisciplinary meeting with Complainant.
31. On March 13, 2013, Mr. Carleton sent a notice of predisciplinary meeting to Complainant. The letter indicated that the information in the recent WUSATA letter, the fiscal violation resulting from the unauthorized hiring of the intern, and a potential conflict of interest, led to the need for the meeting.

Predisciplinary Meetings

32. On March 22, 2013, Complainant attended the predisciplinary meeting with Mr. Carleton and Ms. Gurr, present as Respondent's representative and human resources director. At the meeting, they discussed four issues: the intern hiring issue; operating a personal website in a manner that might present a conflict of interest with his CDOA position; providing inaccurate information to a trade show participant; and failure to report the possibility of fraudulent activity. At the end of the meeting, Complainant was given the opportunity to provide written information on all of the issues discussed.
33. Complainant provided a significant amount of additional information on all of the issues discussed at the meeting.
34. With regard to the intern issue, Mr. Carleton discussed what had occurred with all involved parties, including Ms. Kenefsky, Mr. Anderson, and Tom Lipetsky, Director of Marketing and Strategic Initiatives at CDOA.
35. Mr. Carleton also reviewed Complainant's personnel file. The performance evaluations were all at the satisfactory level or above. Complainant had received a Corrective Action from Mr. Lipetsky on May 1, 2012. The Corrective Action addressed Complainant's submission of a late and poor quality report to the United States Department of Agriculture (USDA) on a project Complainant managed. The letter required Complainant to submit a list of all pending reports and their due dates, to coordinate all future reports through a supervisor, and to apologize to appropriate parties.
36. Mr. Carleton determined that it would be appropriate to reconvene the predisciplinary meeting with Complainant. They met again on April 4, 2013.
37. During the predisciplinary process, Complainant acknowledged that he should not have hired the intern prior to obtaining WUSATA's authorization to do so.
38. The information Complainant provided to Mr. Carleton convinced him that that it would not be appropriate to impose corrective or disciplinary action in connection with the three issues other than the unauthorized hiring of the intern. Mr. Carleton determined that Complainant's direct supervisor should handle those issues in the context of performance management.

39. Mr. Carleton concluded that disciplinary action was appropriate to address Complainant's unauthorized hiring of the intern. He considered the incident to have been very serious, as evidenced by the March 7, 2013 letter from the Controller. On April 9, 2013, Mr. Carleton issued a disciplinary action letter to Complainant, requiring him to repay \$162.83 to the State within one month. Mr. Carleton concluded that Complainant had committed a statutory fiscal violation under C.R.S. section 24-30-202(1) by hiring the intern without prior authorization by WUSATA.
40. Complainant timely appealed.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, § 13(8); § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (1) failure to perform competently;
- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
- (5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant concedes that he permitted AH to begin working prior to execution of the work agreement, that he did not inform WUSATA that he had permitted her to start work, and that he submitted the work agreement to WUSATA on February 1, 2013. Complainant's actions resulted in an employment relationship between the DOAC and AH, in which the agency, and hence the State of Colorado, were liable for the payment of wages to AH for work performed. In addition, had AH been injured on the job, the State would have been liable for applicable Workers Compensation benefits. Complainant's conduct was in direct violation of the fiscal statute cited in the disciplinary action letter, which prohibits any person

from incurring liability for the State without prior authorization by the Controller. § 24-30-202(1)-(3), C.R.S.

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

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; or 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).

Respondent carefully and honestly considered all of the information relevant to its decision prior to imposing disciplinary action. Mr. Carleton's investigation was comprehensive. He discussed the facts with all relevant individuals, reviewed all written materials available, and considered all mitigating information provided by Complainant. Mr. Carleton's predisciplinary process was exemplary, in that he determined the majority of issues would be more appropriately handled at the first-line supervisor level as a performance management issue. This decision resulted in a minimal disciplinary action imposed on Complainant.

Complainant asserts that Respondent's action was inconsistent with the MOA that governed the working relationship between CDOA and WUSATA. That document contains a proviso that the "State is not liable for violation of a requirement or policy or guidance specific to the MAP Generic Program that is not posted on the WUSATA website." He argues that since the pre-authorization requirement was not posted on the WUSATA website, neither he nor DOAC may be held liable for the intern's wages. This argument is unavailing. First, the MOA on its face applies only to six specific WUSATA projects; it has no bearing on the hiring of interns. More importantly, even if the MOA did apply to the events at issue herein, it would not trump state law. No state employee may incur liability on behalf of the State of Colorado without the authorization required in statute, i.e., a commitment voucher reviewed and approved by the Controller. § 24-30-202(1)-(3), C.R.S. Complainant had no such authorization.

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

Respondent's decision to require Complainant to repay the exact amount incurred by the State was a moderate one, tailored appropriately to the circumstances. Complainant's actions were serious. They placed the State in a position of legal liability, and they damaged the relationship between CDOA and WUSATA. Requiring Complainant to reimburse the State for the amount incurred was therefore well within the range of reasonable alternatives.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he 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 29th day
of August, 2013.



Mary McClatchey
Senior Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202-3604

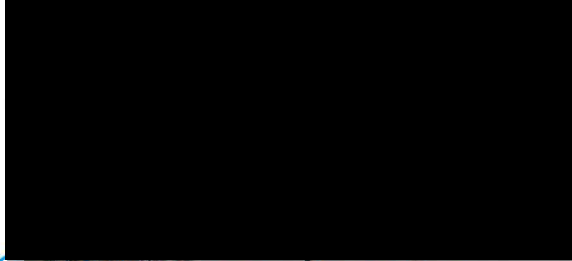
CERTIFICATE OF MAILING

This is to certify that on the 29th day of August, 2013, I electronically served a true copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, as follows:

Timothy Larsen



Davin Dahl, A.A.G.



Andrea Woods

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.