

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020G045**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL DUBLINSKI,
Complainant,

v.

UNIVERSITY OF COLORADO BOULDER, PARKING SERVICES,
Respondent.

Administrative Law Judge McCabe (“ALJ”) conducted the evidentiary hearing in this matter on May 14, 2020 by web conference. This matter commenced on March 30, 2020. The record was closed on June 15, 2020. The record was closed on this date as it was the final deadline the parties were provided to submit paper and redacted copies of their exhibits.

Michael Dublinski, Complainant, appeared on his own behalf. Katie Gleeson, Esq., Assistant University Counsel, represented Respondent. Respondent’s advisory witness was Thomas McGann, Respondent’s Director of Parking Services.

A list of exhibits offered and admitted into evidence is attached as Appendix A. A list of witnesses who testified at the hearing is attached as Appendix B.

MATTERS APPEALED

Complainant appeals an alleged disciplinary suspension without pay following the conclusion of his grievance related to the alleged suspension. Complainant seeks payment for hours he may have worked between August 22, 2019 and November 4, 2019, compensation for the time he spent working on his appeal, reimbursement for expenses associated with the above captioned matter, and for the Respondent to be fined.

Respondent argues that it did not discipline Complainant and requests this matter be dismissed with prejudice.

ISSUE

Did Respondent’s actions constitute disciplinary action subject to the Board’s jurisdiction?

FINDINGS OF FACT

1. Complainant began work for Respondent in 1990. (Stipulated fact.)
2. Complainant is employed as an Events Supervisor by Respondent. (Stipulated fact.)

3. Complainant is classified as a Security I within the State Personnel System. (Stipulated fact.)
4. Complainant's position is a variable appointment position, and Complainant does not have a set amount of hours scheduled per week. Employees in variable appointment positions are sometimes referred to "one percent employees." (Stipulated fact.)
5. Variable appointment employees do not have guaranteed hours.
6. As a variable appointment employee, Complainant does not have regularly scheduled working hours. (Stipulated fact.) Complainant does not maintain an office or a telephone on Respondent's premises, and he does not interact with his supervisor on a daily basis. (Stipulated fact.)
7. Respondent uses a program called Shift Board where it posts available shifts for variable appointment employees. Variable appointment employees use the program to sign up for shifts.
8. Complainant signs up for shifts at his discretion. (Stipulated fact.) However, Respondent has "all hands on deck" events that all employees are required to work unless a supervisor approves otherwise. (Stipulated fact.)
9. Kristina Mauck-Keelick, Signature Campus Events Parking Manager, has scheduling responsibilities. Ms. Mauck-Keelick confirms the shifts that employees sign up for in Shift Board. There are times when too few or too many employees sign up for shifts. Ms. Mauck-Keelick reaches out to an Event Manager if there are not enough people to work a shift.
10. Ellen Hedrick (also known as Sissy), Campus Parking Events Manager, is Complainant's immediate supervisor. (Stipulated fact.)
11. Dan Krusemark, Assistant Director of Events and Enforcement, is Ms. Hedrick's supervisor. (Stipulated fact.)
12. Thomas McGann, Director of Parking Services, is Mr. Krusemark's supervisor and Complainant's Appointing Authority. (Stipulated fact.)
13. Ms. Hedrick and Mr. Krusemark are not appointing authorities. Neither has the authority to administer discipline to employees within the State Personnel System.
14. Mr. McGann has authority to discipline employees, including Complainant.
15. In May 2019, Complainant did not sign up to work an all hands on deck event, the Bolder Boulder ("Event").
16. On May 20, 2019, Ms. Hedrick emailed Complainant about his failure to sign-up for the Event. Ms. Hedrick wrote:

I don't see you signed up for Bolder Boulder yet and it is considered a required

event. Did you ask someone if you could have the day off or did you not get a chance to visit Shiftboard yet?

There is still one supervisor position available!

Ms. Hedrick copied Mr. Krusemark on the email.

17. On the same date, Complainant responded, "I did not ask for permission but I told [Ms. Muack-Keelick] that I would not be working."

18. Ms. Hedrick attempted to call Complainant after receiving his email and left Complainant a voicemail stressing that he was required to work the Event.

19. On the following day, May 21, 2019, Complainant sent Ms. Hedrick an email. Complainant copied Mr. Krusemark, Mr. McGann, and Ms. Mauck-Keelick. Complainant wrote he would not provide Ms. Hedrick with an explanation for why he was not going to work the Event. Complainant concluded the email with the following:

The following are my only requests. Get a clue and consider whether this is a worthy battle. That said, don't be surprised if I don't put up much of a fight. I don't need this job, my wage is underwhelming, and I've never accepted health insurance. I'll admit to wanting to make it to my thirty-year anniversary in 2020 though that's a token achievement I can do without. Besides, I probably shouldn't be working a job where my supervisor is incapable of reasonably applying context to situations such as this. Let me know your thoughts, but might I suggest that you choose your words carefully as there's nothing to be gained, but plenty to be lost.

20. Mr. Krusemark believed Complainant's email was unprofessional.

21. As a result on May 21, 2019, Mr. Krusemark sent Complainant an email. In the email, Mr. Krusemark expressed concern about Complainant's email to Ms. Hedrick and requested Complainant meet with him in person. Mr. Krusemark copied Ms. Hedrick and Mr. McGann.

22. On the same date, Complainant responded to Mr. Krusemark's email as follows:

Make no mistake that I'm the one who has historically been disrespected by [Ms. Hedrick]. In fact, it wasn't that long ago that I was promised a new supervisor. That was never granted for reasons unbeknownst to me. You're [sic] response has convinced me that I need to reevaluate how much I want to be exposed to such mistreatment. Thanks for that.

23. Also on May 21, 2019, Mr. Krusemark responded to Complainant's email, "Well let's please meet and discuss so you can share with me your experiences." Mr. Krusemark copied Mr. McGann and Ms. Hedrick. There are no further emails in the email string ("May Emails").

24. Following the May Emails, Complainant did not attempt to meet with Mr. Krusemark and began removing himself from scheduled shifts.

25. Complainant signed up for, and worked, a shift in June and three shifts in August.
26. On August 22, 2019 at 3:39 p.m., Ms. Hedrick sent Complainant an email as follows:

Dan Krusemark has asked that you call or email him before you work any event or equipment shifts; please reach out to him as soon as possible. I see you are set for a shift on Monday September 9, 2019.

Please let me know when you approve your leave times? This is our regular yearly audit and it needs to be completed by August 26, 2019.

Ms. Hedrick copied Mr. Krusemark on the email.

27. On August 22, 2019 at 4:04 p.m., Complainant sent Mr. Krusemark an email, "Dan, call me anytime. My cell number is [redacted]."

28. Mr. Krusemark was out on medical leave for approximately two weeks during this time period.

29. On September 3, 2019, Complainant sent Ms. Mauck-Keelick an email asking her to remove him from a September 7, 2019 shift, "Please remove me from Shiftboard as I won't be working."

30. On the same date, Ms. Mauck-Keelick forwarded Complainant's email to Ms. Hedrick and wrote, "FYI this has been happening quite a bit lately."

31. On September 17, 2019, Mr. Krusemark responded to Complainant's August 22, 2019 email and asked to set-up a meeting before or after Complainant had a coaching session with Ms. Hedrick. Complainant replied, "Will do."

32. Following the August 22, 2019 email, Respondent never removed Complainant's ability to sign up for a shift, and never removed Complainant from a shift. Complainant was only removed from shifts at his own request.

33. Following the August 22, 2019 email, Ms. Hedrick and Mr. Krusemark did not reach out to Complainant. Complainant also did not reach out to Ms. Hedrick, Mr. Krusemark, or Mr. McGann to see if he could work.

34. On October 7, 2020, Mr. Krusemark met with Complainant to discuss the May Emails. During the meeting, Complainant told Mr. Krusemark he felt he had been suspended from work. Mr. Krusemark clarified that Complainant had not been suspended. Before ending the meeting, Mr. Krusemark asked Complainant if there was anything else Complainant needed from him. Complainant stated clearance to work. Mr. Krusemark told Complainant that he had clearance to work.

35. Immediately following his meeting with Mr. Krusemark, Complainant met with Ms. Hedrick. The meeting was a coaching session. Complainant asked if he had clearance to work

in the meeting. Ms. Hedrick confirmed the Complainant had clearance to work.

36. Complainant began working after the October 7, 2020 meeting.

37. On October 14, 2019, Complainant sent Ms. Hedrick an email asking to be excused from an October 25, 2019 shift. Ms. Hedrick forwarded the email to Mr. Krusemark. Mr. Krusemark replied, "Let's hold off on replying til Tom speaks with HR. He was not thrilled about paying a 1% not to work especially after they were suspended for disciplinary reasons."

38. On October 15, 2019, Complainant initiated a grievance. (Stipulated fact.)

39. In his grievance, Complainant alleged he was "disallowed from working despite the absence of proper cause and procedure." He further alleged, his right to work was violated from August 22, 2019 to October 7, 2019. Complainant's grievance received a Step 1 and a Step 2 grievance decision.

40. On October 29, 2019, Michelle Lamb, Respondent's Executive Assistant, informed Complainant he would receive administrative leave for shifts he did not work in September.

41. On November 1, 2019, Respondent paid Complainant 35.5 hours of administrative leave. (Stipulated fact.)

42. Respondent paid Complainant administrative leave because there was a miscommunication as a result of the August 22, 2019 email and to move the situation forward.

ANALYSIS

Within the State Personnel System, only a certified employee's appointing authority may discipline that employee:

A person certified to any class or position in the state personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined. In considering the conviction of a crime, the board shall be governed by the provisions of section 24-5-101.

§ 24-50-125(1), C.R.S.

Board Rule 1-41 defines Disciplinary Suspension as, "A type of disciplinary action in which an employee is not allowed to work and is not paid for a specified period of time."

The State Employee Personnel System has a well-defined system for issuing discipline to certified employees. See Board Rule 6-8 through Board Rule 6-15. When the appointing authority is considering issuing discipline, they must first meet with the employee, provide the

employee with an opportunity to respond, and provide the employee with an opportunity to supply additional information following the meeting. See Board Rule 6-10. If the appointing authority makes a determination to issue discipline, the appointing authority must provide notice to the employee pursuant to Board Rule 6-15.

Ms. Hedrick's August 22, 2019 email to Complainant was not a disciplinary action as defined by the laws and regulations governing the State Employee Personnel System. Neither Ms. Hedrick nor Mr. Krusemark had the authority to discipline Complainant, as neither one was the appointing authority. Respondent did not initiate the disciplinary process set forth in the Board Rules. There was no formal discipline of Complainant pursuant to the State Personnel System process of administering disciplinary action, and because there was no formal discipline, there was no disciplinary documentation added to Complainant's personnel file.

However, the question remains whether Ms. Hedrick's August 22, 2019 email followed by Mr. Krusemark's untimely response was in effect a disciplinary action resulting in loss of work and pay to Complainant. The wording of the email itself does not demonstrate Complainant was suspended. Mr. Krusemark's delay in response is more problematic, but is not determinative.

Complainant is a variable appointment employee. As a result, Complainant signs up for shifts and works at his own discretion. Respondent, through Complainant's supervisors or scheduler, did not prevent Complainant from working after the August 22, 2019 email. Following the August 22, 2019 email, Complainant continued a pattern of behavior, removing himself from shifts, that started after the May Emails. It was Complainant, not Respondent, who removed Complainant from shifts. Complainant's failure to sign up for shifts and his action of removing himself from shifts was an exercise of his own discretion. Respondent did not prevent Complainant from working after the August 22, 2019 email and, therefore, did not in effect discipline Complainant.

There was a significant communication breakdown between Complainant and his supervisors. Ms. Hedrick and Mr. Krusemark did not address the May Emails in a timely manner, as Mr. Krusemark asked for a meeting in May and there was no follow-up until August. Ms. Hedrick poorly worded her August 22, 2019 email and failed to communicate with Complainant when she became aware he was again removing himself from shifts. Mr. Krusemark did not respond to Complainant in a timely manner following Complainant's response to the August 22, 2019 email, and Ms. Hedrick did not notify Complainant that Mr. Krusemark was out on leave. On his part, Complainant failed to communicate with his supervisors. Complainant did not meet with Mr. Krusemark as requested following the May Emails and did not take steps to clarify the situation after Ms. Hedrick's August 22, 2019 email.

Respondent addressed its role in the communication breakdown by paying Complainant 35.5 hours of administrative leave for time that he did not work in the month of September. Respondent also considered Complainant's position that he was suspended through the grievance process and provided a Step 1 and Step II grievance decision.

Even if the ALJ concluded there was disciplinary action, there is little more relief that Complainant could be provided. There is no disciplinary action to remove from Complainant's personnel file because there was no discipline administered pursuant to the State Personnel

System. The only possible remedy to Complainant at this juncture is additional pay for hours he may have worked between August 22, 2019 and October 7, 2019. That was the time period addressed in the grievance, and on October 7, 2019 Complainant received confirmation from Mr. Krusemark and Ms. Hedrick that he could work. Respondent has already paid Complainant for shifts not worked in that time period. The Board does not have authority to levy a fine against Respondent or award Complainant compensation for time he spent working on this matter.

The ALJ is not convinced that Mr. Krusemark and Ms. Hedrick indicating Complainant was clear or cleared to work demonstrates Complainant was at some point not allowed to work. The evidence indicates Complainant specifically asked if he was clear to work, and both responded in the affirmative. Their affirmative responses only indicate he was allowed to work, not that he was, at some point, disallowed from working. The ALJ is also not convinced that Mr. Krusemark's mid-October email that referenced disciplinary suspension demonstrates that Ms. Hedrick and Mr. Krusemark prevented Complainant from working. The email was sent after Complainant began to allege he had been suspended from work. Additionally, neither Mr. Krusemark nor Ms. Hedrick took action to have Complainant removed from shifts he had signed up to work. Complainant was only removed from shifts at his own request.

Ms. Mauck-Keelick testified Mr. Krusemark told her Complainant could not work, and that she would not have assigned Complainant any shifts had he signed up to work. Ms. Mauck-Keelick's testimony is not credible as her September 3, 2019 email directly contradicts her testimony. Ms. Mauck-Keelick alerted Ms. Hedrick that Complainant was removing himself from shifts and it had been happening with frequency. First, the email indicates Ms. Mauck-Keelick had concern about Complainant removing himself from shifts. If she had been told Complainant could not work, she would not need to alert Ms. Hedrick to the fact that he was removing himself from shifts. Second, the email demonstrates that Ms. Mauck-Keelick did not prevent Complainant from work and that Complainant was removed from shifts at his own request.

Respondent did not discipline Complainant. Even if the ALJ concluded there was discipline, there is no disciplinary action to remove from Complainant's personnel file and Complainant has already received some compensation for time not worked in the time period in question. A hearing would not be warranted if it was found Complainant had been disciplined by Respondent.

Pursuant to Board Rule 8-48, the Board has jurisdiction to review "any action that adversely affects a certified employee's current base pay, status, or tenure" and discipline of employees. As there was no discipline, the Board does not have jurisdiction to review whether Respondent's actions were arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent did not discipline Complainant. Because Respondent did not discipline Complainant, the Board does not have jurisdiction to review whether Respondent's actions were arbitrary, capricious, or contrary to rule or law pursuant to Board Rule 8-48. Therefore, this matter is dismissed from the Board with prejudice.

Dated this 25th day
of June, 2020,
at Denver, Colorado.

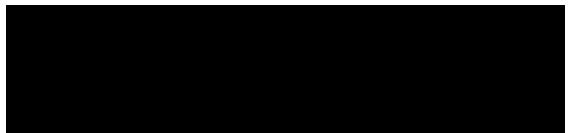
/s/ K. McCabe

K. McCabe
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 26 day of June, 2020, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and attached **NOTICE OF APPEAL RIGHTS**, addressed as follows:

Michael Dublinski


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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 8-62, 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 8-65, 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 8-63, 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 8-64, 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 8-67, 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 8-70, 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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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 8-60, 4 CCR 801.

APPENDIX A

EXHIBITS

Complainant's Exhibits Admitted:

A, E, G, H, I, J, K, L, M

Complainant's Exhibits Offered But Not Admitted:

B, C

Respondent's Exhibits Admitted:

1, 5, 7, 8, 9, 10, 15, 16, 17, 22, 23, 29, 30, 31, 32

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

The following is a list of witnesses who testified at hearing:

Kristina Mauck-Keelick

Michael Dublinski

Dan Krusemark

Ellen "Sissy" Hedrick

Thomas McGann