

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENISE SANDERS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter came on for hearing on August 29, 2002 before Administrative Law Judge Mary S. McClatchey. Denise Sanders represented herself. Assistant Attorney General Danielle Moore represented Respondent Department of Corrections ("DOC").

Amended portions appear in bold.

MATTER APPEALED

Complainant appeals her termination during probationary employment. For the reasons set forth herein, Respondent's action is affirmed.

ISSUES

1. Whether the action of Respondent was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. Prison guards possess extraordinary power in prisons. They operate without on-site supervision. This unsupervised power can be easily abused. Examples of the misuse of authority in the prison context include the following: losing a key and failing to disclose it to a supervisor, thereby placing the security of the prison and community in jeopardy; lying on a count sheet, thereby increasing the potential for an escape; using excessive force against an inmate and lying about it on the use of force report; lying in an

incident report about misconduct by a prisoner whom the guard dislikes or fears.

2. Prison guards who lack honesty also subject themselves to manipulation by prisoners, which also poses a security risk. By example, if an inmate catches a guard in even a small lie, the inmate can blackmail the guard with that information. Blackmailing takes many forms in prisons, including special favors such as overlooking rule infractions, allowing inmates to obtain cigarettes, and bringing contraband into the prison. Once one prisoner becomes aware that a guard is "corruptible," other prisoners expect the same favors and develop a lack of respect for and trust in the guard. Once inmates lose trust in a guard, the system breaks down.
3. In an attempt to maximize the level of honesty and integrity in the prison guards it hires, and to assure that employees have appropriate personal and professional characteristics for prison duty, DOC has developed an in-depth pre-employment screening process for hiring entry-level Correctional Officers. DOC has dedicated an entire unit to this process, the Pre-Employment Unit. The unit administers all aspects of DOC's Administrative Regulation ("AR") 1450-29, Pre-Employment/Background Investigation.
4. The pre-employment process usually takes at least two years. It consists roughly of the following parts:
 - A. initial application form and pre-employment supplemental application(s);
 - B. integrity interview;
 - C. thorough background investigation, including an ongoing search of criminal background history, driving records, and employment records.
5. In the event an applicant fails to disclose information to DOC during the pre-employment process, DOC's policy is to terminate the employee (if already offered a position) or to not offer a position to the applicant.
6. There are no exceptions to this policy. DOC has learned through experience that a nondisclosure during the pre-employment process is an indicator of later nondisclosure on the job. Nondisclosure is a red flag for the character flaw of lack of honesty and integrity. As discussed above, these character traits are central to the successful functioning and security of the prison system.

Complainant's Application and Pre-employment Process

7. On November 11, 1997, Complainant filed an application for employment at DOC.
8. On June 3, 1998, Complainant participated in an integrity interview with an investigator from DOC. This investigator made it clear to Complainant that the background investigation would be thorough and ongoing, and that she was under a continuing duty to disclose all contacts with law enforcement.
9. On September 16, 2000, Complainant submitted a Pre-Employment Supplemental Application. Question Number 18 stated,

"CRIMINAL HISTORY: A criminal record in itself does not necessarily make you ineligible, however false information can be grounds for ineligibility or termination. **List all charges, regardless of when they occurred, to include any court appearances, misdemeanors, traffic offenses, juvenile offenses and expunged or dismissed records.** A. Have you ever been arrested, issued a summons, cited, held, detained, charged or convicted by Federal, State, or other law enforcement authorities of a felony or misdemeanor offense regardless of whether the charge was dropped, dismissed, plea bargained or you were found not guilty?" (Emphasis in original)
10. On this supplemental application, Complainant disclosed an arrest in February 2000 for "Domestic Violence/Harassment." She attached the motion to dismiss the charge filed by the District Attorney's office. The charge had been dismissed shortly after it was brought for insufficient evidence.
11. In June 2001, Complainant was arrested again for domestic violence. The matter was dismissed shortly thereafter, for insufficient evidence.
12. Complainant knew that she was under a continuing duty to disclose this arrest to DOC, but failed to do so.
13. The failure to disclose an arrest for domestic violence constitutes a material omission of fact under Question #18, above, and thereby constitutes "false information" upon which DOC relied in offering Complainant the Correctional Officer I position.
14. In January **2002**, a representative for DOC called Complainant to offer her the position of Correctional Officer I. Complainant accepted. She did not disclose her June 2001 arrest for domestic violence at that time.
15. On February 1, **2002**, Complainant commenced probationary employment as

a Correctional Officer I, and enrolled in the training academy.

16. On February 5, **2002**, Cherrie Greco, Director of the Division of Training, DOC, presented an all-day class in Ethics, Integrity, and Professionalism. In the course of this training, she reiterated the new employees' duty to disclose all prior arrests, and that failure to do so could result in immediate termination.
17. Complainant did not disclose her June 2001 arrest after this training session.
18. In mid to late February, the training academy offered firearms training. Complainant and the other participants were required to fill out a form concerning arrests or convictions for domestic violence. Complainant informed her instructor that she could not sign the document, because she had two arrests for domestic violence. A staff person for DOC told her to obtain the dismissal order for the second arrest, which she did. Thereafter, she resumed part of her training at the academy.
19. When the Pre-Employment Unit learned of the nondisclosure, it scheduled a telephone conference with Complainant, Don Cesare, an investigator for the Unit who conducts integrity interviews, and Frances Massingill, Human Resources Manager, Office of Human Resources, DOC.
20. During the telephone conference, Massingill asked Complainant, "Why didn't you make this disclosure?" Complainant responded, "I knew I had to do it, I just didn't do it." Complainant was unable to explain why she had not made the disclosure. She discussed her divorce from her abusive husband. Cesare followed up, asking, "Did you realize this would affect your employment?" Complainant responded that she did.
21. After the conference call, Massingill and Cesare reported out to Madeline Zabell, Director of Human Resources for DOC. All three determined that termination of employment was the only available alternative, per agency policy. Complainant had been aware of the disclosure requirement, but had not been able to summon the strength to make the disclosure.
22. A routine fingerprint run on Complainant also revealed the June 2001 domestic violence arrest on February 20, **2002**. Even if Complainant had not disclosed it during the training academy, DOC would have confronted her with it during the same week.
23. Complainant was a very sympathetic witness. She was able to somehow summon up the courage to leave an abusive marriage, go back to school in criminal justice, and move her life forward. These accomplishments

demonstrate true strengths, for which she should be recognized.

24. Complainant testified that she "never thought" about the need to disclose the arrest to DOC, did not withhold information intentionally, did not lie, and that she made a mistake for which she is sorry.
25. The weight of the evidence, however, demonstrates that Complainant did know she had to disclose the arrest, but chose instead to hope that DOC would never find out about it. Complainant never rebutted Don Cesare's testimony that during the telephone conference, Complainant admitted she knew she had to disclose the arrest, but had not done so. When asked to explain why she had never disclosed it, she was unable to answer the question. This is just the type of nondisclosure that mandates automatic termination under DOC policy.
26. Zabell concluded that Complainant's nondisclosure constituted a deceit and demonstrated a lack of trustworthiness. On February 26, 2002, Zabell sent a termination letter to Complainant for failure to disclose an important material fact. She noted, "I find it important to add that you had just participated in Ethics training on February 5, 2002 and were given at least three opportunities to disclose this information and did not."

DISCUSSION

Probationary employees have no right to appeal a termination for unsatisfactory performance during the probationary period. Colo. Const. art. XII, Section 13(10); section 24-50-125(5), C.R.S. However, where, as here, the employee is terminated not for unsatisfactory performance, but for other, pre-employment activity that could subject them to disciplinary action, the employee is entitled to a hearing. *Maurello v. Colorado Dept. of Corrections*, 804 P.2d 280 (Colo.App. 1990).

As a probationary employee, Complainant lacks a legally protected interest in her position. *Lucero v. Department of Institutions, Division of Developmental Disabilities*, 942 P. 2d 1246, 1249 (Colo.App. 1996). Therefore, Complainant bears the burden of proving that Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.

In Colorado, arbitrary and capricious agency action is defined 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.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant has failed to demonstrate that Respondent acted in a manner that was arbitrary and capricious. The evidence supported DOC's institutional need for an in-depth pre-employment screening process designed to identify essential character traits of applicants. Honesty and integrity are essential character traits for the Correctional Officer I position. The un rebutted evidence demonstrated that nondisclosure during the pre-employment process is an indicator of nondisclosure on the job. Therefore, the zero tolerance policy mandating termination for nondisclosure is reasonable: it is directly related to DOC's mission of maintaining safe and secure prison facilities.

While Complainant's situation is a highly sympathetic one, she gave DOC no reason to deviate from its policy. She has failed to meet her burden of proving that its action was arbitrary, capricious, or contrary to rule or law.

CONCLUSIONS OF LAW

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

INITIAL DECISION

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
October, 2002, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1400
Denver, Colorado 80203

CERTIFICATE OF MAILING

This is to certify that on the ____ day of October, 2002, I placed true copies of the foregoing **AMENDED INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Denise Sanders
1002 Ussie Avenue, Apt. B
Canon City, Colorado 81212

and in the interagency mail, addressed as follows:

Danielle Moore
Assistant Attorney General
Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
