

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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STEVEN DEAN PONTIUS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

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This matter was heard by Administrative Law Judge Robert W. Thompson, Jr. on March 12-13, 2002. Respondent was represented by Joseph F. Haughain, Assistant Attorney General. Complainant appeared in-person and was represented by Donita B. Rolle-Jackson, Attorney at Law.

**MATTER APPEALED**

Complainant appeals his disciplinary demotion. For the reasons set forth below, respondent's action is affirmed.

**ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of available alternatives.

## **FINDINGS OF FACT**

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Steven Dean Pontius, worked for the Department of Corrections (DOC) for fifteen and one-half years. Starting as a Correctional Officer (CO) I, he was promoted through the ranks and became a Captain (CO IV) in 1990 or 1991. He was demoted to Lieutenant (CO III) effective March 1, 2001.
2. Pontius was the shift commander of the graveyard shift at the San Carlos Correctional Facility (SCCF) in Pueblo. SCCF is a special needs facility and maintains the highest security level (Level 5). Inmates are housed at SCCF because they suffer from mental illness.
3. As graveyard shift commander, Pontius was the highest-ranking officer on duty and was expected to be a role model for the other officers.
4. The facility warden works the day shift. In the warden's absence, Pontius had the ultimate authority over the entire facility.
5. As shift commander, Pontius was responsible for the post and duty assignments of the correctional officers.
6. In order to carry out his duties, Pontius was expected to remain at his post. The only legitimate reason for him to visit another facility was to

provide emergency assistance to the other facility, such as to transport an inmate to the infirmary or help break up a fight.

7. When he went to another facility, Pontius was supposed to e-mail his supervisor, Major Wager, who worked days, to keep the major informed of the goings-on.
8. Smoking is prohibited on DOC property.
9. The accepted DOC practice is for an officer to use a state vehicle when on state business.
10. The warden's office is a restricted-key office and is off-limits to everyone, including shift commanders.
11. It is DOC policy for all officers to sign in and out every time they enter and leave a correctional facility, for the purpose of accountability. The officer should note why he is coming into the facility and where he is going. It is important that the whereabouts of each officer be known at all times in order to account for such situations as an officer being injured or held hostage.
12. During the pertinent time period, a Novel computer program was installed in DOC facilities. By virtue of the Novel system, a computer message could be sent from anyone's computer that was left on when the person was not present. A Novel message could not be printed and was not trackable, except to the terminal from which it was sent. This system was misused by correctional officers who would send a joke message from someone else's terminal and avoid being identified as the sender. The message was not entered into the data bank.

13. Pontius was one of those who sent Novel messages from someone else's computer.
14. Sometime prior to November 2000, Pontius entered the warden's office on at least two occasions to send humorous Novel messages from the warden's computer to other staff members, with the intent that the receiver of the message would think that it came from the warden. Pontius bragged to another officer about doing this.
15. On one night during late November 2000, Pontius and Officer Joseph Perdue (CO I) went from SCCF to the Pueblo Minimum Center (PMC), across the street from SCCF, in Pontius' personal vehicle to visit with Officer Julie Figueroa (CO I). Pontius and Perdue smoked cigarettes enroute. They were at PMC for fifteen to twenty minutes. This was an unannounced visit with no official purpose.
16. While visiting with Figueroa, but while she had stepped out of the room, Pontius answered Figueroa's telephone. The graveyard shift commander at the Youth Offender Service (YOS) facility wished to talk to Figueroa about a Novel message, which he had just received from Figueroa's terminal. Figueroa had not sent the message. Pontius, along with Perdue, transported Figueroa to YOS, a distance of approximately one mile, where they socialized with the YOS shift commander for about 45 minutes.
17. On their return to PMC from YOS, Pontius left the grounds for fifteen to twenty minutes in order to smoke. Pontius had done this more than once in the past in order to get around the DOC smoking prohibition.
18. In this general time period, Pontius went from SCCF to PMC during the graveyard shift to visit with Officer Figueroa four or five times. He went

from SCCF to YOS to visit with the YOS shift commander four or five times. These social visits lasted for about a half hour. He always took one or two correctional officers with him, usually Officer Perdue. He always drove his personal vehicle and he and his companion always smoked on the way.

19. Pontius and Perdue were personal friends, referring to each other as “Son” and “Dad,” respectively.
20. There were numerous times when Pontius did not sign in and out when he went from one facility to another during his shift. His appointing authority would ultimately conclude from this that Pontius did not want to leave a paper trail of where he had been.
21. Pontius did not notify his supervisor by e-mail or otherwise of his having left SCCF while on duty. He neither sought nor received authorization to leave the facility to which he was assigned.
22. Pontius’ activities came to light during an investigation of a romantic relationship between Figueroa and a lieutenant and Figueroa’s claim of sexual harassment, not relevant to this case. He was interviewed by DOC investigators on January 2, 2001. When Warden Mary Smith, the appointing authority, was informed by investigators in mid-January 2001 that Pontius might have engaged in willful misconduct, she gave written notice to Pontius of a Rule R-6-10 meeting pertaining to “conduct that could be considered unprofessional and a computer security breach at SCCF/PMC.” The notice further advised Pontius that he may have “knowingly engaged in behavior in violation of agency rules” and “in violation of AR 1450-1, Staff Code of Conduct and AR 1200-6, Computer Security.” Smith enclosed with the notice a copy of ARs 1450-1 and 1200-6.

23. The predisciplinary meeting was held on February 5, 2001. At the meeting, attended by Pontius and a representative, Smith delineated the potential reasons for discipline as: breach of computer security by entering the warden's office to send Novel messages from the warden's computer, abandoning his post and being absent from his facility in order to socialize at PMC and YOS, allowing for smoke breaks while on duty, and not signing in and out at PMC and YOS. Complainant was given an opportunity to fully respond to each reason.
24. Smith determined that Pontius' acts constituted conduct unbecoming an officer, willful misconduct, willful violation of security systems, and abandonment of post. Specifically, she concluded that he had violated DOC Administrative Regulation (AR) 1450-1 (Staff Code of Conduct), AR 100-4 (Tobacco Use in Buildings and Vehicles), and AR 1200-6 (Computer Security). She took into account her perception that he was a role model for all the other officers since he was the highest-ranking officer in the facility on the graveyard shift, as well as the fact that he always took a correctional officer with him on his unnecessary trips to other facilities thus causing a further security breach.
25. Pontius had received no prior corrective or disciplinary actions.
26. Considering the combination of Pontius' violation of several DOC policies too serious for a corrective action, Smith imposed the discipline of a one-step reduction in rank, from Captain (CO IV) to Lieutenant (CO III), effective March 1, 2001.
27. At an undetermined point in time, complainant was dismissed from DOC due to his exhaustion of leave and inability to return to work. He is now unemployed.

## DISCUSSION

### I.

Complainant first argues that the credible evidence is insufficient to sustain a conclusion that he willfully violated DOC regulations. He next contends, without citation to legal authority, that he was denied due process at the predisciplinary meeting because of inadequate written notice of all the subjects to be covered at the R-6-10 meeting. Finally, complainant asserts that respondent violated the concept of progressive discipline by imposing a disciplinary action before the issuance of a corrective action. Contending that respondent's action was arbitrary, capricious or contrary to rule or law, he seeks reinstatement to the rank of Captain, out-of-pocket expenses and attorney fees.

### II.

Although the letter notifying complainant of the R-6-10 meeting could have been more specific in identifying the particular subject areas, the appointing authority referenced and enclosed a copy of the Staff Code of Conduct as well as the regulation on computer security. At the meeting, the appointing authority delineated all of the reasons for potential discipline and provided complainant the opportunity to add to, refute or explain the information that had come to her attention. She thus complied fully with Rule R-6-10, 4 CCR 801.

Complainant was not denied due process at the R-6-10 meeting. Predisciplinary meetings are informal and are not of record; an appointing authority is not required to present any evidence against the employee. *Kinchen v. Dep't. of Institutions*, 867 P.2d 8 (Colo. App. 1993), *aff'd*, *Dep't. of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This process is sustainable because complainant

had the opportunity for a post-disciplinary evidentiary hearing before a neutral third-party. *Kinchen v. Dep't. of Institutions, supra* at 11.

An appointing authority has the power to hire employees and evaluate job performance and to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that she had before her and appropriately determined that a demotion by one rank was justified and in the best interests of the agency. The appointing authority did not abuse her discretion. See Rules R-6-5, R-6-6, R-6-8, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801.

Substantial credible evidence supports the findings and conclusions of the appointing authority. Respondent's action was not arbitrary, capricious or contrary to rule or law. Conclusively, respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. See *Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

### III.

Rule R-6-2, 4 CCR 801, which incorporates the concept of progressive discipline, provides that an appointing authority may properly impose disciplinary action, up to and including immediate termination, if it is determined that an employee's conduct was so flagrant or serious as to justify the action taken. Though not binding precedent, the reasoning of the court of appeals with respect to the definition of "flagrant or serious" in *Gonzales v. Dep't of Corrections*, Case No. 00CA1975 (Colo. App. 2001) (NSOP), is hereby adopted and applied to the issue in this case. In *Gonzales*, the court said at 5:

To determine whether conduct was serious or flagrant we look to the ordinary meaning of those words. "Serious" means important or significant. See

Webster's Third New International Dictionary 2073  
(1986). "Flagrant" is defined as an act that  
purposefully violates normal standards or good sense.  
See Webster's, supra at 862.

Here, the record establishes that complainant intentionally left his post for no official purpose and without authorization or accounting for his whereabouts. He always took another correctional officer with him, who presumably also left his post. This breach of security was complicated by the fact that complainant was the person in charge of the whole facility. He knowingly placed himself above those under his supervision, who were not allowed to smoke or socialize at other DOC facilities, thus violating his duty as a role model to uphold DOC policies and regulations. He purposefully violated normal standards as well as the dictates of good sense.

This contravention of protocol supports a conclusion that complainant's "willful misconduct" was serious and flagrant and justified a reduction in rank.

#### IV.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. See Rule R-8-38, 4 CCR 801.

## CONCLUSIONS OF LAW

1. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of available alternatives.
3. Neither party is entitled to an award of attorney fees and costs.

## ORDER

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

DATED this \_\_\_\_ day  
of April, 2002, at  
Denver, Colorado.

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Robert W. Thompson, Jr.  
Administrative Law Judge

## 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 SERVICE

This is to certify that on the \_\_\_\_ day of April, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Donita B. Rolle-Jackson  
Attorney at Law  
28 East Willamette  
Colorado Springs, CO 80903

And through interagency mail, to:

Joseph F. Haughain  
Assistant Attorney General  
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