

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LONNIE FAILS,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
Respondent.

THIS MATTER came on for hearing on January 11, 2005, in the offices of the State Personnel Board, before Administrative Law Judge Mary S. McClatchey. Complainant appeared through Michael J. O'Malley, Esquire. Respondent appeared through Rick Dindinger, Assistant Attorney General.

MATTER APPEALED

Complainant, Lonnie Fails ("Fails" or "Complainant") appeals his disciplinary fine in the amount of \$900.00 by Respondent, Department of Corrections ("DOC" or "Respondent"). Complainants seek rescission of the disciplinary fine and an award of attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant worked at DOC's San Carlos Correctional Facility (SCCF) as a Correctional Officer (CO) II, Sergeant.
2. SCCF houses mentally ill offenders. CO's assigned to SCCF receive special training in how to understand and effectively handle mentally ill offenders. The job requires more patience than customary CO positions.
3. Staff at SCFF are trained to use verbal judo to de-escalate situations that arise with the mentally ill offenders. One tool of de-escalation is to avoid repetition of the same statement.

Unit 4; Day Hall

4. Complainant worked the swing shift on Unit 4. The first task of the shift is laundry. Once the laundry is completed, staff are available to staff Day Hall.
5. Day Hall is the only period of the day during which the inmates are permitted to leave their cells to have unstructured time in a common area. They can watch television, read, play games, or socialize. It is an important part of the daily routine for the SCCF inmates.
6. Unit 4 has an intercom system by which correctional staff can communicate directly with the inmates in their cells. In order to talk directly to an inmate in his cell, the staff member turns on the intercom, and then controls the volume level with a dial. Inmates are also able to use this intercom system to call correctional staff with questions, concerns, or requests for assistance.
7. Prior to Day Hall, the CO's contact each inmate over the intercom to confirm whether he will be participating on that day.
8. As the presiding Sergeant during swing shift on Unit 4, Fails was the supervisor and lead worker over several CO I's, including Gilbert McGregor, Clara Aguilar, and Norbert Kaussen.
9. Complainant gave these subordinate officers direct orders and played a significant role in evaluating their performance.

Sgt. Fails' Misconduct

10. All three of these subordinate officers saw Sgt. Fails engage in conduct they believed was harassing and unprofessional towards the inmates. McGregor and Kaussen made comments directly to Fails about their concerns, but Fails disregarded their input by walking away or failing to respond.
11. The subordinates were required by DOC policy to write incident reports on officer misconduct within 24 hours of the incidents they witnessed. None of them filed any incident reports after seeing Sgt. Fails engage in inmate harassment, because they feared retaliation by Fails.
12. During the summer of 2003, Sergeant Fails usually ordered his staff not to start the laundry at the beginning of the shift, but instead to wait forty-five minutes to an hour. During this period, he rested. Fails told his officers "not to turn this into a job," and explained, "This is the time to take it easy," because the lieutenants and captains would not conduct rounds during that time.
13. None of Fails' subordinates agreed with this policy of delaying the laundry, as it had the effect of delaying and sometimes eliminating Day Hall.

14. McGregor became so upset with the practice of delaying the laundry that he started to do the laundry by himself. When he did this, Sgt. Fails became irritated, stating, ““If you do this you’re on your own,” indicating that he still would not work during that period of time. Fails would then walk off the unit for a break lasting between ten minutes and an hour.
15. When any correctional officer assigned to Unit 4, including Fails, is off the unit, the inmates must be locked down.
16. Unit 4 is an admissions unit. When inmates are admitted, the entire unit must be locked down. Therefore, if Day Hall starts late and a new prisoner is admitted, Day Hall is cut short because of the lockdown.
17. Unit 4 also routinely receives calls for back-up staff from other units. When this occurs, the unit has to be locked down and Day Hall is cut short.
18. By refusing to work during the first forty-five minutes of his shift, Fails caused Day Halls to be cut short on a regular basis. There have been occasions where his conduct caused there to be no Day Hall at all.
19. When Sgt. Fails called inmates on the intercom to see if they wanted to participate in Day Hall, he often spoke in such a soft whisper that the inmates could not hear him. Then, after the inmates failed to respond, he deemed the inmates to have waived participation in Day Hall.
20. Sgt. Fails at times intentionally agitated inmates by either repeatedly visiting them in their cells and making statements to get them upset, or by intervening in conflicts that had already been resolved between other correctional staff and the inmates.
21. On one occasion in July or August 2003, Fails unnecessarily tormented one of the inmates. The inmate had expressed frustration as to how the laundry was done. McGregor had settled the issue with the inmate. Fails then got on the intercom to the inmate’s room and repeated, “that’s the way we always do it,” until the inmate became so agitated he started to yell into the intercom very loudly. McGregor reported that this repetition went on for a long time, in violation of the de-escalation tactics Fails was required to utilize with the mentally impaired inmates.
22. On another occasion in July or August 2003, the day after a conflict between an inmate and McGregor, Fails called the inmate on the intercom and informed him that the inmate had “made him look bad.” McGregor reported in a written statement, “By the end of the conversation [the] inmate was banging the cell door, very upset.” McGregor heard a crash and a bang. Fails had caused this inmate to become extremely upset about an issue he had no reason to involve himself with, again in violation of de-escalation tactics.

23. McGregor never confronted Fails or wrote an incident report about these behaviors because Fails was his direct supervisor and he believed Fails could make the job extremely unpleasant for him.

J.D. Incident

24. CO Clara Aguilar, another of Fails' subordinates, also witnessed troubling events on the unit. On one occasion in mid-2003, Sgt. Fails made repeated visits to the cell of inmate J.D., who had been released from Administrative Segregation the day before. Sgt. Fails' repeated, taunting comments to J.D. upset him to the point he covered up the window to his cell, so he would not have to see or hear Fails.
25. Fails ordered J.D. to take down the cover on his cell window. J.D. refused. Sgt. Fails then ordered that J.D. be placed in four point holds; security staff came, placed him in four-point holds, and took him to the "four point room," where he remained for several hours. Fails continued to visit J.D. in this room in order to taunt him.
26. After J.D. returned to his cell, Sgt. Fails snickered about having humiliated J.D. CO Aguilar witnessed this and found it to be very upsetting and unfair to the inmate. She did not report it because she did not want to get Sgt. Fails in trouble and feared he would retaliate against her.

Report to Lt. Jeffries

27. On August 19, 2003, Lieutenant Jeffries, Fails' supervisor, walked through Unit 4 and stopped to talk informally with McGregor. He asked McGregor how things were going. McGregor, who had bottled up his frustrations with Fails' management style and his mistreatment of the inmates for a long time, discussed his concerns about Fails.
28. Jeffries then invited McGregor into his office to have a more lengthy conversation. Jeffries asked McGregor to write up a report on the incidents he had personally witnessed. He did so on August 19, relating events that had occurred in the past four to six week period, during July and the first part of August 2003.
29. Jeffries inquired with the other CO's who worked with Fails on swing shift, and found them to have the exact same concerns as McGregor. Jeffries asked Aguilar and Kaussen to write down their concerns; they did so.
30. Major Bobbie Lynn, Custody/Control Manager at SCCF, took over the investigation into the Fails matter. He interviewed several of the inmates victimized by Fails' conduct and found their statements to corroborate the correctional officers' statements.
31. Major Lynn decided to convene a meeting with Sgt. Fails and other SCCF staff not in his chain of command, in order to assure objectivity.

August 26, 2003 Meeting

32. On August 26, 2003, Major Lynn, J. Green, a Nurse IV, and Lorraine Diaz, Clinical Team Leader, met with Complainant to discuss the allegations of misconduct. They asked Fails specific questions about whether he had ever engaged in any of the following acts: “1) shorting inmate dayhalls; 2) whispering or speaking in a low voice over the intercom asking inmates if they wanted their dayhall and if the inmates didn’t respond quickly he would mark the inmate as refusing, 3) or start dayhalls late which cuts into length or time of dayhall.”
33. Fails denied all of the conduct alleged.

Sgt. Fails’ Grievance Against Accusers

34. On September 8, 2003, Sgt. Fails filed a grievance against Lynn, L. Diaz, and J. Green, all of whom had participated in the August 26, 2003 meeting with him concerning the allegations of misconduct. He requested that Major Lynn be reprimanded; that L. Diaz and J. Green be demoted; and that he [Fails] be given three days of administrative leave for “the aggravation they have caused me.” The subject of the grievance was “false allegations, accusations directed at me in meeting of 8/26/03.”
35. On September 15, 2003, Sgt. Fails met with Warden Leyba to discuss his grievance.
36. On September 17, 2003, Warden Leyba sent Fails a final grievance decision, denying the grievance. The letter noted that at the September 15, 2003 meeting, Fails had modified the basis of his grievance. He had objected only to the manner in which he was spoken to at the August 26, 2003 meeting. Leyba noted that at the September 15 meeting, Fails and his union representative had agreed that the Staff Code of Conduct required all DOC staff to report misconduct, and required Lynn, Diaz, and Green to investigate the allegations.
37. Fails appealed the denial of his grievance.

Lynn Investigation

38. Major Lynn interviewed two inmates whom the CO’s indicated had been the subject of Sgt. Fails’ mistreatment. J.D. confirmed the report of Sgt. Fails having tormented him to the point he was placed in four point holds. The other inmate corroborated staff’s allegations that Fails had made threats to him over the intercom.
39. On September 8, 2003, Major Lynn wrote a memo to SCCF Warden Ron Leyba regarding the investigation and its preliminary results. He informed the warden that he and other staff had been researching and interviewing staff and inmates regarding the allegations against Fails, and that based on the consistency of the reports, he believed there was some validity to the allegations. He stated in part:

- “The harassment to the offenders on the intercom seems to be prevalent in all areas stemming all the way from mild verbal taunting to leading an offender to

physical restraint from other staff to control him because of Sgt. Fails actions. As related in the reports from staff another consistency seems to be in the area of day halls, starting them late, calling inmates in a low voice so they can't hear and miss day hall and conveniently being off the unit when day hall should start.”

- “It is my finding based upon documentation, interviews and research that Sgt. Lonnie Fails has misrepresented his rank through abuse of authority and misconduct to offenders while he is on duty. I respectfully submit this to your office for review and recommendation on how you would like to proceed.”

40. Warden Leyba was particularly concerned that the alleged violations had been occurring for a long period of time and had been unreported. He therefore sought to collect as much information as possible. He elected not to inform Complainant of the investigation in order to assure that nothing would interfere, and to reassign him to the Security Unit at SCCF pending the investigation.
41. On September 22, 2003, Leyba requested that the DOC Inspector General's office investigate the allegations of misconduct by Complainant.
42. The IG's office inadvertently failed to investigate the case promptly. Warden Leyba had to call the IG's office several times in order to get the investigation completed.
43. On April 13, 2004, the IG completed its investigation. The 39-page report contains witness statements with great detail concerning the conduct contained in the Findings of Fact above.

Pre-disciplinary meeting

44. On May 3, 2004, Warden Leyba sent Complainant a notice of a pre-disciplinary meeting pursuant to State Personnel Board Rule R-6-10. In the letter, the warden informed Complainant that the meeting concerned possible violations of the DOC Code of Conduct, AR 1450-1, and Offender Communications, AR 100-19.
45. Prior to the meeting, Leyba gave Complainant a copy of the 39-page IG report.
46. On June 30, 2003, Complainant attended the R-6-10 meeting with his union representative.
47. At the meeting, Warden Leyba read aloud several statements from the IG investigative report. With respect to the sources of the information, Leyba and the report disclosed that 1) co-workers had made the majority of statements regarding alleged misconduct; 2) Lt. Jeffries was the source of much of the information; 3) inmates, who were named, had corroborated those statements of staff; and 4) the prison psychologist, Dr. Craig Gillette, had provided further corroboration.

48. Warden Leyba read Complainant the following, "Dr. Craig Gillette, our Psychologist that treats offenders and sees them said that a number of inmates had reported to him that Sgt. Fails whispers things in the intercoms into their cells."
49. Leyba informed Complainant that Lt. Jeffries had stated that in less than one year period he received over ten inmate grievances complaining about him, and that most had centered around his whispering annoying, harassing, or threatening things into their intercoms or at their doors. He stated that Jeffries had reported that two separate inmates had complained to Jeffries that Fails had whispered, "you are a child molester," and "better watch what you eat" into their intercoms.
50. In the beginning of the meeting, Warden Leyba made it clear that it was Complainant's opportunity to provide any mitigating information he deemed appropriate to address the allegations of misconduct contained in the IG report.
51. Complainant's union representative stated at the outset that Complainant denied any and all allegations of misconduct.
52. Complainant repeatedly stated that it was hard for him to comment because he did not know what he was supposed to be talking about.
53. Warden Leyba asked, "So would you like to provide some mitigation or your side of the story before I decide if disciplinary action is warranted?"
54. Complainant responded, "Yes sir after I find out what I need to provide my side of the story to." At the time he made this statement he was holding the 39-page IG report of witness interviews containing specific allegations of misconduct. Complainant knew that the purpose of the meeting was to rebut or provide mitigating information regarding the contents of that report.
55. Complainant's union representative then stated that they would go through each allegation and "we will then address them one at a time."
56. Warden Leyba next read from the IG report twenty-nine specific allegations made by either SCCF staff or SCCF inmates or the prison psychologist. The conduct recited in Findings of Fact above were included in those allegations. There were numerous additional allegations by staff and inmates, that Complainant had taunted inmates by whispering statements to them, including threats, had kicked their cell doors, and had engaged in other hostile and inappropriate actions.
57. After this recitation of specific allegations had gone on at some length, Complainant's union representative interrupted and stated he preferred to have Complainant respond, because the allegations were similar in nature.
58. Complainant stated, regarding inmate J.D. and the other inmates who had complained about him, "if enforcing the [rules] and running the unit correctly agitates them then that is their

problem. It is not mine I did not write the rules. Inmates have to follow the rules on the unit and many of them don't appreciate that and sometimes convicts make up stories about people. Sometimes there is a ring of convicts that make up stories about people. It is common knowledge that they try to rid of the officer off the unit who is actually doing their job and keep the ones who aren't doing as well. I never agitated [J.D.] or any other inmate other than just enforcing the normal rules on the unit, if that agitates them that is not my problem."

59. He further stated," I have never agitated an inmate," "I have never harassed. I have treated inmates professionally and with respect. Just as I have always maintained."
60. Warden Leyba asked Complainant why staff would report this behavior. Complainant responded that he would have to know "which staff members. Is it cronies of my Lt. that he brings gifts to or is it the ones that work on your house over there and build sheds at your place. I don't know which ones you are talking about sir."
61. Warden Leyba was irritated by this statement, stating no staff had ever built a shed at his house. He then ended the meeting.

Disciplinary and Corrective Action

62. Warden Leyba considered Sgt. Fears' misconduct to have been egregious. He reviewed Fails' nine-year performance history at DOC and found nothing at all notable. He reviewed training records and confirmed that Fails had been trained in how to deal with the mentally ill population, including de-escalating difficult situations.
63. Warden Leyba felt that the misconduct of Complainant was so serious as to warrant termination. However, he gave great weight to Complainant's otherwise clean performance history as mitigation.
64. He decided to impose a disciplinary fine, corrective action, and to transfer Complainant away from the mentally ill prison population he had mistreated.
65. On July 7, 2004, Warden Leyba imposed corrective and disciplinary action consisting of a \$150.00 fine per month for six months. In addition, he reassigned Complainant to the Youthful Offender System.
66. Warden Leyba's letter concluded that Fails' conduct jeopardized the treatment and manageability of the inmate population, created liability for DOC, and had the potential to compromise the security and safety of the facility, staff, offenders, and public.
67. Leyba noted that as a Sergeant, Fails was expected to make sound decisions and act in such a way as to create harmony and respect with co-workers and offenders. Noting that he was expected to demonstrate leadership qualities, Warden Leyba stated, "Your behavior was not appropriate for any individual responsible for the safety and welfare of other persons (both staff and offenders) under your supervision. You are also expected to serve as an example of

acceptable social behavior for offenders, particularly troubling is the taunting and intimidation of the mentally ill offender is evidence of poor judgment on your part. Fellow staff reported your conduct, which only adds credibility that your inappropriate conduct did in fact occur.

68. Leyba stated, “Your actions have had an adverse affect on the morale of your co-workers as well on the integrity of the management of this facility.”

69. The Warden concluded that Fails had violated the following sections of the DOC Staff Code of Conduct:

- “Staff, offenders, and their families shall be treated professionally, regardless of . . . disabilities/handicaps or offenders’ criminal history,” and
- “Excessive physical force or verbal abuse of offenders by staff will not be permitted, nor will physical/verbal force be used beyond that necessary to control an offender or to enforce legitimate and legal commands.”

70. Warden Leyba also concluded that Fails had violated SCCF Implementation and Adjustment policy, AR 100-19, Staff and Offender Communication,” which states in part:

- “Staff when on duty, will be available to answer questions and deal with offender issues and will maintain positive, open and constructive communication with offenders; and
- “Communications with offenders should be made in a positive, fair, firm and consistent manner.”

71. Leyba also imposed a corrective action requiring Fails to write a two-page report on the provisions cited in the disciplinary action letter.

72. Warden Leyba concluded that Fails’ conduct and behavior constituted willful misconduct in violation of the agency rules cited, which affected his ability to perform his job in an acceptable manner. He concluded that the conduct was extremely serious in nature, as his continual teasing of inmates escalated to the point where other staff had to intervene, and could have led to inmate uprisings and altercations, facility disruptions, and staff and inmate injuries.

DISCUSSION

I. 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, §§ 13-15; § 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 R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

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 the agency's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS UPON WHICH DISCIPLINE WAS BASED

Complainant committed the acts upon which discipline was based. His actions constituted willful violations of the DOC Code of Conduct provisions cited in the disciplinary action letter, as well as the SCCF policy governing appropriate communication with the mentally ill inmates. Respondent has sustained its burden of proof.

III. THE DISCIPLINE IMPOSED WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, it must be determined 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; 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).

Warden Leyba found Complainant's conduct to be serious and flagrant enough to warrant termination. The only reason he imposed lesser discipline was his consideration of Complainant's lengthy career at DOC, which was devoid of previous performance issues. He gave that career history great weight in mitigation against the egregious nature of Complainant's misconduct.

Warden Leyba conducted a thorough investigation into the allegations against Complainant, and made sure to obtain all evidence relevant to his inquiry. He gave appropriate consideration to all evidence before him. His exercise of discretion in imposing discipline was far more lenient than it could have been in this situation. The action taken herein was not arbitrary or capricious.

Complainant argues that Respondent violated Rule R-6-10 in two fundamental ways. First, he claims that he was not given the source of the information against him. Board Rule R-6-10 requires,

“When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee the opportunity to respond. The purpose of the meeting is to exchange information before making a final decision.”

Warden Leyba gave Complainant a copy of the IG investigative report prior to the R-6-10 meeting. That report was the major source of information upon which discipline was imposed. The report contained statements of Lt. Jeffries, co-worker statements without attribution, names of inmates alleged to have been mistreated which corroborated the statements of Jeffries and co-workers, and the name of the prison psychologist who further corroborated the staff and inmate statements. Complainant knew who his co-workers were; he knew the source of the information. Under the circumstances here, Respondent met the requirements of R-6-10.

Complainant also contends that he had no opportunity to refute, deny, or explain his side of the story at the pre-disciplinary meeting. This contention is unsupported by the record. At that meeting, Warden Leyba asked Complainant at least twice to provide mitigation. Complainant’s union representative gave a general denial as to all allegations at the beginning of the meeting. Then, after Warden Leyba read twenty-nine specific allegations out of the IG report, Complainant denied all of the conduct alleged. He was given a full and fair opportunity to refute, deny, and provide mitigation at the meeting.

CONCLUSIONS OF LAW

- 1 Complainant committed the acts upon which discipline was based;
- 2 Respondent’s action was not arbitrary, capricious, or contrary to rule or law.

ORDER

The action of Respondent is affirmed. Complainant’s appeal is dismissed with prejudice.

DATED this ____ day
of **February 2005** at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the ____ day of **February 2005**, I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Michael J. O'Malley
1444 Stuart Street
Denver, Colorado 80204

And interagency mail to:

Rick Dindinger
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