# STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B184

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### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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ROBERT ELLSWORTH,

Complainant,

VS.

DEPARTMENT OF CORRECTIONS,
BUENA VISTA CORRECTIONAL FACILITY,

Respondent.

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The hearing in this matter was held on April 14, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Ceri Williams, assistant attorney general. Complainant, Robert Ellsworth, was present at the hearing and represented by Thomas Callison, attorney at law.

Respondent called the following employees of the Department of Corrections (DOC) to testify at hearing: Mike Perry; Mike Taylor; Rae Lewis; Bill Mansheim; Jerry McFarland; Bryan Spence; and Gary Neet.

Complainant testified in his own behalf and called Jason Archibeque to testify at hearing. Jason Archibeque is an inmate at the Larimer County Detention Center. He testified at hearing via telephone.

Complainant's exhibit D was admitted into evidence without objection. Respondent's exhibits 10 through 12 were admitted into evidence without objection. Respondent's exhibits 7, 13, and 13a were admitted into evidence over objection. The parties stipulated to the admission of respondent's exhibits 1 through 6, 8, and 9 and complainant's exhibit A.

# MATTER APPEALED

Complainant appeals the termination of his employment with the Department of Corrections.

### **ISSUES**

- 1. Whether complainant engaged in the conduct for which discipline was imposed.
- 2. Whether the conduct proven to have occurred constitutes wilful misconduct in violation of State Personnel Board Rules and DOC Administrative Regulations 1450-1 and 1450-28.1.
- 3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.
- 4. Whether either party is entitled to an award of attorney fees and costs.

## PRELIMINARY MATTERS

- 1. Complainant's request to sequester the witnesses from the hearing was granted.
- 2. Complainant's request to take the telephone testimony of Jason Archibeque was granted over respondent's objection.
- 3. Respondent's exhibit 7, prepared by CID investigator Larry Rand, is an investigative report of incidents which gave rise to the disciplinary action in this matter. Exhibit 7 was admitted into evidence over complainant's objection for the limited purpose of establishing the information made available to the appointing authority which cause him to initiate the R8-3-3 meeting.

## FINDINGS OF ACT

- 1. Robert Ellsworth (Ellsworth), the complainant, was employed by DOC as a correctional/security services officer from May 1, 1991, to May 28, 1996, when his employment was terminated for wilful misconduct and violation of administrative regulations. During Ellsworth's employment with DOC, he worked at Buena Vista Correction Facility at the Colorado Corrections Alternative Program (boot camp). Ellsworth worked under the supervision of Major Mike Perry, the director of the boot camp. The delegated appointing authority for Ellsworth's position was Gary Neet, superintendent of Buena Vista Correctional Facility.
- 2. The boot camp is operated separate from the Buena Vista Correctional Facility. It is a special program created by DOC to

reduce prison overcrowding. Inmates identified as candidates for the program are eligible for reduction of their sentences following successful completion of the program.

- 3. Three hundred inmates per year are incarcerated at the boot camp. The boot camp receives 30 to 45 new inmates each month. Correctional officers at DOC receive extensive training prior to their assignment to a correctional facility. In addition, officers assigned to the boot camp receive on the job training. Officers are eligible for additional training for boot camp following successful service in the program for a one year period. Training is then received at a U.S. military installation at Fort McCellan, Alabama.
- 4. "Zero day" is the name given to the one day each month when 30 to 45 new inmates arrive at boot camp. Approximately 10 to 20 staff members are present during the reception of the inmates on "zero day". Prior to the arrival of the inmates on "zero day", a briefing is held with all the correctional staff participating in "zero day". Staff are reminded during this briefing of the proper way of dealing with inmates. Correctional officers are instructed that they are not permitted to hit or pinch inmates. Correctional officers are permitted to touch inmates for the limited purpose of correcting a military stance which is taught to inmates on "zero day". They are instructed during the staff briefing that the only other permissible touching that can occur during "zero day" is a procedure referred to as "chesting".
- 5. "Chesting" is a procedure used to hurry inmates on and off a bus during the "zero day" activities. Officers are permitted to push inmates on the inmates' back with the officers' chest. When "chesting" an inmate, an officer is expected to keep his hands behind his back at all times. Female correctional officers are permitted to push inmates with their backs or shoulders in order to avoid injury to the officers' breast. Male officers are only permitted to push inmates with their chests, not their backs or shoulders.
- 6. In 1996, Ellsworth was a correctional/security services officer II. He performed as a lead worker at the boot camp. He was expected to set an example for subordinate officers. During Ellsworth's employment with DOC, he participated in briefings conducted each month prior to the start of "zero day". Ellsworth

Evidence was not presented that Ellsworth attended training for new officers or at a U.S. military installation following completion of his first year of employment at the boot camp. However, no claim was made by Ellsworth that he was not

was aware of the proper way to perform "chesting" on inmates during "zero day". Ellsworth was also aware that it was inappropriate to touch an inmate other than for limited purposes previously described.

- 7. The admissions process during "zero day" is considered very important to inmate initiation into the boot camp program. "Zero day" is also an important day when staff identifies those inmates who may not be suitable to the boot camp program because of aggressive behavior.
- 8. An "initial incident" at "zero day" is staged by the staff to induce stress in the inmates admitted. As soon as the inmates arrive at boot camp by bus, they are put through a rigorous program of callisthenics. Correctional officers, who are referred to as drill instructor, yell commands at the inmates and engage in other acts of psychological intimidation.
- 9. On May 1, 1996, "zero day" at boot camp, Ellsworth participated with the other officers in staging the "initial incident" for incoming inmates. Inmates were required to load and unload their bus repeatedly. Officers encouraged them to do so rapidly. Officers further encouraged the inmates by "chesting" them as they attempted to load the bus.
- 10. On May 1, Mike Taylor, a correctional officer at boot camp, was standing next to Ellsworth as the inmates were reloading the bus. This was a crowded scene with 30 to 45 inmates attempting to pass through the entrance of the bus at the same time. Correctional officers were gathered near the crowd of inmates at the entrance of the bus.
- 11. Ellsworth nudged Mike Taylor and told him he knew a tactic to get the inmates moving. Ellsworth turned backwards, leaned into the crowd of inmates gathered to get on the bus, reached between inmate Jason Quick's legs and grabbed him by the testicles.
- 12. On May 2, 1996, Jason Quick's participation in boot camp was terminated for medical reasons due to a prior leg injury. On May 3, 1996, while Jason Quick was still incarcerated at the boot camp, he reported the incident during which Ellsworth grabbed his testicles to a correctional officer. At the time of the inmate's first report of the incident, he did not know which correctional officer touched him. He reported that he heard an officer say

properly trained.

"watch my tactics, it will get them going". The inmate believed that he could recognize the voice of the correctional officer if he heard it again. On May 6, 1996, Jason Quick reported that it was Ellsworth who grabbed his testicles on May 1, 1996, during "zero day" activities.

- 13. The correctional officer receiving the report on May 3, 1996, from the inmate reported the information to Mike Perry (Perry), the director of boot camp. Initially, Perry placed little significance in the inmate's report. Perry's experience with inmates had shown that inmates can be very manipulative. However, because the boot camp training includes language normally associated with the military, the inmate's use of the word "tactic" sparked Perry's interest to inquire further about the complaint. "Tactic" is a word frequently used by the correctional officers when referring to the methods used to induce stress among the inmates on "zero day". Perry thought it was unusual for the inmate to use this language of his own accord, if he was fabricating this story.
- 14. On or about May 9, 1996, during a staff briefing, Captain Jerry McFarland advised the staff that an inmate lodged a complaint of inappropriate touching. Ellsworth was present at the briefing. He responded to McFarland, advising him that he was aware that inmate Jason Quick accused him of touching his testicles. Thereafter, at Perry's direction, McFarland discussed the allegations with Ellsworth. Ellsworth denied that he engaged in any inappropriate behavior.
- 15. Perry requested that the complaining inmate prepare a statement recounting the incident. Perry showed the inmate's statement to two officers who recently promoted to positions which removed them from the boot camp. Perry believed that peer pressure among the staff at the boot camp was very strong and that he might have success in discovering what other staff observed or knew if he inquired of staff members who were leaving the boot camp.
- 16. Perry spoke with correctional officers, Rae Lewis and William Mansheim, who recently promoted to positions outside of the boot camp. These officers reviewed the inmate's statement and immediately responded telling Perry that they were present on "zero day" prior to May, 1996, and observed Ellsworth make the statement and take the action described in the inmate's statement.
- 17. Rae Lewis reported that during the bus loading of inmates on "zero day" in February and March, 1996, Ellsworth nudged her saying, "watch this, it will get them moving". Rae Lewis further reported that Ellsworth turned his back to the inmates attempting

to load the bus, leaned into the crowd of inmates, and reached his hands between the inmates' legs. Lewis reported that he appeared to touch, squeeze, or pull the inmates' testicles. Lewis reported that she laughed at Ellsworth and told him his conduct was sick. Lewis did not report Ellsworth's conduct because she reported Ellsworth five times previously for other types of misconduct. She believed that no action was taken against him. Thus, she concluded that a report of this incident would be futile.

- 18. William Mansheim reported that in February, 1996, at "zero day" he was standing near Ellsworth while the inmates were attempting to load the bus. Mansheim reported that Ellsworth got his attention, saying, "This is how I get them on the bus". Mansheim reported that Ellsworth turned his back to the inmates crowded at the entrance of the bus, leaned into the crowd and reached his hand between the legs of an inmate.
- 19. Mansheim further reported to Perry that he had heard that Ellsworth grabbed the genitals of the inmates and that he "goosed" the inmates. Mansheim did not previously report the incidents because he felt it pitted his word against Ellsworth's, his superior officer.
- 20. Mike Taylor, a correctional officer present at "zero day" on May 1, 1996, was also interviewed during Perry's investigation. Taylor reported that on May 1, he was standing only two to three feet from Ellsworth when Ellsworth said to him, "Watch this technique, this will get them moving." Taylor reported that he did not see Ellsworth take any action to touch an inmate after making this statement. Taylor reported that while he did not observe this conduct on May 1, he has heard rumors that Ellsworth grabs the testicles of the inmates.
- 21. Bryan Spence is a correctional officer at boot camp. He reported to investigator Larry Rand that he never observed Ellsworth grab the testicles of inmates. Spence further reported that in February, 1996, on "zero day" Ellsworth told him that he knew how to get the inmates moving. Spence reported that Ellsworth told him he "goose them" in order to make them move more quickly. Despite regulations that permit male correctional officers to touch inmates during the "chesting" procedure, Bryan Spence reported to Larry Rand that he observed Ellsworth touching the inmates with his back, instead of his chest.
- 22. The information gathered during the investigation of the allegations against Ellsworth were reported to Superintendent Gary Neet. By letter dated May 14, 1996, Superintendent Neet gave Ellsworth notice that a Board Rule, R8-3-3 meeting would be held

with him on May 23, 1996. Ellsworth was given notice that at the meeting he would be provided an opportunity to respond to allegations that he physically abused an inmate and that he engaged in a pattern of such abuse over a period of time.

- 23. Ellsworth attended that Board Rule, R8-3-3 meeting with his representative Catherine Garcia, a business representative from the Colorado Federation of Public Employees. Ellsworth denied the allegations of misconduct.
- 24. Following the R8-3-3 meeting, in light of the information disclosed during the investigation and at the R8-3-3 meeting, on May 24, 1996, Ellsworth was placed on administrative suspension with pay pending the outcome of the disciplinary process. Superintendent Neet considered the information made available to him during the investigation and the R8-3-3 meeting. Neet spoke with correctional officers Rae Lewis and William Mansheim. He considered Ellsworth's employment record, finding that Ellsworth was not previously corrected or disciplined. Neet considered the disciplinary alternatives available to him and concluded that termination of Ellsworth's employment was the appropriate discipline to impose.
- 25. Neet did not place great significance on Jason Quick's allegation. Nor did he place any reliance on the statement of an inmate, Jason Archibeque, who claimed that Quick told him that he was angry at DOC and the boot camp and would seek revenge by making the false accusation against Ellsworth. Neet concluded that the statements of Ellsworth's co-workers were reliable evidence that he engaged in the misconduct alleged by the inmate.
- 26. Neet concluded that Ellsworth's conduct could not be tolerated, and constitutes wilful misconduct and an abuse of authority. Neet considered the fact that "zero day" is the most volatile day of the boot camp experience. During a period when correctional officers are instructed to purposely induce stress in the inmates in order to acclimate them to the rigors of the new experience and in order to identify troublemakers in the group, Neet concluded that it was unacceptable performance for Ellsworth to touch the testicles of inmates. Neet further concluded that Ellsworth violated DOC administrative regulations 1450-1 and 1450-28.1.
- 27. Neet disciplined Rae Lewis and William Mansheim for failing to report their knowledge of Ellsworth's conduct.
- 28. Ellsworth was charged with third degree sexual assault, a misdemeanor in Chaffee County. Those charges remained unresolved

at the date of hearing in this matter.

### DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. <u>Charnes v. Lobato</u>, 743 P.2d 27 (Colo. 1987); <u>Barrett v. University of Colorado Health Science Center</u>, 851 P.2d 258 (Colo. App. 1993).

The pertinent DOC administrative regulations relied on by Superintendent Neet in making the disciplinary decision in this matter state the following:

Administrative regulation 1450-1(IV): The following rules and standards are accepted principles, expressing in general terms the conduct expected of DOC staff. Violations of these principles may result in corrective or disciplinary action.

T. Brutality, physical violence, physical intimidation or verbal abuse of offenders by staff will not be permitted, nor will force be used beyond that necessary to control an offender or to enforce legitimate and legal commands.

Administrative Regulation 1450-28.1(IV)(B), Examples of prohibited activity:

7. Employee's conduct shall not involve abuse of authority or unwarranted use of physical force.

9. Employees shall not violate any of the Ethical Performance Standards listed in Administrative Regulation 1450-1.

Respondent contends that it sustained its burden to establish that complainant engaged in the acts for which discipline was imposed, that the conduct proven to have occurred violated State Personnel Board rules and DOC administrative regulations, and the decision to terminate complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.

Complainant contends that the evidence presented at hearing does not support the conclusion that he engaged in physical abuse of inmates. Complainant contends the telephone testimony of inmate Jason Archibeque should weigh heavily in determining whether he engaged in the conduct alleged. Complainant alleged that the inmate Archibeque had everything to lose by being labeled a "snitch" when he came forward and reported inmate Jason Quick's alleged retraction of the allegation of abuse. Complainant contends that for this reason his testimony should be deemed credible.

Complainant further contends that the testimony of Rae Lewis should not be deemed credible. Complainant contends that she was routinely reporting him for various alleged acts of misconduct. Complainant argues that her testimony that he spoke to her on "zero day" in February and March, 1996, is not believable because he claims that they had a poor working relationship and complainant did not speak to Lewis. He claims that he was frightened of Lewis.

Having heard the testimony of the witnesses and observed their demeanor, complainant was determined not to be a credible witness. The testimony of respondent's witnesses, Superintendent Neet, Captain McFarland, Major Mike Perry, and correctional officers Bryan Spence, Mike Taylor, Rae Lewis, and William Mansheim was determined to be credible and great weight was placed on their testimony.

The evidence presented at hearing amply supports the conclusion that complainant physically abused inmate Jason Quick on May 1, 1996, and that he engaged in a pattern of physical abuse of inmates. This conduct was proven to violate the administrative regulations cited above and State Personnel Board rules. In light of the serious nature of the conduct proven to have occurred, it was neither arbitrary, capricious, nor contrary to rule or law to terminate complainant's employment.

No evidence was presented at hearing to support an award of attorney fees and costs under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

### CONCLUSIONS OF LAW

- 1. Respondent established by preponderant evidence that complainant engaged in the conduct for which discipline was imposed.
- 2. The evidence established that complainant's conduct constitutes wilful misconduct in violation of State Personnel Board rules and violates DOC Administrative Regulations 1450-1 and 1450-28.1.
- 3. The decision to terminate complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.
- 4. Neither party is entitled to an award of attorney fees and costs under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

#### ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of April, 1997, at Denver, CO

Margot W. Jones
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").
- 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), 10A C.R.S. (1993 Cum. Supp.). 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. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 <u>et seq</u>., 4 Code of Colo. Reg. 801-1. 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).

## 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 should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

# 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 R10-10-5, 4 CCR 801-1.

### 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 R10-10-6, 4 CCR 801-1. 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, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. 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.

# CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_\_ day of April, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Thomas C. Callison, Esq. 1623 Race Street
Denver, CO 80206-1111

and to the respondent's representative in the interagency mail, addressed as follows:

Ceri Williams
Assistant Attorney General
Office of the Attorney General
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1525 Sherman St., 5th Floor
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