

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROGER KENDALL,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

THIS MATTER came on for hearing on February 25, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared pro se. Respondent appeared through John August Lizza, Assistant Attorney General.

MATTER APPEALED

Complainant, Roger Kendall ("Complainant" or "Kendall"), appeals his two-day disciplinary suspension without pay.

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 against Complainant was arbitrary, capricious or contrary to rule or law;
3. Whether attorney fees are warranted.

FINDINGS OF FACT

1. Complainant Kendall has been a Colorado State Patrol ("CSP") Trooper for over twenty years. Prior to the incident at issue herein, he had never received corrective or disciplinary action.

September 19, 2003 Escort

2. On September 19, 2003, at 11:20 a.m., Kendall was on duty, driving on Highway 40, approximately five miles outside of Craig, Colorado. Craig is a small town and there was little traffic on Highway 40.
3. Kendall encountered a vehicle driving at a speed of 82 miles per hour and pulled it over. The driver was a 76-year old woman. Her husband, who had just had a stroke, was slumped over in the seat next to her.
4. Kendall knew the couple, and was aware that the husband had recently had another stroke.
5. Kendall perceived the situation as a life and death matter. He knew from personal experience that if medical personnel immediately assess stroke victims, they can often administer drugs that will stop the stroke. Such timely medical treatment can save not just brain cells but life.
6. Kendall decided to provide a personal escort for the vehicle, and directed the woman to follow him.
7. Kendall called the CSP dispatcher over his car radio to report his activities. The dispatcher, per routine, contacted Kendall's immediate supervisor, Corporal Bagley, who then responded.
8. Bagley, Kendall, and the dispatcher then had a three-way conversation over the radio. Bagley directed Kendall, "We do not do escorts per policy. The parties will either need to stop and wait for an ambulance or drive at normal speeds."
9. Kendall responded that he felt under the circumstances it was necessary to continue with the escort. He also requested that the dispatcher send a local police car to follow the car behind him. This was not done.
10. Kendall's experience with the Craig ambulance service was that it was routinely a thirty-minute wait before its arrival. Kendall felt that this was too long a wait.
11. Kendall was aware of the CSP policy prohibiting escorts. He believed that in the situation, however, he was morally and ethically bound to provide the escort, and that it was a justifiable violation of the policy.
12. Kendall then escorted the car five miles into Craig and another three miles to the hospital. His emergency lights and siren were on. The trailing car had no lights or siren.
13. Kendall and the trailing car proceeded at approximately 65 - 70 miles per hour. They crossed through seven intersections. Five had red lights, at which they stopped, and then

proceeded through the intersection slowly.

14. Kendall and the trailing car made it to the hospital safely.

Applicable Policies

15. CSP policy 306.1, entitled "Motorist Assists," states in part,

"POLICY: Officers will offer their services to motorists and pedestrians who appear to be in need of assistance. Whenever it is impractical or inadvisable to stop, an officer will take steps to arrange for another means of assistance."

PROCEDURE

V. Transporting Persons . . .

D. At no time will a civilian vehicle be allowed to violate any laws or act as an emergency response vehicle.

E. Civilian vehicles will not be allowed to precede or follow a patrol car during an emergency situation."

16. The Vision Statement in the preamble language to the CSP policies states in part,

"It is understood that not every contingency can be provided for in the form of a written policy, rule, or procedure. Therefore, discretion, combined with good judgment, logical and objective thinking, and common sense, must continue to be the tools of our members. In order that members faced with unusual situations may have some latitude with which to make decisions, justifiable variance from policy will be permitted."

17. General Order 2 states, "Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements."

18. General Order 8 states, "Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified."

Previous escorts

19. Kendall had previously provided five escorts for which he had not received disciplinary or corrective action. In one, he and his partner were in a hazardous materials truck at the top of a mountain and encountered a truck, which flashed its emergency lights at them. The

passenger in the truck had shot himself in the leg. Kendall and his partner escorted the truck down the mountain and arranged for an ambulance to meet them at a convenience store parking lot. They then transferred the injured man into the ambulance. Kendall and his partner later informed their supervisor of the incident. No adverse action was taken.

20. Kendall is also aware of other escorts having been performed by troopers who received no corrective or disciplinary action. On one such occasion, David Everidge, a new trooper with six months on the job, stopped a car for speeding. He encountered a wife driving her husband, who had just sustained a heart attack, to the hospital. Everidge provided an escort with his lights and sirens to the hospital. Then he informed dispatch.
21. Everidge was unaware he was violating policy by providing the escort. His supervisor, Bagley, confronted him about it, told him CSP policy prohibited escorts, directed him to go home and read the policies that night, and never to do it again. Everidge asked Bagley if he was going to write him up for the incident, and he responded that he had gotten his attention.

Disciplinary Process

22. When Major Michael A. King, Commanding Officer, District Four, Kendall's appointing authority, learned of the September 19 incident, he issued a letter to Kendall scheduling a pre-disciplinary R-6-10 meeting. In his letter, he referenced the escort and Kendall's violation of a direct order from Corporal Bagley.
23. Kendall attended the R-6-10 meeting with his attorney. At the meeting, Kendall informed King that he and others had provided other escorts previously and had not been found at fault. He also explained that he felt, due to the stroke, it was a critical situation warranting an exception to the policy.
24. At the meeting, Kendall did not express remorse for having disobeyed Bagley's order.
25. King was extremely concerned about Kendall's apparent disregard for having violated a direct order. King felt this was the most serious issue.
26. In addition, he determined that Kendall had created a dangerous situation by providing the escort. The woman in the trailing vehicle was in an extremely stressful situation, unable to function or drive normally, and unable to assess the risks inherent in the situation. Other drivers on the road would have expected to yield to a State Patrol vehicle with its lights and siren on, but would not have anticipated the need to yield also to a trailing, unmarked vehicle following it. The situation created a significant risk that other cars would run into the trailing vehicle.
27. On November 17, 2003, King issued a disciplinary action against Kendall for having violated Chapter 306.1, V, D and E, and General Orders 2 and 8. He imposed a two-day suspension without pay.

28. King considered mitigating and aggravating factors in making his decision. The primary mitigating factor was the fact that Kendall was clearly attempting to do the right thing in the situation. While King considered the Vision Statement language in the patrol policy manual relied on by Kendall, he determined that once a supervising officer issues a direct order, the line officer's discretion to violate policy is eliminated.
29. The aggravating factors were numerous and far outweighed the mitigating factors. First was the violation of a direct order of his supervisor. Second was his choice to disregard the escort policy, of which he was aware. Third was his poor judgment, resulting in the creation of a risky situation in which the trailing vehicle could have been hit by another, unsuspecting vehicle.
30. King also concluded that the other escorts were distinguishable from Kendall's situation, primarily because no supervising officer had ordered the escort to stop.
31. Lastly, King was concerned about the liability of CSP in the event an accident had been caused by Kendall's violation of policy.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules 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.

A. Burden of Proof

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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine 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).

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Kendall admits he knew the escort policy, and that he performed the escort. He further admits the contents of the directive Colonel Bagley gave him over the radio. While he argues that this directive does not rise to the level of a cease and desist order, the directive certainly constitutes a direct order not to conduct the escort.

Kendall's actions were a violation of the policies King listed in the disciplinary action letter. He violated a verbal order of Colonel Bagley. He violated the prohibition on escorts, and he engaged in conduct that endangered others unnecessarily (albeit while attempting to save a life). Respondent has proven that Kendall committed the acts for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of agency discretion can arise in only three ways, namely: (a) by 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) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such a 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*.

Complainant argues that the Vision Statement in the CSP policy manual provided him with the discretion to make his own decision under the circumstances. However, as Major King pointed out, once Colonel Bagley gave him a direct order not to conduct the escort, Kendall lost any discretion he may have had to violate the policy. The direct order is what distinguishes this escort from those cited by Kendall at hearing.

Major King took seriously Kendall's attempt to save a man's life, to mitigate the effects of a stroke in progress, to assist citizens in a crisis situation. He gave due weight to all mitigating information he received from Kendall. King clearly understood that Kendall's motives were entirely good, and were in fact commendable.

However, as a Major charged with enforcing rules and procedures for CSP, it was appropriate for King had to give the greatest weight to the serious aggravating factors caused by

Kendall's violation of policy and a direct order. Kendall did cause a dangerous situation by conducting the escort. Other drivers encountering him and the trailing vehicle were unaware of the situation. It is purely a matter of luck that no one drove into the trailing vehicle as it followed him through one of the five red lights.

C. Attorney Fees and Costs are Not Warranted.

Respondent requests an award of attorney fees and costs against Kendall. Attorney fees and costs are to be awarded if it is found that a personnel action or appeal thereof as instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. Section 24-50-125.5, C.R.S.; Board Rule R-8-38, 4 CCR 801. Kendall presented a strong case in mitigation, and he had a good faith basis for bringing his appeal. Kendall acted in what he felt was the most ethical and humane manner possible in a crisis situation. Fees and costs are not warranted in this situation.

DATED this ____ day of
April, 2004, at
Denver, Colorado.

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

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 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 MAILING

This is to certify that on the ___ day of **April 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Roger Kendall
3665 Juniper Place #6
Craig, Colorado 81625

And in the interagency mail to:

John August Lizza
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods