

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B167

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MELAWAINE ONDREI,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF CLINICAL SERVICES,

Respondent.

The hearing was convened on September 5, and concluded on November 7, 1994. Respondent appeared at the hearing through Diane Marie Michaud, Assistant Attorney General. Complainant Melawaine Ondrei was present at the hearing and represented by Nora V. Kelly, Attorney at Law.

Respondent called the following employees of the Department of Corrections ("Department") to testify at hearing: Jean Carver, Cheryl Smith, Lynn Erickson, Betty Rodan and Robert Moore.

Complainant testified in her own behalf and called Sheila Harwood and James Peasley to testify at hearing.

Respondent's exhibits 1, 3, 4, 5, pages 3 and 4, 27, 28 and 31 were admitted into evidence without objection. Respondent's exhibits 2, 5, pages 1 and 2, 21 and 30 were admitted into evidence over Complainant's objection. Respondent's exhibit 20

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was offered, but was not admitted into evidence. Respondent's exhibit 32 was marked but was not offered into evidence.

Complainant's exhibit C was admitted into evidence without objection. Complainant's exhibit A was admitted into evidence over Respondent's objection. Complainant's exhibit B was offered, but was not admitted into evidence.

PRELIMINARY MATTERS

1. Complainant challenges the constitutionality of the Department's substance abuse policy and drug testing regulation in theory as well as in its application to Complainant on April 21, 1994. Respondent objected to Complainant's challenge to the policy and regulation as unconstitutional. Respondent maintains that the Board is without jurisdiction to consider the issue.

Complainant requested additional time following the conclusion of the evidentiary hearing to brief the issue of the Board's jurisdiction to consider the Department's substance abuse policy and drug testing regulation. Respondent had no objection. Complainant's request was granted. The parties presented evidence at hearing relevant to the issue and submit written closing arguments in which the issue was briefed.

2. Complainant moved to strike exhibits attached to Respondent's Closing Reply, filed October 14, 1994, and Response to Objection to Respondent's Closing Reply, filed October 26, 1994. Complainant argues that the documents attached to Respondent's pleading, both marked "Exhibit 1", are an improper attempted to offer evidence into the record after the close of the evidentiary hearing.

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Exhibits 1 are the Executive Order, D000291, Regarding Substance Abuse Policy for Colorado State Employees and the Substance Abuse Policy for Colorado State Employees. Respondent argues that its Exhibits 1 are not evidence but law, and are therefore properly before the Administrative Law Judge ("ALJ") as a part of the closing argument. Respondent further argues that if its Exhibits 1 cannot be accepted into evidence as the law governing the case, the ALJ should take administrative notice of these provisions.

The ALJ takes administrative notice of these documents. It is Complainant who raised the issue of the constitutionality of the Substance Abuse Policy for Colorado State Employees in her July 27, 1994, Amended Prehearing Statement. In addition, it was Complainant who appeared at hearing on September 5, 1994, representing that she was not prepared to address the constitutionality issue, but argued that because it is a legal issue, the parties should be permitted to submit legal argument following the close of the evidentiary hearing.

3. Complainant moved to continue the September 13, 1994, hearing date. Respondent raised no objection to the continuance. The request was denied because Complainant failed to state good cause for continuance of the hearing. .

4. Complainant's motion to sequester the witnesses was granted. Complainant's request to allow James Peasley to remain in the hearing room was denied because Peasley was identify as a witness to be called to testify at hearing.

MATTER APPEALED

Complainant appeals her termination from employment.

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ISSUES

1. Whether Complainant engaged in the conduct alleged to have occurred on April 21, 1994.
2. Whether Complainant's conduct constitutes violation of State Personnel Board ("Board") Rules.
3. Whether the decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law.
4. Whether the Board has authority to determine the constitutionality of the Department's regulations regarding drug testing of state employees.
5. Whether the Substance Abuse Policy for Colorado State Employees and the Department regulation pertaining to drug testing are constitutional.
6. Whether either party is entitled to an award of attorney's fees and cost.

FINDINGS OF FACT

1. Complainant Melawaine Ondrei has been a nurse for ten years. She was employed as a staff registered nurse at the Canon City Territorial Prison since November, 1984. The prison is a maximum security facility housing inmates who have been convicted of violent crimes.
2. Ondrei received job performance evaluations during her employment with the Department. During the period from 1984 to 1992, her job performance was rated as "above standard",

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"standard" and "good".

3. In 1990, Ondrei received a corrective action and a five day disciplinary suspension. The discipline was imposed because Ondrei was observed at work under the influence of drugs. As a result of Ondrei's behavior on this occasion, a drug/urine screen was conducted and she tested positive for narcotic drugs. Ondrei participated in a substance abuse program and as a part of the corrective action which was imposed with the disciplinary action, she was required to submit to random drug testing.

4. In July, 1993, Ondrei received a corrective action for improperly wasted a drug. On this occasion, Ondrei was warned to improve her accountability and accuracy with regard to medication administration and tool control. The corrective action also required Ondrei to participate in a counselling program. Ondrei grieved the corrective action and challenged the provision that required her to participate in a counselling program. At step 2 of the grievance process, the requirement that Ondrei participate in a counselling program was removed from the corrective action. This corrective action remained in Ondrei personnel file in April, 1994.

5. Ondrei received a letter of counselling in March, 1994, when she and a co-worker were found to be equally responsible for mishandling narcotics maintained in their work area.

6. Ondrei worked under the supervision of Nursing Supervisor Betty Roldan since August, 1993, in the infirmary at the Territorial prison. In Ondrei's position in the infirmary, she came in close contact with the inmates while providing medical care. During Ondrei's employment at the Department, she received information and training with regard to the Department's policy on the use of drugs in the work place. Ondrei was also aware of the

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Department regulation with regard to drug testing of employees.

7. It was the practice, to cross train nurses in other areas of the prison. On April 21, 1994, Ondrei was sent to the Colorado Women's Correctional Facility ("CWCF") for cross training in the infirmary. Ondrei arrived for her shift at CWCF at 6:00 a.m. and worked with three nurses. She performed her job duties related to the care of inmates in need of medical assistance. Jean Carver was the nursing supervisor at CWCF on April 21, 1994. She arrived at work on April 21, 1994, at noon.

8. At noon, Carver observed that Ondrei appeared to be under the influence of drugs. Carver continued to observe Ondrei for approximately one hour. Ondrei's speech was slurred, she had exaggerated arm movements, unsteady gait, appeared sleepy and groggy, her pupils were small and she had impaired large muscle movements. Carver requested that Roldan, Ondrei's regularly assigned supervisor, come to the unit in order to observe Ondrei. Roldan contacted Cheryl Smith, Nursing Services Administrator, to meet her at CWCF infirmary to observe Ondrei's behavior.

9. At 12:30 p.m. on April 21, 1994, Roldan arrived at CWCF infirmary. An inservice program for nurses was scheduled at CWCF at this time, so there were a number of employees milling around the infirmary. Roldan observed Ondrei's behavior. She observed that Ondrei's speech was slow and slurred, her eyelids appeared droopy and heavy, she used exaggerated arm movements and was giddy with loud laughter. Smith arrived in the infirmary, fifteen minutes after Roldan. She also made similar observations of Ondrei's behavior on April 21, 1994.

10. Carver and Smith possessed extensive experience and training in the area of observing people under the influence of drugs or

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alcohol. All three nurses, Roldan, Smith and Carver, worked with Ondrei for numerous years under a variety of circumstances. They observe Ondrei in the performance of her job duties on many occasions. They found her behavior on April 21, 1994, to be irregular and consistent with the behavior of an individual under the influence of drugs.

11. On April 21, 1994, following the supervisors' observations of Ondrei, she was directed to meet with them in a small dental office. Smith advised Ondrei of the nurses' observations of her physical condition. Ondrei explained that she took an over the counter medication, Dimetapp, for a cough. Ondrei denied that she took any prescription drugs. Ondrei denied that she had any personal problem which might explain her demeanor.

12. Robert Moore, Assistant Director of Clinical Services, was the appointing authority for Ondrei's position on April 21, 1994. Following Smith's observation of Ondrei, and her initial conversation with Ondrei in the dental office, she contacted Moore and Maurice Hilty, the Director of Human Resources for the Department. She advised them that Ondrei appeared to be under the influence of drugs. Hilty advised Smith to request that Ondrei submit to a drug/urine screen, if she refused, to suspend her from the workplace and hold a Board Rule R8-3-3 meeting with her thereafter. Moore approved of this course of action.

13. Ondrei was asked by Smith to submit to a drug/urine screen. Smith advised Ondrei that she had the right to refuse, however, her refusal would result in her suspension from the workplace. Smith further advised Ondrei her refusal would result in an R8-3-3 meeting being held with her to consider whether to impose disciplinary action.

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14. Ondrei refused to submit to the drug/urine screen explaining that she could not take such a test. Ondrei was encouraged by Carver to get assistance if a problem existed. Ondrei told Carver that she had no one she could contact for help.

15. On April 21, 1994, at 2:00 p.m., Ondrei was asked to leave the workplace. Smith offered to drive Ondrei home, but she declined the offer. Ondrei was asked to call CWCF and advise one of her supervisors when she arrived at home. Ondrei called Carver on her arrival at home. During this phone call, Ondrei advised Carver that she forgot to tell her that she took a drug called Fiorinil for a headache during the morning, and that this drug might account for her behavior.

16. Ondrei was again encourage to take the drug/urine screen since it would reveal the presence of Fiorinil. Ondrei refused.

17. A Board Rule R8-3-3 meeting was held with Ondrei. She appeared at the meeting with James Peasley, a business representative for the Colorado Association of Public Employees. Ondrei and Peasley met with the appointing authority Moore. Peasley spoke on Ondrei's behalf at this meeting.

18. Moore was primarily interested in Ondrei's explanation for her behavior on April 21, 1994. He was further interested in why she refused the drug/urine screen. Ondrei explained to Moore that she did yard work the night before April 21, 1994, and she was tired when she arrived at work. She further explained that she had allergies.

19. Moore reviewed the statements and reports prepared by the nurses who observed Ondrei on April 21, 1994. Moore considered

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Ondrei's explanation for her behavior as it related to her claim that she took Dimetapp and Fiorinil.

20. Moore is a registered pharmacist who has knowledge of the effect of various drugs. Because of this knowledge, Moore concluded that neither drug that Ondrei claimed to have taken on April 21, 1994, would explain her behavior on that date.

21. Furthermore, Moore concluded that it was an expectation of all employees at the Department working in the clinical field to submit to drug/urine screens when directed to do so. Because of the nature of the work performed by the staff in the clinical field, as medical care givers in a safety sensitive field, Moore expected them to understand the importance of the drug screen.

22. Moore concluded that Ondrei's refusal to submit to the urine analysis was a tacit admission that she was under the influence of an illegal or unauthorized drug at work. Moore considered the fact that Ondrei was previously disciplined for drug related incidents and that because of the nature of her job duties she could not be permitted to work while under the influence of a drug.

23. Moore was concerned that the Department would be liable to a patient under Ondrei's care if the patient was given improper treatment while Ondrei was impaired. He further was concerned about the security implications of Ondrei's actions. He concluded that there was a security risk to the Department for Ondrei to be permitted to remain in the workplace while under the influence of drugs.

24. Moore decided to terminate Ondrei's employment with the Department effective June 8, 1994.

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DISCUSSION

A certified employee may be disciplined only for just cause as specified in Article XII, Section 13(8) of the Colorado Constitution. Colorado Association of Public Employees v. Department of Highways, et. al., 809 P.2d 988 (Colo 1991). The burden of proving by a preponderance of the evidence that just cause exist for the discipline imposed rests with the appointing authority. 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 parties' arguments which are properly before the Board largely concern the application of Respondent's regulation, DOC 1150-4(7)(f), which provides as follows.

- (F) Drug and Alcohol Tests: Employees shall submit to a chemical and mechanical test to determine presence of alcohol or drugs in their system any time while on Department of Corrections facility premises. Failure to submit to such test may be cause for corrective or disciplinary action.

Complainant argues that the decision to terminate her is not sustainable because it is based on her refusal to submit to a drug/urine screen. Complainant maintains that the Board has authority to consider her claims with regard to the constitutionality of the administrative regulation and the policy pertaining to substance abuse. Complainant argues that Moore was without authority to terminate her employment based on her refusal to submit to drug/urine screen because the regulation, DOC 1150-

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4(7)(f), upon which the action is based is unconstitutional.

Complainant maintains that the regulation is unconstitutionally vague because the regulation does not advise the average person of the conduct prohibited or the conduct that is required. Complainant argues that the regulation is overly intrusive because it applies to on and off duty conduct. Complainant further argues that it is overly intrusive because it provides for mandatory testing of all employees whether or not in safety sensitive positions without requiring reasonable suspicion on the part of the supervisor to believe that the employee is under the influence of drugs. Complainant argues that a "suspicionless" testing program is not permissible except where it is random. Complainant maintains that she was not randomly requested to submit to drug/urine screen but was singled out for testing. Complainant further argues that the termination of her employment is not sustainable because she did not have prior notice of the drug testing policy.

Respondent argues that the Board is without authority to consider the facial constitutionality of an administrative regulation. It is Respondent's further contention that the administrative regulation is based on the Executive Order, D000291, and the Board is without authority to determine its constitutionality.

The Board's authority is limited to consideration of actions taken by state agencies and appointing authorities pursuant to legislation or executive rules governing such actions. Horrell v. Department of Administration, 861 P.2d 1194, 1199 (Colo. 1991). Therefore, Complainant's argument that the Substance Abuse Policy for Colorado State Employees and the Department's regulation pertaining to drug testing are facially unconstitutional are not properly before the Board.

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Complainant's arguments that the administrative regulation is unconstitutional as applied to her is properly raised in this matter. However, Complainant's arguments with regard to regulation, DOC 1150-4(7)(f), are deemed to be without merit.

Clearly, positions held in the Department are safety sensitive by the nature of the Department's mission to incarcerated individuals charged with violation of the law. Therefore, the regulation requiring an employee's submission to chemical and mechanical test to determine the presence of drugs or alcohol while at work is reasonable and consistent with the Colorado Supreme Court's pronouncement in, City and County of Denver v. Casados, 862 P.2d 908 (Colo. 1993).

With reasonable suspicion to believe that Complainant was under the influence of drugs, Respondent requested that Complainant submit to a drug/urine screen. Complainant refused, was suspended and was subsequently terminated from employment with the Department, following a R8-3-3 meeting with the appointing authority. There was ample evidence to support the finding that Complainant was well aware of the existence of the regulation and the requirement that employees comply with the regulation or risk disciplinary action.

Complainant had been in the employ of the Department for 10 years, underwent training related to conduct while on duty, and submitted to a drug test in 1990 which resulted in disciplinary action being imposed on her. Complainant cannot be found to be without knowledge that in her safety sensitive position as a nurse in a correctional facility, she was required to submit to a drug screen.

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The appointing authority's decision to terminate Complainant was neither arbitrary or capricious, or contrary to rule or law. Complainant was previously disciplined for conduct related to drug use, administration and handling. It was an appropriate progressive disciplinary action to terminate her employment based on her refusal to submit to an drug/urine screen based on the facts established at hearing.

CONCLUSIONS OF LAW

1. Respondent established by a preponderance of the evidence that Complainant engaged in the conduct alleged to have occurred on April 21, 1994, when she was observed at work exhibiting behavior that indicated that she was under the influence of drugs and she refused to submit to a drug test.
2. The conduct proven to have occurred constituted violation of Board rules.
3. In light of Complainant's employment history, during which she has been repeatedly disciplined for conduct related to the handling and administration of drugs, it was neither arbitrary or capricious, or contrary to rule or law to terminate her employment.
4. The Board has authority to determine the constitutionality of an administrative regulation as applied to Complainant.
5. The department's substance abuse policy and regulation DOC 1150-4(7)(f) is not unconstitutional as applied to Complainant.
6. There was no evidence that either party is entitled to attorney's fees under the provision of section 24-50-125.5, C.R.S

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(1988 Repl Vol 10B).

ORDER

Respondent's order is affirmed. The appeal is dismissed with prejudice.

DATED this ____ day of
December, 1994, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this ____ day of December, 1994, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Nora Kelly
1775 Sherman St., Suite 1775
Denver, CO 80203

and in the interagency mail, addressed as follows:

Diane Michaud
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

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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 and advance the cost therefor. 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 et seq., 4 Code of Colo. Reg. 801-1. 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).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$770.00**

. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

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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.