
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEVEN HARTLEY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF CORRECTIONAL SERVICES,

Respondent.

Hearing commenced on November 14, 1994, reconvened on January 30, 1995, and concluded April 10, 1995, in Denver before Margot W. Jones, administrative law judge. Respondent appeared at hearing through Joseph Haughain, assistant attorney general. Complainant, Steven Hartley, was present at the hearing and represented by William S. Finger, attorney at law.

Respondent called the complainant to testify at hearing and called the following employees of the Department of Corrections (DOC) to testify at hearing: Dennis Houghnon; Gerald Gasko; and Robert Furlong.

Respondent's exhibits 4 through 7, 9A, 9B and 15 were admitted into evidence without objection. Respondent's exhibits 1, 8 and 9 were admitted into evidence over objection. Respondent's exhibits 2, 3 and 10 were not admitted into evidence.

Complainant's exhibits CC, GG, HH and II were admitted into evidence without objection. Complainant's exhibits A through D, AA and BB were admitted into evidence over objection.

MATTER APPEALED

Complainant appeals his demotion from correctional officer III to correctional officer II and his suspension from participation in the SORT team for a period of one year.

ISSUES

1. Whether respondent sustained its burden to establish that complainant engaged in the conduct for which discipline was imposed.
2. Whether complainant is entitled to entry of an order granting judgment for him due to respondent's failure to sustain its burden of proof.

3. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. The parties' request to sequester the witnesses from the hearing room was granted,
2. Respondent identified Dennis Houghnon, a DOC investigator, as its advisory witness. Complainant's request to exclude respondent's advisory witness during consideration of preliminary matters at hearing was denied.

FINDINGS OF FACT

1. Complainant Steven Hartley is employed by the DOC as a correctional officer at Limon Correctional Facility (LCF). Prior to a disciplinary demotion in August, 1994, Hartley was classified as a correctional officer III, a lieutenant. He was also a member of the Special Operations Response Team (SORT).
2. Hartley has an exemplary employment record with DOC. Prior to the discipline which is the subject of this appeal, he was not corrected or disciplined during his employment. He received employee job performance ratings of "commendable" and "outstanding". Hartley was a SORT instructor, teaching other officers techniques to be utilized during special operations at correctional facilities.
3. In 1993 and 1994, the warden at LCF was Robert Furlong. The incident giving rise to the disciplinary action appealed here occurred in July, 1993. Prior to this incident, Hartley had conflicts with Furlong. Hartley felt he was treated unfairly and inappropriately by Furlong. Furlong believed that members of the SORT team were prima donnas. Furlong behaved in an intimidating manner toward Hartley.
4. Prior to the July, 1993, incident, Hartley reported his concerns about Furlong's treatment to Gerald Gasko, the chief of staff for correctional facilities. Hartley and Gasko were communicating as a part of an on-going investigation of LCF by Gasko. Hartley was a part of an intelligence network supplying Gasko with information about the facility.
5. Furlong learned that Hartley was communicating with Gasko. Furlong threatened Hartley with disciplinary action if he continued to report information to the central office where Gasko was assigned.
6. In July, 1993, Hartley was assigned to work in LCF's Armory. He worked there with Correctional Officer Kevin Casper. Hartley supervised Casper. Casper and Hartley were co-workers and exceptionally close friends. Hartley considered Casper to be like a brother. The men spent their entire work day together and many evenings. During the day, they worked at the Armory, exercised together at lunch and Casper frequently spent the evening with Hartley and his wife at their home.

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7. In the Armory, Hartley was in charge of the locks at LCF. Hartley maintained the tools and equipment to repair locks in the Armory. Since LCF is a maximum security penal facility, maintaining and securing the facility is of the utmost importance. Hartley received orders to repair and maintain locks at the facility, including the locks on the inmates' cells.

8. On July 9, 1993, it was discovered that a homemade knife was planted in an inmate's cell. It was determined that the knife was made in the Armory and that the knife was planted in the cell by correctional officers. Correctional Officers Kevin Casper, Mike Ferris and Kevin Coblentz were suspected of being involved in this incident.

9. An investigation of the incident was conducted by Dennis Houghnon and Dave Smith, who are DOC investigators. Ferris, Coblentz and Casper were interviewed by the investigators. They told several different versions of the incident to the investigators. Each officer blamed the other at different points during the investigation.

10. Following the investigation of the incident, Casper and Ferris resigned their positions with DOC. Coblentz was terminated from his position with DOC, however, the termination was later rescinded, and Coblentz was permitted to resign.

11. Criminal charges were filed against Casper and Coblentz in connection with the incident on July 9, 1993. No criminal charges were filed against Ferris. Casper was charged with a felony and he plead guilty to a misdemeanor. Coblentz was charged with a felony and he plead guilty to a felony.

12. On July 9, 1993, Hartley was contacted by Furlong and directed to secure the Armory in order to preserve any evidence related to the incident which might be found in it. Hartley inquired of Furlong why this measure was being taken. Furlong told Hartley that it was none of his business.

13. Between July 9 and 15, 1993, Hartley was approached by Casper, Ferris and Coblentz, and told varying version of the incident. At a party on July 10, 1993, attended by many correctional officers, including Ferris and Hartley, an informal discussion occurred in a parking lot about the incident. Numerous correctional officers were present. Hartley was not advised of Ferris' involvement in the knife planting incident during this conversation.

14. On July 12, 13 and 14, 1993, Houghnon met with Hartley in furtherance of the investigation. Houghnon was aware of the close personal relationship between Hartley and Casper. On July 12, 1993, Houghnon began the investigative interviews with Hartley by advising him that he had no obligation to tell Houghnon anything that he knew about Casper.

15. Despite Houghnon advisement, Hartley freely reported all the information he received about the incident from the three suspected officers. He reported that he received conflicting information from each of these individuals. While Hartley wanted to believe his close friend Casper was not involved, he was unsure of his involvement during this period. Hartley shared his own

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speculation with Houghnon about which officers may have been responsible in the incident.

16. On July 14, 1993, Hartley was asked to retrieve information from the Armory. He did so and met with Houghnon and Furlong. During this meeting, Furlong insisted that Hartley stop spreading rumors. Hartley did not believe that he was spreading rumors since he was reporting to Houghnon the information that he learned from the three correctional officers under suspicion.

17. After Hartley's meeting with Houghnon and Furlong on July 14th, Ferris contacted Hartley. On July 15, 1993, Ferris went to Hartley's home and convincingly told him that he had nothing to do with the knife planting incident.

18. On July 15, 1993, Houghnon and Furlong learned that Ferris contacted Hartley. Ferris had been instructed not to discuss the incident with anyone. On July 15th, Houghnon contacted Ferris by phone. Houghnon scolded Ferris for having spoken to Hartley.

29. On July 15, 1993, Furlong contacted Hartley by phone. He told Hartley to keep his nose out of the investigation. Furlong was agitated during this conversation. He was emphatic with Hartley not to involve himself in the investigation.

21. On July 16, 1993, Ferris, Casper and Coblentz were administratively suspended. On July 23, 1993, R8-3-3 meeting were held with them.

22. After Hartley's July 15, 1993, phone conversation with Furlong, he was not again contacted by Furlong or Houghnon to supply information about the incident. Hartley was aware that predisciplinary procedures were proceeding forward for the suspected officers, but he was clear that he had been instructed not to get involved.

23. In June, 1994, Ferris' deposition was taken during disciplinary appeal proceedings related to Coblentz. During this deposition, Ferris testified about his conversation with Hartley at the July 10, 1993, party.

24. During Ferris' deposition, he testified that on July 10, he talked to a group of correctional officers outside a party about the incident and the investigation. Ferris was asked in the deposition, "Do you recall anything Steve Hartley may have said?" Ferris responded, "Steve Hartley may have asked me what was going on, and I told him, and he asked me what I told them. If he said something specific, I don't remember that, no ma'am."

25. By June, 1994, Ferris had resigned his position at DOC and no criminal charges were brought against him. Subsequently, DOC managers learned that during the July, 1993, Casper made the knife, Ferris planted the knife in the inmates' cell and Coblentz masterminded the incident.

26. Houghnon and Furlong appeared to have bungled the investigation by

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allowing Ferris to get off without disciplinary action or criminal charges being brought against him. In an apparent face saving effort, in June, 1994, Houghnon reported to Gasko that, based on Ferris' deposition testimony, Hartley knew of Ferris' involvement in the incident as early as July 10, 1993, and withheld this information from the investigators.

27. As a result of Houghnon's report to Gasko, Gasko decided to meet with Hartley in June, 1994, to decide whether disciplinary action should be imposed. Gasko decided that despite Hartley's exemplary employment record, he should be disciplined for failure to report information about the knife planting incident.

28. Gasko relied in total upon Houghnon's report to him in June, 1994, (respondent's exhibit 1) to conclude that Hartley withheld information about the incident. Gasko repeatedly requested that Houghnon provide him with all pertinent information. However, Gasko was never provided Ferris' deposition which was relied on by Houghnon to conclude that Hartley withheld information.

29. Following the R8-3-3 meeting, Gasko concluded that Hartley violated administrative regulation 1150-4, which provides that it is a DOC employee's duty to report the conduct of any other employee that they reasonably believe to be criminal. Gasko decided to demote Hartley from a correctional officer III to a correctional officer II and to remove him from the SORT team.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on the agency in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions 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).

Where there is conflicting testimony, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

At the conclusion of respondent's case, complainant's motion for judgment was granted. Respondent failed to produce any evidence that complainant withheld information from Houghnon and Furlong in July, 1993, or thereafter.

The evidence presented at hearing established that Houghnon and Furlong conducted an investigation into the knife planting incident which was unique. It was unique to the extent that Houghnon's first investigative interview with complainant began by warning complainant that he did not have to report anything that he knew about Casper. A warning of this nature is clearly contrary to administrative regulation 1150-4. This warning also set the tone of Houghnon and Furlong's interactions with complainant during the investigation. These encounters can best be described as confusing.

The evidence established that Furlong intimidated and threatened complainant before July, 1993. Then, the evidence showed that during the July investigation, Furlong told complainant repeatedly to stay out of the investigation. The evidence showed that these admonitions were not common sense instructions given to a lieutenant to protect the integrity of an on-going investigation. The evidence established that Furlong's remarks were made in anger, were a part of continuing pattern of inappropriately aggressive and intimidating behavior on Furlong's part toward complainant and reasonably caused complainant to believe after July 15, 1993, nothing he learned about the incident should be reported to Houghnon and Furlong.

Complainant seeks relief in the form of an order overturning the disciplinary demotion and suspension from the SORT team. Clearly, there is no evidence to support the disciplinary demotion. Although there was no specific evidence at hearing on this point, it appears that the assignment to the SORT team constituted the assignment of duties. The assignment of duties is within the discretion of the appointing authority and would not constitute discipline from which relief could be sought in this proceeding.

The evidence clearly established that complainant did not engage in misconduct, therefore, it should be noted that the imposition of any sanction, be it disciplinary or an action which did not affect complainant's pay, status or tenure, would be inappropriate.

Based on the foregoing, complainant is entitled to an award of attorney fees under section 24-50-125.5, C.R.S. The personnel action from which this appeal arose was groundless and instituted in bad faith.

CONCLUSIONS OF LAW

1. Respondent failed to establish by a preponderance of the evidence that complainant engaged in the conduct for which discipline was imposed.
2. Respondent failed to present any evidence that there was justification for the disciplinary demotion imposed in this matter, therefore, complainant is entitled to judgment as a matter of law.
3. Complainant is entitled to an award of attorney fees and cost.

ORDER

1. Respondent is ordered to rescind the personnel action contained in the letter of August 3, 1994, imposing a disciplinary demotion.
2. Respondent is ordered to award complainant all back pay, benefits, interest, attorney fees and cost.

DATED this _____ day of
May, 1995, at
Denver, Colorado.

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").

- 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 **\$1810.00**. 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

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

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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 Code of Colo. Reg. 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 Code of Colo. Reg. 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 Code of Colo. Reg. 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 May, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Attorney at Law
Frank and Finger
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80439

Joseph Haughain
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman St., 5th Floor
Denver, CO 80203

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