

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B052

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD J. CATHCART,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Hearing commenced on November 18, 1994 and concluded on February 3, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by David A. Beckett, Assistant Attorney General, Rumaldo Armijo also appearing. Complainant appeared in person and was represented by Vonda Hall, Attorney at Law.

Respondent's witnesses were Canon City police officers Jerry Alexander, John Valerio and John Smith, and Mark McKinna, Superintendent of the Colorado Territorial Correctional Facility.

Respondent's Exhibits 1, 2 and 4, and Complainant's Exhibits A and F through J were stipulated into evidence. Respondent's Exhibits 5 and 11 were admitted without objection. Exhibit 6 was admitted over objection. Exhibits 10 and 12 were not admitted.

MATTER APPEALED

Complainant appeals a disciplinary termination.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether there was just cause for the discipline imposed;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether Complainant was treated differently from similarly situated employees;
5. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Complainant had six witnesses present and available to testify. At the close of Respondent's case-in-chief, Complainant moved to rescind the disciplinary action. Complainant's motion was granted on the record, with appeal deadlines to run from the date of the mailing of this initial decision.

FINDINGS OF FACT

1. Complainant, Richard J. Cathcart, was a certified correctional officer at the Colorado Territorial Correctional Facility in Canon City.
2. Shortly after midnight on September 2, 1994, two Canon City police officers, Jerry Alexander and John Valerio, arrived at Cathcart's apartment in response to a dispatch call informing them that there had been three 911 telephone hang-up calls from that address. Officer John Smith responded to the scene about five

minutes later.

3. After Officer Alexander knocked on the apartment door several times, Cathcart, who was the only one in the apartment, opened the door to let the officers in. In response to questions, Cathcart related this account of events: He and his wife had been visiting friends earlier in the evening when they had a disagreement. Mrs. Cathcart went home first, then Mr. Cathcart returned home. There, they had an argument. She grabbed him by the neck, and they pushed each other. She was the one who made the 911 calls.

4. Officer Alexander advised Cathcart that this could be a domestic violence situation, to which Cathcart thrice replied, "Just take me to fucking jail."

5. Officer Alexander then advised Cathcart that he was under arrest for investigation of domestic violence and harassment. Cathcart held out his left arm and was handcuffed. But when the officer tried to put on the right handcuff, Cathcart passively resisted in an attempt to prevent being handcuffed. Soon all three officers were struggling with Cathcart. The four men landed on the couch, Cathcart face-down, whereupon Cathcart was handcuffed, and then he settled down.

6. Cathcart's actions were to pull away to avoid being handcuffed. He did not strike at or attempt to harm the officers in any way. Officer Alexander described it as "passive resistance".

7. Based on his statements that he and his wife had had an argument and that he had pushed her, Cathcart was charged with domestic violence and harassment. He was also charged with resisting arrest. State law and local policy require the police officers to take someone into custody in a domestic violence situation. None of the charged offenses is a felony.

8. Officer Alexander transported Cathcart to the county jail. After they left, Mrs. Cathcart arrived at the scene and spoke briefly with Officers Valerio and Smith.

9. Cathcart had been drinking, but his level of intoxication was never determined.

10. Superintendent Mark McKinna found out about Cathcart's arrest the following day at 3:00 p.m. when he was so advised by Cathcart's supervisor, Chess, who had been informed by the night shift supervisor who got his information from a technician who had heard of the arrest on a police scanner. McKinna instructed Chess to tell Cathcart to stay home, that he was on administrative leave.

11. McKinna, who submitted a written request for appointing authority to Canon Region Director H.B. Johnson (Respondent's Exhibit 5), and who testified that he was properly delegated the authority, asked a DOC investigator to obtain copies of the pertinent police reports. (Respondent's Exhibit 1.) Upon reading the reports, McKinna decided there was a need for an R8-3-3 meeting and so notified Cathcart. (Respondent's Exhibit 4.)

12. The R8-3-3 meeting was held on September 7, 1994. Cathcart brought with him mitigating letters from Sergeant Edgar Kurchinski and Mrs. Cathcart. (Respondent's Exhibit 2; Complainant's Exhibits I and J.) McKinna more or less disregarded these letters, believing the respective authors to be biased.

13. At the R8-3-3 meeting, Cathcart was remorseful. He stated that he initially cooperated with the police by extending one arm to be handcuffed, but then he became upset and changed his mind when he noticed one of the officers looking through his checkbook. McKinna considered this an immature and inappropriate response from one who is a correctional officer.

14. Following the meeting, McKinna discussed the case with a deputy district attorney for Fremont County. This discussion did not have a direct bearing on McKinna's ultimate decision. Nor did the fact that Cathcart had been drinking prior to the incident.

15. McKinna placed his emphasis on Cathcart's specific conduct, which McKinna viewed as "unbecoming a correctional officer", as opposed to whether the conduct constituted a felony or misdemeanor and regardless of any adjudication of the charges. The charges had not been adjudicated by the time the disciplinary action was taken. (Ultimately, on October 11, 1994, the defendant pled guilty to harassment upon the dismissal of the other charges. (Complainant's Exhibit H.))

16. McKinna believed that Cathcart had rendered himself "impotent" to perform his day-to-day duties because of the necessary interrelationship with inmates. McKinna holds correctional officers to a higher than normal standard, both on and off-duty, and reasoned that if the inmates found out about the arrest Cathcart would be placed in a compromising position. Another factor McKinna considered was his perception of the need for correctional officers to cooperate with allied agencies.

17. There was no evidence that any inmates knew of Cathcart's arrest. McKinna based his assumption that the incident was "common knowledge" among inmates on his general belief that inmates know everything that the staff knows. No one told him that any inmates knew about it. At some point he asked Captain Todd to inquire of staff as to inmate knowledge. Todd reported that no staff persons had any knowledge of inmate awareness of Cathcart's arrest. About a week before the hearing, Captain Elledge tried to determine the extent of inmate knowledge but was unable to find that any inmates knew.

18. In his capacity as a correctional officer, Cathcart would not

be sent out to interact with allied agencies. He would have contact with outside agencies only in emergency situations, such as having to escort an inmate to the hospital, or if there were a fire within the facility and the fire department was called in. Such emergencies are very rare, and Cathcart would not be acting as a representative of the Department of Corrections in those situations.

19. McKinna did not review Cathcart's personnel file or past performance evaluations because the subject incident occurred off-duty and was not job-related, or "job-specific".

20. As security manager at the Centennial Correctional Facility, Charlie Watson is in charge of the overall security of that facility and comes in contact with outside agencies. Watson was formally charged with assaulting his neighbor. Watson was not dismissed from employment. McKinna was not the decision-maker as to Watson and "would have fired him" if he had been. McKinna has no personal knowledge that Watson's continuation of employment caused any problems for the Department of Corrections.

21. McKinna concluded that termination was the appropriate remedy because it was the only way to keep Cathcart permanently off the job site. In his written termination notice to the employee, McKinna listed the four causes for administering disciplinary actions found in Rule R8-3-3(C), 4 Code Colo. Reg. 801-1, and then wrote:

In considering all the facts and circumstances surrounding your conduct and arrest I have found that your involvement in that behavior adversely effects your ability or fitness to perform the duties assigned to you as a correctional officer with the Department of Corrections. In reviewing your participation in the events of the evening in question, by your own admission your conduct was wilful.

It is normally my policy to attempt to correct

inappropriate or unacceptable conduct on the part of an employee when I believe the employee can be salvaged as a productive correctional professional. I have concluded in this case that this is not possible due to the seriousness and nature of your conduct. Your conduct has become common knowledge among staff and inmates. Your duties as a Correctional employee require you to interact with inmates and, their knowledge of your conduct impedes your ability to do your job. It is therefore my decision to administer a disciplinary action in the form of termination,

(Complainant's Exhibit A.)

22. Cathcart's employment was terminated effective September 26, 1994. A timely appeal was filed on October 5, 1994.

DISCUSSION

A.

In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse Respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. Sec. 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

It is not altogether clear on which of the four causes for administering disciplinary actions Respondent hangs its hat. At hearing, Respondent argued a combination of R8-3-3(C)(1), (2) and (3) to justify termination. The disciplinary letter seems to rely primarily on R8-3-3(C)(3). The hearing testimony reflected an emphasis on R8-3-3(C)(1). Overall, the evidence suggests that the action was taken in accord with the superintendent's personal opinion that Complainant's conduct was "unbecoming a correctional

officer" and thus worthy of immediate termination.

At the close of Respondent's case-in-chief, Complainant moved for rescission of the disciplinary action on grounds that Respondent had not established that McKinna was properly delegated appointing authority by the head of a division and that the delegation was not in writing, and that Respondent failed to meet its burden to show that Complainant had violated R8-3-3(C). Complainant's motion was granted upon a finding that Respondent had failed to establish a prima facie case that Complainant's conduct was violative of any one of the four causes for administering disciplinary actions set forth in State Personnel Board Rule R8-3-3(C).

Rule R8-3-3(C), 4 Code Colo. Reg. 801-1, provides in pertinent part:

Disciplinary actions may be administered for the following causes:

(1) Failure to comply with standards of efficient service or competence.

(2) Willful misconduct may include, but is not limited to, either a violation of these Rules or of the rules of the agency of employment. Discovery after hiring that the employee was subject to exclusion from consideration for any of the following reasons are also grounds for disciplinary action:

....

b. When the person has violated the law, policies, rules, or procedures relating to the State Personnel System in a manner which materially affects the applicant's ability to perform the job.

(3) Willful failure or inability to perform duties assigned.

....

(iii) Inability to perform duties assigned includes being charged with a felony or any other offense involving moral turpitude, when such action or offense

adversely affects the employee's ability or fitness to perform duties assigned or has an adverse effect on the agency should the employee continue such employment.

(4) Final conviction of a felony or any other offense involving moral turpitude, when such action or offense could adversely affect the employee's ability or fitness to perform the duties of the job or has an adverse affect on the agency should the employee continue such employment....

Motions for a directed verdict present a question of law. Grossard v. Watson, 221 P.2d 353 (Colo. 1950). See also C.R.C.P. 50(a); sec. 24-4-105(4), C.R.S. (1988 Repl. Vol. 10A). The evidence must be viewed in the light most favorable to the non-moving party. Singer v. Chitwood, 247 P.2d 905 (Colo. 1952). It is the duty of the trial court to grant the motion when the evidence establishes that there is no basis on which the non-moving party could prevail as a matter of law. Montes v. Hyland Hills Park, 849 P.2d 852 (Colo. 1992).

In the present matter, the evidence was wholly inadequate to establish that the subject off-duty conduct constitutes failure to comply with standards of efficient service or competence, or was willful misconduct.

Despite the agency's action being founded upon the conduct, itself, regardless of the actual crimes charged, Respondent argued at hearing that Complainant's conduct rendered him unable to perform his duties or had an adverse effect on the agency under R8-3-3(C)(3)(iii). On this point, the evidence is purely speculative. Speculation cannot substitute for proof. The proof is not self-evident.

Except for one man's personal opinion, there was no evidence that Complainant's conduct had the prerequisite effect. The agency searched for such evidence, but to no avail. Unlike a case in which an employee is disciplined upon the final conviction of a

felony or other offense of moral turpitude, where the agency only has to prove that the conduct could adversely affect the employee's ability to perform his job (R8-3-3(C)(4)), an employee may be disciplined under R8-3-3(C)(3)(iii) only when the employee's conduct has such effect. Substantial evidence does not point to that result. The disciplinary letter specifically references the fact of "inmate knowledge" as the reason for termination, yet evidence of the same is non-existent. Nor was there evidence of any other cases of this nature in which the employee's continuation of employment had an adverse impact on the employee's performance or on the agency.

Consequently, because there was no evidence upon which Respondent could prevail as a matter of law, the judge was compelled to grant Complainant's motion to rescind the disciplinary action. Montes, supra.

B.

Although Mark McKinna testified to his belief that he was appropriately delegated appointing authority to impose disciplinary actions, upon a challenge from Complainant this record does not substantiate a finding that proper delegation was made pursuant to Rules R8-3-3(D)(1)(c), R1-4-1 and R1-4-2, 4 Code Colo. Reg. 801-1. See also Colo. Const. art. XII, sec. 13(7); sec. 24-50-101(3)(d), C.R.S. (1988 Repl. Vol. 10B).

C.

Complainant tried to prove through cross-examination that he was treated differently from similarly situated employees. However, no commonality of appointing authorities was shown. Just as two criminal court judges may impose different sentences in similar cases in the exercise of their discretion, so appointing authorities are not mandated to exercise discretion in a way to

achieve identical outcomes.

D.

Respondent's action was groundless. Complainant is entitled to an award of attorney fees and costs under sec. 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act.

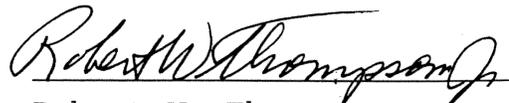
CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. There was not just cause for the discipline imposed.
3. The discipline imposed was not within the range of alternatives available to the appointing authority.
4. Complainant did not prove that he was treated differently from similarly situated employees.
5. Complainant is entitled to an award of attorney fees.

ORDER

Respondent's action is reversed. Complainant shall be reinstated to his former position with full back pay and benefits as of the date of termination with an offset for any substitute earnings or unemployment compensation benefits. Respondent shall pay to Complainant his reasonable attorney fees and costs incurred in pursuing this appeal.

DATED this 2 day of
March, 1995, at
Denver, Colorado.


Robert W. Thompson, Jr.
Administrative Law Judge

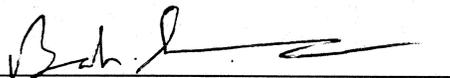
CERTIFICATE OF MAILING

This is to certify that on the 6th day of March, 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:

Vonda G. Hall
Attorney at Law
Colorado Association of Public Employees
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

David A. Beckett
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
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 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 \$410.00. 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 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.