STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B077c

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHARLES E. AHART AND GAVIN McWHIRTER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT SERVICES,
BUENA VISTA CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on February 21, 1995, in Colorado Springs, CO before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at the hearing through David A. Beckett and Paul S. Sanzo, assistant attorney generals. Complainants Charles E. Ahart and Gavin McWhirter were present at the hearing and represented by Carol Iten, attorney at law.

Respondent called the following employees of the Department of Corrections (Department) to testify at hearing: David A. Bradley; John Johnson; Lee Rand; and Gary D. Neet. Complainant also called to testify at hearing, Orlando Peschiera, a Salida police officer, and Mark Robert Dusenberg, a Buena Vista police officer. Complainants did not testify in their own behalf. Robert Furlong was called by Complainants as a witness at hearing.

The parties stipulated to the admission of exhibits 1 through 8, 16 through 19, 21, 22 and 27 and exhibits A through R, U1 and U2. Respondent's exhibits 9, 11, 14b, 15b, 23 and 24 were admitted into evidence without objection. Respondent's exhibits 10 and 25 were admitted into evidence over objection. Complainants exhibits J and V were admitted into evidence without objection.

MATTER APPEALED

Complainants appeal their termination from employment with the Department.

ISSUES

1. Whether the appointing authority had reasonable suspicion to request that Complainants submit to a drug test.

2. If not, whether it can be found that Complainants engaged in wilful misconduct.

3. Whether the decision to terminate Complainants employment was arbitrary, capricious or contrary to rule or law.

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

PRELIMINARY MATTERS

1. Complainants' request to sequester the witnesses from the hearing room was granted.

2. Complainants moved to compel discovery of the identity of a confidential informant alleged to be known to Respondent's managers. Complainants maintained that Respondent relied on the information provided by a confidential informant to decide to administer a drug test to Complainants. Complainants further assert that reference was made to information received from the informant in a criminal investigation division report, dated August 22, 1994. Complainants maintained that they were entitled to discover the identity of the informant.

Respondent argued against discovery of this information on the grounds that the appointing authority did not rely upon the information received from the confidential informant and does not know the identity of the confidential informant.

The ALJ denied Complainants' motion to compel discovery because Respondent represented that the decision to request that Complainants submit to a drug test did not result from the information received from the confidential informant. Respondent maintained that it had other information which it relied on in making the determination that reasonable suspicion existed to request that Complainants submit to a drug test.

Despite Respondent's representation that it did not rely on the August 22, 1994, report, during the course of the hearing in this matter on February 21, 1995, Complainants inquired of Respondent's witness, Lee Rand, about the identity of the confidential informant. During Complainants' cross examination, Rand was asked to identify Respondent's exhibit 10, the criminal investigation division report, dated August 22, 1994, which referenced receipt of information from a confidential informant about illegal drug use by Complainants.

Subsequently, Respondent called BVCF warden, Gary Neet, to testify. Respondent inquired about exhibit 10, without objection from Complainant. Neet testified that he received this document from Robert Cantwell, the inspector general and chief of staff, on November 2, 1994. Neet testified that he believed that the information contained in the investigative report corroborated the

information he received from Jim Osborne in October, 1994.

3. Complainants moved to limit the evidence pertaining to the drug tests. The basis of Complainants' motion was their allegation that Respondent lacked reasonable suspicion to test Complainants for illegal drugs. Complainants maintained that Respondent lacked reasonable suspicion to administer the drug test and thus evidence of the drug test, the test results and the disciplinary process should be excluded. Complainants contend that if Respondent lacked reasonable suspicion to order the drug test then Respondent's actions constituted an illegal search under the Fourth Amendment of the United States Constitution and the "fruits" of the illegal search are excludable at hearing.

Complainants' motion in limine was denied. The ALJ ordered the parties to present all the evidence relevant to the issues and the question of whether Respondent had reasonable suspicion to administer drug tests would be determined in the course of the proceeding.

FINDINGS OF FACT

1. Complainants Charles E. Ahart (Ahart) and Gavin McWhirter (McWhirter) were employed by the Department at Buena Vista Correctional Facility (BVCF). BVCF is a medium security correctional facility, housing approximately 1200 inmates. Gary Neet is the warden at BVCF during the relevant period. On November 15, 1994, Neet was delegated appointing authority to consider disciplinary action in this matter.

2. In 1994, Ahart was the BVCF housing manager, a correctional officer IV. Ahart had significant responsibility as the housing manager. He supervised 100 staff members at BVCF. Ahart had overall responsibility for the five units of housing at BVCF and acted for the warden in his absence. Ahart had daily contact with inmates.

3. McWhirter held the rank of sergeant at BVCF. As a sergeant, McWhirter was the lead worker on an assigned shift. McWhirter had daily contact with inmates. McWhirter was assigned to the Special Operations Response Team (SORT). SORT team members are correctional officer who remain on call at all times to respond to dangerous and difficult situations at BVCF. As a S.O.R.T. member, McWhirter occasionally was required to carry a weapon.

4. McWhirter and Ahart were trusted employees who received above standard performance ratings during their employment with the Department. Their positions at BVCF required them to be alert at all times, it demanded the respect of their fellow officers over whom they exercised supervision and it required the highest integrity for purposes of utilizing their observations and

testimony in criminal investigations and prosecutions of inmates. A sustained allegation of drugs use would make Complainants ineffective for this purpose.

5. In October, 1994, Neet was advised by Jim Osborne, a teacher at BVCF, of suspected drug use by two BVCF correctional officers. Neet had known Osborne for a long time and believed that he could rely on the information he was giving him.

6. Osborne reported that, on March 2, 1994, McWhirter stopped at Ahart's residence on his way home from a fishing trip with another BCVF correctional officer and a Salida police officer. When McWhirter exited the home, he got into the truck and he lit a marijuana cigarette.

7. Neet was advised that Osborne got this information from Mark Dusenberg, a Buena Vista police officer. Neet was further advised that Dusenberg was told of the incident by a police officer who was present on March 3, 1994. Dusenberg did not identify the officer. Neet was advised that the officer did not want his identity known.

8. Neet requested that Lee Rand, an investigator for the Department, investigate whether Ahart and McWhirter were involved in illegal drug use.

9. On November 2, 1994, Neet contacted the police chief for the Buena Vista police department. Neet learned that the police officer who was with McWhirter on March 2, 1994 was a Salida police officer.

10. Neet contacted Robert Cantwell, the inspector general and the Department's chief of staff, to advise him of the allegation of illegal drug use by correctional officers and of the on going investigation. Cantwell faxed Neet a document from the criminal investigation division of the Department. The document was dated August 22, 1994. It contained an allegation by a confidential informant of illegal drug use by McWhirter, Ahart and a co-worker. It is unclear the use to which Neet and Cantwell put this information.[1]

11. Department regulation 1150-4 establishes a Department policy for random drug testing. The policy provides,

Employees shall submit to a chemical or mechanical test to

---

[1] Neet testified that the report held limited significance for him in making the decision to ask Complainants to take a drug test. Neet also testified that the information in the report corroborated the information he received from Osborne.

determine the 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.

12. Department regulation 1150-4 announces a policy of random drug testing. In fact, the Department does not conduct random drug tests of any of its employees. It is the Department's policy to request that a correctional officer submit to a drug test only if there is reasonable suspicion to believe that the officer is involved in illegal drug use.

13. Cantwell and Neet agreed on November 2, 1994, that they had reasonable suspicion to believe that Ahart and McWhirter were involved in illegal drug use. Neet requested that on November 3, 1994, McWhirter and Ahart take a drug test. Complainants agreed to take the test. A preliminary urinanalysis showed that the Complainants' urine tested positive for marijuana. Ahart and McWhirter were placed on administrative suspension on November 3, 1994.

14. November 4, 1994, was the first time that Rand spoke with Orlando Peschiera, the Salida police officer who was present with McWhirter when the illegal drug use occurred on March 3, 1994. On November 8, 1994, Neet and Rand learned the identity of and spoke with the BVCF correctional officer, David A. Bradley, who was also present with Peschiera and McWhirter on March 3, 1994. Peschiera and Bradley confirmed that McWhirter smoked marijuana after leaving a house identified as Ahart's residence.

15. On November 16, 1994, Neet gave Complainants notice of a R8-3-3 meeting to be held on November 22, 1994. The reason given for the R8-3-3 meeting was to consider whether disciplinary action should be imposed for "the alleged use of a controlled substance."

16. Neet met with McWhirter and Ahart at R8-3-3 meetings held on November 22, 1994. At the meetings, McWhirter and Ahart admitted that they smoked marijuana. Neet considered the mitigating and aggravating circumstances and decided to terminate Complainants' employment effective November 28, 1994.

DISCUSSION

A certified state employee can only be terminated 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.2nd 988 (Colo. 1991). The burden of proving by a preponderance of the evidence that just cause exist for the discipline 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 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 a reach contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent's case raises two questions. The first question is whether Neet had reasonable suspicion to order Complainants drug tested. The next question is whether, if reasonable suspicion was lacking, the exclusionary rule applies.

A reasonable suspicion to request that Complainants submit to a drug test could be found if Respondents had specific and articulable facts which gave rise to an individualized suspicion of Complainants' use of drugs. Terry v. Ohio, 392 U.S. 1 (1968); American Federation of Government Employees v. Barr, 794 F. Supp. 1466 (N.D.Cal. 1992). Association with someone who is suspected of drug use does not form an adequate basis for Respondent to order a suspicion based drug test. Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992).

On November 3, 1994, Neet did not have specific articulable facts which would reasonably give rise to a suspicion that Complainants used illegal drugs and therefore should be drug tested. On November 3, 1994, Respondent did not know the identity of Orlando Peschiera, the Salida police officer, or David Bradley, the BVCF correctional officer, who were present when McWhirter smoked marijuana. On November 3, Neet knew vague rumors about Ahart and McWhirter's drug use which had been passed from an unidentified police officer to Dusenberg to Osborne to Neet. This information was not adequate to constitute reasonable suspicion.

Any suggestion that the August 22, 1994, criminal investigations division report was corroborating evidence is incorrect. The report was equally vague and non-specific.

The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible, if the link between the evidence and the unlawful conduct is not too attenuated. Wong Sun v. United States, 371 U.S. 471 (1963). This is referred to as the "exclusionary rule."

The purpose of the exclusionary rule is to prevent law enforcement officials from violating rights guaranteed by the 4th Amendment,

which protects individuals from unreasonable searches.[2] The purpose of the rule is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it, by excluding evidence at trial which is obtained in violation of the 4th Amendment. Elkins v. United States, 364 U.S. 205, 217 (1960). See, United States v. Calandra, 414 U.S. 338 (1974); Terry v. Ohio, 392 U.S. 1 (1968); Mapp v. Ohio, 367 U.S. 643 (1961).

However, whether the exclusionary rule applies to proceedings outside of a criminal prosecution is not clear. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States v. Janis, 428 U.S. 433 (1976). In United States v. Janis, 428 U.S. 433 (1976), the court set forth the framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. The court weighed the likely social benefits of excluding unlawfully seized evidence against the likely costs. The court states that likely cost may include the cost of a burdensome adjudicative process that must prove certain allegations without the use of the evidence.

Applying this equation to this case, it is concluded that the social benefits of excluding the evidence of Complainants' drug tests and their admissions at the R8-3-3 meeting do not outweigh the costs. Therefore, evidence of the drug test should not be excluded. And, the discipline that flowed from that information must stand.

In reaching this conclusion, the fact that Complainants are employed in positions as correctional officers having daily contact with inmates in a medium security prison is of significance. Courts have recognized a diminished privacy interest of employees in such positions. And, under some circumstances, courts have approved random drug testing among this population of employees. Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989); American Federation of Government Employees v. Barr, 794 F. Supp. 1466 (N.D. Cal. 1992). See also, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

At the Department, the policy published to the employees, Department regulation 1150-4, places them on notice of the Department's intent to conduct random drug testing. Facts established at hearing were that the actual Department practice was to only conduct drug tests on reasonable suspicion. While

---

[2] See, Jack E. Murray v. Department of Corrections, Case No. 95B074, decided by Judge Robert Thompson on March 24, 1995, for a thorough discussion of the 4th Amendment right against unlawful searches and seizures.

this presents a somewhat confusing circumstance, it can be said that Complainants' had a diminished expectation of privacy. Complainants were on notice that there was a likelihood that a search of this type might occur.

Under these circumstances, there is very little social benefit to be gained by excluding the unlawfully seized evidence. This evidence was certainly the type which it can be shown the government has an interest in discovering. Since the goal of the Department is to administer a safe and effective corrections program, this goal is made more difficult to attain if the Department's staff engages in the same activity, i.e. the use of illegal drugs, for which inmates are incarcerated.

Complainants maintain that they should not be terminated for the off duty use of drugs. They argue that they perform their duties effectively and therefore should not be terminated for an activity that does not affect their job performance.

The evidence established that a contrary conclusion must be reached. Respondent established that there were ramification from the off duty use of drugs. Respondent established that an officer known to use drugs off duty could not be relied upon in instances where inmate drug use was an issue. Further, Respondent established that Complainant McWhirter, as a S.O.R.T. member, was on call and could not be relied upon to respond to the facility if he engaged in off duty drug use.

Complainants were dismissed from employment for willful misconduct, using illegal drugs. Respondent established by preponderant evidence that Complainants engaged in the conduct for which discipline was imposed. This was proven through the November 3, 1994, drug test and Complainants' November 22, 1994, admissions at the R8-3-3 meeting.

The decision to terminate their employment is not arbitrary, capricious or contrary to rule or law. The termination of their employment was within the range of sanctions available to a reasonable and prudent administrator.

The evidence presented at hearing did not provide a basis for an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Respondent lacked reasonable suspicion to drug test Complainants. However, there is no basis for exclusion of the evidence obtained through the drug test.

2. Respondent's established by a preponderance of the evidence

that Complainants engaged in wilful misconduct.

3. The decision to terminate Complainants' employment was neither arbitrary, capricious nor contrary to rule or law.

4. Neither party is entitled to an award of attorney fees.

ORDER

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

DATED this 7th day of
April, 1995, at
Denver, Colorado.

_____
Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 7th day of April 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:

Carol Iten
Attorney at Law
789 Sherman Street
Denver, CO 80203

and in the interagency mail, addressed as follows:

David Beckett
Paul Sanzo
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
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 **$688.00**. 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.