

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 95B148

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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JACK HAYNES,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY,  
COLORADO BUREAU OF INVESTIGATION,

Respondent.  
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The evidentiary hearing was held on November 1, 1995. Complainant appeared and was represented by John Brooks, attorney at law. Respondent appeared through Dennis Mooney, Agent-in-Charge at the Montrose Office of the Colorado Bureau of Investigation ("CBI"), and was represented by Michael S. Williams, Assistant Attorney General.

Respondent called Valerie McNeill, Earl Christenson, Dennis Mooney and Richard McNamee as witnesses. Complainant called Rosa Perez as a witness and also testified on his own behalf.

Respondent's exhibits 1 through 22 were offered by joint stipulation of the parties. Respondent's exhibits 1 through 22 were admitted.

Complainant's exhibits X through GG and MM were offered by joint stipulation of the parties and were admitted. Complainant's exhibits HH, II, KK (performance evaluations after the March 3 incident) were offered and admitted with relevancy to be determined. (The issue of subsequent performance evaluations was ruled to be irrelevant at hearing.) Complainant's exhibit LL was not offered. Complainant's exhibits OO through QQ were offered without stipulations by the parties and admitted pending ruling on relevancy at hearing. Pursuant to the request of the parties, the administrative law judge took administrative notice of CBI, Policy and Ethics, II. A. Administrative Principles.

**MATTER APPEALED**

Complainant appeals a disciplinary five day suspension.

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## **ISSUES**

1. Whether complainant committed the acts for which discipline was imposed.
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law.
3. Whether either party is entitled to an award of attorney fees and costs.

## **PRELIMINARY MATTERS**

Upon the motion of the administrative law judge, the case caption was amended to reflect that the respondent is the Department of Public Safety, Colorado Bureau of Investigation, rather than the Department of Public Safety, Colorado State Patrol.

Upon the joint request of the parties, a sequestration order was entered. Witnesses were excluded from the hearing room unless testifying and were directed that until this initial decision is issued they are not to discuss their testimony other than with counsel. Dennis Mooney was allowed to remain in the hearing room as the respondent's advisory witness.

The parties stipulated to certain facts set forth in their prehearing statements. The parties stipulated to the following statements in paragraph 5 of the complainant's prehearing statement of undisputed facts: a, b, f, and h. Statements d and e were stipulated to with the amendment that AIC Mooney was "gone" rather than "absent." Statement k was stipulated to in part with testimony to be offered as to what action AIC Mooney did take. Stipulations were made as to the following portions of respondent's prehearing statement of undisputed facts: statements 1 through 5, 8, 10, 11, 13 and 14 were admitted. Statements 9 and 12 were stipulated to as to the fact that discipline was taken and the grounds alleged.

Complainant withdrew his allegations of violation of the Stare Employee Protection Act ("whistleblower act"), sections 24-50.5-101, et seq., C.R.S.(1988 Repl. Vol. 10B).

## **FINDINGS OF FACT**

1. The Colorado Bureau of Investigation ("CBI") is a statutorily created agency that assists in investigations of criminal activity

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and enforcement of applicable laws. The CBI participates in intra-state interdiction against criminal activities involving the sale and distribution of controlled substances.

2. The CBI has field offices in Pueblo, Denver and Montrose. Each field office is supervised by an Agent-in-Charge ("AIC"), who is responsible for ensuring that each of the agents assigned to the field office has appropriate case assignments and that the work is completed in a timely and professional manner. Dennis Mooney has been the AIC in the Montrose office since June, 1994.

3. The Montrose regional office has 12 employees: 5 field officers, 3 laboratory agents, 2 administrative staff and the AIC. The Montrose office handles predominantly narcotics cases.

4. Complainant Jack Haynes is certified as a criminal investigator III with the CBI and has been employed in the Montrose office since January, 1983.

5. Upon his appointment as AIC in June, 1994, Mooney called a meeting of the Montrose office staff. One of items discussed was the chain of command. Mooney indicated that seniority and rank would be utilized for the chain of command for normal office functions. The minutes of this meeting read "If Dennis [Mooney] was gone, chain will go to Roy [Taylor], then Jack [Haynes]. (exhibit AA, pp.5 -6). Seniority was determined by the length of time an investigator has been in the CBI. The general understanding in the Montrose regional office is that if AIC Mooney is available by phone he is to be contacted first before proceeding through the chain of command.

6. On March 3, 1995, AIC Mooney was at a peace officers conference in Grand Junction, within the Montrose district. He left telephone and pager numbers with his office where he could be reached in Grand Junction. Agent Roy Taylor also attended the same meeting. AIC Mooney did not issue a written memorandum identifying an acting AIC for March 3.

7. Valerie McNeill is an administrative assistant in the Montrose office. About 8:30 a.m. on March 3, she received a call from AIC Robert Sexton in Denver asking to speak to AIC Mooney about a reported shipment of cocaine from the Durango area. McNeill called Mooney in Grand Junction. Mooney spoke with Sexton and then called McNeill. AIC Mooney asked her to give the information on the reported shipment to Agent Christenson who was to call AIC Sexton for details and determine if the shipment was related to a case in Craig that Christenson was working on. If so, Christenson was to handle this case. If not, Christenson was to give the information to Agent Haynes and ask him to handle the matter.

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8. Agent Christenson has been assigned to the Montrose office for 8 years. McNeill relayed Mooney's instructions to Agent Christenson, who treated this relayed message from McNeill as a direct order from Mooney. He talked with Sexton and determined that the transport was not related to the Craig case. He then went to Agent Haynes' office, explained the phone call and instructions relayed to him, and told Agent Haynes that AIC Mooney wanted Haynes to handle the case.

9. Agent Haynes said he was too busy to handle the situation. Haynes indicated that Mooney could get in touch with him if he wanted him to handle it. In memos to Mooney and Wayne Willey (exhibits 4 and 14), Haynes admits Christenson told him that Mooney had said Haynes was to handle the incident if it was not related to Christenson's Craig case. Haynes had Mooney's pager number, yet did not initiate a phone call to Mooney to clarify any misunderstandings.

10. Agent Rosa Perez was in Agent Haynes' office and present at the conversation between Haynes and Christenson. She heard Christenson tell Haynes that Mooney had indicated the assignment was to be given to Haynes.

11. Christenson completed the assignment. He called Sexton and obtained additional information. He then called the District Attorney investigator in the Salida area to ask what help the Montrose CBI office might provide. The investigator replied that the target was under surveillance but asked him to contact the Durango Police Department and warn them. He also asked Christenson to send out a teletype on the reported transport.

12. Individuals engaged in drug shipments are often armed and, therefore, considered dangerous. Such indication was present in this situation. This warning needed to be communicated to any law enforcement officers who might stop the vehicle for any reason. At about 9:40 a.m., on the request of Agent Christenson, McNeill issued a teletype on the reported transport of drugs. Because drug traffickers often monitor law enforcement transmissions, Christenson requested, and McNeill included, the notation, "Officer Caution - Do Not Air." (exhibit 6.) It is rare for the Montrose CBI office to issue an officer caution notice. Normally officer caution notices are issued by the local jurisdiction. However, because this was a large area involving many local jurisdictions, Montrose issued the teletype.

13. AIC Mooney returned to the Montrose office late on Friday afternoon, March 3, 1995. Christenson told him that he, rather than Haynes, had completed the assignment. Mooney asked him to prepare a memo for submission on Monday morning, March 6. (exhibit 2).

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14. AIC Mooney discussed the failure to complete the assignment with Haynes on March 6. Mooney asked Haynes for a memo regarding his actions and understandings of the incident of the 3rd. (exhibit 4). Mooney also asked for and received memos from McNeill and Sexton on the March 3 incident. (exhibits 1 and 5).

15. Haynes testified that he thought he was the acting AIC of the Montrose area on March 3. He did not consider Christenson's relay of Mooney's directions to be an order. In testimony he indicated that he was confused by Christenson's comments on March 3 and that he was not sure if Christenson had obtained the directions from Mooney or Sexton.

16. AIC Mooney sent a memo reviewing the incident to McNamee, the CBI Inspector responsible for investigative services and the delegated appointing authority. (exhibit 8). McNamee, pursuant to CBI policy 91-1, assigned AIC Wayne Willey from the Pueblo area to investigate.

17. Willey investigated and on March 20 sent McNamee a cover memo and the documents, including the memorandums from the various participant and transcripts of the interviews he conducted. (exhibit 15).

18. On April 4, 1995, McNamee held an 8-3-3 meeting regarding the March 3 incident. (exhibit 20).

19. In reaching his decision to impose disciplinary action, McNamee reviewed Willey's investigation report, attachments and rules and procedures. Among the items available to him were the transcripts of Willey's interviews with McNeill, Christenson, Haynes and Perez, and the minutes of the June, 1994 staff meeting including the issue of chain of command. He also considered Agent Haynes' personnel file which contained performance evaluations of standard or above. The file did not contain any corrective or disciplinary actions. McNamee weighed what he considered to be the consequences if disciplinary action was not taken. He believed that if this breach was not dealt with seriously it would undermine the importance of discipline and the following of orders in the agency. McNamee felt that this was an extremely serious breach and would have terminated Agent Haynes' employment except for the advice he received that a termination would not be upheld on review.

20. On April 12, 1995, McNamee issued a letter containing his decision and imposing a disciplinary five day suspension. (exhibit 21). McNamee found that complainant's conduct violated CBI policies 91-3 (conduct toward others) and 91-4 (insubordination) and Board rule 8-3-3(1) (failure to comply with standards of efficient service or competence).

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21. On April 26, 1995, the complainant filed a timely appeal of the disciplinary action.

### DISCUSSION

This is an appeal of a disciplinary action affecting a certified employee's pay. The burden of proof, therefore, is upon the respondent to prove by a preponderance of the evidence that the complainant committed the acts alleged. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

This case turns in part on credibility determinations. When there is conflicting testimony, as here, 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). Among the factors considered in judging credibility, this administrative law judge weighed the witnesses' means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; and their manner or demeanor upon the witness stand. The conclusion is drawn that respondent's witnesses are worthy of belief and, accordingly, their testimony is given substantial weight.

The testimony of complainant's witness Rosa Perez supports respondent that Christenson communicated to Haynes that the directions to assign the case to Haynes came from AIC Mooney.

The nature of CBI's mission as a law enforcement agency is that assignments must be conducted in a timely manner and that cooperation, discipline and accountability are key. A predominant part of the case load in the Montrose CBI office deals with narcotics. The complainant had years of experience in working on narcotics cases. The testimony shows that cases involving the transport of drugs are as a matter of practice handled as potentially dangerous, even life threatening, cases.

The complainant admits in two separate memorandums written shortly after the incident that he understood that Agent Christenson was relaying a message from AIC Mooney. He also understood that the transport involved a shipment of drugs. The complainant argues that Mooney was out of the office and under the chain of command he, Haynes, was in fact the acting agent-in-charge of the Montrose region. Under this analysis, Haynes considered himself to be free to disregard the directions of the actual agent-in-charge because Mooney was out of the office and Haynes deemed himself to be in charge and acting in Mooney's place. Haynes could, therefore, fail to undertake the assignment

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he understood that Mooney, the actual agent-in-charge, wanted him to undertake.

At best, this reasoning is specious. It appears to have been constructed after the fact from a hypertechnical reading of CBI policies. The reasoning espoused by the complainant is impractical and blatantly self-serving. The simple fact of this case is that the complainant failed to heed an order from the agent-in-charge. This failure could have needlessly endangered the lives of other law enforcement officers.

Hearsay testimony was also used in this case. Hearsay evidence may constitute substantial evidence to support an administrative determination as long as the hearsay is sufficiently reliable and trustworthy and possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13 (Colo. 1989). Applying the analysis factors listed in Flower Stop, it is concluded that the hearsay evidence presented was reliable, trustworthy and probative.

Respondent has met its burden in this case. The evidence supports the conclusions of the appointing authority. The discipline imposed was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.

Counsel for both parties represented their clients well. They entered into stipulations and pared the presentation of their respective cases to the material disputed issues. Their professional competence increased the hearing efficiencies and is much appreciated.

Although complainant's argument was ill-conceived, the conduct and presentation of his case mitigates this. It cannot be concluded that his appeal was instituted frivolously, in bad faith or was otherwise groundless. Therefore, respondent is not entitled to an award of attorney's fees under the provisions of section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

#### CONCLUSIONS OF LAW

1. Complainant committed the act for which discipline was imposed.
2. Respondent's action was not arbitrary, capricious and contrary to law.
3. Neither side is entitled to an award of attorney fees or costs.

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ORDER

Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
November, 1995, at  
Denver, Colorado.

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Mary Ann Whiteside  
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 \$600. 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.

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**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.*

**CERTIFICATE OF MAILING**

*This is to certify that on this \_\_\_\_\_ day of November, 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:*

*John A. Brooks, Esq.  
Brooks & Brooks  
516 Main St., P.O. Box 179  
Montrose, CO 81402*

*and in the interagency mail, addressed as follows:*

*Michael S. Williams  
Office of the Attorney General  
State Services Section  
1525 Sherman St., 5th Floor  
Denver, CO 80203*

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