

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95G015

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BILLIE F. BELL, JR.,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT SERVICES,
COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Hearing in this matter commenced and concluded on July 24, 1995.

Complainant appeared in person and represented himself. Respondent appeared through Aristedes Zavaras, executive director of the Department of Corrections, and was represented by Diane M. Michaud, assistant attorney general.

Complainant Billie Bell testified in his own behalf. Respondent called Aristedes Zavaras and Robert C. Cantwell, chief of staff/inspector general for the Department of Corrections, as witnesses.

Respondent's exhibits 3 and 5 were admitted. Respondent's exhibit 4, the May 10, 1995, finding of the State Personnel Director that a reasonable basis was established to credit allegations that the administrative regulation at issue did discriminate based on gender, was admitted. Exhibit 4 was admitted for the limited purpose of showing that the administrative prerequisites to bring a discrimination charge were satisfied.

MATTER APPEALED

Complainant petitions for a hearing on respondent's step 4 decision concerning DOC administrative regulation 1450-31, Staff Appearance and Uniform Dress Code. Complainant alleges the administrative regulation discriminates in that male and female correctional officers are treated differently: female correctional officers are allowed to wear stud earrings on duty, while male correctional officers are not.

ISSUES

1. Whether the administrative regulation is valid or whether it discriminates against male correctional officers in violation of rule or law.

2. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent made a motion to dismiss based on lack of jurisdiction. Respondent argues that grooming policies are not included in the matters listed in Board Policy 11-1 in which discrimination is prohibited. The motion was denied. The ALJ noted that grooming policies are enacted to govern employee actions and behaviors in the workplace. The policy is a term and condition of employment covered by section 24-50-125.3, C.R.S. and Policy 11-1, rules R11-1-1 and 10-2-1.

FINDINGS OF FACT

1. Complainant Billie Bell, a certified employee of the Department of Corrections ("DOC"), is a correctional officer at the Colorado Territorial Correctional Facility ("CTCF"). A correctional officer is considered to be uniformed staff and wears a uniform at work.

2. Mark McKinna is the superintendent at CTCF. On July 5, 1994, complainant filed a step 2 grievance with McKinna regarding administrative regulation 1450-31, alleging that the policy discriminated against male correctional officers who wanted to wear earrings on duty.

3. DOC administrative regulation 1450-31 sets forth standards of appearance and dress code for both uniformed and non-uniformed employees. DOC administrative regulation 1450-31.L.5. provides in pertinent part:

Female uniformed officers may wear small stud or button type earrings. One earring per ear which will not extend below the earlobe. Earrings may not be worn by uniformed male officers.

This provision of the regulation applies only to on duty appearance. Correctional officers are not subject to any

prohibition as to earrings during their off-duty time.

4. The Department of Correction houses inmates who have been incarcerated subsequent to conviction. Many of the inmates are violent. The inmates in the DOC facilities are incarcerated in part because they have failed to comply with society's accepted standards of behavior. Rehabilitating inmates and protection of the inmates, correctional officers and the public are the crux of DOC's mission.

5. The DOC adopted administrative regulation 1450-32 to govern standards of appearance of correctional officers on duty. DOC adopted the dress code provisions, including the provisions relating to earrings, to promote a standard of dress, to foster a sense of professionalism and to impart public confidence.

6. In addition, the DOC adopted a ban on all earrings, other than stud or button types, for all on duty correctional officers in part based on safety concerns, i.e., a correctional officer's hoop earrings may be grabbed during a fight, ripping the earlobe, causing pain and distraction.

7. Correctional officers wear distinctive uniforms which clearly indicate they are employees of the Department of Corrections. Correctional officers come in contact with inmates and members of the public on a daily basis, including contact with the public in court, during the transport of prisoners and during visitation at the facilities. By state statute correctional officers are law enforcement officers.

8. DOC views the respect and confidence of the public toward correctional employees to be integral to the discharge of its duties.

9. In developing its administrative regulation on grooming, the DOC sought and received input from management, DOC employees, members of groups working with inmates, and members of the public.

10. Superintendent McKinna denied the grievance at step 2. The complainant filed with Robert Cantwell, chief of staff/inspector general, who investigated the grievance. Cantwell contacted Bell and offered him the opportunity to talk with the Executive Director Aristedes Zavaras. Bell declined the offer. Cantwell forwarded recommendations to the Executive Director who issued a decision denying the grievance at step 4. (exhibit 3)

11. Billie Bell petitioned the State Personnel Board to grant a hearing on July 25, 1995. The matter was referred to the State Personnel Director for investigation of the allegations of discrimination.

12. On May 16, 1995, the Board received the State Personnel Director's finding that there was a reasonable basis to credit the allegation of discrimination.

13. Pursuant to Board Policy 10-5 the petition was set for hearing.

DISCUSSION

This is an appeal of an administrative action, not a disciplinary matter. The burden of proof, therefore, is upon the complainant to prove by a preponderance of the evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); cf., Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant also bears the burden of proof to establish that the administrative regulation is discriminatory based on gender. Sections 24-34-402 and 24-50-125.3, C.R.S.(1988 Repl. Vols. 10A & B). In addition, the acts of an appointing authority are entitled to a presumption of regularity. Chiappe v. State Personnel Board, 622 P.2d 527 (Colo. 1981).

This case presents the question of whether a grooming policy which prohibits male, but not female correctional officers, from wearing stud earrings while on duty is discrimination in violation of law. Discrimination on the basis of certain immutable characteristics is generally prohibited. The only justifiable basis for discrimination is the existence of bona fide occupational reasons. Butero v. Department of Highways, 772 P.2d 633 (Colo. App. 1988). That is, there must be a reasonable business purpose for the differing standard.

Although an employee may have a liberty interest in choosing his own style or appearance, not every restriction on an individual's interest to chose his own style of appearance is prohibited. Kelley v. Johnson, 96 S.Ct. 1440 (1976).

It is true in an that ideal world no significance regarding job performance should attach to appearance. However, in instances involving law enforcement officers, the public's confidence is undoubtedly affected by the image projected. Thus, it is common to see significant restrictions on law enforcement officers as to their appearance on duty. In this specific case, a review of the administrative regulation shows that extensive control is exercised over all aspects of on-duty appearance of both uniformed and non-uniformed officers. One of the reasons DOC articulated for such policies is to achieve uniformity and foster public confidence and respect.

Here, the matter of appearance at issue - the wearing of a stud earring by a male correctional officer while on duty - is a matter of choice. The prohibition does not impinge on any immutable characteristic. Differing standards do not constitute discrimination if they are within the realm of reasonable business judgment and are justified by accepted social norms. Fountain v. Safeway Stores, 555 F.2d 753 (7 Cir. 1977).

The establishment and implementation of a grooming policy are matters of inherent management policy. Law Enforcement v. City of Hennepin, 449 N.W2d 725 (1990). The importance of allowing DOC managerial discretion to discharge their duties effectively outweighs the individual interest at stake.

When the DOC selects employees it may regulate grooming or dress as one of the factors impacting job duties. Cf., Miller v. School District, 495 F2d 658 (1974).

None of the statutory factors are present to justify an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. The administrative regulation allowing female correctional officers to wear stud earrings on duty while prohibiting male officers from doing so is based upon a valid business purpose and does not illegally discriminate based on gender.
2. Complainant did not establish by a preponderance of the evidence that the respondent's refusal to allow male correctional officers to wear stud earrings on duty, while allowing female to do so, was arbitrary, capricious or contrary to rule or law.
3. Neither side is entitled to an award of attorney fees or costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
August, 1995, at
Denver, Colorado.

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 **\$140.00**. 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.

CERTIFICATE OF MAILING

This is to certify that on the ___ day of August, 1995, I sent true copies of the foregoing **INITIAL DEICSION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Billie F. Bell, Jr.
P.O. Box 1374
Canon City, CO 81215-1374

and to the respondent's representative in the interagency mail, addressed as follows:

Diane Michaud
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
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