

STATE PERSONNEL BOARD, STATE OF COLORADO
Case Nos. 95B059

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDWARD J. MILLER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
FREMONT CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on June 19, 1995, in Colorado Springs, CO, before Administrative Law Judge (ALJ) Margot W. Jones. Respondent appeared at hearing through David A. Beckett, Special Assistant Attorney General. Complainant, Edward J. Miller, was present at the hearing and represented by J. E. Lasavio, Jr., Attorney at Law.

Respondent called the following employees of the Department of Corrections (Department) to testify at hearing: Larry Embry, Superintendent of the Fremont Correctional Facility, and Randall Henderson, Superintendent of the Centennial Correctional Facility. Respondent also called as a witness at hearing Frank E. Ruybalid, Step III Inmate Grievance Officer for the Department.

Complainant testified in his own behalf and called Eloy Jaramillo, Correctional Officer, to testify at hearing.

The parties stipulated to the admission into evidence of exhibits 1 through 10. Respondent's exhibits 11, 12 and 13 were admitted into evidence without objection. Complainant did not offer exhibits into evidence at hearing.

PRELIMINARY MATTERS

1. As a preliminary matter at hearing, Complainant moved for judgment or to remand this matter for a Board Rule R8-3-3 meeting before an unbiased appointing authority. Complainant contended that a Step III Inmate Grievance Officer investigated an inmate complaint and recommended that Complainant be discipline on the basis of the information he received from inmates pertaining to Complainant's conduct. The Step III Inmate Grievance Officer's report was forwarded to the Executive Director of the Department. The Executive Director of the Department directed the appointing authority to meet with Complainant for a Board Rule R8-3-3 meeting

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and determine whether disciplinary action should be imposed.

Complainant contends that because of the information supplied to the appointing authority and the direction from the Executive Director of the Department to the appointing authority, the appointing authority was predisposed to impose discipline. Complainant contends that because of this predisposition, he was denied due process during the pre-disciplinary process.

Respondent opposed the motion. Respondent argued that the evidence would show at hearing that the appointing authority who imposed the discipline on Complainant was unbiased. Respondent argued that the motion should be denied.

Complainant's motion was denied on the grounds that the recommendation of the Step III Inmate Grievance Officer and the letter referring this matter to the appointing authority for further action did not, in and of itself, establish that the appointing authority was predisposed to impose discipline, thus denying Complainant due process.

2. As a preliminary matter at hearing, Complainant argued that the notice of disciplinary action, dated October 5, 1994, was defective because it failed to place Complainant on notice of the provisions of law which Complainant was alleged to have violated. Complainant argued that Respondent is required to specify the provisions of law violated by Complainant which provide basis for the imposition of disciplinary action.

Respondent argued that the notice of disciplinary action was not defective nor did Complainant lack notice of the basis of the discipline imposed.

The ALJ determined that the notice of disciplinary action, dated October 5, 1994, was not defective. It was concluded that Complainant was not denied due process by Respondent's failure to specify the provisions of law alleged to have been violated by Complainant. The notice of disciplinary action advised Complainant of the conduct upon which the discipline was based and the conclusions reached by the appointing authority with regard to that conduct.

3. At the conclusion of Respondent's case in chief, Complainant again moved for entry of an order finding for Complainant. Complainant argued that based on the evidence presented during Respondent's case in chief, it was established that Complainant was denied due process during the pre-disciplinary process and that Complainant was denied due process by Respondent's failure to reference in the notice of disciplinary suspension the provisions of law violated by Complainant. Specifically, with regard to the pre-disciplinary process, Complainant maintained that the

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appointing authority was predisposed to impose discipline prior to holding the Board Rule R8-3-3 meeting, that it was error to fail to record the predisciplinary meeting and it was error for the appointing authority to have a representative present at the meeting.

Complainant further argued with the regard to the notice of disciplinary action that Complainant was found by the appointing authority to have acted inappropriately and immaturely. However, Complainant contended that Respondent failed to reference violation of section 24-50-125, C.R.S. (1988 Repl. Vol. 10B), failure to comply with standards of efficient service or competence or willful misconduct. Complainant maintained that the failure to make reference to the provisions of law alleged to have been violated was a denial of due process.

Respondent opposed the motion. Respondent argued that Complainant's motion should be denied because Complainant was not denied due process during the predisciplinary process or in the notice of disciplinary action. Respondent contended that it was not required to record the Board Rule R8-3-3 meeting, and therefore the failure to do so was not a denial of due process. Respondent further contended that the appointing authority is entitled to have a representative present during the R8-3-3 meeting.

Respondent maintained that the appointing authority's knowledge of the Step III Inmate Grievance Officer's findings and recommendations, and the Department's Executive Director's referral of the matter to the appointing authority for appropriate action, did not predispose the appointing authority to take action. Respondent contends that the appointing authority made an independent investigation into the allegations of misconduct, concluding that the Step III Inmate Grievance Officer's recommendation that Complainant be required to write a letter of apology to the inmates was not acceptable.

Respondent finally contended that the notice of disciplinary action placed Complainant on notice of the allegations upon which the discipline was based and that the failure to reference section 24-50-125, C.R.S. (1988 Repl. Vol. 10B) did not constitute a denial of due process.

The ALJ denied Complainant's motion. It was concluded that, during Respondent's case in chief, it established that there was no denial of due process during the predisciplinary or disciplinary processes justifying entry of judgment for Complainant.

MATTER APPEALED

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Complainant appeals the imposition of a corrective action and a three day disciplinary suspension without pay.

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ISSUES

1. Whether Complainant engaged in the conduct for which discipline was imposed.
2. Whether Complainant was denied due process as a result of the procedure followed during the predisciplinary process.
3. Whether Complainant was denied due process by Respondent's failure to specify the provisions of law violated by Complainant.
4. Whether the discipline imposed was arbitrary, capricious or contrary to rule or law.
5. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. At all times relevant to this appeal, Complainant, Edward J. Miller (Miller), was employed by the Department as a correctional officer at the Fremont Correctional Facility. Miller holds the rank of sergeant, or Correctional Technician. As a sergeant, Miller is a lead worker in the correctional facility. He is expected to set an example of appropriate behavior for inmates and correctional officers.
2. The appointing authority for Miller's position is Larry Embry (Embry), the Superintendent at Fremont Correctional Facility.
3. On May 26, 1994, Miller was observed by a group of African American inmates. The inmates were eating a meal in a dining area at approximately 4:15 p.m. Miller was walking down a hallway adjacent to the dining area and the area where the inmates were seated. The inmates had a clear view of Miller.
4. As Miller reached the area in the hallway which was immediately adjacent to the inmates' table, he began to march in a goose step fashion, moving his legs stiffly and high, and swinging his arms stiffly and high. Miller passed the inmates' table marching in this fashion at least two times, and possibly four times, before proceeding down the hall and into a doorway leading to the dining area.
5. Miller's marching style was Nazi like. The inmates who observed the behavior were angered by Miller's display. One of the inmates filed a grievance.
6. In order to reduce the amount of inmate litigation in the federal courts, an inmate grievance process has been established

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by the Department in compliance with federal regulations. At Step III of that grievance process, if an inmate is unsatisfied with the responses he has received at Steps I and II, Frank Ruybalid is the individual who considers an inmate's grievance.

7. Ruybalid is an attorney who is employed on contract with the Department to consider inmate grievances at Step III. Ruybalid conducts an investigation into the allegations contained in the inmate grievance and makes a recommendation to the Executive Director of the Department whether any action should be taken.

8. Ruybalid routinely finds little merit to the inmate grievances. Ruybalid's primary role at Step III of the grievance process is to determine whether a careful investigation of the inmate's allegations has been conducted and whether a thoughtful response to the grievance has been made.

9. Ruybalid investigated the inmate grievance which was filed as a result of Miller's actions on May 26, 1994, outside of the dining area at the Fremont Correctional Facility. During Ruybalid's investigation, he spoke with Miller and the inmates who were seated at the table in the dining hall when Miller marched past in a Nazi like fashion.

10. Following the investigation, Ruybalid prepared a report to the Department's Executive Director, dated September 2, 1994. Ruybalid found that Miller repeatedly marched past the inmates' table within their view in a Nazi like manner. Ruybalid found that, whether Miller acted with malice or simple thoughtlessness, the inmate's allegations formed the basis of a valid grievance. Ruybalid reported that when he spoke to Miller, Miller was indifferent, minimized his conduct and offered a nonsensical explanation for his behavior.

11. Ruybalid made a recommendation to the Department's Executive Director that disciplinary action be taken against Miller and that, at a minimum, Miller be required to issue an apology to the inmates who were present and offended by his behavior. On September 13, 1994, Embry received Ruybalid's September 2, report and a memo from the Executive Director. The memo from the Executive Director instructed Embry that he should review the report and take appropriate action against Miller.

12. Following a September 22, 1994, notice to Miller of a Board Rule R8-3-3 meeting, the meeting was held on September 29, 1994. Embry attempted to make a tape recording of this meeting, but the tape recorder was broken and did not make a record of the meeting. Randall Henderson, the Superintendent of the Centennial Correctional Facility was present at the meeting as Embry's representative. Miller was represented at the meeting by a business representative from the Colorado Association of Public

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Employees, James Peaslee.

13. At the meeting, Miller explained to Embry that he was joking with a fellow correctional officer about military marches. He explained that when he was observed by the inmates, he was responding to something said by that correctional officer. Miller explained that Eloy Jaramillo, the correctional officer that Miller had been speaking to, was located at the end of a long hallway adjacent to the dining area. Miller explained that Jaramillo called to him, "Get in step, soldier". In response to this call, Miller explained that he began to walk like a toy soldier from the "Nutcracker Suite" ballet.

14. At the Board Rule R8-3-3 meeting, Miller explained that in retrospect he should have been more aware of his surroundings and the inmates' perceptions of him. Miller explained that his actions in marching in front of the inmates was insensitive and inappropriate in the prison environment. Miller told Embry that he felt that it was wrong to accept the word of the inmates over that of a correctional officer.

15. Prior to deciding whether to impose disciplinary action, Embry spoke with the inmates who were present in the dining area when the incident occurred on May 26, 1994. Embry also observed the dining area where the incident occurred since there was an allegation that because of a wall in that room the inmates could not see Miller. Eloy Jaramillo, the correctional officer that Miller claimed made the remark which prompted him to march in view of the inmates, submitted a letter to Embry in defense of Miller's actions. Embry reviewed this letter prior to deciding to take disciplinary action.

16. Embry also considered Miller's employment record with the Department. Embry considered the fact that Miller's performance was consistently rated as "standard". Embry further considered that Miller received a corrective action, dated February 15, 1993. The corrective action pertained to Miller's failure to follow Department procedures in his dealings with a disorderly inmate.

17. Embry further considered the fact that Miller received a ten day disciplinary suspension on March 10, 1994. The disciplinary suspension was imposed for use of excessive force on an inmate.

18. Embry concluded that he would not accept Ruybalid's recommendation that Miller apologize to the aggrieved inmates. Embry decided that this was not an acceptable recommendation because it would undermine correctional officer authority in the facility.

19. By letter dated October 5, 1994, Embry gave notice to Miller that he was imposing a corrective action and a three day

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disciplinary suspension. As a part of the corrective action, Miller was directed to participate in a half day class on cultural diversity at the Department's training academy. Miller was also directed to participate in a half day class, entitled "Winning in Human Relations", given at the Fremont Correctional Facility.

20. Embry also imposed on Miller a three day disciplinary suspension. Embry concluded that the information he received indicated that Miller's actions in the presence of the inmates was serious and was inappropriate behavior having the potential to cause an incident at the facility. Embry further decided to impose the disciplinary suspension because he expected Miller, as a sergeant, to serve as a role model of professional behavior for other correctional officers.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent 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); 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 reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

This case rests 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); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

To some extent, this case also rests on the hearsay testimony of Ruybalid and Embry. Determinations of fact in an administrative proceeding can rest on hearsay evidence where that evidence is shown to have indicia of reliability. Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13 (Colo. 1989); 117th Associates v. Jefferson County, 811 P.2d 461 (Colo. App. 1991).

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Respondent argues that it sustained its burden to establish that Complainant engaged in the conduct alleged, that discipline was warranted and that the decision to issue to Complainant a corrective action and three day disciplinary suspension was not arbitrary and capricious.

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Complainant reasserted the arguments made at the conclusion of Respondent's case in chief in support of his contention that the discipline imposed was arbitrary, capricious and contrary to rule and law. These arguments are summarized in the "Preliminary Matters" section, paragraph 3, above.

Based on reliable hearsay testimony from Embry and Ruybalid, Respondent established that Complainant performed a Nazi like march in the presence of inmates who were located in the dining area at approximately 4:15 p.m. on May 26, 1994. It was further established that Complainant's conduct was inappropriate, had the potential to cause an incident at the correctional facility and set a poor example for other correctional officers. Because Complainant was previously disciplined, having received a corrective action and ten day disciplinary suspension, it was appropriate based on the facts established at hearing to imposed discipline in this instance.

Complainant's arguments with regard to the denial of due process were considered by the ALJ and deemed to be without merit. Clearly, there was no denial of due process in Respondent's failure to tape record the R8-3-3 meeting or in the fact that a superintendent from another correctional facility was present during the R8-3-3 meeting as Embry's representative.

Furthermore, it cannot be found that Complainant was denied due process because the appointing authority was predisposed to impose discipline. The evidence established that the Step III Inmate Grievance Officer's report was made available to the appointing authority and that the Department's Executive Director referred that report to the appointing authority with direction to "take appropriate action". The evidence further established that the appointing authority conducted his own investigation, personally speaking to the aggrieved inmates and Complainant, and reviewing a letter submitted by a correctional officer in support of Complainant. The appointing authority testified that he did not made a decision to discipline Complainant prior to the R8-3-3 meeting and, specifically, rejected the Step III Inmate Grievance Officer's recommendation regarding the type of action which should be taken.

Finally, Respondent's failure to give notice in the letter of discipline of the provisions of section 24-50-125, C.R.S. (1988 Repl. Vol. 10B) violated by Complainant does not constitute a denial of due process.

Under section 24-50-125, Respondent's notice of disciplinary action was required to specify the charges giving rise to the discipline imposed. This section further requires that Respondent base a disciplinary action only upon a finding that Complainant failed to comply with standards of efficient service or

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competence, engaged in wilful misconduct, or wilfully failed or was unable to perform his duties.

The evidence presented at hearing established that Respondent did not make specific reference to section 24-50-125, failure to comply with standards of efficient service and competence or wilful misconduct. However, the evidence does establish that the October 5, 1994, letter of discipline states, in pertinent part:

This is an unusual circumstance in that the facts and the intent are less important than the perception and the result of the incident. I believe that your thoughtless act was offensive to the inmates of Color who observed it and that perhaps it borders on being wilful misconduct. As a correctional staff member at your level you must set an example of professionalism; you should not contribute to the creation of a hostile atmosphere or environment. Unfortunately, a frivolous action such as this that might not even be noticed or given a thought in a different environment has the potential of creating a disaster in a correctional facility. It is well established that correctional officers can be held to a higher standard of behavior because they hold a position of public trust. It is reasonable to expect correctional professionals to possess and exercise mature and thoughtful judgment in the performance of their duties. Your judgment with regard to this incident was neither mature nor thoughtful. A review of your personnel file indicates a history of incidents displaying immature, unprofessional behavior that would cause a reasonable and prudent person to question whether you possess the maturity and ability to make sound judgment (sic) expected of a Correctional Technician.

Fortunately, this particular incident did not escalate into a disastrous situation. No physical injuries or property damage occurred as a result of it, but given the environment in which it occurred, it certainly could have. Your behavior is inexcusable in view of your training and years of experience. . . .

The information provided Complainant, while not reciting verbatim the language of section 24-50-125, provided Complainant adequate notice that his conduct on May 26, 1994, failed to comply with standard of efficient service and competence, such that he could appear at the administrative hearing and present a meaningful defense.

Since Complainant was previously disciplined during the two year period preceding this incident and because of the nature of the

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conduct proven to have occurred, it is concluded that the choice of discipline in this matter was within the range available to a reasonable and prudent administrator.

There was no evidence presented at hearing that established that Complainant's appeal was instituted frivolously, in bad faith, as a means of harassment, maliciously or was otherwise groundless. Thus, Respondent is not entitled to an award of attorney fees and cost under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant engaged in the conduct for which discipline was imposed.
2. Complainant's conduct constituted violation of section 24-50-125, C.R.S. (1988 Repl. Vol. 10B), to the extent that Complainant failed to comply with standards of efficient service and competence.
3. Complainant was not denied due process during the predisciplinary or disciplinary procedures followed here.
4. The decision to impose a corrective action and three day disciplinary suspension was neither arbitrary, capricious nor contrary to rule or law.
5. Neither party is entitled to an award of attorney fees and costs.

ORDER

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

DATED this 3rd day of
August, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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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 **\$568.00**. 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.

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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 CCR 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 CCR 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 CCR 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 3rd day of August, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** States mail, postage prepaid, addressed as follows:

J. E. Lasavio, Jr.
Attorney at Law
616 West Abriendo Avenue
Pueblo, CO 81004

and, through interagency mail, to the following individual;

David A. Beckett
Special Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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