

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 96B123

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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ERNEST E. CURTIS,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
AURARIA HIGHER EDUCATION CENTER,  
AURARIA CAMPUS POLICE DEPARTMENT,

Respondent.  
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The hearing was convened on May 28, 1996, and concluded on June 10, 1996, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Elizabeth Weishaupl, assistant attorney general. Complainant, Ernest E. Curtis, was present at the hearing and represented by Barry D. Roseman, attorney at law.

Respondent called complainant to testify at hearing and called the following employees of the Auraria Higher Education Center (AHEC) to testify at hearing: Jerry L. Miller; Kelley Casias; Gary Kasson; and Joseph Ortiz.

Complainant testified in his own behalf and called no other witnesses.

Respondent's exhibits 4 through 6, 11, 13, 20, 34 and 35 were admitted into evidence without objection. Respondent's exhibits 1, 7, 12, 17 through 19 and 33 were admitted into evidence over objection.

Complainant offered respondent's exhibits 15 and 32 into evidence at hearing. Over objection, exhibit 15 was admitted into evidence. Exhibit 32 was admitted into evidence without objection.

**MATTER APPEALED**

Complainant appeals the termination of his employment with the AHEC, Police Department.

**ISSUES**

1. Whether complainant engaged in the acts for which discipline

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was imposed.

2. Whether complainant's conduct constituted an inability to perform the essential functions of the position and a violation of AHEC Police Department policies.

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

4. Whether either party is entitled to an award of attorney fees under section 24-50-125.5 C.R.S.(1988 Repl. Vol. 10B).

#### **FINDINGS OF FACT**

1. Ernest Curtis (Curtis), the complainant, was employed by AHEC as a peace officer. He had been so employed since August, 1978. Curtis was promoted to the position of sergeant with the AHEC police department in 1980. He remained in the position until the termination of his employment in February, 1996.

2. The director of public safety, and the appointing authority for Curtis' position, is Joseph Ortiz. Curtis' immediate supervisor in February, 1996, was Lieutenant Gary Kasson.

3. The AHEC police department is a full service police department serving the 180 acre campus. In addition, security services are also provided in AHEC classrooms and at the Tivoli. Patrol officers secure the campus on foot, by bicycle, in golf carts and in police vehicles. Police vehicles on campus are used to transport victims, individuals who are accused of criminal acts and they are used to haul equipment. The equipment stored in police vehicles include cones, barricades, jumper cables, blankets and first aid kits.

4. As a sergeant at AHEC, Curtis was assigned from January, 1992, to July, 1994, as the sergeant in charge of the Tivoli. In this capacity, Curtis supervised Denver Police Officers working off duty security guard positions at the facility and he supervised law enforcement at the facility. Since Curtis' assignment to the Tivoli sergeant's position, additional duties have been assigned to this position which include duties as the community education officer. This duty is one which requires the officer assigned to the position to travel by motor vehicle to various destinations.

5. In July, 1994, Curtis was reassigned to work as the evening shift patrol sergeant. A significant part of the work done by Curtis as the evening shift patrol sergeant was accomplished at a desk. However, the minimum qualifications for the position of peace officer requires the officer "to possess and maintain a valid Colorado's driver's license. . . . No alcohol related

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traffic offenses in the last three years and no repeat alcohol offenses." The sergeant's position is also required "to provide supervisory oversight, direction and guidance to the line staff. . . ." The sergeant's position is required to perform patrol officer functions due to staffing fluctuation, respond to the scene of various police activities to provide supervision, guidance and oversight, attend court and out of jurisdiction meetings and collect and transport evidence and victims/witnesses/suspects, when necessary. These duties require possession of a valid Colorado driver's license.

6. On January 8, 1996, Curtis was contacted and arrested by the Aurora Police Department. Curtis was operating a motor vehicle in the City of Aurora when he was stopped for driving under the influence of intoxicating liquor (DUI) and for failure to drive in a single lane. Curtis had a blood alcohol level of .119.

7. On January 9, 1996, Curtis reported his arrest and the charges to Joseph Ortiz. When Curtis reported to Ortiz on January 9, he smelled of alcohol.

8. On January 9, 1996, Ortiz assigned Gary Kasson to investigate Curtis' conduct in connection with the DUI.

9. On February 5, 1996, Curtis had an administrative hearing with the State Motor Vehicle Division. As a result of the hearing, Curtis' license and privilege to operate a motor vehicle was denied until February 4, 1997. Curtis' driving record with the Motor Vehicle Division reflects that he had a previous arrest, conviction and revocation for DUI in 1989.

10. Based on the information Ortiz received, he decided to meet with Curtis to determine whether disciplinary action should be imposed. Following a February 6, 1996, notice to Curtis of a Board Rule, R8-3-3 meeting, a meeting was held with Curtis on February 13, 1996. Also present at this meeting was Cynthia Hier, a representative from AHEC's human resources office, Joseph Ortiz and Gary Kasson. Curtis elected not to have a representative present with him at the meeting.

11. At the R8-3-3 meeting, Curtis denied that he was weaving as he operated his vehicle in the City of Aurora on January 8, 1996. He admitted that he had three alcoholic drinks the evening prior to being arrested for driving under the influence. Curtis advised Ortiz at this meeting that within 90 days he could request that the Department of Motor Vehicles issue him a restricted license.

12. The issuance of a restricted license would probably require that any vehicle operated by Curtis be equipped with an "interlock" device. This device would be attached to the ignition system of any car operated by Curtis. The device prevents the

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vehicle from being operated until the driver is self tested verifying the driver's blood alcohol level was below a limit prescribed by the Motor Vehicle Department.

13. Following the R8-3-3 meeting, Kasson submitted to Ortiz a report dated February 16, 1996, which summarized the information he gathered during his investigation. Ortiz considered all the information he received and decided to terminate Curtis' employment with the police department. Ortiz concluded that he could not retain an officer who was without a driver's license due to the officer's DUI conviction. Ortiz concluded that retaining Curtis in AHEC's employ jeopardized the reputation of the police department both with staff and students on campus and the department's reputation off campus.

14. Ortiz further concluded that he could not allow Curtis to take vacation leave, sick leave or unpaid administrative leave during the period when his driver's license was revoked. Ortiz concluded that to place Curtis on leave would create a hardship for Curtis' co-workers and supervisor. Ortiz concluded that Curtis' lack of a driver's license impaired his ability to perform the duties of his position and impacted efficiency, discipline and good order.

15. Ortiz finally concluded that there was no way to accommodate Curtis' lack of license. Ortiz considered the possibility that AHEC vehicles be equipped with the "interlock" device or that Curtis carry out his duties without the use of a vehicle. Ortiz concluded that neither alternative was viable. Since Curtis would have access to all the department's vehicles, all the vehicles would have to be equipped with the "interlock" device. Ortiz concluded that officers could not carry out emergency duties if they were required to self test each time they used a vehicle. Ortiz further concluded that since peace officers at AHEC are expected to respond to emergency requests for assistance within three minutes, Curtis could not meet this demand without the use of a vehicle. Nor could he arrive at the scene of an emergency with the equipment normally stored in the police vehicle.

16. As a result of Curtis' actions, Ortiz concluded that he violated the General Duty Manual, 300.5, because his most recent driving under the influence charge is the second arrest for a like violation. It was further concluded that he violated the General Duty Manual, 300.6E, conduct unbecoming of an officer. It was concluded that Curtis' conduct impaired the operation and efficiency of the department officers. Curtis was further found to have violated the General Duty Manual, 306.4, by consuming intoxicants while off duty to the extent that his job performance was impaired. Ortiz concluded that Curtis violated 306.4 because following Curtis' January 8, 1996, arrest, he appeared for work to report the incident to Ortiz and smelled of alcohol at that time.

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## 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 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.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden of proof establishing that complainant engaged in the conduct for which discipline was imposed, that the decision to impose discipline was warranted and that the discipline imposed was within the range available to a reasonable and prudent administrator.

Complainant argues that respondent acted arbitrarily, capriciously and contrary to rule and law by terminating his employment. It is complainant's contention that respondent should have accommodated complainant by permitting him to remain in his position. Complainant contends, alternately, that: he should be permitted to take paid or unpaid leave during the period of his license revocation; that he should be permitted to perform his duties without the use of a motor vehicle, arriving at locations around the AHEC campus on foot or by bicycle within the department's required time period for emergency response; that he should be reassigned as the sergeant in charge of the Tivoli and that his family members could transport him to assignments which required him to travel to a location off campus; and that respondent should have installed the "interlock" device in the AHEC police department vehicles to meet the restriction of a driver's license issued during the period of revocation.

Complainant contends that the issue in determining the propriety of the discipline imposed should not rest solely on the question whether a driver's license was a condition of complainant's employment. It is complainant's contention that consideration should be given to the questions of whether complainant concealed or misrepresented the status of his license, whether complainant drove a state owned vehicle during the period when he was without

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a valid license and whether complainant's off duty conduct had an adverse impact on his ability to perform in his job.

Complainant, in his hearing brief, cites Board cases which he maintains support his contention that the discipline imposed was too severe and that respondent should have accommodated his license revocation.

Finally, complainant contended during his testimony that the investigating officer, Gary Kasson, had a grudge against him. It appeared to be the complainant's contention the investigation and the conclusions of the investigation, that complainant's employment should be terminated, are suspect because of Kasson's alleged grudge.

To the contrary, the ALJ can find no support for complainant's contentions. Complainant's conduct in having his license revoked following a second DUI conviction provides sufficient grounds for the termination of his employment.

Complainant did not allege a claim under the Americans with Disabilities Act, 42 USC §12001 et. seq. Therefore, there was no basis upon which to conclude that he was entitled to reasonable accommodation.

Complainant's allegation that Kasson had a grudge against him was a bald assertion without support in this record. And, even if Kasson had a grudge, the information Kasson provided in the investigation was factual. There was no room for Kasson to exercise discretion so as to unfairly slant the report against complainant. Complainant had a second DUI and no longer had a valid driver's license. The evidence presented at hearing supported the conclusion reached by Kasson in the report. That conclusion was that complainant's employment should be terminated because there was no way the department could accommodate his lack of a license.

Complainant's assertion that the Board has upheld cases in which lesser discipline was imposed under similar circumstances was considered and determined to be without merit. The cases referenced by complainant in his hearing brief are distinguishable. The cases cited by complainant do not involve peace officers who are held to a higher standard in the performance of their job duties. Gardner v. Broderick, 392 U.S. 273, 277 (1968).

Furthermore, it is within the discretion of an appointing authority to impose discipline within a range which is reasonable in light of the totality of the circumstances. In this case, the evidence established that termination of complainant's employment was the choice of a sanction within the range available to a

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reasonable and prudent administrator under the facts and circumstances proven to exist.

Complainant's further contention that his off-duty conduct should not be used as a basis to terminate his employment was also considered and deemed to be without merit. In this instance, it is clear that complainant's off duty conduct, i.e. having his license revoked for a second DUI offense, directly and narrowly relates to the performance of his official duties as a peace officer and therefore is properly the subject of scrutiny. Harris v. City of Colorado Springs, 867 P.2d 217, 219 (Colo. App. 1993).

The evidence established that complainant engaged in the acts for which discipline was imposed. The evidence showed that complainant was required by his job description to possess a valid Colorado driver's license. The evidence further established that complainant's license was revoked as the result of a second DUI offense. Respondent's witnesses articulated a reasonable basis for concluding that these actions violated the General Duty Manual, constituted an inability to perform the essential duties of the peace officer position and warranted termination of complainant's employment.

Based on the evidence presented at hearing, there is no basis to conclude that either party is entitled to an award of attorney fees under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

#### CONCLUSIONS OF LAW

1. Respondent established that complainant engaged in the conduct for which discipline was imposed.
2. The conduct proven to have occurred violated the provisions of the General Duty Manual and constituted an inability to perform the essential duties of the position of peace officer.
3. The decision to terminate complainant's 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 \_\_\_\_\_ day of  
July, 1996, at  
Denver, Colorado.

\_\_\_\_\_  
Margot W. Jones  
Administrative Law Judge

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**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of July, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Barry Roseman  
Attorney at Law  
899 Logan Street, Ste. 203  
Denver, CO 80203

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

Elizabeth Weishaupl  
Assistant Attorney General  
State Services Section  
1525 Sherman St., 5th Floor  
Denver, CO 80203

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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. 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 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. Payment of the preparation fee 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.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

### 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

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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.