

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 96B153

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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GEORGE PAYTON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.  
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Hearing was held on August 15 and 16, 1996, before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Wallis Parmenter and was represented by Diane Michaud, Assistant Attorney General. Complainant appeared and was represented by James Gilsdorf, Attorney at Law.

Respondent's witnesses were: Ronny Jones, Investigator; Robert Allen, Administrative Program Specialist; and Wallis Parmenter, Superintendent. Respondent's Exhibits 1, 2, 6 through 12 and 15 were stipulated into evidence. Exhibits 4, 5, 16, 17 and 18 were admitted without objection. Exhibits 3, 13 and 14 were admitted over objection. Exhibit 13A was excluded pursuant to a ruling that polygraph evidence is inadmissible.

Complainant's evidence consisted of his own testimony and Exhibit A.

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### **MATTER APPEALED**

Complainant appeals a permanent disciplinary demotion. For the reasons set forth herein, the discipline is modified to a temporary demotion.

### **ISSUES**

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether disciplinary action was warranted;
3. Whether the predisciplinary meeting was properly conducted;
4. Whether the disciplinary action was taken by a properly delegated appointing authority;
5. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
6. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
7. Whether either party is entitled to an award of attorney fees and costs.

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### STIPULATIONS OF FACT

The parties stipulated to the following:<sup>1</sup>

1. Complainant has been employed by the Department of Corrections since 1986.
2. Complainant's PACE evaluations have always been either good (standard) or commendable (above standard), with the majority being commendable.
3. This is complainant's first disciplinary action.

### FINDINGS OF FACT

1. Complainant George Payton has been employed in the food service department of respondent Department of Corrections (DOC) since February 1986. He served for thirty years in the United States Army, where he gained experience as a food service supervisor, inclusive of supervision of prisoners of war in Vietnam. Having served as Correctional Support Supervisor II at the Colorado State Penitentiary for eight or nine months, Payton transferred to the Pueblo Minimum Center (PMC) in the same capacity in February 1994. PMC housed only male inmates at that time.

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<sup>1</sup> Stipulated facts are conclusive upon the parties and the tribunal. Faught v. State, 162 Ind. App. 436, 440-1, 319 N.E. 2d 843, 846-47 (1974).

2. PMC was converted to an all-female facility in February 1995. The San Carlos Correctional Facility, also located in Pueblo, opened in July 1995. Wallis Parmenter is the superintendent of both facilities.

3. As the food service supervisor at PMC, Payton supervised two DOC employees who held the position of Correctional Support Supervisor I and eight to twelve female inmates.

4. Brenda Ethridge was in the first group of female inmates to be supervised by Payton at PMC. Ethridge worked in the dining room and the serving line. Payton assessed her job performance as outstanding, above that of all the others.

5. During the first couple of weeks after the arrival of the female inmate workers, Payton overheard various remarks containing sexual overtones. The inmates felt that the male correctional officers were sexually motivated towards them and that the officers shined flashlights in their faces for longer than was necessary to wake them up in the morning. At about the third week, Payton held what he termed a "sex class", during which he explained to the workers that the officers were not sexually motivated towards them and that it was necessary to shine light on their faces until they were personally identified through the officers' observations. He also advised the inmates that they had the prerogative of filing a formal complaint.

6. Brenda Ethridge was paroled on September 18, 1995. Payton, who was on a hunting trip, was aware that Ethridge would be released during the time of his absence from the facility. He did not know the status of her release, i.e., he did not know specifically that she was being released on parole. Earlier in

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the month he and Ethridge had exchanged telephone numbers in anticipation of Ethridge leaving.

7. When Payton returned from his trip, he telephoned Ethridge and left a message on her answering machine. She returned the call, leaving a message on his answering machine. A few days after that, he called her and they talked for a few minutes. He thanked her for doing a good job for DOC and expressed his good wishes in hoping she "made it" on the outside. His sole purpose was to give her a "shot in the arm" and encourage her to do the right thing with her life. This is in keeping with his overall philosophy of attempting to motivate people to go in the right direction.

8. About a week following their initial telephone conversation, Ethridge called Payton again to tell him that she had gotten a job. During that conversation, Ethridge stated that her father wanted to buy a horse. Payton responded that he knew someone who sold horses and that he could give her the name of that person if she wanted it. There the conversation ended. He did not give her the name, and they did not talk again or have any other contact with each other. Payton never met Ethridge's father and stood to realize no personal gain by offering to pass on the information that he knew someone who sold horses.

9. Payton's hobby is horses. He talked about horses in the presence of other officers as well as inmates. He also once mentioned at work that his mother fell and broke her collarbone because he received that information while he was on duty. He did not otherwise convey personal information to inmates.

10. On December 4, 1995, DOC investigator Ronny Jones was assigned by his supervisor to investigate a complaint made by

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inmate Linda Bueno against George Payton alleging that Payton carried on a personal relationship with Brenda Ethridge, conducted a "sex class" every morning at work and talked about his personal life while on duty. Bueno was a former worker under Payton's supervision who had been fired by Payton for failure to report for work.

11. Investigator Jones interviewed Bueno, Ethridge and two other inmates who had been supervised by Payton. The other inmates contradicted Bueno's allegations. Bueno made inconsistent and contradictory statements during the investigation. Prior to the investigation, Bueno had talked about the subject with two correctional officers who found her allegations unworthy of pursuit. No other inmate workers have ever complained about Payton.

12. Ethridge told the investigator that Payton had called her "several times" but that she had not seen him since her release. Payton told Jones that he was concerned about improper treatment of female inmates by male staff and that he had advised the inmates that they had the right to file a grievance.

13. The investigation turned up no evidence of a sexual or social relationship between Ethridge and Payton. The only contact between them was in the workplace and the aforementioned telephone calls.

14. Payton attended a DOC training class called "Working with Female Offenders" on February 7, 1996. The class emphasized that personal and financial information should not be disclosed to inmates because such information could be used against staff by inmates for purposes of manipulation to gain personal favors. This is true of all inmates, but especially true of females, who

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are more likely to exploit the "male ego". Thus, DOC Administrative Regulation (AR) 1450-28 prohibits "unauthorized social, personal, financial, or business relations between staff members of the Department of Corrections and inmates, parolees, or family members of inmates or parolees." Payton always knew that personal relationships with inmates were prohibited, but, prior to this class, he did not understand that telephone calls were prohibited for two years after the inmate's release, and he had believed that talking to inmates in a "professionally friendly" manner was permitted. He testified that he agrees with the DOC policy one hundred percent and that if he knew then what he knows now he would never have given Ethridge his home telephone number.

15. Upon her receipt of the investigator's report (Exhibit 13), Superintendent Parmenter requested delegation of appointing authority from her supervisor, East Regional Director Carl Zenon. (Exhibit 4.) Zenon, who had been delegated appointing authority by John Perko, the statutory appointing authority (Exhibit 3), granted Parmenter's request. (Exhibit 5.)

16. By letter dated March 6, 1996, Parmenter advised Payton that a Rule R8-3-3 meeting would be held on March 14 to consider whether Payton had established a personal relationship with inmate/parolee Brenda Ethridge, whether Payton agreed to establish a business relationship with Ethridge's father, and whether Payton had conducted unauthorized "sex classes" with inmates. (Exhibit 1.)

17. The R8-3-3 meeting was held on March 14, as scheduled. Payton, Parmenter and Ronny Jones were in attendance. Payton presented a written explanation of his actions (Exhibit 7) and a letter from a male inmate, the apparent purpose of which was to demonstrate that his relationship with inmate Ethridge was not

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based upon her gender. Parmenter, however, viewed the inmate letter as further evidence of Payton having "crossed the line" of appropriate inmate relations. The letter was not solicited by Payton and he did not answer it or initiate any contact with the inmate.

18. Parmenter believed Payton's account of events, except for his profession that he did not know that he had crossed the line in his dealings with Ethridge. She felt that he knew his conduct was inappropriate. She also believed that Payton had formed a business relationship to help Ethridge's father buy a horse.

19. Parmenter concluded that Payton's act of conducting the "sex class" was appropriate counseling intervention. She discounted the statements of Linda Bueno, whose complaint she described as "the account of a single inmate with a grudge".

20. Parmenter considers the prohibition of staff/inmate personal relationships to be critical to DOC operations. In addition to AR 1450-28, "Relations Between Staff and Inmates" (Exhibit 10), AR 1450-32, "Staff Code of Conduct" (Exhibit 11), forbids such conduct. She has terminated the employment of six or seven correctional officers for having engaged in improper relationships with inmates. Unlike George Payton, the others had all been involved in sexual relationships. There are no allegations or hints of a sexual relationship between Payton and an inmate.

21. Parmenter found Payton's honesty refreshing and thought that he would learn from a demotion. She felt that she had to remove him from his supervisory position because of his influence on subordinate staff. One of his subordinates was known to have used sexually oriented language around female inmates, and she apparently held Payton responsible for this conduct. She did not

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know that Payton had verbally reprimanded the subordinate or had written in his performance evaluation to cease using sexual language around inmates. She wrongly believed that Payton had attended the class on inmate relationships in February 1995 as well as in 1996. She took into consideration a counseling letter from Payton's supervisor for failure to issue a timely performance plan (Exhibit 18) but did not consider that important enough to bring up at the R8-3-3 meeting to give Payton an opportunity to explain or otherwise respond.

22. By letter dated March 26, 1996, Parmenter demoted Payton from Correctional Support Supervisor II to Correctional Support Supervisor I, effective May 1, 1996, for willful misconduct and failure to comply with standards of efficient service, the sole basis being Payton's establishment of a social relationship and having informal communications with Brenda Ethridge. (Exhibit 2.) The permanent demotion represents a salary decrease of approximately \$325.00 per month, almost \$4,000.00 annually.

23. Copies of Parmenter's letter imposing disciplinary action were sent to Jerry Gasko, who had replaced John Perko, Carl Zenon and others, including the executive director.

24. Upon his demotion, Payton was transferred to the food service department of the San Carlos Correctional Facility, where he currently supervises eight to ten male inmates but does not supervise DOC employees.

25. Complainant filed a timely appeal of his disciplinary demotion.

#### **DISCUSSION**

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In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

Respondent contends that the discipline imposed was warranted because complainant knew or should have known of the existence of the pertinent DOC regulations and that compliance therewith was mandatory. Respondent submits that the significance of the prohibition of personal relationships with inmates is demonstrated by the appearance of such a policy in two separate DOC administrative regulations.

In complainant's view, the discipline imposed was grossly excessive. Complainant submits that this is one of the most benign acts ever to result in discipline and that, at the most, his conduct reflects an error in judgment to help someone. He argues that corrective action, if any action, should have been taken prior to the imposition of discipline. Complainant argues further that the disciplinary action is void on grounds that the delegation of appointing authority from Carl Zenon to Wallis Parmenter violated both the instructions contained in John Perko's initial letter of delegation and Rule R1-4-2(B), 4 Code Colo. Reg. 801-1.

Rule R1-4-2(A), 4 Code Colo. Reg. 801-1, provides that the oral delegation of appointing authority is presumed to have been ratified by the statutory appointing authority unless the statutory appointing authority takes specific action to

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countermand the action taken by the delegated appointing authority. The appointing authority's opportunity to ratify a delegation is presented upon the action of the delegate. The rule thus distinguishes between "such delegation" and "the action taken". It is illogical to authorize an appointing authority by rule to ratify an oral delegation but to preclude the appointing authority from ratifying a written delegation of which he may not have had prior notice. In the present case, there is no evidence to rebut the presumption that the appointing authority received a copy of the disciplinary letter advising him of the action taken by Parmenter. Since the appointing authority did not take specific action within a reasonable time to countermand the action taken by the delegated appointing authority, Rule R1-4-2 presumes that the delegation was ratified and therefore proper.

The evidence that staff/inmate relationships are a very serious concern for the respondent and must be strictly controlled in order to effectuate the sound management of inmates is persuasive. Nevertheless, that fact alone does not justify a permanent demotion under the circumstances of this case.

Complainant's conduct vis-a-vis Brenda Ethridge was wholly benevolent. His actions were not for his personal benefit or gratification. Rather than being self-serving, his actions were carried out for the purpose of motivating an inmate to put her life on the right track. It is in the public interest to encourage inmates upon their release to not become repeat offenders. And while the telephone calls may have been inappropriate under the regulations, they were not extensive.

The appointing authority's opinion that complainant's offer to provide the name of a horse seller formed a business relationship with Ethridge or her father is unsupported. There is no credible

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evidence to sustain a finding that a business relationship existed.

Complainant testified in a straightforward and direct manner. He explained his actions without defending them. He has a good employment record of ten years duration. It is unlikely that he will ever again "cross the line" into inappropriate staff/inmate relations, however minor. There is a dearth of credible evidence to substantiate a pattern of conduct detrimental to the agency or a pattern of willful failure to follow rules and procedures.

The statements of Linda Bueno, which prompted the investigation into complainant's conduct, were rightly discounted by the appointing authority and are disregarded here as untrustworthy, unreliable, inconsistent and against the weight of the evidence.

Rule R8-3-1, 4 Code Colo. Reg. 801-1, sets out eleven factors to govern the decision to correct or discipline an employee. This rule thus contemplates a "totality of the circumstances" standard.

Viewed in this context, complainant's conduct does not warrant a permanent demotion. A temporary demotion is a more fitting penalty and will serve the goals of the agency while preserving the integrity of a system designed to encourage loyal and dedicated public service.

There is no evidence in this record of the predisciplinary meeting being conducted improperly.

This is not a proper case for the assessment of attorney fees and costs under §24-50-125.5, C.R.S. of the State Personnel System Act.

#### **CONCLUSIONS OF LAW**

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1. Complainant committed some of the acts for which discipline was imposed.
2. Some disciplinary action was warranted.
3. The predisciplinary meeting was properly conducted.
4. The disciplinary action was taken by a properly delegated appointing authority.
5. The discipline of permanent demotion was not within the range of alternatives available to the appointing authority.
6. Respondent's action of imposing a permanent demotion was arbitrary, capricious or contrary to rule or law.
7. Neither party is entitled to an award of attorney fees.

**ORDER**

The permanent disciplinary demotion is modified to a temporary demotion to the date of this Initial Decision. Complainant is reinstated to his former position.

DATED this \_\_\_\_\_ day of  
September, 1996, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of September, 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:

James R. Gilsdorf  
Attorney at Law  
1390 Logan Street, Suite 402  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Diane Marie Michaud  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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