

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 96B158

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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PATRICIA W. HOFFLER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.  
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The hearing in this matter was held on June 25, August 13, and December 17, 1996, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Carolyn Lievers, assistant attorney general. Complainant, Patricia W. Hoffler, was present at the hearing and represented by Benjamin Sachs, attorney at law.

Respondent called the complainant and Warren Diesselin, who was the western regional director at the time relevant to this appeal. Complainant testified in her own behalf and called J. Frank Rice, formerly an employee of the department, and Joseph Hoffler, complainant's father, to testify at hearing.

Respondent's exhibits 9, 10, 19, 20, 20A and 21A were admitted into evidence without objection. Respondent's exhibits 1 through 6, 8, 11, 12 page 15, 22A, 22B, 22C, 23 and 24 were admitted into evidence over objection.

Complainant's exhibits B through D were admitted into evidence without objection. Complainant's exhibit A was admitted into evidence over objection. Complainant's exhibit E was marked but was not offered into evidence at hearing.

**MATTER APPEALED**

Complainant appeals the termination of her employment for violation of the Department of Corrections (department or DOC), administrative regulations and for willful misconduct.

## **ISSUES**

1. Whether complainant engaged in the conduct for which discipline was imposed;
2. Whether the conduct proven to have occurred constituted violation of Department of Corrections administrative regulations and wilful misconduct;
3. Whether the administrative regulations cited in support of the decision to terminate complainant's employment were valid;
4. Whether the theory of judicial estoppel precludes respondent from taking disciplinary action against complainant;
5. Whether Warren Diesslin, the western regional director, had appointing authority to impose disciplinary action on complainant;
6. Whether complainant was subjected to unlawful retaliation;
7. Whether the decision to terminate complainant's employment was arbitrary, capricious or contrary to rule or law; and
8. Whether complainant is entitled to an award of attorney fees and cost under section 24-50.5-125, C.R.S. (1988 Repl. Vol. 10B).

## **PRELIMINARY MATTERS**

1. On June 19, 1996, respondent moved for partial summary judgment on the grounds that as to statements made and testimony offered by complainant during an investigation and during Dr. Frank Rice's (Rice) administrative hearing, there are no disputed issues of fact as to complainant's dishonesty. Respondent contended that the remaining issue to be considered at hearing is whether, in light of complainant dishonesty, the decision to terminate her employment is sustainable.

At hearing, on August 25, 1996, as a preliminary matter, respondent's motion was considered and denied. Contrary to respondent's contention there were disputed issues of fact concerning complainant's statements made in the course of an investigation in the Rice matter.

2. On August 23, 1996, at the conclusion of respondent's case in chief, complainant moved for a directed verdict. Complainant argued that respondent failed to establish by preponderant

evidence that complainant made false statements to department investigators and others regarding whether she was sexually harassed. Complainant further contends that judgment should be entered for her because respondent failed to sustain its burden of proof to establish that the decision to terminate her employment was warranted.

In respondent's September 6, 1996, response to the motion, it is argued that evidence was presented that complainant was questioned about whether she was sexually harassed by Rice, an employee of the department. Respondent contends that the evidence established that in response to this inquiry, complainant responded differently to department investigators, the Attorney General's staff and Dr. Rice's attorney. Respondent further contends that the evidence established that complainant was called as a witness at the administrative hearing in the Rice matter where she offered testimony which was not consistent with the information originally provided to department investigators.

Respondent argues that this evidence is sufficient to provide a basis to deny complainant's motion for directed verdict. Respondent argues that the evidence presented in its case in chief, when viewed in the light most favorable to it, must be found to support the termination action.

On September 16, 1996, the motion for directed verdict was denied. Viewing the evidence in the light most favorable to the respondent, it was concluded that respondent made a prima facie showing that complainant engaged in the acts for which discipline was imposed and that the discipline imposed was neither arbitrary, capricious or contrary to rule or law.

3. Warren Diesslin (Diesslin), the western regional director, was called by respondent as a witness. At the hearing in this matter, on August 13, 1996, on cross examination, Diesslin was questioned about a document which complainant alleged was on Diesslin's desk during the R8-3-3 meetings. It was alleged that the document was a memorandum from Diane Michaud, assistant attorney general. Diesslin testified that he had no recollection of the existence of such a document.

In response to complainant's inquiries about the document, Carolyn Lievers (Lievers), assistant attorney general, representing respondent, promised to search her files for the document. Lievers promised to produce the document or file an affidavit recounting her efforts to locate the document. On August 23, 1996, Lievers filed her affidavit and an affidavit from Diane Michaud, another assistant attorney general. On

August 29, 1996, respondent also filed the affidavit of Aristedes Zavaras, executive director of the department. These affidavits addressed the issue of the effort to locate the document requested by complainant and contained additional information.

On September 10, 1996, complainant filed an objection and motion to strike the affidavits of Lievers, Diane Michaud and Aristedes Zavaras. Complainant contended that the documents represented respondent's effort to place hearsay evidence into the record.

Complainant's September 10, 1996, motion to strike the affidavits of Diane Michaud and Aristedes Zavaras was granted. The affidavits contained inadmissible hearsay evidence. Lievers' affidavit was stricken to the extent that it addresses hearsay matters not pertinent to her efforts to locate the requested document.

4. Complainant moved to bifurcate the hearing to consider the issue of judicial estoppel. Complainant's motion was denied. Complainant's theory of judicially estoppel was considered by the administrative law judge and deemed to be without merit. The position taken by respondent in the Rice case did not preclude respondent from considering disciplinary action against complainant.

5. The undersigned administrative notice of the Initial Decision of the Administrative Law Judge in case number 95B082, entitled, J. Frank Rice v. Department of Correction, decided October 24, 1996.

#### **FINDINGS OF FACT**

1 Complainant, Patricia Hoffler (Hoffler), was an employee of the Department of Corrections from February 1, 1991, to April 9, 1996, when she was terminated from employment. Hoffler began her employment with DOC as a correctional officer assigned to Denver Reception and Diagnostic Center (DRDC). Rice was the superintendent of the facility. After serving in a variety of positions, Hoffler was promoted to a position with the youth offender system (YOS). Regis Groff, the director of the youth offender system, was the appointing authority for Hoffler's position in April, 1996.

2. As a YOS correctional officer, Hoffler was required to work with youth offenders in a boot camp atmosphere at DRDC. Hoffler's honesty, truthfulness, and willingness to work cooperatively with the inspector general's office in

investigations was a fundamental requirement of the correctional officer position. Hoffler was supplied administrative regulations that defined these duties and expectations of the job. She was aware of her duty as a correctional officer.

3. Hoffler's received overall job performance ratings of "good" or "commendable" during her employment with the Department of Corrections.

4. Hoffler is well educated. In 1990, Hoffler received a bachelor's degree from the University of Memphis. She majored in criminal justice. She has attended the University of Colorado at Denver, School of Public Affairs, taking post graduate courses in criminal justice.

5. Hoffler is a native of Colorado Springs, CO. Hoffler's parents continue to reside in the Colorado Springs area. Hoffler's father is a personal friend of Dr. Frank Rice. Hoffler has known Rice as a family friend since she was a young child.

6. On December 8, 1994, Rice was terminated from employment as the superintendent for DRDC. He engaged in a pattern and practice of conduct with female department employees that involved unwelcome sexual advances or other verbal or physical conduct of a sexual nature that had the effect of creating an intimidating, hostile or offensive work environment.

7. Prior to Rice's termination from employment, an investigation was conduct. During the course of the investigation, Hoffler was named by a co-worker as one of a number of female employees who complain of Rice's unwanted sexual advances.

8. In furtherance of the Rice investigation, Hoffler was contacted by department investigators. Hoffler was advised that her name was mentioned by a co-worker as having been a victim of Rice's unwanted sexual advances. On September 23 and October 5, 1994, Hoffler signed statements recounting an incident involving herself and Rice. The statements, dated September 16 and 23, 1994, were prepared by department investigators on the basis of information provided by Hoffler during interviews with her.

9. The September 16, 1994, statement explained that Hoffler was sexually harassed by Rice when she went to dinner with him, they returned to her apartment after dinner, and Rice asked her to sit in his lap.

10. The September 23, 1994, statement explained that Rice's

actions in asking Hoffler to sit on his lap made her feel

uncomfortable because Rice was the superintendent at DRDC and her father's friend.

11. During the interviews with investigators, Hoffler was assured that so many women were coming forward with complaints of sexual harassment against Rice her statement was not likely to be used.

12. After signing the second statement, between October 5 and 10, 1994, Hoffler received numerous telephone calls from a paralegal with the Colorado Attorney General's office. The paralegal was attempting to contact Hoffler on behalf of an attorney representing the department in the Rice matter. The paralegal requested that Hoffler schedule an interview to discuss the information provided to investigators.

13. Hoffler was annoyed by these calls. She felt that department investigators lied to her about the need for her involvement in the Rice case.

14. Rice was represented by an attorney. For reasons which are not clear, on October 10, 1994, Hoffler contacted Rice's attorney to advise him that Rice did not sexually harass her. On October 12, 1994, Hoffler signed a statement to this effect.

15. After discussion with Rice's attorney, on October 16, 1994, Hoffler signed another statement. This statement varied from the October 12, 1994, statement. In the October 12, 1994, statement, Hoffler stated that Rice "never sexually propositioned" her. In the October 16, 1994, statement, Hoffler stated Rice never sexually propositioned her, however, he asked her to sit on his lap in a joking nonsexual manner.

16. On November 26, 1996, Hoffler spoke with a department investigator about the statements she provided Rice's attorney and whether she was sexually harassed by Rice. She explained that she was not sexually harassed. She further explained that she signed the statements because she was asked to sign them and she never corrected the statements given to department investigators because she thought her involvement in the Rice matter was concluded.

17. Between October, 1994, and March, 1995, Hoffler was repeatedly contacted by the assistant attorney general representing the department in the Rice matter. The attorney called by telephone leaving messages for Hoffler requesting an interview with her. Hoffler did not return the attorney's telephone calls. The attorney also appeared at DRDC asking

Hoffler to attend a witness meeting. Hoffler refused to attend the meeting. The attorney contacted Hoffler's father in Colorado Springs. Hoffler's father learned of the allegations against Rice, and Hoffler's involvement in the case, for the first time from the attorney.

18. Following Rice's termination from employment, an administrative hearing was held to consider the propriety of that action. Hoffler was called as a witness at that hearing by the respondent on July 12, 1995. Hoffler testimony was taken on July 12, and August 15 and 16, 1995. At the administrative hearing, Hoffler testified that she felt she would be retaliated against because of her testimony. She testified that Rice did not sexually harass her.

19. The administrative law judge presiding at the Rice hearing told Hoffler that, if any retaliation occurred against Hoffler, she would have recourse through the State Personnel Board. In the Initial Decision of the Administrative Law Judge in the Rice case, the action terminating Rice's employment was affirmed. In reviewing the evidence, the judge wrote that Hoffler was not a credible witness.

20. In December, 1995, Aristedes Zavaras, the executive director of the department, requested that Diesslin, the western regional director, conduct a R8-3-3 meeting to determine whether any adverse action should be taken against Hoffler's employment as a result of the information, statements, and testimony offered by her in the Rice matter.

21. In December, 1995, Diesslin provided Hoffler notice that a rule R8-3-3 meeting was scheduled with her. Hoffler appeared at the R8-3-3 meeting held on December 28, 1995, with her attorney. Also present at the meeting was Regis Groff.

22. Hoffler did not speak at this meeting on her attorney's instructions. Hoffler's attorney asked that the R8-3-3 meeting be adjourned because Hoffler was not provided adequate notice of the basis for the department decision to hold the meeting. Hoffler maintained that the notice of the R8-3-3 meeting failed to apprise her of the administrative regulation relied by the appointing authority in considering disciplinary action against her.

23. Diesslin adjourned the meeting indicating that he would amend the notice of the R8-3-3 meeting. On December 27, 1995, Hoffler filed a complaint and motion for issuance of an order to show cause. Complainant sought to have an order entered

directing the department to explain its actions and an order entered directing the department to stop its retaliatory actions. 24. Hoffler's complaint was docketed with the Board in case number 96D001. In January, 1996, the undersigned judge denied relief and dismissed the complaint and motion on the grounds that no adverse action had been taken against Hoffler. On July 22, 1996, the Board affirmed the decision denying the relief requested.

25. Diesslin held a second R8-3-3 meeting with Hoffler on March 26,, 1996. Diesslin, Hoffler, her attorney, Regis Groff, and an assistant attorney general were present. At this meeting, Hoffler did not speak on the advice of her attorney. Hoffler's attorney explained at the R8-3-3 meeting that Hoffler felt pressured, frightened and nervous when approached by the department investigators and asked to provide a statement. The attorney explained that Hoffler was offered inducements to provide the statements to investigators. The inducement was that if Hoffler provided the statements she would not have to testify at the Rice hearing. Hoffler claimed that, but for, these inducements, she would not have provided the statements to investigators.

26. At the second R8-3-3 meeting, complainant's counsel further contended that the department's administrative regulations relied on in determining that Hoffler acted improperly were invalid. It was Hoffler's contention that the administrative regulations were not adopted in accordance with the administrative procedures act, section 24-4-101, et. seq., C.R.S. (1988 Repl. Vol. 10A).

27. In the only remarks made by Hoffler at the meeting she explained that she did not want to be at the R8-3-3 meeting and she wanted to keep her job.

28. Following the R8-3-3 meetings, Diesslin considered the information he received at the meetings, Hoffler's employment record with the department, information from Hoffler's supervisors that she was a valued employee, Hoffler's testimony at the Rice hearing, the statements provided department investigators and Rice's attorney, and the November, 1994, investigative report from the inspector general's office.

29. Diesslin concluded that Hoffler engaged in a pattern of misrepresentations violating the department's administrative regulations, 1450-1, 1450-5, 1450-32 and 1150-1, and State Personnel Board Rules. Diesslin concluded that since honesty is an integral requirement of the correctional officer position, Hoffler's failure to respond honestly during the investigation of

the Rice matter was a very serious infraction. Diesslin noted no remorse or regret on Hoffler's part in her actions during the investigation. She refused to speak at the R8-3-3 meeting, to offer explanation for her actions.

31. Diesslin further concluded that Hoffler's unwillingness to cooperate in the investigation by giving false statements to investigators and by refusing to cooperate with the assistant attorney general on the Rice case was wilful misconduct and a violation of administrative regulations. Diesslin did not receive any information that gave him assurance that Hoffler would not be dishonest again.

32. Consequently, Diesslin decided to terminate Hoffler's employment. Regis Groff concurred in the decision to terminate Hoffler's employment. By letter dated April 9, 1996, Hoffler was advised that her employment was terminated effective that date.

#### DISCUSSION

Certified state employees have a protected property interest in their employment. 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 Veet 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).

The fact finder is entitled to accept parts of a witness' testimony and reject other parts. United States v. Cueto, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe

all, part, or none of a witness' testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

This case involves the application of department administrative regulations. Administrative regulation, 1150-1, effective on February 5, 1993, pertains to investigations and inspections. Section V, (c), of the regulation was relied upon by respondent. It provides,

It is the responsibility of all Department of Corrections and contract personnel to cooperate fully with the office of the Inspector General.

Administrative regulation 1450-1, pertains to ethical performance standards and was effective December 17, 1990. The pertinent portion is found in attachment A. It provides,

#### I. CODE OF ETHICS

Each person in public office in the executive branch of government:

...

2) Shall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire the public confidence and trust in government.

Administrative regulation 1450-32 pertains to a staff code of conduct. The regulation was effective December 20, 1994. This date is subsequent to the date of the events giving rise to the disciplinary action.

Respondent also references in the April 9, 1996, termination letter, administrative regulation, 1450-5, effective June 15, 1992, pertaining to unlawful employment practices. This administrative regulation addresses respondent's responsibility and authority to investigate allegations of sexual harassment.

The parties in this case make numerous arguments both procedural and substantive. The administrative law judge has carefully considered these arguments and deems complainant's to be without merit. This matter is very simple. Complainant was called upon to provide information during a department

investigation involving issues of substantial concern to the department. She failed to provide honest and truthful information and she failed to cooperate in the investigation.

The evidence established that complainant's actions constituted wilful misconduct and violation of administrative regulations, 1150-1 and 1450-1. Because of the gravity of the matters involved in the Rice investigation, because honesty is an important quality which must be possessed by correctional officers in the performance of their job duties, because of complainant's unwillingness to cooperate in the Rice investigation, and because complainant provided no explanation for her actions and expressed no remorse or regret for her actions, the decision to terminate her employment was neither arbitrary, capricious or contrary to rule or law.

The evidence established that complainant is a well educated, competent woman who made a big mistake in not being honest and cooperative with her employer during an investigation. She compounded her problems by refusing to explain her actions during the R8-3-3 process.

Complainant's obligation to deal honestly and cooperatively with DOC managers and investigators was paramount. This obligation was not diminished by her perceptions about racism in the department, familial relationships, or simply her unwillingness to be dragged into a case which prove to be difficult.

Complainant's arguments about judicial estoppel, lack of proper appointing authority, the failure of respondent to comply with the administrative procedures act in the adoption of the administrative regulations, the alleged discriminatory practices at DOC which lead complainant to believe that she would not be given a fair shake, and complainant's fears surrounding her contacts with DOC investigators and the staff of the attorney general's office were considered. These arguments were found to be without legal basis and to lack factual support.

#### **CONCLUSIONS OF LAW**

1. Complainant engaged in the acts for which discipline was imposed.
2. Complainant's conduct was proven to constitute wilful misconduct and violation of administrative regulations 1150-1 and 1450-1.
3. There was no evidence presented at hearing to support the

conclusion that the administrative regulations cited by respondent in support of the termination action were invalid.

4. The theory of judicial estoppel has no application to this case.

5. There was no evidence that Diesslin lacked authority to impose discipline. Diesslin was delegated appointing authority by the department's executive director and Regis Groff ratified the termination action taken.

6. There was no evidence that complainant was subject to unlawful retaliation.

**ORDER**

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

Dated this \_\_\_\_\_ day of  
January, 1997, at  
Denver, Colorado.

Margot W. Jones  
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. 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 fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). 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 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 ½ 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 \_\_\_\_\_ day of January, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Benjamin Sachs  
Knapp & Sachs, P.C.  
1675 Broadway, Suite 1400  
Denver, CO 80202

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

Carolyn Liewers  
Office of the Attorney General  
State Services Section  
1525 Sherman St., 5th Floor  
Denver, CO 80203

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