

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B177

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RAYMOND LOPEZ,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter came on for hearing on July 12, 1996 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by John Lizza, Assistant Attorney General. Complainant appeared and was represented by James Gilsdorf, Attorney at Law.

Respondent's sole witness was Larry Embry, Superintendent, Fremont Correctional Facility. Complainant testified on his own behalf and called no other witnesses.

Respondent's Exhibits 1 through 8 and 5A were admitted into evidence without objection, except that complainant objected to pages 1-4 of Exhibit 2. Complainant's Exhibits A and B were admitted without objection.

MATTER APPEALED

Complainant appeals the May 20, 1996 disciplinary termination of

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his employment. For the reasons set forth herein, a suspension is substituted for the dismissal.

ISSUES

1. Whether there was a proper delegation of appointing authority;
2. Whether the disciplinary termination was warranted;
3. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
4. Whether complainant is entitled to an award of attorney fees.

FINDINGS OF FACT

1. Complainant, Raymond Lopez, served as a correctional officer for the Department of Corrections (DOC) for fourteen years. His last duty assignment was the Fremont Correctional Facility in Canon City.
2. On Friday, April 19, 1996, Lopez, age 44, was driving in Pueblo when he was stopped by an officer of the Colorado State Patrol for operating a motor vehicle with a defective license plate light. The officer smelled marijuana. Lopez admitted to smoking one-half of a joint and indicated that there was one-half of a joint left in the ashtray. The officer then found a plastic bag containing less than one ounce of marijuana in the car and a pack of cigarette papers on the driver's person.
3. Lopez was not driving erratically; there was no accident.

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4. Lopez was charged with the misdemeanor offense of driving under the influence of drugs, the class 2 petty offenses of possession of less than one ounce of marijuana and possession of drug paraphernalia, and the class 2 traffic infraction of driving a vehicle with a defective license plate light.

5. Lopez testified at hearing to the following account of events:

He has lived in Canon City for three years, having lived in Pueblo for the previous sixteen. He has a twelve year-old son. His seventeen year-old nephew lives in Pueblo.

About a week prior to April 19, his son came home from spending time in Pueblo and remarked that the nephew had said that marijuana was not all that bad for you. Lopez had also heard that his nephew was involved with gangs, and he was concerned about the potential influence on his son. On Friday afternoon, he went to Pueblo to talk to his nephew and to attend a meeting of the Community Youth Foundation, a nonprofit organization serving disadvantaged youth. His concern was heightened by having worked with youth for many years and having "lost" some of them to gangs and drugs. (Lopez has coached twelve soccer teams, four football teams, a basketball team and a boxing team.) He picked up his nephew, drove a few blocks, parked and talked about drug use for over an hour, the nephew assuring Lopez that he had not given any marijuana to the twelve year-old. The nephew told Lopez that he, Lopez, didn't know what smoking marijuana was like and that he, the nephew, would quit and give up his pot and papers if Lopez would smoke a joint. With some hesitation, Lopez agreed to this bargain out of concern for his son, hoping to keep both his son and his nephew away from marijuana. The

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nephew rolled a joint, and Lopez smoked about half of it. The nephew did not smoke with him. The nephew then turned over his plastic bag and pack of papers. Lopez took him home and went on to the Community Youth Foundation meeting, where he felt ill from the marijuana affects; he had never used the drug before that day. He intended to dispose of the bag and papers on the prairie between Pueblo and Canon City, but he was stopped by the patrol officer before he left the city limits.

6. On May 2, 1996, Superintendent Larry Embry received information from DOC investigators that Raymond Lopez had been arrested by the Colorado State Patrol for driving under the influence of drugs. (Exhibit 2.) Believing that DOC regulations may have been violated, Embry placed Lopez on administrative suspension with pay and scheduled a predisciplinary meeting.

7. By letter dated May 2, 1996, Embry requested from Regional Director H.B. Johnson appointing authority to conduct a Rule R8-3-3 meeting with Raymond Lopez. (Exhibit 6.) Johnson delegated such authority in writing the same day. (Exhibit 7.)

8. H.B. Johnson was delegated appointing authority from John Perko on February 1, 1994. Perko's letter of delegation to Johnson included the following instructions: "You may further delegate this `Appointing Authority' as you determine necessary for the effective functioning of your office after having obtained my approval. All requests for further delegation must be approved by me. Your approval for the delegation must be in writing to the delegate and I am to be copied." (Exhibit 8.)

9. John Perko is the Director of Adult Services. Gerald Gasko was acting in Perko's capacity at the time of the incident

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described herein because Perko was on extended sick leave.

10. The R8-3-3 meeting was held on May 13, 1996. Embry expressed his concerns, namely that Lopez had failed to report the incident of his arrest as required by DOC Administrative Regulation (AR) 1450-1 (Exhibit 3), that the arrest involved the illegal use of a drug, and that the incident would impact adversely on DOC vis-a-vis the public and law enforcement agencies.

11. Lopez stated at the R8-3-3 meeting that he had smoked part of a marijuana cigarette as a bargain with his seventeen year-old nephew to stop smoking marijuana, Lopez being concerned about the negative influence his nephew might have on his twelve year-old son.

12. Embry does not know of Lopez ever having been suspected of using illegal drugs or of participating in any other illegal activity. A report from the Colorado Bureau of Investigation Crime Information Center revealed no other offenses.

13. Embry had a difficult time making his final decision. Lopez had been an outstanding employee for fourteen years, as demonstrated by his performance evaluations. Embry, himself, had written a letter of commendation on behalf of Lopez. Lopez was dependable and was dedicated to his job. His supervisor spoke highly of him. He had no prior criminal record and his personnel file reflected no prior corrective or disciplinary actions. He was actively involved in the local community and had coached numerous youth sports teams. To Embry, Lopez was the type of employee that DOC wants.

14. The aggravating factors that Embry considered, and which ultimately prevailed, were the use of an illegal drug, the high

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standard to which correctional officers are held for off-duty conduct, the potentially adverse impact on the employee's job performance and the image of the agency, and the violation of AR 1450-1.

15. By letter dated May 20, 1996, Embry terminated the employment of Raymond Lopez for willful misconduct. Copies of the letter were sent to John Perko and Gerald Gasko, among others. (Exhibit 1.)

16. Complainant filed a timely appeal on May 30, 1996.

DISCUSSION

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).

Complainant contends that the disciplinary action is a nullity because the action was taken by an improperly delegated appointing authority. The parties agree that, as the director of the statutorily created Division of Adult Services, John Perko was the appointing authority from whom the delegation must flow. Colo. Const. Art. XII, §13(7). Complainant argues that the delegation from H.B. Johnson to Larry Embry was improper because Johnson did not seek Perko's prior approval as set out in the initial letter of delegation and as required by Rule R1-4-2(B). Respondent counters that, even if the delegation from Johnson to Embry was improper, which it does not concede, the delegation was

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subsequently ratified pursuant to R1-4-2(A) when Perko and Gasko received copies of the termination letter reflecting the final action of the delegated appointing authority.

Rule R1-4-2, 4 Code Colo. Reg. 801-1, provides in full:

Delegation. The appointing authority may delegate authority for all personnel functions and actions.

- (A) Unless otherwise specified in these rules, such delegation need not be in writing so long as the appointing authority ratifies the action taken. The appointing authority is presumed to have ratified the action taken unless he takes specific action to countermand it within a reasonable period of time.
- (B) The delegee may further delegate authority for personnel functions and actions only if, and to the extent, authorized to do so in writing by the appointing authority. If so authorized, then further delegation shall be governed by subparagraph (A) above.

Perko specifically authorized Johnson to further delegate the appointing authority to administer corrective or disciplinary actions. (Exhibit 8.) Johnson did so in writing (Exhibit 7) but did not comply with Perko's instructions to first seek his approval and to send him a copy of the written delegation. Complainant submits that this is the action that must be ratified by the appointing authority, and it presumably was not because Perko did not know of such further delegation. However, R1-4-2(A) refers to ratification of an oral delegation, with the inference that the appointing authority may not have received prior notice of the delegation. Therefore, ratification must apply to the final action of the delegated appointing authority, in which case the statutory appointing authority would then have an opportunity to take the necessary steps to disapprove such action. Logically, the appointing authority's opportunity to ratify the delegation is presented upon the action of the delegee. The rule thus

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distinguishes between "such delegation" and "the action taken". In the present case, there is no evidence to rebut the presumption that both Perko and Gasko received a copy of the termination letter advising them of the action taken by Embry. They, in turn, did not take action to countermand Embry's action within a reasonable time and are therefore presumed to have ratified that action, inclusive of the required delegation. It is illogical to authorize an appointing authority to ratify an oral delegation but to preclude the appointing authority from ratifying a written delegation. Under the circumstances here, the rule presumes a ratification.

The next issue is whether disciplinary termination was warranted under the facts of this case. Both witnesses testified credibly. Although his account of events is an unusual one, complainant testified in a direct and straightforward manner. He explained his actions without defending them. He was remorseful. His testimony was internally and externally consistent. Embry chose not to believe that this was the first time Lopez had used marijuana, or that he smoked solely to get his nephew off of drugs, yet there is nothing in complainant's background to suggest a suspicion of illegal drug use or of untruthfulness. He was a model employee and citizen. (See, e.g. Exhibit B, letter from Board President, Community Youth Foundation.)

Embry testified that a primary concern was that someone who used an illegal drug could not be counted on when called to work while off-duty in the case of an emergency. Yet complainant demonstrated over a period of fourteen years that he could be counted on in such situations. His work history demonstrated that he was both dependable and willing to work overtime. All of his performance evaluations were above standard. Past behavior is the best predictor of future behavior. This one incident should not

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be allowed to obliterate a lengthy record of commendable public service.

Complainant concedes that he exercised poor judgment. His conduct is not likely to be repeated. There is nothing in this record to suggest a pattern of conduct detrimental to the agency or a pattern of failure to follow rules and procedures.

Rule R8-3-1, 4 Code Colo. Reg. 801-1, sets out the factors governing the decision to correct or discipline an employee. The following considerations weigh in favor of this complainant: the extent of the act, the type and frequency of previous undesirable behavior, the period of time that has elapsed since a prior offensive act, the previous performance evaluation of the employee, an assessment of information obtained from the employee, and any mitigating circumstances.

Overall, this is a strongly mitigated case, so much so that the appointing authority testified with tears in his eyes. If R8-3-1 is to have any meaningful effect, this is it. When viewed under a "totality of the circumstances" standard, as contemplated by the rule, complainant's conduct does not warrant dismissal. Temporary demotion or suspension would have been more fitting penalties and would have served the goals of the agency while preserving the integrity of a system designed to encourage loyal and dedicated service to the State of Colorado.

Pursuant to Rule R8-3-4(A)(1), 4 Code Colo. Reg. 801-1, a disciplinary suspension to the date of this decision will be substituted for the dismissal. This order presumes that complainant is a non-exempt employee as defined by the Fair Labor Standards Act and that the order is therefore in compliance with Rule R8-3-3(A)(1), 4 Code Colo. Reg. 801-1. (The evidence at

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hearing established that complainant is eligible for overtime pay.)

An award of attorney fees and costs is not justified under §24-50-125.5, C.R.S., of the State Personnel System Act.

CONCLUSIONS OF LAW

1. There was a proper delegation of appointing authority.
2. The disciplinary termination was not warranted.
3. Respondent's act of dismissing complainant was arbitrary and capricious.
4. Complainant is not entitled to an award of attorney fees.

ORDER

The disciplinary termination is reversed. A disciplinary suspension to the date of this Initial Decision is substituted for the dismissal. Complainant is reinstated to his former position.

DATED this _____ day of
August, 1996, at

Robert W. Thompson, Jr.

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Denver, Colorado.

Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 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:

John A. Lizza
First Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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