

STATE PERSONNEL BOARD, STATE OF COLORADO  
Case No. 97B063

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INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
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BEVERLY GALLEGOS,

Complainant,

vs.

COLORADO DEPARTMENT OF CORRECTIONS,  
SAN CARLOS CORRECTIONAL FACILITY,

Respondent.  
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Hearing commenced on January 8, 1997 and concluded on August 1, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Wallis Parmenter and was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by Max Wilson, Attorney at Law.

Respondent called the following witnesses: Sherri Zupan, Correctional Officer III; Mark Bravo, Narcotics Detective, Pueblo Police Department; Angel Medina, DOC Captain; Joe Stommel, Administrator of Alcohol and Drug Services; Gary Golder, Security Manager; Robert Allen, Administrative Officer; Ruben Avila, Internal Investigator; and Wallis Parmenter, Superintendent, San Carlos Correctional Facility. Stommel was certified as an expert in drug rehabilitation, identification and treatment.

Complainant testified in her own behalf and called Wallis Parmenter as an adverse witness.

Respondent's Exhibits 1, 2, 7, 8 and 9 were stipulated into evidence. Exhibits 3, 4, 5, 10, 11, 13, 14 and 16 were admitted without objection. Exhibit 12 was withdrawn. Exhibit 21 was not offered. Respondent's Exhibit 19 was admitted into evidence without objection. However, testimony subsequently revealed that Exhibit 19 is a report that was written on December 25, 1996, subsequent to the investigation and the termination of complainant

and only upon the request of respondent's counsel for purposes of this hearing. The report was not generated in the regular course of business, was not part of the investigation into complainant's activities and was not considered by the appointing authority in making the decision under review. Exhibit 19 was erroneously admitted and is now, therefore, properly excluded from evidence as artificially created and irrelevant.

Complainant's Exhibit A was admitted by stipulation of the parties.

#### **MATTER APPEALED**

Complainant appeals the disciplinary termination of her employment.

#### **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether complainant failed to mitigate her damages, if any.

#### **STIPULATIONS OF FACT**

In response to respondent's Renewed Motion to Deem Admitted Requests for Admission, complainant agreed to the following:<sup>1</sup>

1. Complainant attended drug deterrence training on June 18, 1996.

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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. Wallis Parmenter was the appointing authority for purposes of the termination.

3. Complainant was given notice of the R8-3-3 meeting held on or about November 6, 1996.

4. Complainant appeared at the R8-3-3 meeting on November 6, 1996 with a representative of her own choice.

5. Complainant's performance plan required that she ensure compliance with AR 1450-1.

#### FINDINGS OF FACT

1. Complainant Beverly Gallegos began her employment with respondent Department of Corrections (DOC) on April 2, 1990. She was a Correctional Officer III (lieutenant) at the San Carlos Correctional Facility (SCCF) in Pueblo at the time of her termination.

2. Gallegos had an on and off personal relationship with Jack Murray, also a correctional officer, for about three years. They lived together in a home owned by Gallegos at the time of the subject incident.

3. On October 15, 1996, while at home, Gallegos snorted a white powder.

4. On the evening of October 15, Gallegos telephoned Lt. Sherri Zupan at SCCF to discuss two new employees whom Gallegos felt were not doing a good job. Gallegos sounded confused and agitated. To Zupan, Gallegos talked in circles and was hard to understand. The next evening Zupan was dispatched from SCCF to complainant's residence with instructions to be prepared to accept a urine sample from Gallegos.

5. On October 16, 1996, Gallegos and Murray traveled together from Pueblo to Englewood, Colorado, in a vehicle owned by Gallegos, where Murray picked up a box containing a jar of iodine. Iodine is one chemical used in the manufacture of methamphetamines.

6. Officers of the federal Drug Enforcement Administration

(DEA) had been investigating Gallegos and Murray for the possible manufacture and sale of methamphetamines, which are illegal, and had followed them to Englewood.

7. In the evening of October 16, 1996, Murray was arrested by DEA officials at the Gallegos residence in Pueblo and was taken into custody. The house was searched. Detective Mark Bravo of the Pueblo Police Department, who had joined in the surveillance of the suspects, assisted in the search. Gallegos was not arrested.

8. In a night stand located in the bedroom shared by Gallegos and Murray, the officers found numerous rocks of crack cocaine, which were concealed in a manilla envelope tucked inside of a magazine. Found in a dresser drawer was a glass vial that contained a residue of cocaine. In the closet, the officers found a homemade smoking pipe and a gram scale of the type commonly used to weigh small amounts of drugs. A vial containing an illegal substance was found on Murray's person.

9. Detective Bravo asked Gallegos to provide a urine sample, and she declined to do so.

10. Bravo telephoned SCCF and spoke with Captain Ben Mendoza, informing Mendoza of the incident involving two DOC employees. Mendoza then telephoned Captain Angel Medina and Major Gary Golder, telling them that Murray and Gallegos had been taken into custody for possession of a controlled substance.

11. Medina, Golder and DOC Criminal Investigator Ruben Avila all went to the Gallegos residence. Avila asked Gallegos to give a urine sample. Gallegos responded to the effect that she would provide a sample to the Pueblo Police Department, and DOC could use that one for their own purposes. She stated that she would not provide a sample to more than one agency. Avila then let the matter drop. He did not issue an order or formally demand that a urine sample be provided.

12. Gallegos did not provide a urine sample for the Pueblo police.

13. Gallegos reluctantly accompanied Golder and Avila to a DOC facility in Pueblo, where she was interviewed by them. According to both Golder and Avila, Gallegos admitted to the prior

use of illegal drugs, and that she had seen Murray in the possession of illegal substances.

14. Gallegos had knowledge that Murray was once dismissed by DOC for refusing to provide a sample for urinalysis testing but was reinstated by the State Personnel Board for lack of reasonable suspicion to order that a sample be provided.

15. The following day, October 17, SCCF Superintendent Wallis Parmenter suspended Gallegos with pay pending investigation of allegations of possession, use and manufacture of a controlled substance. (Exhibit 2.)

16. The R8-3-3 meeting was held on November 6, 1996. Parmenter conducted the meeting in her capacity as the delegated appointing authority. Investigator Avila also attended. Gallegos appeared with her representative, AFSCME Business Agent Bob Roybal, who is not a lawyer.

17. At the November 6 predisciplinary meeting, Gallegos stated that she did not know what the white powder was that she snorted on October 15. She denied making admissions to Bravo, Golder and Avila and denied knowing anything about Murray's drug activities. She refused to answer Parmenter's questions concerning what she thought the substance was that she had snorted and how long she had known Murray, upon the advice of her representative.

18. Parmenter found it unusual that Gallegos would ingest an unknown substance and concluded that Gallegos knowingly used cocaine on at least two occasions: October 15 and 16, 1996. While noting that a formal DOC order to provide a urine sample for drug testing had not been issued, Parmenter concluded that Gallegos was playing games concerning the urine sample and never intended to give one. When comparing the reports of Zupan, Golden, Medina and Avila (Exhibits 3, 4, 5, 6 and 10) to the statements of Gallegos, Parmenter found Gallegos not worthy of belief.

19. In making her final decision, Parmenter took into account that Gallegos was an experienced and highly regarded correctional officer who knew about DOC's drug policy and the reasons behind the prohibition of illegal drug usage by DOC employees. She considered the importance of the policy reasons for AR 1450-1 and AR 1436-1

with respect to safety and security issues. Parmenter also believed that Gallegos violated the DOC policy requiring employees to report known illegal or unethical conduct by other employees, that Gallegos had an obligation to report Murray's activities, if not her own.

20. Gallegos supervised nine staff members and managed more than 100 inmates.

21 Gallegos had a good employment record with no prior disciplinary or corrective actions.

22. Correctional officers are statutory peace officers.

23. DOC Administrative Regulation (AR) 1450-36 IV(A) provides as follows:

The illegal use of controlled substances is a crime which, in most cases, constitutes a felony. Therefore, any staff, contract or volunteer employee who illegally uses controlled substances poses a substantial threat to the safety of the community and his/her fellow employees, and diminishes the morale and integrity of the DOC. Use of controlled substances would place the employee in association with the criminal element and, potentially, seriously compromise the DOC.

Therefore, the illegal use of controlled substances by employees is prohibited. Violations of this regulation will be cause for management/supervisor intervention that may result in corrective and/or disciplinary action up to, and including, termination.

(Exhibit 7.)

24. DOC AR 1450-1 IV(Z) provides as follows:

Staff have an affirmative obligation to immediately report in writing to the appropriate DOC authority any knowledge of criminal activity or unethical actions that have the potential to threaten the safety of public, staff, offenders, or the security of DOC.

(Exhibit 9.)

25. By letter dated November 14, 1996, Parmenter terminated the employment of the complainant for violation of AR 1450-1 and of AR 1450-36.

(Exhibit 1.)

26. Complainant filed a timely appeal of the disciplinary action on November 21, 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 warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S.

The credibility of 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). The fact finder is entitled to accept parts of a witness's 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's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995). This judge is guided by the factors set out in CJI 3:16, which include the witness' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been contradicted, any bias, prejudice or interest, and their manner or demeanor on the witness stand.

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The weight of the evidence is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and

is not a question of mathematics, but rather depends on its effect in inducing a belief. The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not. See Koch, *Administrative Law and Practice*, Vol. I at 491 (1985).

Respondent contends that the evasive conduct of complainant taken in conjunction with her statements and admissions leads to the conclusions reached by the appointing authority. Respondent argues that complainant had used cocaine on more than one occasion, knew of the substances found in her home and knew about the drug-related activities of Jack Murray. Respondent submits that a preponderance of the evidence sustains the appointing authority's disciplinary action taken against this complainant.

Complainant contends that her conduct does not constitute a failure to comply with standards of efficient service or willful misconduct, as alleged in the termination letter. Her primary legal argument is that, because she did not have exclusive possession of the residence, it cannot be inferred that she knew about all of the contents therein. She argues that there is no proof that she actually exercised control over an illegal substance. Complainant also argues that her conduct was not so serious as to justify immediate disciplinary action, and that she should have been issued a corrective action prior to the imposition of discipline, as provided by the rules of the State Personnel Board. In essence, she blames Murray for everything.

Complainant testified that Murray told her that the white powder she snorted on October 15 would make her feel good and was just an aspirin. She testified that she knew that the substance they went to pick up in Englewood was iodine but was told by Murray that it was to be used for horses, a statement which she admitted did not make sense. She testified to having a sinus problem and implied that the white powder was a sinus medication, a contention which she raised for the first time at hearing. She testified that she was going to go to the doctor the next day, implicitly to give a urine sample, but did not have access to transportation.

Complainant's testimony conflicts with the testimony and written statements of Bravo, Golder and Avila, who indicated that complainant admitted to using drugs with Murray and to seeing

Murray in the possession of illegal substances. Lt. Zupan testified that complainant told her at complainant's residence on October 16 that she did not intend to provide a sample for urinalysis testing.

Substantial evidence supports the conclusions of the appointing authority. Complainant's testimony is found incredible. Respondent's witnesses are found credible.

Complainant's exclusive possession argument is generally used as a defense to a criminal charge and is not applicable here. Respondent presented more evidence than the mere fact that complainant owned the home in which the drugs were found. Her relationship with Murray was not a casual one. Although she may not have approved of it, there is sufficient evidence from which to believe that complainant had knowledge of the existence of illegal substances in her home, as well as knowledge Murray's drug involvement.

Given complainant's position, knowledge and background at DOC, it was not unreasonable for the appointing authority to decide that disciplinary action should be taken. The policies and regulations of DOC clearly prohibit illegal drug usage by DOC employees and plainly set forth the underlying policy reasons therefor. Safety and security concerns were appropriately considered. Complainant's performance on the job was not in need of a systematic plan for improvement or correction. She admits to having notice and knowledge of the prohibition of illegal drug usage.

It is thus found that complainant's conduct was so flagrant or serious as to warrant immediate disciplinary action. See Rule R8-3-1(B) and (C), 4 Code Colo. Reg. 801-1. The chosen discipline was within the realm of alternatives available to the appointing authority.

Neither party requested or is entitled to an award of attorney's fees.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

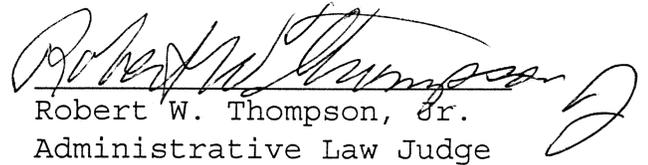
2. The discipline imposed was within the range of alternatives available to the appointing authority.

3. No evidence was presented regarding the mitigation of damages.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 21 day of  
August, 1997, at  
Denver, Colorado.

  
Robert W. Thompson, Sr.  
Administrative Law Judge

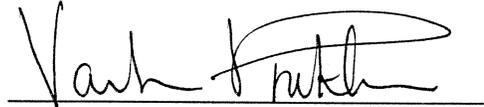
CERTIFICATE OF MAILING

This is to certify that on the 21 day of August, 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:

Max Wilson  
Attorney at Law  
616 West Abriendo Avenue  
Pueblo, CO 81004

and in the interagency mail, addressed as follows:

Thomas S. Parchman  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203



A handwritten signature in black ink, appearing to read "Mark T. Ruhl", is written over a horizontal line.

## 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 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.