

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B099

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INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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MOSES AGUIRRE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

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Hearing was held on October 30 and 31, 1997, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by Paul A. Baca, Attorney at Law.

Respondent's witnesses were: Rosa Frayre, Correctional Officer I; Charles Hicks, Shift Supervisor; Phillip DeFelice, Correctional Officer III; John Gibson, Correctional Officer III; Dennis Burr, Shift Supervisor; Allan Bennett, Superintendent; and Paul Sandoval, Correctional Officer II. Respondent also called complainant as an adverse witness.

Complainant testified on his own behalf and also called: Ron French, Correctional Officer III; Ruben Gurule, a retired Correctional Officer; Mary Alice Newton, Case Manager; Glenn Eklund, Production Supervisor; and Monica Martinez, Correctional Officer II.

Respondent's Exhibits 10, 29 and 35, and complainant's Exhibits A through K, M, N, P through I, V through II, KK, LL and MM were

stipulated into evidence. Respondent's Exhibit 36 and complainant's Exhibits L, K and JJ were admitted without objection. Exhibit U was excluded from evidence.

#### **MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment.

#### **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether complainant was discriminated against on the basis of national origin (Hispanic);
3. Whether the discipline imposed was within the range of available alternatives;
4. Whether complainant failed to mitigate his damages, if any.

#### **FACTUAL STIPULATIONS<sup>1</sup>**

1. Complainant received a disciplinary action in December 1995, which was never appealed.

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<sup>1</sup>Stipuated 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. In June 1996, complainant received an overall PACE rating of "needs improvement", which was not grieved, and a corrective action, which was not grieved.

3. In September 1996, 60 days after the overall PACE rating of "needs improvement", complainant received an interim PACE in the "needs improvement" range and was given a corrective action. Neither was grieved.

#### **FINDINGS OF FACT**

1. Complainant, Moses Aguirre, began employment with respondent, the Department of Corrections (DOC), on April 15, 1991. Aguirre worked as a Correctional Officer I at the Colorado Correctional Center (CCC), also known as Camp George West.

2. Aguirre is Hispanic.

3. CCC is a 150-bed minimum security facility located in Golden, Colorado. Seventy per cent of the inmates work at jobs outside the facility. The inmates have a great deal of freedom by prison standards.

4. On March 1, 1995, Lt. Dennis Burr became Aguirre's direct supervisor. Aguirre's previous performance appraisal rating was in the range of "good".

5. Burr's immediate supervisor was Capt. Charles Hicks. Both Burr and Hicks held meetings with Aguirre regarding Aguirre's performance on the job and his hesitancy to conform to all DOC rules and regulations.

6. Major Al Bennett is the manager of CCC and the appointing authority for disciplinary matters. Bennett has been assigned to CCC since its inception in 1969.

7. Aguirre found himself at odds with the philosophy of Burr and Hicks vis-a-vis the treatment of inmates. Aguirre believed that the management of inmates would be more successful if the inmates were treated with respect as opposed to fear and intimidation. He felt that some DOC rules and regulations were demeaning of inmates and unnecessary.

8. Hicks and Burr discussed Aguirre's performance deficiencies with Bennett, who asked to be kept fully apprised of the situation.

9. On December 11, 1995, Bennett imposed a disciplinary action on Aguirre of a one-day suspension for failure to advise the shift supervisor of the possible presence of a handgun in the facility, his initial refusal to write a report of the incident and writing a factually misleading report. In addition to the disciplinary action, Bennett imposed a corrective action requiring Aguirre to report all information of an important matter to his immediate supervisor and to submit reports in a timely manner. (Exhibit II.)

10. On June 18, 1996, Aguirre received a corrective action in conjunction with an overall rating of "needs improvement" on the PACE for fiscal year 1995/1996.

11. On September 14, 1996, Aguirre received a corrective action in conjunction with an interim overall performance rating of "needs improvement".

12. On November 15, 1996, Aguirre again received an overall rating of "needs improvement" on an interim performance review.

13. Examples of Aguirre's job performance deficiencies include the following:

a. allowing an unauthorized visit with an inmate;

b. overlooking violations of the inmate dress code;

c. not following instructions when transporting an inmate to the hospital; not arriving on time to transport a work crew back to the facility; not notifying the facility of his whereabouts;

d. counting two inmates as present in the facility by signing a count-in sheet that indicated he had seen them in the facility when they were not, in fact, present;

e. not following DOC guidelines in collecting urine samples from inmates and not completing an assignment to collect a certain number of specimens over a designated period of time;

f. opening a security gate and carelessly leaving it open for one and one-half hours;

g. the above-referenced handgun incident.

(See Exhibits D, BB.)

14. By letter dated December 12, 1996, Bennett advised Aguirre of a predisciplinary meeting regarding his performance evaluation ratings. (Exhibit B.)

15. Aguirre appeared at the R8-3-3 meeting represented by counsel. He denied all allegations of unsatisfactory job performance.

16. Bennett concluded that Aguirre had had ample opportunity to improve his performance and that he wasn't going to change. Bennett believed that Aguirre's personal philosophy conflicted at times with DOC policies and procedures.

17. On January 13, 1997, the appointing authority terminated complainant's employment under Rule 8-2-5(A), 4 Code Colo. Reg. 801-1, which provides for the dismissal of an employee who receives two consecutive performance appraisal ratings of "needs improvement". (Exhibit A.)

18. Complainant filed a timely appeal of the disciplinary termination.

#### **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 burden is on complainant to prove discrimination. McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1972).

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. Section 24-50-103(6) C.R.S. In determining whether an administrative agency's decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Department of Social Services, 895 P.2d 506 (Colo. App. 1992).

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). 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).

It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995). 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. Koch, Administrative Law and Practice, Vol. I at 491 (1985).

Substantial evidence supports the conclusion of the appointing authority. On this record, the appointing authority did not abuse his discretion in implementing Rule 8-2-5(A), 4 Code Colo. Reg 801-1, to dismiss complainant.

Bennett had been kept informed on a continuous basis by Burr and Hicks of perceived problems with complainant's job performance. He looked at the situation independently. Because complainant was a Correctional Officer I, there was not a lower level to which he could have been demoted.

Complainant asserts that his policy violations were trivial and overly technical. He suggests that he was singled out and "picked on" because of the differences in philosophy between he and management. This characterization, however, evades the point. His beliefs were not being punished. Rather, his job performance, as reflected in his actions or non-actions, came under scrutiny, which may or may not have been a result of a liberal view toward inmate relations. The incident of counting two inmates present when they were not on the premises, for instance, had nothing to do with complainant's personal philosophy. It was poor job performance and a serious security concern. He falsely indicated that he had personally eyeballed inmates who were not even there.

The evidence suggests that complainant felt demeaned by some of the duties of the job of correctional officer, and he felt intellectually superior to his supervisors. His was a problem of attitude, not lack of ability. If he did not think it was important he did not want to do it. He had the ability, but not the inclination.

It was obvious beginning in December 1995 that complainant's job performance was under scrutiny. While disagreeing with his appraisal ratings, he did not grieve the appraisals or the corrective actions. This is surprising in view of his protestations of innocence. He did nothing to change his behavior or to challenge the actions that were being taken against him. It

appears that he did not take the matter seriously until he lost his job.

Complainant put forth a prima facie case of discrimination by showing that he is a member of a protected group (Hispanic), was qualified for the position of correctional officer and suffered an adverse employment consequence (termination). Colorado Civil Rights Commission v. Big O Tires, Inc., Case No. 96SC184, 26 Colo. L. 260 (Aug. 1997). However, he failed to prove by preponderant evidence that respondent's asserted business reason for the termination was a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); McDonnell Douglas v. Green, *supra*. Ultimately, there was no showing that respondent's action was the result of intentional discrimination. St. Mary's Honor Center, et al. v. Hicks, 509 U.S. 502 (1993).

#### **CONCLUSIONS OF LAW**

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

2. Complainant was not discriminated against on the basis of national origin (Hispanic).

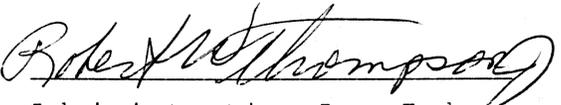
3. The discipline imposed was within the realm of alternatives available to the appointing authority.

4. No evidence was presented on the issue of mitigation of damages.

ORDER

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

DATED this 15 day of  
December, 1997  
at Denver, Colorado.

  
Administrative Law Judge

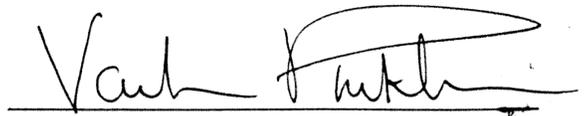
CERTIFICATION OF SERVICE

This is to certify that on the 15 day of December, 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:

Paul A. Baca  
Attorney at Law  
1900 Grant, Suite 610  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Thomas S. Parchman  
Office of the Attorney General  
Department of Law  
1525 Sherman St., 5th Floor  
Denver, CO 80203



## 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 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.