

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 97B145

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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ROBERT P. TUTTLE III,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.  
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Hearing was held on November 7, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Thomas Parchman, Assistant Attorney General. Complainant represented himself.

Respondent called the following witnesses: Dennis Hougnon, Investigator; Annette Fucles, Investigator; Mary Bunnell, Correctional Officer; Ramona Toomey, Correctional Officer (by telephone); Mike Patterson, Shift Supervisor; and Gary Neet, Warden, Department of Corrections.

Complainant testified in his own behalf and called two other witnesses: Shift Supervisor Mike Patterson and Correctional Officer Luis Marien.

Respondent's Exhibits 1 through 9 were stipulated into evidence. Complainant's Exhibits A, B, F, H, L and M were admitted by stipulation. Exhibit P was admitted over objection. Exhibit G was admitted without objection. Exhibits J and K were excluded from evidence.

**MATTER APPEALED**

Complainant appeals a six-month disciplinary reduction in pay.

**ISSUES**

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether the R8-3-3 meeting was properly conducted;

5. Whether respondent is entitled to an award of attorney fees and costs.

### **PRELIMINARY MATTERS**

Complainant withdrew his whistle blower claim and the issues of religious discrimination and his reassignment to the Limon facility.

### **FINDINGS OF FACT**

1. Complainant, Robert Tuttle III, began employment as a Correctional Officer I with respondent, the Department of Corrections (DOC), on February 1, 1991. He was assigned to the Denver Reception and Diagnostic Center (DRDC) until June 1, 1997, when he was reassigned to the Limon Correctional Facility. All events pertinent to this case took place at DRDC.

2. In early 1997, Tuttle took a promotional examination for the position of Correctional Officer II (sergeant). He failed the exam.

3. The test was re-scored to bring some applicants who had failed the test up to a passing level in order to have more employees to interview for the position.

4. Complainant was one of the three finalists for the position, with a modified score of 90. Another finalist was Vaughn Burnette, who passed the test originally and scored 89.

5. Vaughn Burnette, a black officer, was selected for the position. Complainant was angry and upset at being passed over for the promotion.

6. Complainant did not file a grievance over his non-selection.

7. Complainant talked to other DRDC employees about Burnette. He also talked to Superintendent McGoff, who had made the selection. He let it be known that he thought a big mistake had been made in promoting Burnette.

8. Complainant sent a six-page letter dated March 21, 1997, to DOC Executive Director Aristedes Zavaras. He sent a copy of the letter to the Governor, the State Personnel Director, the DOC Inspector General, the Deputy Director of Correctional Services, the Western Regional Director, nine state senators and two state representatives. (Exhibit 3.) The letter was also circulated throughout the facility. Of 28 employees interviewed, 21 had seen a copy of the letter.

9. The letter contained allegations that Officer Burnette scored significantly lower on the

promotional exam than complainant, had lower performance evaluation scores, was less experienced with lower seniority, had been previously disciplined for violations of the Staff Code of Conduct, had been accused by co-workers of harassment, was openly racist, was underqualified to be a sergeant, had severe personal problems and a history of problems in the workplace.

10. The allegations against Burnette, which were stated as facts, were untrue for the most part and otherwise unsubstantiated, mischaracterized and misleading.

11. In the letter, complainant alleged that Superintendent McGoff did not act in the best interests of the facility in promoting Burnette, that he acted only to serve the interests of himself and Burnette, that in so doing he created a hostile and offensive work environment, that McGoff violated established laws and regulations and is "blackmailable."

12. The allegations against McGoff were either untrue, unsubstantiated, exaggerated or misleading.

13. Complainant believes that he was not promoted because he is a Christian.

14. On March 25, 1997, DOC Investigator Dennis Hougnon began an investigation into the truth of the allegations made by Tuttle.

15. Mary Bunnell, a Correctional Officer at DRDC, denies making the statement attributed to her in complainant's letter. She denies being intimidated or sexually harassed by Burnette.

16. Complainant telephoned Sgt. Ramona Toomey at home during the time he was compiling information to put in the letter. He told Toomey that he was upset over the promotion of Burnette, that he was talking to some people and that he was going to "let them know who they promoted."

17. Complainant attributed a statement to Toomey in the letter that is not accurate. After hearing about the letter, she telephoned complainant and asked him why he had altered her statement. She asked him to write a letter to the superintendent retracting what he said she said.

18. Regional Director Warren Diesslen designated Gary Neet to be the appointing authority in this matter. Neet is the superintendent of Fremont Correctional Facility in Canon City.

19. By later dated April 18, 1997, Neet advised complainant that a predisciplinary meeting would be held at DRDC on April 29 to address complainant's possible violation of the Staff Code

of Conduct. (Exhibit 4.) They subsequently talked by telephone to confirm arrangements since Neet would be coming from out of town and to confirm the purpose of the meeting.

20. Neet sent a letter to complainant specifying the administrative regulations with particular provisions that may have been violated. (Exhibit 2.)

21. The 8-3-3 meeting was held on April 29, 1997 at DRDC. The meeting lasted for more than three hours. Complainant appeared with his supervisor, Mike Patterson, who served as his representative.

22. Patterson was satisfied with the conduct of the 8-3-3 meeting. He told Neet that it was one of the best 8-3-3 meetings he had ever seen.

23. Complainant stated at the meeting that he had a duty under the DOC regulations to report wrongdoing. The letter was a response to Burnette's promotion. He admitted that he did not have personal knowledge of Burnette's PACE scores and that Burnette had never received a disciplinary action. He reported what he heard from other people and did not feel that he had a duty to investigate before making allegations.

24. Neet concluded that the accusations against McGoff were unsubstantiated and could severely undermine the credibility of the superintendent.

25. Neet felt that making false accusations against a superintendent and a newly promoted sergeant in writing and sending the letter to eleven state legislators and the governor, in addition to the DOC executive director, the inspector general, the state personnel director and others was an act so serious as to warrant dismissal. In his view, the overall ramifications on the operation of a correctional facility were extremely damaging. He also saw a lot of potential in Tucker as a correctional officer.

26. In a detailed letter dated May 7, 1997, Neet imposed a disciplinary action of a six-month reduction in pay against complainant for violation of Administrative Regulation (AR) 1450-1 and AR 1450-5, which provide that staff will treat each other in a professional manner with dignity and respect; that staff shall not bear false witness against other staff; that relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration and harmony within the DOC; that harassment in any form will not be tolerated; and that false or inaccurate information, or the submitting of false evidence, maliciously or negligently, is prohibited. (Exhibit 1.)

27. Complainant's salary was reduced from Grade 75, Step 6, \$2,584 per month, to

Grade 75, Step 3, \$2,232 per month for a period of six months.

28. Respondent did not explain how it was possible for Burnette, who passed the test originally to end up with a one-point lower score than complainant, who failed the test originally. Nor was evidence presented as to the validity of re-scoring the test rather than re-testing the applicants. This issue was not raised.

## DISCUSSION

Complainant submits that he was merely following the mandate of the Staff Code of Conduct, AR 1450-5, which obligates a DOC employee to report any activity that may be unethical or illegal, and which has the potential to threaten the safety and security of DOC. He argues that the AR requires an employee to disclose any knowledge he has of unethical or illegal conduct. He contends that the key is whether the employee believes it to be true, not whether he knows it for a fact. He further maintains that the information must be reported immediately, not allowing time for an investigation to verify the truth of his assertions. He contends that he was simply reporting what others told him, and he was doing what the regulations required him to do. He does not offer an explanation for why it was necessary to send a copy of the letter to seventeen officials in addition to the DOC director and inclusive of nine state senators, two state representatives and the governor. At hearing, he testified that he was obligated to disclose the information under the whistle blower statute (Exhibit P).

Complainant's testimony is found unworthy of belief. He concedes that the letter was written as a result of Burnette being promoted over him and would not have been written otherwise. The letter was written out of anger and resentment, not as a civic duty or in compliance with the Staff Code of Conduct. Complainant sought out and anxiously accepted negative information about Burnette. He saw no need to substantiate his accusations against McGoff or Burnette. He defends his conduct by saying that the Staff Code of Conduct requires him to report what he believes, not what is necessarily true, and that he must do so without taking time to verify the truth of the assertions. This is incredible.

Complainant's letter amounts to defamation of character. The letter is malicious, vindictive and mean-spirited. There was no rational purpose in disseminating the letter as was done. The letter does not contain complainant's personal knowledge and is not the type of "information" meant to be conveyed by regulation or statute. Complainant violated both the spirit and intent of AR 1450-5. He used the regulation as an excuse for venting his frustration and anger over not being promoted. He chose this approach exclusive of filing a grievance, which was the proper method by which to seek relief. Perhaps worse, he reported inaccurately what others had said to him.

Complainant also argues that the 8-3-3 meeting was improper because he did not know in advance what it was about. Yet, the record reveals that he and the appointing authority talked by telephone after he had received written notice of the meeting, and the appointing authority provided in writing a list of regulations possibly violated. I am convinced that complainant knew exactly what the meeting was to be about, and to contend otherwise is evidence of a total lack of sincerity on complainant's part. It is also noteworthy that complainant claims to have shown the letter to others in order to confirm that they were correctly quoted, yet the letter had already been sent so it was too late for corrections.

Respondent met its burden to prove by preponderant evidence that complainant committed the acts for which discipline was imposed. The appointing authority did not abuse his discretion in imposing this disciplinary action. There is record support for his decision. A reasonable person would not fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P. 2d 506 (Colo. App. 1992).

Complainant has a constitutional right to an evidentiary hearing to make respondent prove just cause for the discipline. § 24-50-125.5 of the State Personnel System Act does not automatically award attorney fees and costs to the prevailing party. As the State Personnel Board ruled, "To read section 125.5 as a prevailing party statute is incorrect. Such a reading would unduly inhibit disciplined employees from asserting a constitutional right." *Sena v. Department of Institutions*, Case No. 93B029, Order of the State Personnel Board, May 20, 1994.

The findings necessary in order to assess attorney fees and costs are not made in this case. § 24-50-125.5, C.R.S.

### CONCLUSIONS OF LAW

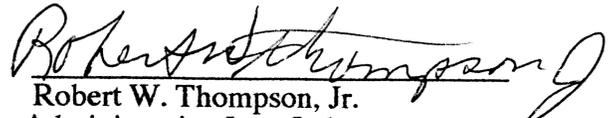
1. Complainant committed the acts for which discipline was imposed.
2. Respondent's action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. The R8-3-3 meeting was properly conducted.

5. Neither party is entitled to an award of attorney fees and costs.

**ORDER**

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

DATED this 22 day of  
December, 1997, at  
Denver, Colorado.

  
Robert W. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the 22<sup>nd</sup> 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:

Robert Tuttle III  
P.O. Box 564  
Byers, CO 80103

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

  
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## 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.