STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B110

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PHILLIP BUFORD,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
ARKANSAS VALLEY CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on May 19, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Ceri Williams, Assistant Attorney General. Complainant, Phillip Buford, was present at the hearing and represented by Randall D. Jorgensen, Attorney at Law.

Respondent called the following employees of the Department of Corrections (DOC) to testify at hearing: Steven Hartley; John Hadley; Glenn Schaffer; Ben Hart; Bryon Crossno; and Richard Marr. Complainant testified in his own behalf and called Bryan Hynes, M.D. to testify at hearing.

The parties stipulated to the admission into evidence of respondent's exhibits 1 through 19 and complainant's exhibits A through D and H.

MATTER APPEALED

Complainant appeals the imposition of a one day disciplinary suspension.

ISSUES

1. Whether complainant engaged in the conduct for which discipline was imposed.

2. Whether the conduct proven to have occurred constituted wilful misconduct.

3. Whether the decision to imposed a one day disciplinary suspension is arbitrary, capricious, or contrary to rule or law.

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

FINDINGS OF FACT

1. Complainant Phillip Buford (Buford) was employed by DOC as a Correctional Officer I at the Arkansas Valley Correctional Facility (AVCF). His duties at AVCF required him to work security guarding inmates. The delegated appointing authority for Buford's position is Richard Marr, Superintendent of AVCF.

2. In January, 1997, correctional officers from AVCF, including Buford, participated in "violence in the workplace" training. This training set forth guidelines to prevent, report, and address behaviors which could lead to violence in the workplace. DOC administrative regulation 100-29 became effective June 1, 1996. It addresses violence in the workplace. DOC has a zero tolerance policy for violence in the workplace. Officers who exhibit violent behavior toward other DOC employees are subject to discipline.

3. An absence of violence in the workplace between correctional officers is very important to the effective functioning of a correctional facility. Officers who have physical conflicts with other officers create a morale problem in the correctional facility. Furthermore, inmates frequently become aware of this type of interaction among correctional officers and use this information to manipulate officers to gain advantage. Correctional officers are expected to set an example for the inmates under their supervision by conducting themselves in a professional manner. Physical violence between correctional officers fails to set the example required.

4. On January 31, 1997, Buford was involved in an altercation with another correctional officer employed by AVCF, Brian Crossno. At approximately 5:45 a.m., Buford and Crossno were in roll call receiving instructions from their commanding officer at the beginning of their work shift. The commanding officer during roll call made reference to the fact that one correctional officer may have reported the conduct of his fellow officers to managers at AVCF.

5. During roll call, Buford gave Crossno unpleasant glances indicating his suspicion that Crossno was the correctional officer who was reporting the misconduct of his fellow officers.

6. Following roll call, the correctional officers proceeded down a hallway to the sallyport to pick up their equipment. Buford proceeded toward the sallyport ahead of Crossno. Crossno and Glen

Schaffer, another correctional officer at roll call, received additional instructions from their commanding officer.

7. Crossno left roll call and proceeded in the direction of the sallyport with Glen Schaffer. As they passed Buford in the hall leading to the sallyport, Crossno remarked to Buford that he should not accuse people of things that he was not sure about. Crossno was making reference to Buford's ongoing accusations that Crossno reported his co-workers' misconduct to managers. Buford previously referred to Crossno as a "snitch" or a "rat", language normally reserved to the inmate population. Crossno believed that the label was misapplied to him because he did not report officers' misconduct.

8. Following Crossno's remark to Buford, Buford pushed past Glen Schaffer and elbowed Crossno in the head or shoulder. Schaffer placed himself between Crossno and Buford in order to break them up and prevent further physical contact. Buford grabbed at Crossno's shirt tearing the shoulder epaulet. Ben Hart, another correctional officer who was getting his equipment, heard the commotion and assisted Schaffer in breaking up the officers. Schaffer held Buford, struggling to hold him back. Hart held Crossno who willingly backed away from Buford.

9. The officers collected their equipment from the sallyport to report to their assignments to begin their work day. Buford left the sallyport area and waited for Crossno. Crossno told Buford that AVCF was not the place for them to fight, but he would be willing to meet him somewhere later. Buford replied, "Fuck you, Crossno."

10. Later that morning, Buford contacted Glen Schaffer at his work station. Buford asked if Schaffer saw Crossno hit him during the altercation earlier that morning. Schaffer told Buford that he did not observe Crossno hit him. Ben Hart contacted Crossno and Buford following their altercation. Hart reminded the officers that what they did was very stupid. Each officer agreed. Buford told Hart that his actions were going to get him in trouble.

11. On January 31, 1997, Crossno reported the incident to Larry Gaskill, Correctional Officer III and one of Crossno's supervisors. On the morning of January 31, 1997, Lieutenant Steven Hartley was directed to investigate the incident. That morning, Hartley spoke with the officers who were present during the altercation. Hartley spoke with Crossno, Buford, Ben Hart, and Glen Schaffer. Hartley obtained written statements from each of the officers he interviewed. Hartley learned that Buford initiated the confrontation with Crossno.

12. When Hartley spoke to Buford, initially, Buford denied that anything happened. With some prompting, Buford changed his story. Buford reported that Crossno was the aggressor and started a pushing match.

13. Hartley also spoke to Crossno who reported the incident in a manner consistent with the information received from Ben Hart and Glen Schaffer. These officers reported that Buford was the aggressor in the altercation.

14. Information about the altercation was reported to Associate Supintendent John Hadley. He reported the information to Richard Marr, AVCF Superintendent. Marr directed Hadley to place Buford and Crossno on administrative suspension until the issues surrounding the confrontation were investigated further and resolution was reached. On January 31, 1997, Crossno and Buford were placed on administrative suspension with pay.

15. On February 2, 1997, Buford reported to AVCF managers that he was injured during the altercation with Crossno. Steven Hartley went to Buford's home and completed a first report of injury form. Hartley instructed Buford to be examined at a medical facility used by DOC for on the job injuries.

16. On February 2, 1997, Buford was seen by Bryan Hynes, M.D. Buford reported to the doctor that he was struck in the back during an altercation at work on January 31, 1997. The physician determined that the injury could have been caused by Buford being struck in the back.

17. On February 3, 1997, at Richard Marr's direction, John Hadley convened a fact finding panel to investigate the altercation between Buford and Crossno. Correctional Officers Tony Reid, Curtis Robinette, and John Hadley made up the fact finding panel. They reviewed the statements collected by Steven Hartley during his investigation. They interviewed Buford, Crossno, and other staff members present at AVCF during the altercation, including, Larry Gaskill, Rueben Gonzales, Ben Hart, Steven Hartley, Jon Robinette, Johnny Rodriguez, and Glen Schaffer.

18. The fact finding panel reached the same conclusion reached by Steven Hartley following his investigation. The panel concluded that there was an altercation between Buford and Crossno on January 31, 1997, in which Buford was the aggressor.

19. On February 3, 1997, the panel's findings were provided to Richard Marr. Marr reviewed the panel's report, talked with panel members about the basis of their fact finding, and reviewed the

statements collected by Steven Hartley. On February 3, Marr requested that the Eastern Regional Director Carl Zenon delegate appointing authority to him to conduct an R8-3-3 meeting with Buford. Appointing authority was delegated to Marr and, on February 4, 1997, Marr advised Buford that a R8-3-3 meeting would be held on February 6, 1997.

20. Buford appeared for the R8-3-3 meeting. Buford explained to Marr that on January 31, 1997, Crossno punched him in the back injuring his kidney and catching him by surprise. Buford further explained that he responded to being punched angrily, and he grabbed Crossno by the shirt. Buford maintained that he was not the aggressor.

21. Richard Marr considered the information he received concerning the altercation between Buford and Crossno. Marr concluded that Buford and Crossno violated the violence in the workplace policy. Marr concluded that Buford violated AR 100-29, pertaining to violence in the workplace, AR 1450-1, pertaining to the staff code of conduct, and State Personnel Board Rule, R8-3-3, concerning causes for disciplinary action, i.e. wilful misconduct.

22. Marr concluded that by fighting in the workplace Buford did not perform his job in a professional manner. He concluded that Buford jeopardized the support of his fellow officers in times of emergency when unity of the correctional staff is needed for security and safety. He finally concluded that Buford's conduct failed to set an appropriate example for the inmate population.

23. Marr decided that the question whether Buford suffered an injury during the altercation was insignificant to the determination whether Buford should be disciplined for participating in a violent altercation in the workplace. The evidence relied on by Marr lead him to conclude that Buford initiated the confrontation with Crossno. Marr decided to impose a one day disciplinary suspension in the hope that a disciplinary suspension would correct and improve Buford's job performance.

24. In a separate disciplinary process, Marr imposed a corrective action on Crossno.

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 Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden of proof to establish that the misconduct occurred and that the discipline imposed was neither arbitrary or capricious. Respondent seeks entry of an order affirming the agency's action and awarding attorney fees.

Complainant contends that respondent failed to sustain its burden of proof to establish that complainant was the aggressor in the altercation with Crossno. Complainant contends that the medical evidence that he presented was uncontroverted. He maintains that evidence establishes that complainant was the victim in the altercation with Crossno. Further, complainant contends that the appointing authority based his decision to imposed discipline on complainant's employment record and he failed to discuss that record with complainant at the R8-3-3 meeting.

Respondent presented a preponderance of evidence from which to conclude that complainant engaged in the conduct for which discipline was imposed. The conduct was proven to constitute violation of R8-3-3 in that it constituted wilful misconduct. The conduct further violated DOC administrative regulations 100-29 and 1450-1. The evidence established the imposition of a one day disciplinary suspension was neither arbitrary, capricious, nor contrary to rule or law.

Complainant's contention that he was the victim in the altercation was not supported by the evidence. Both Glenn Schaffer and Ben Hart, Correctional Officers who were present during all or part of the altercation, testified that complainant was the aggressor. Schaffer testified that complainant elbowed Crossno in the head or shoulder to begin the conflict. He testified that he followed up by grabbing Crossno by the shirt and ripping it. Schaffer further testified that when he attempted to restrain complainant, he continued to strain against Schaffer's hold in his effort to reach Crossno.
Ben Hart testified that as he moved Crossno out of complainant's

reach to end the altercation, complainant reached over Hart's shoulder in an attempt to strike Crossno again.

Furthermore, the testimony of Richard Marr was that he imposed the disciplinary action on complainant not based on who was injured nor based on complainant's employment record. Marr testified that he imposed the discipline in an effort to bring about improvement in complainant's performance because of his conduct in this isolated incident where he initiated an incident of violence at work.

Respondent seeks an order awarding attorney fees and costs under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B). The evidence did not establish that there is a basis for such an award.

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that complainant engaged in the acts for which discipline was imposed.

2. Respondent established that the conduct proven to have occurred constituted violation of R8-3-3.

3. Respondent's decision to impose a one day disciplinary suspension was neither arbitrary, capricious, nor contrary to rule or law.

4. Respondent is not entitled to an award of attorney fees and cost.

ORDER

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

DATED this _____ day of May, 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 May, 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:

R. D. Jorgensen
Attorney at Law
701 North Grand Ave.
Pueblo, CO 81003

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

Ceri Williams
Assistant Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

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