

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B132

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORI JEAN PILMORE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
LIMON CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on July 14, 1997, in Denver before Margot W. Jones, Administrative Law Judge. Respondent appeared at hearing through Robert Furlong and was represented by Thomas Parchman, Assistant Attorney General. Complainant appeared at hearing *pro se*.

Respondent called Complainant as a witness to testify at hearing and Robert Furlong, Superintendent of the Sterling Correctional Facility. Complainant testified in her own behalf and called no other witnesses to testify at hearing.

Respondent's exhibits 4 through 8 were admitted into evidence without objection. Respondent's exhibits 9 and 9A were admitted into evidence over objection.

Complainant's exhibit A was not admitted into evidence. Complainant's exhibit B was admitted into evidence without objection.

MATTER APPEALED

Complainant appeals the termination of her employment.

ISSUES

The following issues were raised by the parties:

1. whether Complainant engaged in the conduct for which discipline was imposed;

2. whether the conduct proven to have occurred violated State Personnel Board rules; and

3. whether the decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Lori Jean Pilmore (Pilmore), the Complainant, was employed as a Correctional Officer for the Department of Corrections (Department) at the Limon Correctional Facility. She began her employment with the Department in February, 1996. She was certified in her position as a Correctional Officer in March, 1997. The appointing authority for Pilmore's position was Robert Furlong who was the Superintendent of the Limon Correctional Facility at the time relevant to this appeal.

2. On or around March 4, 1997, Pilmore was indicted for five counts of felony mail fraud. She advised her supervisor and the appointing authority that she had been served with a felony indictment. Pilmore advised Robert Furlong of the conduct which formed the basis of the indictment.

3. From March, 1994, to January, 1996, Pilmore rented a United States Post Office Box and a private delivery box for the purpose of receiving mail. During this period, she corresponded with men who answered an advertisement she published. Pilmore sent the men photographs of beautiful women claiming that these were pictures of her. Pilmore made false representations to the men about her identity, employment, and intent to relocate if the men sent her money. Men sent her money based on her false representations and her request to do so. She received \$7,800.00 through her deception.

4. Furlong decided to conduct a R8-3-3 meeting with Pilmore to determine whether disciplinary action should be imposed. Pilmore was provided notice of the meeting and advised that the meeting would be held to consider whether her indictment for felony mail fraud violated Administrative Regulations 1450-1 and 1450-29. Furlong met with Pilmore on March 21, 1997.

5. At the R8-3-3 meeting, Pilmore explained that she did not violate Administrative Regulation 1450-29, pertaining to pre-employment screening investigations, because she did not lie during her October, 1995, pre-employment screening when she advised Department personnel that she has not engaged in felony or misdemeanor acts, for which she was not arrested, charged, or convicted. Pilmore admitted that she was aware that she received

money from men under false pretenses. Despite this knowledge, she claimed during the R8-3-3 meeting that she was unaware that her behavior constituted a felony act.

6. Following the R8-3-3 meeting, Robert Furlong decided to terminate Pilmore's employment. Furlong concluded that Pilmore violated Administrative Regulations 1450-1 and 1450-29 by her conduct in connection with the felony charges. Furlong concluded that Pilmore was aware that she was receiving money from men based on her misrepresentations about herself and her intentions. He further concluded that Pilmore's admission that she took money from men under false pretenses constituted a violation of the staff code of conduct.

7. Robert Furlong determined that he could not keep in the Department's employ a correctional officer who was charge with a felony and admitted to her illegal activities. He believed that Pilmore's continued employment would create a morale problem for the rest of the staff, it would diminish the integrity and reputation of the Department in the community, and it would compromise any reports or information provided by Pilmore to law enforcement agencies in the course of her employment. Therefore, by notice dated March 24, 1997, Pilmore was terminated from employment.

DISCUSSION

Certified state employees have a protected property interest in their employment and 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 to establish that Complainant engaged in the acts for which discipline was imposed, that the acts were proven to constitute violation of the Department

of Corrections Administrative Regulations, and the decision to terminate Complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.

Respondent contends that Complainant's termination was premised on the fact that she was charged with a felony involving moral turpitude. Respondent further contends that the appointing authority learned after Complainant's termination that the charges were disposed of through a plea agreement in which Complainant pled guilty to one count of mail fraud. Respondent seeks to have considered this after acquired information. It is argued that, if the basis for the termination is determined to be inadequate, the after acquired evidence of Complainant's conviction should be considered to preclude Complainant's reinstatement and an award of back pay.

Respondent maintains that the after acquired evidence obtained in this matter is unique. Respondent argues that Complainant was provided notice that the criminal charges which lead to the conviction were being considered as grounds for the discipline and Complainant was provided an opportunity at a pre-termination meeting to address these issues with the appointing authority. Thus, Respondent argues that the objection often raised in connection with after acquired evidence, that of lack of notice and pre-termination opportunity for hearing, are not present in this case.

Complainant contends that the termination should not be sustained because it is arbitrary and capricious. Complainant contends that she did not violate Administrative Regulation 1450-29, pertaining to the pre-employment screening investigation, because when she advised Department managers during the pre-employment screening that she had not engaged in felonious activity, she in fact believed that she was telling the truth. She contends that she was unaware that her conduct was criminal. She further contends that with regard to Administrative Regulation 1450-1, the staff code of conduct, Complainant has received information from her former colleagues at the Department that they support her in her effort to return to her position as a Correctional Officer. Therefore, she maintains that it is incorrect to terminate her because other Correctional Officers do not have confidence in her ability to perform her duties. She baldly asserts that other Correctional Officers who continue their employment with the Department have worse criminal records. Complainant seeks entry of an order reinstating her to her position with the Department.

Complainant was terminated from employment for violation of Administrative Regulation 1450-1, the staff code of conduct, and

1450-29, pertaining to the pre-employment screening interview. Complainant is accused of failing to live up to the highest professional and ethical standards and lying during the pre-employment screening interview. The evidence presented at hearing supports the conclusion that Complainant violated the administrative regulations cited. It is undisputed that Complainant was charged with a felony and Complainant admits that she engaged in the felonious activity underlying the charges.

The appointing authority fairly considered all the evidence in making the decision to terminate Complainant. He considered the impact on the agency, reasonably concluding that to allow an employee charged with a felony to continue as a Correctional Officer in a correctional facility would adversely effect the agency.

The appointing authority thus did not act arbitrarily or capriciously in terminating Complainant for violation of Department Administrative Regulations. Imposition of the discipline imposed here is within the realm of alternatives available to a reasonable and prudent administrator.

State Personnel Board rule, R8-3-3(3)(iii), provides that an appointing authority may terminate an employee when that individual is charge with a felony involving moral turpitude. In closing, Respondent argued that under this provision, Complainant's termination was also justified. It does not appear, based on the evidence presented at hearing, that Respondent elected to terminate Complainant under the provisions of this rule but instead relied upon the Department's Administrative Regulations to support the action.

Respondent also contends that the evidence acquired after the date of Complainant's termination supports the action taken here. The after acquired evidence consisted of evidence that Complainant was convicted of felony charges based on her plea of guilt to one count of the indictment. However, the issue whether Respondent can prevail based on this doctrine need not be reached because it is concluded that the basis of the termination was adequate to support the action taken.

CONCLUSIONS OF LAW

1. The evidence established that Complainant engaged in the conduct for which discipline was imposed.
2. The facts proven here establish that Complainant violated Administrative Regulations 1450-1 and 1450-29.

3. The decision to terminate Complainant's employment was shown to be neither arbitrary, capricious, nor contrary to rule or law.

ORDER

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

Dated this ____ day
of July, 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 July, 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:

Lori Jean Pilmore
P.O. Box 195
Arriba, CO 80804

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

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