

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 088

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES B. KLOVAS,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,
COLORADO CORRECTIONAL INDUSTRIES,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on April 3, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General John A. Lizza. Complainant appeared and was represented by James R. Gildsorf, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary revocation of his purchasing authority and consequent suspension of his supervisory authority, a six (6) month reduction in pay from a Step 5 to a Step 1 and a directive to pay 35 % mark-up on tires purchased for his personal use. Complainant also appeals a corrective action imposed for the same actions for which the disciplinary action was imposed. For the reasons set forth below, Respondent is reversed.

PRELIMINARY MATTERS

1. Exhibits

Respondent's Exhibits 1 through 5 were accepted into evidence without objection. Complainant's Exhibits A through C were accepted into evidence without objection.

2. Witnesses

Respondent called the following witness: Mr. Thomas G. Crago, Director of Correctional Industries (CI).

Complainant testified on his own behalf.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the actions of Complainant warranted the corrective and disciplinary actions imposed;
3. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to attorneys fees and costs.

FINDINGS OF FACT

1. Correctional Industries ("CI") programs operate as for-profit businesses within Colorado state government, e.g. CI operates a number of agri-business programs; makes license plates and renewal stickers; builds furniture and panel systems; runs a saddle factory; runs moving crews; runs concrete and painting crews and runs a service station for state vehicles. Each program employs inmates of the Department of Corrections (DOC) along with non-inmate employees. Non-inmate employees fall under the State Personnel system.

2. Mr. Thomas G. Crago, Director of Correctional Industries, properly requested and received appointing authority in this matter. (Respondent's Exhibit 3.)

3. Complainant has been employed by DOC since 1990 and was employed as the non-inmate manager of the CI service station at the time of the incidents leading up to this

disciplinary action. Three (3) other non-inmate employees worked under Complainant's supervision and approximately twenty (20) inmates worked under Complainant's supervision on a regular basis. The service station services only state vehicles at this time. However, the station used to provide services, but not gasoline¹, to private individuals.

4. The CI service station is located inside the checkpoint for the East Canyon Facilities of DOC near Canon City.

5. Complainant lived in Pueblo at the time of the incidents leading up to this disciplinary action.

6. Complainant's duties at the CI service station included supervising two bays for vehicle service, four gasoline pumps (used for state vehicles only) and a large wash bay for vehicles. Service included light service work, e.g. tune-ups, air filter and oil changes, tire rotation. The hours of the service station were 7:00 A.M. to 6:00 P.M.

7. In order to fulfill his duties Complainant was granted "purchasing authority" for any item or group of items under \$500.00 (Five Hundred dollars and No cents), i.e. no bid was required on items under \$500.00. Complainant could purchase these items from various stores throughout the Canon City area, including Pueblo, or through a catalog with delivery to the CI service station.

8. During the time that private vehicles were serviced at the CI station, Mr. Giles Spalding, Complainant's supervisor instituted a Thirty-five percent (35%) mark-up on parts used in the servicing of private vehicles. At the same time DOC procedure for sale to private individuals was a Twenty percent (20%) mark-up. (Respondent's Exhibit 4.)

9. During the time that private vehicles were serviced at the CI station, Complainant had his personal vehicle serviced there at least two (2) times. Complainant paid the 35% mark-up plus tax.

10. During the time that private vehicles were serviced at the CI station, Complainant purchases tires for private vehicles approximately six (6) times. The tires were marked up 35% and sales tax was added.

11. A contract for the use of Kendall oil at the CI service station was negotiated by someone in DOC Purchasing and was in effect during the time Complainant was employed as the manager of the CI service station.

¹ The state does not pay tax on gasoline for use in state vehicles but would have had to charge and collect tax on gasoline sold to private individuals; therefore gasoline was not sold to private individuals at the station.

12. During the time Complainant was employed as the manager of the CI service station, he raced a private vehicle on his own time. He had a private agreement with Kendall Oil by which he received Kendall oil at a discount and displayed Kendall Oil decals on his race car. The value of this agreement was less than One Thousand dollars (\$1,000.00). Therefore Complainant was not required by DOC procedure to file a disclosure statement regarding the agreement.

13. Private agreements for parts, including products, at a discount in return for display of decals on race cars, are frequent in the auto racing industry.

14. On or about March 22, 1995, Kendall Oil delivered cases of oil to the CI service station as per their contract with DOC. In order to save on delivery costs, Kendall delivered approximately ten (10) cases of Kendall products to Complainant for his private use, *at the same time and place* but by separate invoice. The invoice was made out to State of Colorado yet it indicated sales tax. Complainant placed the Kendall items in his private vehicle and personally paid for the products. (Complainant's Exhibit C.)

15. Mr. Crago, the appointing authority, advised Complainant that using Kendall products and decals for his race car and accepting them at the CI station created "the appearance of impropriety". He advised Complainant not to accept delivery of Kendall items at the station. (Respondent's Exhibit 5, pg. 4., J.)

16. Complainant had no control over the state contract with Kendall but from the time he was advised by Mr. Crago not to accept delivery of Kendall items at the station he neither signed for deliveries to the station nor did he receive any personal deliveries at the station, i.e. other employees signed for Kendall oil used at the CI station whenever it was delivered to the station.

17. During the time Complainant was employed as manager of the CI service station, in May and early June of 1997, Complainant visited or called several tire dealers to determine competitive prices for tires for his private vehicle. He was quoted \$66.00 (Sixty-six Dollars) per tire at the BF Goodrich tire store but found the best price at the Pueblo Goodyear store.

18. In the past, Complainant had purchased approximately four (4) sets of tires for personal use from the Pueblo Goodyear store.

19. During the time Complainant was employed as manager of the CI service station, on or about June 3, 1997, Complainant purchased four (4) tires from the Pueblo Goodyear store for personal use. Complainant came into the store on personal business only, i.e. he did not conduct any business on behalf of the state and he advised the Goodyear dealer that the tires were for use on his personal vehicle. Nonetheless, the invoice was made out to DOC. The tires were picked up by Complainant and paid for by Complainant's personal check. No sales or excise taxes were indicated on the invoice nor were they paid by Complainant, i.e. Complainant paid the "State award price". The price for each tire was \$59.21 (Fifty-nine Dollars and Twenty-one Cents). (Respondent's Exhibit 6.)

20. At the time Complainant went to pick up the tires he simply asked the amount due, wrote the check for that amount and accepted the invoice without inspecting it.

21. Complainant has no control over what name or notation the vendor places in the “Sold To” box on invoices.

22. Mr. Tom Crago advised Complainant that the purchase of the tires under such circumstances was an improper use of “purchasing authority” by a person in an influential position, i.e. because Complainant negotiates prices on behalf of the state, his actions could be seen as “coercive”.

23. An R833 meeting was held on January 2, 1998, in which Complainant denied ever having purchased tires for his father. Complainant stated that he no longer signed for Kendall oil at the gas station and he explained that failure to pay sales tax for the tires was an oversight and he would correct it. He explained that he did not pay the 35% mark-up because the tires did not come through the state; they were a personal purchase made on his own time. He further stated that he would never consider withholding purchases from vendors who did not give him the state-award-price for personal-use items.

24. After the R833 meeting Complainant returned to the Goodyear dealer and asked him to add sales tax to the invoice and reissue the invoice in the correct name of the Complainant. The Goodyear dealer did so and Complainant paid the tax. (Complainant’s Exhibits A and B.)

25. After the R833 meeting Complainant began inspecting each invoice, whether for personal use or for the CI service station, to be sure the correct buyer named appeared on the invoice. He specifically instructed his staff to do so as well.

26. Complainant continued with his practice of not receiving delivery of personal items at the CI station and, after the R833 meeting, instructed his staff to refrain from receiving delivery of personal items at the station.

27. After the R833 meeting, Mr. Crago, the appointing authority listened to the tape-recording of the meeting before making his decision. He also considered mitigating factors, e.g. Complainant was open, candid and “presented useful information”. He considered Complainant’s attitude generally. Mr. Crago considered, generally, the propriety of conducting state business and personal business in the same visit or in the same telephone call to a vendor, i.e. improper use of telephones to conduct private business². He considered alternative forms of discipline, e.g. demotion, but decided that a temporary reduction in pay would be more effective to get Complainant to understand his (Mr. Crago’s) point of view regarding what is reasonable behavior

²No such allegations were raised against the Complainant at any time.

for one in Complainant's position. (Respondent's Exhibit 1.)

28. As a result of the R833 meeting in this case and after investigation into the matters involved, Mr. Crago, the appointing authority, imposed both a disciplinary action *and* a corrective action by letter dated January 8, 1998. The disciplinary action required payment of a 35% mark-up plus tax for the 4 Goodyear tires but did not state to whom it should be paid; revocation of Complainant's purchasing powers and a consequent demotion³ and a six (6) month reduction in pay from a Step 5 to a Step 1. The corrective action required that Complainant receive no further deliveries of personal goods at the CI service station. (Respondent's Exhibit 1.)

29. The pay reduction in this matter is equal to an approximate 20% (Twenty percent) pay reduction, i.e. approximately Six Hundred dollars (\$600.00) per month for a total of approximately \$3,500.00 (Three Thousand Five Hundred dollars) in pay reduction.

30. Mr. Crago did *not* review Complainant's past evaluations in determining what action, if any, should be taken.

31. From his date of hire in 1990 to January 1998, Complainant had never received a corrective action or a disciplinary action. His evaluations were "commendable".

32. Complainant has extensive background in the automotive industry. He has a Bachelor of Arts degree in Automotive Service and a Vocational Teaching Certificate. He was initially hired by DOC to teach a vocational automotive service class. His previous employment includes employment as a supervisor for a large wholesale autoparts dealer. He has owned his own autoparts store. He has been racing his own car since 1979.

33. Mr. Crago has very little professional experience in the auto industry and he does not fully understand the duties of a service station manager.

34. Excise tax is not charged on car tires.

35. It is a common automotive industry practice to allow discounts on employees' personal purchases, where the employer has a discount with the vendor.

36. At hearing and in response to questioning by Complainant's Counsel, Mr. Crago stated that the "oil issue" was a "non-issue".

³Although Complainant's job classification remained the same, because Complainant no longer possessed "purchasing authority", he could no longer act as manager of the CI service station.

DISCUSSION

I. Facts and Law

The burden is upon Respondent to prove by a preponderance of the evidence that the acts 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 administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act occurred and 2.) whether just cause warrants the discipline imposed. There is little dispute as to whether or not the act(s) occurred:

- Complainant owns a race car. He displayed Kendall decals on his race car. The CI service station used Kendall oil as per a state contract that Complainant did not negotiate. On at least one occasion Complainant received Kendall products, at the service station, which were intended for private use. After being advised by Mr. Crago, Complainant discontinued receiving Kendall products for personal use at the station and he discontinued signing for delivery of Kendall oil used at the station.
- Complainant purchased tires for use on his personal vehicle from a vendor with whom he may deal in his position as manager of the CI station. He told the vendor the tires were for his personal vehicle and he paid with a personal check. The original invoice listed DOC as the purchaser and did not include sales tax.
- The position of manager of the CI service station requires “purchasing authority” for items under \$500.00.
- Complainant is a “commendable” employee with regard to work performance. He has no prior corrective actions and no prior disciplinary actions.

The remaining question is: Does just cause warrant the discipline imposed? In this case both a corrective action and a disciplinary action were imposed for the same actions of Complainant. State Personnel Board Rule R8-3-1 C states in pertinent part;

“unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary

action.”

The remaining question becomes: Were Complainant’s actions so flagrant or serious that immediate disciplinary action was appropriate?

II. The “Oil Issue”

In response to questioning by Complainant’s Counsel at hearing, and contrary to the appointing authority’s Notice of Disciplinary/Corrective Action letter of January 8, 1998 (Respondent’s Exhibit 1), the appointing authority stated that the “oil issue” was a “non-issue” in his decision to impose concurrent corrective and disciplinary actions. The appointing authority thereby limits the actions to be considered as “so flagrant or serious that immediate disciplinary action was appropriate”. If the appointing authority did not consider the Kendall Oil issue, then the only issue left to hold to this standard is the issue of Complainant’s purchase of tires for personal use from a state vendor.

Even had the appointing authority not so stated at hearing, the oil issue *is* a non-issue because there was no improper action on the part of Complainant; the appearance of impropriety, Complainant’s acceptance of delivery of Kendall products for personal use, occurred in 1995 (Why wait almost three years to impose corrective or disciplinary action?); and since then Complainant had corrected his “appearance of impropriety” actions regarding Kendall products.

Therefore, the only remaining question is: Was Complainant’s purchase of tires for personal use from a state vendor and failure to pay state tax “so flagrant or serious that immediate disciplinary action was appropriate”?

III. The Automotive Industry

Complainant’s testimony clearly showed that he is experienced and well-versed in the practices of the automotive industry. So much so that he was hired to share his expertise in automotive parts and services with inmates under his supervision. He used his expertise in his supervisory capacity at the CI station. His evaluations were “commendable”. The appointing authority, on the other hand, showed little knowledge of the automotive industry, stating that both before and at the R833 meeting, Complainant had “presented useful information”, e.g. information about automotive industry practices. The appointing authority relied on such useful information in running the CI service station. It is the only service station that Correctional Industries runs and the appointing authority, as Director of CI, relied on Complainant’s expertise to keep it running.

Complainant testified that he had called various area dealers before deciding where to buy tires for his car. He was aware of the automotive industry practice of extending similar discounts to employees as those extended to the respective employer. The price he was quoted by Goodyear was not so far out of line from the price quoted by Goodrich as to seem out of the ordinary. He was

aware that he needed to pay state sales tax on personal purchases. He was aware that tires for a car would not be subject to excise taxes. When Complainant went to pick up the tires, he asked for a total, wrote a check for the amount, put the invoice in his pocket without looking at it and took the tires with him. This is a reasonable explanation of Complainant's actions.

If the tires had been taken from the CI station, e.g. delivered there for sale from the station, then taking them would have been both a flagrant and a serious violation of DOC procedures regarding mark-up of resale items and prohibition against servicing private vehicles at the CI station. But the tires never came through the CI station. When Complainant went to the Pueblo Goodyear store, he went to conduct personal business. He did not conduct any business for the state. There was no flagrant disregard for DOC procedures. In fact, by making a separate trip, announcing that the tires were for personal use and later returning to pay sales tax it appears that Complainant was doing everything he believed he needed to do to comply with DOC procedure.

IV. Progressive Discipline

At hearing the appointing authority stated that disciplinary action was necessary to get Complainant to understand his (the appointing authority's) point of view regarding what is reasonable behavior for Complainant, who is both a consumer of automotive parts and a manager of a state-run service station. Complainant and the appointing authority disagreed as to what is reasonable behavior. Perhaps they still do. However, when the appointing authority explained the "oil issue" to Complainant, Complainant modified his actions to comply with the appointing authority's request. No corrective action was needed, nor was one given at that time. Waiting more than two years to impose corrective/disciplinary action is unreasonable and no reason for the delay was offered at hearing.

With regard to Complainant's purchase of tires, Complainant modified his actions and instructed his staff to do the same, before the R833 determination was even made. Clearly a disciplinary action was unnecessary to get this state employee to modify his actions. A corrective action would have been sufficient. Progressive discipline is encouraged in such situations. There was no need for a disciplinary action nor were there grounds for such in conjunction with a corrective action, i.e. there was no act "so flagrant or serious that immediate disciplinary action was appropriate".

V. Arbitrary and Capricious

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 a reasonable person must reach a contrary conclusion. *Van de Vegt v. Board of Commissioners*, 55 P. 2d 703, 705 (Colo. 1936).

In arriving at his decision the appointing authority considered "What if..." questions, e.g.

What if Complainant inquired about the price for an item for personal use in the same conversation as he conducted business for CI? What if the conversation took place on the telephone rather than in person? Yet Respondent presented no evidence that such had ever occurred.

No evidence was presented regarding the allegation of Complainant's purchase of tires for his father.

Complainant's evaluations rated his job performance as "commendable". The appointing authority relied upon Complainant to run the CI service station, relying on Complainant's expertise in the automotive industry. Yet in making his decision regarding a possible corrective/disciplinary action, the appointing authority considered neither Complainant's commendable past performance nor Complainant's expertise.

Complainant paid the 35% mark-up for all parts and services he received through the CI station. Under questioning the appointing authority stated that he did not discipline Complainant for using a 35% mark-up instead of the 20% mark-up set by DOC procedure. (No explanation was offered as to why an overpriced mark-up would be allowed.) Rather the appointing authority wants to charge Complainant a 35% mark-up on tires that were purchased outside the CI service station. The Notice of Disciplinary/Corrective Action letter does not say to whom the 35% mark-up should be paid. Surely, at the time Complainant paid the state sales tax, the dealer would have indicated his or her desire to receive a higher amount for the tires in question, if the dealer wanted the higher price. On the other hand, why should Complainant pay the state a 35% mark-up on tires that never came through the station?

The appointing authority stated that he considered demotion and rejected that as an option. Yet he revoked Complainant's purchasing authority which was a *de facto* demotion. Without the purchasing authority Complainant could no longer act as manager of the CI service station.

The corrective and disciplinary actions taken in this case are unreasonable. The appointing authority considered *possible* scenarios in making his decision. He neglected or refused to consider Complainant's past evaluations, expertise and Complainant's reasonable explanations. He neglected or refused to procure evidence regarding allegations of the purchase of tires for Complainant's father. Further, Complainant modified his actions after being so advised by the appointing authority, without need of a corrective action, but it seems the appointing authority wanted more, i.e. for Complainant to agree with him regarding the reasons for modification of Complainant's behavior.

Neither the corrective action nor the disciplinary action were necessary in order to modify Complainant's actions in this matter. The appointing authority considered possibilities he should not have considered and did not consider factors he should have considered, e.g. Complainant's past evaluations. The appointing authority rejected demotion as a reasonable alternative but by suspending Complainant's purchasing power he created a *de facto* demotion. His reasoning is unsupported and contradictory. A reasonable person would be compelled to reach a contrary conclusion in this matter.

CONCLUSIONS OF LAW

1. Complainant purchased tires for use on his personal vehicle from a vendor with whom he may deal in his position as manager of the CI station. He told the vendor the tires were for his personal vehicle and he paid with a personal check. The original invoice listed DOC as the purchaser and did not include sales tax.
2. This act was corrected by payment of the sales tax due on the tires and was not “so flagrant or serious that immediate disciplinary action was appropriate”.
3. Respondent’s actions were arbitrary, capricious and contrary to State Personnel Board Rule 8-3-1 C.
4. The allegations of improper activity on the part of Complainant are groundless.
5. Complainant is entitled to an award of costs, including attorney’s fees.
6. This judgement is final for purposes of appeal. The only remaining issue is the amount of costs. *Baldwin v. Bright Mortgage Co.*, 757 P.2d at 1072 (Colo. 1988); *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993).

ORDER

1. The actions of Respondent are **reversed**.
2. Respondent is directed to reinstate Complainant’s purchasing authority and position as manager of the Correctional Industries service station, together with back pay at Step 5 offset by Complainant’s pay at Step 1.

Dated this 18th
day of May 1998
at Denver, CO

Michael Gallegos
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 this _____ day of May, 1998, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Mr. James R. Gildorf
Attorney at Law
1690 Logan St., Suite 402
Denver, CO 80203

and in the interoffice mail to:

Mr. John A. Lizza
First Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
