

State Personnel Board, State of Colorado

Case No. 99 B 056

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARTIN A. CROSS,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter was commenced on January 28, 1999. The matter was continued to, and hearing held on March 8 and March 9, 1999 before administrative law judge G. Charles Robertson. Pursuant to an Order Granting Respondent's Motion for Change of Hearing Location, the location of the hearing was the Denver Reception and Diagnostic Center, 10900 Smith Road, Denver, CO 8023 9-8004.

MATTER APPEALED

Complainant appeals the disciplinary termination imposed by Respondent and claims that such action was arbitrary and capricious. The termination was imposed by Respondent based on Complainant failing to comply with standards of efficient service and willful misconduct. In this matter, based on the record of evidence, Respondent did not act in an arbitrary or capricious manner, nor did it act contrary to rule or law.

The disciplinary action of Respondent is upheld. Attorney fees and costs are awarded to Respondent.

PRELIMINARY MATTERS

Respondent, Department of Corrections ("Respondent" or "DOC") was represented by Jennifer M. Dechtman, Assistant Attorney General. Complainant represented himself *pro se*.

1. **Procedural History**

Complainant filed his Notice of Appeal on November 24, 1998. Complainant appealed his disciplinary termination of employment with Respondent. Complainant claimed that the actions of Respondent constituted harassment. He contests that discipline should not have been imposed and maintains that his performance ratings do not support the need for termination.

Hearing on this matter was commenced on January 28, 1999. The matter was continued and the evidentiary hearing was held March 8, 1999 and March 9, 1999. Given that Complainant was represented pro se, a detailed description of the hearing process was provided to Complainant.

Respondent's Motion to Take Telephone Testimony filed March 5, 1999 was ruled upon at the time of hearing. The motion was granted.

2. **Witnesses**

Respondent called the following witnesses during it case in chief: (1) Gene Atherton, Buena Vista Correctional Facility ("BVCF"), Buena Vista, CO; (2) Capt. John Tafoya, South Unit Supervisor, BVCF, Buena Vista, CO; (3) Capt. Ken Grazyk, BVCF, Buena Vista, CO; (4) Sgt. Joe McFee, BVCF, Buena Vista, CO; and (5) Complainant.

On rebuttal, Respondent called the following witnesses: (1) Complainant; and (2) Gene Atherton.

Complainant called the following witnesses: (1) Robert Lentecum, 914 Crawford Ave., Delta, CO 81416; (2) Joe Spilker, correctional officer, BVCF, Buena Vista, CO; and (3) Sandy Bell, correctional officer, BVCF, Buena Vista, CO. Complainant did not provide direct testimony on his own behalf in his case in chief. It should also be noted that Complainant failed to subpoena a number of witnesses. Those witnesses could not be located on the day of hearing.

3. **Exhibits**

The following Respondent's exhibits were admitted into evidence: Exhibits 1, 2, 3 over objection, 16 - 21, 47 and 48. Additionally, exhibits 4 - 15 and exhibits 22 - 46 were stipulated into evidence.

The following Complainant's exhibits were admitted into evidence by way of stipulation: B, C, and G. Despite having a number of other exhibits marked for identification, no other exhibits were offered by Complainant.

ISSUES

1. Whether Complainant engaged in the actions for which discipline was imposed;
2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority;
3. Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule or law; and
4. Whether either party is entitled to an award of attorneys fees pursuant to section 24-50-125.5, C.R.S.

FINDINGS OF FACT

I. Respondent's Background

1. The Department of Corrections is the state department responsible for the incarceration of individuals convicted of crimes. In fulfilling its responsibilities, DOC provides for the housing and meals of inmates while providing for the safety and security of both inmates and staff.
2. Buena Vista Correctional Facility was, and continues to be, one of many prisons within the correctional system.
3. The housing units at BVCF consisted of multiple tiered prison cells. The doors and locks to the cells were controlled from a master housing control unit, referred to as the "cage." An officer was always stationed within the cage in order to control the unlocking/opening and locking/closing of jail cells. The principle means of communication with such an officer was by way of radio. In addition, BVCF had a "yard" in which inmates were occasionally allowed to visit. During such visitations, an officer was responsible for supervising the activities, and maintaining security, in the yard. A schedule was distributed so as to inform officers as to which post, the cage, the yard or other location, they would be responsible for during their shift. Scheduling, and post assignments, could rotate based on a supervisor's decision to utilize the strengths of particular personnel and in order to accommodate daily needs in the housing units.
4. Inmates are allowed to have some personal possessions while at BVCF. Included in those personal possessions are hand held mirrors. In addition to their cosmetic use, mirrors would be used to view events outside of an inmate's cell by the inmate holding the mirror just outside or below his cell door and viewing the reflection from down the tier.
5. The staffing pattern at BVCF emulated a paramilitary type organization, using

rank to distinguish between various levels of staffing. Generally speaking, the reporting structure at BVCF was as follows: correctional officer, sergeant; operation lieutenant; captain; major; associate warden, and warden. Captains had responsibility for housing units of inmates and included supervising employees who staff the housing units. Normally, correctional officers provided staffing for the housing units.

6. During the course of Complainant's employment with DOC, BVCF maintained a south housing unit in which Capt. John Tafoya was south unit supervisor. He was responsible for the overall operations of the unit including answering grievances of inmates, maintaining expenditures within budget, providing for the safety of staff and inmates, and personnel matters. Staffing on the unit was accomplished in shifts. Tafoya supervised Lt. Eggleston and Sgt. John McFee who supervised Complainant.
7. Contemporaneously, Gene Atherton was warden of BVCF. Atherton had been with DOC in some capacity for 22 years in which he had responsibilities associated with being chief of security, manager of housing and classification, and a captain responsible for a housing unit. As warden of BVCF, Atherton was responsible for managing the budget of the facility, making policy determinations vis-a-vis outside agencies, managing all personnel related to the facility, and providing for safety and security of the facility. Atherton was Complainant's appointing authority.
8. DOC Administrative Regulation 1450-1, effective March 1, 1997, is entitled the Staff Code of Conduct. The regulation provides in part:
 - staff, offenders ... shall be treated professionally regardless of sex, race,...;
 - staff will not exchange special treatment or favors. . . from offenders;
 - staff shall not, directly or indirectly, give to. . . any offender. . . anything in the nature of a gift;
 - staff shall not disclose confidential information;
 - professional relationships with colleagues will be of such character as to promote mutual respect;
 - staff shall avoid situations which give rise to a direct, indirect or perceived conflict of interest;
 - all items.. .given to offenders will be through officially sanctioned and documented channels and will have prior approval of the appointing authority;
 - and
 - verbal abuse of offenders by staff will not be permitted.

(Exhibit 4).

9. DOC Regulation 1450-05, effective 6/1/98, addresses unlawful employment practices including workplace discrimination and harassment. (Exhibit 5).
10. The introduction of particular substances into the housing units and inmate living areas was against policy. For instance, by way of DOC regulation, food was considered contraband and was not to be provided to inmates (other than through the dining hall). Staff of DOC facilities are made aware of this administrative regulation at the time of their initial training.

II. Complainant's Background

11. Complainant was certified to his position as a Corrections Officer I in June 1997. He had been with DOC since June 1996 as a probationary employee.
12. In the course of his employment with DOC, Complainant received the following performance documentation:

<u>Date</u>	<u>Overall Rating</u>	<u>Relevant Comments</u>
6/1/96 to 2/28/97 (Exhibits 7, 8, 9, 10)	5-Outstanding 4-Commendable 3-Good 2-Needs Improvement 1 -Unacceptable	
	3 month rating: 2.5	Employee had evaluations done based on performance plan at 3 month, 6 month and 9 month intervals. (Exhibit 7). At 3 month evaluation:supervisor commented on need for improvement on interpersonal skills and noted he had verbal confrontation with staff member; and entered into horseplay with inmates. A plan for improvement in this factor was developed. (Exhibit 8).
	6 month rating: 2.7	At 6 month evaluation: supervisor commented that while there was some improvement in interpersonal relations, there was need for specific training in this area; communication skills had improved but concern remained with non-verbal communication skills; complainant was rated good in terms of organizational commitment. A plan was developed to allow for monthly review, to have Cross attend classes in report writing and Use of Force, and to attend training in Interpersonal Relations. (Exhibit 9).
	9 month rating: 3.0	At 9 month evaluation: Complainant had improved to overall GOOD rating. Interpersonal relations improved to a GOOD rating of 3.0 but it was commented this was still area of concern; the quality of his reports was of concern to the supervisor at this time. (Exhibit 10).

6/1/97 to 3/31/98 (Exhibit 11, Exhibit B)	Transition to Colorado Peak Performance forms and ratings Overall rating: 10 indicating Needs Improvement	Narrative provided Complainant received a letter of counsel regarding inaccuracies in serving reports a letter of counsel on disciplinary reports that contained inaccuracies; another re unprofessional conduct to inmates; referred to corrective action based on Complainant divulging investigation to inmates; mishandling of evidence; letter of counsel re interactions with staff; and failure to report potential or possible fight or assault in A/O Unit (Exhibit 11)
2/20/98 (Exhibits 12, 13)	Corrective Action	Complainant was advised of ability to grieve corrective action and given the deadline Complainant was to improve communication with all staff; act in professional manner at all times, read the Staff Code of Conduct and Unlawful Employment Practices/Workplace. Harassment and Discrimination policies and attend training in those areas. Directed to contact training coordinator ASAP. (Exhibit 12~ 13).
3/28/98 (Exhibit 14)	Corrective Action	Areas needing improvement quality of work, quantity of work communications interpersonal relations and organizational commitment. 45 days provided to improve performance to a level of GOOD.
5/14/98 (Exhibit 15)	Performance Review Form Overall rating: Fully Competent	Notes that Complainant improved in all factors except Communication and Interpersonal Relations. It was emphasized need to improve communication with inmates and written reports were for the most part acceptable.. Need for more training noted. Quality of work, quantity of work and organizational commitment were all Fully Competent. Indicated he does not misuse leave.. (Exhibit 16).
5/15/98 to 10/6/98 (Exhibit 16, Exhibit C).	Performance Review Form Overall rating: Needs Improvement	Complainant was rated as Needs Improvement in all factors: quality of work, quantity of work, communication, interpersonal relations, and organizational commitment. Re: communication and interpersonal relations the following concerns were raised: reacting personally to situations instead of acting professionally and failure to improve in these areas over time after training and additional experience.

Complainant signed all forms (Exhibit 7 - 16) indicating he had received the plans and evaluations timely. Complainant failed to file any petition for hearings on the performance plans, evaluations, or corrective actions.

13. Complainant attended 53 training courses during his employment. (Exhibit 6). The training involved issues including First Aid, CPR, Use of Force, and Discrimination. The following specific training sessions were also completed:

<u>Title of Training</u>	<u>Date</u>
Workplace Discrimination	3/3/98
Stress Management	2/9/98
Radio Communications	6/17/96
Report Writing	6/14/96
Communications	6/12/96
Contraband .	6/10/96
Offender Mgt.	6/7/96

III. Incidents Leading to Discipline

14. On or about May 20, 1998, Complainant entered into a discussion with Officer Bland regarding the location of Complainant's post for the day. Sgt. McFee, who was responsible for assigning posts, decided that Cross was to operate the "cage", the master control room in which the door mechanisms were located. Another officer, Officer Robinson, was not originally scheduled to work the yard, but was assigned to supervise/guard the yard. Complainant was upset that he could not work the yard that day and maintained that he had been scheduled to work the yard. Complainant argued with Bland that his post had been changed before to accommodate Robinson.
15. Officer Bland discussed the matter for approximately 30 minutes with Complainant in order to calm Complainant. Complainant never discussed the issue with Sgt. McFee. (Exhibit 47).
16. Sgt. McFee was concerned about the level of upset by Complainant on this issue in that it demonstrated a failure to comprehend the need to have the schedule flexible and the need to accommodate any changes in the housing environment.
17. During the R8-3-3 meeting, Cross was inconsistent as to his recollection of the event. He first stated he talked to Officer Bland about the incident in order to "vent" his frustrations because Officer Robinson always got what she wanted. He next said that Robinson was assigned to both the cage and the yard. He next said that he thought Officer Bland created the situation. Complainant next said that it was Officer Bland's duty to inform Sgt. McFee of the level of upset of Complainant. (Exhibit 3).
18. On or about June 7, 1998, Complainant brought pastries into the housing unit for inmate consumption. Complainant admitted bringing in the pastries. The pastries are considered contraband. (Exhibit 48). The pastries could also considered gifts to inmates.
19. Throughout his career with DOC, Complainant struggled with his ability to write

reports pursuant to DOC policy. (See performance evaluations listed above). For instance, in May 1997, Lt. Eggleston reported to Complainant that he needed to improve his report writing and improve his accuracy. (Exhibit 30). Lt. Eggleston had previously counseled Complainant on this behavior and the need to improve his report writing.

20. In June 1997, Capt Graczyk documented that Complainant was failing to accurately complete reports. (Exhibit 31).
21. On or about July 1998, Complainant drafted a handwritten report regarding an inmate failing - to complete tasks to which he was assigned, including the wiping down of tables and in which Complainant documented that the inmate had yelled at Complainant and new staff to open his cell door. (Exhibit 17).
22. Lt. Eggleston reported Complainant's failure to provide a professional report on the above incidents. (Exhibit 17). In reviewing the incidents, the appointing authority concluded at the time of discipline that this specific instance was not a matter which was to be considered in the administration of discipline. However, the appointing authority noted the behavior as problematic in terms of Complainant's ability to improve his performance.
23. The substance of Eggleston's report did suggest that Complainant had problems interrelating to inmates despite training in this area. This is confirmed in other incidents:
 - On 8/1/96, Complainant had trouble interrelating with inmates and was found to have engaged in horseplay with the inmates. (Exhibits 23,24).
 - Complainant had disagreements with inmates regarding name calling in March 1997. Cross was advised at that time as to how to improve his skills, possible resolutions to such situations, and Cross indicated that he understood. (Exhibit 28).
 - In March, 1997, threats were made against Complainant by inmates as a result of how Complainant treated them. (Exhibit 29).
 - On 7/1/97, Complainant was involved in an incident in which Complainant was accused of harassing an inmate because of a religious issue. (Exhibit 32). It was determined at that time that Complainant had not harassed inmates based on religious affiliation.
 - Later that month, Complainant was accused of verbally harassing an inmate and telling him to "shut up." Complainant admitted to this conduct and was counseled by Lt. Eggleston to follow procedure and simply inform the inmate that he might be written up and subject to discipline for such

behavior. (Exhibits 33, 35).

- Complainant was unable to determine his boundaries with inmates in that he on one occasion, disclosed confidential information to inmates regarding a in-facility drug investigation. (Exhibit 35). He received an interim performance rating and corrective action as a result.
 - In August 1997, threats were again being made against Complainant from inmates because of his behavior with them. (Exhibit 37). It is uncommon to have inmates outwardly threaten an officer. Capt. Graczyk discussed the matter with Complainant to ensure that Complainant was still comfortable working with inmates. (Exhibit 38). Complainant was counseled on the situation again in October 1997 and provided information on how to improve his relations with inmates. Complainant stated he was oblivious to any issues with inmates. (Exhibits 43, 44).
 - On 6/30/98, Sgt. McFee reported that Complainant had been counseled on how to interact with inmates and how to improve his behavior with them. (Exhibit 18).
 - On or about August 24, 1998, Complainant was involved in an incident with an inmate in which he inappropriately grabbed a mirror away from an inmate that had been being held under the cell door. The incident was caught on video tape and reviewed by Complainant's superiors.
24. Complainant had problems inter-relating to staff during his career with DOC. He would have confrontations with other staff members, including Officer Hamner in September 1997, in which Complainant referred to Hamner as male, then female. (Exhibit 40).
25. Complainant had conflicts with other staff members in February 1998. Specifically, Complainant had set a mousetrap in the cage and failed to inform the incoming female officer. As a result, the mousetrap was triggered by the officer. Complainant was warned by Capt. Tafoya that such activities could be in violation of the Staff Code of Conduct (Exhibit 4) and deemed Harassment (Exhibit 5). Complainant was directed by Tafoya to attend training at the time of the incident and review applicable DOC policies.
26. In one incident on July 16, 1998, an inmate was to be attending an educational class. The inmate failed to report to class. Pursuant to policy, the academic instructor, Des James, called the housing unit in an attempt to locate the inmate. Complainant initially responded to the instructor by stating that he was the inmate. This caused concern by the teacher since inmates did not readily have

- access to telephones. (Exhibits 1, 3, 19). Complainant had corrected himself and eventually indicated he was Officer Cross. When approached by his superiors about the incident, Complainant denied he stated he represented himself as an inmate. (Exhibits 3, 19). During his R8-3-3 meeting, Complainant admitted this behavior was inappropriate and that he had initially lied to superiors about the incident. (Exhibits 3, 19).
27. In August 1998, while working within the cage, Complainant failed to turn on his radio on two separate occasions. As a result, he was unable to verbally communicate with other officers working on the floor of the housing unit. (Exhibit 21). Complainant admitted he forgot to turn his radio "on" during his R8-3-3 meeting. (Exhibit 3). During hearing, he denied that he forgot to turn it "on."
 28. On occasion, an officer's radio "on/off" or volume switch can be mistakenly hit while working in the cage as a result of the cage's layout. This type of incident occurred with at least one correctional officer, Joe Spilker. Spilker, however, would initially turn "on" his radio.
 29. On August 11, 1998, Complainant called in sick to work. (Exhibit 22). He stated that he was ill and would provide a note from a doctor. No such note was ever provided. Complainant also stated he was "sick" because of some discussions he had with another correctional officer.
 30. Respondent provided Complainant with a Notice of R8-3-3 meeting on October 23, 1998. The Notice was very specific as to the rationale for the meeting and included at least 7 specific actions of Complainant which needed to be addressed including:(1) angry and aggressive behavior by Complainant on 5/20/98; (2) introduction of contraband to inmates; (3) unprofessional memo writing; (4) verbal confrontations with inmates; (5) unprofessional communication with academic teacher; (6) failure to use radio communication with staff and (7) possible abuse of sick leave. Respondent clearly stated that discipline was being considered as a result of Complainant's failure to comply with standards of efficient service or competence or Complainant's willful misconduct. See: Board Rule R8-3-3(C)(1)(2), 4 CCR 801-1. (Exhibit 1).
 31. An R8-3-3 meeting was commenced on November 2, 1998. In attendance were Complainant, Atherton, Gary C. Strobridge, Associate Warden, BVCF, and Tony Reid, Associate Warden, BVCF. The meeting with Complainant lasted from approximately 9:30 a.m. to 11:00 a.m. Subsequently, interviews with additional staff with regard to the incidents involving Complainant were conducted. (Exhibits 2,3).
 32. On November 16, 1998, Respondent issued a disciplinary termination based upon information provided during the R8-3-3 meeting, performance

documentation contained with Complainant's personnel file; and interviews with Complainant's supervisors. Based on the information collected and reviewed, Atherton imposed a disciplinary termination upon Complainant for violation of R8-3-3(C)(1), and (2). The letter of discipline contained conflicting dates on the header of the document. The letter references that Complainant's supervisors were interviewed as part of the information collection process. (Exhibit 2).

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). At the time of the incident, such cause was outlined in State Personnel Board Rules R8-3-3 (C) and generally included: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, -32 (Cob. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

- A witness' means of knowledge;
- A witness' strength of memory;
- A witness' opportunity for observation;

The reasonableness or unreasonableness of a witness' testimony;
A witness' motives, if any;
Any contradiction in testimony or evidence;
A witness' bias, prejudice or interest, if any;
A witness' demeanor during testimony;
All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. PARTIES' ARGUMENTS

Respondent argues that there are occasions that an employee needs to be terminated because of that employee's failure to provide standards of efficient service or competence and/or willful misconduct. It is DOC's contention that as a result of the nature of its mission, incarcerating criminals, it is critical to retain good employees. At the same time, DOC argues that it acknowledges that it has a responsibility to nurture employees in order that they can meet the needs of the department. In this instance, Respondent argues that there are a number of incidents in which Complainant demonstrated his inability to provide efficient or competent service. Respondent argues that all of the incidents outlined in the Notice of an R8-3-3 meeting demonstrate that Complainant is incapable of providing the needed level of performance. Additionally, DOC says that this argument is reinforced by the fact that counseling and training were available to Complainant. Respondent argues that the meeting/confrontation with Sgt. McFee regarding scheduling, the introduction of pastries, the unprofessional memo writing of Complainant, the verbal confrontations with inmates, the communication with the academic teacher, the use of sick leave, and the performance record all support the imposition of discipline. Respondent argues that Complainant has failed to provide any significant evidence to rebut its determination. As a result, the level of discipline imposed was appropriate. From DOC's perspective, the only action that could be taken was termination because the information demonstrated a serious and flagrant violation of the rules. Moreover, DOC maintains it provided sufficient opportunities, in the form of counseling and training, for Complainant to improve his performance and correct his behavior. Finally, Respondent argues for an award of attorney fees based on this matter being frivolous and groundless.

Complainant maintains that he should not have been terminated. While Complainant admits to having been involved in the incidents outlined by DOC, it is Complainant's position that he did not violate any rules with regard to providing efficient or competent service and did not engage in willful misconduct. Complainant maintains he did not abuse sick leave. He maintains that issues associated with radio communications occur with all employees. He argues that the scheduling issue should have never been raised to his superiors. Complainant maintains that no inmates have made any recent threats against him, suggesting that he has improved his communications with inmates.

He also states that a great deal of horseplay occurred and that he should not be disciplined for it. Complainant takes issue about whether he was ever counseled and trained on the issue of pastries despite his admission of having provided them. Complainant also argues that his witnesses were intimidated from testifying on his behalf. Finally, Complainant maintains that this entire case is based on “politics” and that he has been “abused.”

III. ISSUES BEFORE THE BOARD

A. Whether Complainant engaged in the actions for which discipline was imposed.

Respondent identifies at least 7 instances or acts which occurred giving rise to the need for discipline. The body of evidence supports Respondent’s position on the incidents. Respondent has demonstrated by a preponderance of evidence that the acts for which discipline was imposed did occur.

First, with regard to the confrontations with Sgt. McFee and scheduling, it is undisputed that Complainant had aggressively discussed the issue with Officer Bland. While Officer Bland did not testify, the documentation supports this proposition. Complainant provided only limited testimony on this issue. Complainant testified that he had been upset but had been merely sharing his concerns with a fellow officer. At the same time, Complainant indicated it was appropriate for Officer Bland to report the matter to his superiors. Complainant’s credibility with regard to re-counting this incident is lacking. During the course of his testimony, he expressed problems remembering the incident. The same memory problem occurred during his R8-3-3 meeting. At one point he remembered the incident, moments later he claimed he didn’t remember the incident. With the record before the Board, it can only be concluded that this incident supports Respondent regarding Complainant’s inability to interact with other staff members constructively.

Second, the record supports Respondent’s contention that Complainant introduced contraband to inmates. Complainant simply admits that he did provide left-over pastries to the inmates. The record supports that Complainant did receive training as to what constitutes contraband. Moreover, DOC’s administrative regulation reinforces the need not to provide gifts to inmates.

Third, Respondent has shown that Complainant failed to file appropriate written reports regarding incidents with an inmate in July 1998. Respondent demonstrated that Complainant had received training in report writing. Complainant admitted to having submitted the report on the incident during his R8-3-3 meeting and that despite being asked to re-submit a typewritten report, he failed to do so. During the R8-3-3 meeting, Complainant contradicted himself as to whether or not he understood it was to be re-done. Respondent met its burden in showing that written documentation of events that

happen between inmates and staff is critical to preserving the safety and security of the facility. Moreover, Respondent demonstrated that the contents of the report exemplifies Complainant's poor interactions with inmates.

Fourth, Respondent demonstrated that Complainant maintained poor relationships with inmates. The body of the record suggests that Complainant had struggled with this issue since he began at DOC. Moreover, it is clear that after having received a wide variety of training in stress management and offender management, Complainant was poor at interacting with inmates. He had received appropriate training within 2 years of all the incidents involving inmates. As late as June 1998, Complainant had received one on one counseling on his relationships with inmates; Yet, he continued to be involved in incidents with inmates such as the "grabbing" of the mirror in August 1998.

Fifth, Complainant exercised poor judgment in his interactions with staff. Respondent showed by a preponderance of evidence that Complainant had issues with other staff as exemplified in Complainant's interactions with Officer Hamner in 1997, the mousetrap incident in February 1998, and with Des James, the teacher in July 1998. It is clear that Complainant did not appropriately interact with staff, in a professional manner, as required by DOC regulation.

Sixth, Respondent demonstrated Complainant's failure to maintain radio communications. Complainant had received training in this area. Complainant admitted to problems with his radio, either forgetting to turn it on, or having it accidentally turned off. The fact that other staff may have experienced their radio being accidentally turned off does not excuse the conduct. Respondent had clearly shown that radio communications are critical to the safe and efficient operation of the BVCF facility. Such communication was necessary to protect the staff and the inmate population.

Seventh, while a simple matter, it is clear that the record comports with Respondent's interpretation that Complainant abused sick leave. Complainant offered no evidence on this matter except to testify that he didn't abuse sick leave. Yet, the evidence suggests that leave was used because of Complainant's poor relationship with a superior and that Complainant never submitted a medial excuse for his leave. During his R8-3-3 meeting, Complainant maintained that he had Gulf War Syndrome, which caused him to forget things. As a result, he maintained he initially forgot to bring in a note. Given that no other evidence was presented on this matter by Complainant, it cannot be determined that there was any reason for Complainant's failure to provide the requested information regarding his use of sick leave.

The preponderance of evidence demonstrates that Complainant failed to comply with standards of efficient service or competence. Given that Complainant had been advised -and counseled on a number of issues involving his poor relationships with staff and inmates, that Complainant failed to improve his behavior after such notice and

training, and that he had notice of DOC regulations regarding staff conduct, Complainant's behavior in these instances can also be characterized as willful misconduct. See: Board Rule R8-3-3(C)(1)(2), 4 CCR 801-1. This is especially true with regard to the incidents involving Complainant's communications with the academic teacher, the lying associated therewith, the failure to provide an appropriate written report regarding an incident with an inmate, and the failure to maintain radio communications.

B. *Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority.*

At the time of discipline, Board Rule R3-3-I, 4 CCR 801-1, provided that "in the case of a certified employee, unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action." This rule also states that in determining discipline the following factors are to be considered: (1) the nature, extent, seriousness and effect of the act, error or omission committed; (2) the type and frequency of previous undesirable behavior; (3) the period of time that has elapsed since a prior offensive act; (4) an assessment of information obtained from the employee; (5) any mitigating circumstances; and (6) the necessity of impartiality in relations with employees.

As determined by the appointing authority, the actions of Complainant had a serious effect on Respondent and its ability to fulfill its role in state government. DOC is charged with housing criminals and providing for their safety, as well as the staffs safety. Complainant's actions effected DOC by impacting the safety of the facility. For instance, the matter involving radio communications was serious. Staff relied upon radio communications to interact with each other in controlling movements of inmates. Failure to appropriately use one's radio compromised staff and inmate's safety. Complainant's actions with regard to staff also impacted the facility and safety. The communications with the academic teacher demonstrate poor judgement and could have easily triggered a concern about staffs security. The fact that Complainant then lied about the incident shows a violation of trust and DOC regulation. The regulations are, in part, a tool to ensure a safe and respectful working environment. The introduction of contraband to inmates again shows Complainant's acts compromised BVCF's security, and ability to house inmates.

Complainant's performance record further demonstrates that his undesirable behavior has occurred during his entire employment with DOC. The performance documentation demonstrates that Complainant has had problems with interpersonal relations and communications for a majority of his employment with DOC. Comments associated with performance evaluations from June 1996 to October 1998 strongly support this contention. While periodic improvement did occur in these two factors, the improvement was not consistent or permanent. Exhibits 7 - 16 demonstrate that Complainant's performance would temporarily improve and then deteriorate over time.

The previous acts all occurred with a few years.

A review of the record demonstrates Complainant failed to provide reasonable explanations for his actions. With regard to past performance, the record reflects that Complainant never grieved any of his performance evaluations and never grieved the corrective actions. The record further demonstrates that Complainant admitted to a majority of the acts committed, as well as facts of those in the past. The only explanation Complainant proffers is that he was relatively new to DOC and BVCF, and that he was learning. However, it is also clear from the record that he had received numerous hours of training on a variety of issues, including those for which he was disciplined. Moreover, the record supports Respondent's claims that Complainant continually received guidance from his superiors, and other staff, regarding appropriate procedures and interpersonal behavior.

Finally, Complainant offered no credible mitigating circumstances for his actions. During his R8-3-3 meeting, and during hearing, Complainant alleged that he was suffering from Gulf War Syndrome. As a result, Complainant argued that he was forgetful, and could not remember particular incidents/acts, and that his ability to retain learned information was somehow impacted. Yet, there is no evidence besides Complainant's argument, to support this notion. As a result, Complainant has failed to outline any mitigating circumstances for the acts he committed.

C. *Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule or law.*

As supported by the record, Respondent did not act arbitrarily or capriciously in this personnel matter. See: *Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen*, 886 P.2d 700, (Cob. 1994). DOC provided extensive and particular evidence clearly demonstrating that its actions were not in violation of rule or law. No irregularities existed regarding the appointing authority and his ability or authority to make decisions of discipline regarding Complainant. Complainant was given very specific notice as to the grounds for the R8-3-3 meeting. Moreover, as the testimony of the appointing authority demonstrated, the instances for which notice was provided were the only instances considered by the appointing authority in considering discipline. During the R8-3-3 meeting, the appointing authority did not vary from the instances for which notice of the meeting was provided. Each issue was addressed individually and Complainant was given an opportunity to respond to each of the matters.

The appointing authority allowed two associate wardens to participate in the meeting, which demonstrated that he was open to feedback as to the seriousness of the incidents from other DOC personnel. While such a practice could be potentially abused by appointing authorities so as to "gang up" on an individual, it is clear from this appointing authority's testimony that he valued the insight of the other staff, and

appropriately weighed its merits.

The appointing authority sought information outside the context of the R8-3-3 meeting. He solicited an appraisal in order to help him weigh performance concerns just prior to the R8-3-3. Again, while such a practice could be abused, vis-a-vis skewed appraisals being conducted by supervisors aware of a pending R8-3-3, it is clear from the appointing authority's testimony that Atherton appropriately weighed the value of such a performance appraisal and noted that it comported with other information, thereby demonstrating its credibility. Additionally, the appointing authority interviewed on tape Complainant's supervisors as to Complainant's performance. Such information again reinforced concerns about Complainant's abilities. (It should be noted that the transcription of the R8-3-3 meeting indicates that interviews with Complainant's supervisors occurred on the "2nd of January" at 11:20 a.m. However, it is clear that either an error in transcription occurred or that the appointing authority misspoke. The time line exemplified by Exhibits 1, 2, and 3 clearly supports that the interviews occurred on the original day of the R8-3-3 meeting on November 2, 1998, after Complainant met with the appointing authority.) It is also without dispute that the letter of termination was completed on November 16, 1998 despite headers on all but the title page being dated November 10, 1998. Again, this can only be a typographical error.

Finally, given that Complainant made a number of admissions at the time of the R8-3-3 meeting with regard to incidents, the appointing authority appropriately considered such admissions.

D. *Whether either party is entitled to an award of attorneys fees pursuant to section 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.*

Board Rule R-8-38 provides definition for the statutory provisions allowing the award of attorney fees and costs. In this case, an analysis of whether or not fees should be awarded to Respondent is complicated by the fact that a number of incidents occurred leading up to the decision to impose discipline and Complainant admitted to having committed some of the incidents as set forth below:

RE: Introduction of Contraband	Complainant admitted he introduced the pastries.
RE: Communications with Academic Teacher	Complainant admitted he provided inaccurate communications and subsequently lied about it.
RE: Radio Communication	Complainant admitted to not turning on his radio at R8-3-3 meeting; and then subsequently argued his radio was accidentally turned off.

In part, the rule provides that in order for a party to be assessed attorney fees and costs, the personnel action must be found to have been instituted frivolously. Frivolous

cases are defined to include actions or defenses in which it is found that no rational argument based on the evidence or the law is presented. Given that Complainant did not admit to all of the incidents, and that Complainant provided evidence at hearing that the radio could have been accidentally turned off and had a witness to support such an argument, it cannot be stated that the personnel action, his appeal, was instituted frivolously.

The rule and statute also allows, in part, for the award of attorney fees and costs in the event the personnel action is found to have been groundless. The rule provides that a personnel action is groundless if despite having a valid legal theory, a party fails to offer or produce ANY competent evidence to support such an action. In this case, Complainant called three witnesses. None of the witnesses provided competent evidence as to the incidents for which Complainant was disciplined. Complainant's lack of providing competent evidence is reinforced in that Complainant's exhibits fail to support his arguments. Instead, the exhibits support Respondent's position. The only exception might be the testimony/evidence provided by Joe Spilker in which Spilker noted that there were times that his radio was accidentally turned off. Yet, Spilker also indicated that it was necessary to keep the radio on at all times and Spilker could not speak to whether or not Complainant's radio was ever turned on or off. In sum, Complainant provided no competent evidence on his behalf as to whether or not he committed the acts for which discipline was imposed, whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority, and whether the appointing authority acted arbitrarily, capriciously, or contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant engaged in the actions for which discipline was imposed.
2. The disciplinary termination was within the range of reasonable alternatives available to the appointing authority.
3. The actions of the appointing authority were not arbitrary, capricious, or contrary to rule or law.
4. Respondent party is entitled to an award of attorneys fees pursuant to section 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801 in that the personnel action, Complainant's Notice of Appeal, was groundless.

ORDER

1. Respondent's actions and the disciplinary termination of Complainant are UPHELD; and
2. Respondent is entitled to an award of attorney fees and costs under section

24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

Dated this 23rd
day of April, 1999.

G. Charles Robertson
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of April, 1999, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE, in the United States mail, postage prepaid, addressed as follows:

Martin A. Cross
P.O. Box 386
Poncha Springs, CO 81242

and in the interagency mail, to:

Jennifer M. Dechtman
Assistant Attorney General
1525 Sherman Street, 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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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 estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. 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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record: For additional information contact the State Personnel Board office at (303) 866-3244.

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 R-8-64, 4 Code of Cob. Reg. 801.

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 R-8-66, 4 Code of Cob Reg. 801. 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. 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.*