

State Personnel Board, State of Colorado

Case No. 99 B 073

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT D. BROWN,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,
CORRECTIONAL INDUSTRIES,

Respondent.

Hearing on this matter was held on February 17, 1999 before Administrative Law Judge G. Charles Robertson at State Personnel Board Hearing Room, B-65, 1525 Sherman Street, Denver, CO 80203.

MATTER APPEALED

Complainant appeals the disciplinary suspension without pay imposed by Respondent. In this matter, based on the record of evidence, Respondent failed to show by a preponderance of evidence that the imposition of a disciplinary suspension, without pay, was not arbitrary, capricious, or contrary to rule or law. Respondent failed to comply with Board rules' regarding the imposition of such discipline. Complainant is entitled to an award of attorney fees based on the action being groundless.

PRELIMINARY MATTERS

Respondent, Department of Corrections, Correctional Industries ("Respondent" or "DOC"), was represented by Jennifer M. Dechtman, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203. Complainant, Robert D. Brown ("Complainant"), was represented by James R. Gilsdorf, Esq., 1145 Bannock Street, Denver, CO 80204.

1. Procedural History

Complainant filed his Notice of Appeal in this matter on January 4, 1999. After receiving a Receipt of Notice of Appeal; Notice of Hearing and a Prehearing Order, Respondent submitted an entry of appearance. Complainant also filed an Entry of Appearance and requested additional time to prepare hearing statements and commence discovery. The administrative law judge ruled so as to allow Complainant to file a prehearing statement but denied Complainant's request for an extension of time to commence discovery for failure to provide good cause. Both parties filed amended prehearing statements.

Hearing on this matter was commenced on February 17, 1999 and lasted one day.

2. Respondent's Motion to Dismiss

On February 5, 1999, Respondent filed Respondent's Motion to Dismiss this matter ("Respondent's Motion"). Respondent argued that this matter should be dismissed on the grounds that Complainant failed to allege any factual dispute for hearing or any claim upon which relief can be granted.

Complainant filed an Opposition to Respondent's Motion to Dismiss on February 11, 1999. Complainant argued that Respondent has the burden of proof in this matter and the burden of going forward. As a result, Complainant argued that Respondent had to prove all elements of the action taken against Complainant.

Based on the arguments made in both the parties' pleadings, and the authority cited therein, Respondent's Motion was denied at the time of hearing. Clearly, Respondent has the burden of persuasion and burden of going forward in this matter. Given that Respondent imposed discipline upon Complainant, Respondent is obligated to demonstrate that it did not act arbitrarily, capriciously or contrary to rule or law. Respondent is also obligated to demonstrate by a preponderance of evidence that all the elements of Board Rules R8-3-4, 4 CCR 801-1 and R8-3-3, 4 CCR 801-1 were met. The pleadings fail to support that there is no issue of material fact.

3. Stipulated Notice of Pending Settlement Agreement

On March 1, 1999, a Stipulated Notice of Pending Settlement Agreement was filed by Respondent. In said Notice, Respondent represents that the parties have reached a settlement of all issues involved in this appeal and requests that the Administrative Law Judge not issue an Initial Decision. The Notice references that counsel for Complainant agrees with the request for the Administrative Law Judge to stay the issuance of the Initial Decision of the Administrative Law Judge pending a final written settlement agreement. On March 3, 1999, the Administrative

Law Judge convened a status conference with counsel for the parties. The parties represented that there was a misunderstanding and that while settlement agreements were pending, no stipulation as to a stay of the Initial Decision had been reached. As a result, Respondent's Notice and request for a stay of the issuance of this Initial Decision was denied by way of order dated March 3, 1999.

4. Witnesses

Respondent called the following witnesses during its case-in-chief: Richard Schweigert, Director of Correctional Industries, Correctional Industries, 2862 South Circle Drive, Colorado Springs, CO 80906. Respondent did not call any witnesses on rebuttal.

Complainant called the following witnesses during its case-in chief: Robert D. Brown, Complainant.

5. Exhibits

The parties stipulated to the authenticity and admission of the following Respondent's Exhibits:

- | | |
|-----------|---|
| Exhibit 1 | Correspondence from Larry Trujillo to Richard Schweigert
Dated 11/1/98 |
| Exhibit 2 | Correspondence from Aristedes Zavaras to Larry Trujillo
Dated 2/26/98 |
| Exhibit 3 | Correspondence from Richard Schweigert to Robert D. Brown
Dated 11/16/98 |
| Exhibit 4 | Amended Information
People of State v. Robert D. Brown
Dated: 10/1/98 |
| Exhibit 5 | Correspondence from Richard Schweigert to Robert D. Brown
Dated 12/24/98 |
| Exhibit 6 | Copy of page 87, 4 CCR 801-1
Copy of page 91, 4 CCR 801-1 |
| Exhibit 7 | Administrative Regulation 1450-01
Effective Date: June 1, 1998 |

The parties stipulated to the authenticity and admission of the following Complainant's Exhibits:

Exhibit A Information
People of State v. Robert Brown
Dated: 5/11/98

Exhibit B Summons
People of State v. Robert Brown
Dated: 6/1/98

The following Complainant's Exhibits were admitted into evidence over objection by Respondent:

Exhibit D Correspondence from Randy Jacobs to Robert Brown
Dated: 10/2/98

Exhibit E Correspondence from William Brent Brown to Robert Brown
Dated: 11/13/98

Exhibit C was not offered by Complainant.

5. Judicial/Administrative Notice

Complainant requested that judicial/administrative notice be taken of the Initial Decision of the Administrative Law Judge in Robert D. Brown v. Department of Corrections, State Personnel Board Case No. 98 B 134. Respondent raised no objections. Judicial/administrative notice was taken of the Initial Decision. No appeal was filed by either party subsequent to the Initial Decision. As a result, the Initial Decision of the Administrative Law Judge represents final agency action by operation of law.

ISSUES

1. Whether the 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 appointing authority were arbitrary, capricious, or contrary to rule or law; and
4. Whether attorney fees should be awarded to Complainant pursuant to section 24-50-125.5, C.R.S. (1998).

FINDINGS OF FACT

I. Complainant's Background

1. Complainant began his employment with Respondent in March 1991.
2. In July 1996, Complainant was a Production Supervisor I and became the effective manager of the computer production department within Correctional Industries, Department of Corrections.
3. By way of letter dated March 31, 1998, Complainant received a disciplinary action in the form of termination. The disciplinary action was issued based on the appointing authority's determination, in part, that during the Fall of 1997, Complainant had: (1) known about, assisted, and/or allowed inmates to bring drugs into the computer shop; (2) unduly authorized, encouraged, and/or condoned inmate thefts of computers; and (3) improperly removed computer parts and computers for himself and others. Neither the disciplinary action of March 31, 1998, nor the notice of the R8-3-3 meeting sent prior to the disciplinary action mentioned that any felony charges had been filed.
4. Complainant appealed the imposition of such discipline on April 3, 1998. After a hearing on the matter on July 20 and August 4, 1998, the administrative law judge issued an initial decision (1998 Initial Decision) and ruled that pursuant to Rule R8-3-4(A)(A), 4 CCR 801-1, a disciplinary suspension should be substituted for the termination. The 1998 Initial Decision was issued on September 16, 1998.
5. On or about June 1998, and during the course of the termination disciplinary action, Complainant was served with a summons from Fremont County to answer a criminal information filed by the district attorney charging Complainant with theft, in violation of CRS 18-4-401. (Exhibit B). Such a charge represented a Class 4 Felony for the alleged theft of three computers and computer software in October 1997. (Exhibit A).
6. The criminal information filed by the district attorney included a list of witnesses in which two individuals from C.I.D. were named: William Bell and Pat Crouch. William Bell was a Criminal Investigator for DOC. (1998 Initial Decision).
7. In the 1998 Initial Decision, the administrative law judge discussed the grounds for discipline, indicating that Complainant was negligent in his supervision of the computer shop such as to warrant the imposition of some level of discipline, but that his conduct was not willful and that termination was not within the range of reasonable available alternatives for discipline.
8. Complainant was reinstated by DOC and required to serve a disciplinary

suspension, without pay, of four and one-half months. The suspension was applied retroactively for the period of March 31, 1998 through September 20, 1998. (Exhibit D).

9. Complainant returned to work at DOC on September 21, 1998. Upon his return, Complainant was assigned new job responsibilities in his position as Production Supervisor. His assigned duties included being the southern sector customer service representative. Complainant's tasks included the off-site installation of office panels **and the supervision of inmates from DOC during such installations**; reviewing customer service reports and determining which matters had been resolved to the customer's satisfaction; coordinating customer service; delivering flowers for Correctional Industries Flower Shop on Wednesday of each week; and supervising inmates at the Correctional Industries warehouse.
10. Upon his reinstatement, Complainant reported to William Brent Brown, Plant Supervisor II. (Exhibit D).

II. Respondent's Background

11. DOC is the state department responsible for the incarceration of individuals convicted of crimes, including crimes such as theft and those related to illegal drugs.
12. Correctional Industries is a division within DOC which operates a variety of business for profit. Correctional Industries has approximately 35 different businesses including those involved with woodworking, furniture manufacturing, agriculture, and computer assembly.
13. As part of operating, Correctional Industries utilizes inmates to provide certain skills and labor. Inmates working at Correctional Industries are supervised by staff. For example, in the computer shop, between 16 and 20 inmates are supervised by 3 staff members.
14. In fulfilling its business needs, Correctional Industries employees, and the inmates supervised by such employees, have occasion to leave DOC property and interact with the public. Inmate crews are used for the delivery of products such as furniture and office panels. Staff are required to check on the whereabouts of inmates at least every 15 minutes when off-site of a DOC facility.
15. Given that nature of DOC and its responsibility to detain convicted criminals, DOC is generally concerned about the ability of inmates to exert pressure on

employees, based on inmates having knowledge about personal issues of employees, in order to obtain contraband such as illegal drugs or weapons.

16. DOC adopted Administrative Regulation #1450-1, effective June 1, 1998 in which it is noted that each employee is to be given a copy of the regulation. The regulation provides for the need for employees to avoid actual or perceived conflicts of interest, to have a strong commitment to professional and ethical correctional service, and to have employees adhere to the Executive Order: Integrity in Government (1988). (Exhibit 7).
17. The Executive Order provides in part that employees are to not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government. (Exhibit 7).
18. On February 26, 1998, the Executive Director of DOC delegated to the Deputy Director of Correctional Service, Larry Trujillo ("Trujillo"), in writing, appointing authority for all positions that report to Trujillo. Said delegation specifically allowed for the further delegation of this appointing authority so long as it was memorialized in writing. (Exhibit 2).

III. Incidents in Fall and Winter of 1998

19. On or about October 1, 1998, a criminal *amended* information was filed in the County of Fremont in which three (3) felonies counts were leveled against Complainant. Count I charged Complainant with knowingly and unlawfully taking three computers and computer software from DOC. Count II was a similar charge involving two computers and software. Count III charged Complainant with unlawfully introducing contraband into the East Canon Complex of DOC in November, 1997. (Exhibit 4).
20. Richard W. Schweigert was appointed as Director of Correctional Industries on November 1, 1998. He was supervised by Trujillo. On November 1, 1998, Schweigert was delegated appointing authority for all positions that report to him by Trujillo. (Exhibit 1). Schweigert's background, vis-à-vis DOC, began in 1991 as working in the Governor's office and analyzing budgetary issues associated with DOC. His appointment in November 1998 was his first as supervisor in a department with correctional functions.
21. Upon his appointment, Schweigert attempted to quickly familiarize himself with Correctional Industries operations. In so doing, Schweigert was only vaguely aware of the job responsibilities of Complainant in the warehouse.

22. Schweigert supervised the Plant Supervisor of Correction Industries, Brent Brown.
23. On November 13, 1998, Brent Brown sent correspondence to Complainant, and to Schweigert, placing Complainant on administrative leave with pay as a result of having determined that Complainant had been "bound over for trial". (Exhibit E).
24. Shortly after his appointment, Schweigert was aware that three felony charges had been filed against Complainant. As of November 13, 1998, Schweigert was to begin assessing the long term status of Complainant's employment with DOC as a result of charges having been filed. (Exhibit E).
25. Three days after Brent Brown's letter was sent to Complainant, Schweigert provided notice of an R8-3-3 Meeting to determine the possible need to administer disciplinary action. The notice specifically referenced that the meeting was to gather all pertinent information and provide Complainant with an opportunity to present information and/or mitigating circumstances before the imposition of discipline. (Exhibit 3).
26. The R8-3-3 meeting was held on November 24, 1998. Schweigert indicated during the meeting that any basis for disciplinary action would be as a result of felony charges having been filed. Complainant failed to provide any information during the meeting based on his attorney's advice.
27. Schweigert deliberated over the next month as to whether or not to impose discipline. During such period, Complainant was on administrative leave with pay. Over the course of the month, Schweigert consulted with the Personnel Director of DOC and DOC's chief of staff.
28. Schweigert was not specifically aware of Complainant's job responsibilities at the time of the R8-3-3 meeting. Nor did he familiarize himself with Complainant's specific duties subsequent to the meeting. He never reviewed Complainant's Personnel Description Questionnaire. He never reviewed Complainant's personnel file. Schweigert was aware that Complainant had supervisory responsibilities over inmates while working in the warehouse. Schweigert was not aware Complainant would take inmates out of town during the course of normal job responsibilities in order to provide either customer service or the delivery of products to customers.
29. Schweigert never reviewed the previous disciplinary history of Complainant.
30. No specific complaints were received with regard to Complainant and the fact that

felony charges had been filed in Fremont County. No members of the public raised the issue. No inmates raised the issue. No fellow employees raised the issue. Schweigert was unaware of the public perception regarding Complainant and his employment with DOC. Schweigert did not actively attempt to ascertain the public's perception.

31. Schweigert concluded that because of the nature of the felony charges, the potential for collusion with inmates, and concerns about Complainant having to supervise inmates, that Complainant should be placed on disciplinary suspension, without pay, pursuant to Board Rule R8-3-4, 4 CCR 801-1. Schweigert considered that the felony charges (1) adversely affected Complainant's ability to perform duties assigned ; and (2) adversely affected the agency.

32. Board Rule R8-3-4, 4 CCR 801-1 (1998) provides, in relevant part:

Disciplinary suspensions by an appointing authority shall be limited to 30 days, except as follows: . . .

In the case of a disciplinary suspension pursuant to R8-3-3(C)(3)(iii), the period of suspension is not limited except as provided in [subsection B]. . .

(B) For purposes of disciplinary suspensions pursuant to R8-3-3(C)(3)(iii), if the employee is not finally convicted or if the charges are dismissed prior to the trial, s/he shall be restored to her/his position and granted full base pay, including but not limited to benefits, and service credit for the period of suspension.

33. Board Rule R8-3-3(C)(3)(iii), 4 CCR 801-1 (1998), provides in relevant part:

Disciplinary actions may be administered for the following causes: . . .

Willful failure or inability to perform duties assigned. . .[i]nability to perform duties assigned includes being charged with a felony or any other offense involving moral turpitude, when such action or offense adversely affects the employee's ability or fitness to perform duties assigned or has an adverse effect on the agency should the employee continue such employment.

34. DOC Administrative Regulation 1450-1 (1998) provides in relevant part:

It is the policy of DOC that staff are to have . . . a strong commitment to professional and ethical correctional service. Staff must constantly live up

to the highest possible standards of their profession and to incorporate and adhere to the September 30, 1988 Executive Order, Integrity in Government, as its ethical performance standard. . .

Staff shall avoid situations which give rise to a direct, indirect or perceived conflicts of interest.

(Exhibit 7).

35. State Personnel Board Policy 8-3-(A) provides, in part:

An employee may not be corrected or disciplined more than once for a single specific act or violation.

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). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (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 (Colo. 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:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. PARTIES' ARGUMENTS

Respondent argues that this is a disciplinary action that was appropriately administered pursuant to the State Personnel Board rules. It argues that DOC was **bound** to impose the disciplinary action of disciplinary suspension, without pay, by virtue of the fact that a rule exists which states that this type discipline is an option. Respondent maintains that the imposition of the disciplinary action is not in violation of any other Board rules and does not represent the imposition of discipline twice upon Complainant for the same specific acts. Rather, Respondent states that the filing of felony charges was a "new" specific act and not related to the discipline imposed upon Complainant in State Personnel Board case number 98 B 134. While some of the underlying events in the previous disciplinary action may be the basis for the felony charges filed against Complainant, Respondent maintains that the plain meaning of Policy 8-3-(A) is that it can impose discipline for the filing of felony charges against Complainant no matter what the underlying conduct of the felonies. Respondent states that the fact that Complainant was charged with three felonies adversely affects his performance of his job duties. Respondent's argument is based on the concern that Complainant would be subject to inappropriate influence by inmates. It also states that the filing of such charges adversely impacts the agency DOC. This portion of Respondent's argument relies on the fact that DOC's mission is to detain convicted criminals and maintain a high security detention area(s). Finally, Respondent argues that its action cannot be considered arbitrary and capricious because the discipline imposed was specifically provided for by rule in dealing with felony charges against an employee and the fact that a remedy is provided for by the rule in the event the employee is cleared of the felony charges. The fact that the rule allows Complainant to be reinstated, with full back pay and benefits, supports the proposition that the imposition of a disciplinary suspension when felony charges are filed, is not arbitrary, capricious, or contrary to rule or law.

Complainant concurs that this is a matter that involves whether or not State Personnel

Board rules were correctly applied. As posed by Complainant, it must be determined whether or not Respondent has met its burden of proof in showing that the appointing authority correctly applied the Board rules. Complainant argues that Board Rule R8-3-4 does not simply allow for disciplinary suspension if an employee is charged with a felony or felonies. Rather, Complainant argues that disciplinary suspension is an appropriate disciplinary tool IF the felony charges adversely impact an employee's ability to perform duties assigned or IF the charges adversely impact the agency. In this instance, Complainant argues that Respondent has failed to meet its burden with regard to demonstrating an adverse impact, by the filing of felony charges, on either the employee's performance or upon the agency. Complainant maintains that Rule R8-3-4 creates a presumption that an employee is unable to perform duties assigned when charged with a felony but that the presumption has conditions that must be met. Complainant further argues that the imposition of discipline in this matter, given that the basis of felony charges is the same underlying conduct as when discipline was imposed in State Personnel Board case no. 98 B 134, represents being disciplined twice for the same acts. Complainant argues that in the previous disciplinary action, he was found not to be culpable for the events which occurred. In the worst case scenario, Complainant can only be seen as having been negligent. In essence, Complainant's contention is that Respondent is estopped from imposing discipline twice by Board rule, and is estopped from arguing that Complainant cannot perform his duties given that Complainant was not immediately suspended without pay and was allowed to continue to work for months after Respondent was aware that the initial felony charges had been filed in Fremont County.

III.

The findings of fact support Complainant's position that the imposition of discipline, in the form of a disciplinary suspension, was arbitrary, capricious, and/or contrary to rule or law. Respondent has failed to meet its burden of proof in this matter.

First, the plain language of Board Policy 8-3-(A) suggests that Respondent did not impose discipline twice for the same specific acts. Clearly, discipline was imposed upon Complainant in early 1998 as a result of incidents that occurred in the workplace involving, in part, illegal drugs and the removal of computer equipment from DOC. At that time, no felony charges had been filed. At that time, as represented in State Personnel Board case no. 98 B 134, it was ultimately determined that Complainant had been negligent in performing his duties at Correctional Industries. In this matter, discipline was imposed based merely on the fact that felony charges had been filed against Complainant. While the underlying events may have been grounds for the felony charges, it is clear from Schweigert's testimony that the decision to impose discipline was not based on the underlying conduct giving rise to the charges. Schweigert merely imposed discipline based on the fact that some felony charges were filed. In essence, the Board rules contemplate that the incidents giving rise to the felony charges, and the felony charges themselves, are two distinct events. In this particular case, given the timing of the

conduct, the previous imposition of discipline, and the subsequent filing of felony charges, it cannot be held that imposition was imposed twice for the same specific acts.

Despite the fact that Respondent was able to discipline Complainant based on the mere filing of felony charges, Respondent has failed to demonstrate that discipline was imposed in compliance with Board Rule R8-3-4. Respondent failed to demonstrate by a preponderance of evidence that the filing of felony charges was such an action adversely affecting Complainant's ability or fitness to perform duties assigned to him. The facts show that Complainant's job duties were not adversely affected. Respondent had no indication that Complainant was not fulfilling his duties. No performance complaints were received. No performance ratings were offered to demonstrate a failure to perform duties. Most importantly, the appointing authority never ascertained or examined Complainant's job responsibilities. At the time discipline was imposed, the appointing authority, by his own admission, had not reviewed Complainant's position description questionnaire. Nor had he reviewed Complainant's personnel file. The appointing authority admitted in the course of testimony that he was only vaguely aware of Complainant's job duties. Additionally, Respondent allowed Complainant to continue in his position for months after at least one felony charge was filed. It is incredible that Respondent would subsequently argue that a disciplinary suspension had to be imposed because of Complainant's inability to perform his duties. The appointing authority never knew what those duties were. Respondent's argument that Respondent had no obligation to be aware of the specific duties of Complainant because the rules allow for an unlimited disciplinary suspension is without merit. Merely because a rule exists does not provide grounds for its application. If so, then Respondent fails to account for any of the other Board rules related to progressive discipline. This is especially true when Respondent has failed to correctly apply all of the elements of Rule R8-3-3(C)(iii) in its entirety by its own admission.

Respondent also failed to show by a preponderance of evidence that the filing of felony charges against Complainant had an adverse effect on the agency. The only evidence offered by Respondent on this issue was the opinion testimony of the appointing authority. However, the appointing authority provided little support for his opinion. The appointing authority's opinion was limited by the fact that he had little experience in the field of corrections and did not provide any specific examples of the adverse impact on the agency. No evidence was offered to demonstrate an actual adverse impact on the agency. Again, no complaints had been received. It cannot be argued that fellow employees were negatively impacted by the filing of charges against Complainant because no evidence was offered to support such a claim. It cannot be argued that citizens or the public at large was negatively impacted by the filing of charges against Complainant because no evidence was offered to support such a claim. In fact, no evidence was put forth to support any adverse impact to the agency. Respondent maintains that the mere fact the DOC is charged with incarcerating criminals is enough to support the fact that an adverse impact is made upon DOC when an employee is *charged* with a felony. This argument has some merit. But, DOC maintained Complainant's employment for months after a charge was filed. And, in this setting, DOC has a burden to demonstrate that an adverse impact

on the agency has actually occurred. That burden was not met. The opinion evidence of the appointing authority was insufficient to show that an adverse effect occurred by a preponderance of evidence.

Respondent's argument that because Board Rule R8-3-4(B) allows for Complainant's reinstatement in the event Complainant is not finally convicted of a felony or if the charges are dismissed prior to trial is also without merit. Again, the mere fact that this remedy exists does not suggest that discipline can be imposed arbitrarily, capriciously, or contrary to rule or law. In order to implement a disciplinary suspension, based on Rules R8-3-4 and R8-3-3(C)(iii), Respondent must still meet the rules' requirements, including the requirements that the felonious charges adversely impact either the Complainant's ability to perform duties assigned or the agency.

Complainant seeks an award of attorney fees and costs that were incurred in pursuing this litigation. Such an award is proper. While it cannot be argued that Respondent acted frivolously, in bad faith, maliciously, or as a means of harassment, it can be argued that Respondent acted in such a way as to be "otherwise groundless." Section 24-50-125.5 C.R.S. (1998). Respondent failed to provide any credible evidence during the hearing. While Respondent may have had a valid legal theory, it offered little or no evidence to support its claim that the appointing authority did not act arbitrarily, capriciously, or contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant did not engage in the actions for which discipline was imposed.
2. The disciplinary termination was not within the range of reasonable alternatives available to the appointing authority.
3. The actions of the appointing authority were arbitrary, capricious and contrary to rule or law.
4. Complainant is entitled to an award of attorney fees pursuant to section 24-50-125.5, C.R.S. The disciplinary action was groundless in that little or no credible evidence was proffered by Respondent to support its disciplinary action.

ORDER

Respondent's disciplinary action is rescinded. Complainant shall be removed from disciplinary suspension and is entitled to full back pay. Respondent shall pay to Complainant the reasonable attorney fees and costs incurred in pursuing this action.

Dated this 4th day
of March, 1999
at Denver, Colorado

G. Charles Robertson
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 2

inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this 4th day of March, 1999, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf, Esq.
1145 Bannock Street
Denver, CO 80204

and in the interagency mail, addressed as follows:

Jennifer M. Dechtman
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
