

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 2000B094

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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MICHAEL R. HIGH,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,  
COLORADO WOMEN'S CORRECTIONAL FACILITY,

Respondent.

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Hearing was held on March 6, 2000 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Assistant Attorney General Joseph Q. Lynch. Complainant appeared and represented himself.

Respondent called four witnesses: Sandra Vernon, Correctional Officer I; Dennis Nix, Graveyard Shift Commander; Jeff Kleinholz, Correctional Officer IV; and James Abbott, Warden, Colorado Women's Correctional Facility. Complainant's sole evidence was his own testimony.

Respondent's Exhibits 1, 2, 3, 4, 5, 14 and 15 were admitted into evidence by stipulation of the parties. Exhibit 16, a diagram made at hearing, was admitted without objection. Complainant did not offer exhibits.

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The witnesses were sequestered per respondent's request. Respondent chose not to designate an advisory witness.

### **MATTER APPEALED**

Complainant appeals a three-month, ten percent disciplinary pay reduction. For the reasons set forth below, respondent's action is rescinded.

### **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority.

### **FINDINGS OF FACT**

1. Complainant Michael High has been a Correctional Security Officer I (CO I) at the Colorado Women's Correctional Facility (CWCF) of respondent Department of Corrections (DOC) for ten years. CWCF, located in Canon City, houses 290 female inmates.

2. In the evening of December 15, 1999, CO Sandra Vernon went to her shift commander, Dennis Nix, to advise him that she had

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twice heard complainant telling inmates of inmate movement from the facility, information inmates should not have. The first instance occurred the day before, December 14, 1999, when Vernon showed complainant the list of inmates who would be moving, and in reference to inmate Ortiz, complainant stated that it was good that she was leaving and that she already knew she was going to court because he had looked it up on the computer and told her. The second occasion was December 15, when Vernon overheard complainant telling inmate Traylor that three or four inmates would be moving from the administrative segregation (ad seg) unit at CWCF to the Denver Women's Correctional Facility, which includes the permanent ad seg unit. Vernon stated that Traylor was wondering if there would be room for her in ad seg because she was to have a disciplinary hearing the following day and knew she would receive an ad seg sentence.

3. Vernon did not hear complainant tell inmate Ortiz that she would be leaving to go to court. She did not witness any conversation between complainant and Ortiz.

4. Inmate Traylor had already had her hearing and was sentenced to ad seg for ten days when Vernon overheard the conversation. The execution of the sentence had been stayed to allow the inmate to receive a special visit from her daughter near the Christmas holiday.

5. The conversation with Traylor took place through a food tray slot, a 15" by 4" opening in a steel door, requiring the inmate to bend down and have her face in the opening while talking.

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Vernon did not hear the entire conversation. She heard Traylor ask three or four times if there would be room for her in ad seg, and complainant replied that there would be plenty of room for her.

6. The standard practice of the facility is to not notify an inmate that she is moving until 5:45 a.m., when she receives a wake-up call. To give an inmate more notice than that is considered a breach of security because the inmate might notify someone on the outside to meet her at the scheduled destination, or in some other way use the information to plan an escape or sabotage the move. To violate this practice is a violation of DOC Administrative Regulation (AR) 1450-1, Staff Code of Conduct, which prohibits correctional officers from communicating with inmates about personal or confidential information. (Ex. 1.)

7. Inmates in administrative segregation know that they will soon be moved to Denver, but they do not know exactly when.

8. The following day, December 16, Nix asked complainant if he had told the inmates that which Vernon said he did. Complainant responded that he did not. In reference to inmate Ortiz, complainant stated that the inmate had been talking about problems she had been having with her cell mate, and that she knew she would be going to court. Complainant advised her to be patient and that the problem would take care of itself when she went to court, not specifying a date. He said to Vernon that inmate Ortiz knew that she was going to court, but not that he had told her. With respect to inmate Traylor, complainant averred that he made a general statement of there being no room in segregation at the time but

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that some of those inmates probably would be moving to Denver.

9. Nix detailed the above in a memo to Captain Jeff Kleinholz and Major Jill Nielson. (Ex. 4.) In the memo, he stated that he was attaching a letter he received from CO Vernon. The referenced letter was not offered into evidence at hearing.

10. Jeff Kleinholz, who was Nix's supervisor, and his supervisor, Jill Nielson, read the Nix memo and Vernon's letter and, together, spoke with Vernon and then met with complainant. Complainant asked them to talk to another officer who was on duty at the applicable times, but they decided that the information would be irrelevant because the officer was not known to have been present at the scene of the conversations. According to Vernon, no other staff person was around.

11. Kleinholz and Nielson did not interview the two inmates because of a belief that their statements were unnecessary and irrelevant and, based at least upon Kleinholz's experience, inmate testimony is very tainted.

12. If complainant wanted to talk to the inmates, he would have to take them to the shift commander's office and talk to them there. Both inmate Ortiz and inmate Traylor were present at the facility and available for an interview. In line with this policy, complainant asked his shift commander, Nix, if he would assist him in taking the deposition of the two inmates, and Nix said no.

13. Kleinholz and, presumably, Nielson,<sup>1</sup> concluded that

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complainant violated the Staff Code of Conduct by divulging security information to the inmates. They made a recommendation to the warden. The evidence does not reveal the nature of the recommendation.

14. Warden James Abbott conducted a Rule R-6-10 meeting on January 6, 2000. In addition to he and complainant, Jeff Kleinholz and Jill Nielson were present.<sup>2</sup> Complainant conceded that the conversation with inmate Traylor took place but denied giving specific inmate movement information and denied telling Officer Vernon that he had told inmate Ortiz when she would be going to court.

15. Abbott asked Lieutenant Hall, otherwise unidentified, to conduct a follow-up investigation. Hall reported back to Nix, not Abbott. The warden does not know what the investigator had to say, if anything.

16. Abbott concluded that complainant committed a security breach and consequently violated AR 1450-1 by disclosing information to inmates about inmate moves. In determining the appropriate sanction, he took into consideration his issuance of a corrective action to complainant in October 1999 for grabbing an inmate by the arm and for making a comment in a joking manner to an inmate with reference to the Ku Klux Klan. (Ex. 5.) He did not consider any behavior by complainant prior to August 1999.<sup>3</sup>

17. No one ever questioned either of the two inmates.

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18. Warden Abbott imposed a disciplinary sanction of a ten percent reduction of pay, approximately \$322.00 per month, for the months of January, February and March 2000, warning complainant that: "If you fail to immediately come into compliance with this agency's expectations and continue to ignore regulations, you will be subject to further disciplinary action which may include termination." (Ex. 3.)

19. Complainant Michael High timely appealed the disciplinary action on January 21, 2000.

### **DISCUSSION**

Complainant contends that he did not commit the acts for which he was disciplined, arguing that Officer Vernon was confused as to what she heard and drew inaccurate conclusions. He submits that there were witnesses who were not interviewed but should have been in an effort to determine the truth before imposing discipline, namely the other correctional officer who was on duty and the two inmates, Ortiz and Traylor.

With respect to the other officer, complainant did not offer any information that would indicate that he was near the area of the subject conversations or might have anything to say about what transpired on either December 14 or December 15. He was merely on duty somewhere in the facility. The two inmates, however, pose a more compelling reason to have been interviewed.

Officer Vernon did not witness the conversation between Ortiz

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and complainant. She reported simply what she believed complainant had said to her, which he denied saying. As to Traylor, Vernon did not hear all of the conversation, and she got at least part of it wrong, alleging that she heard Traylor tell complainant that she had a disciplinary hearing the next day and thought she would receive an ad seg sentence. In fact, Traylor had already had the hearing and received the sentence, which was stayed to enable her to have a Christmas visit with her daughter. While Dennis Nix testified that Vernon was motivated by information she received at a staff briefing about correctional officers telling inmates in advance that the inmates were leaving, Vernon did not testify to her motivation except that she believed a serious security breach had been committed.

Jeff Kleinholz testified that the inmates were not interviewed because their statements were unnecessary and irrelevant and because inmate testimony is "very tainted." Nonetheless, this record shows that their statements were both necessary and relevant. Traylor was the only other witness to her conversation with complainant. Ortiz could have confirmed or denied that complainant told her that she was going to go to court the next day and could have explained how she found out, if she did. As to their testimony being tainted, a determination of credibility cannot reasonably be made without first talking to the witness. It is not rationale to presume that all inmates always lie in every situation. In fact, it is not unusual for prison inmates to testify as witnesses for the prosecution in criminal trials.

Maybe some or all of the statements of Traylor and Ortiz would

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have been incredible. If so, they could have been discounted. There was no obligation to believe them. But the inmates might also have spoken in a logical and truthful manner so as to be worthy of belief. They were the only ones who could have filled the gaps between the statements of Vernon and complainant. Perhaps they would have included corroborating witnesses to verify their statements or other leads which could have been investigated. There was no good reason not to at least talk to them.

The two inmates were available and should have been asked questions in order to determine who said what to whom. Without their input, the appointing authority did not possess an adequate foundation for imposing discipline. He was compelled to seek out all available information in a case such as this.

The Colorado Supreme Court long ago ruled that arbitrary and capricious action by an administrative board (agency) occurs when the agency neglects or refuses to exercise "reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it." *Van de Vegt v. Board of Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Respondent failed to use due diligence in seeking the truth concerning complainant's conduct. The appointing authority's decision to reach a conclusion adverse to complainant without contacting two crucial and available witnesses does not override a certified employee's constitutional and statutory right to be disciplined only for cause. See *Department of Institutions v.*

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*Kinchen*, 886 P.2d 700 (Colo. 1994). See also *Alexander v. Department of Higher Education*, Case No. 99B049 (Thompson, Initial Decision 1999) (failure to interview known eyewitnesses fatal to respondent's case).

Complainant testified straightforwardly, consistently and without hesitation. His testimony was credible and deserves substantial weight.

The failure to attempt to obtain information from the two inmates is fatal to respondent's case. Without their input, the record is insufficient to satisfy respondent's burden to prove by a preponderance of the evidence that complainant's conduct was wrongful and warranted disciplinary action. *Kinchen, supra*. On this evidence, I conclude that complainant did not commit the acts for which he was disciplined.

#### **CONCLUSIONS OF LAW**

1. Respondent's action was arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was not within the range of alternatives available to the appointing authority.

#### **ORDER**

The disciplinary action is rescinded. Complainant shall be

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reimbursed for all lost pay and benefits.

DATED this \_\_\_\_\_ day of  
March, 2000, at  
Denver, Colorado.

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Robert W. Thompson, Jr.  
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), 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. The notice of appeal must be received by the Board no later than the thirty

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(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).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may 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.

### **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 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) 894-2136.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty

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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 R-8-64, 4 CCR 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 CCR 801. Requests for oral argument are seldom granted.

### **CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of March, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Michael R. High  
140 Coyote Circle  
Box 185  
Coal Creek, CO 81221

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and in the interagency mail, addressed as follows:

Joseph Q. Lynch  
Assistant Attorney General  
Personnel and Employment Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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