

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PAUL E. GAFFEY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
CANON MINIMUM CENTERS,

Respondent.

Hearing was held on October 18 and 19, 2000 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by Assistant Attorney General Coleman Connelly. Complainant was represented by Joe Losavio.

PRELIMINARY MATTERS

Witnesses

Respondent's witnesses were: Denise Ortiz, Correctional Officer I, Arrowhead Correctional Facility, Department of Corrections ("DOC"); Tammy Padilla, Correctional Officer II, San Carlos Correctional Facility, DOC; and Patricia Donise Neal, Warden, Canyon Minimum Centers ("CMC"), DOC.

Complainant called Diana L. Degroot, Transporter, CMC, DOC; Douglas Deidrich, Captain, Colorado State Penitentiary, DOC; Sam Beatty, former Correctional Officer, Arrowhead Correctional Center; and he testified on his own behalf.

Exhibits

Respondent's Exhibits 1 through 5 were admitted by stipulation.

Complainant's Exhibits B - J, and O - S were admitted by stipulation. Exhibit V, consisting of the first three pages, was admitted without objection.

Procedural Matters

A witness sequestration order was entered upon the parties' request.

The record was held open until December 15, 2000, for the purpose of accepting the parties' written closing arguments and responses thereto.

MATTER APPEALED

Complainant appeals the imposition of a disciplinary reduction in pay of \$100 per month for three months. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Paul Gaffey, commenced employment with DOC in 1993 as a Correctional Officer I. He is currently a Sergeant.
2. Canyon Minimum Centers ("CMC") consists of four facilities, Skyline, Arrowhead, Four Mile, and Prerelease Correctional Centers.
3. The general culture in DOC prisons includes the widespread use of profanity by prisoners and correctional officers. This profanity is so common as to be unnoticeable to some DOC officers. It sometimes includes language of a sexually suggestive nature.

Denise Ortiz

4. In October of 1999, Denise Ortiz, a correctional officer, was assigned to Skyline. Gaffey was a Sergeant and was above her in the chain of command. He had the authority to assign work duties to Ortiz, but did not rate her on her evaluation.
5. Ortiz worked often with Gaffey, and their job duties sometimes required that they work together alone.
6. Ortiz and Gaffey engaged in the regular use of profanity with each other and with other officers.
7. After working with Gaffey for a short period, Ortiz began to feel that some of his behavior crossed the line to become inappropriate. Gaffey began to hold onto her hand for longer than necessary when she handed him keys. When sitting at the computer working, Gaffey came and massaged her back; Ortiz moved her shoulders in an effort to make him stop.
8. Gaffey touched Ortiz's arm and shoulders in a way she felt was sexual, rather than a necessary touch when passing in tight quarters. Gaffey once suggested that Ortiz sit on his lap.
9. At hearing, Gaffey admitted to placing his hands on Ortiz's shoulders and to calling her "cutie." He also admitted to engaging in the following verbal sparring exchange: Ortiz said "fuck you." Gaffey responded, "does that mean you want to fool around?"
10. Ortiz had difficulty confronting Gaffey about the fact she felt he had crossed the line. She did not feel comfortable telling him to stop the behaviors she disliked. She attempted to smooth it over by making small talk, but this did not work. She may have felt intimidated by his superior rank.
11. In approximately November 1998 Ortiz complained about Gaffey's behavior to her supervisors, Lts. Whittington and Gingrich. She specifically requested of Whittington that he not make the issue a formal one because she did not want to become known among her peers as a troublemaker. She sought to stop the behavior in a low profile manner.
12. DOC nonetheless commenced a formal investigation, after which Ortiz and Gaffey stopped talking to each other.
13. DOC officer Susan Jones was assigned to investigate Ortiz's allegations. After initiating this investigation, Jones learned that sexually loaded verbal

sparring, and even some inappropriate touching, were taking place among a number of officers at Skyline. Ortiz had been accused by officer Sam Beatty of touching his crotch area. Jones felt that the scope of the investigation was too large for her to handle alone, and requested that Warden Neal refer it to the Inspector General's ("IG") office.

14. Warden Neal referred the Ortiz complaint and the entire investigation to the IG's office.

Tammy Padilla

15. During the pendency of the IG investigation into Ortiz's complaint and other incidents, Tammy Padilla, a Correctional Officer II at San Carlos Correctional Facility, made a comment about Gaffey to Tom Benezee, a friend that was a superior officer. Padilla told Benezee that she had heard Gaffey was up for promotion to Lieutenant and she thought he would be terrible for the position. Benezee asked why she felt this way, and she told him about an incident involving Gaffey that had occurred several years ago. Benezee was not involved in the hiring process in which Gaffey was participating, and Padilla's statement was not intended to have an actual effect on Gaffey's prospects for promotion.
16. Benezee informed an investigator in the IG's office about Padilla's report of the Gaffey incident. An investigator called Padilla and directed her to contact the IG investigator assigned to Ortiz's complaint against Gaffey.
17. Padilla informed the IG investigator of the following. Shortly after she was hired at DOC in 1994 she was assigned to work with Gaffey at the Colorado State Penitentiary. After a month or so Gaffey became inappropriate with Padilla, discussing previous sexual experiences with women with her, rubbing her body and shoulders or caressing her arm as he walked past her. He made sexual comments about Padilla's body. Padilla told him to stop touching her that way. She put up her hand when he was about to touch her. She told him repeatedly that she was married. He responded by laughing.
18. In late 1994 or early 1995, Padilla was at a desk filling out paperwork as the "lead tech" or lead worker on the shift. Gaffey resented the fact that Padilla had been given this role when she had less seniority than he did. As she raised her arms to stretch, he walked up behind her and grabbed her biceps and pulled them back. She pulled her arms forward against him and he pulled back. Gaffey was hurting her shoulders, and she told him to stop. He

did not let go of her. They struggled and she attempted to get up, at which point they fell to the floor together. Once on the floor, Gaffey still refused to let go of her, holding one arm across her upper chest. At this point Padilla felt Gaffey's erect penis against her thigh. As Gaffey got up, his hand touched her breast.

19. After this incident, Padilla noticed bruises on her arms. She told her husband about it in general, but not specific terms. She was newly married and feared her husband lacked the maturity at that time to handle the information appropriately.
20. Gaffey testified that this incident occurred in the following way: Padilla was sitting in the chair facing towards the desk and he was standing "a few steps" behind her, far enough behind her that he had to lean forward to touch her. She said something, and he said something "smart" back to her. Padilla then reached back behind her to punch him, with both hands. He grabbed both of her arms to stop her from punching him. She said he was hurting her, and he let go. They did not fall to the floor together.
21. It is found that the incident occurred as Padilla described it at hearing, outlined above in Paragraph 18, not as Gaffey described it.
22. Padilla did not report this incident with Gaffey to anyone at DOC because as a new officer she feared it would be career suicide. She had seen others make complaints of this type at DOC and the negative impact it had on their careers. She told herself to put it behind her, which she did.
23. At some time after Gaffey began harassing Padilla, their supervisor, Douglas Deidrich, became aware of rumors that Padilla had been having problems with Gaffey. He first approached Padilla, who informed him that Gaffey had rubbed her shoulders repeatedly after she asked him to stop, and then had finally stopped. She asked Deidrich not to take action.
24. Deidrich then called Gaffey into his office and told him about the reports he had received, and advised him that if this type of behavior was occurring, it had to stop. Deidrich then reported it to and conferred about it with his captain. They decided not report it to the appointing authority unless it recurred.
25. The Inspector General's office conducted two separate investigations, one regarding Ortiz and one regarding Padilla. Investigators from that office conducted two separate interviews of Gaffey.

26. During the pendency of the investigations, Ortiz sent a letter to Warden Neal in which she addressed Gaffey's conduct again, requesting action, and in which she also defended herself against the allegations she had grabbed officer Beatty's crotch. This letter was not offered into evidence.
27. On January 26, 2000, the Inspector General sent Complainant a letter informing him that the investigation [regarding Ortiz and others] conducted from November 29, 1999 through January 25, 2000 had been concluded.
28. On March 2, 2000, the Inspector General sent Complainant a second letter informing him that the investigation [regarding Padilla] conducted from February 14, 2000 through March 1, 2000 had been concluded.
29. The Ortiz investigative report contained conflicting reports on Ortiz's conduct towards Beatty.
30. The IG report on the Padilla incident concluded that the incident had occurred and that Padilla's credibility was beyond reproach.
31. Neither IG report was offered into evidence.
32. Warden Neal had sole authority to determine whether any disciplinary action should be taken against any officers.
33. On March 7, 2000, Neal sent Gaffey a notice of a Rule 6-10 pre-disciplinary meeting. The letter stated in part, "I have received a complaint you have engaged in sexual harassment of another correctional employee."

Rule R-6-10 Meeting

34. On March 16, 2000, Gaffey, his representative, and Neal attended the R-6-10 meeting. Prior to attending the meeting, Gaffey understood that the purpose of the meeting was to address allegations of sexual harassment by both Ortiz and Padilla. He had been interviewed by the IG's office concerning both sets of allegations, and had received letters closing both the Ortiz and the Padilla investigations.
35. At the outset of the R-6-10 meeting, Gaffey asked if the meeting concerned both IG investigations, regarding Ortiz and Padilla. Neal said yes, and Gaffey agreed to discuss both sets of allegations. Neal reviewed the allegations of sexual misconduct made by both Ortiz and Padilla. Gaffey

admitted that he had called Ortiz "cutie" and had rubbed her neck. He further stated that Padilla and he had had a verbal exchange, and that she had tried to punch him and he grabbed her wrist. He denied having engaged in any conduct that was inappropriate.

36. Neal interviewed all witnesses listed in the IG investigative reports.
37. Neal concluded that Gaffey had committed the behaviors alleged by Ortiz and Padilla.
38. With respect to Ortiz, Gaffey had admitted to some of the conduct alleged, thereby corroborating some of Ortiz's statements. Neal concluded that Gaffey had engaged in inappropriate behaviors towards Ortiz, and believed that Gaffey may not have understood that his actions were offensive to Ortiz.
39. Neal did have some concerns regarding Ortiz's credibility. The IG report indicated that other officers had witnessed Ortiz grabbing the crotch area of officer Beatty; whereas Ortiz denied having made contact with that area of his body. Beatty's statements to her were confusing, however, since he stated there were two incidents, one involving touching and another which did not. Further, it was reported that Beatty grabbed Ortiz back.
40. Neal's concerns about Ortiz's credibility were ultimately put to rest by the corroborating report of Padilla. Padilla's allegations against Gaffey were remarkably similar to those of Ortiz, and the two women had never even met. Neal saw similar behaviors alleged by two women who had never had contact with one another as extremely strong corroboration that Gaffey had engaged in the conduct alleged.
41. Neal also concluded that Gaffey had committed the acts alleged by Padilla. Gaffey had admitted to engaging in a physical tussle with her and grabbing her arms, corroborating the fact there had been a physical "incident." Padilla's husband had verified receiving Padilla's report and having seen bruises on her arms. Further, Ortiz's nearly identical report corroborated Padilla's. Neal had no reason to question Padilla's credibility.
42. Because Gaffey did not understand his conduct to have been offensive, Neal felt it was important to send him a strong message to stop the behavior.

Disciplinary Action Letter.

43. Neal's March 23, 2000 disciplinary action letter outlines the allegations of both Ortiz and Padilla in detail, as well as Gaffey's admissions regarding

both women. She concludes,

"I have determined that your behavior constitutes failure to comply with standards of efficient service or competence and willful misconduct. It is, therefore, my decision to administer disciplinary action of adjustment to base pay of \$100.00 for three months from April, 2000 through June, 2000. This decision was based on the following mitigating and aggravating factors.

Mitigating factors:

1. There were no witnesses to the behaviors in question.
2. You have had no prior disciplinary actions against you.
3. It was approximately five years between behaviors which lead to complaints.
4. You have been an employee of the DOC for approximately seven years.

Aggravating factors:

1. Two separate similar complaints were investigated.
2. DOC regulations clearly do not tolerate sexually harassing behavior.
3. Padilla's husband witnessed bruises on his wife's upper arms following her claim of harassment by you.
4. Padilla's husband indicated he confronted you after his wife told him of your behavior toward her and that you did not deny her claims.

In addition to the above, you are expected to complete training in workplace harassment by June 30, 2000. . . . Finally, you are admonished to refrain from engaging in behavior and/or making statements which would be interpreted by a reasonable person to constitute sexual harassment as defined in AR 1450-1. You are advised that future behavior of this nature could result in further corrective and/or disciplinary action up to and including termination."

44. Neal's letter cited Gaffey for violating DOC Administrative Regulation ("AR") 1450-5, "which establishes the DOC policy of a workplace free of sexual harassment and provides staff will treat each other in a professional manner with dignity and respect." She further cited him for violating AR 1450-1, the DOC staff Code of Conduct, "which mandates that sexual harassment in any form will not be tolerated and that relationships between staff shall be of a

professional nature that promotes mutual respect, assistance, consideration, and harmony within the DOC."

45. Neal also imposed corrective or disciplinary action against many of the other officers covered in the Ortiz investigation, including a reduction in pay of \$50.00 for three months against Ortiz, for either attempting to grab or grabbing Beatty's crotch area, and for one other infraction; and a corrective action against Beatty for grabbing Ortiz back after she grabbed him.
46. Complainant seeks rescission of the discipline.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeak v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

Credibility

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

Complainant's credibility was weak. His explanation of the incident with Padilla was plainly absurd. He testified that he was standing "a few steps" behind her, far enough back that he had to "lean forward" to touch her, when she reached back behind her to punch him with both hands. He further testified that he had to grab her to stop her from hitting him, despite being a "few steps" behind her. It is impossible for an individual to reach back behind herself while sitting in a chair and make a contact punch with a person standing a "few steps" behind her.

Further, Padilla presented as a reasonable, highly intelligent individual that would never

resort to a physical attack in the event of any type of disagreement. Gaffey provided no explanation of why Padilla would suddenly reach back to hit him, other than his making a "smart" remark to her. Gaffey's entire story about the incident makes no sense at all, but does serve to corroborate Padilla's testimony that they had a physical altercation and that he grabbed her body.

Complainant also testified that none of his conduct was sexually harassing in nature. He admitted that he had physical contact with both women, rubbing the neck of Ortiz and grabbing the arms of Padilla to the point where she said he was hurting her. He further admits that he responded to Ortiz's "fuck you" by stating, "does that mean you want to fool around?" It is common knowledge that the statement "fuck you" during a verbal sparring match is not an invitation to have sex. Gaffey's sexually provocative response of asking if Ortiz wanted to fool around was inappropriate. It did cross the line, and it is not surprising Ortiz took offense at it. Complainant's characterization of his behavior as acceptable is not reasonable and lacks credibility.

Padilla's testimony is given great weight. She presented herself extremely well at hearing, was articulate, and demonstrated a clear memory of the events about which she testified. The circumstances of how the incident came to light, as well as her calm and objective demeanor at hearing, evince a complete absence of motive to lie about Gaffey's conduct. Her "complaint" against Gaffey originated when she made an off-hand statement to a fellow officer, never expecting that it would result in a formal investigation. She called the IG investigator only after being ordered to do so by another investigator; at that point, she had an affirmative duty to cooperate with the investigation.

Complainant attempted to attack Padilla's credibility by arguing that if the incident was as serious as she says it was, she should have and would have reported it at the time. However, it was perfectly reasonable for Padilla to put the incident behind her and not report it formally. She was a new employee and felt that her best approach was to maintain a low profile. Complainant also argues that if the incident had been so serious, she would have told her husband about it in greater detail at the time it occurred. Padilla testified credibly that she was newly married at the time the incident occurred, and that she felt her husband lacked the maturity at that time to handle the whole story appropriately.

Complainant also argued that Padilla lacked credibility because after the incident occurred, she reported only Complainant's shoulder rubbing to Deidrich. However, as discussed above, Padilla had decided to keep the matter quiet. Her "underreport" of Complainant's conduct is consistent with this decision. She reasonably determined that if Complainant did not engage in the conduct again, it was worth it to her to let the matter go.

Turning to Ortiz, the only role of Ortiz's testimony in this case is to assess whether or not Complainant committed the acts for which he was disciplined. Ortiz's credibility must therefore be viewed from the perspective of her motive at the time she made the initial report of

Complainant's offensive conduct. At the time Ortiz made her initial report of Complainant's offensive conduct to her superiors, she asked that the matter be kept quiet and that no formal investigation take place. It is therefore concluded that her sole motive in reporting Complainant's conduct was to make it stop.

Ortiz's testimony was also corroborated by Complainant's own testimony. Again, Complainant admitted to rubbing her neck and stating, "does that mean you want to fool around?" Padilla's allegations about Complainant touching her inappropriately and rubbing against her body were nearly identical to those of Ortiz, further corroborating Ortiz's testimony.

A. Complainant Committed the Acts for Which He was Disciplined

1. What Conduct was Gaffey Disciplined For?

Neal testified at hearing that she disciplined Gaffey only for his actions toward Ortiz, and that she utilized the Padilla incident solely as corroboration. However, based on the evidence in the record, it is concluded that Neal actually disciplined Gaffey for his conduct towards both women. Both sets of allegations were discussed at the R-6-10 meeting, and the disciplinary action letter addresses both in detail.¹ Further, Respondent's Prehearing Statements listed both Ortiz's and Padilla's allegations as the actions for which he was disciplined.

2. Gaffey Committed the Conduct for which He was Disciplined

The Credibility discussion above, as well as Findings of Fact #7 - 11, 15 - 24, 30, and 35 lead to the clear conclusion that Respondent has met its burden of proving that Complainant engaged in the conduct alleged by Ortiz and Padilla.

3. Complainant Violated DOC AR 1450-05 and AR 1450-01.

Respondent disciplined Complainant for violating two separate provisions of AR 1450-05, "Unlawful Employment Practices: Policy Prohibiting Workplace Discrimination/Harassment" (Exhibit 5):

"Sexual harassment: Any deliberate, unwanted or unwelcome behavior of a sexual nature or sexual stereotyping, whether verbal, nonverbal, or physical. . . Such conduct has the purpose or effect of unreasonably interfering with an employee's

¹ This discrepancy between Warden Neal's testimony and her disciplinary action letter did not work to diminish her credibility generally. She presented as a calm, objective appointing authority who conducted a thorough and unbiased investigation, weighed all appropriate factors objectively, and determined that corrective or disciplinary action was warranted against a number of employees. She evinced no bias against Gaffey.

work performance or creating an intimidating, hostile, or offensive work environment; and/or, . . . Such conduct stereotypes a gender into a degrading or less than desirable status within the workplace, thus creating an intimidating, hostile or offensive work environment." (AR 1450-5, Section III (G), page 2.)

"DOC staff will treat each other in a professional manner with dignity and respect." (AR 1450-5, Section IV(A)(2), page 3.)

She further cited Gaffey for violating AR 1450-1, the DOC staff Code of Conduct:

"which mandates that sexual harassment in any form will not be tolerated and that relationships between staff shall be of a professional nature that promotes mutual respect, assistance, consideration, and harmony within the DOC."

Complainant's conduct was such that he failed to treat either Padilla or Ortiz with dignity and respect. He therefore violated AR 1450-5. He further violated AR 1450-1 by failing to maintain a relationship with Ortiz and Padilla "of a professional nature that promotes mutual respect, assistance, consideration and harmony" on the job. His behavior had the opposite effect.

B. The Discipline Imposed Was Within the Range of Alternatives Available to the Appointing Authority.

Complainant argues that even if it is found that he engaged in the conduct alleged, as has been found, that conduct "would not constitute sexual harassment under Title VII of 42 U.S.C. 2000e-2(a)(1) [the Civil Rights Act of 1964], or the definition of sexual harassment contained in the DOC Personnel Board Rules R-12-26, and therefore, at most, should have resulted in corrective action rather than discipline under Board Rule R-6-6."

Complainant further argues that "Respondent did not prove that the complaints made by Ortiz, taken in total, arose to the level of "hostile work environment" or that they were unprofessional. The only evidence that was offered by Respondent about the allegations of Ms. Ortiz were statements by Ms. Ortiz alleging that Complainant might have been affectionate. There were no insults, threats, intimidations, or other behaviors alleged that would have constituted a hostile work environment or disrespect for a co-worker. The Complainant has had no prior disciplinary action taken against him and his remarks were apparently not taken into account. The current allegations reasonably justified no action, or corrective action rather than discipline."

Complainant is correct in arguing that to prove "hostile work environment" sexual harassment under Title VII, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and

one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 118 S.Ct 2275 (1998).

However, DOC is free to promulgate its own regulations governing workplace behavior, and the fact that AR 1450-1 and 1450-5 are broader than Title VII's protections has no bearing here.

The choice of imposing discipline is governed by Board Rules R-6-2 (not cited by Complainant) and R-6-6. Rule R-6-6, which mandates that appointing authorities must consider the following prior to imposing disciplinary action: "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Neal's disciplinary action letter and her testimony demonstrate that she objectively and thoroughly weighed all appropriate factors before imposing discipline. She was particularly struck by the identical nature of the two sets of allegations. She was further concerned that Complainant, who admitted to some of the offensive conduct, including unwelcome touching, either had no idea that his conduct was offensive, or refused to acknowledge that his conduct could be offensive. Complainant testified that none of his conduct was sexually harassing in nature. Yet he admitted that he had physical contact with both women, rubbing the neck of Ortiz and grabbing the arms of Padilla to the point where she said he was hurting her. His conduct was "serious" enough to warrant discipline under Rule R-6-2.

Neal was appropriately concerned about Gaffey's **attitude** towards his conduct. The fact that there was a serious incident with Padilla and continued offensive conduct toward Ortiz demonstrated to Neal that Gaffey needed to be sent a strong message. Disciplinary action constitutes such a strong message, and it was appropriate here.

C. Respondent's Action was Not Arbitrary, Capricious or Contrary to Rule or Law.

Complainant argues that Respondent's failure to provide him with written notice prior to the R-6-10 meeting that the Padilla incident would be discussed constituted a deprivation of procedural due process. He argues that "notice in this case was so misleading that it offered no opportunity to defend and was therefore improper." He further avers, "He was totally unprepared to defend himself against these allegations, call witnesses on his own behalf, or cross-examine Ms. Padilla on her allegations because proper notice had not been forthcoming."

Notwithstanding this argument, Complainant himself testified unambiguously at hearing that when he arrived at the R-6-10 meeting, he knew that the two investigations involving Ortiz and Padilla had been completed and might be discussed. He testified that he expected to talk about Ortiz, and was willing to talk about Padilla because he "had nothing to hide."

Gaffey therefore asked at the beginning of the meeting whether it would encompass just Ortiz or also Padilla. Once Warden Neal answered that the meeting would include both incidents, Complainant, with his representative present, agreed to discuss both incidents.

No Board rule mandates what must be included in the letter noticing the R-6-10 meeting. R-6-9 states, "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Here, Respondent fully complied with this rule. Warden Neal presented detailed information regarding the allegations of both Ortiz and Padilla as potential reasons for discipline. Complainant then exercised his opportunity to respond to the allegations by giving his side of the story regarding both Ortiz and Padilla. Complainant presented no evidence that he had an insufficient opportunity to provide Neal with a full response to the allegations.

Under these circumstances, Respondent committed no due process violation by omitting the Padilla allegations from the R-6-10 letter. This ruling, however, is limited strictly to the facts of this case: Complainant knew of the IG investigation into the Padilla allegations and had been interviewed on the Padilla matter prior to the R-6-10 meeting; at the outset of the R-6-10 meeting, Complainant clarified that Padilla would be discussed, and, with his representative present to advise him, Complainant agreed to include the Padilla matter in the meeting. Another case involving different facts, where there was no prior knowledge of an investigation, no discussion of the issue at the outset of the R-6-10 meeting, and no consent to discuss the issue with a representative present, would present a very different analysis. It could be fundamentally unfair for an appointing authority to "spring" a new incident on an employee at an R-6-10 meeting and later base discipline on that incident. That did not occur here.

Turning to Complainant's argument that he was deprived of the opportunity to "defend himself against these allegations, call witnesses on his own behalf, or cross-examine Ms. Padilla on her allegations because proper notice had not been forthcoming," those procedural rights attach at the hearing stage of Board proceedings, and Complainant has been given afforded full procedural due process herein.

The Board's Notice of Hearing in this [and every other] case states in part as follows:

"The evidentiary hearing in this case shall be held to consider matters of fact and law relating to the respondent's action which was appealed by the complainant. The evidentiary hearing will be tape recorded unless either party wishes to provide a court reporter at that party's expense.

The parties may appear personally or be represented by counsel of choice at that party's expense at the evidentiary hearing. . . .The parties have the right to subpoena witnesses, present relevant evidence and argument, and to cross-examine opposing witnesses at the evidentiary hearing. Timely application for subpoenas should be made to the office of the State Personnel Board. The party requesting the issuance of a subpoena shall be responsible for service in accordance with law, and for payment of mileage and witness fees of subpoenaed witnesses."

Respondent's Prehearing Statement listed as facts it intended to prove at hearing: "Complainant was disciplined for conduct in two separate incidents involving two different co-workers." Respondent listed both Ortiz and Padilla as witnesses, and outlined the alleged conduct in great detail. Complainant therefore had full notice and opportunity to depose both Ortiz and Padilla in order to prepare for hearing. He further had the opportunity to, and did, cross-examine Padilla at hearing.

Complainant additionally argues that Respondent's use of a five-year old incident deprived him of due process. He avers that use of the Padilla incident rendered him unable to defend himself adequately "since obtaining evidence that may have disproved the claim is very difficult." Complainant cites Colorado Department of Revenue v. Kirk, 743 P.2d 16, 21 (Colo. 1987) for the proposition that "Even at an administrative hearing, rules of evidence cannot be so relaxed as to disregard due process of law and fundamental rights." Kirk involved the utilization of hearsay evidence as partial grounds to revoke an individual's driver's license. Kirk argued that the use of hearsay evidence violated his right to confront and cross-examine his accusers at hearing. The Colorado Supreme Court held that it was not a deprivation of due process to premise his license denial on hearsay testimony for a number of reasons, among them the fact that Kirk had had the opportunity to subpoena the witness upon whose hearsay statement the revocation was based.

Here, unlike the Kirk case, Respondent relied on no hearsay testimony, but produced Padilla at hearing. While Complainant makes general assertions of a due process violation, he offers no specific way in which his rights have been violated. Therefore, his argument fails.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined;
2. The discipline imposed was within the range of available alternatives;
3. Respondent's action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
January, 2001, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 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. The notice of appeal must be received by the Board no later than the 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).

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 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 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 January, 2001, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Joe E. Losavio
616 West Abriendo
Pueblo, CO 81004

and in the interagency mail, addressed as follows:

Coleman Connelly
Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
