

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 2000B114

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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PERRY VENARD,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,  
ARKANSAS VALLEY CORRECTIONAL FACILITY,  
Respondent.

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Hearing was held on August 28-29 and October 10, 2000, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Cristina Valencia and Joseph Lynch, Assistant Attorneys General. Complainant appeared in person and was represented by William Finger, Attorney at Law.

Respondent called the following witnesses: Steven Hartley, Custody Control Manager; John Hadley, Associate Warden; Elmer Daugherty, Investigator; Daryl Geringer, Physical Plant Manager; Daryl Mullins, Correctional Officer II (by telephone, over objection); and Juanita Novak, Warden, Arkansas Valley Correctional Facility.

In addition to testifying on his own behalf, complainant called Steve Litzenberger, former Correctional Officer.

Respondent's Exhibits 1, 2, 3, 8, 9, 10, 16 and 17 (cassette tape) were stipulated into evidence. Exhibits 4, 7, 12, 13 and 15 were admitted over objection.

Complainant=s Exhibits A-1 through A-35,C-1 through C-10 and G-1 were admitted by stipulation. Exhibits F-1, N (easel drawing) and H-22 were admitted without objection.

### **MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, respondent=s action is affirmed.

### **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;
3. Whether either party is entitled to an award of attorney fees and costs.

### **PRELIMINARY MATTERS**

Respondent=s motion to take the telephone testimony of one witness was granted over complainant=s objection.

Except for complainant and respondent=s advisory witness, Juanita Novak, all witnesses were excluded from the hearing room unless testifying.

### **FINDINGS OF FACT**

1. Complainant, Perry Venard, was hired by respondent, the Department of Corrections (DOC), in October 1987 as a Correctional Support Supervisor II (Lt.) at the Arkansas Valley Correctional Facility (AVCF), which had just opened. A plumber, he supervised an inmate work crew at the physical plant. He consistently received good evaluations. (See Exs. A-1 through A-35.) He had no prior corrective or disciplinary actions.

2. Complainant was in charge of the tools used at the physical plant; his duties included the marking and inventorying of new tools. All tools were to be inventoried quarterly.

3. Class AA@ tools can be used as weapons or in an escape. Large pliers are an example of a Class A tool. Tools are marked and color-coded to distinguish the area to which they are assigned, e.g., the physical plant. Class A tools display a visual red band. (Ex. 13.)

4. In February 1998, fifteen new pliers were received and inventoried by complainant. These were lineman pliers with insulated handles and were seven inches in length. They were Class A tools. Complainant kept twelve of the pliers in his desk drawer to replace broken pliers. Three were put in the tool locker located in the men=s bathroom. The computer inventory showed all of the pliers to be located in the tool locker. It was against procedure to keep tools in one=s desk. The bathroom door and complainant=s desk drawer were usually locked.

5. Tools were also stored in a number of other desks.

6. On September 1, 1999, complainant was promoted to Correctional Support Supervisor III (Capt.). (Exs. G-2, G-1.) Complainant supervised the HVAC and general plumbing staffs, but he was still responsible for the tools. Warden Juanita Novak expected him to continue doing his old duties until that position was filled; she had initiated the necessary paperwork to fill the position.

7. Complainant moved from his Lieutenant=s desk to a desk in the Captain=s office, where he did not have a view of his old desk. (Ex. N.) For the most part, he focused on the duties of his new job. He knew he was still responsible for the tools. Occasionally, he would return to his old desk for a replacement tool. He was responsible for both desks.

8. The Lieutenant=s desk continued to be used by other employees. There may have been ten to sixteen employees on duty. No one person used the desk on a regular basis. They used the telephone on the top of the desk. The key to the desk was kept in a key box located near the door of the staff bathroom, generally known to employees. (Ex. N.) Although complainant moved his personal belongings to his new desk, replacement tools remained in the old desk.

9. Complainant did not do a third-quarter tool inventory because he was focusing on his responsibilities of Captain rather than on his old job. The last tool inventory conducted by complainant was in July 1999.

10. On December 7, 1999, three inmates escaped from the Arkansas Valley Correctional Facility by cutting a hole in the fence. Complainant, who had worked from 7:00 a.m. to 4:00 p.m., was called to the facility by his supervisor, Major Daryl Geringer, sometime after 9:00 p.m.

11. At the facility, Geringer told complainant that there was a pair of lineman pliers on the ground where the escapees had cut through the fence, and that he should go out there. Complainant recognized the pliers as ones he had marked when they came in.

12. Complainant verified from the computer database that the number matched with his inventory. He checked the tool locker, which did not contain that type of pliers. Then he checked the desk and discovered that another pair of lineman pliers, in addition to the pliers found at the fence, was missing as well. He observed that the rest of the order was there.

13. Complainant, upset, told Geringer that two pairs of pliers were missing from the physical plant shop.
14. Geringer knew that tools were sometimes kept in desks in the physical plant. He knew there were replacement tools in the Lieutenant=s desk.
15. Geringer reported to Warden Novak that the pliers had come from complainant=s desk. She instructed Geringer to have complainant write an incident report.
16. That night, at 11:30 p.m., complainant wrote the following report: “Two pair of Lineman Pliers, Klien, 7", D201-7NE Physical Plant Numbers EL513 and EL522 are missing from the Physical Plant. Both pliers were unissued replacement pliers.@ (Ex. 1.)
17. Novak was dissatisfied with this report and told Geringer to have complainant write a more detailed incident report. After being so informed, complainant telephoned the warden intending to ask exactly what she meant by more detail. Novak would not discuss it with him, saying to just write the report.
18. The following afternoon, December 8, complainant composed the second report as follows: “The two pair of pliers missing from physical plant, EL 513 and EL522, are missing from the Staff Bathroom, Tool Locker 5. They are pliers that were not yet issued. They were last inventoried in July of 1999. It is unknown to me how they could have left the locker.” (Ex. 2.)
19. The desks in the physical plant were searched and emptied of tools the day after the escape. Tools were found in more than one desk besides complainant=s.
20. On December 10, 1999, complainant wrote an incident report saying that he had located one of the missing pliers, EL522, in the physical plant at 10:30 a.m. (Ex. 3.) According to respondent, how this pair of pliers was located is not an issue in this case.

21. On December 15, 1999, a "shakedown" of the desks in the physical plant area was ordered by Warden Novak because she had received information that tools were still being stored in the desks. If the desks were locked, they were not searched. Three drill bits, which are Class A tools, were found in the Lieutenant=s desk. While other Class A tools may have been found, there were no pliers in the desk.

22. On December 16, Novak was told that there were still Class A tools in complainant=s desk. She ordered an investigation and placed complainant on administrative leave pending the results of the investigation because of his possible violation of the regulations concerning tool control, combined with the "escape incident of December 7, 1999." (Ex. 8.)

23. The investigator, who completed his report on January 24, 2000, concluded:

An escape of three AVCF inmates on 12-7-99 was accomplished, in part, through the use of pliers obtained by the inmates, who then cut through a security fence and fled the area. The pliers used in the escape were recovered at the scene and were identified by number EL513 as pliers ordered and obtained by Captain Perry Venard. When reporting facts pertaining to the pliers used in the escape, Captain Venard provided minimal information. In the 12-8-99 report submitted by Captain Venard, the information contained in Venard=s report regarding the storage location of the missing pliers was false and misleading. Venard later admitted to investigators that the pliers were stored in the top right hand drawer of his desk. Evidence indicates that Captain Perry Venard, on December 8, 1999, knowingly and intentionally wrote, falsified and submitted an official incident report regarding the pliers used in the December 7, 1999, escape from AVCF. (Ex. 15.)

24. After reading the investigative report, Novak scheduled a predisciplinary meeting with complainant for February 18, 2000.

(Exs. 9, 10.)

25. In making her decision whether to impose discipline following the R-6-10 meeting, it was significant to Novak that complainant had falsified two incident reports, first by not disclosing that the pliers used in the

escape were taken from his desk drawer, and then by falsely stating that both pairs of missing pliers were taken from the tool locker in the staff bathroom. To Novak, a person who files false documents cannot be trusted to provide accurate information, and accurate information is vital because important decisions are based on the information provided. Additionally, false documents jeopardize the safety and security of the facility.

26. Throughout DOC, it is accepted that it is extremely important to file honest, complete incident reports, and it is the obligation of every DOC staff member to be truthful.

27. Novak was mindful of complainant's good work history and his recent promotion, but she felt that his failure to follow DOC's tool regulations jeopardized the security and integrity of AVCF and was a contributing factor in the escape of three inmates.

28. On February 22, 2000, the appointing authority, Warden Novak, terminated the employment of complainant Perry Venard for failure to comply with standards of efficient service or competence and willful misconduct, citing violation of Administrative Regulation (AR) 300-9 with respect to tool control and AR 1450-1, Staff Code of Conduct, by submitting two false documents. Novak found that complainant also violated the Staff Code of Conduct by keeping tools in his desk and that he "intentionally assisted three offenders in their escape from the Arkansas Valley Correctional Facility." (Ex. 12.)

29. It was never determined how or when the escapees gained possession of the pliers.

30. The vindicator system, a motion detector which monitors when someone passes through it, is sometimes turned off so DOC staff may cross without setting off an alarm. The vindicator was turned off for a time the night of the escape. Warden Novak does not believe that the vindicator being turned off facilitated the escape.

31. There is a "midway building" on the grounds with a metal detector to prevent weapons from coming

into the facility. When inmates leave the physical plant, they are patted down. If the pliers went through the midway point, they should have been detected.

32. Correctional Officer Chad McDonald was staffing Tower Two, which looks over the midway area (Ex. 16), the night of the escape and was given a corrective action for his part in allowing the escape to occur. (See Ex. H-22.)

33. Correctional Officer Art Sosa was staffing Tower One the night of the escape and was issued a "confirming memorandum," short of a corrective action, for his failure to notice the inmates cutting through fences and climbing over a fence. (Ex. F-1.)

34. No other corrective or disciplinary actions or letters of counseling were issued with respect to the escape.

35. Complainant Perry Venard filed a timely appeal of his disciplinary termination on March 3, 2000.

## **DISCUSSION**

### Legal Standard

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. ' 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).

An administrative agency abuses its discretion when the decision under review is not reasonably supported by any competent evidence in the record. *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990). No competent evidence means that the agency's ultimate decision is so devoid of evidentiary support that the only explanation must be that the agency's action was an arbitrary and capricious exercise of authority. *Board of County Commissioners v. O'Dell*, 920 P.2d 48 (Colo. 1996).

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). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

In making credibility determinations, the administrative law judge is guided by the factors set out in CJI 3:16, which include: the witnesses' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been contradicted, any bias, prejudice or interest, and their manner or demeanor on the witness stand.

### Arguments

Respondent argues that complainant, who was in charge of the tools, not only kept Class A tools in his desk against policy, but he lied about the circumstances; he was motivated to lie to preserve his job. The major difference between McDonald, who was corrected, and Sosa, who was counseled, and complainant is that complainant falsified two incident reports, the first (Ex.1) because he knew more than that the pliers came from the physical plant and the second (Ex. 2) because he stated that the pliers came from the tool locker when he knew such not to be true.

Respondent asserts that the escape would not have occurred without the pliers, that the policy against keeping pliers in desks is undisputed and complainant was well aware of it, that several witnesses testified to the necessity and expectation of filing accurate incident reports and the end result of complainant=s misdeeds was to jeopardize the safety and security of the facility.

Complainant, on the other hand, submits that mistakes were made by the entire institution, and he is being used as a scapegoat for the escape. Conceding that it was a mistake to keep the tools in a desk and not to do an updated inventory, he points to his having been rated a peak performer just prior to the escape and argues that, while a corrective action or lesser form of discipline may have been appropriate, termination was excessive and inappropriate. He asserts that Geringer was aware that complainant kept tools in his desk and did not tell him to stop doing so.

Complainant argues that he is being blamed for the entire escape, when others were just as culpable but were not disciplined; only McDonald and Sosa received any penalty at all. The warden jumped to conclusions and picked the easiest of all targets.

As to the incident reports, complainant denies intentionally trying to mislead the investigation and avers that he said that the two missing pliers probably came from the desk, but they could also have come from the locker, and that the second report was consistent with the inventory report. He asserts that he has no motive for fabrication.

#### Analysis

Substantial evidence supports the appointing authority=s termination decision. Respondent satisfied its burden under *Kinchen, supra*, *McPeak, supra*, and *Van Sickle, supra*.

Complainant=s contention that he was targeted to be used as a scapegoat received due consideration. There is some merit to complainant=s argument that it was not just he who violated the tool control policy

and that his supervisor was aware that replacement tools were stored in his Lieutenant=s desk. There was no direct evidence that the tools found in that desk on December 15 were put there by him. And, the appointing authority=s assertion in the termination letter that complainant "intentionally assisted three offenders in their escape" is unsupported, though it was established that he intentionally kept the tools in his desk.

Nevertheless, complainant was the one in charge of tool control, and he knowingly shirked this responsibility without regard for potential consequences. He knew that keeping Class A tools in desks violated DOC regulations and compromised the safety and security of the facility. Even though he had moved on to a different job, he knew that he was still the person in charge of the tools. He was responsible for the tool inventory. In view of the escape, under these circumstances some form of discipline short of termination was appropriate.

The decisive factor in this case is complainant=s two incident reports, especially the second one, in which he stated that the specific location of the subject pliers had been the tool locker. By his own testimony, that he checked the tool locker and found an absence of that type of pliers so then went to the desk and discovered that two, not just one pair of pliers was missing, he knew on the night of the escape where the pliers came from. Consequently, the first report was knowingly incomplete since it stated the location as merely the physical plant when he knew more specifically, and the second report was intentionally false because he knew the pliers did not come from where he said they did.

Complainant=s argument that the second incident report was consistent with the inventory report does not justify his statement in the incident report, given his testimony that when he put three pliers in the locker and twelve in his desk, he knew that they would all be inventoried as being in the locker. He knew that there was not a separate inventory list in the computer for the tools in his desk; all of the pliers would show on the computer as being in the locker. He knew at all times that it was incorrect for someone to think that the tools were necessarily located in the tool locker just because the computer said so.

Complainant was thus unsuccessful in persuading the administrative law judge that the incident reports he filed were not intentionally false. There is sufficient support in the record to find otherwise. Furthermore, record evidence supports a finding that filing accurate incident reports is extremely important in the DOC system for the safety and security of the facility and is the recognized obligation of all DOC staff members, as well as is the obligation to tell the truth.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as complainant=s individual circumstances. The appointing authority did not abuse her discretion. *See* Rules R-1-6, R-6-2, R-6-6, R-6-9 and R-6-10, 4 C.C.R. 801. There is no credible evidence of like instances in which an employee was treated differently. McDonald and Sosa were not accused of lying or filing false documents.

This is not a proper case for the award of attorney fees and costs under section 24-50-125.5, C.R.S., of the State Personnel System Act. *See also* R-8-38, 4 C.C.R. 801.

### **CONCLUSIONS OF LAW**

1. Respondent=s action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. Neither party is entitled to an award of attorney fees and costs.

### **ORDER**

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

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

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge  
1120 Lincoln Street, #1420  
Denver, CO 80203

**NOTICE OF APPEAL RIGHTS**

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. 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 December, 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:

William S. Finger  
Frank & Finger, P.C.  
29025-D Upper Bear Creek Road  
P.O. Box 1477  
Evergreen, CO 80437-1477

and in the interagency mail, addressed as follows:

Cristina Valencia  
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1525 Sherman Street, 5th Floor  
Denver, CO 80203

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