

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANNIE CASSABONE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO STATE PENITENTIARY,

Respondent.

This one-day hearing was held on March 21, 2001 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by First Assistant Attorney General Stacy L. Worthington. Complainant represented himself.

PRELIMINARY MATTERS

Respondent called the following witnesses: Louie Ferris, Correctional Officer I at Colorado State Penitentiary ("CSP"); Margaret Hudspeth, Correctional Officer II, CSP; Mike Webb, Sergeant, CSP; Todd Hauck, Correctional Officer I, CSP; Rena Prior, Sergeant, CSP; Charles Shannon, Captain, CSP; and Gene Atherton, Warden, CSP.

Complainant called the following witnesses: herself.

Respondent's Exhibits 1 - 29 and 37 were admitted by stipulation. Respondent withdrew Exhibits 30 - 36.

Complainant offered no exhibits.

Complainant filed a motion to continue the hearing on March 19, which Respondent's counsel received on March 20, the day before the hearing. The Administrative Law Judge ordered Respondent to file its response, if any, on March 20 by facsimile. Respondent did so, and Complainant received it on that date. At the commencement of the hearing, the parties presented argument on the motion. Complainant argued that she needed a continuance in order to obtain new counsel.

Respondent argued the following: the order allowing Complainant's first attorney to withdraw was entered on February 28, 2001, providing Complainant with sufficient time to find new counsel; and, filing the motion one day before hearing was insufficient notice, since Respondent had paid the travel expenses for six witnesses to come from Canyon City to Denver to testify. There being no good cause shown, the motion to continue the hearing was denied.

Procedural History. In December, 2000, Complainant filed an appeal of her November 2000 disciplinary reduction in pay of \$900.00 and corrective action. In January, 2001, Complainant filed an appeal of her termination. On February 7, 2001, the Board entered an order consolidating both cases.

MATTER APPEALED

Complainant appeals Respondent's November 2000 disciplinary reduction in pay and corrective action, and her December 2000 termination. For the reasons set forth below, Respondent's actions are affirmed.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's discipline, corrective action, and termination of Complainant were arbitrary, capricious or contrary to rule or law;
3. Whether Respondent's discipline, corrective action, and termination of Complainant were within the range of reasonable alternatives available.

FINDINGS OF FACT

1. Complainant, Annie Cossabone, commenced employment at DOC as a Correctional Officer I in 1995.
2. On July 5, 2000, Complainant was present at a parole hearing as an escort officer. An inherent part of her duties was to assure that if the prisoner became violent, she would assist in physically containing the inmate.
3. During the parole hearing, Complainant fell asleep and began to snore for a few minutes. When she woke up she caught the eye of one of the other officers present. Throughout the remainder of the hearing, Complainant

periodically made snoring noises and smiled at the other officer, indicating she thought the issue was a joke.

4. The two other officers who witnessed Complainant sleeping and snoring at the parole hearing filled out incident reports. In addition, Respondent issued a Performance Documentation Form, requiring Complainant to attend a professionalism class and warning her that if "this unprofessional behavior continues corrective and or disciplinary action will be requested to the Appointing Authority." The Form also noted that Complainant claimed she was taking medication that could induce drowsiness, and contained a physician's note indicating that two medications "may have potential for sedation taken together." The author of the Form indicated that Complainant was nonetheless responsible for her having slept on the job.
5. In late July, 2000, Sergeant Rena Pryor approached Complainant's workstation with another officer. They saw Complainant sitting in her chair with her head back, mouth open, sleeping. They stood there and watched her sleep. Sergeant Pryor then slammed a door in order to wake up Complainant. Pryor confronted Complainant about sleeping while on duty. Complainant at first denied it, but then admitted it. Pryor did not write up Complainant on this incident because she felt it was appropriate to confront employees directly the first time there is a problem, giving them a second chance before putting anything in writing. In September, however, after Captain Shannon had received a number of reports regarding Complainant's performance problems, he directed that Pryor write up the incident, which she did.
6. One of Complainant's duties was to sit in the Programs Control Center booth, presiding over a series of locked doors, with the responsibility for opening them when officers and prisoners under their escort needed to pass through. Many officers complained that Complainant delayed in opening the doors for them, for no apparent legitimate reason.
7. Complainant routinely made officers wait at the security doors, even when they were escorting prisoners. She cussed at them when they complained to her. This behavior constituted a serious security breach. CSP is a maximum-security prison facility, consisting primarily of highly dangerous inmates that have had disciplinary problems at other prison facilities. When Complainant failed to open the security doors quickly, it could have caused the volatile prisoners to become angry and violent.
8. Complainant routinely spent excessive time on the telephone during work hours. When Sergeant Pryor asked her if it was a business or personal

call, she got angry with her.

9. One of Complainant's duties was to talk to the public on the telephone to schedule prison visits. Complainant was rude to the public on a sufficiently routine basis that Sergeant Pryor received a number of complaints.
10. Complainant was also rude to her co-workers, many of whom complained to Sergeant Pryor.
11. On September 14, 2000, two officers were escorting a prisoner through the secured area to the visiting area. Complainant, in the Programs Control Center, made them wait for approximately five-to-ten minutes before she opened the doors to allow them through, an unduly long time. In addition, when the officers returned from the visiting area, without the inmate, Complainant made them wait another ten-to-fifteen minutes. The officers pressed the intercom button which went directly to Complainant, to assure she knew they were there waiting to pass through the door. They received no response to their intercom page for a few more minutes, tried it again, and again received no response. They next saw an officer from their unit, Officer Giordano, who was returning to the B-pod office. They asked Giordano to have their unit supervisor, Sergeant Margaret Hudspeth, call Complainant and tell her to open the door. When Hudspeth called Complainant, she asked Complainant to open the door to let her two officers through. Complainant responded, "I've already opened the door, so what's your problem." When Hudspeth began to explain that her two officers had been standing there waiting for over ten minutes, Complainant hung up the telephone on Hudspeth.
12. Hudspeth reported the incident to her supervisor, Captain Shannon, who directed her to write an incident report, which she did.
13. On September 16, 2000, Captain Charles Shannon personally witnessed the following incident. Two officers waited with an inmate at the door to the visiting center for over five minutes. There was no other inmate movement in the area at that time. Therefore, there was no legitimate business reason for Complainant to have made them wait.
14. On September 19, 2000, Captain Shannon wrote a memorandum to Major Steve Schuh regarding this September 16, 2000 incident. In his memo, he also referenced Complainant's other performance problems that had been recently reported to him, including rude, inappropriate and unprofessional behavior when dealing with civilians calling to schedule visits and in talking to staff, as well as sleeping on duty at the parole

hearing.

15. In early- to mid-October, 2000, Complainant entered the mailroom and asked the officers assigned there if they needed help. They did not. She sat in a chair by the door as the other two officers continued to work. Soon, she was sleeping. After a couple of minutes, she woke up. One of the officers said to her, perhaps she should get up and move around. Both officers later wrote incident reports on this incident.
16. It is a serious breach of security for a correctional officer to sleep on duty. In the unique context of a prison facility, an emergency can arise at any time that requires all officers to be alert and respond quickly. Sleeping on duty compromises this ability. Sleeping on duty also constitutes willful failure to perform one's job duties.
17. On October 20, 2000, Respondent gave Complainant an overall Low Competent Performance Review, covering the period from April 1 - September 30, 2000. It contained two Needs Improvement ratings, in Quality of Work and Interpersonal Relations. The Review noted, "She has had some trouble this review with staying alert while managing inmates which jeopardizes the safety of staff, inmates, and others. She received a performance documentation on 7/18/2000 regarding this situation." It also noted, "Officer Cossabone needs to improve her interpersonal relations skills. She continues to have verbal conflicts with peers and supervisory staff. She needs to use more tact and diplomacy when dealing with others. She needs to take responsibility for her own actions."
18. On November 6, 2000, CSP Warden Gene Atherton issued a letter to Complainant noticing a Rule R-6-10 pre-disciplinary meeting. The letter referenced the following: the repeated incidents of sleeping on duty; being rude and antagonistic; and failing to perform her duties by refusing to allow passage through the doors for excessive periods of time.
19. Warden Atherton placed Complainant on paid administrative leave pending resolution of the disciplinary issues.
20. At the R-6-10 meeting, Complainant admitted to Warden Atherton that her body posture may have indicated she was sleeping, but that in fact she was not. She denied that she ever had slept on duty, and made no mention of medications causing her to sleep.
21. Atherton concluded that Complainant had slept on duty on at least two separate occasions, and had been admonished, advised, and counseled on the matter. He found her behavior to be "willful misconduct and failure

to meet standards of efficient service." He further stated that "I consider the behavior of sleeping on duty in a correctional facility to be flagrant and serious misconduct that creates dangerous and demoralizing conditions in a work environment that requires attention to the mission and focus on detail in order to sustain acceptable levels of safety."

22. At the R-6-10 meeting, Complainant did not address the specific instances of refusing to open the doors with which she was confronted. She stated that the Programs Control Room is a busy place with many doors to operate, and that there should be a policy regarding time frames for opening the doors.
23. Atherton had received no other complaints regarding any other officers failing to timely open the doors in the Programs Control Room. He concluded that Complainant failed to operate the security doors in a timely manner, as a result either of sleeping on duty or professional misconduct. He found that Complainant had engaged in willful misconduct and a failure to meet standards of efficient service. He stated in part,

"I consider the behavior of the purposeful and unjustified delay in the operation of security doors in a correctional facility to be the cause of significant disruption in the operation of critical functions of the facility and to unnecessarily heighten the level of risk in moving dangerous and disruptive inmates through the facility. It is flagrant and serious misconduct that creates dangerous and demoralizing conditions in a work environment that requires attention to the mission and focus on detail in order to sustain acceptable levels of safety at all times."

24. Regarding the area of "relations with staff/insubordination," Complainant denied that she had been rude to Sergeant Hudspeth or to any other staff. Respondent concluded that she had in fact been rude, unnecessarily argumentative, angry, and insulting in her relationships with staff.
25. Complainant made arguments concerning procedural timeframes in handling her performance problems. Atherton found compliance with all pertinent rules and regulations.
26. Atherton considered Complainant's five and a half years experience at DOC and her prior performance reviews, including her most recent Low Competent rating. He elected to discipline Complainant in the form of a reduction in pay of \$900.00, commencing after the holidays, at \$112.50 per month for eight months.

27. He also issued Complainant a corrective action on the issue of relations with staff and the general public.
28. Complainant returned to duty on November 29, 2000.
29. On December 16, 2000, Complainant and another officer were waiting in an office for a prisoner they were to escort to the medical facility. During their wait, with numerous other officers present in the same office, Complainant sat down, leaned back in her chair with her head to the side, and fell asleep for approximately five minutes. Three officers wrote incident reports on this.
30. Warden Atherton noticed a pre-disciplinary meeting on the December 16 sleeping incident. At the meeting, Complainant denied having slept on duty, and indicated that Officer Dino Williams would corroborate her denial, since he had been with her at all times that morning. Warden Atherton called Williams, and Williams stated that he had no relevant information to aid the Warden in his investigation.
31. Warden Atherton concluded that the three officers that had made written reports of Complainant sleeping on duty were credible, and terminated Complainant's employment.
32. Complainant seeks reinstatement, back pay and benefits.

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).

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).

A. Complainant Committed the Acts for Which She Was Disciplined.

Complainant presented no witnesses on her own behalf except herself. Therefore, she provided no corroboration for her general denials.

Turning to Respondent's evidence, seven separate individuals wrote incident reports documenting Complainant's sleeping on duty. Three of those individuals testified credibly at hearing. Six separate individuals also submitted incident reports on the issue of Complainant failing to open the security doors in a timely manner; a seventh, Captain Shannon, wrote a memo containing his own eyewitness account of this behavior. Three of these individuals testified credibly at hearing on this issue. Lastly, four individuals wrote incident reports on Complainant's rudeness and insubordinate behavior to staff and the public, with Sergeant Pryor testifying credibly on this issue. Significantly, there is very little overlap in the identities of the witnesses regarding Complainant's performance problems in these three different areas.

The only reasonable conclusion to draw from the evidence is that Complainant repeatedly slept on duty, routinely refused to open the security doors in a timely manner, and engaged in a pattern of rude and insubordinate behavior towards her peers, superiors, and the public. She committed the acts for which she was disciplined.

B. Was the Action of the Appointing Authority Arbitrary, Capricious, or Contrary to Rule or Law?

In determining whether an agency's decision is arbitrary or capricious, the court must determine whether a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Dept of Social Services, 895 P.2d 1188, 1192 (Colo. App. 1995). Complainant presented a clear security risk by repeatedly electing to fall asleep on the job and refusing to open the security doors in a timely manner. Respondent addressed this behavior in an appropriate manner by imposing an 8-month reduction in pay of \$112.50 per month, for a total of \$900.00. This discipline sent a strong and appropriate signal that the behavior had to stop immediately. The corrective action on the issue of relations with staff and the general public was also appropriate.

As has been found above, CSP houses the most dangerous and violent of incarcerated offenders in the state. Complainant's behavior evinced a troubling lack of concern for the safety and security of her fellow officers and of the entire prison facility.

Once Respondent had imposed serious discipline on Complainant, in part for sleeping on duty, she elected to fall asleep in a room full of her fellow officers within three weeks of returning to work. This behavior demonstrates conclusively that further disciplinary measures short of termination would have been futile.

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

Complainant committed all of the acts for which she was disciplined. Her repeated willful failure to perform her duties posed a security risk for her fellow officers and the entire facility. The decision to terminate her was within the range of reasonable alternatives available to the appointing authority.

CONCLUSIONS OF LAW

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

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
April, 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 April, 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:

Annie L. Cossabone
34 Normandy Circle
Pueblo, Colorado 81001

and in the interagency mail, addressed as follows:

Stacy L. Worthington
First Assistant Attorney General
Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
