

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VALERIE FRENS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
CANON MINIMUM CENTER,

Respondent.

This matter was heard on May 23 and October 24, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Joseph Haughain, Assistant Attorney General. Complainant appeared in-person and was represented by John R. Palermo, Attorney at Law.

MATTER APPEALED

Complainant appeals the March 2, 2001 disciplinary termination of her employment. The disciplinary action is rescinded for significant procedural violations by respondent, as discussed below.

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 available alternatives;

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

FINDINGS OF FACT

The Administrative Law Judge considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant Valerie Frens worked for respondent Department of Corrections (DOC) for more than eleven years as a Registered Nurse. Frens had no prior corrective or disciplinary actions.
2. On January 31, 2001, at approximately 5:30 a.m., inmate Donald Lewis went to the control room of the pre-release center within the Canon Minimum Center in Canon City and reported that he had chest pains and might be having a heart attack. Sgt. Albrecht telephoned Fremont Correctional Center (FCC) and was told by a nurse to transport the inmate to the medical clinic at the Arrowhead Correctional Center (ACC) and she would meet them there.
3. Officer Raymond transported Lewis to FCC in a DOC van. Shift Commander Deppe, having been apprised by Albrecht, followed in a separate vehicle.
4. Arriving in the ACC parking lot close to 5:40 a.m., Deppe observed a woman getting out of her vehicle about 100 feet from the clinic. He exited his vehicle, told her they were bringing in an inmate and asked if she was the nurse from FCC. Valerie Frens, who was reporting for her 6:00 a.m. shift at ACC, answered no.

5. Raymond and Deppe helped Lewis to the clinic door, which was being held open by Officer Whaley. Lewis was able to walk with assistance, but he was in obvious pain. Raymond and Deppe helped him onto a gurney, where he lay in pain.
6. Frens proceeded to the gatehouse and signed in, then went to the control center to retrieve the infirmary keys. She signed for the keys at 5:40 a.m. The keys consisted of several infirmary keys, including the one that allows access to narcotics. Officer Whaley telephoned the control center from the clinic and told Officer Bradford to have the nurse hurry. Bradford conveyed to Frens that there was an inmate in the infirmary with chest pains. She picked up her kites, which are requests from inmates for clinical care, and walked away. As She was making her way to the clinic, Whaley yelled out the clinic door for her to hurry.
7. When Nurse Dawn Burnett arrived at ACC from FCC about ten minutes after the patient had arrived, she went to the entrance gait and was told that ACC's facility nurse was already there. As she turned, she saw Frens and asked if she was going to take the patient or did she want Burnett to do so. Frens suggested that Burnett take the patient because she, Frens, had a lot of work to do and had to get the insulin ready. Burnett said, "Okay."
8. Frens began the workday by turning on her radio and making arrangements for the morning distribution of insulin.
9. Burnett rushed to the patient and immediately began assessing him. He was in great pain and was asking God to help him.

10. Burnett reviewed the inmate's medical chart, asked about his medical history, took his vital signs, and administered an EKG. She asked Raymond to give Lewis an aspirin from the bag of emergency medical equipment that she had brought with her. She telephoned a doctor who said to give Lewis nitroglycerin, which she did.
11. Frens came by and showed Burnett where the urinal was so Lewis could use it. She took the oxygen tubing from the cupboard and hooked Lewis up to oxygen. She provided Burnett with a roster of on-call doctors from which Burnett selected the one she called.
12. At approximately 6:10 a.m., Burnett called for an ambulance. The ambulance arrived near 6:25 and transported inmate Lewis to the hospital, where he died shortly after arrival.
13. Robert C. Flores, Clinical Team Leader and Administrative Supervisor for the Canon Minimum Center, heard of the Lewis incident at 8:00 a.m. on the same day, January 31, during the morning briefing. In the afternoon of January 31, Flores called a meeting with Frens and two other nurses to discuss workload issues, Frens expressing the view that they needed more help and Flores saying that he could not do anything about it. Each expressed anger toward the other.
14. On February 2, 2001, Dennis Kleinsasser, Director of Correctional Programs, delegated to Flores the appointing authority to handle this matter with respect to possible discipline. Flores was directed to, "work closely with Carolyn Schilling, our Director of Nursing." (Exh. 7.)
15. Frens went on sick leave on February 2, 2001. Her medical problem had to do with a nerve in her face. Her leave qualified for leave under

the Family and Medical Leave Act. She was scheduled to have surgery on February 27.

16. By certified letter dated February 9, 2001, Flores notified Frens of a predisciplinary meeting to be held on February 15 at 10:30 a.m., “to determine if disciplinary action is appropriate” regarding “your performance during an emergency situation at ACC on 1/31/01,....” (Exh. 8.)
17. Frens received the certified letter by picking it up at the post office between 1:00 and 2:00 p.m. on February 15, several hours past the scheduled time of the meeting. She then telephoned Paul Barela, Lead Business Agent for the American Federation of State, County and Municipal Employees (AFSCME), and asked him what she should do, since she was on extended sick leave and missed the R-6-10 meeting before she even knew about it. He said he would act in the capacity of her union representative and call Flores to reschedule the meeting.
18. Barela telephoned Flores shortly after talking to Frens the afternoon of February 15 and requested that the R-6-10 meeting be held after Frens returned from sick leave. Flores was cool to the idea but said that he would call Barela back, which he never did.
19. By certified letter dated February 16, 2001, and received by Frens on February 17, Flores acknowledged talking to Frens’ union representative and stated that waiting until she returned from sick leave to hold the predisciplinary meeting was “unacceptable,” without explanation. He gave Frens ten days from her receipt of the letter to provide him with information she wished to have him consider.

20. In his February 16 letter, Flores outlined the issues which indicated a possible need for disciplinary action in a conclusory manner, as follows: a) "On 1-31-01, you failed to immediately report to your post to address the emergency Medical needs of an inmate with chest pain." b) "Your lack of performance passion and concern for the care of this patient and blatant refusal to meet his health care needs demonstrates a failure to meet generally accepted standards of nursing practice." c) "The flagrant disregard of the patient's well being and substandard nursing care resulted in the fatal outcome for this patient." (Exh. 9.)
21. Having received a copy of the February 16 letter from Frens on February 20, Barela telephoned Gerry Gasko, Deputy Director of the Department of Corrections, on February 27. He apprised Gasko of the situation, indicating that he objected to the meeting and wanted to wait until after Frens returned from sick leave. On February 28, Barela telephoned Flores again asking to postpone the R-6-10 meeting until after Frens returned to work, this time advising him that Gerry Gasko agreed that the meeting should be postponed. Barela wished to arrange a day to have in-person contact between Flores and Frens because of the value of interpersonal communication where each person has an opportunity to ask questions of the other based upon information that is being provided.
22. Flores adamantly refused to postpone the meeting and insisted that Frens respond to his February 16 letter within ten days of receipt. He did not give reasons for such urgency. The tenth day was the day Frens had surgery.
23. Frens did not respond in writing to the February 16 letter because Paul Barela was acting as her representative and had indicated to her that the R-6-10 meeting would be postponed. She wanted to postpone the

meeting because she was on authorized sick leave, was taking narcotics pending surgery, and had difficulty dealing with her numbness and pain.

24. Describing himself as “not a medical person,” Flores consulted with Carolyn Schilling and other medical personnel in making his decision to terminate Frens’ employment. He relied on Schilling’s recommendation to terminate.
25. Carolyn Schilling, Director of Nursing Services, recommended to Flores that he dismiss Frens based primarily on Frens’ uncaring attitude and neglect of a patient in an emergency situation. In forming her opinion, Schilling did not talk to Frens. She was under the false impression that Frens did nothing whatsoever to assist in the emergency situation of January 31, 2001.
26. No one interviewed Frens about the January 31 occurrence. A Rule R-6-10 meeting was never held.
27. There is no evidence to suggest that Frens caused the death of inmate Lewis, and no such allegation has been made.
28. By letter dated March 1, 2001, the appointing authority, Robert Flores, terminated the employment of complainant, Valerie Frens, effective at the close of business on March 2, 2001 on the following factual basis: “According to the information provided to me, you failed to immediately report to your post on the morning of January 31, 2001 to address the emergency medical needs of an inmate with chest pains. You were aware of the crisis and were asked by the shift commander and later by another nurse to assist the inmate. You refused to assist the inmate. The inmate died approximately 20 minutes later.” (Exh. 10.)

29. The factual basis for the termination, as expressed in the termination letter, is both misleading and inaccurate. There is some question of the extent of Frens' awareness. She did not refuse an order of the shift commander. She was never asked by another nurse to assist. She did not refuse to assist the inmate. At no time did she indicate a refusal. She did not cause the inmate's death.
30. In the March 1 termination letter, Flores wrote that Paul Barela had stated in their February 28 telephone conversation that neither he nor Frens intended to provide Flores "with any information regarding this matter." This statement, which Barela credibly denies making, goes against the weight of the evidence and is illogical. The purpose of Barela's telephone call was to urge the appointing authority to postpone the R-6-10 meeting, not to cancel it. Barela desired in-person communication between the complainant and the appointing authority. Frens having just had surgery, and due to her overall medical condition, Barela believed that it was not reasonable to expect Frens to be available for a meeting during the time frame established by Flores. Barela did not say that neither he nor Frens intended to provide information, though the appointing authority may have placed his own bent on Barela's words.
31. Frens did not waive her right to a predisciplinary meeting, either directly or implicitly.
32. Complainant Valerie Frens filed a timely appeal of the disciplinary action on March 8, 2001.

DISCUSSION

I.

Respondent's significant violations of the State Personnel Board Rules are fatal to its case.

Board Rule R-6-10, 4 CCR 801, provides in pertinent part:

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.

A. When reasonable attempts to hold the meeting fail, the appointing authority must send a written notice, to the last known address of the employee, advising the employee of the possibility of discipline and stating the alleged reasons. The employee has 10 days from receipt of the notice to respond in writing.

Pursuant to R-6-10, complainant was wrongfully denied her procedural right to a predisciplinary meeting. When the procedures for the dismissal of a civil service employee are not strictly followed, the dismissal is invalid, and the employee must be reinstated. *Shumate v. State Personnel Bd.*, 528 P.2d 404 (Colo. App.1974). See *McCoy v. Department of Social Services*, 796 P.2d 77 (Colo. App. 1990) (employee's failure to receive a predisciplinary meeting violated employee's procedural rights). The appointing authority propounded no reason for not postponing the meeting until after complainant returned from sick leave. There was no urgency whatsoever. He had been in contact with her representative and knew that she was unable to attend within his arbitrary,

specified time frame. Through her representative, complainant communicated her desire to participate in a predisciplinary meeting.

II.

In order to proceed to written notice under R-6-10(A), "reasonable attempts" must be made to hold the R-6-10 meeting. The word "attempts" is plural. In this case, there were no reasonable attempts. The only attempt consisted of a letter to complainant that was not received until after the time that was set for the meeting. The appointing authority knew this by way of his telephone conversation with complainant's representative. He knew that she was out on sick leave and intended to return to work following surgery. Yet, the next day, rather than make another attempt to set up a meeting, he proceeded to the written notice provision of the rule. Continuing to be unreasonable, he refused to budge from his stance that the written information must be received by him within ten days, despite the reasonable explanation and request of complainant's representative. Again, he did not advance a reason for his insistence. The conclusive nature of the February 16 notice letter strongly suggests that the appointing authority had already made up his mind, in itself violative of R-6-10. At this point, complainant was still entitled to an in-person meeting.

In not holding a predisciplinary meeting, the appointing authority failed to take into consideration any mitigating factors, in violation of Rule R-6-6, which provides that, "Information presented by the employee must be considered." This complainant was not given a fair opportunity to present her account of events; no one ever talked to her. Some of the information that was relied upon by the appointing authority was untrue, particularly information that complainant did absolutely nothing to help the inmate. Additionally, the appointing authority did not consider complainant's eleven years of continuous employment with the agency, the fact that she had no prior disciplinary or corrective actions, the fact

that she arrived for work 20 minutes early on the subject day, or any other potentially mitigating factor.

Termination under these circumstances also violated Rule R-6-2, which requires corrective action before the imposition of disciplinary action, despite the appointing authority's erroneous characterization of complainant's conduct as "so flagrant or serious" as to warrant immediate disciplinary action.

III.

These procedural violations by respondent constitute agency behavior that is arbitrary, capricious or contrary to rule or law and cannot be sustained. Respondent's actions were taken in bad faith and were groundless.

An agency's failure to follow procedural rules constitutes bad faith and justifies an award of attorney fees and costs. See *Mayberry v. University of Colorado Health Sciences Center*, 737 P. 2d 427 (Colo. App. 1987). When the agency has no grounds for the particular disciplinary action taken, an award of attorney fees is mandated. *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), *cert. denied*. See *Hartley v. Department of Corrections*, 937 P.2d 913 (Colo. App. 1997). "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose...was instituted frivolously, *in bad faith*, maliciously or as a means of harassment *or was otherwise groundless*,... the department, agency, board, or commission taking such personnel action *shall* be liable for any attorney fees and other costs incurred by the employee...." Section 24 50-125.5, C.R.S. (emphasis supplied).

CONCLUSIONS OF LAW

1. Respondent's action in terminating complainant's employment 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.
3. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is reversed. Complainant shall be reinstated to her former position with full back pay and service benefits. Respondent shall pay to complainant the amount of her attorney fees and costs reasonably incurred in pursuing her appeal.

DATED this ____ day
of December, 2001, at
Denver, Colorado.

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 (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 1/2 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 SERVICE

This is to certify that on the ____ day of December, 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:

John R. Palermo
Attorney at Law
3333 Quebec Street, #7500
Denver, CO 80207

And by courier pick-up to:

Joseph Haughain
Assistant Attorney General
Consumer Protection Section
1525 Sherman Street, 5th Floor
Denver, CO 80203