

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

ELIZABETH HAINES,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,  
FREMONT CORRECTIONAL FACILITY,

Respondent.

---

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on November 26, 2002. Melissa Mequi, Assistant Attorney General, represented respondent. Complainant appeared in-person and represented herself.

**MATTER APPEALED**

Complainant appeals a disciplinary demotion. 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 available alternatives;
3. Whether respondent is entitled to an award of attorney fees and costs.

## **FINDINGS OF FACT**

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

1. Complainant, Elizabeth Haines, was employed as a Correctional Security/Services Officer (CSSO) II, rank of Sergeant, at the Fremont Correctional Facility (FCF), when she was demoted to a CSSO I on December 10, 2001. At that time, she had been employed by the Department of Corrections for thirteen years.
  
2. On the morning of Sunday, November 11, 2001, Lt. Gary Clayton, complainant's supervisor, walked from the Lieutenant's office to the operations office, a distance of approximately 20 feet. In the process, he passed within five feet of complainant, who was instructing a male inmate to empty his pockets. Returning via the same route, Clayton observed that the inmate was completely naked and complainant was going through the strip-search procedure in the corridor between offices. He proceeded to the Lieutenant's office, and when the inmate was dressed and gone, he told complainant that she should not have done that. Complainant responded that she had done it before, and Clayton replied, "Don't do it again."
  
3. The inmate had a slight build, approximately 140 pounds and 5'10" tall. He was not known as a problem inmate.
  
4. Clayton was available to conduct the strip search of the male inmate, upon complainant's request, as was a male correctional officer who was working in the control center. Both were accessible by radio. Complainant, who was in possession of a radio, did not attempt to contact either one.

5. An emergency did not exist that might have justified the strip-search of a male inmate by a female officer.
6. A strip-search consists of an inmate removing all clothing to permit a visual inspection of all body cavities (mouth, nose, ears, anus), genitals, breasts, buttocks, and the bottoms of feet.
7. DOC Administrative Regulation (AR) 300-06, "Searches and Contraband Control," provides that strip-searches are to be conducted in a private location and by a staff member of the same sex as the inmate being searched.
8. Warden Gary Neet, the appointing authority, received a copy of Clayton's written report of the strip-search incident. He instructed an FCF intelligence officer to conduct a taped interview of the inmate. The inmate stated in the interview that he was going to file a grievance over the incident, which he subsequently did.
9. Because of a possible violation of DOC regulations, Neet called a predisciplinary meeting for November 30, 2001. At the meeting, complainant tried to justify her actions by stating that the facility was in lockdown status due to an assault in the prison yard on November 9, there had been a fight between two inmates on November 10, and the inmate she searched looked "suspect and sneaky." Complainant conceded that she used poor judgment and eventually said she was sorry.
10. The facility lockdown had been lifted by the time complainant strip-searched the inmate. The inmates who were involved in the assault had been removed from population and placed in segregation.

11. A lockdown would not have been justification for a strip-search.
12. Neet concluded that there was no legitimate reason for complainant to strip-search a male inmate and that she abused her authority in doing so. He determined that she violated AR 300-06 when she strip-searched a male inmate, the search was not conducted in a private location as required by the regulation, and the inmate was humiliated to the point of filing an inmate grievance.
13. Neet also determined that complainant violated the Staff Code of Conduct, AR 1450-1(N), which provides: "Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion."
14. Neet reviewed complainant's personnel file and found six corrective actions between 1993 and 2000 involving computer security violations, abuse of leave, harassment, creating a hostile work environment, and failure to attend assigned training.
15. Neet took into account complainant's corrective actions as well as the flagrant nature of her misconduct in subjecting a male inmate to a strip-search when determining the appropriate sanction. He decided that complainant was not suited to be a correctional sergeant because sergeants are lead workers over correctional officers and serve as role models, they must display a high level of professionalism, and they are charged with exercising good judgment and sound discretion. In

deciding against dismissal, he considered complainant's thirteen years of service and the fact that she said she was sorry.

16. By letter dated December 10, 2001, the appointing authority imposed upon complainant Elizabeth Haines a demotion from CSSO II, monthly pay rate of \$4,117, to CSSO I, monthly pay rate of \$3,733, effective January 1, 2002.

### **DISCUSSION**

Complainant contends that, while she admits to conducting a strip-search of a male inmate, disciplinary action was not warranted. She argues that the sanction of demotion was arbitrary or capricious because no time limit was established.

Substantial evidence supports the findings and conclusions of the appointing authority. Respondent's action was not arbitrary, capricious or contrary to rule or law. Conclusively, respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. *See Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

An appointing authority has the power to hire employees and evaluate job performance and to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. Permanent disciplinary demotion is one of the options available. R-6-9. In the present matter, the appointing authority reasonably considered the evidence that he had before him and appropriately determined that a demotion from CSSO II to CSSO I was warranted. He reasonably explained his action and did not abuse his discretion.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a

means of harassment or was otherwise groundless.” See C.R.S. §13-17-102(6). See *also* R-8-38, 4 CCR 801. This record does not support any of those findings. Accordingly, this is not a proper case for a fee award.

### **CONCLUSIONS OF LAW**

1. Respondent’s disciplinary action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of available alternatives.
3. Respondent is not 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, 2002, 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, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Elizabeth Haines  
876 South Bellflower Drive  
Pueblo West, CO 81007

And through interagency mail, to:

Melissa Mequi  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203

---