

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL SCOTT CORTESE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on October 28, 2002. Joseph Q. Lynch, Assistant Attorney General, represented respondent. Complainant appeared in-person, representing himself.

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 available alternatives.

PRELIMINARY MATTERS

An order was entered upon the following stipulation of the parties:

- "1. The parties will restrict the use of DOC AR 300-46RD (Exhibit 3) to this case only.

2. Complainant is required to return all copies of Exhibit 3 to respondent upon conclusion of the case.
3. Complainant is prohibited from sharing Exhibit 3 with any other person.”

Respondent withdrew its request for attorney’s fees.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the 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 Michael Scott Cortese was employed as a Correctional Officer I (CO I) from November 1, 1999 until his dismissal, which was effective July 31, 2002.
2. Complainant was assigned to the Arrowhead Correctional Facility (ACF) of the Canon Minimum Centers (CMC) in the recreation department, where he supervised inmates in the outside yard and in the gym.
3. On March 25, 2002, complainant was arrested by the Pueblo County Sheriff’s Department for violation of a restraining order. The victim was his wife, Lori Ann Cortese.
4. On March 27, complainant notified Donice Neal in writing that he had violated the restraining order against him by calling his wife on the telephone and had been arrested.
5. Donice Neal is the warden of CMC and complainant’s appointing authority. She was informed of complainant’s arrest by a DOC investigator before being so informed by complainant. In such

instances, Neal prefers to wait for the conclusion of the court case before taking action in her capacity as appointing authority.

6. On May 22, 2002, DOC Inspector General Michael Rulo notified complainant in writing that, pursuant to federal law, he was prohibited from possessing or using a firearm during his hours of employment with the Department of Corrections because he had been charged with, convicted of, or received a deferred sentence or probation on a domestic violence related offense. Complainant was further advised that his "firearms disability" status might change if he produced documentation showing that the charges had been dropped or a deferred judgment (not deferred sentence) had been entered. Complainant did not come forth with such documentation.
7. Pursuant to the Federal Gun Control Act of 1998, it is a crime for law enforcement agencies to provide firearms to employees who have been charged with or convicted of domestic violence. It is also a crime for affected employees to train with, or use in the performance of their duties, any firearm.
8. DOC correctional officers are required to be able to carry a firearm.
9. On May 23, 2002, complainant was again arrested by the Pueblo County Sheriff's Department for violation of a restraining order. The victim again was Lori Ann Cortese.
10. On May 29, complainant notified Warden Neal in writing that he had been arrested for violating the restraining order.
11. Neal received information from DOC investigator William Claspell that the Pueblo County Sheriff's Department had issued a warrant for

complainant's arrest on June 21, 2002 for another violation of the restraining order. She confirmed this information with the sheriff's department and received a copy of the incident report. She also was informed of a recent but undated harassment-type incident between complainant and another motorist.

12. The June 21, 2002 sheriff's incident report indicated that complainant had been in his wife's garage with the door shut and his vehicle running and was threatening suicide. It appears, however, that complainant was at his own residence, and the violation of the restraining order occurred via telephone. Because complainant was threatening suicide, his wife telephoned his father, who called 911. Two sheriff's deputies went to the residence, forcibly obtained entry and found complainant inside his vehicle with the motor running. He was incoherent. Rescue personnel arrived, treated him, and transported him to the hospital.
13. Neal also received information from the sheriff's department stating that Lori Cortese had sought and received the restraining order, which was permanent, because complainant had threatened violence against her and her family. Complainant had also threatened violence in the presence of deputies.
14. Neal conducted a predisciplinary meeting with complainant on July 23, 2002 to address information that he may have violated the Staff Code of Conduct.
15. At the R-6-10 meeting, complainant described the traffic incident, in which the other motorist "flipped him off," he followed the other driver until he stopped, and both drivers got out of their cars. Complainant

“smacked” the other motorist because he started to reach into his pocket. The motorist did not press charges.

16. Complainant also told Neal of being charged with disorderly conduct and receiving a six-month deferred sentence for an incident with his ex-wife’s brother-in-law.
17. Neal and complainant also discussed each of the three restraining order violations, complainant stating that the June 21 violation occurred over the telephone, not at his wife’s residence.
18. Neal considered the series of arrests and the other conduct of complainant to be in conflict with DOC standards. Additionally, the firearms disability meant that complainant did not fulfill a requirement of his position. She felt that he had demonstrated a propensity for violence as well as a lack of self-control, both dangerous in a prison environment.
19. Complainant had received no prior corrective or disciplinary actions.
20. Neal concluded that complainant’s pattern of behavior rose to the level of “conduct unbecoming,” defined as: “any act or conduct either on or off duty, which impacts job performance, not specifically mentioned in Administrative Regulations which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff.” Specifically, she concluded that complainant violated the following sections of the Staff Code of Conduct, AR 1450-1:

M. Staff shall avoid situations which give rise to direct, indirect, or perceived conflicts of interest.

N. 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.

T. Staff will not engage in acts of corruption, bribery, indecent or disorderly conduct, nor will staff condone such acts by other staff.

ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

21. On July 26, 2002, the appointing authority relieved complainant of his duties. She terminated his employment effective July 31, 2002 for willful misconduct.

22. Complainant, Michael Scott Cortese, filed a timely appeal of the disciplinary action on August 5, 2002.

DISCUSSION

An appointing authority possesses the discretion to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that she had before her and properly determined that disciplinary termination was justified. She did not abuse her discretion. See Rules R-6-2, R-6-6, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801 (regarding disciplinary actions).

Substantial evidence supports the findings and conclusions of the appointing authority. Respondent's action was not arbitrary, capricious or contrary to rule or law. The discipline imposed falls within the range of alternatives available to the appointing authority. 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).

Rule R-6-2, 4 CCR 801, which incorporates the concept of progressive discipline, provides that an appointing authority may properly impose disciplinary action, up to and including immediate termination, if it is determined that an employee's conduct was "so flagrant or serious" as to justify the action taken. Though not binding precedent, the reasoning of the court of appeals with respect to the definition of "flagrant or serious" in *Gonzales v. Dep't of Corrections*, Case No. 00CA1975 (Colo. App. 2001) (NSOP), is hereby adopted and applied to the issue in this case. In *Gonzales*, the court said at 5:

To determine whether conduct was serious or flagrant we look to the ordinary meaning of those words. "Serious" means important or significant. See Webster's Third New International Dictionary 2073 (1986). "Flagrant" is defined as an act that purposefully violates normal standards or good sense. See Webster's, supra at 862.

Here, the record establishes that, through a series of acts, complainant intentionally engaged in conduct that was violative of the DOC Staff Code of Conduct. He violated normal standards as well as the dictates of good sense. This contravention of protocol supports a conclusion that complainant's "willful misconduct" was serious and flagrant and justified termination of employment.

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.

ORDER

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

DATED this ____ day
of November, 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 November, 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:

Michael S. Cortese, Jr.
P.O. Box 9161
Pueblo, CO 81008

And through interagency mail to:

Joseph Q. Lynch
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
