

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2003B082**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GILIN S. JONES,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, RIFLE CORRECTIONAL CENTER,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on August 2 and 3, 2004 at the State Personnel Board. Assistant Attorney General John A. Lizza represented Respondent. Respondent's advisory witness was Warden Bobby Johnson, the appointing authority. Complainant appeared and was represented by Vonda G. Hall.

MATTER APPEALED

Complainant, Gilin S. Jones, ("Complainant" or "Jones") appeals his termination by Respondent, Department of Correction, Rifle Correctional Center ("Respondent," "DOC," or "Rifle"). Complainant seeks reinstatement, back pay, benefits and attorney fees. Respondent has requested affirmance of the appointing authority's action and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed.**

PROCEDURAL HISTORY

The hearing in this matter was originally held on July 29 and 30, 2003 before Administrative Law Judge Stacy L. Worthington. After the lunch break on the second day, counsel for the Complainant made an oral motion to recuse ALJ Worthington from hearing this matter. On September 29, 2003, ALJ Worthington recused herself from hearing this matter on two grounds.

The first ground for recusal was based upon Complainant's sworn statement that he believed he would not receive a fair hearing based upon the ALJ's prior professional relationship with Respondent's counsel and his perception that the ALJ was not behaving appropriately during the course of the hearing. The second ground was an *ex parte* communication in which Complainant's counsel approached the Board's legal assistant, who was under ALJ Worthington's supervision, to discuss the substance and merits of a matter that was about to be submitted to ALJ Worthington.

ALJ Worthington found that Complainant's counsel did so specifically for the purpose of getting advice on how best to present the issue. ALJ Worthington found that the allegations for the first ground were "slim" but, in combination with the second ground, demonstrated an appearance of a lack of neutrality and impartiality, thereby warranting recusal by the ALJ.

The matter was reassigned to the undersigned ALJ and set for hearing on October 21 and 22, 2003. Due to the illness of both counsel and the unavailability of witnesses, the matter was vacated and re-set three additional times over the ensuing ten months. The hearing was held on August 2 and 3, 2004.

During the intervening time between the hearing held before ALJ Worthington and the hearing held before ALJ Rozansky, one of the witnesses, David Schumacher, an investigator for DOC's Inspector General Office, died. Therefore, a transcript of his testimony was prepared after the August 2004 hearing and submitted to the Board. The parties were then given an opportunity to request a ruling by ALJ Rozansky on objections raised by counsel during Schumacher's testimony at the hearing before ALJ Worthington. Complainant filed such a request on October 7, 2004. Respondent did not file a response to the Complainant's request nor did it file a request for a ruling on any objections. The record in this matter was closed on January 5, 2005.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was a certified employee who had worked for DOC for over twelve years at the time of his termination.
2. Rifle Correctional Center ("Rifle"), where Complainant worked at the time of his termination, is a minimum security center that offers inmates programs in overcoming alcohol abuse; GED and adult education programs; and vocational programs in heavy equipment handling, fire fighting, and, prior to Complainant's termination, landscaping. The purpose of the vocational programs is to help the inmates find jobs when they leave a DOC facility.
3. Complainant was employed at Rifle as a vocational landscape instructor. He was in charge

of Rifle's vocational landscaping program and oversaw the Rifle greenhouse operations.

4. Warden Bobby Johnson was Complainant's delegated appointing authority. Captain Rick Pierce was Complainant's direct supervisor until June 2002. After that, Joe Replogle was Complainant's direct supervisor. Major Warren Leonard supervised both Pierce and Replogle and reported to Warden Johnson.
5. Complainant did not have any corrective or disciplinary actions prior to the disciplinary action terminating him.
6. Complainant's performance ratings administered prior to February of 2003 and while the Complainant was employed at the Rifle Correctional Center have been satisfactory or higher.
7. Community Corrections is a private contractor to DOC that provides a transitional program for qualifying inmates who are leaving a facility and transitioning to being released into the community. While in the program, inmates are employed.
8. Community Corrections is not a private correctional facility provider. Therefore, inmates in the program remain in the legal custody of DOC (overseen by DOC's Adult Parole and Community Corrections Division), but their physical custody is with Community Corrections at one of the organization's halfway houses.
9. All DOC employees receive training on DOC's administrative regulations.

The Rifle Greenhouse Program

10. When Complainant was hired at Rifle in October 1997, he was assigned the task of developing a commercial greenhouse program (the "Greenhouse Program") which would be overseen by Complainant and staffed by inmates.
11. The Greenhouse Program had a dual purpose - educational and commercial. Under the educational aspect of the program, it provided inmates with hands on experience in greenhouse management. Under the commercial aspect, it produced products that were then sold to local customers, including DOC employees.
12. Correctional Industries ("CI") is a statutorily created and self-supporting division of DOC whose purpose is to generate a profit through inmate labor and train inmates in various work skills in order to increase their employment prospects when they are released from DOC. § 17-24-101, et seq., C.R.S.
13. The Rifle Greenhouse Program was originally overseen by CI. However, because of the costs, CI dropped the program and it became part of Rifle's administrative budget.
14. The Greenhouse Program made fiscal reports to CI. It also submitted all money it received

to CI. CI retained ten percent of the Greenhouse Program's proceeds and returned the remainder to Rifle. The remainder of the proceeds did not cover the costs of the Greenhouse Program, including heating, supplies and Complainant's salary. Those costs were covered by Rifle's administrative budget.

15. Prior to working at Rifle, Complainant worked for five years at Arrowhead Correctional Facility in its greenhouse program. The Arrowhead greenhouse program accepts only checks, no cash, for purchases of its products.
16. Payments for the Greenhouse Program's products were made by either cash or check. Cash is considered contraband in a correctional facility setting, therefore, Complainant did not allow any of the inmates working in the Greenhouse Program to handle the cash or check payments.
17. The Greenhouse Program had delivery record forms from CI to track purchases of items grown in the greenhouse. Each of the forms were multi-copy and had tracking numbers that were sequential, noting the fiscal year and the CI organization unit where the transaction was taking place. The tracking numbers allowed for the internal tracking of financial transactions.
18. Because the delivery record forms were expensive, Complainant would often reuse the forms, voiding one transaction, scratching out the tracking number and writing in a new number.
19. At no time was Complainant ever informed by anyone from CI or Rifle that there was any problem with his record keeping or financial reporting systems.

Rifle Vocational Landscaping Program

20. In October 2001, Leonard told Pierce that he and Warden Johnson wanted more of a hands on approach to Rifle's landscaping program and to model the program after the heavy equipment program at the Buena Vista Correctional Facility.
21. As a result of Leonard's October 2001 directive, in January 2002, Complainant and Pierce did a presentation on Rifle's improved vocational landscaping program to Warden Johnson and Leonard (the "Landscaping Program").
22. Under the Landscaping Program, inmates would be put through a college level training course while at Rifle. After completing the course, and while still at Rifle, the inmates would take a test administered by the Associated Landscape Contractors of Colorado ("ALCC"). If an inmate passed the test then the inmate would be a Certified Landscape Technicians ("CLT"), a designation that is recognized nationwide and would make them more employable in the landscaping market.
23. There are testing fees of approximately \$250 associated with the CLT test.

24. If a CLT applicant failed the test, he would not receive a refund of the testing fee.
25. Neither Complainant nor Pierce mentioned the CLT testing fees to Warden Johnson and Leonard during the January 2002 presentation. However, a pamphlet that was part of the presentation refers to study materials being provided upon the receipt of “the application and fees.”
26. During the January 2002 presentation, Leonard made statements that inmates participating in the Landscaping Program would not make as much (\$8-\$15 per hour) as their counterparts in the heavy equipment program (\$18-\$20 per hour).
27. The Buena Vista Correctional Facility operates a vocational heavy equipment program (the “Buena Vista Program”) that trains inmates in the operation of heavy equipment for the construction industry. The inmates in the Buena Vista Program do not need to obtain any type of certification prior to obtaining a heavy equipment job.
28. Upon entering the Buena Vista Program inmates sign an agreement of participation, agreeing to certain standards of behavior. The agreement is not a loan agreement and the only reference to finances is a requirement that an inmate set aside, in a savings account, 10% of his gross earnings each pay period.
29. Inmates in the Buena Vista Program are not allowed to transition to a halfway house in the Community Corrections program until they have a job. However, once they have a job and have transitioned to a Community Corrections halfway house, they have start up costs for equipment. In order to meet those costs, the inmates may obtain a loan which is administered by the Colorado Contractors Association (“CCA”) and Community Corrections.
30. When Complainant investigated how the Buena Vista Program participants received funding for their equipment, he was told that CCA provided money to the Community Corrections halfway house, the inmate would sign a loan agreement and the halfway house would hold the payments out of the inmate’s paycheck. Once all of the payments had been collected, the halfway house would send the money directly to CCA.
31. When Leonard learned about the CLT testing fee, he told Pierce and Jones that DOC would not pay this fee for inmates taking the test.
32. In April 2002, Pierce asked ALCC if it would be willing to waive its testing fees for inmates but ALCC refused to do so.
33. When Pierce told Leonard that ALCC had refused to waive the CLT testing fee, he asked Leonard if proceeds from the Greenhouse Program could be used to pay for the testing fees. Leonard denied this request on the grounds that the proceeds were used to defray costs of the greenhouse and landscaping operations.

34. When ALCC refused to waive its testing fees, Pierce asked DOC's Vocational Education group if they would provide the money for the certification fees. When they said yes, he reported this information to Leonard who said he thought that might be a misappropriation of state funds and to ask Vocational Education to research whether it had ever paid certification fees for inmates before. Pierce never got a reply from Vocational Education on this issue.
35. Leonard also told Pierce that proceeds from the greenhouse operations could not be used to pay for the testing fees. He also told Pierce that if private funding could be found, such funding would be allowed.
36. In May 2002, Complainant and Pierce attended a meeting of the advisory board which oversaw the Buena Vista Program. On the way back to Rifle the two of them discussed the heavy equipment program, its loan program, that it was done through the halfway house and ways to fund the Landscaping Program.
37. Pierce and Complainant then solicited private donations to set up a fund to pay for the certification fees. They received \$1600 in donations from DOC employees, including Warden Johnson. Pierce and Complainant donated \$302.50 and \$552.50, respectively, to the fund.
38. Complainant prepared loan agreements that would loan the inmates in the Landscaping Program money from the fund of private donations (the "Loan Program"). Under the Loan Program, inmates, while at Rifle, were loaned money to cover the costs of the CLT test, after participating in the Landscaping Program. The test was taken while the inmates were still housed at Rifle.
39. The loan agreements state that the inmate agrees to pay back the loan amount by taking ten percent of his pay "when" he gets "to Community or Parole."
40. The loan agreements reflect that ALCC is the payee and that payments are to be sent to ALCC's office. They are signed by the inmates (above the notation "client signature") and Complainant (above the notation "Gil Jones").
41. An advisory board was set up for the Landscaping Program. The August 2002 minutes reflect a discussion about the impressive testing scores of inmates who had taken the CLT test that summer and setting up a scholarship fund for the CLT testing fees.

Investigation by IG's Office

42. In the Fall of 2002, Warden Johnson learned that Complainant had been making weekly calls to a Community Corrections program in Craig and asking whether an inmate in the program there was making payments on a loan.
43. Upon learning about Complainant's calls, Warden Johnson contacted DOC's Inspector General's ("IG") Office, the division of DOC statutorily charged with conducting internal DOC

investigations, and asked for an investigation. David Schumacher from the IG's office, was assigned to handle the investigation.

44. In conducting his investigation, Schumacher interviewed Complainant, Pierce, Tony Romero (the Director of DOC's Vocational Education group), a few other DOC employees and various inmates involved in the Greenhouse Program and the Landscaping Program.
45. Upon completing his investigation, Schumacher prepared a report (the "Investigative Report") which he gave to Warden Johnson.
46. Because there were possible criminal violations by Complainant (the greenhouse records are public records, therefore any deletion or alteration of them may be a crime), Schumacher also submitted a copy of the Investigative Report to the District Attorney for Rifle.
47. The District Attorney did not file any criminal charges against Complainant as a result of the Investigative Report.

Audit of the Rifle Greenhouse Program

48. Lenny Merriam, an internal auditor for DOC, was contacted by Schumacher in November 2002 and asked to assist with a review of the records and internal financial controls of the Greenhouse Program.
49. Merriam reviewed the records at Rifle and then issued an audit report (the "Audit Report").
50. In conducting his audit, Merriam utilized GAAP (generally accepted accounting principles) standards to analyse the various bookkeeping transactions and SAS (statements on audit standards) to guide the audit process.
51. The Audit Report made four findings as follows:
 - a) Finding One: Delivery records were altered, as many transactions were not accounted for and/or voided transactions were not recorded. Often a transaction was recorded on a form, voided and a separate transaction was recorded on the same form. Some transactions that were reported to CI were not recorded on a delivery form. Other transactions were not reported to CI but were recorded on a delivery form. Often the pre-printed delivery record tracking number was altered or concealed and a new number was assigned.
 - b) Finding Two: It was not clear whether, in all transactions, payment had been made. In other words, if payment was made, then often it was not properly tracked. The problem with a lack of proper tracking is that, given the correctional facility environment, there was the possibility of greenhouse products or cash payments becoming contraband within Rifle.
 - c) Finding Three: Promissory notes were established with an inmate to pay for

the CLT test fees. All cash for inmate purchases was to go through inmate banking.

- d) Finding Four: It was not clear if the Greenhouse Program was being operated by Rifle or Correctional Industries.

52. Because of the quality of recordkeeping, Merriam was unable to track any of the funds.
53. Overall, Merriam viewed the Greenhouse Program's record keeping as very problematic because, given that it was a state program, it was important that the record keeping have integrity so that there could be an accounting of all state funds.
54. In Merriam's view, the level of skill needed to complete the necessary delivery records is equivalent to that skill level necessary to record transactions in a checkbook.
55. In Merriam's assessment, the dollar amounts involved in the greenhouse transaction were not financially material. However, because of the correctional facility setting, he viewed the poor bookkeeping methods as operationally material because they resulted in an increased risk of contraband.
56. Merriam did not meet with Complainant before or after the audit. Complainant was on administrative leave while Merriam was conducting the audit.

R-6-10 Meeting and Disciplinary Action

57. Before the R-6-10 meeting, Warden Johnson read the Investigative Report, the Audit Report, Complainant's personnel record and the Board rules. He also discussed the case with Leonard and received advice from Phil Hernandez and Madeline SaBell, both members of DOC's Human Resources Office.
58. On January 29, 2003, Warden Johnson held an R-6-10 meeting with Complainant. Complainant was present with his representative, Ray Enright.
59. During the R-6-10 meeting, Warden Johnson, Complainant and Enright discussed the allegations concerning the loans to the inmates and Complainant's bookkeeping practices for the Greenhouse Program.
60. Complainant told Warden Johnson that Pierce had known about the loans to the inmates and had helped Complainant put the program together. Complainant informed Warden Johnson that he based the program, including the loans, on the Buena Vista Program and had made loans to seven inmates. Finally, Complainant explained that, with regards to his involvement in the loans, he was acting as an agent of ALCC, not as a DOC employee.
61. With regards to the bookkeeping allegations, Complainant explained to Warden Johnson that while he may have been guilty of "sloppy bookkeeping," he had never taken any money from the

Greenhouse Program.

62. After the R-6-10 meeting, Warden Johnson interviewed Pierce and Replogle (who had replaced Pierce in June 2003), and spoke again with Phil Hernandez and Madeline SaBell.
63. Pierce told Warden Johnson that he had participated in setting up the fund for the Landscaping Program but had not authorized or approved Complainant to make loans from the fund. Replogle said that he was not aware of the loans.
64. On February 3, 2003, Warden Johnson issued a written disciplinary action letter to Complainant, terminating Complainant for instituting loans to inmates and for failing to keep accurate financial records of the greenhouse's operations. Warden Johnson stated that Complainant's conduct violated the following statutes, Board rules and departmental administrative regulations ("DOC AR"):
 - a) § 18-8-114(a), C.R.S. (Abuse of Public Records): "The person knowingly makes a false entry in or falsely alters any public record."
 - b) § 18-8-404, C.R.S. (First degree Official Misconduct): "Violates any statute or lawfully adopted rule or regulation related to his office."
 - c) Board Rule R-6-9(1) and (2): Disciplinary action may be imposed when an employee fails to perform competently and/or has engaged in willful misconduct or a violation of Board or agency rules or laws that affect the employee's ability to perform his or her job.
 - d) DOC AR 200-2 (I) (Policy) (Offender Debt Collection): "It is the policy of [DOC] to prevent offender indebtedness."
 - e) DOC AR 200-3(B) (Fiscal Policy): "All DOC employees shall ensure that in their area of responsibility, the obligation of DOC's funds is made with proper authorization and the timely processing of commitment and expenditure documentation."
 - f) DOC AR 1450-1(D) (Staff Code of Conduct): "Staff may not knowingly maintain social, emotional, sexual, business or financial associations with current offenders...."
65. Warden Johnson decided to terminate Complainant because he viewed Complainant's violations as critically serious. He considered but rejected less drastic forms of discipline because he thought they did not apply to the gravity of this situation.
66. When terminating Complainant, Warden Johnson was aware that CI had never complained about Complainant's bookkeeping and that no money was paid directly to either Complainant or any inmates.
67. All seven of the inmates who had signed loan agreements were contacted and told the loans were forgiven.

68. Complainant timely appealed his termination with the State Personnel Board.
69. After Complainant's termination, in June 2003, Rifle began a heavy equipment program. Warden Johnson funded the contract teaching position for the program when a maintenance position was vacated and the funds for that vacant position were transferred to the heavy equipment program.
70. Complainant's former position was not filled immediately after Complainant's termination because of vacancy savings and then was abolished in the middle of 2003.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15 and §§ 24-50-101, et seq., C.R.S. In this *de novo* disciplinary proceeding, the agency has the burden 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 if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Complainant was disciplined for violating various statutes, Board rules and agency regulations on the grounds that he made loans to inmates and he kept poor records for Rifle's Greenhouse Program. Complainant committed the acts for which he was disciplined.

Complainant appears to have had good intentions with regards to both the Greenhouse Program and the Landscaping Program. He was focused on the rehabilitative aspects of working with inmates and appears to have been genuinely committed to such an approach and did not financially benefit from the loans. However, Complainant did set up a situation that violates the plain language of DOC's regulations.

After the January 2002 presentation to their supervisors, Complainant and Pierce discussed various scenarios for paying for the testing fees. All of those scenarios, with the exception of the loan program, were run by Leonard who turned down each of them for various reasons. Complainant was directed to model the Landscaping Program on the Buena Vista Program. However, it was clearly established that the Landscaping Program loans and the Buena Vista Program loans were materially different in three ways.

First, a DOC employee (Complainant) administered the Landscaping Program loans while

the Buena Vista Program loans did not involve any DOC employees in such a capacity. Second, the Buena Vista Program loans were between the halfway house (a private contractor), the industry association (a private entity) and the inmate. It is not clear, in the case at hand, that either the halfway house or the industry association were even aware of, let alone administering, the Landscaping Program loans. Third, under the Landscaping Program loans, the indebtedness occurred while the inmate was still incarcerated in a DOC facility. On the other hand, the Buena Vista Program loans created an indebtedness after the inmate had left a DOC facility and obtained a job. It is also noted that, if the Landscaping Program inmate failed the CLT test then, in order to retake the test, the inmate would need to acquire further debt.

Complainant alleges that he was not working on behalf of DOC but rather on the part of ALCC. It is telling, though, that there was no credible testimony or documentary evidence establishing that ALCC or the halfway house managed, set up or was even aware of the fund or the loans. In addition, while the loan agreements state that the money is being repaid to ALCC, Complainant's signature does not denote any type of relationship (such as director, agent, etc.) to ALCC. Finally, it was Complainant, not ALCC staff, who was following up on late payments.

Even if ALCC had been aware of those loans, DOC's regulation specifically states that a DOC employee may not have a business or financial association with a current offender. Therefore, it is a moot point as to whether Complainant was acting on behalf of ALCC or as a DOC employee. No matter what capacity in which he was acting, it was clearly established that Complainant had a business or financial association with an inmate. Complainant argued that his supervisors were aware of the loans but neither Pierce nor Leonard testified to being aware of the loans. Pierce testified that he was aware of the private fund. He even made a substantial donation to it. But he gave no testimony of being aware of or approving of the loans.

Complainant, in an effort to provide participating inmates with a valuable certification, ignored or did not pay attention to DOC's policy against offender indebtedness (AR 200-2) and its explicit prohibition against a business or financial association with current offenders. While Complainant's objective was not ill intentioned, the means by which he accomplished that objective violated DOC's administrative regulations.

Complainant was also disciplined for his poor record keeping of the Greenhouse Program's financial transactions, with citations to DOC's administrative regulations and state criminal statutes. By his own admission and based upon the Audit, Complainant engaged in "sloppy book keeping." However, it does not appear to have been willful behavior. Therefore, while Complainant violated the DOC administrative regulation concerning proper processing and documentation of DOC funds, there was no credible evidence that he knowingly altered or made a false entry. Without a showing of willful intent, Respondent has not established that Complainant violated the criminal statute cited by Warden Johnson. However, given the violation of the DOC administrative regulation, Complainant committed the act for which he was disciplined.

Finally, Complainant was disciplined overall for violating Board Rule R-6-9 by failing to perform competently and violating agency rules. Complainant's book keeping was a failure to

perform one of his job duties competently and his loans to inmates violated DOC regulations. Therefore, Complainant committed the acts for which he was disciplined under the Board rules.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant's arguments focused on all three of the prongs of the *Lawley* test, including arguing that Complainant set up a program as directed by his supervisors; given his intentions, he should not have been disciplined; and he was not given an opportunity to discuss with Merriam the book keeping errors. Respondent met its burden of establishing that it did not act arbitrarily and capriciously under any of the *Lawley* factors.

Upon learning of the allegations involving loans to inmates, Warden Johnson requested an investigation by the Inspector General's Office. Given that those allegations involved financial transactions, he also requested an audit of the book keeping for the Greenhouse Program. There was no evidence presented that Schumacher failed to interview any of the relevant or necessary witnesses involved in the loan allegations or that he failed to gather all of the relevant information. In connection with the record keeping issue, Complainant argued that Merriam did not meet with Complainant to discuss the results of his audit. However, there was no evidence presented that this violated any specific industry standards for conducting an audit. In addition, the evidence did establish that Complainant, during the R-6-10 meeting, was provided with the opportunity to discuss the Audit Report and provide additional information to Warden Johnson and that he confessed that he had engaged in "sloppy book keeping."

As set forth above, Respondent established that the Landscaping Program loans were materially different from the Buena Vista Program loans and that those material differences were violations of the DOC administrative regulation against employees having a business or financial association with inmates. While it was undisputed that Complainant had good intentions, the means by which he accomplished his objective violated the plain language of the relevant DOC administrative regulations. There was no evidence that Warden Johnson was provided evidence that he then failed to consider or that given the information before him it was unreasonable for him to discipline Complainant with regards to the loans.

With regards to the decision to discipline Complainant for his poor book keeping, Respondent established that Complainant was sloppy and that his disorganization created a situation

in which financial transactions involving state property and funds could not be properly tracked. Merriam's testimony established that the book keeping functions were akin to the simplicity of keeping a checkbook. While many individuals do not keep good records in their individual checkbooks, in this matter, the funds involved are public funds, involving the purchase of state goods. Therefore, it is important that proper records be kept. In light of the correctional facility setting, Complainant's poor records further exacerbate a problematic situation, in that the cash and/or goods could then become contraband.

There was no credible evidence presented that Complainant received any formal training in proper record management or that it resulted in a contraband situation. But common sense dictates that the handling of state funds and/or state property should be properly recorded and failure to do so would be a violation of generally accepted standards of conduct. § 24-50-116, C.R.S. Complainant was not as careful as he needed to be in his oversight responsibilities. Given the environment he was working in, it was not unreasonable for his appointing authority to expect a higher standard of performance and to discipline him for not meeting that standard.

Respondent established that Warden Johnson gathered the information necessary to make his decision, considered all of the evidence in front of him, including the information in both investigative reports and Complainant's statements, and reasonably determined that Complainant should be disciplined.

Complainant made allegations that he was disciplined only because Respondent wanted his position in order to implement a heavy equipment program at Rifle. However, the credible evidence did not support this contention. The heavy equipment program established at Rifle was staffed using a vacant maintenance position, not Complainant's position. While Leonard made statements that inmates working in the heavy equipment industry would make more money, it was Warden Johnson who made the decision to discipline Complainant. In addition, it was Warden Johnson's decision, not Leonard's, as to which vocational programs would be offered at Rifle.

Complainant's actions violated his agency's regulations and had a direct bearing on the quality of his job performance. The credible evidence established that Warden Johnson conducted a thorough investigation, reviewed the results of that investigation and the information from the R-6-10 meeting and reached a reasonable conclusion.

C. The discipline imposed was within the range of reasonable alternatives

Respondent established that Warden Johnson considered Complainant's past history and the individual circumstances of this matter. While the sloppy book keeping alone would not warrant termination, Complainant's clear violation of the plain language of a DOC administrative regulation does warrant such action. Respondent provided evidence, and Complainant did not refute it, that a business or financial association with an inmate is a serious violation of DOC regulations. In addition, it was troubling that Complainant refused to acknowledge his actions as violating DOC regulations. Rather, he was insistent in focusing only on his intentions. It is undisputed that those intentions were good and that Complainant did not financially gain from his actions. However,

those intentions do not negate the fact that Complainant did violate an agency regulation, a violation which involved his relationship with inmates and which his appointing authority took seriously. There was also no evidence presented that other DOC employees violating this regulation were treated differently. The credible evidence demonstrates that the Warden Johnson, in compliance with Board Rule R-6-6, 4 CCR 801, pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees to Respondent is not warranted. Complainant presented rational arguments and competent evidence to support his claims. In addition, there was no evidence which would lead to the conclusion that Complainant pursued his constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he 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.
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 16th day of February, 2005.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
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303-764-1472

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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or 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 the Board does not receive a written notice of appeal 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 1/4 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 February, 2005, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall, Esq.
3773 Cherry Creek Drive North, Suite 575
Denver, Colorado 80209

and in the interagency mail, to:

John A. Lizza
Assistant Attorney General
Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods