

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GREG BAILEY,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Kristin F. Rozansky commenced this matter on October 8, 2003 and held the evidentiary hearing on November 12, 2003 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General John A. Lizza represented Respondent. Respondent's advisory witness was Major Michael King, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Sergeant Greg Bailey ("Complainant" or "Bailey") appeals his one-day (ten hour) suspension without pay by Respondent, Department of Public Safety, Colorado State Patrol, ("Respondent" or "CSP"). Complainant seeks back pay and benefits.

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

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. Sergeant Greg Bailey (Complainant) is a certified employee employed by CSP as a trooper, stationed in the Northwest District of CSP with the Grand Junction troop.
2. Captain Wheeler is Complainant's direct supervisor and oversees the Grand Junction troop.
3. Major Michael King is the District Commander for the Northwest District of CSP. He oversees three troops within his district, including the Grand Junction troop, and is the appointing authority for eighty-seven employees. He is Wheeler's direct supervisor and his office is in the same building as the Grand Junction troop.
4. Lieutenant Colonel Wolfe oversees the region in which the Northwest District is located. He is King's direct supervisor.
5. Complainant has no prior disciplinary history after working for CSP for twenty-six years.

Wheeler's Supervision of Complainant's Troop

6. During Fall 2002, Complainant and Sergeant Blancset wrote memos to CSP's upper level management about their concerns with Wheeler's management style and what they perceived to be Wheeler's favorable treatment of some troopers over others.
7. It is a common perception amongst the Grand Junction troopers that Wheeler treats some troopers more favorably than others.
8. Wolfe held a meeting with Complainant, Blancset, Wheeler and King to discuss the allegations of favoritism and how the Grand Junction office was being managed.
9. After the meeting, Wolfe did not tell King to make any changes in the way the Grand Junction office or the Northwest District was being managed. However, one officer was instructed not to take his patrol car home after his shift and another trooper was moved from one position to another position within the troop.

Complainant's Missing Handgun

10. Approximately four years ago, Complainant's shotgun was stolen from his vehicle, which was locked and parked in front of his house. Complainant was not disciplined for the incident. However, King discussed with him at the time of the incident, in general terms, where the weapon should be left.

11. During June 2003 Complainant was on vacation for approximately three weeks. Prior to leaving on vacation, he hung his service weapon, in its holster, on a coat tree in his bedroom and hung his CSP uniform shirt over it. He had stored his service weapon in this manner throughout his twenty-six year tenure with the CSP.
12. On June 22, 2003, after returning from vacation, Complainant informed Wheeler that his service weapon, a magazine of ammunition and another small piece of CSP equipment were missing from Complainant's home. As of the date of the hearing, none of these items have been found. The cost of replacing the service weapon was approximately \$650.00.
13. Wheeler verbally notified King of the missing weapon, ammunition and equipment. King instructed Wheeler to conduct a fact-finding investigation.
14. On July 24, 2003, Wheeler provided King with a memo outlining what he had found during his fact-finding investigation ("Wheeler's Memo").
15. After reviewing Wheeler's Memo and the police report filed on the incident and speaking with Wheeler and Wolfe, King decided to hold an R-6-10 meeting.

Troopers' Weapon Storage Practices

16. Many troopers store their weapons in a closet in their homes. Some troopers will remove the magazine from their weapons before storing them in a closet. Others will store their weapons in a gun safe. At least one Grand Junction trooper stores his weapon on top of his dresser in his bedroom.
17. Blancset stores his weapon in a bag, which he then stores in his closet or in a locked container in the bed of his truck.
18. In 1987, King's house was robbed and all of his weapons, except his state patrol weapon, which was secured, were stolen.
19. Trooper Carey Cox, a twenty-seven year veteran of the CSP, had his state patrol weapon stolen when it was in his bedroom closet in his locked house in Thornton, Colorado. Cox was not disciplined for the loss of his weapon but had to file a claim with his insurance and sign the check over to CSP to help cover the cost of replacing the weapon.
20. Two troopers in Colorado Springs each had weapons stolen from their homes; one of them had two weapons stolen. Neither of them were disciplined for those thefts. At least one of them stored his weapon in a closet in his home.

R-6-10 Meeting and Disciplinary Action

21. The R-6-10 meeting was held on July 29, 2003. Only Complainant and King were present. The meeting was recorded and transcribed.
22. At the R-6-10 meeting, King told Complainant that he had reviewed Wheeler's Memo and the police reports. King asked Complainant if he had anything that he wished to present in mitigation.
23. Complainant explained that while he was on vacation his seventeen-year old son had some friends over. His son noticed one of them, a boy that his son did not know well, was on the second floor of the house. Complainant told King that when he called the boy's mother to inform her that he had given her son's name as a possible suspect, she told him that he had violated his probation after being at Complainant's house and had been picked up by the police.
24. When King asked Complainant what he could have done to prevent the incident, Complainant responded that he could have done nothing other than putting the gun in a safe and that since the incident he was continuing to hang his service weapon, in its holster, on the coat tree in his room. He also told King that he has a burglar alarm system in his home that he sometimes uses and that, on occasion, he will lock up his house.
25. King told Complainant that he viewed Complainant's actions as violating CSP Operations Manual Chapter 504.1 concerning securing of service weapons and that hanging his uniform over the service weapon was tantamount to placing an ad on it.
26. Complainant told King that he believed that he had complied with CSP regulations to secure his service weapon and that it was reasonable on his part to assume that the weapon hanging on a coat tree in his bedroom on the second floor of his home was secure.
27. Prior to issuing his decision to discipline Complainant, King spoke to Wheeler again, asking whether the weapon had been found. Wheeler said that no progress had been made, there were no additional suspects and the police had been unable to obtain any fingerprints.
28. King also spoke to Marshall Norman in CSP's Human Resources division before issuing his disciplinary decision. He asked Norman for examples of discipline given in other instances in which a CSP trooper had lost his weapon or had it stolen. CSP's database containing disciplinary information has, historically, been sporadically kept. Norman found one other instance, Dale King who had his weapon stolen from his car in Castle Rock. In that instance, Dale King received a corrective action and had to pay for the cost of replacing the weapon.
29. King, prior to issuing his disciplinary decision, also discussed the matter with Major Ron Adams in Pueblo (the most senior CSP major at the time in Colorado), Wolfe and John Lizza. Finally, King reviewed Complainant's personnel file and the investigative file.

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30. King determined that the mitigating factors were Complainant's longevity of service (twenty-six years) with CSP and his clean performance record. King viewed the following as aggravating factors: this was the second weapon which Complainant had lost or had stolen; unwillingness to take responsibility for his actions; the importance of a weapon to a CSP trooper's job performance; and Complainant's lack of willingness to change the manner in which he secures his weapon.
31. King viewed the circumstances surrounding the theft of Complainant's first weapon as different from this matter and, therefore, chose to impose discipline in this matter.
32. King decided on a one day suspension which resulted in a \$375 pay reduction to Complainant, rather than making him pay for the \$750 cost of the weapon, in part because King thought that Complainant, with a son in college, would not be able to afford \$750.
33. On August 4, 2003, King notified Complainant that he was imposing a one-day (ten hour) suspension without pay for violating CSP Operations Manual, General Orders 2 and 9, and CSP Operations, Chapter 504.1. King further directed Complainant to lock his weapon in a secure location whenever he was not on duty in order to prevent theft and to provide King written documentation outlining Complainant's proposed security arrangement for his service weapon in the future.
34. Complainant timely appealed the disciplinary action.

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; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

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 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 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).

II. HEARING ISSUES

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

The undisputed evidence established that Complainant, prior to leaving on his vacation, left his weapon and magazines of ammunition hanging on the coat tree in his second floor bedroom with his CSP shirt draped over them.

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

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing 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; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising 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. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

King delegated to Wheeler the task of investigating this matter. While Complainant made allegations that Wheeler engaged in favoritism, there was no evidence presented that, while investigating this matter, Wheeler did not use reasonable diligence and care to investigate the matter. Even if Wheeler had engaged in such behavior, the credible evidence presented showed that King acted independently and was not unduly or inappropriately influenced by Wheeler. King reviewed Wheeler's Memo, followed up with Wheeler on questions that he (King) had and met with Complainant (in the R-6-10 meeting) in an effort to hear Complainant's side of the story.

Both before and after meeting with Complainant, King reviewed Complainant's investigative file, researched the discipline that had been imposed in other cases and discussed the matter with other senior officers. The credible evidence established that King diligently gathered all of the evidence and fairly and honestly considered that evidence.

Complainant was disciplined for violating an agency rule, grounds for discipline under Board Rule R-6-9 (2). Complainant was alleged to have violated Chapter 504.1, Procedure II C of the CSP Operation Manual and General Order Numbers 2 and 9. Those department rules provide as follows:

1. Chapter 504.1, Procedure II C: “Weapons will be secured at all times in a manner that reasonably reduces the possibility of theft of incident.”
2. General Order # 2: “Members will obey lawful orders and directions. Orders may appear as . . . rules.”
3. General Order #9: “A lack of appropriate security for the weapon directly reflects the lack of appropriate care taken to insure the weapon was secure.”

The crux of disagreement between the parties is whether Complainant’s storage of his weapon was reasonable. Under CSP’s rules it is not mandated that a trooper’s weapon be locked up. Rather, the rules are written in such a manner as to take into account the environment in which the weapon is located.

There are factors that lead to the conclusion that Complainant did not store his weapon in a manner reasonable manner, given the environment. Complainant was not simply storing his weapon overnight, in an area where he would be present and in control. Complainant left his weapon behind while he was on vacation for almost three weeks. A majority of the troopers, who testified as to their storage of their weapons, testified that they stored them in a closet, in between shifts. Some troopers store their weapons in a gun safe. There was no evidence of anyone leaving their weapons out, in the open, unsecured while they went on vacation.

In addition, Complainant was aware that his son would be at home while Complainant was on vacation. It would be reasonable to assume under such circumstances that others would have access to Complainant’s home. This is not a case of someone having to break into a locked area, or search a closed closet. Complainant’s weapon was hanging up with only Complainant’s uniform covering it. Under these circumstances, it was reasonable for King to conclude that Complainant’s weapon was not properly secured and that Complainant had violated the cited rules.

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

The credible evidence establishes that King appropriately weighed the mitigating and aggravating factors in arriving at the one-day suspension disciplinary action and a directive for Complainant to provide King with a written explanation as to how he would secure his weapon in the future. Complainant’s suspension cost him a pay reduction of \$375. The cost of replacing the weapon was \$750, a difference of \$375. In addition, it was the second weapon that Complainant had lost or had stolen and Complainant was taking no steps to further secure his weapon after this incident. In mitigation of these factors are Complainant’s longevity of service to CSP and his clean performance record. The credible evidence demonstrates that King, as the appointing authority,

pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as the Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

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, in this case Respondent, 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.

Respondent did not present any credible evidence that Complainant's personnel action was frivolous, in bad faith, malicious, harassing, or otherwise groundless or that Complainant pursued his/her constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth. In addition, Complainant presented rational arguments and competent evidence to support his claims.

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 ___ day of December, 2003.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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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.

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CERTIFICATE OF SERVICE

This is to certify that on the ____ day of _____, 2003, 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:

Sergeant Greg Bailey
2660 Catalina Drive
Grand Junction, Colorado 81506

and in the interagency mail, to:

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

Andrea C. Woods