

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**CHRIS ENRIQUEZ,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on June 7, 2005 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Vincent Morscher represented Respondent. Stanley M. Gosch, Esquire, represented Complainant.

**MATTER APPEALED**

Complainant, Chris Enriquez (“Complainant” or “Enriquez”) appeals his disciplinary demotion by Respondent, Department of Corrections, Arkansas Valley Correctional Facility (“Respondent,” “DOC,” or “AVCF”). Complainant seeks reinstatement to the position of Sergeant, back pay and benefits, and an award of attorney fees and costs.

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 Complainant is entitled to an award of attorney fees and costs.

**FINDINGS OF FACT**

1. Complainant commenced employment at DOC as a Correctional Officer (“CO”) I in 1994. In 1999 he promoted to Sergeant, CO II.

2. During the evaluation period May 1, 2004 through July 31, 2004, Complainant received an overall rating of Commendable.

### **Games Criminals Play Training Course for DOC Staff**

3. All DOC staff, including Complainant, receive training entitled, "Games Criminals Play." The course objectives are the following:
  - “1. Demonstrate an understanding of the anti-social personality disorder in terms of how it influences inmates to attempt the manipulation of staff.
  2. Demonstrate an understanding of the techniques of an inmate game set-up.”
  3. List the cardinal rule and at least two other defenses against the inmate game.”
4. In the Games Criminals Play course, DOC correctional staff are taught that prison inmates are captive clientele, and that studies indicate that any time a person is held against his will, there will be a sharp escalation in the presence of manipulative behaviors. As potential victims of the inmates, DOC staff are taught how inmates “set up” staff, and how to act in ways to avoid being set up and corrupted by inmates.
5. Staff learn that 85 – 90% of inmates have anti-social personality disorder, which is a propensity to consciously choose to go against the rules. Individuals with this disorder believe the world revolves around them; they give only to receive; and they expect something in exchange for even the smallest of courtesies. DOC staff are taught to treat all inmates as though they possess this disorder, because there is no way to distinguish between those that do and those that don't.
6. Staff are taught that there will be an internal conflict for them, between “the kept and the keeper.” Staff are informed that it is perfectly normal to feel sorry for an inmate and to view the inmate as a human being is also normal, and that to do otherwise would constitute a severe violation of our basic values system. However, the course materials stress, “Because our basic values differ markedly from those of the anti-social personality, as normal people our very jobs will create internal conflict. . . . The average staff member enters the corrections environment ill equipped to deal with the predacious nature of the anti-social personality within the environment of the captive clientele. . . All too often staff will attempt to apply the principles of normal society to a much different world inside corrections. When this is done the staff member becomes vulnerable to the set-up. Advantage is taken of their good nature, kindness, and just basic decency. . . In order to survive the staff member must learn to adapt to the correctional environment. This does not mean that you need to alter the person that you are . . . You should not become a victim of the corrections environment, but you must learn to adapt to it.”
7. DOC staff are taught that it takes the average inmate approximately 18 months to compromise the integrity of a DOC staff member to the point the staffer will violate prison

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regulations to the inmate's benefit. The "tools" that inmates use to set up staff include ego uplifting, pleas for help, we/they syndrome, offers of protection, allusions to sex, rumors, and empathy or sympathy. For example, inmates cultivate staff by stating, "You're the best officer here," "You've changed my life," "I'm concerned if you go on vacation I'll be treated badly."

8. Staff are also taught that inmates categorize prison staff into three groups: hard, soft, and professional. Those most vulnerable to the "set-up" are hard; soft are second. The most difficult to set up are those staff who are able to maintain a calm, professional, distant demeanor, who do not become personally or socially familiar with the inmates.
9. The list of Protectors is given to DOC staff as a toll to avoid being set-up:
  - understand the definition of a professional and strive to act like one (i.e. do not become overly familiar or informal in relating to an inmate; do not interact socially with an inmate);
  - recognize the steps of a set-up and take proper action immediately;
  - learn to say "no" and mean it;
  - be in command of your area and when in doubt assume a rule covers everything;
  - check the file of an inmate you feel is trying to get "too close" to you, or who works for you;
  - if you suspect you are being cultivated, report it.

### **Complainant's Interactions with W.D. and Other Inmates**

10. In June 2004, Captain Sherry Hall, Complainant's supervisor, told Complainant not to hire Inmate W.D. as a porter, because of his reputation for extortion and bartering. Soon thereafter, a different staff member hired W.D. to work as the porter on a shift Complainant did not work. Complainant later transferred to that shift. Therefore, W.D. was a porter on Complainant's shift as of the summer of 2004. W.D.'s job was to clean the cell house; the job had no connection to the kitchen or food service operations at the prison.
11. During the summer of 2004, at the end of Complainant's shift at approximately 1:45 p.m., he often found leftover coffee from the morning. Instead of pouring the coffee down the drain, he offered it to inmates. On one such occasion, he poured the coffee into the inmate's cup.
12. Officer Steve Gonzales, a CO I subordinate to Complainant, saw Complainant giving coffee to inmates and asked him to stop doing it in front of him (Gonzales). Complainant stopped.
13. In the mornings after the inmates had eaten breakfast, Complainant went into the kitchen to request leftover food. Kitchen staff gave him trays with eggs. Complainant brought the eggs to the Unit 2 Sergeants office and shared the food with co-workers.
14. When Complainant had leftover inmate food, he offered it to inmates.

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15. On several occasions, Inmate W.D. approached Complainant and asked him if he could have some of the leftover eggs if they were going to be thrown away. Complainant agreed and gave the food to W.D.
16. It was a common practice at AVCF to give leftover food trays to the kitchen porter (the inmate who works in the kitchen). This practice was widely condoned and practiced up to the Lieutenant level. It may have been practiced because of the difficulty in recruiting inmates for that particular job.
17. Complainant's practice of giving food to W.D. and other inmates was different, because W.D. and the other inmates were not the kitchen porter.
18. Complainant gave W.D. and other inmates special treatment by giving them food and coffee.

### **October 2004 Calendar Incident**

19. Complainant was scheduled to go on vacation in early October 2004. On his last day of work prior to his departure, Inmate W.D. came into the Sergeants office and told him it was going to be a rough two weeks because he, Complainant, was going on vacation.
20. Complainant told W.D. it would be all right.
21. Then, Complainant picked up the calendar used to schedule work chores (such as "laundry day"). Inmates could easily see this calendar. Complainant flipped ahead a week, and on October 13, 2004, wrote, "GIVE D.[full last name] A HUG DAY." Complainant wrote this entry as a joke.
22. This statement on the calendar sent a message to D.W. and other inmates that D.W. was receiving special treatment from DOC staff.

### **Plant Incident**

23. In the fall of 2004, Complainant was in Living Unit 5 when Inmate E. A. delivered a plant there. Complainant stated to E.A., "How does Living Unit 2 get a plant?" The inmate responded that they were in the library, and offered to bring one over to Complainant in Unit 2. Complainant said, "Okay."
24. Two or three weeks later, Inmate E.A. brought a plant to Unit 2. Complainant then put Sergeant Lozano's name on the plant as a joke, and wrote in the "pass-on log" for oncoming staff that all staff were "to take care of Sergeant Lozano's plant and he feels that the office is more pleasant with the plant in it."

### **Steve Gonzales**

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25. Steve Gonzales, noted briefly above, was a Correctional Officer I under the direct supervision of Complainant. Gonzales had recently taken a voluntary demotion from Sergeant at Sterling Correctional Facility to CO I at AVCF. Gonzales was eager to promote back to Sergeant from the reinstatement list.
26. In October 2004, Complainant counseled Gonzales on his repeated failure to update the names on the nametags outside the inmates' cells. Updating of nametags is critical to the officers' ability to conduct accurate inmate counts. Inmate counts are conducted regularly throughout the day and are central to the security function in all prisons.
27. Gonzales was offended by Complainant having corrected him. He confronted Complainant in a hostile and defensive manner. After a heated exchange, he directed Complainant not to address him by his first name.
28. In an unrelated incident, on October 13, 2004, Captain Sherry Hall was informed that one of the inmate workers, Inmate R., came to work beaten up with several bite marks on his arms. He refused to talk to staff. Staff investigated and quickly determined that Inmates W.D. and L. (first initial unknown) had taken most of Inmate R.'s canteen items into their own cells.
29. Captain Hall interviewed Inmate W.D., who stated that he bartered for the items he had in his cell, and denied knowing whether they had been stolen or not. He informed Hall that was "how he gets by," that he barter and sells pies he makes in the microwave and that all of the DOC staff in Unit 2 know he barter and turn their heads.
30. Captain Hall wrote up inmate W.D. for bartering and he plead guilty.
31. On October 19, 2004, Captain Hall met with inmate W.D. and informed him she was moving him to Unit 1, and that she was not comfortable with his statement about Unit 2 staff being aware that he barter and allowing it to happen. She informed him that since he was "the floor person" (presumably the porter), that made it worse. W.D. responded by becoming extremely angry, yelling that he cleans the staff's offices and floors and that it was unfair for her to write him up for something her staff knew about. He challenged her for writing him up but not her own staff.
32. Gonzales was in the vicinity when this heated conversation occurred, and he approached Captain Hall. Gonzales informed Hall that he took offense at W.D.'s statements, did not want to be accused of anything, and then stated that he needed to talk to her about some recent incidents involving W.D. and Complainant. Captain Hall directed Gonzales to write a report, which he did.
33. Gonzales's report contained several allegations proven ultimately to be true; however, some of them, upon investigation, were found not to be true. Gonzales' October 20, 2004 Incident Report stated in part,

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“About two months ago, I . . . approached Sgt. Enriquez about his relationship with inmates. I advised him that I did not like him leaving the techs office unattended while inmates are still inside office and that if a tool was missing from the tool cage because he leaves it unsecured that I will not be held accountable. And that I did not like the fact that he left inmate [W.D.] in the Lt.’s office cleaning alone and that as soon as [W.D.] was done cleaning he went straight to his cell. I also told him that giving inmates coffee was not a good idea and not to do it around me. Sgt. Enriquez has in the past giving (sic) inmate [R.S.] coffee and has gone to the A-pod door and given coffee to inmates. I also advised him not to call me by my first name in front of inmates. He stated to me that he would take full responsibility for his actions mentioned above if anything came back on him. As of 10/5/04 the following has occurred. Sgt. Enriquez has received a plant from Inmate [E.A.] from the law library. [I]nmate [W.D.] told me in front of officer [R.G.] that I should buy the strawberry flavored cookies from Kay’s Kitchen because they taste good since Sgt. Enriquez had bought some and gave him some. I felt I had to inform Capt. Hall about what is occurring with Sgt. Enriquez since he apparently did not take me serious and then inmate [W.D.] made statements to Capt. Hall that all staff on day shift allow him to barter and get away with other things and I do not want my professional career tarnished by staff actions. Also I have seen inmate [W.D.] receive eggs from Sgt. Enriquez in the past.”

34. Lt. Reyes Martinez, the union representative for DOC employees at AVCF, contacted Complainant during his vacation to inform him of Gonzales’ allegations. When Complainant returned from vacation on October 27, 2004, he approached Captain Hall and requested to meet with her. When Gonzales saw that Complainant was meeting with Captain Hall, he knocked on the door and asked to join the meeting. Captain Hall allowed him to participate.
35. Gonzales gave Complainant a copy of his incident report; they all reviewed it. They discussed Complainant having arranged for Inmate E.A. to bring the plant from the Law Library to Unit 2 as a joke on Sgt. Lozano. Captain Hall asked Complainant if he had actually gone to the pod doors and given inmates coffee. Complainant responded that he had stopped doing it when Gonzales told him not to do it in front of him. Hall asked Complainant about bringing food from the kitchen and giving it to inmates. Complainant stated that since they had “the hook-up” (definition unknown) in the kitchen he would give W.D. eggs.
36. Complainant started to discuss when Gonzales had “rolled over on him.” Captain Hall stopped Complainant, telling him she did not want to hear any words like rolled over, snitch, etc, and that if he had not engaged in the conduct, there would have been nothing for Gonzales to report.
37. Captain Hall asked Complainant about the October 13 desk calendar entry, “GIVE [D.W.] A HUG DAY.” Complainant stated he had written that as a joke. Hall stated it appeared he was too close to inmate D.W. Complainant stated he would not engage in any of the conduct discussed again.

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38. Captain Hall followed up on this meeting by talking to the new Law Librarian about the plant. The librarian informed Hall that inmate A had told the librarian that he was taking the plant to the Sergeant in Unit Two, that he had not asked, and that when she found out the plant was not supposed to be moved to another unit, she stopped it. The librarian also informed Hall that Inmate E.A. no longer worked in the law library.
39. Captain Hall wrote up the results of her meeting with Complainant and Gonzales, and her investigation, and gave it to Warden Zenon.

### **Contraband in Car**

40. On October 29, 2004, DOC conducted a “staff interdiction” at 3:00 a.m. at all facilities, including AVCF. These surprise searches are conducted on a random basis in order to assure staff are not bringing contraband into DOC facilities.
41. Complainant had recently been hunting with friends and relatives during his vacation. One of Complainant’s relatives had left three live rounds, or bullets, in the trunk of the car. The DOC canine squad identified the rounds in the trunk of Complainant’s vehicle.

### **Inspector General (“IG”) Investigation**

42. Warden Zenon assigned investigation of the Gonzales and Hall memos to DOC Investigator John Smokey Kurtz, from the Inspector General’s office. Kurtz interviewed Complainant on October 27, 2004. Gonzales confirmed that he had received a plant from the Law Library from Inmate E.A. and had placed it in Lt. David Carpenter’s office in Unit Two.
43. Complainant admitted that he had given leftover eggs to W.D. rather than to throw them away. He informed Kurtz that it was the common practice to give inmates leftover food from the kitchen.
44. Complainant admitted to Kurtz that on several occasions over the last two or three months he had poured inmates coffee that was left over at the end of shift, rather than pour it down the drain.
45. Complainant denied the remaining allegations in Gonzales’ memo. Investigator Kurtz followed up on those issues and determined they were unfounded.
46. Kurtz wrote a report on the above information and submitted it to Warden Zenon.
47. Zenon then scheduled a pre-disciplinary meeting with Complainant.

### **Prior Disciplinary Action**

48. Warden Zenon had previously imposed a disciplinary demotion against Complainant (to CO

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I) on May 1, 2004, for a similar offense involving giving inmates tokens and buying them soda. (The circumstances of these events are not in the record.) Warden Zenon had erroneously prohibited Complainant from having a representative present at the pre-disciplinary meeting. Therefore, on July 7, 2004, Complainant and Respondent signed a settlement agreement under which Respondent reinstated Complainant to CO II effective July 1, 2004, paid him back pay to the date of demotion, and providing, "The disciplinary action, dated April 16, 2004, which is the basis of this appeal, will be withdrawn and removed from his Personnel files."

49. Respondent did remove the disciplinary action from Complainant's personnel file.
50. Respondent kept a copy of the incident report regarding Complainant's conduct in its file for performance evaluation purposes.

### **Pre-Disciplinary Meeting**

51. On November 19, 2004, Complainant and his representative, Lt. Martinez, attended the pre-disciplinary meeting with Warden Zenon and Captain Gene Gonzales, Acting Program Manager at AVCF, the warden's representative.
52. Warden Zenon began the meeting by asking Complainant to describe the incident in which Complainant received a plant from Inmate E.A. Zenon asked Complainant why he would do such a thing. Complainant explained that he was in Living Unit 5 and the inmate delivered a plant there. Complainant stated that he had said to the inmate, "How does Living Unit 2 get a plant." The inmate responded that they were in the library, and offered to bring one over to Complainant in Unit 2. Complainant informed the warden he had said, "okay", and that two or three weeks later the inmate brought a plant to Unit 2. Complainant told Warden Zenon about putting Sergeant Lozano's name on the plant and writing the inscription as a joke.
53. Warden Zenon asked Complainant, "Why would you ask an inmate to get a plant for you?" Complainant stated, "it wasn't for me, it was for the unit." The Warden responded, "It doesn't matter who it was for, why would you ask an inmate to do that?" Complainant stated, "I don't know."
54. Warden Zenon then asked about Complainant having given eggs to inmate W.D. on several occasions. Complainant stated it was not several occasions. He stated that when there were leftover eggs from the dining hall for the inmates, he and other staffers brought the eggs back to the unit to eat them. He stated, "There was leftovers and one of the porters, I can't recall whose name it was, when he came in and turned in his stuff he took the eggs, the leftover eggs."
55. Warden Zenon pointed out that Complainant had admitted to Kurtz that he had given the eggs to inmate W.D. "He didn't take them, you gave them to [W.D.]," the Warden stated. Complainant then stated, "I may have, he, he came in and said, what are [you] doing with those eggs and I said I'm going to throw them in the trash. He said can I have them, I said take them."

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56. Warden Zenon next asked about giving coffee to inmates on several occasions. Complainant stated that on one occasion only, at 1:45 p.m., he was pouring coffee into a drinking fountain. The coffee had been made that morning at 6:00 a.m. "An inmate walked by and had his cup and said can I get some of that. I poured the coffee into his cup. I finished dumping the rest out into the water fountain."
57. The warden asked Complainant why he would have done that. Complainant stated, "I don't know."
58. Warden Zenon then asked Complainant about the three "live tracer rounds in your car." Complainant explained that he had gone hunting during vacation the previous week. He and his relatives had initially thrown their hunting gear into that car, then had transferred it to the truck and the camper. At the end of the trip, they again transferred all hunting gear into the car, which he then used to drive them all home. At the time he dropped off his relatives, they had removed their hunting gear from the trunk. A week later, he had driven the car to work, believing there was nothing in the trunk of the vehicle related to the hunting trip.
59. Warden Zenon asked Complainant if he had taken any steps to make sure the car was clean before he came to work. Complainant stated that he had not. Complainant stated that he understood that the three live rounds were ammunition and as such were contraband.
60. Warden Zenon pointed out that in June 2004 Captain Hall had ordered Complainant not to hire inmate W.D. because of his reputation for extortion and bartering. Complainant and his representative pointed out that he had not hired W.D., and that he had been assigned to graveyard shift at the time another officer had hired W.D.
61. Warden Zenon then referenced the calendar in the Sergeant's office on the desk. He asked Complainant if he had written the note "that read in fairly large letters give [W.] D [full last name] a hug day." Complainant admitted that he had. The Warden asked, "Why would you write a note like that?"
62. Complainant explained as follows: "It was on my last day of working before I went on vacation. Inmate [W.D.] came in and he told me that it was going to be a rough two weeks because I was going on vacation. Because whenever I'm not there staff tend not to let him in the office [to] buff the floors or they're not as willing to go get wax for him and everything else. I told him he would be all right. I got the calendar as a joke I wrote on there hug D.[last name] day approximately a week after I would have been on vacation and not even in the unit."
63. Warden Zenon asked Complainant, "Why would the inmate come up to you and make a statement to you that it would be a rough two weeks?" Complainant responded, "I just explained that." Zenon stated, "I know, but why would he even make a statement like that to you? Would he make that same statement to the other staff in the unit?" Complainant said, "Yes, he would." Zenon then asked, "So what would be rough for him if nobody else but you would tend to his needs?" Complainant stated, "That's what he said. I told him you'll be okay."

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64. Zenon then stated, "You've been through all the training, you get your forty hours of annual training a year. Do you understand the term professional distance and why we have to maintain professional relationships with inmates at all times?" Complainant responded, "Yes sir." The Warden stated, "That we don't give them anything except what they or they've got coming through regular scheduled meals, canteen and whatnot?" Complainant said, "Yes." Zenon said, "but you just don't understand why you behaved the way you did in terms of giving them coffee, eggs and whatnot?"
65. Complainant stated, "I didn't realize the seriousness at the time."
66. Zenon then expressed his frustration with the fact that at the previous pre-disciplinary meeting, Complainant had agreed that he should not give inmates anything, that he understood that very well, and that he would never do that again. He said, "You said you would never do that again and here we're back in a 6-10 with you doing the same thing again." Complainant pointed out, "It's my understanding that the last R-6-10 was removed from my file and it never happened."
67. Zenon pointed out that while the disciplinary action had been rescinded, the working file on Complainant contained the report of the conduct that had led to the disciplinary action. Zenon stated, "Those are working files and in those working files is a report that says you engaged in the same kind of behavior three and a half months ago, four months ago and at that time you indicated you understood through your training and what the rules required. And now you're engaging in the same thing again and you still say you understand what the rules require, but you don't understand your behavior."
68. Late in the meeting, Martinez stated, regarding giving inmates leftover coffee and eggs, "Those things, you know and I've been in the system for twenty-nine years and I've seen it across the board." The Warden responded, "Well I've been thirty-seven years and I've seen people behave very professionally." Martinez responded that he considered himself a professional person, that he "maintain[ed] a very professional attitude with the clientele that we serve," and that in he had done the same thing at Centennial, at CMC, at State Hospital, with the inmates.
69. Martinez informed the Warden, "You have high level individuals doing the same thing. . . Not just the low level individuals." The Warden responded, "No, I'm not talking about level of individuals, I'm dealing with a report that came to me and as the appointing authority I have to make decisions on."
70. Martinez responded by stating that "We all understand that there's a, a line of where you cannot cross. . . . My comment is let's deal with this fairly across the board." The Warden responded, "What do you mean by that? I'm dealing with it fair, it came to my attention and . . ."

71. Warden Zenon considered as mitigation Complainant's Commendable performance evaluations, his five letters of commendation in his personnel file, and his length of service at DOC.
72. On December 6, 2004, Warden Zenon sent Complainant the demotion letter. He reviewed Complainant's employment history at DOC, noting the length of his employment, his training record, his commendable performance rating, his performance documentation for unprofessional conduct, and a 1997 Corrective and Disciplinary Action for violating the workplace discrimination/harassment policy.
73. Warden Zenon discussed the facts underlying his decision to demote Complainant in the letter. He noted in part, "While you may argue that giving coffee and eggs to an inmate is no bi[g] deal it does constitute serious misconduct since this type of behavior tends to compromise your authority and status as a Corrections professional. Giving anything to inmates and taking things from inmates can place not only you in a compromised position but will also reflect on your co-workers in a negative fashion. This can lead to more serious security violations including staff injury and/or death. As Corrections professionals we are taught to treat inmates with firmness, fairness and consistency, thereby upholding professional standards and giving inmates the same message. The firm, fair, consistent rule allows us to operate as a cohesive unit and reduces the confusion and chaos that is created by sending a different message to inmates as you did with your behavior. As a ten year Department of Corrections employee this type of conduct will not be tolerated."
74. Zenon cited Complainant for violating several DOC Staff Code of Conduct regulations, including:
  - Section III, B. "Conduct Unbecoming: Includes any act or conduct either on or off duty, which negatively 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 member."
  - Section IV, I. "All items received or purchased from offenders, or given to offenders, will be through officially sanctioned and documented channels and will have prior approval of the appointing authority."
  - Section IV, 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 staff, is prohibited. Staff will exercise good judgment and sound discretion."
  - Section IV, HH. "Staff shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures and administrative instructions . . . ."

Section IV, 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.”

75. The demotion letter also cited Complainant’s violation of Administrative Regulation 300-6, Searches and Contraband Control, and other regulations prohibiting any individual from bringing contraband onto any DOC facility. Contraband is defined to include, “Any firearm, explosive device, or substance including ammunition . . . .”

## **DISCUSSION**

### **I. BURDEN OF PROOF**

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.

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.

### **II. HEARING ISSUES**

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

Respondent has proven by a preponderance of evidence that Complainant violated the DOC Staff Code of Conduct, as well as regulations barring contraband in the facility. Complainant’s pattern of misconduct demonstrates a notable lack of judgment with respect to maintaining professional boundaries with inmates. Complainant simply failed to understand and exercise his leadership role as a Sergeant. He neglected his duty to act as a role model of professionalism for other staff and inmates; his lax attitude toward professional boundaries set the wrong tone and sent the wrong message.

Complainant made a simple mistake by failing to search his car prior to returning to the

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facility, and had no intention of bringing in contraband. However, as a ten-year employee, Complainant should have known to check his car routinely after a hunting trip.

**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).

Warden Zenon appropriately considered all mitigating information available to him, and conducted a thorough investigation. Captain Hall and Investigator Kurtz both conducted unbiased, complete investigations. In view of the fact Complainant engaged in a pattern of misconduct, demonstrating a fundamental lack of appreciation for his role as a supervising professional, the Warden's exercise of discretion was a reasonable one.

The Warden's chief concern is expressed in the following statement he made at the pre-disciplinary meeting, "you say you understand what the rules require, but you don't understand your behavior." This is the heart of the matter: the evidence demonstrated that Complainant never understood the seriousness of his misconduct. He engaged in repeated violations of the professional distance required of a Sergeant, even to the point of instigating jokes with inmates, yet was completely unaware his conduct was inappropriate.

A correctional officer at the rank of Sergeant is the enforcer of the professional distance standard in the prison setting. Complainant sent the wrong message to inmates and subordinate staff alike that it was acceptable to engage in horseplay with inmates and to give them special treatment.

Regarding W.D., the evidence demonstrates that he was a well-known barterer in the prison, who was displaying the classic signs of "setting up" Complainant, as described in Games Criminals Play. Instead of reporting D.W.'s inappropriate behavior, Complainant actively encouraged W.D., bringing their social interaction to an even higher level, by writing on the calendar, "GIVE [D.] A HUG DAY."

Complainant engaged in horseplay with the Unit 5 inmate, inviting him to take a plant from the Law Library and bring it to Unit 2. This invitation clearly exceeded that inmate's duties on Unit 2, and constituted a significant violation of the professional distance required. Yet, Complainant somehow saw no problem with his behavior.

Complainant raises an important claim in this action, namely, whether it is appropriate for an

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appointing authority to consider prior similar misconduct, where the agency has agreed not to impose disciplinary action based on that conduct. Specifically, Respondent entered into a stipulation under which it agreed not to impose disciplinary action against Complainant for giving inmates tokens and buying them soda. Complainant claims that Warden Zenon inappropriately considered that prior conduct in imposing disciplinary action herein.

State Personnel Board Rule R-6-6 states as follows:

“The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.”

Under Rule R-6-6, Warden Zenon was authorized to consider Complainant’s previous unsatisfactory behavior or acts, as well as the short period of time that had elapsed since the prior misconduct. The stipulation prohibited Warden Zenon from using the previous misconduct as a basis for progressive discipline. However, it did not mandate that the warden erase the incident from his mind. The incident occurred, and it was appropriate for the appointing authority to track the issue in his oversight of Complainant’s ongoing performance.

Complainant argued, and proved by preponderant evidence, that it is common practice for prison staff up to the rank of Lieutenant to give kitchen porters leftover food trays at the end of their shift. Complainant’s pattern of misconduct in this case went far beyond the common practice, and was different. None of the inmates to whom Complainant gave coffee or food was a kitchen porter. Nonetheless, Warden Zenon and all other wardens need to provide clear expectations of prison staff on whether it is acceptable to give inmate kitchen porters leftover food trays. Respondent needs to address this widespread practice and either condone it through an internal policy, or enforce its prohibition. Failure to do so invites arbitrary and inconsistent enforcement of the administrative regulations.

### **C. 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, which is the Respondent in this action, 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. Because Complainant has not prevailed herein, he is not entitled to an award of attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined;

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2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Attorney's fees are not warranted.

**ORDER**

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

Dated this 6<sup>th</sup> day of July, 2005.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
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.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of July 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:

Stanley M. Gosch  
Richard Rosenblatt & Associates, P.C.  
8085 Prentice Avenue  
Greenwood Village, Colorado 80111

and in the interagency mail, to:

Vincent Morscher  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods