STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006G074**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JASON P. MONETT,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO STATE PENITENTIARY,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on August 5 and 6, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The matter was commenced on May 21, 2007. The record was closed on the record by the ALJ on the last day of hearing. Assistant Attorney General Vincent E. Morscher represented Respondent. Respondent's advisory witness was Associate Warden Angel Medina, the appointing authority in this matter. Complainant appeared and was represented by Andrew Newcomb, Esq.

MATTER APPEALED

Complainant, Jason P. Monett ("Complainant") appeals his termination by Respondent, Department of Corrections, Colorado State Penitentiary ("Respondent" or "DOC"). Complainant seeks reinstatement, back pay, a redaction of his personnel file to remove termination materials, a declaration that Complainant's state service time has been continuous, and an award of attorney fees and costs.

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

PROCEDURAL HISTORY

Complainant moved for directed verdict at the conclusion of Respondent's case on the issue that Associate Warden Medina lacked lawful appointing authority to dismiss Complainant from employment. The ruling on that issue was deferred until the conclusion of hearing and is included within this Initial Decision.

A week before the issuance of this Initial Decision, Complainant moved to re-open

the record, permit discovery, and to retry a portion of matter on the grounds of discovery of new evidence. This motion has been denied by separate ruling.

HEARING 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; and

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was hired by DOC as a Correctional Officer I ("COI") on November 1, 2006. He became a certified state employee on November 1, 1997. (Stipulated Facts) Complainant was employed for more than nine years at the Colorado State Penitentiary ("CSP") in Cañon City. CSP is a Level V correctional facility; it houses inmates who have been the most disruptive and dangerous in the system, and the facility is designed to confine those inmates in administrative segregation.

2. Complainant's assigned work location, B pod, is one of six areas of inmate cells and control rooms within CSP. Complainant's duties included escorting offenders from cells to day-rooms, feeding inmates, collecting laundry, and arranging for phone use by inmates. Many of these duties required close contact between Complainant and offenders. At the time of the termination of Complainant's employment, Complainant worked on the swing shift.

Layout of "B Pod"

3. Each pod at the CSP facility is a structure of two stories of cells lining the perimeter of the pod. The cells are all administrative segregation cells and hold one inmate each. Each pod at CSP has cell space for approximately 125 inmates.

4. Each inmate cell is accessed through one of eight day-room areas. The day-room areas are separated from each other. Officers allow inmates out of their cells and into the attached day-room in a manner so that so that no inmate can have contact with another inmate.

5. The eight day-rooms encircle the center of the pod. At the center of the pod is a two-

story structure which has an octagonal shape. The upper floor of this structure is the control room for the pod. The lower floor of the center structure is an office for staff.

6. The pod office is located in the very center of the pod on the lower level. The office has windows around the walls of the office extending from about waist height and up. At times, some of the window space is blocked by a large white board which can be pulled down when necessary for a meeting or similar uses. A mail sorter also partially blocks one of the windows. The pod office is not a private space. The windows allow officers in the office to see into the surrounding day rooms and cell doors; the windows also provide a way for inmates and staff to see into the office if they are in a position where they can see the center of the pod.

Tobacco Incidents

7. Tobacco and tobacco products are considered to be contraband for purposes of detention facilities both as a matter of DOC policy and under state criminal statutes.

8. On March 1, 2000, the facility conducted a search of all staff reporting to work for the swing shift. Complainant had bought a can of chewing tobacco and had placed the can into his jacket pocket. When he arrived at the security checkpoint, a search of his jacket revealed the can and it was seized as contraband. Complainant was issued a Performance Documentation Form on that date for possession of tobacco products.

9. In May of 2006, Complainant understood that tobacco, including tobacco products such as chewing tobacco, was contraband at the facility and could not legitimately be brought into the facility.

10. As of May 3, 2006, Complainant was still recovering from two back problems from the previous year in which he had broken a vertebra. He had been taking pain medication to assist him with recovery from these injuries. Prior to his back injuries, Complainant had also been diagnosed with post-traumatic stress disorder and was taking the medication Effexor for that issue.

11. At some point prior to May 3, 2006, Complainant decided that he could not afford both types of medications. He dropped the medication for his post-traumatic stress disorder. Complainant decided that tobacco use helped him stay focused now that he was no longer taking his medication to ease the symptoms of post-traumatic stress. Complainant did not inform any of his supervisors about his decision to stop taking his medication for post-traumatic stress disorder, or about his decision that tobacco use helped him.

12. At the start of Complainant's shift on May 3, 2006, Complainant hid a can of Grizzly Straight chewing tobacco in a coffee cup. At the start of every shift, correctional facility staff passes through a security checkpoint upon entering the facility. At the checkpoint, staff move through a metal detector and may also have their possessions examined or

searched. The procedure in place as of May 3, 2006 was that coffee cups were not generally opened or inspected. Complainant was successful in having his can of chewing tobacco pass through the security checkpoint undetected.

13. At approximately 8:00 PM on May 3, 2006, Complainant had finished with his duties related to inmate moves and he entered the pod office. Complainant was about to make entries in a log concerning inmate behavior when he decided to chew some of his tobacco. At this point, Complainant was in the pod office.

14. Other officers observed Complainant retrieve chewing tobacco from his lunch box and place an amount in his mouth.

15. One of those officers, Officer Matthew Valdez, phoned the shift commander, Captain Vicki Jaramillo, and reported that Complainant was in the process of possessing and using tobacco products while on duty. Captain Jaramillo contacted the Duty Officer, Associate Warden Angel Medina, to let Mr. Medina know her plans in handling the report. Mr. Medina told Capt. Jaramillo to wait until he had cleared the action with Warden Reid. Shortly thereafter, Mr. Medina called Captain Jaramillo and told her to proceed.

16. Captain Vicki Jaramillo and Lt. Stacy Bishop went to B pod and found Complainant in the pod office. Capt. Jaramillo told Complainant that she had received information that he had a tobacco product on him. Complainant reached for his water bottle. Capt. Jaramillo stopped him and told him that she wanted to see what was in his mouth before he took any water. Complainant opened his mouth and Capt. Jaramillo confirmed that there was chewing tobacco on the roof of his mouth.

17. Complainant admitted to Capt. Jaramillo and Lt. Bishop that he had chewing tobacco. Captain Jaramillo asked Complainant where he kept the can, and Complainant retrieved a can of Grizzly Straight chewing tobacco from his lunch box. Capt. Jaramillo asked Complainant how he brought the tobacco into the facility, and Complainant admitted that it had been brought through security in a coffee cup.

18. Capt. Jaramillo and Lt. Bishop accompanied Complainant to Capt. Jaramillo's office. One the way to the office, Complainant apologized several times for his behavior.

19. Capt. Jaramillo spent time with Complainant reviewing the four departmental policies prohibiting tobacco possession and use in the facility. Complainant prepared an incident report admitting that he had chewing tobacco. At the conclusion of the policy review Complainant was placed on paid administrative leave pending further investigation. Capt. Jaramillo also asked other B pod officers to write incident reports concerning their knowledge of Complainant's possession and use of chewing tobacco.

20. Complainant's actions were also referred to the DOC Inspector General ("IG") for investigation and review. IG investigator Richard Wren performed an investigation of the incident. State criminal charges were eventually filed against Complainant related to his

introduction of contraband into a DOC correctional facility, including a felony charge of contraband introduction and a misdemeanor charge of official misconduct. On March 8, 2007, Complainant pled guilty to misdemeanor official misconduct and the felony count was dropped.

21. Mr. Medina was delegated appointing authority on May 30, 2006 to address Complainant's situation. The delegation of authority was from Gary Golder, Director of Prisons. (Stipulated Fact)

Board Rule 6-10 Meeting

22. Complainant was notified that a Board Rule 6-10 meeting would be held on June 6, 2006 regarding the incident involving chewing tobacco. (Stipulated Fact) This meeting was the first time Mr. Medina had conducted a Rule 6-10 meeting as the appointing authority.

23. On June 6, 2006, Mr. Medina met with Complainant. Associate Warden Michael Arellano attended the meeting as Mr. Medina's representative. Sergeant Mitch Hiatt attended the meeting as Complainant's representative. (Stipulated Facts) Mr. Medina taped the meeting.

24. At the start of the meeting, Mr. Medina informed Complainant that he had been suspended for having chewing tobacco in a correctional facility on May 3, 2006, and that the information had been brought to the agency's attention by Vicki Jarmillo, the shift commander that evening. Mr. Medina did not mention Officer Valdez's call to Capt. Jarmillo.

25. During the Rule 6-10 meeting, Complainant took responsibility for bringing tobacco into the facility on two occasions: the time in 2000 when he had been found with a can of chewing tobacco in his jacket, and on May 3, 2006. Complainant assured Mr. Medina that these were the only two times he had brought tobacco into the facility.

26. Complainant told Mr. Medina during the meeting that he had broken his back a few times in the last year. Complainant also attempted to explain his back problems, but Mr. Medina interrupted the explanation at several points and cautioned Complainant that they could not go into medical issues because of HIPAA [Health Insurance Portability and Accountability Act of 1996] issues.

27. Complainant's most complete explanation of his actions came in this exchange:

Medina:	Do you want to talk about the reasons [for bringing in the chewing tobacco]?
Monett:	Yes sir, over the last year it hasn't been real, real kind to me, I guess you want to say, as far as personally. I got into a situation where I broke my back the first time and...
Medina:	Can I caution you a bit about the medical stuff, if you...

Monett:	Yeah, I'm trying...
Medina:	We're really going to ask you to stay away from that type of sharing, and it's not to be insensitive, it's just that I really have to protect you and the agency with that, Jason.
Monett:	OK, I'm sorry sir, I 'm just trying to explain why it happened...
Medina:	And I don't see you as being difficult because it's a real tough situation to talk about, when you can't talk about it.
Monett:	Yeah, cuz it really does tie into why I did what I did.
Medina:	OK, so can you generally just say...?
Monett:	OK, what it came down to was I, I got off my medication for my head and that controls my stress, anger, depression, you name it, and..
Medina:	Let's just say it was medical...
Monett:	Yeah, for medical reason, money-wise, I had to make a decision between this or that, and I started getting real, real stressed out, and that's why I did it.
Medina:	OK
Monett:	I mean I'm a heavy smoker on the outside and the nicotine is what was keeping me in check.

28. Complainant also explained that he had gone to his father, borrowed the money for the pills that he had stopped buying, and by the time of the Board rule 6-10 meeting had gone back on his medication.

29. If permitted to explain more fully, Complainant could have explained more about his various medical conditions and why he believed that nicotine was helping him.

Deliberation

30. Associate Warden Medina took Complainant's Performance Documentation Form from May 2000 into account in making his decision.

31. Mr. Medina also considered Complainant's training records, leave accruals and performance documentation, including a prior corrective action on an unrelated incident from September of 2002, and a letter of counseling from 2005 concerning Complainant's use of sick leave. Mr. Medina also considered and reviewed two letters of commendation that Complainant had received for his work at the facility.

32. Mr. Medina understood that Complainant had decided to use tobacco as a substitute for a medication that he had discontinued. Mr. Medina did not consider this explanation to carry much, if any, weight as a mitigating factor, given that Complainant's solution to his medication problem was to introduce contraband into the facility.

33. Mr. Medina was concerned that the unlawful introduction of tobacco products, even if that introduction was initially only for personal use, becomes a tool by which offenders can

compromise officers. The offenders at CSP are some of the most dangerous offenders in the correctional system, and are often skilled in ways to manipulate the system to their advantage. The rules prohibiting the introduction of contraband, such as tobacco, into the facility for any reason prevents inmates from obtaining items, or information about prohibited items, that they can use for their own purposes.

34. Mr. Medina was additionally concerned that use of a contraband substance in the pod office within view of other officers represented a challenge to staff morale.

Disciplinary Action

35. Associate Warden Medina issued a letter to Complainant dated June 14, 2006 in which he reviewed the results of the Rule 6-10 meeting and his analysis of the incident.

36. Mr. Medina found that Complainant had violated the following provisions of the DOC administrative regulations ("AR") or other DOC policy documents:

a. AR 1450-01 (III) (B) - Conduct Unbecoming: Any act or conduct either on or off duty, which negatively impacts job performance, not specifically mentioned in administrative regulations, which tends to being the DOC into disrepute or reflects discredit upon the individual as a correctional staff member.

b. AR 1450-01 (M) - Staff shall avoid situations which give rise to direct, indirect, or perceived conflicts of interest.

c. AR 1450-01 (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 the staff, is prohibited. Staff will exercise good judgment and sound discretion.

d. AR 1450-01 (IV) (W) – All incidents which constitute a felony or appear to be of a criminal nature, or which involve staff/offender relationships shall be referred immediately to the [Inspector General] for review, prior to inquiry or investigation. In such cases, the IG will make the decision as to when the subject of the inquiry or investigation is notified of the details of the misconduct. The executive director may require than an investigation be conducted by other DOC staff not assigned to the IG's office, or by an outside agency.

e. AR 1450-01 (IV) (HH) – Staff shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures, and administrative instructions. Staff shall not aid, abet, or incite another in violation of administrative regulations, procedures, operational memorandums, rules, duties, orders, or procedures of the DOC. Failure to obey any lawfully issued order by a supervisor, or any disrespectful,

mutinous, insolent, or abusive language or actions toward a supervisor is deemed to be insubordination.

f. AR 1450-01 (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 action and/or disciplinary action.

g. AR 1450-01 (AAA) – All staff are prohibited from using or possessing tobacco, tobacco-related products, or tobacco substitutes in the workplace, as per AR 100-04, Tobacco Use in Buildings and Vehicles.

h. AR 100-04 (IV)(A) – All staff and offenders are prohibited from using or possessing tobacco, tobacco-related products, or tobacco substitutes in the workplace. Tobacco-related materials are considered to be contraband.

i. High Security Management System Mission Statement – AT/IA 100-18 – Describing the mission of the facility as including "[t]o preserve order in all Department of Correction facilities by effectively managing high risk, violent, dangerous, and disruptive offenders who have demonstrated the inability to function at a less secure facility by providing a safe, secure, and humane environment." The facility mission also includes "[t]o promote a safe work environment in a culture that mentors and encourages staff professionalism, career enhancements, positive morale, and pride."

j. Organization Vision Statement – Work Environment - Creating a healthy organizational culture consisting of shared values, professional ethics, beliefs, attitudes, mutual respect, and practices; promote an interactive multi-disciplinary approach to problem solving, sound decision making and encouraging creativity and innovation in all areas of operations; and to promote and enhance a physical plant that promotes safety and security in a highly technological environment.

k. Organization Vision Statement – Staff – Empowering staff to accomplish the mission through teamwork, communication, trust; and providing tools to effectively manage offender behavior.

37. Mr. Medina concluded that these violations represented a failure to perform competently and willful misconduct or violation of departmental rules and policies that affected Complainant's ability to perform the job. Mr. Medina also considered that the conduct in this case represented a final conviction of a felony or other offense of moral turpitude that adversely affected the ability to perform the job or had an adverse effect on the agency if employment was to be continued.

38. Mr. Medina considered a variety of factors which heightened the severity of the

offense. Mr. Medina considered that Complainant was an officer of more than nine years, that Complainant had been caught in 2000 with a can of tobacco and had been given a Performance Documentation Form at that time, that Complainant had committed an act which could result in his conviction on a felony count, that Complainant had committed an act which could result in his being compromised by offenders who had smelled or seen evidence of tobacco use on his person or even suspected such use, that Complainant had been observed using contraband by other officers on his shift , and that Complainant had engaged in subterfuge in order to smuggle the tobacco past the security checkpoint and into the pod.

39. Mr. Medina was aware that Officer Valdez and other officers had stated in their incident reports that Complainant has made various threats against other staff members. Mr. Medina considered this information to be unresolved finger-pointing and did not use this information in considering whether to discipline Complainant or in deciding the level of discipline.

40. Mr. Medina concluded that the severity of the offense warranted Complainant's termination from employment. Complainant was notified by hand-delivered letter that his employment with DOC was terminated effective June 14, 2006. (Stipulated Fact)

41. Complainant filed a timely appeal of his termination to the Board. (Stipulated Fact)

Other Tobacco Incidents at CSP and other DOC Facilities

42. In his nine years at CSP, Complainant had seen approximately nine other officers at CSP over the years who had chewed tobacco in his presence. A couple of these officers were sergeants; the others were COIs. Complainant did not report any of these other officers. He knew that one of these officers had been caught with tobacco at the same time as Complainant had also been caught with a can of chewing tobacco during the security checkpoint search in 2000. Complainant presented no competent evidence that any of these other officers had been reported to, or found by, command staff to be chewing tobacco while in the facility.

43. Mr. Medina understood that two of the nine officers assigned to CSP at the time of this incident had, in the past, self-reported tobacco use at another facility during an investigation for another incident. Mr. Medina was not the appointing authority in these cases, but he believed that the tobacco use issue had been handled in the course of addressing the other incidents.

44. DOC records show that the following disciplinary actions related to tobacco possession or introduction were taken in 2004 - 2006:

a. S. Bell's employment at Sterling Correctional Facility was terminated on June 21, 2006 for introducing tobacco into the facility for an inmate, providing personal information to an inmate in order to receive payment for the

contraband, and for bringing tobacco into the facility for personal use.

b. D. Dollins' employment at Limon Correctional Facility was terminated on November 10, 2005 for accepting payments to bring tobacco and other materials into the facility for inmates and for discussing personal issues with an inmate.

c. F. Jones was assessed a reduction of pay of $100 per month for three months beginning August 1, 2005 for possessing tobacco and tobacco-related products in his lunch container while driving an inmate transport for Delta Correctional Facility. No mention was made of any prior tobacco or contraband violations.

d. P. Gusman's employment was terminated as of July 29, 2004 for bring a can of Copenhagen chewing tobacco into the Sterling Correctional Facility for an inmate, arranging for payment for that tobacco, and providing the inmate with an address to which payment would be sent .

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 Rule 6-12, 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) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) 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. *Kinchen*, 886 P.2d at 708. 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.

There was no dispute at hearing that Complainant brought chewing tobacco into the facility on May 3, 2006 by hiding the can of tobacco in a coffee cup, and that he had placed an amount of the chew into his mouth while he was on duty and while he was in the pod office.

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 presents three arguments that Respondent's actions were arbitrary, capricious or contrary to rule or law.

First, Complainant argues that state law places the Director of the Division of Adult Parole in charge of correctional facilities, and the delegation of Mr. Medina's appointing authority in this matter was from the Director of Prisons, Gary Golder, and not the Director of the Division of Adult Parole. Complainant raised this argument as grounds for a C.R.C.P. Rule 50 motion for directed verdict as well as at the conclusion of this matter as a basis to invalidate Complainant's termination. Second, Complainant argues that his Rule 6-10 meeting did not meet the standards set by the Board because Mr. Medina repeatedly denied him a chance to explain his medical condition, and failed to tell him that Officer Valdez played a role in turning him in on May 3, 2006. Third, Complainant argues that others had possessed tobacco products in the facility and were not disciplined.

For the reasons discussed in detail below, none of these three arguments constitutes grounds to invalidate Complainant's discipline.

1. Mr. Medina possessed lawful appointing authority in this matter:

Complainant argues that C.R.S. §24-1-128.5(2) provides the Director of the Division of Adult Parole with authority over correctional facilities as a part of the Administrative

Organization Act of 1968. C.R.S. §24-1-128.5(2) reads, in relevant part:

> The department of corrections shall consist of the following divisions:
>
> (a) The division of adult parole, the head of which shall be the director of the division of adult parole... The division of adult parole shall supervise and control each correctional facility, as defined in section 17-1-102, C.R.S., including but not limited to the state penitentiary at Cañon City, the Colorado state reformatory at Buena Vista, and the women's correctional institution at Cañon City...

From this language, Complainant argues that it is the Director of the Division of Adult Parole who retains appointing authority over all of the employees of a correctional facility, and not the Director or Prisons. Mr. Medina, however, was provided with delegation of appointing authority from Gary Golder, DOC Director of Prisons. Therefore, according to Complainant's argument, Complainant's employment was terminated by an individual who had not been delegated appointing authority from the lawful source, thereby rendering the termination unlawful.

Complainant's argument assumes that having control over a correctional facility is the same as having appointing authority over all employees. Appointing authority, however, is defined under Board rules and state statutes in a different manner.

Board Rule 1-8, 4 CCR 801, defines the "executive directors of principal departments and presidents of institutions of higher education" as the appointing authorities for their own offices and for division directors. Division directors are, in turn, the appointing authorities for their respective divisions. *Id.*

In the case of the Department of Corrections, the state statutes create an Executive Director position as the head of the department, C.R.S. §17-1-101(1), and permit the Executive Director to establish "such other divisions and programs as are deemed necessary... for the safe and efficient operation of the department." C.R.S. §17-1-101(2). The executive director is able to "appoint the heads of such divisions," and the head of those divisions are, in turn, given the authority to "appoint such other personnel as are necessary to carry out the functions of the divisions." *Id.*

As a result, Board Rule 1-8 and C.R.S. §17-1-101(2) both reach the same conclusion as to appointing authority: the Executive Director may establish a division within the Department of Corrections and appoint a division head, and the division head, in turn, appoints the rest of the personnel necessary to carry out the functions of that division.

In the time period relevant for this matter, Mr. Golder held the position of division director as the DOC Director of Prisons. He delegated his appointing authority in writing to Associate Warden Medina for the purposes of addressing Complainant's conduct. Written delegations of authority are permitted under Board Rule 1-8.

More importantly for Complainant's argument, there is no indication that Complainant was employed by any division other than the Division of Prisons. Complainant was a Correctional Officer I who worked in a housing unit at CSP. There is no indication in the record that Complainant performed any other type of function, or had any other connection to another division within DOC other than the Division of Prisons. The record fully supports that Mr. Medina's delegated authority from Mr. Golder was the correct delegation under Board Rule 1-8 and C.R.S. 17-1-101.

Complainant's motion for directed verdict is DENIED.

2. Complainant's Rule 6-10 meeting met the applicable requirements:

a. Complainant had a meaningful opportunity to refute the charges against him and to exchange information with his appointing authority:

Board Rule 6-10, 4 CCR 801, is designed to provide an employee with the opportunity to explain his or her version of events to the appointing authority prior to the decision being made as to whether the event warrants discipline. In support of that goal, the rule requires that the appointing authority do at least three things: 1) meet with the employee to present information about the reason for potential discipline; 2) disclose the source of that information unless prohibited by law; and 3) give the employee an opportunity to respond. Board Rule 6-10. "The purpose of the meeting is to exchange information before making a final decision." Id. "Such a meeting must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself." *Shumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo.App. 1974), *overturned on other grounds*, *Lee v. Colorado Department of Health*, 718 P.2d 221 (Colo. 1986). *See also Bourie v. Department of Higher Education*, 929 P.2d 18, 22 (Colo.App. 1996)(affirming a Board finding that the complainant had been given "sufficient notice and a meaningful opportunity to refute the charges" during a pre-disciplinary meeting).

Mr. Medina testified that he believed that the requirements of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prevented him from hearing from Complainant about Complainant's medical conditions. Respondent did not cite to any provision of law which bars Complainant from offering information on his medical condition, and the undersigned has found no such authority within HIPAA and its implementing Privacy Rule.[1]

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[1] The purpose of HIPAA, and its implementing rules, is to protect patient confidentiality while permitting increased technological use of protected health information for treatment, insurance, and other uses. The Privacy Rule, which is the second of three rules created by the Secretary of the U.S. Dept. of Health and Human Services to implement HIPAA, states its purpose in these terms: "This final rule [the Privacy Rule] establishes, for the first time, a set of basic national privacy standards and fair information practices that provides all Americans with a basic level of protection and peace of mind that is essential to their full participation in their care. The rule sets a floor of ground rules for health care providers, health plans, and

Complainant argues that Mr. Medina's interruptions and attempts to prevent him from offering medical information interfered with his ability to provide necessary information to Respondent, thereby violating the requirements for a Rule 6-10 meeting. The undersigned is not persuaded that the limitations imposed by Mr. Medina created a deficient Rule 6-10 process for Complainant.

Despite the interruptions, it is clear from the Rule 6-10 meeting transcript and the testimony at hearing that Complainant was able to offer his rationale for his actions to Mr. Medina. Complainant explained that he had made a choice not to purchase one of his two medications, and then had found that tobacco use helped replace the missing medication.

It is not at all clear that more medical information would have had any more of an impact on the deliberations than already has occurred in this case. A physical or medical problem which prompts the use of tobacco is not a defense to the criminal action of introducing contraband into the facility. While it can be considered to be a mitigating factor, any mitigating influence is significantly undercut by the fact that Complainant did not attempt to alert his supervisors to his medication dilemma, or choose any other option for handling his financial issues with his medications, before deciding to commit an act which could be charged as a felony offense.

Additionally, it is not clear that offering more details about his actions would have been helpful to Complainant during the Rule 6-10 meeting. Complainant took an unambiguous stance during the Rule 6-10 meeting that the only times he introduced tobacco into the facility were the two times that he had been caught. The self-medication explanation, however, raises questions about that statement because it would seem that self-medicating with tobacco would be something that Complainant would do more than once after he stopped taking Effexor. In his interview with Inspector General investigator Richard Wren, for example, Complainant told Mr. Wren that he had been bringing tobacco into the facility since September 2005 after he decided he could not afford to purchase both pain medication and Effexor, and that he did not bring it in every day but just on the days that he was having a bad day. This statement is more consistent with Complainant's explanation that he was self-medicating than Complainant's insistence that he only brought the contraband into the facility on May 3, 2006. Such information, however, would have directly contradicted Complainant's assurances that the problem was strictly limited to two

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health care clearinghouses to follow, in order to protect patients and encourage them to seek needed care." Federal Register at p. 82463 (December 28, 2000).

While HIPAA, and other medical privacy legislation, may create complications for Respondent by creating a need to comply with consent, storage, or disclosure restrictions for confidential medical information, Respondent cannot shy away from permitting an employee to volunteer such information in the course of a disciplinary inquiry. To do so imperils the primary goal of a Rule 6-10 meeting which is to provide an employee with a fair chance to refute potential disciplinary charges before the final decision on discipline is made.

occurrences.[2] As a result, it is doubtful that more detailed medical information would have actually been provided by Complainant if given additional opportunity to do so, or, if such information had been offered, would have been more helpful to Complainant than harmful.

In the final analysis, the fundamental requirement for a Rule 6-10 meeting is that Complainant be given a meaningful opportunity to refute the charges against him or her, and not a test of whether each and every statement which could have been made by Complainant has been made. This was not a case in which there was a significant dispute about the offending behavior. Complainant was able to explain his reason for bringing contraband into the facility, and that explanation was understood by the appointing authority. It not clear that additional medical information would have assisted Complainant, and there is a significant possibility that such information would have either not been offered or would have contradicted other information offered by Complainant. Moreover, Complainant offered no significantly different information other than more explanation of his back and stress problems which he could have discussed if Mr. Medina had not interrupted him. Under such circumstances, Complainant 's Rule 6-10 meeting meets the relevant criteria as providing a meaningful opportunity to refute the allegations against him.

b. Mr. Medina disclosed the source of his information:

Complainant also contends that he should have been told during the Rule 6-10 process that Officer Valdez was the individual who alerted Capt. Jaramillo to Complainant's use of tobacco.

Board Rule 6-10 specifically requires the appointing authority to disclose the "source of the information unless prohibited by law." This disclosure requirement has the effect of promoting a full discussion of the allegations under consideration because it permits employees to explain, if possible and necessary, any conflicting biases or other information about the source that an appointing authority should understand and consider before making a final decision. The rule requires disclosure of the source, however, and not necessarily the disclosure of every person with knowledge of the incident or of witness statements. *See Bourie*, 929 P.2d at 22 ("Neither the regulation [prior Board Rule 8-3-3-(D)] nor fundamental due process requires that the appointing authority provide an employee with the reports, statements of witnesses, or other evidence relating to the matter prior to the initial meeting").

In this case, Complainant was informed that Capt. Jaramillo was the source of the information and Officer Valdez's contribution was not mentioned.

This disclosure was not unreasonable under the facts of this case, although it does

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[2] Given that Mr. Medina did not terminate Complainant's employment based upon a finding that he had a pattern of introducing contraband into the facility, or a finding that Complainant had been disingenuous with him during the Rule 6-10 meeting, the Board does not need to decide the issue of whether Complainant brought tobacco into CSP on other occasions than May 3, 2006 and the incident in 2000.

not necessarily reflect the best practice for appointing authorities. Capt. Jaramillo was Mr. Medina's source of information that: 1) Complainant had tobacco in his mouth when she confronted him; 2) that Complainant provided her with a can of chewing tobacco from his lunch box when she asked him about the tobacco; 3) that Complainant admitted to her that he had brought tobacco into the facility and used it while on duty; and that 4) Complainant had authored a written statement admitting as much. While it is true that Officer Valdez played a role in initiating Capt. Jaramillo's investigation by reporting his observations, it was Capt. Jaramillo who provided Mr. Medina with the evidence to which Mr. Medina referred during the Rule 6-10 meeting. Additionally, it is important to note that Complainant was not contesting that he had placed chewing tobacco in his mouth while he was in the pod office, and that fact was the relevant fact Officer Valdez had reported to Capt. Jaramillo.

Under the relatively simple factual circumstances of this case, disclosing Capt. Jaramillo as the source of Mr. Medina's information that Complainant had possessed and used a tobacco product was consistent with the terms and purpose of Rule 6-10's disclosure requirement.

3. Complainant's knowledge that there were other staff members who chewed tobacco at CSP does not render Respondent's actions in this case arbitrary or capricious:

Complainant's evidence that he had seen nine other of Respondent's employees chewing tobacco on the job at CSP without apparent consequence does not support Complainant's contention that he is being unfairly and arbitrarily singled out for punishment.

The competent and persuasive testimony offered at hearing was cursory at best and provided little information from which to compare Complainant's circumstances to the circumstances of these other individuals. *See e.g. St. Croix v. University of Colorado Health Sciences Center*, __ P.3d __, 2007 WL 1438678 at *5 (Colo.App. May 17, 2007)(holding that, in order to carry the burden of showing that a company has acted in a manner contrary to an unwritten policy, "the plaintiff must show that the employees who were treated differently were similarly situated to the plaintiff in all relevant respects"). From the evidence that was adduced, however, it appears that these other employees have not been reported to command staff for tobacco use while on shift. That difference alone explains why these nine other officers have suffered no known consequences for their use of chewing tobacco.

Complainant's evidence that nine other officers at CSP have chewed tobacco while on shift does not create a reason to find that Respondent has acted in a manner which is arbitrary, capricious or contrary to rule or law in disciplining Complainant for such use.

4. Respondent correctly concluded that Complainant's actions violated several departmental regulations:

Complainant argues that Mr. Medina has attempted to amplify the events in this

case out of proportion to what actually occurred. As part of that argument, Complainant cites to the sheer number of regulation violations cited by Mr. Medina, and to the inapplicability of many of these citations to the facts of this case.

In his disciplinary letter of June 14, 2006, Mr. Medina listed several citations to rules that are not valid descriptions of Complainant's actions in this case. He cited, for example, to the rule against creating a conflict of interest. DOC regulations do not define conflict of interest, but the most common understandings of this term lends support to Complainant's argument that this reliance was misplaced. *See e.g. Black's Law Dictionary*, 6th Edition (1990) at p. 299 (defining a conflict of interest as a "[t]erm used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them... Generally, when used to suggest disqualification of a public official from performing his sworn duty, term 'conflict of interest' refers to a clash between public interest and the private pecuniary interest of the individual concerned... A situation in which regard for one duty tends to lead to the disregard of another")(internal citations omitted). Nothing in the record suggests that a conflict of interest was present in this matter.

Mr. Medina also cited to AR 1450-01(IV)(W), which details the procedure to be followed by the facility staff in referring a potential felony matter to the Inspector General's office. The regulation requires that a subject employee not be informed of the referral at the time it is made. There was no plausible explanation provided of how Complainant could have been in violation of such an obligation, particularly given that the regulation obviously contemplates that Complainant would have no role in the referral process.

Additionally, Mr. Medina's citation to the rules concerning felony convictions were premature; at the time of the Rule 6-10 meeting and the disciplinary decision, Complainant had not been convicted of any crime related to this matter.

Respondent's conclusion, however, that Complainant had willfully violated the rules and regulations of the facility, and had demonstrated a failure to perform competently, is well grounded in several of the other rules cited by Mr. Medina. Complainant violated the specific prohibitions against bringing tobacco and tobacco products into the facility. *See* AR 1450-1 (AAA) and AR 100-04 (IV)(A). Complainant's actions constituted a failure to obey DOC regulations, in violation of AR 1450-01(IV)(HH). His conduct also jeopardized the integrity or security of the Department and called into question the staff's ability to perform effectively and efficiently, and casts doubt upon the integrity of the staff, in violation of AR 1450-01(IV)(N). Complainant additionally engaged in subterfuge in order to hide the contraband as it went through the security checkpoint, which is strong and persuasive evidence of willful misconduct.

Respondent's conclusion that Complainant's actions constituted violations of multiple standards of conduct for correctional officers and proper grounds for the imposition of discipline was not arbitrary, capricious, or contrary to rule or law.

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

Complainant argues that termination from employment for the introduction of tobacco contraband for his own personal use is excessive and outside the range of reasonable alternatives. Several factors, however, differentiate this rule violation from other rule violations

While Complainant may have felt that the fact that some other officers chew tobacco meant that his violation was of a lesser magnitude, the fact still remains that bringing tobacco products into the facility is a felony criminal offense and not simply an administrative rule violation. State law defines the crime of introducing contraband in the second degree if a person knowingly and unlawfully introduces (or attempts to introduce) contraband into a detention facility. In a facility of the department of corrections, contraband is specifically defined to include "any cigarettes or tobacco produces, as defined in section 39-28.5-101." Introduction of contraband in the second degree is a class 6 felony. C.R.S. §18-8-204(1)(a), (2)(m), and (3). The criminalization of this conduct moves this particular type of violation far above the seriousness of other types of rule violations.

Complainant was also well aware that he was not to have brought a contraband tobacco product inside the facility. He had been caught trying to enter the facility with chewing tobacco on a prior occasion. Additionally, and perhaps most importantly, his knowledge of the problem is demonstrated by the fact that he knew to place the can of chew into a coffee cup that he expected would not be searched on the way into the facility. The actions taken to fool the system create greater culpability in this case than in other instances.

Finally, Complainant did not disclose his conduct until after he was caught with the chew in his mouth. This is not a situation where Complainant admitted to his unlawful conduct of his own volition. The disclosure here was prompted by Capt. Jaramillo's command to Complainant not to take a drink of water but to open his mouth.

Mr. Medina considered all of these factors in reaching his decision to terminate Complaint's employment.

Complainant argues that the history of DOC terminations for tobacco related offenses from the last few years shows that the other officers who have been terminated were also accused of facilitating tobacco introduction of inmates, and that no other officer was terminated from employment simply for personal use of tobacco. It is correct that the evidence introduced at hearing shows that other officers who were terminated from employment for offenses involving tobacco were involved in the introduction of contraband for inmates, as well as personal use. This evidence does not establish, however, that termination is only appropriate if an officer is caught introducing contraband for inmates.

Complainant points to the example of the officer who was fined for possession of tobacco in a transport vehicle rather than fired. The disciplinary letter in that case,

however, does not indicate whether the infraction was Officer Jones' first or second offense; the absence of any such information implies that it is a first offense. If so, then the treatment of Officer Jones and Complainant are comparable. Complainant, in fact, has received the more favorable treatment, given that he received no more than a Performance Document Form for his first offense.

Complainant also presented testimony that he had seen a number of his colleagues with tobacco chew on the job, and that none of them had been fired and criminally prosecuted for the possessions. Of all of the information that Complainant presented, however, Complainant presented no evidence that any of these co-workers had been caught smuggling tobacco products into the facility, or had been reported for having done so. Mr. Medina knew of two of the individuals who he believed had admitted to possessing tobacco while they were under investigation of other events. From the limited information presented at hearing, however, there was also no persuasive indication that, once the possession reached the knowledge of management, such an infraction was not taken very seriously.

The credible evidence in this case demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as for Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The choice of termination of employment for conduct which was chargeable as a felony offense under state law was within the range of reasonable alternatives available to Mr. Medina.

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. C.R.S. §24-50-125.5 and Board Rule 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 8-38(B)(3), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted in this case. Complainant did not prevail at hearing, and did not demonstrate that any action taken by Respondent was frivolous, instituted in bad faith, maliciously, as a means of harassment, or was otherwise groundless.

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 24th day of September, 2007.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of September, 2007, 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:

Andrew Newcomb
Frank & Finger, P.C.
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437-1477

and in the interagency mail, to:

Vincent E. Morscher
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Jane T. Sprague
Andrea C. Woods

(rev'd. 5/07)