State Personnel Board, State of Colorado

Case No. 2000 B 140

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Denise Marie Ortiz,

Complainant,

v.

Colorado Department of Corrections,

Respondent.

Hearing on this matter was held on June 16, 2000 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203.

MATTER APPEALED

Complainant, Denise Marie Ortiz ("Complainant" or "Ortiz") appeals her disciplinary reduction in pay of $50 for three months by the Department of Corrections ("Respondent" or "Skyline").

For the reasons set forth below, the actions of Respondent are reversed pursuant to CRS 24-50-125 (1999).

PRELIMINARY MATTERS

Respondent was represented by Coleman Connolly, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Respondent's Advisory Witness for the proceedings was Warden Donice Neal, Department of Corrections, Skyline Correctional Center.

Complainant was represented *pro se.*

1. Procedural History

Complainant filed her Notice of Appeal on May 2, 2000. Complainant appealed her disciplinary reduction in pay. In the Notice of Appeal, Complainant argues that the allegations made against her were false and that her discipline was retaliatory for her reporting incidents of sexual harassment.

Complainant's Prehearing Statement was filed on June 1, 2000. Respondent's Prehearing Statement was filed on June 2, 2000 and a second

Prehearing Statement was filed June 6, 2000. A Notice of Compliance with Rule R-8-55 was filed on June 15, 2000.

2. Witnesses

Respondent called the following witnesses in its case-in chief:

Name	Position and Location
Donice Neal	Warden Skyline Correctional Center
Melissa Neff	Corrections Officer Skyline Correctional Center

No rebuttal case was presented by Respondent

Complainant called the following witnesses in its case-in-chief :

Name	Position and Location
Denise Marie Ortiz	Complainant

3. Exhibits

The following exhibits were admitted by Respondent during its case-in-chief:

Exhibit #	Type	Comments
1	Disciplinary Letter April 19, 2000	No objection
2-C	Admin. Regulation 1450-05 March 1, 2000	No objection

During Complainant's case-in-chief, the following exhibit was admitted:

Exhibit #	Type	Comments
A	Letter to W. Neal December 10, 1999	Stipulated to admissibility

4. Sequestration Order

A sequestration order was entered. The attorneys were advised to notify all witnesses that such an order was put in place and that the witnesses were not to discuss their testimony with each other until completion of this matter.

ISSUES

For the purposes of this administrative hearing, the issues are characterized as follows:

1. Did the Complainant commit the acts for which discipline was imposed?

2. Was the discipline imposed within the reasonable range of available alternatives to the appointing authority?

3. Were the actions of the Respondent arbitrary, capricious, and/or contrary to rule or law?

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

I. Background of Department of Corrections, Skyline Correctional Center and Complainant.

1. Skyline Correctional Center ("Skyline") is one of four facilities of the Canon Minimum Centers. The other facilities include Arrowhead, Four Mile Correction Center, and a pre-release center. (Neal). The facilities employ about 450 individuals and contain approximately 1330 inmates.

2. Skyline is a relatively open facility, compared to the other facilities, which is demonstrated by the lack of razor wire and fencing. (Neal). The facility has a dining hall which seats 96 inmates at tables of 4 each. The dining hall is divided. Inmates move through one side of it, through a serving line, and are then free to be seated. Corrections officers monitor the dining hall at the entry door. (Neff). Inmates work in the cooking area even when other inmates are not present.

3. Warden Donice Neal is the appointing authority over the four institutions including Skyline. She has been in the corrections industry for approximately 20 years and has been with the Canon Minimum Centers, as Warden for 1. 5 years.

4. In addition to her years with the Department of Corrections, Neal's education includes a Bachelor of Science from Adams State College, in which she majored in Psychology. She received a Master of Science degree from Trinity University with a major in clinical psychology. (Neal).

5. The Department of Corrections has adopted a policy with regard to

unlawful employment practices:

Regulation	Subject/Relevant Portions:
1450-05	Unlawful Discrimination/Sexual Harassment. • Purpose of the AR is to ensure a workplace free from sexual harassment; to inform all staff of their rights to a workplace without sexual harassment; and to establish standards preventing harassment. • Workplace harassment is defined as a course of conduct which results in an intimidating, hostile, or offensive environment. • In determining harassment, whether in comments or conduct, where inappropriate, the behaviors will be reviewed from the perspective of a *"reasonable or average" person standard*. (emphasis added).

II. Events Leading up to Discipline.

6. An investigation regarding sexual harassment at Skyline was being conducted by Warden Neal in the Fall of 1999. She assigned Associate Warden Susan Jones to conduct the investigation. (Neal). During the investigation, a number of interviews were conducted with various members of the Canon Minimum Centers staff. (Neal).

7. As a result of the investigation, a number of complaints surfaced.

8. In November 1999, Complainant discussed concerns about Sgt. Gaffey's behavior with Lt. Wittington. (Ortiz). She felt Gaffey's actions were sexually harassing because Gaffey would touch her hands and pretend to spank her. (Ortiz). Ortiz wanted to keep this issue informal in the hopes of de-escalating any conflicts.

9. In December, Complainant sent correspondence to Warden Neal with regard to potential violations of A.R. 1450-05. In that correspondence, Ortiz identified the following incidents:

- Comments from Sergeant Gaffey calling Ortiz "cutie."
- Gestures in which Sergeant Gaffey was to spank Ortiz.
- Shoulder rubs from Sergeant Gaffey to Ortiz.
- Sergeant Gaffey told Ortiz to "fuck off" and that he would retaliate as a result of the Sgt. not being able to conduct rounds with Ortiz.
- Ortiz had been accused of grabbing the genitals of fellow corrections Officer Beatty.
- Ortiz had been accused of an unprofessional relationship with an inmate by Officer Beatty.
- Officer Beatty had reported during the investigation of sexual harassment that he and Ortiz had felt each other's genitals.

(Ex. A).

10. As a result of the investigation, a number of personnel actions were taken, including:

Party	Action

• Sergeant Gaffey	• Received discipline through a reduction in pay of $100 for 3 months.
• Officer Beatty	• Resigned.
• A Lieutenant at Skyline	• Received corrective action
• A 2nd Sgt. At Skyline (Neal).	• Received a letter of counseling

11. The investigation revealed two incidents involving Complainant. First, Complainant had used a water bottle once to squirt an inmate. (Neal, Ortiz).

12. Neal considered this unprofessional conduct because there is an expectation that staff will conduct themselves professionally in front of inmates in order to model appropriate behavior. This was also considered unprofessional because given the lack of freedoms of inmates, that using a water bottle in this fashion was horseplay, and it always put inmates at a disadvantage because they cannot retaliate without threat of serious reprisals from corrections staff.

13. Complainant admitted having committed this behavior. (Ortiz).

14. A second incident was also identified in the investigation which occurred in the Skyline dining hall.

15. The second incident occurred in Fall 1999 with Complainant, Officer Beatty, Officer Neff, and Lt. Wittington in the dining hall at Skyline. (Neal, Neff).

16. Officer Neff, a Corrections Officer I, had been with Skyline for 3 years. She had a Bachelor of Science in Criminology from the University of Southern Colorado and had worked at Pikes Peak Community College prior to beginning with DOC.

17. While at Skyline, Neff received similar assignments as Ortiz. In Fall 1999, Neff was on duty with Ortiz and both were assigned to monitor the dining hall. Neff was at the doorway, watching for inmates to enter. She could see Complainant, Sgt. Beatty and Ortiz. (Neff). No inmates had entered the seating area as they were just arriving at the serving line. (Ortiz).

18. Ortiz and Beatty were joking around near one of the tables. Beatty had a habit of annoying Ortiz by “flicking” his fingers at her and making contact with her. (Ex. 1, Ortiz, Neff).

19. At one point, Ortiz moved towards Beatty and he hopped back. It appeared to Neff that Ortiz had moved to grab Beatty’s genitals but she did not see any contact. (Neff).

20. None of the staff indicated that inmates witnessed the incident.

21. Neff provided this information during the course of the investigation and did not feel it necessary to report it previously.

22. Based on the investigation, Neal convened an R-6-10 meeting for Ortiz on April 3, 2000, two months after the incident. (Ex. 1). Neal outlined the following objectionable behavior by Complainant:

- Spraying inmate with water bottle;
- Grabbing a fellow officer in the genital area;
- Performing several sexually provocative behaviors in front of male staff;
- Making sexually loaded comments; and
- Touching of a food service employee.

23. Neal concluded that such behavior constituted violations of **AR 1450-1,** Staff Code of Conduct, including: conduct unbecoming; engaging in prohibited horseplay; not promoting mutual respect, assistance or consideration within DOC; failing to comply with DOC regulations; and workplace harassment. (Ex. 1).

24. Neal further concluded Complainant violated **AR 1450-05**, Unlawful Discrimination/Sexual Harassment and that the acts were serious and flagrant so as to warrant discipline. She believed the behavior was serious because the acts compromised safety and put DOC is disrepute.

25. Neal concluded that Complainant violated R-6-9 and failed to comply with standards of efficient service or competence and willful misconduct of agency regulations.

26. Neal's conclusions were based, in part, on the incident in the dining hall in which she states there were 2 witnesses and Beatty. She noted in the disciplinary letter that it made no difference if Ortiz actually grabbed Beatty or merely attempted to. Neal concludes that inmates *could* have seen the incident and food service inmates *could* have seen the behavior. (Neal, Ex. 1).

27. Complainant is a relatively new member of the Dept. of Corrections workforce. (Neal). She had a good record of performance (Ortiz).

28. Board Rule R-6-2, 4 CCR 801 (2000) provides that a certified employee shall be subject **to corrective action before discipline** unless the act is so **flagrant or serious** that immediate discipline is proper. It provides that:

> The nature and severity of discipline depends upon the act

> committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

29. Board Rule R-6-6, 4 CCR 801 (1999) provides, in part:

> The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omissions, 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.

DISCUSSION

Certified state employees have a property interest in their positions and may only be disciplined for just cause. *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 (1999) 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 disciplinary action of a certified state employee**, the burden of proof is on the agency, not the employee**, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

> Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge*, *Inc.,* 972 P.2d 707 (Colo. App. 1999). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the

following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

In *Bodaghi v. Department of Natural Resources*, 2000 WL 276913 (Colo. 2000), the Supreme Court of Colorado held:

> The findings of an administrative tribunal as to the facts shall be conclusive if supported by substantial evidence. See § 24-4-106, 7 C.R.S. (1999). Even when evidence is conflicting, the hearing officer's findings are binding on appeal, and a reviewing court may not substitute its judgment for that of the factfinder. See: *Glasmann v. Department of Revenue*, 719 P.2d 1096, 1097 (Colo.App.1986). An agency's factual determination reasonably supported by the record is entitled to deference. See: *Department of Revenue v. Woodmen of the World*, 919 P.2d 806, 817 (Colo.1996); *G & G Trucking Co. v. Public Utils. Comm'n*, 745 P.2d 211, 216 (Colo.1987).
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> > The credibility of witnesses and the weight to be accorded their testimony lies within the province of the agency as trier of the facts. See: *Goldy v. Henry*, 166 Colo. 401, 408, 443 P.2d 994, 997 (1968). Where the record supports the findings of the factfinder, the court of appeals is not at liberty to make an independent evaluation of the evidence and substitute its judgment for that of the factfinder. See: *Linley v. Hanson*, 173 Colo. 239, 242-43, 477 P.2d 453, 454 (1970). As stated *in Goldy v. Henry:*
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> > [T]he credibility of witnesses as well as the weight of the testimony are peculiarly within the province of the commission to whom a statute entrusts the fact finding process. When a conflict in the evidence exists, it is not within the power of a reviewing court to substitute its judgment for that of the fact finding authority as to the weight of the evidence and the credibility of witnesses.

All of these factors were considered in evaluating witnesses' testimony. Additionally, all evidence introduced was considered.

1. The Acts for Which Discipline was Imposed.

With regard to the incident in the **Skyline dining hall and other matters of sexual harassment**, Respondent has failed to demonstrate by a preponderance of evidence that the acts for which discipline was imposed occurred. In this matter, only a limited amount of evidence, both written and testimonial, was provided in Respondent's case. Only the appointing authority, Warden Neal and Officer Neff testified on behalf of Respondent. The investigator did not testify. The investigative report involving the incidents at Skyline was not introduced. None of the other witness to the dining hall incident testified nor was any other evidence introduced regarding other behaviors of Complainant (with the exception of the disciplinary letter).

The only individuals who testified who were *at the dining hall* during the interaction with Sgt. Beatty were Officer Ortiz and Officer Neff. Both have very different accounts of the incident. During her testimony, Ortiz claimed everyone had been sitting down, Sgt. Beatty had stood up and moved behind her as if to "flick" her with his fingers, and she attempted to stop him by moving her elbow lightly into his groin as she was seated. This account does not match Officer Neff's rendition of the event which was that the parties were all standing and that Officer Ortiz simply reached over and grabbed Sgt. Beatty's groin. During her testimony, Officer Neff said Sgt. Beatty hopped or "jumped" back, but she did not observe Officer Ortiz actually grab Sgt. Beatty. The other witnesses to the event did not testify, Sgt. Beatty or Lt. Wittington.

While the appointing authority stated she interviewed a number of individuals associated with the incident, reviewed the investigative report, and considered Complainant's behavior in the context of the previously alleged sexual harassment, only the appointing authority testified. Nothing else was introduced to support Respondent's position. The contradicted testimony of Officer Neff and the appointing authority's testimony in this case is not enough to overcome Respondent's burden of proof.

Testimony reflects that a number of other DOC employees received either corrective actions or discipline. It is unclear why these personnel actions were administered although they are presumably linked to this incident or incidents referenced in Complainant's letter to the Warden. It does indicate that other individuals engaged in some types of behavior which warranted the personnel actions, and it demonstrates that there were personnel issues at Skyline, but it does not support Respondent's burden that Complainant participated in any prohibited behavior and violated AR 1450-05.

With regard to the use of the **water bottle**, Complainant admits that she squirted an inmate with the bottle once. This constitutes a violation of AR 1450-1, Staff Code of Conduct, in that it may amount to horseplay as noted in the

disciplinary letter. This evidence is un-rebutted. Respondent has met its burden of proof that this act for which a personnel action was imposed occurred.

2. The Discipline Imposed was Not Within the Reasonable Range of Alternatives pursuant to Board Rule.

State Personnel Board rules allow an appointing authority to impose both corrective and disciplinary actions. See: Board Rule R-6-2. In applying this rule, an appointing authority is first **required** to determine if the acts involved are so serious or flagrant as to warrant discipline instead of corrective action. Next, the appointing authority is **required** to examine the acts involved to determine the nature and severity of any discipline. An appointing authority is to weigh individual factors such as outlined in Board Rule R-6-6 when administering corrective or disciplinary action. Thereby, the rules allow an appointing authority to distinguish incidents on a case by case basis and administer a measured level of corrective action or discipline.

In this instance, Respondent has not met its burden of proof that the act involving the water bottle was so serious and flagrant as to warrant the imposition of a reduction in pay for three months. It must be noted that no evidence was introduced regarding the details of this event or the circumstances involved. The only evidence with regard to the seriousness of the act of Complainant was that squirting the water bottle on an inmate compromised security because inmates would have no way to "strike back" thus causing tensions to build amongst inmates and DOC staff. It is clear that Warden Neal has a background in corrections and psychology. Yet, it is unclear why Ortiz' behavior would create a cause and effect relationship with lack of security. Neal simply testifies that it would create a security problem and that such behavior puts DOC in disrepute with the public. Given that the behavior only happened once and no other evidence was introduced, Respondent failed to show by a preponderance of evidence that the behavior should be viewed as so serious or flagrant as to warrant discipline.

As a result, pursuant to Board Rule, corrective action should have been imposed and the employee given an opportunity to correct her behavior. By failing to do so, Respondent acted in violation of rule.

CONCLUSIONS OF LAW

1. Complainant committed one act, the use of a water bottle on an inmate, and violated the Department of Corrections Administrative Regulation 1450-1. Respondent did not meet its burden of proof and thus it must be concluded Complainant did not violate Administrative Regulation 1450-05 regarding unlawful discrimination or sexual harassment.

2. The discipline imposed was not within the reasonable range of available alternatives to the appointing authority. The appointing authority misapplied Board rules with regard to progressive discipline, by not fully accounting for the severity and nature of Complainant's act and the level of discipline imposed as defined by Board Rule R-6-2 and R-6-6, 4 CCR 801.

ORDER

Respondent's disciplinary action is reversed pursuant to CRS 24-50-125 (1999). Complainant is entitled to any amounts previously withheld from her pay related to this matter.

Dated this 31st day of July, 2000

G. Charles Robertson
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, CO 80203

Certificate of Service

This is to certify that on the _____ day of _____, 2000, I placed a true copy of the **foregoing Initial Decision of the Administrative Law Judge and Notice of Appeal Rights** in the United States mail, postage prepaid, addressed as follows:

Denise Marie Ortiz
1702 East 8th Street
Pueblo, CO 81001

and by interdepartmental mail to:

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