State Personnel Board, State of Colorado

Case No. 2000 B 130

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GARY KOVERMAN,

Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO BUREAU OF INVESTIGATION,

Respondent.

Hearing on this matter was commenced on July 5, 2000 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. Hearing in this matter continued on July 6 and concluded on July 7, 2000. The record in this matter was kept open until July 17, 2000 for reasons cited below. As a result of post-hearing pleadings, as described below, this Initial Decision was not issued until September, 2000.

MATTER APPEALED

Complainant, Gary Koverman ("Complainant" or "Koverman") appeals his disciplinary termination by the Department of Public Safety, Colorado Bureau of Investigation ("Respondent" or "CBI").

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

PRELIMINARY MATTERS

Respondent was represented by John A. Lizza, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Respondent's Advisory Witness for the proceedings was Peter Mang, Deputy Director, CBI.

Complainant was represented by Douglas Jewell, Esq., Bruno, Bruno, & Colin, P.C., 1560 Broadway, Suite 1099, Denver, CO 80203. Complainant was present for the evidentiary proceedings.

1. Procedural History

A. Pleadings

Complainant filed his Notice of Appeal on April 10, 2000. Complainant appealed his disciplinary termination from CBI because: the grounds for the discipline were unfounded and unsupported in facts; the discipline imposed was a penalty disproportionate to the alleged offense; CBI failed to consider Complainant's previous performance with CBI; the allegations were based on information illegally obtained; CBI's policies and procedures are vague and ambiguous; and that Complainant's actions comported with CBI policy.

Complainant moved to close the hearing to the public in order to prevent publicity regarding the case and to preserve the jury pool in a pending criminal matter related directly to the events associated with the imposition of discipline. The motion was denied on May 19, 2000 based on section CRS 24-6-402 (1999) and *Lanes v. State Auditor's Office and State Personnel Board*, 797 P.2d 764 (Colo. App. 1990).

On June 29, 2000, Complainant filed Notice of Intent to Assert Fifth Amendment Privilege as a result of a pending criminal proceeding. No responsive pleading was filed by Respondent.

At the conclusion of the hearing, based on the issues raised in this matter, the Administrative Law Judge ruled that the record would remain open until July 17, 2000 at which time, the parties were to have submitted a Case List of the relevant cases associated with the constitutional issues in this matter. Both parties submitted a Case List by July 17, 2000. At such time, the record was deemed closed.

B. Telephonic Testimony

Complainant indicated at the beginning of the hearing that he had trouble locating one particular witness, Vance Patterson. At the time of hearing, it was believed that Patterson was in California. Complainant requested that the record be kept open until Patterson could attend the hearing in person. The ALJ determined that telephonic testimony would be sufficient and that the record did not need to be left open. Having raised an objection, Complainant attempted to have Patterson available by telephone. Patterson was never available.

2. Witnesses

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

Name	Position and Location
Peter Mang	Deputy Director CBI, Denver
Robert Sexton	Agent-In-Charge CBI, Denver
Kevin Humphreys	Agent CBI, Montrose
Tom Netwall	Agent-In-Charge CBI, Denver

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

Name	Position and Location
Dennis Mooney	Agent-In-Charge CBI, Montrose
Sam Marso	Intern, Material Handler CBI, Montrose
Peter Mang	Deputy Director CBI, Denver

3. Exhibits

The following exhibits were admitted by Respondent during its case-in-chief, unless otherwise noted:

Exhibit #	Type	Comments
1	Letter of Suspension Cantwell to Koverman 3/20/00	No objection
2	Letter of Delegation Cantwell to Mang 8/1/99	No objection
3	Notice of R-6-10 mtg. 3/22/00	No objection
4	Transcript of R-6-10 mtg. 3/28/00	No objection
5	Notice of Disciplinary Action Mang to Koverman 3/31/00	No objection
6	Transcript of Koverman Interview 3/20/00	No objection
7	Last Page of Transcript of Report	No objection
8	CBI Report of Investigation AIC Sexton 3/23/00	No objection
11	Tape of Koverman Interview 3/20/00	No objection

The following exhibits were introduced by Complainant during its case-in-

chief:

Exhibit #	Type	Comments
A	Report of Investigation: Re: Surveillance Camera 3/25/00	Stipulated into evidence
B	Report of Investigation: AIC Dennis Mooney 3/25/00	Stipulated into evidence
D	Letter re: Drug analysis Bell to Lab No date	Stipulated into evidence
E	Case Mgr. Check off list 3/20/00	Stipulated into evidence
F	Forensic Lab. Internal Inventory	Stipulated into evidence
H	Montrose Police Dept. Case Supplement 3/20, 3/22/00	
L	CBI Report of Investigation K. Humphreys 3/20/00	No objection
P	Search Warrant, affidavit Koverman Office 4/5/00	Stipulated into evidence
Q	Inventory of Home Search 3/21/00	Stipulated into evidence
R	Document describing Items tested	No objection
S	CBI Report of Investigation Netwal 4/3/00	Stipulated into evidence
T	CBI Official Request for Lab Examination	Stipulated into evidence
W	CBI Lab Report 3/27/00	Stipulated into evidence
X	CBI Forensic Lab Quality Manual	No objection
Y	CBI Chemistry/Trace	No objection
AA	ASCLAD Site Audit (portions)	Stipulated into evidence

4. Sequestration Order

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

5. Pending Motions

On August 29, 2000, one day prior to the statutory “due” date and issuance of the decision, Complainant filed a Motion to Consider Newly Discovered Evidence. The administrative law judge provided Respondent 10

days to respond to Complainant's motion in an order dated August 29, 2000. Complainant argued that a copy of a particular CBI policy, "Policies and Procedures – Subject: Employee Incident Investigation, Disciplinary Actions" ("Investigation Policy") was not timely produced in time for the administrative hearing. Complainant maintains that this policy should have been produced pursuant to discovery requests propounded upon Respondent. Complainant maintains that Respondent agency did not properly apply this policy because the policy required an independent agent to lead any investigation leading to a disciplinary action. Complainant maintains that Agent-in-Charge Mooney, Complainant's second-level supervisor, should not have been involved with the investigation at all.

Respondent filed a Response to Motion to Consider Newly Discovered Evidence on September 11, 2000. Respondent argues, in part: (1) the administrative record has already been closed; and (2) the Investigation Policy could not have reasonably been interpreted to fall within Complainant's discovery requests. Respondent further argues that an independent agent from a different office was assigned to *lead* the investigation.

A review of the discovery requests does not fully support Complainant's contention that the policy should have been previously produced The requests ask for "evidence" used in the decision making process and which were received by Respondent. The policies were not "evidence" in any case at the time the requests were propounded, nor at any time thereafter. Moreover, the discovery requests propounded by Complainant cannot be interpreted to have contemplated a copy of the Investigation Policy. Complainant's contention that had the policy been produced in discovery, he would have known that CBI did not follow it's own policy is not persuasive based on the evidence introduced at hearing. At hearing, testimony was solicited that CBI did assign an investigator from outside Complainant's chain of command to determine any wrong-doing. Had Complainant been aware of the Investigation Policy, it would not have been persuasive in impeaching or discrediting the fact that an independent agent was assigned to investigate the matter.

Complainant's Motion to Consider Newly Discovered Evidence is **DENIED**.

ISSUES

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

1. Whether the search and seizure of items in Complainant's work area was accomplished illegally, in violation of U.S. Const. 4th Amendment, and should the items be excluded from evidence?

2. Whether the statements made by Complainant during the course of the investigation should be suppressed from evidence as violative of the U.S. Const. 5th Amendment?

3. Whether CBI's Policies and Procedures are inapplicable to Complainant's conduct because they are unconstitutionally vague and ambiguous?

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

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

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

7. Respondent argues an additional issue of whether the presumption of administrative regularity is overcome by Complainant.[1]

8. Is either party entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999)?

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

I. Background of CBI and CBI Laboratories

1. The Colorado Bureau of Investigation, an agency within the Department of Public Safety, is divided primarily into 2 sections. The organization has an investigatory support services section and a section dedicated to technology and providing support to other law enforcement agencies. (Mang). In part, CBI is responsible for investigating white collar crimes, sexual assault and crimes involving narcotics. (Mang).

2. Peter Mang, the delegated appointing authority in this matter, is Deputy Director of CBI. (Ex. 2, Mang). He has been with CBI for approximately

[1] Application of this presumption acts to shift the burden of persuasion from Respondent to Complainant. Given that Complainant's Notice of Appeal is with regard to a disciplinary action, pursuant to *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994), application of such a presumption would be contrary to law.

21 years. During that period of time, he has held a variety of positions, including being a criminal investigator II, being in charge of the Denver laboratory as Agent-In-Charge, and being Deputy Director of Investigatory Support Services.

3. Agent-In-Charge Dennis Mooney worked in the Montrose offices.

4. Agent-In-Charge Sexton was assigned to the Denver CBI office. He had been with CBI for 11 years and was the AIC for major crimes within the investigation section. He participated as a CBI agent in matters involving gaming, intelligence, and major crimes. Prior to joining CBI, Sexton was a law enforcement officer for 20 years, in part with Colorado State Patrol. (Sexton).

5. Agent-In-Charge Tom Netwall worked in the Denver offices. Netwall was Agent-In-Charge of the Denver lab of CBI. His area of expertise included arson investigation and debris, trace evidence analysis, and chemical analysis. (Netwall).

6. CBI has three labs associated with its investigations. One is in Denver, one is in Pueblo, and a third is in Montrose, Colorado. The lab in Montrose is within the general hospital. (Mang). Lead Agent Kevin Humphreys supervises the lab in Montrose. (Humphreys). Besides Koverman and Humphreys, other individuals worked in the lab including Sam Marsos, who began as an intern and subsequently joined the staff. (Marsos).

7. Humphreys has a Bachelor of Sciences in Chemistry and his area of expertise is in serology and DNA analysis. His duties include analysis of controlled substances.

8. CBI has been attempting to complete an accreditation process for its labs over the last 2 years through the American Society of Crime Lab Directors ("ASCLD"). This process involves having lab standards comport with ASCLD's standards. The national organization periodically audits the CBI labs in order to determine whether or not progress is being made towards compliance with its standards. The accreditation process allows labs to demonstrate quality assurance to the public and law enforcement. (Mang, Humphreys, Ex. AA). As part of the process, CBI had an informal audit conducted by ASCLD. The audit reflected that a number of internal policies and standards of practice had to change. For instance, it was noted that handling and preserving the integrity of evidence policies needed to have specific procedures outlining protocols. It was also noted that standards or samples of drugs needed to be of high quality and their origins traceable. (Ex. AA).

9. During its evolution towards accreditation, CBI established a CBI Forensic Laboratory Quality Manual. (Ex. X). The manual provides processes for the testing of substances as well as how to care and keep a chain of custody on all substances.

10. The labs contain evidence related to crimes and crime scenes. In addition, the labs have drug standards or samples ("standards") which consist of drugs used for comparative purposes, and used as examples in making presentations and during teaching and training. The standards can be derived from crime evidence submitted to the lab, or purchased commercially. Thus, some standards are considered secondary standards while others are considered primary standards. In other words, drug samples, from crime scenes, can be stored for comparative and demonstrative purposes in the future. (Humphreys, Netwall).

11. An up-to-date log of standards is to be kept. (Ex. Y).

12. Prior to May 1999, standards could be withheld from drugs submitted to the laboratory for criminal examination so long as the drugs were identified, appropriately placed in marked containers, and recorded in a standards inventory log. (Ex. Y). This would allow the whereabouts for all drugs entering a lab to be determined. Subsequent to May, verbal instructions had been given by Humphreys that standards were to be purchased commercially and that none were supposed to be taken from crime evidence. (Humphreys, Marso). This decision was not yet documented but was facilitated by the need to get CBI accredited and a recent audit of procedures. (Humphreys, Netwall).

13. The labs each have Standard Operating Procedures ("SOPs") which outline the means of handling and testing particular drugs. (Humphreys, Netwall). With regard to standards, the manual for Montrose provides in part:

    - Standards and controls, ***whether*** made in-house or from commercial sources such as those for drug testing, must be verified/tested prior to use.

    (Ex. X) (emphasis added). The manual does not prohibit the removal of drugs from crime evidence submitted to the lab for use as standards. It provides such removal as an option. The SOP also does not state that counting of pills or drugs is always necessary. However, an expectation of CBI was to count pills when requested to by an agency. Otherwise, amounts used for testing, and amounts left over, were tracked by weight. (Netwall).

14. Labeled standards were shared between Humphreys and Koverman while

Koverman provided training to Humphreys. (Humphreys). Those standards were sometimes kept in drawers at the workstation, as opposed to the vault. Workers within the lab area would normally and routinely enter each other's work area and borrow standards. Such was the practice prior to CBI seeking accreditation. (Humphreys).

15. To ensure that drugs are not missing, tracking documents are used and audits are conducted periodically. (Humphreys, Exs. E, F, and X).

16. Narcotics are frequently tested by the CBI labs. The Montrose lab can only be accessed with a code. The code for the Montrose lab was known by the intern, agent(s) in charge, and lab analysts. Cleaning staff had access by being accompanied by an individual with the code. (Humphreys).

17. The lab analysts' offices at Montrose are located near the work stations, and are not as accessible as the work stations. The offices and desks could be locked. (Humphreys).

18. Once a narcotic or any drug is brought to a CBI lab as evidence, a few different tests can be run to identify the type of substance. First, visual tests can be used. In addition, chemical presumption color tests can be used to identify active ingredients. Microscopic examinations can occur. Finally, testing can include using a gas chromatic mass spectrometer. This instrument performs 2 different test on drugs.

19. To test a drug on the Montrose lab spectrometer, only a small amount of the substance is needed, i.e., 10 milligrams, or about the amount that would fit on the head of a match. (Humphreys, Netwall). For example, such an amount would be equivalent to less than 1/10 of a pill of Ecstasy. (Humphreys, Netwall). Depending on the substance, the testing can take as little as ½ an hour.

20. When testing occurs, the individual conducting the test documents the sample, the weight, and the results of testing as notes. As a best practice, such notes reflect the amount of drug used for testing purposes. In Montrose, the notes are then reviewed by Humphreys, and after approved, are provided to office staff for transcription.

21. The final report on a drug's composition is provided to the law enforcement agency which initially requested the analysis. A verbal report of an analysis is sometimes made and then a final written report is completed.

22. While in the possession of CBI, narcotics are kept in an evidence vault. Standards retained are kept within a standards locker within the vault.

(Humphreys, Ex. L).

23. In March 2000, the CBI Montrose lab had 3,4 methylenedioxymethamphetamine ("Ecstasy"), in the form of tablets, in its possession for use as standards. (Ex. 8, Ex. 11, Humphreys). It also had standards for a variety of drugs, including Cocaine and LSD. (Netwall, Humphreys).

II. Events at the CBI Montrose Lab in March 2000.

24. In the first week in March, 2000, Agent-In-Charge Mooney received at least 2 telephone calls from Vance Patterson. Mr. Patterson indicated that Complainant was dating an individual named Diana Relph and that the two of them had been taking a drug known as Ecstasy.

25. On or about March 3, 2000 AIG Mooney contacted Peter Mang and informed him of the phone calls. Mang instructed Mooney to try and substantiate the allegations which included "running" down the sources, and confirming the veracity of Patterson's statements. (Mang, Mooney).

26. Mang assigned Robert Sexton of the Denver CBI office to help lead the investigation the allegations. (Mang.)

27. Mang and Sexton were concerned about the integrity of the Montrose lab and as a result, Mang decided to run an undercover operation to determine if Koverman's alleged activities had compromised the lab's integrity. (Mang, Sexton).

28. After having obtained 99 Ecstasy pills from the North Metro Task Force, the pills were provided by Sexton to Agent Tom Netwall. (Sexton, Netwall).

29. On or about March 17, 2000, Netwall verified that the drugs were in fact Ecstasy and he placed an ultraviolet marker dye on each pill. The pills were then placed in bags, with 57 tablets in one bag, and 42 in the other bag. Subsequently the pills were delivered to Montrose by AIC Sexton and provided to AIC Mooney. AIC Humphreys and Mooney double counted the pills to make sure they had an accurate count. Next, the pills were provided to the Montrose Police Department. (Sexton, Ex. H).

30. The pills were delivered to Commander Vic R. Bell of the Montrose Police Department. They were still divided into 2 bags. The bags were then delivered to the Montrose CBI Lab. (Ex. D, Ex. L, Sexton). Bell requested in writing that the drugs be analyzed and that a pill count be made.

(Humphreys, Ex. D, Ex. L).

31. Humphreys provided the pills to Koverman at approximately 2:00 p.m. on March 20, 2000 and indicated that this was a rush job. (Humphreys).

32. At approximately 3:00 p.m, Koverman provided notes to Humphreys and the conclusions of the analysis. The pills were Ecstasy. Thereupon, Humphreys noted that a pill count had not been conducted but that weights of the submitted Ecstasy had been provided. Humphreys instructed Complainant to verify with Cmdr. Bell the need to count the pills. (Ex. H, Humphreys). Koverman's notes did not reflect any portion of the pills being held for use as standards.

33. As 5:00 p.m. approached, AIC Mooney indicated it was time to leave for the evening. By this time, the pills had been returned to the evidence room. Nothing was placed in the standards locker. Koverman completed his work for the day and left the building.

34. Humphreys then conducted a pill count of the Ecstasy and it was determined that 8 pills were missing from the 2 bags. (Ex. H, Ex 5, Mooney). That information was conveyed to AIC Sexton.

35. In the parking lot, AIC Sexton confronted Complainant and queried him as to why the pill count was short by 8 pills. Sexton explained that this was part of a controlled test. (Sexton, Ex. 8).

36. Koverman responded that the pills were consumed in testing. (Sexton, Ex. 6, Ex. 8).

37. Sexton then accompanied Koverman to the lobby of the building, and conducted a pat down of Koverman for weapons and took his jacket, gun and badge. (Ex. H).

38. Sexton, Mooney, Humphreys and to some extent, Koverman, then searched Koverman's work area for the missing Ecstasy. The search included looking for test viles from the analysis process, the pills, and anything else that would demonstrate what happened to the missing 8 pills. Koverman insisted during the search that the pills had been consumed in testing. (Ex. 8).

39. Because the pills were not readily found, Sexton conducted a strip search of Koverman. Koverman consented to the search. (Sexton). Nothing demonstrated that Koverman was acting against his will in consenting to the search. Nothing demonstrated that Koverman was unable to refuse the strip search. And, nothing was found in the search. (Ex. 8). While Koverman was getting dressed after the search, Sexton continued

searching the lab.

40. In the course of the search, Sexton discovered 7 pills and some residue in a drawer at Koverman's work station. The pills were not labeled or identified in any manner. Also discovered, in an unlocked temporary storage locker (which had been supplied as part of the accreditation process) were a Cocaine standard and a Ketamine standard. (Sexton, Ex. H).

41. Having not disclosed that the pills had been discovered, an interview was conducted with Koverman by Agents Sexton and Mooney. At the commencement of the interview, Sexton provided *Miranda* warnings to Complainant verbally, and also produced them in writing. Koverman indicated he understood his rights both verbally and in writing. (Exs. 6, 8, 11, Sexton). Koverman was in custody and subject to interrogation at this point.

42. During the interview, Complainant hesitantly described how he tested the 2 bags of Ecstasy. He stated that his testing included:

    - weighing each bag, and the contents of each bag,
    - recording the weights,
    - selecting 4 pills from each bag,
    - grinding up all of the pills and performing various tests,
    - conducting a test using the mass spectrometer.

    (Ex. 6, Ex. 11).

43. Complainant asserted that as he conducted the test, two reaction viles were used in the mass spectrometer testing. At the time of the search, only one vile could be found. (Sexton, Ex. 6, Ex. 11). The other vile has never been located.

44. Sexton queried Koverman as to whether using 8 pills for testing was excessive. Koverman believed it was not excessive. (Ex. 6, Ex. 11).

45. Koverman indicated during the interview that for testing purposes, one only had to account for the weight of the drugs and did not have to do a pill count. Any amount consumed could be determined by weight. Koverman admitted he could have used less of the drug for testing but that his practice was to use more drugs in sampling/testing if a larger quantity of drugs is provided for testing, asserting that this allowed a greater "range" of testing the sample. (Ex. 6, Ex. 11, Sexton).

46. At the interview Koverman indicated he returned all the pills, except those used in sampling, to the evidence locker. (Ex. 6, Ex. 11, Sexton).

47. Koverman completed a one page written statement describing the testing process at the direction of Sexton. (Ex. 6, Ex. 7, Ex. 11, Sexton).

48. After having maintained that the 8 pills were used in testing, and after having completed the written statement, Sexton produced the pills found in the search of Koverman's work area. Koverman admitted these were the pills and that he was holding them back for standards. (Ex. 6, Ex. 11, Sexton).

49. During the interview, Koverman maintained that he did not use drugs, and that he had not used drugs with his girlfriend, Dianna Relph. After concluding the interview, Koverman was arrested and charged with a number of criminal charges.

50. On March 20, 2000, Robert C. Cantwell, Director of CBI, placed Complainant on administrative suspension with pay pending the need for a thorough investigation. (Ex. 1).

51. On March 22, 2000, Mang issued a letter providing notice of an R-6-10 meeting. (Ex. 3).

52. On March 28, 2000, an R-6-10 meeting was held. Complainant, his counsel, Mang, and CBI's counsel were all present for the meeting. Complainant did not provide any information during the R-6-10 meeting on the advice of counsel as a result of pending criminal charges. (Ex. 4).

53. On March 31, 2000, a disciplinary letter was issued by Mang in which Koverman was terminated from employment for the following reasons:

- Violation of CBI Policies and Procedures: Policy and Ethics II D 9: Tampering with evidence by withholding evidence;
- Violation of CBI Policies and Procedures: Policy and Ethics II D 10: False Statements by making false statements when questioned or interviewed or in reports submitted;
- Violation of CBI Policies and Procedures: Policy and Ethics II D 11: Statements during Departmental Investigations shall be full, complete and truthful;
- Violation of CBI Policies and Procedures: 11 E 1: Performance of Duty and failing to be efficient;
- Violation of CBI Policies and Procedures: 11 E 2: Incompetence and acting in a manner that discredits himself or CBI and failing to act responsibly in fulfilling duties;
- Violation of CBI Policies and Procedures: 1-1-2: Integrity in Government and failing to demonstrate the highest standards of personal integrity, truthfulness, and honesty so as to foster public's

trust in government.
(Ex. 5)

54. Mang noted that a number of criminal charges were pending and that Complainant's conduct could be in violation of state statutes, including:

C.R.S.	Title
18-18-405	Possession of Schedule I Controlled Substance
18-8-306	Attempt to Influence Public Servant
18—8-407	Embezzlement of Public Property
18-8-415	Obtaining a Controlled Substance by Fraud and Deceit
18-8-404	1st Degree Official Misconduct
18-5-114	Offering false instrument recordings
18-8-610	Tampering with Evidence

(Ex. 5, Mang).

55. Mang indicated that Koverman had committed multiple felonies, seriously jeopardized the credibility of the CBI Laboratory, seriously jeopardized the integrity of cases analyzed by Koverman, failed to exercies diligence, intelligence or interest in the way the matter was handled, failed to comply with standards of efficient service and engaged in willful misconduct, deceit and deception, and negatively affected various budgets and personnel staffing patterns.

56. Mang terminated Koverman from employment with CBI.

57. 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.

58. 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

I.

Certified state employees have a property interest in their positions and may only be terminated 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 terminating authority, 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). [2]

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;

---

[2] It should be noted that the allegations in this matter are the grounds for a pending criminal action in which the burden of proof is much heavier for the State, having to demonstrate that an individual is guilty beyond a reasonable doubt.

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).
>
> 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:*
>
>> [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.

II.

1. Application of Miranda Warnings and the Fifth Amendment; Application of the Exclusionary Rule and the Fourth Amendment.

One of the first matters that demands resolution in this matter is whether

or not the statements made by Complainant in the parking lot facilitated by AIC Sexton, his subsequent statements during the search of the lab, his statements during the interview process, and the subsequent search of Complainant's workplace, were done in violation of the United States Constitution. This issue is deemed critical because the grounds for discipline emanate from both the statements made and the articles found during the search of Complainant's work area. Through the submission of a Case List, counsel for the parties provided ample authority regarding the matter. And, it is clear that both the 4th and 5th amendments are applicable in this state action through the provisions of U.S. Const., amend. 14.

The **Fifth** Amendment provides, in part: that: " . . . [no person] shall be compelled, in any criminal case, to be a witness against himself…." U.S. Const., amend 5.

The **Fourth** Amendment generally provides for:

> the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmations, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend 4. Application of these amendments is most commonly known in situations involving alleged criminal activity and law enforcement officers' (i.e., the government's) desire or need to seize evidence, search a person or premises for evidence of a crime, or interrogate a person.

A. Application of Miranda and the 5th Amendment .

In examining the application of the 5th Amendment, it must be determined whether or not Complainant voluntarily provided information to CBI prior to being advised of his Miranda warnings. This element is critical because if Complainant did not provide voluntary disclosures, prior to being advised that he had the right to remain silent and that anything he said could and would be used against him, the information provided *could* be suppressed and not considered as evidence.

The first statements that need to be considered are those made in the parking lot by Complainant to AIC Sexton. As the facts demonstrate, at the end of the day, Complainant was approached in the parking lot and asked for the 8 missing pills of Ecstasy. Complainant responded that the pills had been consumed in testing the substance's composition. At this point, Complainant made a statement. He was not under arrest, and he was not being restrained. Rather, he was being approached by a fellow law enforcement officer who was attempting to fulfill his job duties and account for all of the Ecstasy.

In *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285 (1985), the U.S. Supreme Court held that a failing to provide Miranda warnings does not taint statements made voluntarily unless accompanied by actual coercion or other circumstances calculated to undermine a suspect's ability to exercise his free will (i.e., not to provide a statement). Additionally, in *People v. Probasco*, 975 P.2d 1330 (Colo. 1990), the Colorado Supreme Court reiterated that in order for the 5th Amendment and *Miranda* rights to attach, an individual must be (1) in custody; and (2) that there must be an interrogation by police. See also*: People v. Trujillo*, 938 P.2d 117 (Colo. 1997). Thus, there are 2 elements which must be considered vis-à-vis the statements made by Complainant: Was he in custody and was he interrogated.

In considering whether or not Complainant was in custody, one must consider the totality of the circumstances surrounding the interrogation in order to determine whether a reasonable person in the suspect's position would consider himself deprived of freedom of action in a significant way. *Probasco* at 1332. In making such a determination, consideration should be given to:

- The time, place and purpose of the encounter;
- The persons present during the encounter;
- The words spoken to Complainant;
- The length and mood of the interrogation;
- Whether any limitation of movement or other form of restraint was placed on Complainant;
- Whether directions were given to Complainant during the interrogation; and Complainant's verbal and non verbal responses to such directions.

Id. At the time of the confrontation in the parking lot, a reasonable CBI officer responsible for working and testing drug types would not consider himself deprived of freedom of action in a significant way. In essence, he was approached by a fellow officer, that officer was performing his job, and was trying to determine the location of missing drugs (i.e., evidence) for which Complainant was responsible. At this point, a CBI officer would not believe that he was suspected of any criminal wrong-doing. Rather, he would have believed that a mistake was made in processing the drugs in the lab and that in order to protect future evidence, he needed to account for the drugs. That was, in essence, part of his job. In other words, Complainant, after being approached by Sexton in the parking lot, was merely approached by and obeying orders of a superior in his place of employment. His actions comported with a worker's voluntary obligation to his employer. *Probasco* at 1334, 1335. This cannot be interpreted as being taken into custody or an interrogation. Complainant's statement at this time should not be suppressed and should be included in evidence. Based on the statements made, Respondent conducted searches of the work area and Complainant's person, in order to locate the missing drugs. The consequences of the statement need not be suppressed.

Additional statements were made by Complainant after he was asked to produce his gun and his badge. These statements were made during the preliminary search of Koverman's work area and the lab. Once Complainant was asked to turn in his weapon and badge, it is not clear that he was being detained. On the other hand, having a law enforcement officer and your supervisor ask for the articles would lead to some conclusions by Koverman that he was not free to leave the facility. At this point, one can assume that Complainant was in custody. He had not be advised of his *Miranda* rights yet. However, he was not being interrogated when he made the comments about the pills being destroyed in testing. Rather, he volunteered those comments as the agents and himself were searching the lab. It was not in response to any direct questioning. As a result, the comments should be admissable.

The third category of statements that need to be considered are Complainant's responses during the interview with CBI agents on March 20, 2000. During his taped interview, Complainant was first advised of his Miranda rights. Clearly, he was in custody and undergoing an interrogation. Thus, Complainant's Miranda rights "attached." Complainant acknowledged that he understood his rights both verbally and in writing. The statements were not coerced or forced. They were provided voluntarily. Thus, Complainant's statement that the drugs had been destroyed in testing should be deemed admissible for the purposes of this hearing. And, his subsequent statements in which he identified the drugs once found, and that he had held them back for standards should also be admissible. Complainant's Constitutional rights regarding self-incrimination were not infringed.

B. Application of 4th Amendment.

In this matter, application of the 4th Amendment is not so clear because state employees (i.e. government employees) are involved and those employees happen to be law enforcement officers. In order to determine the issue, one must first examine whether or not a public sector employee has an expectation of privacy at work, and if so, whether or not the 4th Amendment was violated if a warrantless search was conducted. In a 1987 split decision by the United States Supreme Court*, O'Conner v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987), it was determined that within the workplace context, employees may have reasonable expectations of privacy against intrusions by the police. Such expectations extend to public employees. As one justice phrased it:

> Constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

It is possible, despite being in a public-sector working environment, that an employee could have an expectation of privacy. The Court notes that such an expectation, given the realities of the workplace, may be impacted by whether a

supervisor or law enforcement officer is conducting a search. For instance, an employer would not necessarily have to comply with the 4th Amendment if it was investigating work malfeasance. On the other hand, if the employer was working in a law enforcement capacity, issues of the 4th Amendment are implicated. The Court maintains that given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

In other words, a state employee, in the context of his employment, may have a reasonable expectation of privacy in his work area(s), free from warrantless searches and seizures by law enforcement. *Ortega* at 717. The Court suggests that determining whether an employee shared his desk or file cabinets might determine whether the employee had a reasonable expectation of privacy. It notes that the expectation of privacy might be limited by *actual* office procedures and practices. See also: *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). It also notes in *Ortega* that an individual's term of service as a public employee may create a expectation of privacy in so far as the person would have accumulated materials in a "private" office over a long period of time, i.e., 17 years.

In this instance, with regard to his working environment, Complainant had a reasonable expectation of privacy in his office. He had worked for CBI for a number of years, and had a separate office and desk, capable of being locked. Other employees did not generally have access to the office. However, Complainant's reasonable expectation of privacy stopped at his office door. He did not have a reasonable expectation of privacy with regard to his work area within the lab. Other individuals could use his work station and share standards among themselves. Although limited, a number of individuals had access to the work area. And, actual practices reflect that other individuals would use the same work area or have to enter Koverman's work area for a variety of reasons.

In essence, the employer, CBI, generally had control over the work area environment. It was not reasonable for Koverman to have an expectation of privacy in his work area. As a result, the search conducted by CBI during March 20, 2000 was reasonable and not in violation of the 4th Amendment. And, given that there was no reasonable expectation of privacy, it becomes of no consequence that CBI was acting either as an employer or in a law enforcement capacity. See: *People v. Rosa*, 928 P.2d 1365 (Ct. App. 1996). But see: *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). It is appropriate, in this matter, to consider the fact that 7 unmarked "missing" tablets and some powdery residue, were found in Koverman's work area and all the evidence that flows therefrom. See*: Ahart v. Colorado Dept. of Corrections*, 964 P.2d 517 (Colo. 1998).

In *Ahart v. Colorado Dept. of Corrections*, 964 P.2d 517 (Colo. 1998), the Colorado Supreme Court generally affirmed that evidence obtained in violation of an individual's constitutional right to privacy (i.e., 4th Amend.) may be excluded

from evidence in a criminal prosecution (the "Exclusionary Rule"). However, in an administrative hearing context, the Court determined that proceedings can be intra-sovereign and quasi-criminal in nature, and thus the applicability of the Exclusionary Rule must be decided by a tribunal weighing an individual's benefits and right to privacy against the societal costs of applying the rule. In applying the *Ahart* rule, it is apparent that Complainant's right to privacy was minimal with regard to his work station. Societal costs of excluding evidence would be extreme because CBI's Montrose lab, if not all the labs, would be compromised. Confidence in law enforcement would be lost because the public would be unsure about whether CBI was able to preserve the chain of custody when working with illegal substances, which could impact a variety of investigations and cases.

In sum, with regard to the discovery of Ecstasy in Koverman's work area, the evidence need not be suppressed.

2. The Act for Which Discipline was Imposed.

As referenced above, the statements made by Koverman during the events described above and the search of his office were not in violation of the Constitution. Thereby, when considering the statements made and the results of the search, Koverman committed the acts for which discipline was imposed. With regard to the violations of CBI policy, the following can be concluded about Koverman's actions:

• Tamper with Evidence	• He withheld drugs despite lab practice of not using drugs from evidence as standards; [3] • He failed to make any notations that he did withhold drugs as standards.
• False Statements	• He made false statements during the course of the investigation, before and after having been advised of his rights.
• Statements During Departmental Investigations	• He failed to provide full, complete and truthful statements, both verbal and written.
• Performance of Duty	• He failed to direct his efforts in a manner which would maintain the highest efficiency because he failed to disclose the location of the drugs.
• Incompetence	• He demonstrated incompetence by discrediting himself, CBI and failing to assume responsibility and/or exercise due diligence in the pursuit of his duties. He departed from the lab's policy of not

[3] While a provision of the Montrose Lab Standards of Practice Manual indicated that narcotics could be set aside as standards, that provision was specifically countermanded by Humphreys in order to obtain accreditation almost a year before this incident. In addition, Complainant was required to comport his practices with instructions from his superiors. See: CRS 24-50-116 (1999) and *Barrett v. Univ. of Colorado Health Sciences Center*, 851 P.2d 258 (Ct. App. 1993).

	removing standards from evidence, not using the standards locker in the vault, and not labeling the drugs held back.
• Integrity in Government	• He failed to demonstrate the highest standards of personal integrity, truthfulness, and honesty. His actions did not inspire public confidence and trust in government.

As a result, Respondent has met its burden of a preponderance of evidence that Complainant did engage in willful misconduct and failed to comply with standards of efficient service or competence; and engaged in willful misconduct including violating the rules of the agency of employment.

3. The Discipline Imposed was Within the Reasonable Range of Alternatives.

In determining whether or not the discipline imposed was within the reasonable range of alternatives, one must look to Board Rules R-6-2 and R-6-6, 4 CCR 801. As Mang noted in the disciplinary letter, and during the course of the hearing, this matter was serious and flagrant. It is clear that Koverman should not have withheld any pills from the evidence submitted for testing. It is also clear that even if he were to withhold pills as standards, that such standards should be marked. Most importantly, it is clear that Complainant lied about the whereabouts of the evidence. Given CBI's role in law enforcement, and its responsibility for testing evidence, Koverman's actions were serious. His actions call into question the chain of custody for evidence submitted to CBI labs. His failure to document that he had removed pills for use as standards, his failure to label and safely store the supposed standards of Ecstasy, and his failure to disclose information, if representative of CBI, could call into question CBI's reputation and have an adverse impact on the agency. The matter can be considered flagrant given that he continued to lie about the location of the pills until he was confronted with them after having been removed from his work station.

The Board's rules allow an agency to impose discipline immediately for serious and flagrant conduct by its employees. In this instance, Mang correctly determined that the consequences of Koverman's actions were significant, serious and flagrant, and that termination was a reasonable form of discipline.

4. Actions of the Respondent were not arbitrary, capricious and/or contrary to rule or law.

CBI's actions in this matter cannot be considered arbitrary or capricious. This matter began as the result of a tip from an informant. Mang first instructed that the credibility of the informant be determined. Subsequently, while the tip may not have been credible in and of itself, Mang determined the need to conduct a controlled test to either verify that the tip was false, or that Koverman

was actually violating CBI policies. As a result, Mang approved the "sting" operation in order to gather information regarding the tip. Had no sting been conducted and Koverman disciplined based merely on the tip, such action could be considered arbitrary and capricious. But, in this instance, the sting operation worked so as to provide credibility to the tip, and in such a way as to help determine whether or not CBI's operation was threatened. It provided information for the appointing authority to consider. The appointing authority did not ignore any information in making his determination to terminate Complainant's employment. And, reasonable persons fairly and honestly considering the evidence in this matter could not reach a different conclusion. See: *Van de Vegt v. Board of Commissioners*, 55 P.2d 703, 705 (Colo. 1936).

CONCLUSIONS OF LAW

1. In the administrative law forum, the search and seizure of items in Complainant's work area was legal and did not violate the 4th or 5th Amendments to the Constitution.

2. CBI's Policies and Procedures are applicable to Complainant's conduct. While the Standard of Practice of the CBI lab's may have created options and flexibility in testing, it was not so vague as to be unenforceable, especially given the knowledge of the accreditation process. More importantly, the policies addressing the matters for which discipline were imposed were not vague or ambiguous.

3. Complainant did commit the acts for which discipline was imposed.

4. The discipline imposed was serious and flagrant so as to warrant immediate discipline and it was within the reasonable range of available alternatives to the appointing authority.

5. The actions of the Respondent were not arbitrary, capricious, and/or contrary to rule or law.

6. Neither party is entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999)

ORDER

The disciplinary actions of the Respondent are affirmed.

Dated this 22nd day of September, 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 September, 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:

Douglas Jewell, Esq.,
Bruno, Bruno, & Colin, P.C.,
1560 Broadway, Suite 1099
Denver, CO 80202

and by interdepartmental mail to:

John Lizza
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203