State Personnel Board, State of Colorado
Case Number 2001 B 040

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CLARENCE NEJDL,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,
LIMON CORRECTIONAL FACILITY,

Respondent.

Hearing was held before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. This matter was commenced on December 21, 2000 and hearing lasted for one day. It had been previously delayed as the result of a family emergency with one of Respondent's witnesses.

MATTER APPEALED

Complainant, Clarence Nejdl ("Complainant" or "Nejdl"), appeals his disciplinary termination by the Department of Corrections, Limon Correctional Facility ("Respondent" or "DOC").

For the reasons set forth below, Respondent's actions are affirmed..

PRELIMINARY MATTERS

Respondent was represented by Coleman Connolly, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203. Respondent's advisory witness for the proceedings was Associate Warden Robert Taylor, Limon Correctional Facility, Department of Corrections, Limon, Colorado.

Complainant was represented by John Palermo, Esq., 3333 Quebec Street, #7500, Denver, CO 80207. Complainant was present for the proceedings.

1. Procedural History

Complainant filed a Notice of Appeal with the Board on September 29, 2000 in which he appealed his disciplinary termination for refusal to submit to a random drug test. The parties timely entered their prehearing statements.

This matter was originally set for hearing on November 13, 2000 by way of order dated October 4, 2000. However, as the result of a family emergency with the appointing authority, the matter was continued until December 21, 2000.

The record remained open in this case until January 10, 2001 in order to allow the parties to file an additional exhibit consisting of both audio recording tapes and transcripts.

2. Witness

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

Name	Position and Location
Robert Thiede	Investigator II Limon Correctional Facility, DOC
Robert Taylor	Associate Warden Limon Correctional Facility, DOC

During its rebuttal case, Respondent called Robert Taylor as a witness.

Complainant called himself as his only witness in his case-in-chief.

3. Exhibits

The following exhibits were introduced on behalf of the Respondent:

Exhibit #	Description	Notes
1	Memo Taylor to Soares 8/25/00	Admitted No objection
3	DOC Administrative Regulation 1450-36 Employee Drug Deterrence Program	Admitted No objection
4	Incident Report by Taylor Refusal to Submit to U.A. 8/24/2000	Admitted No objection
5	Incident Report by Robinette Informational 8/24/2000	Admitted No objection

6	Incident Report by Day Informational 8/25/2000	Admitted No objection
7	Disciplinary Action September 21, 2000	Admitted No objection

The following exhibits were introduced on behalf of Complainant during the hearing:

Exhibit #	**Description**	**Notes**
B	Letter of Commendation	Admitted No objection
C	Corrections Award ACA 1/95	Admitted No objection
D	Letter from Furlong to Complainant Outstanding Actions 3/15/94	Admitted No objection
E	Promotion Letter 1/7/94	Admitted No objection
F	Distinguished Service Award 4/93	Admitted No objection
G	Performance Evaluation Ltr 3/14/00	Admitted No objection
H	Performance Plan & Evaluation Period: 4/1/99 to 3/31/00	Admitted No objection
I	Performance Plan & Evaluation Period: 1/1/97 to 12/31/97	Admitted No objection
J	Performance Plan & Evaluation Period: 4/1/98 to 3/31/99	Admitted No objection
K	Performance Plan & Evaluation Period: 1/1/98 to 3/31/98	Admitted No objection
L	Performance Plan & Evaluation Period: 1/1/97 to 12/31/97	Admitted No objection

At the close of hearing, the parties stipulated to the late admission of Exhibit A, a transcript of the R-6-10 meeting of Complainant, accompanied by tape copies of the same meeting (Ex. A-1; A-2). The record remained open until January 10, 2001 and the filing of Exhibit A by the parties.

ISSUES

The issues, as characterized by Respondent, include whether Complainant committed the acts for which discipline was imposed and whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule and/or law. Complainant concurs that one issue is whether or not the actions of the appointing authority were arbitrary, capricious, or contrary to rule and/or law. Complainant further maintains that the termination of Complainant was not reasonable under the circumstances, i.e., the level of discipline imposed was not reasonable.

The issues to be determined as determined by the ALJ are as follows:

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

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

3. Did the appointing authority act arbitrarily, capriciously, or contrary to rule or law?

FINDINGS OF FACT

I. Department of Corrections and Random Drug Testing

1. The Department of Corrections ("DOC") has a number of administrative regulations ("ARs") governing conduct of employees. Included in the ARs is AR 1450-36. (Ex. 3). This AR addresses the Employee Drug Deterrence Program within DOC and was effective March 15, 2000.

2. The AR outlines DOC's policy with regard to a drug-free workplace for all employees. It notes that DOC has a vital interest in maintaining a safe, "healthful" and efficient working environment for its staff, offenders and the general public.

3. The AR applies to controlled substances as defined by statute, including: heroin, cocaine, crack, marijuana, PCP, amphetamines and met amphetamine. It also applies to drugs that have a known mind- or function- altering effect. (Ex. 3).

4. Drug testing for controlled substances is provided for by the AR :

   Under the supervision of the Office of the Inspector General or designee a DDP will be utilized to test various employees for the

> presence of illegal controlled substances in their urine as follows: . . (2) Random Testing: Safety related positions …will be subject to random testing through a computer generated process of selection. All those in safety related positions will have an equal chance of being selected each time a random selection is made throughout the calendar year.

(Ex. 3).

5. The AR outlines the consequences of refusing to submit to testing. It provides a definition of what is considered a refusal to submit to a test. A refusal is deemed to include the following behavior: refusal to provide a specimen; inability to provide sufficient quantities of breath, saliva or urine without a valid medical explanation; tampering with or altering the specimen; and not reporting to the collection site in the time allotted. (Ex. 3).

6. The regulation further provides that a refusal will be cause for disciplinary action, up to and including termination. (Ex. 3).

7. The testing procedures are outlined in the regulation and specify that all testing shall be conducted under controlled and monitored conditions. The DDP urinalysis is performed as a 2 step process involving an initial screening performed by immunoassay tests, and if positive, retested with a gas chromatography/mass spectrometer. (Ex. 3).

8. The authority for have such a regulation stems from the Substance Abuse Policy for Colorado State Employees; the Drugfree Workplace Act, the Omnibus Transportation Employee Testing Act; Colorado Revised Statutes and Executive Order D000291 Re: Substance Abuse Policy for Colorado State Employees. (Ex. 3).

9. DOC also has AR 1450-01, Staff Code of Conduct. (Ex. 2). This AR provides in subsection 4, TT: "[f]ailure to submit to a urinalysis/intoximeter or saliva screening when requested for DOC drug or alcohol testing, may result in corrective or disciplinary action. . . ." However, the effective date for this AR is dated October 15, 2000, months after the incident with Complainant.

10. The Limon Correctional facility houses approximately 953 inmates who are classified as being one level down from the maximum security level. On a scale of 1 to 5, with 5 representing maximum security, Limon Correctional facility is rated 4. The Associate Warden of the facility is Robert Taylor. He has been employed by DOC for 19 years. (Taylor).

11. At the Limon Correctional Facility, Robert Thiede, Investigator, is responsible for determining subjects for random drug testing and receiving drug testing equipment from the Inspector General's ("IG's") office. Thiede has worked at Limon facility for about 1.5 years. Prior to working at Limon, Thiede worked for 2 years in the IG's office. In sum, Thiede has 33 years of law enforcement experience including working for the Denver Police, the Kit Carson sheriff's office, and as a chief of police in Kansas. (Thiede).

12. When implementing the AR on random drug testing, Thiede receives equipment and a list of individuals subject to testing from DOC's Colorado Springs office. An overview of the testing process includes:

- Initialing and dating the sample containers;
- Marking the temperature of a sample;
- Allowing an employee to seal cap of sample;
- Allowing an employee to put the sample in a designated sack;
- Sealing the sack;
- Completing the paper work and having employee sign the paper work;
- Placing the sack in a sealed box, transporting the box to the High Plains Medical Center and refrigerating the collected samples;
- Overnight mailing the samples for testing.

(Thiede).

II. Background of Complainant

13. Complainant worked at the Limon facility and held the rank of sergeant. Prior to August 2000, Complainant had worked for DOC for approximately 11 years. In the course of his employment, he attended drug deterrence training. (Thiede, Complainant).

14. Complainant received a Distinguished Service Award in 1993 for courage and professionalism. (Ex. F).

15. In 1994, Complainant received a "thank you" letter from Aristedes Zavaras, Executive Director of DOC, for his dedication and team work. (Ex. D). That same year, Complainant was promoted to Corrections Officer II. (Ex. E).

16. In 1997, Complainant received a Letter of Commendation based on his actions during a use of force incident. (Ex. B). He has received accreditation for attaining excellence in the operation of an Adult Correction Institution from the American Correctional Association and the Commission for Accreditation for Corrections. (Ex. C).

17. Complainant's performance was rated as Fully Competent in 1998, while achieving peak performance levels in the quality and quantity of his work. (Ex. J, K, L).

III. Events of August 24, 2000

18. On August 24, 2000, Thiede received a list from the Inspector General's office identifying individuals for random drug testing. The list included the name of Complainant. (Thiede, Complainant).

19. Upon notifying Complainant and giving him an opportunity to review the associated paperwork, Thiede asked Complainant to provide a urine sample for analysis. (Thiede, Complainant).

20. Complainant refused to provide a sample. (Thiede, Complainant). Thiede provided Complainant with at least 2 opportunities to provide a sample and advised him that failure to do so would be deemed to be the same as having a positive result. (Thiede).

21. Complainant believed the process at the Limon facility for random drug testing would lead to error and a false positive result. He based his concern on the fact that he believed he had seen samples from other tests on previous occasions laying around, unattended. Complainant failed to disclose these concerns to Thiede. (Complainant).

22. Complainant was also concerned about providing a test sample because he had been taking some medication. (Complainant, Ex. 4).

23. Upon Complainant's refusal to submit to the test, Thiede accompanied Complainant to the "Muster" room and met Associate Warden Taylor, and Majors Day and Robinette. (Thiede, Taylor, Ex. 4).

24. After an explanation by Thiede of the circumstances, Taylor reviewed a copy of the applicable AR in the presence of both Majors. In so doing, Taylor shared the information with those personnel and asked for their insight in interpreting the AR. (Taylor, Ex. 5).

25. Complainant, who had been waiting outside the office, met with Taylor who advised him at least twice that he should take the drug test or that he would be left with no choice but to follow the dictates of the AR. Taylor contemporaneously believed DOC applied the AR in such a way that refusal to take a drug test was equivalent to testing positive for drug use. (Taylor).

26. Taylor placed Complainant on administrative leave and had him accompanied off the property. (Taylor, Complainant, Ex. 5).

27. Taylor was the delegated appointing authority as delegated by Warden Richard A. Soares. (Taylor, Ex. 1).

28. On September 11, 2000 an R-6-10, 4 CCR 801 meeting was held. At that time, Complainant admitted to refusing to take the test as a result of not trusting the drug testing system and procedures. (Taylor, Ex. 7). Complainant agreed to take a drug test at the time of the meeting.

29. Based upon the admissions by Complainant as to being familiar with DOC's ARs; refusing to take a drug test when and where requested; review of Complainant's performance; consultation with the Department of Law; review of previous similar cases at DOC; and understanding that Complainant was aware of the choice he had made in refusing to take the test, Taylor imposed discipline in the form of termination. (Taylor, Ex. 7).

30. Discipline was imposed on the grounds that Complainant violated the AR 1450-1, Staff Code of Conduct and AR 1450-36, Employee Drug Deterrence Program by refusing to submit to a drug test.

PARTIES' ARGUMENTS

Respondent argues that Complainant admitted to refusing to take a random drug test. Under DOC administrative regulations, such a refusal is grounds for a disciplinary action, up to and including termination. Respondent further argues that the nature of Respondent's responsibilities includes having to house inmates of convicted crimes, provide for the safety of inmates, provide for the safety of DOC employees as well as the public. Its responsibilities are of utmost importance. DOC notes that because of its unique mission, it must constantly be concerned about contraband (including drugs and controlled substances) entering its facilities. As a result, it has zero tolerance for infractions involving drugs or controlled substances. Such is represented in its administrative regulation. Respondent argues that all procedural requirements were met, i.e., due process was provided. The drug testing was random and conducted according to internal procedures. Complainant was given numerous opportunities to provide a urine sample. Complainant was given an opportunity to provide information to the appointing authority. Based on above, Respondent maintains the appointing authority appropriately administered discipline.

Complainant argues that the circumstances in this situation warrant a different conclusion and that the appointing authority acted arbitrarily, capriciously, and contrary to rule or law. Complainant maintains that he offered to take the test at another location or at his own doctor's office. He argues that there were consistent problems with the sampling techniques at the Limon facility because refrigeration did not occur immediately and in the past he had seen samples unattended. Complainant argues that given these arguments, the

appointing authority should not have imposed discipline. In making this argument, Complainant cites *James Toothaker v. Dept. of Corrections*, Case 97CA1970 (Ct. App. 2000), *not selected for publication.* In *Toothaker*, a DOC employee was disciplined prior to receiving a corrective action because of his failure to participate in an investigation. The ALJ found that Toothaker's actions were not serious or flagrant so as to warrant disciplinary action. The Court of Appeals upheld that decision. In this instance, Complainant argues that his actions were not so serious or flagrant as to warrant discipline in the form of termination.

DISCUSSION

I. Introduction

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 Rule 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).

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.

II.

1. A "Snapshot" of Drug-Testing in the Public Workplace

By way of background, the 10th Circuit Court of Appeals issued a decision in 1998 which outlines the law on drug-testing in the public sector. In *Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. (N.M.) 1998), the 10th Circuit described the need to balance an individual's privacy right and the Fourth Amendment's protection against unreasonable search and seizure (i.e., providing a drug testing sample) against the public's interest in establishing a drug enforcement program. Relying upon U.S. Supreme Court case law, the Court of Appeals established an analytical test for determining the validity of drug testing. The test sets forth that the government must first show whether the drug-testing program at issue is warranted by a "special need." A "special need" must be real by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public. Second, any testing program must be shown to meet the related goals of detection of drugs and deterrence in the use of drugs. The court is to examine the nature of the privacy interests upon which the search at issue intrudes and the character of the intrusion that is complained of. Finally, upon a showing of special need, the court is to determine the immediacy of the governmental concern at issue and the efficacy of the challenged drug test for meeting it. See: *Solid Waste Dept. Mechanics v. city of Albuquerque*, 156 F.3d 1068 (10th Cir. (N.M.) 1998, at 1072-1074.

The appellate court further held that "even if the privacy interest is virtually non-existent, the special need requirement prevents suspicionless searches where the government has failed to show either that it has a real interest in testing or that its test will further its proffered interest.". *Solid Waste Dept*. at 1073.

In this instance, it would appear that the validity of the DOC random drug testing program meets the above analysis. DOC presented evidence that it does have a special need for having a drug testing program. Its mission and statutory purpose of housing convicted criminals in a level 4 prison, providing for the safety of those inmates, providing for the safety of the staff, and providing for the safety of the public is real. Second, it is apparent that the random drug testing program acts as a deterrence of the import of contraband. The intrusion into the privacy interests of the individual employees seems minimal given that it is limited to a urine sample. And, when one considers the need to make sure that staff are not under the influence of drugs or controlled substances while guarding inmates, the need for immediacy is apparent.

Thus, in this matter, no issue exists as to DOC's ability to conduct random drug testing within the Limon Correctional facility.

2. The Act for which Discipline was Imposed

In this instance, there is no controversy with regard to Complainant refusing to submit to a urinalysis for the purposes of a random drug test at DOC's Limon facility. It is undisputed that Complainant refused to participate in the drug testing when asked to do so.

Complainant testified he was willing to participate in such a test at another facility or at his own doctor's office at the time of the test. The evidence demonstrates he did make such an offer *at the time of the R-6-10 meeting*. However, the evidence does not reflect that Complainant made such an offer on August 24, 2000, *at the time of the drug testing*. It seems incredible that Complainant would prefer to provide a testing sample at another facility or at his own doctor's office based on his own testimony. First, he describes what he perceives as actions by Limon personnel which compromise testing samples. But, he did not provide any testimony as to how another facility would have a better or different testing method. In other words, Complainant argues he would rather go to a facility that he is unfamiliar with than provide a sample at Limon. He further describes that even his own doctor's office has made mistakes in testing samples. It would seem by Complainant's own testimony that there was no resource for the administration of a proper test. Complainant's recitation of the events of August 24, 2000 and his insistence that he offered to take a test somewhere else seems unreasonable.

Moreover, Complainant's offer to take a drug test at the time of the R-6-10 meeting is of no consequence. The meeting occurred 20 days subsequent to the initial request to take a urine sample. A result at the time of the R-6-10 meeting would have been meaningless so far as whether or not Complainant had been using drugs or controlled substances on August 24, 2000.

3. The Discipline was within the Range of Reasonable Alternatives Available to the Appointing Authority

Given that Complainant refused to take a drug test on August 24, 2000, Respondent has met its burden of proof, by a preponderance of evidence, that the discipline imposed was within the range of reasonable alternatives available to the appointing authority. First, it is clear that AR 1450-36 contemplates an employee's refusal to take a random drug test and defines what constitutes a refusal. The AR also clearly notes that refusal to participate in a drug test is grounds for disciplinary action and termination.

Complainant argues that some lesser form of discipline should have been imposed. Under Board Rule R-6-2, 4 CCR 801, an employee is to be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. In this instance, Respondent sufficiently demonstrated that Complainant's refusal to submit to a drug test was serious and flagrant. The role of the Department of Corrections in housing inmates, having to protect inmates, having to protect staff, and protect the public is vital. Moreover, given the nature of the inmate population at Limon and the type of facility, DOC must watch for use of drugs and controlled substances. Refusal to submit to a random drug test is serious and warrants disciplinary action.

Nejdl further argues that because of his previous employment history, as demonstrated through exhibits, the appointing authority should have noted the mitigating circumstances and imposed a lesser form of discipline. Clearly, Complainant has contributed to DOC and his employment history contains evidence of good to excellent performance. By way of analogy, in a case entitled *Anderson v. Exxon Coal U.S.A., Inc.,* 110 F.3d 73, (C.A.10 (Wyo.) 1997)(unpublished opinion)[1], the 10th Circuit Court of Appeals wrestled with this issue of past performance and refusal to take a drug test. In the appellate case, Exxon had an employee handbook which warned that refusal to submit to a drug test could lead to termination. The court held:

> As we said in *Williams v. Maremont Corp*., 875 F.2d 1476, 1486 (10th Cir.1989), what the employer did here--fire a faithful, long-term employee with an essentially unblemished record, for a single seemingly small infraction--may have been unfair and harsh, but that is not the question. The question is whether the employer had the right to do what it did. We hold that the handbook gave Exxon the right to terminate Ms. Anderson [for failure to take a drug test].

Although the public sector is different from the private sector, the reasoning is analogous. It cannot be ignored that society has determined that matters involving drugs and security are serious issues, serious enough to render termination as a type of discipline no matter the previous work circumstances.

Although distinguishable because the case did not deal with random drug testing, the State Personnel Board has held that matters involving drugs, drug testing, alcohol, and controlled substances are serious and can warrant disciplinary termination. See: *Melawaine Ondrei v. Department of Corrections, Division of Clinical Services,* case no. 94B167 (dealing with refusal to test based on suspicion of being under influence).

Complainant's reliance on *Toothaker* is not persuasive. In that matter, the employee failed to participate in an internal investigation within DOC. The

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[1] Citation to an unpublished opinion is only for the purposes of adopting part of its reasoning. The cited case is not treated as precedent.

investigation was concerning allegations of theft of guns and ammunition, drug use, and other crimes by some SORT Team members within DOC. Toothaker did not participate in the investigation because he was prevented from tape recording his interview/interrogation. The Colorado Court of Appeals held that the record supported the ALJ's finding that the act of not participating in the investigation was not so serious or flagrant as to warrant discipline. In this case, however, failure to provide a urine sample can be treated as serious and flagrant. This is because of the danger posed by an employee being under the influence of drugs or controlled substances and being on-duty at the time. Such a situation would have inmates, staff, and the public immediately at risk. In *Toothaker*, the investigation was on-going and there was no imminent threat of harm or risk of safety.

The level of discipline imposed, given the responsibilities of Respondent agency, is reasonable and within the appointing authority's available alternatives as supported by Board Rule R-6-2, AR 1450-36, and AR 1450-01.

4. The Appointing Authority Did Not Act Arbitrarily, Capriciously, or Contrary to Rule or Law

Respondent demonstrated that Robert Taylor was the delegated appointing authority. He conducted an R-6-10 meeting in which both Complainant and Complainant's representative were present. A review of the transcript and tapes reflect that Complainant and Complainant's representative fully participated in the meeting. Respondent collected information from Complainant and was faced with an admission about not taking the drug test. The only controversy was the issue that arose regarding whether or not Complainant had stated he would take a test at another facility on August 24, 2000. Yet, as described above, Complainant's line of argument is not reasonable. As indicated in testimony by Taylor, he did consider Complainant's performance history, previous cases at DOC regarding refusal to provide samples for drug testing, and consulted with the attorney general's office. Thus, Respondent, in administering discipline, substantially complied with Board Rule R-6-6, 4 CCR 801. Reasonable people could not be compelled to reach a different conclusion other than Taylor's decision. See: *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Based on the evidence presented by both parties, Respondent has shown by a preponderance of evidence that it did not act arbitrarily, capriciously, or contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant committed that act for which discipline was imposed. He refused to provide a sample for random drug testing purposes.

2. The level of discipline imposed was within the range of reasonable alternatives available to the appointing authority as provided by Board Rule R-6-2, AR 1450-36, and AR 1450-01.

3. Respondent proved by a preponderance of evidence that the appointing authority did not act arbitrarily, capriciously, or contrary to rule or law.

ORDER

Respondent's action of disciplinary termination is **affirmed**. The case is dismissed with prejudice.

Dated this 12th
day of February, 2001.

G. Charles Robertson
Administrative Law Judge
1120 Lincoln Street, Suite 1450
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 □ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of February, 2001, I placed true copies 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:

John Palermo, Esq.
3333 Quebec Street, #7500
Denver, CO 80207

AND IN THE INTERAGENCY MAIL TO:

Coleman Connolly
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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