STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B109**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRED SAILAS,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT DENVER & HEALTH SCIENCES CENTER, OFFICE OF LABORATORY ANIMAL RESOURCES / CENTER FOR LABORATORY ANIMAL CARE,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on October 16, 2006 at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Senior Associate University Counsel Steven Zweck-Bronner represented Respondent. Respondent's advisory witness was Dr. Mark Douse, the appointing authority. Complainant appeared and was represented by Robert W. Thompson, Esq.

MATTER APPEALED

Complainant, Fred Sailas ("Complainant"), appeals his termination by Respondent, University of Colorado at Denver & Health Sciences Center, Office of Laboratory Animal Resources / Center for Laboratory Animal Care ("Respondent" or "Center"). Complainant seeks reinstatement, back pay and benefits, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

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

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted;

FINDINGS OF FACT

General Background

1. Complainant was hired on October 3, 2000 as a Research Animal Attendant I in Respondent's Office of Laboratory Animals / Center for Laboratory Animal Care. (*Stipulated Fact*) At the time of the termination of his employment with Respondent, Complainant was a certified state employee. His salary at the time of the termination of his employment was $2,500.00 per month. (*Stipulated Fact*)

2. As a Research Animal Attendant I, Complainant's primary duties related to the care of the various animals used by Respondent in scientific research. Complainant monitored and fed animals, maintained cages, handled health issues for the animals and animal husbandry issues.

3. In his position of Research Animal Attendant I, Complainant primarily interacted with the approximately 40 - 45 other employees at the Center. He also interacted with Respondent's researchers and student researchers who were utilizing the animals in research projects. The building in which Complainant worked was a secure facility requiring a badge for entrance, and Complainant had no interaction with the general public as part of his duties. Complainant was not a supervisor or team leader in his position.

4. Prior to termination of his employment, Complainant's appointing authority considered Complainant to be a good and decent worker who had been with the Center for a long time, as compared to other workers in similar positions.

Arrest and House Search on April 7, 2006:

5. Denver police and agents of the U.S. Department of Alcohol, Tobacco and Firearms ("ATF") received information on or about April 7, 2005, that Complainant may have been involved in the illegal sale of firearms. Detectives went to Complainant's home on that date.

6. Complainant agreed to speak with officers and told them that he had recently purchased two firearms, and that there were also firearms in his car and in his bedroom.

7. At the time, Complainant was shooting competitively in United States Practical Shooting competitions. He would make use of 150 or more rounds of ammunition each time he went to the range to practice for these events,

and he had a significant amount of ammunition at his house.

8. Complainant also told officers that, in December 2004, he had constructed three firecrackers using plastic PVC pipe and two types of explosive powder. Complainant told officers that he has been scared at how loud the first firecracker was when he set it off, so he had put the other two devices on top of his refrigerator on the back porch and left them there.

9. Using the information offered by Complainant, police returned to the home with a search warrant. During the search, they recovered six firearms, several hundreds rounds of ammunition, loaded magazines, and 18 grams of marijuana.

10. Police also recovered two unexploded homemade explosive devices from the top of the refrigerator on Complainant's back porch. These two devices were both made of plastic PVC piping with plastic end pieces glued into place, and were approximately four inches long and ¾ inch in diameter. The end of each pipe had a small hole through which was threaded a 5 inch long fuse. Each pipe contained explosive material, and additional explosive powder was found in the house. Police also recovered additional PVC pipe, PVC glue and additional explosive powder.

11. Police did not discover any evidence to corroborate their original suspicions that Complainant was illegally selling firearms.

12. Complainant was arrested on April 7, 2005. (*Stipulated Fact*)

13. Complainant's arrest was widely reported in the local media. Staff members contacted Dr. Mark Douse, the Center's Director, at Dr. Douse's home to let him know that Complainant had been arrested the previous night.

<u>The State's Failure to Prosecute and Respondent's Initial Decision</u>:

14. Complainant was released from jail in time to return to work the following Monday. He met with Dr. Douse and explained that he had been arrested. He told Dr. Douse that the police had searched his house and had retrieved his homemade firecrackers, that he had been taken to jail and was released on bail.

15. The state's criminal prosecutor did not appear at Complainant's subsequent hearing to present formal charges against Complainant. Complainant faced no state charges resulting from the search of his home on April 7, 2005.

16. After it became apparent that Complainant was not going to be prosecuted by the state, Dr. Douse reported to his superiors that he did not intend to place

Complainant on administrative leave. In a May 13, 2005, e-mail on the subject, Dr. Douse reported that:

"Mr. Sailas has been and continues to be a good employee and a hard worker. I have met with Mr. Sailas several times regarding this situation and feel comfortable that he is not a threat or concern to my office. Given that all charges against Mr. Sailas have been dropped, I see no reason to put Mr. Sailas on administrative leave. In my opinion, I believe that when the police made a misjudgment in arresting Mr. Sailas, perhaps believing that they had a 'big fish', when all they got was Fred."

17. Dr. Douse informed Complainant that, if a similar situation arose in the future, he would be suspended and his employment may be terminated.

18. Mr. Sailas continued to work at the Center without incident for approximately eight additional months after his April 2005 arrest. The fact that Complainant had been arrested in April 2005, had no adverse effects on Complainant's job or the Center during this period.

Federal Charges:

19. On October 31, 2005, a federal grand jury in Denver indicted Complainant on a charge of Unlawful Possession of a Destructive Device in violation of title 26, U.S.C. §§ 5861(d) and 5871 arising from Complainant's April 2005 arrest.. (*Stipulated Fact*). No other charges were brought against Complainant.

20. The indictment resulted in a warrant for Complainant. Complainant did not know there was an outstanding warrant for him until he was taken into custody on January 16, 2006. (*Stipulated Fact*)

21. Complainant's last day at work was January 14, 2006. By letter dated January 17, 2006, Dr. Douse placed Complainant on unpaid administrative leave, effective as of that date.

22. In a subsequent letter dated February 1, 2006, Dr. Douse implemented an indefinite disciplinary suspension without pay pending the outcome of Complainant's felony charge.

23. Complainant appealed this action to the Board. That appeal was resolved not long after it was filed with the Board, and Complainant received back pay as part of the resolution.

Federal Plea:

24. On March 3, 2006, Complainant appeared before Judge Lewis T. Babcock of the United States District Court for the District of Colorado and pled guilty to one count of Possession of an Unregistered Destructive Device in violation of 26 U.S.C. §§ 5861(d) and 5871. Complainant's sentencing hearing was scheduled for May 12, 2006.

25. On March 15, 2006, Dr. Douse held a Rule 6-10 meeting with Complainant concerning his guilty plea. (*Stipulated Fact*) His letter dated March 31, 2006, notified Complainant that he was on indefinite disciplinary suspension without pay pending the outcome of his sentencing hearing. The terms of the March 31 letter were amended by letter dated April 20, 2006, but the outcome was the same: Complainant was placed on indefinite disciplinary suspension without pay pending his sentencing hearing.

26. The indefinite suspension without pay imposed in the letter of April 20, 2006, began as of April 21, 2006. Separate arrangements were made to provide Complainant with back pay for the period of February 1, 2006 through March 31, 2006.

Sentencing:

27. The federal sentencing guidelines for Complainant's offense were expected to place the sentence at 24 months to 30 months of incarceration. The federal sentencing guidelines also provided for a fine in the range of $5,000 to $50,000, plus applicable interest and penalties.

28. Complainant was sentenced on May 23, 2006.

29. Complainant's sentencing judge, Judge Babcock, chose to depart from the sentencing guidelines. He sentenced Complainant to five years of probation with no incarceration. The first five months of Complainant's probationary period were ordered to be on home detention. The terms of the probation allowed Complainant to leave his residence for employment or other activities approved in advance by Complainant's probation officer.

30. Judge Babcock also found that Complainant needed to pay only $100 in special assessment fees, with no fine assessed because Complainant had no ability to pay a fine, the cost of incarceration, or supervision.

Board Rule 6-10 Meeting and Disciplinary Action

31. On June 5, 2006, an R-6-10 meeting was held regarding Complainant's sentencing. (*Stipulated Fact*)

32. By letter dated June 12, 2006, Dr. Douse terminated Complainant's employment effective June 16, 2006. (*Stipulated Fact*)

33. Dr. Douse explained in his June 12, 2006 termination letter that "the reason for the termination is that your conviction of a felony adversely affects your ability to perform your job and may have an adverse effect on the department if your employment is continued." This was the only factual basis for Complainant's termination.

34. In determining that the conviction adversely affected Complainant's job, Dr. Douse was aware that the conviction would not prevent Complainant from working or have any other direct effect upon Complainant's job. Dr. Douse's sole concern was the possible effect having a staff member with a felony conviction may have on the Center.

35. Dr. Douse's decision to terminate Complainant's employment was based upon his concern about how others may react if they found out that Complainant was working at the Center after being convicted of a felony. Dr. Douse thought that a researcher or student, upon having to work in the same area with Complainant and interacting with him, may be uncomfortable if he or she found out that Complainant had a felony conviction. He also considered that, if Complainant could work at the Center with a felony conviction and no consequences to his job, then the rest of the staff would develop discipline or morale problems.

36. Dr. Douse's concerns had not been voiced by staff or researchers to him but were situations that he considered to be possible.

36. Complainant filed a timely appeal of his termination with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;

(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

II. HEARING ISSUES

A. Complainant committed the act alleged:

It is undisputed in this case that Complainant pled guilty to one felony count of Unlawful Possession of a Destructive Device in federal court, and was sentenced on May 23, 2006, to five years of probation for that violation.

B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law:

The Board is empowered to reverse Respondent's decision if it is contrary to rule or law. *See* C.R.S. § 24-50-103(6).

Additionally, the Board may reverse an appointing authority's decision if that decision is arbitrary or capricious. *Id.* A decision is arbitrary or capricious if the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

1. State law prohibits the discipline of an employee solely because of the conviction of a felony or other offense involving moral turpitude:

One of the enumerated reasons under state law for the dismissal or discipline of a state employee is "final conviction of a felony or any other offense which involves moral turpitude." C.R.S. § 24-50-125(1). In considering a criminal conviction as grounds for discipline, the Board is explicitly instructed to be governed by the provisions of C.R.S. § 24-5-101. *Id.*

C.R.S. § 24-5-101, in turn, provides that, except as otherwise described in a list of exceptions, "the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent the person from applying for and obtaining public employment or from applying for and receiving a license, certification, permit, or registration required by the laws of this state to follow any business, occupation, or profession." C.R.S. §24-5-101(1)(a). None of the listed exceptions apply in this matter.

The intent of C.R.S. § 24-5-101 is to prevent offenders from being discriminated against in employment simply because they have been convicted of a crime. "The Colorado legislature itself has indicated that the strong public policy of this state is to aid ex-offenders in their rehabilitation to society and to insure that they are not discriminated against solely because they, at one time, were convicted of crimes." *Watson v. Cronin*, 384 F. Supp. 652, 661 (D.Colo. 1974). While the terms of section 24-5-101, C.R.S., do not translate directly into the Board's disciplinary processes, the clear command of C.R.S. §24-50-125(1) is for the Board to apply the principles in section 24-5-101, C.R.S., to its disciplinary processes. This should mean, for example, that the fact that a state employee has been convicted of a felony or other offense involving moral turpitude shall not, *in and of itself*, prevent the person from maintaining employment. There must be some other reason other than the fact of a conviction upon which to base a disciplinary decision.

In analyzing the facts of this matter, it is important to first consider what is not present in this case.

Respondent's decision to terminate Complainant's employment was not made because of problems at work, or concerns that Complainant's conviction would affect his work. It was undisputed that no such adverse effect on Complainant's work at the Center had occurred after Complainant was arrested in April 2005 and his last day of work on January 14, 2006. Moreover, Dr. Douse's opinion of Complainant's work was that he had been a good and decent worker prior to his April 2005 arrest.

This is also not a case where there was any persuasive evidence presented that Complainant's co-workers believed that Complainant's conviction was abhorrent or would otherwise cause them to hesitate to work with Complainant. Additionally, this is not a case where Complainant had supervisory or management duties which would be impaired a criminal conviction of any type.

It was apparent from the testimony in this case that Dr. Douse considered the fact that Complainant had a felony conviction to be the one and only reason to terminate his employment. Additionally, it was the fact of a criminal charge, and the subsequent conviction on that charge, which was important here rather than the conduct that the charge reflected. After the state dropped the case against Complainant, for example, Dr. Douse did not feel as if any action had to be taken. He testified at hearing that the dropping of the state case made the issue a non-event as far as he was concerned. Complainant's employment then continued in its normal course until it became known that a criminal

charge was lodged in federal court. At that point, Complainant's employment was abruptly ended, first with an unpaid suspension and then with termination of employment.

The rationale for Respondent's action was Dr. Douse's anticipation of the reaction that Complainant's criminal charge and conviction may prompt. In other words, this is a case where the appointing authority has based his decision solely on the anticipated social stigma of a felony conviction rather than any more tangible impact that the conviction would have on Complainant's job.

Permitting the imposition of discipline under such circumstances, however, runs afoul of C.R.S. §24-5-101(1)(a)'s prohibition against allowing a conviction to be the sole reason for denying employment. Criminal convictions generally carry the potential stigma that Dr. Douse has identified in this case. If it were permissible to end state employment on nothing more than the anticipated negative reaction others might have to a criminal conviction, C.R.S. §24-5-101would be rendered meaningless in the Board's processes.

Respondent's actions in terminating Complainant's employment solely because he had been convicted of a felony are contrary to C.R.S. §24-5-101.

2. Respondent's decision to terminate the employment of a Research Animal Attendant I because of a fundamentally unrelated felony conviction was based upon conclusions that reasonable men fairly and honestly considering the evidence would not reach:

Respondent has concluded in this matter that the conviction of a Research Animal Attendant I on a charge of unlawfully possessing two 4 inch by ¾ inch plastic pipe explosive devices at his home was of sufficient importance and potential disruption to the Center to warrant termination of Complainant's employment after five years of satisfactory performance in that job.

That conclusion, however, appears to ignore the essential nature of Complainant's work. There was no persuasive evidence presented at hearing that the criminal conviction (and underlying activity1) had any impact on Complainant's ability to care for laboratory animals, or that the criminal conviction had any link to behavioral issues on the job.

Moreover, the link between the conviction and Complaint's role at work is attenuated to the point of being speculative. This is not a case where Complainant had any supervisory role at the Center, and his conviction cannot reasonably be assumed to have an effect on any management or leadership role. Dr. Douse argued that the other staff members may develop disciplinary problems if they see Complainant continuing to work at

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1 The activity at issue in this case is the creation of the explosives/firecrackers, given that this was the only illegal activity linked to Complainant and the basis for Complainant's felony charge and conviction. Complainant's conviction, moreover, was the only action referenced by Dr. Douse in making his decision to terminate Complainant's employment.

the Center without any consequences, but it has hardly been the case that Complainant has suffered no consequences for his actions. He was placed on unpaid disciplinary suspension from his job while awaiting his criminal case sentencing, he was under house detention for the first five months of his sentence, and he reports to a criminal probation officer. It seems to be unlikely that staff members would conclude, in the absence of termination of employment, that nothing has happened to Complainant as a result of his criminal conviction.

This is not to say that the charge for which Complainant was convicted was an insignificant event. The question before the Board, however, is whether this off-duty event constituted just cause for termination of Complainant's employment as a Research Animal Attendant I. Respondent has reached a conclusion in this case that reasonable men, fairly and honestly considering all of the evidence, would not reach. As such, the decision to terminate Complainant's employment was an arbitrary or capricious decision under the standards enunciated in *Lawley,* 36 P.3d at 1252.

C. The discipline imposed was not within the range of reasonable alternatives

Under such circumstances of this matter, termination of employment is not within the reasonable range of alternatives available to a prudent appointing authority.

The discipline imposed in this matter was imposed in order to forestall two potential problems. Dr. Douse believed that the impact of taking no action on the rest of the staff could lead to discipline problems for other staff. He was also concerned that a staff researcher or student researcher may be uncomfortable dealing with Complainant if they learned that he had a felony conviction

Appointing authorities have a wide range of non-disciplinary and disciplinary options available to them to address or prevent problems. Some of the options are relatively simple, such as holding a meeting with staff to explain how a departmental policy is being applied. An appointing authority would also control how staffing was arranged at the Center and could instruct Complainant on how to conduct his job in the event another staff member or researcher expresses discomfort with his presence. Even if disciplinary action was necessary in this case, an appointing authority has a number of other reasonable options available to respond to a criminal conviction other than termination of employment.

In this case, there was no persuasive evidence presented that other options, short of termination, had been seriously considered to address Dr. Douse's concerns of future possible problems, or that these other options had been reasonably rejected. Accepting for the moment that disciplinary action had to be imposed in this case, there was no logical, persuasive explanation offered as to why termination had to be imposed in this case rather than some lesser form of discipline.

The credible and persuasive evidence demonstrates that the appointing authority did not pursue his decision thoughtfully and with due regard for the circumstances of the

situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The discipline imposed in this matter was not within the range of reasonable alternatives.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted in this case. The facts of this case demonstrate that Respondent unreasonably construed the connection between Complainant's off-duty arrest and conviction and Complainant's work as warranting termination of his employment and, in that process, Respondent's actions contravened C.R.S. §24-5-101. These errors, however, were not of such a nature as to represent bad faith by Respondent, a means of harassment by Respondent, or otherwise represent a groundless action by Respondent.

CONCLUSIONS OF LAW

1. Complainant committed the act for which he was disciplined.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay, benefits, and statutory interest to be calculated from the date of his termination from employment. Attorney fees and costs are not awarded.

Dated this 30th day of November, 2006.

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

2006B109

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.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

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 appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of Dec., 2006, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Robert W. Thompson
[redacted]

and

Stephen Zweck-Bronner
[redacted]

[redacted]
Andrea C. Woods