STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014B118

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VERONICA ANN GARRETT,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, STERLING CORRECTIONAL FACILITY
Respondent.

Senior Administrative Law Judge (ALJ) Denise Deforest held the first day of hearing in this matter on September 22, 2014, and ALJ Pamela Sanchez held the second day of hearing in this matter on March 30, 2015, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on January 7, 2016, after the audio and video recordings admitted into evidence during the proceeding had been reviewed. Bradford C. Jones, Assistant Attorney General, represented Respondent, Department of Corrections, Sterling Correctional Facility. Respondent's advisory witness, and Complainant's appointing authority, was James Falk, Warden of Sterling Correctional Facility. Complainant appeared and was represented by Robert Grossman, Esq., and Joseph Scheideler, Esq.

MATTERS APPEALED

Complainant, a Correctional Officer I (CO I) with the Department of Corrections, appeals the disciplinary action resulting in her separation from employment effective June 16, 2014, arguing that she did not engage in inappropriate sexual contact with offenders during pat searches. Complainant "would like the remedy of the termination being retracted along with all criminal charges being dropped. Complainant also asks for back pay, attorney fees, emotional distress, punitive sanctions, and any other remedies or sanctions available to Complainant by law."

Respondent, Department of Corrections, Sterling Correctional Facility, argues that Complainant engaged in the conduct for which she was disciplined; principles of progressive discipline were followed; the disciplinary action was not arbitrary and capricious; and that the discipline should be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action resulting in Complainant's separation from employment is **affirmed**.

ISSUES

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

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

3. Whether the discipline imposed was within the range of reasonable alternatives; and,

4. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

Background:

1. Veronica Garrett, Complainant, has worked for the Department of Corrections ("DOC" and "Respondent") since May 1, 1999. At all times relevant to this proceeding, Complainant worked as a Correctional Officer I (CO I), assigned to the Sterling Correctional Facility (SCF).

2. As a Correctional Officer I (CO I), it is part of Complainant's job duties to conduct routine and systematic pat down searches. In September 2013, Complainant completed training regarding universal pat search procedures training and a refresher course on the Prisoner Rape Elimination Act (PREA).

3. Correctional officers conduct universal pat searches by standing behind the offender, having the offender spread their legs and hold their arms outstretched before searching the offender's collar area and arm. The correctional officer then searches the upper left and upper right portions of the offender's body. The correctional officer then searches the offender's waist band by patting around the waist band area before pat searching the lower portions of the offender's body. The correctional officer then searches the inside and outside of the offender's leg starting from high in the thigh and searching down to the offender's ankle, facing the palms toward the thigh. A slight touch to the offender's genital area by the blade of the hand or the back of the hand is permissible; however, a correctional officer should not search the groin area with an open palm and should not cup, fondle or grope the offender's groin area. The correctional officer then pat searches the back of the offender's buttocks using the back of his or her hands. If a correctional officer believes an offender is hiding something on their body, such as their groin area, then can request a male correctional officer to perform a strip search of the inmate.

Basis for Discipline – March 2014 Incidents

4. On March 6, 2014, Correctional Officer Amy Haskell was working with Complainant. CO Haskell was approximately 7 to 10 feet away from Complainant when she was performing a pat search of Offender B and Offender L. CO Haskell overheard Offender B say to Complainant, "[o]h wow I feel the vibes." Complainant was performing a pat search of the lower half of Offender B's body when he made the comment. Complainant then laughed and said, "[o]h yeah, you like that? I can pat you down again." Complainant then proceeded to pat down Offender B and Offender L again. CO Haskell prepared a written incident report regarding her observations of Complainant's conduct.

5. The testimony of Amy Haskell was credible.

6. On March 14, 2014, Complainant performed a pat search of Offender DY. CO Jess Orin observed Complainant as she performed the search. When Complainant reached Offender DY's lower body, she grabbed the front of the offender's pants and shook vigorously,

then moved her hands to his sides and rear and vigorously shook his pants again. CO Orin could then see that Complainant ran both her hands, with palms open and facing the offender's body, blatantly across his groin area from side to side and "obviously touching his privates." It was obvious to CO Orin at this point that Offender DY was aroused. CO Orin had observed Complainant perform other pat searches on other offenders and could see that she groped the offender between the testicles and anus while reaching through the offender's legs with open palms facing up. CO Orin submitted an incident report regarding his observation of Complainant's conduct.

7. The testimony of Jess Orin was credible.

8. On March 31, 2014, Complainant asked CO Craig Jost to conduct a strip search of two offenders. While CO Jost was performing the search, Offender ES told him that Complainant had grabbed his penis during the pat search and then Complainant asked, "[a]re those bananas in your pocket?" Offender ES said Complainant then grabbed him again and said, "[t]hat's not what your momma gave you." When CO Jost performed the strip search of the second offender, the second offender had an erection. CO Jost submitted an incident report regarding the report from Offender ES and his observations of the condition of the second offender.

9. The testimony of Craig Jost was credible.

PREA Report and Office of Inspector General Investigation

10. On April 30, 2014, a handwritten letter from Offender MM reported inappropriate contact by Complainant during a pat search which occurred approximately six weeks earlier. During that pat search, Complainant grabbed his "private area" and rubbed him inappropriately.

11. As such an incident could be a violation of the Prison Rape Elimination Act, a Professional Standards case was initiated by the Office of the Inspector General. The investigation was conducted by Investigator Randy Smithgall.

12. Investigator Smithgall conducted recorded interviews of Offender MM, who initiated the PREA complaint and other offenders who were identified over the course of the investigation. Offender AC, Offender ES, Offender S, Offender JM, Offender EV, Offender EF, and Offender CM were all subjected to pat searches by Complainant during which she cupped the offender's testicles and rubbed or otherwise touched the offender's penis.

13. Investigator Smithgall also interviewed several correctional officers, CO Haskell, CO Orin, and CO Jost. In addition, Investigator Smithgall interviewed CO Katelynn Wittwer, Sgt. Cary Yetter, CO Rodriguez-Gonzales, CO Landis, CO Christopher Wheeler, Sgt. Timothy Werth, CO Ashley-Bolt, and Sgt. Joseph Barnhill. All of these individuals observed Complainant performing pat searches of offenders during which she rubbed or otherwise inappropriately touched the offender's penis and testicles.

14. Complainant was interviewed by Investigator Smithgall and denied all allegations. Complainant acknowledged, however, that she understood that she was to have one hand bladed on the inside of the offender's leg, with the back of the hand towards the offender's genitals while searching in the groin area.

15. Upon completing his investigation, Investigator Smithgall concluded that there was a significant amount of corroborating information to support the allegations being made against Complainant. Both offenders and other correctional officers reported witnessing sexually inappropriate pat searches conducted by Complainant and similarly described the inappropriate physical contact as touching, rubbing, and groping of the offender's penis, testicles and groin area, cupping of the offender's buttocks and intrusive searching of the area between the buttocks.

16. Investigator Smithgall concluded that the information and evidence supported that the unwanted sexual contact committed by Complainant was intentional.

17. Investigator Smithgall also concluded that Complainant's behavior and actions demonstrated:

a. Violations of Administrative Regulation (AR) 100-18 requiring that communication with offenders be made in a professional and respectful manner;
b. Violations of AR 1450-01 holding that acts of sexual conduct by DOC employees, regardless if consensual in nature, may be a crime as defined in AR 100-40, Prison Rape Elimination Procedure;
c. Violations of the Code of Ethics, which requires that the conduct of government employees must hold the respect and confidence of the people of the State of Colorado; and,
d. Violations of the principles of the Performance Management Plan defining the required competencies of Complainant's job.

18. The testimony of Investigator Randy Smithgall was credible.

Board Rule 6-10 Meeting:

19. Complainant's appointing authority was James Falk, Warden for Sterling Correctional Facility.

20. Warden Falk held a Board Rule 6-10 meeting with Complainant on June 11, 2014, on the issue of Complainant's possible violation of Administrative Regulation 1450-01, Code of Conduct, which states in pertinent part:

> Acts of sexual conduct by DOC employees . . . Regardless of consensual nature, to include sexual misconduct, sexual conduct in a correctional institution, sexual harassment against offenders may be a crime as defined in AR 100-40, *Prison Rape Elimination Procedure*. . . . All employees have a continuing affirmative duty to disclose any behavior of engaging in sexual abuse/sexual assault in a prison.

21. AR 100-40 defines sexual abuse as all sexual behavior including sexual harassment, sexual assault and sexual misconduct and specifically includes actions directed towards a person that does not or cannot consent to any intentional contact, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person or where the DOC employee has the intent to abuse, arouse or gratify sexual desire. Under AR 100-40, an offender is defined as lacking the ability to consent to sexual or romantic behavior with DOC employees as the offender is in a custodial setting.

22. The Board Rule 6-10 meeting was attended by Complainant, her attorney, Robert Grossman, and Major Raymond Bilderaya, as representative for Warden Falk.

23. Complainant declined to make any statements pursuant to her Fifth Amendment right against self-incrimination. The meeting was audio recorded.

Disciplinary Decision:

24. Warden Falk determined that Complainant failed to comply with the standards of efficient service or competence by engaging in sexually inappropriate conduct.

25. Warden Falk considered Complainant's training regarding universal pat searches, PREA, Ethics and Professional Communications.

26. Warden Falk determined that Complainant's conduct violated AR 100-18, holding that DOC supports a professional, empowered workforce that embodies honesty, integrity and ethical behavior; AR 100-19, which states that communications with offenders should be made in a professional and respectful manner and derogatory references toward offenders are not acceptable under any circumstances; AR 1450-01, Staff Code of Conduct, defining conduct unbecoming as any act that negatively impacts job performance which tends to bring DOC into disrepute or reflects discredit upon the individual as a DOC employee and holding any acts of sexual conduct by DOC employees in a correctional institution may be a crime; Code of Ethics, requiring that the conduct of government employees must hold the respect and confidence of the people of the State of Colorado; and the competencies as defined in the Complainant's Performance Plan.

27. The testimony of James Falk was credible.

28. On June 16, 2014, Complainant was issued a formal disciplinary action resulting in her separation from employment.

29. Complainant filed a timely appeal of the June 16, 2014 disciplinary action.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. § 24-50-101, *et seq,*; *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 perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and

5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Complainant did not present any evidence at hearing. Therefore, Complainant did not dispute or refute the evidence establishing that on March 6, 2014, March 14, 2014, and March 31, 2014, she engaged in sexual contact with offenders while conducting pat searches. Additionally, Complainant did not dispute or refute the evidence that Offender AC, Offender ES, Offender S, Offender JM, Offender EV, Offender EF, and Offender CM were all subjected to pat searches by Complainant during which she cupped the offender's testicles and rubbed or otherwise touched the offender's penis.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer"). The testimony of Respondent's witnesses was credible.

Respondent has successfully demonstrated by a preponderance of the evidence that Complainant violated AR 1450-01, AR 100-40, AR 100-18, AR 100-19, Code of Ethics and Staff Code of Conduct, and engaged in intentional, willful misconduct.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

(1) Respondent's decision to impose discipline was neither arbitrary nor capricious:

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 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).

Respondent's actions in this case were neither arbitrary nor capricious. The evidence at hearing demonstrated that Respondent took reasonable steps to investigate the allegations of sexual misconduct by Complainant. Respondent obtained statements regarding the factual events that occurred and gave Complainant the opportunity to respond and provide information she wished the appointing authority to consider. Respondent gave candid and honest consideration to Complainant's statements to Investigator Smithgall and her prior performance history. Respondent's decision to impose discipline in this case was not arbitrary or capricious.

(2) Respondent's action was not contrary to rule or law:

A. Board Rule 6-9:

Respondent's determination in taking disciplinary action comports with Board Rule 6-9, 4 CCR 801, which requires that a decision to take disciplinary action "shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, 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. Information presented by the employee must also be considered."

The evidence at hearing demonstrated that Respondent evaluated the evidence supporting the allegations of Complainant's sexual misconduct, both the inappropriate physical conduct and inappropriate statements of a sexual nature. Respondent reviewed all the information and considered Complainant's statement and prior performance history.

The evidence established that there was no violation of Board Rule 6-9 in Respondent's decision that the nature, extent, and seriousness of the violations in the case required the imposition of discipline.

B. Progressive Discipline:

Board Rule 6-2, 4 CCR 801, 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."

The evidence presented at hearing established that the nature of Complainant's sexual contact with offenders, in many instances unwelcomed, was conduct that was so flagrant or serious that immediate discipline was not only proper, but critical for the safety of staff and offenders.

C. Board Rule 6-10:

Board Rule 6-10, 4 CCR 801, provides, in relevant part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Complainant did not dispute Respondent's compliance with Board Rule 6-10. Respondent met with Complainant prior to the issuance of any discipline and gave her the opportunity to present any information regarding the allegations against her. Complainant is not required to make a statement or present any information for consideration by the appointing authority. There was no violation of Board Rule 6-10 in this matter.

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

The final issue is whether the discipline imposed was within the range of reasonable alternatives available to Respondent.

Respondent established by a preponderance of the evidence that under the circumstances presented here, no lesser sanction is reasonable. The disciplinary action of separation from employment is within the range of reasonable alternatives available to Respondent in this case.

D. Complainant did not establish a basis for entitlement to attorney fees and costs.

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 R-8-38(B), 4 CCR 801.

Complainant offered no evidence at hearing regarding any issue. Therefore, Complainant did not establish that attorney fees and costs were warranted.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

4. Complainant request for attorney fees and costs is properly denied.

ORDER

Respondent's disciplinary action is **AFFIRMED.** Complainant's separation from employment effective June 16, 2014, is **AFFIRMED**. Complainant's appeal is **Dismissed with Prejudice**.

Dated this **11th** day
of **January**, 2016 at
Denver, Colorado.

Pamela Sanchez, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 13th day of January, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-63, 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 electronic record on appeal in this case is $5.00. 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 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-67, 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 8-70, 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 8-60, 4 CCR 801.