

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2017B078

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CASSANDRA SINGLETON,
Complainant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on September 15, 2017, and the evidentiary hearing on February 20-22, 2018, in this matter at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. Complainant appeared in person and was represented by Casey Leier, Esq. Respondent was represented by Jacob Paul, Esq., and Jeanne Baak, Esq., Assistant Attorneys General. Respondent's advisory witness was Warden Steven Owens, Complainant's Appointing Authority.

The following exhibits were admitted into evidence: Complainant's Exhibits U, V, W, X, Y, FF, HH, II, JJ, VV, and Respondent's Exhibits 1, 6-15, 17-29, 32-35. In addition, the following exhibits were admitted into evidence and, pursuant to the Protective Orders issued by the ALJ, placed in the record under seal: Exhibits 2, 2A, 3, 4, 5, 15, 30, 31, and Complainant's Exhibits A and B. Pursuant to Orders issued by the ALJ, the evidentiary record was held open pending receipt of properly redacted exhibits from the parties on February 28, 2018, and photographs of large demonstrative exhibits on March 9, 2018. The record was closed on March 9, 2018.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of her employment. Complainant argues that she did not commit the act for which she was disciplined, and that Respondent's termination decision was arbitrary, capricious, and contrary to rule and law. Complainant further argues that Respondent's actions were groundless, frivolous, in bad faith, constituted harassment or were stubbornly litigious. Complainant seeks rescission of the disciplinary termination, reinstatement to her former position, an award of back pay, with statutory interest, and benefits, and reimbursement of attorney fees and costs.

Respondent argues that its decision to terminate Complainant's employment was appropriate, and was not arbitrary, capricious, or contrary to rule or law. Respondent seeks affirmance of its decision to terminate Complainant's employment, denial of all relief requested by Complainant, and dismissal of Complainant's appeal with prejudice.

For the reasons discussed below, Respondent's decision to discipline Complainant is **reversed**.

ISSUES

1. Whether Complainant committed the act for which she was disciplined;
2. Whether Respondent's termination of Complainant's employment 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 an award of attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant was a certified state employee with rights under the state personnel system. (Stipulated Fact)¹
2. Complainant began her employment with Respondent Department of Corrections (DOC) in December 2013 as a Correctional Officer I (CO I) at the Colorado State Penitentiary (CSP). (Stipulated Facts)
3. Warden Steven Owens has been employed by Respondent for 23 years. Warden Owens held various managerial positions before being promoted to Associate Warden of the San Carlos facility in 2013. In November 2016, he was promoted to Warden of CSP.
4. At all relevant times herein, Warden Owens was Complainant's Appointing Authority.
5. At all relevant times herein, Lt. Larry Van Gelder was Complainant's supervisor.
6. CSP is a "high custody" facility. It manages problematic offenders in "close custody," which involves 23-hour-a-day lockdown. CSP has Colorado's three death row offenders and a generally disruptive population that can be difficult to manage.
7. CSP includes six residential pods housing offenders: A, B, C, D, E, F.
8. D Pod is unique among the pods at CSP. It is an "incentive unit," housing offenders who have demonstrated good behavior and compliance with facility rules. D Pod allows more offender movement and benefits, such as checking out DVD players to watch movies and "Xboxes" to play computer games. Misconduct by an offender can result in a write-up and the offender's removal from D Pod.
9. D Pod is staffed with three CO's, a "floor sergeant," and a supervising lieutenant who does not stay in the Pod. Because the offenders in D Pod are generally cooperative and helpful, only three staff members are required on site to supervise the Pod. The extra staff member is "farmed out" to other pods.

¹ The parties stipulated to a number of facts, which are identified with parenthetical notes.

10. Other pods (A, B, C, E, F) have more than three staff assigned. (Stipulated Facts) The other pods have more conflicts and fights between offenders, have more lockdowns, and are less pleasant to work in.
11. In approximately early 2015, Complainant began working in D Pod.
12. On or about January 1, 2017, Karee Watzka, a CO I, began working in D Pod. Officer Watzka had previously worked for Respondent as a CO I for 4 ½ years, beginning in December 2010. She took a year off and then returned to work at CSP in June 2016.

Complainant's Employment History

13. From December 2013 through April 2017, Complainant received consistently satisfactory performance ratings.
14. On May 16, 2016, Complainant received a Corrective Action for inappropriate contact with a parolee. The parolee was a relative of Complainant's room-mate. Complainant was not aware that this relative was a parolee until Respondent's investigators questioned her about him. After being questioned, Complainant contacted the parolee through Facebook and asked him why he did not tell her he was a parolee. Complainant admitted that she should not have contacted him after learning that he was a parolee.
15. For the evaluation period April 1, 2016 through March 31, 2017, Lt. Van Gelder gave Complainant an overall satisfactory performance rating, with exceptional ratings in the areas of "Job Knowledge" and "Interpersonal Skills." Lt. Van Gelder commented:

Officer Singleton is very knowledgeable in the CDOC/CSP Emergency Plan. She responds appropriately to all drills and actual emergencies. ... Officer Singleton fills in as Shift Leader when there is no Sergeant on duty and does an excellent job. ... She knows what is required of her during an Emergency.

Post Orders and Applicable Regulations

16. The Post Orders for D Pod require the officers working on the floor of the Pod to "[c]ontinually monitor offender activity throughout the living unit," to supervise the distribution of food trays and medical services to offenders in the Pod, and to supervise offender movement to and from the Pod. Offenders leaving the Pod are subjected to "a thorough pat search" to ensure they are not carrying contraband. Floor officers are also required to "[e]nsure that when a unit custodian is utilized, he is under constant and direct supervision."
17. The Post Orders for the D Pod control center require the officer staffing the center to respond to emergencies as follows:

Contact CSP Master Control IMMEDIATELY in cases of emergency, by radio or phone. Ensure living unit floor staff is aware of the situation. Maintain a thorough knowledge of emergency response procedures and respond appropriately...
18. DOC's Prison Rape Elimination Procedure, AR 100-40, section IV.A.3 provides, in pertinent part: "If any DOC employee...learns that an offender is subject to a substantial risk of imminent

sexual abuse or sexual assault/rape, that person will take immediate action to protect the offender.”

19. Both Complainant and Officer Watzka received annual training on AR 100-40 during their employment with Respondent.

Officer Watzka's Observations of Officer J.B.'s Behavior

20. Approximately one week prior to April 21, 2017, Officer Watzka observed another CO I, Officer J.B., enter D Pod and approach offender D.B.² Officer J.B. was not assigned to work in D Pod that day.
21. Officer Watzka saw Officer J.B. take a note from offender D.B. Officer Watzka had previously observed that Officer J.B. and offender D.B. had a “close” relationship.
22. Officer Watzka told Complainant what she observed. Complainant advised Officer Watzka to report her observations.
23. Because Officer Watzka's supervisor, Lt. Van Gelder, was out of town, Officer Watzka decided to wait until his return before reporting her observations.

The Events of April 21, 2017

24. On the morning of April 21, 2017, Complainant was working the day shift in D Pod with Officer Watzka and Officer J.B.
25. Because Officer Watzka was pregnant, she was assigned to work in the control room. Officer J.B. and Complainant were assigned to work on the floor of the Pod. Complainant was assigned to be the shift lead, as there was no floor sergeant on April 21.
26. D Pod has eight two-story day halls with cells housing offenders. These halls are connected to a central open area like spokes to a wheel. The Pod's control center is located in the open central area above a first floor office. The control room is enclosed in glass and has views of each of the day halls via a series of cameras.
27. Approximately 125 offenders were living in D Pod on April 21, 2017. (Stipulated Fact)
28. “Rounds” in D Pod consist of a visual inspection by a correctional officer of every cell in the pod. Rounds involve two officers walking the pod and looking into each cell, either through the open door or through the window. Each officer inspects half of the Pod's cells; the other officer inspects the other half.
29. Per protocol, a “round” is required to be conducted once per hour. (Stipulated Fact)
30. At approximately 7:45 a.m., Officer J. B. and Complainant conducted and completed a “round,” each of them visually inspecting half of the cells in D Pod so that all of the cells were inspected. (Stipulated Fact)

² Pursuant to a Protective Order entered by the ALJ, Officer J.B. and any offenders will be identified only by their initials.

31. Upon completion of the "round," Officer J.B. informed Complainant and Officer Watzka that she would be conducting a shakedown of a cell.
32. A shakedown is a search of a cell for contraband that may be kept in an offender's cell.
33. Because D Pod is an incentive housing unit, offenders housed there are likely to be allowed more personal possessions, which can lengthen the time it takes to complete a shakedown. A shakedown in D Pod can take up to forty-five minutes.
34. In order to conduct a shakedown, a correctional officer identifies a cell, clears the cell of all occupants, enters the cell and closes the door. Shakedowns on D Pod are conducted by one correctional officer, alone in the cell while the offender waits outside.
35. When Officer J.B. left to begin her shakedown, Complainant was busy patting down and checking out offenders for their various work assignments outside D Pod.
36. Officer J.B. did not inform her coworkers in which cell she would be conducting the shakedown. Both Complainant and Officer Watzka watched Officer J.B. to see which cell she entered.
37. Officer J.B. entered cell D7-27, in day hall 7. Offender D.B.'s cell was D7-24.
38. While Officer J.B. was conducting her shakedown, Officer Watzka was in the control room with a clear view of day hall 7. She noticed that several offenders on the floor were watching her and became concerned that "something wasn't right."
39. Just outside the second floor control room, a grate in the floor allows the Officer working in the control room to communicate with an Officer on the floor, if the other Officer is standing right underneath the grate. Officers would generally need to shout to be heard through the floor grate.
40. Complainant was standing beneath the grate, supervising an offender who was cleaning the office. Officer Watzka approached the grate and asked Complainant to check on Officer J.B.
41. Complainant understood that Officer Watzka was asking her to assist Officer J.B. with the shakedown. She did not immediately leave to check on Officer J.B. because offenders cannot be left unsupervised in the office. She intended to remove the offender from the office, secure the office and then check on Officer J.B.
42. After Officer Watzka asked Complainant to check on Officer J.B., she turned on the intercom to cell D7-27, and heard strange noises, like skin slapping on skin. Officer Watzka "panicked" and "froze." She "did not want to believe [she] was hearing that."
43. Officer Watzka did not use the intercom system to contact Officer J.B. Officer Watzka did not tell Complainant what she heard. She did not attempt to contact anyone else using her radio or the telephone in the control center, or take any other action. Officer Watzka did not believe Officer J.B. was in physical danger.
44. Before Complainant could check on her, Officer J.B. exited cell D7-27 at approximately 8:20 a.m. Officer J.B. appeared fine and showed no signs of distress.

45. Between the time that Officer J.B. entered the cell and the time that the next round was conducted, Officer Watzka maintained visual observation on the cell. She did not see anyone entering or exiting the cell other than Officer J.B.
46. During the next round, conducted at approximately 8:45 a.m., Complainant observed that offender D.B. was in cell D7-27, where Officer J.B. had been.
47. Complainant notified Officer Watzka that offender D.B. was in the cell. Officer Watzka "was panicking" and said "Oh my gosh, we have to call someone." Complainant instructed her to call Lt. Michael Sherwood, who was filling in for Lt. Van Gelder.
48. Officer Watzka did not call for first responders on April 21, 2017. (Stipulated Fact)

OIG Investigation into the Events of April 21, 2017

49. At approximately 9:15 a.m., Officer Watzka contacted Lt. Sherwood and informed him that she thought something "inappropriate" had happened in cell D7-27 between Officer J.B. and offender D.B. Officer Watzka was emotionally distraught. Lt. Sherwood conferred with Captain Ortiz, who instructed Lt. Sherwood to reassign Officer J.B. to another unit, and tell Complainant and Officer Watzka to complete incident reports.
50. While Officer Watzka was preparing her incident report, she was upset and crying. Lt. Sherwood talked to her at greater length, and finally understood that Officer Watzka thought Officer J.B. had a sexual encounter with offender D.B. in cell D7-27. Lt. Sherwood contacted Major Nunez and the Office of the Inspector General (OIG) at approximately 9:45 a.m.
51. OIG assigned Investigators Maureen Sheridan and Chris Barr to conduct an investigation into what had occurred in cell D7-27. As part of that investigation, Officer Watzka and Complainant were interviewed
52. Officer Watzka was under a lot of stress and "couldn't focus" while being interviewed and providing her statements. Her "head was a mess" and she "just wanted to go home." She provided inconsistent versions of her request to Complainant that morning to check on Officer J.B.
53. During her interview with the OIG investigators, Complainant stated that Officer Watzka asked her to "go and check" on Officer J.B. "because she has been in there for a while." Complainant stated she "...was doing something...but as soon as I was, I don't remember what I was doing exactly, but as soon as I was done doing that I was gonna go and check on her."
54. In her report, Complainant stated that Officer Watzka asked her to "go and check on [Officer J.B.]" and "[a]t that exact second, I was busy. I told her in a second I will head up there." Complainant stated that Officer J.B. exited from the cell "a few minutes later."
55. After an OIG investigator questioned her, Officer J.B. admitted to having a sexual encounter with offender D.B. in cell D7-27.
56. The investigation conducted by OIG found evidence of a sexual assault committed on an offender by Officer J.B. The OIG also raised concerns that Complainant had not checked on Officer J.B. when requested to, and appeared to give inconsistent statements about what she was doing at the time she received the request.

57. On May 5, 2017, Warden Owens sent Complainant a letter that he had received information indicating that she may have violated the Code of Conduct and that a thorough investigation into this issue needed to be conducted. The letter also informed Complainant that she would be placed on paid administrative leave during the pendency of the investigation.

Rule 6-10 Meeting and Termination Decision

58. On May 11, 2017, Warden Owens sent a letter to Complainant informing her that he had received information indicating the possible need to administer disciplinary and/or corrective action for violation of the Code of Conduct. This letter also set a meeting with Complainant, pursuant to Board Rule 6-10, for May 22, 2017.

59. During the May 22, 2017 meeting, Warden Owens stated that his key concern was Complainant's response to Officer Watzka's request to check on the safety and well-being of Officer J.B. while she was in cell D7-27 on April 21, 2017.

60. Complainant told Warden Owens that Officer Watzka asked her to "check on" Officer J.B. Complainant thought that Officer Watzka was asking her to help Officer J.B. complete the shakedown. Complainant had no idea that someone else was in the cell with Officer J.B. or that there were any safety concerns. She told Warden Owens that there was a "miscommunication."

61. Complainant explained that, on the morning of April 21, 2017, Complainant had a lot going on; it was the busiest time of day. When an officer in D Pod is doing a shakedown, the other officer is the only one left on the floor to complete all the required duties. Complainant was busy pulling and patting down the offender work crews who were leaving D Pod, and supervising offenders who were checking out DVD players and Xboxes. By the time Complainant finished her supervision duties, Officer J.B. had already left the cell.

62. After his May 22 meeting with Complainant, Warden Owens interviewed Officer Watzka, Lt. Sherwood, and Lt. Stroup.

63. On May 31, 2017, Warden Owens sent a letter to Complainant informing her of the need to conduct a second meeting pursuant to Board Rule 6-10. This meeting was held on June 7, 2017.

64. During the June 7, 2017 meeting, Complainant again explained that, when Officer Watzka asked her to check on Officer J.B., she did not understand that there were any safety concerns. She emphatically stated, "If I had known anything was going on, I would have gone up there."

65. Warden Owens asked Complainant about her prior observations of Officer J.B. and offender D.B. Complainant stated that Officer J.B. talked with offender D.B. a lot more than the other offenders. Warden Owens asked Complainant why she didn't report these observations. Complainant explained that she did not want to accuse a co-worker of improper conduct based only on a suspicion. Complainant pointed out that Officer J.B. was not in offender D.B.'s cell on April 21, 2017.

66. Warden Owens found Complainant's statements about a "misunderstanding" were inconsistent with her previous statements to OIG about being "busy." On June 15, 2017,

Warden Owens issued a Notice of Disciplinary Action terminating Complainant's employment due to her failure to immediately respond to a request to check on Officer J.B. on April 21, 2017. Warden Owens noted Complainant's unreported concerns about Officer J.B. "getting too close to an offender in D Pod" as a factor in this decision.

67. Following the events of April 21, 2017, Warden Owens did not issue a disciplinary or corrective action to Officer Watzka. While she had concerns about Officer J.B. and offender D.B. prior to April 21, 2017, Officer Watzka explained that she did not want to accuse a co-worker of misconduct without something more substantial. Warden Owens concluded that Officer Watzka had a "reasonable" explanation for not immediately acting on her suspicions concerning Officer J.B.
68. Complainant timely appealed the termination of her employment to the State Personnel Board. (Stipulated Fact)

DISCUSSION

I. 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; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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.

Board Rule 6-8 further provides: "An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature."

In this *de novo* disciplinary proceeding, Respondent has the burden to prove by a preponderance of the 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 706-08. The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT DID NOT COMMIT THE ACT FOR WHICH SHE WAS DISCIPLINED.

Warden Owens determined that, on April 21, 2017, Complainant failed to immediately comply with Officer Watzka's request to check on Officer J.B.'s safety. However, the preponderance of the evidence establishes that Officer Watzka failed to communicate her concerns about what Officer J.B. was doing in cell D7-27 to Complainant or to anyone else until after Officer J.B. emerged from the cell. In fact, Officer Watzka testified that she was not even

concerned about Officer J.B.'s safety. Instead, she was upset over the prospect of reporting inappropriate conduct by a co-worker.

Officer Watzka was unable to definitively describe exactly what she communicated to Complainant through the floor grate on the morning of April 21. Her descriptions of her request to Complainant vary throughout the statements and interviews she provided during Respondent's investigation. During the hearing, Officer Watzka testified, for the first time, that she made a second request to Complainant to check on Officer J.B. before that officer emerged from the cell. When asked why she had never mentioned this second request before, Officer Watzka explained that she was upset and under a lot of stress when she provided her prior statements. However, she was also visibly upset during her testimony. These contradictions, inconsistencies and shifting stories, combined with Officer Watzka's admissions that her "head was a mess" and she "couldn't focus" when providing her various statements to Respondent, render her testimony fundamentally unreliable.

In contrast, Complainant's descriptions of being asked to check on Officer J.B., and her understanding that she was being asked to assist with the shakedown in cell D7-27 rather than check on Officer J.B.'s safety, are consistent and supported by other evidence in the record. Officer Watzka's ability to clearly communicate with Complainant through a floor grate was limited. When Officer Watzka finally contacted Lt. Sherwood later that morning, she was so distraught that Lt. Sherwood had trouble understanding what she was trying to tell him. These facts support Complainant's consistent statements to Warden Owens that she did not understand that, on the morning of April 21, 2017, Officer Watzka attempted to communicate an urgent request to check on Officer J.B.'s safety.

The preponderance of the evidence establishes that Officer Watzka did not communicate an urgent request to check on Officer J.B.'s safety to Complainant on the morning of April 21, 2017. Therefore, Respondent has failed to establish that Complainant committed the act for which she was disciplined on June 15, 2017.

III. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO BOARD RULE 6-9.

In determining whether an agency's decision to discipline an employee 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 that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In addition, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within the range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "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." Board Rule 6-9.

In reviewing the statements and interviews concerning the April 21st incident, Warden Owens excused Officer Watzka's inaction in the face of a potential emergency, and instead concluded that Complainant was to blame for failing to immediately check on Officer J.B. Warden Owens reached this conclusion after Complainant explained, during a Rule 6-10 meeting, that she misunderstood Officer Watzka's request and did not know that there was a safety concern. Warden Owens somehow found this explanation to be inconsistent with Complainant's prior statements and therefore not credible. In contrast, Warden Owens found Officer Watzka's explanations for her failure to immediately report her suspicions concerning Officer J.B., which might have prevented the sexual encounter that occurred, to be "reasonable."

Warden Owens did not consider whether Officer Watzka clearly communicated her concerns to Complainant on April 21. He did not doubt that Complainant was performing other important duties that morning, but believed that Complainant should have realized that Officer Watzka's request was urgent and should take priority. Warden Owens also did not give fair consideration to Complainant's consistently satisfactory performance ratings over her three and a half years of employment with Respondent, including Lt. Van Gelder's most recent commendation of Complainant's reliable responses to emergencies.

In reaching his conclusions concerning Complainant's actions and inactions on April 21, Warden Owens failed to give candid and honest consideration to the evidence before him, and exercised his discretion in such manner that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley*, 36 P.3d at 1252. Warden Owens also failed to fully and fairly review the circumstances surrounding Complainant's alleged "act, error or omission" on April 21, as well as Complainant's previous performance evaluations and mitigating circumstances, as required by Board Rule 6-9. For these reasons, Respondent's termination of Complainant's employment was arbitrary, capricious, and contrary to Board Rule 6-9.

IV. COMPLAINANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Sec. 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). In *Coffey v. Colorado School of Mines*, 870 P.2d 608, 609 (Colo. App. 1993), the Colorado Court of Appeals held that § 24-50-125.5(1), C.R.S., mandates an award of attorney fees where an employer has no grounds to seek an employee's discharge.

As reflected in the prior discussion, Respondent's termination of Complainant's employment was groundless. There was no reliable evidence that Officer Watzka clearly

communicated a request to immediately check on what Officer J.B. was doing in cell D7-27 on the morning of April 21, 2017. In the absence of such an urgent request, there was no reason for Complainant to abandon the performance of her existing duties, especially when she was the only officer available on the floor to supervise a large number of offenders in D Pod. Under § 24-50-125.5(1), C.R.S., and Board Rule 8-33(C), Complainant is entitled to an award of reasonable attorney fees and costs.


CONCLUSIONS OF LAW

1. Complainant did not commit the act for which she was disciplined.
2. Respondent's termination of Complainant's employment was arbitrary, capricious, and contrary to Board Rule 6-9.
3. Complainant's termination was not within the range of reasonable alternatives.
4. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **reversed** and the termination of Complainant's employment is rescinded. Complainant shall be reinstated with full back pay, with statutory interest, and made whole for all lost benefits. Complainant is also awarded her reasonable attorney fees and costs.

Dated this 29th day
of March, 2018.



Susan J. Tyburski
Senior 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 30th day of March, 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and attached **NOTICE OF APPEAL RIGHTS** 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 Rules 8-62 and 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 8-66, 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.

