STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B032**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANTHONY K. BENSON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, CENTENNIAL CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on January 28, 2008, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney Eric Freund represented Respondent. Respondent's advisory witness was Susan Jones, the Warden for the Centennial Correctional Facility (CCF) and the Colorado State Penitentiary (CSP). Complainant appeared and was represented by Richard Callison, Attorney at Law.

MATTER APPEALED

Complainant, Anthony K. Benson (Complainant), appeals his termination by Respondent, Department of Corrections, Centennial Correctional Facility (Respondent). Complainant seeks rescission of the disciplinary action, back pay, corresponding 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For the reasons set forth below, Respondent's action is **rescinded.**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 Complainant's discipline was within the range of reasonable alternatives; and
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was a certified employee who was employed by DOC as a Correctional Officer I for approximately ten years. During those ten years, Complainant has worked at the CSP and CCF. At all times relevant to this appeal, Complainant was working at CCF.

Complainant's First DUI

2. On June 18, 2006, Complainant was arrested for Driving Under the Influence of alcohol (DUI). Complainant did not report the incident to DOC until he returned from his vacation on June 24, 2006. As a result of the DUI arrest, as well as Complainant's delay in reporting the incident, Complainant's supervisor imposed a corrective action on July 21, 2006. Complainant had no prior disciplinary or corrective actions.

3. Complainant's July 21, 2006 corrective action provided, in part, "Any further lapses of this nature will result in further corrective and/or disciplinary action. You must forward to me the final disposition of any judicial action and orders you are to accomplish within 15 days of completed judicial action. By August 1, 2006, furnish to me, a 2-3 page written statement, from you, explaining why this incident is a violation of DOC AR 1450-01, Staff Code of Conduct, and how such incidents have a negative effect on the Department of Corrections and all of its employees. You must also attend Professionalism Training at the Colorado Corrections Training Academy by September 30, 2006."

4. Complainant fulfilled all the requirements of his July 21, 2006 corrective action.

5. As a result of the June 18, 2006 DUI, Complainant received a deferred sentence, was required to perform 120 hours of community service, and attend alcohol classes. Complainant has completed all of the terms of his deferred sentence.

Complainant's Second DUI

6. On December 10, 2006, Complainant was involved in an automobile accident. When police officers responded to the scene, they smelled alcohol on Complainant's breath, and had Complainant take field sobriety tests. Complainant was arrested and charged with DUI, Careless Driving, and Failure to Provide Proof of Insurance.

7. On December 16, 2006, Complainant completed an Informative/Incident Report Form regarding his accident and arrest and submitted it to Respondent.

8. On February 9, 2007, Angel Medina, then the Associate Warden for the CSP, sent Complainant a letter advising him that he was going to hold a meeting pursuant to Personnel Board Rule 6-10 to discuss the events of December 10, 2006. Specifically, Medina wrote that he was going to discuss: 1) Complainant's arrest for driving while under the influence of alcohol which resulted in an accident and charges of Careless Driving and Failure to Provide Proof of Insurance; 2) that by driving under the influence of alcohol, Complainant placed the general public at considerable risk; 3) that Complainant's arrest negatively impacted his job performance and brought DOC in disrepute, and reflected discredit upon himself as a correctional officer; 4) that Complainant's decision to drive under the influence of alcohol compromised his credibility and integrity of his decision making as a correctional professional; and 5) that when Complainant first reported the incident to his immediate supervisor, he failed to disclose that his arrest included charges of Careless Driving Resulting in an Accident and Failure to provide Proof of Insurance. Medina also reminded Complainant that this was his second DUI.

9. Complainant and Medina discussed all of the topics listed in the Notice of the Rule 6-10 meeting. The Rule 6-10 meeting was held on February 16, 2007.

10. During the Rule 6-10 meeting, Complainant took full responsibility for his actions, and admitted that he used poor judgment in driving after drinking alcohol. Complainant expressed remorse for his actions. Complainant further told Medina that he had a summons regarding his arrest, and that he had started drug and alcohol treatment.

11. Medina concluded that Complainant, by his own admission and arrest, had violated several sections of DOC's Administrative Regulations (AR)1450-1, Code of Conduct. Those sections are: 1) AR 1450-01 III B; 2) AR 1450-01U; and 3) 1450-01 IV. W. Medina also concluded that Complainant violated AR 1450-01 IV. ZZ. The aforementioned AR's contain the following language:

    - AR 1450-01 III. B. Conduct Unbecoming: Any act or conduct either on or off duty, which negatively impacts job performance, not specifically mentioned in administrative regulations which tends to bring the DOC in disrepute or reflects discredit upon the individual as a correctional staff member.

    - AR 1450-01 U. When a DOC employee, contract worker, or volunteer is the subject of an external investigation, has been arrested for, charged with, or convicted of any crime or misdemeanor (except minor traffic violations), or is required to appear as a defendant in any criminal court, he/she will immediately inform and provide a written report to his/her appointing authority who shall inform the IG's office.

- AR 1450-01 IV. W. All incidents which may constitute a felony or appear to be of a criminal nature . . . shall be referred immediately to the IG for review . . .

- AR 1450-01 IV. ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, may lead to corrective and/or disciplinary action.

12. After the Rule 6-10 meeting, Medina issued a disciplinary action and a corrective action to Complainant on March 7, 2007. As a disciplinary action, Complainant's monthly salary was reduced by $150.00 for six months. As a corrective action, Complainant was required to refrain from any further conduct which may be considered inappropriate or an act of willful misconduct and focus on his behavior as a Correctional Officer. As further corrective action, Medina gave Complainant two assignments. The first assignment was to read the book, The 7 Habits of Highly Effective People, and prepare a ten-page typewritten document to summarize his understanding of the book as to how it may relate to his actions and decision making. The second assignment was to provide his immediate supervisor with a monthly written report for a period of six months that reflected his personal progress, any and all court orders, and to include examples of any self help efforts made by Complainant.

13. Complainant complied with the terms of his March 7, 2007 corrective action.

Complainant's Court Appearance and Sentence

14. When Medina issued the corrective action and disciplinary action on March 7, 2007, it was reasonably foreseeable that Complainant would have legal consequences as a result of his December 10, 2006 DUI.

15. On October 4, 2007, Complainant attended a scheduled court appearance concerning his DUI. On that date, Complainant pled guilty to Driving While Ability Impaired (DWAI). Complainant was sentenced to six days in jail, but was only required to serve four of those days. Complainant's sentence also included forty-eight hours of community service.

16. Because of his position as a Correctional Officer, Complainant asked the judge who sentenced him to put him in administrative segregation while he was in jail. When an offender is placed in administrative segregation, the other offenders are placed in lock down while the offender in administrative segregation is brought into the El Paso Criminal Justice Center. That offender is then processed and sent to the medical holding unit; he has no contact with other inmates. His name card is turned over so no one can read it. As a result of being placed in

administrative segregation, Complainant was not observed by any other inmates while he was in jail.

17. Complainant also asked the judge who sentenced him if he could serve his time on weekends, so his jail time would not interfere with his job at DOC. The judge agreed to that request.

18. After his December 10, 2006 DUI, Complainant did not engage in any further acts that negatively affected his job at DOC.

19. After his second DUI, but prior to his termination, Complainant received an overall "Satisfactory" Performance Evaluation, and was found to be "Commendable" in the areas of "Job Knowledge" and "Customer Service." That Performance Evaluation covered the time period from April of 2006 to March of 2007. Complainant also received a Performance Review Form, which covered the time period from April of 2007 to September of 2007, which indicated that he was a "Level Two" (out of three levels) employee.

Complainant's Termination

20. On October 1, 2007, Susan Jones became the warden for both CSP and CCF. Thus, she became Complainant's new Appointing Authority. Medina was no longer employed at DOC.

21. As he was instructed to do in the March 7, 2007 notice of disciplinary and corrective action, Complainant immediately notified Jones of "any and all court orders" in this instance, his sentence, by memorandum on October 4, 2007. Complainant informed Jones that he would be spending the next two weekends in jail, which would not affect his work schedule at CCF, and that he requested to be placed in administrative segregation.

22. Jones read Complainant's October 4, 2007 memorandum on October 12, 2007. After she read it, she checked with DOC Human Resources to see if the issue of Complainant's DUI had been addressed. She also found a copy of Medina's March 7, 2007 notice of disciplinary and corrective action.

23. Jones decided that she needed to do more research and placed Complainant on administrative leave with pay. After reading Medina's letter, she determined that it did not deal with a conviction, the possibility of convictions or criminal sanctions.

24. Jones issued a notice of a Rule 6-10 meeting. That meeting was held on October 19, 2007. At the start of the meeting, Jones informed Complainant that the purpose of the meeting was to "review the allegations regarding the sanctions that were imposed as a result of [Complainant's] recent conviction."

25. During the Rule 6-10 meeting, Complainant told Jones that he was in outpatient therapy to treat his alcohol problem, and had gotten a negative result on every random alcohol test he had taken since his second DUI. He also told her that at the time he got his second DUI, he was depressed over the death of his brother and consequently made bad decisions. He further explained to her how he had asked the judge to sentence him to administrative segregation so other inmates would not see him.

26. Complainant's lieutenant was also present at the Rule 6-10 meeting. He told Jones that Complainant had been a great addition to the shift, and was very dependable.

27. On October 24, 2007, Jones issued a letter of disciplinary action terminating Complainant, after considering all of the information available to her. Jones terminated Complainant for receiving a DUI and the resulting sanctions.

28. In her October 24, 2007 letter, Jones wrote, "I find that your behavior indicates a pattern of disregard for the law and casts doubt upon the integrity of the Department. Your conviction of DUI and the subsequent sanctions imposed by the court are in direct conflict with the Department of Correction's Code of Ethics, 1450-1. I feel that these sanction [sic] are of a severity that termination is the most appropriate course of action."

29. Jones concluded that Complainant's "behavior" violated DOC AR 1450-1 IV. N. and ZZ.

30. Jones felt that Complainant's conviction and jail time hurt the credibility of the DOC and that his conviction and jail time would have impeded Complainant's ability to do his job. She also felt that it put the rest of the staff and the facility at risk.

31. Complainant timely appealed his termination.

DISCUSSION

I. GENERAL

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

II. HEARING ISSUES

A. Complainant did commit the act for which he was disciplined.

According to Warden Jones' testimony, Complainant was disciplined for the sentence he received as a result of his December 10, 2006 DUI. However, the act for which Complainant was terminated was receiving a DUI, which ultimately resulted in a four-day jail sentence. Board Rule 6-8 provides, in part, "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 case, Complainant is being disciplined twice for his DUI of December 10, 2006. Respondent claims that Complainant's sentence is a separate and distinct incident; however, this contention is not supported by the record. Once Complainant received his second DUI, it was reasonably foreseeable and inevitable that he would face legal consequences. Medina recognized this when he issued the March 7, 2007 disciplinary letter. For example, Medina concluded that Complainant violated DOC AR 1450-01 IV. W., which addresses incidents which may constitute a felony or appear to be criminal in nature. Medina anticipated that Complainant would go to court over the December 10, 2006 DUI as he required Complainant to provide any and all court orders to Complainant's immediate supervisor. Respondent considered the damage to Complainant's credibility resulting from the legal consequences of the DUI when it disciplined Complainant in March of 2007. It is therefore barred by Board Rule 6-8 from disciplining him again based on the same legal consequences.

Jones testified that she terminated Complainant because he received a jail sentence. Complainant's sentence was imposed by the judge in his DUI case. It was not an act or action on Complainant's part. Even if Complainant's guilty plea could be construed to be an act or action, it was an act that stems directly from act of driving while under the influence of alcohol, for which he had already been disciplined.

Respondent argued that Complainant committed a new act when he pled guilty to DWAI on October 4, 2007, which resulted in the four-day jail sentence. This argument is without merit, and discourages employees, such as Complainant, to take accountability for their actions. Complainant admitted to Medina that he had been driving while under the influence of alcohol, and he was disciplined for his actions. He should not be disciplined again for admitting his guilt in his subsequent criminal proceeding.

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

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; 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).

Jones did use reasonable diligence and care to gather all of the relevant evidence she was authorized to consider. She also gave candid and honest consideration to the evidence she gathered. However, she failed to exercise her discretion in a manner that indicates that her decision to discipline Complainant was such that reasonable men fairly and honestly considering the same evidence would have reached the same conclusion. Complainant did not commit any additional acts which could subject him to additional discipline; his guilty plea and resulting sentence were a logical and foreseeable consequence of the DUI for which Complainant had already been disciplined on March 7, 2007. It is unreasonable to assume that Complainant would not take steps to resolve the criminal charges against him. In fact, the evidence available to Jones demonstrated that Complainant took full responsibility for the December 2006 DUI during his meeting with Medina; hence, it was foreseeable that he would plead guilty to the offense. Respondent could have waited until Complainant was sentenced to impose discipline, but did not.

Finally, Complainant was not convicted of a felony or a crime of moral turpitude. Complainant pled guilty to Driving While Ability Impaired, which is not an offense that involves moral turpitude. *Hartman v. Wadlow*, 545 P.2d 735 (Colo.App.1975), aff'd 551 P.2d 201 (Colo. 1976). Thus, Respondent's decision to terminate Complainant was arbitrary, capricious and contrary to rule or law.

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

Because Complainant had already been disciplined for the December 10, 2006 DUI, any discipline imposed by Respondent was not reasonable.

D. Attorney fees are 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, 4 CCR 801.

Board Rule 38(A)(1) defines a "frivolous personnel action" as "an action or defense in which it is found that no rational argument based on the evidence or the law is presented." Moreover, Board Rule 38(A)(3) defines a "groundless personnel action"

as "an action .. . in which is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action. . . ." Respondent failed to produce competent evidence in support of Complainant's termination, and the termination is, therefore, groundless. An award of attorney fees and costs is proper as long as a determination of groundlessness has a reasonable basis in law and fact. *Hartley v. Department of Corrections, Division of Correctional Services*, 937 P.2d 913 (Colo. App. 1997).

Given the above findings of fact an award of attorney fees is warranted. Complainant's administrative termination was frivolous and groundless. Respondent argues that Complainant's jail sentence casts doubt upon his integrity and credibility as a Correctional Officer and upon DOC's integrity. While this may be true, it stems from the act of driving while under the influence of alcohol, an act for which Complainant was already disciplined. Moreover, a potential jail sentence was foreseeable at the time Medina disciplined Complainant. Respondent could have waited to discipline Complainant, pending the outcome of his court appearance, but did not. Complainant was disciplined twice for the single act of driving while under the influence of alcohol. Receiving a jail sentence as a result of that act was beyond Complainant's control. As a result, Respondent's action of terminating Complainant had no basis in law or fact.

CONCLUSIONS OF LAW

1. Complainant did commit the acts 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 fees are warranted.

ORDER

Respondent's action is **rescinded.** Attorney fees and costs are awarded.

Dated this 27th day of February, 2008

[redacted]

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

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 8 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 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 27th day of Feb., 2008, 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:

Richard Callison, Esq.

[redacted]

and in the interagency mail, to:

Eric Freund

[redacted]

[redacted]

Andrea C. Woods