

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIM BARWICK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on December 9, 2008, at the State Personnel Board, 633 - 17th Street, Courtroom 6, in Denver, Colorado. The record was closed on December 9, 2008. Assistant Attorney General Willow Arnold represented Respondent. Respondent's advisory witness was Warden Steven Green, the appointing authority. Complainant appeared and was represented by Phil Klingsmith, Klingsmith & Associates, P.C.

MATTER APPEALED

Complainant, Tim Barwick ("Complainant"), appeals his termination by Respondent, Department of Corrections ("Respondent" or "DOC"). Complainant seeks reinstatement, backpay and benefits, and an award of attorney fees and costs.

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

ISSUES

1. Whether Respondent's termination of Complainant's employment during the probationary period was a violation of his statutory or constitutional rights;
2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment as a Correctional Officer I for the Delta Correctional Center in October 2007. His employment was terminated during his probationary period in June 2008.
2. According to Complainant's Position Description, his work unit exists to "protect the citizens of Colorado and the United States by confining convicted felons in a constitutionally defensible environment. The work unit provides secure living quarters and rehabilitative programs. The management philosophy of the work unit is to provide an environment which will improve an inmate's propensity toward successful reintegration into society which includes work, training, treatment and discipline. The Housing and Security environments are set in an atmosphere of control, consistency, affirmative role models and positive staff support."
3. During the month of October 2007, Complainant received training in the DOC Code of Conduct, Administrative Regulation (AR) 1450-01.
4. When Correctional Officers take the oath of office for their positions, they commit to uphold the laws of the State of Colorado.

May 29, 2008 Motorcycle Accident and Arrest

5. On May 29, 2008, in the early evening, Complainant was riding his motorcycle while off duty. He had just purchased a six-pack of beer, which was in his saddle bag.
6. As Complainant drove over a hill, he crashed into a guard rail. He was injured in several areas.
7. An ambulance arrived at the scene. Complainant refused assistance.
8. A State Trooper, Officer Darel Reed, was called to the scene. Reed was informed over his radio that the accident involved serious injury potential.
9. When he arrived on the scene, Reed sought out Complainant. Complainant was sitting on the guard rail talking on the telephone at the time Reed approached him. Reed heard Complainant state to the person on the telephone, "I'm in big trouble, State Patrol is here and need to talk to me about my crash."
10. Reed noted that Complainant was walking with a limp due to apparent leg injuries from the accident. In addition, Reed noted that Complainant's speech was slurred, his eyes were watery, and he smelled of alcohol.
11. Reed asked Complainant if he had been drinking, and Complainant responded that he had had two beers.

12. Reed had deputies assisting him and he therefore did not go near the site of the motorcycle. There were bottles of beer in the saddlebag on the motorcycle at the time of the accident. If any bottles of beer broke in the saddlebag, Trooper Reed did not smell alcohol from this source, because the motorcycle was not near Reed and Complainant.
13. Reed determined that he had probable cause to administer roadside sobriety maneuvers. He asked Complainant to touch his nose and walk in a straight line. Complainant refused to participate in the roadside sobriety maneuvers.
14. Reed next asked Complainant to participate in the "express consent test," which consists of either a breath or blood test to determine his blood alcohol level. Complainant refused.
15. Reed then placed Complainant under arrest and charged him with Driving Under the Influence of Alcohol and Careless Driving. Once Complainant was in Reed's patrol car, Reed advised Complainant of the Colorado Express Consent law and asked him again to be tested for his alcohol level. Complainant responded that he needed a few minutes to think about it. Reed gave him a few minutes, asked him again, and Complainant stated that he would not take the test.
16. On May 29, 2008, at the Delta County Sheriff's facility, Complainant was asked again to submit to the Express Consent test. He refused. Trooper Reed filled out the Express Consent Affidavit and Notice of Revocation form.
17. Complainant signed the Express Consent Affidavit and Notice of Revocation form, checking the box stating: "REFUSAL. Because you refused to take or complete, or to cooperate with any testing or tests of your blood, breath . . . , your driver's license and/or driving privilege is hereby revoked." The form noted that for a first offense, the period of revocation was one year.
18. Reed confiscated Complainant's driver's license.
19. Reed observed Complainant to be alert and responsive to questions at all times during his contact with him.
20. Complainant was fully conscious and aware of his actions at the time he refused the Express Consent test.
21. On June 6, 2008, Reed filled out his offense report on the May 29, 2008 incident. In the report, he noted the following: Complainant was talking on the telephone when Reed initially approached him; Reed heard Complainant state that he was in "big trouble," Complainant appeared intoxicated and Reed asked him if he had had any alcohol to drink and Complainant responded he had had a couple of beers; Reed asked him to perform some voluntary roadside maneuvers; Complainant stated that he wouldn't; Reed arrested Complainant; Reed advised Complainant of the Colorado Express Consent Law; Complainant asked for a few minutes to think about it; after a few minutes, Complainant refused the test.

Warden Green

22. Warden Green learned of the incident and requested that one of his lieutenants obtain all of the law enforcement and court documents relating to the incident. Green obtained and reviewed Officer Reed's incident report and the Express Consent Affidavit. He also reviewed an Inspector General report that was completed pursuant to policy.
23. Warden Green was very concerned about Complainant's refusal to submit to the Express Consent test. He viewed it as an extremely serious breach of Complainant's duty as a Correctional Officer to uphold the law and serve as a role model for inmates.
24. Warden Green generally viewed Complainant as a satisfactory employee. Although he was not required to do so, Green set a pre-disciplinary meeting with Complainant in order to discuss the events of May 29, 2008.
25. Complainant attended the pre-disciplinary meeting. He told Warden Green that he had received a concussion in the fall from the crash, and that he did not recall having refused the Express Consent test.
26. Warden Green determined, based on the information he had reviewed, including the incident report prepared by Trooper Reed and the Express Consent Affidavit, that Complainant had been fully conscious of his decision when he refused the Express Consent test.
27. The DOC Code of Conduct, AR 1450-01, provides:

Any action on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of DOC employees, . . . is prohibited. DOC employees . . . will exercise good judgment and sound discretion. AR 1450-01, Section IV(N).

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 DOC employee . . ., or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action. AR 1450-01, Section IV(ZZ).

Termination

28. In the course of considering how to respond to the events of May 29, 2008, Warden Green gave foremost consideration to the fact that when Correctional Officers take the oath of office, they commit to uphold the laws of the State of

Colorado. In refusing to take the Express Consent test, Green believed, Complainant had violated the law and the oath of office for his position. Green concluded that Complainant's value as a Correctional Officer was diminished because he did not uphold the oath of office in becoming a Correctional Officer.

29. Green concluded that Complainant had violated the DOC Code of Conduct by engaging in conduct unbecoming an officer, which conduct called into question his integrity and ability as an officer.
30. On June 20, 2008, Warden Green issued the letter terminating Complainant's employment. The letter noted that on May 29, 2008, at the accident site, Complainant had refused to submit to voluntary roadside maneuvers and the Express Consent test when asked by the arresting officer. The letter also noted that as Complainant was being processed at the Delta County Sheriff's Office, Complainant again refused the Express Consent test and signed the Express Consent Form verifying his refusal.
31. The letter acknowledged that since May 29, 2008, Complainant had stated to Warden Green and others that he did not recall having refused the Express Consent testing. It continued, "Your statement is in direct counterpoint to the troopers' statements."
32. The letter concluded that Complainant had willfully violated the Express Consent law, since both of his refusals "occurred across an expanse of time when both troopers noted that you were alert and responsive to their questions." The Warden concluded that this willful violation of the Express Consent law constituted a violation of Respondent's Code of Conduct, Administrative Regulation (AR) 1450-01, Subsections N and ZZ, "by reflecting discredit upon yourself as a DOC employee and jeopardizing your ability to perform your duties as a correctional officer effectively and efficiently." The letter concluded that Complainant's misconduct constituted grounds for termination under State Personnel Board Rule 6-12, which defines the reasons for discipline.
33. Complainant appealed his termination to the State Personnel Board.

DISCUSSION

I. GENERAL

A. Probationary Employment

Probationary employees terminated for unsatisfactory performance have no right to a hearing before the Board. Under the Civil Service Amendment of the Colorado Constitution, "unsatisfactory performance shall be grounds for dismissal by the appointing authority during [the probationary] period without right of appeal." Colo. Const. art. XII, Section 13(10). The Colorado Personnel Systems Act states, "A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing

to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee." § 24-50-125(5), C.R.S. Subsection (1) governs disciplinary proceedings taken for unsatisfactory performance, defined therein as "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude. . . ." § 24-50-125(1), C.R.S.

Colorado State Personnel Board Rule 6-12 states:

"Reasons for discipline include:

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

In addition to the above authorities, the State Personnel Systems Act requires, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." § 24-50-116, C.R.S. See *Bishop v. Dept. of Institutions, Division of Youth Services*, 831 P.2d 506, 509-510 (Colo. App. 1992)(violation of the agency code of ethics, general standards of the job manual, and established standards in employee's office under § 24-50-116, C.R.S., constituted valid grounds for termination).

Therefore, a probationary employee has no right to a hearing if he or she has been terminated for engaging in conduct outlined in § 24-50-125(1), C.R.S., Board Rule 6-12, or which violates generally accepted standards or specific standards prescribed by law, rule of the board, or any appointing authority, under § 24-50-116, C.R.S., any of which constitute unsatisfactory performance.

B. Complainant's Actions Constituted Unsatisfactory Performance

Complainant served as a Correctional Officer at Delta Correctional Center. In this position, Complainant was responsible for safely confining convicted felons. According to Complainant's Position Description, one of his responsibilities was to assure an environment of "control, consistency, affirmative role models and positive

staff support.” Serving as an affirmative role model for convicted felons is therefore an explicit requirement of Complainant’s job.

Upon taking the oath of office as a Correctional Officer, Complainant swore to uphold the laws of Colorado. In addition, the DOC Code of Conduct requires its officers to comport themselves both on and off the job in such a way as to reflect positively on the agency, and to avoid conduct that could jeopardize the integrity of the agency or its officers.

A breach of DOC’s Code of Conduct constitutes a “violation of these or department rules or law that affect the ability to perform the job” under Board Rule 6-12(2). In addition, a violation of the oath of office and the Code of Conduct governing Correctional Officers constitutes failure to comply with standards of efficient service or competence under § 24-50-125(1), C.R.S., and a violation of the standards of service that govern Complainant’s employment under Section 24-50-116, C.R.S.

Respondent determined that Complainant’s refusal to take the Express Consent test violated the DOC oath of office for Correctional Officers and the Code of Conduct governing all DOC employees. An examination of the Express Consent statute is therefore appropriate.

“The primary purpose of the express consent statute is to facilitate cooperation between citizens and police officers in the enforcement of highway safety.” *Turbyne v. People*, 151 P.3d 563, 569 (Colo. 2007). The statute’s key provisions include the following:

(1) Any person who drives [in Colorado] shall be deemed to have expressed such person’s consent to the provisions of this section.”

(2)(a)(I) Any person who drives [in Colorado] shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of such person’s breath or blood for the purpose of determining the alcoholic content of the person’s blood or breath when so requested and directed by a law enforcement officer”

(III) “If a law enforcement officer requests a test under this paragraph (a), the person **must cooperate with the request such that the sample of blood or breath can be obtained within two hours of the person’s driving.”**

C.R.S. § 42-4-1301.1(1), (2)(a) (I) and (III)(emphasis added).

Citing these specific provisions of the law, the Colorado Supreme Court has stated, “The provisions of this statute are plain. The driver must select between a blood or a breath test when a police officer, upon probable cause, invokes the express consent law in connection with an alcohol-related offense. The driver must cooperate with taking and completing the selected test within two hours of driving.” *Turbyne v. People*, 151 P.3d 563, 568 (Colo. 2007). *See also Gallion v. Colorado Department of Revenue*, 171 P.3d 217, 219 (Colo. 2007)(the Express Consent law provides that “all

drivers are required to take, and to cooperate in the taking and completing of, a BAC test when requested to do so by an officer with probable cause that the individual was driving under the influence.”)

Complainant violated the Express Consent statute by refusing to submit to a chemical test upon request by the arresting officer. *Turbyne, supra; Gallion, supra*. Complainant’s refusal was in direct contravention of the statute’s purpose of facilitating cooperation between citizens and police officers in the enforcement of highway safety. *Turbyne*, 151 P.3d at 569. Respondent therefore correctly concluded that Complainant’s refusal violated the oath of office requiring Correctional Officers to uphold the laws of the State of Colorado. Respondent also correctly found that Complainant violated DOC’s Code of Conduct: his off duty conduct reflected poorly on Complainant and the Department, cast doubt on the integrity of DOC employees, and brought discredit upon Complainant as a DOC employee. As the Warden of Delta Correctional Facility, Warden Green’s interpretation of the Code of Conduct is entitled to deference.

C. Respondent did not violate Complainant’s statutory or constitutional right to refuse the Express Consent test.

Complainant can still prevail in his appeal if he proves by preponderant evidence that Respondent’s termination was a violation of statutory or constitutional law. *Williams v. Colorado Dept of Corrections*, 926 P.2d 110 (Colo.App. 1996); § 24-50-125(5), C.R.S. In *Williams*, a probationary employee terminated for unsatisfactory performance appealed to the State Personnel Board, alleging race discrimination. After evidentiary hearing, the Board found that the race claim lacked merit, but vacated the disciplinary termination on other grounds. The Court of Appeals vacated the Board order, clarifying that the Board lacked jurisdiction to probe the basis for the termination based on unsatisfactory performance, except to determine the merits of his racial discrimination claim. *Id.*

Complainant was granted a discretionary hearing in order to address his claim that the termination violated his statutory and constitutional right to refuse the chemical test mandated under the Express Consent law. It has long been held that there is no constitutional right to refuse to submit to the Express Consent test. *People v. Brown*, 485 P.3d 500, 504 (Colo. 1971)(citing *Schmerber v. California*, 384 U.S. 757, “[which] holds that there is no constitutional right to refuse to surrender blood for a chemical analysis to determine its alcohol content.”)

The Express Consent law does not create a “right” to refuse the chemical test when directed by a police officer. To the contrary, the law imposes a serious penalty for refusing to take the chemical test, namely, mandatory revocation of one’s driver’s license for a period of one year. To equate the “choice” of license revocation with a “right to refuse” the test is to elevate the act of refusal to a protected legal status which the Express Consent law never intended. Again, the purpose of the statute is to promote cooperation between citizens and police in the enforcement of highway safety. DOC’s imposition of its own administrative penalty against Complainant because of his

refusal is consistent with the Express Consent statute, not a violation of it.

In *People v. Sanchez*, 467 P.2d 980 (Colo. 1970), the Colorado Supreme Court alludes, in *dicta*, to the fact that if a citizen refuses to submit to the chemical test, the "right of refusal" "must be honored by the arresting officer." *Id.*, at 982. This section of the *Sanchez* opinion simply points out that the arresting officer must permit the administrative revocation process to run its course in the event of a refusal in violation of the statute, and may not physically force a refusing citizen to submit to the test. However, the opinion does not hold that the refusal is not a violation of the statute. *Id.* As discussed *infra*, the Colorado Supreme Court has repeatedly held that the Express Consent law "requires" Colorado citizens, as a condition of driving, to submit to a blood or breath test for alcohol upon direction by a police officer. *Turbyne, supra; Gallion, supra.*

In conclusion, while the Express Consent law imposes an administrative penalty on citizens who exercise their "right to refuse" to take the chemical test, there is no legal support for the assertion that this sanction is an exclusive one. The Express Consent law does not preclude Respondent from imposing its own penalty against Complainant based on its agency regulations and standards of conduct that govern its employees. Therefore, Respondent's action was consistent with the Express consent law, not a violation of it.

D. Complainant is not entitled to an award of attorney fees and costs.

Complainant requested an award of attorney fees and costs. Because he did not prevail in this matter, he is not entitled to such an award.


CONCLUSIONS OF LAW

1. Respondent did not violate Complainant's statutory or constitutional rights in terminating his probationary employment.
2. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 22nd day of January, 2009.


Mary S. McClatchey
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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 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 8-70, 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 8-68, 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

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 8-72, 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

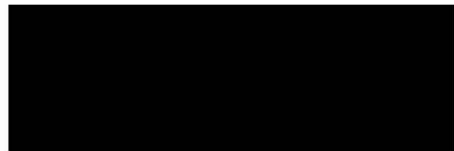
This is to certify that on the 23rd day of Jan., 2009, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Phil Klingsmith



and in the interagency mail, to:

Willow I. Arnold



Andrea C. Woods