

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**DAVID R. MARTINEZ,**  
Complainant,

vs.

**DEPARTMENT OF CORRECTIONS, ARKANSAS VALLEY CORRECTIONAL FACILITY,**  
Respondent.

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Administrative Law Judge ("ALJ") Keith A. Shandalow held the hearing in this matter on September 29, 2015 at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The case commenced on the record on September 29, 2015 and the record was closed on October 20, 2015 after the submission and acceptance of the original of one of Respondent's exhibits. Senior Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Warden Randy Lind, Complainant's appointing authority. Complainant appeared and represented himself.

**MATTERS APPEALED**

Complainant, David R. Martinez ("Complainant") appeals the termination of his employment by Respondent, Colorado Department of Corrections ("Respondent" or "CDOC"). Complainant alleges that he did not commit the acts and omissions for which he was disciplined, that the termination was arbitrary, capricious or contrary to rule or law, and that his termination was not within the reasonable range of alternatives available to the appointing authority. Complainant also alleges that he was the victim of age discrimination.<sup>1</sup> Complainant seeks reinstatement to his position as a Correctional Officer II, as well as back pay and benefits.

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

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined.
2. Whether Respondent's actions were arbitrary, capricious, or contrary to rule or law.
3. Whether the discipline imposed was within the range of reasonable alternatives.

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<sup>1</sup> On the form that initiated Complainant's appeal to the Board, Complainant also checked boxes indicating he was alleging discrimination based on race/color and disability. He voluntarily dropped those claims at the start of the evidentiary hearing. With respect to his possible claim of disability discrimination, Complainant was not under a doctor's care for alcoholism, and did not request any accommodation arising from his abuse of alcohol. Accordingly, even if Complainant had maintained his disability claim, it would not have succeeded.

Pueblo, Colorado. Lt. Salazar also told Inspector Davidson that Complainant told him that he has a 60-day driving permit.

14. On November 8, 2014, Complainant drafted, signed and submitted an Incident Report about his arrest on November 6, 2014. In his report, Complainant wrote, in pertinent part, that "ON 11-6-2014 AT APPROXIMATELY 0253 HRS I WAS ARRESTED FOR DUI BY PUEBLO PD. I WAS VERY INTOXICATED AND ASLEEP IN MY CAR MY BAC WAS .195...."

15. On November 10, 2014, Investigator Davidson obtained a record of the arrest from the Pueblo Police Department, reviewed it and noted that Complainant was charged with DUI and impeding the normal flow of traffic. Investigator Davidson provided a copy of the police report to the Warden and Associate Warden at AVCF.

### **The January 2015 Urinalysis**

16. On January 18, 2015, Complainant provided a urine sample to the Nextep Community Supervision Program ("Nextep"). Complainant was required to submit to random urinalysis ("UA") testing as part of his bail bond terms and conditions. The specimen tested positive for alcohol.

### **Complainant's Arrest in February 2015**

17. A warrant for Complainant's arrest was issued by a Pueblo County Court Judge on February 17, 2015. The warrant indicated that Complainant was in contempt of court.

18. On February 24, 2015, Complainant was informed by a staff member at Nextep that there was a warrant out for his arrest. Complainant voluntarily went to the Pueblo County Sheriff's Department and was arrested on a charge of Contempt of Court.

19. Complainant did not inform his supervisor or anyone else in his chain of command of either the arrest warrant or his February 24, 2015 arrest.

20. On March 12, 2015, Investigator Davidson was contacted by Betty Cordova of the CDOC Background Investigations Unit, who asked him if he was aware that Complainant had been arrested on February 24, 2015, by the Pueblo County Sheriff's Department. He replied that he was not aware of that.

21. Investigator Davidson then sent an email to Warden Lind and Associate Warden Colin Carson and asked them if they knew about Complainant's arrest. They responded that they did not know about the arrest.

22. On March 13, 2015, Investigator Davidson spoke with clerks in the Pueblo County Sheriff's Office and was told that a warrant had been issued for Complainant's arrest for contempt of court and that Complainant had turned himself in on February 24, 2015.

### **Appointing Authority**

23. On March 4, 2015, Steven T. Hager, Director of Prisons, delegated appointing authority in writing to Frances Falk, Deputy Director, Prison Operations, for all positions reporting to her. On the same day, Ms. Falk delegated appointing authority in writing to Randy Lind, Warden of the AVCF, for all positions reporting to him.

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."

33. AR 1450-01 (IV)(X) provides that "DOC employees, contract workers, and volunteers shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation."

34. AR 1450-01 (IV)(ZZ) provides that "[a]ny act or conduct on or off duty that affects job performance and that tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer or tends to adversely affect public safety is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

35. When asked about the November 6, 2014 arrest, Complainant said that "It happened." Complainant admitted that "things got out of control." He explained that he was looking for his wife and had pulled over to call her, was not in the lane of traffic, when the police appeared.

36. When asked about the arrest on February 24, 2015, Complainant said that he was told by someone at Nextep that there was a warrant for his arrest. He stated that he went down to the County jail and was told by his attorney that the warrant was for a failure to appear, but that he had made all his court appearances and the matter would be cleared up. He also said that his attorney told him not to tell anyone about the matter.

37. Warden Lind asked Complainant if there were any similar issues in his past while employed by Respondent. Complainant responded that he was charged with DUI 12 years ago. He explained that he was in front of his house, cleaning his car, with the car running with the keys in the ignition, and had been drinking and had an open beer can. He was moving his car back and forth.

38. Warden Lind pointed out that the records indicate that in the 2003 incident, he received a corrective action and a disciplinary action and the police report indicated that he was driving drunk, that he was charged with DUI, hit and run and careless driving. Complainant responded that it was not a hit and run, he was on his own property, and the charges were dropped to careless driving.

39. Warden Lind also pointed out that in January 2001, he came to work with the smell of alcohol on his breath, and tests indicated that he was under the influence of alcohol, despite Complainant's allegation that he had used an inhaler and that was the reason for the smell. Complainant stated that he had not been drinking, that when tested at CCOM "it showed up" but the machine was not calibrated.

40. Towards the end of the Rule 6-10 meeting, Warden Lind asked Complainant if he had any additional information that he would like Warden Lind to consider in making his decision to impose disciplinary action or not. Complainant responded by stating that he knew that he has a problem with alcohol but that he was seeing a counselor for the grief that he was experiencing arising from his mother's death a year and a half ago. He was also going to meetings, speaking with his priest, and was getting a lot of help. He alleged that he had been sober for the last 5 months.

49. The Code of Ethics, an attachment to AR 1450-01, provides, in pertinent part, as follows:

#### I. Declaration

Public confidence in the integrity of state government demands that public officials demonstrate the highest ethical standards at all times. Those who serve the people of the State of Colorado as public officials should do so with integrity and honesty, and should discharge their duties in an independent and impartial manner. At the same time, qualified individuals should be encouraged to serve in state government and have reasonable opportunities with all citizens to develop private economic and social interests.

When the voters passed Amendment 41, now Article XXIX of the Colorado Constitution, they sent a clear message that they want their public officials and government employees to meet a high ethical standard. The touchstone of Amendment 41 was that public officials and government employees must not violate the public trust for private gain.  
Governor Bill Ritter, Jr.

Executive Order D 021 09

#### II. Ethics in Government

Article XXIX of the Colorado Constitution states:

##### Section 1. Purposes and findings.

A. The people of the state of Colorado hereby find and declare that:

1. The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
2. They shall carry out their duties for the benefit of the people of the state;
3. They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
4. Any effort to realize personal financial gain through public office, other than compensation provided by law, is a violation of that trust; and
5. To ensure propriety and to preserve public confidence, they must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.

B. The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be borne by the state or local government.

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. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court; and,
6. final conviction of an offense of a Department of Human Services' employee subject to the provisions of §27-1-110, C.R.S. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court.

51. Warden Lind concluded that, "Your conduct reflects not only a violation of Department Regulations, but also an inability to meet the responsibilities inherent to the position of a Correctional Officer II. I have determined that your conduct has negatively impacted the mission of the Colorado Department of Corrections and Arkansas Valley Correctional Facility, placing members of the public and staff at risk, and betraying public trust. Your actions reflect poorly upon your credibility, integrity, and honesty and are not in line with the standard that is expected by the Colorado Department of Corrections. It is essential to be able to trust the integrity of Correctional personnel. Your willful choice to violate department policy and willfully depart from the truth has damages your credibility and integrity."

52. Warden Lind also indicated that Complainant's demonstrated lack of honesty and integrity would negatively impact his ability to testify in any court proceeding: "The CDOC is a Criminal Justice agency and as such has adopted high standards for employment. The nature of the work in Corrections may require an individual to appear in court should he or she become involved in a criminal or civil case. Witnesses in criminal and civil prosecutions may come under intense scrutiny by the defense or the complainant. Therefore, it becomes critical that an individual's integrity be able to withstand the intensity of that scrutiny. If it can be shown that an individual departed from the truth during the formal completion of his or her job duties, the defense or complainant has sufficient information to case doubt about the credibility of the witness and the Department."

### **Board Appeals and Process**

53. Complainant filed a timely appeal of the termination of his employment with the Board on April 15, 2015.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. XII, §§ 13-15; §§ 24-50-101, *et seq.* C.R.S.,

Administrative Regulation 100-18 (Mission Statement), Administrative Regulation 1450-01 (Code of Conduct), the Code of Ethics, and State Personnel Board Rule 6-12.

**B. The Appointing Authority's action was not 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; 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).

Warden Lind's decision was neither arbitrary or capricious, or contrary to rule or law. Warden Lind gave appropriate notice to Complainant of the Rule 6-10 meeting and the primary subjects to be discussed. He conducted the Rule 6-10 meeting appropriately, provided the information that was the basis for the meeting and the possibility of disciplinary action, and allowed Complainant to tell his side of the story and to provide any additional information that might be relevant to Warden Lind's ultimate decision. Prior to making the decision to terminate Complainant's employment, Warden Lind reviewed Complainant's personnel file, reviewed the records of Complainant's arrests, spoke with Complainant's supervisor, and considered the version of events provided by Complainant. He also reviewed pertinent Administrative Regulations and department policies, as well as the impact of his findings on Complainant's ability to testify in future court matters. There was no evidence presented that Warden Lind failed to give candid and honest consideration of the evidence he reviewed. There is no indication that Warden Lind exercised his discretion in such manner after a consideration of evidence before him as clearly to indicate that his decision to terminate Complainant's employment was based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.

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

Complainant's acts and omissions for which he was disciplined were serious, especially given his position as a Correctional Officer in a law enforcement agency. Arguably, Complainant's arrest for DUI in November 2014 may not have been enough to justify the discipline imposed, although such a serious criminal violation for a law enforcement officer is not an insignificant event. However, his misrepresentation of some of the facts of that incident, his failure to inform his chain of command of his arrest in February 2015, and his misrepresentations about previous alcohol-related incidents made during his Rule 6-10 meeting, create the appearance of a pattern of lack of truthfulness and integrity that is violative of pertinent CDOC Administrative Regulations. The impact of Warden Lind's findings that Complainant's credibility, integrity and honesty were questionable was potentially significant, given the fact that these findings could significantly interfere with Complainant's ability to testify in any court proceeding. Complainant's violations of the law regarding drinking and driving, the lack of credibility he displayed in the statements he made during the Rule 6-10 meeting, and the higher standards of honesty and integrity that are required of law enforcement employees justify the discipline imposed.

**CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he 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. Respondent's actions did not constitute unlawful discrimination on the basis of age.

**ORDER**

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

Dated this 4<sup>th</sup> day  
of December, 2015,  
Denver, Colorado.

  
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Keith A. Shandalow  
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 4<sup>th</sup> day of December, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

David R. Martinez

Eric Freund  
Senior Assistant Attorney General  
Employment Unit  
1300 Broadway, 10th Floor  
Denver, CO 80203  
eric.freund@state.co.us

  
\_\_\_\_\_  
Andrea C. Woods

## 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.