

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DEAN COPLEY,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, STERLING CORRECTIONAL FACILITY,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on April 23 and 24, 2019, at the State Personnel Board (Board), 1525 Sherman Street, Denver, Colorado. The matter commenced on December 12, 2018. The record was closed on April 25, 2019, after the ALJ confirmed the listenability and viewability of audio and video exhibits. Jeremiah J. Boies, Esq. represented Complainant. Lauren K. Peach, Assistant Attorney General, represented Respondent. Respondent's advisory witness, and Complainant's appointing authority, was David Scherbarth, Associate Warden of the Sterling Correctional Facility.

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

Complainant Dean Copley (Complainant) appeals the termination of his employment by Respondent, the Colorado Department of Corrections (DOC), Sterling Correctional Facility (SCF). Complainant alleges that he did not commit the acts for which he was disciplined, the decision to terminate his employment was arbitrary, capricious or contrary to rule or law, and Respondent's disciplinary action was outside the range of reasonable alternatives. Complainant seeks reinstatement to his position as a Correctional Officer II, as well as back pay and back benefits.

For the reasons set forth below, Respondent's decision to terminate Complainant's employment is **affirmed**.

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 the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

General background

1. Prior to the termination of his employment, Complainant was a Correctional Officer II, equivalent to the rank of Sergeant. He began his employment at SCF on November 1, 1999.
2. At the time his dismissal, Complainant was a certified State employee.

3. Per the Correctional Officer II job description, the basic purposes of the position include, but are not limited to, providing lead work guidance to assigned positions; managing offender behavior and encouraging personal accountability; maintaining the safety and security of facility and work sites; and ensuring that correctional professionalism is at the forefront of daily interactions. Additionally:

Through conscientious observation, clear communications and adherence to agency Administrative Regulations (AR's), facility implementation Adjustments (IA's) and the Code of Penal Discipline (COPD), position promotes a safe and secure environment that upholds professional integrity and credibility. As a correctional professional, the use of professional communication and modeling of positive, pro-social behavior to the public, visitors, volunteers, staff and offender population are required.

4. Prior to his disciplinary dismissal, Complainant received no disciplinary or corrective actions. His job performance evaluations were positive.

Complainant at Scheels sporting goods store, August 3, 2018

5. On August 3, 2018, Complainant drove his personal truck from his home in Sterling, Colorado to Scheels, a large sporting goods store in Johnstown, Colorado. The trip from Sterling to Johnstown took approximately two hours.

6. Complainant spent approximately two hours in Scheels. As he wandered through the store, he carried a basket, into which he placed merchandise he considered purchasing. Among other items, Complainant placed two knives, a belt, a flashlight, and a pair of Sitka pants in the basket.

7. At one point, Complainant opened a package containing a knife, put the knife in his pocket, and hid the empty package underneath a counter.

8. At another point, Complainant chose a belt, tore off the belt's tag, and hid the tag in a clothes display.

9. Complainant took his store basket into a dressing room and remained in the dressing room for over nine minutes.

10. Complainant's actions drew the attention of Scheels employees. When Complainant went into the dressing room with a basket full of merchandise, a Scheels employee alerted a Scheels loss prevention employee, Nicole Cline. Ms. Cline began following Complainant around the store; at one point she picked up an empty package that Complainant had discarded behind some clothes.

11. After two hours, Complainant left the store, leaving the store basket on a checkout counter. He took with him items for which he had not paid.

12. Ms. Cline followed Complainant into the parking lot and made a note of Complainant's truck's license plate number.

13. Complainant drove out of the parking lot without returning to the store.

Scheels reports theft to the Johnstown Police Department

14. On August 22, 2018, Ms. Cline contacted the Johnstown Police Department and reported that a Dean Copley of Sterling, Colorado had stolen a small flashlight, two Buck knives, a belt and 6 boxes of ammunition from Scheels on August 3, 2018. Scheels provided the Johnstown Police Department with video clips from the store's security cameras showing Complainant's conduct while in the store.

Complainant meets with Officer Otero of the Johnstown Police Department

15. On August 23, 2018, Officer Christian Otero of the Johnstown Police Department contacted Complainant by telephone. Officer Otero informed Complainant that a Scheels employee reported a theft and Complainant's license plate number led to Complainant being identified as the alleged shoplifter. Complainant agreed to travel to the Johnstown Police Department for an interview that same day.

16. Complainant then went to the Johnstown Police Department and was interviewed by Officer Otero. The interview was not recorded. Complainant told Officer Otero that he did not take any items out of their packaging while at Scheels and that he did not open or hide any packages. Officer Otero told Complainant that security camera video clips showed Complainant taking items out of their packaging, tearing off tags, and discarding the packaging and tags. Complainant insisted that he did not take any items out of their packaging and that he did not hide any packages. Complainant asked Officer Otero what would happen if he admitted guilt. Officer Otero asked Complainant why he would admit guilt if he was not guilty. Complainant replied that he might as well admit guilt because he believed he would not be given a fair trial. Officer Otero issued Complainant a citation, requiring him to appear in Larimer County Court on September 17, 2018, which date was later changed to October 1, 2018. Officer Otero also gave Complainant a Notice of Trespass Warning, which prohibited Complainant from entering Scheels.

17. Complainant asked Officer Otero if it was okay for him to speak to the Scheels loss prevention employee. Officer Otero granted permission to do so.

18. Directly after he left the Johnstown Police Department, Complainant contacted Randy Smithgall, an investigator with DOC's Office of Inspector General, assigned to SCF. Complainant told Investigator Smithgall of his contact with the Johnstown Police Department regarding a theft allegation. Investigator Smithgall told Complainant to contact Warden Matthew Hansen of the Sterling Correctional Facility and to submit a confidential report to him.

Complainant meets with Scheels' loss prevention supervisor

19. Complainant then went to Scheels. Ms. Cline was not available, so Complainant spoke to the loss prevention supervisor instead, who showed Complainant some security camera video clips of Complainant's actions. Complainant was told that Scheels would pursue a civil action against him for shoplifting in the amount of \$194.90 plus a civil penalty of \$250.00, for a total of \$444.90. Complainant immediately paid Scheels \$444.90, and agreed to a one-year ban from the store.

Complainant submits confidential report to, and is interviewed by, Investigator Smithgall

20. Complainant submitted a confidential report to Investigator Smithgall on August 25, 2018, which stated in its entirety:

On 8/23/18 I (Dean Copley) was contacted by Officer Otero from the Johnstown, CO Police Department. Officer Otero requested me to come to his police department and speak with him about Scheels, a sporting goods store in Johnstown, CO, claiming theft of \$194.00 on 8/3/18. In my meeting with Officer Otero I informed him that I did not steal anything from Scheels. Officer Otero wrote me a summons, CR#180975 NO:20938, for Larimer County Court on September 17, 2018. I will be out of the country at that time so the Larimer County Court Clerk said I can reschedule it in seven days for a later date.

21. On August 27, 2018, Investigator Smithgall interviewed Complainant. The interview was recorded.

22. During his interview with Investigator Smithgall, Complainant said that while he was walking around Scheels he found an empty plastic knife case and put it in his basket, intending to turn it in, but then decided not to and put it on a counter.

23. Complainant also told Investigator Smithgall that he tried on a couple of conceal carry holsters and some clothes, and put a Buck knife in his pocket to see if he wanted it. He admitted that he pulled a tag off a belt and told Investigator Smithgall that he should not have done that. He explained that he decided he did not want the Buck knife and left it on a counter. He told Investigator Smithgall that while going through the store, he noticed a woman looking at him and thought to himself, "oh, she thinks I stole the case." He stated that when he went to checkout, he realized he left his wallet in this truck, so he left the basket at the checkout counter and told the cashier that he would be right back. While at his truck retrieving his wallet, he noticed the same woman looking at him. Complainant represented to Investigator Smithgall that he did not want to deal with a confrontation so he left.

24. Complainant admitted to Investigator Smithgall that he told the Johnstown police officer that he made some poor choices but he did not steal anything, and that when he spoke with the Scheels' loss prevention supervisor, Complainant admitted that, "I destroyed a few things." He explained to Investigator Smithgall that he paid Scheels \$194.00 because he thought it was easier to pay than go back and forth to court because he lives two hours away from Larimer County Court. When Investigator Smithgall asked him why he paid for merchandise that he did not take, Complainant said that he did tear the tag off the belt and took the knife out of its package; furthermore, the court was two hours away from his home. He insisted to Investigator Smithgall that he did not steal anything.

Investigator Smithgall submits his investigative report

25. Investigator Smithgall submitted his investigative report to Warden Hansen on September 17, 2018, after receiving the Johnstown Police Department report. Investigator Smithgall's investigative report consisted of Investigator Smithgall's communications with Complainant, and attachments, including the Johnstown police report.

Warden Hansen delegates appointing authority to Associate Warden Scherbarth

26. On September 19, 2018, Warden Hansen delegated appointing authority to Associate Warden David Scherbarth regarding employment matters concerning Complainant.

Scherbarth notifies Complainant of a Rule 6-10 meeting and prepares for it

27. On September 25, 2018, Associate Warden Scherbarth sent Complainant a notice scheduling a Board Rule 6-10 meeting for October 2, 2018. Associate Warden Scherbarth wrote, in pertinent part, that the information to be discussed at the meeting "includes, but is not limited to the following: a citation you received from the Johnstown Police Department on August 23, 2018, for theft."

28. In preparation for the Rule 6-10 meeting, Associate Warden Scherbarth reviewed the Investigator Smithgall's report and its attachments.

Complainant's Larimer County court appearance

29. On October 1, 2019, Complainant's appeared in Larimer County Court for his criminal case.

30. A Larimer County Deputy District Attorney offered Complainant a deferred judgment provided that complainant complete 12 hours of community service, given that Complainant already paid restitution and civil penalties to Scheels.

31. Complainant agreed to the Deputy District Attorney's offer.

Rule 6-10 meeting on October 2, 2018

32. On October 2, 2018, Complainant participated in a Rule 6-10 meeting conducted by Associate Warden Scherbarth, with Major Michele Wingert attending as his representative. Complainant was not accompanied by a representative. During the Rule 6-10 meeting, Major Wingert read the Johnstown Police Report and indicated what policies Complainant may have violated, including the Code of Ethics, AR 100-18, mission statement no. 2, AR 1450-01 Code of Conduct, III.B, IV.A.1, IV.A.3, IV.A.8, IV.A.9, IV. B.1, and performance objectives included in his performance plan signed on April 1, 2018.

33. During the Rule 6-10 meeting, Complainant admitted that he opened a couple of packages at Scheels, where he went to look for a conceal carry holster. He stated that he opened one Buck knife package and tried the knife but did not like it. He tried on a pair of Sitka pants, and a belt, and left them in the dressing room or put them back on the shelf. As he went through the store, he would put things in his basket and then decide that he did not want them and take them out and put them on a shelf.

34. Complainant admitted that he was disrespectful of a couple of items. He found a plastic case on a shelf that had been cut open, and put it in his basket to turn it in. At some point he felt hungry, and did not want to deal with turning the empty package in, so he put it on a shelf. He admitted that he should have gone back to speak with the manager, but did not. He paid the store \$194.00.

35. Complainant also stated that he went to the court hearing the previous day and the prosecutor said that if he completed 12 hours of community service and had already paid Scheels, she would dismiss all charges. He intended to go back to court on October 19, 2018 to show the confirmation of his community service.

36. In response to the question of why he agreed to pay Scheels and complete 12 hours of community service if he did not take anything from Scheels, Complainant alleged that it was simpler than spending several thousand dollars on a lawyer and going to court. Associate

Warden Scherbarth noted that there was a huge difference in what the police and Scheels employees were saying about what Complainant did and what Complainant was saying.

Scherbarth obtains Scheel's security camera video clips and reviews them

37. Subsequent to the Rule 6-10 meeting, Respondent obtained video clips from Scheels' security cameras. Associate Warden Scherbarth reviewed them.

Scherbarth notifies Complainant of a second Rule 6-10 meeting

38. On October 15, 2018, Associate Warden Scherbarth sent Complainant a notice of a second Rule 6-10 meeting, scheduled for October 23, 2018. Associate Warden Scherbarth indicated that the information to be discussed would be "my review of camera footage provided by the Johnstown Police Department."

Rule 6-10 meeting on October 23, 2018

39. A second Rule 6-10 meeting was held on October 23, 2018. Associate Warden Scherbarth presided, with his representative, Major Wingert. Complainant attended and was unrepresented.

40. During this meeting, Complainant represented that he placed empty packages on counters, as well as the belt tag, even as the video clips showed Complainant hiding the packages and tag from view. Complainant stated that the video clips comprised only a fraction of the time he spent in Scheels and if all his actions could be reviewed, it would reveal that he did not take anything from the store.

Scherbarth reviews the evidence and concludes that Complainant stole from Scheels

41. Subsequent to the second Rule 6-10 meeting, Associate Warden Scherbarth reviewed audio recordings of Investigator Smithgall's interview of Complainant, the audio recordings of the two Rule 6-10 meetings, Investigator Smithgall's report, the Scheels' video clips, and Complainant's personnel file. After his review of all the evidence, Associate Warden Scherbarth concluded that the evidence was more consistent with the charge of theft than with Complainant's version of events.

Scherbarth's Disciplinary Decision

42. On November 9, 2018, Associate Warden Scherbarth sent a notice of disciplinary action to Complainant via certified mail informing Complainant that his employment was terminated effective immediately.

43. In arriving at a decision to terminate Complainant's employment, Associate Warden Scherbarth reached the following conclusions:

- You provided conflicting statements to the Johnstown Police Department, Investigator Smithgall and during our meetings. The security Camera footage supports the Johnstown Police Report and associated criminal charges. The security camera footage clearly shows you opening packages and removing tags from items. The footage also shows you concealing these empty packages and tags. One part of the footage shows you concealing a knife in your pocket.

- I find you were not truthful in your statements to the Johnstown Police Department, Investigator Smithgall, and during our Rule 6-10 meeting.
- Your actions reflect discredit upon you as a correctional professional, and also bring discredit to the Department of Corrections. As a correctional professional, you are entrusted to uphold the public trust and ensure public safety. Your actions are held to a higher standard, and I find that you have not met the expectations of your assignment.
- Your actions cast doubt upon your decision making and have impacted your credibility and authority with your coworkers and offenders. As a correctional professional and a member of the law enforcement community, you are expected to comply with all Federal, State, and local laws.
- The Colorado Department of Corrections 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/she become involved in a criminal / civil case. Witnesses in criminal / civil prosecutions may come under intense scrutiny by the defense / 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/her job duties, the defense / complainant has sufficient information to cast doubt about the credibility of the witness and the Department. Because you have lied to the investigator during the investigation, it could possibly create a Brady issue in court where you may be listed as a witness on current or future criminal cases.

44. Associate Warden Scherbarth determined that Complainant violated the performance expectations detailed in DOC Administrative Regulation (AR) 1450-01 Code of Conduct, Section IV, Subsections A.1, 3, 8, 9, B.1 and 2, E.1 and 4; AR 1150-20 Brady Reporting and Disclosures, Section IV.A. Code of Ethics; and Board Rule 6-12(2).

Rules and regulations referenced in the notice of disciplinary action

45. AR 1450-01 Code of Conduct, Section IV, Subsections A.1 provides, "DOC employees, contract workers, and volunteers shall avoid situations which give rise to direct, indirect, or perceived conflicts of interest."

46. AR 1450-01 Code of Conduct, Section IV, A.3 provides, "DOC employees, contract workers, and volunteers shall comply with and adhere to all DOC ARs, procedures, operational memorandums [sic], rules, duties, legal orders, and administrative instructions."

47. AR 1450-01 Code of Conduct, Section IV, A.8 provides, "Any act or conduct on or off duty which affects job performance and/or 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."

48. AR 1450-01 Code of Conduct, Section IV, A.9 provides, "DOC employees, contract workers, and volunteers will exercise good judgment and sound discretion at all times."

49. AR 1450-01 Code of Conduct, Section IV, B.1 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, adversely affects public safety, casts doubt upon the person's integrity or which reflects discredit upon the individual as a DOC employee, contract worker, or volunteer is expressly prohibited as conduct unbecoming."

50. AR 1450-01 Code of Conduct, Section IV, B.2 provides, "While on or off duty, DOC employees, contract workers, and volunteers are required to maintain considerate, cooperative, cordial, and professional relationships toward each other. Professional relationships will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies."

51. AR 1450-01 Code of Conduct, Section IV, E.1 provides, "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."

52. AR 1450-01 Code of Conduct, Section IV, E.4 provides, "During the course of an official DOC investigation, DOC employees, contract workers, and volunteers shall cooperate fully by providing all pertinent information that they may have. Full cooperation involves responding to all questions and providing a signed statement or affidavit, if requested."

53. AR 1150-20 Brady Reporting and Disclosures, Section IV.A provides, "DOC employees, contract workers, and volunteers of DOC have an affirmative duty to conduct themselves in a manner which reflects honesty, integrity, and truthfulness at all times."

54. Board Rule 6-12(2) provides, in pertinent part, "[r]easons for discipline include: . . . willful misconduct or violation of these or department rules or law that affect the ability to perform the job"

55. Complainant timely appealed his disciplinary dismissal.

DISCUSSION

BURDEN OF PROOF

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.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (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.

In this *de novo* disciplinary proceeding, "the scales are not weighted in any way by the appointing authority's initial decision to discipline." *Kinchen*, 886 P.2d at 706. Respondent has the burden of proving 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. *Id.* at 704. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706.

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

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

HEARING ISSUES

I. Complainant Committed the Acts for Which He Was Disciplined

Respondent terminated Complainant's employment because his appointing authority, Associate Warden Scherbarth, concluded that Complainant shoplifted from Scheels, and then lied about it. At hearing, Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which he was disciplined.

Evidence of Theft

Complainant's conduct in Scheels, and his subsequent conduct and statements, are much more consistent with someone who was guilty of shoplifting than someone innocent of such charges.

The Scheels' security camera video clips show Complainant opening a package containing a knife, putting the knife in his pocket, and hiding the empty package. Video clips also show Complainant hiding another empty package, tearing off tags from a belt and hiding the tags, and spending an inordinate amount of time in a Scheels dressing room. Complainant's suspicious behavior caught the attention of Scheels employees, who began tailing Complainant throughout the store and into the parking lot. Complainant had no reason to hide empty packages and a belt tag if his intent was purely honorable.

Rather than get his wallet from his truck and return to the store to pay for the items he had in the store basket left at the checkout counter, Complainant drove away and did not return to Scheels. After driving for two hours from his home in Sterling to Scheels, and after spending two hours in Scheels carefully choosing items to purchase, it does not make sense for Complainant to just leave without buying the merchandise he had collected.

Complainant argued that the security camera video clips, which were relied upon by Associate Warden Scherbarth in concluding that Complainant shoplifted, comprise only 17 minutes of the approximately 120 minutes or more that Complainant was in Scheels, and do not definitively establish that Complainant took anything out of the store. This is true. However, Complainant's conduct while at Scheels that can be confirmed by irrefutable video evidence is

much more consistent with shoplifting than not. Tearing open at least one package, putting a knife in his pocket, tearing the tag off a belt, hiding the empty knife package and the belt tag, leaving the store without purchasing anything after two hours of shopping, permit an inference that Complainant shoplifted.

Complainant's explanation for why he chose to drive away from Scheels rather than get his wallet from his truck and return to the store and pay for the items he spent over two hours shopping for is less than credible. He alleges that when he grabbed his wallet and was about to return to the store, he saw a woman looking at him, the same woman who had been following him around in the store and who he thought believed that he had stolen something. He explained further that he did not want a confrontation, and that he had been in the habit of avoiding confrontations because he usually carried a concealed weapon, although he was not carrying that day. The woman, whoever Complainant thought she was, surely did not pose a threat to Complainant if he had nothing to hide. It is more likely that, if he was truly innocent of any wrongdoing, he would have returned to the store, faced any questions, paid for the products he selected, and left, and that would have been the end of it.

Complainant's subsequent conduct is also more consistent with guilt than innocence. Complainant's comment to Officer Otero to the effect that he might as well plead guilty because he would not receive a fair trial is an unusual statement for an innocent person to make, and suggests that Complainant feared that the evidence at a trial would likely establish his guilt.

In addition, Complainant's willingness to pay Scheels \$444.90, which included a civil penalty of \$250.00, supports an inference that Complainant shoplifted. Complainant's actions raise the question, "Why would an innocent man pay \$444.90 for items that he didn't take?" The reasons Complainant provided were inconsistent and therefore not credible. Complainant told Investigator Smithgall that he thought it was easier to pay \$194.00 than go back and forth from his home in Sterling to court in Larimer County. He also admitted that he thought he should pay Scheels because he tore the tags off a belt and took a knife out of its packaging. However, when Complainant paid Scheels \$444.90, he had no reason to believe that the criminal case against him would be dismissed and he would not have to travel to and from Larimer County Court. He told Associate Warden Scherbarth and Major Wingert that he paid \$194.00 because it was simpler than spending several thousand dollars on a lawyer and going to court. These shifting explanations belie Complainant's credibility.

Complainant failed to tell Investigator Smithgall as well as Major Wingert and Associate Warden Scherbarth that he actually paid Scheels \$444.90, which included a civil penalty of \$250.00. He represented to them that he paid Scheels \$194.00. When asked about this omission, Complainant testified that he did not notice that he paid \$444.90 rather than \$194.90. That testimony is not credible.

Evidence of Dishonesty

With respect to the issue of Complainant's honesty in his interviews or discussions with Officer Otero, Investigator Smithgall, and Associate Warden Scherbarth and Major Wingert, Complainant's statements changed over time, undermining Complainant's credibility and casting doubt on his innocence.

Complainant told Officer Otero that he did not take any items out of their packaging while at Scheels and that he did not open or hide any packages. Officer Otero told Complainant that security camera video clips showed Complainant taking items out of their packaging, tearing off tags, and discarding the packaging and tags. Complainant insisted that he did not take any items out of their packaging and that he did not hide any packaging. The evidence at hearing

established that Complainant was dishonest in his representations to Officer Otero.

Complainant told Investigator Smithgall a materially different explanation of his conduct while at Scheels. He alleged that he found an empty plastic case for a knife and put it in his basket, intending to turn it in, but then decided not to and put it on a counter. While going through the store, he noticed a woman looking at him and thought to himself, "oh, she thinks I stole the case." While in the store, he tried on a couple of conceal carry holsters, a Buck knife he took out of its package, and tried on some clothes. He also pulled a tag off of a belt and admitted he should not have done that.

During this Rule 6-10 meeting, Complainant admitted that he opened a couple of packages at Scheels, where he went to look for a conceal carry holster. He stated that he opened one Buck knife package and tried the knife but didn't like it. He tried on a pair of Sitka pants, and a belt, and left them in the dressing room or put them back on the shelf. He found a plastic case on a shelf that had been cut open, and put it in his basket to turn it in. At some point he felt hungry, and didn't want to deal with turning the empty package in, so he put it on a shelf.

However, Scheels' security camera video clips show that Complainant did not merely place empty packages and the belt tags on a counter or shelf. He hid them from view. Even while reviewing the video with Associate Warden Scherbarth and Major Wingert during the October 23, 2018 Rule 6-10 meeting, he refused to admit that he hid the belt tags:

Complainant: [After pulling off the belt tag I] Put the tag on the counter area.

Associate Warden Scherbarth: No, you hid it inside the bin. You put it inside here, not on the counter. See?

Complainant: Uh-huh.

Complainant also misrepresented to Associate Warden and Major Wingert that all charges against him were dropped because he paid Scheels and agreed to complete 12 hours of community service. Associate Warden Scherbarth had to correct Complainant and told him that because he paid Scheels and completed 12 hours of community service, his prosecution was deferred.

Respondent has established by a preponderance of the evidence that Complainant committed the acts for which he was disciplined.

II. The Appointing Authority's Action was not Arbitrary, Capricious, or Contrary to Rule or Law

A. Respondent's Decision to Impose Discipline was Not Arbitrary or Capricious

In determining whether an agency's decision is arbitrary or capricious, the ALJ 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. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001). The ALJ on behalf of the Board must determine whether a reasonable person, upon consideration

of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colo. Dep't of Social Svcs.*, 919 P.2d 942, 947 (Colo. App. 1996).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the range of reasonable alternatives.

1. Diligence and Care in Procuring Pertinent Evidence

In considering the matter of Complainant's conduct and whether it warranted disciplinary action, Associate Warden Scherbarth was diligent in procuring all pertinent evidence prior to making his decision. He held two Rule 6-10 meetings with Complainant, reviewed Investigator Smithgall's report, the Johnstown Police report, and viewed, and reviewed, the security video clips provided by Scheels. Associate Warden Scherbarth also reviewed Complainant's job performance history. Associate Warden Scherbarth gathered and reviewed all relevant evidence that was required to arrive at a decision based on all the available and probative information. He provided Complainant the opportunity to provide information about the allegations giving rise to the Rule 6-10 meetings. Associate Warden Scherbarth also gave Complainant an opportunity to provide additional information after the Rule 6-10 meetings. In short, Associate Warden Scherbarth used reasonable diligence to gather all evidence that should have been considered prior to making his decision about disciplining Complainant.

2. Candid and Honest Consideration of the Obtained Evidence

At hearing, Respondent established by a preponderance of the evidence that Associate Warden Scherbarth honestly and candidly considered the evidence he gathered in making his disciplinary decision. The most reasonable interpretation of the relevant evidence is that Complainant shoplifted, and was not truthful when questioned about it. At hearing, Associate Warden Scherbarth's testimony was clear, consistent and entirely credible, as was the testimony of Respondent's other witnesses, Investigator Smithgall and Major Wingert.

Associate Warden Scherbarth's conclusions were arrived at reluctantly – Complainant was a solid, experienced employee, and if Associate Warden Scherbarth's consideration of the evidence led him to conclude that termination was not warranted, he would have welcomed that conclusion. However, his honest and candid consideration of the evidence led Associate Warden Scherbarth to conclude, correctly, that the termination of Complainant's employment was warranted.

3. The Appointing Authority's Conclusions after Considering the Evidence were Reasonable and Justified

After considering the evidence before him, Associate Warden Scherbarth concluded that Complainant shoplifted and was untruthful, conduct that warranted discipline, and that the appropriate discipline was termination of Complainant's employment. These conclusions are reasonable and justified in light of the evidence. No evidence was available to Associate Warden Scherbarth that would justify serious consideration of a less severe disciplinary action given Complainant's conduct and his lack of honesty.

It would have been incongruous to maintain the employment of a correctional officer who violated the law in the manner Complainant did, and then misrepresented the facts to a law enforcement agency, an OIG investigator, and his appointing authority. In addition, Complainant's lack of honesty raises a *Brady* issue, which could severely restrict Complainant's efficacy as a

correctional officer. In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that failure by the prosecution to provide material evidence favorable to an accused violates due process. *Id.* at 87. The U.S. Supreme Court in *Giglio v. U. S.*, 405 U.S. 150 (1972), held that when the reliability of a given witness may well be determinative of guilt or innocence, the nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution. *Id.* at 153-54. See also § 24-33.5-114(4)(a)(II), C.R.S. (a law enforcement agency must notify the local district attorney whenever there is a finding that a peace officer made a knowing misrepresentation during the course of any internal investigation related to the peace officer's alleged criminal conduct).

Because the evidence he gathered demonstrated that Complainant shoplifted and then lied about it, Associate Warden's conclusions about Complainant's conduct and his decision to terminate Complainant's employment were reasonable and justified.

B. Respondent's Action was Not Contrary to Rule or Law

Complainant introduced no evidence at the hearing that Associate Warden Scherbarth's actions violated any Board Rule or any applicable law. Associate Warden Scherbarth complied with Board Rule 6-9, which provides that "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... 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". Respondent established at the hearing that Associate Warden Scherbarth carefully considered all these factors in arriving at his decision to terminate Complainant's employment.

The Rule 6-10 meetings met all the requirements of Board Rule 6-10. Complainant was given the opportunity to provide additional information for consideration, consistent with Rule 6-10. Complainant was given a full opportunity to respond to the allegations of misconduct that gave rise to the Rule 6-10 meetings.

The discipline imposed was in accord with Board Rule 6-12, which outlines some reasons for discipline to include "willful misconduct or violation of these or department rules or law that affect the ability to perform the job...."

III. The Discipline Imposed Was Within the Range of Reasonable Alternatives

Board Rule 6-9 requires that an appointing authority weigh the facts of the incident giving rise to the discipline as well as an employee's information and performance in making a decision on the level of discipline to impose. As discussed above, Associate Warden Scherbarth's decision that the appropriate discipline for Complainant was termination of his employment was reasonable and justified.

Generally, based on the principle of progressive discipline, an employee should be subject to a corrective action prior to a disciplinary action. Board Rule 6-2. However, Board Rule 6-2 provides, in pertinent part, that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination."

As discussed above, Complainant's conduct was so flagrant and serious as to warrant immediate termination of Complainant's employment despite the fact that Complainant had not been subject to progressive discipline.

Under these circumstances, termination of Complainant's employment was well within the range of reasonable alternatives.


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.

ORDER

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

Dated this 10th day
of June 2019,
at Denver, Colorado



Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of June 2019, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Jeremiah J. Boies, Esq.
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APPENDIX A

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED:

B, C, D, E

RESPONDENT'S EXHIBITS ADMITTED:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

The following is a list of witnesses who testified at hearing:

Randy Smithgall

Michele Wingert

David Scherbarth

Dean Copley

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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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.

