

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

---

CRIS CLARE,  
Complainant,

v.

DEPARTMENT OF CORRECTIONS, STERLING CORRECTIONAL FACILITY,  
Respondent.

---

This matter came before the Colorado State Personnel Board for an evidentiary hearing on September 9-10, 2024. Complainant appeared by video conference without counsel. Respondent appeared by video conference, by and through counsel, Kerry Ferrell, Esq. Respondent's advisory witness, Jeff Long, Warden of the Sterling Correctional Facility, Department of Corrections (DOC), was also present. A list of the exhibits admitted into evidence and the witnesses who testified at hearing is attached as an appendix.

**MATTER APPEALED**

Complainant contends that Respondent's decision to demote him to the rank of lieutenant and reduce his salary was arbitrary, capricious, or contrary to rule or law. As relief, he requests the salary of his previous Corrections Officer IV position.

Respondent contends that Complainant performed the act for which he was disciplined. Respondent further contends that the discipline imposed was not arbitrary, capricious, or contrary to rule or law.

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

**ISSUE TO BE DETERMINED**

Was Respondent's decision to demote Complainant and reduce his salary arbitrary, capricious, or contrary to rule or law?

**FINDINGS OF FACT**

1. Complainant has been employed as a Corrections Officer with the DOC since 1999. He is a certified state employee. He currently works at the Sterling Correctional Facility (Facility), and Warden Long is his appointing authority.

2. On December 29, 2008, Complainant received a Disciplinary Action after he reported late for duty under the influence of alcohol.
3. Complainant received other disciplinary or corrective actions in September of 2002, March of 2020, July of 2020, and May of 2023 that were not alcohol related.
4. As of December of 2023, Complainant was a Corrections Officer IV with the rank of captain.
5. Complainant was scheduled to report to work on December 10, 2023 at 5:45 a.m. He was supposed to be the highest ranked officer at the Facility for this shift.
6. Complainant arrived for his shift approximately 15 minutes late. He then contacted Lt. Custer to discuss the passing of the shift command per standard procedure.
7. Lt. Custer is a former trooper for the Colorado State Patrol. He has training and experience in the detection of alcohol impairment.
8. On contact with Complainant, Lt. Custer noticed the odor of alcohol coming from Complainant's breath. He observed that Complainant had bloodshot watery eyes and unsteady balance. He specifically noticed that Complainant was swaying and holding on to the counter for support. Based on past observation, he believed Complainant's behavior was unusual for him.
9. During the shift change discussion with Complainant, Lt. Custer mentioned there was an offender in the "drunk tank." Complainant stated he should join the offender in the drunk tank as Complainant was having a rough morning.
10. Lt. Overturf was also present during the shift change conversation between Complainant and Lt. Custer. Lt. Overturf also observed that Complainant had the odor of alcohol, bloodshot eyes, and unsteady balance. He heard Complainant's remark about joining the offender in the drunk tank.
11. Lt. Custer contacted Major Leech to report his suspicion that Complainant was impaired by alcohol.
12. Major Leech directed Lt. Friend to check on Complainant. On contact, Lt. Friend noticed that Complainant had glassy, reddened eyes and raised color in his face. Lt. Friend did not notice the odor of alcohol or slurred speech, but he did not get close to Complainant.
13. Major Leech reported to the Facility and contacted Complainant. Major Leech observed that Complainant had slurred speech and unsteady balance. He believed that Complainant's behavior was unusual for him.

14. Investigator Annable of the Office of the Inspector General was called to the Facility to perform a professional standards investigation.
15. Inspector Annable is a former police officer with over twenty years of training and experience in detecting alcohol impairment. He was trained to perform standardized field sobriety tests (SFST's) but was not certified to do so on the date of the incident in question.
16. On contact with Complainant, Inspector Annable noticed the odor of an unknown alcoholic beverage. He observed that Complainant had bloodshot watery eyes, occasional slurred speech, and unsteady balance.
17. Complainant admitted to Inspector Annable that he had consumed between 14 and 18 shots of tequila the previous evening. He stated he stopped drinking and went to bed at 8:00 p.m. He further admitted he was hung over, although he denied any impairment at the time he reported for work.
18. Complainant agreed to perform a preliminary breath test (PBT) to test for the presence of alcohol. Complainant's breath alcohol content (BAC) was extraordinarily high. Inspector Annable did not feel the BAC was consistent with his observations of Complainant's behavior. Inspector Annable later tested the PBT device on himself, which showed a breath alcohol content of .02 grams of alcohol per 210 liters of breath, despite the fact that Inspector Annable had not consumed any alcohol.
19. Inspector Annable attempted to arrange for another PBT at an off-site testing center, but this was not available because it was Sunday. The nearest available off-site testing center that offered after hours testing was in Denver, approximately 125 miles away. Inspector Annable chose not to transport Complainant to Denver for testing due to his concern that any alcohol in Complainant's system would dissipate before the PBT could be completed.
20. Because the off-site testing was not available, Inspector Annable conducted SFST's.
21. After completing his investigation, Inspector Annable concluded that Complainant was impaired by alcohol and unfit for duty. He decided to drive Complainant home. On the way down the stairs to exit the facility, Complainant was unsteady and had to hold onto the rail with both hands.
22. Inspector Annable submitted his report to Warden Long. He also submitted a supplemental report indicating the PBT device used to test Complainant was not properly calibrated on the date of the incident in question.
23. Warden Long scheduled a Rule 6-10 meeting. In preparation for this meeting, he reviewed Inspector Annable's report and supplemental report, the incident reports

from the witnesses, and Complainant's personnel file. Warden Long also reviewed the applicable rules and regulations.

24. At the Rule 6-10 meeting, Complainant raised issues regarding Inspector Annable's lack of certification to perform SFST's, as well as his failure obtain off-site testing. Warden Long continued the Rule 6-10 meeting to investigate these issues.
25. During the continued Rule 6-10 meeting, Complainant was allowed the opportunity to present information and mitigating factors.
26. Warden Long found that Complainant violated Administrative Regulation 1450-01 *Code of Conduct*, Administrative Regulation 1450-36 *Drug Deterrence Program*, and Administrative Regulation 100-18 *Mission Statement*, as well as the Code of Ethics. He also found that Complainant's misconduct was willful.
27. Warden Long considered the nature, extent, seriousness, and effect of Complainant's performance issues or conduct. He found that Complainant's conduct had placed both offenders and staff at risk.
28. Warden Long considered the type and frequency of prior unsatisfactory performance or conduct, including a prior Disciplinary Action for alcohol impairment in 2008. He also considered that the last corrective action had been only one year prior.
29. Warden Long considered Complainant's satisfactory performance evaluations.
30. Warden Long further considered Complainant's mitigating factors including the failure to complete off-site testing, the fact that the PBT was not properly calibrated, and Complainant's assertion that he was merely hung over.
31. On June 6, 2024, Warden Long issued a written Notice of Discipline demoting Complainant from the rank of captain to lieutenant (Corrections Officer III) and reducing his salary accordingly.
32. Complainant filed this appeal on June 10, 2024.

## **ANALYSIS**

### **Respondent's Decision to Demote Complainant Was Not Arbitrary and Capricious, or Contrary to Rule or Law**

#### **I. Principles of Law**

The Colorado Constitution states that certified state employees "shall hold their respective positions during efficient service. . ." Colo. Const. Art. XII, § 13(8). A certified

state employee may be disciplined for “failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties.” *Id.* Respondent has the burden to prove by a preponderance of the evidence that the employee committed the conduct for which he was disciplined. *Dep’t of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

If an employee commits the acts for which he was disciplined, the Administrative Law Judge must then determine “whether the appointing authority’s disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.” *Dep’t of Corrections v. Stiles*, 477 P.3d 709, 717 (Colo. 2020). See also C.R.S. § 24-50-103(6) (a disciplinary action “may be reversed or modified on appeal to the board only if at least three members of the board find the action to have been arbitrary, capricious, or contrary to rule or law”).

A disciplinary action is arbitrary and capricious if the appointing authority has: (1) neglected or refused to use reasonable diligence and care to procure the relevant evidence; (2) failed to give candid and honest consideration of the evidence; or (3) reached a conclusion that reasonable persons fairly and honestly considering the evidence must reach a contrary conclusion. *Lawley v. Dep’t of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

## **II. Complainant Committed the Act for Which He Was Disciplined**

The first issue is whether Complainant committed the act for which he was disciplined, specifically whether he came to work impaired by alcohol on December 10, 2023. There are four credible and impartial witnesses who observed indicia of impairment, including the odor of alcohol, bloodshot watery eyes, slurred speech and unsteady balance. Two of those witnesses had training and experience in the detection of alcohol impairment. Claimant’s obvious unsteadiness, including swaying and holding onto things for balance, is evidence of significant impairment. Furthermore, Complainant admitted to drinking an extreme amount of alcohol the night before he was scheduled to work. Even though he went to bed at 8:00 p.m., it is not surprising that he still had alcohol in his system the next morning, given that he admitted to drinking at least 14 shots of tequila. Complainant also obliquely admitted to continued alcohol impairment at work, joking that he should be in the drunk tank.

This ALJ agrees with Inspector Annable’s conclusion that Complainant was impaired by alcohol and not fit for his job duties as the highest ranked officer at the Facility on December 10, 2023. This finding is based on the totality of the circumstances with particular weight on Complainant’s admission to drinking an excessive amount of alcohol the previous night, along with the witnesses’ observations of impairment.

Complainant argues that Inspector Annable was not certified to perform SFST’s. This ALJ is not placing any weight on the SFST’s because Inspector Annable was not qualified at the hearing as an expert in the administration and interpretation of the SFST’s. See, *Campbell v. People*, 443 P.3d 72 (Colo. 2019). Complainant further argues that the

PBT was not properly calibrated. This ALJ is not placing any weight on the PBT due to the calibration issues and the PBT's inherent inaccuracy. Nevertheless, this ALJ finds that the witnesses' credible testimony proves by a preponderance of the evidence that Complainant was impaired by alcohol when he appeared at work on December 10, 2023, irrespective of the SFST's and the PBT.

Complainant also argues that Respondent failed to follow its own procedures by failing to obtain off-site testing to confirm the presence of alcohol. However, there is evidence in the record that the local off-site testing facility was not available because it was Sunday. The only available off-site facility available was too far away to be practicable given the possibility that the alcohol in Complainant's system would dissipate before the test could be completed. Under the circumstances, Respondent's failure to obtain offsite testing was excusable. In addition, Inspector Annable testified that the test performed at the off-site facility would have been another PBT, which has limited evidentiary value. Cf. C.R.S. § 42-4-1301(6)(III) ("Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action. . . ."). Here, an additional PBT conducted several hours after the beginning of Complainant's shift would have had little or no weight and would therefore not affect this ALJ's finding of impairment.

Complainant additionally argues that he was only "hung over," not impaired. This ALJ does not put any weight on Complainant's testimony that he was only hung over because it is contradicted by four independent witnesses who observed impairments in Complainant's speech and balance. In addition, the DOC's Administrative Regulation 1450-36 defines impairment as "when a DOC employee, contract worker or volunteer's behavior or condition adversely affects performance (e.g. reduced awareness, coordination, reactions, attendance, responses or effort) or threatens the safety of the DOC employee, contract worker, others, or property." Under the influence is defined by the same regulation as "a condition in which a person is affected by a drug or alcohol in any detectable manner." Even if Complainant was merely hung over, his excessive consumption of alcohol the night before affected his mental readiness and job performance. As a result, he would still be considered impaired or under the influence as defined by Administrative Regulation 1450-36.

Complainant finally argues that medical issues caused the indicia of impairment. He testified his unsteady balance was caused by back pain. This ALJ does not credit this explanation. Complainant did not submit any medical records supporting a back condition, and the witnesses testified that Complainant's unsteadiness on the day in question appeared unusual for him. Complainant also testified that he had a medical condition in 2019, which may have caused slurred speech, but there is no medical or other evidence in the record that he was suffering any residual symptoms in December of 2023. Complainant further testified his bloodshot, watery eyes were caused by allergies. While bloodshot, watery eyes can have many causes other than alcohol, the totality of the evidence establishes that Complainant's was, in fact, impaired by alcohol on December 10, 2023.

Complainant did submit medical records indicating he successfully completed an alcohol recovery program. While this ALJ applauds Complainant's efforts to seek treatment, this does not excuse him from the consequences of his actions on December 10, 2023.

### **III. Respondent's Decision to Demote Complainant was Not Arbitrary and Capricious or Contrary to Rule or Law**

As to the first element under *Lawley*, Respondent did not neglect or refuse to use reasonable diligence in procuring the relevant evidence. Warden Long obtained all the necessary information, including Inspector Annable's report and supplemental report, the incident reports from the witnesses, and Complainant's personnel file. While he did not interview the witnesses, this was unnecessary as their observations were contained in their reports. Because he obtained all the available information, Warden Long used reasonable diligence to procure the relevant evidence.

As to the second element under *Lawley*, Respondent gave candid and honest consideration of the evidence. Warden Long reviewed and considered all of the documents in his possession. He held a Rule 6-10 meeting where he heard and considered Complainant's information and mitigating factors. After the first Rule 6-10 meeting, he performed additional research regarding Complainant's contentions. He then held a second Rule 6-10 meeting where he reviewed all of the evidence with Complainant. Warden Long was candid and honest in his assessment of the evidence.

As to the third element under *Lawley*, this is not a case where reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. Complainant's conduct was very serious as his impairment placed the entire facility at risk. In addition, as a captain, Complainant had the responsibility to set a good example for both subordinates and offenders. His failure to do so was a discredit to the DOC and to himself. It was entirely reasonable, even lenient, for Warden Long to demote Complainant and reduce his pay accordingly, particularly since Complainant had a similar incident in 2008.

Finally, Warden Long's decision to demote Complainant was not contrary to rule or law. Warden Long considered the appropriate factors pursuant to Board Rule 6-11, as well as Complainant's mitigating factors. While Complainant argues that Respondent did not follow its internal policies by not completing off-sight testing, as discussed above, this was excusable under the circumstances.

### **CONCLUSIONS OF LAW**

Based on the above analysis, Respondent's decision to demote Complainant from captain to lieutenant and to reduce his salary accordingly was not arbitrary, capricious, or contrary to rule or law.

**ORDER**

**IT IS THEREFORE ORDERED:** that Respondent's decision to demote Complainant and reduce his salary is affirmed, and this appeal is dismissed with prejudice.

Dated October 21, 2024 by:

/s/ [REDACTED]  
Charlotte A. Veaux  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4th Floor  
Denver, CO 80203

**CERTIFICATE OF SERVICE**

This is to certify that on the **21<sup>st</sup>** day of **October, 2024**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Cris Clare

[REDACTED]

Kerry J. Ferrell, Esq.  
Assistant Attorney General  
[kerry.Ferrell@coag.gov](mailto:kerry.Ferrell@coag.gov)

[REDACTED]



## **APPENDIX**

### **Complainant's Witness:**

- Cris Clare, Lieutenant, Sterling Correctional Facility
- Micah Friend, Lieutenant, Sterling Correctional Facility,

### **Complainant's Admitted Exhibits:**

A-C, F, G, J, K, L, M, O (Exhibit O was previously labeled X)

### **Respondent's Witnesses:**

- David Custer, Lieutenant, Sterling Correctional Facility
- Nicholas Leech, Major, Sterling Correctional Facility
- Scott Annable, Investigator, Office of Inspector General
- Jeff Long, Warden, Sterling Correctional Facility

### **Respondent's Admitted Exhibits:**

1-15

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS:**

To abide by the decision of the Administrative Law Judge ("ALJ").

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).

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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

### **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. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5) – (7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at: [dpa\\_state.personnelboard@state.co.us](mailto:dpa_state.personnelboard@state.co.us)

### **BRIEFS ON APPEAL**

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

### **ORAL ARGUMENT ON APPEAL TO THE BOARD**

In general, no oral argument is permitted. Board Rule 8-55(C).

**MOTION FOR RECONSIDERATION**

Motions for reconsideration are discouraged. See Board Rule 8-47(K).