

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B096

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRADLEY ANDERSON,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
OFFICE OF YOUTH SERVICES,
MOUNT VIEW YOUTH SERVICES CENTER,

Respondent.

The hearing in this matter was held on April 9, 1997, in Denver before Administrative Law (ALJ) Judge Margot W. Jones. Respondent appeared at hearing through Thomas Parchman, Assistant Attorney General. Complainant, Bradley Anderson, was present at the hearing and represented by James R. Gilsdorf, Attorney at Law.

Respondent called F. Jerald Adamek and Maurice Williams, employees of the Department of Human Services, to testify at hearing. Complainant testified in his own behalf and called Frank Prorock, an employee of the Mount View Youth Services Center, to testify at hearing.

Respondent's exhibits 1 through 9 were admitted into evidence without objection. Complainant's exhibit A was admitted into evidence over objection.

MATTER APPEALED

Complainant appeals the termination of his employment with the Mount View Youth Services Center.

ISSUES

1. Whether complainant engaged in the conduct for which discipline was imposed.
2. Whether the conduct proven to have occurred constituted violation of Board Rule, R8-3-3.

3. Whether the decision to terminate complainant's employment is arbitrary, capricious, or contrary to rule or law.

4. Whether complainant is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent sought to introduce at hearing after acquired evidence, that is evidence acquired after the decision to terminate complainant's employment was made. It is evidence that respondent maintains supports the decision to terminate complainant's employment because had respondent been made aware of the evidence prior to the date of termination, it would have been used to support the termination decision. It also is evidence that complainant was not given notice of or opportunity to respond to consistent with *Loudermil v. Cleveland Board of Education*, 470 U.S. 532 (1985).

Since complainant was not provided a pretermination opportunity to be apprised of the allegations of misconduct and to respond to those allegations, the after acquired evidence pertaining to that conduct was excluded at hearing. Respondent's exhibit 9, which was Maurice William's documentation of an event pertaining to the after acquired evidence was admitted into evidence without objection, but was not deemed relevant in light of this ruling.

FINDINGS OF FACT

1. Bradley Anderson (Anderson), the complainant, was employed by the Department of Human Services at the Mount View Youth Services Center (Mount View) as a Security Services Officer I. Anderson began his employment at Mount View in April, 1989. Anderson began his employment at the Department of Human Services at Wheat Ridge Regional Center in 1985.

2. As a Security Services Officer at Mount View, Anderson's duties required him to provide direct care to youth committed or detained at Mount View. Anderson's direct care duties required him to supervise the activities of the youth, ages 10 to 17 years. There are approximately 30 females and 150 males housed at Mount View. Youth at the facility have committed crimes against property and persons.

3. Anderson's employment record prior to November, 1996, was good. He received yearly job performance ratings of good and

commendable. He was not previously disciplined during his employment with the Department of Human Services.

4. On November 4, 1996, Anderson was five hours late for work. Anderson failed to contact his supervisor to advise him that he would not appear for work on time.

5. On November 18, 1996, Anderson failed to report to work for a double shift. He failed to report to his supervisor that he would not be at work for the double shift.

6. Attendance at work for the security staff at Mount View serves an important function. The safety and security of the youth detained or committed at Mount View is dependent on their being adequate staff members on duty. Younger or smaller youth have been assaulted at the facility. This problem is aggravated when there is inadequate staff present to supervise their activities. The safety of staff members is also jeopardized by inadequate staffing of the facility.

7. On November 11, 1996, Anderson was asked to assist a co-worker in controlling a resident at Mount View. The resident was an individual who is approximately 5'6 tall and weighs 150 to 160 lbs. The resident was known to be very combative, belligerent, arrogant and he frequently defied authority.

8. On November 11, 1996, the resident was dressed in only his underwear. As the conflict increased to bring the resident under control, his shirt was ripped off. Anderson and three co-workers struggled to remove the resident from his room and to place him in isolation. At one point during the struggle, Anderson and another co-worker were seated on top of the youth on the floor. The youth was face down with his hands tucked under him to prevent the employees from placing shackles on them. Shackles were placed on the youth's legs.

9. Anderson escorted the resident out the room to isolation. In isolation, the youth cried and continued to be very upset. He complained to Anderson that he was bitten and pinched by Anderson's co-worker during the altercation in his room. He threatened Anderson that he would see that Anderson and one of his co-workers involved in the altercation were fired.

10. Anderson was present for most of the altercation with the resident in his room. He did not observe any of his co-workers bite or pinch the resident. In isolation, the youth was dressed in only his undershorts. Anderson did not observe any bite or pinch

marks on him. Anderson did not believe the resident's allegation of abuse was true.

11. On the evening of November 11, 1996, Anderson was under the mistaken belief that he did not have an obligation to report the resident's allegation of physical abuse to the Jefferson County Department of Human Services, supervisor on duty or to the facility's medical staff.

12. Anderson prepared an incident report and a use of force report. In these reports, Anderson did not mention the resident's allegation of physical abuse.

13. In November, 1996, Penny Brown was the newly appointed director at Mount View. F. Jerald Adamek, the director of the Division of Youth Corrections, instructed Maurice Williams (Williams) to temporarily work at the facility with Penny Brown. Adamek expected Williams to assist Brown during her training period in the new position. Adamek verbally advised Williams that he was delegated appointing authority while at the facility.

14. Williams' first day at the Mount View was November 12, 1996. He encountered a Mount View resident who reported to him that he was physically abused the night before during an altercation with Anderson and his co-workers. The youth pulled down his sweatshirt in front to reveal bruise marks on his upper chest.

15. Williams did not inquire further of the youth about his health. Williams did not ask him to reveal the rest of his body to observe if there were other indications of physical abuse. Williams did not refer the youth to the facility's medical staff for further examination.

16. Williams reported the youth's allegation to the Jefferson County Department of Human Services for investigation. Williams was provided with a report by the investigating officer on November 12, 1996. Williams was advised on November 21, 1996, by the investigator that third degree assault charges would be filed against Anderson and a co-worker as a result of the resident's allegation of abuse.¹

17. Anderson's co-worker, who was involved in the altercation with

¹ The 3rd degree assault charges were brought against Anderson and, on March 27, 1997, the charges were dropped.

the resident on November 11 and was to be charged with third degree assault, resigned his position at Mount View. On November 25, 1996, Williams provided Anderson notice that a R8-3-3 meeting would be held with him on December 2, 1996. The notice of this meeting advised Anderson that it would be held to consider job performance issues. The letter enumerated instances when Anderson was tardy or absent from work. It is also noted that the meeting would be held to consider that Anderson was going to be cited with third degree assault due to the alleged use of excessive force on a resident on November 11, 1996.

18. The December 2 R8-3-3 meeting was continued to December 9 in order to allow Anderson's representative to be present. The R8-3-3 meeting was held with Anderson, Chuck Williams, a business representative from the Colorado Association of Public Employees, and Maurice Williams.

19. Anderson explained to Williams that on November 4, 1996, he was five hours late for work and he did not call to advise his supervisor of his tardiness because he missed his bus. Anderson further explained that he did not call his supervisor on this date because he feared that he would miss the bus again if he left the bus stop to use the telephone.

20. Anderson explained that on November 11, 1996, he did not report for a double shift and he did not call his supervisor because he "did not care and it just did not matter".

21. Anderson further explained with regard to the allegation of the use of excessive force that any injury suffer by the youth on the evening of November 11, 1996, appeared to be superficial. Anderson explained to Williams that he did not observe any bite or pinch marks on the youth. Finally, Anderson explained that he did not report the allegation of resident abuse to the Jefferson County Department of Human Services because he believed that there was a change in the Division of Youth Corrections' policy with regard to reporting allegations of resident abuse. Anderson promised to supply Williams with the new policy he relied on that evening.

22. Following the R8-3-3 meeting, on December 10, 1996, Anderson provided to Williams with a July, 1996, memorandum which reflected that the Department of Youth Corrections' policy changed with regard to reporting residents' allegations of assault on each other to the Jefferson County Sheriff's Department. The new policy required that before a report was made to the Sheriff's Department an internal investigation should be conducted by Mount View staff. Anderson acknowledged that he misread the memorandum and that it

did not change the policy with regard to reporting allegations of resident abuse by staff to the Jefferson County Department of Human Services.

23. In fact, the Department of Youth Corrections adopted policy number 9.17 on March 28, 1994, regarding the requirement that the staff report allegations of resident abuse to the Jefferson County Department of Human Services. The policy also requires that an incident report be prepared documenting the residents' allegations of abuse and that the shift supervisor be advised of the allegation. Anderson was aware of this policy.

24. On December 20, 1996, following the R8-3-3 meeting, F. Jerald Adamek prepared a written delegation of appointing authority to Williams "for the purpose of conducting Corrective and Disciplinary actions at Mount View Youth Services Center."

25. On January 3, 1997, Williams decided to terminate Anderson's employment with Mount View for violation of R8-3-3(C) (1), (2), and (3) and Department of Youth Corrections, policy 9.17(I). The termination became effective January 6, 1997. F. Jerald Adamek, director of youth corrections, was not provided notice of the disciplinary action by being copied on the January 3, 1997, notice of termination.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it sustained its burden of proof to establish that the misconduct occurred and that the discipline

imposed was neither arbitrary or capricious. Respondent seeks entry of an order affirming the agency's action.

Complainant argues that there are numerous basis upon which to conclude that the discipline imposed was arbitrary , capricious and contrary to rule and law. Complainant contends that Maurice Williams did not have appointing authority to impose disciplinary action. Complainant maintains that discipline imposed without authority is not sustainable.

Complainant further contends that the discipline imposed is too severe. Complainant argues that the decision to terminate his employment fails to take into consideration his employment record and the severity of the incidents which gives rise to the discipline.

Complainant asserts that he was not familiar with the Department of Human Services, Division of Youth Corrections, policy 9.17 which required him to report the resident's allegation of abuse to the Jefferson County Department of Human Services. He maintains that he cannot be found to have violated the policy if he was not aware of the policy.

Alternately, it is complainant's assertion that policy 9.17 permits the exercise of discretion in the reporting of an allegation of resident abuse. Complainant argues that he did not believe that the resident was abused during the altercation. He, therefore, exercised his discretion, and did not report the allegation.

Complainant contends that his action in exercising discretion and not reporting the allegation of abuse was further bolstered by the fact that Williams, when he encountered the resident on the day following the altercation, did not believe that the bruising on the resident's chest was of sufficient concern to merit a medical examination.

Complainant argues that Williams testified that the only conduct which merited termination of complainant's employment was his failure to report the resident's allegation of abuse. Complainant further contends that Williams testified that complainant's absenteeism and tardiness did not provide a basis for the termination. Complainant asserts in conclusion that the failure to report the allegation of abuse is not adequate evidence of misconduct to support the decision to terminate his employment.

Complainant argues that the after acquired evidence was not admissible at hearing because complainant would be denied due

process by its admission. Complainant contends that a procedure that does not permit him to be apprised of the allegations against him and a procedure which does not provide him the opportunity to respond to those allegations prior to the imposition of disciplinary action denies him due process.

At hearing, though respondent's after acquired evidence was excluded and ruled not admissible, respondent was permitted to make an offer of proof as to the evidence that it would present if permitted to do so. Complainant objected to respondent's offer of proof. Complainant contended that he was prejudiced by respondent making an offer of proof concerning information ruled to be inadmissible after acquired evidence.

Thus, complainant presented a defense which addressed the allegations arising from the after acquired evidence. No objection was raised by respondent to the evidence presented by complainant in his defense. In light of the ruling as to the inadmissibility of the after acquired evidence, complainant's evidence in his defense on this issue was determined to be irrelevant.

Complainant's allegation that Williams lacked appointing authority to impose the discipline was considered and deemed to be without merit. State Personnel Board Rule, R1-4-2, permits an appointing authority to make an oral delegation of appointing authority as long as the action taken is ratified. In this case, F. Jerald Adamek and Williams testified that appointing authority was delegated orally prior to the December 9, 1996, R8-3-3 meeting. However, there is no evidence that the action taken was ratified. Adamek was not copied on the January 3, 1997 disciplinary letter. Adamek testified that he ratified the discipline imposed as of the April 9, 1997, hearing date.

Despite this procedural difficulty, the evidence established that following the R8-3-3 meeting, on December 20, 1996, Adamek provided Williams with a written delegation of appointing authority. It is found that this delegation was adequate to provide Williams with the authority to act in this matter. It is form over substance to conclude that the written delegation dated December 20, 1996, did not cover Williams' conduct of the R8-3-3 meeting on December 9, 1996. The State Personnel Board Rules do not impose the requirement of ratification of a delegation of appointing authority where the delegation is in writing. Therefore, in this case, where authority was delegated to Williams in writing, it was effective to extend authority to him to impose the discipline contained in the January 3, 1997, letter of termination.

The evidence presented at hearing supported the conclusion that complainant was aware of the requirement to report allegations of resident abuse to the Jefferson County Department of Human Services. Complainant was employed at Mount View for approximately seven years. This was a sufficient period of time from which to conclude that complainant had been made aware of the agency's policies. Complainant testified that he believed that the reporting policy was recently amended. It must be presumed that he was aware that a policy existed since he contends that he mistakenly believed the policy had been changed.

Furthermore, the language of policy 9.17 does not suggest that staff is permitted to exercise discretion to report only those allegations which they deem meritorious. The policy states that, "Mount View Youth Services Center staff are required by law to report all incidents, suspected incidents and/or allegations of child abuse." Thus, complainant's failure to report the resident's allegation on November 11, 1996, was a violation of the Department of Youth Corrections' policy.

Complainant contends that the termination of his employment was too severe in light of the incident which gave rise to the discipline and his employment record. The issue before the ALJ is whether the discipline imposed was within the range of alternatives available to a reasonable and prudent administrator. The evidence supports the conclusion that complainant's failure to report the resident's allegation of abuse to the Jefferson County Department of Human Services was a serious infraction of the Department's policy. The evidence established that even in the incident report complainant prepared on November 11, 1996, he only made mention of the fact that the resident suffered superficial red marks and minor cuts. In this report, the allegation of abuse is not mentioned.

The Department of Youth Corrections' duty is to safeguard committed and detained youth. The failure of a staff member involved in an altercation with a youth to participate in carrying out the Department's mission by reporting allegations of abuse warrants severe and definitive response such as was taken in this case.

Complainant seeks an order awarding attorney fees and costs under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B). The evidence did not establish that there is a basis for such an award.

CONCLUSIONS OF LAW

1. Respondent established by preponderant evidence that complainant engaged in the acts for which discipline was imposed.

2. Respondent established that the conduct proven to have occurred constituted violation of R8-3-3 and Department of Youth Corrections' policy, 9.17.

3. Respondent's decision to terminate complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.

4. Complainant is not entitled to an award of attorney fees and cost.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of
May, 1997, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date

the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

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. Rule R10-10-6, 4 CCR 801-1. 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, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. 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 decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of May, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan St., Ste. 402
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Thomas Parchman
Assistant Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203
