

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B181

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VICTOR L. GUTIERREZ,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF YOUTH CORRECTIONS,

Respondent.

Hearing commenced on September 5, 1996 and concluded on December 27, 1996 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Edward Greivel and was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by Vonda G. Hall, Attorney at Law.

Respondent's witnesses were: Maurice Williams, Assistant Director of Gilliam Youth Services Center; Tanya Lyons, Social Services Coordinator, Gilliam Youth Services Center; Madline SaBell, Personnel Administrator, Department of Human Services; and Edward Greivel, Regional Director, Division of Youth Corrections. Respondent also proffered witness Jerald Adamek, Director, Division of Youth Corrections. Complainant's objection to Adamek testifying, on grounds of insufficient notice, was sustained.

Complainant testified on his own behalf and called the following other witnesses: Tracy Love, Patrol

Officer, Denver Police Department; Theodore Barley and Ronald Williams, Safety Security Officers, Division of Youth Corrections; Scott Thomas, Senior Maintenance Mechanic, Division of Youth Corrections; and Edward Greivel.

Respondent's Exhibit 4 was stipulated into evidence. Exhibits 5 and 6 were not admitted.

Complainant's Exhibits B, F, G and L were stipulated into evidence. Exhibits A and N were admitted without objection. Exhibits D, E, H, I, J, K and M were admitted over objection.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action in terminating complainant's employment was arbitrary, capricious or contrary to rule or law;
2. Whether there was just cause for the discipline imposed;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether the appointing authority was properly delegated;
5. Whether complainant failed to mitigate his damages.

PRELIMINARY MATTERS

Complainant's Motion for Summary Judgment and respondent's Motion for Partial Summary Judgment Regarding Proper Delegation of Appointing Authority were denied. Complainant's Motion to Strike was granted as to expert witnesses on the grounds stated in the motion. Respondent's Motion for Reconsideration of Respondent's Motion to Commence and Continue Hearing was denied. Complainant's Motion to Take Witness Testimony Out-of-Time was denied. A witness sequestration order was entered upon complainant's motion. Excepted from the order were the complainant and the respondent's advisory witness, Edward Greivel.

FINDINGS OF FACT

1. Complainant Victor Gutierrez was employed by respondent Department of Human Services, Division of Youth Corrections as a Safety Security Officer at the Gilliam Youth Services Center (Gilliam) in Denver for 22 years. During the most recent six years of his employment, Gutierrez was assigned to the intake area of Gilliam, processing children in and out of detention. Everyone who entered Gilliam was required to sign in at the intake desk. Gutierrez thus had frequent contact with officers of the court, parents and other members of the public, detainees, supervisors of residential pods and other staff members, administrators and medical personnel. He controlled the entrance and exit doors. This job can be stressful at times.
2. Gutierrez had a good employment record. He had received no prior corrective or disciplinary actions.
3. In the late afternoon of February 14, 1996, his day off, Gutierrez went to the agency administrative offices to talk to Gilliam Director Vel Garner. He felt stressed out and depressed over his working conditions, his relationship with his supervisors and personal problems. Upon learning that Garner was not in, Gutierrez went to an empty office, where Tanya Lyons spotted him leaning against a wall, sobbing. Gutierrez asked Lyons if he could see Gilliam Assistant Director Maurice Williams. Because she sensed an importance of Gutierrez talking to someone, she called Williams out of a meeting to meet with him.

4. At Williams' office, Gutierrez asked that Lyons sit in on the discussion as a witness to how he felt. Both Lyons and Williams agreed to the request. Gutierrez sat directly across from Williams, who was seated behind his desk. Sometimes crying and sometimes laughing, Gutierrez offered that he was upset over his job and was experiencing difficulties in his marriage. He discussed his job-related concerns, which included what he perceived as a poor relationship with both of his supervisors. He stated that he did not like the way Gilliam was being run and he wanted a transfer. He feared that a corrective action was in the offing and sought assurance that he was not about to be fired. Williams gave him that assurance.

5. At some point during that February 14 conversation, Gutierrez stated that he had thoughts of killing Garner, Williams and two former Gilliam employees. According to Williams, Gutierrez volunteered that he had plans to kill Garner, Williams, and the two others, whom he named. When Williams asked how he intended to do that, Gutierrez formed the shape of a gun with his thumb and index finger and said, "Poof, poof," indicating that he would use a handgun. His plan was to transfer both of his houses to his wife and then come in and kill Garner and Williams. Gutierrez indicated that he had been thinking about killing people for some time. Based on these statements, Williams perceived that his life had been threatened. Lyons was concerned enough to look around for a weapon; Gutierrez displayed no sign of being armed.

6. Lyons left and returned twice--once to make a telephone call pertaining to her child, and once to look for a police officer or someone else who could provide assistance. She had determined from Gutierrez's statements that they could not let Gutierrez leave without getting him some help.

7. Under the guise of requesting the telephone number for C-SEAP (Colorado State Employees Assistance Program), Williams telephoned Personnel Administrator Madline SaBell. Speaking in a low voice while Lyons conferred with Gutierrez, Williams told Sabell that Gutierrez had threatened to kill him. To SaBell, Williams sounded concerned and frightened. She told Williams that she would call 911, which she did, telling the dispatcher that an employee had threatened to kill the assistant director. Neither Lyons nor Gutierrez heard what Williams said on the telephone.

8. Gutierrez was surprised when three police officers eventually arrived. The officers said that they wanted to take him to the hospital. He thrice insisted that they place him in handcuffs, which was not their original intent. Officer Love testified that they had been told that Gutierrez had expressed suicidal and homicidal thoughts, but not that he had made direct threats. Handcuffed and leaving, Gutierrez spoke words to the effect that he would soon be out because he knew how to play the game.

9. Gutierrez was escorted by the police officers to Denver General Hospital, where he was certified as a threat to himself or others and was placed on a mandatory 72-hour hold. After several hours, he was transferred to Bethesda Psychiatric Hospital for approximately seven days.

10. Williams telephoned Denver General Hospital to inquire into Gutierrez's status, offer information and to ask that he be informed of Gutierrez's release because Gutierrez had just threatened to kill him. Williams subsequently inquired into the possibility of the State obtaining a bulletproof vest for him but ultimately decided against taking such action.

11. Edward Greivel is the Regional Director of the City & County of Denver for the Division of Youth Corrections (formerly the Division of Youth Services). He is in charge of all facilities in Denver that are operated by the Division of Youth Corrections. He has sole responsibility for hiring the Gilliam director, who reports directly to him.

12. Greivel derives his appointing authority from Policy 3.4, signed and reissued by Division of Youth Services Director Jerald Adamek on July 1, 1993. Continuously in effect to date, Policy 3.4 provides in pertinent part:

The authority to issue disciplinary actions is hereby delegated to all appointing authorities having responsibility for a program facility. Disciplinary actions shall be discussed with the Director of the Office of Human Resources prior to being administered to the employee

Appointing Authority: The head of each principal department who is both responsible and accountable for the actual operation and management of the State

Personnel System for his/her respective department.

(Exhibit G.)

13. Greivel discussed the Gutierrez matter with Adamek, who asked Greivel to handle it himself because the Gilliam director was one of those allegedly threatened and consequently might have a personal conflict of interest. Greivel understood that the requisite written delegation of appointing authority was provided to him via Policy 3.4. Greivel later advised Adamek of his final decision.

14. On February 16, two days following the incident, Greivel wrote and had delivered at Bethesda a letter to Gutierrez approving the use of accumulated sick leave and advising Gutierrez that he would not be allowed to enter any agency office or facility pending written statements from attending psychiatrists or psychologists. (Exhibit B.)

15. By letter dated February 29, 1996, Greivel informed Gutierrez that a Rule R8-3-3 meeting would be held on March 21, 1996 to discuss information of Gutierrez's threat to harm staff members at Gilliam. (Exhibit 4.)

16. Through union representative Chuck Williams, Gutierrez advised Greivel that he was not yet in satisfactory condition to participate in a predisciplinary meeting and asked that the meeting be postponed. Greivel agreed to postpone the meeting.

17. The R8-3-3 meeting was held on April 23, 1996. The attendees were Gutierrez, union representative Chuck Williams and Greivel. Gutierrez stated that his February 14 statements were made in the past tense and that he did not have a present or future intent to harm anyone.

18. Gutierrez testified at hearing that his statements were not only made in the past tense, but were in direct response to questions from Tonya Lyons, contrary to the testimony of Lyons.

19. Greivel placed Gutierrez on administrative leave with pay so Gutierrez would no longer be

charged with sick leave. He contemplated the circumstances of the situation in depth before being comfortable with a decision, ultimately concluding that he was faced with the behavior of threatening the lives of others and that such conduct was so outrageous as to mandate termination. Greivel concluded that the circumstances of threatening and putting someone in fear for his life constituted workplace violence and created an intolerable and risk-filled situation for the staff as well as the children at Gilliam. He also took into account the potential liability of the agency for knowingly employing a person who had expressed threats against others.

20. By letter dated June 5, 1996, Greivel summarized his view to Gutierrez and concluded:

After reviewing the information I gathered during my investigation which included your admissions, I have determined because of your flagrant behavior at Gilliam on February 14, 1996, that your presence at any Office of Youth Services Facility would present a grave risk to the safety of clients and staff. Therefore, the disciplinary action I am administering is to terminate your employment with the Office of Youth Services, Department of Human Services.

(Exhibit F.)

21. Complainant filed a timely notice of appeal of the disciplinary action on June 10, 1996.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. United States v. Cueto, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness's testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance."

This standard of proof has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985) (emphasis supplied).

Following a considered review of the entire record, the administrative law judge concludes that it is more likely than not that complainant committed the acts for which discipline was imposed.

The testimony of Maurice Williams is given substantial weight. Williams testified in a direct and straightforward manner. His testimony is largely consistent with that of Lyons and SaBell. Complainant's contrary testimony goes against the weight of the evidence. It is specifically found that complainant lead the conversation for the most part and did not provide incriminating information solely in response to direct questions from Lyons. It is further found that complainant did not seek out Williams to ask for "help." He was not seeing Williams in the capacity of a

counselor or therapist. He asked to talk to Williams as a person within the chain of command when he learned that the director was not available. He went to the administrative offices to seek assurance that he would not lose his job and to express concerns about the workplace. There is no evidence that he had first taken appropriate steps to manage his purported depression or personal problems. Being upset does not excuse one from the responsibility for his own actions. Nor is it an excuse to be “under the weather,” as complainant testified he was on February 14. Even if complainant did not use the exact words, “I am going to kill you,” which he proffers as a defense, it is telling that, after describing his plan, he did not denounce an intent to carry out the plan. For instance, he did not then say, “But I would never do it,” or any words to that effect.

The seriousness of threatening the lives of co-workers cannot be underestimated. The potential for workplace violence is real in our society and must not be ignored by an employer. The resulting psychological impact on the victim must also be considered. There is no doubt that Maurice Williams believed that his life was in danger and acted accordingly. This alone can, and did, affect the work environment.

A reading of the transcript of the 8-3-3 meeting is persuasive in determining that the appointing authority approached this matter with an open mind and was intent on being fair while acting in the best interests of the agency and all of the individuals involved, including complainant. He did not rush to judgment.

Dismissal was not the only option. Nevertheless, it is the responsibility of the appointing authority to determine the appropriate course of action in a given situation. The State Personnel Board should give due deference to the agency's primary discretion in exercising its obligation to maintain employee discipline, efficiency and safety. There is no evidence of record from which to conclude that the appointing authority abused his discretion. This administrative law judge is not persuaded that the judge is better suited in this case to exercise the responsibilities of personnel management than is the appointing authority who disciplined this complainant, notwithstanding complainant's length of service and prior job performance. See *Chiappe v. State Personnel Board*, 622 P.2d 527, 534 (Colo. 1981).

In addition to arguing that his conduct of February 14, 1996 did not warrant termination, complainant contends that the personnel action is void because Policy 3.4 is not a proper written delegation of appointing authority.

Rule R1-4-2, 4 Code Colo. Reg. 801-1, provides in full:

Delegation. The appointing authority may delegate authority for all personnel functions and actions.

(A) Unless otherwise specified in these rules, such delegation need not be in writing so long as the appointing authority ratifies the action taken. The appointing authority is presumed to have ratified the action taken unless he takes specific action to countermand it within a reasonable period of time.

(B) The delegee may further delegate authority for personnel functions and actions only if, and to the extent, authorized to do so in writing by the appointing authority. If so authorized, then further delegation shall be governed by subparagraph (A) above.

The appointing authority of Jerald Adamek is not contested. The unrefuted testimony of Edward Greivel was that he advised Adamek of his final decision, having been asked by Adamek to handle the matter instead of further delegating appointing authority to the Gilliam director, which he presumably could have done. R1-4-2(A) distinguishes between “such delegation” and “the action taken.” Since Adamek did not countermand Greivel’s action within a reasonable time, he is presumed to have ratified “the action taken,” resulting in the required delegation. This analysis obviates the need to interpret Policy 3.4. It is noted, however, that Greivel’s unrefuted testimony was that Policy 3.4 was intended to apply to his position relative to the delegation of appointing authority. An agency’s interpretation of its own rules is entitled to due deference.

CONCLUSIONS OF LAW

1. Respondent’s action in terminating complainant’s employment was not arbitrary, capricious or contrary to rule or law.

2. There was just cause for the discipline imposed.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. There was a proper delegation of appointing authority.
5. No evidence was presented with respect to complainant's mitigation of damages.

ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
January, 1997, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 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:

Vonda G. Hall
Attorney at Law
1390 Logan Street, Suite 402
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and in the interagency mail, addressed as follows:

Thomas S. Parchman
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