

State Personnel Board, State of Colorado

Case No. 98 B 076

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOE MINJAREZ,

Complainant,

v.

DEPT. OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, GILLIAM
YOUTH SERVICES CENTER,

Respondent.

Hearing on this matter was held March 31, 1998 and April 1, 1998 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, B-65, 1525 Sherman Street, Denver, CO 80203.

MATTER APPEALED

Joe Minjarez, Complainant ("Complainant" or "Minjarez"), appeals the disciplinary termination of his employment as a Security Services Officer I ("SSOI") at Gilliam Youth Services Center ("Gilliam" or "Respondent").

For the reasons set forth below, the actions of the Respondent are **UPHELD.**

PRELIMINARY MATTERS

Respondent was represented by Thomas S. Parchman, Assistant Attorney General, State Services Section, 1525 Sherman Street, 5th Floor, Denver, CO. Complainant was represented by Nora V. Kelly, Esq., 1776 Lincoln Street, Suite 418, Denver, CO 80203.

1. Procedural History

Complainant filed his Notice of Appeal with the State Personnel Board ("Board") on December 30, 1997. Hearing in this matter was originally set for February 13, 1998. On February 13, 1998, the ALJ issued an order to reconvene the hearing on March 31 - April 1, 1998 for good cause.

2. Witnesses

Respondent called the following witnesses during its case-in-chief: (1) Kris Fagan, SSOI, Gilliam Youth Services Center, Denver, CO; (2) Michael Padilla, Shift Supervisor, Gilliam Youth Services Center, Denver, CO; (3) Maurice Williams, Regional Director for Denver Region, Dept. of Human Services, Denver, CO; (4) Denesio Gonzales, Assistant Director of Gilliam, Gilliam Youth Services Center, Denver, CO. On rebuttal, Respondent called (1) Michael Padilla; and (2) Lawrence Medina, SSOI, Gilliam Youth Services Center, Denver, CO.

Complainant called the following witnesses which included: (1) Michael Padilla, Shift Supervisor, Gilliam Youth Services Center, Denver, CO; (2) Rick Sandoval, former supervisor, Gilliam Youth Services Center, Denver, CO; (3) Dan Smith, employee, Gilliam Youth Services Center, Denver, CO.; (4) Cornelius Foxworth, former supervisor, Gilliam Youth Services Center, Denver, CO; (5) Complainant; and (6) Det. Martin Martinez, Assault Bureau, Denver Police Department, Denver, CO.

3. Exhibits

Respondent offered the following exhibits:

1. Division of Youth Corrections ("DYC") Policy 3.20 - Relationships Between Juveniles and Staff;
2. DYC Policy 3.7 - Code of Ethics;
3. Correspondence dated December 22, 1997 to Complainant from Denesio Gonzales, Assistant Director, Gilliam;
4. Correspondence dated November 10, 1997 to Complainant from Denesio Gonzales;
5. Correspondence dated December 18, 1997 to Complainant from Denesio Gonzales;
6. Written Statement from Kris Fagan, dated November 3, 1997;
7. (not offered)
8. Correspondence dated November 4, 1997 to Complainant from Denesio

Gonzales;

9. A Copy of a Greeting Card, and
10. Transcript of R8-3-3 meeting, dated December 22, 1997.

Respondent's Exhibits 1, 2, 3, 4, 5, and 8 were admitted by way of stipulation. Exhibit 7 was withdrawn. Exhibits 6 was admitted after voir dire by Complainant. Exhibits 9 and 10 were admitted. Exhibit 9 was entered without objection. Exhibit 10 was admitted over objection.

Complainant proffered the following exhibits.

- A. PACE Form, dated 7/91-6/92 for Complainant;
- B. PACE Form, dated 7/92-6/93 for Complainant;
- C. PACE Form, dated 7/1/93-6/30/94 for Complainant;
- D. PACE Form, dated 7/31/95 -7/5/96 for Complainant;
- E. PACE Form, dated 7/96-7/97 for Complainant;
- F. Offense Report, dated 9/4/97 in which Complainant is noted as "victim";
and
- G. Correspondence dated October 22, 1997 to Complainant from Denesio Gonzales re: a previous grievance.

Complainant's exhibits were entered into evidence by way of stipulation.

4. Sequestration Order

A sequestration order which instructed witnesses not to discuss this matter or their testimony with other witnesses during the course of the hearing was entered at the commencement of the hearing.

ISSUES

1. Whether the Complainant engaged in the actions for which discipline was imposed;
2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority, including whether or not Respondent violated State Personnel Board Rule R8-3-1 in imposing a level of discipline;
3. Whether the person imposing the disciplinary action was properly authorized as

the appointing authority;

4. Whether Complainant has failed to mitigate damages, or in the alternative, whether Respondent should be entitled to offset against any back pay awarded to Complainant any amounts earned by Complainant.

FINDINGS OF FACT

I. Background

A. Gilliam Youth Services Center

1. Gilliam is a detention center for juveniles located in Denver, Colorado and is a part of the Office of Youth Services or Division of Youth Services, Department of Human Services. It has a capacity of holding 78 juvenile residents, both male and female. The residents most often have been involved in the commission of a felony, including murder, sexual assault, and crimes against property.
2. Because the residents of Gilliam are confined to the premises of Gilliam, there is a need to limit the personal relationships with the juveniles. This is a result of the staff occupying a position of trust vis-à-vis the residents and the need for staff to be appropriately viewed as authority figures.
3. Gilliam has a set of personnel policies which govern the conduct of employees of Gilliam. Included in those policies is Policy 3.20 entitled Relationships Between Juveniles and Staff. The section entitled "Policy" of Policy 3.20 provides, in part:

There shall be no personal/social or financial/business relations between staff members of the Office of Youth Services and resident juveniles , or family members of juveniles, who are or, who within the last year, have been in the custody of the Office of Youth Services. . . .

Subparagraph III(A) of Policy 3.20 further provides:

Any relationship between an employee of the Office of Youth Services and a juvenile or family member of a juvenile who is currently or who, within the past year, has been in the custody of the Office of Youth Services and which may be viewed as a potential conflict of interest or as a compromise of a professional relationship shall be prohibited.

Policy 3.20 further outlines specific types of behavior which are prohibited including: (1) fraternization or other social situations after working hours or away from work sites, and (2) compromising personal contact, such as consumption of alcoholic beverages or engaging in a sexual relationship with a juvenile. The only exception to this policy relevant in this matter is if a staff member has established a therapeutic relationship and terminating the relationship when a resident is not longer at Gilliam would be detrimental to the juvenile. Policy 3.20 specifically states that it is the Office of Youth Services' staff that is responsible for ensuring that all staff members are aware of this policy.

4. In addition to Policy 3.20, Gilliam has an implementing procedure for the policy. It states that:

It is the position of administration at [Gilliam] that no personal, social or financial business relations between the staff and residents or family members of juveniles under our custody or previously under our custody within the past two years, be interacted.

5. Gilliam also has Policy 3.7 entitled Code of Ethics. This policy specifically addresses the relationships of staff with juveniles. The policy provides that employees are to respect and protect the civil and legal rights of all juveniles and that each employee's "conduct, behavior, and practices with juveniles shall serve to protect the juveniles from any form of physical, emotional, or verbal abuse, sexual contact, [or] harassment. . . ."
6. Policy 3.20 was initially effective March 1, 1991 and reissued on July 1, 1993. Gilliam's implementation procedures for Policy 3.20 were implemented February 14, 1994. Policy 3.7 was effective March 7, 1991 and reissued on July 1, 1993. During the late summer of 1997, as a result of an unrelated matter, the Assistant Director of Gilliam and appointing authority, Denesio Gonzales ("Gonzales") directed that all the staff at Gilliam be reminded of this policy. This directive was completed.
7. The juveniles at Gilliam are divided into different "pods" of the same sex. Each pod can contain juveniles ranging in ages from 10 to 17 years old. There are three pods for the males and three pods for the females. All of the male pods are on one side of the facility while the female pods are on the opposite side of the facility. The pods are separated from the control center by walls made of brick and glass. A SSOI staff member is customarily responsible for the juveniles in a particular pod. Customarily, resident juveniles attend dinner with the other members of their pod, as a group.

8. While SSOI staff are responsible for the daily care of resident juveniles, they are *not counselors*. Gilliam has staff retained as counselors to work with individual residents on particular problems or issues. The SSOI staff is not specifically trained to develop or work in a therapeutic relationship with the juveniles.
9. Gilliam also has rules prohibited the passing of notes between juveniles and that staff was not to provide food to the juveniles.

B. Complainant

10. Complainant has been an employee at Gilliam for the last six and one-half years. Prior to working at Gilliam, Complainant worked at the Colorado Mental Health Institute at Pueblo and for the Department of Corrections (“DOC”). While at DOC, Complainant’s responsibilities included some counseling.
11. Complainant’s performance, as rated through various Performance Planning and Appraisal forms was as follows:

Date	Overall Rating	Applicable Comments; Planning/Appraisal (if any)
7/91 to 6/92	Commendable	Appraisal: Spanish interpretation is good, and your report writing.
7/92 to 6/93	Commendable	Appraisal: He has a sound knowledge of policies and procedures
7/93 to 6/94	Commendable	Appraisal: None
7/95 to 7/96	Commendable	Planning: Familiarize (READ) and comply and follow all DHS or OYS policies and GYSC policies; As lead worker, insure that all staff adhere to all DY/GYSC policies and procedures. Appraisal: None
7/96 to 7/97	Commendable	Planning: Areas of Development

Continue to develop skills in coping with a very stressful environment.

Appraisal: None

12. Complainant was an SSOI. Complainant was a member of the “pod” staff but was not specifically responsible for the youth in any particular pod. His responsibilities included looking after youth at the facility and making sure that the youth were safe from each other if necessary. At the time of his termination, he worked the evening shift and was therefore responsible for ensuring that the juvenile residents had showered, been fed, had any medical needs met, and to generally provide assistance to all pods.
13. Complainant was perceived by his supervisors and other staff as a “stickler” for following rules and procedures. He was viewed by his co-workers as having an excellent knowledge of the rules and procedures at Gilliam and even would help co-workers such as Dan Smith prepare for review examinations on Gilliam’s policies, rules, and procedures.
14. In July 1997, another employee was disciplined for a violation of Policy 3.20. At that time, all staff was reminded of the existence of Policy 3.20. Complainant reported to Padilla that he understood Policy 3.20 and wanted to avoid any issues associated with it.
15. In August 1997, Complainant filed a grievance with the Assistant Director of Gilliam, Denesio Gonzales. He alleged that he was experiencing harassment, discrimination, and duress placed upon him by various co-workers. After completing an interview with the Colorado State Employees Assistance Program (C-SEAP) to determine if counseling was necessary, it was determined that the problems involved the workplace only. Gonzales subsequently discussed the problems with all of the employees involved, changed Complainant’s supervisor, Ms. Whitley, and basically insulated Complainant from the individuals of which he complained.
16. During 1997, Complainant was having marital problems and, at times, was residing in a motel rather than at his familial residence. Complainant was married and had at least one teenage son. In addition, in February 1997, Complainant’s father died and Complainant had been taking medication periodically which could have impacted his memory.

II. Incidents in November 1997

17. On November 3, 1997, Complainant was on duty at Gilliam. His responsibilities that evening included manning the West control station. At approximately 5:30 p.m. Complainant was having dinner at the Gilliam cafeteria with a co-worker, Kris Fagan ("Fagan"). Fagan was also a SSOI but was directly responsible for a pod of female juvenile residents. Next to Complainant and Fagan was a table of female residents who were laughing, giggling and generally carrying-on. One of the female residents, Sylvia, was being particularly loud and obnoxious.¹
18. Sylvia had a history of incarceration at Gilliam. She had been at Gilliam on a number of occasions. During August/September 1997, Sylvia was not at Gilliam. Rather, she was on the outside, referred to by the residents as "on the Outs." Sylvia had a history within the criminal justice system and can be characterized as "knowing the system and being able to manipulate it." Complainant had established a professional relationship during Sylvia's confinement at Gilliam to the point where Sylvia would (1) sometimes provide information to Complainant regarding the other staff's activities; (2) call Complainant at his station in Gilliam to chat about various issues; and (3) call Complainant "Dad".
19. A male juvenile at Gilliam had an interest in having a relationship with Sylvia.
20. On November 3, 1997, during dinner with Fagan, Complainant warned Sylvia to "eat her dinner" and to stop her behavior. Despite this warning, Sylvia continued her behavior. Initially, Sylvia muttered some derogatory language regarding Complainant. Complainant never completed an incident report regarding Sylvia's behavior although he would have been required to under Gilliam policy. Eventually, Fagan accompanied Sylvia back to her pod on the East wing, while overhearing derogatory comments being made by Sylvia regarding Complainant, including the comment he was a "pervert."
21. After dinner was completed, and Fagan's residents were all returned to the pod, Fagan noticed that Sylvia was still upset and that she was crying. Soon thereafter, after having called Fagan to ask permission to speak to Sylvia alone, Complainant appeared, having switched with another employee from the West to the East wing, and asked to talk to Sylvia. Complainant and Sylvia then were observed to have a conversation in the control area, outside of the East wing, but observable through the glass barrier. While the specific comments could not be

¹ Given that the residents of Gilliam are juveniles who have been remanded to care and are awaiting disposition within the criminal justice system, the names of the female juveniles are to remain confidential. For the purposes of this Initial Decision, the female juvenile primarily involved in this matter will be identified simply as "Sylvia."

overheard, Fagan did hear raised voices.

22. After a few minutes, Sylvia returned to her pod, crying, and muttering that Complainant was a “f*cking pervert.” Fagan proceeded to interview Sylvia to determine the problem. At that time, Sylvia stated (1) that Complainant had called her a “hood rat” during the conversation; and (2) Complainant had been in contact with Sylvia when she had been outside of Gilliam, i.e., while she was on the Outs.² Sylvia reported to Fagan that while on the Outs, she had the following contact with Complainant:
 - 1) Sylvia and Complainant would have conversations on the telephone;
 - 2) At one time, Sylvia, another friend, and Complainant had dinner with Complainant at a Denver-area restaurant after having purchased alcohol and drinking in the car (the “Dinner Incident”);
 - 3) At one time, Sylvia had called Complainant asking for transportation to/from a party and eventually, Complainant had taken Sylvia to his motel room, appeared in boxers, and asked for sex (the “Motel Incident”); and
 - 4) Sylvia was responsible for scarring Complainant above his eye while on the Outs.
23. In conveying these allegations, Sylvia provided Complainant’s home telephone number, a cellular phone number, described his truck both inside and out, and identified a specific motel. Given this information, Fagan reported her conversation with Sylvia to her supervisor, Mike Padilla (“Padilla”).
24. Padilla instructed Fagan to report her observations to Gonzales which she did by completing a written statement and filing it in Gonzales’ office that same evening. The following day, November 4, 1997, Gonzales received and reviewed the report of the incident. Pursuant to Rule R8-3-4(C), Gonzales suspended Complainant with pay until an investigation was completed on the allegation that Complainant had inappropriate contact with a Gilliam resident.
25. An investigation was conducted by Gonzales. As part of that investigation, Gonzales interviewed Sylvia and advised the department of social services of the incident. During the interview, Sylvia confirmed her previous story. She provided the correct telephone number of Complainant’s residence, provided an accurate

² “Hood Rat” is a street slang derogatory term used by juveniles to portray a person as willing to have sex easily with individuals.

cellular phone number (although she transposed a few of the numbers in the prefix), described the type of truck Complainant drove, and where he kept his cellular phone within the truck. Gonzales also interviewed Sylvia's companion who recited similar facts regarding the Dinner Incident. Gonzales determined that the level of detail provided by Sylvia made her story sufficiently credible.

26. On November 10, 1997, Gonzales notified, in writing, Complainant of an R8-3-3 meeting in order to collect additional information, to allow Complainant to present information, and to determine if disciplinary action was to be imposed. In addition, Gonzales requested telephone records for the period of December 1996 to August 1997 from Complainant in an attempt to verify who placed what calls to/from both Complainant's residence and cellular phone. Complainant failed to produce telephone records at that time but was given an opportunity to provide them in the near future, at no cost to Complainant. Eventually, Complainant provided three (3) months worth of telephone records for his residence. He *never* supplied the additional records or the cellular phone records to Gonzales despite having been given the opportunity.
27. In the course of the investigation, Complainant made certain admissions. Complainant indicated during the meeting that he was not living at home and was living in a motel during portions of September 1997. Complainant admitted to receiving calls from Sylvia at his home prior to his living in a motel. Complainant's son also received calls from Sylvia after Complainant's son had broken up with his girlfriend and after Complainant revealed this information to Sylvia during a period when she was at Gilliam. At that time, Sylvia said she could talk to Complainant's son regarding the break-up. Complainant did not object.
28. Complainant maintained that the scar above his eye was the result of a domestic disturbance in September 1997 at his familial residence and inflicted upon him by a family member, not Sylvia.
29. A second R8-3-3 meeting was held on or about December 22, 1997, after Gonzales provided written notice on December 18, 1997, in order to discuss additional information that had been received in the course of the investigation. This meeting specifically addressed the issue of whether or not Complainant had sent a greeting card to Sylvia expressing his affection for her. The card was written primarily in Spanish. This card had been retrieved from Sylvia's mother by Gonzales during the course of his investigation. The card had printed, in English, "Thinking of you, loving you, missing you." It was signed, in Spanish, "Con Mucho Amor". In addition, the card had writing on it, in Spanish, as

translated by Gonzales, stating “My love, I don’t want you to forget me when you leave here because you’ll break my heart. Your love.”

30. Complainant initially denied writing any cards to Sylvia. However, subsequent to his initial denial, Complainant admitted that the card was in his writing. Thereafter, Complainant stated he wrote the card for a male juvenile who wanted to give it to Sylvia. Complainant admitted he would sometimes provide translations for illiterate illegal aliens that involved writing cards or notes.
31. On December 22, 1997, Gonzales imposed discipline upon Complainant in the form of termination. The termination was based, in part, on Complainant violating R83-3(C)(2) and willful misconduct as having violated the rules of the agency of employment. Gonzales cited Gilliam’s Policy 3.7 and Policy 3.20. In addition, termination was based on R8-3-3(C)(1) for Complainant’s failure to comply with standards of efficient service or competence.

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board’s rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony; and
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. PARTIES' ARGUMENTS

Respondent argues that despite the accusations having been made by a juvenile in the custody of Gilliam, Complainant violated the provisions of R8-3-3 by breaching the policies of Gilliam and the trust relationships between Complainant and the staff and residents of Gilliam. It is argued that Complainant established a relationship with a resident outside of the Gilliam facility despite having known of the prohibition against such relationships. Respondent maintains that such a violation is a violation of the core rules established at Gilliam, harms the juveniles by diminishing staff's authority, and that termination is the appropriate level of discipline.

Complainant argues that Respondent has failed to meet its burden of proof in showing that Complainant had engaged in the acts for which discipline was imposed. Complainant argues that this entire matter was based on hearsay from a juvenile who had been incarcerated at Gilliam. Complainant maintains that the juvenile's story is not credible and that there is a lack of reliable evidence to support the story. Complainant further argues that even if such burden was met, the discipline imposed was not in conformity with Rule R8-3-1, 4 CCR 801-1. Complainant's character and past exemplary performance history would support the need to exercise progressive discipline. At the time of hearing, Complainant withdrew its argument that Gonzales did

not have authority to impose discipline.

III.

A. Violation of Policy 3.20 - Relationship Between Juveniles and Staff

Whether or not Complainant violated Policy 3.20 turns on the issue of credibility of the Complainant and witnesses in this case, as well as upon the information produced as a result of Respondent's investigation.

As a result of the investigation, it is clear that Complainant had a relationship which can be characterized as personal or social with a juvenile from Gilliam. It is also clear that such a relationship existed within the past year or two of the juvenile's incarceration at Gilliam. Complainant admits that telephone conversations occurred while he was at his home with the juvenile. In addition, Complainant admits that he facilitated numerous discussions between his son and the juvenile. Complainant also admits that it was his handwriting on the greeting card that was retrieved from the juvenile's home.

It is also clear that Complainant, for whatever reason, was not cooperative during the investigation. Despite having had the ability and time to produce telephone documentation, he failed to do so. As a result, an inference cannot help but be drawn that he did not want to produce the records at the time of the investigation. Ignoring the fact that Complainant made admissions that he did receive calls at his residence from Sylvia, such records might have been exculpatory. For instance, such records could have demonstrated that in August 1997, as well as September, October, and November, 1997, Complainant was not having telephone conversations with Sylvia after having been reminded of Policy 3.20 in July 1997.

Complainant does not take issue with the various incidents which occurred subsequent to dinner with the pod on November 3, 1997. He confirms that he had reprimanded the girls during their dinner, confirms that he had a private discussion with Sylvia at the control center after making an effort to meet with her by temporarily switching job positions, and confirms that Sylvia was upset that evening. All of these events can be verified by Fagan or other witnesses. He confirms that he wrote the greeting card. Yet, in all of the instances when witnesses were not present, he denies that the incidents occurred. He denies that he drafted a greeting card with the intent of personally sending it to Sylvia. He denies that he met with Sylvia while she was on the Outs to take her to dinner. He denies that he took Sylvia to a motel room and attempted to solicit sex. Determinations as to validity of these events can only be measured by Complainant's credibility.

Complainant's credibility is weak. The most glaring demonstration of Complainant's weak credibility involves the issue of the greeting card. During the investigation, Complainant first denied having written the card. He argued that he did not speak or write Spanish well enough to have drafted the card. But, his own previous PACE evaluations indicate he was bilingual and capable of translating Spanish. Then, Complainant admitted to the card having been in his handwriting but denies having sent it to Sylvia. During the investigation, he made this admission. That is completely inconsistent with his first explanation re: the card. Subsequently, Complainant next remembers writing a card for a male juvenile, an illegal alien, who said he was going to send the card to Sylvia.³ This story is inconsistent with both the previous explanations. Moreover, it is illogical. If an illegal alien who was a resident of Gilliam wanted to send a card which could be understood by Sylvia, wouldn't he have asked Complainant to translate from *Spanish to English*? Yet, the card was written in Spanish. In addition, if the male juvenile wanted to just have a card written in his native tongue, why would he rely on Complainant to write the card. Compounding this illogic is the testimony of Complainant which was that he did not write in Spanish. At best, Complainant's memory is very weak regarding the greeting card. In reviewing the factors of credibility, this alone would not cause this ALJ to conclude he was not credible. However, his testimony regarding the card is unreasonable and lacks logic, and he contradicts himself repeatedly during the course of the investigation. Realizing that the greeting card represented evidence directly demonstrating that he had a relationship with a juvenile, he is certainly motivated to develop some story, no matter how unlikely, to explain the greeting card.

Complainant's weak credibility is also borne out by the evidence he presented regarding his ability to comply with Gilliam's rules. Complainant presented evidence in the form of testimony of Padilla, Rick Sandoval, and Dan Smith which established that he knew and followed the rules of the facility. Yet, Complainant contemporaneously claims that he was not aware of Policy 3.20 until July, 1997. Complainant appears to be inconsistent and there is no weakness in the credibility of the other witnesses.

Complainant's credibility is also viewed with skepticism as a result of his actions regarding Sylvia. Complainant testified that he was trying to "cut all ties" with Sylvia after having been informed of Policy 3.20 in July, 1997. Yet, his actions in November, 1997 demonstrate the opposite. He chose to meet with Sylvia, outside of the hearing of Fagan and others. He placed himself in a position in which he was interacting with Sylvia without any witnesses who could hear what he said. This is inconsistent with his statement that he was trying to cut ties so as to not be in conflict with Policy 3.20.

³ Complainant admitted during his testimony that he knew it was a rule violation to allow juveniles to pass notes to one another.

Complainant's argument regarding Sylvia's lack of credibility is bolstered by the police report indicating that the scar over Complainant's eye was inflicted by someone other than Sylvia. However, this sole inconsistency in Sylvia's testimony is not sufficient to overcome Complainant's lack of credibility. Moreover, it does not excuse the admitted acts of Complainant or explain the reasons Sylvia knew detailed information regarding Complainant.

B. Violation of Policy 3.7 - Code of Ethics

This policy provides that staff is to protect the juveniles from all types of abuse, including physical, emotional, or verbal abuse, sexual contact, and harassment. However, in violating Policy 3.20, it is clear that Complainant was not complying with Policy 3.7. Policy 3.20 was in place to protect and keep juveniles safe from having inappropriate relationships with staff and authority figures. Complainant ignored that and established a social relationship with Sylvia, a relationship that at the very least occurred while Sylvia was on the Outs.

Respondent has established through a preponderance of evidence that Complainant established a personal/social relationship with a juvenile of Gilliam's, in violation of Policy 3.20. As a result, Respondent also established that Complainant violated Policy 3.7. Complainant's argument that the evidence produced was merely hearsay of a juvenile who had been committed to Gilliam is not persuasive. First and foremost, Complainant makes admissions as to his conduct in direct conflict with Policy 3.20. Moreover, while Fagan's testimony and those of the other witnesses is relatively credible, Complainant's credibility is demonstrably weak and cannot be relied upon.

IV.

Respondent terminated Complainant as a result of his violations of Policy 3.20 and Policy 3.7. The question remains as to whether or not this form of discipline was warranted and whether the acts committed were so serious and flagrant as to warrant Complainant's termination of employment.

A number of elements regarding the level of discipline imposed must be considered. First, State Personnel Board Rule R8-3-1, 4 CCR 801-1 encourages progressive discipline. The rule provides that the decision to correct or discipline an employee shall be governed by (1) the nature, extent, seriousness and effect of the act, error or omission committed; (2) the type and frequency of the previous undesirable behavior; (3) the period of time that has elapsed since a prior offensive act; (4) the previous performance evaluation of the employee; (5) an assessment of information obtained from the employee; (6) any mitigating circumstances; and (7) the necessity of

impartiality in relations with employees. The rule further states that unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action. However, the imposition of the level of discipline is also a matter to be determined by the appointing authority and the appointing authority is presumed to make such decisions regularly and appropriately. See: *Chiappe v. State Personnel Board*, 622 P.2d 527, 532-533 (Colo. 1981), *State Personnel Board v. District Court In and For City and County of Denver*, 637 P.2d 333 (Colo. 1981).

Given the role of Gilliam in the corrections community, and the fact that it provides services to juvenile residents who are frequently involved with felonies and who have issues with authority, Respondent did not act arbitrarily, capriciously or contrary to rule of law in imposing the discipline of termination. While his employment record is commendable, the events involving Complainant demonstrate he has violated Policy 3.20, despite knowing its prohibitions, and therefore, committed willful misconduct. Complainant's actions also show he failed to meet efficient standards of service or competence. The evidence demonstrates that Complainant continued in his course of behavior over a period of time. His interaction with the juvenile was not a one time event. Rather, it occurred over a period of time, despite his awareness of Policy 3.20. Complainant provides no mitigating circumstances. He purports that because Sylvia would call him he should not be held responsible. He maintains that it was his son who had conversations with Sylvia. He argues that he was under a great deal of stress as the result of his marriage being in trouble and the death of his father. Unfortunately, none of these circumstances mitigate Complainant's behavior. None of them provide an excuse for his conduct. Given the nature of the violations, and the potential impact of Complainant's behavior upon Sylvia, it can only be considered serious and flagrant thereby warranting termination.

CONCLUSIONS OF LAW

1. Complainant engaged in the actions for which discipline was imposed.
2. The disciplinary termination was within the range of reasonable alternatives available to the appointing authority.
3. The person imposing the disciplinary action was properly authorized as the appointing authority.
4. Whether Complainant failed to mitigate damages, or in the alternative, whether Respondent should be entitled to offset against any back pay

awarded to Complainant any amounts earned by Complainant need not be determined based upon this ruling.

5. Neither party is entitled to an award of attorney fees or costs in this matter.

ORDER

Gilliam's action is **AFFIRMED** and **UPHELD**. Complainant's appeal is dismissed with prejudice.

Dated this 18th day
of May, 1998
at Denver, Colorado

G. Charles Robertson
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. Vendetta 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 2 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 this 18th day of May, 1998, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly, Esq.
Nora V. Kelly, P.C.
1776 Lincoln Street, Suite 418
Denver, CO 80203

and in the interagency mail, addressed as follows:

Thomas S. Parchman
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
