

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B104(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHARLES N. NIEMI,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF YOUTH SERVICES,
LOOKOUT MOUNTAIN YOUTH SERVICES CENTER,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on April 20, 1995. Respondent was represented by Stacy L. Worthington, Assistant Attorney General. Complainant represented himself.

Respondent's witnesses were: Stephen Humbart, Safety & Security Officer II; Michael Olson, Safety & Security Officer I; David Foster, Treatment Team Coordinator; Thomas Leverage, Youth Services Counselor II; Dan Fremont, Youth Services Counselor III; Stephen Bates, Director, Lookout Mountain Youth Services Center; and Maurice Williams, Assistant Director (by deposition).

Complainant called the following witnesses: Frederick Fenn, Youth Services Worker I; George Lewis, Safety & Security Officer I; Benito Rodriguez, Safety & Security Officer; Patty Graham, Safety & Security Officer II; Eric Klanderud, Safety & Security Officer

95B104

II; Melanie Jones, Safety & Security Officer I; Stephen Bates, Director, and Michael Finnerty, Assistant Director, Lookout Mountain Youth Services Center. Complainant did not testify.

The following exhibits were stipulated into evidence: Respondent's 1, 4, 6 through 12, and 14, and Complainant's C, E, F, H, I, J, L, O and P. Exhibit M was admitted without objection. Exhibits N and D were admitted over objection.

MATTER APPEALED

In this consolidated appeal, Complainant appeals a one-month disciplinary demotion and his subsequent disciplinary termination on February 3, 1995.

ISSUES

1. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether Complainant failed to mitigate his damages;
4. Whether Respondent is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Charles Niemi, was certified in the position of Youth Services Counselor IB at Lookout Mountain Youth Services Center (Lookout) at the time of the termination of his employment.

95B104

He had been employed by the Division of Youth Services for more than twelve years and had a good employment record.

2. Lookout is a long-term treatment facility for adolescent males ages 13-20, referred to as "students"; all have been adjudicated delinquent. The facility, located in Golden, is situated on twelve acres of land surrounded by a sixteen-foot high perimeter fence, installed in 1988. The chain-link fence is just under one-half mile long and slants back at the top to prevent climbing out from the inside. A road runs around the perimeter two to three feet inside the fence. There are about 200 students and a staff of 100. There are five treatment cottages, an educational building, a vocational building, dining room facilities, and a "common use" area in the center of the facility for exercise and sports. Lookout is not considered a prison; it is a facility for the treatment and rehabilitation of juvenile offenders.

3. On December 26, 1994, at approximately 5:30 p.m., a group of students was being moved across an open area. Three gun shots were heard. One student broke formation and ran toward the fence, with staff member George Lewis in pursuit. A fourth shot was fired. Lewis dove to the ground. Lewis noticed an individual kneeling down near the outside of the fence. The escape attempt was not successful.

4. Apparently the Golden police had information that there would be another escape attempt the next day. On December 27, Director Steve Bates instructed unit supervisor Fred Fenn to organize a vehicle patrol of the perimeter inside the facility from 4:45 p.m. until 9:00 p.m. Fenn did so, but not without expressing his concern that such a patrol would place staff members in harm's way.

95B104

5. The Lookout management team met and, in response to the December 26 incident, decided to institute the vehicle patrols on a daily basis after 5:00 p.m. at least as a temporary measure to increase security until permanent improvements could be made. Long-term improvements which require specific funding approval, such as additional fencing and lighting, motion detectors and surveillance cameras were also discussed. Several security enhancements have been proposed to the state legislature.

6. As implemented on January 4, 1995, the patrol policy is one of "report and run". The safety & security officers are assigned by the respective shift unit coordinators to conduct the patrols, observing and reporting any problems concerning the perimeter fence, such as evidence of an attempt to cut through the fence. (It is estimated that the fence can be cut through in three minutes.) The officers are instructed to not confront anyone, but rather to immediately get to a safe distance and to call the Golden police. They carry a flashlight and a two-way radio. The vehicle they drive is a white van. The officers are not expected to use any skills which they do not use in the regular course of their duties, i.e., observation, driving, and use of a two-way radio.

7. From 1972 to 1988, when the facility was encompassed by a fence seven feet high, both vehicle and foot patrols of the perimeter were conducted on a regular basis. After the new fence was installed in 1988, the perimeter patrols were discontinued. Two years hence, vehicle and foot patrols were renewed on the midnight to 8:00 a.m. shift only. There have been no incidents of a staff member being injured while on a perimeter patrol.

8. Over the past five years, there have been an average of two escapes per year at Lookout. In July 1994, three students escaped

95B104

through a cut section of the fence.

9. On January 4, 1995, a staff meeting was held to discuss the new perimeter patrol policy. Several staff members expressed concern that the policy exposed them to unnecessary danger and that they were not properly trained for that type of activity. Complainant Niemi indicated that he might not comply with the policy.

10. On January 5 by telephone and on January 6 in person, Niemi and his direct supervisor, Scott Foster, talked in depth about Niemi's reluctance to follow the perimeter patrol policy. Although Niemi had not definitely decided, Foster was left with the impression that he would comply.

11. On the evening of January 6, Steve Humbart, a shift supervisor, spotted a pick-up truck outside the fence. He called Niemi, who was the supervisor with the responsibility for perimeter patrols, and suggested a vehicle patrol of the fence. Niemi responded that he would not do it. When asked why, he said, "I just won't do it." Humbart and Michael Olson, a safety & security officer, then did a foot patrol of the fence to see if anything had been thrown over. They carried flashlights and a two-way radio. The pick-up had left before they began their patrol.

12. Later in the evening of January 6, Scott Foster received a telephone call from Director Bates informing him that the perimeter patrol had not been assigned. Foster then talked to Niemi, who stated that he would not assign anyone to do the patrol. Foster went to see Bates, then talked to Niemi again for about an hour, then talked to Bates again. The decision was made to place Niemi on administrative leave with pay effective January

95B104

7 pending a Rule R8-3-3 meeting.

13. Niemi wrote a grievance letter to Bates on January 7, setting forth his position that the decision to institute perimeter patrols was made without sufficient concern for staff safety and that he had a right to refuse to comply with an inappropriate order. (Complainant's Exhibit L.)

14. The management team met on January 7 to review the perimeter patrol policy and decided to continue the patrols at least until additional lighting could be installed in the southwest corner of the facility, the area in which the December 26 incident occurred.

15. Maurice Williams, an assistant director and Niemi's appointing authority, held the R8-3-3 meeting on January 12. On January 19, Bates referred Niemi's grievance to Williams. (Complainant's Exhibit F.)

16. By letter dated January 23, Maurice Williams imposed a one-month disciplinary demotion from Step 6, Grade 87 to Step 3, Grade 87 effective February 1, 1995, for willful failure to perform duties assigned based upon Niemi's refusal to assign staff to patrol the perimeter of the facility. Niemi was instructed to report to work at his scheduled time on January 25 and to perform his duties as assigned. (Respondent's Exhibit 6.)

17. Niemi returned to work on January 25 and again refused to conduct the perimeter patrol. He was again placed on administrative leave. (Respondent's Exhibit 4.)

18. On January 26, Niemi resubmitted his grievance letter directly to Bates, again asserting his right to refuse to comply with an inappropriate order out of concern for staff safety.

95B104

(Complainant's Exhibit H.)

19. A second Rule R8-3-3 meeting with Williams was held on February 2. Niemi reiterated his belief that he had a moral and legal obligation to refuse to assign staff to dangerous duty without proper training. Niemi stated that, if he were to return to work, he would continue to refuse to comply with the perimeter patrol policy. (Respondent's Exhibit 9.)

20. On February 3, 1995, Maurice Williams terminated the employment of Charles Niemi for willful failure to perform duties assigned. The action was based upon Niemi's refusal to assign staff to perform perimeter checks twice during the month of January and his indication that he would continue to so refuse.

21. Some Lookout employees agree with Niemi that the perimeter patrol policy is unduly dangerous. Several safety & security officers testified that they feel uncomfortable on the patrols and conduct them out of fear of losing their jobs if they don't. Unit supervisor Fred Fenn testified that, if Niemi were reinstated, he, too, might refuse to assign staff to conduct the patrols. Other officers and supervisors feel that the perimeter patrols are necessary for the security of the facility and do not present undue danger. No one besides Niemi has refused to comply with the policy.

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).

95B104

Niemi contends that the perimeter patrol policy is unduly dangerous and that he has an ethical obligation to not assign his subordinates to hazardous duty without proper training. In support of his position, he relies on Governor Romer's "Executive Order, Safety in the Workplace" (Complainant's Exhibit D) and Rule R1-4-3(E), 4 Code Colo. Reg. 801-1, providing that "an appointing authority shall not require an employee to work under conditions which endanger the employee's health and safety."

The executive order and Rule R1-4-3(E) apply to environmental hazards and are designed to prevent an employee from having to work in an unsafe environment not a part of the normal working conditions of the job. They do not apply to the situation here under review.

The very job of safety & security officer at Lookout Mountain Youth Services Center involves some risk-taking. Maintaining security is a primary function of the position. As evidenced by the December 26 incident, the job can at times be dangerous. The facility director has an obligation to ensure that the facility is as secure and safe as possible for the staff, the students and the public but cannot be expected to positively eliminate all risk or potential danger, given the nature of the facility itself.

The decision to institute the perimeter patrol policy was a reasonable response to the December 26 incident. Potential hazards and feasible alternatives were considered and balanced. It cannot be concluded from this record that the policy exceeds the scope of the job descriptions of the affected employees. Charles Niemi is free to disagree, but he is not the policymaker. Neither is the administrative law judge.

95B104

Niemi left no doubt that he would not adhere to the perimeter patrol policy. A corrective action, intended to correct or improve the performance of an employee in a systematic manner, would serve no purpose when the employee steadfastly refuses to comply with a lawful and direct order from his supervisor. Niemi could have performed the assigned duties while his grievance was pending and then appealed the adverse decision if that were the result. The imposition of the one-month disciplinary demotion gave him an opportunity to reconsider his stance. His insubordination had no effect on changing the agency policy that he opposed. The appointing authority acknowledged that he was a good employee of longstanding. In the end, the appointing authority was faced with the unenviable choice of either condoning the acts of an insubordinate employee or terminating his employment even though the employee was acting according to his conscience.

Given the circumstances of this case, an award of attorney fees and costs is not justified under § 24-50-125.5, C.R.S. of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's actions were not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. No evidence was presented that Complainant failed to mitigate his damages.
4. Neither party is entitled to an award of attorney fees and costs.

95B104

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
June, 1995, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of June, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles N. Niemi
6619 South Lincoln Street
Littleton, CO 80121

and in the interagency mail, addressed as follows:

Stacy L. Worthington
Assistant Attorney General
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

95B104

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 and advance the cost therefor. 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 - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$774.50**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 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-

95B104

10-6, 4 Code of Colo. Reg. 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 Code of Colo. Reg. 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.

95B104