

State Personnel Board, State of Colorado

Case No. 97 B 142

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL TRUJILLO,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF YOUTH CORRECTIONS,
MOUNT VIEW YOUTH SERVICES,

Respondent.

Hearing on this matter was commenced on July 9, 1997 before Administrative Law Judge Margot Jones. At such time, the matter was convened, via telephone, in which the parties entered their appearances before the Board. No evidence was admitted at that time. Subsequently, on September 16, 1997, the Board issued a Notice of Change in Administrative Law Judge. No objection was raised as to the change in administrative law judge subsequent to the Notice Of Change or at the time the hearing was reconvened. An evidentiary hearing was held and completed before G. Charles Robertson, Administrative Law Judge, on October 22 - 23, 1997 at Hearing Room B-65, 1525 Sherman Street, Denver, CO.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, Respondent's actions are upheld.

PRELIMINARY MATTERS

Respondent, Department Of Human Services, Division Of Youth Corrections, Mount View Youth Services Center ("DYC" or "Respondent") was represented by Thomas S.

Parchman, Assistant Attorney General. Complainant, Michael Trujillo ("Complainant") was represented by James R. Gilsdorf, Attorney at Law.

1. Witnesses

DYC's witnesses included: (1) Ms. Penny Brown, Director of Mount View; (2) Edward Greivel, Director of Special Projects for DYC; and (3) Paul Targoff, Director of Quality Control and Staff Development, DYC.

Complainant's witnesses included: (1) Ivan Tate, Associate Director for Administrative and Support Services at Division of Youth Corrections; (2) Daniel Beilfuss, Safety Security Officer I, Recreation Coordinator for DYC; (3) Ralph Krutsche, previously an employee at DYC as a Youth Service Worker I; (4) Brad Anderson, previously employed at DYC; and (5) Complainant.

In order to accommodate both parties, and upon both parties' consent, a number of witnesses were taken out of order. The testimony of Ms. Penny Brown during Respondent's case-in-chief was interrupted to (1) allow Ivan Tate, Complainant's witness, to testify for Complainant's case-in-chief; and (2) to allow Ed Grieval, to testify for Respondent's case-in-chief. In addition, testimony was taken out of order to allow Dan Beilfuss to testify for Complainant's case-in-chief and Respondent was permitted to call Paul Targoff out of order to testify.

2. Exhibits

The authenticity of DYC's exhibits 1 - 6 was initially stipulated to by the parties. DYC's exhibits 1-6 were subsequently admitted without objection at the end of Respondent's case-in-chief. The exhibits included:

- 1) Certification of Awareness of Policies, Procedures and Regulations.
- 2) Memorandum to F. Jerald Adameck, Executive management Team from Paul Targoff, dated June 7, 1996.
- 3) Division of Youth Services Policy Number 3.21 - Employee Background Search.
- 4) Division of Youth Services Policy Number 3.4 - Administering corrective and Disciplinary Actions.
- 5) Memorandum to Mike Trujillo from Penny Brown, dated April 4, 1997.
- 6) Correspondence to Mike Trujillo from Penny Brown, Director, dated May, 2, 1997.

Respondent's Exhibit 7, entitled Request to Plead No Contest, District Court, Arapahoe County, State of Colorado, Case No. 96 CR 2195, was introduced and admitted during cross-examination of Complainant.

Complainant's exhibits A, B, C, and E were admitted into evidence by way of stipulation although Respondent reserved argument as to relevancy of these exhibits. These exhibits were subsequently admitted. Complainant's exhibit D was admitted over objection. Complainant's Exhibit F was admitted over objection, for the purposes of demonstrating the Respondent could have reconsidered the discipline imposed. Complainant's exhibits G, I, J, K were not offered into evidence. Complainant's exhibit H was not admitted into evidence on the grounds that its admission would be cumulative. Complainant's exhibits L and M were admitted over objection. The exhibits entered into evidence included:

- a) PACE Form for Mike Trujillo, for July 1, 1995 through June 30, 1996.
- b) PACE Form for Mike Trujillo, for July 1, 1996 through June 30, 1997.
- c) PACE Form for Mike Trujillo, for February 2, 1997 through May 2, 1997.
- d) Division of Youth Services Policy Number 3.12 - Personnel Selection, Retention and Promotion, dated July 1, 1993.
- e) Division of Youth Services Policy Number 3.5 - Drug Free Workplace, dated July 1, 1993.
- f) Correspondence, dated May 13, 1997, to Penny Brown from Ron Frager
- l) Transcript of R8-3-3 Meeting dated April 18, 1997.
- m) Division of Youth Services Polices and Procedures Manual, General Index.

3. Orders

Pursuant to motion by Complainant, a sequestration of the witnesses was ordered which instructed witnesses not to discuss this matter, or their testimony, with other witnesses during the course of the hearing. Counsel for the parties were reminded to inform their witnesses of this order.

4. Judicial Notice

Pursuant to C.R.C.P. 201, judicial notice was taken of *Jones v. Civil Service Commission*, 489 P. 2d 320 (Colo. 1971).

ISSUES

1. Whether complainant committed the acts for which discipline was imposed, including:

- i) Failure to comply with standards of efficient service or competence; and
 - ii) Final conviction of a felony or any other offense involving moral turpitude, when such action of offense could adversely affect the employee's ability or fitness to perform the duties of the job or has an adverse affect on the agency should the employee continue such employment [and] conviction should include a plea of nolo contendere or acceptance of a deferred sentence.
2. Whether there was an appropriate delegation of appointing authority;
3. Whether the discipline imposed, termination, was within the range of alternatives available to the appointing authority; and
4. Whether the actions of the appointing authority were arbitrary, capricious, or contrary to rule of law.

FINDINGS OF FACT

1. Mount View Youth Services, Division of Youth Corrections ("DYC"), is a detention facility which houses approximately 135 male and female residents between the ages of 10 and 18 ("residents"). The residents are committed to the facility prior to or after an adjudicatory proceeding. In the course of providing services, employees of DYC interact with members of the public, various state agencies, and parents of residents.
2. Approximately 75 % of the residents at the facility have been involved in substance abuse.
3. DYC Policy 3.4 provides that "the authority to issue disciplinary actions is hereby delegated to all appointing authorities having responsibility for a program or facility."
4. DYC has at least two policies that address the issue of substance abuse. Policy 3.21, reissued on July 1, 1993, is entitled Employee Background Search. The majority of the policy is dedicated to the procedures involved in background searches of prospective employees. Policy 3.21 states in Section I that:

The Division of Youth Services is committed to upholding the highest professional standards in all areas of service delivery to juveniles' human rights, dignity, safety, security, and well being are protected; therefore, every potential permanent employee, temporary employee, intern, volunteer and/or

contract employee shall be subject to clearance by a background search.

Subparagraph III (E) of this policy provides:

Any staff currently employed by the Division of Youth Services who is charged with a crime that is an offense against persons, involves substance abuse, or is a serious traffic violation shall inform his/her Facility Director, Regional Manager, or Program Manager within 24 hours of notification of the charge being filed. That information shall subsequently be discussed with the Director of the Office of Human Resources within 24 hours after the Director or Manager has been informed of the charges by the employee.

5. **DYC also has Policy 3.5, reissued on July 1, 1993, with regard to the subject of Drug Free Workplace. Paragraph I of this policy provides that its purpose is "to ensure a safe working environment and to avoid compromising the health, safety and well being of Division of Youth Services' employees and clients. . . ." Paragraph III (A) states in part that "in ensuring a drug-free workplace, the [Division] . . . shall establish and maintain a clear drug-free workplace policy statement; . . . shall support a continuum of drug prevention, intervention, and treatment services; and shall collaborate with the Colorado State Employee Assistance Program (C-SEAP) to identify and utilize appropriate service resources to assist staff who have need of services." Paragraph III (D) of this policy states, in part:**

All Division of Youth Services' employees should assist in maintaining a drug-free workplace by: . . . acting as role models for Division of Youth Services' juveniles, including exhibiting appropriate language, dress, and drug-free lifestyles.

Paragraph III (E) (4) of the policy further provides that: "[w]henver an employee has continued to exhibit problem behaviors, has violated Division of Youth Services' policy, . . . such actions shall result in administrative intervention which may result in referral to mandatory treatment and/or corrective and/or disciplinary action, up to and including termination."

6. **The Division of Youth Corrections Policy and Procedures Manual contains a general index which references both of the above-described policies. However, the index fails to cross-reference the policies.**
7. **In the past, DYC has employed individuals who were convicted of criminal charges, including charges associated with substance abuse. By way of example, DYC has employed at least: (1) one individual who served two prison terms prior to his**

employment with NYC for armed robbery and assault; (2) one individual who was convicted of a substance abuse charge prior to working at NYC; (3) one individual who was convicted of driving under the influence while employed at NYC; (4) two individuals who are currently employed at NYC and have restraining orders in effect against one another; and (5) an individual currently employed with NYC who was previously convicted of a substance abuse charge prior to her employment at NYC.

8. In addition, Brad Anderson, an employee of NYC, was convicted of driving under the influence on at least three occasions while employed with NYC. NYC was aware of these convictions as a result of Mr. Anderson having to enter a work release program necessitating the cooperation of NYC. Mr. Anderson's employment was subsequently terminated based upon another incident.

9. Section 24-5-101, C.R.S., entitled "Effect of criminal conviction on employment rights," provides, in part:

[T]he fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent him from applying for and obtaining public employment The intent of this section is to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of law-abiding and productive member of society. Nothing in this section shall require a public agency to employ a convicted felon if the agency concludes that the nature of his offense disqualifies him from such employment.

10. Complainant has been employed with the State of Colorado since March, 1991. At such time, he executed a Certification of Awareness of Policies, Procedures and Regulations.

11. Complainant initially held the position of Youth Service Worker or Safety Security Office I ("SSO I"). During the tenure of this position, his responsibilities included working with residents and having direct contact with the residents.

12. After participating in an Arapahoe County Jail project for 9 months, Complainant returned to NYC in August, 1994 as an SSO I. From August 1994 through May 1996, he acted, in part, as an accreditation manager, responsible for preparing facilities for compliance audits. His supervisor during this period of time was Ivan Tate.

13. During this period, in August of 1995, his responsibilities were split in half at which time he spent 20 hours a week training additional staff and 20 hours per week with the risk management program which included reviewing policies focused on fire safety, workmen's compensation, and hazardous materials. Complainant's responsibilities at this time did not include review of personnel policies.

14. In or around May/June 1996, Complainant transferred to Quality Control and was under the supervision of Paul Targoff. On or about July 1996, Complainant was promoted to an SSO II position. This relationship existed until January, 1997. Complainant's duties at this time included coordinating risk management compliance at DYC, including training and redrafting policies involving liability. Mr. Tate initially assigned these duties to Complainant.
15. During this time, Complainant would participate in audits, involving fire safety, safety and security, and special management of juveniles at various facilities. None of the audits in which Complainant participated related to personnel issues.
16. The audit process primarily consisted of determining whether or not a facility was in compliance with several hundred standards of the American Correctional Association. These standards are frequently referenced in DYC's policies. Personnel management standards were also included in the standards of the American Correctional Association and were sometimes incorporated in DYC's policies. Complainant was not involved in auditing personnel management standards although audit of such policies did occur within the Quality Control department.
17. In or about January 1997, Complainant was promoted to a SSO III. At this time, he was located at the DYC detention facility. Complainant's responsibilities included scheduling of personnel, time sheets, reviewing resident grievances, participating in filling in staff positions, and responding to emergency situations. Such responsibilities varied depending upon the particular staffing needs of the detention center and the presence of Complainant's supervisors, including Penny Brown and Jonathan Hough.
18. During this period of time, Complainant had contact with the residents, although he did not directly supervise any residents.
19. During this period of time, his performance appraisals were as follows:

<u>Position</u>	<u>Date</u>	<u>Rating</u>
SSO I	July 1, 1995 to June 30, 1996	Outstanding (460 pts.)
SSO II	July 1, 1996 to June 30, 1997	Outstanding (455 pts.)
SSO III	February 17, 1997 to May 2, 1997	Commendable (interim rating)

20. During the change in his positions, no background checks were made of Complainant.

21. In the late evening of Wednesday, February 28, 1996, Complainant was taken into custody by the Glendale police department after security officers in a strip tease bar observed him ingesting a white substance in the men's restroom of the bar. Complainant was at the bar with at least one other employee of the Division of Youth Corrections. Ten or eleven years previously, Complainant has experimented with cocaine.
22. After being detained at the police station for 3 - 4 hours, Complainant was released. No evidence was proffered to indicate whether or not Complainant was released on bond and whether or not formal criminal charges had been filed. Complainant himself was unclear as to the status of any criminal charges or his release at that time.
23. Complainant was not scheduled to return to work until the following Monday. Complainant did not inform his supervisors or anyone at DYC of his arrest.
24. In April, 1996, Complainant received a summons to appear in court with regard to the arrest. In May, 1996, during an arraignment proceeding, Complainant was advised that he was charged with being in possession of a controlled substance. At such time, Complainant entered a plea of not guilty. Complainant failed to report the status of the case to his supervisors or anyone at DYC of the charges.
25. On November 26, 1996, as the result of a plea agreement, Complainant entered a plea of no contest to the charge of Attempted Possession of Controlled Substance - Schedule IV on March 1, 1996. Conviction of this charge is a Class 6 Felony carrying a minimum sentence of 6 months to a maximum sentence of three years in jail, and a fine between \$1000 and 100,000. Complainant was sentenced to a two year term of probation and assessed a fine. Complainant still failed to report the status of the case to his supervisors or anyone at DYC of the charges or conviction.
26. During the pendency of the criminal proceedings, Complainant referenced DYC's policy manual and concluded he had no obligation to report his arrest and subsequent conviction. He specifically reviewed the index to the policy manual. He reviewed Policy No. 3.5 and concluded he had no obligation to report the incident given that the incident did not occur on state property or during working hours and that a final conviction had not occurred. He reviewed Policy 3.7 regarding the Code of Ethics and Policy 3.4 regarding corrective and disciplinary actions. He did not review Policy 3.21.
27. Additionally, Complainant contacted the State of Colorado Department of Personnel on two occasions and anonymously inquired as to what his obligations were in reporting the incident. Complainant contacted the C-SEAP staff and inquired as to any reporting requirements. Subsequent to these contacts, Complainant determined he had no obligation to report the arrest or conviction.

28. Complainant finally reported the incident in February 1997 to Ivan Tate, his supervisor at the time of the incident in February, 1996, as a result of his co-defendant in the matter becoming subject to discipline pursuant to Policy 3.21, paragraph III (E).
29. Complainant did not report the arrest, incident or conviction to his current supervisors, Jonathan Hough and/or Penny Brown, the facility director and delegated appointing authority.
30. At the end of March, 1997, Complainant was contacted by both Ivan Tate and Penny Brown and told to prepare for an R8-3-3 meeting. An R8-3-3 meeting was scheduled for April 18, 1997. Ms. Brown was the delegated appointing authority pursuant to DYC Policy 3.4.
31. At no time prior to the R8-3-3 meeting was Complainant placed on leave or otherwise relieved of responsibilities.
32. An R8-3-3 meeting was held on April 18, 1997. Complainant was present as was legal counsel for Complainant. Complainant admitted the fact that he had been convicted of the class 6 felony. Subsequent to the R8-3-3 meeting, Ms. Brown, the delegated appointing authority, met with F. Jerald Adamek, Director of DYC, Ivan Tate, and other staff of DYC to discuss the results of the R8-3-3 meeting and to discuss potential disciplinary actions with regard to Complainant and other employees involved in substance abuse crimes. At such time, Mr. Adamek confirmed that Ms. Brown was the delegated appointing authority in this matter and that her decision would not be subject to review.
33. A disciplinary action was issued on May 2, 1997 in which Complainant's employment was terminated. The disciplinary action stated that the grounds for termination of Complainant's employment were: (1) Failure to comply with standards of efficient service or competence, and (2) Final conviction of a felony or any other offense involving moral turpitude, when such action or offense could adversely affect the employee's ability or fitness to perform the duties of the job or has an adverse affect on the agency should the employee continue such employment [and] conviction should include a plea of nolo contendere or acceptance of a deferred sentence.
34. At no time subsequent to the R8-3-3 meeting, but prior to termination and disciplinary action, was Complainant relieved of any of his job responsibilities.

DISCUSSION

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.

Respondent argues that Complainant, a Safety Security Officer III with the Mount View Youth Services Center, was convicted of a class 6 felony involving substance abuse, and thereby, his employment should be terminated. Respondent maintains that pursuant to State Personnel Board Rule R8-3-3, 4 CCR 801-1, Complainant can be separated from service for (1) failure to comply with standards of efficient service or competence; and (2) final conviction of a felony when such action or offense could adversely affect Complainant's ability or fitness to perform his duties, or have an adverse affect on the agency should Complainant continue in his position as an SSO III. Respondent argues that there is no issue of fact as to Complainant having been convicted of a felony given that Complainant admitted at the time of his R8-3-3 meeting, and during the hearing, that he had entered a plea of nolo contendere for attempted possession of a controlled substance-schedule IV. Complainant further admits that he ingested cocaine in the bathroom at a strip-tease club. Respondent states that as a result of its role in the criminal justice system, its inter-relationships with other agencies, the public and parents of residents, as well as the fact that its employees are to be role-models, the termination of Complainant's employment was not arbitrary and capricious. In addition, it is Respondent's argument that Complainant's employment should be terminated because he failed to comply with DYC Policy 3.21 by not timely informing the appropriate superiors of being charged with a crime that involved substance abuse. In essence, Complainant failed to report the charge until eleven months after his arrest.

Complainant argues that Respondent acted inconsistently and erratically in terminating Complainant's employment. As a result, DYC's action was arbitrary and capricious.

Complainant relies on the fact that he attempted to determine through various means what his responsibilities were with regard to reporting his arrest and subsequent conviction. It is argued that because Complainant could not easily reference portions of Policy 3.21 which require current employees to report charges involving substance abuse to superiors, that he did not knowingly violate Policy 3.21. It is also argued that other NYC policies which address the issue of substance abuse encourage means of rehabilitation and the opportunity for Complainant to receive support in overcoming any substance abuse issues. Complainant maintains that based upon all of the sources he reviewed, he attempted to follow NYC policy but was not required to report the arrest or subsequent conviction. Further, Complainant suggests that the discipline imposed in this matter was not imposed by the delegated appointing authority, but rather, was imposed by the Director of NYC despite him having delegated that authority to discipline. Finally, Complainant argues that the level of discipline imposed was arbitrary and capricious given the fact that (1) Complainant had either outstanding or commendable performance evaluations while employed with NYC, (2) other known felons are in the employ of NYC and, (3) that other policies of NYC regarding substance abuse do not mandate termination.

I.

A. Failure to Comply with Standards of Efficient Service or Competence

A preponderance of evidence supports that Complainant failed to meet the standards of efficient service or competence, thereby supporting Respondent's disciplinary action. No issue of fact exists as to the underlying circumstances which gave rise to the discipline imposed. Complainant was arrested and convicted of a felony involving substance abuse. Complainant did not report to NYC his arrest or conviction for approximately one year. Thus, one issue in this case is whether Complainant's failure to timely report his initial arrest, the charges filed and subsequent conviction, can be interpreted as failing to meet the standards of efficient or competent service.

Clearly, the issue of substance abuse and the ramifications of substance abuse are contained within Respondent's policies. Respondent's policy manual had Policy 3.21 and Policy 3.5 which discusses in great detail the Respondent's position with regard to the issue of substance abuse *in and outside the workplace*. These policies require that (1) Respondent's employees are to exhibit a drug-free lifestyle; and (2) even current employees are required to report any criminal charges involving substance abuse within 24 hours of notification of such charges being filed. Complainant argues that the policy provisions which mandate that he report any charges involving substance abuse are based in Policy 3.21 which is, but for one section, only applicable to employee background searches for new employees. Thus, Complainant maintains he was unaware of this provision and his requirement to report the filed charges. However, Complainant signed a certification, albeit years earlier, indicating he was familiar with NYC policies and procedures and

that he was responsible for applying them. See: *Jones v. Civil Service Commission*, 489 P.2d 320 (Colo. 1971). In addition, Complainant was frequently involved with the multitude of DYCs policies as a result of his preparing DYCs facilities for policy compliance audits. Although such audits did not involve personnel rules per se, Complainant admits his previous responsibilities included working with policies and, to some extent, determining if DYC was complying with its own policies and the standards of the American Correctional Association. Complainant was not ignorant of the complexity of policies of DYC.

Complainant's own actions demonstrated that he attempted to review policies involving substance abuse and his job. Unfortunately, he missed a policy provision which was not obvious, but one that was not so obfuscated as to relieve him of his requirement of being aware of it. In addition, Complainant's lack of timely reporting the charge, the arrest or the conviction is not justified by his contacting the Department of Personnel. Complainant's testimony reflects that he queried the Department of Personnel anonymously, and suggests he may not have provided sufficient facts so as to enable the Department of Personnel to provide adequate advice. It is clear that Complainant failed to contact anyone in DYC's human resources department to determine if he was required to report his arrest, the charges, or the conviction.

By failing to timely report the charge, the arrest, and the conviction, Complainant failed to comply with the standards of efficient and competent service.

B. Final Conviction of a Felony

Given that Complainant admits that he was convicted of a class 6 felony, no issue exists as to whether or not Complainant was in violation of State Personnel Board Rule R8-3-3, 4 CCR 801-1. As a result, Respondent had the authority to impose discipline based solely on the fact that Complainant had been convicted of this crime involving substance abuse. It is also clear that such a conviction can adversely affect the employee's ability or fitness to perform the duties of the job and that it has an adverse effect on the agency.

Complainant's conviction is a matter of public record. At the time of his conviction, Complainant was an SSO II. Almost immediately after his conviction, Complainant was promoted to the level of SSO III. He had supervisory responsibilities for the facility and staff. In addition, as a result of his responsibilities, he potentially would have to interact with the residents of the facility, their parents, and members of the public. As a member of the facility staff, Complainant was required to be a role-model pursuant to DYC Policy 3.5. This policy provided that all DYC employees are to be role-models and are to exhibit drug-free lifestyles. Testimony reflects that this policy was implemented at many, if not all, DYCs facilities. Complainant maintains that since Policy 3.5 was not referenced within the disciplinary action letter, it should not be relied upon by Respondent in proving that Complainant failed to provide efficient or competent service. However, Complainant's own testimony indicates he consulted that policy,

prior to any disciplinary action, in trying to determine if he should report his arrest and conviction. The Complainant admits he reviewed the policy. As a result, he must have known that his arrest and conviction was not exhibiting a drug-free lifestyle. In failing to exhibit a drug-free lifestyle, and by not reporting the conviction, Complainant demonstrates that the conviction adversely impacted his ability to perform his duties and comply with DYC policies.

II.

No issue exists as to whether or not Ms. Brown, Director of Mount View Youth Services Center, was the delegated appointing authority. Policy 3.4 states that the authority to issue disciplinary actions is delegated to all appointing authorities having responsibility for a program or facility. Ms. Brown testified that as Director, she was an appointing authority and responsible for the Mount View Youth Services facility. The findings of fact support that the responsibilities of appointing authority were correctly delegated.

III.

The most difficult issue in this matter is the issue of whether or not the discipline imposed, termination, was within the range of alternatives available to the appointing authority. Complainant argues vehemently that termination was too severe a discipline to be imposed. In making this argument, Complainant highlights his employment record. Complainant's performance as a Safety Security Officer, during the tenure of his employment, was outstanding and commendable. Testimony proffered by both parties reflects that but for his failure to timely report his arrest and conviction, Complainant contributed to the Department of Youth Corrections and the fulfillment of its mission. In addition, Complainant argues that DYC employs a number of felons within its facilities and, as a result, he should not be terminated. To do so, Complainant maintains, is arbitrary and capricious.

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. 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). Second, Colorado statute provides that individuals who have been convicted of a felony shall not be prevented from applying for and obtaining public employment. The same statute states that the intent of the statute is to allow individuals who have been rehabilitated to be productive members of society. The statute has one caveat. It provides that a public agency is not required to employ a convicted felon if the agency concludes that the nature of his offense

disqualifies him from such employment. Third, NYC's Policy 3.5 suggests that in addition to providing the alternative of mandatory treatment, NYC can take corrective or disciplinary action against an employee for violating the Drug Free Workplace policy.

Given the role of NYC in the corrections community, and the fact that it provides services to residents who are frequently involved in substance abuse, NYC did not act arbitrarily, capriciously or contrary to rule of law in imposing the discipline of termination. NYC is not required to continue the employment of Complainant. While his employment record is outstanding, the events involving Complainant's arrest and conviction, and his failure to timely report such, demonstrate that Complainant failed to meet efficient standards of service or competence. The failure to report the arrest and conviction can be interpreted as being serious and flagrant. In addition, Complainant pled nolo contendere to a felony, was convicted of a felony, and sentenced to two years probation. The Board rules allow for NYC to terminate Complainant on the mere fact that he was convicted of a felony. Short of a more serious felony, Complainant's violation of R8-3-3 could hardly be more flagrant or serious. Thus, it does not necessarily warrant the need for progressive discipline. NYC's own policies also provide for the alternative of issuing disciplinary action. The level of discipline imposed was not outside of the range of alternative means of discipline.

Complainant's argument that NYC is being arbitrary and capricious in terminating Complainant because other convicted felons are employed by NYC is not persuasive. As cited above, statute provides for the employment of convicted felons. In addition, in each of the applicable examples provided by Complainant, the NYC employees had been convicted of *felonies* sometime in the past and had, at least in theory, had the opportunity to be rehabilitated prior to being employed at NYC. In this matter, Complainant was convicted of a felony, and sentenced, while employed at NYC. At the time of his termination, Complainant was still serving his sentence of two years probation but had not yet completed it.

IV.

Section 24-50-125.5, C.R.S. provides, in part:

[I]f it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, [or] agency taking such personnel action shall be liable for any attorney fees and other costs incurred

Substantial evidence does not support such a finding in this case. No evidence was proffered indicating that this matter was instituted frivolously, in bad faith, maliciously, or as a means of

harassment. In addition, the appeal of the personnel action taken is not groundless, despite the serious and flagrant violation, as a result of Complainant seeking a determination as to the level of discipline imposed.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed by (1) failing to comply with standards of efficient service or competence; and by (2) having a final conviction of felony or any other offense involving moral turpitude, when such action or offense could adversely affect the employee's ability or fitness to perform the duties of the job or has an adverse affect on the agency.
2. There was an appropriate delegation of appointing authority.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. A preponderance of the evidence supports the actions of the appointing authority and such actions were not arbitrary, capricious, or contrary to rule of law.
5. Neither party is entitled to an award of attorney fees or costs in this matter.

ORDER

DYC's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 8th day
of December, 1997
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. 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 this 8th day of December, 1997, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf, Esq.
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

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

A handwritten signature in black ink, appearing to read "Mark Fritsch", is written over a horizontal line.