

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRANDY BICKELL,

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, PLATTE VALLEY YOUTH SERVICES
CENTER, DIVISION OF YOUTH CORRECTIONS,**

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on May 29, 2002; and July 2 and 3, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. First Assistant Attorney General Jill Gallett represented Respondent. Respondent's advisory witness was Brent Nittman, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Brandy Bickell ("Complainant" or "Bickell") appeals her reduction in pay for six months by Respondent, Department of Human Services, Platte Valley Youth Service Center, Division of Youth Corrections ("Respondent" or "PVYSC"). Complainant seeks back pay and benefits.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. The Division of Youth Corrections (“DYC”), under the Department of Human Services, manages PVYSC, a youth detention center and institutional placement facility serving the various Colorado judicial districts. PVYSC first opened in October 1997, with the first juveniles arriving at the facility in November 1997.
2. PVYSC provides services in three areas involving youth between the ages of 10 and 18. Those three areas are detention (the equivalent of jail for adults), regional diagnostic services, and institutional placement for youth whose legal custody has been given to the Department of Human Services.
3. The Intake Unit at PVYSC is responsible for receiving and admitting juveniles brought to the facility by police officers. The juveniles, after completing the admissions process in the Intake Unit, are assigned to one of the living units elsewhere in PVYSC.
4. When juveniles first arrive at the Intake Unit, they are strip searched for contraband and then placed in a holding cell until they are assigned to a living units.
5. Friday evenings are busy in the Intake Unit because many of the courts that PVYSC serves hold detention hearings on Friday afternoons and juveniles may be sent to PVYSC as a result of those hearings. In addition, juveniles often serve their sentences over a series of weekends and, therefore, must arrive at PVYSC on Friday evenings.
6. Complainant has been a Correctional/Security Service Officer I (CSSOI) at PVYSC since June 7, 1999 and is certified in that position.
7. Brent Nittmann, Director for PVYSC, is Complainant’s appointing authority.
8. Complainant has a strong performance history and is viewed by her supervisors and Nittmann as an asset to PVYSC.

Division of Youth Corrections Training and Policies

9. Complainant, prior to working at PVYSC, attended DYC’s two-week pre-service training course. In addition, she also received on-site training when she began to work at PVYSC. During both trainings, the security of a facility is discussed.
10. During the pre-service training DYC employees are told about DYC’s policies and procedures, that each DYC facility also has policies and procedures pertinent to that

2002B121

facility, that the employees should review both the DYC and facility's policies and should be aware of any changes.

11. Pursuant to DYC Policy 9.1(III)(B)(1) *Security Door Regulations* – “Security doors shall be kept locked at all times.” Furthermore, PVYSC’s Implementing Procedure for DYC Policy 9.1 states “[a]ll staff shall **regularly and systematically monitor** to assure that doors are locked.” (emphasis in original).

Physical Layout of Intake Unit

12. The Intake Unit has an inverted U-shape configuration, with the staff sitting in the area at the top of the “U,” separated from the main area of the Intake Unit by a 40 inch high wall with a 36 inch high wall of plexiglass above the wall (“Staff Area”).
13. The walls around the Staff Area are high enough that if a staff member is seated, it is possible for someone to crouch down and walk by unnoticed.
14. The holding cells in the Intake Unit face the Staff Area and are along the top of the “U.” Alongside one side of the “U” is the room in which searches take place and additional space exists for conducting admissions. On the other side of the “U” is a corridor leading to a secured door (the “Door”). The Door leads into the bonding area, an area in which families meet juveniles who are being released.
15. The Door is a solid core door that automatically locks when it closes. It can be opened only with a key. However, if it is obstructed or held open, it does not automatically lock.
16. Prior to January 11, 2002, there was no request for maintenance on the Door.

The Escape

17. On Friday, January 11, 2002, Complainant was one of two staff assigned to the Intake Unit.
18. At approximately 7:55 p.m., Joshua Gomez, charged with felony menacing and two counts of misdemeanor assault on family members, was brought to PVYSC by Greeley police officers.
19. Complainant placed Gomez in one of the holding cells, Room 110 in the Intake Unit (the “Gomez Room”), to await admissions processing. The Gomez Room is located directly across from the Staff Area.
20. The door to the Gomez Room was left unlocked and open after Gomez was placed in there.

21. At 8:15 p.m., Complainant escorted another juvenile, David Moreno, from the Intake Unit, through the Door, to the bonding area to wait for release on bond into the custody of his parents.
22. Complainant last saw Gomez in the Gomez Room at 8:15 p.m., still in his street clothes.
23. At approximately 9:15 p.m., John Fults, Jr., the acting shift supervisor for the swing shift, went to the Intake Unit to unlock the safe and retrieve items for a juvenile being released from custody.
24. While Fults was in the Intake Unit he saw two juveniles in one of the holding cells, Room 108, and noticed blood on the floor of their room. One of the juveniles explained that the blood was from him. Because the blood was a health hazard, Fults moved the other juvenile into the Gomez Room, which was empty and the door was unsecured.
25. Prior to placing the juvenile in the Gomez Room, Fults inspected the room. Nothing appeared to be out of place.
26. Fults then informed Dan Danielson, a PVYSC employee, who was assisting in the Intake Unit, that the juvenile had been placed in the Gomez Room.
27. At 9:25 p.m., Complainant escorted another juvenile, David Flores, from the Intake Unit, through the Door, to the bonding area for release on bond into the custody of his parents.
28. At approximately 10:45 p.m., after the shift change, PVYSC employees realized that Gomez had left his holding cell (the Gomez Room) and escaped from custody.
29. Chris Thompson, Assistant Director at PVYSC, the on-call administrator on January 11, 2002 was notified of Gomez' escape. Around midnight, Thompson notified Nittmann of the escape. Nittmann, in turn, called Paul Cooper, DHS' Northeast Regional Director.
30. After his escape, Gomez made threats that he would obtain a firearm, get involved in a shootout and force a law enforcement official to kill him – referred to as “suicide by cop.”
31. In mid-March 2002, Gomez was apprehended and returned to PVYSC.
32. In late March 2002, while an alleged assault by Gomez on a staff member was being investigated, Gomez, referring to his escape, stated that “Moreno didn't close the door [between the Intake Unit and the bonding area] and I ran in there at Intake, then when a family left a visiting room I walked out with them.”

2002B121

33. Since PVYSC was opened five years ago, there have been over 15,000 admissions. Gomez was the first juvenile to escape.

34. As a result of the escape, Nittmann has received a number of negative comments from various members of the law enforcement community.

Investigation and Revisions to PVYSC Procedures

35. The day after Gomez' escape, Thompson sent the PVYSC staff an e-mail telling them that the escape was being investigated and that in the meantime various intake procedures should be enforced.

36. Nittmann and Cooper decided to have an independent third party with correctional experience investigate Gomez' escape. The Weld County Sheriff's Department conducted the investigation and prepared a written report on their findings (the "Investigative Report").

37. The Investigative Report concluded that Gomez escaped from the Intake Unit through the Door because it "was not secured per procedure."

38. The report further concluded that Gomez would not have ultimately escaped from PVYSC if there had been compliance with the facility's log-in and log-out procedures.

39. The Investigative Report made various recommendations, including:

- placing juveniles on the facility's official head count immediately upon arrival;
- conducting more frequent head counts;
- having the Intake Unit inform the Control Center whenever a juvenile is released;
- shutting and locking doors between the Intake Unit and the bonding area;
- prioritizing tasks for Control Center staff when they are busy;
- following procedures that were currently in place at PVYSC.

40. After Gomez' escape, mirrors were installed in the Intake Unit. The mirrors provide the staff with visual contact of the entire corridor leading to the Door.

R-6-10 Meeting and Disciplinary Action

41. Complainant was removed from the Intake Unit after Gomez' escape because it is Nittmann's common practice when there is an incident involving an employee's performance, to remove that employee from the area in which the incident occurred.

42. During the investigation, Complainant injured her arm and was assigned to work in PVYSC's Control Center. This assignment was made so that Complainant would not have to use up her sick leave and because the station provided the least amount of contact with juveniles.
43. At some point prior to discipline being imposed, Complainant was reassigned to the Intake Unit.
44. On March 8, 2002, pursuant to Board Rule R-6-10, Nittmann held a meeting with Complainant at which time Complainant presented information in support of her position.
45. Prior to imposing discipline, Nittmann considered Complainant's past performance and her statements during the R-6-10 meeting, the investigative report prepared by the Weld County Sheriff's office and the various incident reports prepared relating to the escape.
46. Prior to imposing discipline, Nittmann considered imposing a correction action or various disciplinary actions, including demotion, reduction in pay and termination. He also spoke to Paul Cooper (DHS' Northeast Regional Director), the human resources staff for DHS' northeast region and two other facility directors who had had escapes from their facilities.
47. Nittmann chose not to impose a corrective action because it did not adequately address the serious consequences of Complainant's actions. As an entry-level employee, Complainant could not be demoted. Nittmann did not want to terminate Complainant because, based on her strong past performance, he viewed her as an asset to PVYSC.
48. In a letter dated March 26, 2002, Nittmann informed Complainant of his decision to take disciplinary action, imposing a six-month reduction in pay of 5%, effective April 1, 2002.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 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

2002B121

- 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 *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Complainant was disciplined for improperly securing the Door between the Intake Unit and the bonding area, which allowed Gomez to escape from the Intake Unit and, eventually, PVYSC. The undisputed evidence showed that Complainant escorted Moreno, through the Door, into the bonding area and returned to the Intake Unit. It was during this time period that Moreno managed to block the Door in such a way that Gomez was able to escape. If Complainant had properly secured the Door, after Moreno had exited from the Intake Unit, Moreno would have been unable to block it and Gomez would have been unable to open it without a key. Complainant committed the act for which she was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

In this action, Gomez' escape was thoroughly investigated and a written report was prepared, along with recommendations for improvements to PVYSC's facility and

2002B121

procedural practices. There is no credible evidence to show that Nittmann failed to consider any evidence. Complainant argues that many other PVYSC employees failed to lock and/or secure doors and that many additional security procedures were put in place after the escape. However, the substantial evidence demonstrated that but for the unsecured Door between the Intake Unit and the bonding area Gomez would not have been able to escape. While the evidence also showed that Gomez was able to pass through the remainder of the facility and eventually exit, he would not have been able to even attempt to do so but for the improperly secured Door between the Intake Unit and bonding area.

Complainant's violations of both NYC's policy and PVYSC's procedure regarding properly secured doors were grounds to discipline her. Board Rule R-6-9, 4 CCR 801. As shown by Respondent, this was the only escape in over five years of operation for PVYSC. Complainant argues that other employees who leave doors unsecured are not disciplined. It is unfortunate that Gomez was able to evade other security checks at PVYSC. However, that does not negate the fact that it was Complainant's failure to properly lock the Door that initially allowed Gomez to escape. The decision to take disciplinary action must be based, in part, on the seriousness and effect of the act. Board Rule 6-6, 4 CCR 801. Complainant's action, as opposed to that of fellow employees who acted similarly, resulted in an escape. There was not any credible evidence of like instances in which an employee was treated differently.

Respondent has shown that it did not act arbitrarily, capriciously or contrary to rule or law when it disciplined Complainant.

C. The discipline imposed was within the range of reasonable alternatives

As stated above, when imposing discipline, an appointing authority must consider the nature, extent, seriousness and effect of the act, as well as past performance and mitigating circumstances. The Respondent demonstrated that Gomez' escape put the community at risk, by virtue of his threat to commit suicide in a shootout with law enforcement. This was the only escape in the five-year history of the facility, the only escape out of 15,000 admissions. In this case, a youth, with the strong potential for creating a violent incident, was at large in the community, having escaped PVYSC through an improperly secured door. The community and local law enforcement agencies were, understandably, upset about the incident.

In balance, however, Complainant had a strong performance record. Her supervisors viewed her as an asset to the facility. In fact, Nittmann credited her with the ability to learn from this mistake and reassigned her to the Intake Unit.

As set forth in the findings of fact, in weighing the level of discipline to impose, Nittmann considered a corrective action, demotion and termination, as well as the reduction in pay that he ultimately imposed. He considered both the serious consequences of Complainant's action and her strong potential to contribute positively

2002B121

to PVYSC in the future. His decision to impose a 5% reduction in pay for six months was a measured response that took into consideration the factors mandated by Board rules.

In sum, the credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this ____ day of July, 2002.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal 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).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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. 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.

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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

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 R-8-64, 4 CCR 801.

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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of July, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Brandy Bickell
2221 A Street Road
Greeley, Colorado 80631

and in the interagency mail, to:

Jill M.M. Gallett
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Andrea C. Woods