

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VICTOR NEVINS,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS,
Respondent.

THIS MATTER came on for hearing on April 27, 28, and 29, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared through counsel, William E. Jones, Jr. Respondent appeared through Monica J. Ramunda, Assistant Attorney General.

MATTERS APPEALED

Complainant, Victor Nevins (“Complainant” or “Nevins”) appeals a March 2003 disciplinary reduction in pay and his July 2003 termination from employment by Respondent, Department of Human Services, Division of Youth Corrections (“DYC” or “Respondent”). Complainant seeks reinstatement, back pay, and an award of attorney fees and costs.

For the reasons set forth below, Respondent’s actions are **affirmed**.

PROCEDURAL MATTERS

A protective order is in effect under which the names of youth residents of Gilliam Youth Services Center (“Gilliam”) are to remain confidential.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent’s disciplinary actions against Complainant were arbitrary, capricious or contrary to rule or law;
3. Whether Respondent is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment at DYC in 1988. At all times relevant he has been a Security Services Officer I.
2. In 1998, Nevins transferred to Gilliam, a youth detention facility.
3. SSO I staff at Gilliam are charged with assuring the safety and security of all youth residents under their charge.
4. Gilliam managers recognize Nevins as having a gift for getting through to the troubled residents.
5. In 2001, however, Nevins' performance began to decline. He began to allow his temper to adversely affect his performance. His inability to control his hostile and angry behavior toward residents and staff ultimately contributed to his termination.

Gilliam Policies: Normative Culture; Violence in the Workplace; Code of Ethics

6. Being a role model for the youth residents at Gilliam is of paramount importance.
7. Gilliam's "Normative Culture – Respect - Responsibility – Positive Relationships" policy sets the standard of behavior for staff. It provides the following:
 - I. Staff and residents are to be addressed in a professional and courteous manner.
 - II. Staff and residents will respect their own, and each other's race, culture, religion, and gender.
 - III. Conflicts are to be resolved without verbal or physical violence of any kind.
 - IV. Staff and residents will take responsibility for their actions and accept both positive and negative consequences.
 - V. Confidentiality of self and others is an expectation at GYSC.
 - VI. Staff and residents will project a positive self-image through hygiene, appearance, and demeanor."
8. The Normative Culture policy states that all staff will be reviewed for compliance therewith, and that failure to follow the norms established at Gilliam may result in either corrective or disciplinary action.
9. DYC's Violence in the Workplace Policy 3.28 prohibits violent behavior or threats of violent behavior directed towards a co-worker, supervisor, subordinate, or client [resident]. The policy defines a "threat" as "Making a declaration or announcement that harm or injury will be inflicted in retaliation for something, whether real or imagined; an indication of a coming harm. Threats include veiled, conditional or direct verbal, written threats, racial slurs,

offensive/abusive/coarse language or gestures which are intended to intimidate, harass, harm or endanger the safety of another person or state property.”

10. The DYC Code of Ethics Policy 3.7 mandates that with respect to relationships with the juveniles, the public, and colleagues,
 - “Employees shall respect and protect the civil and legal rights of all juveniles.
 - 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, harassment, or corporal punishment.
 - Employee-to-employee relationships shall promote mutual respect within the facility.”

June 2001 Corrective Actions

11. On June 6, 2001, Nevins’ immediate supervisor, Zondra D. Draper, Correctional Security Services Officer III ("CSSO III"), issued him two corrective actions. The first involved his use of aggressive and intimidating body language towards a coworker, in front of a resident. He had stated, “you better not say anything to me,” in a threatening manner, to the coworker.
12. The corrective action ordered Nevins to cease “all forms of intimidating behavior towards residents and staff” and to review DYC workplace violence, code of ethics, resident rights, and Normative Culture policies in their entirety.
13. The second corrective action involved his having left Gilliam in his car during his shift without proper authorization, leaving a unit unattended and unsecured. The letter stated in part, "To correct and improve this behavior in the future not only will you seek coverage for your pod [unit] you will consult with a supervisor prior to leaving the facility for approval so that your whereabouts can be accounted for and there is not a breach in safety and security. This is necessary in the event there was to be an assistance call or a fire or other emergency type situation."
14. Nevins did not grieve either corrective action.

August 2001 Confirming Memo; January 2002 Memo of Concern

15. In August 2001, Nevins was involved in two verbal altercations in which he violated the Normative Culture policy. In one, he engaged in an escalating verbal dispute with a resident in which he made comments about the resident’s mother. Draper wrote Confirming Memoranda to Nevins on both of these incidents, in which she directed him to review Policy 3.28 Violence in the Workplace, Policy 3.7 Code of Ethics, and the Normative Culture policy, and then to provide a report to her discussing the importance of each policy and the seriousness of violating each. In addition, Draper directed Nevins to, "provide a report

indicating why this form of unprofessionalism is inappropriate behavior in front of [a] resident and it's [sic] possible effects on them and the work environment," to communicate appropriately with co-workers in a professional, courteous, and non-threatening manner, and to contact a supervisor if he feels he cannot do that.

16. On January 22, 2002, Nevins was walking towards a coworker accompanying residents across a courtyard. Nevins, in a hostile gesture directed at his coworker, grabbed his crotch area and gave him an angry glare. Nevins received a memorandum of concern for this incident.

June 2002 Corrective Action

17. In March 2002, one of Nevins' supervisors discovered that he had not been charting behavior observation notes on any resident for at least one month. In discussing the matter with Nevins, he admitted that he had not done so for several months.
18. On June 7, 2002, Draper imposed a corrective action on Complainant for his failure to record behavior observation notes on residents. The letter stated that as a ten-year veteran of the DYC, he was aware of the legal importance of the observation notes, as well as their importance in passing on information to staff on incoming shifts. Draper directed Nevins to "complete all behavior observation notes as well as other necessary documentation on all residents that you are responsible for on a daily bases [sic]."
19. Nevins did not grieve this corrective action.

July 2002 Disciplinary Action

20. On May 19, 2002, Nevins and a coworker transported residents to the cafeteria. Residents asked why they couldn't go to the gym. Some conversation ensued, and Nevins and his coworker had a disagreement. When they reached the cafeteria, Nevins turned to his coworker and stated, "Go ahead, I'm ready whenever you are," in a threatening and angry tone of voice. He made this threat in front of residents.
21. Tanya Lyons, Assistant Director of Gilliam, investigated the incident and concluded that Nevins had violated the workplace violence policy.
22. On July 22, 2002, Lyons imposed a disciplinary fine of \$100.00 per month for four months, against Nevins. She concluded that he had violated the Violence in the Workplace policy in displaying angry and threatening behavior toward a co-worker.
23. Nevins did not appeal this disciplinary action.

Resident Rights Policy

24. DYC's Basic Rights and Responsibilities of Residents Policy, 13.1, provides in part, "Residents have the right to be treated respectfully, impartially, and fairly and to be addressed by name in a dignified conversational form;" "Residents have the right not to be subjected to corporal punishment, harassment, mental or physical abuse, personal injury, disease, intimidation, property damage, threats, harm, assault, humiliation"

November 17, 2002 Incident with JG

25. On November 17, 2002, following the end of his shift, Nevins was asked to fill in for another staff member on break. Nevins was angry about having to work the extra time.

26. Nevins was unfamiliar with most of the residents on the unit. When he arrived, the residents were watching television, and they began to throw orange peels at each other. Nevins directed them all to sit still, not to move, and to be quiet. Nevins directed one youth to his room for violating this directive.

27. Resident JG moved his chair close to another resident, in order to talk. Nevins then directed JG to his room. Nevins told JG to stand outside his room door until he arrived with his keys to open the door.

28. JG, age fourteen, weighed 115 pounds and was approximately 5'5" tall. Nevins weighed 175 pounds and is over 6 feet tall.

29. Nevins unlocked the door to JG's room. As JG passed him, walking into his room, he muttered, "This is bullshit."

30. Nevins became very angry, entered JG's room with him, and said, "what did you tell me?" Nevins then grabbed JG, placing one arm around JG's neck. This caused JG to fall down, hitting his head on the bed railing. Nevins then put JG's arm behind his back, picked up JG by the arm and the back of his shirt, and threw him out of his room, causing JG to fall onto a chair in the hall. Some residents witnessed this.

31. By responding to JG's statement with physical violence, Nevins violated JG's right to be free of physical abuse and assault, and the DYC Violence in the Workplace and Normative Culture policies.

32. When JG rose to his feet, he was so angry at being treated in this way that he threw orange peels at Nevins. He also may have taken a step towards Nevins at this time. Nevins, who was unfamiliar with JG, had no idea whether he would be physically aggressive with him. Nevins then engaged in a "take down" of JG, placing him on the ground, in a face down position.

33. Nevins placed JG in handcuffs with his body on the floor, facing down.
34. Nevins was justified in taking down JG at this time.
35. After placing JG in handcuffs, Nevins picked him up into a standing position by pulling on the handcuffs, causing great pain to JG. This act of physical violence against JG also violated JG's rights and DYC's Violence in the Workplace and Normative Culture policies.
36. Nevins walked JG to isolation. JG said to Nevins that he had no right to treat him that way. Nevins responded that he was right, and he was sorry.
37. That evening, JG informed another Gilliam staff member that Nevins had choked him during the incident. He reported his injuries, which were documented in an Incident Report form. The following morning, a nurse observed and documented his injuries.
38. JG sustained injuries from the incident, including redness around his neck, redness and a small cut to his left forearm, and swelling on his right forearm.
39. On the morning following this incident, JG and two resident eyewitnesses wrote statements about what had occurred.
40. Pursuant to facility policy, JG's allegation of excessive force was referred to an outside agency, Human Services Management Enterprises, for investigation. The investigator interviewed JG, three resident eyewitnesses, the staff member who received JG's report on November 17, and Nevins. The investigation concluded that Nevins had committed minor child abuse against JG on November 17, 2002.

Sexual harassment allegations

41. In late November, 2002, female residents of Gilliam made allegations against Nevins, in a group therapy session. Human Services Management Enterprises investigated the allegations and found that they were not confirmed for sexual abuse [inappropriate touching] but confirmed for a pattern of sexual harassment [inappropriate verbal statements to the female residents].
42. Complainant did not engage in sexual harassment of female residents at Gilliam.¹

February 2003 R-6-10 Meeting

43. On February 27, 2003, Cornelius Foxworth, Gilliam Director and appointing authority, held a pre-disciplinary R-6-10 meeting with Nevins and his attorney, to address the allegations of child abuse against JG and of sexual harassment/abuse of female residents.

1. Neither the female residents nor the investigator testified at hearing.

44. At the meeting, Foxworth reviewed the allegations against Nevins. Nevins denied having engaged in any misconduct.
45. At the meeting, Foxworth asked Nevins if he was entering all required data, particularly observation notes on the residents, into the Trails computer system. Nevins responded that in his opinion he had.
46. In fact, in November 2002, Nevins' Trails' data entries showed that he entered just 25% of those he could have made for the month, in violation of the June 2002 corrective action.
47. Foxworth reviewed the investigative reports, including all accompanying documentation (the written statements by JG and the other residents, incident reports, etc.).

March 2003 Disciplinary Action

48. Foxworth concluded that Nevins had committed minor child abuse against JG on November 17, 2002; Nevins had engaged in sexual harassment of numerous female residents; and Nevins had violated the June 7, 2002 corrective action by entering only 25% of the required observation notes on residents into the Trails system.
49. On March 11, 2003, Foxworth imposed a disciplinary reduction in pay from \$3,890 to \$3,501 per month, from April 1, 2003, until September 30, 2003. He also required that Nevins attend an anger management course.
50. In the disciplinary action letter, Foxworth noted that over a two-year period, Nevins had shown a history of violating the violence in the workplace policy, the code of ethics, and the normative culture policy. He further noted Nevins had repeatedly reviewed the policies at issue with supervisors and the assistant director of Gilliam.

June 2003 Corrective Actions

51. Gilliam's call-in policy requires an employee requesting time off to call in daily to request leave unless previously approved.
52. Nevins failed to receive prior approval of time off on May 20 and 21, 2003.
53. On June 4, 2003, Draper imposed a corrective action on Nevins for failing to follow the call-in procedure on May 20 and 21. It noted that he "did not report for training on 5/20 nor did you report for your 11 – 7 shift . . . you also did not report to work on 5/21 making you a no call/no show. You later submitted paperwork (leave request) for family sick leave on 5/19 (no sick time available) and 3 days of holidays attached with a letter informing me why you needed to be off the graveyard (11 – 7) shift. When questioned about the time off you replied that you had told Mr. Saunders that you would not be in for the rest of the week and

that the shift was getting to you and you should be off of it anyway. This is unacceptable.”

54. The corrective action directed him to "improve your work in the core competency area of organization accountability / calling in," to report for his shift on time; to call in according to procedures; and to provide documentation to support his reason for calling in if requested. It also directed him to read the call-in procedure, write a summary of why it is important, and submit it with a signed copy of the procedure to Draper and Lyons by July 1, 2003.
55. During the week of June 7 and 8, 2003, Nevins' father was ill. Nevins violated the call-in policy by failing to call Gilliam at the beginning of the shift to request permission to take leave. He left a message with Assistant Director Lyons requesting the time off. Lyons returned the call but did not reach Nevins; she did not grant him the time off. Nevins took the time off anyway.
56. On June 16, 2003, Ewall Strickland, CSSO III, imposed a corrective action on Complainant for his failure to call or report to work on June 7 and June 8, 2003. The requirements for the corrective action were substantially the same as those of the corrective action dated June 4, 2003.
57. Nevins did not grieve either corrective action.

Internet Use Policies

58. DHS Electronic Communications Policy VI 2.14, provides, “While it is recognized that some personal uses [of the internet] will occur, inappropriate or excessive personal uses, as determined by the appointing authority, are prohibited under this policy.”
59. NYC’s Information Technology Policy 22.4, Internet/Intranet Access, defines “Prohibited Practices” as: 1. Using the internet/intranet for personal/non work-related business. 2. Accessing, transmitting, storing, displaying or requesting obscene, pornographic, erotic, profane, racist, sexist, or other offensive material . . . 5. Allowing another person to use your log-in ID . . . 8. Allowing clients access to any computers that are connected to the DHS Intranet or are designated for staff use only.”
60. Nevins signed a copy of the NYC internet policy 22.4 in August 2002, acknowledging his knowledge and understanding of it.

Unauthorized Use of Internet

61. During the period March through May, 2003, Nevins spent an excessive amount of time on the internet while on duty for inappropriate, personal, non work-related reasons.
62. From March 1 through 16, 2003, in eight separate sessions, Nevins spent 6 hours logged onto an online dating service, “match.com.” He spent over five hours watching

“courttv.com” during this period.

63. During the period April 1 – 30, 2003, Nevins spent over 11 hours in seven separate sessions on the dating service site, “match.com.” He spent 5 ½ hours on the erotic site, “wickedweasel.com,” in 29 separate sessions during the month of April.
64. During the period May 1 – 31, 2003, Nevins spent over 29 hours in nine separate sessions logged onto the dating service, “match.com.” He spent 4 ½ hours in 19 user sessions logged onto the erotic site, “wickedweasel.com.”
65. Nevins and his co-workers spent a significant amount of time reviewing female models on websites and commenting on their appearance.
66. Nevins sometimes left his computer unattended while he had these websites up. Other staff and residents had access to the internet during these periods.
67. Nevins violated DHS’s Electronic Communications Policy VI 2.14 and NYC’s Information Technology Policy 22.4, Internet/Intranet Access by engaging in prohibited uses for excessive periods of time over a three-month period.

June 16, 2003

68. When Foxworth learned of Nevins’ unauthorized use of the internet, he noticed a pre-disciplinary R-6-10 meeting.
69. On June 16, 2003, when Nevins arrived at work, he was informed that one of the supervisors, Mr. Strickland, needed to see him. Strickland informed Nevins that there had been some allegations made against him, and handed him the notice of pre-disciplinary R-6-10 meeting. The letter referenced possible violations of the internet policies, Sexual Harassment, Employee Civil Rights, and Code of Ethics policies.
70. Nevins asked for details about the allegations, but Strickland was not at liberty to share the information at that time.
71. Nevins became extremely upset and asked for permission to leave Gilliam. Strickland said that he could not leave the building and he had to work his shift that day, but gave Nevins a fifteen-minute break to allow him to regain his composure.
72. After taking his break, Nevins refused to go to work. Strickland brought Assistant Director Lyons to the scene, to intervene. She was unable to get Nevins to agree to go to work. Lyons then brought Gilliam Director Foxworth to the scene. Foxworth told Nevins he had to assume his duties at that time. Nevins refused. Foxworth asked Nevins if he was absolutely not going to work on that day. Nevins confirmed that he would not work that day, and stated that he did not know what he would do if he were on a unit.

73. Foxworth then asked Nevins for his keys, sent him home, and directed him to return to work the next day.
74. While Foxworth testified at hearing that he had given Nevins permission to go home on June 16, that was only after Nevins had made it clear that he would not work on that day. It would have served no purpose for Nevins to remain at Gilliam after he had made it clear under no circumstances would he work.
75. Nevins was absent without leave on June 16, 2003.

June 24, 2003 Pre-Disciplinary Meeting Regarding Internet Use

76. On June 24, 2003, Nevins appeared without a representative at the pre-disciplinary meeting. Gilliam Director Foxworth also attended without a representative present.
77. Foxworth reviewed the results of the reports of the DHS information technology staff detailing the websites visited under Nevins' user ID.
78. Nevins admitted to having visited the sites. He informed Foxworth that he spent time on the internet during the graveyard shift in order to stay awake.
79. He also informed Foxworth that he and his co-workers looked at the fashion models "to pass the time."
80. With respect to the erotic site, Nevins stated to Foxworth that he had been on wickedweasel.com only for the purpose of attempting to find the "perfect gift" for his girlfriend. He indicated it had taken him one month to find it.
81. After the meeting, Foxworth had DHS technology staff go back beyond one month to see if Nevins had spent more than one month on that site.
82. Other DYC staff also engaged in misuse of the internet.
83. At hearing, Nevins contended that Foxworth was biased against him, because he investigated Nevins' internet use for a longer period than co-workers who had also violated the internet use policies. However, Foxworth was responding to Nevins' statement at the pre-disciplinary meeting about shopping for a specific gift.
84. Foxworth was not biased against Nevins.
85. Foxworth concluded that Nevins had violated both internet use policies cited above, 22.4 and VI 2.14, as well as the Code of Ethics.

June 28, 2003 Refusal to Work

86. On June 28, 2003, Nevins was advised that he was being investigated for child sexual abuse. He left the facility after Strickland had informed him he could not leave. Gilliam staff were forced to call another staff member in to work on his day off.
87. Nevins was absent without leave on June 28, 2003.

July 11, 2003 Pre-disciplinary Meeting Regarding Absences without Leave

88. On July 11, 2003, Foxworth scheduled a pre-disciplinary meeting with Nevins to address his refusal to work on June 16 and 28, 2003. At that meeting, Nevins informed Foxworth that another staff member, Mr. Leyba, had witnessed Strickland telling Nevins that he could leave the building on June 28.
89. Foxworth spoke to Mr. Leyba, who stated that he had not seen or heard Strickland inform Nevins he could leave the building on June 28, 2003.
90. At the meeting, Nevins admitted that he had “blown up” on June 16. Nevins denied it was a pattern of behavior for him to leave the building after receiving negative documentation. He stated that he had received thirty documents, and had not asked to go home in every instance.

Termination

91. On July 15, 2003, Foxworth sent Nevins two separate termination letters.
92. The first letter cited Nevins’ violations of DYC Policy 22.1 Use of Electronic E-mail, DYC Policy 22.4, CDHS Policy VI 2.14 Electronic Communications, Board Rules R-1-12 and R-12-26, and DYC Policy 3.22 Sexual Harassment. Foxworth made the following pertinent points:
- An ITS audit on Complainant's Internet usage from May 1, 2003, to May 31, 2003, showed that he went to websites that were inappropriate (personals and erotic material) for the work environment for approximately 44 hours during that time frame;
 - On August 2, 2002, Complainant signed a review of Policy 22.4 and Board Rule R 8-1-5 regarding state assets being put to private use;
 - Guidelines for Internet users include: electronic communications are the property of CDHS, use of this property must be limited to business purposes, employees who use the property for non-business purposes may be disciplined, and CDHS has the right to monitor computers and communications for any legitimate business reason;
 - Below standard performance has continued to persist, including violations of CDHS policies against workplace violence;
 - Prior disciplinary actions included a pay reduction of \$3,890 to \$3,790 from August 1, 2002, to December 31, 2002; and a pay reduction of \$3,890 to \$3,501 from April 1,

- 2003, until September 30, 2003;
- Under Board Rule R-6-9, Nevins' violation is willful misconduct, a violation of Board and department rules, and a willful failure to perform competently.

93. Foxworth's second July 15, 2003 termination letter referenced the R-6-10 meeting held on July 11, 2003, and cited Nevins for violating Director's Procedure P-5-1 and DYC Policy 3.7 Code of Ethics. Foxworth noted the following in the letter:

- On June 28, 2003, Complainant left the building without authorization after Strickland informed him of allegations of child abuse;
- During the R-6-10 meeting, Complainant stated that Mr. Leyba heard Strickland say he could leave the building on June 28, but when questioned, Leyba stated that Strickland never gave Complainant permission to leave the building;
- On June 16, 2003, after receiving information of a pending R-6-10, Complainant requested to leave the building, while Strickland requested that he return to his post. After being given a fifteen-minute break, Complainant refused to return to his post. Lyons spoke to Complainant, conveying to him that it seemed to be a pattern that when Complainant received negative documentation, he requested to leave the building. Complainant again refused to return to his post after speaking to Lyons. After Foxworth "entered into the situation," Complainant still refused to return to his post. Finally, Complainant was relieved of his keys, given permission to leave the building, and told to return to work the next day;
- On June 10, 2003, Complainant received a corrective action for failing to call in or report to work on May 20 and May 21, 2003;
- In accordance with Board Rule R-6-9, Nevins' actions constituted willful misconduct and a willful failure to perform competently;
- Based on having three prior disciplinary actions in a twelve-month period, termination is warranted.

94. Nevins appeals both termination letters and the March 2003 disciplinary action.

DISCUSSION

I. BURDEN OF PROOF

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 Rule 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 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 if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED NEARLY ALL OF THE ACTS FOR WHICH HE WAS DISCIPLINED

Nevins appeals his March 2003 demotion and his July 2003 termination.

Turning first to the demotion, Respondent disciplined Nevins for three separate reasons: minor child abuse against JG; sexual harassment of female residents; and failure to keep progress notes on residents, in violation of a corrective action. Respondent proved that Nevins engaged in minor child abuse against JG and violated the corrective action.

With respect to the termination, Respondent proved that Nevins committed all of the acts upon which the termination was based. Nevins flagrantly violated the agency's internet policy by spending multiple hours on erotic and dating websites, often with his co-workers. Further, he engaged in a pattern of refusing to work; this pattern started with his refusal to call in prior to taking leave, and escalated in 2003 when he became upset about receiving notices of potential disciplinary action.

Nevins' attempt to discredit his accusers at hearing was unsuccessful. While he argued that Draper, his immediate supervisor, was motivated to retaliate against him due to his rejection of her socially or romantically, he failed to prove this at hearing. Moreover, his attempt to demonstrate that Foxworth was biased against him is rejected. In view of the number of corrective and disciplinary actions that preceded Nevins' termination, it appears that Foxworth was dedicated to attempting to salvage Nevins as an employee, rather than to getting rid of him.

III. RESPONDENT'S ACTIONS WERE NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Despite the fact that one of the three bases for the demotion was not proven at hearing, the demotion was appropriate. The physical attack on JG alone is sufficient to warrant termination. As a sixteen-year veteran of DYC, Nevins was aware when he assaulted JG that he was committing an extremely serious violation of DYC's Violence in the Workplace and Normative Culture policies, as well as JG's right as a DYC resident to be free of physical abuse. As an SSO I at Gilliam, it was Nevins' job to protect JG from physical harm. Instead of protecting JG, he abused his position of trust by intentionally inflicting physical pain on him, not once, but repeatedly. Foxworth demonstrated restraint in not firing Nevins for this incident, considering as mitigation Nevins' length of service to DYC.

Nevins' termination was also appropriate. By the end of his tenure, Nevins had engaged in a two-year escalating pattern of flagrant violations of DYC rules and regulations. Moreover, when confronted, he showed no remorse. Nevins could no longer be trusted to show up for work as required, or once there, to remain on duty. Moreover, despite having been repeatedly corrected and disciplined for temper-related incidents, and having attended anger management training, Nevins could not be trusted to control his behavior towards co-workers or residents. Termination was Respondent's only choice in this situation.

This case is unfortunate in a number of ways. At hearing, Nevins presented himself as an articulate and intelligent individual. Gilliam Director Foxworth and Assistant Director Lyons both evinced a deep appreciation for Nevins' ability to work well with the youth, when he was inclined to do so. It appears that ultimately, the stress of the very challenging SSO I position became too much for Nevins to handle.

IV. ATTORNEY FEES AND COSTS ARE NOT WARRANTED

Respondent requests an award of attorney fees and costs against Complainant. Section 24-50-125.5, C.R.S. states,

“Upon final resolution of any proceeding related to the provisions of this article, if 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 . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred . . .”

Complainant's appeals of his demotion and termination were not instituted frivolously, in bad faith, or as a means of harassment. His appeal was not groundless. He produced evidence to support his defense in this three-day hearing. An award of attorney fees and costs is not warranted.

CONCLUSIONS OF LAW

1. Complainant committed nearly all of the acts upon which the discipline was based;

2. Respondent's actions were not arbitrary, capricious, and contrary to rule or law;
3. Respondent is not entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are affirmed. Complainant's appeals are dismissed with prejudice.

DATED this ____ day of
June, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

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. The notice of appeal must be received by the Board no later than the 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 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).

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 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 MAILING

This is to certify that on the ___ day of **June, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William E. Jones, Jr.
1314 Texas Avenue, Suite 1218
Houston, Texas 77002

And in the interagency mail to:

Monica Ramunda
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods