

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**SHELLEY BURKE,**  
Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES,**  
Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 30 and 31, 2005. The record was held open until September 9, 2005 for submission of Closing Arguments. Complainant appeared through David Lane, of Killmer, Lane & Newman, LLP. Respondent appeared through Joseph Haughain, Assistant Attorney General.

**MATTER APPEALED**

Complainant, Shelley Burke (“Burke” or “Complainant”) appeals her disciplinary termination by Respondent, Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center (“DHS,” “Platte Valley,” or “Respondent”). Complainant seeks rescission of the termination, reinstatement to a similar position in a different facility, back pay and benefits, and an award of attorney fees and costs.

For the reasons set forth below, Respondent’s action is **rescinded**.

**ISSUES**

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent’s disciplinary action was arbitrary, capricious or contrary to rule or law;
3. Whether Respondent discriminated against Complainant on the basis of disability;
4. Whether Respondent retaliated against Complainant in violation of her First Amendment speech rights;
5. Whether Complainant is entitled to an award of attorney fees and costs.

## FINDINGS OF FACT

1. Complainant has been a Correctional Safety and Security Officer (CSSO) for DHS for twelve years. One of the primary job duties of a CSSO is to “provide the direct care, safety, security and supervision of adjudicated/pre-adjudicated youth in a locked setting. Enforce established security rules and behavior of a group of youth, supervise and direct daily living and leisure activities, orient youth to the unit and agency rules and routines, intervene in potentially, or actively, volatile situations.”
2. In the year 2000, Complainant transferred to Platte Valley. She worked on the Acadia Unit, which housed twenty-five to thirty female residents.
3. Platte Valley houses two types of youth, aged 10 to 21: “committed students” and “detention students.” Committed youth are ordered into custody by the state for purposes of temporary guardianship. Detention students are sentenced to serve time upon conviction of criminal offenses.
4. Complainant had previously served DHS at several other correctional facilities. Shortly after her arrival at Platte Valley, Complainant noticed a general laxness by management in the enforcement of safety procedures, compared to the facilities she had worked at previously. For example, staff were permitted to leave residents’ doors unlocked. This practice allowed the residents to enter each others’ rooms, thereby placing many of the youth in danger of being physically threatened or hurt by other residents. It was common for the tougher residents, many of whom were gang members, to harass the more vulnerable residents.
5. In addition, Platte Valley management maintained an unusual policy of allowing commingling of male and female residents in several activities. Generally, boys and girls are completely separated in the correctional environment, in order to maximize discipline and control over the students. At Platte Valley, boys and girls on the units were allowed to serve detention in the same room; they had physical contact with each other there, in violation of facility rules. Complainant observed that the detention area was always full, because the boys and girls wanted to be together.
6. Complainant believed that commingling boys and girls in the detention area served as an incentive for the youth to misbehave and violate policies in the facility, so they could be together there. Complainant believed this policy ran counter to the mission of rehabilitating the youth.
7. At the time Complainant arrived at Platte Valley, the management also allowed male and female residents to write letters to each other every evening. Complainant observed that this practice led to girls fighting with each other over the boys, again in contravention of the goal of maintaining order and discipline on the unit.
8. Platte Valley management also allowed boys and girls to attend classes together, unlike every other facility at which Complainant had worked. Complainant found this practice to interfere with the mission of educating the students.

9. Complainant voiced her concerns to the Director of Platte Valley, Brent Nittman. Mr. Nittman explained to her that he had a different philosophy than she and others who directed other youth detention facilities. He explained that he sought to create as normative an environment as possible, in which the youth could learn how to establish relationships between the sexes. He sought to give the youth experiences that would help them re-enter society successfully.
10. Over time, Complainant found that Mr. Nittman's policies had a detrimental effect on the mission of the facility.

### **Email to DHS Management**

11. In the year 2000, approximately eight months after her arrival at Platte Valley, Complainant sent an email to several top managers at DHS' Division of Youth Corrections (DYC), in Denver. All recipients were above Mr. Nittman in the chain of command. Complainant outlined the above policies and the adverse affects she saw on the residents and the program.
12. Other employees at Platte Valley also made complaints to top managers in Denver during this time period.
13. DYC authorities conducted an investigation into Platte Valley policies and practices. As a direct result of Complainant's email and the complaints of others, DYC administrators ordered Platte Valley to change the policies. Boys and girls were no longer permitted to serve in detention together or to exchange letters.
14. Following the investigation and policy changes, Complainant felt that Mr. Nittman was hostile towards her. She believed he gave her callous looks.

### **Complainant's Declining Health; Call-Off Issues**

15. During the period of mid-2002 through her termination, Complainant's health steadily deteriorated. She was losing weight for no apparent reason, was becoming increasingly weak and shaky, found it difficult to concentrate at work, and struggled with nausea. She often vomited every few hours while at work. She began seeing doctors for her condition.
16. On May 18, 2003, Complainant was admitted to the emergency room. She was finally diagnosed with Hyperthyroidism and given medication to treat her thyroid condition. She was told that she needed surgery to treat her condition, and that she would have to bring her thyroid under control through medication prior to being approved for the surgery.
17. Complainant's condition periodically rendered her unable to wake up in time for work. Under Platte Valley Procedure 3.23, she was required to call in sick three hours prior to the start of her shift, which was at 6 a.m. On February 1, 2003, she called in sick one hour and twenty minutes prior to her shift. She received a Performance Notation reminding her to call off three hours ahead of her shift. On February 11, 2003, she received another confirming

memorandum, noting that on July 25 and October 29, 2002, she had called in sick with less than three hours notice.

18. On February 28, 2003, Respondent issued a corrective action to Complainant regarding her failure to adhere to the call off procedure. On February 25, 2003, she had called off sick at 6:20 a.m. for her 7:00 a.m. shift. (The starting time had changed.) On March 26, 2003, Respondent issued another Performance Notation for her failure to either call or show up for work. In fact, her shift had been changed without her having been notified. She worked the evening shift.
19. Complainant remained very ill. On June 9, 2003, she saw a doctor and was diagnosed with lingular pneumonia (a condition in addition to her Hyperthyroidism). The pneumonia lasted for several weeks, during which time she was very weak and shaky, continued to lose weight, and suffered from frequent bouts of nausea and vomiting. These symptoms continued until her last day of work on July 18, 2003.

### **Policies Governing Staff Monitoring and Reporting of Misconduct**

20. Platte Valley Procedure 14.03 governs “Major Rule Violations.” The rule defines a Major Rule Violation as: escape or attempting to escape; physical or sexual assault; dangerous contraband; security violation; damage or theft of property; fighting; gang activity; harassment or threatening behavior; inappropriate sexual behavior; and willful misconduct.
21. In the event of a major rule violation, Procedure 14.03 staff must adhere to the following procedures:
  - “The staff with first contact or initiation of the Incident Report shall complete the report before the end of their shift.
  - “The original copy of the Incident Report is placed in the Unit Incident Report Log.
  - “The Shift Supervisor on duty (or Unit Supervisor if present) shall review and sign all Incident Reports before the end of their shift.
  - “If necessary, within 24 hours, the Unit Supervisor or designate shall conduct a further investigation.
  - “The student shall be given a copy of the Incident Report as soon as possible.”
22. DYC Procedure 09.03, Juvenile Supervision and Movement, states in part, “Staff are responsible for assuring that Platte Valley Youth Services Center is safe for both staff and students.” The policy notes, “Whenever students are not safe, there arises a question of institutional neglect, and institutional neglect equals child abuse.” The policy states,
  - “When staff fail to know the whereabouts of students it may be institutional neglect.

- When students engage in unsafe behavior (physical or sexual) it may be institutional neglect.
  - When students assault (physical or sexual) other students it may be institutional neglect.”
23. Procedure 09.03 sets forth criteria for staff regarding “Communications and Approach.” It states, “Do you write in the log and verbally notify other staff about specific situations? - Think of team as you communicate in any form; - Inform the shift supervisor and others when you hear, are told, or know of a problem. – write the problem in the staff logs and the student’s individual notes; - Request that the shift supervisor include the information in the shift supervisor’s report. . . .”
24. DYC Policy 9.8 governs Reporting Critical Incidents. The Policy defines a Category I Critical Incident as “a serious life safety incident that requires immediate notification, further investigation and final disposition of the incident.” The policy defines a Category II Critical incident as “A potential life safety concern that is managed by the facility/PROGRAM and reported within 24 hours. Category II Critical Incidents require further investigation and final disposition of the event.”

### **Late June and early July 2003**

25. Platte Valley utilizes a “level” program of rewards and punishments for disciplining the residents. Residents are rewarded for good behavior by being raised a level; Special Privileges (SP) is the highest level. Residents are punished for bad behavior by being “level suspended,” which is to reduce the resident’s level of privileges.
26. Complainant’s direct supervisor on the Acadia Unit was Shamila Stewart. Stewart was lax in disciplining the tough girls and allowed her staff to be lax as well. It was widely rumored that Stewart was having inappropriate sexual contact with one of the tough girls on the unit who often received no consequences for misbehavior. This girl was known as Stewart’s “girlfriend.”
27. In late Spring 2003, Complainant noticed that staff were again being lax in keeping residents’ rooms secure. She sent an email to Mr. Nittman about the issue. He responded that he would handle it.
28. Mr. Nittman sent an email to staff in late June or early July 2003 mandating that staff comply with the requirement of securing residents’ doors.
29. During the week prior to July 7, 2003, Complainant noticed that two of the tough girls on the Acadia Unit had given each other hickies on their necks.
30. The incident had not occurred on Complainant’s shift. None of the staff working that prior shift had taken any disciplinary action against the girls, noted it in any documents, or discussed it with their supervisor.

31. Complainant informed her direct supervisor, Stewart, about the hickies and asked why the girls had not been “consequenced” on the previous shift. Stewart minimized the situation by responding that they were only pinch marks and therefore constituted horseplay, not sexual misconduct.
32. Complainant noted the incidents in the behavioral observation notes for the day. In addition, she imposed level suspensions on the girls.
33. By the time Complainant returned to work the next day, the girls had been reinstated to their former privilege status level. Someone had gone into the computer and had removed the suspensions.
34. When Complainant questioned Stewart about someone having reinstated the girls’ privileges, Stewart responded that Complainant had had insufficient information to warrant a level suspension.
35. Complainant discussed the removal of the level suspensions with other staff on her unit, who had experienced the same thing. Complainant discussed this problem with Stewart’s supervisor, Curtis Medina.
36. Complainant concluded that to impose any harsher sanction against the girls for the hickies would have been futile, as Stewart would have opposed it.
37. Complainant was the highest performing staff member on the Acadia Unit in imposing appropriate discipline, enforcing safety regulations, and protecting the residents.

**July 7, 2003**

38. On July 7, 2003, when Complainant arrived for her shift, she found that resident J.V. had a hickie on her neck. Complainant then noticed that another resident, V.M., had bruising on her face.
39. Burke met with V.M. to discuss what had occurred. V.M. then disclosed to Burke a recent history of serious problems on the Acadia Unit, which had gone unchecked. V.M. informed Complainant that she (V.M.) had fought another resident, R.A., in the bathroom. She informed Complainant that residents in Acadia “go heads” in the bathroom to settle their differences, and that Stewart, Complainant’s supervisor, allowed it to occur. V.M. also informed Complainant that on the previous evening, on July 6, 2003, girls on Special Privileges were in Room 213 with two of the gang residents who told them to kiss each other or they would be hit. On that evening, resident N.D. had been alone in that room and had been kissing J.V. and that is where the hickie came from. V.M. informed Complainant that later that evening another girl, C.S., became jealous and pushed N.D. V.M. reported that C.S. was given no consequences for this.

40. V.M. informed Complainant that residents were not secure during shower time, as their doors were not locked down. Therefore, certain girls were able to be in the shower area to intimidate the other girls taking showers.
41. V.M. also reported to Burke that residents were acutely aware that Platte Valley staff gave inconsistent consequences to residents for contraband violations.
42. Immediately following this report, Complainant summoned Medina, the day shift supervisor, and Don Smith, Assistant Director of Platte Valley, to a meeting. Complainant reported everything V.M. had told her to Medina and Smith, both of whom took copious notes.
43. Based on Complainant's report, Platte Valley officials contacted Social Services to report possible abuse and neglect on the Acadia Unit. In addition, Platte Valley managers placed the Acadia Unit in lock down, under which all residents were locked in their rooms and had all privileges removed.
44. The residents responded to the lockdown by fighting staff, screaming threats at Complainant and other staff, threatening to kill themselves, and banging on their doors. The unit was in chaos; it was a near riot situation. Complainant and other staff had to use restraints (cuffs and shackles) on physically combative residents in order to contain them.
45. During this challenging day, Complainant was very ill. She was weak and unable to concentrate. She spent most of the remainder of her shift writing incident reports on the girls who were physically combative in response to the lock down that day, and escorting each of the over 25 residents to the bathroom. By the end of the shift, she could barely stand up.
46. Platte Valley officials deemed the contents of the report received by Burke, and given to Smith and Medina, to constitute a Category II Critical Incident. Under Procedure 14.03, the incident report was required to be written before the end of Burke's shift.
47. Medina directed Burke to write the incident report before the end of the shift. Complainant felt so ill and weak that she unable to keep a clear train of thought. She attempted to write the report, but her first attempts contained errors. She informed Smith, Assistant Director of Platte Valley and Medina's supervisor, that she was so ill she needed to leave, and requested permission to write the incident report the next day.
48. Smith knew how ill Complainant was. He expressly authorized her to leave Platte Valley on July 7 without having completed the incident report.

### **July 8, 2003**

49. On July 8, 2003, Complainant was so ill she slept through her alarm. She woke up vomiting and feeling too ill to come to work. She called in sick, but when Medina informed her there was no one to fill in for her, she agreed to come in.

50. Burke has never had difficulty writing accurate and timely incident reports during her twelve year tenure at DHS.
51. On July 8, 2003, Burke wrote several incident reports regarding July 7 use of force incidents with physically combative residents. In addition, she made several attempts to write the Category II Critical Incident report. These contained simple errors she had never made before, caused by her extremely poor health. Complainant finally completed an incident report that met the standards required, and one of her supervisors signed it, as approval.
52. Burke included the following in her incident report, "I personally have had LS [level suspensions] disappear from tracking so that non-deserving residents could remain SPs [Special Privilege level]. Residents are being pushed around by SPs and punked on a regular basis. Certain SP's [naming seven] are alleged to be untouchable while others who are not in the popular group lose their SPs days after getting it. After residents are locked down for showers it has been reported that all SPs come out do help with showers, but they are going into bathrooms and rooms on a regular basis."
53. On July 8, Nittman spoke to Don Smith, who informed him that Burke had been so ill on July 7, she was unable to complete the incident report. He informed Nittman that she looked so ill he had excused her from completing the incident report on July 7.

### **July 9, 2003**

54. On July 9, 2003, Complainant was ill. She called in sick at 6:30 a.m., thirty minutes after the scheduled start of her shift. She arrived at work two and a half hours late.

### **July 11, 2003 No Contact Order**

55. On July 11, 2003, Mr. Nittman emailed the entire staff at Platte Valley, ordering them not to have any contact with each other during the pendency of the investigations regarding potential neglect. He stated in part,

"All, there may be as many as three investigations going on in Acadia from recent allegations. First, the Department of Social Services will conduct an investigation regarding potential neglect. They may have their completed report in 60 days although it is possible it will go longer. . . . Second, I will be investigating staff performance issues. I hope to have most of my work starting to be completed by next week. I will notify you as it is my intent to speak with all of you. Third, it is possible that the Greeley [police department] will investigate and if so it will be to determine if criminal charges will be filed against any student. I think this is unlikely.

During the period the investigation goes on to not contaminate the investigation or damage its integrity you are to: 1) Have no contact with other staff being investigated about this circumstance; 2) Have no contact with students on Acadia. Do not call the unit to speak to them or otherwise stimulate contact with them. 3) Take no statements from others about this. Address them to me in a sealed envelope . . . ."

56. Mr. Nittman considered the scope of the order to extend only to the subject matter of the investigation. He understood that in the normal course of business, staff would have to have contact with each other.
57. The Department of Social Services investigated the Acadia Unit and found wrongdoing by Platte Valley staff and management. The Department found no evidence of wrongdoing by Complainant.

**July 16, 2003 Email to Smith; Telephone Contact with Smith**

58. On July 16, 2003, Complainant drafted an email to Maurice Williams, Northeastern Regional Director of DYC, entitled, "Re: Brent Nittman." Prior to sending it, she sent a draft of it to Smith, asking him to edit it to make it look more professional. Complainant's draft email to Williams stated the following:

"Mr. Williams, I am deeply apologetic to have to bother you with Platte Valley issues, but I have no supervisor, and Brent has put a no contact with Don Smith. I do not want to talk to you specifically about the investigation on Acadia, but what goes on in this building and Brent's tolerance of it. I have wanted to talk with you for some time, but have heard that you will not stand for someone not going through the chain of command. I have no one else to talk to. I will come to your office if you will allow me a few minutes to speak with you. I am sure you have heard plenty about Brent and management, but this is my fourth facility and I have been in the system for 12 years. We have lost incredible staff, and the tolerance for incompetent [sic] staff is now affecting me."

59. Smith advised Complainant not to send the email. She did not send it to Williams.
60. Complainant's last day of work was July 18, 2003, at which time she went on approved Family Medical Leave for Hyperthyroidism. She and her daughter moved in with her mother at that time, as she was no longer able to care for herself.
61. Complainant was required to maintain ongoing contact with a representative of Platte Valley, to keep the facility apprised of her medical status. She had twenty-seven telephone conversations with Smith between July 14 and August 14, 2003, concerning her medical status, plans for leave, and related issues.
62. Complainant and Smith did not violate the no contact order by discussing the investigation.
63. Nittman believed that Smith was having conversations with members of the media, and was concerned about it.
64. On August 15, 2003, Nittman obtained a copy of Don Smith's telephone records for the months of July and August, 2003. He also obtained records of Smith's email exchanges. Nittman discovered at this time the July 16, 2003 email from Burke to Smith, containing the

draft email to Williams. In addition, Nittman learned that Smith and Complainant had had ongoing telephone contact during July and August 2003.

65. Nittman never informed Smith or Burke that he knew about their telephone conversations. He never asked either of them about the content of those conversations.

### **Pre-disciplinary process**

66. On August 18, 2003, Mr. Nittman sent a notice of pre-disciplinary meeting to Complainant, who was on disability leave at that time. He listed as reasons for possible discipline, to be discussed at the meeting, her failure to “document, report or take appropriate actions with students of the Acadia Unit pursuant to PVYSC Procedure 9.3 Juvenile Supervision and Movement and [failure] to produce an Incident Report in a timely fashion according to PVYSC Procedure 14.003 Major Rules Violations. It has also come to my attention that you have continued with a pattern of tardiness according to PVYSC Procedure 3.23 Work Scheduling Leave Time.”
67. Mr. Nittman did not mention the July 16 email to Smith or his concern about Burke’s telephone contact with Smith in the letter.
68. At the time Mr. Nittman sent Complainant the letter, he was aware that Complainant was out on approved leave due to a serious health condition.
69. During the month of September 2003, Complainant’s condition worsened. She lost so much weight that it took her weeks to gain the three pounds required for surgery to address her Hyperthyroidism.
70. Mr. Nittman agreed to postpone the pre-disciplinary meeting with Complainant due to her poor health; twice this was due to her hospitalization.

### **Pre-disciplinary meeting**

71. On September 18, 2003, Complainant attended the pre-disciplinary meeting. She was so ill she was unable to drive herself to the meeting.
72. Mr. Nittman informed Complainant that the first and only report he received from any Platte Valley staff regarding potential abuse of residents was from her, on July 7. He stated that upon review of the incident reports previous to that date, he did not see any incident reports from her, which concerned him.
73. Complainant responded that she had missed a lot of work and had not been aware of anything until the day she saw the hickies on V. and R. She stated that she had documented it in their behavioral observation notes and had imposed level suspensions on them for the behavior. She further clarified that after those suspensions had been mysteriously removed without her authority, she had performed a file search and had discussed the issue with other staff, in an effort to determine how that had occurred.

74. Ms. Burke informed Mr. Nittman that when she expressed concern about the hickies to Stewart, Stewart had responded, "Well they're probably pinches." She further explained that because the incidents had occurred on the evening shift prior to her arrival the next day at work, a level suspension was the greatest discipline level she could impose.
75. Burke also informed Nittman that in her prior experience, girls would have lost all privileges for the same behavior that was tolerated by Stewart on the Acadia Unit. She stated that she would attempt to take the girls' Special Privileges status away, but that Stewart prohibited it, mandating that the girls "go through three level suspensions, pretty much no matter what they do," under which they would still maintain SP status.
76. Complainant stated that the bad girls remained SP's because Stewart allowed them to.
77. Complainant told Nittman that she had reported the rescission of her level suspensions to Medina, Stewart's supervisor. She also gave Nittman an example in which another staff member's disciplinary action against a resident had been overturned by a supervisor, thereby undercutting the authority of that staff member to impose discipline.
78. Mr. Nittman responded that as a general rule, he opposed having staff on other shifts second-guess the discipline either imposed or not imposed by other staff. He stated, "Well, your point is well taken that one of the things that I am very cautious about is going into a unit and overturning the work done by people that are in the unit. About the only conditions [under which] I would do that is, if I thought something was illegal or immoral, I would intervene immediately. . . It's clear that shift supervisors are obligated to determine if something is appropriate and take corrective action to improve in order to process an issue, like a level suspension of a PRS. That is their job."
79. Burke made it clear in the meeting that July 7 was the first time she had heard any of the allegations made by V.M.
80. Nittman then had a long discussion with Complainant about her incident report writing on the information reported to her by V.M. July 7, 2003. Nittman acknowledged that he had confirmed that she had been given permission not to write the incident report on July 7. He stated in part, "your report to me this morning is consistent with other reports I have heard, where you were granted by an administrator some relief in the immediate production of that incident report. That's a problem any way I slice it, that's a problem. But I can tell you that in good conscience, at least for me today, were given some opportunity not to write it pursuant to procedure."
81. Nittman then questioned Burke about her recent pattern of tardiness, stating, "the only day I have in question was the 9<sup>th</sup> of July, and the report that I've taken is that you called the shift supervisor and said, "my alarm didn't go off, can I have permission to be late," and then my understanding is that you were instructed that's not an option.

82. Burke responded that his information was not correct. She stated that she had called Mr. Medina and informed him her alarm had gone off, because she was so sick she did not hear it. She explained that she had a letter from her doctor explaining that she had been diagnosed with hyperthyroidism in June, that she had been very ill for several months prior to that diagnosis, and that she therefore should be excused for any absences during that period.
83. Burke informed Nittman that she had a doctor's letter she had meant to bring to the pre-disciplinary meeting, which she had accidentally sent to another DHS staff member, stating she should not be held accountable for being late during those several months preceding June 2003, due to her hyperthyroidism. Nittman responded, "And you said your doctor produced some report to that." Nittman then reviewed Complainant's history of performance notations, confirming memoranda, and the corrective action, regarding violation of the call off procedure. Burke noted that the majority of absences were medically excused. Nittman noted that the documents did not support that assertion. He then reviewed her record and confirmed that her last day of work was July 18, 2003.
84. At the pre-disciplinary meeting, Mr. Nittman did not ask Complainant about her telephone conversations with Smith during July and August 2003. He never mentioned her July 16, 2003 email to Smith, in which she attached the draft email to Williams.
85. Mr. Nittman did not inform Complainant that he was considering disciplining her on the basis of violating the no contact order, on the basis of her phone calls with Smith, or on the basis of her July 16 email, at the pre-disciplinary meeting. Complainant did not have the opportunity to explain or rebut that information.
86. Mr. Nittman did not know what Smith and Burke discussed during their telephone conversations. He based his decision to terminate Complainant in part on his assumption that they had violated the no contact order during those conversations.
87. Mr. Nittman viewed Complainant's July 16, 2003 email to Smith as a violation of his no contact order. He based his decision to terminate her in part on that email.
88. During the meeting, the only question Nittman asked Burke that was related to the no contact order was the following: "Have you had ongoing contact with parties from the agency subsequent to this period of investigation?" Burke responded that she had not.

### **Termination Decision**

89. Following the pre-disciplinary meeting, Mr. Nittman did not obtain copies of the doctor's letter or other medical documents verifying Complainant's Hyperthyroidism and its effect on her tardiness on July 9 or on the other dates in early 2003.
90. Mr. Nittman did not investigate Complainant's statements in mitigation on the call-off issue.
91. At hearing, Mr. Nittman testified that he based his decision to terminate Burke in part on the basis of the July 16 email. He viewed it to be a violation of his no contact order.

92. On September 19, 2003, Mr. Nittman sent a termination letter to Complainant. He cited four issues in the letter as grounds for her termination:

- A. “You have failed to effectively document and report incidents, pursuant to PVYSC Procedure 9.3 Juvenile supervision and Movement, occurring in the Acadia unit from early June to early July 2003. I find that you were aware of sexual activity between girls and chose to implement level suspensions. However, you did not make more thorough or complete written reports, as is required, when you were made aware of abusive behavior or sexually inappropriate contact.”
- B. “You have failed to produce the initiating Incident Report in a timely fashion (by the end of your shift) pursuant to employment expectations as noted in PVYSC Procedure 14.03 Major Rules Violations. In fact, it took in excess of 24 hours to produce a report that was similar in nature to your initial verbal report, as provided morning of 7/7/03, when specifically directed to write such, and when the issues cited were both a Major Rule Violation and rose to the threshold of a Critical Incident Report. This is clearly deficient performance.”
- C. “You have also failed to provide sufficient call off notification as specifically instructed in previous performance Notations, Confirming Memoranda and a Corrective Action as follows for the date of 7/9/03.”
- D. “You reported to me [at the pre-disciplinary meeting] that you had had no contact with other PVYSC staff involved in this incident during the period of this investigation. This, I find, is not a truthful statement. You were directed by explicit written instruction of my email of 7/11/03, opened by you on 7/12/03, that you were not to have contact with other PVYSC staff identified in the email during the period of the investigation. After verifying phone records from the agency I find you to have had multiple conversations with PVYSC staff. Your home number longest call was 22.75 minutes with a total of 27 contacts after this directive to maintain no contact. I find your actions here to be insubordinate in your failing to follow my directive and not truthful.”

93. Mr. Nittman did not consider Complainant’s Hyperthyroidism in terminating her.

94. Complainant did not request any type of accommodation of Respondent for her Hyperthyroidism during her employment.

95. In September 2003, Complainant was approved for disability leave by the State of Colorado insurance provider.

96. In October 2003, Complainant had surgery to treat her hyperthyroidism. It was successful.

97. In December 2003, her treating physician cleared her to return to work without restrictions.

## **Other Platte Valley Staff Consequences**

98. Mr. Nittman imposed no corrective or disciplinary action on the staff who were on duty during the pre-July 7 hickie incidents. He wrote performance notations that were placed in their files. Stewart was disciplinarily terminated for reasons not in the record.

99. Mr. Nittman was not a credible witness.

## **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; § 24-50-125, 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. *Kinchen, supra*. The Board may reverse the agency'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 NONE OF THE ACTS UPON WHICH DISCIPLINE WAS BASED**

Respondent has failed to meet its burden of proving that Complainant committed the acts upon which discipline was based and that just cause warranted the termination of her employment. The preponderance of evidence demonstrates that Complainant was the best performer on the Acadia Unit with respect to imposing discipline when appropriate and enforcing regulations designed to protect residents' health and safety. Respondent had no factual basis upon which to discipline Complainant.

1. Violation of Procedure 9.3, Failure to Timely Document and Report Incidents involving "sexual activity between girls" and choosing instead to impose level suspensions.

Complainant did document and report the incidents involving the hickies; she documented the incidents in the behavioral observation notes and reported the incidents to her direct supervisor, Stewart. Burke was the only staff member who complied with the letter and the spirit of Procedure 9.3.

Complainant informed Mr. Nittman that Stewart had joined rank with the offending residents by claiming the hickies were merely pinches, downplaying the incident and portraying it as horseplay, not sexual misconduct. She also informed him at the pre-disciplinary meeting that Stewart did not allow her to impose any discipline against the offending girls greater than a level suspension.

In response to Complainant's statements at the pre-disciplinary meeting, Mr. Nittman explained to her that he was opposed to staff or supervisors on other shifts second-guessing another staff member's determination of appropriate discipline. He stated, "one of the things that I am very cautious about is going into a unit and overturning the work done by people that are in the unit. About the only conditions [under which] I would do that is, if I thought something was illegal or immoral, I would intervene immediately. . . . It's clear that shift supervisors are obligated to determine if something is appropriate and take corrective action to improve in order to process an issue, like a level suspension of a PRS. That is their job."

Mr. Nittman violated his own standards by imposing discipline against Complainant for incidents that occurred on another shift. Under Mr. Nittman's stated criteria, two options were available to Complainant: a) allow the shift supervisor to determine what was appropriate under the circumstances, or b) step back and refrain from "going into a unit and overturning the work done by people that are in the unit." Complainant took the moderate approach: she determined that documentation and discipline were appropriate, and she discussed her decision with her supervisor. In summary, no evidence supports Respondent's contention that Complainant violated Procedure 9.3.

2. Failure to produce the incident report based on V.M.'s report by the end of her shift, in violation of Procedure 14.03.

It is undisputed that Mr. Nittman knew Assistant Director Don Smith gave Burke permission to leave work on July 7, prior to completing the incident report. He informed Burke of this fact at the pre-disciplinary meeting. As the Assistant Director of the facility, Smith had authority to excuse Complainant from complying with Procedure 14.03. No evidence supports imposition of disciplinary action for violation of Procedure 14.03.

3. Failure to provide sufficient call off notification on July 9, 2003.

Complainant proved by preponderant evidence that on July 9, 2003, she was physically incapable of hearing her alarm. She had Hyperthyroidism so serious as to render her unable to work from July 18 forward. She informed Mr. Nittman at the pre-disciplinary meeting of these facts, and that she had a doctor's excuse ready to provide to him. While she may have violated the call-off policy on that date, her failure is excusable because of her physical condition. This condition rendered her so ill as to be unable to care for herself. When an employee violates a procedure due to events beyond her control, there is no basis for imposition of disciplinary action.

4. Violation of no contact order.

Respondent has failed to prove by preponderant evidence that Complainant violated the no contact order concerning the investigation into Acadia Unit, or that she lied to Mr. Nittman at the pre-disciplinary meeting. The only evidence in the record concerning the telephone contacts between Burke and Smith is that they discussed her FMLA status and plans to remain on leave on an ongoing basis, as required by rule. The July 16 email does not constitute a violation of the no contact order; in fact, the email references the no contact order so as to assure she does not violate it.

Respondent has produced no evidence supporting its termination of Complainant.

### **III. THE DISCIPLINE IMPOSED WAS ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW**

In determining whether an agency's decision is arbitrary or capricious, it must be determined 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).

Respondent's decision to terminate the employment of Complainant was arbitrary and capricious under *Lawley, supra*. Respondent ignored the fact that Complainant was the highest performing staff member on the unit in imposing appropriate discipline, enforcing safety regulations, and protecting the residents. Respondent ignored its own evidence that the Assistant Director of Platte Valley had permitted Complainant to leave work on July 7 without having completed the incident report. It refused to give any consideration to the fact that Complainant had a doctor's note excusing her for violating the call-off policy on July 9. These failures are inexplicable and constitute arbitrary and capricious agency action. *Lawley*.

Respondent also violated State Personnel Board Rule R-6-10, in effect at the time of the events herein, which states as follows:

“When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision.” 4 Code Colo. Reg. 801.

Respondent violated this rule by failing to present information to Complainant at the pre-disciplinary meeting about her perceived violation of the July 11 no contact order. Mr. Nittman failed to disclose anything to Complainant about this issue at the meeting: the fact that he was aware she had spoken to Smith by telephone; the fact that he had a copy of her July 16 email to

Smith, containing the draft email to Williams; the fact he perceived she had violated his no contact order; and the fact he planned to impose disciplinary action based on same. Had Mr. Nittman disclosed the basis of his concern to Complainant, she would have had the opportunity to explain that per FMLA regulations, she had communicated with Smith regarding her health status and her plans to return to work. Having failed to engage in any exchange of information on this issue, Mr. Nittman made his termination decision based on untested assumptions, in contravention of Rule R-6-10.

Respondent's failure to consider the mitigating information noted above, provided by Don Smith and Complainant, also violated Board Rule R-6-2. That rule mandates that prior to imposing disciplinary or corrective action, appointing authorities must consider mitigating circumstances and information submitted by the employee.

#### **IV. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF DISABILITY**

Complainant argues that she was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("the Act").

Under the Act,

"It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

Disability under the Act "means a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." Section 24-34-301(2.5)(a), C.R.S. The Colorado Civil Rights Commission ("the Commission") has promulgated rules in which it interprets the Act as being "substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act," 42 U.S.C. Sections 12101 - 12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act "shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.*

Complainant has failed to prove that she was disabled under the Act. In determining whether an individual is substantially limited in a major life activity, "three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2)." *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10<sup>th</sup> Cir. 1999). Complainant has failed to establish that her Hyperthyroidism meets this standard. In fact, following her surgery in October 2003, she was

cleared to return to work in December 2003. Further, there is no evidence in the record that Respondent considered her to have such an impairment.

Even if Complainant's Hyperthyroidism did constitute a disability as defined by the Act, Complainant admits she never requested an accommodation for her condition. Therefore, Respondent cannot be found to have violated the Act by depriving her of a reasonable accommodation. Respondent did not discriminate against Complainant on the basis of disability.

## **V. RESPONDENT VIOLATED COMPLAINANT'S FREE SPEECH RIGHTS IN TERMINATING HER EMPLOYMENT**

Complainant avers Respondent terminated her in retaliation for exercising her free speech rights under the First Amendment of the United States Constitution and analogous provisions of the Colorado Constitution. The government as an employer does not have unchecked power to limit its employees' speech on matters of public concern. *Bass v. Richards*, 308 F.3d 1081, 1088 (10<sup>th</sup> Cir. 2002), citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). Rather, when the government restricts the speech rights of its employees, its interest in limiting the speech must be balanced against the employees' interest in speaking. *Id.*

To prevail on a *Pickering* claim, an employee must demonstrate that: 1) the speech in question involves a matter of public concern; 2) his interest in engaging in the speech outweighs the government employer's interest in regulating it; and 3) the speech was a substantial motivating factor behind the government's decision to take an adverse employment action against the employee. *Id.* If the employee makes the required showing, the government employer may escape liability if it can show that it would have taken the same employment action in the absence of the protected speech. *Id.*

Generally, speech involves a matter of public concern when it is "of interest to the community, whether for social, political, or other reasons," rather than a matter of a mere personal interest to the speaker. *Id.*, 308 F.3d at 1089. Speech relating to internal personnel disputes and working conditions does not touch upon matters of public concern. *Id.* Burke's July 16 email concerned her perceptions of mismanagement at Platte Valley, and the adverse affects of that mismanagement on the safety of residents in the state's custody. The email involved a matter of public concern.

Respondent had a legitimate interest in regulating Platte Valley staff's speech regarding the matters under investigation by the Department of Social Services and others. Mr. Nittman's July 11 no contact order was necessary to assure the integrity of the fact finding investigation. However, the face of Burke's July 16 email evinces her intent to respect that limitation on her speech. Her communication related to overall management of Platte Valley, not to the subject of the investigation. Further, her email did not pertain to an internal personnel matter; she was genuinely concerned about Mr. Nittman's pattern of failure to enforce regulations designed to protect the youth in DHS' custody, and its effect on attrition of highly qualified staff.

Respondent does not dispute that Complainant's July 16 email was a motivating factor to terminate Complainant. At hearing, Mr. Nittman testified that he based his decision to terminate

Burke in part on the basis of the July 16 email. The question is to what extent Complainant's protected speech motivated Respondent to terminate her.

In addition to the direct evidence of the causal connection between Burke's protected conduct and the adverse action, there is circumstantial evidence justifying an inference of retaliatory motive herein. When protected conduct is closely followed by the adverse action, an inference of retaliation is established. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 386 (10<sup>th</sup> Cir. 1984). Mr. Nittman had Smith's telephone and email correspondence records pulled on August 15. He sent Burke the letter noticing the pre-disciplinary meeting on August 18. These facts, coupled with the complete absence of any other evidence supporting disciplinary action, demonstrate that Nittman was motivated by retaliation against Complainant in terminating her employment.

Lastly, Respondent has failed to meet its burden of proving that even in the absence of Burke's protected speech, it would have taken the same employment action against her. Respondent had no factual basis upon which to impose any disciplinary action. But for Respondent's discovery of Burke's July 16 email and concurrent communication with Smith, Respondent would have taken no action against her. She would have remained on disability leave pending recovery.

## **VI. COMPLAINANT IS ENTITLED TO REINSTATEMENT AT A DIFFERENT FACILITY**

Complainant requests reinstatement to a facility other than Platte Valley. When an employee is wrongfully terminated, she is entitled to receive an amount of damages which will make her whole. *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987). *See also Lanes v. State Auditor's Office*, 797 P.2d 764 (Colo.App. 1990). To place Burke back at Platte Valley, where the same management is in place, would not serve to make her whole. Therefore, she is entitled to reinstatement to a CSSO position at another facility.

## **VII. ATTORNEY FEES AND COSTS ARE MANDATED**

Complainant requests an award of attorney fees and costs against Respondent. 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 . . . .”

Respondent's termination of Burke was groundless. Board Rule R-8-38(A)(3) defines a groundless personnel action as one in which “it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.” Where the employer has no grounds to seek an employee's dismissal, the termination is

groundless and an award of attorney fees is mandated under the statute. *Coffee v. Colorado School of Mines*, 870 P.2d 608 (Colo.App. 1993). In *Coffee*, the Colorado Court of Appeals determined that while a minor form of discipline was warranted by the facts presented, no evidence supported the dramatically more serious decision to terminate the employee's employment. It therefore reversed the State Personnel Board and awarded the employee attorney fees and costs.

Complainant committed none of the acts upon which discipline was based. In fact, she stood out as the staff member on the Acadia Unit most willing to impose discipline and enforce safety regulations. Respondent therefore had no grounds to seek her dismissal. Attorney fees and costs are mandated under the statute, Board Rule R-8-38, and *Coffee, supra*.

In addition, Respondent's termination of Complainant was made in bad faith. Board Rule R-8-38(A)(2) defines a personnel action made in bad faith, maliciously, or used as a means of harassment as one "pursued to annoy or harass, ...made to be abusive, ... stubbornly litigious, or ... disrespectful of the truth." As the discussion above demonstrates, Respondent's termination of Complainant was disrespectful of the truth: the fact that Complainant acted appropriately to protect the youth on the unit prior to July 7; the fact that her supervisor prohibited her from taking stronger action prior to July 7; the fact that Assistant Director Don Smith excused her from completing the incident report on July 7; and the fact that her Hyperthyroidism caused her failure to call in on time on July 9 and during the preceding months. Lastly, Respondent made no effort to ascertain the contents of the conversations between Burke and Smith during July and August 2003. Under these circumstances, the decision to terminate was disrespectful of the truth under Rule R-8-38(A)(2). Attorney fees and costs are mandated.

### **CONCLUSIONS OF LAW**

1. Complainant did not commit the acts upon which discipline was based;
2. Respondent's action was arbitrary, capricious, or contrary to rule or law;
3. Respondent did not discriminate against Complainant on the basis of disability;
4. Respondent retaliated against Complainant for exercising her free speech rights;
5. Complainant is entitled to an award of attorney fees and costs.

### **ORDER**

The action of Respondent is **rescinded**. Respondent shall reinstate Complainant to a CSSO position at a different facility, with full back pay and benefits, minus compensation she has earned from other sources after her termination. Respondent shall reimburse Complainant for attorney fees and other costs incurred in bringing this action.

DATED this \_\_\_\_ day  
of **October 2005** at  
Denver, Colorado.

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Mary S. McClatchey  
Administrative Law Judge  
633 17<sup>th</sup> St., Suite 1320  
Denver, CO 80203

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of **October 2005**, I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

David Lane  
Killmer, Lane & Newman, LLP  
1543 Champa Street, Suite 400  
Denver, Colorado 80202

And interagency mail to:

Joseph Haughain  
Assistant Attorney General  
Employment Section  
1525 Sherman Street 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods