

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

IRIS HAWKINS,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, YOUTHFUL OFFENDER SYSTEM,
Respondent.

THIS MATTER came on for hearing on December 21, 2004 and January 7, 2005, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared through Kirk Brown, Esquire. Respondent appeared through Christopher Baumann, Assistant Attorney General.

MATTER APPEALED

Complainant, Iris Hawkins (“Hawkins” or “Complainant”) appeals her disciplinary fine in the amount of \$300.00 by Respondent, Department of Corrections (“DOC” or “Respondent”), Youth Offender System (“YOS”). Complainants seek rescission of the disciplinary fine and restitution of her right to apply for a promotion to Sergeant.

For the reasons set forth below, Respondent’s action is rescinded.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 Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. YOS is a prison facility for youth convicted as adults who, at the time of conviction, were between 14 and 19 years of age.
2. Complainant commenced employment at YOS as a Correctional Officer (CO) I in 1998. At all times relevant herein, she worked in Building 112, on the second floor, which was a living unit.

Correctional Officer Duties at YOS

3. In 2002, following significant budget cuts, YOS eliminated most case manager and youth counselor positions and reassigned most of those duties to the correctional officers, including Hawkins.
4. In addition to the traditional safety and security duties of a correctional officer, YOS correctional officers performed social worker duties.
5. To accomplish these social worker duties, Officer Hawkins was required to know each resident's gang affiliation, if any; grade level in school; difficulties in school; difficulties relating to family and friends; and difficulties in relating socially to the other residents.
6. Officer Hawkins was required to assess the residents' problems, talk to them about those problems, learn what the driving force was behind their behaviors, and make recommendations for possible disciplinary actions. Hawkins played a central role in determining whether residents progressed or regressed in the program.
7. Hawkins' performance plan required that she advocate for the residents towards development of a positive peer culture at YOS, and that she act as a mentor, counselor, and advocate for the youth.
8. The Post Orders for CO I's at YOS, including Hawkins, contained the following duties:
 - Conduct individual counseling with assigned residence caseload to address problem areas, behavioral changes, etc.
 - Supervise Guided Group Interaction (GGI) sessions; ensure proper documentation/follow up is completed for each session. Oversight of group counseling sessions.
9. The GGI's consisted of presiding over meetings with 13 to 15 residents, lasting 45 to 90 minutes. Hawkins' performance plan required that she act as a coach and mentor to this group, developing rapport with the residents so that they trusted her enough to verbalize their thoughts and feelings. Hawkins had to assure the residents adhered to the format for these sessions, make notations in residents' files regarding negative information, and monitor each resident's status and progress in the program.
10. Officer Hawkins also performed Progress Assessment Forms (PAS's) on each resident. To do a PAS, Officer Hawkins met with a resident and conducted an in depth one-on-one counseling/dialogue session. She then inputted information into the computer regarding: present status; behavior; attitudes; social or thinking errors; and progress as to what the resident was doing to work on those issues.

11. To complete the PAS's, it was necessary that Hawkins and the resident be present at a computer terminal, in order to input the information into a computer file. The computer was located in an office separate from the main living area; therefore, being in this location precluded Officer Hawkins from viewing the majority of the residents.
12. When Officer Hawkins conducted GGI's and PAS's and other social worker duties, she was not available to perform security related functions on the unit. This concerned her a great deal.

Hawkins' Concerns About Safety and Security at YOS

13. Officer Hawkins is a hard worker, dedicated to her job at YOS. She has received several written commendations from others at YOS during her tenure.
14. Hawkins has made several suggestions to supervisors on how to increase security on the unit, such as placing mirrors on the large, wide beams in common areas to assure staff can monitor the inmates in all locations. Residents are acutely aware of the areas where DOC staff's line of sight is blocked; they often misbehave in those areas.
15. In April 2002, Hawkins wrote a memo to Carol Zenon, Deputy Director of YOS, informing him of her concerns about lack of security at YOS in view of the correctional staff having to perform social worker duties. Her memo included suggestions on what she viewed as possible solutions to security problems.
16. On April 19, 2002, Zenon responded to Hawkins in a memo entitled, "G.G.I. Process." He stated in part,

"I have discussed our schedules with [other managers] and it does not appear that we can move our G.G.I. process to a different part of the day or reduce the number of G.G.I.'s we are currently performing. . . While we are pressed for time to complete showers, chores, chow hall, and escorts during swing shift we cannot ever let these activities be a primary reason for not doing G.G.I.'s or reducing the number of G.G.I. sessions.

"Quick Skills and G.G.I. sessions are at the heart of the YOS program, in terms of promoting a positive peer culture. All YOS staff must work hard to protect this aspect of the program. While some residents do not like the process this must be viewed as a natural consequence of being confronted on their thinking errors. This is why it is critically important for staff to recognize and deal with the resistance and anger they see some residents display. . . .

Thanks for your concerns about the G.G.I. sessions and the workload and I hope that you continue to think about ways and ideas which we can use to improve the YOS program."

17. After receiving this memo, Hawkins continued to voice her concerns about security to supervisors. She requested building meetings. However, such meetings were not held and her concerns were not addressed.

Inmate Counts

18. YOS staff must conduct two types of counts of the residents while on shift, informal counts and formal counts. The purpose of these counts is to assure every single resident's presence is accounted for.
19. For all counts, Master Control sends a message over the public announcement ("PA") system, directing staff to conduct the count. Staff then conduct the count by walking around the unit with a unit count sheet in hand, making eye contact with every single inmate on the unit, and highlighting each name as direct contact is made.
20. Staff on the different floors then confer and add up the total numbers, to assure that all inmates have been accounted for in the building.
21. For informal counts, staff call Master Control to report the final count total. Informal counts are also referred to as "area reports." For formal counts, staff actually walk the unit count sheet over to Master Control to deliver the count.
22. The only difference between an informal and a formal count is that formal counts are delivered to Master Control; informal counts are instead called in to Master Control.

Thirty Minute Rounds

23. Post Orders required that Complainant and others at YOS also conduct welfare checks on the youth every thirty minutes. These are referred to in the Post Orders as "thirty minute rounds." The purpose of these rounds is for staff to walk through all areas of the unit to assure no fights or other incidents harmful to any youth are occurring.

December 10, 2003

24. On December 10, 2003, two residents, R.C. and A.H., escaped from YOS during Complainant's shift. The youth were on her unit. They escaped within minutes of Hawkins having counted them during the 7:00 p.m. informal count. In fact, they were outside the YOS facility perimeter by 7:13 p.m.
25. Complainant was working her customary swing shift with Officer Parra on December 10, from 2:00 p.m. to 10:00 p.m. Officers Hawkins and Parra were responsible for the safety and security of twenty-eight residents on their unit. Sergeant Cole was their unit leader, but he did not work on the second floor with them.
26. Officer Gallery was a Youth Counselor I assigned to the swing shift in Building 112. He was stern with residents and his presence on the unit increased security. Gallery was permitted by YOS management to work the day shift instead of swing shift on a routine basis.
27. On December 10, 2003, Gallery was not present on the swing shift.

28. During the afternoon on December 10, R.C. and A.H. requested a “lay-in,” informing Hawkins they did not feel well. A “lay-in” exempted them from attending group meetings and functions on the unit. She granted their request.
29. Neither R.C. nor A.H. attended snack that afternoon. One of these two residents normally did not miss snack. However, since it was December and the inmates had canteens full of candy and holiday treats, Officer Hawkins thought nothing of his absence.
30. Officer Hawkins was required to report the “lay-in” to medical personnel or to advise the living unit sergeant on duty, Sgt. Cole, of it. She was so busy that day that she did not have time to do so.
31. Officer Hawkins conducted the G.G.I. session from 3:30 p.m. to 4:30 p.m. For reasons not in the record, Officer Parra was never required to conduct those sessions.
32. Some time early in the shift, the staff found dice on one of the living units in Building 112. Officer Parra left the second floor and spent nearly the entire swing shift downstairs. Part of this time was spent interviewing residents and filling out incident reports.
33. Officer Parra was routinely absent from the second floor during swing shift, and Officer Hawkins had complained to management about it before December 10, 2003.
34. At some point during the shift, Hawkins had to go to the “chow hall” to bring a resident back to Building 112.
35. After dinner, prior to 6:45 p.m., all residents returned to the unit. At that time, Officer Hawkins was required to perform the one-on-one’s and PAS’s in the office with residents.

7:00 p.m. Count

36. At 6:56 p.m., Master Control announced the informal count. Officer Hawkins conducted the count on the second floor, walking through the entire unit, making eye contact with all residents (approximately twenty-eight), including R.C. and A.H., and highlighting each inmate’s name on the unit count sheet.
37. She then called the staff member downstairs to compare and total the numbers. They confirmed every single inmate was accounted for.
38. At 7:13 p.m. Officer Hawkins called the count in to Master Control. She then returned to the office to continue with one-on-one’s and PAS’s.
39. Between the time Hawkins made eye contact with R.C. and A.H. at approximately 7:00 p.m. and the time she called in the count to Master Control at 7:13 p.m., the two residents escaped from YOS.

Escape Route

40. The two youth escaped while the 7:00 p.m. count was taking place. After they were counted, they walked down a hallway on the second floor to a stairwell leading downstairs. They walked down the stairs, walked over to the front door, opened it, walked through it, and exited the building.
41. The front door to Building 112 was required to have been alarmed. However, on that evening, and apparently as a general practice, the door was not alarmed.
42. It was the responsibility of the management team, consisting of the warden, assistant warden, programs manager, custody and control captain, and security manager, to assure the exit door was alarmed on the swing shift. They erred in failing to assure the door was alarmed.
43. The failure to have an alarm on this front door was the major cause of the escape. Had an alarm gone off, Officers Hawkins, Parra, and the downstairs staff would have been alerted to their exit. As the responsible officers, they would have known whether there was a reason for an inmate to leave the building at that time. Further, residents are only permitted to leave with a staff escort. (The only permissible reasons for inmates to leave the building were for such activities as classes, medical appointments, and other pre-planned activities.)
44. The youth then climbed Building 111, which had protruding bricks on its sides as part of its architectural design. They ascended the building just as though it were a climbing wall.
45. Once on the top of that building, the residents were able to freely gain access to the roof because there was a gap in the wire perimeter around it, another serious security breach.
46. The youth walked across the top of this building and then jumped off of it, over the perimeter fence, onto the ground outside the YOS campus.
47. The anti-tamper alarm on the perimeter fence that should have detected the two inmates jumping over it was not functioning.
48. It was the duty of the perimeter patrol officer, also known as the zone officer, to walk the perimeter at the beginning of each shift and to shake the fence to assure the alarm is working. The patrol officer failed to detect the alarm was not working on the swing shift on December 10, 2003.
49. The YOS video camera caught the youth on the street after their escape, giving each other high fives and then running away, at 7:13 p.m. The correctional officer in charge of monitoring the video camera missed this.
50. There were several security breaches at YOS that enabled the youth to escape. None of them was related to Complainant's conduct on the night of December 10, 2003.

51. The youth escaped during the time Hawkins conducted the informal count, between 6:56 and 7:13 p.m. It would have been impossible for her to monitor their location during this time, as she alone performed the count of 28 inmates during this short timeframe. Officer Parra was not on the unit he was assigned to at the time of the escape.
52. Officers Hawkins and Parra conducted all required counts during swing shift on December 10, 2003.
53. At 9:00 p.m., the time of the next count, it was discovered that the two residents had escaped. YOS Warden Juanita Novak was contacted and she immediately arrived at the facility to implement the emergency escape protocols. Because there was no observable breach of the perimeter of the YOS campus, it was assumed the residents were still on campus. Novak ordered a lock down and a complete search.
54. At approximately 3:00 a.m., prison leaders established that the youth had escaped at 7:13 p.m., as they finally viewed the video tape.
55. At 8:30 a.m. the next morning, the two escapees were caught.

Thirty Minute Checks

56. Sgt. Cole was responsible for assigning tasks to Officers Parra and Hawkins and assuring their completion. While Officer Hawkins' duties of performing the GGI's and PAS's had been assigned to her, apparently no tasks had been assigned to Parra.
57. Sgt. Cole did not assign the thirty-minute checks to either Parra or Hawkins.
58. Officer Parra was not on the unit he was required to work on at the time Hawkins did the informal 7:00 p.m. count and at the time the inmates escaped.
59. Neither Officer Parra nor Officer Hawkins conducted a thirty-minute round or welfare check at 7:30, 8:00, or 8:30 p.m.
60. From 7:13 p.m. until the end of her shift, Officer Hawkins was doing PAS's (which included one-on-one counseling sessions) in the office, as required.
61. It is unknown what Officer Parra was doing during this time, but he should have conducted the thirty-minute checks, because Officer Hawkins was conducting the PAS's, as required. Officer Parra was not required to perform that task.

Factfinding Investigation

62. Warden Juanita Novak directed two veteran officers to conduct a factfinding investigation into the factors leading to the escape.

63. Novak created the list of witnesses to be interviewed and gave it to the investigators. They limited their interviews to that list.
64. The investigators interviewed all staff in Building 112 on the evening of December 10, including Complainant.
65. At the time of the investigation, the investigators were unaware that correctional officers at YOS had to perform case manager and social worker duties. They did not know that at 6:45 p.m. and immediately following the 7:00 p.m. count, Officer Hawkins was required by Post Orders to be in an office performing one-on-one assessments and completing PAS's on the computer.
66. The investigators made several recommendations in their final report:
 - A. "review the current procedure of offenders signing themselves out of the unit. This process may compromise the security of the facility";
 - B. consider staggering and rotating area reports;
 - C. door alarms should remain in use despite any inconvenience to staff;
 - D. thirty-minute rounds must be completed "and staff need to identify offenders, not just account for numbers of offenders";
 - E. "performance documentation and/or Corrective Action should be given to the following staff:" Sergeant Cole, Officer Hawkins, and Officer Parra. (Emphasis added.);
 - F. consider rotating staff assignments to "prevent over familiarization and complacency. This may also prevent offenders from exploiting staff weaknesses and complacency";
 - G. consider development of a facility activity schedule to identify high activity times when staff resources are drained, in order to maximize staff.
67. The investigators concluded that Sergeant Cole had "failed to ensure his subordinates were making thirty-minute rounds," and had failed to assign that task and other tasks to specific staff. Therefore, "there is no ownership to ensure that the specific tasks are being completed."
68. The investigators recommended that Sergeant Cole receive a Needs Improvement in Job Knowledge and Communication on his evaluation, and training in basic security practices and supervision, and that consideration be given to a change in assignment as he had been in building 112 for many years.
69. Regarding Officer Hawkins, the investigators were concerned about her statement that she was disappointed that the two inmates had taken advantage of her because she felt like a "mother" to the offenders. They concluded based on that statement that she was "task oriented for the YOS program and places the program ahead of the completion of good security practices."
70. The investigators recommended that Officer Hawkins receive a Needs Improvement in several areas on her evaluation, and that she receive training in basic security practices,

Games Criminals Play, and communications. Games Criminals Play is a course offered to prison staff focusing on how inmates manipulate staff into sympathizing with them, in order to pull the staff away from their duties. They also suggested, "Consideration should be given to a change in assignment as she has been in Unit 112 for many years."

Pre-disciplinary process

71. Warden Novak had been recently assigned to YOS to "clean it up" after a period of staff misconduct. Correctional officers had engaged in inappropriate sexual and personal relationships with incarcerated youth, resulting in criminal charges and bad publicity.
72. Novak viewed a large part of her job as restoring YOS's reputation in the community. The December 10, 2003 escapes detracted from this goal.
73. During Novak's tenure at YOS prior to the December 10, 2003 escape, all external audits of safety and security at the YOS facility had resulted in excellent ratings.
74. Warden Novak relied on the factfinding investigation and the pre-disciplinary meeting in making her decision.
75. Novak did not check to see whether Hawkins had ever received previous corrective or disciplinary action when she imposed discipline.
76. Novak did not read Officer Hawkins' job description prior to imposing discipline. She was unaware of the fact that in addition to her traditional correctional officer duties, it required Hawkins to function as a social worker by acting as a mentor, counselor, and advocate for the youth.
77. Neither Warden Juanita Novak nor the factfinding team investigated any of the following issues:
 - who was responsible for the front door to Building 112 not being alarmed;
 - why had downstairs staff not noticed the inmates' exit;
 - why had the perimeter patrol officer not checked the perimeter anti-tamper fence alarm at the beginning of the swing shift, as required;
 - why had the fencing around the education building been permitted to have a gap
78. Immediately following the escape, the front door to Building 112 was alarmed during swing shift and several other policies restricting resident movement were modified to increase security.

R-6-10 Meeting

79. Warden Novak conducted the pre-disciplinary meeting pursuant to State Personnel Board Rule R-6-10 on January 28, 2004. Hawkins attended without a representative present.

YOS Acting Custody Control Manager Mike Romero also attended, apparently to observe.

80. Warden Novak commenced the meeting by reviewing the results of the factfinding investigation. She then recited the Post Orders and Administrative Regulations (“AR’s”) she determined Officer Hawkins had violated.

81. Novak reviewed the following Post Orders: Number 7, Conduct Formal Counts; Number 9, Supervise/monitor resident movement; and Number 18, Conduct 30 minute rounds of entire living unit with appropriate documentation.

82. She then reviewed the following DOC AR’s:

- 300-04, Offender Counts, section IV A. formal counts, and B. informal counts;
- 1450-1, Staff Code of Conduct, Definitions, “Conduct Unbecoming: Includes any act or conduct either on or off duty, which negatively impacts job performance not specifically mention in the administrative regulations which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff member”;
- 1450-1, Section IV. G. Staff are prohibited from aiding or abetting an escape or an attempted escape. Staff are under a duty to report any information regarding evidence of plans to escape, escape attempts, or actual escapes to their appointing authority immediately.
- 1450-1, Section IV. M. staff shall avoid situations which give rise to a direct, indirect, or perceived conflict of interest;
- 1450-1, Section IV. N. Any actions on or off duty . . . which jeopardizes the integrity or security of the Department, calls into question the staff’s ability to perform effectively and efficiently in his or her position, or cast doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.
- 1450-1, Section IV. HH. Staff shall comply with and obey all DOC administrative regulations, procedures, operational memos, rules, duties, legal orders, procedures, administrative instructions. Staff shall not aid, abet, or incite another in violation of these [AR’s];
- 1450-1, Section IV. ZZ. Any act or conduct, on or off duty, which affects job performance or which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.”

83. Hawkins explained to Warden Novak that she felt she had violated none of the AR’s reviewed. She explained that when the area report, or informal count, was called, she had accounted for the two escapees specifically. She stated that she then called downstairs and verified her numbers with that staff prior to calling the numbers in to Master Control.

84. Hawkins then stated that from that point on, after completing the informal count, she had started to do her “PAS’s and one-on-one’s” as her duties required for that night.
85. With regard to the snack issue, she stated “there were many residents that did not come for snacks that night.”
86. Warden Novak clarified that she was relying on the “conduct unbecoming” provision of the Code of Conduct because, “by these inmates escaping, you jeopardized public safety as well as security practices within the facility.” She stated, “It adversely affected the Department of Corrections.”
87. Officer Hawkins responded, “Okay. I understand that and I have really, I’ve felt a lot of shame and regret that this happened on my watch. But I feel that there were some things that were beyond my control. The fact that we don’t have security on the front door is not my call to make” She also explained that the entire escape route out of the facility was not an area under her control.
88. Warden Novak concluded that she would impose disciplinary action against Hawkins because she had become “too closely involved with the inmates.” She determined that Hawkins had violated the Code of Conduct, AR 1450-1, because her violation of security rules had resulted in “bad publicity” for YOS.
89. Novak did not consider the other security breaches that made the escape possible on December 10 as mitigation in disciplining Hawkins. She testified that there was “no evidence any other officer except for her and Parra were negligent in their duties.” The evidence demonstrated that security breaches beyond Officer Hawkins’ control made the escape possible: the failure to lock and alarm the front door to Building 112; the failure to assure the wire around Building 111 was intact; the failure to check the perimeter fence anti-tamper alarm.
90. The factfinding investigative report suggested that Officer Hawkins be given either a needs improvement rating in certain areas on her performance evaluation, or a corrective action.
91. Warden Novak did not provide a reason at hearing for imposing disciplinary action instead of corrective action, as recommended by the factfinding team upon which she relied.

Disciplinary Action

92. On February 4, 2004, Warden Novak issued a disciplinary action letter to Officer Hawkins. It stated in part the following:
 - A. Complainant did not recognize several “red flags” created by the escapees. During the afternoon on December 10, 2003, the two youth had requested a “lay-in” based on medical issues. She had authorized this and had not contacted

medical personnel or advised the unit sergeant off their condition. The second red flag was her failure to note the significance of their having skipped snack that evening.

- B. Hawkins and Parra “failed to conduct thirty minute rounds as listed in the Living Unit Post Orders. The estimated time the offenders left the unit is between the hours of 1900 and 1917.”
 - C. “The committee felt that Officer Hawkins is task oriented for the YOS program and placed the program ahead of the completion of good security practices. She also stated that she was disappointed that resident’s (sic) [A.H.] and [R.C.] took advantage of her because she felt like ‘a mother’ to the offenders.”
 - D. “The committee felt that there are inconsistencies in practice among staff and a complacent attitude surrounding good security order. Residents . . . capitalized on these opportunities and exploited the weaknesses and complacency of unit staff to plan and facilitate their escape.”
 - E. “It is my decision that you did, in fact, violate Administrative Regulation 300-4, Offender Counts, Post Order for Living Unit 110-112, and 113, and Administrative Regulation 1450-1, Staff Code of Conduct. Officer Hawkins, security has to be the number one priority in managing offenders in the Colorado Department of Corrections. By your negligence, two convicted felons escaped the confines of the [YOS]. It is incumbent upon you to stop whatever paperwork you are doing and make a round to ensure all the offenders are present in your unit.”
93. Warden Novak imposed a \$100.00 per month pay reduction for three months, and transferred Officer Hawkins to Pueblo Minimum Center (PM).
94. At PMC, Hawkins lost all seniority and was forced to work the graveyard shift.
95. The demotion has precluded Hawkins from applying for promotions to Sergeant within DOC.
96. Officer Hawkins did not act negligently on December 10, nor did her conduct have a connection to the escapes. The inmates’ lay-in and failure to eat snack had no connection to their escape.
97. The failure to conduct thirty-minute rounds had no connection to the escape.
98. Warden Novak erroneously assumed that Officer Hawkins had not conducted any count at 7:00 p.m.
99. No evidence at hearing demonstrated that Officer Hawkins had a “complacent attitude surrounding good security order.”

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 DID NOT COMMIT THE MAJORITY OF ACTS UPON WHICH DISCIPLINE WAS BASED

Warden Novak based her disciplinary action upon Hawkins' alleged violations of AR 300-4, Offender Counts, Post Orders requiring thirty-minute checks, and the Staff Code of Conduct. She also concluded that Officer Hawkins had missed "red flags" and had placed "the program ahead of the completion of good security practices."

The evidence established that Officers Hawkins and Parra conducted all required counts on December 10, 2003. Warden Novak based the discipline on the erroneous assumption that Hawkins had conducted no count at 7:00 p.m. Therefore, Respondent failed to prove that the primary basis for discipline occurred.

At hearing, Warden Novak clarified that she concluded Hawkins had violated the Code of Conduct because Hawkins' violation of security rules had resulted in "bad publicity" for YOS. No evidence supports the conclusion that Hawkins violated security rules resulting in the escapes. Further, the lay-in and snack issues were unrelated to the escape.

Respondent failed to prove that Officer Hawkins placed "the program ahead of the completion of good security practices." To the contrary, the evidence demonstrated that she was keenly aware of the conflict between case manager and security officer duties, and that she routinely made constructive recommendations to management on how to increase security at YOS. Respondent failed to prove that Complainant was lax on security. Therefore, there is no factual basis in the record to support a Code of Conduct violation.

The only remaining basis for imposition of discipline is the Post Order requiring that Officers Hawkins and Parra conduct thirty-minute rounds. These rounds are welfare checks, not counts. Sergeant Cole did not assign these checks to either Hawkins or Parra.

The evidence demonstrated that the only officer who had specific duties on swing shift on December 10 was Officer Hawkins. Officer Parra had no specific duties, according to the evidence. From 6:45 p.m. until the end of her shift, Officer Hawkins conducted one-on-one meetings and PAS's with residents, and did the informal count. She performed 100% of the duties on the second floor of Building 112 during that period of time. In the meantime, Officer Parra was absent from the floor, not performing any duties on the unit, including the thirty-minute checks.

Warden Novak gave this notable disparity in duties no consideration prior to imposing disciplinary action against Complainant. Under the circumstances of December 10, wherein Officer Hawkins was assigned and indeed conducted all of the duties on the second floor, it stands to reason that accountability for the thirty-minute checks should fall to Officer Parra.

III. RESPONDENT'S IMPOSITION OF DISCIPLINE WAS ARBITRARY AND CAPRICIOUS AND CONTRARY TO BOARD RULES

Officer Hawkins committed only one of the three acts upon which discipline was based. Respondent has failed to meet its burden of proving that just cause existed to impose disciplinary action against Officer Hawkins. Therefore, the discipline imposed cannot stand. Colo. Const. Art. 12, section 13(8); section 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

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).

Warden Novak neglected or refused to use reasonable diligence and care to obtain the evidence she needed in order to make an informed decision to discipline Officer Hawkins. She failed to check the records regarding formal and informal counts on December 10; those records would have confirmed that Officer Hawkins had conducted a count at 7:00 p.m., and had in fact, with Officer Parra, conducted all required counts during the shift.

The weight of the evidence at hearing demonstrated that Warden Novak also failed to consider the other serious security breaches that contributed to the escape; she testified that there was no evidence any other officer except for Hawkins and Parra were negligent in their duties. If the other security breaches had not occurred, the attempted escape would not have been

successful. These factors therefore constitute substantial mitigation Warden Novak was required to consider.

Board Rule R-6-6 mandates that in imposing corrective or disciplinary action, appointing authorities must consider mitigating circumstances and information presented by the employee. Hawkins pointed out to Warden Novak in the R-6-10 meeting that she had no control over the escape route once the inmates reached the first floor of Building 112. Officer Hawkins had no control over the fact the front door to Building 112 was not alarmed; that the wire fence on Building 111 was broken; that the perimeter patrol officer failed to check the perimeter fence; and that the perimeter fence alarm was not functioning. The warden's failure to consider this mitigating information was arbitrary and capricious and a violation of Rule R-6-6.

Warden Novak and the factfinding investigators were also unaware of the dual nature of Officer Hawkins' duties, and therefore failed to give appropriate consideration to the fact Officer Hawkins was required to be a mentor, counselor, and advocate for the youth. The investigation was deeply flawed in this regard. Warden Novak's conclusion that Officer Hawkins placed "the program ahead of the completion of good security practices" because of her statement about feeling betrayed was not supported by the evidence.

Board Rule R-6-2 mandates, "a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Respondent offered no evidence or argument supporting the decision to impose disciplinary action instead of corrective action, as recommended by the factfinding report. While the escape of an inmate is always an extremely serious incident, the evidence regarding Hawkins' performance history, her attempts to increase security at YOS, and her actual performance on the job on December 10, are such that the discipline assessed appears unwarranted. Her actions or omissions on December 10 were not serious and flagrant. Officer Hawkins' small role in the failure to conduct thirty-minute rounds, which had no relation to the escape, was not flagrant or serious enough to warrant disciplinary action. While the violation of the Post Order regarding thirty-minute checks may constitute grounds to impose corrective action, as suggested in the factfinding report, it does not, alone, constitute adequate grounds to support the imposition of discipline.

IV. ATTORNEY FEES

Section 24-50-125.5, C.R.S. mandates that attorney fees and costs be awarded when a personnel action or appeal thereof is instituted "frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." Warden Novak proceeded in good faith. She did not impose discipline in bad faith, maliciously, or as a means of harassment.

The question of groundlessness is a closer question. Board Rule R-8-38 defines a groundless personnel action as one wherein "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." As discussed above, Officer Hawkins failed to conduct thirty-minute checks. This failure was unrelated to the escape, and yet it revealed to the Warden a certain laxness among Sgt. Cole and Officers Parra and Hawkins. This violation would have served as grounds to impose corrective action against

Officer Hawkins. Therefore, it is concluded that the action was not groundless. An award of attorney fees is not mandated herein.

CONCLUSIONS OF LAW

1. Complainant did not commit the majority of acts upon which discipline was based;
2. Respondent's action was arbitrary and capricious and contrary to rule or law;
3. An award of attorney fees and costs is not mandated.

ORDER

The disciplinary fine of \$300.00 is rescinded. Respondent shall reimburse Complainant in the amount of \$300.00 and shall permit Complainant to apply for promotions, retroactive to the date the discipline was imposed. The transfer shall remain in place, as Complainant has not requested rescission of the transfer.

DATED this ____ day
of **February 2005** at
Denver, Colorado.

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

CERTIFICATE OF MAILING

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

Kirk Patterson Brown
200 West 1st Street, Suite 203
Pueblo, Colorado 81003

And interagency mail to:

Christopher Baumann
Assistant Attorney General
Employment Section
1525 Sherman Street 5th Floor
Denver, Colorado 80203

Andrea C. Woods