

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**NICK GALBREATH,**

Complainant,

vs.

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

Respondent.

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Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on November 15, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. First Assistant Attorney General Stacy L. Worthington represented Respondent. Respondent's advisory witness was Ralph Krutsche, the appointing authority. Complainant appeared and represented himself.

**MATTER APPEALED**

Complainant, Nick Galbreath ("Complainant" or "Galbreath") appeals his five percent reduction in pay for ninety days by Respondent, Department of Human Services, Division of Youth Corrections ("DYC", Mount View Youth Service Center ("MVYSC") ("Respondent" or "DHS"). Complainant seeks back pay and removal of the disciplinary action upon his successful completion of a ninety day performance plan. Respondent seeks affirmance of the appointing authority's action and attorney fees.

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

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

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## **FINDINGS OF FACT**

### **General Background**

1. Complainant is employed by DHS at Mount View Youth Services Center (“MVYSC”) as a Correctional Officer II (“COII”), working as MVYSC’s Recreation Coordinator. As a COII, Complainant has supervisory duties over other staff members.
2. MVYSC is a DHS facility for youth who are adjudicated as delinquent. Residents at the facility range in age from 11 to 21. The facility is surrounded by businesses and residences.
3. Ralph Krutsche is the Assistant Director for MVYSC. He was delegated appointing authority over Complainant on July 9, 2004.
4. DYC employees are trained annually regarding agency and facility policies.

### **The Escape**

5. On June 20, 2004, Complainant was supervising a group of seven youths during a “yellow shirt recreation period.” Youth at MVYSC are assigned to yellow shirt recreation period when they have disciplinary or mental health issues. During such a recreation period, given the youths’ issues, a higher level of supervision is required.
6. During the final few minutes of the recreation period, Complainant directed the group to run laps around the soccer field.
7. As the youths were running around the soccer field, Complainant sat on the bleachers on the east side of the soccer field. After running a few laps, two of the residents stopped to talk to Complainant. While talking to the two residents, Complainant looked directly at them and did not look at the field for a brief period time.
8. When Complainant looked back at the group and did a head count he noticed that some of the residents were missing. Two sixteen-year old residents, NS and DC, had broken away from the rest of the group while they were out of Complainant’s direct sight.
9. Complainant began to do a search around nearby buildings for the two residents, finally sighting them running for the perimeter security fence. During his search, Complainant radioed a May Day to MVYSC’s Control Center.
10. Whilst he was conducting his search, Complainant yelled to the remaining five residents to return to their residence.
11. When Complainant sighted the two residents running for the fence, he went in pursuit of

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them, reaching them as they were attempting to go over the facility's perimeter fences.

12. One resident, NS, stood on the other resident's (DC's) shoulders, grabbed a protruding latch and escaped from MVYSC by climbing over the security fence.
13. The other resident, DC, was part way up the fence and dropped back to the ground when directed by staff to descend.
14. NS was at large for ten days after he escaped. He was apprehended breaking into a house.
15. The day after the incident, Csaba Cseresnyes (MVYSC Director), Krutsche, Brent Buford (the other MVYSC Assistant Director), Dan Beilfuss (Complainant's direct supervisor) and Complainant did a walk through of the entire incident.
16. During the investigation of the incident, Beilfus collected statements from the residents present during the incident.
17. Approximately two years prior to this escape, another resident had escaped at the same location on the perimeter security fence. The resident had utilized two latches on a pole at the fence to assist him in scaling the fence. Remedial measures were taken after that escape by removing one of the two latches and by greasing the fence pole.

#### **R-6-10 Meeting and Disciplinary Action**

18. On July 14, 2004, Krutsche held a R-6-10 meeting with Complainant. Krutsche, Complainant and Georgia Adame (a human resources representative for DYC) were present at the July 14<sup>th</sup> meeting.
19. During the July 14<sup>th</sup> meeting, Krutsche made a comment that the next time they met it would be to administer a disciplinary action. When Complainant asked if Krutsche had already made a decision, Krutsche apologized and explained that he meant a disciplinary hearing.
20. When Krutsche discovered that the tape recording of the July 14<sup>th</sup> meeting had not worked, a second R-6-10 meeting was held on July 28, 2004. The same parties were present.
21. During the second R-6-10 meeting Complainant reviewed the escape, drew Krutsche's attention to the previous escape at that point and admitted that he was not following DYC and MVYSC policies and procedures when he was talking to the two residents. He also admitted that he did not appropriately secure the other residents until after he called the May Day and other staff responded.
22. During the second meeting, Complainant asked Krutsche to take into consideration his past performance, his relationships with co-workers and residents, his prior disciplinary history, and the prior escape attempt at this location.

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23. Krutsche informed Complainant at the second R-6-10 meeting that he had not yet made a decision and would be reviewing the information from the investigation prior to doing so. He made this statement because Complainant had expressed concerns that Krutsche was predetermined to discipline him.
24. In reviewing Complainant's personnel file, Krutsche noted that Coomplainant had been nominated for employee of the month, gotten a number of positive comments from supervisors and his performance evaluations averaged at the third level (out of a possible four levels).
25. Prior to issuing the disciplinary action, Krutsche considered a range of actions, from a corrective action up through termination. He decided that a disciplinary action was appropriate because of the seriousness of the incident, the violation of a number of policies and the lack of protection of the community. In addition, another employee who had had an escape received a disciplinary action. Ultimately, Krutsche thought that a reduction in pay was an appropriate balance of all the factors.
26. On August 9, 2004, Krutsche disciplined Complainant, reducing Complainant's pay by five percent for 90 days. Krutsche disciplined Complainant because he believed Complainant had violated NYC and MVYSC policies and procedures by leaving the remaining five residents unsupervised and going in pursuit of the escapees, rather than insuring that the five remaining residents were secured.
27. The following pertinent NYC and MVYSC policies and procedures were violated by Complainant:
  - a. NYC Mission statement "to protect, restore, and improve public safety through a continuum of services..."
  - b. MVYSC Guiding Principles, in particular, to "provide a safe and just environment."
  - c. NYC Policy 9.3 I., which states "To ensure both juvenile and public safety, juveniles shall always be supervised by facility staff inside or outside of the facility unless authorized by the Director of the facility, his/her designee, or by order of the Court."
  - d. NYC Policy 9.12 III.C.1.a,b,c and d, which state, "In the event a juvenile(s) attempts to escape from the facility, the following procedures shall be followed: a) Immediately escort the remainder of the group/unit to a secure setting; b) Maintain direct control of the group; c) Conduct a population count; d) If possible, pursue the juvenile(s) immediately."
  - e. MVYSC Implementing Procedure 9.1 II.B.2, which states, "Staff must position themselves so as to be able to observe their entire group."
  - f. MVYSC Implementing Procedure 17.3 II.D, which states, in part, "Staff must position themselves in such a manner as to maintain constant surveillance of their residents."

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- g. MVYSC Implementing Procedure 9.12 V.A.1-4 (Attempted Escapes) and B.1 and 2 (Successful Escape), which state, “A.1) Call “May Day” and alert others of the situation and provide information necessary to resolve the situation; 2) Immediately secure the remainder of the group (stay with your unit); 3) Responding staff will secure the attempting escapee(s); 4) As soon as enough assistance arrives, move the attempting escapee(s) to a seclusion room for secure confinement” and “B.1) Immediately secure your group in the area. If on the pod lock residents in their sleeping rooms; 2) Call “May Day” and request immediate assistance from the Shift Supervisor.”

28. Complainant timely filed with the State Personnel Board his appeal of the disciplinary action.

## **DISCUSSION**

### **I. GENERAL**

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

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board’s 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.

### **A. Burden of Proof**

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent’s decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

## **II. HEARING ISSUES**

### **A. Complainant committed the acts for which he was disciplined.**

Complainant was disciplined for failing to properly supervise and secure the residents during the incident. Respondent established that there were DYC and MVYSC policies and procedures applicable to this situation and that Complainant had, by not supervising and securing the residents, violated those policies and procedures. Complainant’s arguments go to whether he should have been

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disciplined and the extent of the discipline. Complainant, during the second R-6-10 meeting, admitted that he did not properly secure the residents. Respondent established that Complainant committed the acts for which he was disciplined.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent demonstrated, and Complainant did not refute, that Respondent conducted a thorough investigation of the incident. There was a walk through of the incident the day after it occurred. Residents who were present were interviewed and gave statements. Complainant was interviewed and, when the tape recorder failed, there was a second interview.

Complainant's argues that it was arbitrary and capricious to discipline him because the remedial measures taken after the other escape were not adequate, thus contributing to MS' escape, and Krutsche had predetermined to discipline him. These arguments go to whether Krutsche considered the evidence before him and/or whether he reached a reasonable conclusion based on the evidence. It also goes to whether Krutsche acted contrary to rule or law and predetermined Complainant would be disciplined.

As discussed above, Complainant did violate DYC and MVYSC policies and procedures concerning escapes and the securing of other residents during such incidences. It was a lack of adequate supervision that allowed MS and DC to begin the escape. It was the amount of time that lapsed before their escape was discovered that allowed them to reach the fence and for DC to hoist MS high enough to facilitate his escape. Complainant's violation of not securing the other residents before pursuing the escapees created a dangerous situation. Telling them to return to the residence, whilst he pursues MS and DC, ignores the nature of the people whom Complainant is supervising and sets the stage for possible additional escapes. DYC and MVYSC policies and procedures clearly anticipated such a situation and established a rational procedure for handling it. There was no credible evidence that Krutsche did not consider all of the evidence nor that he reached an unreasonable conclusion.

With regards to Complainant's argument that there was a predetermination to discipline him, the credible evidence did not establish that this occurred. Complainant cites two incidences to support his argument. The first is the wording of the notice of the two R-6-10 meetings, that Krutsche has "gathered information that indicates the possible need to administer disciplinary action

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based on [Complainant's] supervision of residents..." This wording merely indicates the purpose of the R-6-10 meetings and that there is a possibility that disciplinary action may result. If an appointing authority is considering imposing discipline, then he or she must meet with employee to exchange information about the potentially violative behavior. Board Rule R-6-10, 4 CCR 801. Krutsche's wording appropriately gives Complainant notice about the possible consequences of the meeting. The wording does not indicate a predetermination that Complainant will be disciplined.

In addition, in reviewing all of the evidence, Krutsche's statement at the first R-6-10 meeting that the next meeting would be to administer disciplinary action appears to be what he claims it was – a slip of the tongue. There is no other indication whatsoever that Krutsche had predetermined Complainant should be disciplined. There was a thorough investigation, including the walk-through, collection of statements by the residents and the information provided by Complainant. When the tape recorder did not work, a second R-6-10 meeting was held. Finally, given the low level of discipline imposed, it is clear that Complainant's past history was taken into account and weighed against his serious violations.

Respondent has not acted arbitrarily, capriciously or contrary to rule or law in imposing discipline against Complainant.

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

Krutsche, prior to imposing discipline, considered the various possible actions he could take against Complainant. These ranged from a corrective action to termination. He considered mitigating factors, including the Complainant's evaluations and past history. He also considered the aggravating factor that there was an actual escape. Complainant argues that the only reason there was an escape was because the remedial measures taken after the prior escape had not been adequate.

Complainant's argument ignores Complainant's role in the incident. Complainant looked away from the residents running laps when two residents approached him. It is understandable and even commendable, that he was trying to focus on what the two residents were saying to him. However, it is that time period which allowed DC and MS to begin their escape. That time period, in fact, was long enough that when Complainant did look up, DC and MS were not in sight and had enough of a head start for MS to make a successful escape. Therefore, Complainant's role in the escape is an aggravating factor.

In addition to Complainant's distraction, his reaction to the discovery of missing residents must also be considered. The DYC and MVYSC policies and procedures clearly set out what the supervising staff member must do in case of an attempted escape. Complainant, simply, did not comply with those procedures, thereby creating a potentially dangerous second situation. Given these two aggravating factors it was appropriate to consider something more severe than a corrective action. A five percent reduction in pay is a measured response which balances Complainant's serious and deliberate behavior against his history and his well meaning, but violative, behavior.

The credible evidence demonstrates that Krutsche pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

**D. Attorney fees are not warranted in this action.**

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs, which is the Respondent in this action, shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. Complainant presented rational arguments and competent evidence to support his claims. In addition, there was no evidence that would lead to the conclusion that Complainant pursued his constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

**CONCLUSIONS OF LAW**

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

**ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 27<sup>th</sup> day of December, 2004.

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Kristin F. Rozansky  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-764-1472

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## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

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

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of December, 2004, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Nicholas Galbreath  
6493 Deframe Way  
Arvada, Colorado 80004

and in the interagency mail, to:

Stacy L. Worthington  
First Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
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Andrea C. Woods