

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LINDA ESCOBEDO,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS,
ZEBULON PIKE YOUTH SERVICE CENTER,

Respondent.

State Personnel Board Administrative Law Judge Mary S. McClatchey held the hearing in this matter on March 1, 2005, in the offices of the State Personnel Board. Complainant appeared through counsel, Patrick K. Avalos. Respondent appeared through Melanie Sedlak, Assistant Attorney General.

MATTER APPEALED

Complainant, Linda Escobedo (“Complainant” or “Escobedo”) appeals her disciplinary termination from employment by Respondent, Department of Human Services (“DHS”), Division of Youth Corrections (“DYC”), Zebulon Pike Youth Service Center (“Zebulon Pike” or “Respondent”). Complainant seeks reinstatement, back pay, and an award of attorney fees and costs.

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

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent’s disciplinary action against Complainant 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. Zebulon Pike is a DYC facility that houses youth convicted of criminal offenses. One of the primary goals of the facility is to provide treatment to the youth with the goal of rehabilitation.
2. At all times relevant, Complainant was employed as a Security Service Officer I at Zebulon Pike. Complainant's position involved direct contact with vulnerable persons.

Mandatory Reporting Requirements

3. Two separate policies that govern Complainant's employment contain mandatory reporting requirements with respect to criminal matters: DHS Policy VI-2.4, Background Investigation, and DYC Policy 3.21, Employee Background Search; Employee Reporting Responsibility; Trails Database Checks.
4. DHS Policy VI-2.4, Background/Purpose, states in part,

“Colorado Revised Statute 27-1-110 mandates that prior to the department's hiring of a state employee and/or a contracting employee who will have direct contact with vulnerable persons, applicants will have to successfully pass a criminal background check related to specific criteria as outlined in the statute. In addition, current employees in a position involving direct contact with vulnerable persons must report to their supervisor if they are arrested, charged with, or served a summons for any of the disqualifying criteria as referenced in the statute.”
5. Policies VI-2.4 and 3.21 both require that current employees whose positions involve direct contact with vulnerable persons must report to their employing agency an arrest, charge, or summons and complaint for specific “disqualifying offenses.”
6. The policies define “disqualifying offenses” to include:
 - a crime of violence
 - a felony or misdemeanor offense of child abuse
 - any felony or misdemeanor offense, the elements of which are substantially similar to the elements of the offenses listed above.
7. The policies require that employees must provide charging documents of arrests and/or charges for all disqualifying offenses “to their supervisor before returning to work.”
8. Both policies require that the employee must inform his or her supervisor of the disposition of the criminal charges.

9. Under both policies, any employee who fails to report required information may be terminated from employment; if any employee is convicted of a disqualifying offense, the employee shall be terminated from employment.
10. DHS Policy VI-2.4 establishes a process for handling self-reports. The supervisor immediately sends copies of the report to the Appointing Authority and the Director of the Background Investigations Unit (BIU); the Appointing Authority contacts the director of the BIU to discuss, qualify, and validate the charges; the employee is or may be suspended pending resolution of the criminal charges, depending on the nature of the offense.
11. Complainant was aware of the reporting requirements at all times relevant.

March 2001 Corrective/Disciplinary Action

12. On March 14, 2001, Respondent issued a disciplinary/corrective action to Complainant for failing to report a December 28, 2000 police contact to Zebulon Pike, and for performance issues. The disciplinary action consisted of a six-month pay reduction. The corrective action included the following: “Effective immediately, in accordance with policy 3.21, you are to report all police contacts. In addition, you will produce copies of all court documents related to your arrest on December 28, 2000. This will include notices to appear, and the disposition of the case itself. You or your representative will produce these documents within 24 hours of a court appearance, as it relates to the arrest on December 28, 2001.” The corrective action included a directive that Complainant participate in a chemical dependency program.

April 2002 Charge of Felony Child Abuse

13. On April 22, 2002, Complainant was charged with felony child abuse and reckless endangerment. The incident involved her being under the influence of alcohol and driving a car while having custody of her children.
14. The felony child abuse charge against Complainant is a “disqualifying offense” under DHS Policy VI-2.4 and NYC Policy 3.21.
15. Complainant failed to report the child abuse charge to any individual at Zebulon Pike. She did not provide a copy of the charging documents to any individual at Zebulon Pike.
16. On March 4, 2004, Complainant reached a negotiated disposition of her criminal case arising out of the child abuse charge. Complainant plead guilty to reckless endangerment, and received a deferred sentence.
17. Complainant did not report the disposition of her case to any individual at Zebulon Pike.

August 2004 Charge of Felony Menacing

18. On August 15, 2004, Complainant was charged with three counts of felony menacing with a real or simulated weapon. The incident involved allegations that she was in an intoxicated state, walking around the area outside her home, engaging in a heated exchange with neighbors, and swinging an object in a threatening manner.
19. On August 17, 2004, Complainant called Zebulon Pike Director Leo Navarro to report that she had been arrested. She stated that she had not reported the event within 24 hours because she had been in jail.
20. Navarro directed her to fax him the charging documents. She did not comply with this directive.
21. Navarro considered the felony menacing charge to be a crime of violence under the definition of “disqualifying offense” in policies VI-2.4 and 3.21. He was unfamiliar with the elements of felony menacing. He was also unfamiliar with the elements of a “crime of violence” as defined by policies 3.21 and VI-2.4.
22. On August 25, 2004, Navarro sent Complainant a letter placing her on administrative leave and directing her not to return to the Zebulon Pike premises. Complainant has been on leave since that date and has not returned to work.
23. Navarro scheduled a pre-disciplinary meeting to address the incident.

September 10, 2004 Pre-disciplinary Meeting

24. On September 10, 2004, Complainant and her attorney attended the pre-disciplinary R-6-10 meeting with Navarro and his representative, a Human Resource Specialist.
25. Navarro asked Complainant to describe the events of August 15, 2004. Her attorney advised her not to speak at all regarding the August 15, 2004 pending criminal matter, premised on her 5th Amendment right not to incriminate herself. Complainant’s counsel informed Navarro that she had been charged with three counts of menacing, and that she was denying all charges.
26. Navarro asked, “Are there any other charges that you should have reported?” Complainant’s attorney responded that no other charges were pending against her. Navarro asked, “So you’re saying that this is the only situation that you should have reported. . . is that what I understand?” The Human Resources Specialist asked, “Since you’ve been employed here?” Complainant’s attorney answered that she had provided all required information. Complainant said nothing.
27. Navarro asked why Complainant had not provided a copy of the charges against her, as he

had directed her to do. Her attorney responded that they had waited until the pre-disciplinary meeting to address the issue, stating that he felt she had complied with all state personnel rules by advising him of the charges, of the next court date, and by denying all charges.

September 30, 2004 Pre-disciplinary Meeting

28. Navarro scheduled a second, follow-up pre-disciplinary meeting for September 30, 2004. The same individuals attended this meeting.
29. Navarro opened the meeting by asking Complainant if she had been previously given corrective or disciplinary action for similar matters. She stated, "No." Navarro then stated that his records showed she had received a March 14, 2001 disciplinary/corrective action for a violation of DYC policy 3.21, which directed her to comply with that policy. He pointed out that the corrective action stated, "Effective immediately in accordance with policy 3.21 you are to report all police contacts."
30. Complainant responded, "[Y]ou know, that should have been a yes and I was given that . . . I really can't remember the circumstances around that, but I always reported police contact . . . every ticket, everything I've ever gotten."
31. Navarro asked Complainant if she had been arrested on April 22, 2002. She stated that she had and that she had reported it. He asked what were the charges; she responded, "I'm not sure."
32. Navarro stated that he had information indicating that on April 22, 2002 she had been charged with child abuse. She responded, "No that was reckless endangerment."
33. After Navarro stated that he had the police records from the incident, Complainant acknowledged that her initial charge was child abuse.
34. Navarro pointed out that charges such as child abuse are disqualifying offences under DYC and DHS policy 3.21, and that she was required to self report that charge to DYC directors within twenty-four hours.
35. Complainant stated that she had reported it to Jema Hill, who had been the Director of Zebulon Pike in 2002. She stated, "I reported it . . . I reported to her every time I went to court. . . I reported to her every time I had any contact with my attorney. . . I reported to her every time I needed to take off of work to go to court."
36. Navarro asked when and what the final disposition of the child abuse charge was; Complainant responded that she did not know. Navarro stated that he had information indicating she had been convicted of reckless endangerment, a misdemeanor. He stated that DHS and DYC policy 2.2 requires employees to report all convictions of felony or misdemeanor offenses, and he asked Complainant if she had reported it.

37. Complainant responded that she had reported it to Director Hill.
38. Navarro asked Complainant why she had not disclosed the reckless endangerment conviction at the previous pre-disciplinary meeting on September 10, 2004. Complainant's attorney responded that she had not needed to, and that the incidents were two years old.
39. Navarro stated that he took reporting requirements seriously, and, as a facility charged with the treatment of vulnerable persons, he took the honesty and integrity of employees very seriously.
40. Navarro then stated that he had spoken with Ms. Hill regarding the question of whether Complainant had reported the April 2002 child abuse charge and the final disposition to her. He stated that Ms. Hill stated Complainant had not reported anything about it, and that there was nothing in Complainant's personnel file regarding the charges.
41. Complainant's counsel stated that because the final disposition of the child abuse charge, the plea to reckless endangerment, had been a deferred judgment, it was not considered a conviction under State Personnel Board rules. Navarro stated that he could not confirm that at that time.
42. At hearing, Complainant testified that she had reported the April 2002 child abuse charge to then-Assistant Director of Zebulon Pike Marsha Jackson. This was the first time she had made this claim. Her testimony regarding self-reports of the child abuse charge to both Hill and Jackson is found not to be credible.
43. Navarro reviewed Complainant's personnel file. Her performance ratings were consistently "Competent."

Termination Letter

44. On October 4, 2004, Navarro sent a termination letter to Complainant. The letter stated in part:

He had considered "all the information you presented during the R-6-10 meeting, verbal and written statements of other witnesses, your failure to report a qualifying charge after specifically being directed to report all police contact in your corrective action dated March 2001, review of the Lawrence Bill, DHS policy VI-2.4 Background Investigations and DYC Policy 3.21 Employee Background Search; Employee Reporting Responsibility; Trails Database Checks, the DHS Code of Conduct, and your prior corrective and disciplinary actions, and your most recent charge involving menacing with a simulated weapon. This last charge has a potential impact to the agency. Based on this information, I have determined that disciplinary action is appropriate."

45. Navarro cited Complainant for “inability to perform the job and for willful misconduct or violation of department rules or law (specifically CDHS policy VI-2.4 Background Investigations and DYC policy 3.21 Employee Background Search; Employee Reporting Responsibility; Trails Database Checks) that have a direct affect on your ability to perform the job.”

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 THE ACTS FOR WHICH SHE WAS TERMINATED

April 2002 Child Abuse Charge. Complainant intentionally violated the self-reporting policies that governed her employment by failing to report the April 22, 2002 felony child abuse charge, and by failing to provide a copy of the charging documents and the final disposition to her supervisor. In violating policies VI-2.4 and 3.21, she also violated the 2001 corrective action. At the R-6-10 meeting on September 10, 2004, after Director Navarro asked her if there had been any additional previous criminal charges she was required by agency rules to report, she failed to disclose the April 2002 charge. These acts and omissions constitute sufficient grounds for termination.

Complainant argues that because her ultimate conviction arising out of the 2002 incident was a plea to reckless endangerment, which is not a disqualifying offense, policies VI-2.4 and 3.21 did not require her to report it. This argument ignores the language of Policies VI-2.4 and 3.21, which require, “The employee shall inform his or her supervisor of the disposition of the criminal charges” that originated as disqualifying offenses.

Complainant also argues that her reckless endangerment conviction involved a deferred

sentence; therefore, it does not constitute a “final conviction” under the State Personnel Board Rules. In fact, Board Rule R-6-9(5) and (6) defines a “final conviction” to include “acceptance of a deferred sentence.” 4 CCR 801 (2004).

August 2004 Felony Menacing Charge. Complainant argues that because felony menacing is not a disqualifying offense as defined by either policy VI-2.4 or 3.21, she cannot be held accountable for failing to provide copies of the charging documents to Navarro. Even assuming that felony menacing is not a disqualifying offense, and therefore Complainant was not required by the agency policies to provide Navarro with a copy of the charging documents, the broader context must also be considered.

Board Rule R-6-9 states in part, “Reasons for discipline include:

- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job; . . .
- (5) final conviction of a felony . . . that adversely affects the employee’s ability to perform the job or may have an adverse effect on the department if employment is continued. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court; and,
- (6) final conviction of an offense of a Department of Human Services’ employee subject to the provisions of C.R.S. 27-1-110. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court.” (Emphasis added.)

Subsection (6)(A) states,

“An employee who is charged with a felony . . . that adversely affects the employee’s ability to perform the job or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending a final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits. **Department of Human Services’ employees charged with an offense as defined in C.R.S. 27-1-110 may be indefinitely suspended without pay pending final disposition of the offense.**” (Emphasis added.)

Appointing authorities have the discretion and authority to order an employee to provide charging documents involving felonies that may “adversely affect the employee’s ability to perform the job or may have an adverse effect on the department.” Such information is critical to the manager’s determination of whether to place such an employee on leave or not.

In this case, Navarro was aware that Complainant had a criminal history and had been previously corrected and disciplined for failing to self-report a criminal matter. Faced with Complainant’s charge of felony menacing, he acted well within his discretion by ordering

Complainant to immediately fax him copies of the charging documents. Her failure to comply with this directive, particularly as an employee of DHS, constituted willful misconduct that appropriately subjected her to disciplinary action.

III. RESPONDENT’S ACTION WAS NOT ARBITRARY OR CAPRICIOUS

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

The preponderance of evidence demonstrates that Respondent used reasonable diligence to ascertain all information necessary to make a fully informed decision. Further, Director Navarro held two separate pre-disciplinary meetings in order to provide Complainant with a full and fair opportunity to provide mitigation.

DHS must be able to trust its employees to self-report in compliance with its policies, and as mandated by section 27-1-110, C.R.S. DHS cannot afford to employ individuals who demonstrate a pattern of willfully disregarding the self-reporting policies designed to protect those it serves.

Complainant requested an award of attorney fees and costs. Because she has not prevailed on her claims at hearing, such an award is not warranted.

CONCLUSIONS OF LAW

1. Complainant committed the acts upon which the discipline was based;
2. Respondent’s action was not arbitrary, capricious, or contrary to rule or law;
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

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

DATED this ____ day of _____

April, 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 **April, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Patrick K. Avalos
132 West "B" Street, Suite 280
Pueblo, Colorado 81003

And in the interagency mail to:

Melanie Sedlak
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods