STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B039**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BETTY SHEA,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, SPRING CREEK YOUTH SERVICE CENTER,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on March 15, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. The record in this case was held open until April 17, 2006, for the submission of written proposed findings of fact and a review of the file and evidence to determine that the evidence could be properly closed at that point. Assistant Attorney General Roberta Lopez represented Respondent. Respondent's advisory witness was Elise Strada. Complainant appeared and was represented by Nora Kelly, Esq.

MATTER APPEALED

Complainant, Betty Shea ("Complainant") appeals her termination by Respondent, Department of Human Services, Spring Creek Youth Services Center ("Respondent"). Complainant seeks reinstatement, back pay and benefits, and an award of attorney fees.

For the reasons set forth below, Respondent's action is **rescinded.**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

FINDINGS OF FACT

Background:

1. Complainant had been employed as a Correctional Youth Security Officer I ("SSO I") at Spring Creek Youth Services Center in Colorado Springs, Colorado, since July 1999. Complainant was certified to her position at the time of her termination from employment effective November 15, 2005. The SSO I position holds no supervisory authority and does not function as a team leader.

2. At the time of the incident which resulted in her termination, Complainant was assigned to the unit at the facility referred to as Puma Pod.

3. Michelle Smith and Tamra Drake also held the position of SSO I and were also assigned to Puma Pod during the relevant time period. Douglas Lockett was Complainant's appointing authority.

Events of October 11, 2005:

4. Complainant was scheduled to work from 6 a.m. until 2 p.m. on October 11, 2005.

5. A group life meeting was usually scheduled for the afternoon of the second Tuesday of the month. When a group life meeting is held at the facility, the meeting time is scheduled so that it bridges the morning and afternoon shifts. Morning shift workers are either assigned to come in at 6 a.m. and receive extra time off later in the week to account for the fact that they stayed late for the meeting, or are given a later start time for the shift that day.

6. On October 11, 2005, the group life meeting ended early.

7. Complainant had shared a ride into the work that morning. The individual with whom she had driven to work received permission to leave work early.

8. Complainant was given permission by one of her supervisors, Ron Uhrick, to leave work early as well so she that could catch her ride home. Complainant returned to Puma Pod to pick up her belongings.

M.F.'s Letter:

9. When Complainant entered Puma Pod to collect her belonging, Tamra Drake was on duty and logging the mail for Puma Pod residents.

Logging Mail:

10. The logging of resident mail at the facility is a process by which mail is examined briefly for contraband or other problems. The process requires the staff to open the envelopes and to scan the letters inside. Scanning a letter is not the same as reading the letter. A scan is a quick review of the pages to see if there are gang symbols or other problems with the content of the letter. Reading a letter, on the other hand, typically refers to reading each word of the letter from left to right.

11. Under the governing facility directives, every piece of mail is scanned. Mail is not to be read, however, unless several specific criteria are met.

12. One of the residents, M.F., received a letter from her father on October 11, 2005. Ms. Drake was reviewing M.F.'s letter when Complainant returned to Puma Pod to retrieve her belongings.

13. Two lines in the letter from M.F's father said that when M.F. felt like giving up, to let him know and they would do it together so they could end together, or something similar.

14. Ms. Drake expressed her concern about these two lines to Complainant, and asked Complainant to review the lines and tell her what she thought should be done with the letter.

15. Complainant reviewed the two lines of the letter. She was also aware that M.F.'s father was incarcerated at the time for killing M.F.'s mother. Complainant considered the two lines in the letter to be M.F.'s father's suggestion that father and daughter could commit suicide together.

16. Complainant told Ms. Drake that she wouldn't give the letter to M.F., but that Ms. Drake might ask another staff member with more experience in this area.

17. Complainant handed the letter to Ms. Smith, who was also standing nearby. Complainant then left the facility and went home.

18. Ms. Smith reviewed the two lines in the letter and decided that the two lines were an invitation for a suicide pact. While Ms. Smith was talking with Ms. Drake about the issue, she noticed that M.F. was in the pod and was watching them intently, as if she was aware that they were discussing her letter.

19. Ms. Smith then took the letter to another staff member, Antonio Dionisio, to ask what should be done with the letter. Mr. Dionisio was a Youth Services Counselor I at the time of this incident. He had been a direct supervisor of the SSO I staff assigned to Puma Pod earlier in 2005.

20. Mr. Dionisio told Ms. Smith that he was no longer a supervisor with any authority over this type of issue, but that he believed that the letter should be provided to M.F. and that Ms. Smith should take the letter to the current unit supervisor, Sharon Ferguson. Mr. Dionisio also recommended that Ms. Smith speak with the unit therapist, Gina Harvey, for advice on how to handle the matter. Ms. Harvey was a therapist with Pikes Peak Mental Health Services and had conducted many of the suicide assessments for Puma Pod residents.

21. Ms. Smith then spoke with Ms. Harvey and provided Ms. Harvey with the letter. Ms. Harvey advised that the letter should be given to M.F., and then M.F. should be monitored to see if there was any change in behavior. An Extended Suicide Risk Assessment could be conducted if M.F's behavior indicated a need for one after she had reviewed the letter.

22. Ms. Smith communicated the results of her conversations with Ms. Drake. Ms. Drake provided the letter to M.F.

23. M.F. was not exhibiting any signs which would place her in a risk category for an extended suicide assessment prior to the point when her letter was reviewed.

24. No extended suicide risk assessment was performed on M.F. even after she had received her father's letter.

The Facility Audit:

25. As is true for all Division of Youth Corrections facilities, Spring Creek undergoes periodic audits by the Department of Human Services. Rudy Presas, Program Manager, was part of the assessment team for these audits.

26. Spring Creek was audited by a team of quality assurance personnel, including Mr. Presas, in mid-October, 2005.

27. During the audit, Mr. Presas noted that several of the residents of Puma Pod had complained that staff members were improperly reading their mail. Complainant was one of the named staff members, and M.F. was one of the residents who had informed Mr. Presas of the mail issue.

28. Mr. Presas informed Mr. Lockett of the results of his portion of the audit both prior to the audit team's exit interview and during the exit interview on October 14, 2005. He also included his results in a written audit report delivered in mid-November 2005.

29. Mr. Lockett followed up on the audit finding and asked the Puma Pod supervisors if there had been any reports from residents concerning mail procedures. The supervisors did not provide him with any reports of issues relating to the mail procedures.

Complainant's Complaint Concerning Ms. Ferguson:

30. On October 18, 2005, Complainant reported her direct supervisor, Sharon Ferguson, for possible workplace violence stemming from an incident where Ms. Ferguson was alleged to have responded angrily and loudly to Complainant's question about work assignments.

31. Workplace violence allegations at the facility are investigated by Scott Bowers, Safety Manager. Complainant filed her information with Mr. Bowers.

32. Mr. Bowers decided that the matter was a possible abuse of authority rather than a workplace violence issue because it appeared to involve belittling behavior. He referred the matter to Mr. Lockett on October 28, 2005, for resolution. Mr. Bowers also informed Complainant on the same date that the matter had been referred to Mr. Lockett.

33. Prior to the time that Mr. Bowers referred Complainant's complaint concerning Ms. Ferguson to Mr. Lockett for resolution, Mr. Lockett contacted Complainant by phone about the matter. During this phone call, Mr. Lockett informed Complainant that he thought her complaint was shabby at best. He asked Complainant if she would mediate the matter, and Complainant declined to do so.

34. Mr. Lockett made arrangements so that Complainant would not need to report to Ms. Ferguson until the matter had been resolved.

35. Once the matter was referred to Mr. Lockett for resolution, he informed Complainant that he would address her complaint about Ms. Ferguson only after he had addressed the matter of Complainant's performance which would be the subject of an upcoming 6-10 meeting.

Mr. Lockett's Investigation and Decision to Impose Discipline:

36. When Mr. Lockett investigated the mail issue in the audit report, he examined the Puma pod logs and found that no staff member had noted that M.F.'s mail had been read on the date in question.

37. Mr. Lockett decided to hold a 6-10 meeting with Complainant. He issued a letter dated September 12, 2005, in which he referenced a possible need to administer disciplinary action based on violation of the Division of Youth Corrections and Spring Creek Youth Service Center policies for mail handling.

38. The 6-10 meeting was held on October 31, 2005. It was attended by Mr. Lockett, Complainant, and Jim Nyland, the human resources representative for Spring Creek.

39. During the meeting, the parties discussed the mail handling allegations, and M.F.'s allegation was specifically referenced. Complainant told Mr. Lockett that she gave advice on the two lines, as requested by Ms. Drake, and that was the extent of her involvement. She told Mr. Lockett that she had been infrequently involved in the mail handling because it came in at the end of her usual shift and was logged and handed out by the following shift.

40. Mr. Nyland also asked Complainant what steps she had taken insofar as her concerns about the two lines in the letter. Complainant told him that she hadn't done more than express to Ms. Drake that the concerns needed to be raised with someone with more experience than herself.

Spring Creek Mail Handling Policy:

41. When Mr. Lockett evaluated the matter, he considered the policies which govern mail handling at the facility.

42. Division of Youth Service Policy No. 18.2, "Communications: Mail, Visits, and Telephone," provides, in relevant part:

D. Juveniles' letter and packages may be opened and inspected for contraband in front of the juvenile or a representative of the juvenile population…

2. If no contraband is found, the letters and packages shall immediately be given to the juvenile.
3. If contraband is found, the letter or package and its contents shall be directed to the supervisor on duty with the infraction fully documented in accordance with facility procedures. The juveniles shall be advised on the action.
4. Letters shall not be routinely read. However, when a staff member has determined that a threat to the safety and security of other juveniles, staff, or the general public exists, a juvenile's correspondence shall be withheld, censored or rejected at that time, as determined by the staff person who has read the letter.

a. The juvenile shall be fully informed when incoming or outgoing mail is withheld in part or in full.

b. The reason(s) for the action taken shall be fully documented in the juvenile's permanent file…

43. Spring Creek Youth Services Center Policy No. 18.2, "Communication: Mail, Visits and Telephone", provides additional instruction on the facility's inspection and reading of mail. In the portions of that policy relevant to the facts of this matter, the facility policy states:

II. PROCEDURES

A. Written guidelines governing correspondence by residents at Spring Creek Youth Services Center will be made available to all detained juveniles upon admission.

1. A list of contraband will be posted and each juvenile made aware that incoming mail will be inspected.

   a. Contraband includes but is not limited to:
      - Money
      - Drugs
      - Weapons

   b. Residents are not allowed to send or receive envelopes marked with profanity or gang-related graffiti (i.e., marked with x's, Westside W's, drawings of gang or violent ideation, etc.) ...

C. Letters and packages received by residents will be inspected for contraband...

2. Staff will open mail in the presence of residents to check for contraband.

3. If no contraband is found, the package/letter will be given to resident immediately after inspection...

4. If contraband is found, the package/letter will be directed immediately to the shift supervisor, and the resident will be advised of the action being taken.

   a. An Incident Report will be completed when contraband is found.

      (1) Copies of Incident Report is placed in youth's file and forwarded to agency director.

   b. Contraband will be noted on Contraband Log Sheet and placed in the locked box...

E. Residents' incoming and outgoing mail will not be read by staff unless there is cause to believe the safety and security of other

juveniles, staff, or the general public is threatened. In such cases:

1. Staff will open the letter in the presence of the youth.

   a. Staff must document that resident mail has been read and include the following information:

      (1) Name of resident
      (2) Name of staff reading the letter
      (3) Date and time
      (4) Reason for reading

F. Residents' incoming and outgoing mail will not be withheld unless there is cause to believe the safety and security of other juveniles, staff, or general public is threatened.

   1. When withholding mail, staff are to follow procedures as outlined in Section C, 1 – 5 of this procedure...

44. As a practical matter, the facility staff distinguished between scanning for contraband and reading a letter as a part of a contraband review by the specific nature of the review. Scanning would be conducted by quickly reviewing a portion of the words in the document, usually the words located at the center of each page of a letter, and looking for symbols or pictures which may be contraband. Reading, on the other hand, would include a word-by-word, left-to-right review of the document.

<u>Suicide Assessment Policy</u>:

45. Mr. Locket considered the facility's suicide assessment policy in assessing Complainant's performance.

46. Division of Youth Corrections Policy 15.2, "Suicide Assessment, Monitoring and Intervention," includes, in relevant part:

   II. DEFINITIONS:...

      B. Extended Suicide Risk Assessment: An additional assessment of the juvenile to determine the extent of risk of harm to self or others...

III. RISK RATING CRITERIA;

1. No Apparent Risk: Through the application of the Imminent Risk Screening form or the Extended Suicide Risk Assessment form and activities, there is no apparent indication that the individual displays an explicit or implicit risk of harm to self or others.

2. Possible Risk: Individuals who do not show any current signs or either explicit or implicit suicidal threats OR THREATS OF HARM TO OTHERS but who may meet one or more of the following conditions:

   a. There is a history (within the last 12 months) of suicidal threats, suicidal gestures, or of a serious suicide attempt.

   b. The juvenile appears depressed, anxious, emotionally unstable or PRESENTS A RISK OF VIOLENCE and has had thoughts of or indicates concern about self harm.

   c. There are circumstances in the juvenile's life which prompt staff to be concerned about the threat of self harm or suicide including, but not limited to, the following: PROBLEMS IN COPING WITH CUSTODY (SERIOUSNESS OF THE CHARGES, FACILITY TRANSFERS, ETC.) BREAKDOWN IN RELATIONSHIPS, LACK OF OUTSIDE CONTACT, RISK OF VICTIMIZATION.

   d. There is a recent history of self-harm.

3. Definite Risk: Individuals who indicate any one of the following in addition to meeting the criteria for Possible Risk:

   a. There is a recent history of suicidal threats, suicide gestures or suicide attempts (within the past 30 –45 days).

b. There is suicidal AND/OR HOMICIDAL thinking.

c. There is suicidal AND/OR HOMICIDAL talk.

4. Imminent Risk: individuals who meet the criteria for Definite Risk and additionally meet any one of the following criteria:

a. Makes adamant verbal or written statements regarding suicidal AND/OR HOMICIDAL intent.

b. Demonstrates intent to avoid or evade staff attempts to prevent suicide.

c. Has made a serious suicide attempt (with high lethal intent) within 48 hours of the interview…

IV. PROCEDURES …

B. Guidelines for the Extended Suicide Risk Assessment of a Juvenile:

1. Any juveniles residing in a Division of Youth Corrections' facility or program who is judged to be a Possible, Definite or Imminent Risk, either initially or at any other time while in residence, shall be immediately placed on Special Observation Status (SOS) and an Extended Suicide Risk Assessment shall be completed.

2. The Extended Suicide Risk Assessment shall be completed by a trained staff member, SSO I or above.

3. The Extended Suicide Risk Assessment shall minimally include:

4. If, as a result of the Extended Suicide Risk Assessment the juvenile is rated as No Apparent

Risk, the juvenile shall be removed from Special Observation Status (SOS) without further actions, utilizing the facility's procedures for removal from Special Observation Status.

5. If, as a result of the Extended Suicide Risk Assessment the juvenile is rated as a Possible, Definite, or Imminent risk for harm to self or others, the following shall be completed by the designated, responsible staff:

    a. Place juvenile on Suicide Precautions Monitoring (SPM).
    b. Notify the shift supervisor, the SSOI who has direct supervisor for the juvenile, the legal guardian, and the Client manager in accordance with the facility's implementing procedures. Document each contact on the EXTENDED SUICIDE RISK ASSESSMENT FORM with the name, date, and time of the contact.
    c. Outline a suicide action plan using the Suicide Risk Action Plan…

E. Designation of Staff Responsibilities and Duties:

1. The Imminent Risk Screen and the Staff Impression Rating Scale shall be completed either by a trained staff person admitting the juvenile into the facility or a trained supervisor on duty at the time of the juvenile's admittance.

2. Extended Suicide Risk Assessment shall be completed by a specifically trained staff person, SSO I or above, or by a mental health specialist…

Staff Code of Conduct:

47. Mr. Lockett considered the Staff Code of Conduct in reaching his decision in this matter.

48. The Staff Code of Conduct includes, in relevant part:

> All employees at the Colorado Department of Human Services are expected to:
> ...
> Be truthful, honest, and courteous to co-workers and to customers at all times.
> Listen actively and share information in open, honest, and appropriate ways.
> Demonstrate respect for all people and their ideas, and commit to resolve conflicts.
> Be considerate of fellow workers when performing job tasks.
> Accept responsibility for own mistakes; ask for clarification and guidance when unsure about job duties.
> ...
> Do your job proactively; don't wait to be told; see the problem, ask for guidance if needed, solve the problem and inform others what was done.
> Propose solutions to problems.
> ...
> Take initiative about seeking communication; don't always wait for it to come to you.
> Be committed to your job and present yourself as a good role model.
> Treat others as they wish to be treated.
> Have a CARE attitude (**C**aring **A**ttitude **R**eaps **E**xcellence).

Complainant's Past Performance:

49. Mr. Lockett also considered Complainant's performance in making his decision.

50. Complainant has one disciplinary action from July, 2004. Complainant was docked $500 in pay based upon the fact that Complainant had maintained contact with a resident during the period of time in which such contacts are disallowed after a resident's release from the facility, and had failed to report suspected child abuse by this former resident.

51. Complainant has had one corrective action from 2003. This corrective action was instituted as a result of Complainant sending

a card to a resident who had left the facility shortly prior to the sending of the card.

52. Complainant's mid-year performance evaluation immediately prior to her termination rated her as meeting or exceeding expectations in all areas. The evaluation specifically notes that Complainant "needs to be more aware of mail procedures and ensuring they are followed," and that "[o]verall, Ms. Shea does a solid job with safety and security. She pays attention to the status of residents and makes sure checks are done appropriately." Complainant signed the evaluation on October 31, 2005.

53. Two of Complainant's prior direct supervisors testified at hearing that Complainant had been a reliable and enthusiastic employee, open to feedback and instructions on how to modify her work, and empathetic to the residents. These two supervisors worked with Complainant from the beginning of her employment until September 2005.

54. In May 2002, Complainant received a certificate as a Colorado Department of Human Services Employee of the Year for direct service. Complainant has also received recognition in 2002 for her work in support of the restorative justice program.

55. Complainant has also had performance documentation added to her file. This documentation was most often in the form of a memorandum of understanding ("MOU"), although some of the documentation was in the form of a letter or memo. In order of most recent to oldest, Complainant's performance documentation includes:

    a. Complainant received a letter dated December 11, 2003, describing an incident in which Complainant had released information about the facility to the public without having first cleared the release through Mr. Lockett.

    b. In November of 2002, a supervisor issued an MOU to Complainant because she and another staff member were both standing outside of the pod area at the point when the supervisor had walked past, and that this had allowed the rest of the pod to be unattended.

    c. In August of 2002, Complainant received an MOU because she had twice failed to read the schedule

and realize that she had been scheduled to start work at 6 a.m. These two events took place in May and August in 2002.

d. Complainant received a June 27, 2000 MOU concerning the fact that she allowed two residents to be out of their rooms at the same time while they were on special program requirements which should have permitted only one resident out at a time.

e. Complainant received a letter dated December 7, 1999, from the facility supervisor. The letter recorded that a staff member had called the facility at 1:30 a.m. asking to talk with a resident, and that Complainant had awakened the resident to speak with the staff member. The correct procedure would have been to ask the facility supervisor whether the call should be put through.

56. Mr. Locket decided that Complainant was operating from her heart and not according to policy, and that her performance history showed that she allowed residents to be in a position to harm themselves because she was not paying attention to departmental policy.

The Termination Letter:

57. In his November 3, 2005 termination letter, Mr. Lockett determined that Complainant's actions constituted "failure to perform competently, willful misconduct or violation of rule or law that affect your ability to perform your job, or willful failure to perform."

58. Mr. Lockett adopted the version of events that Complainant had discussed at the 6-10 meeting. Mr. Lockett then argued:

> Ms. Shea, in this instance, you were the senior person present. Ms. Drake has been employed here for a shorter time period than you. You have a person who is junior to you in time in grade seeking advice. You advised Ms. Drake to not give her the correspondence because you felt that it was likened to a suicide pact with her father. That being said, you then proceeded to disassociate yourself from the incident when in fact is was your duty to adhere to the policy as prescribed in DYC Policy 15-2, Suicide assessment, monitoring and intervention.... You completely disregarded

this policy on a female whom you believed to be involved in a suicide pact with her father. Then, you turned your back on the entire incident and failed to even raise this issue with a supervisor.

59. Mr. Lockett addressed the facility mail policy concerning the necessary documentation when mail has been read, and stated:

> You failed to comply with this implementing procedure. We have a case of the letter being opened and confiscated. By your own admission, the youth were "on the unit" when you arrived. Your junior worker asked for advice, you failed to point the junior worker to the policies/implementing procedures for this situation nor did you, with the knowledge of the occurrence adhere to the policy/procedure or even report it to the facility supervisor.

60. Mr. Locket found that Complainant had violated Spring Creek Implementing Procedure 18-2 Paragraph E.1 regarding the handling of resident mail and DYC Policy 15.2 as to the implementation of an Extended Suicide Assessment.

61. Mr. Lockett terminated Complainant's employment effective as of November 15, 2005.

62. Mr. Lockett also issued a corrective action to Ms. Drake for her actions regarding M.F's letter.

General Discussion:

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, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12B, 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) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) 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*, 886 P.2d at 708. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

Hearing Issues

I. Complainant committed the acts alleged:

The essential historical facts of this matter were not in dispute in this case. As the findings demonstrate, Mr. Lockett adopted Complainant's version of events in his November 3, 2005 termination letter. He imposed discipline on the grounds that Complainant came into Puma Pod to retrieve her belongings and to go off duty, that Complainant had been asked to review two lines of a letter that another staff member was logging, that she did review those lines and offered her opinion, and then left.

While the proper level of responsibility that Complainant bears in this matter was a matter of great contention in this proceeding, there was no significant question in hearing that the version of events from October 11, 2005 was as Complainant explained.

II. Respondent's disciplinary action was arbitrary or capricious:

A. Defining arbitrary or capricious action for purposes of a personnel case:

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).

B. It is arbitrary or capricious to hold Complainant responsible for violating the two cited policies:

Respondent asserts that Complainant had several duties that she was to perform upon reading the two lines in M.F.'s letter. One duty was to either perform or arrange for an extended suicide assessment under DYC Policy 15-2.

The other was to log the fact that she had read the letter under Spring Creek Implementing Procedure 18-2 Paragraph E.1.a. Neither assertion is reasonable under these circumstances.

(1) Holding Complainant responsible for failing to provide an extended suicide assessment to M.F. is unreasonable under the circumstances:

Respondent argues that M.F. was someone who Complainant should have considered to be a possible suicide risk because of the two lines in the letter from her father and who would be subject to an extended suicide assessment under DYC Policy 15-2. This argument is not supported either by the facts or by the policy itself.

(a) No Extended Suicide Assessment was necessary in this case:

Complainant's advice was that the two troubling lines of the letter should not be provided to the youth, thereby eliminating the reason why any suicide assessment may become necessary. Mr. Lockett's explanation in the termination letter that Complainant "completely disregarded the policy on a female who you believe to be involved in a suicide pact with her father" is incorrect as a factual matter – Complainant did not believe that M.F. was in a suicide pact, but that her father was suggesting one.

Even if the letter was to be provided to M.F., however, the appropriate procedure under DYC Policy 15-2 would be to wait and see if M.F. demonstrated any of the behaviors which would trigger an Extended Suicide Assessment.

DYC Policy 15-2 defines "Possible Risk "as:

> Individuals who do not show any current signs of either explicit or implicit suicidal threats or threats of harm to others but who may meet one or more of the following conditions:
>
> a. There is a history (within the last 12 months) of suicidal threats, suicidal gestures, or of a serious suicide attempt.
>
> b. The juvenile appears depressed, anxious, emotionally unstable or presents a risk of violence and has had thoughts or of indicates concern about self harm.
>
> c. There are circumstances in the juvenile's life which prompt staff to be concerned about the threat of self harm or suicide including, but not limited to, the

following: problems in coping with custody (seriousness of the charges, facility transfers, etc.), breakdown in relationships, lack of outside contact, risk of victimization.

d. There is a recent history of self-harm.

Under this policy, a juvenile resident is not within the Possible Risk category until he or she demonstrates some type of behavior or there are circumstances which indicate a need for the assessment, the monitoring, and the other suicide prevention procedures which will accompany a finding of Possible Risk or higher.

M.F. was not exhibiting any of these behaviors prior to the arrival of the letter from her father. There was no expressed concern that, should M.F. be provided the letter with the two sentences redacted, the remainder of the letter would create the need for an Extended Suicide Assessment.

There was, of course, the thought that providing M.F. with her father's entire letter may push M.F. into the Possible Risk category or higher. This risk seemed to be recognized by all of the staff members who reviewed the two lines of the letter. As the unit therapist, Ms. Harvey, recommended, however, the logical course of action under the policy would be to provide the letter and then see if it had any effect on M.F.'s behavior which would warrant an Extended Suicide Assessment.

This understanding of the procedure appears to have been shared by every single staff member who was involved in this incident – the other two SSOIs, a counselor, and the unit therapist. No one performed an Extended Suicide Assessment on M.F. prior to the point when she was given the letter. Additionally, there was no indication in the evidence that M.F. was exhibiting any behavior or signs that she warranted an Extended Suicide Assessment even after she was given the unredacted letter, and no such assessment was ever done on her.

Mr. Lockett's assertion that Complainant was required under Policy 15.2 to provide an Extended Suicide Assessment at the point prior to the provision of the letter to M.F. is an unreasonable interpretation of that policy.

(b) The choice of Complainant to bear responsibility for the lack of an Extended Suicide Assessment is unreasonable:

Additionally, Respondent has not offered any tenable explanation for why Complainant should be the staff member held responsible for initiating an Extended Suicide Assessment, assuming that there were grounds for one.

Ms. Drake was the staff member logging in the mail. Ms. Drake and Ms. Smith were both continuing on their shifts while Complainant was in the process of picking up her belongings to end her shift. Ms. Drake, Ms. Smith, Mr. Dionisio, and Ms. Harvey all had access to the letter, with the latter three offering advice on what to do about the two suspect lines in that letter. Respondent produced no evidence that anyone other than Complainant was held responsible for the assessment.

Mr. Lockett's proffered explanation for why Complainant is the one to be held responsible was that Complainant is senior to Ms. Drake because Complainant began work at the facility earlier than Ms. Drake. Both women, however, hold the same position. Respondent failed to produce any policy, procedure, or other legitimate reason which gives Complainant the right and the responsibility to take over Ms. Drake's work simply because she was hired before Ms. Drake. Respondent's Code of Conduct, in fact, describes that Complainant is to be part of a team and provides no support for the notion that Complainant is to assume duties being performed by others simply because she may have been hired earlier than the staff member performing the job.

This is also not a case where Complainant held special expertise that she failed to make available, where she was asked to perform a function and left work without performing it or making arrangements for it to be completed, or that she had any other role in this matter other than to offer advice when requested to do so by a co-worker. There may well be circumstances under which an employee could be held liable for failing to take over another co-worker's assignment, but nothing about these facts and the applicable policies suggests that Complainant had any duty other than to cooperate with Ms. Drake's request for advice.

In the final analysis, Respondent's evaluation of Complainant's responsibility for the Extended Suicide Assessment fails to take into proper account that: 1) Complainant's entire contribution to the incident was to provide her opinion to another SSO I employee about what Complainant would do under the circumstances presented; 2) an Extended Suicide Assessment was not necessary at the point where Complainant was involved, which was prior to the point where M.F. had received the letter from her father; and 3) no other staff person involved in this incident provided an Extended Suicide Assessment or apparently thought one should be provided in this case even after the letter was provided to M.F. Contrary to Respondent's argument, it is unfair and illogical to single out Complainant for failing to provide an Extended Suicide Assessment under the circumstances of this case.

(2) Holding Complainant responsible for violating the mail policy is unreasonable given the policy and Complainant's role:

The facility's mail policy requires that staff log in resident mail. The applicable policies also establish standards to be followed for review of that material for contraband.

In this case, Ms. Drake was the SSO I who was logging in mail and who had originally reviewed M.F.'s letter to the point of ascertaining that there were two troubling lines in that letter. Given the evidence produced at this hearing, the policies would appear to create a duty for Ms. Drake to make sure that the logging, contraband review, and reading of the letter were done in conformance with the policies.

The mail handling policies, however, do not address how to handle the unusual type of situation that Complainant, Ms. Smith, Mr. Dionisio, and Ms. Harvey had before them. The practice of the staff was to consider that a reading of a letter was a left-to-right, word-by-word review of the letter as part of the contraband review process, and more than simply a review of a small part of the document upon the request of another staff member. Mr. Dionisio, for example, had been a supervisor of Puma Pod earlier in 2005 and he did not believe that the mail policy was implicated by reviewing two lines of the letter to provide advice on what should be done under the policy. Mr. Lockett examined the logs to see if any of the staff had logged the reading of M.F's letter and no one had done so including, apparently, Mr. Dionisio and Ms. Smith.

Under the staff Code of Conduct, Ms. Drake was entitled to ask her co-workers for help in understanding what she was to do with the letter, and her co-workers were expected to answer her questions. The mail policies, however, do not define whether looking at a very small portion of the letter in order to answer a request for advice from the staff member performing the contraband review creates any obligation under the mail policy. To single out Complainant for having reviewed two lines of a letter upon the request of the staff member logging the mail is an unreasonable interpretation of the mail handling policies.

III. Termination of employment is outside of the range of reasonable disciplinary alternatives in this matter:

Given that the undersigned has reached the conclusion that it is an arbitrary or capricious decision to discipline Complainant for her role in the review of M.F.'s letter, any discipline imposed under such circumstances would be outside the range of reasonable alternatives.

Assuming *arguendo*, however, that there had been some level of misconduct on Complainant's part, termination from employment is well outside the reasonable range of disciplinary alternatives.

Complainant's role in this incident is secondary to every other staff member who had some involvement in the consideration of how to handle M.F's letter. There was no evidence presented that Complainant had ever been told that her prior handling of suicide assessments or resident mail was deficient in any way. As has been noted previously, no suicide assessment was ever necessary for M.F., even after she was given her father's letter in unredacted form. All of these factors militate toward handling any performance issues which may be found in this case in a more lenient fashion rather than through imposition of serious levels of discipline.

Respondent repeatedly argued at hearing that Complainant's performance and disciplinary history was the reason why the appointing authority decided that termination was the proper disciplinary alternative. Specifically, Respondent argued that Complainant's conduct indicates an escalating problem with safety and security issues.

The evidence does not support Respondent's contention. Complainant has been rated as at least satisfactory on safety and security issues in her performance reviews. She has had a series of apparently unrelated performance/training critiques offered over the last five years, two of which were critiques of how Complainant handled a security issue. These incidents, however, do not appear to have been serious enough to even trigger a corrective action.

Complainant's one prior corrective action and her prior disciplinary action were not related in any direct or obvious way to the current situation or to safety and security issues. If there is a theme established in Complainant's performance and disciplinary history, it is (as Complainant's former supervisor Kim Diestelkamp testified at hearing) that Complainant has had trouble with cutting off support and communications with residents once the residents have left the facility, and not that Complainant has been failing to provide support and services or failing to maintain safety and security.

Additionally, Respondent argues that Complainant's final mid-year review document shows that Complainant had a prior history of non-compliance with regard to the mail procedures because one of the comments in that document is that Complainant "needs to be more aware of mail procedures and ensuring they are followed." This argument ignores the timing of the audit results, and is not supported by the persuasive evidence at hearing. By the time the mid-year review was done, Mr. Lockett had already been told that the Puma Pod mail procedures were an issue in the audit. There was no persuasive evidence offered at hearing that Complainant's supervisors had ever critiqued

Complainant's mail procedures on Puma Pod prior to the point when the audit results were available.

Discharge of an employee requires grounds which demonstrate that discharge, as opposed to some lesser form of correction or discipline, is warranted. Even if one were assume that Complainant violated the two cited procedures, termination of her employment under these circumstances is so excessive as to be arbitrary or capricious.

IV. Attorney fees are 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. C.R.S. § 24-50-125.5 and Board Rule 8-38B, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38B(B)(3).

A groundless personnel action is defined under Board rule 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." Board Rule 8-38B(A)(3).

The appointing authority in this case terminated the employment of a staff member who played an exceedingly minor role in the handling of M.F.'s letter. Moreover, the appointing authority has understood at least since the 6-10 meeting that Complainant's role was limited to offering one piece of advice to a co-worker who asked her for that advice. In prosecuting this action, however, Respondent has taken a number of agency policies and stretched them past the breaking point in order to argue that Complainant was in some way obligated to do more than she did in this matter. A common sense review of those policies and the circumstances of M.F.'s letter, however, does not support the appointing authority's extreme interpretation. Respondent has also repeatedly argued that Complainant's performance history shows an ever increasing cycle of safety and security issues and that this justifies the agency's reaction to the incident, but that argument is not borne out by the actual performance history presented at hearing.

In the end, the competent evidence in this case does not support that the extended suicide assessment policy required any action at the time Complainant was asked to review the two lines in M.F's letter, and or that Complainant would have been the staff member who was responsible for logging in the mail and for reading the letter. Additionally, even if one assumes that some form of discipline was warranted under these facts, the choice of termination is so extreme that it creates a separate basis for a finding of a groundless personnel action. *See Coffey v. Colorado School of Mines*, 870 P.2d 608, 610 (Colo. App.

1993)(holding that the fact that some discipline could be imposed in the matter did not insulate the agency from having pursued a groundless termination action because the attorney fees analysis focuses upon the specific personnel action taken). Respondent's decision to terminate Complainant's employment under the circumstances of this case is properly characterized as a groundless personnel action.

Pursuant to C.R.S. § 24-50-125.5(1), "the department, agency, board, or commission taking such personnel action **shall be liable** for any attorney fees and other costs incurred by the employee" if the personnel action was groundless (emphasis added). Complainant is therefore entitled to an award of attorney fees in this matter.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law.

3. The discipline imposed was not within the range of reasonable alternatives.

4. Attorney fees are warranted.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits. Attorney fees and costs are awarded to Complainant.

Dated this 31st day of May, 2006.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.); Board Rule 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69B, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 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. Board Rule 8-73B, 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. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65B, 4 CCR 801.

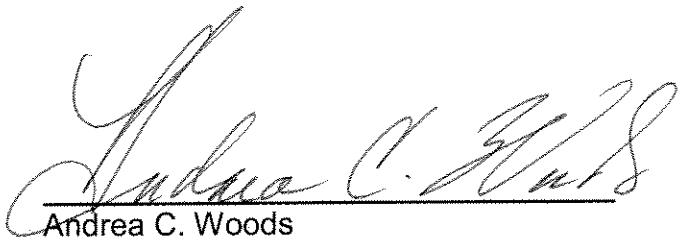
CERTIFICATE OF SERVICE

This is to certify that on the 31st day of May 2006, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, to the following addresses:

Nora V. Kelly, Esq.
Trinity Place
1801 Broadway
Suite 1204
Denver, CO 80203

And via interoffice courier:

Roberta Lopez, Esq.
Assistant Attorney General
Employment Section
1525 Sherman St., 5th Fl.
Denver, CO 80203



Andrea C. Woods