STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B050**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLASS HARRIS,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

Administrative Law Judge ("ALJ") Denise DeForest held the hearing in this matter on April 9, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ at the conclusion of the hearing. First Assistant Attorney General Stacy Worthington represented Respondent. Respondent's advisory witness was Diane Skufca, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Douglass Harris ("Complainant") appeals his demotion from Client Manager to Correctional Youth Security Officer I by Respondent, Department of Human Services, Division of Youth Corrections ("DYC") Central Region Office ("Respondent"). Complainant seeks a return to his former position or, in the alternative, a return to his former pay rate.

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

PROCEDURAL HISTORY

Complainant initially filed an appeal which included claims of discrimination based upon sex and race/color/creed. Complainant waived his right to have the Colorado Civil Rights Division investigate his claims of discrimination, and the matter was set for hearing on April 9, 2008. At hearing, Complainant withdrew his discrimination claims, and the matter was tried solely on the issue of the disciplinary action.

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.

FINDINGS OF FACT

General Background

1. Complainant was certified as a Youth Services Counselor II prior to his demotion to Correctional Youth Services Officer I in December of 2007. Complainant has been employed by Respondent since October 16, 1981.

2. Respondent is responsible for the supervision and management of some of the most serious juvenile offenders in the state, both while the youths are within Respondent's detention facilities and after the youths are released to the community on parole. The Division of Youth Corrections Parole Supervision program provides supervision of parolees according to risk and needs of committed youth on parole status. Parolees are assigned to one of five levels of supervision, from an Intensive level of supervision to an Administrative level of supervision. Each level of supervision requires a different schedule of contacts by a Parole Officer and/or a Client Manager. All levels of the parole supervision system, however, depend upon both telephone and face-to-face meetings between Parole Officers and Client Managers and the youth they are supervising.

3. Complainant was assigned as a Client Manager, with responsibility for supervising the progress of juvenile offenders on parole status. As a Client Manager, Complainant was given the flexibility to work the types of hours which permitted him to make the telephone and face-to-face contacts expected under DYC Parole Supervision Standards.

Complainant's Second Job

4. Approximately four years before Complainant's demotion, Complainant began experiencing financial stress. He was also trying to raise his two daughters as a single parent. In order meet the need for additional income, Complainant began working two overnight shifts a week at a gas service station. He found that the overnight shifts left him fatigued during the work week. Complainant was still working this second job at the time of his demotion.

Initial Investigation

5. In the fall of 2007, an administrative review of the parole status of one of Complainant's clients, J.S., was conducted by Andrew Bolton of the Administrative Review Division and Office of Administrative Courts ALJ Michelle Norcross. During that review, Mr. Bolton and Judge Norcross questioned J.S. outside the presence of Complainant about discrepancies in J.S.'s contact files. J.S. told Mr. Bolton and ALJ Norcross that he had signed a number of blank monthly review forms all at one time early in his parole commitment on Complainant's request. J.S. also reported that he had not seen Complainant every month while on parole.

6. The information provided by J.S. was reported to Diane Skufca, Assistant Regional Director of the Central Region Office, and Complainant's appointing authority. Ms. Skufca directed Jim Economy, Complainant's direct supervisor, to contact a review of other files to see if the information reported concerning J.S. was repeated with other parolees.

7. In early November, 2007, Mr. Economy reviewed some of Complainant's files and contacted some of the parolees who had files with inconsistencies in them.

8. Mr. Economy was concerned that five files appeared to have parolee signatures that appeared to be copied, copies of a father's signature substituting for a parolee's signature, monthly review forms that were unsigned by the parolees, and monthly reviews that were documented as completed in the computer system, TRAILS, but had no corresponding hard copy documentation supporting the entries.

9. Of the five parolees that Mr. Economy attempted to contact, he reached four by telephone. One parolee, A.G., told Mr. Economy that he had had monthly contacts with Complainant and signed contact forms at these meetings. Three other parolees, R.H., R.J., and L.L., told Mr. Economy that they had not met with Complainant on a monthly basis. One of the parolees, L.L., told Mr. Economy that he had had only one face-to-face contact with Complainant in August of 2007, and could not account for his signature on monthly contact forms for May, June or July of 2007. Complainant's file for L.L., however, included monthly review forms dated for contacts on May 10, June 25, and July 18, 2007, with what appeared to be a signature that had been copied onto the forms. The file also lacked documentation for a September or October 2007 monthly meeting.

10. Mr. Economy provided a report of his review to Ms. Skufca on or about November 7, 2007. Ms. Skufca scheduled a Board Rule 6-10 pre-disciplinary meeting with Complainant for November 9, 2007.

Board Rule 6-10 Meeting

11. Ms. Skufca and Mr. Economy met with Complainant in the afternoon of

November 9, 2007. Complainant had been told that he had a right to bring a representative with him, but declined to do so. The Rule 6-10 meeting was tape recorded.

12. At the start of the Rule 6-10 meeting, Ms. Skufca explained what parolee J.S. had told Mr. Bolton and ALJ Norcross concerning the pre-signing of monthly contact forms and the lack of face-to-face contacts with Complainant. She then explained the results of Mr. Economy's review of the files and interviews with parolees R.H., R.J., and L.L.

13. Ms. Skufca summarized her concerns that there had been falsification of official government records in both the TRAILS computer entries and the parole contact sheets, and that there had been involvement of youth in covering up for some "really willful and premeditated, thought out in advance, failure to perform your job or to avoid performing your job." She told Complainant that she had a concern about Complainant's failure to meet monthly with his clients and that he intentionally deceived his supervisor about his contacts through TRAILS entries and reports that he handed in to his supervisor. Ms. Skufca explained that she believed that the failure to provide appropriate or required supervision places a youth's parole adjustment at risk, and that putting parolee adjustment at risk places public safety at risk.

14. Complainant responded by apologizing for what happened and admitted that he was guilty of what Ms. Skufca had described had occurred.

15. Complainant explained that he let his financial problems and need to hold a second job during the last four years interfere with his ability to contact some of his parolees, particularly the ones who were holding down jobs with long hours which made it difficult for him to see them other than on weekends. Complainant admitted that, when he thought it would be hard to catch a parolee who was working or otherwise unavailable, he would have them sign a blank contact form, and that he would then submit that form if he couldn't make a face-to-face contact during the month.

16. Complainant told Ms. Skufca and Mr. Economy that his second job was originally scheduled on weekends, but that those hours made it difficult for him to have his daughters participate in weekend events, such as soccer. Complainant had changed his work schedule so that he had overnight shifts during the week. This revised work schedule, however, made it difficult to Complainant to make all of his face-to-face contacts with parolees.

17. Complainant falsified official government records, involved youths in covering up his failure to perform his job, and failed to meet monthly with his assigned parolees. (Stipulated Facts)

18. Complainant also explained during the Rule 6-10 meeting that an earlier incident for which he received a corrective action was also due to his second job. Complainant explained that he had left a mandatory training class early on April 19, 2006, because he had already been working for 30 hours and couldn't keep his eyes open any

longer. Complainant was issued a corrective action for failing to complete the training and for ignoring Ms. Skufca's specific direction to return to the class when she confronted Complainant and another co-worker as they were leaving the class site.

19. After the Board Rule 6-10 meeting on November 9, 2007, Complainant spoke again with Respondent on more than one occasion about the possible courses of action, such as resigning in lieu of discipline or taking retirement. Ms. Skufca gave Complainant time to check on his retirement status with PERA. Complainant informed Ms. Skufca that he did not wish to retire and wanted to continue to work.

Disciplinary Action

20. Ms. Skufca took the weekend after the Rule 6-10 meeting to consider the information and the available options. She also consulted with other DYC managers before making her decision.

21. Ms. Skufca found that Complainant's actions constituted a willful failure to perform his assigned duties as a Client Manager, and a failure to meet the standards of conduct in various applicable policies.

22. Ms. Skufca was concerned that Complainant had failed to maintain the required level of face-to-face contacts with some of his parolees. She concluded that Complainant had violated the performance standards describing the role of the Client Manager in effectively monitoring the progress of his assigned parolees under the case plan created for that parolee, as described under DYC Policy 21.1 – "Risk Assessment, Classification and Reclassification" Section III(D)(2), and the DYC Parole Levels Of Supervision Standards policy.

23. Ms. Skufca was concerned that Complainant was willing to file false reports with his supervisor and on the TRAILS system, and to fail to file required reports. She concluded that such actions were a violation of DYC Policy 5.1 – "Management Information" Section III(C)(2) which requires that each DYC program create a computerized client data system in which all data "shall be verified by accompanying documentation before it is entered into the system," and all data is to be "verified by professionals involved in the case and, when possible, by the person-in-interest before it is entered into the system."

24. Ms. Skufca was also concerned that Complainant's decision to involve his parolees in signing blank forms in advance of the monthly meetings implicated the parolees in the scheme and provided parolees with something that could be held over Complainant's head. She concluded that such actions were sufficiently serious so as to affect Complainant's ability to render independent judgment about the parolees' progress and to decrease his ability to effectively manage the youths. She concluded that such actions violated DYC Policy 3.3, "Outside Employment and Conflict of Interest," Section III(A)(2) and (3) which prohibits Complainant from accepting compensation "under circumstances

in which the acceptance may result in...the impedance of governmental efficiency or economy [or] any loss of complete independence or impartiality..."

25. Ms. Skufca also considered that Complainant's continuation in his second job, constituted a decision to accept "compensation... which would influence him or her to depart from the faithful and impartial discharge of his or her duties" in violation of Executive Order D 001-99, "Executive Department Code Of Ethics," section 2(e), and which failed to "demonstrate the highest standards of personal integrity, truthfulness and honesty" capable of "inspiring public confidence and trust in government" as required under section 2(b) of the Executive Order.

26. Ms. Skufca concluded that Complainant's second job posed a prohibited conflict of interest under DYC Policy 3.7(III)(B) – "Code of Ethics," which prohibits outside employment unless "the outside employment does not interfere with the performance of state duties," and also violated similar prohibitions in DYC Policy 3.3 – "Outside Employment and Conflict of Interest."

27. Ms. Skufca was additionally concerned that the lack of proper supervision created a risk to the public, or a perception of a risk, that paroled youths were not being supervised properly by Respondent, and that the records kept by Respondent on the work performed by the agency were not truthful reports. Ms. Skufca concluded that such actions violated DYC Policy 3.3, "Outside Employment and Conflict of Interest, Section III(A)(7) which prohibits a DYC employee from accepting compensation under circumstances in which the acceptance may result in "any adverse effect on the confidence of the public in the integrity of the State of Colorado."

28. Ms. Skufca also considered that Complainant had presented mitigating factors in his forthrightness when confronted with evidence of misconduct, and with the fact that he had been under severe financial strain. She concluded that Complainant was genuinely remorseful about how he had handled the face-to-face meeting requirements.

29. Ms. Skufca reviewed Complainant's performance record and found that he had 26 years of service with generally good to very good performance evaluations and only one corrective action.

30. Upon consideration of the information she had assembled, Ms. Skufca decided that Complainant could continue employment with Respondent, but would have to do so at a level that was directly supervised and did not involve supervising other employees. Ms. Skufca considered available positions for which Complainant was qualified, and determined that a Correctional Youth Security Officer I ("CYSOI") would constitute a sufficiently supervised position for Complainant.

31. By letter dated December 3, 2007, Ms. Skufca explained her decision to discipline Complainant by demoting him to a CYSOI. Ms. Skufca arranged for Complainant to continue employment at the top of the pay range for that position. Even

with the pay in the top portion of the available range for CYSO I positions, Complainant's demotion resulted in a loss of approximately $1,300 per month in base pay. Complainant's demotion took effect December 4, 2007.

32. Complainant filed a timely appeal of the disciplinary action with the Board.

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; C.R.S. § 24-50-101, *et seq.*, *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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 706. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

Respondent has proven all of the material facts underlying the disciplinary decision through stipulation or by a preponderance of evidence at hearing. Complainant admitted at the Board Rule 6-10 meeting, and again at hearing, that he had provided blank forms to be signed to parolees with whom he was to have face-to-face meetings, that he had not performed all of his face-to-face meetings with parolees, and that he had submitted false reports to his supervisor and into the TRAILS computer system concerning the meetings. Complainant also admitted that his failure to meet his contact requirements was due to the fact that he was working a second job.

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).

Ms. Skufca's handling of the matter was not arbitrary or capricious action. Upon receiving reports of possible misconduct, Ms. Skufca ordered an investigation into the manner in which Complainant had handled his other cases. That investigation revealed that there were at least three, if not four, examples of cases in which a similar pattern of problems with contacts and contact sheet information had emerged. Once that information was received, Complainant was brought into the discussion through the Board Rule 6-10 process. During that meeting, Complainant admitted to the violations and there was no need to conduct further investigation to resolve any disputed factual issues. Once consideration moved to the question of sanction, Ms. Skufca took the time to consider both the mitigating circumstances presented by Complainant as well as the aggravating circumstances presented by the facts before reaching her decision to demote Complainant. Ms. Skufca also reached reasonable conclusions that Complainant's actions violated a variety of policies and procedures for DYC employees.

Additionally, Complainant has not presented evidence or persuasive argument that the procedure used in this matter failed to meet the applicable rules for the imposition of disciplinary action.

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

Complainant's primary issue on appeal to the Board was his belief that the sanction of demotion was too severe under the circumstances. Complainant contends that the sanction did not take into account that he had served the state well for twenty-six years and that he believed that he had been able to sufficiently keep track of his assigned parolees even though he wasn't able to complete the monthly face-to-face visits with some of them.

Complainant's argument does not take into account at least four aggravating circumstances present in this matter which justify an even more serious sanction than demotion.

First, the monthly face-to-face meeting requirement is a core procedure in Respondent's plan to oversee the progress of parolees, and is an important part of

Complainant's job as a Client Manager. Failing to make face-to-face contact with parolees on a regular basis cannot be construed as merely a violation of a technical or minor job requirement.

Second, this is not a case of an unplanned or unexpected failure to perform. Complainant knew he was going to have problems meeting his face-to-face meeting requirements, and he planned how he was going to fool the system into thinking that he had made the contacts through the submission of incorrect reports. This raises the violation of standards to the level of willful misconduct rather than merely poor performance.

Third, Complainant's decision to involve his parolees in his plan to evade his reporting requirements sets a terrible example for his parolees, and impinged upon his ability to impartially and effectively enforce parole requirements with those parolees.

Lastly, this is not a case of a couple of mistakes taking place in a short period of time or only infrequently. The difficulty was caused by Complainant's second job, and Complainant worked that job for nearly four years. Rather than solving the problem once it became obvious that Complainant could not work the overnight shifts and complete all of his required contacts, Complainant allowed the problem to continue over an extended period of time.

The credible and persuasive evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The decision to demote Complainant to a position that was well-supervised was within the range of reasonable alternatives available under the circumstances of this matter.

CONCLUSIONS OF LAW

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

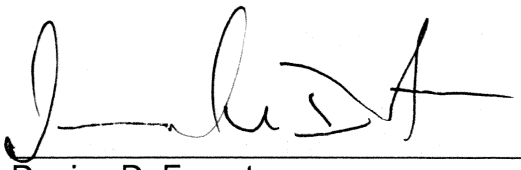
2. Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this 23rd day of May, 2008.



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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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 8-68, 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 8-69, 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 8-75, 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 8-65, 4 CCR 801.

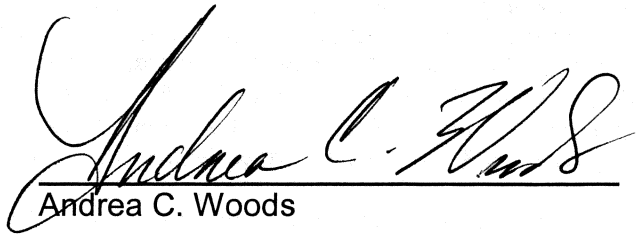
CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of May, 2008, 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:

Douglass Harris
5374 South Taft Court
Littleton, CO 80217

and in the interagency mail, to:

Stacy Worthington
First Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods

(rev'd. 5/07)