STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B044

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT BACA,

Complainant,

vs.

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

Respondent.

HEARING was held on January 18 and February 29, 2000 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Susan J. Trout, Assistant Attorney General. Complainant appeared and was represented by John R. Palermo, Attorney at Law.

Respondent called the following witnesses: Richard Brinker, Supervisor; Thomas Andrews, Jr., Supervisor; Robert J. Baca, Complainant; and Douglas Lockett, Director, Spring Creek Youth Services Center.

Complainant testified in his own behalf and called the following witnesses: Lana Kim Diestelkamp, Building Supervisor; John Cartright, Safety & Security Officer I; and Ronald Everett, Safety & Security Officer I.

Respondent's Exhibits 1, 3, 4, 5, 7-20, 23 and 27 were admitted into evidence over objection. Exhibit 2 was admitted

without objection and Exhibit 21 was admitted by stipulation. Exhibits 22 and 24 were not admitted.

Complainant's Exhibit B was stipulated into evidence.

MATTER APPEALED

Complainant appeals the October 15, 1999 disciplinary termination of his employment. For the reasons set forth herein, a disciplinary suspension is substituted for the termination.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of available alternatives;

3. Whether complainant mitigated damages, if any;

4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Respondent's motion to substitute Division of Youth Corrections Policy 3.21 (Exhibit 4) for Policy 3.24, which had been incorrectly identified as Exhibit 4, was granted over objection. Complainant's motion to allow a particular witness to testify by telephone was granted without objection. Per respondent's request, a witness sequestration order was entered, excepting complainant

and respondent's advisory witness, Douglas Lockett.

FINDINGS OF FACT

1. Complainant Robert Baca worked as a Safety & Security Officer I (SSO I) with respondent Division of Youth Corrections (DOYC) for four years, the final one and one-half years being at Spring Creek Youth Services Center (Spring Creek). Spring Creek, located in Colorado Springs, is a 100-bed facility for juvenile delinquents, both male and female. Baca resides in Pueblo.

2. At approximately 8:45 p.m. on September 26, 1999, Baca was involved in an altercation with his niece in the driveway of his home. There were no physical injuries to either person. He was arrested by the police and taken to the Pueblo jail, where he requested and received permission to make three telephone calls. He was told that he could not make long-distance calls unless collect. It is a long-distance telephone call from Pueblo to Colorado Springs. It was his understanding and belief that his facility would not accept a collect call, yet he understood that he had to notify the director or the director's designee that he had been arrested and would not be able to report for work the next day.

3. Baca first telephoned his immediate supervisor, Richard Brinker, who lives in Pueblo West. He told Brinker what happened and asked him to call the facilty to let them know. Brinker responded that it was against policy for him to make that call and that Baca had to telephone the facility, himself, and notify the shift supervisor. Baca's shift began at 6:00 p.m. (Ex. 1).

4. Brinker did not notify anyone of Baca's arrest.

5. Baca placed a call to his wife who, unknown to her husband, then telephoned Thomas Andrews, one of the supervisor's at the facility and Baca's friend. Baca then phoned Andrews to tell him he was in jail and to ask Andrews to notify Spring Creek for him because he could not make a long-distance telephone call from jail. Andrews agreed to phone the facility but reminded Baca that, eventually, he had to make the call, himself.

6. Andrews notified the facility by telephone that Baca had been arrested and would not be in for work September 27. He talked to Assistant Director Navarro.

7. The morning of September 27, Navarro advised Director Lockett that Andrews had called and said that Baca was in jail in Pueblo and had asked him to notify the facility. The day after that, September 28, Lockett telephoned the jail to confirm that Baca had been incarcerated.

8. Baca was released from jail at 3:00 p.m. on September 27. He was charged with felony menacing and third degree assault. Believing that he had to personally notify the director withing 24 hours of being charged, he informed Locket by telephone the morning of September 28.

9. On October 1, 1999, Lockett conducted an R-6-10 meeting to consider whether Baca was absent from work "without proper authority" and whether he failed "to report as required." (Ex. 2.) At the meeting, Baca was forthcoming and apologized for his actions.

10. Lockett concluded that Baca did not use proper call-off procedures as outlined in the agency operating procedure 3.23 #11a

and #11b by failing to report that he would not be at work on September 27 and failed to report his arrest to the director within 24 hours, as required by DOYC Policy 3.21 III F.

11. Operating Procedure 3.23 #11 pertains to granting an employee's request for sick leave. It requires the employee to notify the agency four hours in advance of the shift. (Ex. 5.) This procedure is applied to requests for any type of leave.

12. DYOC Policy 3.21 III F provides that any staff member who is charged with any felony, misdemeanor or other criminal offense must inform the facility director, regional or program manager "within 24 hours of the arrest or, of notification of the charge being filed." (Ex. 4.)

13. Baca understood that he had to report the information within 24 hours of charges being filed. Lockett interpreted the policy as meaning within 24 hours of the arrest because charges are not necessary in order to make an arrest.

14. A four-hour advance notice of an absence is required by Procedure 3.23 in order to arrange for shift coverage.

15. On the grounds of Baca failing to report his situation as required and failing to call-off as required, Lockett decided to impose discipline. In choosing the appropriate discipline, Lockett considered Baca's position as a role model and the fact that he had been charged with a crime against a person. He reviewed Baca's personnel file and took into account the following documentation:

a. Memorandum of January 26, 1999 referencing Baca's unauthorized absence from mandatory training (Ex. 17);

b. Memorandum of May 6, 1999 referencing Baca's unauthorized removal of art supplies from a classroom (Ex. 19);

c. Memorandum of July 6, 1999 referencing Baca's's failure to check a suicidal resident for seventeen minutes (Ex. 20);

d. Memorandum of September 19, 1999 referencing Baca's refusal to bring in a sick slip documenting his illness (Ex. 15);

e. Performance appraisal dated March 1, 1999 indicating a need for better management of sick leave and a need to improve in accepting constructive criticism (Ex. 14);

f. Corrective action of December 10, 1998 for making personal telephone calls and charging the fees to Spring Creek (Ex. 7);

g. Performance documentation form of June 29, 1995 referencing calling off sick for three days and keeping facility handcuffs with him (Ex. 8);

h. Performance documentation form of December 7, 1995 for calling off sick, saying he had a sick child and subsequently indicating that it was he who was sick (Ex.9);

I. Performance appraisal dated July 10, 1996 with a rating of "needs improvement" in the area of leave practices and tardiness (Ex. 10);

j. August 6, 1997 disciplinary action for multiple violations of procedures (not in evidence);

k. Memorandum of September 3, 1996 referencing taking a day of annual leave and then calling off sick (Ex. 11);

l. Performance appraisal dated June 23, 1997 with a rating of "needs improvement" in the area of timekeeping and leave practices (Ex. 12);

m. Memorandum of December 28, 1998 referencing extending a holiday by using sick leave (Ex. 13);

n. Performance documentation form of June 25, 1996 referencing not calling off properly for mandatory training (Ex.

16);

o. Memorandum of November 9, 1999 referencing a failure to properly conduct room checks (Ex. 18).

16. There was no policy on whether the facility would or would not accept collect telephone calls. In Lockett's view, Baca should have at least tried calling collect and should have had his wife or Andrews call Lockett directly at home.

17. The appointing authority terminated complainant's employment effective October 15, 1999 for the following behavior: "You failed to use the call-off procedures as outlined in SCYSC operating procedure 3.23, number 11 a and b to report that you would not be at work as required. You then failed to report your arrest to me within 24 hours as required by Division of Youth Corrections Policy 3.21 III F. (Ex. 1.)[1]

18. Complainant Robert Baca filed a timely appeal of the disciplinary termination on October 22, 1999.

DISCUSSION

Respondent submits that this is a case of progressive discipline warranting termination, based upon complainant not calling off properly and not personally contacting Lockett within 24 hours of the arrest. Respondent asserts that, if termination is found not appropriate, then a lessor form of discipline is called for.

[1] The termination letter inadvertently refers to September 24 instead of September 27.

Complainant counters that he tried to do that which he understood needed to be done on September 26 and that it is not a reflection of his performance on the job. The facility was, in fact, notified, and Director Lockett had notice within 24 hours of the arrest. The necessary information was received, albeit from someone other than complainant, himself. After his release, complainant placed a call to Director Lockett.

Complainant contends that he did not violate the call-off procedures of Procedure 3.23 because he gave the required notice of his impending absence. His immediate supervisor was given the information on the evening of the arrest. Complainant argues that he should not be cast to the wind for a technical violation.

I give substantial weight to complainant's testimony. The credible evidence suggests that complainant was not allowed to make a long-distance telephone call from jail unless it was a collect call. He did not believe that the Spring Creek facility would accept collect calls, and he had no reason to believe otherwise. Immediately upon his incarceration, he commenced efforts to provide notice to the agency, beginning with a telephone call to his supervisor, who did nothing.

Through complainant's efforts, the facility got the necessary information. The director was informed within 24 hours of the arrest. Complainant thus complied with the spirit of the agency's policies and procedures. The purpose was fulfilled. This is not a case of an employee disregarding the rules.

Complainant's conduct, by itself, does not justify dismissal. Respondent did not prove by preponderant evidence that Baca

willfully violated either Procedure 3.23 or Policy 3.21. *See Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994)(burden on respondent to show just cause for dismissal). Consequently, termination was not within the realm of available alternatives.

Nevertheless, by his acts, complainant inconvenienced the agency. Although the director did not decide that complainant being arrested, alone, should result in termination, he gave consideration to the role model aspect of complainant's position. Together with the documentation in complainant's personnel file, his conduct warranted some form of discipline.

Rule R-6-9(B), 4 CCR 801, provides in full:

> If the Board or hearing officer reverses a dismissal, but finds valid justification for the imposition of disciplinary action, a suspension may be substituted for a period of time up to the time of the decision.

This matter is such a case as that contemplated by R-6-9(B). Dismissal was improper under these facts and is hereby reversed, yet there is justification for imposition of disciplinary action. Consequently, a suspension will be substituted for a period of time up to the date of this initial decision, pursuant to the rule, except that the period of suspension may not exceed 135 days. *Rose v. Department of Institutions*, 826 P.2d 379 (Colo. App. 1991).

An award of fees and costs is not appropriate in this case. *See* R-8-38, 4 CCR 801.

No evidence was introduced to show whether complainant did or did not mitigate damages.

CONCLUSIONS OF LAW

1. Respondent's decision to administer disciplinary action terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was not within the range of available alternatives.

3. There was no evidence as to whether complainant mitigated damages.

4. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is reversed. A disciplinary suspension is substituted for the termination through the date of this decision, but not to exceed 135 days. Complainant shall be reinstated with full back pay and benefits except for the period of suspension and less any income earned which he would not have earned if his employment had not been terminated by respondent.

DATED this _____ day of
April, 2000, at
Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

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. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

John R. Palermo
Attorney at Law
3333 Quebec Street, #7500
Denver, CO 80207

and in the interagency mail, addressed as follows:

Susan J. Trout
Assistant Attorney
Personnel and Employment Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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