

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2006B007

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KENNETH W. ROBINSON,
Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE
AT PUEBLO,**
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on February 7 and 8, 2006. Complainant appeared pro se. Respondent appeared through First Assistant Attorney General Jill M.M. Gallet.

MATTER APPEALED

Complainant, Kenneth Robinson ("Robinson" or "Complainant") appeals his disciplinary five percent reduction in pay for three months by Respondent, Department of Human Services, Colorado Mental Health Institute at Pueblo ("Respondent," "DHS" or "CMHIP"). Complainant seeks rescission of the pay reduction and reimbursement of the amount deducted from his paycheck.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined; and
2. Whether Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant is a certified state employee and has held the position of Correctional Security Officer (CSO) I at CMHIP since December 1, 2003.
2. CMHIP is a mental health facility housing residents with mental illnesses. The residents often become aggressive and combative towards each other and towards the staff, including nurses and psychiatric technicians.

3. CSO's are assigned to be present on the more demanding units at CMHIP. A CSO's presence on a unit acts as an effective deterrent against resident violence towards other residents and towards CMHIP staff.

Verbal Judo

4. Anthony Pinelle is the Chief of Public Safety for CMHIP. In 1976, Pinelle was first hired at CMHIP as a psychiatric technician. In 1983, he became a correctional officer there. Since that time, he has worked his way up the Public Safety chain of command.
5. Several years ago, in an effort to reduce the incidence of use of force and physical restraints on residents at CMHIP, Captain Pinelle brought a de-escalation technique, verbal judo, to the facility.
6. Verbal judo is used to de-escalate a situation prior to, and in order to avoid, the use of force.
7. Captain Pinelle requires all staff who work with residents at CMHIP to be trained in verbal judo. Prior to the events at issue herein, Complainant had received the verbal judo training and a refresher course in the technique.
8. Pinelle designed the staff training program in verbal judo at CMHIP; he is one of the verbal judo instructors there and also teaches nationwide.
9. All CMHIP staff, including Complainant, are required to de-escalate situations involving agitated or combative residents by exhausting the five elements of verbal judo, prior to laying hands on the resident.
10. The five elements of verbal judo are:
 1. Ask or command. Document that you asked or commanded. Include the response.
 2. Explain why and set the context with a rule, policy, or practice. Document response.
 3. Present options. Give the resident a positive option for solving the crisis.
 4. Confirmation. Ask if there is anything you can do to get the resident to do what you ask. You can go forward or backward to act. Re-confirm.
 5. Act.
11. Use of verbal judo is a professional standard of conduct expected of all CMHIP staff who work with residents.
12. Use of verbal judo is excused if a resident's conduct causes imminent danger to persons or property or constitutes an escape attempt.

Events of June 18, 2005

13. On June 18, 2005, Complainant was assigned to work on Wards F-1 and F-3 (also known as Units).
14. Ward F-1 is a forensic unit which houses Department of Corrections inmates referred to CMHIP for psychiatric treatment.
15. Two residents on Unit F-1, MC and JB, had been in an argument during the morning of June 18, 2005. During the argument, they had made threats on each other's lives.
16. At approximately 1:30 p.m., a nurse, Ms. Trujillo, noticed that JB was waiting for MC to leave the shower area, and that a confrontation appeared imminent.
17. Trujillo called Officer Robinson to the unit, and informed him of the situation. Nurse Trujillo knew that Robinson had good rapport with MC.
18. Robinson spoke with JB as MC left the shower area, and JB went to his room.
19. Robinson returned to the nurses' station. He and Trujillo assumed that a confrontation had been averted.
20. Robinson and Trujillo next heard MC and JB arguing down the hall. Robinson and Trujillo approached the scene. Officer Robinson approached the residents and attempted to separate them. He directed them both to move away from each other and go to their rooms. Nurse Trujillo and nurse Mondragon were also present; they attempted to assist in redirecting the residents to their rooms.
21. MC started to argue with Robinson. Robinson told him to step back. MC did not step back, but continued to argue with Robinson. Robinson repeated, "I said, take one step back." MC refused to move.
22. MC then started to walk down the hall to his room, away from Robinson. Then he stopped, turned around, and yelled back at Officer Robinson, "You're just being prejudiced," or words to that effect. JB was African American, as is Officer Robinson. MC accused Officer Robinson of protecting JB because of his race.
23. MC had his hands in his pockets as he made these statements to Officer Robinson.
24. At this moment, verbal judo standards of professional conduct required that Officer Robinson use words to de-escalate MC's anger and to re-direct him to his room.
25. Instead, officer Robinson escalated the situation. He walked right up to MC, brought his face to within inches of MC's face, pointed his finger at MC, and yelled, "Are you threatening me?!" Robinson was taller than MC and yelled down at him.

26. Robinson's manner was threatening and intimidating to MC.
27. Robinson then opened the door to the Seclusion Room and stated to MC, "You're going in this room now."
28. MC entered the Seclusion Room and handed his glasses to another staff person in anticipation of being searched.
29. Routine practice when bringing a resident into the Seclusion Room is to search the resident for any items that may harm the resident.
30. Officer Robinson ordered MC to face the wall, put his hands on the wall, and spread his legs, while he searched him. When he touched MC, MC flinched and tightened up. Robinson said repeatedly, "Don't flex up on me."
31. Robinson placed MC in a one-person protective restraint technique, by placing his arms through MC's arms, in back of MC's body. He then placed MC up against the wall and stated he had to check his pockets.
32. MC asked Robinson why he was doing this. Robinson then placed his hand on MC's shoulder in an intimidating manner and yelled at him, stating, "Why are you flinching? Are you threatening me?" MC then stated to the nurses present, "Look what he is doing to me."
33. In the course of attempting to control MC, Robinson pushed MC forward, causing his head to hit the wall. Robinson did not purposely or intentionally cause MC's head to hit the wall. Another nurse present, Ms. Mazza, noticed that MC looked scared and was near tears.
34. Both of the nurses present felt that Officer Robinson had become emotionally upset, and they sought to de-escalate and calm the situation. They both said, "Ken," to Officer Robinson, in an attempt to get his attention and calm him down.
35. Officer Robinson did not respond to the nurses.
36. Robinson yelled at MC again, stating, "Why are you flinching? If you don't cooperate I'll have to cuff you."
37. Officer Robinson placed MC's right hand in a handcuff. He told MC not to resist; MC said he was not resisting. Robinson told MC he was tensing up and pushed him into the wall again.
38. Nurses Mondragon and Trujillo tried several times during the incident to get Officer Robinson's attention, but he did not respond to them.

39. Several other residents were very upset with the way Robinson was handling MC in the Seclusion Room. At least two of them yelled racial slurs at Officer Robinson during the incident.
40. The residents on Unit F-1 became so agitated during Officer Robinson's encounter with MC that the nursing staff on the unit determined they had to place the unit in "lock down." "Lock down" is when all residents must be in their rooms with the door locked.
41. The residents on unit F-1 did not comply with the lock down order. A staff member pressed the duress button. Additional staff arrived on Unit F-1 and the ward was placed under control.
42. Lieutenant Lawrence Ortiz and Officer Ramirez were about to respond to the duress button on Unit F-1 when Officer Robinson called to report that the unit was under control. Officer Ramirez went to the unit anyway to assure everything was all right.

MC Report of Excessive Force

43. When MC was released from the Seclusion Room approximately four hours later, he informed the nursing staff he wished to make a report against Officer Robinson for use of excessive force and patient abuse. He did so.
44. At the time MC wrote his report, he had developed a light bruise on his forehead. Nurse Mondragon noticed this bruise.
45. After the incident, Robinson approached Ms. Mondragon and asked her if she was mad at him. He stated he was not going to let "those cons" run the unit and if she felt he needed to leave, it would give them control.
46. Mondragon informed Robinson she did not agree with how the situation was handled and that her concern was for safety.
47. Robinson had a similar conversation with Ms. Mazza, who told him she felt the situation could have been handled differently.

Investigation

48. Upon receipt of the complaint from MC, Chief Pinelle immediately assigned Lieutenant Jeremy Van Zandt, a police officer with the Department of Public Safety at CMHIP, to investigate the report of excessive force and patient abuse.
49. Nurse Manchester informed Officer Van Zandt that three residents on unit F-1 wanted to speak to him about the incident. He interviewed them; they told him that Officer Robinson had escalated the situation in an inappropriate manner.

50. Officer Van Zandt took pictures of MC's bruise on his forehead.
51. Once Officer Van Zandt completed his initial investigation, Chief Pinelle assigned the investigation to Lieutenant Lawrence Ortiz.
52. Officer Ortiz interviewed all of the nurses present on the unit during the incident on June 18, 2005, including Mondragon, Trujillo, Mazza, and Jim Elson.
53. The nurses all submitted written statements to Lt. Ortiz for his investigative report. Their interview responses and written statements describe the incident as it is set forth in the Findings of Fact above.
54. Nurse Mondragon, who was present in the Seclusion Room with Officer Robinson and MC, informed Lt. Ortiz that she was so upset by how Officer Robinson was handling the situation that she left the Seclusion Room and assisted in getting the rest of the patients to their rooms for lock down.
55. The investigators wrote a lengthy report. They had taken contemporaneous notes during their interviews with eyewitnesses. They had collected written statements. All of the information collected was put into the report.
56. Chief Pinelle read the report and sent a letter to Robinson notifying him of a pre-disciplinary meeting.
57. CMHIP Policy 16.15, Adult Patient Abuse/Neglect, defines Patient Abuse as "any behavior by an employee that is anti-therapeutic, non-professional and/or affects the patient detrimentally. Examples of anti-therapeutic or non-professional behavior or neglect include, but are not limited to: striking a patient; foul or offensive language; language that is personally derogatory of the patient; persistent confrontation that exceeds therapeutic requirements; using unnecessary force; sexual misconduct; verbal or nonverbal threats, or intimidation, or retaliation; withholding clinically indicated care"

Pre-disciplinary Meeting

58. On July 8, Chief Pinelle, Robinson, and his representative, the supervising nurse on Unit F-1, Jim Elson, attended the pre-disciplinary meeting. At the meeting, Mr. Elson presented written statements from several employees who had worked on Unit F-1 on June 18, 2005.
59. The statements are very supportive of Officer Robinson. They universally express the opinion that Officer Robinson maintains the highest of professional standards, is alert to issues on the unit, regularly inquires about the residents' status when he is on the unit, and is always very helpful when asked to assist in any situation.

60. At Robinson's request, Chief Pinelle agreed to assign another investigator to interview all those employees who had submitted statements in support of Robinson.

61. An officer conducted those interviews and the results are in the final investigative report. (One employee would not be interviewed.) No new information was found concerning the incident on June 18, 2005.

Chief Pinelle's Decisionmaking Process

62. Chief Pinelle reviewed all applicable policies and procedures and the supplement to the investigative report prior to determining what action to take. He also reviewed Complainant's performance evaluations, which are consistently good, and his training records.

63. Pinelle confirmed that Complainant had been trained in verbal judo and had attended the refresher course in it as well.

64. He interviewed the investigating officers at length about the contents of the investigative report.

65. Chief Pinelle considered as mitigation the fact that Officer Robinson has, throughout his tenure at CMHIP, been a highly valued, professional member of the Public Safety department at CMHIP, and that he has had no prior similar incidents to this one.

66. Chief Pinelle considered the fact that residents were yelling racial epithets at Robinson at the time he had MC in the Seclusion Room. He also took into account the fact that officers are trained to recognize their own triggers in volatile situations and to ignore those triggers. He also considered the fact that residents in a mental health institution routinely attempt to "press the buttons" of the staff present by any means at their disposal.

67. Chief Pinelle determined that Complainant had violated the standard of professional conduct requiring CSO's to utilize verbal judo to de-escalate a situation, prior to making physical contact with a resident.

68. Chief Pinelle concluded from his review of the evidence that Officer Robinson had failed to maintain his composure on June 18 in dealing with MC, that his approach had escalated the situation, and that the situation did not require Robinson to use physical force. He concluded that Robinson had yelled at the patient inappropriately, and that his conduct had led to the unnecessary injury of a patient.

69. Pinelle determined that Robinson had unintentionally acted in a manner that caused injury to MC.

70. Pinelle concluded that Officer Robinson had used unnecessary force with MC, had yelled and confronted MC in a manner exceeding therapeutic requirements on June 18, 2005, in violation of CMHIP Policy 16.15, Adult Patient Abuse/Neglect.

71. Based on his consideration of all factors above, Chief Pinelle imposed a corrective action (requiring additional training in verbal judo and physical containment techniques) and a disciplinary action of a five percent pay reduction (\$148.40) for three months.

72. Complainant complied with the terms of the corrective action and appeals only the disciplinary action.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801¹ and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

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

II. COMPLAINANT COMMITTED THE ACTS UPON WHICH DISCIPLINE WAS BASED

Respondent has met its burden of proving that Complainant committed the acts for which he was disciplined. Officer Robinson's actions on June 18, 2005 with MC violated CMHIP Policy 16.15, Adult Patient Abuse/Neglect, which defines Patient Abuse as "any behavior by an employee that is anti-therapeutic, non-professional and/or affects the patient detrimentally."

Complainant concedes that he used force with MC; however, he argues that the force was necessary and appropriate. There is no evidence in the record supporting Complainant's assertion that force was warranted. The evidence conclusively

¹ In effect at the time of the incidents herein. The rule has subsequently been modified to Rule 6-9B.

demonstrated that Complainant's inability to keep his emotions in check drove his actions on June 18, 2005. Complainant escalated the situation on June 18, 2005 by failing to utilize the five steps mandated by verbal judo. Robinson intimidated and traumatized MC by walking up to within a few inches of his face, yelling at him, and then physically escorting him into the Seclusion Room. Once in the Seclusion Room, Robinson used unnecessary force with MC by pushing him toward the wall, causing his head to bump the wall, resulting in a small bruise.

Section 24-50-116, C.R.S., "**Standards of performance and conduct**," states, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." (Emphasis in original.) The use of verbal judo constitutes a generally accepted standard of performance and conduct at CMHIP; it is also a specific standard prescribed by the appointing authority, Chief Pinelle. Complainant violated that standard.

III. THE DISCIPLINE IMPOSED WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW

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

Respondent's action was not arbitrary, capricious, or contrary to rule or law. Chief Pinelle conducted a thorough investigation into the events of June 18, 2005, and took all mitigating information into account, prior to making his decision in this case. At the pre-disciplinary meeting, Complainant and his representative presented mitigating statements from several co-workers. Chief Pinelle responded by assigning another investigator to interview those individuals. These actions demonstrate that the appointing authority used the utmost diligence to procure and consider all pertinent evidence, prior to making a decision.

As director of security at CMHIP, it is Chief Pinelle's duty to enforce the professional standards of care that apply to all security staff there. The disciplinary action imposed herein accomplishes that goal in an appropriate manner. Pinelle's ultimate decision to impose a small deduction in pay represents a mild response to the incident, and was well within the range of reasonable alternatives available to him as appointing authority.

CONCLUSIONS OF LAW

1. Complainant committed the acts upon which discipline was based;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

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

DATED this 21st day
of **March 2006** at
Denver, Colorado.



Mary S. McClatchey
Administrative Law Judge
633 17th St., Suite 1320
Denver, CO 80203

CERTIFICATE OF MAILING

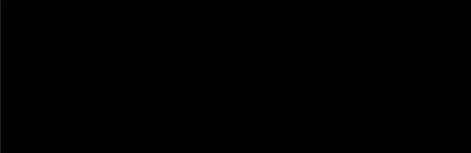
This is to certify that on the 21st day of **March 2006**, I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Kenneth W. Robinson



And interagency mail to:

Jill M.M. Gallet



Andrea C. Woods

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 R-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 R-8-65B, 4 CCR 801.