STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010B067**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DALE MCCAULEY,

Complainant,

vs.

UNIVERSITY OF COLORADO DENVER, UNIVERSITY OF COLORADO DENVER POLICE DEPARTMENT,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on March 9, 2010, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Christopher J. Puckett of the Office of University Counsel represented Respondent. Respondent's advisory witness was Doug Abraham, the Chief of Police for the University of Colorado Denver Police Department. Complainant appeared and was represented by David R. Osborne, Attorney at Law.

MATTER APPEALED

Complainant, Dale McCauley (Complainant), appeals his disciplinary pay reduction by Respondent, University of Colorado Denver, University of Colorado Denver (UCD) Police Department (Respondent). Complainant seeks rescission of the disciplinary action.

For the reasons set forth below, Respondent's action is **rescinded.**

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 Complainant's discipline was within the range of reasonable alternatives.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee who has been employed by Respondent as a patrol officer since 1999. At all times relevant to this appeal, Complainant was assigned to the Anschutz Medical Campus. His duties included patrolling the campus.

2. Doug Abraham is the Chief of Police for Respondent and Complainant's Appointing Authority. In his long career as a police officer, Chief Abraham has many years of experience dealing with juveniles.

3. The UCD Police Department is an actual police department. Its officers are certified in Peace Officer Standards and Training, and receive all the training that municipal police officers receive.

Complainant's Corrective Action

4. On October 25, 2007, Complainant received a Corrective Action. The bases of the Corrective Action were: 1) demonstrating "a lack of courtesy and uncommunicative behavior to peers subordinates and other business associates"; 2) issuing a parking ticket and inserting the paper into the cassette player of a motorcycle; and 3) an incident in June 2007 where Complainant's behavior resulted in the inability to locate a tuning fork used to calibrate radar devices for a number of months.

5. As a result, Complainant was advised to take the following Corrective Actions: "On an immediate and sustained basis, you will follow the direction provided during your coaching sessions from March 28, May 30, June 29, July 28 and August 28, 2007 and our September 12 Rule 6-10 meeting regarding your need to be courteous, friendly and communicative with all of your contacts within the department and campus community. You will treat everyone with respect, courtesy and professionalism. Additionally, you will treat department equipment appropriately to avoid damage or loss."

6. Complainant complied with the Corrective Action. He has not demonstrated any of the behaviors for which he received the Corrective Action since receiving it.

7. On September 22, 2009, a Tuesday, Complainant was at work at UCD headquarters when he heard a dispatcher say that there had been a robbery at a liquor store at Colfax and Peoria. Although this area is not part of the Anschutz Campus, it is adjacent to it.

8. The dispatcher described the robbery suspect as a 37-year-old Black male with a thin build wearing black pants and a red shirt. The dispatcher advised that the suspect was last seen northbound on Peoria. The dispatch regarding the robbery was made at 2:54 p.m.

9. When he heard the dispatch, Complainant got into his patrol car and began to patrol the area to see if he could locate the suspect. Another UCD officer, Mark Battle, also began patrolling the area.

10. As Complainant was patrolling, he saw an individual at a bus stop just west of Peoria who he believed matched the description of the suspect. There was also a young girl at the bus stop. Complainant sent a radio transmission at 2:55 that he had seen the suspect.

11. When Complainant arrived at the bus stop, he told the person he believed to be the suspect to get on the ground with his hands in front of him. The individual, a 16-year-old Black male with a thin build wearing a red shirt and black pants, complied. Complainant had his gun drawn and pointed at the juvenile suspect. Complainant's actions were standard police practices.

12. About that same time, Officer Battle arrived and handcuffed the juvenile suspect. Battle then helped the suspect to his feet and had him sit down on a bench at the bus stop.

13. Complainant began to gather information from the juvenile suspect while he was sitting on the bench. The suspect said the lived with his father, but said he could not provide his father's address or telephone number. The juvenile suspect was evasive with the answers he provided to Complainant.

14. While Complainant was gathering information from the suspect, an Aurora Police Department officer arrived with a witness to the robbery. The witness said that the suspect in custody was not the person who committed the robbery. At that point, Battle released the suspect. Detaining the juvenile any further would have been a violation of his civil rights. The young girl with the juvenile was his younger sister who attended middle school close to the bus stop.

15. Complainant forgot to give the juvenile suspect his business card, which is a standard procedure and requirement for UCD police officers.

16. After the incident was over, Complainant returned to headquarters to draft his report. It occurred to him, after he returned, that he needed to get a phone number for the juvenile's parents so he could contact them, and advise them of what had occurred.

17. About the time Complainant remembered that he needed to get the phone number, his then direct supervisor, Corporal Hall, told him that he needed to get

the juvenile's phone number and contact his parents. Corporal Hall received this direction from Chief Abraham and relayed it to Complainant.

18. Complainant got back in his patrol car, and returned to the bus stop, but the juvenile and his sister were no longer there. Complainant went to the middle school where the juvenile's sister was a student. With the help of the school's resource officer, he got a phone number for the juvenile's mother.

19. Complainant tried to call the juvenile's mother four times from his work cell phone. Each time he called, he received a recorded message which provided that the "call could not be processed." Complainant told his supervisor that he was unable to get through to the juvenile's mother. The supervisor suggested using the land line telephone in the squad room. Complainant tried to reach the juvenile's mother two times from the squad room phone, but received the same message that the call could not be processed. Complainant made a good faith effort to contact the juvenile's parents.

20. Someone from the school did reach the juvenile's mother that day, and advised her that her son had had contact with the police. Complainant was not aware that this phone call had been made.

21. Because Complainant tried to call the juvenile's mother six times and received the same message, he thought that her phone was dead or no longer in service.

22. When Complainant left work on Tuesday, September 22, he had not yet made contact with the juvenile's mother. He was off work on Wednesday, Thursday and Friday. He returned to work on Saturday, September 26, but did not attempt to contact the juvenile's mother on either Saturday or Sunday.

23. When Chief Abraham reported to work on Monday, September 28, he realized that the juvenile's parents had never been contacted, and was upset by this fact. Chief Abraham contacted Corporal Hall and told him that Complainant had not yet contacted the juvenile's parents, and that it needed to be done immediately.

24. Corporal Hall relayed the message to Complainant who called the juvenile's mother's phone number again. He again got the message that the call could not be processed. He tried the number again, and the call went through to the mother. Had Hall not directed Complainant to make additional attempts to contact the juvenile's parents on September 28, Complainant would not have done so.

25. The juvenile's mother expressed unhappiness that she had not been contacted sooner by a police officer. An administrator from her daughter's school called her on the date of the incident. After Complainant apologized and explained about his inability to reach her by telephone, the call with the juvenile's mother ended amicably.

26. Complainant has very limited experience dealing with juveniles because there are so few of them in UCD's jurisdiction.

27. After reading all of the reports regarding the incident with the juvenile, Chief Abraham ordered an After Action Review, which is a type of investigation, to determine what, if anything, went wrong during the incident, and to determine if any policies needed to be changed or improved.

28. Sergeant Deana LoSasso conducted the After Action Review. In addition to reviewing the police report generated as a result of the incident, she interviewed the dispatcher who radioed that a robbery had taken place, Complainant, Officer Battle and Corporal Hall. She also reviewed a statute regarding the use of physical force in making an arrest and various Standard Operating Procedures for the Department.

29. After she finished her investigation, Sgt. LoSosso authored a report for Chief Abraham regarding her findings. Among her findings, Sgt. LoSosso acknowledged that the Standard Operating Procedure regarding contacting a juveniles was "being updated and was not available to Officer McCauley." Sgt. LoSosso wrote in her report that it was a "policy failure."

30. In the section of Sgt. LoSosso's report entitled "Recommendations," Sgt. LoSosso wrote, among other recommendations, "I recommend that Officer McCauley review the juvenile policy, and the actions that need to take place when dealing with juveniles. (However, I could not locate any policy on handling juveniles.)"

31. It is understood in the Department that if an officer has contact with a juvenile, the officer should contact the juvenile's parents. There is no policy which requires an officer to contact a juvenile's parents, nor did the Department provide guidance regarding how quickly a juvenile's parents needed to be contacted. At the time of the hearing, the Department was working on developing a policy regarding the requirement of contacting a juvenile's parents.

32. When Complainant was hired in 1999, the Department did provide him training on juvenile procedures. The training provided that if a juvenile was arrested, his parent or guardians had to be notified. Complainant received similar training in 2009. The juvenile in this case was never arrested; he was temporarily detained.

33. After Chief Abraham read Sgt. LoSosso's report, he scheduled a meeting pursuant to Board Rule 6-10 with Complainant.

34. Prior to the meeting, Chief Abraham listened to the relevant dispatch recordings and read the police report generated from the incident with the juvenile.

35. The Rule 6-10 meeting was held on November 24, 2009. Chief Abraham appeared with a representative from the Department's Human Resources office. Complainant appeared at the meeting with his attorney.

36. During the meeting, Chief Abraham asked Complainant to provide his side of the entire incident. Complainant explained that he had tried to call the phone number he had been provided, but was unable to get through to the juvenile's mother.

37. During the Rule 6-10 meeting, Complainant admitted that he had made a mistake in not making additional efforts to contact the juvenile's parents. Complainant could have made additional attempts, such as going to the middle school to get the juvenile's address, to contact the juvenile's parents, but did not.

38. After the meeting was over, Chief Abraham provided Complainant an additional five working days to submit any additional information that he wanted Abraham to consider. Complainant did not provide any additional information.

39. Chief Abraham reviewed all of the information he had gathered, including Complainant's statements during the Rule 6-10 meeting and Complainant's prior performance before he made his final decision. Complainant had always met or exceeded expectations according to his performance evaluation. Chief Abraham also spoke with a member of the Human Resources office before making his final decision.

40. Chief Abraham considered that Complainant's job performance with regard to not calling the juvenile's parents was unsatisfactory. Chief Abraham acknowledged that there was no written policy requiring the contact of juvenile's parents, but felt that policing is a "gray area," where every situation cannot be covered by a policy. Chief Abraham felt that Complainant used poor judgment when he pointed a weapon at a child and then waited six days to contact the child's parents.

41. Chief Abraham considered different levels of discipline, including corrective action. He decided that a corrective action was not adequate because he needed to do more than correct Complainant's behavior, and that the failure to contact the juvenile's parents warranted disciplinary action.

42. Chief Abraham decided, after considering all of the information, to impose a disciplinary action of a temporary pay reduction in pay of 2.5% for three months. The entire dollar amount of Complainant's disciplinary action was $349.20.

43. In the letter of disciplinary action, Chief Abraham wrote that the specific charge giving rise to the disciplinary action was "Unsatisfactory Performance." He further wrote, "After determining a 16 year old you confronted at gunpoint was not the robbery suspect you were looking for, you failed to obtain adequate

contact information and failed to contact a parent after being directed to do so by the chief via Corporal Dave Hall. You were directed to do so a second time six days later and you were able to contact the mother." Complainant was not disciplined for any other actions related to the incident.

44. Complainant timely appealed his disciplinary action.

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; §§ 24-50-101, *et seq.*, C.R.S.; *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 perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

A. Burden of Proof

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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). 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.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence and it was stipulated that Complainant committed the acts for which he was disciplined. Complainant was unsuccessful in his attempts to contact the juvenile's parents until six days after the incident at the bus stop. Moreover, Respondent has proven by preponderant evidence that Complainant would not have made any additional attempts to contact the juvenile's parents after September 22, 2009, if he had not been given specific direction to do so.

B. <u>The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.</u>

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).

As the Appointing Authority, Chief Abraham was charged with determining what discipline, if any, should be imposed on Complainant. Chief Abraham used reasonable care and diligence in gathering all of the information and evidence relevant to the situation. He held a Rule 6-10 meeting with Complainant, where Complainant was permitted to respond to all of the allegations against him. Chief Abraham also had LoSosso conduct an After Agency Review, and he considered the final report concerning that investigation. Finally, Abraham gathered information regarding Complainant's work history and his past performance at UCD. Chief Abraham gave candid and honest consideration to all of the evidence before he made his decision to discipline Complainant.

Finally, however, Chief Abraham's decision to discipline Complainant was arbitrary and capricious given the fact that that there was no policy at UCD regarding the requirement of contacting a juvenile's parents. Complainant knew that he should call the juvenile's parents, and was, in fact, directed by Corporal Hall to do so. Complainant immediately went back to the middle school and obtained a telephone number for the juvenile's mother. He tried the telephone number six times, and each time received a recording that the call could not be processed. It was not unreasonable for Complainant to reach the conclusion that the telephone number for the juvenile's mother was no longer valid. Although Complainant knew that he was expected to contact the juvenile's parents, he did not realize the importance of making the contact without a policy or training to guide him. Even Sgt. LoSosso acknowledged that there was a policy failure with respect to the incident. Complainant made a good faith effort to reach the juvenile's mother, and should not be subject to discipline when the expectations for contacting a juvenile's parents were not set forth clearly. Respondent argues that is sufficient that Complainant violated generally accepted standards of performance. *Bishop v. Department of Institutions, Division of Youth Services*, 831 P.2d 506 (Colo. App.1992). Given the information and training he had, Complainant did not fail to perform competently. None of the causes for discipline outlined in Board Rule 6-12 is present in this case.

C. <u>The discipline imposed was not within the range of reasonable alternatives.</u>

Because discipline is not proper in this case as explained above, the discipline imposed in this case was not appropriate.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.

ORDER

Respondent's action is **rescinded**.

Dated this 21st day of April, 2010.

Hollyce Farrell
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 7th day of April, 2010, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** addressed as follows:

Reid Elkus, Esq.

[redacted]

Christopher J. Puckett, Esq.

[redacted]

[redacted]

Andrea C. Woods