STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010B097**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SCOTT LYONS,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 26, 2011, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. The record was closed on June 9, 2011. Senior Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Kristen Withrow, Assistant Director, Lookout Mountain Youth Services Center (Lookout Mountain), and Complainant's appointing authority. Complainant represented himself.

MATTER APPEALED

Complainant Scott Lyons (Complainant or Lyons), appeals his disciplinary termination of employment by Respondent, Department of Human Services (DHS or Respondent). Complainant seeks rescission of the disciplinary action and reinstatement.

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

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 range of reasonable alternatives; and

4. Whether Respondent discriminated against Complainant on the basis of race.

JUDICIAL NOTICE

The Administrative Law Judge took judicial notice of the Lawrence Bill, C.R.S. § 27-1-110, now found at C.R.S. § 27-90-111 (2010).

FINDINGS OF FACT

General Background

1. Complainant was a certified Safety and Security Officer (SSO) I at Lookout Mountain at all times relevant. Complainant worked for DHS for approximately seven years, with no history of corrective or disciplinary action until his termination in January 2010.

2. Lookout Mountain is an incarceration facility that houses 161 youth between ages 15 and 21. Half of the youth have substance abuse diagnoses; most have diagnoses of behavioral and conduct disorders; 75% have learning disabilities and are in special education programs; and many have significant abuse histories (emotional, physical, or sexual abuse).

3. As an SSO, Complainant was responsible for the direct supervision of youth in his care, implementing treatment programs, providing recreational supervision, and conducting clinical staffings through one-on-one counseling with the youth.

4. Complainant's job included regular unsupervised access to youth under his direct care. He often worked the graveyard shift.

5. The Lookout Mountain youth are often defiant towards and talk back to the SSO's. Despite these challenges, SSO's are expected to act as role models for the youth, teaching, mentoring, and coaching them in appropriate behaviors. This behavioral modeling is designed to assure the youth are safe to return to the community upon release.

6. On November 18, 2000, Complainant pled "Guilty" to Third Degree Assault, Criminal Mischief, Vehicle, under C.R.S. § 18-3-204. Complainant received a deferred sentence for this conviction. Upon successful completion of the deferred sentence stipulation in 2001, Complainant's Guilty plea was withdrawn and the charge of Third Degree Assault was dismissed with prejudice.

7. At the time Complainant was hired to be an SSO for DHS, at a youth detention facility other than Lookout Mountain, DHS was not aware of this charge.

October 2008

8. Complainant has a daughter, M[1], born in January 2001. Complainant does not reside with M's mother, Heather Coonts, who has always had primary physical custody of M.

9. Susan Levis is Ms. Coonts' mother. During the fall of 2008, Ms. Levis and Complainant picked up M from school in the afternoons on a rotating basis. The custody order indicated that M's parents had the "'first right to parenting' whereas if parent responsible for child is not watching her the other parent will be called first and has option to watch daughter."

10. In October 2008, Complainant and Ms. Coonts were negotiating a modification of arrangements for pick-ups after school.

11. On October 9, 2008, at approximately 3:00 p.m., Complainant arrived at M's school to pick her up. Ms. Levis was already there to pick her up. Complainant approached M, led her to his car, and placed her in the back seat of his car.

12. As M approached Complainant's car, she dropped her backpack. Ms. Levis picked it up. Complainant walked over to Ms. Levis, grabbed her arm hard, squeezed her forearm, took the backpack, and told her that she had no right to take M.

13. Complainant caused a bruise approximately four inches by one inch on Ms. Levis' forearm when he grabbed her. This incident was frightening and intimidating for Ms. Levis, who arranged to have a school staff person present for pick-ups for the remainder of the year.

14. The police were called to the school and they interviewed the involved parties. Complainant left with M.

15. Complainant was initially charged with a violation of custody orders. The police report included a description and photograph of the bruise on Ms. Levis' arm.

16. The custody violation charge was later dropped. Complainant was charged with "Harassment" based on his interaction with Ms. Levis on October 9, 2008. Complainant plea bargained the case and entered a "No Contest" plea to a municipal code violation for "Disorderly Conduct." The court documents regarding this case were sealed after Complainant's termination of employment.

November 2009

17. On November 9, 2009, M was in her bedroom at Complainant's house during the early evening. She was sitting on his lap and he was helping her do homework. She had difficulty with a math word problem, and continued to ask him the

[1] Complainant's daughter will be referenced as "M" in order to protect her privacy.

same question repeatedly. He told her to stop asking him that question. She remained confused and asked him the question again, then started to cry. Complainant said, "Don't cry or I'll put you in my bedroom." She responded, "No, you can't do that."

18. Complainant told M if she kept talking back to him, he was going to spank her.

19. Complainant picked up M with one arm, walked her over to her bed as he spanked her on her buttocks, and laid her face down on her bed with her face in a pillow. He spanked her additional times.

20. M said to Complainant, "I can't breathe, Daddy." Complainant responded, "I don't care." Complainant placed his hands on both sides of her head and pushed it into the pillow more than one time.

21. M then got up from the bed and Complainant directed her to go to his bedroom to gather herself. Ten minutes later, he went to his bedroom to get M. They completed her homework together, they had dinner, and then Complainant drove M to his mother's house to spend the night while he worked his graveyard shift at Lookout Mountain.

22. Jeri Lyons is Complainant's mother. As Ms. Lyons was putting M to bed on November 9, 2009, M told her that her father had held her face into a pillow and she could not breathe.

23. The next day, M reported the incident to her mother while they were in the car. She told Ms. Coonts that her father had held her head into the pillow and she was very afraid. She said to keep it a secret between the two of them, because she wanted to be able to keep visiting her father.

24. Ms. Coonts did not discuss the incident with M further that evening, but called her mother to discuss it. Ms. Coonts and Ms. Levis decided that they should not discuss it further with M, but would bring her to the Lakewood Police Station the next day to file a report.

25. At the Lakewood Police Department, a police officer trained in interviewing children, Officer Thomas, conducted the interview of M. Ms. Coonts and Ms. Levis were not present in the same room, but were able to watch and listen from an adjacent room.

26. M described the incident in detail to the police officer. She stated that Complainant had told her not to ask the question about her math homework again, but she had; that he had told her if she cried he would put her in his bedroom; and that she responded, "No, you can't do that." She said that her father thought she was talking back to him, so he picked her up and carried her to her bed, spanking her with his hand as he carried her. M then reported that Complainant put her face down on the bed and told her to put her head on the pillow. She stated that she put her face down on the

pillow, and then Complainant put his hand on the back of her head, holding her face into the pillow so it was hard for her to breathe. M then stated that after awhile she was able to turn her head to the side and she told her father, "I can't breathe." She said her father responded, "I don't care," and grabbed her head with both hands, turned her face back into the pillow and held it there for a shorter interval.

27. When asked to do so, M also demonstrated the entire incident on a stuffed bear. The officer asked her if she was able to breathe while her face was being pushed into the pillow, and she said, "It was hard to breathe. For a minute I thought I was going to die."

28. M informed the officer that later that night, she described the incident to her grandmother, Ms. Lyons, who responded, "that she's going to give my dad a whooping."

29. M's descriptions of the incident to Ms. Lyons, her mother, and the police officer were consistent.

30. A Lakewood Police Child Abuse Task Force Officer interviewed Ms. Lyons. She confirmed that M had reported the incident to her on the evening of November 9, 2009.

31. The officer then interviewed Complainant several times. He initially denied the incident had occurred. After the officer informed Complainant that M had reported the incident to his own mother first, Complainant described what had occurred in more detail. He informed the officer that he and M were in her bedroom and he was helping her do her homework. He stated she kept talking back to him. He said he put her face-down on the bed and spanked her. He admitted that during this episode she did say, "I can't breathe, Daddy." He denied having put her head into a pillow, but said the pillow was next to her head and her head hit the pillow.

32. After this incident, M had difficulty swallowing her food. She lost enough weight to go from a size 8 to a size 6. Ms. Coonts took her to see a therapist provided by the Lakewood Police Department, to help her deal with the incident.

33. Complainant testified that M made up the story about the incident in order to help her mother obtain a different custody arrangement. He also testified that he never informed M about losing his job over the November 2009 incident, and that he never put any pressure on her to recant her statements.

34. In April 2010, M participated in a court-ordered forensic interview with the Lakewood Police Department. During this interview, she recanted her statements made to Officer Thomas. She stated that she had told Officer Thomas "that I thought he did but he didn't." When asked what she had said her father did, M said, "I told her that he put my head in the pillow and shook my head." M stated that her father had his hands on the side of her head because he pulled her head off the pillow so she could breathe.

She also stated, "My Dad seems really sad after I did that." And, "I could breathe. I just know I could." These statements are found not to be credible.

35. M's statements made in November 2009 are found to be credible for the following reasons. She informed Complainant's mother first, indicating that she lacked any understanding of the possible consequences of her complaint against her father. Her statements made to her mother and to the Lakewood Police Department were consistent and never varied in detail. Complainant confirmed to the Lakewood Police Department the major details provided by M, including that her head hit the pillow and that she stated she couldn't breathe. He only denied the most incriminating portions of her report.

Child Abuse Charge

36. On November 16, 2009, Complainant was charged with Child Abuse under C.R.S. § 18-6-401(1). The Summons and Complaint stated that Complainant "did unlawfully or recklessly permit M, a child under 16 years of age, to be placed in a position which posed a threat of injury to this child's life or health."

37. Pursuant to Respondent's self-reporting requirement, Complainant informed Kerry Martin, Youth Service Counselor III at Lookout Mountain, of the charge. Ms. Martin forwarded the report of the charge to Ms. Withrow, Assistant Director of Lookout Mountain and Complainant's appointing authority.

38. Ms. Withrow received the police report containing notes of the interviews with M, Ms. Lyons, Ms. Coonts, Ms. Levis, and Complainant. She then requested any additional cases involving Complainant from Lakewood.

39. Ms. Withrow was provided copies of police records showing that Complainant had a Third Degree Assault conviction from November 2000, and that he had entered a "No Contest" plea to a Lakewood municipal code violation for "Disorderly Conduct" in 2008. She immediately became concerned about what she viewed as an apparent pattern of violent behavior by Complainant.

The Lawrence Bill and DHS Policy VI-2.4

40. Ms. Withrow reviewed the Lawrence Bill, passed into law by the Colorado General Assembly in 1999, and DHS Policy VI-2.4 (Background Investigation Policy), prior to scheduling a predisciplinary meeting with Complainant. The Lawrence Bill and the DHS Background Investigation Policy require that any applicant for employment be disqualified from consideration, and any current employee be dismissed from employment, for the following offenses: misdemeanor or felony crimes of violence, crimes involving domestic violence, sexual crimes, and child abuse.

41. The Lawrence Bill, at C.R.S. § 27-90-111, states in part,

(1) The general assembly hereby recognizes that many of the individuals receiving services from persons employed by the state department pursuant to this title or title 26, C.R.S., are unable to defend themselves and are therefore vulnerable to abuse or assault. It is the intent of the general assembly to minimize the potential for hiring and employing persons with a propensity toward abuse, assault, or similar offenses against others for positions that would provide them with unsupervised access to vulnerable persons. The general assembly hereby declares that, in accordance with section 13 of article XII of the state constitution, for purposes of terminating employees in the state personnel system who are finally conceited of criminal conduct, offenses involving moral turpitude include, but are not limited to, the disqualifying offenses specified [below].

(2) (b) 'Conviction' means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court or adjudication for an offense that would constitute a criminal offense if committed by an adult. 'Conviction' also includes having received a deferred judgment and sentence or deferred adjudication; except that a person shall not be deemed to have been convicted if the person has successfully completed a deferred sentence or deferred adjudication.

(e) 'Vulnerable person' means any individual served by the department who is susceptible to abuse or mistreatment because of the individual's circumstances, including but not limited to the individual's age, disability, frailty, mental illness, developmental disability, or ill health.

(9) (c)(I) [A] person shall be disqualified from employment either as an employee or as a contracting employee if less than ten years have passed since the person was discharged from a sentence imposed for conviction of . . . (1) Third degree assault, as described in Section 18-3-204, C.R.S.;

(10)(b). . . Nothing in this paragraph (b) shall prohibit the department from taking administrative action if the employee's conduct would justify disciplinary action under section 13 of article XII of the state constitution for failure to comply with standards of efficient service or competence or for willful misconduct, willful failure, or inability to perform his or her duties.

42. The DHS Background Investigation Policy contains the following introductory Policy statement:

It is the vision of [DHS] to be the nation's leader in helping individuals, families, and communities to be safe and independent; therefore, this policy, in concert with and in addition to C.R.S. 27-1-10, intends to protect vulnerable individuals receiving services from [DHS] from persons with a propensity toward abuse, assault or similar offenses against others.
C.R.S. 27-1-110 itself does not preclude the Department or the Director of any facility operated by the Department from adopting additional standards regarding disqualification from employment that includes issues of moral turpitude and/or offenses not set forth in this statute; **therefore this policy does include additional department wide requirements intended to further protect**

vulnerable individuals and as determined by the Executive Management Team (EMT) of the [DHS]. (Emphasis in original)

43. The DHS Background Investigation Policy definition of "conviction" is identical to that contained in the Lawrence Bill.

DHS Code of Conduct

44. The DHS Code of Conduct requires that all employees be truthful, honest, and courteous to co-workers and to customers at all times; and that they demonstrate respect for all people and their ideas, and commit to resolve conflicts.

Predisciplinary Meeting

45. On December 18, 2009, Complainant and his representative, the Grievance Coordinator for Colorado WINS (the employee union), attended the predisciplinary meeting under Board Rule 6-10 with Ms. Withrow and her representative, Ms. Martin.

46. Mr. Withrow began by explaining that the purpose of the meeting was to discuss and gather all pertinent information concerning the assault and criminal mischief charges dated November 18, 2000, the violation of custody and harassment charge from 2008, and the child abuse charge. She further informed Complainant that the purpose was to give Complainant the opportunity to present information to her and any mitigating circumstances, prior to her decision whether to impose disciplinary action.

47. Ms. Withrow then explained that she was investigating the allegation of child abuse, a possible pattern related to anger management concerns, and their impact on the facility and the vulnerable population at Lookout Mountain, the other criminal history, and "what appear to be multiple police contacts with the Lakewood Police Department." She stated that the police department had reported over 50 contacts with him. She also indicated that none of the cases had been brought to DHS' attention because Lakewood did not have Complainant's fingerprints on file. It is standard procedure for DHS to have employees' fingerprints on file.

48. Complainant reported that for the 2000 offense, he was given a deferred judgment on the assault and criminal mischief charge. Withrow asked what happened that led to the charges. Complainant stated he was working at a nightclub and was defending someone who had gotten into a fight. He stated that there was damage to "the other gentleman's car, but I paid the restitution." Complainant's representative read part of the definition of "conviction" form the Lawrence Bill and DHS Background Investigation Policy, "A person shall not be deemed to be convicted if the person has successfully completed a deferred sentence," and noted that Complainant had completed it successfully prior to the time of hire.

49. Ms. Withrow explained that a deferred sentence could potentially be a disqualifying offense, and that she was concerned about a pattern of behavior.

50. Ms. Withrow stated that the police report she reviewed contained information different from that which Complainant was giving her, namely, that in 2000 he had had a fight with another man over a woman at the grandmother's house, not at a nightclub. Complainant stated that it originated at a different spot, "I did get in a fight with another man, who I was not related to and serious damages happened, I was a young man." He stated that the deferred sentence term was six months, after which it was stricken from his record.

51. Complainant informed Ms. Withrow that the 2008 incident involving Ms. Levis was pled down to a municipal code violation, Disorderly Conduct, to which he pled "No Contest." Ms. Withrow stated that the police report concerning that incident contained some very concerning behaviors.

52. Ms. Withrow reviewed the police report on this incident containing a detailed description of the bruise on Ms. Levis' forearm. Complainant denied having caused the bruise, and stated it was hearsay that was never proven in court. He said that Ms. Levis and Ms. Coonts made up the story to obtain more parenting time.

53. Ms. Withrow stated that the violation of child custody charge was dropped, but a charge of Harassment was made against Complainant for the incident with Ms. Levis. She asked what was the basis for the harassment charge, which was pled down to disorderly conduct, and to which Complainant had pled "No Contest."

54. Complainant explained that there were mitigating circumstances at the time. He was in the process of modifying his parenting time, he had signed the papers regarding after school pick-up days, but he was unaware that Ms. Levis had not yet done so. He stated that the court agreement stated that he had the first right to parenting time if Ms. Coonts was not there.

55. He stated that he committed no crime that day; he simply followed the court document giving him first right to parenting time.

56. Ms. Withrow asked Complainant why he pled "No Contest" instead of "Not Guilty," if nothing had happened with Ms. Levis. She also asked if anger management classes or counseling had been ordered.

57. Complainant responded that no classes or counseling had been ordered, but that he had attended family therapy, and it had felt good to be able to talk to somebody about the issues. He noted that he had given Ms. Martin a contact phone number in connection with that therapy.

58. Complainant also stated he had attended ten parenting classes of his own accord, because he is trying to be a better person.

59. Ms. Withrow asked Complainant about the fifty contacts with the Lakewood police department. Complainant explained that he had asked for drop-offs to be at the Lakewood Municipal Courthouse, but that request was denied. Therefore, on many occasions he had asked the Lakewood police to be at his home for drop-offs, for his and others' safety, because there had been a lot of false accusations in the past. He also stated that Ms. Coonts had on some occasions failed to drop off his daughter at the right time, and he called the police to make a report.

60. Ms. Withrow then turned to the child abuse allegation. Complainant stated that he had been "found not guilty" by Social Services and denied having done anything other than spank his daughter. He stated he was innocent until proven guilty.

61. Ms. Withrow responded that she was not a court of law and that she was gathering information to render a decision about whether he was able to safely perform his duties and service the population at Lookout Mountain. She stated that the police reports contain some concerning behaviors.

62. Complainant stated that the case was about misdemeanor child abuse, because there were no bruises on his daughter. He explained that they were doing homework and she was being disrespectful to him; he confronted her several times; he tried to give her a time out; and she was disrespectful, so he spanked her. He stated, "My daughter has already stated that she [felt] intimidated by the police, and she just went along with whatever they, she was just trying to appease them basically."

63. Complainant responded that the police reports contained hearsay. He stated he had never been under investigation for harming a child at Lookout Mountain and had always had good reports. He stated that in the previous year, he had saved a staff member's life and captured both of the people who tried to kill him without any harm or physical contact with anyone involved.

64. Complainant indicated that he planned to enter into a plea bargain on the child abuse charge, and reiterated, "Social Services found me not guilty."

65. Ms. Withrow stated that Complainant's daughter had gone to his own mother first. Complainant responded that his daughter had exaggerated.

66. Ms. Withrow asked Complainant if he had put his daughter's face down on a pillow when she said she couldn't breathe. He denied having done that.

67. Ms. Withrow stated that in reviewing Complainant's personnel file, and having been around the agency for a number of years, she had known Complainant to "have conflicts with your coworkers, that I think had shown a poor management of anger." She mentioned a conflict with Mr. Nestel and one with Mr. Smits.

68. Complainant stated that there was a misunderstanding with Mr. Nestel, they had done mediation, and they worked well together.

69. Ms. Withrow also noted that on Complainant's mid-year review, under Interpersonal Skills, "a couple of the students commented that they did not like the way they were being talked to by you." Complainant responded that he had been counseled on his tone of voice, "Try to speak a little bit nicer." He also stated that as far as he knew, he had not received any grievances by students for over a year, maybe he had, but he did not recall receiving any. He stated that he had great rapport with the students on the unit.

70. Ms. Withrow expressed her concern that it appeared that Complainant was given supervised overnights with his daughter after November 9, 2009, according to the court order she had. She read the Order, which indicated he had unsupervised visitation during the day, and that, "petitioner will exercise his overnight parenting time at his mother's home." She stated that it concerned her that he might not be safe to work with the Lookout Mountain population, particularly on graveyard shifts.

71. Complainant stated that this language was incorrect, that his attorney sent a letter to the judge, and that it would be amended.

72. At the end of the meeting, Complainant requested and Ms. Withrow gave Complainant five extra days to provide any additional information for her to consider. She reminded Complainant to obtain the court order modifying his supervised overnight visitation, if available.

73. At the time of the meeting, all criminal files involving Complainant were not sealed and Complainant did not mention sealing them.

Complainant's RAP Sheet

74. Complainant's "RAP" (Record of Arrest and Prosecution) Sheet with the Lakewood Police Department lists Complainant as a "Subject/Associate – Incident" on October 14, 2006; as a "Suspect – Harassment" on October 9, 2008, as a "Parent/Guardian – Incident – Attn: Crimes Against Children" on February 19, 2009; as a "Victim - Harassment" on February 21, 2009; as a "Subject/Associate – FI Contact – Attn: Persons" on August 28, 2009; and as a "Suspect – Child Abuse – Cruelty Toward Child" on November 11, 2009.

75. Complainant's RAP Sheet also lists Complainant as a victim of several crimes during the same period, including theft from auto, criminal trespass – vehicle, in 2007, 2008, and 2009, and as the reporting party for harassment on March 5, 2010.

Withrow Decision

76. After considering all of the information in the police files, and the discussion with Complainant in the predisciplinary meeting, Ms. Withrow decided to terminate Complainant's employment. She determined that Complainant had exhibited

a propensity for abusive and assaultive behavior towards others which placed Lookout Mountain youth at risk of being abused or assaulted by Complainant. She was not concerned about whether Complainant was ever found guilty in a court of law of committing the crime of child abuse.

77. On January 21, 2010, Ms. Withrow sent a termination letter to Complainant. She noted that it is the mission of DHS to be the nation's leader in helping individuals, families, and communities to be safe and independent. She cited the Lawrence Bill, noting its policy to protecting vulnerable individuals receiving services from DHS from persons with a propensity toward abuse, assault or other offenses against others. She noted that Complainant served in a position of direct contact with vulnerable persons as defined under the Act.

78. Ms. Withrow stated that Complainant had had "charges including a deferred sentence, and convictions that I reviewed and that you provided me include:

- Third Degree Assault, Criminal Mischief, Vehicle, November 18, 2000. This case involved an assault on G.T. In addition, you dented the passenger side rear door of G.T.'s car. Per C.R.S. 18-3-204, Assault in the Third Degree is defined as (a) The person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon; or (b) the person, with intent to inflict, injure, harm, harass, annoy, threaten, or alarm another person whom the actor knows or reasonably should know to be a peace officer. . . You indicated that you accepted to a (sic) deferred sentence.

- Violation of Child Custody and Harassment, October 9, 2008. This case involved a conflict between yourself and your child's grandmother. You indicated you plead guilty to Disorderly Conduct. Per C.R.S. 1809-106, Disorderly Conduct is defined as (1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly: (a) Makes a course and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace . . . (c) Makes unreasonable noise in a public place or near a private residence that he has no right to occupy; or (d) Fights with another in a public place . . .

- Child Abuse, Cruelty Toward Child, November 11, 2009. This case is currently in Jefferson County Court."

79. Ms. Withrow also noted that in the course of the investigation she had "received information from the Lakewood Police Department that they have been a respondent to your home on at least 50 occasions. You reported to me that these incidences concerned your custody arrangements with your children. Again, this was of great concern and alarm to me."

80. The letter stated that based on the information contained in his personnel file, police reports, Complainant's statements during the predisciplinary meeting, and court documents, she was terminating his employment. Ms. Withrow concluded, "Your criminal behaviors are in direct conflict with the Department's Code of Conduct specifically 'demonstrating respect for all people and their ideas, and commit to resolve conflict.'"

81. The letter summarized that the disciplinary action was based on the following: 1. a pattern of criminal conduct; 2. conduct that is in direct violation of the DHS vision and policies; 3. conduct that is hazardous and contrary to the conduct and behavior required by your job duties when having direct contact with vulnerable populations; and 4. exhibiting a pattern of conduct categorized as a violation of moral turpitude.

82. Complainant is Hispanic. However, he did not indicate he was Hispanic on Background Check Authorization forms submitted to DHS in 2002. Instead, in the space for "Race," Complainant wrote, "W" for White instead of "H" for Hispanic. Throughout Complainant's employment, Ms. Withrow was unaware that Complainant is Hispanic.

83. Complainant timely appealed the disciplinary action.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Under the Civil Service Amendment, a certified employee "may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, conviction of a felony or any other offense which involves moral turpitude . . ." Colo. Const. art. XII, Section 13(8); § 24-50-125(1), C.R.S.

Just 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.

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 or modify Respondent's decision if it is found to be arbitrary, capricious or contrary to rule or law. § 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 that Complainant committed the acts upon which discipline was based. Respondent terminated Complainant for engaging in a pattern of violent conduct towards others which demonstrated a propensity toward abuse, assault or similar offenses against others. In November 2000, Complainant assaulted another individual and caused serious damage to his vehicle. In October 2008, Complainant grabbed Ms. Levis by the arm hard enough to cause bruising, leading her to become so fearful of Complainant that she arranged to pick up her granddaughter only with a witness present. This incident resulted in Complainant pleading no contest to disorderly conduct. In November 2009, Complainant lost control of his temper with his daughter and held her head down into a pillow and shook it, in a manner violent enough to give her trouble breathing and to fear for her life.

i. Complainant was covered by the Lawrence Bill.

Lookout Mountain serves a vulnerable population as defined by the Lawrence Bill. The statute defines vulnerable person as "any individual served by the state department who is susceptible to abuse or mistreatment because of the individual's circumstances, including but not limited to the individual's age, disability, frailty, mental illness, developmental disability, or ill health." § 27-90-111(2)(e), C.R.S.

Complainant is a person in a position of "direct contact" with vulnerable persons as defined by the Act. The law defines such a person as, "providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to vulnerable persons, regardless of the level of supervision of the employee. 'Direct contact' may include positions in which persons have access to or unsupervised time with clients or patients, including but not limited to maintenance personnel, housekeeping staff, kitchen staff, and security personnel." § 27-90-111(2)(c), C.R.S. Complainant's job included regular unsupervised access to youth under his direct care and he often worked the graveyard shift.

Therefore, Complainant is subject to the Lawrence Bill in his position as an SSO at Lookout Mountain.

ii. Complainant was not convicted of any disqualifying offenses under the Lawrence Bill or DHS' Background Investigation Policy.

2000 Guilty Plea to Third Degree Assault. The Lawrence Bill, at § 27-90-111(9)(c)(I), C.R.S., states, "[A] person shall be disqualified from employment either as an employee or as a contracting employee if less than ten years have passed since the person was discharged from a sentence imposed for conviction of . . . (1) Third degree assault, as described in Section 18-3-204, C.R.S." Complainant pled guilty to this disqualifying offense, Third Degree Assault, § 18-3-204, C.R.S., in November 2000, less than ten years prior to his termination in January 2010.

However, the Lawrence Bill and DHS' Background Investigation Policy define "conviction" as, "having received a deferred judgment and sentence, deferred adjudication; except that a person shall not be deemed to have been convicted if the person has successfully completed a deferred sentence, or deferred adjudication." § 27-90-111(2)(b), C.R.S.

This definition comports with the deferred sentencing provision of the Colorado Criminal Code, by exempting from the Lawrence Bill any disqualifying offense conviction that was deferred and successfully completed. The Colorado Criminal Code mandates that for all deferred judgment and sentence cases, upon "full compliance" with the conditions of the deferral agreement, "the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice." § 18-1.3-102(2), C.R.S. By operation of this law, Complainant's guilty plea in November 2000 was withdrawn and the charge of Third Degree Assault was dismissed with prejudice in 2001, when he complied with the conditions of the deferred sentence. Therefore, the November 2000 guilty plea is not a disqualifying offense under the Lawrence Bill.

October 2008 No Contest Plea to Disorderly Conduct. Complainant pled no contest to a Lakewood City Ordinance violation of disorderly conduct in 2008. Although Ms. Withrow referred to this case in the termination letter as a disorderly conduct violation under § 18-9-106, C.R.S., that is not the charge to which Complainant pled. And, the charge cited by Ms. Withrow is a petty offense, not a misdemeanor subject to the Lawrence Bill. § 18-9-106(3)(a), C.R.S. The Lawrence Bill and DHS Policy VI-2.4 apply only to misdemeanors and felonies. § 27-90-111(9), C.R.S.; Policy VI-2.4(A)(8)(a) and (b). Therefore, Complainant's 2008 criminal case is not a disqualifying offense.

November 2009 Charge of Child Abuse. At the time of termination, the criminal charge against Complainant for child abuse under C.R.S. § 18-6-401(1), a disqualifying offense, had not yet been adjudicated. Complainant informed Ms. Withrow that he intended to plea bargain the case; however, no plea had been entered at the time of

termination. Therefore, under the definition of "conviction" in the Lawrence Bill and the DHS Background Investigation policy, no disqualifying offense had yet occurred.

iii. Complainant demonstrated a propensity towards abuse and assault in violation of the Lawrence Bill policy, DHS policies, and DHS standards of conduct.

Complainant asserts that Respondent must prove that he was convicted of disqualifying offenses under the Lawrence Bill and DHS Background Investigation Policy in order to establish just cause for disciplinary action. This argument is unavailing as a matter of law. The Lawrence Bill states in part, "Nothing in this paragraph (b) shall prohibit the state department from taking administrative action if the employee's conduct would justify disciplinary action under [the Civil Service Amendment] for failure to comply with standards of efficient service or competence or for willful misconduct, willful failure, or inability to perform his or her duties." § 27-90-111(10)(b), C.R.S.

Classified state employees are required to perform their duties and conduct themselves in accordance with generally accepted standards and specific standards prescribed by law, rule of the board, or any appointing authority. § 24-50-116, C.R.S.; *Barrett v. Univ. of Colo.*, 851 P.2d 258 (Colo.App. 1993); Board Rule 6-12(2). These authorities recognize that job performance standards generally have no relation to criminal proceedings. The Lawrence Bill and DHS Background Investigation Policy constitute specific standards prescribed by law and rule for DHS employees working in a direct contact role with vulnerable populations. As an SSO I at Lookout Mountain working with vulnerable youth on an individual and unsupervised basis, Complainant was required by law to comport with these specific standards.

These standards consist of: A) the requirement that DHS employees conduct themselves in a manner that would not demonstrate "a propensity toward abuse, assault, or similar offenses against others," under § 27-90-111(1), C.R.S. and DHS Background Investigations Policy; B) the obligation to refrain from conduct that would comprise an offense of moral turpitude as defined by the Lawrence Bill, under § 27-90-111(1), C.R.S.; and C) DHS' Code of Conduct, which requires employees to demonstrate respect for other people and their ideas, and to commit to resolve conflicts.

Complainant engaged in a pattern of conduct demonstrating that he escalated conflicts instead of resolving them and respecting other people. He also demonstrated a worsening propensity for using force against others in emotionally fraught situations. His last mid-year performance review mentioned students' comments that they did not like the way they were being talked to by Complainant. Complainant's demonstrated propensity toward abuse and assault, and his pattern of escalating conflicts, constitute just cause for disciplinary action under the Civil Service Amendment. *See also* § 27-90-111(10)(b), C.R.S. ("Nothing . . . shall prohibit [DHS] from taking administrative action if the employee's conduct would justify disciplinary action under [the Civil Service Amendment] for failure to comply with standards of efficient service or competence . . .")

And, under Board Rule 6-12(2), Complainant's violation of the "department rules or law" above adversely affected his ability to perform the job.

B. The Appointing Authority's action was not arbitrary or capricious, or contrary to rule or law.

i. Respondent's action was not contrary to rule or law.

Complainant raised several legal defenses at hearing. First, he asserted that DHS' Background Investigation Policy constitutes a binding contract, and that to hold him responsible for complying with the Lawrence Bill violates his contract right under the Policy. He states that he was unaware of certain provisions of the Lawrence Bill that are now being used against him. This argument is unavailing because contract law principles do not apply to state employment. Further, the Lawrence Bill language upon which Respondent relies is contained in the Policy.

Complainant also contends that to discipline him for conduct that has been litigated in criminal court subjects him to double jeopardy, in violation of the Fifth Amendment of the United States Constitution. That provision states in part, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." This argument is also rejected because the constitutional protection against double jeopardy only applies to subsequent criminal proceedings. *Woodrow v. Wildlife Comm.*, 206 P.3d 835 (Colo.App. 2009). The Board proceedings are civil in nature.

Complainant argues that Respondent violated State Personnel Board Rule 6-2, 4 CCR 801, which requires progressive discipline. The Rule mandates:

> A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

The acts that gave rise to disciplinary action in this case were serious. The evidence in this case involves a pattern of violent conduct towards others, including a young child, demonstrating a propensity toward abuse, assault, or similar offenses against others. Respondent was therefore justified under Board Rule 6-2 to impose disciplinary action, without first imposing a corrective action.

In this case, the nature and severity of the discipline imposed, termination, was justified due to the unique nature of Complainant's position. Complainant held a position of trust in which he was responsible for vulnerable youth in his care, often on an unsupervised basis. The Lawrence Bill codifies the special nature of this position of trust and the higher standard of conduct that is required of it. Therefore, Respondent did not violate Rule 6-2 by failing to use progressive discipline.

The terms of State Personnel Board Rule 6-12(A) were also given close consideration. This portion of the Rule provides:

> A. An employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department may be placed on indefinite suspension without pay pending a final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits. Department of Human Services' employees charged with an offense defined in § 27-1-110, C.R.S. [now codified at § 27-90-111, C.R.S.], may be indefinitely suspended without pay pending final disposition of the offense.

Complainant was charged with child abuse under C.R.S. § 18-6-401(1), a disqualifying offense defined in the Lawrence Bill. Under Rule 6-12(A), Respondent was permitted to indefinitely suspend Complainant without pay pending final disposition of the offense. By contrast, Rule 6-12(A) mandates that for non-DHS employees, if a charge is dismissed or the employee is not convicted, a suspended employee "is" to be restored to the position with back pay and benefits.

Respondent comported with Rule 6-12(A). The Rule does not require an agency to wait to take action against a DHS employee for conduct underlying a disqualifying offense under the Lawrence Bill. Even if the Rule were to do so, it would directly conflict with the Bill itself. As discussed above, the Lawrence Bill expressly permits DHS to impose disciplinary action against an employee for underlying conduct that does not meet the statutory definition of a disqualifying offense. It states, "Nothing in this paragraph (b) shall prohibit the state department from taking administrative action if the employee's conduct would justify disciplinary action under [the Civil Service Amendment] for failure to comply with standards of efficient service or competence or for willful misconduct, willful failure, or inability to perform his or her duties." § 27-90-111(10)(b), C.R.S.

Therefore, Respondent was permitted to impose disciplinary action for underlying conduct that led to criminal charges, notwithstanding the ultimate disposition of those charges.

ii. Respondent's action was not arbitrary or capricious.

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; or 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).

Complainant contends that Respondent acted in an arbitrary and capricious manner by failing to wait until there was a legal disposition of the child abuse charge, before imposing discipline. Respondent counters that the police report established convincingly for Ms. Withrow that Complainant had engaged in violent conduct towards his daughter; she therefore was not concerned about whether the criminal case was proven in court. The police report contained not only M's detailed report to the police officer, but a corroborating statement by Complainant's own mother that M immediately reported the incident to her within a few hours of the traumatic event.

The circumstances of this case establish that it was reasonable for Respondent to take action when it did, prior to the disposition of the pending criminal child abuse case. Once Ms. Withrow collected all of the documentation available on Complainant's criminal history, she discovered that he had a history of assaultive conduct towards others. As the Assistant Director of Lookout Mountain, Ms. Withrow had a duty to protect vulnerable individuals receiving services from [DHS] from persons with a propensity toward abuse, assault or similar offenses against others.

Respondent therefore used reasonable diligence and care to procure relevant information, gave the evidence appropriate consideration, and exercised its discretion in a reasonable manner.

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

Complainant argues that termination was not within the range of reasonable alternatives, because his conduct outside of work has never been reflected in his performance history. Board Rule 6-9 requires that appointing authorities consider all of the following factors in making the decision to take disciplinary action: "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Complainant presented significant mitigating evidence. First, he has no history of corrective or disciplinary action. Second, he has always earned satisfactory performance ratings. Third, Respondent was unable to locate any grievances filed by residents against him. Complainant also informed Ms. Withrow at the predisciplinary meeting that he had attended ten parenting classes of his own accord, because he was trying to be a better person. This is significant mitigation. In light of these facts, Complainant asserts, Respondent has failed to demonstrate any link between his conduct outside of work and his conduct on the job.

In aggravation, at the predisciplinary meeting, Complainant consistently denied having engaged in violent conduct with either Ms. Levis or with his daughter. He repeatedly stated that nothing had been proven in court and that it was all hearsay. This blanket denial closed the door on any possibility of Ms. Withrow having an honest and meaningful discussion with Complainant about his inability to control his physical anger in heated situations. Without an avenue of open and honest communication with Complainant, it was not possible for Respondent to be able to trust that he would tell the truth about his own conduct with Lookout Mountain youth, when he was alone with them during the graveyard shift.

Additionally, the frequency and severity of Complainant's violent conduct increased over time, rather than decreased. While there was an 8-year period of time between the 2000 and 2008 incidents, there was only a 1-year period of time between Complainant's incidents with Ms. Levis and his daughter. This pattern demonstrates a growing propensity towards violence, not a diminishing one.

The youth at Lookout Mountain have myriad problem behaviors and are routinely combative and confrontational towards SSO staff. Employees in the SSO position must be trusted to be alone with these youth and to control their violent impulses while on the job. The Lawrence Bill and the Background Investigation Policy require Lookout Mountain to protect the youth in its care from any employee who has a demonstrated propensity toward abuse, assault or similar offenses against others. This statutory duty was the driving force behind the decision to terminate Complainant's employment.

Respondent weighed the mitigating information against Complainant's recent history of abusive and assaultive behavior, and determined that it could not take the risk of continuing to trust him in the SSO position. Based on all of the information in the record, Respondent's decision was within the range of reasonable alternatives available to it.

D. Respondent did not discriminate against Complainant.

Complainant asserts that Respondent discriminated against him on the basis of race in terminating his employment. The Colorado Anti-Discrimination Act (CADA) prohibits discrimination in employment on the basis of race. § 24-34-402, C.R.S. To prove intentional discrimination, the employee must establish, by a preponderance of the evidence, a *prima facie case* of discrimination. The elements of a *prima facie* case of intentional discrimination are:

1. complainant belongs to a protected class
2. complainant was qualified for the position
3. complainant suffered an adverse employment decision despite his or her qualifications
4. circumstances give rise to an inference of unlawful discrimination.

Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397, 400 (Colo. 1997). *See also Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

Complainant has failed to establish a *prima facie* case of intentional discrimination. He is a member of a protected class as a Hispanic individual. He was qualified for his SSO position. He suffered an adverse employment action, namely, termination of employment. However, none of the circumstances of this case give rise to an inference of unlawful discrimination. In fact, Ms. Withrow was unaware that Complainant was Hispanic until after the termination action.

Even assuming Complainant had established a *prima facie* case of discrimination, Respondent has articulated a legitimate, non-discriminatory reason for the adverse employment action. Therefore, the burden shifts back to Complainant to prove that the proffered reasons for his termination were in fact a pretext for discrimination. *Bodaghi*, 995 P.2d at 298.

"Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999). Pretext may also be proven by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Id.*

There is no evidence of pretext in the record in this case. Respondent's reasons for the termination were clear and consistent. There are no inconsistencies or contradictions in the reasons provided by Respondent for its termination decision.

Complainant's claim of discrimination therefore fails.

CONCLUSIONS OF LAW

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

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

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

4. Respondent did not discriminate against Complainant on the basis of race.

ORDER

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

Dated this 22nd day of June, 2011

Mary S. McClatchey
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 23 day of June, 2011, I electronically served 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:

Scott Lyons
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Lakewood, Colorado 80232
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and in the interagency mail, to:

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Andrea C. Woods