

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CORNELIUS FOXWORTH,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS,
Respondent.

Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on November 6, 13, and 26, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on November 6, 2012. The record was closed on November 27, 2012, following the parties' closing arguments. Assistant Attorney General Sabrina Jensen represented Respondent. Respondent's advisory witness was Caren Leaf, Associate Director, Division of Youth Corrections (DYC), Department of Human Services (DHS or Respondent). Complainant represented himself.

MATTERS APPEALED

Complainant, the former Director of Gilliam Youth Services Center (Gilliam), DYC, DHS, appeals his disciplinary termination of employment. He asserts that termination was an excessive disciplinary action and that Respondent discriminated against him on the basis of race and age.

For the reasons set forth below, the action of Respondent 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 and age.

FINDINGS OF FACT

1. Complainant started his career with DYC in 1988. He began as a Correctional Youth Security Officer (CYSO or CSSO) and worked up the chain of command. In 2001 he became the Director of Gilliam.

2. Gilliam is a youth detention facility which houses children of both genders aged 10 to 18 for an average of two-week stays. Gilliam has 64 sleeping rooms, with 78 secure detention beds. Gilliam's primary mission is to provide safe and secure pre-trial detention services for its residential population. The program is designed primarily for behavior management provided in a cognitive restructuring program methodology. The facility uses internal and community resources to deliver its educational, counseling, tracking, home detention, case management, religious, recreational, restorative justice and other program services.

3. Maurice L. Williams, Assistant Director, Central Region Office, NYC, was Complainant's direct supervisor and appointing authority at all times relevant until July 1, 2010.

4. In April 2007, Complainant received an overall performance rating of Level 3: Often Exceeds Expectations, on a 4-level scale. He agreed with this evaluation.

2008 Evaluation and Corrective actions.

5. On March 28, 2008, Complainant received a corrective action for failure to take any action following a pre-disciplinary meeting with a staff member. The corrective action stated that the staff member had had inappropriate contact with a female resident in violation of Policy 3.20, prohibiting relationships between juveniles and staff; the Denver Department of Human Services had made findings in the case; and Complainant had taken no action to hold the employee accountable. The corrective action required that Complainant submit his written decision regarding all personnel matters to his supervisor following information gathering and investigation, including matters in which he decided to take no action.

6. Complainant did not appeal this corrective action.

7. In April 2008, Complainant received an overall performance rating of Level 2 on a 3-level scale. He agreed with this evaluation. The Supervisor Comments by Mr. Williams noted that Complainant had used a 360-degree evaluation "to take a hard look at his own performance as a facility manager" that had resulted in "some pretty aggressive goal setting for himself which should pay major dividends both personally and for the organization in the future. He should be commended for his openness to this process and investment in positive change."

8. Mr. Williams' Comments on this evaluation also indicated that Complainant was focusing on improving the decreased audit results, which were primarily due to "policies and procedures not being updated," as well as improvements to the physical plant to improve safety for staff. Williams noted that Complainant had succeeded in having new lights and cameras installed in several locations, "greatly enhancing staff's ability to see what is going on outside the walls." He also mentioned that the birth of a child in the medical isolation room at Gilliam "cast the facility in a negative light" but that the Root Cause Analysis of the incident revealed that a single supervisor had failed to perform his duties appropriately. Complainant had applied appropriate discipline and assisted the staff member in deciding to retire.

9. On October 7, 2008, Complainant received a corrective action for failing to submit an annual facility report to the Regional Director, James Gault, on August 17, 2008. The corrective action noted that Mr. Gault and Mr. Williams had both requested the report repeatedly, yet Complainant still had not provided it as of October 7, 2008. The corrective action required Complainant to submit all requested and required reports no later than the due date.

10. Complainant did not appeal this corrective action.

11. All DYC facilities, including Gilliam, are annually audited to 270 Standards by the DYC Office of Quality Assurance. Following the audits, the facility directors have quarterly meetings to follow up on compliance problems and their resolution. The 2008 audit of Gilliam contained several problem areas.

12. On October 15, 2008, Mr. Williams placed Complainant on a Performance Action Plan for six months, through April 15, 2009. The Plan required that Complainant:

- Correct all failed audit standards by November 12, 2008;
- Notify Mr. Williams prior to taking any annual, sick, or other leave;
- Obtain prior approval to attend non-DYC required meetings;
- Submit all requested and required reports no later than the due date;
- Implement a "Restorative Justice" program at Gilliam immediately and include details on the program in Complainant's monthly facility reports;
- Attend all internal management meetings and obtain prior approval from Mr. Williams to miss such meetings;
- Notify Mr. Williams of any time spent outside Gilliam between 9:00 a.m. and 5 p.m.

2009 Audit and Performance Action Plan

13. On November 14, 2009, Gilliam received an annual performance audit that was poor. The executive summary of the audit reported:

- 5 Program Strengths (down from 12 in 2006)
- 31 Non-compliant findings (up from 14 in 2006)
- 8 Repeat Non-compliant findings (down from 11 in 2008 and up from 1 in 2006)
- 4 Immediate Actions required (an increase from 1 in 2007 and 2008).

14. An Immediate Action item is one in which more than one incident occurred. Gilliam's Immediate Action items included: 1) use of administrative seclusion without required documentation of the justification for seclusion, ongoing need for seclusion, time of release from seclusion, and using pre-determined timeframes; all of this information was required to have been documented on an Incident Report form; 2) placing youth behind locked doors for time-outs, in violation of the prohibition on use of isolation for disciplinary reasons; 3) no log-in system for checking in and out handcuffs; staff were bringing in and using their personal handcuffs on the residents; and 4) the Gilliam Physician's Assistant did not have a current CPR certification.

15. Repeat Non-compliant findings are those repeated from one calendar year to the next, demonstrating institutional failure to resolve identified violations of regulations and/or statutes governing DYC facilities.

16. The 2009 audit executive summary noted that while there were improvements in several areas in the last fourteen months, few of them had improved to the rating of compliant. It also noted that, "The physical plant aesthetics continue to be a concern with the amount of tagging, torn furniture, clutter and overall disorganization. There has been effort to improve the walls in bedrooms by installing fire retardant paneling, and the overall cleanliness of the units has improved, although it is overshadowed by the physical plant damage."

2010 Audit

17. The 2010 audit trended in a good direction. The summary noted the following:

- 5 Program Strengths (same as 2009)
- 11 Non-Compliant (down from 31 in 2009)
- 3 Repeat Non-Compliant (down from 8 in 2009)
- 2 Immediate Actions required (down from 4 in 2009)

18. The summary noted that improvements to the physical plant were very noticeable and there was promise that the work being done would receive the necessary attention.

Worthington Investigation and Report

19. In the early spring of 2010, a Gilliam employee came forward with an allegation of sexual harassment by a CSSO II, Felix Acosta. Complainant and Gilliam Assistant Director Tanya Lyons arranged to have Stacy L. Worthington conduct an independent investigation of the complaint. Ms. Worthington interviewed twenty-two Gilliam employees.

20. On April 1, 2010, Ms. Worthington completed and submitted her report to Gilliam. Among her findings were the following: Mr. Acosta had engaged in a long pattern of inappropriate and unwelcome sexual conduct toward female employees at Gilliam. His conduct included placing his hand down a CSSO I's pants to touch her buttocks; asking whom she was sleeping with; touching her arm and thigh; grabbing her face and kissing her; asking her to be "friends with benefits"; and making lewd comments to her; after she told Acosta to stop harassing her, he retaliated against her by writing her up for unwarranted issues, changing her work schedule to take away her Sunday off, and threatening to put her on swing shift, trade her to a different pod, and write her up. Acosta told her that she knew how to get what she wanted, implying that if she had sex with him he would stop retaliating.

21. The Worthington report found that Acosta had had a sexual relationship with another Gilliam CSSO I under his direct supervision, which was consensual at the time it was initiated, despite being a violation of DHS policy. After the CSSO I ended the relationship, Acosta retaliated against this employee by being mean to her at work. The other CSSO II's noticed his changed demeanor toward her, and changed her shift so that Acosta would no longer supervise her. In addition, Acosta wrote, "Who's your daddy?" on her car; Complainant saw it and asked her if Acosta had written it; he talked to Acosta about it. The next day Acosta talked to the CSSO I and told her she had better retract the statement to Complainant. She did retract it.

22. After the CSSO I had ended the relationship with Acosta, she informed another Gilliam CSSO I, Michelle Cook, of his harassing emails about having sex. Cook informed Complainant and Ms. Lyons about Acosta's relationship with his subordinate and his hostile behavior toward her after she broke it off. Acosta then started spreading rumors about Cook at Gilliam. Two years later, when Cook applied to be a CSSO II, Lyons and Complainant called her into an office and asked if she was sleeping with two CSSO I's. She denied it and stated that Acosta started all of the rumors about female staff at Gilliam. Cook did not receive the promotion.

23. Complainant and Lyons investigated Acosta's relationship with the CSSO I and

concluded that because it was consensual there was no problem. They did not address the information regarding Acosta retaliating against her after she ended it, and spreading rumors about her to others at the facility.

24. Acosta spread rumors about several female Gilliam staff having affairs with other Gilliam staff.

25. The report found that several employees had been retaliated against by Acosta if they did not do what he wanted them to do.

26. In addition, Ms. Worthington found that Mr. Acosta had shown Gilliam's residents a movie, "The Last House on the Left." This film is rated R and includes graphic depictions of rape, violence, murder, and revenge killings. It was grossly inappropriate for juvenile offenders aged 10 – 18 at Gilliam, many of whom were in the legal system for violent crimes. Several Gilliam staff had objected to Acosta's showing of the film at the time; however, he ignored their objections and showed it anyway. None of the Gilliam staff complained about Acosta's conduct up the chain of command and neither Lyons nor Complainant was aware it had been shown.

27. The Conclusions of Worthington's report included the following: Gilliam administrators were aware that several supervisors had sexual relationships with staff subordinates and imposed no consequences; because no action was imposed against Acosta and his retaliation continued, other Gilliam staff determined that to complain about Acosta's sexual harassment and retaliation would be fruitless and would merely escalate his retaliation; Gilliam employees spend a tremendous amount of time discussing the sex lives of other employees and other gossip, resulting in low morale in the facility with many employees no longer participating in workplace conversations.

28. Worthington's Recommendations were that Gilliam administration take action to protect employees from harassment by other employees; clarify the process for reporting sexual harassment when the perpetrator is in the victim's chain of command; train all supervisors and employees in sexual harassment, including how to react when a supervisor sees other supervisors violating appropriate boundaries with and retaliating against subordinates; and, tamp down gossip and get staff focused on productive activities.

29. In response to the Worthington report, Gilliam did schedule sexual harassment training for all employees and supervisors at the facility.

May 2010 Felony Assault Arrest at Gilliam

30. On May 25, 2010, a Gilliam staff member was arrested on charges of contributing to the delinquency of a minor, a felony, and official oppression, a misdemeanor, for allegedly arranging a fight between two juveniles housed at Gilliam. The Denver District Attorney's Office indicated in a statement issued to the press that "while on duty at Gilliam . . . [the staff member] brought a juvenile from an adjacent pod to enter another juvenile's room and assault him."

31. The DYC Office of Quality Assurance conducted a review of assault incidents at Gilliam in June and July 2010. It discovered that Complainant's Facility Monthly Reports provided to the DYC Leadership documented no use of pointed restraints. However, there were six Gilliam incident reports documenting use of pointed restraints. When questioned by the auditors, Complainant reported that there were two incidents of pointed restraint in the past year.

32. The Quality Assurance analysis of assault incidents at DYC facilities also demonstrated a higher-than-average incidence of assaults at Gilliam versus other DYC facilities. Gilliam is reputed at DYC to have a more violent resident population than most other facilities.

June 2010 Evaluation Closeout by Mr. Williams

33. On June 30, 2010, Mr. Williams performed his closeout evaluation for the period April 1, 2010 through June 30, 2010. Mr. Williams rated Complainant at a Needs Improvement level, 1.7, in the area of Interpersonal Skills. He stated that although he had seen some improvement, Interpersonal Skills continued to be an area of concern. He noted that in Complainant's last evaluation, Complainant was informed that he needed to do a better job of being visible in management meetings and in working with management and staff to ensure that a positive culture and positive norms were established. Complainant had not improved.

34. Mr. Williams stated, "Staff climate and culture are seen as a major concern at this time. There seems to be a major lack of open communication, and mutual trust. Fox also is seen as needing to participate in a major and consistent fashion in his management team meetings. These areas will be a primary focus during this next evaluation cycle. This focus needs to be continued during this next evaluation cycle."

35. In the area of Empowerment, Mr. Williams complimented Complainant on doing a good job of encouraging his staff to seek opportunities for growth and development and rated him at a Level 2, Meets Expectations. He stated that Complainant's supervisory staff of his management team "seems to be improving in their willingness to address complex facility issues, and seemed more willing to confront items and each other. However, Fox needs to continue working on being very active in working with his staff and managers to develop a culture that is conducive to expressing fears, concerns, issues, problems."

36. Complainant received a Needs Improvement in Performance Management, 1.5. Mr. Williams stated, "This is an area of concern." He indicated that Complainant needed to provide the necessary leadership to establish a structure throughout the team that "demonstrates a more positive, open, proactive, success oriented culture. There are some staff who strive to demonstrate these attributes, and there are others who do not." Complainant also received a Needs Improvement in Organizational Management, 1.8. Mr. Williams stated that Complainant and his management team did a good job managing the budget, but "the formulation and implementation of facility goals needs to be accomplished."

37. In the area of Customer Service, Mr. Williams rated Complainant at a Needs Improvement level, 1.8. He stated that while Complainant did a good job of connecting with community organizations, his focus appeared geared toward helping Gilliam be seen in a positive light in the community. Mr. Williams stated that Complainant needed to focus more on internal customers, and, "We have discussed how Gilliam will be negatively viewed if operational procedures are not carried out correctly. Fox does have a long-term goal for how he would like to see Gilliam operating. However, greater focus needs to [be] given to the short-term more immediate issues."

38. Mr. Williams also rated Complainant at a Needs Improvement level, 1.7, in Communication. He noted that this was an area Complainant continued to work on, that concern remained about untimely submission of monthly time sheets, leave requests, and Pcard monthly statements. Mr. Williams noted feedback that Complainant took a few days to respond to inquiries. He also stated, "Fox does do a good job in providing me with timely information

when there is a significant issue that develops at Gilliam.”

39. Complainant received a level 2 in Operational Management for accomplishing the goal of reducing the non-compliant audit standards by 40%. In the area of Organizational Accountability, Mr. Williams stated that Complainant had had an unfortunate number of family situations to address, including deaths, illnesses and other family issues.

Caren Leaf Tenure as Interim Director of Facility Operations

40. Mr. Williams promoted out of his position at the end of June 2010. The position of Director of Facility Operations over Gilliam and two other facilities was open during the period July 1, 2010 through November 1, 2010.

41. Caren Leaf had been the Associate Director of NYC since 2006. In the spring of 2010, the Division underwent a reorganization under which she assumed supervision of the ten state NYC facilities. Ms. Leaf assumed the role of Interim Director of Facility Operations over Gilliam and two other facilities during that period and was delegated appointing authority over Complainant. John Gomez, NYC Director, delegated appointing authority over all NYC facility directors, including Complainant, to Ms. Leaf.

42. In her interim role as appointing authority over three NYC facility directors, including Complainant, Ms. Leaf spent several days at each facility familiarizing herself with its leadership team, its operations, and its current strengths and challenges. In July 2010, she required all CO III's to meet with her one-on-one, at all three facilities, and held meetings with the entire management teams. In addition, she informed all line staff at each facility that she was available to speak with anyone on a one-to-one basis to discuss any issues involving the facility, and gave all staff the opportunity to sign up for twenty-minute slots to meet with her.

43. Forty-two line staff at Gilliam signed up to meet with Ms. Leaf one-on-one, requiring her to add a second day of meetings there. This response was dramatically higher than the other two facilities she supervised.

44. In the one-on-one meetings with Gilliam line staff, themes and patterns emerged demonstrating a leadership void at the Director and Assistant Director level. Ms. Leaf learned that many staff had never met either Complainant or Ms. Lyons; that many staff believed neither of them knew who they were; that Complainant and Ms. Lyons were not visible to staff on a daily or weekly basis; that there was no direct communication by email or in person between Complainant and Ms. Lyons and the line staff; that the CO III's were perceived as running Gilliam without any oversight; that staff felt there was rampant favoritism, an “in group” and an “out group” who were treated inconsistently; and that gossip and sexualized discussion among staff was rampant. Several staff asked her if she could help them transfer away from Gilliam to another NYC facility.

45. In her meetings with line staff at the other two facilities she oversaw, Ms. Leaf did not receive similar reports regarding a general absence of leadership and a failure to communicate by the facility leadership.

46. Ms. Leaf was extremely concerned about the results of the Worthington report, the one-on-one meetings with Gilliam staff, and the inconsistent audit performances at Gilliam. She concluded that there was a hidden culture below the level of Director and Assistant Director under which no one dared to report misconduct up the chain of command and under which

individuals such as Acosta were permitted to operate in blatant disregard of appropriate standards of conduct.

47. Ms. Leaf discussed the outcome of her Gilliam staff meetings, the Worthington report, and the inconsistent audit outcomes, with DYC Director John Gomez and other members of the DYC leadership team. They determined that a facility assessment was appropriate.

Assessment of Gilliam

48. Ms. Leaf assembled a team of six to conduct a facility-wide assessment of Gilliam, with two members of the team assigned to assess each area. None of the members had any ties to Gilliam. On the team were Cindy Owen, Quality Assurance Director for DYC, who had conducted all recent audits of Gilliam and was very familiar with it; Dave Maynard, Director, Grand Mesa Youth Services Center; Jamie Nuss, Assistant Director, Platte Valley Youth Services Center; Don Sanders, CYSO III, Zebulon Pike Youth Services Center; and Robby Khamvilli, an auditor in the Quality Assurance office of DYC, with expertise in safety and security issues as a former CYSO III. The team visited Gilliam for a week in late August 2010.

49. Safety and Security. The team defined this area as “(daily structure, line of sight supervision, movement, staff youth interactions) impact from staff shortages and call-ins, consistent practices across teams.” The team worked various hours over the weeklong assessment period on all shifts, and reviewed written documents including the residents’ handbook, daily program schedules, grievances, the grievance log, and implementing procedures.

50. The general operations at DYC facilities must comply with DYC Policy 14.1 “Written Rules of Juvenile Conduct,” the purpose of which is to ensure a positive environment. This policy requires staff “to assure the consistent and appropriate application of the facility’s reward and sanctioning systems.”

51. The assessment team learned that Gilliam units are staffed inconsistently from day to day and there is no supervisor in charge of a particular unit, resulting in different staff working on the same unit and a resulting constant change in, or lack of, programming. The team found that this “method results in a lack of investment in the development of a unit structure. The overall belief is that the youth are in control of the facility and that enforcing a structure is not possible as staff must serve in a reactionary role to the current situation involving youth at each moment.

52. The team observed little to no structure at many times on the living units. Numerous staff reported that shifts are managed inconsistently; each shift worker does his or her own thing; the lack of consistency in programming causes confusion for the youth and difficulty for staff to create an appropriate, positive environment for youth. One staff member reportedly asked Complainant or Ms. Lyons to purchase Scrabble in order to make structured leisure time more meaningful. She was given a promise to do so, she followed up for a month, but because she “got the run around” she eventually gave up.

53. While at Gilliam, the assessment team witnessed repeated violations of safety and security laws and regulations governing DYC facilities. For example, one staff member disciplined four boys for cussing and acting out by locking them in their rooms for over thirty minutes without placing room check sheets on the youth’s doors or checking in on the youth in any fashion. On another occasion, youth returned early from school because two of them got

into a fight at school. Staff locked everyone in their rooms and did not complete required checks or documentation. More than once, staff placed youth behind locked doors without room check sheets.

54. The team found that these practices violated Sections 26-20-102 and -103, C.R.S., which limits seclusion (defined as “the placement of a person alone in a room from which egress is involuntarily prevented”) to “cases of emergency . . . after the failure of less restrictive alternatives; or after a determination that such alternatives would be inappropriate or ineffective under the circumstances.” The report concluded, “the seclusion of the boys who were horse playing on the living unit and the seclusion of a whole living unit when they returned early from school is in clear violation of this statute.”

55. In addition, these incidents of locking youth in their rooms without 15-minute checks and related documentation for as long as two hours violated DYC Policy 9.3 “Juvenile Supervision and Movement.” It also violated DYC Policy 14.3B “Administrative Seclusion” which specifies that seclusion shall “never be used as a form of punishment” and only “when less restrictive alternatives have failed.”

56. Team members observed a violation of the line of sight supervision requirement when a female staff member walked out of her pod while two female residents were out of their rooms and no other staff was present. The team member mentioned it to the shift supervisor, who responded he was too busy to deal with it; the team member followed up two additional times and the supervisor had still not addressed it with staff.

57. Assessment team members also observed that youth consistently do not adhere to basic line movement norms; they frequently curse and staff fails to confront the behavior; there appears to be no normative or positive peer culture programming implemented and no peer accountability; and, no effective use of youth behavior contracts or special management programs was evident.

58. A new grievance process had been approved at the Leadership Team level of DYC in 2009 and Complainant was required to have fully implemented the policy at Gilliam by May 1, 2010. The team found that Gilliam administrators had failed to implement this new process: there was no grievance log in facility procedures; the grievance forms were several years old, failing to reflect the wider scope of grievable issues; staff did not respond to all grievances within 72 hours; and one pod lacked a grievance box.

59. Ms. Lyons, who directly supervised the CYSO III's, was unaware of the existence of the new grievance policy at the time of the assessment.

60. DYC Policy 13.1 “Basic Rights and Responsibilities of Residents” states that juveniles have the right to be treated respectfully and the responsibility to treat staff members and other residents respectfully. Team members observed several staff failures to intervene when youth cursed and threatened each other.

61. Physical Management and Administrative Seclusion. The team defined this area to include use of seclusion of residents behind locked doors, use of physical restraint, documentation, supervisor/administrative review, improvement feedback loops, and possible reluctance to use continuum of force and possible safety impacts. The team conducted staff interviews, directly observed youth and staff conduct, and reviewed incident reports for fiscal year 2010 involving fights, assaults, and restraints.

62. Pressure Point Control Techniques (PPCT) are approved restraint techniques for DYC staff. When PPCT's are utilized, Section 26-10-106, C.R.S. requires, "Each agency shall ensure that an appropriate notation of the use of restraint is documented in the record of the individual restrained." DYC Policy 9.4 "Physical Management and Security Equipment" does not permit modified restraints that deviate from PPCT tactics.

63. A "pointed restraint" is one in which the youth is tied down to his or her bed. The team learned through its research that Gilliam staff were afraid to use the pointed restraint because they believed Complainant opposed its use; they feared being placed on administrative leave pending investigation into the circumstances of using force; and they feared the ensuing investigation by Denver Department of Human Services.

64. Instead of using approved PPCT's, Gilliam staff informed team members that they used a modified form of the 3-point restraint in which staff strap down the mid-section of a youth and one staff holds the youth's head while another staff holds the youth's feet until the resident regains control of himself or herself. Gilliam staff failed to document these modified restraints.

65. Complainant reported to the assessment team that 3-point restraints are not used at Gilliam. Complainant was unaware that Gilliam staff were using an unapproved version of PPCT restraints on youth.

66. Gilliam staff placed youth at risk of serious bodily injury by using unapproved PPCT tactics, creating a liability risk for DYC.

67. The team concluded, "The Assessment Team cannot overemphasize how staff's use of inappropriate, unapproved restraint procedures and staff's failure to complete checks on youth who are isolated and secluded in locked rooms seriously endangers the safety of Gilliam residents."

68. Complainant provided no evidence at hearing rebutting the above findings of the Assessment in the area of Safety and Security.

69. Lines of Communication. The area of Lines of Communication was defined as "structure and systems for communicating information throughout facility, upwards, downwards and lateral, rumors, gossiping, retaliatory acts." The assessment team interviewed Complainant, Ms. Lyons, and several CYSO I's and II's and two CYSO III's; it also reviewed team meeting and supervision notes, grievance logs, the residents' handbook, incident reports on the database, and the call-off/overtime list. The team requested samples of email communications staff received from Complainant and Ms. Lyons; none were produced.

70. The assessment team found that Complainant had over 600 unread emails on the first day of the assessment, and 174 unread emails a few days later. The team found no evidence of email communication between Complainant and Gilliam staff.

71. Staff reported that Complainant was rarely onsite; that he came to the facility six days out of one recent month because he reported being at meetings offsite the remainder of the time. Complainant informed the reviewers that very few staff come to his office to discuss issues.

72. Staff reported that Ms. Lyons was not visible or onsite to communicate with them

and there were no emails or team notes to demonstrate any communication between her and Gilliam employees. The majority of staff reported that Ms. Lyons usually arrives late in the morning and tends to leave very early. Ms. Lyons reported that her communication style is face-to-face.

73. Several staff reported that communication between CYSO III's tends to be inconsistent, if there is any at all, and that two of the four do not help out. Two line staff reported that the graveyard CYSO III is not visible; staff reported that one of the day shift CYSO III's refuses to wear a radio and does not assist staff; CYSO I's and II's reported that CYSO III's over-delegate duties. A common theme was that staff do not feel supported by these supervisors.

74. The assessment team found a notebook of "organizational procedures" which are not utilized by the Division. No one at the facility knew who was responsible for updating the facility's Implementing Procedures, how it was to be done, or what the process was for communicating those changes to line staff. Complainant and Ms. Lyons said that they email new policies to staff; staff denied this.

75. The team concluded that Gilliam was non-compliant with the spirit and letter of DYC Policy 1.2, "Internal and External Communications, which requires that "meetings shall be held at varying levels within the organizational structure to assure that necessary information is communicated within and throughout the organization." Despite several regular meetings at Gilliam, the objective of the meetings, to ensure facilities operate in an efficient and consistent manner, was not being achieved.

76. The team also concluded there was a potential violation of DYC Policy 1.5, "Establishment and Maintenance of Policy Manual," which requires that policies and procedures be disseminated to staff and reviewed and updated as necessary.

77. Complainant provided no evidence at hearing rebutting the above findings of the Assessment in the area of Lines of Communication.

78. Management and Leadership. The area of Management and Leadership was defined as "top administration's knowledge, engagement and quality control of all systems as well as strategic planning and management) operational insight and ability to provide detail and feedback on systems." The team spent several hours interviewing Complainant and Ms. Lyons, staff at all levels of the facility, primarily during daytime hours; they reviewed documentation including past audits, facility goals for the last three fiscal years, and monthly facility reports generated for the DYC Leadership Team.

79. The CYSO III's reported to the team that they have a lot of latitude to operate autonomously and there is no formal supervision structure. While Ms. Lyons receives oral reports from the CYSO III's, she had set no clear expectation regarding what to communicate or how to use the information for program development. The CYSO III's are assigned to supervise a team of staff and not program areas. The team concluded that this resulted in inconsistent daily operations. The team found that the CYSO III's do use the on-call system of contacting Complainant and Ms. Lyons by phone when necessary.

80. According to the assessment report, Gilliam had no FY 10-11 goals and had not adhered to its Fiscal Year (FY) 07-08 or FY 08-09 goals, and had not established Key Performance Indicators or established a way to report such information to staff. The team

concluded in its report, "This Administrative Team [Complainant and Ms. Lyons] appears to be unengaged in programmatic processes. There were no long-term facility goals or current vision of the facility should be providing for students, families and staff."

81. The team discussed the staff's perception that Complainant and Ms. Lyons are not part of the management team at Gilliam, are not visible, and that they are out of touch with the needs of the facility, with Ms. Lyons. Ms. Lyons described the culture as a game in which the supervisor "tries to catch me."

82. Staff reported to the team that they were uncertain regarding program expectations, they felt they were under a microscope, and if they made a mistake they would be written up. Staff experience contact with Complainant and Ms. Lyons only when there is a problem, in a reactive mode.

83. The team concluded, "The professional relationship between the worker on the floor and the administration is lacking with many, and non-existent with some. This overall belief lies at the crux of the negative culture. Staff do not feel that their administration is supportive of the work they do, the problems they face, or collaborative in their approach to fix issues." This leads to a continued reactive environment with little to no systems in place to identify, monitor and change systemic issues.

84. Operational Supervision. Operational Supervision was defined by the team as "How operational supervision works (scope, regularity, formal/informal, structure, documentation) role of the CYSO II and III, related to supervision; use of confirming memos and corrective actions in lieu of verbal feedback, coaching, mentoring and performance goals." The team conducted interviews and reviewed supervision notes made available, of which there were few.

85. When the team asked several staff members how they would go about bringing problems or concerns to their direct supervisor, they replied "that they feel lucky if they are able to see him during their shift. . . One staff stated, 'When you talk to him he acts like you are bothering him.'" Another staff member reported working at Gilliam for a year before meeting Ms. Lyons. A third staff member stated that during day shift he asked for a restroom break; the shift supervisor, the runner, and another staff member were watching a Broncos game; the shift supervisor yelled to him to put the kids in their rooms and go use the restroom.

86. Staff reported that the CYSO III's have too much power, do not support the workers, do not receive coaching or praise, are usually only told what they are doing wrong, and that confirming memorandums are never used. Instead, corrective actions are automatically used.

87. Staff informed the team that in the middle of the hiring process to fill a CYSO II position at Gilliam, for which several CYSO I's applied, Complainant and Ms. Lyons accepted an outside transfer. This incident was upsetting to staff and had a negative impact on morale.

88. The team concluded that administrators and managers at Gilliam take a punitive approach to managing problems in the facility and offer little mentoring and coaching. The report noted that this information was not verified and was based only on staff reports, but that the themes were pervasive and consistent.

89. Positive areas in the assessment included sound fiscal management.

90. During the assessment of Gilliam, Ms. Owens, Director of Quality Assurance, met with Complainant to discuss the findings on a daily basis. These meetings varied in length.

91. Ms. Owens was very familiar with the history of audits at Gilliam because she had conducted them and had met with Complainant regarding resolution of problem areas for years. Ms. Owens was very concerned about Complainant's failure to establish systems to resolve programmatic failures that had existed for years.

92. Some of the percentage calculations analyzing data contained in the assessment report were erroneous. The underlying data and substantive information were accurate.

July 1, 2010 – November 1, 2010 Evaluation by Ms. Leaf

93. On November 5, 2010, Ms. Leaf wrote her interim evaluation of Complainant summarizing her time supervising him. She initially noted that she had had one to one supervision sessions with Complainant on June 28, July 6, August 18, September 2, 9, and 30 and October 18, 2010. Ms. Leaf indicated Dave Maynard would replace her, and also referenced the recent Worthington report and the pending assessment being conducted at Gilliam.

94. In the area of Communication, Ms. Leaf rated Complainant at a 1.25, Needs Improvement level, citing his untimely response to voice messages, emails, and failure to follow up on scheduling appointments unless repeatedly prompted by others. She stated that it was a longstanding pattern for Central Office Managers to have difficulty scheduling meetings with and obtaining information from Complainant. Ms. Leaf also stated that Complainant had repeatedly failed to respond to requests for information during the previous two months. She required that he answer all phone messages and emails within 24 hours, timely submit leave requests for approval, and submit a calendar every Monday morning to his supervisor outlining meetings, time out of the building, and approved leave time.

95. Ms. Leaf gave Complainant a 1.25 rating in Interpersonal Skills and said this was an area of concern. She indicated that feedback received from staff was that they were not able to give examples of Complainant providing leadership and/or consistent direction leading to the definition and execution of agency goals and objectives; and, an area of development would be increasing his visibility and engagement with staff. She stated that Facility Directors reported that Complainant is not an active participant in that group. Ms. Leaf also stated that Complainant has a desire to provide the best possible services to residents.

96. In the area of Customer Service, Ms. Leaf stated that Complainant's lack of timely response to many of his customers is problematic; he is best in face to face interactions; one strength was his view of the community, youth, and families as his customers and that Gilliam is there to serve the community. She noted that staff perceive that he is not at the facility often and he lacks visibility. He received a 1.5 rating in this area, Needs Improvement.

97. Ms. Leaf rated Complainant at Needs Improvement, 1.5, in Organizational Accountability. She affirmed Complainant's support for the vision, mission and strategies of CYC, but noted as weakness, "Unfortunately many feedback requests report Cornelius as being absent, vacant and not engaged in the operation of Gilliam YSC or the greater goals of the Facility Directors and the DYC. He has not provided the leadership for his staff to indicate that he is providing information from across the state on policy development and system

enhancements.”

98. In the Empowerment area, Ms. Leaf noted mixed reviews of Complainant from his direct reports and other supervisors in Gilliam. Some staff reported he was very supportive and available to them; others believed he was not; this caused inconsistency in communication from the top down at the facility. Leaf noted she provided modeling and coaching on ways to solve organizational problems, and had asked Complainant to research Change Management.

99. In the area of Performance Management, Ms. Leaf rated Complainant at a 1, Needs Improvement, stating “He does not provide direct supervision to any of his direct reports and has not utilized IPO’s as a function of PMAP’s. An independent investigation of the workplace specific to hostile work environment resulted in findings that there is not an environment of respect, dignity or inclusion and that staff are in factions and gossip and retaliation is believed by many staff to be the culture of the program. This was also reported in 1 to 1’s and has been discussed with Cornelius directly in supervision.” Ms. Leaf required Complainant to schedule and document supervision with all direct reports every three weeks; assure the Assistant Director conducts supervision with the CO III’s and they have IPO’s that reflect supportive and skill building; and communicate with his supervisor prior to issuing corrective and disciplinary actions.

100. Lastly, in the area of Organization Management, Complainant was rated at a 1, Needs Improvement. Ms. Leaf founded this rating on Complainant’s failure to complete the DYC Goals and Objectives required of all facilities in the prior fiscal year and to formulate them for the current fiscal year; and his “ineffective or nonexistent systems of communication, data tracking, budget management of contracts and staffing and safety issues” identified by the Assessment.

101. Ms. Leaf noted that in response to these problems she had developed a Program Strategy Report (PSR) and mandated its use across all three shifts by all supervisors, in an attempt to provide oversight to operations. She stated she had “felt the need to be in daily contact with supervisors and administration providing feedback and direction, and that despite some improvements she did not believe it was sustainable without her direct involvement.”

Searches of Juveniles; September 2010 Assault in Holding Cell

102. DYC Policy 9.13, Searches of Juveniles and Facilities, requires that “when searching a juvenile, the juvenile shall be informed quietly, simply and privately of the process that is about to take place,” and that “a strip search shall be performed in an area that ensures the privacy and dignity of the juvenile.”

103. Group searches were prohibited by these policies.

104. It was common practice at Gilliam for youth returning from court to be searched together in one large room. Gilliam staff, including supervisors and Complainant, believed this practice to be acceptable.

105. On September 1, 2010, after juveniles in a group had returned from court, they were searched together in a holding cell. Then the Gilliam staff left the juveniles alone in the holding cell while they got dressed.

106. A fight ensued in the holding cell between two juveniles. The Denver Police were

called and responded to Gilliam, resulting in the filing of second degree assault charges against a juvenile who admitted to the assault.

107. No Gilliam staff witnessed the assault.

108. Gilliam staff never advised Complainant of the September 1, 2010 assault incident. Complainant was unaware and was never advised of the assault, the police contact, or the assault charges brought against the juvenile during his employment.

109. Ms. Leaf learned of this incident in December 2010. She questioned Complainant about it in the predisciplinary process. He responded that he was unaware the incident had occurred.

December 1, 2010

110. The Assessment Team issued its report on December 1, 2010. On that day, Ms. Leaf gave Complainant a copy of the report and placed him on paid administrative leave. The letter prohibited Complainant from entering any and all NYC facilities or offices without the prior approval of Mr. Maynard or Ms. Leaf, and from accessing his department email account or voice mail messages. It also prohibited him from contacting or discussing the investigation, reports, or any NYC business with other NYC employees. On the same day, Ms. Leaf placed Assistant Director Lyons on paid administrative leave and gave her a copy of the Assessment.

Predisciplinary Process

111. Ms. Leaf sent Complainant a notice of predisciplinary meeting on December 1, 2010. Complainant asked that the meeting be rescheduled.

112. On December 9, 2010, Complainant sent a letter to Ms. Leaf requesting more time to review the assessment report and secure legal counsel, indicating that it appeared NYC was engaged in a rush to judgment. In addition, he stated his belief he had been discriminated against because both he and Gilliam had been treated differently than other NYC facilities.

113. Complainant stated that the prohibition on entering NYC facilities seriously limited his ability to defend himself. He requested the following: access to his email account and computer; permission to communicate with other NYC employees and Human Services; a Critical Incident Report from January 1, 2009; any reports or investigations involving sexually inappropriate behavior from staff to staff over the prior five years at other NYC facilities including Martin Foote, Zebulon Pike, Sol Vista, Platte Valley, Spring Creek, Lookout Mountain, and Montview; the assessment reports and reports of discrimination against all of the NYC facilities listed; and a list of all voluntary demotions and relocations at NYC from January 2000 to the present.

114. Lastly, Complainant requested to be sent "any and all questions pertaining to this R-6-10 meeting in advance and in writing" and an extension for the meeting.

115. In a December 13, 2010 letter, Ms. Leaf agreed to reschedule the meeting and set it for December 30, 2010. She also stated she would not provide the reports and documents he requested, the meeting was not a hearing but instead an opportunity to exchange and gather pertinent information, and, "If during the 6-10 meeting you believe that there is a specific report or document you would like to me to look at, please let me know and I will review it prior to

making my decision.” She also denied Complainant access to his email and computer.

116. Ms. Leaf’s notices advised Complainant of his right to have a representative present at the predisciplinary meeting.

117. At the December 30, 2010, meeting, after Ms. Leaf opened the meeting, Complainant advised Ms. Leaf that he would not be participating in the meeting. They discussed the alternate process under State Personnel Board Rule 6-10(A), under which she would provide him questions in writing, and he would respond in writing. Complainant agreed to engage in the Rule 6-10(A) process in lieu of the meeting.

118. On January 4, 2011, Ms. Leaf sent Complainant the questions via certified mail. She requested his responses by January 12, 2011. Complainant was on full time paid administrative leave at the time.

119. There were 75 questions, divided into sections, many of which corresponded with the sections of the Assessment of Gilliam. For example, under Working Relationships, Ms. Leaf asked Complainant to describe his working relationship with Mr. Williams; how the two of them normally exchanged information; the type of direction he received from Mr. Williams regarding daily operations; how often he had supervision meetings and a sample agenda; and, what changes in behaviors resulted in his performance after Complainant received the corrective actions in 2008. Under Communications: Email, Ms. Leaf asked Complainant why he had over 100 unopened emails at the time of the assessment; to describe his practice for opening and responding to emails; and why he did not have a state-issued blackberry. Under Communication, Ms. Leaf asked Complainant to explain his systems for ensuring communication across all levels in the facility, and to describe what documentation exists to demonstrate it. Ms. Leaf asked what process Complainant used to assure compliance with NYC’s new grievance policy, a list of grievance officers at Gilliam, and, based on recent grievances submitted by the youth, how he assesses the information and identifies trends and actions necessary.

120. Ms. Leaf asked detailed questions regarding Complainant’s performance management policies and procedures at Gilliam, and what his role was with Ms. Lyons when she is acting as appointing authority. She asked him if he agreed with Ms. Lyons’ decision not to terminate the employment of an employee after there were two founded child abuse findings against him.

121. Regarding the Worthington report, Ms. Leaf asked Complainant if he knew that “who’s your daddy” had been written on the employee’s car, and whether he had discussed it with Mr. Acosta. She also asked, “If a supervisor and subordinate have a relationship that is consensual, is this considered a violation of NYC policy? Have you had situations where this was brought to your attention?” She asked what Complainant had done to address the gossip and inappropriate discussions by staff while on duty that had been identified in the Worthington report.

122. Ms. Leaf learned through the assessment process that Complainant had apparently not implemented NYC’s program entitled, “Motivational Interviewing.” She asked Complainant about the program, and what he had done to implement it at Gilliam, including training of his staff to be trainers.

123. With regard to the group searches of youth at Gilliam, Ms. Leaf asked

Complainant to explain the procedure for searching youth when they returned to the facility from court or by law enforcement, including where they are placed, how they are searched, and whether group searches are conducted during intake. She also asked for incidents in the past where youth were assaulted by other youth during the search process, and to describe any changes implemented to eliminate the assaults.

124. Ms. Leaf asked Complainant to describe the process to train staff to new DYC policies, and to monitor and review Implementing Procedures annually. She asked him what his plan was and what steps he had taken to improve morale at Gilliam, and outcomes.

Complainant's Responses to 6-10(A) Questions

125. Complainant provided responses to questions 1 - 24 on January 9, 2011. He requested more time to respond to the remainder, and requested copies of some documents. Ms. Leaf spoke with Complainant by phone and agreed to provide him a DVD of his personal computer drive at work. She denied his request to provide reports involving any sexually inappropriate behavior from staff to staff over the previous ten years. She agreed on an extended schedule for answering the remaining questions, which addressed the most important issues. Ms. Leaf sent a confirming letter to Complainant via certified mail.

126. On January 27, 2011, Complainant provided some answers to questions regarding budget, performance management and safety and security. His responses were cryptic and provided little substantive information. His answers to question 42 – 72 comprised one page worth of writing. Complainant acknowledged seeing "Who's your daddy?" on a car in the Gilliam parking lot, bringing Acosta outside to look at it, and asking him who wrote it and whose car it was. Complainant stated that Acosta denied any knowledge of the car or the writing.

127. With regard to a question regarding whether any modified restraint taking place, Complainant stated he was not aware of any. He said it was common knowledge that he was not in agreement with the new PPCT technique of using 3-point restraints.

128. On February 1, 2011, Ms. Leaf sent a letter to Complainant confirming his agreement to pick up his H drive DVD on February 1, denying his request for access to common drives, and requesting that his additional responses be submitted by February 9, 2011.

129. On February 9, 2011, Complainant provided additional responses. He detailed the grievance process thoroughly. He had no information regarding the content of the grievances, trends presented in them, or actions taken to address issues raised by Gilliam youth. He provided a timeline for implementing Motivational Interviewing.

130. Question 58 stated, "It was noted on more than one occasion that youth were placed in their rooms (locked) without justification or without appropriate documentation. Explain the process in place to monitor violation of this policy." Complainant responded, "This is a problem that is across division of youth corrections. The main problem is often there is only one staff member on a pod. So other than a youth reporting the violation all information is after the fact." He indicated it was a standing agenda item "with the RAC group which has provided feedback about T.O. being used that may not be recorded. Once the information is received it is given to the CYSO III to address. Staff members who violate this policy may be given additional training and or given corrective action depending on the violation. Also CYSO-II are now required to sign in each pod log book three times a shift. This gives them greater visibility

to the resident and allows the CYSO-II the ability to view possible violations.”

131. Complainant indicated that improper use of isolation is a concern and all facilities have had a very difficult time being compliant with this standard. He said he had trained on it, it was a standing agenda item, and violators receive corrective actions.

132. Complainant stated that there had not been an assault or fight during the search process in years. He responded that group searches of youth returning to Gilliam was a common practice. He was unaware that DYC regulations prohibited the practice.

Assessments of Other DYC Facilities

133. During the period 2008 – 2011, DYC Director Gomez ordered three other DYC facilities to be assessed, Montview, Spring Creek, and Platte Valley.

134. The Montview facility was a multi-purpose facility that had three separate programs. One of those three programs, the long-term treatment program, was the subject of the assessment. The assessment demonstrated significant problems with that program. The result was that the white female director of that program left the employment of DYC.

135. Spring Creek’s assessment was centered around allegations of sexual harassment by the Assistant Director, a Hispanic male. The allegations were founded and the Assistant Director was disciplinarily terminated. The Hispanic male Director of that facility retired.

136. The Platte Valley facility assessment was focused on allegations of there being a culture of harassment. The assessment determined that the allegations were unfounded. The two white directors had both moved out of Platte Valley by the time of the hearing in this case.

137. Additionally, Lookout Mountain’s white Assistant Director was recently terminated for sexual harassment. This facility did not undergo an assessment, however.

138. Complainant is African American.

DUI

139. On January 31, 2011, while on administrative leave, Complainant received a citation for driving while under the influence of alcohol and careless driving.

140. On February 1, 2011, Complainant contacted Mr. Maynard by telephone to report that he had been in a car accident and had a police contact. On February 2, 2011, Complainant called Mr. Maynard again and stated he had been cited with a DUI and careless driving. Mr. Maynard directed Complainant to provide a copy of the ticket.

141. Complainant repeatedly promised Mr. Maynard to give him a copy of the ticket. Complainant never gave him or anyone at DYC a copy of the ticket. He did provide the court documents containing the criminal summons and complaint, showing the citations.

142. Ms. Leaf and Complainant used the written question and answer format under Board Rule 6-10(A) to address the DUI incident.

143. Complainant did not request proof of Ms. Leaf’s appointing authority during the

predisciplinary process.

144. Ms. Leaf possessed appointing authority over Complainant from June 2010 through his termination.

2011 Audit

145. The 2011 audit, conducted between July 2010 and February 2011, trended poorly. The summary noted the following results:

- 3 Program Strengths (down from 5 in 2010)
- 28 Non-Compliant (up from 11 in 2010)
- 5 Repeat Non-Compliants (up from 3 in 2010)
- 6 Immediate Actions (above both 2008 and 2009 numbers)

Termination Decision

146. Ms. Leaf considered all of the information contained in the assessment report, the Worthington report, the recent audits, Complainant's employment history, and his citation for driving under the influence and careless driving resulting from a car accident. She closely reviewed Complainant's responses to the questions.

147. Ms. Leaf concluded that Complainant was either unable or unwilling to perform at the level necessary to effectively direct Gilliam. She was extremely concerned that despite repeated audit findings of non-compliance in areas such as safety and security, Complainant had taken no steps to correct the problems. She was equally concerned that despite corrective action and Needs Improvement ratings in the area of communication and management, Complainant had not changed his hands-off approach to leading Gilliam. He had not actively engaged himself in running the facility on a day-to-day basis, had failed to implement systems to track compliance with DYC policies and procedures governing grievances, safety and security, gang tagging, rights and responsibilities of youth, and programming. The result was a facility lacking in safety, security, positive programming for youth, and run primarily by the CO III's.

148. Ms. Leaf considered mitigation in Complainant's favor, including his 28-year tenure with DYC, his early and mid-career success, his clear and unquestioned commitment to youth, and his demonstrated strength in working with community organizations.

149. Ms. Leaf gave some consideration to a demotion for Complainant. The only position that would have been appropriate would be that of Assistant Director. She rejected this possibility because she felt that Complainant's failings as a Director would be even more pronounced in the Assistant Director position, one in which the operational demands were even higher than that of Director.

150. On April 13, 2011, Ms. Leaf hand-delivered a letter to Complainant, terminating his employment for failing to perform as Director of Gilliam and for the DUI criminal incident. The detailed letter was thirteen pages, single-spaced.

151. Complainant timely appealed his termination.

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. 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.

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 or modify 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 that Complainant committed the acts for which he was disciplined. Most of the evidence in this case was un rebutted. Complainant did not refute any of the findings of the Worthington report or audits of Gilliam.

With regard to the Assessment Report, Complainant presented two types of evidence designed to attack the report: first, he demonstrated that some of the percentages used to summarize data in the Report had been erroneously calculated. These miscalculations did not affect the veracity of the underlying data. More importantly, Complainant did not rebut any of the substantive information in the Report. Complainant also presented evidence designed to attack the motives of the members of the team. This evidence was not persuasive. Several members of the Assessment Team testified in this hearing and they were credible. The most important was Ms. Owen, Director of Quality Assurance for DYC, who had historic knowledge of Gilliam's audits in recent years, and as a member of the Assessment Team observed that none of the major long-term issues at Gilliam had been fixed. Complainant was unable to demonstrate that any of the witnesses called by Respondent had a motive or bias against Complainant that would influence their objectivity.

The preponderance of evidence demonstrates that Complainant abdicated his role as

Director of Gilliam several years ago. Respondent imposed corrective actions and negative performance evaluations on Complainant in an attempt to improve his performance and address the audit deficiencies. Complainant had several years of notice of the problems at Gilliam, and was given the opportunity to implement systems necessary to improve performance at Gilliam. He did not rise to the challenge.

The September 1, 2010, incident is one of the most telling in the record. Complainant was unaware of the NYC prohibition on group searches of youth. Therefore, he had no systems in place to enforce the prohibition. After a group search of returning youth resulted in a fight causing injury to a youth, the Denver Police were called and responded to Gilliam. The police filed second degree assault charges against a juvenile who admitted to the assault.

Not one individual at Gilliam reported this event to Complainant. The fact that this information never made it to the Director level confirms the lack of peer accountability at Gilliam, as well as the lack of engagement by Complainant.

Lastly, Complainant did not deny having driven under the influence of alcohol at hearing. Complainant's charges of careless driving and driving under the influence of alcohol constitutes off duty conduct that adversely affects his ability to lead a youth corrections facility as a role model for youth, and his standing as a community leader.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 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).

Respondent used reasonable diligence and care to procure all relevant evidence prior to imposing action in this case. In 2008, NYC leaders were aware of audit problems at Gilliam and imposed a corrective action and negative performance evaluations on Complainant in an attempt to prompt Complainant to correct those problems. It closely tracked those audit results over the next few years. When the sexual harassment complaint was made, those leaders ordered the Worthington investigation, an objective third-party inquiry. Next, the May 2010 youth-on-youth assault arranged by a Gilliam staff member, leading to felony charges, led NYC leaders to look even more closely at what was going on at Gilliam. Finally, they ordered the assessment, conducted by another group of objective individuals with no direct ties to Gilliam. NYC exercised its discretion in a reasonable manner in order to assure that it closely scrutinized operations at Gilliam in an unbiased manner, to meet its statutory duty of protecting the youth in its custody.

The results of the assessment confirm the audit reports, the Worthington report, and Ms. Leaf's one-on-one interviews with Gilliam staff over a period of two days at the outset of her supervision of Complainant. Respondent acted reasonably on the information it gathered.

Complainant asserts that Ms. Leaf lacked the required appointing authority to administer disciplinary action in this case, citing Board Rule 1-8, 4 CCR 801. That rule requires a written document specifying the appointing authority for each individual employee and this information must be made available to the employee. *Id.* The undisputed evidence is that Complainant never asked Ms. Leaf to provide him with a copy of the written delegation of appointing authority. To raise the issue at trial does not retroactively nullify the appointing authority Ms. Leaf possessed at the time of the events herein.

Complainant also argues that Respondent did not permit him to improve his performance after imposing the Needs Improvement rating in 2010. This argument is unavailing because under Board Rule 6-2, 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 actions and omissions of Complainant were serious. Despite years of notice, Complainant permitted safety and security violations to continue unabated and unaddressed at Gilliam. Several witnesses testified of their serious concern about the potential for youth injury resulting from seclusion of youth in their rooms for disciplinary purposes for extended periods, during which time no staff made the required 15-minute checks. The Assessment Report clearly stated alarm regarding the potential for imminent harm to youth and resulting liability for NYC. The record demonstrates that Complainant took no action to address this issue, such as posting of check sheets, regular screening of those check sheets up the chain of command to his level, systematic training of all staff to stop the practice, and communication via email of his expectation of peer accountability.

Instead, Complainant stated in his response to Ms. Leaf that the routine use of isolation (in violation of state law and NYC regulations) was merely an outgrowth of a universal staffing shortage experienced by all NYC facilities. This response evinces a lack of understanding of and concern about the seriousness of the issue. Complainant exhibited the same pattern of lack of understanding and concern about other repeated audit violations, such as the continued use of prohibited PPCT practices and Gilliam’s failure to document and track their use. Ultimately, Respondent concluded reasonably that the risks posed by Complainant’s serious breach of his leadership duties became too serious to endure.

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

For the reasons set forth above, the decision to terminate Complainant’s employment was within the range of reasonable alternatives available to NYC. NYC lost trust in Complainant as a leader, and Complainant did not take action to demonstrate he was worthy of that trust.

D. Respondent did not discriminate against Complainant.

Complainant asserts that the decision to terminate his employment violated the Colorado Anti-Discrimination Act (CADA), § 24-34-402, C.R.S. He alleges that the decision was based on unlawful race and age discrimination.

In enforcing the CADA, Colorado courts utilize the shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny. *Colorado Civil Rights Com’n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997). See also *Bodaghi v. Department of*

Natural Resources, 995 P.2d 288, 300 (Colo. 2000) and Board Rule 9-4, 4 CCR 801, “Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred.”

To prove intentional discrimination under the CADA, an 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: a) complainant belongs to a protected class; b) complainant was qualified for the position; c) complainant suffered an adverse employment decision despite his or her qualifications; and d) the circumstances give rise to an inference of unlawful discrimination. *Big O Tires*, 940 P.2d at 400; *Bodaghi*, 995 P.2d at 300.

Once the employee has established a prima facie case of intentional discrimination, he has created a presumption that the employer unlawfully discriminated against him. If the employer does not rebut the presumption, the fact finder is required to rule in favor of the employee. *Id.*

The burden next shifts to the employer “to articulate some legitimate, non-discriminatory reason for the [Claimant’s] rejection.” *Big O Tires*, 940 P.2d at 400. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the prima facie case is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the employer’s proffered reason was not the true reason for the employment decision and instead was a pretext for intentional discrimination. *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1095 (1981); *Big O. Tires, Inc.*, 940 P.2d at 401. Pretext may be proven indirectly “by showing that the employer’s proffered explanation is unworthy of credence.” *Id.*

Complainant is an African American male over forty years of age and therefore belongs to two protected classes under the CADA. He was qualified for his position and suffered an adverse action in being terminated. He has therefore established the first three elements of a prima facie case of discrimination. *Id.*

With regard to the fourth element, the critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination. *Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005). There must simply be a logical connection between each element of the prima facie case and the inference of discrimination. *Id.* There is no unbending or rigid rule about what circumstances allow an inference of discrimination. *Id.* Courts have enumerated a variety of circumstances that can give rise to an inference of discriminatory motive, including “actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus . . . , preferential treatment given to employees outside the protected class . . . or, more generally, upon the timing or sequence of events leading to” the adverse action. *Id.*

Complainant bases his discrimination claim on his assertion that DYC treated him and Gilliam differently than other facilities that had similar problems. First, no other facility director, or DYC facility had problems as serious as those in this case. Second, the evidence shows that DYC terminated two assistant directors for sexual harassment and that the director of a problem program at Montview was separated from employment after the assessment. The Platte Valley assessment concluded that the allegations of problems were unfounded.

The preponderance of evidence demonstrates that no preferential treatment based on race or age occurred in this case. No evidence in the record could give rise to an inference of unlawful race or age discrimination. Therefore, the claims fail.

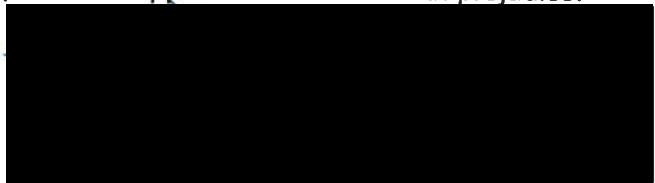
CONCLUSIONS OF LAW

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.

ORDER

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

Dated this 11th day
of January, 2013 at
Denver, Colorado.



Mary S. McClatchey
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 14th day of Jan, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Cornelius P. Foxworth

[REDACTED]

[REDACTED]

Sabrina Jensen A.A.G.

[REDACTED]

[REDACTED]

[REDACTED]

Andrea 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. 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 electronic record on appeal in this case is \$5.00. 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.