STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013BB068(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AL PAIZ,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, LOOKOUT MOUNTAIN YOUTH SERVICES CENTER,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on March 7 and 8, 2013, at the State Personnel Board, 633 17th Street, Denver, Colorado. Micah Payton, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Kristen Withrow, Assistant Director of Lookout Mountain Youth Services Center and Complainant's appointing authority. Complainant appeared and was represented by Timothy Markham, Esq.

MATTERS APPEALED

Complainant, a certified Safety Security Officer I (SSO I), appeals the imposition of a 10% reduction in pay for three months, as well as the issuance of a corrective action, on the grounds that the decisions to discipline him and to impose the corrective action were arbitrary, capricious, and contrary to rule or law. Complainant asks for rescission of the disciplinary action, removal of the corrective action, back pay, and an award of attorney fees and costs. The Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Services Center (Respondent or Lookout Mountain) argues that the imposition of a 10% reduction in pay for three months, and the imposition of the corrective action, was warranted by Complainant's failure to appropriately supervise three youth, resulting in the youth engaging in juvenile sexual misconduct, for failure to respond when Complainant witnessed a security violation by the youths, and for being untruthful during the Board Rule 6-10 process. Respondent asks that the disciplinary and corrective actions be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary and corrective actions are **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined and corrected;

2. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of reasonable alternatives; and

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

FINDINGS OF FACT

Background:

1. Complainant is certified as a Security Services Officer I (SSO I), and has been employed by the Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Services Center (Lookout Mountain or Respondent) since 2007.

2. Lookout Mountain is a juvenile corrections facility that houses approximately 150 youth who are within the Division of Youth Corrections (DYC) system. The average age of youth at the facility is over 18 years old. These youth have often been in several DYC facilities prior to arriving at Lookout Mountain.

3. The youth who live at Lookout Mountain vary considerably in terms of their level of functioning and development. The youth include sexual offenders, drug offenders, and violent offenders. Complex mental health issues are also common.

4. The youth at Lookout Mountain live in residential units, with each unit having several living areas referred to as "pods." Each unit houses youth that have a similar level of functioning. Cedar Unit houses the more criminally sophisticated youth at the facility.

5. The youth at Lookout Mountain generally wear blue shirts. If a youth is placed onto a more restricted program because of behavioral issues, then the youth changes into a burnt orange shirt. The burnt orange shirt is a visual indication to staff that the youth is on a restricted program, such as a Safety Intervention Program (SIP), and will have special limitations and requirements placed on his actions.

6. A youth may be placed on a SIP after it has been found that he committed a major rule violation. A youth on SIP loses privileges and is expected to perform some community restoration activities. The youth is also not permitted to freely interact with others on the pod, and should be located within the pod so that he is not with the other pod residents.

Duties of SSO I:

7. SSO I's work directly with the youth inside the pods, providing security and overseeing programming for the youth in those units.

8. SSO I's are expected to maintain constant observation of the youth on the pod. Constant observation requires each SSO I to know the count of the youth to be in the unit, and to be able to see the heads of the youth at all times. SSO I's are not to leave the pod unsupervised.

9. The geometry of the living areas in the pods create blind spots where youth will be out of sight of the SSO I has not moved to an appropriate spot to view all of the youths on the pod. If an SSO I is located in the main living area of the Cedar Unit A Pod, for example, the back portion of the upper quiet living area will not be entirely visible to the SSO I.

10. SSO I's are expected to know the status of the youth assigned to the pod they are watching. This duty includes understanding whether a youth is subject to a special program that restricts his movement or placement within the pod, such as a youth on SIP, and to maintain that restriction.

11. SSO I's are also expected to model the behavior expected of youths. SSOI's are required to hold themselves and others accountable for the community values and expectations of the facility.

12. All direct care staff, including SSO I's, are required to document the behavior of the youth that they observe in daily observation reports, shift logs, and other staff reports. If a youth's behavior violates the rules of the facility, and the violation is defined in facility policy as a major incident, then SSO I's are required by facility policy to document the behavior in an incident report so that the behavior can be properly addressed.

13. In the event that a SSO I observes a major rule violation, he or she is to fill out a major incident report in the Colorado Trails system. The major incident report creates a record of what the SSO I observed. The report will be discussed among the direct care staff as to how to respond to the actions observed by the SSO I. The report may then be served on the youth who committed the infraction. The youth then will go to an internal hearing and have an opportunity to explain his actions and to produce witnesses on his behalf. A youth found to have committed an infraction of the rules may be sanctioned. The sanction may include being placed on one of the various levels of SIP.

14. Lookout Mountain defines major rule violations to include security violations. Security violations, in turn, are defined for the youth as "any action you take which placed you out of the normal boundaries set by Unit policy for on-grounds movement, being in a location on-grounds without staff knowledge and permission or the use of the telephone without permission." If a SSO I observes that a youth has been in a place which could be out of the boundaries set by staff, an SSO I is expected to investigate whether that youth had permission to be in that location, and to report the security violation in an incident report if there did not appear to be permission granted.

Juvenile Sexual Conduct at Lookout Mountain:

15. Lookout Mountain is subject to the requirements of the federal law which addresses sexual conduct in correctional settings, the Prison Rape Elimination Act (PREA).

16. PREA established a zero-tolerance standard for juvenile nonconsensual sex, abusive sexual contact, and staff sexual misconduct. DYC has established policies to implement PREA and to prevent incidents of sexual contact with and by youth.

17. DYC Policy 9.19 implements PREA. It defines juvenile sexual misconduct as "[a]ny behavior of a sexual nature, either consensual or nonconsensual between juveniles." Any sexual conduct involving youth at the facility is prohibited by the policy.

18. Lookout Mountain staff are expected to immediately report any reason to believe that sexual conduct has occurred involving a juvenile:

> Division of Youth Corrections' employees...who receive any information, regardless of its source, concerning nonconsensual sex, abusive sexual contact, staff sexual misconduct or juvenile sexual misconduct, or have reason to suspect, or who observe an incident, are required to immediate report the incident to the shift supervisor AND facility director/designee as outlined in [the facility's] implementing procedures.

DYC Policy 9.19, III.E.1 (emphasis in original).

Reporting of Sexual Misconduct Allegations To Jefferson County:

19. Lookout Mountain is also subject to investigation and reports by the Jefferson County Department of Social Services (DSS) when there is an allegation of juvenile sexual misconduct at the facility.

20. The DSS investigation focuses on the issues of whether there has been institutional abuse or neglect committed by the facility.

September 8, 2012 Incident of Juvenile Sexual Misconduct:

21. On September 8, 2012, Cedar Unit A Pod was the residence for youths K.S. and A.L. A.L.'s room was located in the upper quiet living area of A Pod. K.S.'s room was located in the lower quiet living area of the pod.

22. Youth M.S. had previously been a resident on the Cedar Unit but was no longer a resident as of September 8, 2012. M.S. had been promoted to the Eagles Unit after he was at the Cedar Unit.

23. In the afternoon of September 8, 2012, the residents of the pod were watching a movie. Residents generally watched movies on Saturdays from 2:30 to 4:30 PM.

24. M.S. had been permitted to visit at the Cedar Unit A Pod on September 8, 2013, because M.S. had progressed to the Eagles level and was allowed to provide one-on-one counseling and support to youths who were on SIP. Initially, M.S. was providing support to A.L. A.L. was sitting outside of his room in the upper quiet living area because A.L. was on SIP at the time and was restricted from socializing with the other residents. M.S. initially was sitting on the stairs leading to the upper living quarter while he spoke with A.L.

25. K.S. was initially sitting outside of his room door in the lower quiet living area. K.S was on Freeze Phase at the time, and was also not permitted to join the rest of the residents. Freeze Phase is a very specific intervention applied when a youth has been through several previous SIP designations and who requires an even more controlled environment than a youth on SIP. Of the 150 youths at Lookout Mountain, typically only one or two are on Freeze Phase.

26. While the rest of the A Pod residents watched a movie, K.S. found a moment to leave his position in the lower living quarters and move to the upper living quarters unobserved by a SSO I. M.S. also moved from the stairs to the back of the upper quiet living area. K.S. joined M.S. and A.L. in the back of the upper quiet living area.

27. While K.S., M.S., and A.L. were in the back of the upper quiet living area, M.S. performed oral sex on K.S. K.S. then moved to the front of the upper quiet living area while M.S. performed oral sex on A.L.

28. When Complainant saw that K.S. was in the upper quiet living area, he called for him to come down. All three youth came down the stairs to the main living area. K.S. and M.S. continued down into the lower living area as K.S. returned to his room.

29. While M.S. and K.S. were in the lower quiet living area, M.S. performed oral sex on K.S. again. When the incidents were later reported, M.S. reported that this second incident was not consensual.

A Pod Supervision on September 8, 2012:

30. Complainant was assigned as a "rover" on Cedar Unit from 3:00 to 4:00 PM on September 8, 2012. As the rover, Complainant filled in for other SSO I's who needed to take a break. Complainant was assigned as the SSO I on A Pod from 4:00 to 5:00 PM on that date.

31. SSO I Roberto Lopez-Vega was assigned as the SSO I on A Pod from 3:00 – 4:00 PM on that date. Mr. Lopez-Vega was a new SSO I at the time. He had worked at the facility on a temporary basis since July of 2012, and began as a full-time SSO I on September 10, 2012.

32. The usual SSO II supervisor for the Cedar Unit A Pod staff was Damon Carver. Mr. Carver was on leave as of September 8, 2012. SSO II Thomas Sager was the unit's supervisor on September 8, 2012. Youth Services Counselor III (YSC III) John Brinkman was the Cedar Unit manager on September 8, 2012.

33. While Complainant was on-duty in Cedar Unit A Pod during the afternoon of September 8, 2013, he was on the main floor of the pod with the residents who were watching a movie.

34. Complainant did not notice when K.S. moved from the lower quiet living area to the upper quiet living area. Complainant also did not notice that M.S. had moved from the stairs into the back of the upper living quarters with A.L. A short time after K.S. moved to the upper quiet living area, Complainant did notice that K.S. was visible upstairs. Complainant called to K.S. to come downstairs. K.S. complied. Complainant also asked K.S. if the other two youth, A.L. and M.S., were with him. When K.S. came down the stairs from the upper quiet living area, A.L. and M.S. also came out from the back of the upper quiet living area as well. A.L. and M.S. had not been within sight of Complainant while they were in the back of the upper quiet living area.

35. Complainant knew that M.S. was a security concern because of his history of sexually acting out. He considered M.S. to be flirtatious, to not maintain boundaries, and to be the type of youth that he should always watch.

36. As the time of the September 8, 2012, incident, both K.S. and A.L. were on SIP (or on Freeze Phase, which is a more controlled version of SIP) and were wearing burnt orange shirts. Complainant knew that K.S. had a history of being a volatile and violent youth. K.S. was known by Cedar Unit staff for being on the shift report at least once a week for fighting, possessing contraband, extorting things from others on the unit, or similar misconduct. Complainant also knew that A.L. had difficult time with self-esteem and that this often led him into joining whatever bad behavior was occurring.

37. The fact that youths A.L. and M.S. had positioned themselves together on the upper living quarter and out of the view of the SSO I on the pod was a security violation that Complainant was expected to investigate and to report. The rules for youth who are on SIP also limit their association with other residents on the pod. K.S. and A.L. should not have been together, and K.S. should not have been in the upper quiet living area. These violations of the SIP rules should have also been reported by Complainant.

38. Other than telling the three youth to come down from the upper quiet living area, Complainant did nothing else to address the misconduct.

39. Complainant did not create incident reports on the Colorado Trails system or notify his immediate supervisor that there had been a security violation with three youth together in the upper living quarter area of the pod. Complainant did not alert a supervisor to his observations of the youth, or to any concerns about the supervision in the pod. Complainant did not speak with SSO I Lopez-Vega about any concerns that he had concerning the supervision and security of pod A when Mr. Lopez-Vega's was in charge of the pod.

The First Reports of Sexual Contact:

40. On or about October 1, 2012, word reached the Lookout Mountain staff from an uninvolved youth that A.L. and K.S. had engaged in sexual conduct. Mr. Brinkman interviewed A.L. and K.S. about the information. Both youth denied any sexual contact.

41. Lookout Mountain staff filed a report with the Jefferson County DSS as to the allegation of juvenile sexual misconduct and the denials by the youth allegedly involved.

42. On Friday, October 12, 2012, K.S.'s Behavioral Health Specialist, Colby Rogers, contacted Mr. Brinkman and told him that K.S. had acknowledged that there had been sexual conduct, and that he needed to talk about what had occurred.

43. Mr. Brinkman interviewed K.S. on October 12, 2012. K.S. acknowledged that he had sexual contact with M.S. Mr. Brinkman asked K.S. for the name of the staff was that was on duty at the time, and K.S. identified Complainant. K.S. described where Complainant was sitting at the time and how he has slipped past Complainant when he moved upstairs to the upper quiet living area.

44. Mr. Brinkman updated the report to DSS about the incident with the new information provided by K.S.

45. Mr. Brinkman interviewed A.L. and M.S. on Monday, October 15, 2012.

46. During his interview with Mr. Brinkman, A.L. also identified Complainant as the staff on duty when the incident occurred. A.L. told Mr. Brinkman that SSO I Lopez-Vega had been on the pod prior to the incident, but that Complainant was the only staff on the unit at the time of the incident.

47. M.S. reported to Mr. Brinkman on October 15, 2012, that Complainant was the staff on the pod when K.S. came upstairs to the upper quiet living area, that Complainant had noticed them when they came down the stairs after the sexual contact. M.S. also reported that

Complainant was the staff on the pod when M.S. went into K.S.'s room during the second sexual contact incident.

48. Mr. Brinkman contacted Jefferson County DSS with an update to his prior report on the juvenile sexual misconduct allegations.

The DSS Investigation:

49. On or about October 16, 2012, DSS assigned Mary Lou Juhl to investigate the institutional neglect aspect of the allegations.

50. Ms. Juhl conducted interviews of the three youths on October 18, 2012.

51. M.S. told Ms. Juhl that he was on Cedar Unit to provide support, as required by his Eagles program. He reported that Complainant was the SSO I on duty at the time, and that Complainant was sitting on the main level while the other residents were watching a movie. M.S. reported that, at first, he sat on the top step of the stairs so Complainant could see him. At the time the incident began, A.L. was in the upper quiet living area and K.S. was in the lower quiet living area. M.S. reported that K.S. came upstairs and went to the far corner of the upper quiet living area. M.S. asked Complainant for permission to go upstairs, and did so once Complainant agreed. M.S. reported that the oral sex occurred when K.S. was sitting next to him at the back of the upper quiet living area. K.S. then changed places with A.L. and M.S. performed oral sex on A.L.

52. M.S. also reported that Complainant had not known where K.S. was when K.S. was upstairs, but that K.S. was not disciplined by Complainant when Complainant saw him come downstairs form the upper quiet living area. K.S. then went to his room on the lower quiet living area. M.S. reported that K.S.' bedroom door was unlocked at the time.

53. K.S. reported to Ms. Juhl that M.S. had performed oral sex on him and on A.L. In terms of who was on that staff at the time, Ms. Juhl reported that K.S. told her:

> K.S. said that staff knew that the boys were upstairs. K.S. said that the staff was 'Al' and Al went on a break. K.S. said that Al returned from his break and he told the boys that they could not be upstairs. K.S. said that the staff was sitting by the stairs leading upstairs. K.S. said he could not remember what staff came on the pod after Al went on his break. K.S. said that the incident was not staff Al's 'fault'. The incident 'just happened on his shift."

54. A.L. reported to Ms. Juhl that he and M.S. were on the upper level of the pod and that A.L. was sitting in a chair. A.L. reported that the other residents were watching a movie on a lower level of the pod, and the staff was Roberto and "staff Al was on a bathroom break." A.L. reported that there had been sexual contact between M.S. and K.S., and then between himself and M.S. A.L. reported to Ms. Juhl "that staff Al came back onto the pod, and the boys, 'heard the door'... Staff Al told the boys to come downstairs and staff Al noticed that K.S. was missing from where he was supposed to be sitting." A.L. reported that he went to watch the movie, and that M.S. and K.S. continued to talk downstairs.

55. Ms. Juhl also interviewed Complainant, SSO I Lopez-Vega, SSO II Carver and SSO II Sager during the period of November 1, through 8, 2012.

56. Ms. Juhl interviewed Complainant on November 1, 2012. During his interview, Complainant told Ms. Juhl that he recalled a day when he had realized that youths A.L., M.S. and K.S. had all been upstairs in the upper quiet living area. Complainant told Ms. Juhl that the three youth had gone upstairs while he was on break and while Mr. Lopez-Vega was the SSO I on the pod. Complainant told Ms. Juhl that he had told Mr. Lopez-Vega not to allow anyone go upstairs prior to leaving the pod on his break. Complainant also told Ms. Juhl that he was 'pretty sure' he told SSO II's Carver and Sager about his concerns about the boys being on the upper quiet living area together the same day as the incident occurred.

57. When Ms. Juhl interviewed Mr. Lopez-Vega, he reported to Ms. Juhl that he did not remember any conversation with Complainant regarding the three boys or the incident.

58. When Ms. Juhl interviewed SSO II Carver, Mr. Carver informed her that Complainant had not said anything to him about the three boys. Mr. Carver noted that, if he had heard about a security issue involving the boys, he would have created an incident report on the issue.

59. Ms. Juhl interviewed SSO II Sager about whether Complainant had reported the incident to him. Mr. Sager denied being told anything specific about such an incident. He reported to Ms. Juhl that, if he had heard that more than one boy was on the top level of the pod, this would have gotten his attention, and he would have written a report and conducted an investigation.

60. Ms. Juhl concluded her investigation by finding that the institutional neglect allegation was "inconclusive." She included these recommendations and findings in her report:

> Caseworker Juhl recommends that the facility provide training regarding staff responsibilities for supervision on the pod and expectations for staff to have all doors on the pod locked when the youth are in the common area or in their rooms. Caseworker cannot substantiate institutional neglect regarding staff because of the different stores of what allegedly occurred on the pod and what staff Al Paiz may have been doing or not doing. There appear to be internal issues regarding Mr. Paiz' job performance at the facility.

Respondent's Actions Prior to Rule 6-10 Meetings:

61. After Mr. Brinkman had interviewed K.S. on October 12, 2012, he contacted Kristin Withrow, the Assistant Director of Lookout Mountain, with the information provided by K.S.

62. Ms. Withrow determined that Complainant should be moved out of Cedar Unit. Mr. Brinkman contacted Complainant on the evening of October 12, 2012, and told him that K.S. had reported that youth on the pod had engaged in juvenile sexual misconduct while Complainant was on duty, and that Complainant was to avoid going to Cedar Unit and should report to Spruce Unit instead.

63. Later during the evening of October 12, 2012, Complainant spoke with Mr. Brinkman and informed Mr. Brinkman that Complainant recalled an incident when he thought two of the youth had been on the upper quiet living area and something had happened. Complainant initially believed that the incident had taken place on September 29, 2012.

64. Complainant's appointing authority, Ms. Withrow, decided to place Complainant on administrative leave as the investigations into the allegations of institutional neglect and Lookout Mountain internal process proceeded. Ms. Withrow spoke to Complainant on October 16, 2012,

about her decision to place him on leave as of that date. By letter dated October 18, 2012, Ms. Withrow notified Complainant of the placement in writing.

65. The October 18, 2012 letter also informed Complainant that there would be a Board Rule 6-10 meeting held on November 5, 2012, to discuss the allegations that there was a lack of supervision resulting in three youth engaging in juvenile sexual misconduct.

Board Rule 6-10 Meetings and Disciplinary Decision

66. On November 5, 2012, Ms. Withrow held a Board Rule 6-10 meeting with Complainant and his representative, Timothy Markham. Ms. Withrow's representative was the facility Director, Anders Jacobson. The meeting was taped.

67. At the time of the Board Rule 6-10 meeting on November 5, 2012, Ms. Withrow thought that the date of the incident was September 29, 2012.

68. Complainant was asked for his recollection of the day when he noticed that M.S., A.L., and K.S. had all been together in the upper quiet living area. Complainant described having Mr. Lopez-Vega come into the A Pod unit to relieve him for approximately a half an hour for a meal break at about 3:40 PM on that date, and that he returned to the pod about at 4:10 PM. Complainant told Ms. Withrow that, when he came back into the pod, he could only see 9 residents and then saw that K.S. was upstairs. Complainant recalled that both K.S. and A.L. were wearing orange shirts that day.

69. Ms. Withrow asked Complainant if he found it strange that three kids were coming down the stairs. Complainant replied that he did find it strange, and that was why he mentioned it to Mr. Lopez-Vega. Complainant said he had a quick chat with Mr. Lopez-Vega not to let people upstairs. Complainant also told Ms. Withrow that he had mentioned the incident to Mr. Carver and Mr. Sager as well. Complainant told Ms. Withrow that Mr. Carver had been in control that date and had told him that, no, nothing had happened and that Carver would have noticed three people being upstairs in the pod for a period of time. Complainant also reported to Ms. Withrow that he had a talk with Mr. Sager in which Complainant told Mr. Sager that he had told Mr. Lopez-Vega not to allow anyone upstairs. Complainant said that Mr. Sager had told him that there was no way people were upstairs long enough for anything to happen.

Investigation After First Board Rule 6-10 Meeting:

70. After the Board Rule 6-10 meeting, Ms. Withrow continued her investigation by contacting Mr. Sager, Mr. Carver, and Mr. Lopez-Vega individually. All three denied that they had had any conversation with Complainant concerning an incident with three youth in the upper quiet living area, or about security concerns related to allowing youth on the upper quiet living area.

71. Ms. Withrow and Mr. Jacobson also interviewed the involved youth.

72. A.L. told Ms. Withrow and Mr. Jacobson that Mr. Lopez-Vega was the staff present at the time of the incident. K.S. declined to say anything more about the incident and reported that he had told Mr. Brinkman everything.

.73. M.S. reported that Complainant was the staff on the pod at the time of both incidents of sexual conduct.

Second Board Rule 6-10 meeting:

74. Ms. Withrow held a second Board Rule 6-10 meeting with Complainant on November 13, 2012. The meeting included Complainant, Complainant's representative, Mr. Markham, Ms. Withrow and Mr. Jacobson. The meeting was taped.

75. During the second Board Rule 6-10 meeting, Ms. Withrow explained that the only two dates were M.S. was signed out to of the Eagles program to provide support at Cedar Unit were September 8 and 15, 2012.

76. Ms. Withrow told Complainant that SSO II Carver and SSO II Sager had not recalled any discussion about the three youth on the upper quiet living area. Complainant told Ms. Withrow that he hadn't said anything specific to them about three youths being upstairs on the quiet living area, but that he told them he had a quick chat with Mr. Lopez-Vega about not allowing youth upstairs.

77. Ms. Withrow also told Complainant that SSO I Lopez-Vega had said that Complainant had not spoken to him about his supervision of the pod. Complainant told Ms. Withrow that he hadn't had a formal meeting with Mr. Lopez-Vega, but just told him to make sure he didn't let anyone upstairs. Complainant told Ms. Withrow that he had this conversation with Mr. Lopez-Vega a few hours after the incident.

78. Complainant acknowledged during the meeting that K.S. being out of bounds was a security violation and should have generated an incident report. Complainant argued that he was being discouraged by supervisors concerning the issuance of incident reports, however, so he didn't write one.

79. Complainant also told Ms. Withrow that YSC II Brinkman had a personal vendetta against him, and that a number of staff had told him this, including SSO II Carver.

Investigation after the Second Board Rule 6-10 Meeting:

80. After the second Board Rule 6-10 meeting, Ms. Withrow re-interviewed two other staff members about information that Complainant had offered to her in that meeting.

81. Ms. Withrow re-interviewed Mr. Carver to determine if he had observed a problem between Mr. Brinkman and Complainant. Mr. Carver reported no specific problem between Complainant and Mr. Brinkman.

82. Ms. Withrow also checked on the number of incident reports that Complainant had filed recently to check on Complainant's statement that he had been discouraged form writing them. Ms. Withrow found that Complainant had filed 18 major incident reports since January 2012, including six that were from security violations and one report which was filed after the September 8, 2012 incident.

83. As the Lookout Mountain internal investigation progressed, Ms. Winthrop also continued her own inquiry into who was on duty on various Saturdays in late August and September to determine when the incident in question was likely to have occurred. Ms. Winthrop also

consulted the records of when M.S. had been permitted to go to Cedar Unit to counsel other youths. She determined that Complainant was not on Pod A during the afternoon of September 29, 2012, and the only Saturday which fit the descriptions provided by the youths and staff was September 8, 2012.

The Decision To Discipline Complainant and To Issue A Corrective Action:

84. Ms. Withrow concluded that the information she had gathered showed that Complainant had been the SSO I on duty in the Cedar Unit A pod at the time when K.S. had moved to the upper quiet living area, and when the first instance of juvenile sexual misconduct occurred. She also concluded that Complainant was the SSO I on duty when the second incident of juvenile sexual misconduct occurred on the lower quiet living area. Ms. Withrow concluded that Complainant's failure to observe the youth closely enough to maintain a visual count of them violated Complaint's obligations under DYC Policy 9.3., which requires that "staff shall be responsible for knowing the location of the juveniles assigned to their supervision at all times." DYC Policy 9.3., section IIIC(1).

85. Ms. Withrow also concluded that, once he had noticed the three youth coming down the stairs together, Complainant also had an obligation to separate the youth, investigate their presence on the upper quiet living area, and to report the incident. Ms. Withrow concluded that's Complainant's failure to take any action when he observed a security violation violated Complainant's obligation under Lookout Mountain's performance expectations for SSO Is.

86. Ms. Withrow was particularly concerned that Complainant was aware that M.S. was a youth at high risk for sexually acting out, and that Complainant had still not taken action when he saw evidence of M.S.'s security violation with two other youth,. Ms. Withrow concluded that Complainant's inaction in the face of his reason to suspect that there may have been sexual misconduct by M.S. and the other youth constituted a violation of Complainant's obligations to report the incident under DYC Policy 9.19.

87. Finally, Ms. Withrow considered Complainant's statements during the Board Rule 6-10 meetings that he had conversations with his supervisors and Mr. Lopez-Vega concerning his observations and concern over security issues were false statements, made in violation of the Colorado Department of Human Services Employee Code of Conduct, which requires that employees, "[b]e truthful, honest and courteous to co-workers and to customer at all times. Listen actively and share information in open, honest and appropriate ways."

88. Ms. Withrow considered these violations by Complainant to be sufficiently serious to warrant the imposition of immediate discipline. She considered discipline which was more serious than a salary reduction as potentially proper for the lapses in security. After review of Complainant's performance documentation, training, and supervisory notes, Ms. Withrow determined that a sanction of a three month pay reduction of 10% would be a sufficient response, in addition to a requirement for additional training for Complainant.

89. By letter dated December 10, 2012, Complainant was issued a disciplinary action which reduced his pay for a total of $996.00 during December 2012, January 2013 and February 2013.

90. The December 10, 2012 letter also imposed a corrective action which required Complainant to review specified policies, undergo a five hour refresher training on security

issues with Mr. Brinkman, undergo an additional five hour training on security issues from a SSO II on the Juniper or Cypress Units, and to review his job duties with Mr. Brinkman.

91. Complainant filed a timely appeal of the imposition of discipline with the Board.

92. Complainant also grieved the corrective action that he received on December 10, 2012.

93. Ms. Withrow handled Step 1 of Complainant's grievance. By letter dated December 27, 2012, Ms. Withrow declined to change the terms of the corrective action.

94. Lookout Mountain Director, Mr. Jacobson, handled Step 2 of Complainant's grievance. By letter dated January 4, 2013, Mr. Anderson declined to change the terms of the corrective action.

95. Complainant filed a timely petition for hearing with the Board. Complainant's petition for hearing on the corrective action was consolidated with his appeal of the imposed discipline.

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; C.R.S. § 24-50-101, *et seq,*; *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. *Kinchen*, 886 P.2d at 704.

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

Complainant argued at hearing that he had not been the SSO I on duty when M.S., A.L.

and K.S. engaged in sexual conduct, and that he should therefore not be held accountable for a lack of supervision.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer").

Complainant's protest that he was not the SSO I who had missed that the three youth were gathering on the upper quiet living area was not credible. The evidence at hearing established that Complainant was the SSO I in the Cedar Unit A Pod during a period which matched the descriptions of when the incidents occurred. The preponderance of the evidence presented at hearing also demonstrated that Complainant took no action at the time which would be consistent with a belief that Mr. Lopez-Vega had failed to supervise the youth. It is extremely telling that Complainant, an experienced SSO I, did not remind the brand new SSO I, Mr. Lopez-Vega, of the importance of maintaining the head count and of not permitting violations of SIP restrictions. This is particularly true when the identities of the involved youth are considered. K.S.'s behavior had previously been so troubled that he was on Freeze Phase at the time of the incident. M.S. was also the type of youth that Complainant knew that he had to watch at all times. Complainant's silence in the face of evidence that these youth had been involved in a security violation is much more consistent with Ms. Withrow's understanding of the events; that is, that it was Complainant who was on duty throughout the key moments in the incident and who failed to respond to the evidence of security violations.

Additionally, Complainant severely undermined his credibility by claiming in both the DSS investigation and in the his Board Rule 6-10 meetings that he had discussed the fact that the three youths were on the upper quiet living area with Mr. Lopez-Vega, and reported and discussed the incident with Mr. Carver and Mr. Segar. The credible and persuasive evidence produced at hearing demonstrated that these conversations did not occur, and that Complainant was not truthful in his reports about this incident.

Complainant also argued at hearing that A.L.'s statements which implicated Mr. Lopez-Vera as the staff supported his contention that it was not Complainant who was present when the youths gathered in the upper quiet living area. A close examination of A.L.'s statements, however, demonstrates that A.L. had initially placed Mr. Lopez-Vera on the pod prior to the incidents and prior to Complainant's presence. A.L. initially reported that it was Complainant who was present when the incident took place. A.L.'s initial version of events appears to be consistent with the schedule for A Pod coverage on September 8, 2012. The later discrepancy in A.L.'s report is not sufficient to undermine the other circumstances present in this case which point toward Complainant as the SSO I in A Pod at the time of the incident.

The credible and persuasive evidence at hearing established that Complainant was the SSO I on duty in Cedar Unit A Pod when K.S. moved from his assigned position to the upper quiet living area of the pod; that it was Complainant who did not notice that M.S., K.S., and A.L. had gathered together at the back portion of that area; that, once Complainant did realize that they were up there together, took no action to hold the youths accountable for the infraction or to report and investigate the incident; and that Complainant was the SSO I present when the

second incident of sexual contact occurred in the lower quiet living area.

The credible and persuasive evidence at hearing also demonstrated that Complainant was not truthful when he told Ms. Juhl and Ms. Withrow that he had reported the incident and his security concerns to SSO II Carver, SSO II Sager, and SSO I Lopez-Vega.

As a result, Respondent has successfully demonstrated by a preponderance of the evidence that Complainant has committed the acts for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule, although it was contrary to law in one regard.

(1) Respondent's decision to impose discipline was neither arbitrary nor 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).

Respondent's actions in this case were neither arbitrary nor capricious. The evidence at hearing demonstrated that Ms. Withrow took the steps that were necessary to thoroughly investigate Complainant's performance. She gathered the reports that were available, and conducted multiple interviews of staff and youth to determine what had occurred. She also conducted two Board Rule 6-10 meetings with Complainant to determine what information he wished to add to the investigation. After each Board Rule 6-10 meeting, Ms. Withrow also conducted more interviews to follow-up on the information offered by Complainant. The evidence at hearing established that Ms. Withrow was diligent in the manner in which she collected relevant information in this case, and that she carefully considered that information in making her decision.

The evidence at hearing also demonstrated that Ms. Withrow reached reasonable conclusions from the information she had gathered. She reasonably concluded that Complainant was the SSO I on duty at the time of both sexual misconduct acts. She also reached a reasonable conclusion that Complainant had reason to suspect sexual misconduct when he saw M.S. with two other youth in a blind spot in the pod, and that Complainant should have investigated and reported that possible PREA violation and the security violations. Additionally, Ms. Withrow reasonably concluded that Complainant had not been truthful with her in the Board Rule 6-10 meetings.

Complainant argued at hearing that Ms. Juhl's decision that the evidence was inconclusive on the charge of institutional neglect was the reasonable conclusion to be reached from the evidence in this case. Ms. Juhl, however, was investigating a different type of claim than Lookout Mountain's internal performance review, and she had less contact with the involved youth and less information before her at the time of her decision than Ms.

Withrow possessed. It is also important to note that Ms. Juhl did not determine that Complainant was not responsible by clearing him of the allegations. In fact, she noted for the file that she had concerns with his performance. Ms. Juhl's decision not to sustain a change of institutional neglect is not a reason to determine that Ms. Withrow's review of Complainant's performance should be found to be arbitrary or capricious.

Accordingly, Respondent's decision to discipline and correct Complainant was neither arbitrary nor capricious.

(2) Respondent's action was not contrary to rule or law:

A. Progressive Discipline:

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper."

Complainant argues that Complainant's good performance history does not include a corrective action for sufficiently similar acts that would allow Respondent to impose discipline in this case rather than just a corrective action.

Board Rule 6-2, however, does not require that there be a corrective action in every instance prior to the imposition of discipline. In this case, Complainant was found to have violated one of the most basic requirements for a security officer. The youth at Lookout Mountain are to be under relatively constant observation, and SSO I staff carry that primary responsibility in their job as direct care staff on the pod with the youth. The staff at Lookout Mountain are also charged with the important responsibility of eliminating the opportunities for juvenile sexual misconduct, and to investigate and respond when there is reason to suspect that such conduct may have occurred. Additionally, the obligation to be truthful during inquires is a critical and basic requirement for staff. Complainant's violation of these obligations are sufficiently serious to warrant the imposition of immediate discipline.

Under such circumstances, Respondent's decision to impose discipline is not a violation of Board Rule 6-2.

B. Board Rule 6-10:

Board Rule 6-10, 4 CCR 801, provides, in relevant part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Complainant objected at hearing to the fact that Respondent did not present a set date to Complainant in the Board Rule 6-10 meetings. The record in this case shows that Ms. Withrow did not determine that the date of the incident must have been September 8, 2012, until after the Board Rule 6-10 meetings were completed. There is no requirement in Board Rule 6-10, however, that a specific date must be provided in each case. The record also demonstrates that Complainant provided a detailed description of his actions on the day that he had noticed the three youth coming from the upper quiet living area. As a result, the lack of a date did not violate any specific requirement of the rule, create a point of confusion that impaired the truth

finding function of the process, or materially impair Complainant's ability to present his version of events and explanation.

There was no violation of Board Rule 6-10 in this matter.

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

The third issue is whether decision to reduce Complainant's pay 10% for three months was within the range of reasonable alternatives available to Respondent.

Complainant argues that the seriousness of the events here has been overstated and do not support the sanction of a pay reduction. Complainant specifically objects to his perception that Respondent is unfairly and harshly punishing him for being responsible for the juvenile sexual misconduct which occurred in this case.

The violations in this case, however, represent violations of some of the most important and basic duties for a SSO I. Complainant's inattention, and then silence in the face of evidence of a security violation by three youth (including two youth who were known to Complainant as high risk individuals), significantly undermined the security of Cedar Unit. His failure to react when he saw evidence of a security violation also allowed a second act of juvenile sexual misconduct to occur shortly after the youth came down the stairs form the upper quiet level area. Complainant's actions and inaction allowed a serious set of sexual misconduct incidents to occur unnoticed by Respondent.

Complainant's violation of some of his most important security duties warrants a significant response by Respondent. A reduction of pay for three months is well within the range of reasonable alternatives available to Respondent in this case.

D. An award of attorney fees and costs is not warranted.

Attorney fees are warranted in a personnel action has been instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party who requests the award bears the burden of proof.

In this matter, Complainant has not been successful in persuading the ALJ that his version of events was correct, or that there was a persuasive reason to doubt Respondent's version of events. The evidence at hearing established that Respondent responded to allegations of a serious problem by making a proper referral to outside authorities in Jefferson County DSS, cooperating with the DSS investigation, performing its own complete internal investigation, and taking reasonable action in response to the information disclosed in those investigations. As a result, there are no grounds to award Complainant attorney fees and costs.

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. An award of attorney fees and costs is not warranted in this case.

ORDER

Respondent's imposition of disciplinary and corrective actions are **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 22nd day of April, 2013 at Denver, Colorado.

[redacted]

Denise DeForest
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 23rd day of April, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Timothy Markham
[redacted]

Micah Payton
[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.