STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014B049

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

YOLANDA YORK,
Complainant,

vs.

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

Senior Administrative Law Judge (ALJ) Denise DeForest held the commencement of this matter on August 18, 2014, and the evidentiary hearing in this matter on October 15, 2014, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on December 15, 2014, after neither party objected to the removal of certain personally identifying information such as social security numbers from the exhibits and such changes to the evidentiary record were made by the Board.

Joseph Haughain, Senior Assistant Attorney General, represented Respondent. Respondent's advisory witness was Vera Dominguez, Assistant Director of Gilliam Youth Services Center and Complainant's appointing authority. Complainant appeared and was represented by Richard S. Gross, Esq.

MATTER APPEALED

Complainant appeals the decision to terminate her employment. Complainant asks for the discipline to be rescinded, to be returned to the position of Correctional Officer (CO) II. Complainant also argues that the termination of her employment was unlawful discrimination on the basis of Complainant's race.[1]

Respondent argues that the discipline was warranted because of Complainant's statement and behavior during an incident in which she was arrested for domestic violence, for her failure to fully and timely report the arrest once she had returned to Gilliam, and because her disciplinary history shows that she has been corrected

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[1] In Complainant's appeal form, Complainant also alleged that she was retaliated against for her worker's compensation injury. This issue was not addressed in Complainant's pre-hearing statement, and no evidence was produced at hearing to support such an argument. This claim has, therefore, been waived by Complainant.

repeatedly for in appropriate comments and other similar behavior. Respondent asks that the Board affirm the decision to discipline Complainant.

For the reasons presented below, the undersigned ALJ finds that Respondent's decision to terminate Complainant's employment is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

2. Whether Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law;

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

FINDINGS OF FACT

1. Complainant was hired by Respondent as a Correctional Officer (CO) I in July of 2001. Complainant is an African-American woman. Complainant was voted by her peers to be the employee of the month at her DYC facility in May of 2004. In 2012, Complainant suffered a serious leg injury during an on-the-job security incident. This injury kept Complainant out of work for approximately a year.

2. Complainant was promoted from CO I to CO II. As a CO II, Complainant worked directly with the youth who have been committed by the state to Respondent's facility. Complainant served as a coach, teacher, and mentor to the youth who lived at the facility.

Requirements for Respondent's Employees:

3. As a CO II, Complainant's position meant that she was in "direct contact" with the youth at her facility, as that term is understood for purposes of Colo. Rev. Stat. § 27-90-111(2)(c). The youth at Respondent's facility also meet the definition of "vulnerable person" for the purposes of meeting the requirements of Colo.Rev.Stat. § 27-90-111(2)(e).

4. The state general assembly has passed statutes that prohibit the employment of individuals who have been convicted of specific types of criminal offenses from working in direct contact with vulnerable persons. The employment screening and disqualification requirements apply to facilities such as Respondent's facility.

5. State law also obligates employees who are employed in a position involving direct contact with vulnerable persons to self-report if they are arrested, charged with, or issued a summons and complaint for any of the disqualifying offenses

set forth in the statute. The employee is expected to inform his or her supervisor of the arrest, charges, or issuance of a summons and complaint before returning to work. Under the provisions of state statute, any employee who fails to makes such a report or disclosure may be terminated from employment.

Departmental requirements for criminal convictions – disqualifying offenses:

6. The Department of Human Services ("Department" or "D.H.S.") has promulgated a series of employment policies to implement state law. *See* D.H.S. Policy Number VI-2.4. The Department's policies create a broader set of prohibitions and requirements than state statutes.

7. The Department's policies bar the employment of individuals with certain types of criminal convictions. These criminal offenses are considered to be disqualifying offenses. *See* D.H.S. Policy Number VI-2.4, section A.8.

8. Among other prohibitions, the Department will not hire anyone who has been convicted at any time of "[a]ny felony, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in Section 18-6-800.3, C.R.S." Policy VI-2.4, section A.8.a (3). Departmental policy also bars individuals from employment who have been convicted less than ten years ago of "[a]ny misdemeanor, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in Section 18-6-800.3, C.R.S." Policy VI-2.4, section A.8.b (2).

Departmental regulations – self-reporting requirement procedures:

9. Departmental policy requires an employee who has been charged with one of the disqualifying offenses listed in the policy to self-report the charge. The self-reporting process requires that "[t]he employee must provide charging documents of arrests and/or charges listed [as disqualifying offenses in the policy] to their supervisor before returning to work." Policy VI-2.4, section B(1).

10. Once a supervisor is notified of an arrest for a disqualifying offense, the employee's appointing authority is to decide whether the employee should be placed on leave pending the disposition of the charges. The appointing authority is to contact the director of Respondent's Background Investigation Unit and confer with the director on the appropriate action to be taken pending the resolution of the charges.

11. Departmental policy provides that, if an employee is charged with any of the disqualifying offense for which conviction would prohibit employment no matter how old the conviction, the employee is not to return to work but will be suspended until the criminal charge is resolved. If the employee is charged with a disqualifying offense for which conviction would bar employment for ten years, the appointing authority may be suspended at the discretion of the appointing authority until resolution of the criminal charges or completion of administrative action.

12. Under Departmental policy, a current employee who has self-reported a disqualifying offense conviction that would result in a ten-year bar from employment may petition for a review on whether the employee poses a risk of harm to vulnerable persons. The review takes into account a number of factors concerning both the offense itself and the employee, such as the seriousness of the offense and the vulnerability of the victim at the time of the offense.

Complainant's October 2013 Arrest:

13. At approximately 1:00 AM on October 12, 2013, Complainant's domestic partner, Loleta Moore, called the Aurora Police Department during an incident with Complainant.

14. Ms. Moore reported that Complainant had been banging on her apartment door for a long period of time. Ms. Moore reported that she had grabbed her purse and answered the door. When she opened the door, Complainant came into her apartment and Ms. Moore walked out of the apartment. Ms. Moore reported that, once she was outside of her apartment, Complainant jumped in front of her and told to go back into the apartment, and the two of them returned to her apartment. Ms. Moore further reported that, once the two of them had returned to her apartment, she had told Complainant that she was going to call the police. Complainant responded that she would kick the phone away from her, and made efforts to grab the phone in Ms. Moore's hand. When Ms. Moore called the police, Complainant shoved Ms. Moore into a wall. At some point during the argument, Ms. Moore's table was knocked over. Ms. Moore then left the apartment.

15. Another neighbor in the apartment complex also called the police and reported the disturbance in Ms. Moore's apartment.

16. Aurora Police Officer Alan Buchholz responded to the calls. He located Ms. Moore outside of the apartment building and interviewed her. Ms. Moore provided her with her version of events, including that she had been pushed and that Complainant had threatened to kick the phone out of her hands if she called the police. Officer Buchholz found that Ms. Moore had no marks on her indicating that she had been injured. He viewed Ms. Moore's apartment and saw that the table was knocked over and that there were other items on the floor. He then located Complainant in her apartment and interviewed her.

17. Complainant was intoxicated when Officer Buchholz interviewed her. She denied that she had entered Ms. Moore apartment or that that she had shoved Ms. Moore. Complainant told Officer Buchholz that all she had done was to ask Ms. Moore for her keys.

18. Officer Buchholz arrested Complainant for misdemeanor assault and battery on a domestic partner and placed Complainant into custody.

19. Complainant was initially polite with Officer Buchholz. After Complainant learned she was to be arrested, however, Complainant became verbally aggressive with Officer Buchholz. She called Officer Buchholz a "white ass, motherfucker, cracker." Complainant told Officer Buchholz that she would kill him for putting her in jail, and that if she were going to jail it would be for a good reason. Complainant told Officer Buchholz that Ms. Moore had assaulted her. Complainant additionally kicked the door of the police cruiser hard enough to knock the window off its track.

20. Complainant was taken to the Aurora City Jail and placed on bond for assault and battery. She was released on bond later that morning.

21. On October 14, 2014, the Aurora Municipal Court issued a Municipal Protection Order against Complainant. The court found that Complainant constituted a credible threat to the life and health of Ms. Moore. The court also found that Complainant and Ms. Moore met the definition of an intimate partner for purposes of the Brady Handgun Violence Protection Act. The protection order required that Complainant not assault, threaten harass, follow, interfere with or stalk Ms. Moore, prohibited Complainant from possessing or purchasing any firearm or ammunition, and prohibited Complainant from possessing or consuming alcoholic beverages or controlled substances.

Complainant's Return To Work:

22. Complainant's arrest on October 12, 2013 took place on a Saturday. Complainant's shift was structured so that she had every Sunday and Monday off and so that she had every other Tuesday off. Complainant's first scheduled day at work after her arrest occurred on Wednesday, October 16, 2013.

23. While Complainant was at the Aurora detention facility, she had called her work. The message that she left with her facility, however, was that she would not be coming in. Complainant did not leave a message that she had been arrested. Prior to Complainant's return to work, facility staff had learned of Complainant's arrest over the weekend, but that information had not come from Complainant.

24. Complainant appeared for her shift on Wednesday, October 16, 2014. She had not provided any of her supervisors with a copy of her charging document prior to arriving at work.

25. When Complainant first arrived at work, her supervisor Jeremy Pierce contacted her and told her that she had to report for a meeting with Ms. Dominguez at 10:30 a.m. Mr. Pierce asked Complainant if she had her paperwork with her, and Complainant told him that she did not.

26. Complainant actually had a copy of her arrest paperwork with her when she returned to Respondent's facility. She did not provide that copy to Mr. Pierce or to Ms. Dominquez on October 16, 2013.

27. Ms. Dominguez placed Complainant on paid administrative leave starting October 16, 2013, pending the outcome of the criminal charges or administrative action.

28. The criminal charges against Complainant were eventually dismissed. Complainant was not convicted of any offense related to her arrest on October 12, 2013.

The Board Rule 6-10 Process:

29. Ms. Dominguez originally scheduled a Board Rule 6-10 meeting with Complainant for November 6, 2013, in order to discuss Complainant's arrest. Complainant requested that the meeting be rescheduled. The meeting was rescheduled for November 26, 2013.

30. On November 26, 2013, Complainant met with Ms. Dominguez and the Director of Gilliam Youth Services Center, Jamie Nuss. Complainant did not bring a representative with her to the meeting. Complainant also did not provide her arrest paperwork during the meeting.

31. During the Board Rule 6-10 meeting, Complainant repeatedly acknowledged that she had failed to self-report her arrest or to provide her arrest paperwork to her supervisors. She insisted, however, that Respondent should not be asking her any questions about what occurred on the night of her arrest because it was not any of Respondent's business. When asked if she would answer questions about what happened that night, Complainant replied that she would not answer them.

Disciplinary Decision:

32. As part of her consideration of the proper response to Complainant's arrest, Ms. Dominguez considered the Aurora Police Department report documents concerning Complainant's arrest. These documents included the general offense report, which included the written report of Officer Buchholz and a written statement by Ms. Moore.

33. Ms. Dominguez also obtained copies of the documents from the Municipal Court In and For The City of Aurora, which included a summons document, detention information, and a Municipal protection Order entered by the Court on October 14, 2013.

34. Ms. Dominguez reviewed Complainant's personnel file from her years with the Department of Youth Corrections.

35. Complainant's annual performance reviews noted an overall satisfactory performance each year.

36. Complainant also had a history of corrective and disciplinary actions that were included in her personnel file. These actions included:

a. A February 2003 corrective action from her supervisor at Mount View Youth Services Center for failing to timely report that she had received a summons for drinking and driving, even though agency policy required self-reporting of all alcohol and drug related offenses. The corrective action required Complainant to review the self-reporting policy and to provide the required documentation of the charge.

b. An April 2005 corrective action issued for failing to follow a supervisory directive and making rude and disrespectful comments to the supervisor when he called to inquire why his prior instruction had not been followed.

c. A June 2005 disciplinary action of a one-time pay reduction and imposition of a performance improvement plan for failing to obey a directive from the shift supervisor for Complainant to relieve other staff for breaks, and for making a derogatory statement about the supervisor.

d. An April 2008 corrective action from Platte Valley Youth Services Center for adamantly refusing to complete a transport for the facility that was requested by a supervisor and the Assistant Director of the facility.

e. A November 2009 disciplinary action involving the withholding of one day of pay from Platte Valley Youth Services Center for the use of profanity in the workplace and use of such language to intimidate others.

f. A May 2013 corrective action from Gilliam Youth Services Center for sexual harassment of a co-worker.

Ms. Dominquez considered Complainant's prior corrective and disciplinary action history in reaching her decision on the level of discipline to impose, and concluded that the history indicated a serious pattern of inappropriate behaviors.

37. Ms. Dominquez considered Complainant's failure to self-report an arrest for domestic violence was a serious offense, particularly given that Complainant had already been corrected for failing to correctly self-report a prior arrest. Ms. Dominguez was also concerned that the facts of the incident that Complainant was involved in, along with her behavior during the arrest, demonstrated that Complainant was prone

toward abusive behavior and should not be permitted to work in direct contact with the youths at Respondent's facility.

38. Ms. Dominquez issued Complainant a disciplinary letter dated December 5, 2013.

39. Ms. Dominguez concluded that termination was warranted in this case because Respondent was expected to protective vulnerable individuals in its care from persons with a propensity towards abuse, assault, or similar offenses. She noted that Gilliam YSC had a diverse population with many youths who have significant abuse histories, including emotional sexual, and physical abuse. Ms. Dominguez concluded:

> Your egregious actions, ongoing willful misconduct; and your failure to correct such egregious behaviors even after multiple corrective and disciplinary action measure demonstrate that you incapable of working with, and modeling appropriate behavior for the vulnerable youth we service. As I review your history it is clear that you have a propensity towards abuse and inappropriate behaviors.

40. Complainant's employment was terminated effective at the close of business on December 5, 2013.

41. Complainant timely filed an appeal of the disciplinary action with the Board.

DISCUSSION

I. BURDENS 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 discipline or the decision to administratively separate Complainant from employment 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 she was disciplined:

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 and to determine whether Respondent has proven the historical facts that are the foundation of any disciplinary decision by a preponderance of the evidence. *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").

In this case, a preponderance of the credible evidence established that Complainant was engaged in a dispute with her domestic partner on October 12, 2013, that she was arrested on charges involving domestic violence as a result of that dispute, and that during the arrest process Complainant used a threat and a racial slur against the officer arresting her and kicked at the police car door. The credible evidence also established that, under the rules in effect at Respondent's facility, Complainant was obligated to self-report her arrest for this offense and that Complainant did not properly self-report her arrest prior to, or at the time of, her return to the facility.

Respondent alleged only one fact that was not proven at hearing. Ms. Dominguez was under the impression that Complainant had acknowledged that she had actually kicked a cellphone out of Ms. Moore's hands. That allegation was not made by Ms. Moore, however, and was not something that Complainant acknowledged that she had done.

With the exception of that one unsupported factual assertion by Ms. Dominguez, therefore, Respondent has established that Complainant has committed the acts for which she was disciplined.

B. Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law:

1. The decision to impose discipline was neither arbitrary nor capricious -

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

Complainant's primary argument at hearing was that Respondent's use of information about an off-duty event involving Complainant's private life was not an appropriate grounds for discipline. This argument is, in essence, that Respondent's decision was arbitrary and capricious because it was improperly focused on off-duty conduct.

a. *Is there a performance standard that applies to off-duty conduct?*

While off-duty conduct is not generally proper grounds for discipline of state employees, there can be, and are, exceptions to that general principle. Discipline can be based upon a violation of standards for performance, and the standards of performance at times will encompass off-duty conduct, or the need to avoid certain types of off-duty behaviors.

The state legislature has, for example, designed a series of requirements concerning off-duty conduct for those state employees who are in positions of direct contact with vulnerable persons. Respondent has issued regulations concerning that obligation that have the effect of applying that policy to its staff as part of the staff performance requirements. There was no dispute at hearing that these restrictions apply to Complainant in her position as a CO II.

Respondent argues that this policy makes it possible for it to discipline Complainant for her off-duty conduct in this case.

b. *Respondent's main policy does not apply on these facts.*

Respondent's argument is not entirely grounded in the applicable law.

The statute that Respondent cites in support of its argument references a bar on employment for on certain types of convictions, and a period of ineligibility for

employment based upon other types of criminal convictions. *See* C.R.S. § 27-90-111(9)(b) and (9)(c)(listing disqualifying criminal convictions and convictions for which employment is barred for ten years since the individual was discharged from the sentence for the offense). Respondent's disqualification policy is also focused upon convictions for which a prospective employee is disqualified from employment forever or for a period of ten years. *See* DHS Policy Number: VI-2.4(A)(8). It is important to note that this statutory scheme and this policy are focused upon eliminating employees with a propensity for violence and abuse as demonstrated through their criminal convictions.

In this case, there is no conviction capable of triggering any of these policy concerns and provisions. Under such circumstances, it would not appear that Complainant's arrest on domestic violence charges (as opposed to a conviction) could constitute a performance or misconduct issue that would be lawful grounds for discipline.

c. *Respondent's self-reporting policy does apply here.*

On the other hand, both the state statute and Respondent's policy create self-reporting expectations for current employees who are arrested for one of the offenses that could eventually result in a disqualifying criminal conviction.

DHS Policy Number: VI-2.4(B)(1)(b) requires all current employees in direct contact with vulnerable persons to self-report "all arrests, charges or summons and/or complaints for any of the disqualifying offenses as set forth in (A.8.b) above." The list of offenses at sub-section A.8.b includes "any misdemeanor, the underlying factual basis of which has been found by the court on the record to include an act or domestic violence, as defined in section 18-6-800.3, C.R.S."

The self-reporting process requires that an employee provide "charging documents of arrests and/or charges listed in ... (A.8.b) to their supervisor before returning to work." DHS Policy Number: VI-2.4(B)(3)(a)(1).

The policy also notes that "[a]ny employee who fails to self-report may be subject to corrective or disciplinary action up to and including termination." DHS Policy Number: VI-2.4(B)(2)(c).

This self-reporting requirement would generally be triggered by off-duty conduct by an employee, as occurred in this case. Regardless of whether or not the activity is considered to be a performance standard based upon off-duty conduct or is a performance standard based upon an employee's conduct in the course of returning to work, Respondent's performance standards required that Complainant self-report her arrest for misdemeanor assault and battery on her domestic partner. This arrest was properly considered by Respondent to be an arrest on a misdemeanor for which the

underlying factual basis had been found by a court to include an act of domestic violence, as defined in Section 18-6-800.3, C.R.S.[2]

2. Respondent's disciplinary 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." The purpose of this rule is to require that an employee be warned and corrected on an improper activity before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary reaction.

The requirements for progressive discipline have been met in this case. Complainant had been corrected on a similar issue of failing to properly self-report a DUI arrest in 2003. The requirements of Board Rule 6-2 have been satisfied in this case.

b. Complainant has not demonstrated that this termination was an act of unlawful discrimination –

An employee alleging unlawful employment discrimination "may prove intentional discrimination through either direct evidence of discrimination (e.g., oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (i.e., circumstantial) evidence of discrimination." *Kendrick v. Penske*, 220 F.3d 1220, 1225 (10th Cir. 2000).

Complainant filed a claim of unlawful discrimination based upon her race or color when she filed her appeal. At hearing, she presented no direct evidence of discrimination. Under such circusmtances, the legal test for unlawful discrimination udner the Colroado Anti-Discrimination Act (CADA) requires Complaiant to present a *prima facie* case of discrimination using indirect evidence. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 399 (Colo. 1997).

A *prima facie* case of discrimination is one sufficient to raise a presumption of intentional discrimination. *St. Mary's Honor Ctr v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). "As the very name '*prima facie* case' suggests, there must be at least a logical connection between each element of the *prima facie* case and the illegal discrimination for which it establishes a legally mandatory, rebuttable

[2] The Aurora Municipal Court issued a restraining order against Complainant based upon a determination that there was a credible threat to Ms. Moore from Complainant, and that the two were intimate partners. Those findings are sufficient to show that the requirements of C.R.S. section 18-6-800.3 have been met in this case.

presumption." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)(internal citation and quotations omitted).

The specific elements of a *prima facie* showing may vary according to the situation. The requirements for such a case, however, are established to eliminate the most common lawful reasons for an adverse personnel decision. *See Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (holding that the *prima facie* case raises an inference of discrimination precisely because once the two most common nondiscriminatory reasons for an adverse employment decision are eliminated, that decision, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors"). *See also Perry v. Woodward*, 199 F.3d 1126, 1140 (10th Cir. 1999)(holding that "[w]hen viewed against the backdrop of historical workplace discrimination, an employee who belongs to racial minority and who eliminates the two most common, legitimate reasons for termination, i.e., lack of qualification or the elimination of the job, has at least raised an inference that the termination was based on a consideration of impermissible factors"). In the case of a minority employee who is arguing that she was terminated from employment because of unlawful discrimination based upon her race, the *prima facie* case requires a showing that:

1) She is a member of a protected class;

2) She was qualified for his job;

3) Despite her qualifications, she suffered an adverse employment decision; and

4) The circumstances give rise to an inference of unlawful discrimination.

Big O Tires, 940 P.2d at 400.

If a complainant establishes a *prima facie* case, the burden of production shifts to the employer to proffer a facially nondiscriminatory reason for the challenged employment action. "It is important to note... although the establishment of the *prima facie* case shift the burden of production to the defendant, the defendant does not share in the burden of proof in an employment discrimination case... If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support that legitimate purpose, the presumption of the *prima face* case is rebutted and drops from the case." *Bodaghi*, 995 P.2d at 298. Complainant always retains the burden of proof on her discrimination claim. *Id.*

In this case, Complainant presented no credible evidence that she had been treated any differently than any other employee, or that her race was a factor at any point in the process. As a result, Complainant has not succesfully presented a *prima facie* case of unlawful discrimination based upon her race or color, and has not met her burden to prove unlawful discrimination.

No other rule or law appeared to be violated in the process chosen by Respondent in this case. Respondent's imposition of discipline in this matter was, therefore, neither arbitrary nor capricious, and was not contrary to rule or law.

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

The third issue to be determined is whether termination was within the range of reasonable alternatives available to Respondent.

Board Rule 6-9, 4 CCR 801, requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose.

In this case, Ms. Dominguez decided that the facts surrounding Complainant's arrest demonstrated that Complainant has a propensity for abuse and violence, and that she could not be allowed to continue in her position as a mentor and role model for the at-risk youth at the facility. Complainant challenges any use of the information concerning Complaint's arrest and the incident that prompted the arrest, arguing that such information is irrelevant to the employment decision.

As determined above, the arrest at issue in this case, by itself, is not sufficient to show a violation of a performance standard that was applicable to Complainant. The facts surrounding that arrest and the failure to self-report it, however, are relevant as possible aggravating and mitigating information in the determination of the level of discipline to be imposed for the performance standard violation present in this case. An appointing authority has the discretion under Board Rule 6-9 to determine if an incident should be treated in a more minor fashion, or whether it is an indicator of something far more serious. It is not unreasonable for Ms. Dominguez to look at Complainant's prior incident of failing to properly self-report an arrest, at Complainant's history of irresponsible language, at the facts of the incident itself, and at the inappropriate language and actions that Complainant used while she was being arrested. These are all aggravating factors in this case.

Ms. Dominguez also knew and weighed Complainant mitigating factors, such as her good annual reviews and her promotion to the CO II level. In the end, however, a decision to terminate Complainant's employment is not outside the range of reasonable alternatives, given the totality of the circumstances here.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined;

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

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

ORDER

Respondent's decision to terminate Complainant's employment is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 29th day of January, 2015 at Denver, Colorado.

[redacted]

Denise DeForest
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 30th day of Jan, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Richard S. Gross
[redacted]

Joseph Haughain
[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.