

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**SHAWN BOSTON,**  
Complainant,

vs.

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

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Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on December 18, 2014, and the evidentiary hearing on May 7 and 8, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on May 15, 2015, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared on May 7 and 8, and was represented by Mark Schwane. Respondent was represented by Bradford Jones, Assistant Attorney General. Respondent's advisory witness was Appointing Authority Jeff Blackmon.

**MATTER APPEALED**

Complainant, a certified employee, appeals his disciplinary demotion on September 11, 2014 from a Correctional Youth Security Officer (CYSO) II to a CYSO I, resulting in a reduction in pay. Complainant argues that this demotion was not within the range of reasonable alternatives, as Respondent failed to adequately consider his lengthy record of exemplary service and the confusion about proper takedown techniques caused by recent training deficiencies. He seeks rescission of the disciplinary action, an action within the reasonable range of alternatives, reinstatement to the classification of CYSO II, reinstatement to his original rate of pay, and an award of attorney fees and costs. Respondent argues that its decision to disciplinarily demote Complainant was not arbitrary, capricious or contrary to rule or law; was within the range of reasonable alternatives, and should be affirmed. Respondent argues that all relief sought by Complainant should be denied.

For the reasons discussed below, Respondent's decision to discipline Complainant is **affirmed with modifications**.

**ISSUES**

1. Whether Complainant committed the act for which he was disciplined;
2. Whether Respondent's demotion of Complainant was 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.

## FINDINGS OF FACT

### Background

1. Complainant began his employment with Respondent as a CYSO I at Marvin Foote Youth Services Center on January 31, 2005. Complainant is a certified state employee.

2. On September 30, 2008, Complainant was promoted to a CYSO II position at Lookout Mountain Youth Services Center (LMYSC). He originally worked as the supervisor for the Eagles program, which involved a group of youth residents who were working their way out of LMYSC and were separately housed. In 2013, the Eagles program was discontinued as a separate housing unit, and Complainant was moved to the Day Programming team at LMYSC.

3. LMYSC houses youth residents between the ages of 14-21 years of age. As of August 2014, LMYSC housed approximately 138 residents.

4. LMYSC residents are longer term, higher risk youthful offenders, many of whom have committed violent crimes. The residents come from all over Colorado; most of them are over the age of 18.

5. In August 2014, Complainant was responsible for the largest milieu in DYC, keeping track of over 130 youth residents and their individualized programs.

### Complainant's Performance Prior to August 2014

6. On October 25, 2010, Complainant was commended by Michael Smits for a "professional job" he did "while orchestrating clear and concise direction and leadership" when a fight broke out between youth residents in a gym. Mr. Smits and Glenda Melaragno provided Complainant with a Staff Appreciation Form thanking him for his "leadership" and "patience/calm" during this incident.

7. On November 15, 2010, a letter of appreciation was sent to Complainant from Kris Leyba, a Compliance Officer at the Phillip P. Gilliam Youth Services Center (Gilliam), thanking Complainant and the Eagles Unit residents he supervised for a life social skills training they provided for Gilliam. Ms. Leyba noted that the youth residents supervised by Complainant "did an outstanding job," and "were extremely professional and mature when presenting the information."

8. From April 1, 2010 through April 18, 2013, Complainant received overall Level 2 ratings on his annual evaluations, which is described as "Proficient, Successful, Meets Expectations, Reliably Performs, Directly Supports the Mission of the Organization."

9. Complainant was recognized as Employee of the Month in March and October 2011. On August 25, 2011, Complainant was nominated for Employee of the Month because of his "outstanding coordination and leadership" during a "Code Blue." He was praised for "role modeling of management and situation-control" and being "a capable leader during crises."

10. Complainant was recognized as Employee of the Month in June 2012. He also

received a Certificate of Appreciation on June 5, 2012 for his helpful response to a disturbance.

11. Complainant was recognized as Employee of the Month in October 2012 and in May 2013.

12. In January 2014, Complainant was recognized as "Staff of the Month" for "working towards ongoing school improvement" and demonstrating "commitment to the residents and their success."

13. On February 20, 2014, Complainant was awarded a Certificate of Excellence for "Outstanding Performance in Safety Interventions." On March 1, 2014, Complainant was awarded another Certificate of Excellence for "Outstanding Performance as Construction liason [sic]."

14. On April 23, 2014, Complainant received an overall Level 3 rating on his annual evaluation, which is described as "Outstanding, Exceptional, Consistently Exceeds Expectations, Model of Excellence." The comments concerning Complainant's performance in the area of "Programming" note that Complainant "creates a safe and healthy milieu for our youth." The comments concerning Complainant's performance in the area of "Safety and Security" in this evaluation include the following:

[Complainant] applies PPCT tactics and techniques including restraints and verbal de-escalation as per training and policy. [Complainant] not only participates in administrative debriefs of any restraints involved in, but also coordinates them and facilitates them for everyone. Again [Complainant] is the milieu Manager of the largest milieu in DYC with 130 plus kids all mixed together and moving from class to class. The fights, assaults and IR [Incident Report] numbers are almost half the percentage of the units with only 40 plus kids.

15. The March 21, 2014 "Checklist for Level 3 ratings" notes that Complainant "has worked as the only CYSO II on the day programming shift due to the other being out" and that he "completes the work of two CYSO IIs and does so on time and with quality." In addition, Complainant received the "Employee of the Month" award twice during the 2013-2014 fiscal year.

16. On May 30, 2014, DYC Director John Gomez sent Complainant a letter congratulating him for his "outstanding achievement in earning a Level 3 performance evaluation" for the 2013-14 evaluation cycle. In this letter, Mr. Gomez states that "only approximately 10% of all Division of Youth Corrections staff" earned a Level 3 rating during this evaluation period. Mr. Gomez further commends Complainant for providing "a model of excellence for others to emulate," and making "positive impacts on behalf of youth and families."

17. During his ten years of employment, Complainant received only one corrective action. This corrective action was issued on April 14, 2010, and coached Complainant to avoid using disrespectful or abusive language with staff, becoming too physically involved in recreational activities with youth, and using a cell phone while in the presence of youth and while on duty. Prior to September 11, 2015, Complainant was never formally disciplined by Respondent.

## August 6, 2014 YASS Training

18. In August 2014, Respondent was in the process of transitioning from the use of Primary Pressure Control Tactics (PPCT) in youth restraint protocols to a revised Youth and Staff Safety (YASS) program.

19. Complainant had been a PPCT Certified Trainer since 2009, and was very comfortable with those restraint techniques.

20. The revised YASS program emphasizes verbal skills and verbal de-escalation in an attempt to reduce the need for physical management and restraint. This program was first introduced to youth restraint trainers, including Complainant, during a 4-hour training session conducted by an outside contractor on August 6, 2015, after which the participants were certified as YASS trainers and the new YASS program became effective. No other training concerning the YASS program changes was provided to Complainant prior to his encounter with A.B. eight days later, on August 14, 2015.

21. PPCT utilizes a simple "1+1" rule, allowing staff to move up one step in their use of force from the specific behavioral stage a youth is in. In contrast, the revised YASS program utilizes a more complex Situational Response Matrix, requiring staff to first analyze the behavior level of a youth and then decide among four different categories of possible responses to that behavior.

22. The revised YASS program youth behavioral levels listed in the August 6, 2014 YASS training materials are:

Stage One: Calm - The youth is relatively calm and cooperative.

Stage Two: Trigger - During this stage, the youth experiences unresolved conflict that set in motion the behavior escalation.

Stage Three: Agitation - The youth is increasingly unfocused and upset.

Stage Four: Acceleration - As the conflict remains unresolved, the youth actually focuses on the conflict.

Stage Five: Peak - The youth is out of control and exhibits the most severe behavior.

Stage Six: De-escalation - Having vented in the peak stage, the youth displays confusion in this phase, but the severity of the peak behavior subsides.

Stage Seven: Recovery - Youth displays eagerness to participate in non-engagement activities and feels shame, sorrow, fear, or regret.

23. Once the specific behavioral level is identified, staff then may choose to employ one of the following responses listed in the August 6, 2014 YASS training materials:

a. Non-escalation Response: Designed to work with clients in a way that does not raise escalation from their current level.

- b. De-escalation Response: Used to support a student's ability to return to the Calm Stage and to prevent the Peak Stage from being activated.
- c. Verbal Directive Response: Clear, concise, expressed directives designed to gain compliance.
- d. Physical Response: Designed to respond to a potential or imminent risk to the wellbeing of others or an imminent risk to the security of the organization. Physical responses are described as the last option for intervention, when other responses have failed.

24. If staff determines that a youth is exhibiting Peak Behavior, staff may only utilize a physical response compatible with the appropriate level of Peak Behavior delineated on a Response Chart. The four levels of Peak Behavior listed in the August 6, 2014 YASS training materials are:

Level 1 Response: Used in response to potential safety or security risk. These are situations that [sic] injury or damages could occur. This includes youth who are verbally threatening, clinching their fists, moving towards another in an aggressive way, throwing objects, and/or hitting objects.

Level 2 Response: Used in responses to imminent safety and/or security risk. These are situations when a youth's [sic] displays behaviors that indicate a dangerous situation is about to occur if there is not some type of intervention. These situations include: physical or verbal confirmation from the youth that they are going to act violently, failure to respond to staff lesser interventions, and/or a youth whose [sic] acting aggressive towards another (walking towards the other person with fists clenched) and displaying dangerous behaviors.

Level 3 Response: Used only to respond to an assault on another. This is a high safety risk situation when there is no opportunity to gain compliance through the use [sic] de-escalation or non-escalation skills because the wellbeing of another is actively in jeopardy. Behaviors requiring a Level 3 response include: fights between two or more youth and/or one or more youth assaulting another.

Critical Response: A staff's response to being assaulted. A staff person is facing a severe safety and security risk that puts her/him in a position of needing defending [sic] her/himself from being assaulted. These situations include: physical or sexual assault and/or attempted assault against staff.

25. Compared to the use of PPCT, the revised YASS program involves a more complex analysis of the specific behaviors displayed by a youth in order to match an appropriate response to that behavior, as listed in the Situational Response Matrix and the Peak Response Chart. In addition, any lower level response in the YASS Matrix may be used at a higher level.

26. The revised YASS program altered protocols for 30 of the 34 physical skills taught and used by DYC prior to August 6, 2014. Only 4 of the handcuffing techniques remained unchanged by this new youth restraint program.

27. A "take down" refers to a youth being taken down to the floor for the purposes of management, including hand cuffing.

28. PPCT allowed the use of a knee strike when there was an imminent safety or security risk. The revised YASS only permits a knee strike if a youth is actively fighting or assaulting someone. If a youth is pulling away rather than actively fighting, a level 2 response is appropriate. The revised YASS authorizes nine different physical responses to level 2 youth behavior, including a "leg lift."

29. During the August 6, 2015 training session, several of the attendees, including Complainant, expressed confusion over the new techniques to be used, especially the leg lift, explaining that they had never performed this maneuver or seen it demonstrated. The instructor at the August 6<sup>th</sup> session did not have time to demonstrate this technique or allow the attendees to practice it, and informed the attendees that a follow-up session would be scheduled to go over this maneuver, and any others the attendees were confused about, in more depth.

30. No follow-up or additional YASS training sessions were held before August 14, 2015.

#### August 14, 2014

31. In August 2014, Complainant, as a CYSO II, was the morning milieu manager on the Day Programming team at LMYSC, and was responsible for maintaining safety in the school milieu. He was responsible for the largest milieu in DYC, keeping track of over 130 youth residents and their individualized programs, and ensuring that the youth were where they needed to be and were safe. Complainant described it as a "fast paced" job, requiring you to quickly respond to incidents and "think on your feet."

32. On the morning of August 14, 2014, Complainant was in the Multipurpose building at LMYSC, assisting with moving residents from treatment groups to fifth period, when he heard what sounded like an argument from the treatment group conducted by Barb Olseen. Complainant went to the room where the group was being conducted, and witnessed A.B. say in a threatening tone, "Fuck you, nigger, I'm going to fuck you up." Complainant did not know to whom this statement was directed.

33. Ms. Olseen was directing the residents in the room to group up to be moved, but no one was responding to her direction. A.B. said, "Shut up, Barb, you are a bitch." Complainant began walking towards A.B. A.B. stood up from his chair, stating, "I'm going to fuck both you niggas up." Complainant continued to walk towards A.B., informing him that they needed to go talk.

34. A.B. did not resist Complainant's verbal directive, and followed Complainant outside, while continuing to state, "I'm going to fuck you up." It was unclear who A.B. was directing this threat towards. Complainant testified that he had a "pretty good relationship" with A.B. and felt he had the situation under control.

35. Once outside the multipurpose building, A.B. turned to Complainant and stated, "Fuck you, nigger, you can't control me or my thought. I'm going to fuck you up, nigger, and punch you in the face. I don't care if I get charges; I want to go to jail. All my ICP people are there. I will fuck you up and punch you in the face and look good in jail."

36. Complainant decided to take A.B. to the Spruce Unit for a time out. In a calm but direct tone, Complainant instructed A.B. to stop making threatening statements and to walk towards the Spruce unit. Complainant used light guided touch, with his left hand touching A.B.'s

right shoulder, and A.B. resumed walking.

37. A.B. continued to make the same threats towards Complainant as they were walking. Approximately three or four feet from the front door of the Spruce Unit, A.B. turned around towards Complainant and stated, "Fuck you, nigga, once these doors open up, I'm going to punch you in the face." Complainant continued to verbally direct A.B. to walk to isolation.

38. Complainant and A.B. entered the Spruce unit at approximately 11:25 a.m. Charles Tyous, Youth Service Counselor III and the Spruce Unit Manager, and Victor Kern were present in the Spruce Unit control center when Complainant entered with A.B. Complainant immediately made eye contact with each of them as he continued to give A.B. verbal directives.

39. Mr. Tyous observed that Complainant was giving A.B. clear verbal directives as they entered the Spruce Unit. It appeared to be a "typical transport." A.B. was using profanity and saying something about what he would do to Complainant; Complainant responded, "Say what you want, just keep walking." These types of statements were typical of the youth residents.

40. A.B. began walking towards the A pod. Complainant saw that another youth was already in the A pod. Complainant began re-directing A.B. to seclusion room C by lightly placing his left hand in the middle of A.B.'s back and his right hand on the outside of his right shoulder. The youth tensed up and started to turn towards Complainant. Complainant attempted to secure A.B.'s right arm in an approved hold position; A.B. pulled his arm away. The video recordings of this incident reflect that these actions occurred very quickly, within a few seconds.

41. When Mr. Kern saw A.B. begin to show resistance, he went to assist Complainant. Mr. Kern was concerned that A.B. was about to assault Complainant.

42. Complainant could not remember what the appropriate Level 2 response was under the revised YASS program. A.B. was standing in front of Complainant with his back to him. Complainant was not sure what to do next, so he "instinctively" wrapped his arms around A.B.'s waist. A.B. began struggling to get out of this hold. Complainant realized that A.B. was taller and stronger than he was, and was scared that A.B. would get loose and assault him. Complainant explained that, under the PPCT techniques he had used for years, he would have used a knee strike at this point; however, he had just been instructed in YASS training that he could no longer use that technique for a Level 2 situation. Again, these events occurred very quickly, within a few seconds.

43. Because Complainant could not remember what the appropriate Level 2 response was under the revised YASS program, Complainant panicked and lifted A.B. up in an attempt to take him down to the ground. A.B. was lifted one or two feet off the ground. After Complainant lifted A.B., the youth suddenly stopped resisting and became dead weight, causing him to fall to the ground hard and in an awkward way.

44. After A.B. hit the ground, Complainant placed him in a prone position. He directed A.B. to place his hands behind his back. A.B. complied and Complainant put hand cuffs on him. A.B. then began shaking and his face started turning red. A nurse was present at the Spruce Unit and called a code blue, which is a request for urgent medical assistance.

45. By the time medical assistance arrived, A.B. had recovered; he sat up and was

speaking to the nurse, Heather Schmidt. After obtaining a confirmation of compliance from A.B., Ms. Schmidt approved the removal of his hand cuffs and A.B. walked on his own to the medical department for further evaluation and treatment. It was subsequently determined that A.B. suffered a broken wrist.

46. Complainant admitted that the technique he used to take down A.B. was not approved under either PPCT or YASS.

47. A physical management debrief is held at LMVSC after all physical management incidents, with all the individuals involved, to evaluate what went wrong and what went right, and to determine whether any follow-up actions are needed.

48. Approximately one hour after Complainant's take down of A.B., a debrief was held with Complainant, Mr. Tyous, Mr. Kern, Humberto Garza, Chris Anderson, and Assistant Director Marty Shull.

49. During the debrief, Mr. Tyous stated that he wished he had been notified that Complainant was bringing A.B. to Cedar Unit, so that he could have prepared the seclusion room in advance, and Complainant may not have had to redirect and engage A.B.

50. Complainant testified that he did not call for assistance because he didn't believe the situation "turned" until he entered the Spruce unit. He knew there were staff at the Spruce unit who could assist him, and he made eye contact with them as soon as he entered. When A.B. started resisting, he saw Mr. Kern begin to move towards him to assist.

51. Shortly after this debrief, Mr. Blackmon placed Complainant on paid administrative leave, effective August 15, 2015, pending an investigation.

#### Investigation and Rule 6-10 Meeting

52. The August 14, 2014 use of force on A.B. was reported to Jefferson County Department of Social Services. This incident was investigated by Child Protection Lead Intake Caseworker Allison Riley.

53. On August 22, 2014, Ms. Riley informed Mr. Blackmon, via email, that the interviews she conducted, as well as the video footage of the incident, constitute "clear evidence that more likely than not, [Complainant's] actions towards A.B. [were] physically abusive." Ms. Riley identified the "severity level of the physical abuse" as "medium/moderate," which "means the investigation found that excessive or inappropriate force was used, resulting in an injury that may require medical attention."

54. Mr. Blackmon notified Complainant, via letter dated August 19, 2014, that a Rule 6-10 meeting was scheduled for August 25, 2014 to discuss Complainant's justification for the force he used during the August 14, 2014 physical management of A.B. Complainant was informed that this meeting was an opportunity for him to present any mitigating circumstances before Mr. Blackmon determined whether a disciplinary action was appropriate.

55. The Rule 6-10 meeting was rescheduled at Complainant's request, and was held on September 2, 2014. Mr. Blackmon attended with his representative, Director Jason Lillich, and Complainant attended with his representative, Pam Cress.



## Demotion Decision

56. On September 11, 2014, Complainant received a disciplinary action, demoting him from his position as a CYSO II to a CYSO I, effective September 16, 2014.

57. The September 11, 2014 disciplinary action letter issued by Mr. Blackmon states:

I decided to take Disciplinary Action based upon your poor decision-making and subsequent actions on August 14, 2014. You applied an unapproved Youth and Staff Safety Technique, which caused significant injuries to the youth you were restraining. In making this decision, I also considered these additional factors:

1. Your position here as the CYSOII, Day Program Milieu Manager, which requires a higher level of decision-making due to the duties you are asked to complete.
2. You are a certified Youth and Staff Safety (YASS) instructor and are aware of the techniques that must be utilized during a physical management.
3. You did not attempt to get support when transporting youth A.B. from the Multi-Purpose Center to the Spruce Unit while he was actively making threats and was visibly escalated.
4. You did not attempt to handcuff youth A.B. prior to transporting him to the Spruce Unit.
5. You again failed to ask for support from the staff present as you entered the Spruce Unit.
6. You used an unapproved technique during the restraint of youth A.B. on August 14<sup>th</sup>.
7. Your actions caused serious injuries to the youth.
8. The Jefferson County Department of Human Services investigated this incident. The investigator, Allison Riley, has informed me that her investigation supports a finding that excessive or inappropriate force was used, resulting in an injury that may require medical attention. By definition your actions are consistent with "moderate physical abuse."

After careful deliberation and consideration of all information gathered, your work history, and a review of your training records, in accordance with Personnel Rule R-6-9, I have decided to take the following Disciplinary Action: You are demoted from your current position as a CYSOII, PN# 247 to a CYSOI, PN# 1976, effective September 16, 2014. Since there are no openings on the Day Program team at this time, you will be placed at the Cedar Unit. Your current base pay rate is \$3,915.00, and your base pay will be decreased by 5% to \$3,719.00 to reflect your demotion to a CYSOI. In addition, you will no longer be permitted to train Youth and Staff Safety for LMYSO or any other DYC program. This status may be reviewed on an ongoing basis.

## DISCUSSION

### **I. BURDEN OF PROOF**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't 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. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

### **II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.**

Complainant admitted that he used an unapproved technique for restraining youth A.B. on August 14, 2015, and that this technique resulted in injury to A.B. Thus, there is no dispute that Complainant committed this act, which is the primary reason for Mr. Blackmon's decision to demote Complainant. Mr. Blackmon testified that, in making this disciplinary decision, he also considered certain decisions by Complainant leading up to this unapproved restraint that he admitted were discretionary, but which he saw as contributing to the need for Complainant to execute an unapproved restraint. Complainant explains these decisions but does not deny making them. Therefore, Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined.

### **III. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW.**

In determining whether an agency's decision to discipline an employee 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 that after a consideration of the 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). A court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly

be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Respondent's actions in this case were neither arbitrary nor capricious, as those terms are defined in *Lawley*. A Rule 6-10 meeting with Complainant was held on September 2, 2014. Mr. Blackmon described a thorough and thoughtful review of the events of August 14, 2014, as well as a review of Complainant's employment record, before reaching a decision to discipline Complainant. Complainant does not deny that he used an unapproved technique for restraining youth A.B. on August 14, 2015, and that this technique resulted in injury to A.B. Complainant does not identify any law or rule violated by Respondent in deciding to discipline him. Thus, Respondent has met its burden of establishing that, under *Lawley*, it did not act arbitrarily or capriciously, or contrary to rule or law, in deciding to discipline Complainant on September 11, 2014.

#### **IV. THE DISCIPLINE IMPOSED WAS NOT WITHIN THE RANGE OF REASONABLE ALTERNATIVES.**

In reviewing the decision to impose discipline, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within a range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Board Rule 6-9.

Mr. Blackmon testified that, in determining the level of discipline to impose, he considered Complainant's excellent work record, and rejected the option of termination as too harsh a penalty in light of this record. Instead, Mr. Blackmon decided that a demotion from CYSO II to CYSO I was an appropriate disciplinary action. However, the ten year period of Complainant's excellent service, numerous commendations and acknowledgments concerning his handling of youth residents and crises, combined with the confusion caused by the lack of adequate training of the new YASS Situational Response Matrix and Peak Behavior Response Chart, render the disciplinary demotion imposed in this case outside the range of reasonable alternatives.

Complainant took full responsibility for his use of an unapproved control technique on August 14, 2014. In his ten years of employment with Respondent, Complainant received numerous commendations, several of which described his calm and effective responses to fights and disturbances involving youth residents at LMYSC. Complainant's last performance review, issued less than four months before the events of August 14, 2014, gave him an exemplary rating. In this evaluation's comments on "Safety and Security," Complainant is commended for his ability to appropriately use PPCT tactics and techniques, including restraints and verbal de-escalation. This evaluation further notes that, while Complainant managed the largest youth population in DYC, the reported fights, assaults and other incidents in that unit were almost 50% less than those in much smaller units.

A week before the incident for which Complainant was disciplined, Complainant, as well as other youth restraint trainers, were first introduced to the new YASS Situational Response Matrix and Peak Behavior Response Chart in a four hour presentation. At least one of the new techniques authorized under this new YASS program – the leg lift – was completely unknown to

Complainant and several other trainers. Despite these concerns, Complainant and the other trainers were certified as YASS trainers upon completion of this four hour session. No opportunity was provided for Complainant or the other trainers to practice and actually learn these new techniques before Complainant was required to put them into action on August 14, 2014.

Complainant credibly testified that his confusion about what new control technique he could use caused him to panic and, for lack of other options, perform an unapproved takedown on August 14, 2014. Mr. Blackmon acknowledged that he was aware of issues with the YASS training provided one week before Complainant's incident with A.B.; however, the disciplinary letter he issued on September 11, 2014 describes Complainant as "a certified YASS trainer" and lists Complainant's awareness "of the techniques that must be utilized during a physical management" as a factor in Mr. Blackmon's decision to demote Complainant. While Complainant's decision was a serious error and led to the injury of the youth resident involved, Respondent bears some responsibility for its failure to provide adequate training of the revised control techniques to its employees, which negatively affected the split second decision Complainant had to make on August 14, 2014. In imposing discipline, Mr. Blackmon did not adequately consider the effect this lack of training had on the decisions Complainant made on August 14, 2014.

Under these circumstances, the decision to impose an indefinite disciplinary demotion with a five percent decrease in pay was not within the range of reasonable alternatives. A ten-month reduction in pay of five percent, beginning September 16, 2014 (the effective date of the disciplinary action), reflects the seriousness of the error made by Complainant on August 14, 2014, but is more closely aligned with Complainant's otherwise excellent work record and numerous commendations, and the mitigating factor of inadequate YASS training.

#### **V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.**

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-103(6), C.R.S.; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

A groundless personnel action is one in which it is found that, despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-38(A)(3). Frivolous actions, on the other hand, are actions "in which it is found that no rational argument based on the evidence or law is presented." Board Rule 8-38(A)(1).

As discussed above, Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law. Imposing discipline outside the range of reasonable alternatives does not rise to the level of a decision that was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Thus, Complainant is not entitled to attorney fees.

#### **CONCLUSIONS OF LAW**

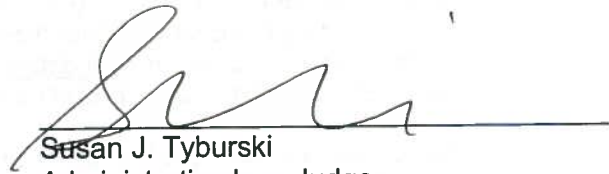
1. Complainant committed the acts for which he was disciplined.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Complainant is not entitled to attorney fees.

**ORDER**

Respondent's action is **affirmed with modifications**. Complainant's disciplinary demotion is **rescinded** and replaced with a ten-month disciplinary reduction in pay of five percent, beginning September 16, 2014. Attorney fees and costs are not awarded.

Dated this 26<sup>th</sup> day  
of June, 2015.

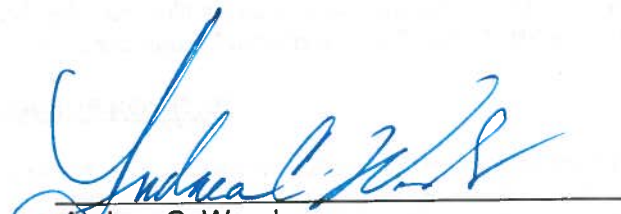
  
\_\_\_\_\_  
Susan J. Tyburski  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, CO 80203  
(303) 866-3300

**CERTIFICATE OF MAILING**

This is to certify that on the 29<sup>th</sup> day of June, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Mark Schwane, Esq.  
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[Bradford.Jones@state.co.us](mailto:Bradford.Jones@state.co.us)

  
\_\_\_\_\_  
Andrea C. 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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.