

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VICKI ARMSTRONG,
Complainant,

v.

**DEPARTMENT OF HUMAN SERVICES, OFFICE OF CHILDREN, YOUTH & FAMILIES,
DIVISION OF YOUTH CORRECTIONS, ADAMS YOUTH SERVICES CENTER,**
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the commencement hearing in this matter on April 3, 2017, and the evidentiary hearing on August 14, 15, and 16, 2017, at the State Personnel Board (Board), 1525 Sherman Street, Courtroom 6, Denver, Colorado. The record was closed on August 16, 2017 at the end of the evidentiary hearing. Complainant Vicki Armstrong (Complainant) was represented by Nelson G. Alston, Esq. Respondent, Colorado Department of Human Services (CDHS), Office of Children, Youth & Families, Division of Youth Corrections (DYC), Adams Youth Services Center (AYSC) was represented by Lucia Padilla, Assistant Attorney General. Respondent's advisory witness, and Complainant's appointing authority, was Jeff Blackmon, AYSC's Director.

MATTERS APPEALED

Complainant, formerly a certified Dining Services III employee at AYSC, appeals her disciplinary termination. Complainant argues that she did not commit the acts for which she was disciplined; that Respondent's decision to terminate her was arbitrary, capricious or contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives. Complainant requests reinstatement with back pay and benefits.

Respondent argues that Complainant committed the acts for which she was disciplined; that Respondent's decision to terminate Complainant's employment was not arbitrary or capricious or contrary to rule or law; that the discipline imposed was within the range of reasonable alternatives; that the decision to terminate Complainant should be upheld; and that Complainant is not entitled to any of the relief she has requested.

For the reasons discussed below, Respondent's termination of Complainant's employment is affirmed.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

General Background

1. Complainant began her employment with Respondent in 1992 as a kitchen worker, first as a temporary, part-time employee, then as a permanent, full-time employee.
2. When Complainant was first hired in a full-time capacity, she held a Dining Services (DS) I position. Subsequently, Complainant was promoted to DS II and DS III positions.
3. At all times relevant to this matter, Complainant held a DS III position and was a certified state employee.

Complainant's Employment History at Gilliam Youth Services Center

4. Complainant worked in the kitchen at the Gilliam Youth Services Center (Gilliam) for approximately 25 years.
5. During the 14 years prior to March 2012, Complainant received no corrective or disciplinary actions.
6. For Complainant's annual performance evaluation for the fiscal year April 1, 2010 through March 31, 2011, referred to as Performance Management and Pay (PMAP), Complainant received an overall rating of Level II, indicating "Proficient, Successful, Meets Expectations, Reliably Performs, and Directly Supports the Mission of the Organization."
7. On March 12, 2012, Linda Boldin, Food Service Manager at Gilliam, gave Complainant a corrective action "intended to improve your job performance and specifically relating to your behavior in regards to interpersonal skills and communication" This corrective action arose from a perceived unprofessional and inappropriate interaction between Complainant and her immediate supervisor, and required Complainant to communicate appropriately and respectfully with co-workers, follow the CDHS Employee Code of Conduct, and attend a training on Communicating Non-Defensively, Preventing Workplace Violence for Employees and Conflict Resolution at Work.
8. Complainant was rated at Level II on her PMAP for the fiscal year April 1, 2011 through March 31, 2012.
9. Complainant was rated at Level II on her PMAP for the fiscal year April 1, 2012 through March 31, 2013.
10. On December 12, 2013, Complainant was given a corrective action for failing to properly document temperatures on production records for the month of November, a repeated offense. Pursuant to this corrective action, Complainant was required to appropriately record cooking and holding temperatures.
11. Complainant was rated at Level II on her PMAP for the fiscal year April 1, 2013 through March 31, 2014.
12. Shortly before June 2014, Complainant observed LaToya Sayers, Food Service Manager at Gilliam, and Complainant's then-supervisor, baking cakes for her own, private

business using state-owned ingredients. Ms. Sayers asked for Complainant's help in some minor aspect of Ms. Sayers' preparation of the cakes, but Complainant told Ms. Sayers that she was uncomfortable helping Ms. Sayers in that activity. Complainant did not report this incident to management.

13. On June 13, 2014, Ms. Sayers gave Complainant a corrective action for raising her voice during a discussion regarding a schedule change. Ms. Sayers characterized Complainant's conduct as a "[f]ailure to communicate in a manner deemed professional in nature," and a "[f]ailure to adhere to Employee Code of Conduct." Pursuant to this corrective action, Complainant was required to "work on fostering a positive working relationship with your Supervisor and your peers" and to adhere to the Employee Code of Conduct at all times.

14. On June 24, 2014, Ms. Sayers gave Complainant a corrective action arising from a digital thermometer that had been reported missing the previous week. It was determined that the thermometer had been in Complainant's possession but Complainant could not find it. Complainant was instructed to stay on the premises until it was found, but Complainant left prior to the recovery of the thermometer. At the time of the corrective action, six days after the thermometer was reported missing, it had not yet been recovered. Pursuant to this corrective action, Complainant was required to "keep inventory of all sharps that you are using on the inventory log" and "locate all missing sharps prior to the end of your shift. If the missing item has not been located, you will remain on duty until the item is located."

15. On July 28, 2014, Ms. Sayers gave Complainant a corrective action for failing to comply with her posted schedule, arriving late on multiple occasions and leaving early once without prior authorization. Pursuant to this corrective action, Complainant was directed to abide by her posted schedule and obtain prior permission from Ms. Sayers "before clocking in or out prior to the start or finish of your scheduled shift."

16. On October 6, 2014, Ms. Sayers gave Complainant a corrective action for leaving a pan of romaine lettuce next to a pan of raw ground turkey in the refrigerator, creating a potential life safety issue by the threat of cross-contamination.

17. On October 14, 2014, Ms. Sayers gave Complainant a corrective action for a violation of proper temperature check for chilling foods and several minor code violations.

18. On March 5, 2015, Nadine McAlister, Training Coordinator, gave Complainant a corrective action for violation of *DYC Policy 4.1, Training and Training Requirements – Facility Based*. The corrective action was given because Complainant failed to complete a mandatory training by the designated deadline.

19. On March 5, 2015, Complainant was given a second corrective action for her failure to complete production or prep work the day before because Complainant worked instead on the mandatory training that she had failed to complete by the designated deadline.

20. In April 2015, Complainant's then-supervisor, Caleb Cameron, gave Complainant her annual PMAP for the fiscal year April 1, 2014 through March 31, 2015, which Complainant refused to sign. Mr. Cameron rated Complainant at Level I (Needs Improvement) overall and at Level I in three out of the four core competencies (Communication, Interpersonal Skills, and Organizational Accountability). He rated Complainant at Level II for Customer Service.

21. Due to Complainant's Level I rating for the 2014-2015 fiscal year, Complainant was put on a Performance Improvement Plan (PIP) in April 2015.

22. The extensive PIP required Complainant to comply with multiple directives in the Core Competencies of Communication, Interpersonal Skills, Customer Service, Organizational Accountability, and two other areas that are termed Job Knowledge on Complainant's PMAP but called core competency areas in the PIP: Resource Management and Food Service Sanitation. Among other many other directives, the PIP included the following orders:

- You will communicate with all staff, food service and non-food service in a manner that promotes a healthy and productive work environment.
- You will familiarize yourself with the Code of Conduct so that you are able to properly demonstrate professional behavior in the work environment on a day to day basis.
- You will treat the youth, and your co-workers inside and outside of the kitchen with courtesy, dignity and respect at all times.
- You will not receive any complaints/grievances regarding your attitude or behavior from the youth or staff.
- You will inspect all products for spoilage, signs of damage, infestation, or improper thawing to ensure that all food is safe for consumption.
- You will make sure that are putting items in the correct locations in the walk-in refrigerator and freezer preventing cross contamination and/or food spoilage.
- You will make sure that you are following are HACCP¹ [sic] procedures for correctly thawing out foods which would be by means of the cooking process, the refrigerator or under cold running water.
- You will immediately contact a Security Supervisor to notify them of missing sporks/cups or sharps item.
- You will find any missing sharps or sporks/cups prior to you leaving your shift for the day.

23. The written PIP warned that "Failure to complete with the requirements of this PIP by specified dates may result in Corrective and/or Disciplinary Action." The PIP also required monthly review with Complainant's then-supervisor Matthew Harper. Complainant refused to sign the PIP.

24. On June 11, 2015, Ms. Sayers gave Complainant a corrective action for using outdated milk and not following the "first in, first out" method of food rotation, resulting in food spoilage. Pursuant to this corrective action, Complainant was directed to follow the HACCP First In First Out rotation procedures and ensure that spoiled food items were not served to Gilliam's residents.

Transfer to Adams Youth Services Center

25. Complainant was transferred to AYSC in August 2015.

26. Complainant was still on her PIP when she transferred.

27. Angela Gabaldon, a DS III employee, worked at AYSC at the time that Complainant was transferred.

¹ HACCP stands for Hazard Analysis Critical Control Point, a management system for food safety procedures.

28. On several prior occasions, Ms. Gabaldon helped out at Gilliam and worked with Complainant before Complainant's transfer to AYSC. Ms. Gabaldon had complained about Complainant to her managers because she felt that Complainant was not a team player and did not assist her as expected and required. Complainant had also complained about Ms. Gabaldon.

29. On February 9, 2016, Complainant was given a corrective action for violating NYC policy and AYSC Implementing Procedures 9.22, "Use of Personal Electronic Devices in Facilities," which prohibits employees from bringing personal electronic devices into the facility. On December 30, 2015, a small electronic recording device was found on the floor next to the freezer in the kitchen. The device was Complainant's, who told Jeff Blackmon, AYSC's Director and Complainant's Appointing Authority, that it was hers and was used to monitor her heart rate. Mr. Blackmon gave Complainant a corrective action because Complainant had not obtained prior permission to use the device in the facility. Complainant was required to not bring any personal electronic devices into the facility without prior approval of the facility director, adhere to policy 9.22; and attend the NYC Pre-Service Academy from March 8th through March 11th, 2016, to review NYC policies.

30. On April 19, 2016, Complainant was given a corrective action for insubordination when she failed to follow verbal directions to acknowledge receipt and understanding of staff meeting minutes by a prescribed deadline. As a result of this corrective action, Complainant was required to comply with all verbal and written directives by specified timeframes, if provided, and was directed to check her email every 24 hours at a minimum during her scheduled work week and respond accordingly.

31. In April 2016, Complainant was given her 2015-2016 PMAP by her then-supervisor Anthony Trujillo. Complainant received a Level II overall rating, but received Level I ratings in three out of four core competencies (Communication, Interpersonal Skills, and Organizational Accountability). She was rated at Level II in the fourth core competency, Customer Service.

The July 13, 2016 Disciplinary Action

32. On the morning of June 9, 2016, Ms. Gabaldon discovered that a pan of thawing chicken had been placed atop two containers of fruit in the walk-in refrigerator.

33. The placement of uncooked chicken on top of containers of fruit created a threat of cross-contamination and was a violation of state and NYC food safety regulations.

34. Ms. Gabaldon took a picture of the chicken on top of the fruit with her cell phone and sent it to Mr. Trujillo. Complainant was identified as the employee who had prepped the chicken the day before.

35. When Complainant reported for work on June 9, 2016, she moved the pan of chicken to a lower shelf in the refrigerator, but did not dispose of the fruit that might have been contaminated by the raw chicken.

36. After Mr. Blackmon was notified of this incident, he scheduled a Rule 6-10 meeting with Complainant, which was held on June 30, 2017.

37. During the Rule 6-10 meeting, Complainant denied putting the chicken on top of the fruit, alleging that Ms. Gabaldon had been moving things around in the walk-in refrigerator.

38. Complainant admitted that she was aware that the fruit should have been disposed of because of the threat of cross-contamination, but she was not sure why she did not dispose of it.

39. Complainant admitted that she did not report that she believed that one of her co-workers had placed the pan of raw chicken on top of the containers of fruit until Mr. Blackmon informed her of the possibility of cross-contamination.

40. In a disciplinary letter dated July 13, 2016, Mr. Blackmon communicated his findings to Complainant and notified her of his decision to impose a disciplinary action.

41. Mr. Blackmon concluded that Complainant had placed the raw chicken on top of the containers of fruit, and that her denial was not credible.

42. Mr. Blackmon also concluded that Complainant had violated NYC and state policies regarding food handling procedures to prevent the threat of cross-contamination, and that she "potentially caused a life-threatening illness due to cross-contamination and possible introduction of the salmonella virus to youth that are considered to be in a high risk population."

43. Mr. Blackmon decided to impose a disciplinary action on Complainant, which consisted of a reduction in Complainant's base salary of 5% over three months (September, October and November 2016).

44. Complainant did not grieve or appeal this disciplinary action.

August 17, 2016

45. On August 17, 2016, there were three DS IIIs working in the AYSC kitchen: Complainant, Ms. Gabaldon, and Colby Clements, who had been transferred to AYSC earlier that month because AYSC was short staffed.

46. In the morning, sometime prior to 10:00 a.m., Ms. Gabaldon used a small sandwich spreader while making sandwiches for that day's lunch. She properly put the spreader in the dish machine after use, and the spreader was then placed in the locked cabinet where all sharp utensils were stored when not in use accordingly to policy.

47. Sometime around 12:20 p.m., Complainant used the spreader to cut bananas for banana chocolate pudding.

48. At 12:39 p.m., Complainant put the spreader in one of the two buckets that were in the far left of a three-compartment sink and soon forgot that she had done so. These buckets were used to wipe down tables in the dining room and, when the dish machine was not functional, to sanitize cooking utensils. The dish machine was functional that day.

49. The spreader was considered a "sharp," and was subject to policies that required sharps to be locked in a cabinet when not in use. A sharps inventory, pursuant to which an employee accounted for all sharps, was conducted three times a day, after breakfast, lunch and dinner. The policies were designed to prevent any of the residents from obtaining a sharp and

using it as a weapon. If the spreader was not found, the facility would have to go on lock down and all residents would need to be searched.

50. At approximately 2:20 p.m., while Ms. Gabaldon was conducting the mid-day sharps inventory prior to her leaving early for the day, she discovered that the spreader was missing.

51. In discussing the situation with Mr. Clements, Ms. Gabaldon said, "I just used it." Complainant heard her say it and believed that Ms. Gabaldon used it recently. Ms. Gabaldon meant that she had used it earlier that day, but did not say that.

52. Complainant did not tell her co-workers that she put the spreader one of the buckets in the sink a couple of hours before, because she had forgotten that she had done so.

53. Ms. Gabaldon and Mr. Clements looked around the kitchen for the spreader without success. Complainant did not participate in the search.

54. Ms. Gabaldon went outside to the trash to see if the spreader had been inadvertently thrown out. She did not find the spreader there.

55. At approximately 2:29 p.m., Complainant went directly to the bucket in the sink, pulled out the spreader, and put it in the middle compartment, in which there was a clear container with eggs thawing under running water.

56. Complainant said, "Here it is," and gave the spreader to Mr. Clements, who asked her where she found it. Complainant said it was in the middle compartment of the sink, under the container.

57. Complainant did not tell Mr. Clements that she found the spreader in the bucket, where she had placed it a couple of hours before and then forgotten about it, because she feared that she would get into trouble.

58. Mr. Clements knew that Complainant was not telling the truth about where she found the spreader because he had checked the middle compartment of the sink more than once while looking for spreader.

59. About twenty-five minutes later, at 2:55 p.m., Complainant sent herself an email, which she forwarded to Mr. Blackmon at 3:37 p.m. the same day:

i heard angela saying she was going out to trash to look for spreader she said she use it but couldnt find it she went out came back saying she didnt find ask me if i see it i said not since earlier when i used it i look over at sink and found it in bucket i don't know but angelas been playing set up games and i figure this was another one to try to track me back to it Colby asked i told him it was in under container in he told angela outside she came in and left for the day i truly don't know if i put back or she put in because of a game so imm confused I was on lunch and i stated i was at lunch and hadnt seen since i alson not sure if or when she used it, i will let jeff Mr. Blackmon no asap i think hes off today.

60. After the spreader was found, Mr. Clements told AYSC Assistant Director Celaniz Romero about the incident, who then informed Mr. Blackmon, who was off-site that day.

61. Mr. Blackmon investigated the incident over the next several days. He reviewed AYSC kitchen video footage from early August 17th up to the time Complainant retrieved the spreader and handed it to Mr. Clements. He preserved two segments of the footage, showing Complainant using the spreader and placing it in one of the buckets, then later retrieving the spreader from the bucket, but did not preserve footage between these two segments. Mr. Blackmon also spoke with Mr. Clements and Ms. Gabaldon and asked them to memorialize their recollections of the incident.

62. On August 23, 2016, Mr. Clements sent an email to Mr. Blackmon with his recollection of the August 17th incident. Ms. Gabaldon did the same on August 24, 2016.

Notice of and Preparation for Pre-Disciplinary Meeting

63. On August 23, 2016, Mr. Mr. Blackmon sent Complainant a notice of a predisciplinary Board Rule 6-10 meeting by certified mail, notifying Complainant that he had scheduled a Rule 6-10 meeting for September 1, 2016. The notice indicated that the purpose of the meeting was to discuss the events of August 17, 2016 and Complainant's role in the matter. Mr. Blackmon wrote:

On August 17, 2016, a small sandwich spreader was observed to be missing while doing the sharps count at 2:15 p.m. After reviewing the video footage of the kitchen it was observed that you were using the spreader at around 12:25 pm to cut up some bananas and then you place it in the red bleach bucket on the left of the 3 compartment sink at 12:40 pm. When it was noticed that the spreader was missing later at 2:15 pm you made no effort to look for the item until both Angela and Colby had left the kitchen. You then walk straight towards the 3 compartment sink and being washing the spreader in the green bucket and then you move it to the middle compartment. You then notice Colby walking towards you and it was at this time you hand Colby the spreader and say, "Oh, here it is." I will be scheduling an R-6-10 meeting with you to discuss this incident further. Please be prepared to discuss your role in this matter and why it is you did not feel the need to acknowledge your co-workers and assist in looking for an item that you had not properly secured.

64. Prior to the Rule 6-10 meeting, Mr. Blackmon created a chart that he titled "Job Performance Timeline." The chart lists all of the corrective and disciplinary actions received by Complainant from 1996 through May 5, 2016, as well as a few other documents raising issues critical to Complainant and her conduct.

Board Rule 6-10 Meeting

65. Mr. Blackmon held the Rule 6-10 meeting as scheduled on September 1, 2016. His representative at the meeting was AYSC Assistant Director Romero. Complainant appeared without a representative, despite being notified in the pre-disciplinary letter that she could bring a representative to the meeting.

66. At the beginning of the meeting, Mr. Blackmon stated that "the reason for this meeting is to gather all pertinent information and to give you the opportunity to present information and/or mitigating circumstances before I decide if disciplinary action is appropriate."

67. He then added, "It is my time to ask you questions, not your time to ask me for information."

68. Mr. Blackmon informed Complainant at the beginning of the meeting that she would be allowed "up to five business days after the meeting to provide the appointing authority any additional information relating to issues discussed at the meeting."

69. During the meeting, Mr. Blackmon conveyed the following information to Complainant:

a. On August 17, 2016, a small sandwich spreader was discovered to be missing during a sharps inventory count at 2:15 p.m.

b. Video establishes that Complainant used the spreader around 12:25 p.m. and then put it in one of the two buckets in the left compartment of the three-compartment sink at 12:39 p.m.

c. Ms. Gabaldon said, "I just used it."

d. Complainant made no effort to assist Ms. Gabaldon and Mr. Clements in looking for the spreader.

e. The video revealed that, around 2:29 p.m., Complainant walked over to one of the two buckets in the three-compartment sink, took out the spreader, and moved it to the middle compartment. Complainant then turned around with the spreader in her hand and told Mr. Clements, "Here it is."

f. Mr. Blackmon watched the video from 12:39 p.m. until 2:29 p.m. and no one moved the spreader from the bucket into which Complainant placed the spreader.

70. In response, Complainant made the following admissions:

a. She forgot that she had placed the spreader in the bucket. "I didn't even realize I had done it. . . . I didn't have any idea I just left it in there until later on."

b. She knew she was not supposed to put the spreader in the bucket if the dish machine was functional, which it was that day. "It's really a bad habit, actually."

c. She knew that Ms. Gabaldon and Mr. Clements were looking for the spreader, but she thought she heard Ms. Gabaldon say that she, Ms. Gabaldon, had just used it and now couldn't find it.

d. She didn't assist in the search for the spreader at first because no one asked her to help.

e. At around 2:29 p.m., Complainant wondered if she had placed it one of the buckets earlier.

f. She "just happened to walk over and I was just like 'please don't let this thing be in this water,' and there it was."

g. Complainant took it from the bucket and placed it in the middle compartment because she "freaked out" and feared that she would get into trouble because she left it in the bucket and didn't remember leaving it there.

h. She told Mr. Clements that she found it in the middle compartment under a container and admitted that what she told Mr. Clements was not true.

i. She intended to deceive Mr. Clements by not telling him where she left the spreader after using it before.

71. Mr. Blackmon did not provide Complainant with copies of Ms. Gabaldon's and Mr. Clement's written statements concerning the events of August 17th.

72. During the Rule 6-10 meeting, Mr. Blackmon reviewed policies 9.11 and 10.4, which addressed the proper use and management of sharps.

73. Near the end of the meeting, Mr. Blackmon said, "I have just a few more questions and then we can wrap this up."

74. Mr. Blackmon then commenced a brief review of prior corrective or disciplinary actions relating to failing to follow food safety guidelines, not following DYC policy pertaining to food equipment, or for not following the CDHS Employee Code of Conduct.

75. Mr. Blackmon and Complainant first discussed the incident that led to Complainant's July 13, 2016 disciplinary action. Complainant denied placing the raw chicken on top of the containers of fruit, and suggested that Ms. Gabaldon moved the chicken. She admitted that she should have thrown the fruit out when she saw that there was a risk of cross-contamination. She did not explain why she did not grieve or appeal this disciplinary action.

76. Mr. Blackmon briefly reviewed several of Complainant's previous corrective actions relating to failing to follow food safety guidelines, following DYC policy pertaining to food equipment, or for not following the CDHS Employee Code of Conduct, including corrective actions dated June 11, 2015, October 6, 2014, June 24, 2014, and June 13, 2014.

77. Complainant denied that the allegations underlying the June 24, 2014 were true, denied knowing about the June 13, 2014 corrective action, and asserted that the December 12, 2013 corrective action was dismissed. Complainant did not provide any evidence to support her claims, either during or after the Rule 6-10 meeting.

78. The meeting lasted just over one hour. Mr. Blackmon did not remind Complainant at the close of the meeting that she had five business days to provide him with additional information about any of the issues discussed during the meeting.

Mr. Blackmon's Post Rule 6-10 Investigation

79. After the Rule 6-10 meeting, Mr. Blackmon considered Complainant's performance record, which included multiple corrective actions, a disciplinary action, and the PIP that Complainant was still on at the time of the August 17th incident. He also considered Complainant's PMAPs for the years 2014-2015 and 2015-2016. He reviewed Complainant's personnel file. He reviewed Complainant's training records. He reviewed NYC policies 10.4 and 9.11 and the CDHS Employee Code of Conduct. He also reviewed the job performance timeline he prepared prior to the Rule 6-10 meeting. He reviewed the video footage from August 17, 2016. He reviewed the email Complainant sent him on August 17, 2016. He reviewed the written statements of Ms. Gabaldon and Mr. Clements about the August 17, 2016 incident. He consulted with Human Resources. He consulted with the NYC Central Office. He reviewed Board rules, particularly Board Rule 6-9, which requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose.

80. Mr. Blackmon concluded that termination of Complainant's employment was warranted based on repeated violations of policy over several years. Mr. Blackmon determined that Complainant was not improving and her conduct posed a risk to the youths being served at AYSC. The manner in which Complainant handled food and sharps put both youths and staff at risk. Mr. Blackmon decided that the PIP was not working and that he could not allow this type of job performance to continue.

Disciplinary Letter

81. On September 14, 2016, Mr. Blackmon issued a notice of disciplinary action, in which he notified Complainant that he had decided to terminate Complainant's employment. In his letter, Mr. Blackmon reviewed Complainant's corrective and disciplinary history, her performance evaluations, Complainant's conduct on August 17, 2016, and her statements during the Rule 6-10 meeting.

82. Mr. Blackmon referenced the following corrective actions that he mentioned during the Rule 6-10 meeting: December 12, 2013, June 13, 2013, June 24, 2014, October 6, 2014, and June 11, 2015.

83. Mr. Blackmon based his decision to terminate Complainant's employment on Complainant's violation of NYC policies 10.4 and 9.11 by mishandling the spreader, attempting to deceive her co-workers, and admitting that she did not always follow these policies; violation of the Employee Code of Conduct by being untruthful with her co-workers and non-responsive to their needs; willful misconduct by knowingly deceiving her co-workers about the location of the spreader in order to avoid personal responsibility; a pattern of willful failure to perform as documented by her performance history over the last several years; inability to perform duties competently as evidenced by her repeated policy violations and corrective actions; and repeated violations despite multiple corrective actions.

84. Mr. Blackmon concluded that "your inability to improve your performance after repeated attempts to supervise, correct, and discipline you for repeated policy violations led to this final decision [to involuntarily separate you from your employment]."

Appeal

85. Complainant timely appealed her termination to the Board.

DISCUSSION

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.; *Dept of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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, Respondent has the burden of proving by a preponderance of the 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. § 24-50-103(6), C.R.S.

HEARING ISSUES

I. Complainant Committed the Acts for Which She was Disciplined

Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which she was disciplined.

On August 17, 2016, Complainant placed the small sandwich spreader in one of the buckets in the three-compartment sink and forgot about it. When her co-workers, Ms. Gabaldon and Mr. Clements, searched for it pursuant to Ms. Gabaldon's sharps inventory, Complainant failed to tell them where it was, and failed to help them look for it. Finally, she went directly to the bucket in which she placed the spreader a couple of hours before, found it, and then represented that it was under a container in the middle compartment of the sink. During her Rule 6-10 meeting, she admitted that she had a bad habit of putting utensils, including sharps, in the buckets rather than running them through the dish machine, which was the proper way to sanitize cooking utensils when the dish machine was in service, which it was on that day. She also admitted that she intended to deceive Mr. Clements about where she found the spreader

because she was concerned that her handling of the spreader would get her into more trouble than she was already in.

DYC Policy 9.11 provides, in pertinent part, that, "All tools, equipment, or utensils, used within the facility, including items such as hacksaws, kitchen knives, hammers, scissors, screwdrivers, all technology equipment used in a vocational program, medical equipment, or other devices that could be used as a weapon, shall be controlled at all times. Such items shall be inventoried, distributed in a controlled manner, returned to an established storage location in a timely manner, and re-secured after each use, for safety purposes."

DYC policy 10.4 provides, in pertinent part, "Knives and sharps shall be secured in a tool locker when not in use. . . . A physical count of the knives, sharps, shall be taken and documented at a minimum of three times per day. These times shall be first thing in the morning, at the mid-day shift change, and at the end of the work day."

The Employee Code of Conduct includes the following directives, among others:

- Be truthful, honest, and courteous to co-workers and to customers at all times.
- Listen actively and share information in open, honest, and appropriate ways.
- Be considerate of fellow workers when performing job tasks.
- Accept responsibility for own mistakes; ask for clarification and guidance when unsure about job duties.
- Assist customers and co-workers in a positive manner and follow through on commitments to them.
- Take the initiative about seeking communication; don't always wait for it to come to you.

Complainant had a documented history of policy violations, which included lapses in the proper handling of utensils and the proper adherence to food safety practices, as well as violations of the Employee Code of Conduct regarding interpersonal skills and communication with her co-workers.

Complainant's conduct on August 17, 2016, concerning the spreader and her co-workers' search for it, was violative of DYC policies 9.11, 10.4, and the Employee Code of Conduct. She did not properly secure the spreader, and she was not truthful with Mr. Clements when she misrepresented where she found the spreader. Her leaving the spreader in a bucket and then forgetting about it threatened the safety of AYSC's residents and staff. The buckets were used to wipe down tables in the dining room, and the presence of a sharp in one of the buckets posed a risk that a resident could gain access to it and use it as a weapon against staff or another resident.

At hearing, Complainant argued that her conduct on August 17, 2016 was not egregious, that many of the corrective actions given to her in the past were unfounded and, with respect to Ms. Sayers' actions, were imposed in retaliation for Complainant expressing discomfort with Ms. Sayers' alleged use of state resources for her own business. Complainant also raised the

possibility that sometime between her use of the spreader on August 17th and her retrieving it, someone else placed the spreader in the bucket to set her up.

The weight of the evidence, and an assessment of the credibility of Complainant and her co-workers, establishes that Complainant was at fault in her actions on August 17, 2016, and that she was not set up by either Ms. Gabaldon or Mr. Clements. Her allegations about the purported retaliatory motives of Ms. Sayers were made without any supporting evidence, and if the corrective actions Ms. Sayers gave Complainant were the result of a pattern of retaliation, Complainant should have raised that issue at the time she received the corrective actions, but she did not.

Accordingly, Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which she was terminated.

II. The Appointing Authority's Action was Neither Arbitrary or Capricious, Nor Contrary to Rule or Law

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

Mr. Blackmon's decision to terminate Complainant's employment was neither arbitrary or capricious, nor contrary to rule or law. Mr. Blackmon gave appropriate notice to Complainant of the Rule 6-10 meeting and the primary subject to be discussed. He conducted the Rule 6-10 meeting appropriately, provided the information that was the basis for the meeting and the possibility of disciplinary action, allowed Complainant to tell her side of the story and to provide any additional information that might be relevant to Mr. Blackmon's ultimate decision. Prior to making the decision to terminate Complainant's employment, Mr. Blackmon reviewed and considered all documentation available to him regarding Complainant's job performance, training record, and disciplinary record, as well as the August 17, 2016 incident. He consulted with Human Resources and with the DYC Central Office. He reviewed Board rules, particularly Board Rule 6-9 concerning the factors he was to consider when making a disciplinary decision.

Mr. Blackmon considered the seriousness of Complainant's conduct on August 17, 2016 and Complainant's failure to improve her performance over time, despite repeated corrective and disciplinary actions. He considered alternative forms of discipline, but decided that termination was appropriate due to Complainant's failure to correct her deficient performance in such areas as proper food and sharp handling, interpersonal skills and communication.

Complainant presented no evidence that Mr. Blackmon failed to give candid and honest consideration of the evidence he reviewed. There is no indication that Mr. Blackmon exercised his discretion in such a manner after a consideration of evidence before him as clearly to establish that his conclusions were unjustified.

In some minor ways, Mr. Blackmon could have improved the manner in which he conducted the Rule 6-10 meeting. His statement to the effect that the meeting was his time to ask questions, not Complainant's opportunity to ask for information, may have confused Complainant and may have hampered the "exchange of information" that was the purpose of the Rule 6-10 meeting. It would have been helpful if, at the close of the meeting, Mr. Blackmon reminded Complainant that she had five business days to provide additional information, given the evidence Mr. Blackmon possessed that Complainant's memory was, at times, faulty at best.

However, none of these issues undermine the essential validity of the manner in which Mr. Blackmon conducted the Rule 6-10 meeting, which adequately afforded Complainant her due process rights. See *Bourie v. Dep't. of Higher Educ.*, 929 P. 2d 18, 22 (Colo. App. 1996) (due process requires that appointing authority meet with a certified state employee facing disciplinary action, present the information to the employee and allow the employee an opportunity to admit or refute the information).

Accordingly, the Mr. Blackmon's action, as Appointing Authority, was not arbitrary or capricious under *Lawley*, and was not contrary to either rule or law.

III. The Discipline Imposed was Within the Range of Reasonable Alternatives

The final issue is whether the discipline imposed was within the range of reasonable alternatives available to Respondent.

Complainant had been the subject of multiple attempts to assist her in correcting her deficient job performance concerning safe food handling, proper management of sharps, and interpersonal skills and communication. Multiple prior corrective actions and disciplinary actions put Complainant on notice of her need to improve these areas, and warned her that failure to do so would lead to more severe consequences. Complainant failed to improve in those areas.

Mr. Blackmon's assessment that Complainant failed to improve her performance despite the multiple corrective actions, disciplinary action, performance evaluations and PIP – an assessment that was justified by the facts – warranted his conclusion that it was unlikely that Complainant would be able to correct her performance deficiencies. These deficiencies posed a significant threat to the health and safety of AYSC's residents and Complainant's co-workers. The termination of Complainant's employment was, therefore, within the range of reasonable alternative under such circumstances.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she 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.

ORDER

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

Dated this 2nd day
of October 2017,
at Denver, Colorado.



Keith A. Shandalow
Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 3^d day of October 2017, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Nelson G. Alston, Esq.
2851 S. Parker Road
Aurora, CO 80014
nalston@alstonlawfirmllc.com

Lucia Padilla
Assistant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Lucia.Padilla@coag.gov



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.