STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2015B044**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANTHONY MARTINEZ,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, CENTENNIAL CORRECTIONAL FACILITY,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on March 2, 2015, and the evidentiary hearing on August 31, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on August 31, 2015, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared *pro se*. Respondent was represented by Sabrina Jensen, Assistant Attorney General. Respondent's advisory witness was Warden and Appointing Authority Travis Trani.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment as a Correctional Officer I effective December 1, 2014 for excessive use of force that resulted in substantial injury to an offender. Complainant did not offer any evidence or argument at the hearing; in his December 8, 2014 Notice of Appeal, he requests reinstatement with full back pay and full restoration of all lost benefits.

Respondent argues that its decision to terminate Complainant's employment was not arbitrary, capricious or contrary to rule or law; was within the range of reasonable alternatives, and should be affirmed. Respondent requests that all relief sought by Complainant be denied and Complainant's appeal be dismissed with prejudice.

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

ISSUES

1. Whether Complainant committed the act for which he was disciplined;

2. Whether Respondent's termination of Complainant's employment 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

Background

1. Complainant was a certified employee of the Department of Corrections (DOC) and worked as a Correctional Officer I at Centennial Correctional Facility (CCF) at all times relevant to this appeal.

2. In 2014, Travis Trani, Warden of Colorado State Penitentiary and CCF, was Complainant's appointing authority. Warden Trani was properly delegated this authority in writing on November 1, 2014.

3. CCF is a DOC facility for offenders with serious mental illnesses, and is classified as a Level V facility, which is the highest security level in DOC.

4. Observation cells located in the South Intake area of CCF were used for offenders who threatened to harm themselves and were put on a "mental health watch."

5. Video of the South Intake area of CCF, as well as other areas of CCF, is recorded 24 hours a day, seven days a week via security cameras.

DOC's Use of Force Guidelines & Training

6. DOC Regulation No. 300-16RD, Section I(A), outlines the following broad criteria justifying use of force: (1) "The use of control methods was initiated by an individual's level of resistance and/or non-compliance," and (2) "[t]he physical force used is necessary and reasonable, not excessive, and is appropriate when considering the type of resistance/non-compliance encountered."

7. Warden Trani testified that the level of force used on an offender should always be determined by how much an offender is resisting, and how much of a threat that offender poses to the officer and to others. In addition, the force used by an officer should be the least amount necessary to overcome the resistance offered by the offender and to maintain the safety and security of everyone in the facility.

8. Correctional officers are provided regular training concerning the appropriate use of force under DOC regulations, including frequent refreshers during the year. Complainant's training record indicates that he received regular training concerning the appropriate use of force, including a refresher in April 2014.

September 10, 2014

9. On September 10, 2014, at approximately 10:20 a.m., Complainant and Officer Shannon Proud were in the process of removing Offender L from an observation cell in the South Intake area of CCF and returning him to his living quarters. Before the observation cell door was opened, Offender L was instructed to back up to the door and place his hands by the tray slot so that wrist restraints could be applied through that slot. Offender L complied with this request. Once Offender L's hands were restrained, Officer Proud briefly left the area to open the observation cell door, and then returned.

10. As Offender L backed out of the observation cell according to instructions by

Complainant, he was using profanity and making threats. However, he complied with Complainant's instructions to face the wall and lift each leg, one at a time, while Complainant applied leg restraints. Offender L was facing the wall with his left leg lifted while Complainant began double locking the leg restraints. Complainant suddenly grabbed the leg restraints and lifted them up in the air, approximately chest high, forcing Offender L to fall head first onto the concrete floor. The Offender began bleeding profusely from a head injury.

11. Other officers and emergency responders quickly arrived; Officer Sandy Valentine began videotaping the incident via a hand held video camera. This is the only video of the incident that includes an audio recording. At the beginning of this video, Offender L is already on the ground; Complainant tells the responding officers that Offender L tried to kick him. Offender L is lying on the ground, moaning and groaning, as a sizable pool of blood forms around his head. This video does not reflect any visible resistance from Offender L.

12. While Offender L was still on the ground, Officer Proud attempted to double lock the Offender's leg restraints. They appeared to be broken, so Officer Proud discarded them and applied new restraints. Once Offender L's leg restraints were secured, the Offender was placed in a wheelchair and taken to the medical emergency room at CCF, where he was assessed and received nine stitches for lacerations on his left forehead. Offender L told the treating physician, Dr. Richard Hodge, that he did not know how he had been injured, and thought he had been unconscious.

13. Following this incident, Offender L had blurred vision, and received follow-up treatment.

14. As a result of this incident, Complainant reported an injury to his right hand and wrist, but did not seek treatment for this injury.

Investigation and Rule 6-10 Meeting

15. Warden Trani was at a personnel conference on September 10, 2014 when he was notified of Complainant's use of force by Major Matthew Winden, the Custody and Control Manager on duty at CCF. Major Winden described Complainant's use of force against Offender L and relayed Complainant's report that he was kicked by the Offender. When the Warden returned to CCF on September 11, 2014, he read the incident reports from the officers involved. He also watched the two videos available at that time: the security camera video of the CCF intake area, which recorded the entire incident, and the video recorded by Officer Valentine upon responding after the incident occurred. Neither of these videos show Offender L kicking or physically resisting Complainant. Warden Trani concluded that the force used by Complainant against Offender L was clearly excessive.

16. Because he found Complainant's use of excessive force against Offender L to be egregious, the Warden placed Complainant on paid administrative leave pending further investigation.

17. The Warden contacted the Office of the Inspector General (OIG), which conducted a criminal investigation into Complainant's use of force. As part of this investigation, the Warden provided a copy of the September 10, 2014 security camera video concerning this incident to the OIG. The OIG enhanced this video by enlarging the pixels, and using slow motion, to reveal a more detailed view of the actions of Complainant and Offender L just before Complainant's use of force. Offender L's legs are visible in this enhanced video, which shows

the Offender, as he is facing the wall with his hands handcuffed behind him, raising one leg and then the other in response to instructions by Complainant. The enhanced video does not show Offender L kicking or otherwise physically resisting Complainant. Following the OIG's investigation, the case was referred to the district attorney. Criminal charges are currently pending against Complainant as a result of his use of force on September 10, 2014.

18. The Warden was provided a copy of the enhanced security camera video by the OIG; after watching it, he confirmed his original observation that Offender L did not kick or physically resist Complainant.

19. As part of his investigation, Warden Trani talked with Officer Proud, who told him that he did not observe Offender L kicking or resisting Complainant. Instead, while Complainant was securing the leg restraints, he was looking towards Offender L's head and asking him whether he wanted to take his snack with him to his living quarters. Because he didn't see what happened just before Offender L was taken to the ground, he relied on Complainant's explanation of what occurred. None of the other officers responding to this incident saw what happened between Offender L and Complainant before they arrived.

20. On November 7, 2014, Warden Trani sent Complainant a letter notifying him of a Rule 6-10 meeting scheduled for November 13, 2014. In this letter, the Warden informed Complainant that they would discuss information, including possible violations of Administrative Regulation 1450-01: Code of Conduct and Administrative Regulation 300-16: Use of Force Options, which could lead to the imposition of disciplinary and/or corrective action.

21. Warden Trani testified that, during the Rule 6-10 meeting on November 13, 2014, Complainant stated that Offender L was arguing and making threats as he was being moved out of the observation cell. When he bent down to doublelock the two leg restraints, Offender L, who was leaning against the wall with his left leg up, kicked back, striking Complainant's right hand and wrist. Complainant reacted to regain control of Offender L.

22. Warden Trani allowed Complainant until 5:00 p.m. on November 17, 2014 to provide any additional information he wanted the Warden to consider. Complainant asked the Warden to talk with Captain Richard Persons, Lieutenant Tracey Miramontes, Officer Shannon Proud and Sergeant Sandy Valentine. Complainant also asked the Warden to consider Offender L's violent and assaultive history prior to making his decision.

23. Complainant worked for DOC for over ten years. Warden Trani reviewed Complainant's personnel file and did not find any negative information concerning Complainant. Complainant's training record reflected regular training concerning the use of excessive force; the most recent was in April 2014.

Termination Decision

24. Warden Trani testified that Complainant's use of force on Offender L on September 10, 2014 was the worst incident of excessive force that the Warden had ever witnessed. In addition, Warden Trani concluded that Complainant's incident report was not truthful. Complainant stated that Offender L aggressively kicked at him; however, neither the original security camera video of the incident, or the enhanced version created by the OIG, show Offender L kicking or otherwise physically resisting the leg restraints being placed on him. Warden Trani testified that, if Offender L had attempted to kick Complainant with the leg that

was lifted, Complainant could simply have pushed Offender L against the wall, as the Offender was already off balance, standing on one leg.

25. Warden Trani concluded that Complainant's excessive use of force against Offender L, and his dishonest statements concerning the incident, violated Administrative Regulation 1450-01: Code of Conduct and Administrative Regulation 300-16: Use of Force Options, as well as the DOC's Code of Ethics. As a result, Warden Trani concluded that Complainant could no longer safely work with offenders, and that termination of Complainant's employment was the only available option.

26. Warden Trani's testimony was consistent and credible.

27. On December 1, 2014, Warden Trani issued his decision to terminate Complainant's employment, effective that same day.

28. Complainant timely appealed his termination to the Board on December 8, 2014.

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.

Respondent terminated Complainant's employment for using excessive force against a restrained offender who did not constitute a physical threat, as well as submitting a false report about this incident. Respondent argues for an adverse inference from Complainant's invocation of the 5th Amendment during his deposition conducted prior to the evidentiary hearing. However, Complainant did not invoke the 5th Amendment during the evidentiary hearing; Complainant presented no evidence or argument, and Respondent did not call Complainant as

a witness or put his deposition testimony into evidence. Under these circumstances, an adverse inference against Complainant is not appropriate.

The unrebutted evidence submitted by Respondent establishes that, on September 10, 2014, Complainant used excessive force on Offender L, who was restrained and was not physically resistant. The unrebutted evidence further establishes that Complainant submitted an incident report stating that Offender L kicked him when Complainant was attempting to fasten his leg restraints; however, neither the original security camera video of the incident, or the enhanced version created by the OIG, show Offender L kicking or otherwise physically resisting prior to Complainant's use of force. No evidence to the contrary was submitted by Complainant. 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*. Warden Trani used reasonable diligence and care to assemble and review all available evidence, including the incident reports from all of the officers involved and the available videos from September 10, 2014. The Warden placed Complainant on paid administrative leave and conducted a thorough investigation that lasted two months, during which he obtained an enhanced security video from the OIG and talked with the officers involved. The Warden then scheduled a Rule 6-10 meeting with Complainant, which was held on November 13, 2014. The Warden shared the information he had and listened to Complainant's explanations, and then gave Complainant until November 17, 2014 to provide any additional information he wanted the Warden to consider. The Warden gave candid and honest consideration to all the evidence he assembled. His conclusions that Complainant used excessive force on September 10, 2014, and then provided a false report about this use of force, are not such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. 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 December 1, 2014.

IV. THE DISCIPLINE IMPOSED WAS 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, Board Rule 6-9 requires Respondent 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 6-2 provides that immediate disciplinary action is proper when an employee's act is flagrant or serious enough: "The nature and severity of discipline depends upon the act committed."

Warden Trani credibly testified that Complainant's use of force on Offender L on September 10, 2014 was the worst incident of excessive force that the Warden had ever witnessed. Complainant's decision to yank Offender L's leg restraints up into the air, when Complainant's hands were handcuffed behind his back, caused Offender L to fall forward head first onto a concrete floor and suffer a serious head injury. This action alone is flagrant and serious enough to justify the immediate termination of Complainant's employment.

Under these circumstances, the decision to immediately terminate Complainant's employment was within the range of reasonable alternatives, and was justified under Board Rule 6-2.

CONCLUSIONS OF LAW

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

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

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

ORDER

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

Dated this 9th day
of September, 2015.

[redacted]

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

CERTIFICATE OF MAILING

This is to certify that on the 14th day of September, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Anthony Martinez
[redacted]

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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.