

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FULTON RUSHING, JR.,
Complainant,

v.

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

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on May 20, 2016, and the evidentiary hearing on November 14, 15 and 16, 2016, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on November 17, 2016, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared and was represented by Mark Schwane. Respondent was represented by Stacy Worthington, Senior Assistant Attorney General. Respondent's advisory witness was Cynthia Owen, Respondent's Director of Facility Operations.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment, effective February 13, 2016, for excessive use of force on a resident. Complainant argues that he did not use excessive force contrary to Respondent's policy and procedure, that Respondent's termination of his employment was arbitrary, capricious and contrary to rule or law, and that such termination was not within the reasonable range of alternatives. Complainant seeks all damages to make him whole, including but not limited to rescission and removal of the disciplinary action, reinstatement to his position effective the date of the termination, an award of back pay and compensatory damages, and an award of attorney fees and costs. Respondent argues that Complainant committed the acts for which he was disciplined, and that its decision to terminate Complainant's employment was not arbitrary, capricious or contrary to rule or law. Respondent requests that its disciplinary termination of Complainant be affirmed and this appeal be dismissed with prejudice.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;
3. Whether termination of Complainant's employment 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 the Division of Youth Corrections (DYC) as a temporary employee in March 1998, and became a permanent employee on July 1, 1999.

2. Complainant initially worked at the Zebulon Pike Youth Services Center (Zebulon Pike) as a Correctional Youth Security Officer (CYSO) I. Upon the opening of the Spring Creek Youth Services Center (SCYSC) in 2000, Complainant transferred to SCYSC, and worked at SCYSC until his employment was terminated in February 2016.

3. SCYSC houses two categories of youth residents: those who are "detained" to await a court hearing, and those who are "committed" after being sentenced to a specific term of incarceration. Treatment and other services are provided to committed youth residents, in an effort to assist them in transitioning back into the community.

4. In SCYSC, the Lynx pod houses committed residents receiving treatment services, and the Jaguar pod houses committed residents who have been regressed to SCYSC following a parole violation.

5. On August 9, 2014, Complainant was promoted to CYSO II.

6. Brent Nittman served as Interim Director of SCYSC from September 1, 2015 through April 29, 2016.

7. Emory Abeyta was appointed as the Assistant Facility Director of SCYSC, and delegated Appointing Authority for staff at SCYSC, including Complainant, by DYC Associate Director Anders Jacobson and SCYSC Director Dave Maynard, in August 2015.

Youth and Staff Safety Guidelines (YASS)

8. Under § 26-20-103(1), C.R.S., of the Human Services Code included in the October 26, 2015 YASS Program Staff Manual, an agency may only use restraint "[i]n cases of emergency" and "[a]fter the failure of less restrictive alternatives," or "[a]fter a determination that such alternatives would be inappropriate or ineffective under the circumstances." § 26-20-103(2), C.R.S., further provides that an agency using restraint "shall use such restraint: (a) For the purpose of preventing the continuation or renewal of an emergency; (b) For the period of time necessary to accomplish its purpose; and (c) In the case of physical restraint, using no more force than is necessary to limit the individual's freedom of movement."

9. Respondent's Policy S 9.4, Section I, effective April 15, 2011, states, in pertinent part:

To ensure safety and security and to prevent injury to employees of the Division of Youth Corrections, and juvenile(s) under the supervision of Youth

Corrections, physical force may be used in instances such as self-protection, protection for others, or prevention of escapes. [Capitals from original omitted.]

10. In 2012, the YASS program replaced the prior Pressure Point Control Tactics (PPCT) program used by Respondent. The new YASS guidelines eliminated a number of PPCT techniques that were determined to be inappropriate for use on youths, and emphasized the avoidance of a physical response to youths acting out except in the case of an imminent threat of bodily harm to themselves or others.

11. The YASS Program Staff Manual contains the following explanation of this program philosophy:

The primary purpose of the Youth and Staff Safety program is to provide staff with skills needed to prevent, de-escalate and, if necessary, intervene when there is a risk of harm to the youth and/or others. The situational response tactics and techniques contained within this program focus on using the appropriate response to counter an escalating youth's actions to include emergency interventions that are only to be used when absolutely necessary. The program is designed to maximize the opportunity to use verbal and non-verbal skills to meet the needs of the youth. By focusing primarily on verbal skills when working with youth, the Division of Youth Corrections positions itself to reduce physical management and restraint.

12. The YASS Program identifies seven stages of "acting-out behavior" by youths: (1) Calm, (2) Trigger, (3) Agitation, (4) Acceleration, (5) Peak, (6) De-escalation and (7) Recovery. Youths can progress through these stages very quickly, and can even skip some stages as they escalate in acting out.

13. According to the YASS Program Staff Manual, physical responses are only appropriate during the fifth, or Peak, stage, and "only when necessary to ensure a safe environment." The Manual explains:

[Physical responses] are designed to respond to a potential or imminent risk to the well-being of others or security risks. Physical skills **are our last means of intervention and should only be used when lesser alternatives have failed or after a determination that such alternatives would be inappropriate or ineffective under the circumstances.** (Emphasis in original.)

14. The key difference between the Acceleration and Peak stages is the youth's ability to harm self or others. The YASS Program Staff Manual states: "Threats that the youth states, but does not have the ability to carry out are considered to be at the ACCELERATION stage (no physical response)." This manual emphasizes that staff responding to a youth who is acting out are responsible for accurately identifying the youth's ability to carry out the threats being made.

15. As part of its "Situational Response Matrix," the YASS Program identifies four levels of the Peak stage, with delineated responses authorized for each level. The first Peak level exists when the youth presents a "potential safety or security risk." At the first level, the appropriate response is simply an "escort." The second level exists when the youth presents an

"imminent safety or security risk." At the second level, limited physical responses are authorized, including a "straight arm bar takedown" and various types of "touch pressure."

16. The "straight arm bar takedown" described in the YASS Manual presupposes that the youth is in a "straight arm escort hold," not in handcuffs.

17. The YASS Manual does not identify an authorized takedown technique for a youth in handcuffs. When a youth is in handcuffs, the youth is unable to break a fall and thus is especially vulnerable to injury.

18. The YASS Manual includes the following Note:

Only Responses and skills trained in the Youth and Staff Safety Program are sanctioned to be used in accordance with the Situational Response Matrix. No other skills from PPCT Inc. may be taught or used. However, there may be instances where an intervention such as a "bear hug" may be the safest and most efficient response to a Peak Stage behavior. In those cases, the person utilizing the skill must clearly explain, in writing, why it was the safest and most efficient option in that particular situation. All use of non-sanctioned techniques will be reviewed by the Director or the Director's Designee.

19. Complainant was trained in the prior PPCT program, as well as the new YASS program. He was a certified YASS trainer, and as a trainer, received annual YASS recertification training. He is familiar with the YASS program manual.

Complainant's Performance Prior to December 4, 2015

20. Richard Brinker, currently a Colorado WINS representative, was a supervisor at Zebulon Pike in 1998, and was involved in the initial decision to hire Complainant. Complainant was honorably discharged from the U.S. military in 1997, where he served as a "19 D Calvary Scout." Mr. Brinker "deliberately picked" Complainant because he had just left the military, and appeared to be hard-working and dedicated. Mr. Brinker brought Complainant in to the Lynx pod at Zebulon Pike to "flip" a troubled environment, where youth residents were acting out, in order to create to a new "positive peer culture."

21. Mr. Brinker became very emotional during his testimony, emphatically stating that Complainant was "not replaceable," because of his energy level, and because Complainant "had passion, and the kids knew it was real." Complainant was instrumental in instituting a "positive peer culture" on the Lynx pod, in which the residents worked to resolve their own problems, and helped to "police" and "motivate" each other. As a result, the residents had "dignity and felt worthwhile."

22. A couple months after becoming a permanent employee, Complainant received a Memorandum of Understanding on September 10, 1999, from his supervisor Kim Diestelkamp, Correctional Officer III, concerning Complainant's use of force during an escort of a resident to a holding cell. Questions were raised concerning Complainant's use of force to obtain the resident's compliance, and Officer Diestelkamp concluded that Complainant could have used de-escalation skills to help prevent some of the resident's resistance. As a result, Complainant was directed "to attend the next training in PPCT/de-escalation to assist you in tuning your skills."

23. On March 25, 2000, Complainant received a corrective action for engaging a youth in his room without requesting staff assistance. When the youth made an aggressive move towards Complainant, Complainant used an authorized PPCT hold and took the youth to the floor, fracturing the youth's arm. Following an investigation, Complainant was cleared of using excessive force, but was found to have used poor judgment by failing to request staff assistance before engaging the youth. Complainant was retrained on the practices and procedures to be used in confrontations with residents.

24. In his annual performance evaluations from 2004 through 2015, Complainant received consistently excellent ratings, ranging from "proficient, successful, meets expectations, reliably performs" to "commendable" and "exceeds expectations" to "exceptional, consistently superior, model for excellence."

25. In April 2005, supervisor Ronald Uhrick commented that Complainant "is solid in safety and security," "is excellent in program facilitation and group facilitation," and connects with youth and draws from experience and knowledge in order to teach and relate."

26. In April 2006, Mr. Uhrick noted that Complainant "has solid interpersonal skills," and "[w]hen [Complainant] is on duty you know program will be run and implemented appropriately. He develops solid trust and rapport with the youth and upholds norms and expectations on a consistent basis." Mr. Uhrick further observed that Complainant "draws from personal experiences to help relate and redirect negative behavior, and give the youth better options and choices."

27. In April 2008, supervisor Jessica Chacon commented that Complainant "puts forth tremendous effort to help residents make positive change in their lives" and "has taken extra steps to help one of his clients to become successful in the community." Ms. Chacon specifically commended Complainant for his use of de-escalation skills and efforts to train others in PPCT techniques:

Safety and security is one of [Complainant's] best attributes. He is fully aware of his surroundings and utilizes his verbal de-escalation skills to defuse intense situations. He has a take-charge attitude with great training abilities. This has been demonstrated by the way he trains staff ensuring all techniques are accomplished correctly in accordance with PPCT policies and procedures.

28. In April 2009, Ms. Chacon observed that Complainant "not only is dedicated to the facility but to the youth that he works with." In dealing with youth, Ms. Chacon commented that Complainant "is firm and direct and has excellent de-escalation skills. He has been able to gain compliance by using various de-escalation skills and using hands on as the last resort." Ms. Chacon further noted: "In crisis situations [Complainant] is calm and able to manage the situation per protocol."

29. In April 2010, supervisor Eric Lance reported:

[Complainant] is an excellent staff member and one that any supervisor and area would benefit from having. He is a consistent bright light throughout the facility and consistently arrives to work in an upbeat, energetic [sic], and happy mood. He deeply cares for the clients in our care, is highly motivational, has extraordinary verbal skills, is able to relate to our clients,

and command a great deal of respect through the strong relationships he builds and healthy boundaries he sets with our clients. ... Over the past year, Mr. Rushing has received employee of the quarter, employee of the year, 18 documented commendations from professionals both inside and outside the facility ... In addition to these accomplishments, [Complainant] regularly promotes positive staff moral [sic] through facilitation of breakfasts and lunches on the weekends in which he purchases the food, cooks, and distributes it to all of the facility staff working.

30. In April 2013, supervisor DuJuan Young stated that Complainant "excels in the skill of de-escalation and PPCT ... He continues to exceed the facility standards helping provide a positive environment for staff members and the residents within our facility." Mr. Young addressed Complainant's assumption of a leadership role in training new staff: "We have several new staff members assigned to the team. [Complainant] found himself in the role of a leader on the team. He answered questions, provided on the spot feedback and guidance to assist his peers, helping them managing the milieu and the daily function of the facility ... I've challenged [Complainant] to allow others to manage their own problems..." Mr. Young also noted: "While [Complainant] has good intentions, there are times he can monopolize discussion and gives the impression of becoming overbearing in a conversation and not willing to listen to others."

31. In April 2014, Mr. Young again commended Complainant for his skill in de-escalating "clients who are having an anger outburst, or those who become emotional after receiving bad news," and described Complainant as "consistently effective working with difficult clients" and "a skilled crisis intervention manager." Mr. Young noted that, while Complainant demonstrated "outstanding verbal communication skills" and had "the knack of making the clients he talks to feel special and heard," he "was asked to broaden his strong verbal communication skills to his professional colleagues," as "some staff members felt like [Complainant] dominated conversations when talking to colleagues." Mr. Young commended Complainant for making progress "in what was a new form of communication" with his colleagues.

32. Complainant wanted to "stay in the trenches and keep counseling groups." However, Mr. Maynard put pressure on Complainant to accept a promotion to CYSO II in August 2014. Upon his promotion, Complainant was responsible for training and directing the work of employees serving as CYSO I's.

33. In April 2015, supervisor Edward Duncan commented that Complainant "is very skilled at verbal de-escalation techniques. He is sometimes seen as the 'go to' person in many high stress situations due to his excellent de-escalation skills." Mr. Duncan observed: "[Complainant] approaches work with the most positive attitude I have ever seen. His excitement about work seems to influence others to also be positive." Mr. Duncan also noted that, while Complainant "consistently displays care and concern for those he is responsible for and will advocate for his staff whenever the need arises," he "continues to struggle to allow his subordinates and trainees to take the lead while he is on the pod."

34. During his eighteen years of employment with Respondent, Complainant never received a disciplinary action.

December 4, 2015 Use of Force

35. On December 4, 2015, the Jaguar pod was on a "slow down program" because the youth residents were acting out, and engaging in gang jargon, in the dining hall the previous evening. During a "slow down," residents cannot leave the unit, cannot go to their regular programs or school, and cannot be around residents from other units.

36. On the morning of December 4, 2015, Complainant was alone in the Jaguar pod with a new CYSO I, Mr. Johnson, who was shadowing him. Four residents were involved in a small group activity in the next door atrium, two residents were still locked in their rooms, and one resident was out, getting ready to have breakfast in the pod.

37. Before residents emerge from their rooms, they are required to be dressed in their uniforms, and to have tidied their rooms, including making their beds.

38. At approximately 8:00 a.m., Complainant opened the door to PV's room. PV¹ was agitated when he came out. He was not dressed in the proper uniform, had not made his bed, and his room was disorganized.

39. PV was part of the reason that the Jaguar pod was on a "slow down program." He had shaved the numbers "1" and "3" in his eyebrows, referring to one of the gangs in the facility.

40. Complainant instructed PV to go back in and take care of his room, and put his uniform on. Instead of returning to his room, PV sat down in his assigned seat for breakfast.

41. Complainant approached PV and tried to persuade him to return to his room and take care of his business, using verbal de-escalation techniques. Complainant believed he had an excellent rapport with PV, and could persuade PV to comply with his directives. Instead of returning to his room, PV pushed his chair back, stood up and started pacing, using obscenities and gang jargon: "Fuck this, CRIP 719."

42. As PV's acting out became accelerated, Complainant followed the YASS situational response matrix. He stood a couple feet away from PV, outside striking distance, and continued to try to de-escalate PV. PV continued to act out, saying, "Fuck this program, CRIP 719."

43. Because PV's acting out and use of gang jargon could incite the other youth on the pod, Complainant wanted to get PV off the pod to avoid further escalation of the situation.

44. Complainant instructed PV to "cuff up" for everyone's safety. PV turned around and allowed Complainant to use mechanical restraints to restrain PV's hands behind his back. Complainant called for staff assistance on his radio.

45. Jimmy Browder, CYSO I, and Adam Trahan, CYSO I, responded to Complainant's call for assistance. Officer Browder had approximately two years of experience, and Officer Trahan had approximately 6 months of experience, as permanent employees at SCYSC.

¹ Pursuant to a protective order issued by the ALJ, youth residents are referred to by initials only.

46. Complainant instructed Officers Browder and Trahan to take PV to a holding cell for a "time out," to allow him to calm down and de-escalate away from the other residents.

47. Officers Browder and Trahan began escorting PV to a holding cell, walking him out of the pod and through the atrium next door, where four of the pod residents were sitting at a table, engaged in a group activity with another staff member. The Officers, who were both larger than PV, were on each side of him, with a firm hold on each of his arms. PV was charging forward, shouting obscenities and using gang jargon. As he was escorted out of the atrium, PV kicked open the door leading to a hallway.

48. Complainant followed the Officers and PV. As they left the atrium and entered the hallway with PV, they stopped and Officer Trahan turned back towards the atrium, where Complainant was speaking to him through the open door. PV was leaning forward in an attempt to continue moving, and Officer Browder bent down to talk with him.

49. Complainant was concerned that Officers Browder and Trahan did not have proper control of PV, and did not have enough training and experience to handle the situation. He was concerned that they or PV might be injured, as a youth in handcuffs could still use a shoulder or a head butt to injure someone.

50. Complainant recalled that he instructed the Officers to put PV on the floor until he complied with their instructions, as he would be less dangerous on the ground, and that the Officers did not immediately comply with this directive.

51. Officer Trahan believed that he had good control of PV and did not believe PV "was going to escape his grip." He did not recall Complainant directing him to take PV to the ground; instead, he recalled Complainant telling them to stop, after which he came through the door to take over the escort.

52. Complainant quickly walked through the doorway to the hall, tapped Officer Browder on the shoulder and directed the Officer to replace him in the Jaguar pod.

53. In a December 10, 2015 interview with Mr. Nittmann, Officer Browder stated that he had control of PV during the December 4, 2015 escort, and was attempting to use verbal de-escalation techniques with PV before Complainant took over.

54. Complainant took hold of PV's left arm as it was released by Officer Browder, who returned to Jaguar pod to replace Complainant. Officer Trahan dropped PV's right arm and stepped back. Complainant tried to talk with PV as he was escorting him, encouraging him to comply with his directives and walk to the holding cell. PV then appeared to go "dead weight," sliding towards the floor while moving his legs.

55. Complainant was concerned that the situation could get out of hand and tried to initiate a straight arm bar takedown. Because PV's hands were cuffed behind his back, however, his arm was not straight, as this technique requires. Complainant lifted PV up and threw him to the ground. Complainant was unable to go down on one knee to guide the youth to the ground.

56. PV had no way to break his fall. His head hit the floor, and he began bleeding from his nose and mouth.

57. Less than two minutes elapsed from the time Complainant turned PV over to Officers Trahan and Browder to the time Complainant reassumed control of PV and took him down to the ground.

58. After PV was on the ground, Complainant got into position to use touch pressure behind the base of PV's earlobe, known as the "mandibular angle." PV indicated he would comply with Complainant's directives and Complainant did not use this pressure on PV.

59. PV was lifted to his feet and to the intake area for medical treatment. Following an examination, PV was taken to Memorial Hospital, where he was diagnosed with a concussion.

60. Later than morning, Assistant Director Abeyta placed Complainant on administrative leave.

Investigation and Rule 6-10 Meetings

61. In the December 4, 2015 incident report Complainant completed before being placed on administrative leave, he stated that, when he replaced Officer Browder, he took PV's right arm to continue the escort of PV to a holding cell away from the other unit residents. Complainant stated that PV struggled with him and Officer Trahan.

62. Video of the December 4, 2015 incident shows that Complainant took PV's left arm, and that Officer Trahan then followed behind Complainant and PV.

63. Mr. Nittmann assisted Mr. Abeyta in gathering information concerning Complainant's use of force on December 4, 2015. He interviewed Officers Browder and Trahan on December 10, 2015. Mr. Abeyta was present during these interviews. Prior to these interviews, which were recorded, Officer Browder and Officer Trahan were shown videos of the December 4, 2015 incident involving Complainant and PV.

64. Mr. Abeyta held an initial Rule 6-10 meeting on December 17, 2015 at the SCYSC. Interim Director Brent Nittmann attended this meeting. Complainant attended with his Colorado WINS representative, Mr. Brinker. During this meeting, Mr. Abeyta asked Complainant to explain what happened on December 4, 2015. Complainant was not shown the available videos of his encounter with PV.

65. Complainant explained that YASS "evolves over time." He acknowledged that the YASS manual does not list a technique for taking down a youth in handcuffs. However, Complainant believed there was an "unwritten rule" that allowed him to use a physical response with a struggling youth in handcuffs, as long as he did not "strike" or "stun" the youth.

66. Mr. Abeyta held a second Rule 6-10 meeting on January 14, 2016. Interim Director Brent Nittmann attended this meeting. Complainant attended with his representative, Pamela Cress from Colorado WINS. During this meeting, Complainant was allowed to view the videos of his December 4, 2015 encounter with PV, and asked to provide any additional information or mitigating circumstances. After viewing the video, Complainant clarified that, after he took over the escort of PV from Officers Browder and Trahan, he was holding PV's left arm, not his right arm, as Complainant originally stated in his incident report and the initial Rule 6-10 meeting held on December 17, 2015.

Termination Decision

67. Mr. Abeyta concluded that Complainant inappropriately intervened in the escort of PV by two other officers, and then used unauthorized force to take PV to the ground while PV was handcuffed, resulting in injury to PV. Mr. Abeyta acknowledged that Complainant did not act out of hostility or anger, and did not intend to hurt PV.

68. Because PV was restrained and unable to carry out any of the threats he was making, Mr. Abeyta concluded that Complainant was not at the Peak stage, as Complainant stated, but instead was at the Acceleration stage. Under the YASS guidelines, no physical response is appropriate at the Acceleration stage.

69. In determining the level of discipline to impose on Complainant for failing to follow the YASS guidelines and using excessive force resulting in injury to PV, Mr. Abeyta reviewed Complainant's performance history. Mr. Abeyta found a prior corrective action issued to Complainant over 15 years earlier, in March 2000, for engaging in the use of force without staff assistance and fracturing a youth's arm, to be especially relevant. While Complainant's use of force was determined to be authorized in that incident, Mr. Abeyta noted that Complainant was admonished for acting alone and failing to call for assistance.

70. The primary reason articulated by Mr. Abeyta for terminating Complainant's employment was a concern that PV's parents would sue Respondent over the December 4, 2015 incident.

71. Complainant's employment was terminated effective February 13, 2016. His base pay at the time of termination was \$4,297.00 per month.

72. Complainant filed a timely appeal of the termination of his employment, postmarked February 24, 2016.

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 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 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. *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.

After requesting assistance to escort PV from the Jaguar pod on the morning of December 4, 2015, and turning PV over to Officers Browder and Trahan for this escort, Complainant decided that it would be better for him to take control. This sudden change appeared to create some confusion, requiring the Officers escorting PV to stop right at the open door of the atrium, near several other youths who were sitting and watching. When PV continued to resist after Complainant took over the escort, Complainant took PV down to the ground. Officer Trahan credibly testified that he believed he had good control of PV, and Officer Browder made a similar statement during his interview with Mr. Nittman. The video does not show an emergency situation requiring Complainant to leave the Jaguar pod, no matter how briefly, and take over the escort of PV.

Complainant denied using excessive force during his December 4, 2015 encounter with PV, and explained that he needed to take PV down to the floor because PV was at the "Peak" stage, as defined by the YASS guidelines for use of force. Complainant believed that he could use a modified version of a straight arm takedown in this "Peak" situation. However, the YASS manual does not identify any technique for taking a handcuffed youth down to the floor.

While Complainant's testimony was generally credible, his clarification, during the second R 6-10 meeting, of which arm he was holding during his December 4, 2015 escort of PV, and his erroneous belief that Officer Trahan continued to assist with the escort instead of following behind Complainant and PV, demonstrates that Complainant's memory of this incident was not completely accurate. The video recording shows that, as PV was sliding towards the ground following Complainant's assumption of the escort, Complainant lifted PV up and threw him down to the ground. This use of force was not authorized by the YASS guidelines and resulted in injury to PV. Therefore, Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which he was disciplined.

III. THE DISCIPLINE IMPOSED WAS NOT WITHIN THE RANGE OF REASONABLE ALTERNATIVES, AND THUS WAS CONTRARY TO BOARD RULE 6-9.

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 arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S. 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.

During his testimony, Mr. Abeyta identified the primary reason for his decision to terminate Complainant's employment as a concern that Respondent would be sued by PV's parents. While this potential effect of Complainant's actions may be a relevant consideration under Board Rule 6-9, it is only one of several factors to be considered.

Complainant did not act out of hostility or anger, and did not intend to hurt PV. Instead,

Complainant made an error in judgment when he intervened in the transport of PV, and then used an unauthorized technique to take PV to the ground when Complainant believed PV was at "Peak" stage, causing injury to PV. These were serious errors committed by Complainant; however, they should be considered in the context of Complainant's eighteen-year career of dedicated service at SCYSC.

Mr. Abeyta stated that he reviewed Complainant's personnel file prior to reaching a decision to terminate his employment. However, he did not identify Complainant's lengthy work record and consistently excellent performance evaluations, or Complainant's demonstrated dedication to the rehabilitation of the SCYSC residents and the development of the SCYSC staff, as relevant factors in his disciplinary decision. Instead, Mr. Abeyta focused on the only corrective action in Complainant's personnel file, which he received over fifteen years prior to the December 4, 2015 incident at issue in this appeal.

Following this corrective action early in his career, Complainant was retrained. He never received a disciplinary action, and his subsequent evaluations indicate that he developed his verbal de-escalation skills to the point where he could be relied upon in a crisis to calm down a youth who was upset or acting out without resorting to the use of force. During the course of his lengthy career at SCYSC, five different supervisors documented Complainant's consistent ability to de-escalate, and positively motivate, angry or frustrated residents. Complainant's original supervisor, Mr. Brinker, described Complainant's strong work ethic and dedication to the youth residents. While Mr. Brinker was biased as a union advocate, and had not supervised Complainant since his early years with SCYSC, Mr. Brinker's descriptions of Complainant's work performance were supported by the numerous commendations by subsequent supervisors found in Complainant's personnel file. In addition, Complainant's credible testimony about his desire and dedication to help the residents transform their lives, and successfully transition back into society and become productive citizens, provides further support for his supervisors' observations.

Complainant's performance evaluations also indicate some issues in the last few years, noted by two different supervisors, concerning Complainant's tendency to be "overbearing" at times and not allow officers under his leadership to "handle their own problems." His decision not to allow Officers Browder and Trahan to complete their escort of PV on December 4, 2015 resulted in an unfortunate situation in which PV was injured and Complainant's employment was terminated.

Considering the decisions Complainant made on December 4, 2015 within the context of Complainant's otherwise excellent work record and demonstrated dedication to the youth residing at SCYSC during the eighteen years he served there, the decision to terminate Complainant's employment was not within the range of reasonable alternatives, in contravention of Board Rule 6-9. The appropriate penalty should hold Complainant accountable for his errors in judgment, while also acknowledging his eighteen years of excellent service. A demotion from CYSO II to CYSO I, with a 5% reduction in pay, reflects the seriousness of the errors made by Complainant on December 4, 2015, while providing an opportunity for an otherwise dedicated and valuable employee to further develop his supervisory skills and learn from his errors.

IV. 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. § 24-50-125.5, C.R.S.; Board Rule 8-33. In frivolous actions, "no rational argument based on the evidence or law [is]

presented.” Board Rule 8-33(A). Actions taken in bad faith, maliciously or as a means of harassment are those “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-33(B). 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 8-33(C).

As discussed above, Respondent established that Complainant committed the acts for which he was disciplined. Imposing discipline outside the range of reasonable alternatives in this case 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 termination of Complainant’s employment was contrary to Board Rule 6-9.
3. Respondent’s termination of Complainant’s employment was not within the range of reasonable alternatives.
4. Complainant is not entitled to attorney fees.

ORDER

Respondent’s action is **modified**. Complainant’s termination is **rescinded** and replaced with a demotion to the position of CYSO I, with a 5% reduction in pay, retroactive to February 13, 2016, the effective date of his termination. Back pay shall be awarded to Complainant at this reduced rate, with statutory interest, from the effective date of his termination. Complainant shall also be made whole for all lost benefits. Attorney fees and costs are not awarded.

Dated this 16th day
of December, 2016.




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 16th day of December, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Mark Schwane, Esq.
Schwane Law LLC
3773 Cherry Creek Drive North, Ste. 575
Denver, CO 80209
mark@schwanelaw.com

Stacy L. Worthington, Esq.
Senior Assistant Attorney General
Civil Litigation & Employment Law Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th floor
Denver, CO 80203
Stacy.Worthington@coag.gov


Jenney Reed 

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.

