

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHRISTIAN J. BARAHONA,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF CHILDREN, YOUTH & FAMILIES,
DIVISION OF YOUTH SERVICES, MARVIN W. FOOTE YOUTH SERVICES CENTER,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on June 29, 2020 through a web conference using Google Meet. The record was closed on June 29, 2020. Complainant Christian J. Barahona (Complainant) represented himself. Stacy L. Worthington, Senior Assistant Attorney General, represented Respondent Department of Human Services (Respondent or DHS). Respondent's advisory witness, and Complainant's appointing authority, was Charles W. Tyous, Jr., Director of the Martin W. Foote Youth Services Center (Foote).

MATTERS APPEALED

Complainant appeals the termination of his employment. Respondent terminated Complainant's employment after concluding that Complainant had used an unauthorized and injurious physical restraint technique on a youth and was untruthful about the incident. Complainant alleges that he did not commit the act for which he was disciplined; the decision to terminate his employment was arbitrary, capricious, or contrary to rule or law; and the disciplinary action was outside the range of reasonable alternatives. Complainant seeks reinstatement and back pay.

For the reasons set forth below, Respondent's decision to terminate Complainant's employment is **affirmed**.

ISSUES

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

FINDINGS OF FACT

General Background

1. Complainant began work for Respondent on April 27, 2015. (Stipulated fact.)
2. Prior to the termination of his employment, Complainant was a Youth Service Specialist (YSS) II at Foote, and a certified State employee.
3. Employees of DHS, including Complainant, must at all times adhere to the DHS Employee Code of Conduct, the Division of Youth Services (DYS) Safe Practices, and DHS personnel policies.
4. The DHS Employee Code of Conduct requires that employees be professional, respectful, truthful, and courteous. It also requires employees to accept responsibility for their own work and conduct.
5. The DHS Safe Practices and personnel policies address employee professional conduct, juvenile supervision and movement, and physical responses and protective devices, among other matters.
6. The personnel policies governing employees' physical responses require employees to follow Protective Supports and Intervention (PSI) training when physically managing youth. The personnel policies also prohibit certain physical restraint techniques, including, but not limited to, offensive strikes, except in emergency situations. When an employee has utilized an unauthorized technique, personnel policies require that the employee complete a Physical Response Report and explain in writing why it was necessary to use the unauthorized technique.
7. At all times relevant to this matter, Charles W. Tyous, Jr., was the Director of Foote and the appointing authority. (Stipulated fact.)
8. At all times relevant to this matter, Director Tyous had the authority to discipline employees, including Complainant.

Complainant's Employment Record

9. Complainant is generally well-liked by his co-workers and the youth at Foote.
10. Complainant received a corrective action on September 26, 2016. (Stipulated fact.) The corrective action addressed Complainant's use of his personal cell phone while on duty, a violation of DHS policy.
11. Complainant received a corrective action on January 23, 2017. (Stipulated fact.) The corrective action addressed Complainant's lack of credibility during an investigation into allegations that Complainant harassed and intimidated a teacher at the Foote school.
12. Complainant received a disciplinary pay reduction on July 2, 2018. Complainant received a 5 percent reduction in pay for three months. (Stipulated fact.) The disciplinary action arose out of Complainant's utilization of an unauthorized wrist lock on a youth at Foote, which the youth alleged injured his wrist. Complainant took the youth for medical care but he failed to report that he had used an unauthorized physical restraint technique, a violation of policy. Complainant did not appeal this disciplinary action.

The October 10, 2019 Altercation

13. On October 10, 2019, Complainant was working in Foote's Condor Pod.
14. Two youths under Complainant's supervision in the Condor Pod engaged in a verbal argument that quickly turned physical.
15. Complainant called for staff assistance and made no serious attempt to physically intervene until other staff arrived.
16. When other staff responded to Complainant's call, Complainant and at least two other staff members physically restrained one of the fighting youths. The altercation and restraint were recorded by a camera that was part of Condor Pod's video surveillance system.
17. Complainant and another staff member took the youth to the floor and turned him over into a prone position while another staff member held the youth's legs down.
18. While restraining the youth on the floor, Complainant sprawled over him on the youth's left side in an effort to gain a more effective position.
19. During the time Complainant was physically restraining the youth, other responding staff members partially obstructed the surveillance camera's line-of-sight by coming between the camera and Complainant's point of contact with the youth on the floor.
20. While assisting in restraining the youth, Complainant lifted his right leg and foot from the floor and swiftly moved his right knee toward the youth's upper body. Complainant's right knee is blocked by staff situated between the camera and the youth's upper body, but it appears that Complainant's knee struck the youth twice and the youth and those staff members restraining him all move at the moment of apparent impact.
21. Once under control, the youth was lifted to his feet and escorted from the Condor Pod.

The Report of Injury

22. Several days later, the youth who had been restrained on October 10, 2019, met with his client manager, Sharon Stephens, who noticed that the youth had a black eye around his left eye and asked him about it. The youth told her that a DYS staff member had kned him twice on his face during the October 10, 2019 altercation.
23. The youth refused to provide the name of the DYS employee who applied the knee strikes. The youth stated that the responsible DYS employee was well-liked, and the youth feared retaliation by his peers if he got the employee in trouble.
24. The youth asked Ms. Stephens not to report his allegation about the cause of his black eye. Ms. Stephens informed the youth that she had a mandatory obligation to report allegations of excessive force against a DYS staff member.

Respondent's Investigation

25. Upon receiving Ms. Stephens' report, Director Tyous, Richard Pak, Foote's Assistant Director, and YSS III Eugene Forbes, Foote's training coordinator, conferred and reviewed the video of the October 10, 2019 altercation.

26. During their review of the video footage, Director Tyous, Mr. Pak, and Mr. Forbes concluded that Complainant had twice used unauthorized knee strikes on the youth.

27. On October 20, 2019, Complainant was placed on administrative leave pending further investigation of the October 10, 2019 altercation. (Stipulated fact.)

Rule 6-10 Meeting

28. On October 30, 2019, Complainant participated in a Rule 6-10 pre-disciplinary meeting conducted by Director Tyous. During the Rule 6-10 meeting, Director Tyous explained Ms. Stephens' report of the youth's allegations of excessive force and indicated what policies Complainant may have violated, including the DHS Code of Conduct, DYS Safe Practices and DYS personnel policies.

29. During the Rule 6-10 meeting, Director Tyous reviewed the video footage with Complainant. Director Tyous re-reviewed the pertinent portion of the video, which depicts Complainant twice moving his knee swiftly toward the body of the prone youth. Director Tyous pointed out that during these movements, it appears that the responding staff, who are supporting the youth's legs and lower body, jolt with the momentum of Complainant's moving knee and leg.

30. Complainant denied that he applied knee strikes to the prone youth and pointed out that the video footage did not actually show his knee contacting the youth's body. Complainant stated that he was merely repositioning himself while the youth was resisting.

Director Tyous' Post-Rule 6-10 Review and Determinations

31. Director Tyous found that Complainant used an inappropriate and unauthorized knee strike during the October 10, 2019 altercation, a violation of DYS personnel policies, DYS Safe Practices, and the DHS Code of Conduct. He also concluded that Complainant was not credible during the Rule 6-10 meeting. He also reviewed Complainant's personnel file and noted that Complainant had used another unauthorized physical restraint technique the previous year, which resulted in Complainant receiving a disciplinary action.

Tyous' Disciplinary Decision

32. On November 18, 2019, Director Tyous sent a notice of disciplinary action to Complainant via certified mail informing Complainant that his employment was terminated effective immediately. (Stipulated fact.)

33. In arriving at the decision to terminate Complainant's employment, Director Tyous reached the following conclusions:

- Complainant's response to the October 10, 2019 altercation was reckless and endangered the youth served at Foote.
- Despite being specifically trained on response techniques and having previously received a disciplinary action for failure to use appropriate response techniques, Complainant failed to utilize proper response techniques, failed to follow the appropriate protocol to notify Foote administration that he utilized an unsanctioned response and failed to properly document the unsanctioned response.

- Complainant's statements during the Rule 6-10 meeting that he was repositioning himself and that the footage does not show his knee physically touch the body of the youth lacked credibility.
- Complainant's actions, the actions observed on video and the subsequent actions by all others involved, are consistent with a knee strike being applied as alleged by the youth.

34. Director Tyous determined that Complainant violated DYS and Foote Implementing Procedures Policy S9.4 (Physical Response, Protective Devices), Policy S9.4A (Physical Response, Protective Devices), Policy 13.1 (Basic Rights, Responsibilities, and Access to Services), DYS Safe Practices, and the DHS Code of Conduct.

35. Complainant timely appealed his disciplinary dismissal to the State Personnel Board.

Policies Referenced in the Notice of Disciplinary Action

36. Policy S9.4 (Physical Response, Protective Devices) provides:

To ensure the safety of all youth in the care and custody of the Colorado Division of Youth Services, and to prevent injury to youth and employees, physical response and protective devices may be used only in emergency situations and after the failure of less restrictive alternatives. Protective devices shall only be used when a youth is determined to be a serious, probable, imminent threat of bodily harm to self or others where there is the present ability to effect such bodily harm (C.R.S. 26-20-102). Protective devices shall only be utilized for the minimum period of time necessary to accomplish their purpose, using no more force than is necessary. To ensure the safety of the youth or others, physical response and protective devices shall never be utilized as a means of punishment, coercion, discipline, convenience, or retaliation by an employee. Physical response and protective devices shall only be applied under prescribed conditions by employees certified in the approved Colorado Division of Youth Services' Protective Supports and Interventions program (PSI).

37. Policy S9.4A (Physical Response, Protective Devices) provides:

To ensure the safety of all youth in the care and custody of the Colorado Division of Youth Services, and to prevent injury to youth and employees, physical response and protective devices may be used only in emergency situations and after the failure of less restrictive alternatives. During physical responses, protective devices shall only be used to protect the youth from imminent self-harm, causing harm to others, or when an escape attempt is in progress. Protective devices shall only be utilized for the minimum period of time necessary to accomplish the purpose of keeping youth safe, using no more force than is necessary. To ensure the safety of the youth or others, physical response and protective devices shall never be utilized as a means of punishment, coercion, discipline, convenience, or retaliation by employees. The use of protective devices within the youth center shall be approved by the program director or designee. Physical response and protective devices shall only be applied under prescribed conditions by employees certified in the

approved physical response program and shall follow all applicable licensing regulations and laws in relation to physically responding to youth. A physical response report shall be entered into the Colorado Trails Database, or other approved tracking database if the Colorado Trails Database is not available, no later than 24 hours whenever force has been used to control a youth or whenever a youth remains in protective devices at the end of the employee's shift.

38. Policy 13.1 (Basic Rights, Responsibilities, and Access to Services) provides:

All youth, regardless of their gender, in the custody of the Division of Youth Corrections shall be informed of their rights and responsibilities through the intake orientation process . . . Remedies for complaints of violations of any rights set forth shall be subject to the youth's grievance procedure and youth who do not accept responsibilities shall be subject to the youth center's disciplinary process. The rights in this policy shall not be diminished or denied for disciplinary reasons.

39. DYS (Safe Practices), which outlines the provision of quality services consistent with procedure and the maintenance of a safe environment, provides:

Communication (includes):

- Be willing to ask for assistance from peers and/or supervisors as needed in order to maximize safety and security.
- If a situation is suspicious or something does not feel right, communicate your concerns with a peer and/or supervisor.

Interaction with Youth (includes):

- Be willing to ask for assistance from peers and/or supervisors as needed in order to maximize safety and security.
- Treat youth with respect.
- Do not engage in power struggles. Instead use Verbal De-Escalation or Motivational Interviewing techniques.
- Role model healthy responses and behaviors, youth will emulate what they observe

40. The DHS Code of Conduct provides, in pertinent part:

- Be professional, respectful, truthful, and courteous to co-workers, customers, clients, partners and contractors at all times.
- Serve as a positive role model to others.
- Accept responsibility for their own work, behavior, and actions.
- Communicate in a professional and respectful manner.
- Resolve conflicts in an appropriate, respectful, timely, and courteous manner.
- Avoid conflicts of interest that may harm the reputation of our clients, business partners, the Department, and the State of Colorado.
- Act on the values of the Department; be good stewards of public trust and public resources.

The Vulnerable Persons Act

The Vulnerable Persons Act, § 27-90-111, C.R.S., provides, in pertinent part, that individuals receiving services from DHS are vulnerable to abuse or assault. Subsections 15(a) and (b) of § 27-90-111 provide that:

In considering any disciplinary action under section 24-50-125(1) against an employee who is certified to any class or position in the state personnel system for engaging in mistreatment, abuse, neglect, or exploitation against a vulnerable person, the appointing authority shall give weight to the safety of vulnerable persons over the interests of any other person....

If the appointing authority finds that the employee has engaged in mistreatment, abuse, neglect, or exploitation against a vulnerable person, the appointing authority may take such disciplinary action as the appointing authority deems appropriate, up to and including termination, taking into consideration the harm or risk of harm to vulnerable persons created by the employee's actions. Nothing in this subsection (15)(b) affects the constitutional or statutory due process rights afforded to an employee who is certified to any class or position in the state personnel system.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause based on constitutionally-specified criteria. Colo. Const. Art. XII, §§ 13-15; §§ 24-50-101, *et seq.* C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Just cause for disciplining a certified state employee is outlined in Board Rule 6-12, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

Burden of Proof

In this *de novo*¹ proceeding, "the scales are not weighted in any way by the appointing authority's initial decision to discipline." *Kinchen*, 886 P.2d at 706. Respondent 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. *Id.* at 707-8. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706.

The Board may reverse or modify Respondent's disciplinary decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. This applies not only

¹ A *de novo* hearing is one in which the ALJ renders a decision based solely on evidence admitted at the hearing, and any prior determination by the appointing authority is not given any precedential deference. See *B.C., Ltd. v. Krinhop*, 815 P.2d 1016, 1018 (Colo. App. 1991).

to the decision to impose a disciplinary action, but also to the propriety of the particular discipline that is imposed.

II. HEARING ISSUES

A. Complainant Committed the Act for Which He was Disciplined

The first question to be determined is whether Complainant committed the act for which he was disciplined.

Respondent decided to terminate Complainant's employment because Director Tyous concluded, along with Assistant Director Pak and Mr. Forbes, that during the October 10, 2019 altercation, Complainant struck the restrained youth with two knee strikes to the left side of the youth's head. Director Tyous also considered Complainant's perceived untruthfulness about, and refusal to take responsibility for, his actions during the altercation. Complainant has consistently denied that he applied any knee strikes while helping to restrain the youth in question.

Although the evidence is not absolutely conclusive, the preponderance of the evidence establishes that Complainant did commit the act for which he was terminated. The video shows Complainant forcefully moving his knee in the direction of the restrained youth two times, and a movement of the other individuals involved in the incident that is consistent with Complainant striking the youth. The youth's black eye is consistent with knee strikes to the left side of his face. The youth reported that a staff member had applied two strikes to his face. The youth's report of the altercation, which was solicited by his client manager, is deemed credible based on the youth's reluctance to make a formal complaint and refusal to name the staff member responsible for his injury. Watching the video in light of the youth's statement, Complainant is the most likely person to have applied the knee strikes.

In his defense, Complainant maintained that the video does not show his knee touching the youth, and that the movements that Respondent interpreted as knee strikes were, in fact, Complainant merely shifting to maintain his balance and control of the youth. Complainant also pointed out that none of the other employees who were assisting in restraining the youth saw Complainant strike the youth with his knee.

It is true that the obscured nature of the video results in an inability to see Complainant's knee hit the youth's face. It is also true that none of the other restraining employees indicated that they saw Complainant apply knee strikes to the youth's face. Both of these facts, however, do not warrant a conclusion that Complainant did not strike the youth in the face with his knee, twice, and are outweighed by the evidence that Complainant did apply knee strikes to the youth. There is the fact of the youth's black eye and his statement that a DYS employee struck him with his knee during the altercation. The video is more consistent with Complainant striking the youth than not. The fact that other employees stated that they did not see Complainant striking the youth can be explained by the fact that each employee was focused on what he himself was doing in assisting with restraining the youth and was not focused on what Complainant was doing. In addition, as Director Tyous surmised, it is probable that even if one or more of the employees witnessed Complainant's knee strikes, they may have been reluctant to admit that about a well-liked co-worker.

Given the video evident, the youth's injury and his credible and solicited report of its cause, Respondent has established by a preponderance of the evidence that Complainant committed the act for which he was disciplined.

B. The Appointing Authority's Action was not Arbitrary, Capricious, or Contrary to Rule or Law

The second question to be determined is whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law. In determining whether an agency's decision is arbitrary or capricious, the ALJ 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. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the range of reasonable alternatives.

1. Respondent's Decision to Impose Discipline was Not Arbitrary or Capricious

a. Diligence and Care in Procuring Pertinent Evidence

Based on the evidence presented at hearing, Director Tyous was diligent and careful in procuring pertinent evidence. He considered the youth's report of the altercation and the cause of his black eye. He had access to the video of the altercation, which he watched multiple times. He reviewed the video with Mr. Pak and Mr. Forbes, who possessed greater expertise in proper physical techniques, and solicited their input. He spoke with the Foote employees involved in the altercation. He properly obtained Complainant's version of the altercation during the Rule 6-10 meeting. He obtained and reviewed Complainant's personnel file. In short, Director Tyous diligently procured all the pertinent evidence he was authorized to consider in reaching his decision.

b. Candid and Honest Consideration of the Obtained Evidence

Director Tyous watched the video multiple times, and watched it with others and obtained their more expert opinions. His repeated viewings indicate that he wanted to be sure that he was arriving at the correct conclusion about Complainant's actions during the altercation. As he testified at hearing, he was reluctant to separate Complainant from employment because he liked Complainant, thought he was generally a good employee, and knew he was well-liked by the youths and his co-workers. But his candid and honest consideration of the evidence led to his conclusion that Complainant had twice struck the prone youth with his knee during the October 10, 2019 altercation. He considered Complainant's version of the altercation, and found it to be inconsistent with the video evidence and with the youth's disclosure to Ms. Stephens.

c. The Appointing Authority's Conclusions after Considering the Evidence Were Reasonable and Justified

Director Tyous' conclusion that Complainant administered an unauthorized physical technique on the youth during the incident was justified by the evidence. Director Tyous' decision to discipline Complainant was also reasonable and justified. The youth at Foote are

a vulnerable population, and the Vulnerable Persons Act, § 27-90-111, C.R.S., is a clear expression of the legislature's intent to ensure the safety of vulnerable populations, including those juveniles at youth services centers such as Foote. Director Tyous was obligated to impose discipline on Complainant given the nature of Complainant's act.

C. Respondent's Action was Not Contrary to Rule or Law

Complainant introduced no evidence at the hearing that Respondent's actions violated any Board Rule or any applicable law. Director Tyous complied with Board Rule 6-9, which provides that

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... 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.

Respondent established at the hearing that Director Tyous carefully considered all these factors in arriving at his decision to terminate Complainant's employment, as discussed in more detail below.

The Rule 6-10 meeting met all the requirements of Board Rule 6-10. Complainant was given the opportunity to provide additional information for consideration, consistent with Rule 6-10. Complainant was given a full opportunity to respond to the allegations of misconduct that gave rise to the Rule 6-10 meeting.

The discipline imposed was in accord with Board Rule 6-12, which outlines some reasons for discipline to include "willful misconduct or violation of these or department rules or law that affect the ability to perform the job. . . ." Complainant utilized an unauthorized restraint technique during the altercation, and violated various DHS and DYS policies. Furthermore, the mandates of the Vulnerable Persons Act required that Director Tyous impose a disciplinary action on Complainant.

D. The Discipline Imposed Was Within the Range of Reasonable Alternatives

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

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. These factors are applicable not only to the decision to take disciplinary action, but also to the specific disciplinary action taken once it has been decided that a disciplinary action is warranted. These considerations, as applied to the facts of this matter, are discussed immediately below.

1. Nature, Extent, and Seriousness of the Act, Error or Omission

To protect and keep the youth at Foote safe are two of the most essential duties of Youth Services Specialists. The fact that Complainant utilized an unauthorized physical restraint technique inflicting injury constitutes a failure to comply with standards of efficient service or competence as well as willful misconduct, including violation of DHS and DYS rules and policies. Director Tyous properly considered the nature and seriousness of Complainant's acts – including Complainant's failure to report his unauthorized action and his lack of credibility in recounting his

version of the October 10, 2019 altercation -- and properly concluded that Complainant's act was so serious as to warrant immediate disciplinary action.

2. Effect of the Act, Error or Omission

Besides the injuries to the Foote youths arising from Complainant's actions, those actions led Foote management to have serious concerns about how Complainant might handle difficult situations at Foote going forward. Knowing that Complainant was capable of using unauthorized techniques on vulnerable persons, and knowing that he had done so twice within a short span of time, they ran the risk of future liability. Complainant's actions prompted Director Tyous to lose trust that Complainant was an appropriate employee to entrust with the safety and protection of the vulnerable youth at Foote.

3. Type and Frequency of Previous Unsatisfactory Behavior or Acts

Director Tyous properly gave weight to the fact that, a little over a year prior to the October 10, 2019 altercation, Complainant committed the same wrongful and injurious act by using an unauthorized restraining technique and injuring a youth.

4. Prior Corrective or Disciplinary Actions

After the 2018 incident during which Complainant used an unauthorized physical restraint technique of another youth, resulting in the youth's wrist injury, Complainant was given a disciplinary action in the form of a salary reduction. That disciplinary action did not prevent Complainant from once again utilizing an unauthorized physical restraint technique against a youth during the October 10, 2019 altercation, failing to report it, and failing to credibly present his version of the incident.

5. Period of Time Since a Prior Offense

There is a close temporal proximity between Complainant's prior act resulting in a disciplinary action and the act at issue here.

6. Previous Performance Evaluations

Complainant's performance evaluations were satisfactory and were considered by Director Tyous in arriving at his disciplinary decision.

7. Mitigating Circumstances

Director Tyous considered Complainant's protestations of innocence, but his conclusion, based primarily on his repeated viewings of the video evidence, that Complainant had struck a youth at Foote with two knee strikes, prompted Director Tyous to reject Complainant's version of the incident. Complainant presented no other mitigating circumstances for Director Tyous to consider.

Of significant importance in reviewing Respondent's decision to terminate Complainant's employment rather than impose a lesser disciplinary action is the applicability of the Vulnerable Persons Act, § 27-90-111(15)(a) and (b), C.R.S., which requires the appointing authority to give more weight to the safety of vulnerable persons than to the interests of any other person, and which permits the appointing authority to take whatever disciplinary action he deems appropriate, up to and including termination. Complainant was disciplined in 2018 for applying an unauthorized restraining technique on a youth and for failing to appropriately document the

incident. The fact that Complainant used another unauthorized technique on a youth during the October 10, 2019 altercation reasonably led Director Tyous to conclude that Complainant posed a danger to the youth under DYS' supervision.

Furthermore, Complainant's denial of his actions and his questionable defense that because the video of the incident did not actually show his knee striking the restrained youth, it did not happen, led Director Tyous to conclude that Complainant was not trustworthy. Director Tyous reluctantly decided that he could not justify the continued employment of a Youth Services Specialist who had mistreated youth under his care and then failed to take responsibility for his actions.

Under these circumstances, the termination of Complainant's employment was within the range of reasonable alternatives.


CONCLUSIONS OF LAW

1. Complainant committed the act 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 disciplinary action is **affirmed**. Complainant's appeal is **dismissed with prejudice**.

Dated this 12th day
of August 2020,
at Denver, Colorado

/s/  _____
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 13th day of August 2020, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Christian J. Barahona



Stacy L. Worthington, Esq.
Senior Assistant Attorney General
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Denver, CO 80203
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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 Rule 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 8-67, 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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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.