

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TYLER GONZALES,
Complainant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow presided over the evidentiary hearing in this matter on October 3, 2023, conducted remotely via Google Meet. The record was closed on October 4, 2023. Complainant Tyler Gonzales (Complainant) appeared representing himself. Respondent Colorado Department of Corrections (Respondent or DOC) was represented by Vincent E. Morscher, Senior Assistant Attorney General, and Grace E. Chisholm, Assistant Attorney General. Respondent's advisory witness, and Complainant's Appointing Authority, was Terry Jaques, Warden of the Limon Correctional Facility (LCF).

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

Respondent demoted Complainant from a Correctional Officer (CO) II (Sergeant) position to a CO I (Officer) position due to Complainant's use of force that violated Respondent's policies and training. Complainant alleges that Respondent's decision to demote him was unjustified. Respondent contends that Complainant committed the acts for which he was disciplined, and that the demotion decision was not arbitrary, capricious or contrary to rule or law.

For the reasons discussed below, Respondent's action is **affirmed**.

ISSUES

1. Did Complainant commit the acts for which he was disciplined?
2. Was Respondent's decision to demote Complainant arbitrary, capricious, or contrary to rule or law?

I. FINDINGS OF FACT

1. Complainant was hired by DOC as a Correctional Officer (CO I) on February 13, 2019. He was promoted to Sergeant (CO II) on August 1, 2021. (Stipulated fact.)
2. Complainant is employed at LCF in Limon, Colorado. (Stipulated fact.)
3. Terry Jaques is the Warden at LCF and is Complainant's Appointing Authority. (Stipulated fact.)

4. On February 25, 2020, Complainant received an outstanding performance document for his actions responding to a suicide attempt. (Stipulated fact.)
5. On August 5, 2022, Complainant received a confirming memo for unprofessional behavior involving horse play with another staff member. (Stipulated fact.)
6. Complainant's annual performance evaluations have been satisfactory.
7. Complainant has received adequate training in the proper use of force, defensive tactics and the use of a TASER with probes. (Stipulated fact.)
8. On February 2, 2023, at approximately 4:40 p.m., LCF first responders were activated to respond to a fight involving three offenders in the A pod of LCF Unit 2. (Stipulated fact.)
9. Offender RG was one of the three offenders involved in the fight.
10. The door to the day hall was opened, and the responding correctional officers, including Complainant, entered the hall. Complainant walked briskly towards offender RG who was talking on the wall phone. (Stipulated fact.)
11. Complainant entered the pod without ascertaining whether another correctional officer accompanied him.
12. Complainant held his TASER in his hand as he approached RG.
13. Complainant passed two offenders as he walked toward offender RG.
14. Complainant approached RG while pointing his TASER at him and instructed RG to get off the phone and prone out. (Stipulated fact.)
15. Complainant deployed his TASER at RG less than two seconds after his last verbal order to prone out. (Stipulated fact.)
16. Offender RG was complying with the command to prone out when Complainant deployed his TASER.
17. Complainant aimed his TASER at RG's chest area.
18. Complainant was approximately six feet away from RG when he deployed the TASER at RG. The prongs of the TASER connected with RG on the front of his body, and he immediately collapsed to the ground. (Stipulated fact.)
19. Later that evening, RG was transported to the hospital. (Stipulated fact.)
20. The correctional officers involved in the incident created incident reports memorializing what occurred. (Stipulated fact.)
21. On February 6, 2023, Warden Jaques informed Office of the Inspector General Inspector Joseph Colpitts of the incident, and he opened a professional standards investigation into the incident, PS#2023000760. (Stipulated fact.)

22. An incident review committee was convened on February 24, 2023, to review the February 2nd incident. (Stipulated fact.)

23. On March 13, 2023, the incident review committee issued a memorandum with conclusions and recommended accountability actions based on its review of the incident. The committee determined that Complainant's deployment of the TASER at RG was not necessary or reasonable, and therefore deemed excessive. The memorandum was provided to Inspector Colpitts and Warden Jaques. (Stipulated fact.)

24. As part of the professional standards investigation, Inspector Colpitts reviewed the incident reports, and video from the incident. The video was from the left wall and right wall of LCF Unit 2, and Complainant's GoPro body cam video. He also interviewed RG. At the conclusion of his investigation, Inspector Colpitts issued an investigation report and provided the report to Warden Jaques. (Stipulated fact.)

25. In his professional standards investigative report, Inspector Colpitts concluded that Complainant "could have afforded [RG] more time to comply with his order to prone out. Also, Sgt. Gonzales deployed his TASER to the chest of [RG], which is not a preferred target area of the TASER."

26. Complainant was placed on administrative leave with pay on May 11, 2023.

27. Warden Jaques provided Complainant with a notice of Board Rule 6-10 meeting, and a Rule 6-10 meeting was held on May 22, 2023. (Stipulated fact.)

28. Warden Jaques' representative at the meeting was Kristen Waters. Complainant attended the meeting without a representative. (Stipulated fact.)

29. In the Rule 6-10 meeting, Warden Jaques raised the following issues with Complainant: the allegation that his use of his TASER on February 2, 2023 was unnecessary and dangerous because it was deployed near RG's heart; the investigative report, which concluded that Complainant failed to give RG adequate time to prone out before deploying his TASER, and that Complainant deployed his TASER to RG's chest, a violation of his training; and an incident review board review of the incident found that Complainant failed to give RG adequate time to prone out before deploying his TASER, struck RG in the chest in violation of training, and that "your utilization of a TASER with probes was not necessary or reasonable and was therefore excessive."

30. Following the meeting, and after providing Complainant with additional time to submit any other information for consideration, on June 30, 2023, Warden Jaques issued a Notice of Corrective and Disciplinary Action after Rule 6-10 meeting. (Stipulated fact.)

31. The Disciplinary Action was a demotion from Sergeant (CO II) to Officer (CO I), with a 10% pay reduction. (Stipulated fact.)

32. In his Notice of Corrective and Disciplinary Action, Warden Jaques based his decision on the following conclusions:

- You have received adequate training in the proper use of force, defensive tactics, and the use of a TASER with probes.

- When you entered the unit's pod, you purposely went past at least two other offenders in an effort to target offender RG. You stated during the 6-10 meeting that this targeting was based on your belief that RG might have been under the influence and was motivated by a prior incident you experienced in which an offender who was under the influence assaulted you and another officer.
- You placed yourself and your team at risk of injury by crossing the path of other offenders in your effort to control offender RG.
- Contrary to your training, you approached offender RG with your TASER drawn and without a supporting restraint staff member.
- You failed to provide offender RG adequate time to respond to your directives to "prone out."
- You targeted an area with the TASER (the offender's chest, near his heart) that is not preferred according to your training.
- You utilized a TASER with probes on offender RG even though he appeared to have been complying with your directives.
- By utilizing your TASER on RG's chest near his heart, you also placed him in danger. The Investigative Report concluded that RG had seizures after you deployed the TASER to his chest and that he does not normally have seizures. As shown in the video recordings of the incident, RG was transported to a medical center on a gurney after your use of force against him.
- Your actions were not necessary or reasonable and were therefore excessive.

33. Warden Jaques also determined that Complainant violated performance expectations reflected in the DOC Code of Conduct, DOC Administrative Regulation 300-16RD Use of Force Options and Restraint Systems, the DOC Code of Ethics, Complainant's performance plan, and Board Rule 6-12, failure to perform competently and failure to comply with the department's rules and policies.

34. The Corrective Action required that Complainant take numerous actions related to training and use of force incidents, and he was also required to complete a report on the incident. Complainant completed the report and submitted it to Warden Jaques. (Stipulated fact.)

35. Complainant timely appealed the disciplinary demotion to the State Personnel Board. (Stipulated fact.)

II. HEARING ISSUES

A. Respondent's Burden of Proof to Establish Authorized Grounds for Discipline

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service." Colo. Const. Art. XII, § 13(8). A certified state employee may be disciplined "only for just cause based on constitutionally specified criteria." *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

Section 13(8) lists the following specific criteria upon which discipline may be based:

... written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the Appointing Authority, which shall be promptly determined.

Colo. Const. Art. XII, § 13(8).

The Colorado Supreme Court has clarified certified employees' rights in two seminal decisions. In *Kinchen*, the Supreme Court held that Respondent has the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred in a *de novo* hearing. *Kinchen*, 886 P.2d at 706-08. An Appointing Authority must establish a constitutionally authorized ground when disciplining an employee. *Id.* at 707. The ALJ is required to make "an independent finding of whether the evidence presented justifies a [disciplinary action] for cause." *Id.* at 706. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because "the Appointing Authority is the party attempting to overcome the presumption of satisfactory service" by the employee. *Id.* at 708.

More recently, the Colorado Supreme Court clarified the two-part inquiry required in an ALJ's review of a disciplinary action:

[I]n reviewing an Appointing Authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; and if it did, (2) whether the Appointing Authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

Dep't of Corrections v. Stiles, 477 P.3d 709, 717 (Colo. 2020). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the Appointing Authority establishes that the conduct on which the discipline is based occurred:

If the Appointing Authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the Appointing Authority's decision in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

Id. at 718. See also § 24-50-103(6), C.R.S. ("An action of the state personnel director or an appointing authority which is appealable to the board pursuant to this article or the state constitution may be reversed or modified on appeal to the board only if at least three members of the board find the action to have been arbitrary, capricious, or contrary to rule or law").

B. Complainant Committed the Acts For Which He Was Disciplined

Warden Jaques, as Appointing Authority, decided to demote Complainant, and issue a corrective action, because of Complainant's actions on February 2, 2023. Warden Jaques based his decision on his determination that Complainant's conduct on that day violated various policies and the proper use of his TASER.

At hearing, Respondent established by a preponderance of the evidence that Complainant committed the acts for which he was disciplined. Complainant entered the pod with his TASER drawn and without another correctional officer to provide supporting restraint. Complainant passed two offenders, putting himself and other staff members at risk. Complainant prematurely deployed his TASER on offender RG, and he targeted RG's chest, which was not a preferred target due to the possibility of interference with the healthy function of the target's heart. These actions were in violation of Complainant's training and departmental policies.

Respondent established that Complainant committed the acts for which he was disciplined.

C. The Appointing Authority's Decision to Demote Complainant was Neither Arbitrary and Capricious nor Contrary to Rule or Law

1. The Appointing Authority's decision was not arbitrary and capricious

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

a. The Appointing Authority used reasonable diligence and care to procure relevant evidence

Warden Jaques used reasonable diligence and care to procure such evidence as he was authorized to consider in exercising his discretion. The evidence Warden Jaques procured included the video of the February 2, 2023 TASER incident, the investigative report, the special incident report, the information Complainant conveyed during the Rule 6-10 meeting, and Complainant's performance evaluations. In addition, Warden Jaques provided Complainant the opportunity to provide information subsequent to the Rule 6-10 meeting. The evidence Warden Jaques procured constitutes the universe of relevant information that Warden Jaques was authorized to consider in making his decision. Warden Jaques, therefore, used reasonable diligence and care to procure the evidence he was authorized in exercising his discretion.

b. The Appointing Authority candidly and honestly considered the evidence

In discussing this prong of the arbitrary and capricious standard, the Colorado Supreme Court in *Stiles* explained:

The second *Lawley* prong focuses on whether the Appointing Authority "candid[ly] and honest[ly] considered the evidence." *Id.* (quoting *Van De Vegt*, 55 P.2d at 705). This prong is satisfied if the Appointing Authority considered, in good faith, the relevant evidence, including the evidence related to the factors that an Appointing Authority must consider under Rule 6-9 in exercising its discretion on disciplinary matters.

Stiles, 477 P.3d at 719.

Board Rule 6-11 addresses the factors an Appointing Authority must consider in imposing discipline on a certified state employee. Board Rule 6-11(A) provides:

The decision to take corrective or disciplinary action shall be based on:

1. The nature, extent, seriousness, and effect of the performance issues or conduct;
2. Type and frequency of prior unsatisfactory performance or conduct (including any prior performance improvement plans, corrective actions or disciplinary actions);
3. The period of time since any prior unsatisfactory performance or conduct;
4. Prior performance evaluations;
5. Mitigating circumstances; and
6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.

Warden Jaques testified credibly that he considered the relevant evidence he procured thoughtfully and in good faith. He carefully considered the Rule 6-11 factors in making his disciplinary decision. Complainant failed to offer any evidence that Warden Jaques' consideration of the relevant evidence was anything other than thorough, thoughtful, and conducted in good faith.

Respondent established by a preponderance of the evidence that Warden Jaques candidly and honestly reviewed the relevant evidence in this matter.

c. Reasonable people would not reach contrary conclusions

The Colorado Supreme Court's *Stiles* opinion addressed the third prong of the arbitrary and capricious test as follows:

The third prong of *Lawley's* arbitrary or capricious test assesses the Appointing Authority's weighing of the evidence and the reasonableness of the Appointing Authority's disciplinary action.... But that inquiry doesn't simply ask whether the disciplinary action was reasonable. It asks whether "reasonable [people] fairly and honestly considering the evidence must reach contrary conclusions" regarding the propriety of the disciplinary action. *Id.* at 1252 (quoting *Van De Vegt*, 55 P.2d at 705).

Stiles, 477 P.3d at 720.

Warden Jaques' conclusion that Complainant's actions on February 2, 2023 warranted Complainant's demotion and his correction action – a conclusion that Warden Jaques arrived at after careful consideration of all pertinent evidence he procured -- was reasonable and well-supported by the evidence.

At hearing, Complainant argued that his use of the TASER during the February 2, 2023 incident was not excessive, while admitting that his entrance into the pod and his premature

deployment of the TASER targeting RG's chest were in violation of his training and departmental policies. However, as reflected in the incident report and the professional standards investigative report, other professionals who reviewed the incident came to the same conclusions that Complainant's actions were unnecessary, unreasonable, and therefore excessive.

Accordingly, reasonable people fairly and honestly considering the evidence in this matter would not be compelled to reach conclusions contrary to those reached by Warden Jaques.

2. The Appointing Authority's decision to demote Complainant was not contrary to rule or law

The evidence establishes that Warden Jaques complied with the Board rules governing the consideration and imposition of discipline on a certified state employee.

Board Rule 6-2 provides that "A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the Appointing Authority may proceed immediately to disciplinary action, up to and including immediate termination."

Here, Complainant's actions during the February 2, 2023 incident were serious enough to warrant immediate discipline. Complainant's violations of his training and departmental policies, put himself, his colleagues, and offender RG at risk. His premature, unnecessary, and dangerous use of his TASER caused RG to have seizures, necessitating hospitalization. Based on the seriousness of Complainant's actions, Warden Jaques was justified in imposing discipline on Complainant without a prior corrective action.

Board Rule 6-10 addresses the requirements for a Rule 6-10 meeting, convened when the Appointing Authority considers discipline of a certified state employee. Respondent established that Warden Jaques complied with all the requirements of Board Rule 6-10.

As discussed above, Warden Jaques carefully and thoughtfully considered the factors an Appointing Authority must consider in imposing discipline on a certified state employee enumerated in Board Rule 6-11.

Complainant failed to offer any evidence that Warden Jaques failed to comply with any Board rule, departmental rule, or law in considering and imposing discipline on Complainant in this matter.

Accordingly, Warden Jaques' decision to demote Complainant was not contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's decision to demote Complainant was neither arbitrary and capricious, nor contrary to rule or law.

ORDER

Respondent's decision to demote Complainant is **affirmed**. Complainant's appeal is **dismissed** with prejudice.

DATED this 20th day
of November 2023,
at Denver, Colorado

/s/ [REDACTED]
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 20th day of November 2023, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Tyler Gonzales
[REDACTED]

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[REDACTED]

APPENDIX A

EXHIBITS ENTERED INTO EVIDENCE

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

Tyler Gonzales

Terry Jaques

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

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 8-54.

ORAL ARGUMENT ON APPEAL

In general, no oral argument is permitted. Board Rule 8-55(C).

PETITION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).