STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2025B004**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RYAN PRIEST,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH SERVICES,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the evidentiary hearing in this matter on November 20, 2024, remotely through Google Meet. The record was closed on November 21, 2024. Mark A. Schwane, Esq., represented Complainant Ryan Priest. Vincent E. Morscher, Senior Assistant Attorney General, represented Respondent Department of Human Services (Respondent or DHS). Respondent's advisory witness, and Complainant's appointing authority, was Samantha Wilson, Director of the Rocky Mountain Youth Services Center.

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

MATTERS APPEALED

Complainant, formerly a Youth Services Specialist I and a certified state employee, appeals Respondent's decision to terminate his employment. Complainant argues that he did not commit the acts for which he was disciplined and that Respondent's decision to terminate his employment was arbitrary and capricious and contrary to rule or law. Complainant requests rescission of his disciplinary termination, back pay and benefits, reinstatement, and attorney's fees and costs.

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

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**.

ISSUES

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

2. Whether Respondent's action was arbitrary and capricious, or contrary to rule or law; and

3. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant Ryan Priest was hired by DHS on December 13, 2021, as a Youth Services Specialist (YSS) I at Respondent's Rocky Mountain Youth Services Center (RMYSC). (Stipulated)

2. RMYSC is a co-ed youth facility serving the 1st and 5th judicial districts for youth in the juvenile justice system. RMYSC is a facility within the management and authority of DHS, Division of Youth Services (DYS).

3. At all times relevant to this case, Samantha Wilson was RMYSC's Director. (Stipulated)

4. On May 4, 2022, Complainant abandoned his assigned post and left the facility without notifying his supervisor and without being properly relieved.

5. On June 17, 2022, Jim Sexton, RMYSC's Assistant Director, issued Complainant a Corrective Action for Complainant's actions on May 4, 2022. Sexton found that Complainant violated Division of Youth Services policy S-9-3.

6. DYS Policy S-9-3, Youth Supervision and Movement, provides, in pertinent part, "EMPLOYEES SHALL PROVIDE GENERAL SUPERVISION TO ALL YOUTH ASSIGNED TO THEM, HAVING THE ABILITY TO SEE AND HEAR, TO PREVENT, INTERVENE AND/OR RESPOND TO SITUATIONS." (Capitalization in original.)

7. Complainant received satisfactory performance evaluations on his 2021-2022 yearly evaluation, his October 2022 mid-year evaluation, and his 2022-2023 yearly evaluation.

Complainant is Promoted to YSS II but Struggles

8. On December 2, 2023, Priest was promoted to a YSS II, a supervisory position, and began serving a trial service period pursuant to Board Rules 1-77.1 and 4-42.

9. On December 17, 2023, Director Wilson discussed with Complainant how to be a successful supervisor and Complainant's new responsibilities, including but not limited to completing the YSS II checklist nightly, reviewing postings for the next day by

the end of his shift each evening, and completing shift postings and the overtime list by the 15th of the current month for the previous month.

10. Complainant struggled in his new role as a YSS II. His failure to complete his responsibilities, especially concerning his paperwork duties, was discussed with Director Wilson or his immediate supervisor, Program Manager Tyler Piersch, on the following dates: January 29, 2024, February 6, 2024, February 27, 2024, February 28, 2024, March 4, 2024, March 10, 2024, March 12, 2024, March 14, 2024, and March 19, 2024.

11. On March 18, 2024, Complainant was showing his laptop to a youth on the unit while other youths were excessively horseplaying behind his back. Director Wilson considered this a violation of the laptop policy announced by Assistant Director Sexton on December 26, 2023. The policy provided, in pertinent part, "AT NO TIME CAN THE YOUTH HAVE ACCESS TO ANY LAPTOP!!! EVER!!!" (Capitalization in the original.) Director Wilson also considered this incident to be a violation of policy S-9-3, Youth Supervision, and Movement, which provides, in pertinent part, "Employees shall maintain the ability to have sight and sound supervision of the youth."

12. In late March 2024, Director Wilson reviewed the monthly supervisor checklists and discovered that Complainant failed to complete, fix corrections, or submit required checklists on 25 days between January 16, 2024 and March 19, 2024.

The March 24, 2024 Incident

13. On March 24, 2024, a RMYSC staff member discovered an empty hand sanitizer bottle under a couch on C pod, one of the residential units within the RMYSC. The staff member brought the empty bottle to the attention of Complainant and another supervisor, and expressed her concern that youth M.F.-H.[1] might have consumed the hand sanitizer because M.F.-H. may have been intoxicated. Some containers of hand sanitizer contain alcohol.

The March 26, 2024 Incident

14. On March 26, 2024, Complainant was on C pod, along with YSS I trainee J.R., supervising seven male youths. C pod consists of three tiers – a lower tier, a middle tier, and an upper tier, which contained the youths' sleeping quarters.

15. At or about 8:00 p.m., Complainant, who was feeling pressure from his direct supervisor, Tyler Piersch, to complete seriously overdue paperwork, was working on his computer at a table on the lower tier of C pod.

16. Complainant was seated in the same location that Director Wilson had recently advised Complainant against as not being the most advantageous location at which to properly observe and supervise the youths on the unit.

[1] This individual as well as others are referred to by initials only to protect their privacy interests.

17. While working on his laptop, and not paying attention to what youths were doing on the middle tier, Complainant was approached by, and began talking to, youth A.M.

18. Complainant was not observing the youths on the middle tier; he was under the impression that J.R. was supervising those youths.

19. Complainant knew that J.R. would often leave the pod without informing Complainant.

20. While J.R. was out of the pod, three youths were horseplaying on the middle tier and moving around. Complainant was unaware of these activities.

21. Shortly thereafter, J.R. returned to the pod with a large bottle of hand sanitizer and gave it to M.F.-H. on the middle tier. J.R. then exited the pod again.

22. M.F.-H. took the hand sanitizer and poured it into his water bottle and a short while later drank from his water bottle.

23. During this time, J.R. was not in the pod, and Complainant was not observing the youths on the middle tier.

24. Later that night, M.F.-H. became disruptive, slurring his words, gurgling while being restrained, and smelling of chemicals. Staff believed that M.F.-H. had ingested hand sanitizer.

25. Medical staff were called and checked on M.F.-H. the next morning, March 27, 2024, and concluded that there were no health concerns.

26. Later on March 27, 2024, Director Wilson reviewed the video of the March 26th incident and noted that Complainant was not observing and supervising the youths on the middle tier while J.R. was out of the pod.

Policies Applicable to the March 26, 2024 Incident

27. In addition to DYS Policy S-9-3, Youth Supervision and Movement, Complainant was required to follow the policies memorialized in the DYS Safe Practices document, which include the following:

> Move around frequently, and in a manner that allows you and your co-worker to maximize supervision.
>
> Maintain a mobile presence to guard against standing in one location together as this invariably produces blind spots or negatively effects responses.
>
> Be aware of attempts to distract your attention. These distractions may come in many different forms, such as requesting you to get something;

> engaging you in a conversation that is distracting; diverting your visual view to another area.
>
> Never allow juveniles to block your vision of others. This is especially easy for juveniles to do if you are seated.

28. Additional material policies in effect at the time included restricting the number of youths who were allowed to be standing to two, requiring youths to ask permission to stand up, and prohibiting youths from engaging in horseplay.

Complainant placed on administrative leave on April 1, 2024

29. On April 1, 2024, Complainant was placed on administrative leave because of the March 26th incident.

Jefferson County Investigation and Determination

30. On March 27, 2024, Wilson reported the March 26, 2024 incident to Jefferson County's Human Services as she was required to do.

31. The matter was assigned to Lead Intake Caseworker Becky Hjellming.

32. Pursuant to her investigation, Hjellming reviewed the video footage of the incident, visited C pod, interviewed M.F.-H. and other youths in C pod, and interviewed Complainant.

33. On or about May 3, 2024, Jefferson County Human Services made a finding against Complainant of "neglect-lack of supervision" regarding the March 26th incident.

Reversion to YSS I

34. On April 1, 2024, Complainant received a reversion for unsatisfactory performance during Complainant's trial service period. Effective April 20, 2024, he was demoted to a YSS I. (Stipulated)

35. In her reversion letter, Director Wilson wrote, in pertinent part:

> It has been determined that retention of the job knowledge as a supervisor is low. This is evident by having to re-train you and answer several basic questions regarding the same subjects over and over. This includes and is not limited to: Supervising Staff, Emergency Situations, Documentation of Physical Response, Postings, and Medication Errors. I have observed you actively avoiding the unit and failing to follow programming expectations while training new staff. When asked, in the "Areas of Improvement Email" on 3/12/2024, what support you needed to guide to success, you stated you were going to have a reset on 3/17/2024 and then continued to show the inability to make decisions as a supervisor. In addition, you are not completing assigned tasks. For example, not completing the RS Book for multiple

> weeks since January 2024. Also, not helping staff submit their SRM for physical responses by the end of their shift or complete Major Rule Violations when asked to by the Program Manager. There have been multiple times you have failed to provide group materials to subordinate staff for the assigned shift.

36. Director Wilson concluded her reversion letter as follows:

> I have determined that you have demonstrated unsatisfactory performance in the YSSII position during your trial service period. As a result of this, pursuant to State Personnel Board Rule 4-43, I am revoking your trial service status for unsatisfactory performance. You will revert back to your former position of YSSI effective April 20, 2024.

37. Complainant's reversion was not based on the March 26th incident and had been in process prior to March 26, 2024.

Board Rule 6-10 Meeting and Its Aftermath

38. On May 8, 2024, Director Wilson sent Complainant a Notice of Rule 6-10 Meeting, to be held on May 17, 2024. Director Wilson prepared for the Rule 6-10 by reviewing the videos of the March 26th incident, reviewing the reports about the incident, and speaking with other staff.

39. Director Wilson held a Board Rule 6-10 meeting with Complainant on May 17, 2024.

40. During the Rule 6-10 meeting, Complainant admitted that he was not aware of what M.F.-H. and the other youths were doing on the middle tier, but defended his actions by placing the responsibility of supervising the youths on the middle tier on J.R.

41. On May 22, 2024, Complainant sent Director Wilson and Assistant Director Sexton a personal statement about the March 26th incident, in which he wrote, in pertinent part:

> … I was informed by administration that J.R., my partner for supervising the pod, had introduced contraband onto the unit within an hour or so of the incident, which they found out after reviewing cameras. Despite knowing it was considered contraband and dangerous for the youth, J.R. brought a massive jug of hand sanitizer to the unit and handed it to M.F.-H. M.F.-H. proceeded to pour the contents into his water bottle and drink it while on the middle tier. It was J.R.'s responsibility to monitor the middle tier and ensure the safety of the youth. At the time, I was on the lower tier finishing administrative tasks that were issued urgent by my supervisor to complete. Another youth had required my assistance during the time M.F.-H. consumed the hand sanitizer.

Although I have noted that J.R. made a habit of leaving the unit without giving proper notification, I had previously had a 1:1 conversation with her to address that issue and ensure better performance and handle the problem at the lowest level of conflict management per our department policies. It was my understanding that the poor supervision had been resolved and I trusted my partner to perform her duties in accordance with department regulation to which she was fully trained. To schedule staff onto a pod is to affirm that standards of conduct, understanding of policies, commitment to maintaining safety and integrity of the pod, and priority of teamwork and collaboration has been understood and will be followed. Although I was a supervisor, I reasonably divided the tasks with J.R. and assumed she would be following her duties and responsibilities as a partner within the pod. I do not have authority to search staff to ensure they are following department policies and preventing incidents such as bringing contraband. Safety checks is a department responsibility within the whole team beginning with inspection from security when entering the facility. I allowed J.R. to have a degree of autonomy in how she wanted to secure her tier as to not micromanage her efforts and allow her to excel following the completion of her recent training. She intentionally brought in contraband onto the unit that led to this incident. It is not reasonable to assume that I would know J.R.'s every activity nor is it logical that I as a supervisor can see every movement by every youth at all times. That is the purpose of having a trusted partner who has been vetted by staff to be competent in securing the safety of youth. During the R6-10 meeting it was noted that the incident was considered "egregious" and warranted not following partnership agreement mandates of progressive discipline. However, the investigation from [Jefferson County] DHS in the letter of Founded Finding deemed the incident "minor" and directly conflicts with the elevation of this meeting. I have no history within my performance or any discipline that involves neglect and abuse. The actual neglect of safety was conducted by J.R. when introducing contraband and handed it to M.F.-H. not me. I cannot control the actions of another staff member and have no way of knowing their intentions before a situation arises. If there was a mistake on my part, it would be trusting J.R. to perform her duties, follow department policies, and that she had abided by my instruction following our 1:1 conversation when I followed progressive discipline protocol. M.F.-H. was not harmed, threatened, violated, dismissed, belittled, or battered to constitute the allegation of abuse. Considering that I followed my duties and responsibilities as a supervisor, contraband was introduced by J.R. that led to this incident, and that M.F-H was not abused in any form, I believe the demotion from my supervisory position has warranted enough discipline and action regarding this incident. I believe the appropriate action would be to have a review of departmental policies for myself and J.R. and a meeting that details how I can improve my performance should I pursue a supervisory position again in the future.

Complainant's Character References

42. Following the Rule 6-10 meeting, Director Wilson reached out to other RMYSC employees identified by Complainant as character references.

43. In response to Director Wilson's inquiry, M.M., a YSS III, wrote, in pertinent part:

> I have been working with Priest since he first came to the facility/Program. I have to say that Priest has been a complicated staff to work with due to the fact that he has a negative attitude and lack of self initiative. In December, 2023 I was working overtime as a shift supervisor and I noticed that Priest was not having the youth following pod expectations. I then ask Priest to have the youth follow pod expectations to which he responds "Send me home, I am not feeling good." In January, 2024 Priest was working as a YSS-II and I was the program manager. I asked Priest to give bathroom breaks to the staff running pods and he stated "I am not doing it right now, I need to take 30 minutes lunch." In February, 2024 Priest did not follow the code of conduct for staff by wearing a hat. I asked Priest take it off as it is not part of our dress code to which he stated "I am not taking it off, you can write me a memo."

44. In response to Director Wilson's inquiry, J.C., a YSS II, wrote:

> I worked with Priest side by side for the better part of two years. I consider him not only a colleague but also a friend. We have been in some tough situations at work many times together and he always maintains professionalism and treats everyone, youth and staff alike, with the utmost respect and dignity. Even in the most stressful of situations he always remains calm and continually looks out for the safety of everybody. He takes his job seriously and is always looking to improve. He's never been afraid of taking criticism. I can't think of anybody I would rather have on my team.

45. In response to Director Wilson's inquiry, P.R. wrote, "Ryan was always a positive peer came to work in a good headspace willing to help staff and youth. Always answered any questions I had to the best of his knowledge and try to be the best staff he could."

46. In response to Director Wilson's inquiry, A.N., a Behavioral Health Specialist, wrote, "I worked with Ryan Priest for several years. Ryan was a consistent staff member who supported the facility (and did not quit) during the difficult time period of covid. Ryan is a polite/calm/caring person whose disposition is relatively relaxed."

47. In response to Director Wilson's inquiry, M.D., Quality Assurance, YSS II, wrote:

> I am writing this Letter of Recommendation in regards to Ryan Priest and his character. Ryan and I worked together at Rocky Mountain Youth Service Center, as a Correctional Youth Security Officer I and as Supervisors (Labeled as CYSOII) on the Campus at Mount View.
>
> From my perspective, Ryan displays a willingness to assist in whatever ways he is capable. During our time on the same team, Ryan was the first of many staff to instill in me a sense of security and reliability. Ryan helped to foster in me the "I have your back" mentality that is necessary for situations staff often can respond to. Supervisors at CAMV have long been expected to set the bar as a consistent support resource for security staff, while maintaining flexibility when meeting youth's needs. I have witnessed Ryan be a constant support in emergency situations, myself calling a code and seeing Ryan as one of the first through the door to support on more than one occasion. Ryan is not only an emergency support resource, he is consistently flexible when understanding youths needs and concerns. Christmas day 2023, I observed Ryan handle a difficult situation on the detained girls unit with poise and firmness. The youth were troubled about spending the holiday in a facility rather than at home, and acted out by tearing decorations and making a mess of the pod. I watched Ryan as he intently listened to discover that the youth were truly frustrated by a sense of loss of quality time with their families, and was able to de-escalate the situation through conversation rather than physical means. He took this a step further as he not only brought calm to the situation, the youth were appropriately consequenced for their choices in commitment to Growth and Change. Ryan met this situation with compassion and patience to understand the youth's perspectives, while also committing to holding the youth accountable for their actions.
>
> Ryan has been a strong support for myself and I believe all of campus, and I wouldn't hesitate in my duties as staff knowing that he is here and willing to help.

Complainant's Employment Termination

48. Complainant's employment was disciplinarily terminated effective July 2, 2024. (Stipulated)

49. In her disciplinary letter, Director Wilson announced her conclusion based on all the information she had gathered, including Complainant's comments during the Rule 6-10 meeting and his personal statement:

> I find that you, who were at the time classified as a YSSII, failed in your supervisory duties of the youth on your pod and did not provide sight and sound supervision of our vulnerable population. I find that as a Youth Center Training Officer you were aware of the trainee's tendency to abandon the unit and you did not take appropriate steps to ensure

that the staff member remained present and that all youth on the pod were under appropriate observation and supervision. I further find that your failure to appropriately supervise the pod allowed a youth to engage in dangerous conduct that constituted neglect.

Your actions and behavior violate DYS policy S9.3 Youth Supervision and Movement, constitute failure to perform competently and willful misconduct as set forth in Board Rule 6-12B (1) and 6-12B (2), and violate section 24-50-116, C.R.S.

Your conduct also violates the MANE provisions of the Vulnerable Persons Act, § 27-90-111(15). That statute requires me to consider the safety of vulnerable persons ahead of any other interest and allows me to take the action I believe is appropriate and necessary to protect the vulnerable population we serve. I have concluded that separation of your employment is necessary to protect our vulnerable residents.

As a result, I have decided to take disciplinary action, to terminate your employment effective July 2, 2024.

50. The disciplinary letter also discussed Board Rule 6-11 factors that Director Wilson considered in making her decision. Most significantly, Director Wilson discussed the nature, extent, seriousness, and effect of Complainant's performance issues or conduct as follows:

- You did not follow policy S9.3 Youth Supervision and Movement. This policy is in place to ensure the safety and security of youth, employees, and the public. Youth shall always be supervised by youth center employees, and your failure to abide by this policy puts the youth, youth center employees, yourself and the public at significant risk. During the shift in question, you were responsible for the supervision of a staff member who had not yet completed our Youth Center Training (YCT) program and was therefore unable to supervise youth alone. General supervision of youth assigned to you requires your ability to see and hear, to provide, to intervene, and to respond to situations; your failure to provide sight and sound supervision of the youth on your pod put their health and safety in danger. You repeatedly stated during our Rule 6-10 meeting that you did not notice anything that was happening on the middle tier, where youth were located. By choosing not to observe the youth on the middle tier, you risked not identifying that the youth was in crisis, preventing the proper life safety response should such a situation arise. The Rocky Mountain Youth Services Center houses youth who are a risk to themselves and/or the community and not properly monitoring them increases that risk.

- During our Rule 6-10 meeting, you placed responsibility for youth supervision on the new staff, the trainee, who was still in the YCT program and did not have an expectation to perform her job duties autonomously. Not only did you not provide proper supervision of the vulnerable population, you also failed to fulfill your responsibilities as a Youth Center Training Officer.

- During our Rule 6-10 meeting, you reported that you did not receive training on what to do if a youth was distracting you. On January 24, 2024, you signed the DYS Safe Practices document in Cornerstone, a portion of which states that you should, "be aware of attempts to distract your attention. These distractions may come in many different forms, such as requesting you to get something; engaging you in a conversation that is distracting; or diverting your visual view to another area (this is especially easy for youth to do if you are seated)."

- The Jefferson County Department of Human Services investigation determined that the allegation against you was founded for neglect and lack of supervision.

- In consideration of this information I find your misconduct to be serious and eggregious [sic].

51. Complainant timely appealed his termination to the Board. (Stipulated)

52. Complainant's base pay rate was $26.58 per hour effective April 20, 2024. (Stipulated)

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause based on constitutionally and statutorily-specified criteria. Colo. Const. Art. XII, §§ 13-15; C.R.S. § 24-50-101, *et seq.*; *Dep't 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.

See also, Dep't of Corrections v. Stiles, 477 P.3d 709, 715 (Colo. 2020) ("Rule 6-12 outlines what constitutes just cause to discipline a certified state employee").

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. *Kinchen*, 886 P.2d at 707-08. The Board may reverse or modify Respondent's disciplinary decision if the action is found to be arbitrary and capricious, or contrary to rule or law. C.R.S. § 24-50-103(6); *Stiles*, 477 P.3d at 717.

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.

Stiles, 477 P.3d at 717. 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* C.R.S § 24-50-103(6) ("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").

II. HEARING ISSUES

A. Complainant Committed the Acts for Which He Was Disciplined

The first issue to be determined is whether Complainant committed the acts for which he was terminated. *Stiles*, 477 P.3d at 717. Respondent terminated Complainant's employment for his failure to appropriately supervise the youth for whom he was responsible, resulting in a youth ingesting hand sanitizer and becoming intoxicated.

Respondent established by a preponderance of the evidence that Complainant failed to adequately supervise the youth in RMYSC's C pod on March 26, 2024. Pursuant to policy S-9-3, Complainant, who at that time was a YSS II, was required "to see and hear [youth under his supervision at all times], to prevent, intervene and/or respond to situations." During the relevant times on the evening of March 26, 2024, Complainant was working on his laptop on the lower tier of C pod, while YSS I J.R. was going in and out of the middle tier of the unit. Complainant believed that J.R. was responsible for the youth on the middle tier, although he also knew that J.R. was in the habit of leaving the pod and disappearing without informing him of her exits (what Complainant termed "ghosting").

What occurred, all without Complainant's awareness, was the following: at the request of youth M.F.-H., J.R. brought a large bottle of hand sanitizer, which was contraband and contained alcohol, into the pod. While J.R. was out of the pod, and while Complainant continued to either work on his laptop or talked to youth A.M., M.F.-H. took the bottle of hand sanitizer, transferred an unknown quantity of the hand sanitizer to his water bottle, returned the hand sanitizer to a table in the common area in the middle tier, and drank from his water bottle. Later that night, M.F.-H. began to act erratically, and was likely intoxicated from drinking hand sanitizer.

At hearing, Complainant did not dispute that he failed to notice what M.F.-H. was up to involving the hand sanitizer, but he argued that he believed that J.R. was responsible for the youth on the middle tier, and so he was not negligent in his acts or omissions. That argument, however, is unpersuasive.

Complainant knew of J.R.'s habit of leaving the pod without informing him, so Complainant's reliance on his belief that J.R. was properly supervising the middle tier on March 26, 2024 was misplaced. Complainant's belief that J.R. was responsible for supervising the youth on the middle tier did not obviate his responsibility to adhere to the requirements of policy S-9-3, to always see and hear all the youth in C pod "to prevent, intervene and/or respond to situations" irrespective of J.R.'s actions. Complainant violated that policy by failing to properly supervise all the youth in C pod, including the youths on the middle tier, who were standing without permission, horseplaying, and, in M.F.-H's case, getting access to hand sanitizer and drinking it, to his detriment. Complainant's failure to supervise is a more egregious failure given the fact that just two days earlier, another staff member alerted Complainant to the possibility that M.F.-H. was drinking hand sanitizer to become inebriated.

The preponderance of the evidence establishes that Complainant committed the acts for which he was disciplined.

B. The Appointing Authority's Action Was Not Arbitrary and Capricious

The second analytic inquiry is whether the appointing authority's disciplinary decision was arbitrary and capricious or contrary to rule or law. *Stiles*, 477 P.3d at 717.

In determining whether an agency's disciplinary 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).

1. Reasonable Diligence and Care to Procure Evidence

Director Wilson, as the appointing authority and ultimate decision maker, used reasonable diligence and care to procure the necessary evidence in making her decision to terminate Complainant's employment. Wilson reviewed the videos of the March 26th incident, she reported the incident to the Jefferson County Human Services, she communicated with Investigator Hjellming and received the Jefferson County determination, after its investigation, that Complainant engaged in abuse by his lack of proper supervision, she prepared for the Rule 6-10 by reviewing the videos of the March 26th incident, reviewing the reports about the incident, and spoke with other staff. Director Wilson properly conducted the Rule 6-10 meeting and considered Complainant's input. She also solicited input from employees identified by Complainant as character witnesses. Accordingly, Respondent established by a preponderance of the evidence that Director Wilson used reasonable diligence and care to procure the authorized evidence in deciding on the appropriate discipline that Complainant's acts and omissions warranted.

2. Candid and Honest Consideration of the Evidence

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

> 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 6-11] in exercising its discretion on disciplinary matters.

Stiles, 477 P.3d at 719.

Board Rule 6-11(A), lists the factors to consider in taking discipline:

> 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.

In addition, given the nature of the youth under Complainant's supervision, Board Rule 6-11(B) is applicable and provides:

> In considering any disciplinary action of an employee who has engaged 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. A vulnerable person shall be as defined in § 27-90-111(2)(e), C.R.S.

C.R.S. § 27-90-111(2)(e) provides: "'Vulnerable person'" means any individual served by the department who is susceptible to abuse or mistreatment because of the individual's circumstances, including but not limited to the individual's age, disability, frailty, behavioral or mental health, intellectual and developmental disability, or ill health."

Director Wilson testified credibly that she considered in good faith the evidence she had gathered, and considered the Board Rule 6-11 factors in making her disciplinary decision. Director Wilson's disciplinary letter carefully reviews each of the Rule 6-11 factors she considered in arriving at her decision. (*See* pages 18-20 below for Director Wilson's discussion of the Rule 6-11 factors.) There is no reason to doubt that Director Wilson candidly and honestly considered all the evidence that she had gathered.

3. The Evidence Does Not Support the Conclusion That Reasonable People Fairly and Honestly Considering the Evidence Must Reach Contrary Conclusions

The Colorado Supreme Court in *Stiles* 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.

Although some reasonable people considering the evidence might conclude that Complainant, who was successful as a YSS I, could have, or even should have, been retained at that rank and been disciplined with a lesser form of discipline, not all reasonable people would have reached that conclusion, which is contrary to the conclusion made by Director Wilson. Director Wilson's conclusion – that the appropriate discipline to be imposed on Complainant was termination of his employment – was based not only on his failure of proper supervision on March 26, 2024, but also on Complainant's previous supervisory lapses, for example, when Complainant abandoned his post without communicating with anyone in May 2022, his decision to place himself in a position on the lower tier of C pod that was not optimal just prior to March 26, 2024, and his decision to place himself in that same position on March 26, 2024, which contributed to his failure to observe and prevent M.F.-H. from obtaining and drinking hand sanitizer and becoming intoxicated.

In addition, Complainant failed to take precautions about youths seeking to obtain hand sanitizer, even though he was warned of such a concern just a couple of days prior to the March 26th incident. Also, despite the fact that Complainant knew J.R. had a tendency to leave the pod without notifying him of her movements, Complainant failed to take this tendency into account while he was working on his laptop and talking to A.M. on the night of March 26th. Complainant's reluctance to take responsibility for the March 26th incident, placing the blame on J.R., a fairly new employee who had not completed her training, indicated to Director Wilson a pattern of suboptimal awareness of Complainant's need to be ever vigilant and observant. Director Wilson concluded that Complainant would not consider the incident as an educable moment based on his reluctance to take full responsibility for the March 26th incident, and that conclusion prompted her to decide that the termination of Complainant's employment was the most appropriate form of discipline to be imposed on Complainant. In addition, Director Wilson had a statutorily-imposed obligation to ensure the safety of vulnerable youths at RMYSC, an obligation that took precedence over the interests of any other person, including Complainant. Accordingly, the evidence does not support a conclusion that "'reasonable [people] fairly and honestly considering the evidence must reach contrary conclusions regarding the propriety of the disciplinary action." *Lawley*, 36 P.3d at 1252.

4. Complainant's Argument Expanding the Arbitrary and Capricious Standard

At hearing, Complainant argued that, although J.R. was equally at fault for lack of supervision of the youth on C pod on March 26, 2024, and might be more at fault for providing the M.F.-H. with the contraband hand sanitizer, it is not apparent that she was disciplined, and it is clear that she remains an employee of DHS's DYS. Complainant contended that if two employees committed the same objectionable acts and only one

employee was disciplined by termination, that constitutes arbitrary and capricious application of disciplinary actions.[2]

That argument is not totally unpersuasive, but is ultimately unavailing. Whatever the apparent attractiveness of this argument, it is not reflected in, nor is it authorized by, the long-existing definition of arbitrary and capricious articulated by the *Lawley* court. Historically, the Board, and the Board's Administrative Law Judges, have reviewed and determined each appeal of discipline of a certified state on its own merits, without regard to what other state employees may have done in the same or similar circumstances, and what consequences these other employees may or may not have suffered for their acts or omissions. It would take no less than legislative action, or an overturning of the *Lawley* standard, to effect the kind of change for which Complainant argues. The undersigned ALJ lacks the authority to implement such a change.[3]

C. The Appointing Authority's Action Was Not Contrary to Rule or Law.

The third issue to be determined is whether Director Wilson's decision to terminate Complainant's employment was contrary to rule or law.

1. Board Rule 6-2

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 purpose of this rule is to require that an employee be warned and corrected about improper conduct before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary action.

Here, Director Wilson credibly considered Complainant's actions on March 26, 2024 egregious enough to warrant discipline, even in the absence of a corrective action. The ALJ will not disturb that determination. Complainant had been the subject of a corrective action in June 2022 concerning a prior violation of policy DYS Policy S-9-3, Youth Supervision and Movement. Accordingly, the disciplinary action did not violate Board Rule 6-2.

2. Board Rule 6-10

Board Rule 6-10 addresses the requirements related to the Board Rule 6-10 meeting. Board Rule 6-10(C) provides, in pertinent part, "When considering discipline, the appointing authority shall meet with the employee before making a final decision…." *See also, Stiles*, 477 P.3d at 715 (" Rule 6-10 . . . provides that prior to disciplining a certified state employee, an appointing authority must meet with the employee, inform the employee of the alleged just cause for discipline, and permit the employee to respond.").

Director Wilson fully complied with the requirements of Board Rule 6-10.

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[2] For example, the Merriam-Webster dictionary lists "inconsistent" as a synonym for "capricious."
[3] In addition, Complainant, who was a YSS II on the night of March 26, 2024, was not similarly situated to J.R., who was a YSS I trainee.

3. Board Rule 6-11

As discussed above on page 15, as indicated in her disciplinary letter, Director Wilson carefully considered each of the Board Rule 6-11 factors in reaching her disciplinary decision.

In her disciplinary letter, Director Wilson outlined her consideration of the Rule 6-11 factors, in addition to the nature, extent, seriousness, and effect of the performance issues or conduct, which discussion is included in the paragraph 50 of the Findings of Fact on pages 10-12, above:

> 2. Type and frequency of prior unsatisfactory performance or conduct, including any prior performance improvement plans, corrective actions, or disciplinary actions:
>
> You received a Corrective Action on August 16, 2023, for not showing up to work a mandated shift. As a result, you signed the Employee Code of Conduct, acknowledging that you would "perform job tasks promptly and effectively and always strive to perform at the highest level possible, accept responsibility for you own work, behavior, and actions and to be responsive to client and coworker requests and needs."
>
> You received notice on April 1, 2024, that you were reverted from a YSSII to a YSSI for similar performance concerns. The performance concerns included in the reversion dated back to January 29, 2024. The types of concerns included poor accountability for posting responsibilities, medication errors, incomplete Restorative Safety Tracking Sheets, showing youth the screen of the staff laptop while youth were horseplaying behind you, and incomplete supervisor checklists. The current March 26, 2024, issue was not considered in the reversion decision as the investigation into this new matter had just been initiated. While the reversion decision itself had not been issued at the time of the March 26, 2024, incident, you had been made aware of the underlying performance concerns through numerous communications prior to the March 26 incident date.
>
> 3. The period of time since any prior unsatisfactory performance or conduct:
>
> The last incident date noted on the reversion document was March 18, 2024, and August 16, 2023.
>
> 4. Prior performance evaluations:
>
> 2021-2022 PMP year (4/1/21 - 3/31/22) overall score: 2.0
> 2022-2023 PMP year (4/22/22 - 7/31/23) overall score: 3.3
>
> 5. Mitigating circumstances:

I considered your time and past performance with DHS, information you provided in the review process, and information received from the individuals you requested I contact.

6. Information discussed during the Rule 6-10 meeting, including information you presented.

IV. Complainant has not established a basis for entitlement to attorney fees and costs.

Complainant has requested his attorney fees and costs incurred in this litigation.

Board Rule 8-51(B) provides:

> Upon final resolution of a proceeding under this Chapter 8, Resolution of Appeals and Disputes, Part A, attorney fees and costs may be assessed against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, a means of harassment, or was otherwise groundless.

Complainant failed to establish that Respondent's disciplinary decision was arbitrary and capricious or contrary to rule of law. Respondent's decision was neither frivolous, in bad faith, malicious, a means of harassment, nor groundless. Complainant has not established grounds for an award of attorney fees and costs.

Accordingly, Complainant is not entitled to an award of attorneys' fees and costs.

CONCLUSIONS OF LAW

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

2. Respondent's action in terminating Complainant's employment was neither arbitrary and capricious nor contrary to rule or law.

3. Complainant is not entitled to an award of reasonable attorney fees and costs.

ORDER

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

DATED this 6th day
of January 2025,
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 6th day of January 2025, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Mark A. Schwane, Esq.
Mark@schwanelaw.com

Vincent E. Morscher, Esq.
Senior Assistant Attorney General
Vincent.Morscher@coag.gov

[redacted]

APPENDIX A

WITNESSES APPEARING AND TESTIFYING AT HEARING

Respondent's Case in Chief:

Jordyn Romero
Becky Hjellming
Tyler Piersch
Samantha Wilson

Complainant's Case in Chief:

Ryan Priest

APPENDIX B

EXHIBITS ADMITTED AT HEARING OR STIPULATED TO BY THE PARTIES

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

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).