

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KEVIN BACA,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT
PUEBLO,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on August 24, 2016, and the evidentiary hearing on November 21-22, 2016, in this matter at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on November 30, 2016, after receipt of Respondent's redacted exhibits for inclusion in the record. Complainant appeared and was represented by Lawrence D. Saunders. Respondent was represented by Bradford C. Jones, Assistant Attorney General. Respondent's advisory witness was delegated Appointing Authority Birgit M. Fisher, Ph.D.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment, effective May 4, 2016, for violation of the Respondent's Workplace Violence policy and Employee Code of Conduct. Complainant argues that he did not make any threats of violence against his co-workers or otherwise behave inappropriately. Complainant seeks reinstatement, back pay, restoration of lost benefits, and attorney fees. Respondent argues that Complainant committed the acts for which he was disciplined, and that its decision to terminate Complainant's employment was not arbitrary, capricious or contrary to rule or law. Respondent requests that its disciplinary termination of Complainant be affirmed and this appeal dismissed with prejudice.

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

ISSUES

1. Whether Complainant committed the act(s) for which he was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant is entitled to an award of attorney fees.

FINDINGS OF FACT

Background

1. The Colorado Mental Health Institute at Pueblo (CMHIP) is one of two state-operated in-patient psychiatric hospitals in Colorado, serving adult, adolescent and geriatric patients. CMHIP also provides evaluations of individuals who may not be competent to stand trial, and serves criminally charged adults who are found not guilty by reason of insanity or incompetent to stand trial.

2. At all times relevant to this appeal, Complainant worked as a Client Care Aid (CCA) II at CMHIP. His immediate supervisor was Esther Garcia, Lead Nurse. His second level supervisor was Christine Ochoa, Program Chief Nurse at CMHIP. Ms. Ochoa reported to Cara Dasher, Director of Nursing at CMHIP.

3. Patty Moore is a Licensed Psychiatric Tech III at CMHIP. She also serves as the President of Colorado WINS, a union representing State employees, and as a union steward. A union steward passes along information to union members, helps employees to file grievances, can serve as an employee's representative in a Board Rule 6-10 meeting, and is available to discuss workplace issues with employees.

Relevant Workplace Policies

4. On October 7, 2009, Governor Bill Ritter, Jr., issued Executive Order D 023 09, "Establishing a Policy to Address Workplace Violence, including Domestic Violence Affecting the Workplace." This Executive Order states, in pertinent part: "State employees expect their employer to take necessary steps to provide a violence-free environment and to address issues concerning violence in the workplace." State agencies were directed to develop "a universal policy addressing workplace violence, including domestic violence affecting the workplace," as well as specific policies and procedures to implement this universal policy.

5. In compliance with Executive Order D 023 09, Respondent's Policy VI, No. 3.5, titled "Workplace Violence, and Domestic Violence Affecting the Workplace" (Workplace Violence policy), revised January 10, 2011, sets forth the following "zero tolerance" policy concerning violence in the workplace:

[Respondent] has a zero tolerance for violence, threats, harassment, intimidation and other disruptive behaviors in the workplace. [Respondent] does not tolerate violent behavior or the threat of violent behavior by anyone toward state employees, members of the public, state property or facilities. Such behavior may result in corrective and/or disciplinary action, up to and including termination of employment, if a state employee or state contractor commits the behavior.

6. Respondent's Workplace Violence policy prohibits the following conduct:

The following kinds of conduct, without limitation, are prohibited: threats, harassment, acts of intimidation, physical abuse, property damage, sabotage, and oral or written statements, gestures, or expressions that communicate a direct or indirect intent to commit physical or psychological harm. This list is not intended as an all-inclusive list.

7. Respondent's Workplace Violence policy adopts the following definition of "violent behavior" from Executive Order D 023 09:

"Violent behavior" means any act or threat of physical, verbal or psychological aggression or the destruction or abuse of property by any individual. Threats may include implied, conditional or direct threats in verbal, written, electronic or gesture-related form, resulting in intimidation, fear, harassment, harm or endangerment to the safety of another person or property.

8. Respondent's Employee Code of Conduct, dated July 2001, includes the following expectations:

- Be truthful, honest and courteous to co-workers and to customers at all times.
- Listen actively and share information in open, honest and appropriate ways.
- Demonstrate respect for all people and their ideas, and commit to resolve conflicts.
- Be considerate of fellow workers when performing job tasks.
- Accept responsibility for own mistakes ...
- Be committed to your job and present yourself as a good role model.
- Treat others as they wish to be treated.
- Have a CARE attitude (Caring Attitudes Reaps Excellence).

9. Complainant was familiar with Respondent's Workplace Violence policy, revised January 10, 2011, and with Respondent's Employee Code of Conduct, dated July 2001.

Complainant's Employment History

10. Complainant began his first term of employment with Respondent on September 8, 1999 as a Food Service Worker I, and promoted to a Dining Service I position in December 2000.

11. On April 26, 2004, Complainant received a Corrective Action following a co-worker's submission of a formal workplace violence allegation against him. The co-worker reported that Complainant threatened her with physical harm, engaged in intimidating behavior ("clenched fist, pounding one fist into the other, flexing muscles, shaking out of control"), yelled and "spew[ed] profanity." As a result, Complainant was transferred to another work station and required to attend a class entitled "Conflict Resolution at Work."

12. Complainant resigned his first term of state employment on July 8, 2005.

13. In March 2007, Complainant returned to state employment as a CCA II at CMHIP.

14. As a CCA II, Complainant was responsible for observing, recording, and documenting changes in a patient's condition; communicating and interacting with patients and other staff members; assisting patients with activities of daily living, self-maintenance and hygiene skills; monitoring the location and condition of patients; applying verbal and/or physical

intervention techniques to diffuse patient behaviors; assisting patients to attend various activities; and providing support to clinicians in delivering psychiatric nursing care and therapeutic seclusion and restraints.

15. Complainant became a certified state employee in 2008, and continued to work as a CCA II until the termination of his employment on May 4, 2016.

16. On June 27, 2010, Complainant received a verbal counseling from former supervisor Joseph Mendoza instructing him "not to holler at his co-workers" after Complainant became angry and began yelling during a team meeting.

17. Following issues with Complainant's interactions with co-workers arising in 2012, Complainant agreed to attend an April 26th Conflict Resolution class and a May 2nd Communicating Non-Defensively class.

18. On July 3, 2012, Complainant received a Performance Improvement Plan (PIP) after becoming "angry at a co-worker" and "yelling and throwing his hands in the air" during a June 28, 2012 team meeting. This PIP directed Complainant to "communicate appropriately, non-defensively, in a professional and courteous manner at all times in the work environment," to "be respectful toward co-workers and supervisors at all times," and to "take active steps to build a professional and positive work environment at all times." Complainant was instructed to review Respondent's Workplace Violence policy and Code of Conduct, attend a staff development class on Communicating Non-Defensively, and attend a staff development class on Creating a Respectful Workplace.

19. On February 7, 2013, Complainant received a Corrective Action for contributing to a hostile work environment for a female co-worker and treating her with disrespect after she filed a complaint against him, thus violating the Employee Code of Conduct and the Universal Policy on Anti-Harassment. Complainant was required to attend a class on Workplace Violence and Domestic Violence Affecting the Workplace, and was warned that failure to comply with the requirements of this Corrective Action could result in further corrective or disciplinary action, up to and including termination.

20. On March 26, 2014, Complainant received a combined Disciplinary/Corrective Action, which imposed a disciplinary penalty as well as corrective training measures on Complainant arising from his harassment of another female co-worker. This Action was amended as part of a settlement on August 8, 2014, and addressed Complainant's insubordination and violation of Respondent's policies, including the Universal Policy on Anti-Harassment. Complainant was required to review Respondent's Code of Conduct, as well as the Workplace Violence and Domestic Violence Affecting the Workplace policies, and to attend a class on Workplace Violence and Domestic Violence Affecting the Workplace. Complainant was again warned that failure to comply with the requirements of this Disciplinary/Corrective Action could result in further corrective or disciplinary action, up to and including termination.

Events of September 2, 3, and 4, 2015

21. On September 2, 2015, Complainant was out on annual leave. Because he was running out of annual leave, he called Ms. Ochoa to ask whether he could use sick leave to cover a day when he needed to take care of his children. Ms. Ochoa told Complainant he could not use sick leave for that purpose. Complainant became angry and yelled that he knew she would not help him. Ms. Ochoa tried to reassure Complainant she could work with him if he had

a hardship, and asked him to put his request in writing. Complainant yelled that he did not have a computer and hung up. Ms. Ochoa described this behavior as "normal" for Complainant.

22. After Complainant hung up on Ms. Ochoa, he called Ms. Dasher, who authorized him to work extra hours to make up the time he needed to take off work in order to care for his children.

23. On September 3, 2015, at approximately 6:00 p.m., Complainant contacted Ms. Moore by telephone while she was at work to discuss his frustration over his conversation with Ms. Ochoa, who he believed was "out to get him." Ms. Moore referred him to Pam Cress, a Grievance Coordinator with Colorado WINS.

24. Complainant called Ms. Cress to complain that no one would help him. He called Ms. Ochoa a "bitch," said she was "out to get him," screamed and cussed, and complained that the union was not helping him, either. Ms. Cress had never experienced anything like the anger Complainant displayed. He was "out of control," "screaming at the top of his lungs" and seemed "delusional," she became afraid he was going to harm someone. Following this conversation, Ms. Cress warned her family about Complainant, and called Ms. Ochoa to warn her, as well.

25. Complainant subsequently sent Ms. Moore text messages and left her voice mail messages expressing frustration that no one would help him. When Ms. Moore arrived home after work on September 3, 2015, Complainant called her around 9:00 p.m. When Ms. Moore answered the telephone, Complainant called her "a fucking bitch." Ms. Moore responded, "Shut the fuck up and settle down." She admitted that this response was not professional, but explained that Complainant was so upset, she thought a shocking statement might get his attention and calm him down. As their conversation progressed, however, Ms. Moore became alarmed.

26. Ms. Moore's 9:00 p.m. telephone conversation with Complainant lasted over an hour. Complainant was extremely agitated, and his anger and frustration seemed to be "escalating." He seemed panicked, as though "the walls were closing in on him." Complainant told her that he was going to "take out" the Director of Nursing (DN) and Program Chief Nurses (PCNs), and referenced a large stack of paperwork that would help him do that.

27. As a union steward and president of Colorado WINS, Ms. Moore has a great deal of experience in talking with frustrated employees. However, she had never experienced the level of anger and hostility expressed by Complainant during her 9:00 p.m. telephone call with him on September 3, 2015. Ms. Moore described Complainant's 6:00 p.m. telephone call as Complainant "doing his thing of yelling and being frustrated." In contrast, the extreme frustration expressed by Complainant during his 9:00 p.m. telephone call "made the hair on the back of her neck stand up." He was rambling and seemed to be targeting Ms. Ochoa as the primary source of his frustration. She could imagine him "going postal."

28. After she finished talking with Complainant, Ms. Moore made sure that the doors of her home were locked, and warned her family members that, if anyone showed up that they did not know, to call the police.

29. Ms. Moore was so upset by her second conversation with Complainant on September 3, 2015 that she could not sleep. She kept thinking about how vulnerable Ms. Ochoa and the other PCNs were, as their offices were right next to a stairwell easily accessible to an attacker.

30. When Ms. Moore went to work on September 4, 2015, she told Ms. Ochoa about her disturbing conversation with Complainant. She told Ms. Ochoa that she was afraid that Complainant might cause her, or other PCNs, harm, as their offices were all right next to a stairwell. Ms. Ochoa became alarmed and contacted Ms. Dasher, who advised Ms. Moore to contact the CMHIP security guards.

31. After the warnings she received from Ms. Moore and Ms. Dasher, Ms. Ochoa keeps her office door closed, has asked her coworkers to watch out for her, and has her husband, who works as a Correctional/Transport Officer at CMHIP, wait for her when she gets off work.

32. After these events, Ms. Moore arranged for a guard to walk her to her car when she leaves work. She chemically straightened her hair, in an attempt to make her less recognizable to Complainant, and takes a different route home after her work shift ends at night.

Investigation and Rule 6-10 Meetings

33. On September 8, 2015, Ms. Dasher notified Complainant that he was being placed on Administrative Leave, effective September 4, 2015, pending an investigation of his misconduct. Complainant was ordered not to have any contact with CMHIP employees until further notice.

34. Human Resources (HR) Generalists Mark Castillo and Candice Mahoney, in Respondent's Employment Affairs Division, were assigned to investigate Complainant's behavior on September 2 and 3, 2015. They interviewed Ms. Ochoa, Ms. Moore, Ms. Cress, Ms. Garcia, Ms. Dasher, Complainant, and some of Complainant's co-workers, and reviewed Complainant's personnel file. They prepared a written report, with attached interview statements and relevant documents from Complainant's personnel file, dated October 23, 2015. This report concluded that Complainant engaged in aggressive, intimidating, harassing and threatening behavior on September 2 and 3, 2015, in violation of Respondent's Workplace Violence policy.

35. On October 23, 2015, Assistant Superintendent of Clinical Programs Birgit Fisher, Ph.D., was delegated "specific appointing authority" over Complainant by Superintendent Ronald Hale "for the following limited purpose":

[C]onducting a Rule 6-10 meeting and taking any corrective or disciplinary action, as appropriate, in relation to the allegations against [Complainant] related of [sic] violations of the Colorado Department of Human Services (CDHS) Workplace Violence and Harassment policies as well as the CDHS Code of Conduct.

This delegation of specific appointing authority is limited to addressing concerns that arose in September 2015.

36. After reviewing the HR investigation report, Dr. Fisher conducted an initial Rule 6-10 meeting with Complainant on December 22, 2015. Justin Icenhower, Southern District Human Resources Team Leader, and Mr. Saunders, Complainant's attorney, were also present.

37. Following the initial Rule 6-10 meeting, Complainant and his attorney were

provided with a copy of the October 23, 2015 HR investigative report and exhibits.

38. A follow-up meeting was scheduled for February 5, 2016, but was cancelled and rescheduled due to Complainant's failure to attend.

39. On February 10, 2016, Dr. Fisher reconvened the Rule 6-10 meeting with Complainant. Again, Justin Icenhower, Southern District Human Resources Team Leader, and Mr. Saunders, Complainant's attorney, were also present. During this meeting, Complainant responded to the October 23, 2015 HR investigative report and exhibits, denying that he made any threats or engaged in any inappropriate conduct.

40. Following the February 10, 2016, Rule 6-10 meeting, Complainant was provided an opportunity to provide additional information. He did not do so.

Termination Decision

41. Prior to reaching her decision, Dr. Fisher considered the October 23, 2015 HR investigation report and attached exhibits, as well as Complainant's complete personnel file and the information she received from Complainant during the two Rule 6-10 meetings.

42. While Dr. Fisher did not conclude that Complainant made any verbal threats, she did conclude that Complainant's interaction with Ms. Ochoa on September 2, 2015, was "of a threatening, intimidating, and harassing nature," as defined in Respondent's Workplace Violence policy.

43. Dr. Fisher concluded that Complainant's interaction with Ms. Moore on September 3, 2015, "was of a hostile nature," as defined in Respondent's Workplace Violence policy, and was "inconsistent with [Respondent's] Employee Code of Conduct."

44. Dr. Fisher concluded that Complainant yelled at Ms. Cress during a telephone conversation on September 3, 2015, "in direct contradiction to [Respondent's] Employee Code of Conduct" and Workplace Violence policy.

45. Dr. Fisher concluded that Complainant could not or would not acknowledge that he needed to change his behavior in the workplace. His outbursts caused disruption in the workplace, as well as distress to Ms. Moore and Ms. Ochoa. Dr. Fisher was also concerned that Complainant's anger issues could affect the patients he was responsible for monitoring, especially if there was a need for him to use "intervention techniques to diffuse patient behaviors."

46. Dr. Fisher reviewed Complainant's work history and noted a series of corrective actions, as well as a disciplinary action, imposed on him by Respondent to address his angry outbursts in the workplace.

47. In her May 4, 2016 termination letter, Dr. Fisher expressed the following concerns:

The consistent and marked discrepancy between your perception of events, including your own conduct, and the perception offered by others is puzzling and worrisome. This concern is highlighted by a persistent failure to acknowledge any fault on your part or to take responsibility for your role in

potentially problematic situations. Even when presented with convincing evidence that contradicts your perception of events, you fail to acknowledge the validity of that evidence, resorting instead to accusations against others. Given these observations, your ability to benefit from the classes and workshops you were required to attend repeatedly is called into question.

48. While Dr. Fisher had experience in investigating and administering corrective and disciplinary actions, she had never previously reached the decision to terminate someone's employment. Dr. Fisher preferred to work with employees to correct and improve their behavior and performance in the workplace. However, she observed that progressive discipline had failed to correct Complainant's "willful misconduct," and concluded that any further corrective measures imposed on Complainant would be unsuccessful.

49. Because of Complainant's violation of Respondent's Workplace Violence policy and Employee Code of Conduct, Complainant's employment was terminated effective May 4, 2016.

50. Complainant filed an appeal of the termination of his employment, which was determined to be timely.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Ms. Ochoa, Ms. Moore and Ms. Cress all consistently and credibly testified that Complainant was angry and abusive during their telephone conversations with him on September 2 and 3, 2015. While Ms. Ochoa was not initially concerned about her September

2, 2015, conversation with Complainant, her testimony clearly and consistently described Complainant's angry and hostile attitude during this conversation. Ms. Moore also clearly and credibly described Complainant's escalating anger and hostility during her 9:00 p.m. telephone conversation with him on September 3, 2015. Ms. Moore's descriptions of Complainant's behavior during this conversation were corroborated by Ms. Cress, who had a similar telephone conversation with Complainant that evening. Both Ms. Moore and Ms. Cress perceived Complainant's anger and hostility to be threatening, and their communication of these concerns to Ms. Ochoa resulted in disruption of the workplace. As union representatives with Colorado WINS who were dedicated to advocating for employees, the testimony of Ms. Moore and Ms. Cress were especially credible.

In contrast to the credible and mostly consistent testimony of these witnesses, Complainant's categorical denial that he engaged in any inappropriate behavior on September 2 or 3, 2015, was not credible. Therefore, Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which he was disciplined.

III. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

A. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY OR CAPRICIOUS.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001). A court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Respondent's actions in this case were neither arbitrary nor capricious, as those terms are defined in *Lawley*. The delegated appointing authority, Dr. Fisher, held two Rule 6-10 meetings with Complainant to allow him time to review and respond to the HR investigation report, rescheduling the second meeting when Complainant failed to appear. Dr. Fisher described a thorough and thoughtful review of the events of September 2-4, 2015, as well as a review of Complainant's complete employment record, before reaching a decision to discipline Complainant. Dr. Fisher explained that, while she has imposed numerous disciplinary and corrective actions, she has never terminated anyone's employment. She always looks for a way to retrain employees, allowing them to learn from their mistakes. Unfortunately, Complainant failed to recognize that he had done anything wrong, much less display an ability or willingness to change his disrespectful and abusive behavior. Because of the seriousness of Complainant's angry outbursts and the disruption caused to the workplace, Dr. Fisher concluded that termination of Complainant's employment was appropriate.

Thus, Respondent has met its burden of establishing that, under *Lawley* and *McPeak*, it did not act arbitrarily or capriciously in deciding to terminate Complainant's employment.

B. THE DECISION TO TERMINATE COMPLAINANT'S EMPLOYMENT WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES, AND WAS NOT CONTRARY TO RULE OR LAW.

In reviewing the decision to impose discipline, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within a range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Board Rule 6-9.

Dr. Fisher explained that she considered the seriousness of Complainant's angry outbursts on September 2 and 3, 2015; the effects of these outbursts on Ms. Moore and Ms. Ochoa, and the resulting disruption in the workplace. She provided Complainant and his attorney with a copy of the HR investigation report, and allowed them time to review it and to respond. Dr. Fisher also considered prior measures imposed on Complainant for similar workplace outbursts. She concluded that Complainant's inability to recognize that he had engaged in inappropriate behavior and failure to correct such behavior in the last few years rendered such measures ineffective.

Under these circumstances, the decision to terminate Complainant's employment was within the range of reasonable alternatives, and was not contrary to rule or law.

IV. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule 8-33. In frivolous actions, "no rational argument based on the evidence or law [is] presented." Board Rule 8-33(A). Actions taken in bad faith, maliciously or as a means of harassment are those "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that, "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C).

As discussed above, Respondent established, by a preponderance of the evidence, that Complainant committed the acts for which he was disciplined, and that Respondent's decision to terminate Complainant's employment was not arbitrary, capricious, or contrary to rule or law. Therefore, Complainant is not entitled to attorney fees.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Complainant is not entitled to attorney fees.

ORDER

Respondent's action is **affirmed**. Attorney fees and costs are not awarded. Complainant's appeal is dismissed with prejudice.

Dated this 11th day
of January, 2017.



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

CERTIFICATE OF MAILING

This is to certify that on the 11th day of January, 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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Jenney Reed

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.