

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2018B004

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL DODSON,
Complainant,

v.

UNIVERSITY OF COLORADO BOULDER, UNIVERSITY OF COLORADO POLICE DEPARTMENT,
Respondent.

THIS MATTER is before the Administrative Law Judge (ALJ) following the receipt of the parties' stipulated facts and respective legal arguments. Complainant is represented by his attorney, Carrie L. Slinkard. Respondent is represented by its attorney, Assistant University Counsel Catherine Gleeson.

PROCEDURAL BACKGROUND

ALJ Susan J. Tyburski held the commencement hearing on September 29, 2017, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. During the commencement, the parties proposed, and the ALJ agreed to, a determination of this appeal upon stipulated facts and exhibits, followed by briefs, submitted by the parties. Upon receipt of the parties' responsive briefs on December 11, 2017, the record in this case was closed.

MATTER APPEALED

Complainant has appealed Respondent's July 11, 2017 imposition of an indefinite disciplinary suspension without pay, pursuant to Board Rule 6-12(6)(A), pending the final disposition of a felony charge against Complainant. Complainant argues that this suspension without pay was arbitrary, capricious, and contrary to rule or law. Complainant seeks modification of the suspension without pay to administrative leave with pay, and an award of back pay and benefits from July 11, 2017 to the date Complainant is placed on administrative leave with pay.

Respondent seeks affirmance of its decision to place Complainant on indefinite disciplinary suspension without pay under Board Rule 6-12(6)(A) .

The following exhibits were admitted into evidence: Stipulated Exhibits 1, 2, 3, 4, 5, 6, 7.

For the reasons discussed below, Respondent's July 11, 2017 decision to place Complainant on indefinite disciplinary suspension without pay is **affirmed**.

ISSUE

Was Respondent's July 11, 2017 decision to place Complainant on indefinite disciplinary suspension without pay arbitrary, capricious, or contrary to rule or law?

FINDINGS OF FACT¹

1. Complainant is a Police Officer III with the University of Colorado Boulder Police Department ("CUPD"). (Stipulated Fact)
2. Complainant has been employed by CUPD since January 2, 1996. (Stipulated Fact)
3. As a Police Officer III, Complainant is a commissioned police officer and a supervisor within the Patrol Bureau, Police Operations Division of the CUPD. His responsibilities include oversight of patrol functions, community safety, and supervision of troops / platoons of officers. Complainant is also responsible for law enforcement, which includes various methods of patrol, emergency response, arrests, and crime prevention, detection, solving, and documenting criminal activity. (Stipulated Fact)
4. On June 5, 2017, Complainant was charged by criminal complaint with one count of stalking pursuant to C.R.S. § 18-3-602(1)(c), C.R.S., a class 5 felony. (Stipulated Fact)
5. The felony stalking charge filed against Complainant is defined, in pertinent part, as follows:

A person commits stalking if directly, or indirectly through another person, the person knowingly:

.

Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress.

§ 18-3-602(1)(c), C.R.S.

6. State Personnel Board Rule 6-12(6)(A) states: "An employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits." (Stipulated Fact)
7. On June 13, 2017, Ken Koch, Chief of Police for the CUPD, sent Complainant the following certified letter notifying him of a Board Rule 6-10 meeting scheduled for June 21, 2017:

I have received information about alleged conduct by you, that, if found true, indicates the possible need to administer corrective or disciplinary action against you as provided for in the State Personnel Board Rule 6-10. More specifically, I have been informed of the following information:

¹ These findings of fact are based upon the stipulated facts and exhibits submitted by the parties.

On June 6, 2017 [sic], you were formally charged with one count of felony stalking by the City of Longmont Police Department. It is alleged that the stalking charge involves another employee of the University of Colorado Police Department (CUPD). If you do not have a copy of the charge, I can provide you one.

Pursuant to State Personnel Board Rule 6-12(6)(A), “[a]n employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee’s ability to perform the job or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending final conviction.”

In accordance with State Personnel Board Rule 6-10, I have scheduled a meeting with you on Wednesday, June 21, 2017 at 9:00 am, in room 332 of the ARCE Building to present the information that has come to my attention. During this meeting, you will have an opportunity to admit or refute this information and to present information concerning mitigating circumstances. This meeting is not a formal hearing; rather, it is an opportunity for us to meet and exchange information.

Additionally, as you are aware, both the University’s Office of Institutional Equity and Compliance, and the Professional Standards Bureau of the Police Department are conducting investigation [sic] into your alleged conduct, and the results of those investigations may warrant the possible need to take corrective or disciplinary action at a later time.

You have the right to have a representative of your choice present at this meeting. If you choose to do so you must inform me of this by Monday June 19, 2017. If your representative is an attorney, a representative from the Office of University Counsel will be present as well. Prior to or at the meeting, or if you are unable to meet in person, you may also provide me with any written and/or oral information that you would like me to consider. You will also be allowed up to five business days after the meeting to provide me with any additional information relating to issues discussed at the meeting.

If you have any questions about this meeting, please contact me.

8. This initial Rule 6-10 Meeting Notice was also emailed to Complainant on June 14, 2017.
9. On June 19, 2017, Complainant requested that the Rule 6-10 meeting be rescheduled for a date that his attorney could attend. This meeting was rescheduled for June 27, 2017.
10. On June 27, 2017, Complainant’s attorney asked to cancel this meeting and allow Complainant to respond in writing. That same day, Chief Koch sent Complainant a second Rule 6-10 Meeting Notice, informing Complainant that he had “ten days from receipt of this notice to respond in writing before I proceed based on the information in my possession.”
11. On July 10, 2017, Complainant’s attorney submitted a five-page “response to the proposed imposition of unpaid leave pursuant to Board Rule 6-12.” In this response, Complainant did not deny that he had been charged with felony stalking. Instead, he argued that a charge alone was not proof that he committed a crime. Complainant informed Chief Koch that the

judge presiding over his criminal case determined that nothing more than a personal recognizance bond was needed and no additional nonmonetary conditions of release were imposed, as Complainant was not a threat to the public. Complainant was not prohibited from possessing a firearm or ammunition, and thus was not prevented “from operating in a law enforcement capacity.” Complainant urged Chief Koch to consider Complainant’s dedicated service to Respondent for more than twenty years, and to place him on paid administrative leave pending the conclusion of Respondent’s internal investigation, allowing Complainant to utilize his accrued leave balances.

12. Chief Koch received and reviewed the July 10, 2017 letter from Complainant’s attorney.
13. On July 11, 2017, Chief Koch sent Complainant a letter notifying Complainant of the decision to place him on indefinite disciplinary suspension without pay pending final conviction pursuant to Board Rule 6-12(6)(A). (Stipulated Fact)
14. In his July 11, 2017 decision, Chief Koch made the following determinations:

As a CU-Boulder Police Officer III, you perform specific functions directly impacting the safety and security for all students, faculty and staff. As a supervisor you are also directly responsible for setting an example for subordinates and ensuring strict compliance with university and department policy. As a police officer in general you are expected to respect and obey the laws you enforce and not act in a way that could cast doubt on your credibility. It is vital that all CUPD employees do not pose a potential threat to the health and safety of students and other members of the university community. After reviewing your written response, I find the felony charge against you negatively affects your ability to perform your job and has created an adverse effect on the department.

15. The University complied with the Board Rule 6-10(A) & (B) processes and sent communications to Complainant consistent with that rule before deciding to place Complainant on indefinite disciplinary suspension without pay pending final conviction pursuant to Board Rule 6-12(6)(A). (Stipulated Fact)

DISCUSSION

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. XII, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). The agency has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Id.* at 705. 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.

Board Rule 6-12(6)(A) states, in pertinent part:

An employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee’s ability to perform the job or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the

position and granted full back pay and benefits.

The parties' stipulated facts and exhibits establish that, on June 5, 2017, Complainant was charged with stalking a female co-worker "in a manner that would cause a reasonable person to suffer serious emotional distress," a class 5 felony pursuant to § 18-3-602(1)(c), C.R.S. After being notified of this charge, Chief Koch scheduled a Board Rule 6-10 meeting with Complainant to discuss his potential suspension without pay pursuant to Board Rule 6-12(6)(A). In lieu of a meeting, Complainant's attorney provided a written response and argument on July 10, 2017. On July 11, 2017, Chief Koch suspended Complainant without pay pending resolution of the felony charge.

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. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's actions in this case were neither arbitrary nor capricious. After being notified of the felony stalking charge against Complainant, Chief Koch made two attempts to schedule and hold a Rule 6-10 meeting with Complainant. When Complainant's attorney subsequently informed Chief Koch that Complainant did not wish to meet in person and wished to submit his response in writing, Chief Koch allowed Complainant ten days to submit this response. Upon receipt of Complainant's response, Chief Koch considered it before reaching his decision.

The stipulated evidence in the record establishes that Chief Koch used reasonable diligence and care to procure the evidence he was authorized to consider, and honestly considered that evidence, including the facts and arguments presented by Complainant's attorney. Complainant's argument that his due process rights were somehow violated by Chief Koch's failure to engage in a more extensive investigation ignores Complainant's refusal to meet with Chief Koch and discuss his pending felony charge. Chief Koch granted Complainant's request to provide a written statement in place of a meeting. Under these circumstances, Chief Koch provided the Complainant ample opportunity to respond, and considered that response before reaching a decision.

Complainant also argues that Chief Koch failed to make the requisite finding, required by Board Rule 6-12(6)(A), that Complainant's felony charge "adversely affects [his] ability to perform the job" or has "an adverse effect on the department." However, Chief Koch's letter details his determination that Complainant's pending felony charge adversely affects his ability to perform his duties as a Police Officer III, which require him to set "an example for subordinates," ensure "strict compliance with university and department policy," "respect and obey the laws" he was responsible for enforcing, and "not act in a way that could cast doubt on [his] credibility." Chief Koch also determined that Complainant's pending felony charge "created an adverse effect on the department," and that "[i]t is vital that [Respondent's] employees do not pose a potential threat to the health and safety of students and other members of the university community." These conclusions are reasonable under the standard articulated in *Lawley*, 36 P.3d at 1252, and meet the requirements of Board Rule 6-12(6)(A). Therefore, Chief Koch's decision to place

Complainant on indefinite disciplinary suspension without pay pursuant to Board Rule 6-12(6)(A) was not arbitrary or capricious, or contrary to rule or law.


CONCLUSIONS

Respondent's decision to place Complainant on indefinite disciplinary suspension without pay pursuant to Board Rule 6-12(6)(A) was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's July 11, 2017 decision to place Complainant on indefinite disciplinary suspension without pay is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 19th day
of January, 2018.


Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-67, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of January, 2018, I electronically served a true copy of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS as follows:

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A handwritten signature in blue ink, appearing to read "Andrew Walsh", is written over a horizontal line.