

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019B094**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KURT LILJEKVIST,
Complainant,

v.

UNIVERSITY OF COLORADO AT COLORADO SPRINGS, DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on July 31, 2019, and the evidentiary hearing on July 6-7, 2020, in this matter via web conference. The parties submitted post-hearing briefs, and the record was closed, on July 10, 2020.

Throughout the evidentiary hearing, Complainant appeared in person and was represented by his attorneys, Michael T. Lowe, Esq., and Heidi J. Hugdahl, Esq. Respondent was represented by Hermine Kallman, Esq., Senior Assistant University Counsel. Respondent's advisory witness was Marc Pino, Executive Director of Public Safety and Chief of Police, and Complainant's Appointing Authority.

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

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment effective June 4, 2019, arguing that this termination was arbitrary and capricious. He seeks all damages to make him whole, including but not limited to rescission and removal of the disciplinary action, reinstatement to his position of Police Officer effective the date of his termination, an award of back pay and benefits, and an award of attorney fees and costs.

Respondent argues that the action of the appointing authority should be affirmed, that all relief requested by Complainant be denied, and that Complainant's appeal be dismissed with prejudice.

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

ISSUES

1. Whether Complainant committed the acts 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 and costs.

FINDINGS OF FACT

Background

1. On October 1, 2013, Complainant was hired by the University of Colorado – Colorado Springs (UCCS), Department of Public Safety (DPS) as a Temporary Aide (Police Officer). (Stipulated fact.¹)

2. Effective January 15, 2014, Complainant was hired by UCCS as a full-time Police Officer. (Stipulated fact.)

3. At the time of his termination, Complainant was a certified state employee.

4. At all relevant times, Marc Pino, Executive Director of Public Safety and Chief of Police, was Complainant's appointing authority.

5. From April 1, 2014 to March 31, 2019, Complainant was supervised by Sergeant (Srgt.) Lisa Dipzinski.

6. During Complainant's last two months of employment (April and May 2019), Complainant was supervised by Srgt. Grant Lockwood.

7. The mission of the DPS University Police identified is:

[P]rovide for the safety and security of persons and property on the UCCS campus. Enforcement of state and federal statutes and University rules and regulations. Responsible for reporting, investigating and processing criminal and non-criminal incidents on the UCCS campus.

8. The role of Complainant's position identified in Complainant's 2019 Performance Evaluation is:

To be the first line contact with victims of crime and emergencies, to provide assistance, information, and direction to all members and visitors of the campus community. To serve as a shift supervisor and work leader to other police officers and community service officers.

Complainant's Performance Record

9. From January 15, 2014 to March 31, 2019, Complainant consistently received an annual performance rating of meeting or exceeding expectations.

¹ The parties stipulated to certain facts.

10. On November 17, 2015, Sgt. Dipzinski conducted a coaching session with Complainant to discuss two policy violations: Obedience to Orders and Insubordination. This coaching session resulted from Complainant's conduct towards Sgt. Dipzinski on September 29, 2019, during a conversation about how to process a DUI revocation form. Complainant disagreed with the directions provided by Sgt. Dipzinski and became angry.

11. Sgt. Dipzinski issued a coaching memorandum, in which she described Complainant's conduct as "abusive," "unbecoming," "discourteous," "disrespectful," and "threatening." Complainant apologized and "took full responsibility for his actions."

12. On November 17, 2015, Lieutenant (Lt.) Clay Garner issued a Corrective Action to Complainant for failing to properly investigate two service calls. Lt. Garner found that Complainant's failure to adequately investigate and document his investigation of these service calls was "a significant failure in your performance."

The April 12, 2019 Dispatch Call

13. Complainant was working the 6 a.m. to 4 p.m. shift on April 12, 2019. (Stipulated fact.)

14. Complainant was serving as the Patrol Training Officer (PTO) for Officer Kaylee Marquez on April 12, 2019. (Stipulated fact.)

15. On the afternoon of April 12, 2019, David Duran, a UCCS Parking Enforcement Officer, was driving on campus near the Alpine Garage when he saw a bald man yelling at a red-headed woman.² The woman was crying. Officer Duran stopped and asked the woman if she was all right. The man yelled, "Go ahead and get in the car, bitch." The woman declined Officer Duran's help and walked away. The man continued to follow the woman and yell at her.

16. Officer Duran reported this incident to UCCS Police Headquarters. At approximately 3:47 p.m., a UCCS Dispatcher, identified only as Dispatcher Ryan, asked any available officers to respond to a suspicious person call in the area of the Alpine Garage and Stanton Road.

17. Complainant and Officer Marquez responded to the dispatch call. Two other UCCS Police Officers, Patrick Warren and Marvin Yanez, also responded. Dispatcher Ryan informed the officers that a bald man was following a red-headed woman and yelling at her.

18. Complainant and Officer Marquez arrived at the intersection of Austin Bluffs Parkway and Stanton Road, where they found a bald man and a red-headed woman. They were joined by Officers Warren and Yanez.

19. As the senior Officer on scene and the PTO for Officer Marquez, Complainant oversaw the Officers' investigation and handling of the dispatch call.

20. The Officers separated the parties. Officer Marquez interviewed the woman, and Complainant interviewed the man.

² The names of the man and the woman, who are not parties to or witnesses in this case, are omitted to protect their privacy.

21. The man told Complainant that the woman was his wife and they were “just having a yelling match.” They were “stressed out” because they were “trying to get a place, a different place.” The man explained that “we’re out of this hotel here” and “have a place that we’re gonna rent.” The man and the woman were attempting to reach the UCCS Library to make some photocopies of documents needed in order to rent a new place to live. They had ordered an Uber to take them to the library, but the Uber driver dropped them off at the wrong location.

22. After obtaining identification information from the man, Complainant called dispatch and asked that the man be run through the Colorado Crime Information Center (CCIC) and National Crime Information Center (NCIC) databases. Dispatch informed Complainant that the man had a mandatory protective order issued against him, and the woman was the protected party.

23. The protective order was issued by Douglas County Court on March 21, 2019, and expired on March 20, 2020. It restrained the man “from assaulting, threatening, abusing, harassing, following, interfering, or stalking the protected person,” and required the man “to stay away from the residence, property, school or place of employment of the protected person.” The protective order further stated: “No contact except electronic contact and contact in public places is permitted.”

24. Complainant asked for the protective order to be forwarded to his Mobile Data Computer in his patrol vehicle. When he received the protective order, he had difficulty reading and understanding it.

25. Officer Warren looked at the protective order, and pointed out that the man and the woman could be together in public.

26. Sgt. Dipzinski was monitoring the situation from Police Headquarters and directed Complainant via radio to call her.

27. Sgt. Dipzinski previously worked in the Domestic Violence Division in El Paso County, and was very familiar with protection orders.

28. Complainant called Sgt. Dipzinski and informed her of what the man told him. Complainant told Sgt. Dipzinski that he did not observe the man threatening, harassing or following the woman.

29. Because Officer Duran had reported the man following and yelling at the woman, and because the man admitted to sharing a ride in a private vehicle, arguing, and living with the woman, Sgt. Dipzinski directed Complainant to arrest the man for violating the protective order.

30. Complainant discussed Sgt. Dipzinski’s directive with Officer Warren. Officer Warren again pointed out the language in the protective order allowing the man and woman to “have contact in a public place.”

31. Complainant asked the man about the protective order. The man told Complainant that the protective order had been changed so that they could be together in public. The man told Complainant that they “had a copy of the amended order in their motel room.” The woman also stated that they had a copy of the order in “their hotel room.”

32. Complainant agreed with Officer Warren that the man was not in violation of the

protective order because he and his wife were out in public, and commented, "I really didn't want to take him to jail."

33. Officer Warren stated that he was going to give the man and the woman a ride to the UCCS Library so they could photocopy some documents needed for their new place to live.

34. Complainant called Srgt. Dipzinski and informed her of his decision. They discussed the provisions of the protective order. Srgt. Dipzinski repeated her directive to arrest the man for violation of the protective order.

35. Complainant called Officer Warren, who was on his way to the library. Complainant instructed Officer Warren to have the man and woman wait for him at the library, and informed Officer Warren of Srgt. Dipzinski's directive.

36. When Complainant and Officer Marquez arrived at the library, Officers Warren and Yanez were waiting with the man and the woman. Complainant talked with the other Officers about Srgt. Dipzinski's directive. Officer Warren disagreed with Srgt. Dipzinski's directive and emphasized once again that the protective order stated that the man and woman could be together in public.

37. Officer Warren told the man and the woman that they needed to clear up the issue of the protective order language, and that the Officers needed to bring the man to police headquarters to sort things out.

38. The woman remained at the library. Officers Warren and Yanez transported the man to police headquarters. Complainant and Officer Marquez also drove to police headquarters. None of the Officers handcuffed the man or told him that he was under arrest.

Complainant's Confrontation with Srgt. Dipzinski

39. When Complainant arrived at police headquarters, Srgt. Dipzinski asked him and Officer Warren to come into the sergeants' office.

40. Another sergeant who was on duty, Jerod Heidrick, joined them in the sergeants' office.

41. Srgt. Heidrick asked why the man was brought into police headquarters without being restrained, per departmental policy. Complainant replied that the man had not been arrested because Complainant was still "investigating."

42. Srgt. Dipzinski pointed out that Complainant had already effectively arrested the man by transporting him to police headquarters.

43. Complainant became angry, leaned over a desk that separated him from Srgt. Dipzinski, stuck his finger approximately four to six inches from her face, and yelled that he could bring the man back and investigate further.

44. Srgt. Dipzinski told Officer Warren, a younger officer, to leave the office.

45. After Officer Warren left the office, Srgt. Dipzinski told Complainant to calm down and began explaining why they were mandated to arrest the man. She explained that, if the man

were to be released and killed the woman, they would all be liable. Complainant stated, in a loud and agitated voice, "I don't care about what he does to her or what happens to her. That's not what we are investigating right now."

46. Because of Complainant's comments and belligerent conduct towards her, Sgt. Dipzinski left the sergeants' office.

47. Sgt. Heidrick talked with Complainant and ordered him to proceed with the arrest.

48. Complainant left the sergeants' office and instructed Officer Marquez to arrest the man.

49. Sgt. Heidrick found Officer Warren and explained the provisions of the protection order, line by line, to him. Officer Warren could then see that the officers had probable cause to arrest the man.

Complainant's April 17, 2019 Submissions to Chief Deputy Garner

50. On April 17, 2019, Complainant handed a written notice withdrawing from his training duties to Deputy Chief Garner.

51. Pursuant to DPS's chain of command, Complainant should have handed this notice to the training program supervisor, Sgt. Dipzinski.

52. On April 17, 2019, Complainant also gave Deputy Chief Garner a memorandum stating that, on April 12, 2019, Sgt. Dipzinski ordered him "to violate the Civil Rights of an individual by conducting an arrest of which I had no Probable Cause to make." In the memorandum, Complainant stated he was "angry and confused as to why the Sergeants got involved." Complainant admitted that he had "never done an investigation of a Protection Order Violation" and stated he hated "it when Sergeants butt into my case."

Complainant's Refusal to Supplement His Narrative

53. On April 18, 2019, Sgt. Lockwood gave Complainant the case file concerning the April 12, 2019 incident with a note from Sgt. Dipzinski instructing Complainant to add relevant information omitted from the narrative of his report.

54. Complainant refused to comply with Sgt. Dipzinski's directive.

Internal Investigation and Rule 6-10 Meeting

55. Deputy Chief Garner conducted an internal investigation into the events of April 12, 2019. He spoke with Complainant, received written reports from Srgts. Dipzinski, Lockwood and Heidrick, and reviewed Complainant's body camera video.

56. Deputy Chief Garner confirmed that probable cause existed for the man's arrest. Deputy Chief Garner reviewed the records of Complainant's 2015 coaching and corrective action.

57. Deputy Chief Garner prepared a report for Chief Pino outlining Complainant's insubordinate conduct:

- (1) You refused to follow a lawful order by a supervising officer on two occasions during this incident.
- (2) By leaning over the desk and sticking your finger in a sergeant's face and yelling in response to a question.
- (3) By once again, as you did in 2015, tendering your resignation from the PTO unit to the Deputy Chief as opposed to the PTO Sergeant who is responsible for administering the program.
- (4) By refusing to add to your supplement the statement of the reporting party after ordered to do so by Sergeant's [sic] Dipzinski and Lockwood. A statement which you took.
- (5) Your assertion that you don't like it when sergeants "butt" into your case. It is specifically for this reason that sergeants are required per their job description to provide oversight on all police actions below their rank.
- (6) As you indicated in your complaint, Sergeant Dipzinski asked you if the male and female party lived together. You departed from the truth when you replied that they didn't currently but were looking for a place to rent. Per your body camera video, the male party specifically told you in the beginning of your contact with him, "We're out of this motel here and we're trying to find a place." You also referenced the male party telling he had the revised copy of the protection order in "their" motel room in your supplement.

58. Deputy Chief Garner found that Complainant's conduct in April 2019 was a "repeat of the insubordination" for which Complainant had been counseled by Srgt. Dipzinski in November 2015.

59. Deputy Chief Garner also found that Complainant failed to properly investigate a call for service as follows:

- (1) By ignoring or failing to recognize the probable cause presented to you during your contact with the male and female party (ig. [sic] The subjects are living together, took private transport to reach the location in which you contacted them and the initial report that the male party was chasing and yelling at the female).
- (2) By failing to properly investigate the call for service (ig. [sic] Making no attempt to contact the reporting party to obtain his statement even after you were informed the reporting party was a UCCS Parking Enforcement Officer who was currently on duty).
- (3) Your assertion that the sergeants were trying to gather evidence simply to reinforce their decision to order you to make an arrest is absurd. The sergeants were doing exactly what you should have been doing, which is gathering all of the available evidence to support the prosecution of this case in a court of law.

60. Deputy Chief Garner found that Complainant's handling of the April 12, 2019 dispatch call was a "repeat" of Complainant's "failure to properly investigate a call for service" for which Complainant received a corrective action in November 2015.

61. On May 6, 2019, Complainant was placed on paid administrative leave. (Stipulated fact.)

62. On May 7, 2019, Complainant was provided with a Rule 6-10 Meeting Notice. (Stipulated fact.)

63. On May 13, 2019, Complainant participated in a Rule 6-10 meeting, represented by legal counsel. (Stipulated fact.)

64. During the Rule 6-10 meeting, Chief Pino asked Complainant about the allegations contained in Deputy Chief Garner's report. Complainant admitted that he had a "conflict" with Sgt. Dipzinski. He stated: "Being told by a supervisor who was not on scene to make the arrest was, yeah, I considered that not a lawful order.... I don't see how you can provide oversight from a desk."

65. When Chief Pino asked Complainant about undermining Sgt. Dipzinski's authority, Complainant responded that Sgt. Dipzinski undermined him in front of his trainee and the other officers.

66. When Chief Pino asked Complainant about the man and the woman living together, Complainant explained: "The way that I read the protection order ... it restrained the male party from being at her residence. I never considered staying at a motel somebody's residence." Complainant further stated that it was "not general practice for police officers to investigate protection orders."

Termination Decision

67. Complainant met with Chief Pino on May 31, 2019, when he was provided with a Notice of Disciplinary Action, terminating his employment effective June 4, 2019. (Stipulated fact.)

68. Complainant was represented by legal counsel during the May 31, 2019 meeting. (Stipulated fact.)

69. In his Notice of Disciplinary Action, Chief Pino reached the following conclusions concerning Complainant's conduct:

[Y]ou have willfully violated a lawfully issued court-ordered protection order by failing to make an arrest when given a lawful order, willfully violated lawful orders from Sergeant Dipzinski, departed from the truth as captured on your Body Camera, and willfully acted insubordinately in violation of the Department's Standard Operating Procedures, specifically the On Duty Conduct policy. Your behavior constitutes a failure to perform competently, willful misconduct and violation of department rules and the law that affects your ability to perform your job, and a willful failure to perform your law enforcement duties.

70. In reaching his decision to terminate Complainant's employment, Chief Pino reviewed Deputy Chief Garner's investigative report, Complainant's statements during the Rule 6-10 meeting, the case file concerning the man and the woman, Complainant's body cam video from April 12, 2019, and the statements of Srgts. Dipzinski, Lockwood and Heidrick. Chief Pino considered Complainant's past performance, including the 2015 coaching memorandum and corrective action. Chief Pino also considered Complainant's refusal to acknowledge any misconduct, show any remorse or take any responsibility for his actions. Chief Pino concluded that Complainant did not exhibit "any conduct that would inform me that you would not engage in the exact same behavior again."

71. Chief Pino concluded that the "egregious nature" of Complainant's conduct,

“together with the severity, seriousness and effect, both on the department and broader law enforcement community, demands the most serious of discipline.”

72. Complainant filed a timely appeal of the termination decision on June 5, 2019.

ANALYSIS

A. 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, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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, 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 706-708. The ALJ is required to make “an independent finding of whether the evidence presented justifies a dismissal 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.

The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

B. RESPONDENT ESTABLISHED, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED ALL BUT ONE OF THE ACTS FOR WHICH HE WAS DISCIPLINED.

Respondent had the burden to prove, by a preponderance of the evidence, that Complainant committed the acts alleged by Chief Pino in his May 31, 2019 Notice of Disciplinary Action. *Kinchen*, 886 P.2d at 709.

1. Complainant's Willful Violation of Lawful Orders

Chief Pino found that Complainant willfully violated a court-ordered protection order by failing to make an arrest when given a lawful order and willfully violated lawful orders from Srgt. Dipzinski.

The evidence establishes that a protection order was issued to the man by Douglas County Court on March 21, 2019, and was valid through March 20, 2020. The terms of that protection order prohibited the man “from assaulting, threatening, abusing, harassing, following, interfering, or stalking” the woman and required the man “to stay away from” the woman’s residence or property. The protective order further stated: “No contact except electronic contact and contact in public places is permitted.”

Complainant found this order confusing. While Complainant may have been confused about the provisions of the protective order, Sgt. Dipzinski’s repeated orders to arrest the man were clear. Instead of listening to Sgt. Dipzinski’s explanations and instructions, and properly evaluating the evidence provided by the man and the woman about living together and “having a yelling match,” Complainant relied solely on his own limited observations of the man and the woman being cooperative. Complainant failed to obtain relevant information from Officer Duran, who observed the man chasing and yelling at the woman and calling her a “bitch.”

Complainant disregarded Sgt. Dipzinski’s directives and instead consulted with a junior officer, Officer Warren, who repeatedly insisted that the man and the woman could be together in public. Complainant focused on that limited exception, and disregarded the rest of the protection order and Sgt. Dipzinski’s directives. Complainant’s body camera recorded his comment to Officer Warren that Complainant “really didn’t want to take [the man] to jail.” It was only after Sgt. Heidrick ordered Complainant to arrest the man that Complainant finally instructed his trainee, Officer Marquez, to proceed with the arrest.

Complainant subsequently refused to comply with Sgt. Dipzinski’s order to supplement his report with relevant information concerning the man and the woman.

After considering all of the evidence presented, Respondent met its burden to prove, by a preponderance of the evidence, that Complainant willfully violated lawful orders.

2. Complainant’s Insubordination

Chief Pino found that Complainant “willfully acted insubordinately in violation of the Department’s Standard Operating Procedures, specifically the On Duty Conduct policy.”

Respondent submitted two “On Duty Conduct” policies as exhibits in this case. Both policies provide, in pertinent part, the following provisions concerning “Obedience To Orders” and “Insubordination”:

IV. OBEDIENCE TO ORDERS

Officers will obey any order lawfully issued by a supervisor or commander and will not commit any act in opposition to those orders be they verbal, written or conveyed through a third party of the same or lesser rank.

V. INSUBORDINATION

An officer may be found to be insubordinate for the following:

- A.) Failure or deliberate refusal by any officer to obey a lawful order issued by a supervisor of the Department...
- B.) Conduct that impairs the operation of the Department by interfering with the

- ability of work leaders or supervisors to maintain discipline.
- C.) Speech or conduct to a work leader or supervisor, which is discourteous, abusive, profane, or threatening.

The evidence establishes that Complainant not only acted in opposition to Sgt. Dipzinski's lawful orders, but that he was insubordinate. Sgt. Dipzinski testified that, when Complainant arrived at police headquarters, she asked him and Officer Warren to step into the sergeants' office. When Sgt. Dipzinski began explaining the need to arrest the man, Complainant became angry. He clenched his jaw, and with a piercing stare at Sgt. Dipzinski, pointed a finger in her face and yelled, "No, I can bring him back here and I can investigate further."

Sgt. Dipzinski saw that Complainant was reacting just as he had during a confrontation she had with him in November 2015. As a result of that prior confrontation, Sgt. Dipzinski gave Complainant a coaching memorandum for insubordination. Sgt. Dipzinski testified that Complainant was "so adamant" that he was right, just as he had been in November 2015. She didn't want Officer Warren, a younger officer, to see Complainant being "completely insubordinate," so she asked Officer Warren step outside.

After Officer Warren left the office, Sgt. Dipzinski put her hands up and told Complainant to calm down. She began explaining that they were mandated to arrest the man. If they didn't arrest the man and he ended up killing the woman, they would all be liable. Complainant responded that he didn't care what the man did to the woman. Sgt. Dipzinski was upset by Complainant's comments and his belligerent conduct towards her, and left the office to take a "breather."

Sgt. Heidrick testified that he was in the sergeants' office on April 12, 2019, during Complainant's confrontation with Sgt. Dipzinski. Sgt. Heidrick testified that Complainant's face was red and his fists were clenched. Complainant "got into her face" and was pointing at Sgt. Dipzinski. Sgt. Heidrick testified that Complainant's "anger level" was "incredible," and that he had never seen anything like that before in his career. Sgt. Heidrick's testimony was consistent with Sgt. Dipzinski's testimony and with the written statements he provided to Deputy Chief Garner as part of his investigation of Complainant's conduct.

Officer Warren testified that he entered the sergeants' office with Complainant, who began arguing with Sgt. Dipzinski. Complainant's behavior – raising his voice to a senior officer and a supervisor – made Officer Warren uncomfortable and he "was not sure how to process it." Sgt. Dipzinski asked Officer Warren to leave the room. Officer Warren's testimony about Complainant's behavior was consistent with the testimony of Srgts. Dipzinski and Heidrick.

During his testimony, Complainant denied that he acted aggressively towards Sgt. Dipzinski or pointed a finger in her face. He admitted that he disagreed with Sgt. Dipzinski and that she told him to "calm down." When asked about his prior coaching for insubordination, Complainant stated, "Obviously, I had a problem with Sgt. Dipzinski." In his April 17, 2019 memorandum, Complainant states that he was "angry and confused as to why the Sergeants got involved" and that he hated "it when Sergeants butt into my case." He subsequently refused Sgt. Dipzinski's order to supplement his narrative report concerning the April 12, 2019 dispatch call. Complainant's statements and actions confirm that he was angry and argumentative with Sgt. Dipzinski.

The evidence establishes that Complainant not only deliberately refused to comply with Sgt. Dipzinski's orders; his belligerent confrontation with Sgt. Dipzinski in the presence of a

junior officer interfered with her ability to maintain discipline. Officer Warren testified that he did not know “how to process” Complainant’s conduct. It was only after Srgt. Heidrick explained the protective order provisions to him that he understood that Srgt. Dipzinski was correct in ordering the arrest. The evidence establishes that Complainant engaged in discourteous, abusive and threatening speech and conduct, and was willfully insubordinate, towards Srgt. Dipzinski.

On June 4, 2019, Srgt. Lockwood provided the following comments concerning Complainant’s performance in his final performance evaluation form:

In my experience with Kurt. He can be very difficult to reason with. He refuses to listen to alternative views of others and is outspoken with his contempt of command staff.

. . . .

Kurt’s performance related to current events clearly shows his inability to work with others and/or supervisors when he does not understand or is not familiar with a law enforcement situation he is presented with. Job knowledge and life experience play a big role in knowing when you need to be humble and listen to others.

While Srgt. Lockwood was not involved in any of the incidents on April 12, 2019, his experience working with and supervising Complainant render his observations relevant and credible. These observations lend additional credence to the testimony of Srgt. Dipzinski, Srgt. Heidrick and Officer Warren about Complainant’s insubordinate conduct towards Srgt. Dipzinski.

After considering all of the evidence presented, Respondent met its burden to prove, by a preponderance of the evidence, that Complainant engaged in willfully insubordinate conduct.

3. Complainant’s Alleged Departure From the Truth

Chief Pino found that Complainant “departed from the truth as captured on your Body Camera.” This “departure from the truth” involved Complainant’s statements that the parties were not living together or sharing a residence, even though Complainant’s body camera footage contained comments to the contrary by the man being investigated.

Complainant stated that he had never received training on protection orders and how to handle them, had never investigated a protection order and had never investigated a crime off campus. He explained that he did not review his body camera footage before writing his narrative report, and did not consider a motel or hotel room to be “permanent housing” or a “residence.” The body camera footage reveals that Complainant appeared unsure of how to handle the situation involving the man and the woman, and was influenced by Officer Warren’s repeated statements that the man and the woman had a right to be together in public.

Deputy Chief Garner originally concluded, in his investigation of Complainant’s conduct, that Complainant “departed from the truth” when asked whether the man and the woman were living together. During his testimony, however, Deputy Chief Garner conceded that this conclusion was an overstatement. He testified that he did not believe that Complainant intentionally departed from the truth, but that Complainant was simply “mistaken” about the parties’ living arrangements.

After considering all of the evidence presented, Respondent failed to meet its burden to

prove, by a preponderance of the evidence, that Complainant was intentionally untruthful in stating that the parties were not living together or sharing a residence.

D. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW, AND WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES.

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 persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In reaching his conclusions concerning Complainant's conduct, Chief Pino used "reasonable diligence and care" to gather the available evidence and carefully considered that evidence. *Id.* at 1252. Chief Pino reviewed Deputy Chief Garner's investigative report, Complainant's statements, the case file concerning the man and the woman, Complainant's body cam video from April 12, 2019, and the statements of Srgts. Dipzinski, Lockwood and Heidrick. Chief Pino considered Complainant's past performance, including the 2015 coaching memorandum and corrective action. Chief Pino also considered Complainant's refusal to acknowledge any misconduct, show any remorse or take any responsibility for his actions.

Complainant's repeated refusal to obey Srgt. Dipzinski's orders, his hostile and insubordinate conduct towards her, and his failure to acknowledge his misconduct led Chief Pino to conclude that termination was the only appropriate discipline. Complainant's egregious conduct would not lead reasonable persons, fairly and honestly considering the evidence, to reach contrary conclusions. *Id.* at 1252.

The Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within the range of reasonable alternatives. In deciding to take disciplinary action, Respondent must 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.

In reaching his disciplinary decision, Chief Pino considered the information gathered by Chief Garner, Complainant's body cam video from April 12, 2019, and Complainant's statements during the Rule 6-10 meeting. Chief Pino also considered Complainant's previous performance evaluations and the documented coaching and corrective action Complainant received on November 17, 2015, as required by Board Rule 6-9. Chief Pino was especially concerned about Complainant's refusal to acknowledge any misconduct, show any remorse or take any responsibility for his actions.

Complainant's refusal to obey Srgt. Dipzinski's orders and insubordinate conduct were, as Chief Pino concluded, egregious actions justifying termination of Complainant's employment. These actions were exacerbated by Complainant's prior coaching for similar insubordinate

conduct towards Sgt. Dipzinski, as well as a corrective action for failing to adequately investigate a call for service, in November 2015. Chief Pino's unfounded conclusion that Complainant was "untruthful" does not mitigate or nullify the intolerable nature of Complainant's willfully insubordinate conduct in April 2019. Complainant's refusal to obey lawful orders, and his disrespectful and aggressive conduct towards Sgt. Dipzinski, alone justify the termination of his employment.

For all of these reasons, Respondent's decision to terminate Complainant's employment was not arbitrary, capricious or contrary to rule or law, and was well within the range of reasonable alternatives.

E. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Section 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "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 "a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C).

Because the ALJ finds that Respondent's termination should be affirmed, as discussed above, this action was not "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." Therefore, Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent proved, by a preponderance of the evidence, that Complainant committed all but one the acts for which he was disciplined.
2. Respondent's termination of Complainant's employment was not arbitrary and capricious.
3. Complainant's termination was within the range of reasonable alternatives.
4. Complainant is not entitled to an award of attorney fees and costs.

ORDER

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

Dated this 21st day
of August, 2020.

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

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of August, 2020, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and the attached **NOTICE OF APPEAL RIGHTS** addressed as follows:

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APPENDIX A

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: Complainant's Exhibits A-G, I, J, L, and M were stipulated into evidence.

COMPLAINANT'S EXHIBITS PLACED UNDER SEAL: Complainant's Exhibit I (Video Nos. 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 and 244) was placed under seal to protect the privacy of individuals who are not parties to this case.

RESPONDENT'S EXHIBITS ADMITTED: Respondent's Exhibits 1-15, 17-30 were stipulated into evidence. Respondent's Exhibit 16 was admitted into evidence without objection by Complainant.

RESPONDENT'S EXHIBITS PLACED UNDER SEAL: Respondent's Exhibit 3 (Video No. 234) and Exhibit 4 (Video No. 236) were placed under seal to protect the privacy of individuals who are not parties to this case.

APPENDIX B

WITNESSES

The following witnesses testified in the evidentiary hearing:

Lisa Dipzinski, Sergeant, UCCS Department of Public Safety

Kurt Liljekvist, Complainant

Jerod Heidrick, Former Sergeant, UCCS Department of Public Safety

Grant Lockwood, Sergeant, UCCS Department of Public Safety

Patrick Warren, Officer, UCCS Department of Public Safety

Clay Garner, Deputy Chief, UCCS Department of Public Safety

Marc Pino, Executive Director of Public Safety and Chief of Police, UCCS Department of Public Safety

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.

Email Filing: The parties are encouraged to file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at: <https://spb.colorado.gov/forms-and-filing>.