

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT TODD GONSER,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on August 13, 2007, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Brooke Meyer represented Respondent. Respondent's advisory witness was Karla Harding, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Robert Todd Gonser (Complainant) appeals his disciplinary thirty-day suspension and his disciplinary demotion from a Professional Engineer I to an Engineer in Training III. Complainant further appeals the disciplinary measure of prohibiting him from taking in-state, work-related overnight travel trips for a period of one year. Complainant seeks reduction or elimination of the demotion and/or the suspension, as well as removal of his travel restrictions. Respondent seeks to have the action of the appointing authority affirmed.

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

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee, who, prior to this matter, held the position of Professional Engineer I (PE I) at the Colorado Department of Transportation (CDOT), Region 4. Complainant has been employed by CDOT for approximately nine years.
2. Karla Harding is the Regional Transportation Director for Region 4, and is Complainant's appointing authority.

Events of April 18, 2007

3. As part of his work duties, Complainant was scheduled to attend an Association of Public Works meeting in Grand Junction from April 18 to April 20, 2007.
4. Because April 18 is Complainant's brother's birthday, Complainant had lunch with him in Evans, Colorado that day. After lunch, Complainant began driving to Grand Junction at approximately 1:30 p.m. Complainant did not stop for food, but did eat snacks in his CDOT truck as he drove.
5. The meeting Complainant was to attend was being held at the Doubletree Hotel in Grand Junction, and Complainant had a reservation at that hotel. However, when Complainant arrived, the Doubletree had sold his room, and did not have any other rooms available. Complainant called other hotels, and was able to locate a room at the La Quinta Hotel, which was about a mile away from the Doubletree.
6. Complainant checked into his room at the La Quinta at about 6:00 p.m., but then went back to the Doubletree Hotel about 8:00 p.m. to get some dinner because the La Quinta did not have a restaurant. When Complainant walked into the Doubletree, he saw a sign indicating that there was a party in a hospitality suite for people who were attending the Association of Public Works meeting.
7. Instead of eating dinner as he had planned, Complainant went to the party in the hospitality suite. While at the party, Complainant consumed three drinks of whiskey and coke in sixteen ounce cups. Complainant also ate some snacks at the party, but did not have dinner.
8. After the party was over in the hospitality suite, Complainant and some other people went to the Doubletree's lounge. Someone ordered another round of drinks for Complainant's table, and Complainant drank part of another whiskey and coke drink. Complainant did not eat dinner all evening.

9. After leaving the Doubletree's lounge shortly after 11:00 p.m., Complainant got into his CDOT truck and began driving back to the La Quinta Hotel. Complainant went through several intersections and was required to make several turns before reaching the La Quinta parking lot.
10. When Complainant entered the parking lot, he noticed it was very full. When he saw a vacant parking space, he swung his CDOT truck wide onto a grass area attempting to enter the vacant parking space. Complainant tried to apply the brake, but his foot slipped off the pedal and hit the accelerator causing Complainant to travel across the parking lot.
11. He tried to correct his steering to the left, but struck two parked empty vehicles on the right. His truck then came to a stop.
12. Witnesses to the accident called the police, who responded immediately to the parking lot. Complainant, who was very cooperative and polite, admitted to the police officers that he had been drinking and driving. Complainant also readily agreed to take a field sobriety test, which he failed.
13. After Complainant failed the field sobriety test, the police officers arrested him for suspicion of driving while under the influence of alcohol. The officers asked Complainant if he would submit to a breath test or a blood test. Complainant agreed to a blood test, and was handcuffed and transported in the back of a police car to the hospital for the blood test. Complainant's blood test results were 0.186, which is more than twice the legal limit for driving. Complainant has not been convicted of driving under the influence (DUI) as his case is still pending in Mesa County.

Complainant's Subsequent Actions

14. After Complainant finished the blood test at the hospital, the police officers gave him a ride back to the La Quinta. It was then approximately 3:00 a.m. Complainant was extremely concerned and called his supervisor, Gary DeWitt, at 3:00 a.m. to report the incident. He also left a voice mail for a co-worker, Dennis Allen, who had also been at the hospitality suite party.
15. Complainant took immediate responsibility for his actions. The morning after the accident, he waited for the owners of the two vehicles he had hit to come out so he could explain to them what had happened. He also left his business card on the vehicles so the owners could contact him later. Because Complainant's truck had been towed, Complainant rode back to Greeley with two other CDOT employees.
16. When Complainant returned to work on Friday, April 20, 2007, he met with Harding as quickly as he could, and admitted to the events of April 18, 2007.

Harding was already aware of the situation, and had already notified Complainant's supervisor that Complainant was not to drive any CDOT vehicles.

Investigation and Rule 6-10 Meeting

17. Based on the information she had, including the information she had received from Complainant, Harding determined that it was necessary for her to hold a pre-disciplinary meeting pursuant to State Personnel Board Rule 6-10. In preparation for her meeting, Harding had Rick Gabel, Region 4's North Program Engineer, and Wendy Miller, Region 4's Equal Employment Opportunity (EEO)/Civil Rights Specialist, meet with Complainant regarding the DUI arrest and the accident.
18. During the meeting with Gabel and Miller, Complainant was completely forthright and honest about the April 18, 2007 incident. Gabel also informed Complainant that, in accordance with CDOT Procedural Directive 81.2, he would need to meet with a Substance Abuse Professional (SAP) as a condition of returning to work. Gabel gave Complainant a list of names of SAPs.
19. Complainant contacted one of the SAPs on the list, only to learn that the person was not certified as a SAP. Gabel then gave Complainant other names of SAPs, and again, the one selected by Complainant was not certified. Finally, however, Complainant did meet with a certified SAP, and did everything that was asked of him; he was completely compliant.
20. Gabel prepared a report regarding the meeting he and Miller had with Complainant for Harding. Harding reviewed the report, as well as the applicable policies and procedures and the Code of Ethics for state employees before Complainant's Rule 6-10 meeting.
21. On May 5, 2007, Harding delivered a letter to Complainant regarding the Rule 6-10 meeting, which was scheduled for May 8, 2007.
22. Present at the Rule 6-10 meeting were Complainant, Harding, Gabel, Miller and DeWitt. During that meeting, Complainant was allowed to present information regarding the incident. Complainant was very honest with Harding and admitted to everything and was very remorseful.
23. After the meeting, Complainant sent Harding an email again apologizing for the incident and the disappointment and embarrassment he had caused. He further explained to Harding that he "cherished" his job and that he understood he had made a "huge mistake" and that he needed to be responsible for his actions and face the consequences. Harding considered this email in making her decision concerning Complainant's discipline.

24. Before making her final decision, Harding also considered the statements Complainant made during the Rule 6-10 meeting, the traffic accident report concerning the incident, the police report (both of which Complainant provided to her as soon as he received them), the results of Complainant's blood alcohol test, the report concerning Complainant's field sobriety test, a vehicle accident report completed by Complainant, the report from Gabel concerning his meeting with Complainant, CDOT Policy Directive 81.0 and CDOT Procedural Directive 81.2.
25. CDOT Policy Directive 81.0 does not apply to this situation because it concerns the use of alcohol and drugs by CDOT employees during work hours and job impairment. Complainant's accident did not take place during work hours and there was no evidence presented that Complainant's alcohol use impaired his job.
26. CDOT Procedural Directive 81.2 provides, in pertinent part, "Violation of this procedure may result in corrective and/or disciplinary action at the sole discretion of the appointing authority up to and including termination Employees are in violation of this procedure when they: . . . [O]perate CDOT motor pool vehicles, their personal vehicle on CDOT business, off-road construction equipment, or machinery while physically impaired from the use of alcohol, drugs, or both." This Procedural Directive was available to Complainant on the Internet, and Complainant was aware of it.
27. Harding determined that Complainant violated CDOT Procedural Directive 81.2 and that his behavior constituted willful misconduct. She also considered the nature, extent and seriousness of Complainant's offense. She considered mitigating factors which included Complainant's honesty about the incident and Complainant's personnel file which contained no corrective or disciplinary actions. Harding further considered her opinion that Complainant was an engineer who has value to the state.
28. Harding's initial inclination was to terminate Complainant, but she first checked with other Regional Transportation Directors to see what they did in situations involving employees who were disciplined for alcohol-related offenses. There was one other instance where an employee was driving a CDOT vehicle while intoxicated, and had an accident. That employee had a blood alcohol level over 0.2 and hit a sign; no other vehicles were involved. That individual received thirty days suspension and a demotion. There were no other instances where an employee had an accident while driving a CDOT vehicle while under the influence of alcohol.
29. After reviewing the information she received from the other RTDs, Harding decided to impose the following discipline on Complainant:

- 1) Complainant will not use state property while under the influence of alcohol or allow alcohol to affect his work performance or the reputation of state employees or CDOT;
- 2) Effective June 1, 2007, Complainant was demoted from a Professional Engineer I to an Engineer in Training III (EIT III) (the next lowest position) and his salary was reduced by 15%. Complainant is not eligible for promotion back to a Professional Engineer I for a minimum of one year;
- 3) Complainant was placed on disciplinary suspension without pay for thirty calendar days. Harding gave Complainant the option of taking one week suspension per month for four months, and required him to submit to Return-to-Duty Testing by an SAP.
- 4) Complainant was required to attend and complete any drug or alcohol classes as recommended by the SAP.
- 5) Complainant is allowed to drive state owned vehicles, but not authorized to take any in-state (overnight) travel trips for one year from the date of his disciplinary action letter. [Complainant's driver's license had not yet been revoked or suspended at the time the disciplinary letter was written.]
- 6) Complainant was to immediately notify CDOT of any change in the status of his driver's license, which he did.

Harding informed Complainant of his disciplinary action in a letter dated May 10, 2007.

30. Complainant's driver's license was revoked following the accident. Although Complainant's Position Description Questionnaire (PDQ) for both the Engineer in Training III position and the Professional Engineer position require him to have a valid Colorado driver's license, CDOT is accommodating Complainant by allowing him to ride with other employees.
31. Complainant's PDQ for the Engineer in Training III position contained many of the same duties as his Professional Engineer I PDQ. The Engineer in Training III position has an added duty of being on call. An Engineer in Training works on less complex assignments than a Professional Engineer I does and requires more oversight.
32. Although attending training and conferences is listed in Complainant's Engineer in Training III PDQ, he is precluded by his disciplinary action from attending any training or conferences that would involve overnight travel.

Events Following Disciplinary Action

33. Following Complainant's disciplinary action of May 10, 2007, Complainant was asked by another CDOT supervisor to interview for a vacant PE I position.

Because of his disciplinary action, Complainant was not allowed to interview for the position, which was upsetting to Complainant.

34. Complainant opted to take his suspension one week per month for four months. In June and July of 2007, Complainant entered his time as "leave without pay," but he actually went to work on those days. Complainant was not expecting to be paid, but did not want to let down the workers in his unit and there was a great deal of work to be done. When Harding discovered that Complainant worked those weeks, she requested that he be paid and told Complainant that he would have to not work during the weeks he was on leave without pay.
35. Colorado fleet management is requiring Complainant to reimburse the state for the value of the CDOT truck. Additionally, neither CDOT, nor Complainant's insurance, is willing to pay for the damage to the other two vehicles. Complainant has suffered great financial loss as a result of his DUI and his accident.
36. Complainant appealed his disciplinary action to the Board.

DISCUSSION

I. GENERAL

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.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12B, 4 CCR 801, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Complainant was disciplined for driving a CDOT truck while intoxicated, and hitting two parked vehicles. There is no dispute that Complainant committed those acts.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

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

Harding used reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant. She reviewed all of the potentially relevant policies and procedures. She reviewed the police report, the accident report, the field sobriety test results and the results of Complainant's blood alcohol level. Moreover, she had Gabel and Miller interview Complainant and prepare a report regarding that interview, which she reviewed. During the Rule 6-10 meeting, Complainant was given the opportunity to provide mitigating information. Harding considered all of the information provided by Complainant during the Rule 6-10 meeting, as well as the email he sent her following the meeting. The credible evidence demonstrates that Harding pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's mitigating circumstances. Board Rule 6-9, 4 CCR 801.

C. The discipline imposed was within the range of reasonable alternatives.

The discipline imposed by Respondent was within the range of reasonable alternatives. Harding contacted other appointing authorities within CDOT to aid her in determining what discipline was appropriate for Complainant. There was only one other CDOT employee who had a collision in a CDOT vehicle while driving under the influence of alcohol. That employee, who hit a sign, also received a thirty day suspension and a demotion, just as Complainant did. Complainant asserts that the discipline imposed is unduly harsh because of several mitigating factors. Most importantly, he has no prior corrective or disciplinary actions. However, Complainant's PDQ, both as a PE I and an EIT III, require him to have a valid Colorado driver's license. Although Complainant does not currently have a valid driver's license, CDOT is

accommodating Complainant and allowing him to work, instead of terminating him for not meeting one of the requirements for his position. While it is true that Complainant has never received any prior disciplinary or corrective actions, the acts of driving a CDOT vehicle while intoxicated and totaling the vehicle by running into two parked cars are serious, and warranted immediate disciplinary action. *See Board Rule 6-2.* Given the seriousness of Complainant's actions, a disciplinary action of a suspension, demotion, and a restriction on work-related travel, is within the range of reasonable alternatives.

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.

ORDER

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

Dated this 4th day of September, 2007



Hollyce Farrell
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. 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. 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 8-68, 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 record on appeal in this case is \$50.00. 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 8-69, 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

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 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 8-75, 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 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of Sept., 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Robert Todd Gonser


and in the interagency mail, to:

Brooke Meyer





Andrea C. Woods