

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CELESTE ARELLANO,
Complainant,

vs.

DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES, TITLE &
REGISTRATION SECTION,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on August 31 and September 16, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on August 31, 2012. The record was closed on September 21, 2012, upon the filing of Respondent's redacted admitted exhibits. Assistant Attorney General Micah Payton represented Respondent. Respondent's advisory witness was Maren Rubino, Operations Director of the Division of Motor Vehicles, Title and Registration Sections, and Complainant's appointing authority. Kate Sereff, Esquire and Sean Paris, Esquire, Pearson & Paris, P.C., represented Complainant.

MATTERS APPEALED

Complainant, a certified employee classified as an Administrative Assistant II (AA II) appeals her termination of employment from the Department of Revenue, Division of Motor Vehicles (DMV), Title and Registration Sections (Respondent), arguing that it was arbitrary, capricious and contrary to rule or law that Complainant was terminated from employment while she was in the middle of a performance improvement plan and was showing progress. Complainant asks for reinstatement to her position, back pay, attorney fees and costs, and other relief as determined by the ALJ. Respondent argues that the termination was properly imposed after Complainant had failed to comply with the terms of various improvement plans and corrective actions, and then received a "Needs Improvement" overall evaluation for the period of April 1, 2011 through March 31, 2012. Respondent asks that the discipline be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**, and Complainant's appeal is dismissed with prejudice.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action 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. Complainant was hired by Respondent as an AA II in October of 2008.
2. The purpose of the Title and Registration Sections is to ensure that vehicle ownership titles are correct and are handled according to the state legal requirements. The DMV offices in each county do the front end of the work on titles and registrations. The Title and Registration Sections provide support for the counties by performing research and answering inquires from the counties.
2. Respondent has two sections that perform similar vehicle title work: the Compliance and Audit Section, and the Title Processing and Verification Section. Respondent has a total of 12 employees in these two sections. There is a manager for each of the units, two support workers, and 8 administrative assistants.
3. Ms. Lomas hired Complainant as an AA II for the Audit and Compliance Section. Administrative Assistants for the section were normally hired at the AA I level, and then promoted to the AA II level. At the time of Complainant's hiring, there was a hiring freeze that would have gone into effect that would have created a problem in moving Complainant's position to the AA II level. Complainant was, therefore, hired at the AA II level.
4. In April of 2011, Complainant transferred as an AA II to the Title Processing and Verification Section. Complainant received the normal training for her positions in Audit and Compliance Section and for the Title Processing and Verification Section.
5. During the period that Complainant worked for the Title and Registrations Sections, her direct supervisor was Alma Lomas, Crystal Soderman, or Pamela England-Moore. Ms. Soderman was also Complainant's second-level supervisor when Complainant moved to the Title Processing and Verification Section in 2011. Complainant's third level supervisor was the section's Operations Manager, Irene Gutierrez. Complainant's appointing authority throughout her tenure with Respondent was Maren Rubino, Respondent's Operations Director.

Complainant's Performance Prior to 2011:

6. As an AA II, Complainant's primary duties included deciding whether to issue or reject a motor title application, determining whether to issue or reject Vehicle Identification Number applications, preparing title applications for the image section, processing mail-in abandoned vehicle notices to provide the agency with owner and lien holder information, and communicating with government agencies and the public by phone to handle inquiries and provide information on the applicable legal requirements.
7. Regardless of the specific section to which Complainant was assigned, one of the core functions for a AA II was to communicate well with county Motor Vehicle Offices (MVO) that called Respondent for assistance with title questions. County MVO staff would often call Respondent's offices while a title applicant was standing there at the county MVO office, waiting

for an answer on a title registration question. AA II workers in the title units were expected to be able to deal well with the county staff, and be able to provide clear, efficient, and correct answers to the title issues posed by the situation.

8. The sections in which Complainant worked were also small in terms of the number of employees. Complainant's ability get along with her co-workers in a small office environment was also an important performance component.

9. The work in each section involved a variety of tasks that were measured quantitatively. In the Audit and Compliance Unit, for example, the "good" standard required that Complainant be able to perform 26 – 55 specials and salvages audits, 33 – 44 tow searches per hour, or perform 15 – 31 bond searches per hour. Handling fewer audit or searches than the listed amount would constitute a "needs improvement" level.

10. By October 22, 2010, Complainant had worked for the section for two years. In that time, she had received a total of three corrective actions and had attended one Rule 6-10 meeting with Ms. Rubino in December of 2009.

11. The three corrective actions were issued on September 28, 2009; November 5, 2009; and October 22, 2009. Complainant did not grieve or appeal any of these corrective actions.

12. All three of Complainant's corrective actions included admonishments concerning Complainant's treatment of callers from county offices or her co-workers and supervisors.

13. The September 28, 2009 corrective action referenced three instances when a co-worker had complained about statements made by Complainant, a loud argument with a co-worker, and an argument with a supervisor while Complainant was receiving her nine month review that ended with Complainant walking out of the meeting. The September 28, 2009 corrective action noted that, of the three FTE in the Audit and Compliance Section, each employee had had some type of negative interaction with Complainant in the preceding six months, and that one of the employees had asked to move to another work area because of the interactions with Complainant.

14. The September 29, 2009 corrective action also referenced Complainant's statement to a co-worker during a call concerning a tow bill that Complainant had to leave soon and that she was just going to hang up on the call. The co-worker reported this statement to Complainant's supervisor, who interviewed Complainant about the call the next day. Complainant denied that she had hung up on the caller and said that the call was disconnected by accident.

15. Complainant's second corrective action was issued on November 5, 2009. At the time of this corrective action, Complainant had been on a performance improvement plan (PIP) since September 2, 2009, relating to her document processing production goals. The corrective action was issued, in part, because Complainant had not met acceptable production levels in three of the six areas measured as part of the PIP.

16. The November 5, 2009 corrective action also admonished Complainant for her handling of two calls from county MVO staff.

17. One call had occurred on October 5, 2009, involving a call from Sharon Adams of the Jefferson County MVO involving a Certified VIN verification issue. Ms. Adam's complaint was that Complainant had not listened to her question, and that Complainant had continued to tell

Ms. Adams only what the manual said. When Ms. Adams objected that she knew what the manual said but that the manual did not answer her question, Complainant told Ms. Adams that she (Ms. Adams) was not listening to Complainant, and Complainant repeated the manual statement again. Ms. Adams grew sufficiently frustrated with Complainant's response that Ms. Adams told Complainant to never mind the question and that her office would figure out the issue.

18. The second call referenced in the November 5, 2009 corrective action involved an October 23, 2009 call from Sherry Schaffer at the Pueblo County MV. Ms. Schaffer emailed Ms. Soderman on October 28, 2009 with a complaint that Complainant interrupted Ms. Schaffer and did not allow her to complete her sentences. Complainant also asked Ms. Schaffer something to the effect of what is wrong with Pueblo and why did Pueblo have to have something special, and Ms. Schaffer answered that she was not asking for something special. At that point, Complainant laughed and told Ms. Schaffer that she was just joking. Ms. Schaffer eventually decided that Complainant did not know the answer to the question, so she told Complainant that she would find someone else to help her.

19. Complaint's third corrective action issued October 22, 2010, admonished Complainant for her handling of three other inquiries from counties.

20. Ms. Soderman admonished Complaint for providing incorrect information in two of the instances. Ms. Soderman received information from Linda Ward of the Alamosa County MVO that Complainant had told her during the mini conference held that previous September that Ms. Ward needed to contact the trainers if there was a question on how to complete a particular form. Ms. Soderman also received information that staff at the Heurfano County MVO had obtained the answer concerning their issue after calling a trainer and working through the applicable decision tool for that issue, and that Complainant had gone on and on about the issue when the office contacted her and eventually told them that they would need a court order form District Court.

21. The third corrective action also admonished Complainant for the manner in which she handled a call from Jessica Guerra, of Dino's Customs, regarding an assigned VIN application. Ms. Guerra complained to Irene Gutierrez that she had never been treated so rudely by anyone at the state, and that she wanted to file a complaint because Complainant had refused to give her any information even after she told Complainant that she had a power of attorney.

22. The three corrective actions required that Complainant take the time to listen carefully to the callers so as to understand the question fully, and to use tact and diplomacy in responding to the caller, even when the call was stressful because the caller was upset.

23. Complainant had also been observed reacting impatiently or rudely to co-workers or her supervisors on a number of occasions, particularly when they were providing her with advice on how to handle an issue or were explaining why they had taken an action that Complainant disagreed with or did not understand. Complainant was instructed to use tact and diplomacy when interacting with co-workers, and to take the time to listen to what was being said and think about her response before speaking.

24. Given that Complainant had been given two corrective actions within a matter of months at the end of 2009, Complainant's appointing authority, Ms. Rubino, decided to hold a predisciplinary Rule 6-10 meeting with Complainant.

25. Complainant attended the Rule 6-10 meeting with Ms. Rubino on December 29, 2009, to discuss her performance in meeting quantitative standards, along with her customer service and interpersonal skill issues. During this meeting, Complainant noted that her supervisors had not provided her with sufficient guidance for at least the first six months on the job. Complainant also noted that her performance had improved in December of 2009, and asked Ms. Rubino to take those results into account as well. Ms. Rubino researched that issue by examining the supervisory records on the types of feedback that had been provided to Complainant and found that there had not been much guidance provided to Complainant initially. Ms. Rubino also expanded her review of Complainant's performance to include her December 2009 results.

26. Ms. Rubino found that Complainant had brought her quantitative performance levels up to the required levels in December of 2009, and that there was no indication that her interpersonal or customer service skill issues had continued in December of 2009. As a result, Ms. Rubino decided not to take corrective or disciplinary action.

27. Complainant's annual performance reviews from 2008 – 2009, 2009 – 2010, and 2010 – 2011 were all at an overall rating of "2" or "Good."

28. Complainant's mid-year reviews and the annual reviews on the core competency areas and job factors, however, showed that Complainant was at a Needs Improvement level on a variety of competencies and factors. In Complainant's 2010 – 2011 annual performance evaluation, for example, Complainant was rated at Needs Improvement for the core competencies of Communication and Customer Service, and at the Needs Improvement level for the job performance factor of Problem Solving. The other core competencies and job performance factors were rated at the Good level.

Complainant's Performance in 2011-2012:

29. Complainant continued to struggle with her relationships with co-workers and supervisors in the Audit and Compliance Section during 2011. In January 2011, Complainant was overheard responding to a co-worker in a way that was not tactful or diplomatic on two different occasions. Complainant apologized to the co-worker concerning one interaction.

30. In February 2011, Complainant argued with her supervisor, Ms. England-Moore, when Ms. England-Moore was attempting to explain why a rejection form had been changed. The next day, Complainant came to Ms. England-Moore for assistance about an application rejection issue, and then was overheard telling the caller with the question that she would check again and asking another co-worker the same question that she had asked Ms. England-Moore. During this two-month period to time, Complainant also had made mistakes on some title applications that were caught during audits of the title applications.

31. On February 14, 2011, Complainant received her fourth corrective action. This corrective action noted the issues that had been observed in January and February of 2011, and required Complainant to make a number of changes in her performance. Complainant was admonished that she had to consistently speak to others in a respectful, tactful, and diplomatic manner, and that she must handle stressful situations without taking it out on her co-workers. Complainant was also reminded that she had to consistently allow others to complete their comments, to demonstrate her willingness to listen without interruption, and to consider her responses before she spoke.

Transfer to the Title Processing and Verification Section:

32. Ms. Rubino approved the plan to transfer Complainant from the Audit and Compliance Section to the Title Processing and Verification Section because Complainant was not able to bring her work to a consistently acceptable level in the Audit and Compliance Section. Ms. Rubino thought that Complainant might do better in a section where she did not have to handle the more complicated title issues that the Audit and Compliance Section addressed. Complainant moved to the Title Processing and Verification Section in April of 2011.

33. Complainant's adjustment to the Title Processing and Verification Section did not correct some of the issues which had been noted previously. Complainant's quantitative productivity measures in the new unit from April 7 through May 26, 2011, were not uniformly at the acceptable level.

34. On May 11, 2011, Complainant received a complaint about her customer service from a Jefferson County clerk. Complainant's supervisors initially understood that part of the issue was that Complainant had hung up on the caller. When the complaint was received, Complainant's phone duties were removed in order to allow her to focus on the other duties in her new unit without having to provide services to the callers from the county DMV offices.

May 2011 Rule 6-10 Meeting:

35. Ms. Rubino scheduled a predisciplinary Rule 6-10 meeting with Complainant for May 26, 2011, to discuss Complainant's performance in the Title Processing and Verification Section. During that 6-10 meeting, Complainant discussed with Ms. Rubino that she didn't feel that she had sufficient training to meet the quantitative expectations immediately. Complainant also told Ms. Rubino that she had not hung up on the caller.

36. By letter dated July 26, 2011, Ms. Rubino concluded the Rule 6-10 process without taking corrective or disciplinary action in significant part because she had determined that Complainant had not hung up on the caller from the Jefferson County MVO. Ms. Rubino reinstated Complainant's phone answering duties, and noted that Complainant must be able to successfully perform such duties in order to hold the AA II position. Ms. Rubino also informed Complainant that the terms of her previous four corrective actions remained in effect.

Complainant's 2011-2012 Performance Review and Performance Improvement Plan:

37. On or about April 13, 2012, Complainant's direct supervisor at the time, Ms. Lomas, and her second-level supervisor, Ms. Soderman, issued Complainant an overall Level 1 / Needs Improvement evaluation for the performance year of April 1, 2011 through March 31, 2012.

38. Of the five core competencies, Complainant received a Needs Improvement rating in four categories: Communication, Interpersonal Skills, Customer Service, and Accountability. Complainant received a Good rating in the core competency of job knowledge.

39. Complainant was also given a Needs Improvement rating in two of the three job performance factors: Quality Measures and Problem Solving. Complainant received a Good rating for the job performance factor of Quantity Measures.

40. The primary bases for the Needs Improvement ratings stemmed from Complainant's inability to fulfill the requirements from her February 14, 2011 Corrective Action, which required

Complainant to maintain a Good level of performance in the areas of Communication, Interpersonal Skills, Customer Service, Quality Measures and Accountability.

41. The performance review noted that Complainant had had six documented incidents involving her interpersonal communications during the performance year period, including four incidents involving her communications with co-workers, and one complaint involving a caller concerning her customer service. The review also noted that Complainant had had seven incidents where her quality measures were not at the Good level.

42. Complainant's performance review form noted that a corrective action or performance improvement plan that lists specific improvements must accompany a Needs Improvement evaluation. The narrative in Complainant's review also noted that Complainant was "subject to further corrective or disciplinary action."

43. The overall Needs Improvement rating was reviewed by a panel of seven upper level supervisors, including Ms. Rubino, prior to its issuance to Complainant. The reviewers agreed with the rating.

44. Complainant disagreed with the evaluation because she believed that the complaints from her co-workers about her interpersonal skills were subjective, and that they objected to her personality rather than her work performance. Complainant also agreed to attend CSEAP counseling because she wanted to understand why others reacted so negatively to the things she said.

45. On April 17, 2012, Ms. Lomas and Soderman implemented a PIP for Complainant which addressed the areas which had received Needs Improvement ratings in Complainant's 2011-2012 annual performance review. The PIP required that Complainant be evaluated for compliance on four dates: April 27, May 4, May 11, and May 18, 2012.

46. In the first weekly PIP review meeting of April 27, 2012, Complainant and Ms. Lomas discussed that she had walked away from a supervisor when she was receiving feedback, she had disrupted the office by standing up and stating, "God help us all" in a voice loud enough for other workers to hear, she had rejected two duplicate titles that should have been allowed, and she was missing one form. In the other performance areas covered by the PIP, Complainant was found to have had no problems reported during the week, including good ratings for all of her quantitative measures for all but one type of document processing.

The Decision To Terminate Complainant's Employment:

47. Ms. Rubino sent Complainant a notice dated April 20, 2012, that there would be a Rule 6-10 meeting on April 27, 2012, to discuss Complainant's Needs Improvement performance evaluations from the last two years.

48. Complainant and Ms. Rubino met on April 27, 2012, to discuss Complainant's history of performance evaluations. Complainant had an opportunity to present Ms. Rubino with her explanation for why she was given a Needs Improvement overall rating in the most recent annual performance review, as well as the Needs Improvement ratings in various sections of her prior annual review.

49. Complainant explained to Ms. Rubino that her co-workers and supervisors were harassing her by complaining about her, and that she did not feel as if she fit in with the group.

Complainant explained why she made the remark about the help desk that was reported to her supervisors. Complainant also explained that her co-workers simply did not like her, and that their complaints had to do with her personality rather than her work. Complainant brought up that she had asked for a transfer to a different unit.

50. The day of the Rule 6-10 meeting, Ms. Rubino had also received a complaint from a supervisor of the help desk which reported that Complainant had told a caller from the Huerfano County MVO not to call the help desk because they were overwhelmed and to call the training staff instead for assistance. Complainant discussed that issue with Ms. Rubino and explained why she told the caller not to call the help desk, and told Ms. Rubino that she had been instructed that no one was to call the help desk unless they had not been able to contact their IT trainer. Ms. Rubino told Complainant that such an instruction would be outside of normal practices and that it reflects badly on the team.

51. Ms. Rubino told Complainant during their meeting that she was very concerned that Complainant did not accept responsibility for making changes to her performance, but was instead was taking the position that there were no performance issues.

52. Ms. Rubino considered all of Complainant's performance reviews in reaching her decision on what action, if any, to take concerning Complainant's performance. She took into account the four prior corrective actions that had been issued to Complainant. Ms. Rubino also took into account various PIPs that had also been implemented over the years to improve Complainant's performance.

53. Ms. Rubino tracked the number of times that supervisors had intervened with Complainant to provide correction and guidance to Complainant over the previous years. She calculated that there had been no fewer than 60 meetings with Complainant concerning various performance issues. Ms. Rubino considered this to be an excessive amount of supervisory time spent on the performance issues of one employee. No other employee in the sections required anything like that level of supervisory effort.

54. Ms. Rubino decided that Complainant had been provided with ample guidance on what performance factors she needed to improve. She also considered Complainant's work history to show that, while Complainant could improve her performance for short stretches of time, Complainant was not going to be able to consistently reach the required performance levels for an AA II in either of Respondent's sections.

55. Ms. Rubino also rejected Complainant's request for a transfer because she had no indication that a transfer would improve Complainant's performance.

56. By letter dated and delivered on April 30, 2012, Ms. Rubino informed Complainant that she had concluded that "it is evident that your job performance is unsatisfactory...[i]n the areas of communication, interpersonal skills, customer service, accountability, problem solving and quality of work your work failed to consistently meet standards and expectations for this position. These areas represent 70% of your performance evaluation." Ms. Rubino noted that Complainant's performance had been deemed to be unsatisfactory as documented on her performance evaluations in the alt two consequent performance period, with ratings of 'needs improvement' in several areas and an overall rating of 'needs improvement' this past year.

57. Ms. Rubino informed Complainant that, effective at the end of the day on April 30, 2012, Complainant's employment with Respondent would be terminated. Ms. Rubino provided Complainant with a correct statement of her appeal rights.

58. Complainant filed a timely appeal of her termination with the Board.

DISCUSSION

I. GENERAL

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; C.R.S. § 24-50-101, *et seq.*; *Department 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. *Kinchen*, 886 P.2d at 704. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

The core evidentiary issue presented at hearing concerned whether or not Respondent could prove that Complainant had committed performance violations in the 2011-2012 performance period.

Complainant argued at hearing that her co-workers had exaggerated some of their reports of her actions and that her supervisors had been unfairly focusing on her. Complainant also argued that her co-workers and supervisors were objecting to Complainant's personality rather than her performance.

The evidence at hearing established that Complainant had indeed been having trouble with her interpersonal relationships during her entire tenure with Respondent. She demonstrated a tendency to say things which created conflict with her co-workers, to fail to respond well when her supervisors corrected her, and to handle callers in ways that created additional conflict or failed to provide the expected level of customer service. It may be that

Complainant's personality is not well-suited for small office environments and customer service on telephone calls. The fact that there may be a personality component to this issue, however, does not diminish the fact that Complainant struggled with her performance in these areas over a number of years, and that she never found a solution that permitted her to meet the performance expectations in these areas.

Accordingly, Respondent has proven by preponderant evidence that Complainant committed the acts for which she was terminated.

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).

Complainant's primary argument at hearing was that Complainant's termination while she was on a performance improvement plan, and doing reasonably well on that plan, constitutes arbitrary and capricious action that is contrary to the personnel rules.

The implementation of a PIP or corrective action is required under Board rules when an employee receives an overall "Needs Improvement" rating. Board Rule 6-6, 4 CCR 801, provides that, "[a] needs improvement performance rating shall result in a performance improvement plan or a corrective action and a reasonable amount of time must be given to improve, unless the employee is already under corrective or disciplinary action for the same performance matter." The rule permits an agency to impose either a PIP or a corrective action in response to an overall Needs Improvement rating. In this case, Complainant's supervisors decided to implement a PIP, and that PIP was on-going while Complainant's appointing authority was deciding whether to take disciplinary action.

The rule issue, therefore, is whether Respondent needed to allow Complainant time to improve her performance under the PIP prior to deciding to take disciplinary action. Prior to her 2011-2012 annual performance evaluation, Complainant had been subject to four corrective actions that had addressed the same fundamental themes that Complainant was not using sufficient interpersonal, communication, or customer service skills in her handling of callers, supervisors, and co-workers. Complainant's 2011-2012 annual evaluation included these very same themes, and the PIP imposed as a result of that evaluation covers the same issues. Under such circumstances, there is no need under Board Rule 6-6 for Respondent to wait to take action to determine if Complainant would be able to improve her performance because the PIP addressed the same performance matters as the prior corrective actions. Respondent's imposition of discipline while the PIP was on-going did not violate Board Rule 6-6.

Respondent's action in taking disciplinary action also comports with Board Rule 6-9, which requires that a decision to take disciplinary action "shall be based on 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.” In this case, Complainant’s history of corrective actions and the repetitive nature of her performance deficits lead to the conclusion that the imposition of disciplinary action was a reasonable response. There has been no violation of rule or law in Respondent’s handling of this issue.

Respondent’s actions in this case were also neither arbitrary nor capricious, as those terms are defined in *Lawley*. The evidence at hearing demonstrated that Ms. Rubino assembled the information she needed to evaluate Complainant’s performance, and provided Complainant with an opportunity to address that information. Ms. Rubino’s actions in evaluating Complainant’s performance in each of her Rule 6-10 meetings with Complainant reflect that she provided an honest and reasonable assessment of the circumstances. When Complainant told Ms. Rubino during their first Rule 6-10 meeting in September of 2009 that Complainant had not been able to spend much time with her supervisors and being trained, Ms. Rubino’s response was to examine the supervisory records and to determine that Complainant had not had the benefit a much early guidance. Ms. Rubino, accordingly, did not take the first six months into account in evaluating Complainant’s work record, and she expanded the review to include Complainant’s more successful December 2009 performance. Similarly, when Complainant and Ms. Rubino met during the second Rule 6-10 meeting in November of 2010, Ms. Rubino had been told that Complainant had hung up on a caller. The evidence, however, did not support such a claim, and Ms. Rubino changed her mind about what had occurred during that event. The record also supports that Ms. Rubino provided a similarly candid and honest assessment of the circumstances which had prompted the third Rule 6-10 meeting with Complainant, and that she reached a reasonable decision that Complainant had not met her performance expectations and was not going to be able to consistently meet her performance requirements. Such a conclusion is neither arbitrary nor capricious under the circumstances of this case.

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

The final question is whether termination was within the range of reasonable alternatives available to Ms. Rubino.

Complainant had been subject to multiple efforts to allow her to correct her performance. Although no prior discipline had been imposed, the steady imposition of corrective actions provided Complainant with ample warning as to which areas of her performance had to improve. Those improvements did not occur. Moreover, the areas of performance which were at issue were key performance areas, such as Complainant’s ability to provide customer service to the county MVO staff and her ability to work well in a small work unit environment. Ms. Rubino’s assessment that Complainant seemed unable to acknowledge that there were issues with her performance, and that such a stance would make it unlikely that Complainant would be able to change her performance levels, was a reasonable conclusion here. The termination of Complainant’s employment was within the range of reasonable alternatives under such circumstances.

D. 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. C.R.S. § 24-50-125.5; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear

the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

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 8-38(A)(3). Frivolous actions, on the other hand, are actions "in which is it found that no rational argument based on the evidence or law is presented." Board Rule 8-38(A)(1).

In this case, Respondent's actions have been fully upheld as well grounded in fact and in law. Complainant has not demonstrated that Respondent's decision to terminate her was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Complainant is not entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she 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**. Complainant's appeal is dismissed with prejudice.

Dated this 5th day
of NOVEMBER, 2012 at
Denver, Colorado.



Denise DeForest
Administrative Law Judge
State Personnel Board
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CERTIFICATE OF MAILING

This is to certify that on the 07th day of Nov., 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Kate Sereff, Esq.

[REDACTED]
[REDACTED]

Micah Payton, A.A.G.

[REDACTED]
[REDACTED]

[REDACTED]

Andrea Woods

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 8-67, 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 8-70, 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 8-68, 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 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 8-69, 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

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 8-72, 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.