

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020B053**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ERIC SCHOLL,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL FACILITY,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing on August 31 – September 2, 2020, via web conference. The record was closed on September 10, 2020, after the ALJ received and reviewed properly redacted exhibits from the parties.

Throughout the hearing, Complainant appeared via web conference in person and through his attorney, Casey J. Leier, Esq. Respondent appeared via web conference through its attorney, Senior Assistant Attorney General Lauren K. Peach, Esq. Respondent's advisory witness was Maureen Sheridan, Investigator.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's termination of his employment. Complainant argues that this termination was arbitrary and capricious. He seeks reinstatement, back pay, 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 discipline Complainant is **affirmed**.

ISSUES

1. Whether Complainant committed the act 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. Complainant began his employment with the Department of Corrections (DOC) on February 13, 2017. (Stipulated fact.¹)
2. Complainant was certified to his position, with rights under the State Personnel Board System. (Stipulated fact.)
3. Complainant was a Correction Officer I (Officer) for the entirety of his employment with DOC. (Stipulated fact.)
4. At all relevant times, Colin Carson, Associate Warden, Colorado Territorial Corrections Facility, was Complainant's appointing authority.

Complainant's Performance History

5. On April 26, 2017, Complainant received an overall Level II (Satisfactory) performance evaluation in his first annual review.
6. On September 20, 2017, Complainant's supervisor, Danny Eggers, issued a performance document concerning Complainant's acceptance of a soda from an offender. Supervisor Eggers noted the following concerns:

While managing offenders and performing daily duties, staff will maintain the utmost of professionalism and tact to ensure positive, constructive and open communication. It is the responsibility of staff to make certain strict boundaries are defined as well as maintained when communicating and interacting with the offender population. Miscommunication creates anxiety as well as unintentional and unforeseen consequences. Situations will arise that may create uncertainty when dealing with offenders. In order to avoid such issues in the future, CO Scholl will familiarize himself with policy and procedure as well as seek guidance from supervisors prior to making a decision that may blur boundaries, be inconsistent or violates [sic] policy.

7. As a result of the concerns described above, Supervisor Eggers ordered the following actions to improve Complainant's performance:

Officer Scholl will familiarize himself with policy and procedure to include 1450-1 Code of Conduct as well as AR 100-19 Communication with offenders. Officer Scholl will meet with his immediate supervisor within one week of receiving this performance documentation to discuss the behavior and how he will handle future situation [sic].

¹ The parties stipulated to certain facts.

8. Administrative Regulation (AR) 100-19, Section IV(A)(1)(b) provides, in pertinent part:

DOC employees ... will communicate with offenders in a professional manner. Inappropriate areas of communication include, but are not limited to:

1) Personal Matters: Family relationships, phone number/addresses, substance abuse, medical issues, personal history, sexual preference, financial issues, criminal history, corrective/disciplinary actions, other DOC employees, contract workers, or volunteers, and religious proselytizing.

.....

4) Offender Information: Crime, sexual preference, protective custody issues, family background, file information, medical/mental health history, and religious affiliation.

9. AR 1450-01, Section IV(D)(8) provides: "DOC employees ... will not discuss their personal lives or other DOC employees, contract workers, and volunteers [sic] personal lives with offenders."

10. On November 29, 2017, in his mid-year review, Complainant received an overall Level II (Satisfactory) performance evaluation from his new supervisor, Sarah Ann Heisch. In a narrative describing Complainant's performance in the area of Communication, Supervisor Heisch noted: "Scholl needs to ensure that he has open communication with offenders while maintaining that professional boundary. Scholl needs to focus and learn where his line is between being approachable and assisting offenders and being overly friendly."

11. On April 30, 2018, Complainant received an overall Level I (Unsatisfactory) performance evaluation in his second annual review. In a narrative describing Complainant's performance in the area of Communication, Supervisor Heisch noted:

Officer Scholl has struggled in this competency during this rating period and has had a steady decline since his last review. Officer Scholl's [sic] was tasked with his mid-year review to focus on having an open communication style with offenders while maintaining a professional boundary. He has failed to improve in this area, Officer Scholl has been counseled several times and has continued to struggle in this area to the point of giving his personal information to offenders as well as releasing offender information to a different offender. This jeopardizes himself, his co-workers, and the offender population. ... To meet expectations Officer Scholl needs to continue to focus on being firm, fair and consistent in his communication style and ensure he holds all offenders accountable for their behavior while focusing on understanding the professional boundary between himself and the offender population. He needs to ensure every interaction he has with offenders or staff is positive and professional.

12. On April 30, 2018, Associate Warden Carson issued a corrective action to Complainant for looking up sensitive information for offenders on the computer, telling some offenders that Complainant was under investigation, and engaging in a "pull up" competition with an offender. Associate Warden Carson found that Complainant violated Respondent's Mission

Statement, Administrative Regulation (AR) 100-18; AR 100-19, Communication With Offenders, and Respondent's Code of Conduct, AR 1450-01. Associate Warden Carson instructed Complainant to thoroughly review these three ARs.

13. On November 28, 2018, in his mid-year review, Complainant received an overall Level II (Satisfactory) performance evaluation due to his improved performance in all competency areas.

14. On February 27, 2019, Complainant received a Corrective Action for failure to meet work deadlines, questionable attendance, and improper use of leave. Complainant did not file a grievance regarding this Corrective Action. (Stipulated fact.)

15. On April 21, 2019, Complainant received Complainant received an overall Level II (Satisfactory) performance evaluation. Supervisor Heisch noted that Complainant "is responsive to the offender population and generally would like to help them be successful. Officer Scholl still needs to be mindful of the potential for manipulation and ensure he maintains an open communication style while maintaining professional boundaries."

16. On November 19, 2019, in his mid-year review, Complainant received an overall Level II (Satisfactory) performance evaluation. Supervisor Heisch again noted that Complainant "still needs to be mindful of the potential for manipulation and ensure he maintains an open communication style while maintaining professional boundaries."

Complainant's Interactions with Offender G.T.²

17. During the August – September 2019 time period, Complainant worked at Colorado Territorial Correctional Facility. (Stipulated fact.)

18. During the August – September 2019 time period, Complainant was assigned to a unit in which an offender, G.T., was housed. (Stipulated fact.)

19. Sometime in early August, 2019, Complainant told G.T. that he sees his wife all the time at the gym. Officer Brianna Marquez overheard this comment.

20. On the morning of September 5, 2019, Complainant, Officer Marquez and Officer Kenneth Wofford were assigned to the housing unit. Offender G.T. was working as a porter, cleaning the lower level of the housing unit. Complainant told G.T. to ask his wife about the self-checkout at Walmart.

21. G.T. became angry and, using profanity, yelled at Complainant to keep his wife's name out of Complainant's mouth.

22. Officers Marquez and Wofford overheard the exchange between Complainant and G.T.

23. Later on during the morning of September 5, 2019, Officer Brianna Marquez was counting the offenders in the housing unit. G.T. told Officer Marquez that he was upset with Complainant's comments about his wife, and that he was going to complain to the Warden. G.T. also told Officer Marquez that, "If this does not get fixed, I will punch him in the face."

² Initials are used for the offender's name to protect his privacy.

24. After the count was completed, Officer Marquez reported her conversation with G.T. to her housing supervisor, Lieutenant (Lt.) Cobler.

25. After Officer Marquez reported this incident to Lt. Cobler, Captain Matthew Valdez came down to the housing unit. Officer Marquez told Captain Valdez what happened between Complainant and Offender G.T.

26. Captain Valdez instructed Officer Marquez, Officer Wofford and Complainant to prepare individual incident reports concerning Complainant's interaction with G.T.

27. Complainant prepared and submitted the following incident report:

While working in Ch-3 [G.T.] was down in the lower vestibule cleaning as he is a porter in Ch-3. Offender [G.T.] was standing by the slider to get back to the sergeant's office. I had asked the offender if his wife disliked the self checkout in Walmart because I had heard that they re-did the front of the store. (I had seen her in the front of the store checking out and she was on the south side of the store and I had been on the north side of the self check out line and did not speak to her, and her back was facing me. But I recognized her by the pictures the offender had shown me.) This was around 5:45 P.M. on Wednesday Sept. 4th.) Offender [G.T.] then became agitated and began cursing and went upstairs to his cell. Offender [G.T.] had shown me pictures before of his family and his wife after I had conducted a shakedown. He has talked to me on numerous occasions about his case and how he was going to file for divorce and other personal matters with his family. He has told me that his family moved to Canon City so that way they could be closer to him while he is doing time at this prison. Offender [G.T.] has often told me about his visits and come to me when he was frustrated after a phone call. This has been much of the conversation that this offender has had with me other than when we talk about weight lifting and how he used to work on an oil rig. He has asked me before if I had seen her in town and even if we went to the same gym. I do not tell the offender where I work out but told him that it "sounds like a good gym. I hear that they are the best in town." I believe that he told me that she works on Justice way [sic] in Canon city [sic] as well. I had told Offender [G.T.] that I live around here and that is why he keeps insisting to tell me this information.

28. During a telephone conversation on September 5, 2019, Offender G.T. angrily informed his wife that Complainant was talking about her.

29. G.T.'s wife emailed complaints about Complainant's comments to Respondent on September 5 and 9, 2019, and to Investigator Sheridan on September 16, 2019.

Office of the Inspector General (OIG) Investigation

30. On September 6, 2019, Investigator Maureen Sheridan from the DOC Office of the Inspector General began investigating allegations that Complainant was making comments to an inmate about his wife.

31. On September 7, 2019, Offender G.T. was involved in a fight with another offender. The other offender accused G.T. of getting Complainant in trouble and called G.T. a "snitch."

32. On September 9, 2019, Investigator Sheridan interviewed G.T. G.T. stated that Complainant had been making comments about G.T.'s wife for a few months, which made him angry. G.T. wanted Complainant to stop talking about G.T.'s wife.

33. Investigator Sheridan also interviewed G.T.'s wife by telephone. G.T.'s wife verified that she was at the Walmart self-checkout on the evening of September 4, 2019. G.T.'s wife also stated that, after learning about Complainant's comments about her, she looked him up on Facebook and found his photo. G.T.'s wife recognized him from the gym as someone who tried to make "small talk" with her a few times.

34. Investigator Sheridan reviewed the September 5, 2019 incident reports by Complainant, Officer Marquez and Officer Wofford, and gathered information about the September 7, 2019 fight between G.T. and another offender.

35. On September 18, 2019, Complainant was interviewed by investigator Sheridan. (Stipulated fact.)

36. During the interview, Complainant stated that he was not sure whether he saw Offender G.T.'s wife at Walmart on September 4, 2019. Complainant stated that he saw G.T.'s wife's photograph when he was doing rounds, not during a shakedown, as he had not performed a shakedown for several months.

37. During the interview, Complainant stated that he was not sure whether he saw G.T.'s wife at the gym; he might have said "hi" to her when he had his headphones on. Complainant stated that he "did not remember" talking with G.T.'s wife. He claimed that incidents were "twisted," and that he was "targeted" and "blamed for everything."

38. Sometime in late October 2019, Investigator Sheridan talked with Associate Warden Carson about the results of her investigation.

39. Investigator Sheridan sent her investigation report to Associate Warden Carson on November 1, 2019. This report contained the following summary of her findings:

Inmate G.T. was upset after Officer Eric Scholl made a comment about his wife at the Walmart self checkouts. This comment was witnessed by two other staff. Scholl stated in his report that he saw T's wife at the check out. One of the staff reported she had heard Scholl make comments approximately a month prior.

T's complaint was this had been going on for a few months, he told Scholl to stop and he didn't. T's wife Z.T. wrote complaints to headquarters about the situation. She was worried Officer Scholl was stalking her. She looked Scholl up on Facebook, she did recognize him from the gym, stated he has come up to her and spoken with her. Small talk; he never mentioned where he worked or her husband.

Rule 6-10 Meeting

40. On October 29, 2019, Complainant received a Notice of Rule 6-10 meeting. (Stipulated fact.)

41. DOC held a 6-10 meeting with Complainant on November 4, 2019. (Stipulated fact.)

42. During the 6-10 meeting, Complainant stated that he believed he had a good relationship with G.T. and did not understand why G.T. became so angry with him.

Discipline Decision

43. Associate Warden Carson concluded that Complainant engaged in inappropriate communications with Offender G.T., in violation of AR 100-19, as well as Respondent's Code of Conduct, AR 1450-01; Respondent's Mission Statement, AR 100-18; Respondent's Code of Ethics; Complainant's 2019 Performance Plan, and Board Rule 6-12 (2).

44. Complainant was terminated from DOC employment on November 20, 2019. (Stipulated fact.)

45. Complainant's monthly pay at the time of his termination from DOC employment was \$4,283. (Stipulated fact.)

46. After termination, Complainant submitted job applications during the months of February and March 2020, but was not offered any positions. (Stipulated fact.)

47. Complainant filed a timely appeal of Respondent's disciplinary action.

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 THE ACT FOR WHICH HE WAS DISCIPLINED.

Associate Warden Carson concluded that Complainant engaged in inappropriate communication with Offender G.T., in violation of Respondent's strict policies on communication with offenders. Respondent's AR 100-19, Section IV(A)(1)(b), prohibits discussions with offenders concerning personal matters and offender information. Similarly, Respondent's Code of Conduct, AR 1450-01, Section IV(D)(8) provides: "DOC employees ... will not discuss their personal lives or other DOC employees, contract workers, and volunteers [sic] personal lives with offenders." Complainant had been repeatedly counseled about these policies during his two and a half years of employment with Respondent.

Both Officer Marquez and Officer Wofford reported that, on September 5, 2019, Complainant told G.T. to ask his wife about the self-checkout at Walmart. Complainant testified that he asked G.T. to ask his wife if she liked the self-checkout at Walmart. Complainant's characterization of his comment is markedly different than the comment reported by Officers Marquez and Wofford. The comment reported by Officers Marquez and Wofford sounds more like a tease or a taunt, which is how G.T. interpreted it. The comment made G.T. angry. Using profanity, G.T. yelled at Complainant to get his wife's name out of Complainant's mouth.

Officer Marquez testified that, in early August 2019, she heard Complainant tell G.T. that he sees G.T.'s wife at the gym "all the time." On September 5, 2019, G.T. told Officer Marquez that Complainant's comments about his wife made him angry and that he intended to file a complaint against Complainant. G.T. also told Officer Marquez that, "If this does not get fixed, I will punch him in the face." Officer Marquez's testimony was consistent with her statements in her September 5, 2019 incident report, and the ALJ finds her testimony to be credible.

In Complainant's September 5, 2019 incident report, he described seeing G.T.'s wife at Walmart on September 4, 2019, the night before he made his comment to G.T. Complainant also stated that G.T. showed him pictures of his wife during a shakedown of G.T.'s cell that occurred a few months before.

Investigator Sheridan interviewed G.T.'s wife and verified that G.T.'s wife was at the Walmart self-checkout on the evening of September 4, 2019. G.T.'s wife also stated that, after learning about Complainant's comments about her, she looked him up on Facebook and found his photo. G.T.'s wife recognized Complainant from the gym as someone who tried to make "small talk" with her a few times.

When Investigator Sheridan interviewed Complainant on September 18, 2019, she asked him about seeing G.T.'s wife at Walmart. Complainant said that he was not sure. Complainant stated that he saw G.T.'s wife's photograph when he was doing rounds, not during a shakedown, because Complainant had not performed any shakedowns for a number of months. Complainant stated that he was not sure whether he saw G.T.'s wife at the gym; he might have said "hi" to her when he had his headphones on.

During his testimony, Complainant said he "wasn't one hundred percent sure" about

seeing Complainant's wife at Walmart and might have seen "someone who might have resembled her." Complainant testified that he had only seen a photo of G.T.'s wife once, a couple months prior to September 2019. When asked about the discrepancies between the statements in his incident report and his statements in his interview with Investigator Sheridan, Complainant said that he was upset and wasn't thinking clearly when he wrote the incident report. He also stated that he "performed poorly" during his interview with Investigator Sheridan.

Complainant testified that he was targeted by staff and "baited" by Offender G.T. He said that Captain Valdez instructed him to describe seeing G.T.'s wife at Walmart on September 4, 2019, in case she accused him of stalking her. Captain Valdez credibly testified that he did not give Complainant this instruction.

The ALJ finds that Complainant's inconsistent statements about whether or not he saw G.T.'s wife at Walmart on September 4, 2019; when he saw a photo of G.T.'s wife; and whether he saw one or more photos of G.T.'s wife, render his testimony unreliable. The ALJ further finds that Complainant's claims that Captain Valdez told him what to include in his incident report, and that both staff and offenders were setting him up, to be improbable, and cast further doubt on his testimony.

Complainant introduced check-in logs from Elite Fitness, the gym where Complainant and G.T.'s wife both work out. These logs covered the dates from July 18, 2019 – July 23, 2020. While these logs reflect that Complainant and G.T.'s wife were rarely at the gym around the same time, they do not rule out the possibility that Complainant encountered G.T.'s wife prior to July 18, 2019. However, Associate Warden Carson did not terminate Complainant's employment for talking with G.T.'s wife at the gym. Associate Warden Carson terminated Complainant's employment for making inappropriate comments to Offender G.T. about G.T.'s wife, which caused G.T. to become upset and created safety issues within the facility. After G.T. complained about Complainant's comments, another offender called him a "snitch," resulting in a fight between G.T. and the other offender.

The preponderance of the evidence establishes that Complainant engaged in inappropriate communication with Offender G.T., in violation of Respondent's regulations. Therefore, Respondent has established that Complainant committed the act for which he was disciplined.

C. RESPONDENT'S DISCIPLINARY ACTION WAS NOT ARBITRARY OR 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).

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.

Associate Warden Carson relied on information gathered by Investigator Sheridan over the course of several weeks and detailed in her investigation report. He carefully weighed this evidence, discounting various allegations by G.T. and his wife that could not be verified. Associate Warden Carson held a Rule 6-10 meeting with Complainant to obtain his version of events. Ultimately, Associate Warden Carson relied on the corroborating statements of Officers Marquez and Wofford, as well as Complainant’s admissions, about the comment Complainant made to G.T. on September 5, 2019.

Associate Warden Carson reviewed Complainant’s performance history. During his two and a half years of employment with Respondent, Complainant was repeatedly warned about engaging in inappropriate communications with offenders. In September 2017, Supervisor Eggers warned Complainant about maintaining strict boundaries during his interactions with offenders. Supervisor Eggers instructed Complainant to thoroughly review Respondent’s regulations concerning communication with offenders and Respondent’s Code of Conduct, both of which prohibit the discussion of personal information with offenders. This warning was repeated by Supervisor Heisch in Complainant’s November 2017 performance evaluation. Five months later, in April 2018, Supervisor Heisch found Complainant’s performance to be unsatisfactory. Supervisor Heisch warned Complainant about sharing personal information, and failing to maintain professional boundaries, with offenders. On April 30, 2018, Assistant Warden Carson issued a corrective action to Complainant for inappropriate communications with offenders. Assistant Warden Carson ordered Complainant to review Respondent’s Mission Statement, Respondent’s regulations concerning communication with offenders, and Respondent’s Code of Conduct.

While Complainant improved his performance during the next several months, he once again engaged in an inappropriate communication with Offender G.T. on September 5, 2019. This comment created unsafe conditions in the facility. Offender G.T. immediately became upset, began cursing and returned to his cell. Later that day, Offender G.T. angrily confronted his wife during a phone conversation about having contact with Complainant. Offender G.T. told Officer Marquez he was going to pursue a complaint against Complainant and would “punch him in the face” if Complainant did not stop talking about his wife. A couple days later, Offender G.T. got into a fight with another offender who was angry about G.T.’s complaint against Complainant. All of these events endangered staff and other offenders in the facility.

Complainant testified that he did not consider his September 5, 2019 comment to Offender G.T. to be “unprofessional.” This comment indicates that, despite being repeatedly warned about failing to maintain safe boundaries with offenders, Complainant did not understand why he should refrain from discussing offenders’ spouses or other family members with offenders. Complainant’s comment to G.T. overheard by his co-workers – “Ask your wife about the self-checkout at Walmart” – assumes a familiarity with G.T.’s wife. This comment angered G.T., prompted complaints by G.T. and his wife to Respondent about Complainant’s comments, and ultimately resulted in a fight between G.T. and another offender.

Because of Complainant’s repeated failure to maintain professional boundaries with offenders, despite warnings and corrective actions by his supervisors, Associate Warden Carson

testified that he did not feel he could rely on Complainant to follow Respondent's policies. Associate Warden Carson testified that his decision was not an easy one; however, he believed that terminating Complainant's employment was necessary to maintain safety and security in the facility.

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. Therefore, Respondent's decision should be affirmed.

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

§ 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).

As discussed above, the ALJ finds that Respondent established that Complainant committed the act for which he was disciplined; that Respondent's termination was not arbitrary or capricious, or contrary to rule or law; and that such termination was within the range of reasonable alternatives. Therefore, Respondent's personnel action was not "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." Under § 24-50-125.5(1), C.R.S., Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the act for which he was disciplined.
2. Respondent's termination of Complainant's employment was not arbitrary or capricious, or contrary to rule or law.
3. Respondent's termination of Complainant's employment 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 25th day
of October, 2020.

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

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of October, 2020, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: I, J, K, L, M, N, O, P, Q, U, V, W, X, BB-JJ. The following additional exhibits were admitted into evidence: A, C, D, E, F, G, H, T, Y.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits. 1-8, 10, 11, 12, 14, 15, 18, 19, 24-27. The following additional exhibits were admitted into evidence: Exhibits 22, 23, 28.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Colin Carson, former Associate Warden, Colorado Territorial Correctional Facility
Brianna Marquez, Correctional Officer
Matthew Valdez, Captain
Maureen Sheridan, Investigator, Office of Inspector General
Complainant Eric Scholl

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.