

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2021B004**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DESMOND MANNING,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, OFFICE OF THE INSPECTOR GENERAL,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing on October 22, 23, and 26, 2020, via web conference using Google Meet. The record was closed on November 17, 2020, after the ALJ received the parties' post-hearing submissions. The record was reopened on December 21, 2020, to allow the parties to submit supplemental arguments following the Colorado Supreme Court's decision in *Dep't of Corrections v. Stiles*, Case No. 19SC107, 2020 CO 90 (December 21, 2021). Following receipt of these arguments, the record was closed on January 6, 2021.

Throughout the hearing, Complainant appeared in person and through his attorney, William Finger, Esq. Respondent appeared through its attorneys, Senior Assistant Attorneys General Jack D. Patten, III, Esq., and Leslie Schulze, Esq. Respondent's advisory witness was Sherrie Daigle, Respondent's Inspector General and Complainant's appointing authority.

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

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's termination of his employment. Complainant argues that he did not commit the alleged misconduct for which he was disciplined, and that Respondent's termination of his employment was arbitrary and capricious, and contrary to rule or law. He seeks reinstatement and back pay, and an award of attorney fees and costs.

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

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

ISSUES

1. Did Complainant commit the alleged misconduct for which he was disciplined?
2. If so, was Respondent's termination of Complainant's employment arbitrary, capricious, or contrary to rule or law?

3. Is Complainant is entitled to an award of attorney fees and costs?

FINDINGS OF FACT

Background

1. Complainant began employment with Respondent on July 1, 1998. Prior to the termination of his employment, he was a certified, classified employee in the personnel system. (Stipulated fact.¹)

2. Prior to Respondent's termination of his employment, Complainant was employed by Respondent for 22 years, and had never received corrective or disciplinary action.

3. Beginning in 2004 until his employment was terminated, Complainant was involved in monitoring Security Threat Group (STG), or gang, members, and their activities throughout the Denver Metro area. He was widely recognized for his expertise in this area.

4. At the time his employment was terminated, Complainant was a use-of-force and firearms instructor for Respondent.

5. Sherrie Daigle became Respondent's Inspector General on May 1, 2019. She previously worked for the Department of Corrections for the State of Alaska.

6. At all times relevant to this matter, Ms. Daigle was Complainant's appointing authority. (Stipulated fact.)

Complainant's Performance History as a Correctional Officer

7. From April 1, 2010 to December 31, 2015, Complainant worked as a Correctional Officer II. He received commendations for his work in September 2014 and March 2015.

8. During the rating periods from April 1, 2010 to March 31, 2014, Complainant consistently received an overall Level III, or Exceptional, rating from his supervisor, Vaughan Burnette.

9. During the rating period from April 1, 2014 to March 31, 2015, Complainant again received an overall Level III, or Exceptional, rating from Mr. Burnette. Mr. Burnette commented:

Sgt. Manning always goes the extra mile in working with DOC and other agencies when dealing with sensitive STG [Security Threat Group] issues. ... Sgt. Manning continues to assist outside agencies with interviews and information gathering on key high profile offenders. Sgt. Manning has become a valuable asset for outside agencies in identifying hard to find STG members.

10. During the rating period from April 1, 2015 to August 31, 2015, Complainant received another overall Level III, or Exceptional, rating from Mr. Burnette. Mr. Burnette commented:

¹ The parties stipulated to certain facts.

Sgt. Manning is noted for his professional and calm demeanor. This includes when dealing with difficult situations. ... Sgt. Manning has the ability to interview offenders who are not always cooperative and can obtain the needed information while calming the situation.

11. Mr. Burnett also noted: "Sgt. Manning has volunteered his vast knowledge to the University of Denver and the Denver Police Department in Security Threat Group training."

12. During the rating period from September 1, 2015 to December 31, 2015, Complainant was promoted to the rank of Lieutenant. He received an overall Level II, or Satisfactory, rating from his new supervisor, John Bongirno, in this new position.

Complainant's Performance History as a Community Parole Officer

13. On January 1, 2016, Complainant accepted a position as a Community Parole Officer (CPO). He worked as a CPO from January 1, 2016 to February 1, 2018. During this time, he received commendations for his work in January 2016, March 2016, January 2017, April 2017 and July 2017.

14. During the rating period from January 1, 2016 to March 31, 2016, Complainant received an overall Level II, or Satisfactory, rating from his new supervisor, James Cooper. Mr. Cooper commented:

Officer Manning's previous experience in corrections and particularly in offender-related intelligence gathering and dissemination will surely help him to adjust to a new career in parole operations. Due to his experience identifying and classifying Security Threat Group members in the Denver Complex Intel Unit, Desmond has already assumed a partial caseload of active gang members to supervise.

15. During the rating period from April 1, 2016 to March 31, 2017, Complainant received an overall Level II, or Satisfactory, rating from his new supervisor, Allen Wesley. Mr. Wesley commented:

Due to and to take advantage of his prior experience identifying and classifying Security Threat Group members at the Denver Complex Intel Unit, CPO Manning supervises a case load of active gang members (STG). He is demonstrating that he has the ability to adequately supervise these offenders and is expected to continue progressing satisfactorily in this area. He practices good officer safety skills in the field...

16. During the rating period from April 1, 2017 to March 31, 2018, Complainant received an overall Level II, or Satisfactory, rating from his new supervisor, Matthew Cooper. Mr. Cooper noted that Complainant was working a "primarily STG oriented case load." Mr. Cooper commented that "Desmond's STG knowledge is unrivaled within the Department, much less the Division. A true asset in this regard."

17. Mr. Cooper also commented:

Desmond is a long-term Department employee ... This long-term commitment

in and of itself shows a commitment to our organization and such long-term employees should be applauded for their service.

.....

Desmond is an absolute pleasure to have in the workplace. He can be counted on to assist with anything that is asked of him. Desmond will work with any officer at Aurora without hesitation or judgement. If the concept of a team player needed a photo, it would be of Desmond.

18. On January 19, 2018, Respondent issued a commendation to Complainant for volunteering for a joint task force operation with the Aurora Police Department Gang Intervention Unit to address "a spike in gun related violence" in the City of Aurora.

Complainant's Performance History as a Criminal Investigator

19. On February 1, 2018, Complainant began work as a Criminal Investigator I in the Office of the Inspector General. (Stipulated fact.)

20. Complainant was assigned to the Denver Reception and Diagnostic Center. His duties included conducting investigations of alleged violations of professional standards by Department of Corrections (DOC) employees and alleged crimes committed by DOC offenders.

21. During the rating period from April 1, 2018 to March 31, 2019, Complainant received an overall Level II, or Satisfactory, rating from his new supervisor, Grace Novotny. Ms. Novotny commented:

Des has easily transitioned into his position as a Crim 1 and is a welcome additional [sic] to our team. ... Des has been exceptionally helpful during this rating period in volunteering to assist with responses to call outs and after hour situations occurring at the Denver Complex. Des represents the OIG well and is professional in his demeanor and his appearance.

22. During the rating period from April 1, 2019 to March 31, 2020, Complainant received an overall Level III, or Exceptional, rating from his new supervisor, Matthew Richardson. Mr. Richardson commented:

I believe that Desmond is a great asset to the IG's Office, and brings a wealth of experience from other areas in CDOC. I believe Desmond should look for promotional opportunities to become a Criminal Investigator II, as he is ready for the next step in his career.

The Events of April 23, 2020

23. On April 23, 2020, Complainant was involved in an off-duty shooting incident at his home in Denver, Colorado. (Stipulated fact.)

24. Complainant lives with his wife, adult son and two young children.

25. Complainant's neighborhood experiences frequent gang activity, including break-ins of cars and homes. Gunfire can sometimes be heard in the neighborhood.

26. In the summer of 2008, the Mannings' home was broken into. Access was gained through a downstairs window.

27. Complainant owns a .40 caliber semi-automatic Glock pistol. He has a license for this personal weapon and keeps it, loaded, in a lockbox in the couple's bedroom.

28. On April 22, 2020, Complainant went to sleep around 9:30 p.m. He did not drink any alcohol before he went to sleep.

29. Complainant and his wife sleep in an upstairs bedroom. Their bedroom window overlooks their back yard. They are separated from their neighbors by a six-foot wooden fence that encloses their back yard. From their bedroom window, they can see a neighbor's home on the other side of this fence.

30. The Mannings' 22-year-old son sleeps in his bedroom on the first floor, underneath his parents' bedroom. The son's bedroom window opens onto the back yard.

31. The Mannings have two other children aged six and eleven. They sleep in another upstairs bedroom.

32. At approximately 1:35 a.m., Complainant's wife, Jenna Manning, was going to bed when she heard noises outside. She looked out her window and saw what looked like a group of men breaking into their neighbor's home located on the other side of the Mannings' backyard fence.

33. Ms. Manning woke her husband and told him that several men were breaking into their neighbor's home.

34. Mr. Manning went to the bedroom window, and observed what looked like five or six men kicking and smashing the back door of the neighbor's home. He heard glass breaking and saw the individuals enter the home. It was a "scary sight," and Mr. Manning "was concerned that his house could be next."

35. At 1:40 a.m., Ms. Manning called 911 and reported five men breaking into the back door of her neighbor's home. She believed the home was unoccupied.

36. Complainant did not see any police or hear any sirens. The police were often slow to respond to calls for assistance in his neighborhood.

37. At approximately 1:47 a.m., Ms. Manning called 911 again, as the police had not shown up at her neighbor's home. Ms. Manning reported that the men were inside the home, and were going through and "tearing things up."

38. Ms. Manning told Complainant that she wasn't sure that their back patio door was locked.

39. Complainant took his weapon out of the lockbox and went downstairs. He looked out of the sliding glass door to see what the men were doing. Mr. Manning still did not see any police.

40. Complainant became concerned that his son's bedroom window was open. He

opened the sliding glass door and went outside to the edge of the patio to see whether the window was closed.

41. As Complainant was looking towards his son's window, he heard a loud crash. He turned and saw what looked like three men jump over his back fence and run towards him.

42. The three individuals were running away from the police who had arrived at the neighbor's home. However, Complainant was not aware that the police had arrived.

43. Complainant could not clearly see the three figures running towards him. It was dark, they wore hooded jackets, and he could not see their faces.

44. Complainant felt threatened and yelled at the individuals, saying either "No" or "Stop." The individuals continued running towards him and his home. The sliding glass door was open behind him.

45. Complainant did not know whether the individuals were armed and whether they intended to invade his home. Complainant believed that the individuals were gang members. In his experience, gang members were usually armed. When the individuals continued to run towards him, Complainant fired his weapon at them.

46. When Complainant fired his weapon, the individuals changed direction and began running towards the side of Complainant's home. When the individuals started running away from him, Complainant stopped firing.

47. Complainant was concerned that the individuals might try to double back or break into his home, so he followed them around the side of his home.

48. Complainant saw the individuals jump over a padlocked gate at the side of his home. Complainant did not shoot at the first two individuals who jumped over the gate.

49. The last person stopped at the top of the gate and began turning towards Complainant. Complainant had been trained that anyone who turns to face you could present a weapon and "engage" you.

50. Complainant could not see the person's hands or what the person was doing with his hands. Complainant was concerned that the person was going to shoot him, so he fired at the person. The person jumped down on the other side of the gate.

51. The three individuals ran up the street away from Complainant's home. Complainant jumped over the gate and stood in the front driveway of his home.

52. Mrs. Manning came outside and asked Complainant if he was all right. Complainant asked his wife to open the garage door. He then took a round out of the chamber of his gun and moved the magazine to the side, to make the gun safe. Complainant placed the gun in the garage and waited for the police to arrive.

53. One of the individuals shot by Complainant was a 17-year-old youth, who died from his gunshot wound. A second individual was seriously wounded.

54. The Denver police took Complainant into custody pending investigation of the

shooting. After questioning Complainant's family, as well as some of the individuals involved in the incident, Complainant was released the next day.

55. After investigating the incident and obtaining a statement from Complainant, the Denver Police Department concluded that the shooting was "justified." No charges were ever filed against Complainant.

Rule 6-10 Meeting

56. Ms. Daigle became Respondent's Inspector General on May 1, 2019. She previously worked for the Department of Corrections for the State of Alaska.

57. On April 24, 2020, Complainant was served notice by electronic mail that he was on Administrative Leave with pay. This notice was signed by Ms. Daigle. (Stipulated fact.)

58. In this notice, Ms. Daigle stated that she was informed that Complainant had been charged with a crime as a result of the off-duty shooting incident.

59. On April 24, 2020, Respondent sent Complainant, by electronic mail, a notice scheduling a Rule 6-10 meeting for April 28, 2020 at 1:00 p.m., that was signed by Ms. Daigle. (Stipulated fact.)

60. Because Ms. Daigle believed that Complainant was being held at the Denver County jail, the Rule 6-10 meeting was originally scheduled to take place at the jail. When Ms. Daigle learned that Complainant had been released, she rescheduled the meeting to take place at a DOC office.

61. The Rule 6-10 meeting was continued at Complainant's request. On May 7, 2020, Ms. Daigle issued a new Rule 6-10 meeting notice for May 11, 2020. (Stipulated fact.)

62. On May 11, 2020, Complainant and his attorney, David Kaplan, appeared by video for the Rule 6-10 meeting. The Rule 6-10 meeting was continued at Complainant's request.

63. On June 10, 2020, Ms. Daigle issued a Rule 6-10 meeting notice for June 16, 2020. (Stipulated fact.)

64. On June 16, 2020, Complainant and Mr. Kaplan attended the Rule 6-10 meeting, which was held by video. (Stipulated fact.)

65. Prior to the Rule 6-10 meeting, Ms. Daigle reviewed the arrest warrant affidavit, which contained brief summaries of interviews with Ms. Manning, the Mannings' adult son and three of the individuals involved in the break-in of the Mannings' neighbor's home. She did not review any other information.

66. Prior to the Rule 6-10 meeting, Ms. Daigle erroneously believed that Complainant had been charged with a crime and that this charge had been dismissed.

67. During the Rule 6-10 meeting, Mr. Kaplan informed Ms. Daigle that the Denver Police Department determined that the shooting was "justified" and did not bring any charges against Complainant.

68. During the Rule 6-10 meeting, Complainant explained the circumstances that led to the April 23, 2020 shooting. Complainant stated that he was standing alone outside, without “backup,” and with his “family in the background.” He suddenly had “three men coming at me” and had to decide “in a split second” how to protect himself and his family.

Discipline Decision

69. On July 10, 2020, Ms. Daigle issued a disciplinary letter to Complainant that terminated his employment. (Stipulated fact.)

70. In reaching her decision to terminate Complainant’s employment, Ms. Daigle concluded that Complainant shot at individuals who were fleeing his property, “suggesting that a reasonable person in your position should not have thought there was imminent threat of serious harm.” Ms. Daigle further concluded:

You, as a use of force instructor, peace officer, and criminal investigator, are responsible for assessing use of force, and even teaching others on when it may be appropriate. Yet, you exercised poor judgment in using force that ultimately resulted in the death of a minor. Your actions do bring extreme disrepute to DOC.

71. Complainant filed a timely appeal of Respondent’s termination of his employment.

Complainant’s Earnings

72. At the time his employment was terminated, Complainant earned \$6,239 a month.

73. After his employment was terminated, Complainant applied for two jobs before he was hired as a part-time worker at an Amazon warehouse.

74. Beginning September 28, 2020, Complainant worked 15 hours a week, earning \$16 an hour, or \$240 per week.

75. Prior to obtaining part-time employment at Amazon, Complainant received \$1,032 in unemployment benefits.

ANALYSIS

A. BURDEN OF PROOF.

The Colorado Constitution guarantees that certified state employees “shall hold their respective positions during efficient service.” Colo. Const. Art. XII, § 13(8). A certified state employee may be disciplined “only for just cause based on constitutionally specified criteria.” *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

Section 13(8) lists the following specific criteria upon which discipline may be based:

... written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the

appointing authority, which shall be promptly determined.

Colo. Const. Art. XII, § 13(8). State Personnel Board Rule 6-12 lists the following potential bases for discipline of certified employees:

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 alleged misconduct on which the discipline was based occurred. *Kinchen*, 886 P.2d at 706-708. An appointing authority must establish a constitutionally authorized ground in order to discharge an employee. *Id.* at 707. 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 Colorado Supreme Court recently clarified the two-part inquiry required in an ALJ's review of a disciplinary action:

[I]n reviewing an appointing authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; **and if it did**, (2) whether the appointing authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

Dep't of Corrections v. Stiles, Case No. 19SC107, 2020 CO 90, slip op. at pp. 20-21, par. 38 (December 21, 2021) (Emphasis added). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the appointing authority establishes that the conduct on which the discipline is based occurred:

If the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's decision in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

Dep't of Corrections v. Stiles, slip op. at p. 22, par. 41 (December 21, 2021). See also § 24-50-103(6), C.R.S.

B. RESPONDENT FAILED TO ESTABLISH, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED THE ALLEGED MISCONDUCT FOR WHICH HE WAS DISCIPLINED.

Ms. Daigle based her decision to terminate Complainant's employment on her conclusion that Complainant engaged in "conduct unbecoming." Respondent's Code of Conduct, AR 1450-01, Section III(B), defines "conduct unbecoming":

Includes any act or conduct either on or off duty which brings the DOC into disrepute or reflects discredit upon the agency, negatively affects job performance, or calls into question one's ability to perform effectively and efficiently in his/her position.

Respondent's Code of Conduct further provides:

Any act or conduct on or off duty which affects job performance and/or tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee ... or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

Respondent's Code of Conduct, AR 1450-01, Section IV(A)(8) (September 1, 2019).

In her termination letter, Ms. Daigle concluded that Complainant engaged in "conduct unbecoming" because he shot individuals who were fleeing his property and "exercised poor judgment in using force that ultimately resulted in the death of a minor." Ms. Daigle concluded that these actions brought "extreme disrepute to DOC."

While there is no dispute that Complainant was involved in an off-duty shooting incident at his home on April 23, 2020, Complainant denies that he shot individuals who were fleeing his property. The preponderance of the evidence establishes that Complainant shot at what he believed to be three men invading his yard. Complainant only shot at the men when they were running towards him or otherwise presented a threat to him. Complainant testified that, when the men who had been ransacking his neighbor's home began jumping the fence and running towards Complainant, he was forced into a defensive position. Complainant did not know that the police had arrived at his neighbor's home. Complainant felt threatened and yelled at the individuals, saying either "No" or "Stop." A police interview with one of these individuals confirms that Complainant yelled at them before firing his weapon.

The individuals did not stop but continued running towards Complainant and his family's home. Complainant did not know whether the individuals were armed or whether they intended to invade his home. The sliding glass door behind him was still open. Complainant had just watched the individuals violently break into and ransack his neighbor's home. Complainant believed that the individuals were gang members. In his extensive experience with Security Threat Groups, gang members are usually armed. Therefore, when the individuals continued to run towards him, Complainant believed that his life was in danger, and fired his weapon at the individuals.

When Complainant fired his weapon, the individuals changed direction and began running along the side of Complainant's home. Because Complainant was still concerned that they might try to break into his home, he followed them. He saw the individuals jump over a padlocked gate

at the side of his home. The last person stopped at the top of the gate and began turning towards Complainant. Complainant believed that this person was going to shoot him and fired his weapon at the individual. The individual then jumped down to the other side of the gate.

The Denver police investigated the incident and concluded that the shooting was “justified.” No charges were filed against Complainant.

During her testimony, Ms. Daigle did not dispute Complainant’s need to monitor the activities of the individuals ransacking his neighbor’s home. Rather, Ms. Daigle identified Complainant’s decision to monitor the individuals’ activities from outside, instead of inside, his home constituted “poor judgment.” Ms. Daigle testified that Complainant should have checked on whether his son’s bedroom window was closed, and monitored the activities of the individuals breaking into his neighbor’s house, from inside Complainant’s home.

Ms. Daigle’s conclusion that Complainant committed “conduct unbecoming” was based solely on the original arrest report and her brief conversation with Complainant during the June 16, 2020 Rule 6-10 meeting. In her termination letter, Ms. Daigle stated: “There was every indication that police had arrived on scene at the time you shot the individuals.” During the Rule 6-10 meeting, Ms. Daigle did not ask Complainant whether he was aware that the police were present. Complainant testified that, when he was suddenly confronted with three figures invading his yard, he was not aware that the police had arrived at his neighbor’s home.

The preponderance of the evidence establishes that Complainant believed that his family was potentially in danger from the activities of the individuals ransacking his neighbor’s home. Complainant testified that he needed to keep an eye on what was going on, and that if he left his vantage point at the back sliding glass door to see whether his son’s bedroom window was closed, he would lose sight of the back fence and the home where the criminal activity was occurring. By going outside, Complainant was able to check on his son’s bedroom window while also monitoring the break-in.

Respondent failed to establish that going outside to check on his son’s bedroom window while monitoring the ransacking of a neighbor’s home constituted “poor judgment” or “conduct unbecoming.” Respondent also failed to establish that, under the circumstances described by Complainant, firing his weapon at three individuals involved in criminal activity that he perceived to be a threat constituted “poor judgment” or “conduct unbecoming.” The preponderance of the evidence establishes that Complainant initially shot at a group of individuals who were running towards him, and then shot at an individual who stopped and turned towards him. In both circumstances, Complainant believed that he, and his family, were in danger. Complainant did not know that one of these individuals was 17 years old. His extensive experience with Security Threat Groups reasonably led him to believe that these individuals were armed and dangerous. Complainant lived in a neighborhood that had a lot of gang activity, and his home had previously been broken into.

After the Rule 6-10 meeting, Ms. Daigle concluded that Complainant did not reasonably believe that he was facing an “imminent threat of serious harm.” Complainant’s testimony about the palpable threat posed by the group of individuals invading his yard was consistent with his prior statement to Ms. Daigle, with his wife’s testimony, and with the statements of the witnesses interviewed by the police. The ALJ finds Complainant’s testimony about the threat he faced from these individuals to be compelling and credible. In its investigation of the incident, the Denver Police Department concluded that the shooting was “justified.” Under the circumstances credibly described by Complainant and supported by other evidence in the record, Complainant’s actions

on April 23, 2020 do not constitute “conduct unbecoming.”

In its recent decision in *Stiles*, the Colorado Supreme Court clarified an agency’s burden of proof to establish that an employee engaged in “misconduct” for which he was disciplined:

It was in the specific context of determining that the appointing authority bears the burden of establishing *the factual basis* for any challenged disciplinary action that we said in *Kinchen* that “the scales are not weighted in any way by the appointing authority’s initial decision to discipline the employee.” *Id.* at 706. In other words, the disciplinary decision doesn’t give the appointing authority a leg up in attempting to meet its burden of proving by a preponderance of the evidence the factual allegation of misconduct.

Stiles, slip op. at p. 22, par. 40. (Emphasis in original.)

Respondent has failed to establish, by a preponderance of the evidence, its “factual allegation of misconduct;” i.e., that Complainant shot at individuals who were fleeing his property. *Id.* Therefore, Respondent has failed to establish that Complainant committed the act for which he was disciplined. *Stiles*, slip op. at pp. 20, 22 (December 21, 2021); *Kinchen*, 886 P.2d at 709.

C. COMPLAINANT’S LOST WAGES.

Complainant testified that, at the time his employment was terminated on July 10, 2020, he was earning \$6,239 per month. Complainant received \$1,032 in unemployment benefits. At the end of September 2020, Complainant obtained part-time employment at an Amazon warehouse, working 16 hours a week for \$15 an hour. From September 28, 2020 through February 5, 2021, Complainant will have earned \$4,560 from his part-time employment at Amazon.

As of February 5, 2021, Complainant’s lost wages from his prior position with Respondent will total \$43,673. After subtracting Complainant’s unemployment benefits and his wages from his work for Amazon, Complainant’s lost wages will total \$38,081.

D. COMPLAINANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

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

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

A frivolous personnel action is an action for which “no rational argument based on the evidence or law was presented.” Board Rule 8-33(A). Personnel actions that are “in bad faith, malicious, or as a means of harassment” are actions “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-33(B). A groundless personnel action is one in which it is found that “a party fails to offer or produce any competent evidence to support such an action...” Board Rule 8-33(C).

As discussed above, Respondent failed to establish that Complainant exercised “poor judgment” and committed “conduct unbecoming,” the alleged misconduct for which he was disciplined. Ms. Daigle concluded that Complainant shot at individuals who were fleeing his property after police arrived on the scene, and that Complainant did not reasonably believe that he was facing an “imminent threat of serious harm.” The preponderance of the evidence establishes that, at the time he was suddenly confronted with three individuals invading his property, Complainant was not aware that the police had arrived at his neighbor’s home. Complainant believed that he was alone, “without backup,” facing men involved in violent criminal activity who had suddenly invaded his property. The preponderance of the evidence establishes that Complainant believed that these men presented a threat to him and to his family. After investigating the incident, the Denver Police Department determined that the shooting was “justified.”

In *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), the Court of Appeals held that an award of attorney fees and costs “was mandated” where an ALJ reduced the school’s disciplinary discharge of an employee to a three-day suspension. The Court explained that, even though the school established that Complainant engaged in misconduct that justified a disciplinary suspension, the attorney fee award was statutorily “mandated” because the school had “no grounds” to discharge the employee. *Id.* at 609-610.

In the instant case, the preponderance of the evidence establishes that Complainant did not engage in misconduct, and that Respondent had “no grounds” to terminate Complainant’s employment. Because Respondent failed to produce competent evidence to support its decision to terminate Complainant’s employment, this action was groundless. Therefore, under § 24-50-125.5(1), C.R.S., Complainant is entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent failed to establish, by a preponderance of the evidence, that Complainant committed the alleged misconduct for which he was disciplined.
2. Because Respondent’s personnel action was groundless, Complainant is entitled to an award of attorney fees and costs.

ORDER

1. Respondent’s termination of Complainant’s employment is **rescinded**.
2. Respondent shall **reinstate** Complainant to his former position as a Criminal Investigator I at the compensation level he would now hold had he not been terminated.
3. Respondent shall **reimburse** Complainant for his lost wages from July 10, 2020 to the date Complainant is reinstated to his former position. By February 5, 2021, the amount of back pay due Complainant will be \$38,081. This amount is subject to the employer’s PERA contribution, as well as interest of 8% per annum to the date of reinstatement.

4. Complainant is **awarded** reasonable attorney fees and costs attributable to his appeal. Complainant shall file a Bill of Attorney Fees and Costs no later than February 1, 2021. Respondent shall file a response within 10 days after receipt of Complainant's Bill of Attorney Fees and Costs.

Dated this 19th day
of January, 2021
at Denver, Colorado.

/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 20th day of January, 2021, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Finger & Thigpen, P.C.
William Finger, Esq.
Casey Leier, Esq.
bill@fingerlawpc.com
casey@fingerlawpc.com

Jack D. Patten, III, Esq.
Senior Assistant Attorney General
Leslie C. Schulze, Esq.
First Assistant Attorney General
Leslie.Schulze@coag.gov
Jack.Patten@coag.gov

Andrea Woods

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits A-T. The following additional exhibits were admitted into evidence: Exhibits DD, EE, FF, TT.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 12, 24, 25. The following additional exhibits were admitted into evidence: Exhibits 1, 11, 15, 19, 21.

WITNESSES

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

Desmond Manning, Complainant
Sherrie Daigle, Respondent's Inspector General and Complainant's appointing authority
Richard Thompkins, Respondent's Chief Human Resources Officer
Matthew Richardson, former Criminal Investigator III
Adam Cummings, former Criminal Investigator II
Scott Smith, Criminal Investigator III
James Palestino, Private Investigator
Grace Novotny, former Criminal Investigator III
David Kaplan, Esq.
Jenna Manning, Complainant's wife
Myra Langlois, former Criminal Investigator II

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.