STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B081**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RONALD D. SALAZAR,

Complainant,

vs.

DEPARTMENT OF REVENUE, MOTOR CARRIER SERVICES DIVISION,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on April 6 and 30, 2009, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed by the ALJ after the review of the file on May 18, 2009, upon the filing of the final written closing argument. Assistant Attorney General Michael D. Scott represented Respondent. Respondent's advisory witness was Kirstie L. Nixon, the appointing authority. Complainant appeared and was represented by Michael J. Belo, Esq.

MATTER APPEALED

Complainant, Ronald D. Salazar (Complainant) appeals his termination by Respondent, Department of Revenue, Motor Carrier Services Division (Respondent or DOR). Complainant seeks an order reversing his termination and restoration of the Port Of Entry Officer II position, expungement of his personnel file, an award of back pay and benefits, restoration of seniority, and compensation for all other compensable losses.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was employed as a Port of Entry (POE) Officer II with DOR within the Motor Carrier Services Division. Complainant was promoted to the position of mobile unit supervisor as of May 1, 2007, after approximately 20 years of experience as a POE Officer. At the time of the termination of his employment, Complainant was the supervisor for two other members of a mobile unit, Officer Gregg Mustered and Officer Robert Strauss. Complainant reported to District Supervisor Jeffrey Byers.

2. The Colorado Ports of Entry enforce state and federal size, weight, and safety regulations for commercial vehicles. There are several fixed Ports of Entry throughout the state on main highways. The fixed Ports of Entry also have staff assigned to mobile units which use the fixed port as a base and which conduct inspections along roadsides in locations beyond the fixed port.

3. While engaged in their duties, POE officers are peace officers under state law. POE officers, however, are not fully commissioned peace officers, are not Peace Officer Standards and Training board-certified, and are not armed. POE officers contact drivers who are compliant with the instructions to pull over for inspection. If a POE officer sees that a vehicle has bypassed the inspection station, the POE officer is to call for law enforcement backup. The same is true if drivers ignore POE officer instructions that they are to remain out of service.

4. POE officers wear blue coveralls with a patch identifying them as POE officers, along with a POE safety vest for visibility.

5. Instead of working in a fixed location, Complainant was assigned to work with the Monument Port of Entry with the Monument Mobile Unit.

Mobile Unit Function:

6. Mobile units travel in teams of two or three officers. The officers have a van that is stocked with the equipment and supplies that the officers will need to set up inspection sites alongside a roadway.

7. The vans operated by mobile units are not equipped with red and blue flashing lights, as are police vehicles, but have yellow caution lights.

8. Respondent's policies and rules require that a mobile unit team set up temporary mobile unit sites at which to conduct inspections. Mobile units are also to set up proper temporary signage to safely direct traffic to and from the inspection site.

9. Respondent's policies and rules require the mobile unit officers to take several factors into consideration in the selection of a site for mobile unit inspections:

> No compromise of the safety of Port of Entry personnel or the motoring public.
> Meeting the conditions specified in Handbook 44.
> Have visibility to approaching traffic from any direction.
> Cause minimal obstruction to local passenger vehicle or pedestrian traffic.
> Carry sufficient volume of truck traffic to justify Mobile Unit operations.
> Be of a dimension adequate for several trucks to be weighed, cleared, inspected, or detained until cleared.
> When possible, allow appropriate space to allow for safe off-loading of excess weights.
> Weather considerations should be given high consideration.

10. Respondent's policies also list the following guidelines for site set-up:

> Prior to departure from base, perform the vehicle and equipment pre-trip safety check.
> Upon arrival at a mobile unit site, place the signs as necessary following the diagrammed recommendations.
> Place traffic cones to mark the work area and scale location.
> Designate an area for safety inspections and mark that area with cones.

11. Respondent's policies provide mobile unit officers with diagrams on how to set up signs and exit points so as to meet the requirements for a proper mobile unit site for inspections. These diagrams show distances and specific signage to be used for various types of roadways.

12. For a road with two lane, two-way traffic, for example, the diagram shows a white on green sign stating "Weigh station 1 mile" located before a black on white sign which reads "All trucks Commercial Vehicles STOP AHEAD." There is then a white on green arrow sign with the words "Weigh Station" on it.

13. Other road types, such as four lane highways and two lane highways with an egress lane, show sign placements with four signs: the three described above and a black on white sign stating "All Trucks Commercial Vehicles Use Right Lane" placed before the "STOP AHEAD" sign.

14. Complainant was aware that Respondent's rules and policies required that he post the appropriate signage for a pre-selected mobile unit site.

15. In December of 2006, the Monument mobile officers asked the new Deputy Chief of the Colorado Port of Entry, Rick Archer, for additional authority to be granted to them. The

Monument mobile unit supervisor at the time was Steve Melton. Officer Melton, Officer Mustered and Complainant spoke with Mr. Archer about their desire to undertake traffic enforcement duties, in order to contact trucks that appeared to be in violation of the law, rather than to wait at mobile unit sites for trucks to pull in for inspection.

16. Mr. Archer responded to the Monument mobile officers by e-mail dated December 11, 2009. Complainant received a copy of the e-mail. The e-mail read, in pertinent part:

> I also understand your ideas and beliefs are based on a frustration caused by seeing trucks with obvious safety violations driving past when you are unable to do anything about it. I know that trucks bypass your operations, both intentionally and unintentionally and that you feel unable to do anything about it; I realize that with the authority and backing to conduct traffic enforcement by actually stopping those trucks that have obvious safety violations, or have run ports, you believe your effectiveness would increase greatly, thus increasing safety on the roads....
>
> As for stopping unsafe trucks as a function of our mobile ports. I understand why you want to, the value you see in it, and the frustration you face in not doing so, but these values are far outweighed by the dangers and administrative support necessary in such an endeavor. I spoke with Major Hernandez of the Colorado State Patrol about this issue, He assured me that the budgetary liabilities involved in a project such as this would easily double our personnel costs. From the pragmatic side, I don't need to look further than the Colorado Springs officer recently killed during a DUI contact (something Steve indicated he wanted as a desired task for MP) for reasons not to support such job duties for our officers.

17. While Complainant and Officer Mustered were POE officers working under the mobile unit supervision of Steve Melton, Complainant would conduct stops of trucks or commercial vehicles that did not utilize a pre-selected mobile unit site or signage. During these stops of vehicles, the mobile unit van would pull up next to a vehicle that the mobile unit officers wished to inspect, roll down the window and tell the driver of the vehicle to pull over for inspection. At other times, Officer Mustered would also use flashing yellow lights on the van to pull over vehicles to be inspected.

Human Signpost Method

18. In the years prior to 2008, some Monument mobile unit officers had used a system of truck stops called the "human signpost" method.

19. POE mobile units would carry a rolled up cloth that could be unfurled as a sign directing trucks to exit. If mobile unit officers wanted to contact a truck that was on the road, the mobile unit van would pull in front of the truck on the road and a member of the mobile unit would get out and unfurl the sign for the truck to be contacted. The

understanding was that officers could stop the truck if they could get a sign up to do so.

20. The supervisor of the Monument Mobile Unit immediately prior to Complainant, Mr. Melton, believed that so long as there was any sign up, that the inspection of a vehicle stopped with that one sign would be legitimate under POE rules.

21. The human signpost method of conducting stops was called into question in an April 2007 stop in Chaffee County involving Complainant and Officer Mustered's stop of a cement truck that appeared to be overweight. A judge in a Salida, Colorado case had also found the human signpost method to be problematic.

22. After the county courts had ruled on the human signpost issue, POE management decided that it needed to clearly disallow the human signpost method. In December of 2007, Mr. Byers called in the members of the Monument mobile unit into his office and told them that they needed to stop using the human signpost method.

23. During this meeting, Officer Mustered asked Mr. Byers if the mobile unit could still contact trucks at stop signs. Mr. Byers did not ask Officer Mustered for clarification of his question. Mr. Byers assumed that Officer Mustered was talking about speaking with drivers who were about to enter into a normal mobile unit inspection site. Mr. Byers told the mobile unit officers present that he did not see a problem with contacting drivers at stop signs or red lights.

24. Mr. Byers was not asked if the mobile unit could contact drivers with no signage visible and with no pre-selected mobile site set up for inspection. Mr. Byers had been in the field with the Monument mobile unit officers prior to this point, but he had not witnessed the mobile unit use anything other than the approved inspection site selection and signage techniques.

25. Even after POE management had informed Complainant that the human signpost method could not be utilized, Complainant continued to conduct stops of trucks and commercial vehicles without setting up a mobile unit site or using signage to direct vehicles over to the mobile unit site.

26. Complainant permitted his mobile unit officers to pull up next to vehicles that were believed to be in violation of the law and to order drivers to pull over. Complainant would also permit his officers to make contact with vehicles that were believed to be in violation of the law at stop signs or stop lights and to direct the drivers of those vehicles to pull over. These inspections were not made at mobile unit sites that had been selected according to the factors contained in Respondent's policies and were not made with proper signage.

The Quail Lake Loop Stop

27. On the morning of January 22, 2008, Mr. Byers provided the Monument mobile unit with a tip that a trash truck at a particular address would be driven by a driver without a

commercial driver's license.

28. Complainant and Officers Mustered and Strauss drove to the address provided by Mr. Byers. They saw a trash truck in the front of the address. The mobile unit waited for fifteen to thirty minutes alongside the road away from the address and watched the driver of the truck come out and start the truck to warm it up. The mobile unit team was attempting to contact a Colorado Springs police officer to assist with the stop, but could not arrange for the officer to assist them.

29. Once the driver got into the truck to drive it, the mobile unit moved along a parallel road so that it could move to a spot in front of the truck. The truck had to stop at a cross walk at a stop sign. Officer Mustered was dropped off along the side of the road at a spot where the trash truck would stop at the stop sign, and the mobile unit van continued a short distance down the road.

30. Officer Mustered waited in the middle of the road for the trash truck to arrive at the stop sign; when the truck approached the stop sign, he spoke to the driver and told the driver to pull over for an inspection. The mobile unit officers did not set signs or designate a mobile unit area for this inspection.

31. The driver of the trash truck was not able to produce a driver's license. Officer Mustered told the driver to write down his name and date of birth, and the driver appeared to be having a difficult time remembering his date of birth. Once a date of birth was provided, Officer Strauss ran the information provided and found it to be invalid.

32. At about the time that the mobile unit realized that the driver was not providing correct information, Officer Mustered saw a Colorado State Patrol officer, Officer Mel Thomas, passing by on his way back to the nearby State Patrol offices. Officer Mustered waved Officer Thomas over to the stop, and the POE officers explained the problem. Officer Thomas took over the stop and confronted the driver about the incorrect information. The driver eventually admitted that he was providing his supervisor's name and date of birth, and that he did not have a commercial driver's license. Officer Thomas cited the driver and the owner of the vehicle for the improper driver's license status.

33. While Officer Thomas was handling the stop, another Colorado State Patrol officer, Officer Dave Paik, approached Officer Mustered and cautioned Officer Mustered to be careful because the mobile unit officers were doing traffic stops. Office Paik told Officer Mustered that the Colorado State Patrol had recently received a complaint in the previous week that a POE mobile unit had pulled over a vehicle with flashing yellow lights.

34. By memoranda dated February 12 and February 15, 2008, the Colorado State Patrol officers filed reports with Respondent complaining that the Monument mobile unit was conducting traffic stops. These complaints were directed to the Division Director of the Motor Carrier Services Division, and Complainant's appointing authority, Kirstie Nixon.

Respondent's Investigation:

35. When Complainant's appointing authority, Kirstie Nixon, found out about the complaints filed by the Colorado State Patrol, she directed Steve Archer to investigate the tactics being utilized by the Monument mobile unit.

36. Mr. Byers told Complainant, Officer Mustered, and Officer Strauss to write memos describing the Quail Lake Loop stop of the trash truck. All three officers completed short memos describing the enforcement action. These memos were forwarded to Mr. Archer for his review.

37. Mr. Archer began his investigation on or about February 15, 2008.

38. Mr. Archer interviewed a driver of a vehicle who had been stopped by the Monument mobile unit on February 12, 2008, while he was driving a pick-up with a gooseneck trailer. The driver told Mr. Archer that he had passed the mobile unit and a Colorado Springs police vehicle conducting a stop, and that the mobile unit had pulled away from the stop followed him for at least a mile and a half until he was stopped for a red light. At that point, one of the officers ran up to his driver's window and ordered him to turn and park his vehicle in a vacant lot. About 20 minutes later, a Colorado Springs Police Department officer arrived and issued him a summons.

39. Complainant was interviewed during the investigation by Mr. Archer. Mr. Byers and District Supervisor Dan Wells were also present. Complainant told Mr. Archer that the only time his mobile unit stopped vehicles was when they had a hot tip or if they saw something wrong. Complainant told Mr. Archer that he had conducted traffic stops of vehicles three times in the prior six months. When asked about the February 12, 2008, summon issued to the pick-up with he gooseneck trailer, Complainant acknowledged that this had been a fourth vehicle stop.

40. Officers Mustered and Strauss were also interviewed as part of Mr. Archer's investigation.

41. Officer Strauss reported to Mr. Archer that the mobile unit had conducted at least a dozen traffic stops since he had started with the unit in January 2008. Officer Strauss told Mr. Archer that the mobile unit would work the highway by watching for overweight trucks as they exit the highway. The unit would then attempt to pull next to the trucks to order them over; if the unit could not pull next to the truck to be inspected, the officers would wait for the trucks to stop and approach the trucks on foot. Officer Strauss confirmed that the mobile unit had conducted three of these stops in February.

42. Officer Mustered told Mr. Archer that the mobile unit conducted traffic stops about 25% of the time. He explained to Mr. Archer that, where there wasn't room to set up a mobile operation, the mobile unit worked with law enforcement officers and stopped illegal vehicles that they saw, such as when they would park at the top of a highway ramp and

stop obviously overweight trash trucks exiting the highway. Officer Mustered also told Mr. Archer that the mobile unit spent about 25 % of its time searching for vehicles to stop, and had conducted about 15 to 20 of such stops in the previous two months.

43. Mr. Archer then reviewed the 61 summons that the Monument mobile unit had issued since the beginning of 2008. Of those 61 summons, many did not contain contact information, such as phone numbers for the drivers cited. Mr. Archer was able to phone 13 drivers of, or the responsible party for, vehicles contacted during that time period. Of those 13 contacts, Mr. Archer was told by 10 different individuals that the mobile unit had contacted the vehicle in question after following the vehicle, without the use of any signage, and that the inspection or issuance of a summons did not occur at a mobile unit inspection site. Of the remaining three contacts, two were made at mobile unit inspection sites, and one stop was conducted by a law enforcement officer with the mobile unit following behind the patrol vehicle.

44. Mr. Archer prepared a written report of his investigation and provided it to Ms. Nixon.

Board Rule 6-10 Meeting

45. Ms. Nixon reviewed Mr. Archer's report and decided that a Rule 6-10 meeting with Complainant was necessary. By letter dated February 21, 2008, Ms. Nixon informed Complainant that she had scheduled a Rule 6-10 meeting for February 28, 2008.

46. Complainant appeared for the Rule 6-10 meeting with Cheryl Hutchinson as his representative. Mr. Archer appeared as Ms. Nixon's representative. The meeting was taped and transcribed.

47. Ms. Nixon asked Complainant if he was familiar with the regulations for port administration and operations. Complainant told Ms. Nixon that he had received the regulations two days before the meeting, and then later clarified that he had read other port policies and procedures but did not know until the prior Tuesday where to find promulgated rules.

48. Ms. Nixon explained that she was concerned that Complainant had been guiding his group, as a supervisor, to actively look for vehicle violations as those vehicles moved down the road rather than setting up mobile unit sites. Ms. Nixon also explained that this process of actively pursuing violations exposed Complainant and his staff to danger from the driving maneuvers they have performed to follow vehicles, as well as having officers out in the road and knocking on vehicle doors while in the roadway.

49. Ms. Nixon asked Complainant if he had been conducting traffic stops, and Complainant replied that he had looked for a definition of a traffic stop and not found one. Later in the meeting, however, Complainant agreed that he had been conducting traffic stops, and that he had conducted traffic stops while he was working under the supervision of Mr. Melton as well.

50. Complainant told Ms. Nixon and Mr. Archer that, once he had been told by Mr. Byers not to use human signpost, then he began to pull alongside of vehicles and order them over to the side of the road. Complainant also told Ms. Nixon and Mr. Archer that he began to approach drivers at intersections after he had been told not to use the human signpost.

51. Complainant informed Ms. Nixon and Mr. Archer that Mr. Byers had told him, Officer Mustered, and Officer Strauss that they could approach vehicles when the vehicles were stopped at stop signs, or at stop lights, or stopped alongside of the road.

52. Ms. Nixon gave Complainant until March 6, 2008, to provide her with any additional comments that he wanted to make in writing. Complainant submitted additional information that Ms. Nixon considered as part of the Rule 6-10 process.

Decision on Disciplinary Action

53. Ms. Nixon decided that the evidence supported that Complainant's mobile unit had been routinely contacting vehicles on the road rather than setting up mobile unit sites with the proper signage and space and waiting for vehicles to pull in for inspection. These actions concerned Ms. Nixon because they represented a deviation from mobile unit policy, represented dangerous contacts that the mobile unit was unprepared to handle and created safety hazards for both the POE officer and the public.

54. Ms. Nixon concluded that Complainant had acted "outside the scope of authority of a POE officer and supervisor by conducting traffic stops on the Monument mobile unit and also instructing and allowing your staff, consisting of two POE officer I positions, to do the same."

55. Ms. Nixon also decided that Complainant's actions were flagrant and willful violation of policy because Complainant had been made aware of the rules requiring signs and mobile unit set-ups on several occasions.

56. Ms. Nixon also considered that Complainant had told her during the Rule 6-10 meeting that he was completely ignorant of any rules and policies governing Port operations, and that this statement represented a lack of honesty that was detrimental to Complainant's ability to continue his employment as a POE officer.

57. Ms. Nixon considered Complainant's work record in reaching a decision on the level of discipline to be imposed. Complainant's annual performance reviews in the previous five years had all resulted in an overall rating of either commendable or good.

58. In considering Complainant's work record, Ms. Nixon also reviewed a corrective action that Complaint had received on March 3, 1998. This corrective action was based on actions taken by Complainant as part of the Lamar mobile unit that violated Respondent's

mobile unit operations policy. Those violations included not having drivers or company representatives sign off on certain documentation and contacting commercial vehicles on private or business properties, such as convenience stores. "The mobile team apparently made contact with industry outside the parameters established under port policy and procedures governing the set up of mobile sites and locations. Port policy clearly states the proper locations and signage requirements must be established before conducting mobile site operations." Complainant explained to his supervisor that he had little or no training in these areas. As a result, Complainant was reassigned to the fixed port facility in Lamar to receive hands-on training in order to "correct the improper direction and training [Complainant] may have received in the past."

59. Ms. Nixon also noted that Complainant's performance review covering April 1, 2006, through March 31, 2007, noted that Complainant had violated Respondent's mobile unit policy during an inspection of a truck on August 21, 2006, in Woodland Park. The evaluation noted that his reviewer "questioned Ron about this, as port policy requires that signs be up. After speaking with Ron, I determined that signs were not up, although the vehicle was already stopped, according to Ron. I cautioned him that policies needed to be followed. This was the only incident during the evaluation period."

60. Ms. Nixon also reviewed the e-mail of December 11, 2006, between Rick Archer and the members of the Monument mobile unit concerning Mr. Archer's decision that officers were not to conduct contacts of trucks that appear to be in violation of the law rather than awaiting the arrival of trucks for inspection at the properly set mobile unit inspection site.

61. Ms Nixon decided that termination of employment was appropriate for the level of violation and untrustworthiness that Complainant had displayed. Complainant's employment was terminated effective April 7, 2008.

Other Related Actions:

62. Of the four POE staff involved in this mater, Complainant is Hispanic, Officers Mustered and Strauss are white, and District Supervisor Byers is white.

63. Officer Greg Mustered's employment was also terminated. Through post-termination settlement agreement discussions, Officer Mustered was reinstated as an officer at a fixed port facility.

64. Supervisor Jeff Byers attended a Rule 6-10 meeting on March 11, 2008, to determine what he had told the Monument mobile unit and knew about their practices. Ms. Nixon determined that Mr. Byers' intent in providing the Monument mobile unit the information about the possible non-licensed driver of the trash truck on January 22, 2008, was to have the officers set up a mobile unit site in the vicinity of the address. Ms. Nixon also determined that Mr. Byers' agreement that an officer could contact a vehicle already stopped was offered with the thought that this would occur at a mobile site set up in accordance with division policy. Mr. Byers was issued a corrective action for failing to

communicate clearly with Officers Mustered, Strauss, and Complainant with regard to the legitimacy of contacting vehicles at stop signs.

65. Officer Robert Strauss was not disciplined or issued a corrective action because he had been hired only in December 2007, was still in training at the time of the violations, and was expected to follow the directions of the more experienced mobile unit officers with regard to departmental policy.

Board Appeal and Unemployment Benefits Appeal

66. Complainant filed a timely appeal of the termination of his employment with the Board.

67. Complainant also applied for unemployment benefits. Respondent opposed the award of Complainant's unemployment benefits. Ms. Nixon testified as to the grounds for termination of Complaint's employment at the hearing held on Complainant's appeal.

68. The decision on whether to oppose unemployment benefits for a former Department of Revenue employee is made by a company employed by the state to handle unemployment issues, Employer's Edge. Ms. Nixon did not make the decision to oppose Complainant's unemployment benefits.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; 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 comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). The Board may reverse 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).

Complainant also raises a claim of unlawful discrimination on the basis of ethnicity or ancestry under the Colorado Anti-Discrimination Act, C.R.S. §§ 24-34-401, *et. seq.* (CADA). The legal standards for the determination of a CADA claim are discussed below in section II. B.2.

II. HEARING ISSUES

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

Respondent's evidence established that POE policy required POE mobile unit officers to erect proper signage and to direct vehicles to be inspected to carefully selected mobile unit inspection sites.

The persuasive and competent evidence at hearing demonstrated also that, under Complainant's supervision, the Monument mobile unit was contacting vehicles to be inspected without selecting a proper mobile unit inspection site and without setting the necessary signage to direct traffic to the mobile unit inspection site. These contacts were occurring on a regular basis for at least the first two months of 2008 under Complainant's leadership. These contacts were conducted in violation of Respondent's policies on mobile unit operation because they failed to use mobile unit sites selected as compatible with the factors provided in policy and they failed to provide the appropriate signage.

Complainant's main contention at hearing was that Mr. Byers had authorized contacts of vehicles at stop signs and stop lights, and that Mr. Byers had expected the Monument mobile unit to contact the illegal trash truck as they did on January 22, 2008.

The persuasive evidence at hearing did not support this contention. Mr. Byers was asked if the unit could contact vehicles at stop signs and stop lights. Mr. Byers, however, did not understand the import of the question. Moreover, the question he was asked did not address the central feature of the monument mobile unit's operations; that is, the mobile unit officers were talking about dispensing with any signage and pre-selected mobile unit inspection sites and were, in essence, chasing suspected illegal vehicles until they could make a contact. Mr. Byers did not authorize such actions. Additionally, Complainant's contention that Mr. Byers provided the Monument mobile unit with the tip about the improper driver for the trash truck with the expectation that they would perform a traffic stop of that truck was not borne out by the persuasive evidence at hearing. Mr. Byers was a credible witness when he testified that he believed that the mobile unit would use a mobile inspection location in the vicinity of the address, and that he did not expect Complainant and the other officers in that unit to stake out the trash truck.

Complainant also contends that Ms. Nixon's decision that Complainant had claimed be entirely ignorant of the policies and procedures was an incorrect statement, and that her use of that factor in the disciplinary decision warrants reversal of the decision.

A review of the transcript of the Rule 6-10 meeting shows that, while Complainant

reported that he had not seen the promulgated rules, he did not make a sweeping denial of knowing any policies.

Ms. Nixon's statement, however, is not added to the letter to illustrate that Complainant did not know policies. To the contrary, Ms. Nixon's point was that Complainant was not being forthright and honest with her during the investigation process. Her point is well taken. During Respondent's investigation and the Rule 6-10 meeting, Complainant consistently minimized his unit's use of the improper techniques, admitting during Mr. Archer's investigation to only three or four such actions while Officers Mustered and Strauss admitted to a far more comprehensive use of the disapproved tactics. While Ms. Nixon's citation to Complainant's denial of knowing any policy is a misinterpretation of Complainant's specific statement about his knowledge of policy, her essential point was correct: Complainant was not truthful and forthcoming in describing his actions during either the investigation leading up to the Rule 6-10 meeting or during the Rule 6-10 meeting itself.

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

1. Respondent's disciplinary decision 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; 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).

Respondent performed a reasonably thorough investigation into allegations by members of the Colorado State Patrol that Complainant and the Monument mobile unit had been performing illegal stops of vehicles. Complainant presented no evidence that Respondent should have considered other information concerning these allegations and had failed to do so.

Following the investigation, Respondent held a Rule 6-10 meeting, at which time Complainant was permitted to add whatever information he thought would be relevant or mitigating. Complainant presented information that his supervisor, Mr. Byers, had authorized actions that Complainant was taking. Ms. Nixon investigated this information and found it to be incorrect. There is no persuasive indication that Respondent failed to give candid and honest consideration of the evidence before it in this matter.

Finally, Complainant presents no persuasive reason to believe that Respondent has reached unreasonable conclusions. Complainant's violations of departmental policies on the handling of mobile unit contacts with vehicles constitute failures to comply with the standards of efficient service or competence for a POE officer and are a proper basis of discipline under Board Rule 6-12. Ms. Nixon has concluded that Complainant's actions were willful violations of departmental policy and, given Complainant's history with this issue, such conclusions are warranted.

Complainant's primary contentions at hearing were that Complainant had been subject to an unreasonable level of discipline and had been subject to unlawful discrimination. These specific objections are addressed below.

Overall, however, there is no persuasive evidence to find that Respondent's handling of this matter was arbitrary, capricious, or contrary to rule or law.

2. Complainant Has Not Demonstrated That He Was Subject To Illegal Discrimination On The Basis Of His Ancestry:

(a) Legal Test for Discrimination On the Basis of Ancestry:

Complainant's employment discrimination claim arises under the Colorado Anti-Discrimination Act (CADA). Section 24-34-402(1)(a), C.R.S., provides, in relevant part:

> It shall be a discriminatory or unfair employment practice . . . [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of disability, race, creed, color, sex, age, national origin, or ancestry.

In most cases, a plaintiff lacks direct evidence of an employer's discriminatory motivation and must prove intent indirectly by way of inference. Colorado has adopted the following approach, modeled on the Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for proving an inference of discriminatory intent.

Initially, the plaintiff must establish a *prima facie* case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination. *Colo. Civil Rights Comm'n v. Big O Tires, Inc.,* 940 P.2d 397, 400. (Colo. 1987).

If the plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. If the employer produces such an explanation, the plaintiff must

then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Id.* at 401.

Intentional discrimination is presumed if a plaintiff proves a *prima facie* case unrebutted by an employer's offer of a nondiscriminatory reason for an adverse job action. *See Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A nondiscriminatory reason is one that is not prohibited by CADA, namely, a reason that is not based on factors such as disability, race, creed, color, sex, age, national origin, or ancestry. *See Equal Employment Opportunity Comm'n v. Flasher Co.,* 986 F.2d 1312, 1316 n. 4 (10th Cir.1992); *Bodaghi v. Dep't of Natural Res.,* 995 P.2d 288, 307 (Colo.2000).

Once such a reason is provided, however, the presumption of discrimination "drops out of the picture"; at that point, the trier of fact must decide the ultimate question of whether the employer intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). The burden of proving intentional discrimination always remains with the plaintiff. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1248 (Colo.2001); *Bodaghi,* 995 P.2d at 298.

Plaintiffs typically demonstrate pretext in one of three ways: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220 (10th Cir. 2000).

"A plaintiff who wishes to show that the company acted contrary to an unwritten policy or to company practice often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness." *Kendrick,* 220 F.3d at 1230. The plaintiff bears the burden of proving different treatment from that of similarly-situated employees. *Burdine, supra,* 450 U.S. at 258, 101 S.Ct. at 1096.

To carry this burden, the plaintiff must show that the employees who were treated differently were similarly situated to the plaintiff in all relevant respects. To be similarly situated, other employees must be supervised by the same person, and subject to the same standards concerning performance, evaluation, and discipline. *McGowan v. City of Eufala, 472 F.3d 736,* 745 (10th Cir.2006). In evaluating whether employees are similarly situated, a court should "compare the relevant employment circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees." *Aramburu v. Boeing Co.,* 112 F.3d 1298, 1404 (10th Cir.1997). In order for the disparate treatment of other employees to be relevant, they must have engaged in conduct of "comparable seriousness" to the plaintiff's conduct. *Kendrick,* 220 F.3d at 1230.

(b) Complainant's Evidence:

There is no dispute at hearing that Complainant met the first three elements for a *prima facie* showing of unlawful discrimination on the basis of ancestry[1]: 1) Complainant is Hispanic; 2) Complainant was qualified for his position as a POE Officer II; and 3) Complainant suffered an adverse employment decision in the termination of his employment.

The fourth element in a *prima facie* showing, however, is not met in this case; Complainant has not shown that the circumstances give rise to an inference of unlawful discrimination.

Complainant's ancestry has appeared only one time in the case, and that was when Complainant argued that he was the only Hispanic involved in this incident and that he was the only officer to suffer termination. Complainant's argument lacks any indication that he the decision to terminate his employment occurred in whole or in part because he was Hispanic. For this reason, Complainant has not been able to present a *prima facie* case of discrimination.

Assuming, however, that Complainant has made a *prima facie* showing, the next step in the analysis is for Respondent to offer its nondiscriminatory reason for terminating Complainant's employment. Respondent has asserted that it terminated Complainant's employment because he used, and as unit supervisor had authorized the use of, improper mobile unit inspection techniques while knowing that such tactics were not permitted under departmental policy. This explanation suffices as a nondiscriminatory reason for taking disciplinary action.

The burden of production then shifts to Complainant to prove that this reason is merely pretext for racial discrimination. Complainant attempts to show pretext by maintaining his argument that Complainant was the only Hispanic involved in this incident and the only officer terminated.

Complainant's argument on similarly situated white employees is not persuasive because none of the other officers were similarly situated to Complainant. In order for

---

[1] Complainant refers to his claim as one based upon national origin/ethnicity, rather than a claim of race discrimination. CADA, however, does not use the term ethnicity as a possible grounds upon which a finding of unlawful employment discrimination would be founded. A claim based upon ancestry, however, would be the functional equivalent of a claim based upon ethnicity, while national origin implies foreign birth. *See Colorado Civil Rights Commission v. The Regents of the University of Colorado*, 759 P.2d 726, 729 (Colo. 1988)(noting that the Civil Rights Commission had found probable cause for unlawful discrimination based on national origin or ancestry on behalf of an Hispanic employee); *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288, 292 (Colo. 2000)(affirming a finding of national origin discrimination against an Iranian-born state employee). Complainant's discrimination claim is analyzed with that substitution of language to reflect a claim of unlawful discrimination based upon ancestry.

Complainant's argument to serve as a proper basis for a finding of pretext, Complainant must show that that there were employees who were treated differently than he was, and that the others were similarly situated to him in all relevant respects. To be similarly situated, other employees must be supervised by the same person, and subject to the same standards concerning performance, evaluation, and discipline. *McGowan, 472 F.3d at* 745. Complainant, however, was the mobile unit supervisor in charge of the functions of the mobile unit. Officer Mustered was a unit officer, and Officer Strauss was still in training. Supervisor Byers also was not similarly situated to Complainant because there was credible and persuasive evidence that he did not know about the tactics being used by Complainant and the Monument mobile unit, and had not authorized the use of any such tactics. Complainant has presented insufficient evidence from which to conclude that there were any similarly-situated employees at the Monument mobile unit or Monument POE.

Complainant also argued at hearing that Respondent's willingness to oppose his application for unemployment benefits was also evidence of discrimination by his appointing authority. The persuasive evidence at hearing, however, established that Complainant's appointing authority did not make the decision to oppose Complainant's unemployment benefits. Complainant did not establish any other circumstances that would support his argument of pretext based upon the department's handling of his unemployment benefits.

Complainant, therefore, cannot on this record demonstrate that Respondent's explanation for why it terminated his employment is merely a pretext for unlawful discrimination. Complainant does not prevail on his claim of unlawful discrimination on the basis of ancestry.

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

Board Rule 6-9, 4 CCR 801, requires that an appointing authority is to weigh the facts of the incident as well as an employee's information and performance in making a decision on the level of discipline to impose. *See* Board Rule 6-9 ("The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... 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").

Ms. Nixon's decision to terminate Complainant's employment was reached after a reasonably thorough investigation into the allegations, a review of Complainant's statements, and a review of Complainant's work history, including his prior corrective action and performance reviews. Respondent correctly found that the tactics adopted by Complainant were not just violations of departmental policy but were the type of tactics that created dangerous situations for both the POE officers on the unit and for motorists. Respondent has also persuasively demonstrated that these violations were willful violations, that Complainant knew that he was not authorized by departmental policy to

employ the tactics, and that he was not honest and forthcoming when confronted with evidence that he had been using such tactics.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, as required by Board Rule 6-9. The sanction of termination is within the range of reasonable alternatives available to Ms. Nixon under the circumstances of this case.

D. Attorney fees are not warranted in this action.

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 and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs[2] 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), 4 CCR 801.

Complainant has not prevailed in this matter because there was credible and persuasive evidence that Complainant was using unapproved techniques as part of his work at the Monument mobile unit. Respondent has, accordingly, presented rational arguments and competent evidence to support its imposition of a personnel action against Complainant. In addition, there was no evidence that would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth. Given the above findings of fact, an award of attorney fees is not warranted in this matter.

CONCLUSIONS OF LAW

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

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

4. Attorney fees are not warranted.

---

[2] Complainant has requested a remedy of reimbursement for all compensable costs. Attorney fees and costs would be compensable if the requirements of C.R.S. § 24-50-125.5 were met. Complainant, therefore, has filed a request for attorney fees and costs under that statutory provision and the Board's implementing rule, Board Rule 8-38.

ORDER

Respondent's action is **affirmed**. Attorney fees and costs are not awarded.

Dated this 29th day of JUNE, 2009.

[redacted]

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

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. 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 record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

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.

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of June, 2009, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Michael J. Belo

[redacted]

and in the interagency mail, to:

Michael D. Scott

[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)