

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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PAUL RODRIGUEZ,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT  
DENVER, INFORMATION TECHNOLOGY SERVICES,

Respondent.

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Administrative Law Judge Denise DeForest held the hearing in this matter on November 25, 2008, at the State Personnel Board, 633 - 17<sup>th</sup> Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ at the conclusion of the hearing. Special Assistant Attorney General Manual R. Rupe represented Respondent. Respondent's advisory witness was Aaron Wishon, the appointing authority. Complainant appeared and was represented by George C. Price. Esq.

**MATTER APPEALED**

Complainant, Paul Rodriguez ("Complainant") appeals his demotion by Respondent, University of Colorado at Denver, Information Technology Services ("Respondent").<sup>1</sup> Complainant seeks removal of the discipline, reinstatement to his former position, back pay and benefits, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded**.

**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

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<sup>1</sup> Complainant originally asserted claims of retaliation and violation of the State Employee Protection Act. Complainant was permitted to withdraw both claims at the hearing.

available to the appointing authority;

4. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant has been employed as a certified employee as part of the Information Technology ("IT") section at the University of Colorado at Denver ("University" or "UCD") for more than 14 years. He has promoted over the years to the position of IT Professional IV. In 2008, Complainant's direct supervisor and appointing authority was Aaron Wishon, Assistant Vice Chancellor for Information Technology Services.
2. As an IT Professional IV, Complainant held administrator access to the University's computer system.
3. In his 2007 – 2008 performance evaluation as an IT Professional IV, Complainant was given an overall rating of Exceeds Expectations by Mr. Wishon. In his previous seven years of performance reviews, Complainant received a Satisfactory rating only in one year. He received Above Standard, Outstanding, or Peak Performer ratings in the other six years.

### **Complainant's workplace violence complaint**

4. On April 8, 2008, Complainant was working on a project with a representative from Dell in his office. The project required that certain documents be reviewed by another member of the IT department, Sean Clark.
5. Prior to April 8, 2008, Complainant and Mr. Clark did not have a good working relationship. The two of them had gone through counseling through the University to work on how they could interact more professionally.
6. On April 8, 2008, Complainant walked the short distance from his office to Mr. Clark's office, knocked on Mr. Clark's door, and put his head inside the door to speak with Mr. Clark about an e-mail he sent to Mr. Clark for review. Mr. Clark did not react well to the interruption. Complainant told Mr. Clark to forget it, turned around, and left Mr. Clark's doorway.
7. Complainant later reported what occurred next as a workplace violence complaint. Complainant reported that Mr. Clark followed him out of the office and into the hallway as Complainant returned to his office. When Complainant turned around at his office doorway, he found Mr. Clark, red-faced and angry, standing about an inch from his face. Mr. Clark is also considerably taller and bigger than Complainant. Complainant reported that Mr. Clark told him, through gritted teeth, "Don't you ever turn your f\*\*\*ing back on me."

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Complainant thought Mr. Clark might hit him. Complainant opened his office door and Mr. Clark went back to his own office.

8. Complainant reported to Mr. Wishon that Mr. Clark had committed workplace violence against him. Mr. Wishon referred the matter to the University's Human Resources ("HR") department for investigation. Complainant provided his description of the events of April 8, 2008, to HR. Complainant also informed HR that he believed that Mr. Clark had been hostile toward him and others in IT for quite some time, and he described Mr. Clark as a bully.

9. Shelly Crowley, an HR Consultant in the University's Human Resources department, completed an investigation into Complainant's workplace violence complaint. Ms. Crowley obtained information from Complainant, Mr. Clark, and the Dell employee who was in Complainant's office at the time of the incident. Complainant informed Ms. Crowley that he thought that the interaction would have also been caught by the security camera which viewed the hallway between Complainant's and Mr. Clark's offices.

10. Ms. Crowley's report, dated May 19, 2008, reached the conclusion that that the interaction between Complainant and Mr. Clark was in direct violation of the University's Anti-Violence policy in that there was obstreperous conduct, a disruption of the working environment, and an intimidating, threatening, or hostile statement. Ms. Crowley found, however, that the behavior was not sufficiently serious to warrant the issuance of a Corrective Action. Ms. Crowley recommended instead that both Complainant and Mr. Clark be issued letters of instruction in which they were to be advised of the importance of dealing with each other in a professional, business-like manner.

11. Mr. Wishon provided Complainant with the results of the HR investigation of his complaint on June 9, 2008. During this meeting, Mr. Wishon also issued a Corrective Action to Complainant for two other interactions with Mr. Clark in March of 2008.

12. Complainant was upset that the results of the investigation did not sanction Mr. Clark for the intimidating and bullying conduct that Complainant had reported. He asked Mr. Wishon whether the HR report was the final action to be taken by the University, and Mr. Wishon told him that it was. Complainant told Mr. Wishon that he would pursue the matter as a civil matter with his own attorney. Complainant did not have any specific plan in mind as to how he could pursue the matter. Complainant did not file a damages lawsuit against Mr. Clark or the University or ask for a protective order against Mr. Clark.

13. The University Police Department maintains security cameras at various locations on campus. The camera system feeds the footage recorded into a digital recording system. The footage is not permanently recorded and must be retrieved before it is erased if it is to be maintained.

14. Complainant was concerned and upset that the report from Ms. Crowley did not indicate that she had obtained the security camera footage and had viewed the interaction.

15. The University had no written policy in place defining limitations on the circumstances under which the University would release security camera footage, or restricting the release of such information. From the University's standpoint, the decision on when footage would be released was left to the discretion of the University Police Department.

16. The University had a policy of permitting *de minimus* use of the University's telephones and email system for personal use.

### **Incident**

17. Complainant had previously been disciplined in 2003 for an incident when he had used his IT administrator access without authorization and had found an inappropriate sharing of MP3 music files. Complainant was well aware of the fact that he could not use his IT Professional IV computer access to find and retrieve any video files that he may have wanted to view. Complainant decided to go through the normal channels to obtain the video footage. Complainant knew that Terry Thomas worked on information technology issues for the University Police Department. Complainant contacted Mr. Thomas and asked Mr. Thomas who he needed to contact to request the security camera footage. Mr. Thomas told Complainant to contact Mr. Robin Brown, Director of Electronic Security. (Stipulated Fact)

18. Complainant spoke with Mr. Brown on the phone and asked Mr. Brown what was required to obtain a copy of security camera footage. Mr. Brown's normal procedure was to have a short discussion with requestors to tell them that, in order to obtain footage, they needed to provide him with an email containing three pieces of information: the date and time, the location, and why the footage was needed.

19. Mr. Brown told Complainant to email him with the three required pieces of information. Mr. Brown did not inform Complainant that Complainant needed any special access for the record or any particular reason to obtain the record. Mr. Brown was aware that Complainant was an upper-level employee in the IT section.

20. Complainant emailed Mr. Brown on June 9, 2008, at about 3:38 PM. The entire e-mail read:

Robin, Can I get the video from the 4<sup>th</sup> floor IT area on the dat[e] of April 8 between 9:00 AM – 1:00PM? This is for a lawsuit.

21. Mr. Brown responded on the same day at about 4:14 PM: "Is this a time and attendance issue? I will work on it but we may need to send copies to others because these are police records. Normally we send to supervisor and to HR. Will that be a problem?"

22. The next day, June 10, 2008, Complainant emailed Mr. Brown on 12:42 PM and asked: "Robin, What is the normal turnaround time on these requests?"

23. Mr. Brown informed Complainant a few minutes later by return email: "It's available. Who is the supervisor and who is the rep in HR? [A]nd this is the camera looking down the server corridor?"

24. Complainant told Mr. Brown in an e-mail sent a few minutes after Mr. Brown reported that the footage was available:

I have been working with Shelly Crowley. My supervisor is Aaron Wishon. Yes the camera looking down the server room corridor. Where can I pick it up at or do you have a way I can get it online? Thank You for your assistance with this.

25. Mr. Brown then sent a copy of the video stream to Complainant via email at 2:55 PM on June 10, 2008. Mr. Brown also sent copies of the video, along with the e-mail chain of the conversation between Complainant and himself, to University Police Chief Doug Abraham, Mr. Wishon, Ms. Crowley, and a detective at the University Police Department.

26. In making his request for the camera footage, Complainant did not misrepresent his motive or provide false information to Mr. Brown. Complainant did not intend to be misleading in the information he was providing to Mr. Brown. Complainant also did not bypass any requirement imposed by the University Police Department or the University as a whole in obtaining the video footage. Complainant did not need to utilize, and did not actually utilize, his access to the IT systems in order to obtain the video footage.

### **Response of University Supervisors to Complainant's Request**

27. Upon review of the email chain between Complainant and Mr. Brown, Chief Abraham recognized that Complainant was not in a position to be addressing a lawsuit on behalf of the University. Chief Abraham emailed Complainant in the late afternoon of June 10, 2008, asking Complainant for clarification:

Paul what lawsuit is this for? Typcially department heads will make these requests after consultation with legal. I am not aware of any lawsuit in which you would be requesting a video for the university. Can you please advise? Thanks in advance.

The Chief's email was copied to the same four individuals who had been included in Mr. Brown's email, as well as to a fifth person.

28. Chief Abraham also was in contact with Mr. Wishon to discuss why Complainant was receiving a copy of the footage. Mr. Wishon and Chief Abraham spoke in the late afternoon of June 10, 2008. During this conversation, Mr. Wishon informed Chief

Abraham that Complainant had not been satisfied with the University's response to his workplace violence complaint and had mentioned pursuing the matter independently through legal counsel.

29. After Mr. Wishon spoke with Chief Abraham in the late afternoon of June 10, 2008, Mr. Wishon contacted Kevin Jacobs and Steve Zweck-Bronner, two attorneys for the University, by email:

Per Kevin and I discussing this issue this evening – do you read any false pretense from Paul regarding the request below [the emails between Complainant and Mr. Brown]? After discussing with Doug [Abraham], I grew concerned that we might have an individual that could exceed their authority for other “evidence gathering” for personal use – to the extent that Paul basically had admin rights for most of our computing systems. Paul stated to me yesterday that he was looking into the “civil route” and would engage his lawyer due to not being happy on the outcome of an investigation of workplace violence against another staff member.

30. Early in the morning on June 11, 2008, Chief Abraham sent an email to Mr. Wishon in which he expressed his opinion that Complainant had intentionally withheld information from Mr. Brown:

I feel strongly that our department has been taken advantage of by Paul. His email (and phone conversations with Robin [Brown]) clearly led Robin to believe that Paul was representing the University ITS in his request. He did not lie but in my opinion he clearly abused his authority with the university to obtain this video. To the point, if he had said to Robin that it was for personal use, he would have been denied. Or if he didn't work here, he would have been denied. His intentional omissions and statements were misrepresentation. He obtained this for personal use on company time, using company email and his company position to obtain this video.

31. Complainant replied to Chief Abraham's email at 9:04 AM on June 11, 2008. Complainant sent his response to everyone originally copied on the Chief's email. Complainant's response was directed at explaining why he felt he needed to retrieve the camera footage and why he needed to take action:

Doug,

At the time this incident happened, I was in shock and I think calling the police would have been a better alternative [than] HR, but that was the option I chose.

When someone attacks another individual in the manner that I was attacked and there was a witness I think you guys would have did [sic]

a better job of collecting information on the spot, because that is what you are good at. Maybe working with HR might have some suggestion for them on how they might handle these situations in the future.

If Shelly wants to share with you my story and other personnel in ITS, other department and a women who left this orgnization after 7 years due to the [bullying] and intimidation of this man, that is her choice, but my story and [other's stories] will eventually be heard.

Thank You.

32. Neither Chief Abraham nor Mr. Wishon asked Complainant to return or destroy the video footage as improvidently released to him.

### **Administrative Leave**

33. On June 13, 2008, Mr. Wishon placed Complainant on paid administrative leave pending the outcome of an investigation.

34. Mr. Wishon also notified Complainant in writing that there would be a Board Rule 6-10 meeting held on June 18, 2008, for the purpose of determining whether or not there was cause to administer disciplinary action. The letter from Mr. Wishon quoted the language of Board Rule 6-10. The letter also referenced the portion of Board Rule 6-12 which provides that "willful misconduct or violation of these or agency rules or law that affect the ability to perform the job" is a lawful basis for imposition of discipline.

### **Board Rule 6-10 Process**

35. By Monday, June 16, 2008, Mr. Wishon had researched University policies and decided that Complainant had violated three provisions and that Complainant had a history of similar behaviors. He explained his thinking Ms. Crowley in the HR department:

Shelly - based upon the incident with Paul Rodriguez (attached), I've identified at least three major policy violations (links below) that need to be considered as part of the R-6-10 meeting with him. (1) Paul misled the UC Denver Police Department that he needed video footage from the 4<sup>th</sup> floor IT Services offices for a personal lawsuit. Providing missing and/or misleading information and use of a position of trust to obtain information for personal gain is a fiscal code of ethics violation; (2) Paul used his work computer and the UC Denver email system to obtain video footage for a personal lawsuit. This is a violation of the UC Denver policy on Use of Facilities and Equipment by Outside Parties or For Private Gain as these are considered to be state resources. (3) Similar to #2, Paul's use of Information Technology for personal use is a violation of the UC Denver Policy on Use of Information

Technology.

Unfortunately, after reviewing Paul's HR file it appears that he has a pattern of these types of behaviors that I need to take into consideration as part of discussing the violations with Paul. Please let me know if you have any additional thoughts. Thanks, Aaron.

36. Complainant met with Mr. Wishon on June 18, 2008. The meeting included Rhonda Thorton and Shelly Crowley in addition to Mr. Wishon. Complainant's attorney, George Price, attended with Complainant.

37. The Board Rule 6-10 meeting was not taped by Respondent. Mr. Wishon's impression of that meeting was that Complainant did not provide any mitigating information during the meeting but instead continued to insist that Mr. Clark had committed workplace violence against him.

### **Respondent's Policy Review**

38. Mr. Wishon considered the University's "Use of Facilities and Equipment by Outside Parties or for Private Gain" policy ("Use of Facilities Policy") as part of his deliberations. The Use of Facilities Policy defines private gain as "monetary or non-monetary remuneration that is a benefit to an individual or outside entity rather than the UCD." The Use of Facilities Policy permits limited personal use of UCD facilities, "provided [that] such use does not add any measurable cost to the UCD, does not interfere with the performance of regular job responsibilities, is not related to political activity, and is not for the purpose of achieving private gain, except as otherwise authorized in this policy."

39. Complainant's use of the phone and email to contact Mr. Brown regarding his desire to obtain a copy of the video footage did not result in measureable costs to the University, did not interfere with the performance of regular jobs, and was not requested for the purpose of achieving private gain, as that term is defined under the policy.

40. Mr. Wishon also considered the University's Administrative Policy for Use of Information Technology ("Use of IT Policy"). The Use of IT Policy defines its essential purpose:

This policy is intended to ensure that the use of, access to, and disclosure of information technology resources are consistent with the [University] mission of teaching, conducting research, and providing health care and public service.

41. The Use of IT Policy informs University staff that use of "computing and networking resources of the [University] is a privilege and as such, any individual who uses the information technology resources of the [University] is responsible for making use of these resources in an efficient, ethical, and legal manner." The policy also states:



All activities inconsistent with these objectives or that could be construed to constitute a conflict of interest or commitment are considered to be inappropriate and may jeopardize the user's privilege of using IT resources.

42. The policy additionally imposes conditions for use of University IT resources. Mr. Wishon considered two of these conditions in evaluating Complainant's actions:

1. To respect the rights and sensibilities of others using IT resources.

Users should avoid harsassing other users, violating others' privacy, tampering with security provisions, or attempting entry to non-public hosts. Users should be mindful that they are often guests on other institutions' hosts.

5. To respect the stated purpose of accounts on the systems.

Individuals shall use their accounts only for the purposes specified upon creation of the account and shall not use any other individual's account unless explicitly permitted to do so by the personal authorized to use that account. Under no circumstances shall UCSHS IT resources be used for personal profit.

43. Complainant's specific use of IT Resources in obtaining the camera footage was that he used his employee-issued telephone and email account to request a copy of the footage. Complainant did not use his access authorization for the IT system to search for, or retrieve, any information. Complainant made no profit from his use of the phone and email system to request the video footage or from the footage itself.

44. Mr. Wishon also considered the University's Fiscal Code of Ethics. The Fiscal Code of Ethics applies to all University employees. Mr. Wishon specifically considered the following provisions from that code:

II. Employment Responsibility -

Employees **shall**, in the performance of their responsibilities, be accountable for:...

Exercising prudence and integrity in the management of resources in their custody and in all fiscal transactions in which they participate....

Protecting privileged or confidential information to which they have access by virtue of their position;

### III. Conflict of Interest –

Employees **shall** actively avoid conflicts between personal and university interests by:...

Discharging their duties in the best interest of the university and in such a manner that their professional judgment in administration, management, instruction, research, and other professional activities is not affected by any outside financial or personal interest.

45. Complainant's use of the telephone and email system to request a copy of security camera footage did not affect Complainant's professional judgment, Complainant's job duties, or the management of any resources in Complainant's custody. Complainant also did not obtain confidential or privileged information by virtue of his position.

#### **Disciplinary Action**

46. Mr. Wishon decided that the events of April 10 and 11 showed that Complainant was untrustworthy and could not be permitted to continue with IT Professional IV-level access to the computer systems. Mr. Wishon demoted Complainant from his position of IT Professional IV to IT Technician II and reassigned Complainant to the IT Services Network Team at the University of Colorado at Denver campus. In his new position, Complainant's salary was adjusted to \$4,350 per month, which was a reduction in salary of more than \$3,000 per month.

47. By letter dated June 23, 2008, Mr. Wishon notified Complainant that he had found that Complainant had used his position of trust and exceeded his authority as an IT Professional IV to obtain the surveillance tape, and that Complainant had made the request for the tape without Mr. Wishon's permission.

48. Mr. Wishon found that, when the police department asked the reason for the request, that Complainant "did not provide straightforward answers and misled the Police Department into believing that it was official University business by saying that the recording was for a 'lawsuit'". Mr. Wishon additionally noted that, when challenged by the Chief of Police concerning the explanation, Complainant "did not provide a satisfactory answer."

49. Mr. Wishon also found that Complainant's request "was made using state computers and time," that therefore the request was made "using state resources for personal use and/or gain."

50. Finally, Mr. Wishon found that Complainant's conduct constituted willful misconduct or violation of agency rules or laws that affect the ability to perform the job. Mr. Wishon considered Complainant's actions to be such a violation of trust with IT Services customers

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that it undermined the organization's ability to accomplish the University mission. "You have refused to accept responsibility or acknowledge that you should not have exceeded your authority as an IT Professional IV and obtained the information using the proper university procedures."

51. Complainant's demotion was made effective as of July 1, 2008.

52. Complainant filed a timely appeal of his demotion with the Board.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, *et seq.*; *Department of Institutions v. Kinchen*, 886 P.2d 700, 707 (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. *Kinchen*, 886 P.2d at 707-8. 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).

### **II. HEARING ISSUES**

#### **A. Complainant did not commit the acts for which he was disciplined.**

There was no dispute at hearing as to how Complainant obtained a copy of the camera feed that he requested from Mr. Brown. Complainant was disciplined, however, for reasons that require evidence of more than just an email request for video footage.

Respondent's cause for demoting Complainant includes four different types of violations, and each violation required proof of a different series of facts.

- (1) Respondent failed to prove that Complainant committed the acts which were the basis of the finding of willful misconduct:

Respondent primarily based its decision to discipline Complainant, and for the severity of the sanction, on Mr. Wishon's conclusion that Complainant's actions constituted willful misconduct. While Respondent did not explain its specific basis for this finding clearly in its disciplinary letter, the charge of willful misconduct presumably refers to Respondent's contention that Complainant used his position as an IT Professional IV and exceeded his authority as an IT Professional IV to obtain the video footage, and that he intentionally did not provide straightforward answers and misled the Police Department into believing that the footage was for official University business.

These factual contentions, however, were not supported by persuasive and credible testimony at hearing.

After consideration of the credibility of the witnesses, the undersigned has determined that Complainant did not intentionally mislead anyone in his requests for the video footage and that Complainant intended to follow the normal channels in obtaining the footage. See *Sanchez v. State*, 730 P.2d 328, 333 (Colo. 1986)(holding that the agency officer who heard the conflicting testimony "is in the best position to make the credibility assessments"); *Brodak v. Visconti*, 165 P.3d 896, 898 (Colo. App. 2007)(noting that the credibility of witnesses and the weight to be given to the evidence are factual matters solely within the province of the hearing officer). Complainant's explanations at hearing explaining the content of his emails constituted credible explanations.

Complainant also did not use his position as an IT Professional IV for access to the footage. The fact that Mr. Brown knew that Complainant was an IT Professional IV did not appear to play much of a practical role in Mr. Brown's decision to release the video footage because he was also explicitly told by Complainant at the same time that the video footage was for a lawsuit. This disclosure that the video was related in some way to a lawsuit took the request outside of any reasonable assumption that it was related to Complainant's IT work. Chief Abraham recognized that point immediately, and it is reasonable to conclude under these circumstances that Mr. Brown also understood that Complainant's request was not business as usual.

Moreover, it is not at all clear that Complainant's statements misled Mr. Brown, and the Findings of Fact do not include any finding that Mr. Brown was misled. Mr. Brown's testimony on this point was not persuasive at hearing. Additionally, Mr. Brown asked a very curious question of Complainant during the period in which he was processing Complainant's request. He told Complainant that release of the video normally requires that others receive copies of the footage, such as Complainant's supervisor and HR. He then asked "Will that be a problem?" If Mr. Brown was misled into thinking that this footage was for official University purposes only, the question makes very little sense. The more logical conclusion to be drawn from all of the credible evidence is that the University's

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policies (as understood and applied by Mr. Brown at the time) did not categorically prohibit employees from requesting copies of videos for their own needs, and not that Mr. Brown was misled in thinking that the video was solely for University use or that Complainant was intentionally misleading him.

In Respondent's disciplinary letter, Mr. Wishon also found that Complainant had not followed University policies in obtaining the video footage. The University's policies, however, were not as stringent as Chief Abraham might have preferred in hindsight. Complainant followed what he was told were the appropriate procedures. He provided Mr. Brown with the information Mr. Brown required in order to gain access. The University is free to impose a more rigorous policy for access to security camera footage, but Complainant satisfied what few requirements were in effect at the time he made his request.

Mr. Wishon's conclusions that Complainant had intentionally misled Mr. Brown and that Complainant had used his position to obtain the video footage, therefore, were not supported by the evidence at hearing.

- (2) Respondent did not prove that Complainant committed the acts which would constitute a violation of the Use of Facilities Policy:

Mr. Wishon also testified that he applied the terms of the University's Use of Facilities and Equipment by Outside Parties or for Private Gain Policy ("Use of Facilities Policy") in evaluating Complainant's actions, and that Complaint had violated he policy.

The Use of Facilities Policy "outlines the circumstances under which [University of Colorado at Denver] facilities or equipment can be used for activities outside the normal scope of the UCD mission." Use of Facilities Policy at A(1). Specifically, "the policy addresses employee use of facilities or equipment for personal purposes or for private gain and by outside parties." Use of Facilities Policy at B(1).

The policy prohibits use of UCD facilities by employees or students for commercial, personal, political, or private financial gain or for commercial advertise "except as expressly provided in this policy." Use of Facilities Policy at C(2)(a). The policy then outlines several express provisions which permit use of University facilities by employees or students, such as the "Faculty Incidental Use Exception" and "Pro Bono Use." The policy also contains a general permissible use provision, which permits activities to qualify as permissible if they meet a series of requirements. Use of Facilities Policy at C(2)(c).

More importantly, the policy also includes a provision permitting limited personal use of University facilities and equipment:

Infrequent and incidental employee personal use of UCD facilities such as local telephone calls, offices, and office equipment is permitted, provided such use does not add any measureable cost to

the UCD, does not interfere with the performance of regular job responsibilities, is not related to political activity, and is not for the purpose of achieving private gain, except as otherwise authorized in this policy.

Use of Facilities Policy at C(2)(d). The policy specifically defines "private gain" to mean "monetary or non-monetary remuneration that is a benefit to an individual or outside entity rather than to the UCD." Use of Facilities Policy at B(2)(e). This Personal Use provision is consistent with the testimony at hearing that the University permits *de minimus* personal use of telephones, email, and other equipment by employees.

Respondent offered two related theories at hearing as to how Complainant violated the Use of Facilities Policy. First, Respondent argued that Complainant's use of the telephone and email to contact Mr. Brown was a violation of the general prohibition stated in the Introduction Section: "As a general rule, UCD does not allow for the use of campus facilities or equipment for personal or outside party use." Use of Facilities Policy at C(1). Given the limited nature of Complainant's use of the telephone and email to accomplish his contact of Mr. Brown and the personal use exception in the policy, however, this general provision alone does not provide a viable basis for Respondent's position.

Respondent's second theory addressed the personal use exception. Respondent argued at hearing that Complainant had violated the Use of Facilities Policy because he used his access for the purpose of achieving private gain and could not qualify for the Personal Use exception to the general prohibition.

In order to prevail at hearing on this allegation, accordingly, Respondent must prove that Complainant used the University's facilities for the purpose of achieving remuneration. The term remuneration is not defined in the policy, but in its broadest sense remuneration generally refers to "the act of paying an equivalent for services, loss or sacrifices." *Webster's New Universal Unabridged Dictionary*, 2d ed., at p. 1530.

No persuasive evidence at hearing supported that Complainant used the University's facilities for the purpose of achieving a payment of some type. Complainant's statement to Mr. Wishon that he would pursue the workplace violence matter is not sufficient to show that Complainant requested the video footage for the purpose of achieving remuneration. Complainant did not have a specific plan in mind, and he did not pursue anything in civil court. If he had pursued something through the courts, though, the most useful civil remedy would be a civil protective order against Mr. Clark. A protection order, however, would not fit within the definition of remuneration.

Additionally, Respondent's argument at hearing that pursuing a personal interest in a matter should be treated as having a purpose of achieving private gain is not supportable, given the express policy definition of the term "private gain."

In reaching his decision on the propriety of Complainant's actions, Mr. Wishon also

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found that departmental policy required Complainant to make a request through him for any records, and no such permission had been requested or granted.

The Use of Facilities Policies includes a subsection generally describing how permissible use of University facilities could be established. These requirements include that compliance with the specified conditions "must be documented and the employee or student must obtain prior written approval..." Use of Facilities Policy at C(2)(c).

The terms of subsection (2)(c), however, are not applied to the following subsection, subsection (2)(d), permitting infrequent and incidental employee use of University facilities and equipment by employees. There was also no indication that the University policy on personal use required each employee to obtain prior written permission in order to, for example, call home during the day or make social arrangements for dinner. So long as Complainant's use of University equipment falls within the exemption for Personal Use, there was no requirement under the Use of Facilities Policy that Complainant obtain prior written permission for such use.

The credible and persuasive evidence at hearing demonstrates that Complainant's use of the telephone to call Mr. Brown for a short conversation, and then his use of the email system to provide Mr. Brown with his request and to follow-up on that request, constituted a permissible infrequent and incidental personal use of the University's facilities. No persuasive evidence was received at hearing which demonstrated that the use added a measurable cost to the University, interfered with the performance of regular job responsibilities, or was related to political activities. Respondent has also not proven that Complainant's actions were for private gain. As a result, Complainant's actions fit within the permitted Personal Use exception in the Use of Facilities Policy. Respondent has failed to prove by a preponderance of the evidence that Complainant committed actions which could violate the Use of Facilities Policy.

(3) Respondent failed to support its contention that Complainant committed actions which violated the Use Of Information Technology Policy:

Mr. Wishon also testified that he considered Complainant's actions to be in violation of the University's Administrative Policy for Use of Information Technology ("Use of IT Policy").

The Use of IT Policy is "intended to ensure that the use of, access to, and disclosure of information technology resources are consistent with [the University's] mission of teaching, conducting research, and providing health care and public service." Use of IT Policy at I.A. IT resources under the policy includes such items as telephones, computers, video systems, and email systems.

Mr. Wishon testified that he had considered two specific standards within the policy that he believed had been implicated by Complainant's actions.

The first of those provisions requires IT resource users to "avoid harassing other users, violating others' privacy, tampering with security provisions, or attempting entry to non-public hosts." Respondent presented no evidence at hearing that Complainant used his IT resources to harass others, violate the privacy of others, or that he attempted entry to a non-public host.

The second provision cited by Mr. Wishon requires users to "respect the stated purpose of accounts on the systems." This requires that IT resource users "use their accounts only for the purposes specified upon creation of the account," and "not use any other individual account unless explicitly permitted to do so by the person authorized to use that account." There was no contention at hearing that Complainant had violated either of these first two provisions, and it is difficult to see how these provision would apply to this matter.

The second policy provision also includes the prohibition against personal profit: "Under no circumstances shall [University] IT resources be used for personal profit." Respondent contends that Complainant use of the telephone and email systems to obtain the camera footage for a matter in which he had a personal interest is the use of such resources for personal profit.

This argument, however, is unreasonable and unpersuasive. The plain language of the policy applies itself to the narrower conception of "personal profit" rather than the significantly broader concept of "personal interest." Interpreting the policy in the manner argued by Respondent expands the phrase beyond its plain meaning.

Additionally, interpreting the phrase in the manner argued by Respondent creates a conflict between the Use of IT Policy and the Use of Facilities Policy. The University's Use of Facilities Policy permits a limited amount of personal use of the equipment covered by the Use of IT Policy, such as email and telephones. If having a personal interest at stake was sufficient to constitute a prohibited use for "personal profit", there could be no *de minimus* personal use of University equipment and facilities. Respondent did not succeed at hearing in demonstrating that a personal interest held by an employee should also be construed to be "personal profit" by that employee.

This is a not a case where Complainant was attempting to sell the video or took any other action which indicates that he was going to profit from the video. The most reasonable interpretation of Complainant's actions was that he was attempting to protect his right to respond to what he perceived as workplace violence by making sure that the video evidence was retrieved. This does not fit the definition of a prohibited use of IT resources for personal profit under the Use of IT Policy.

Respondent, accordingly, has not demonstrated by a preponderance of the evidence that Complainant had committed any acts which could violate the University's Use of IT Policy.



- (4) Respondent did not prove that Complainant committed acts that could be a violation of the University's Fiscal Code of Ethics:

Mr. Wishon also examined the University's Fiscal Code of Ethics and applied two of the provisions from that policy to Complainant's conduct.

Mr. Wishon accused Complainant of failing to protect "privileged or confidential information to which they have access by virtue of their position" and in acting with a conflict of interest by failing to "discharge their duties in the best interests of the university and in such a manner that their professional judgment... is not affected by any outside financial or personal interest."

As explained in more detail above, however, Complainant followed the University's procedures to obtain a copy of the footage, and did not obtain the information by virtue of his position. Moreover, nothing in this course of events involved or affected Complainant's professional judgment or responsibilities.

Respondent's conclusion that Complainant violated the University's Fiscal Code of Ethics is not supported by a preponderance of the evidence that Complainant committed any act in violation of that policy.<sup>2</sup>

#### **B. The Appointing Authority's action was arbitrary and capricious.**

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).

As documented in the discussion, *infra*, concerning the necessary factual basis to support violations of the cited University policies, there were a number of missing links in Respondent's evidence.

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<sup>2</sup> At hearing, Mr. Wishon also testified that the ethics policy also incorporates other standards of conduct, including the standards under C.R.S. § 18-8-402 describing the crime of misuse of official information. This provision cannot support Respondent's personnel action. The University did not allege this as a violation in its disciplinary letter and cannot now add a separate cause of action to support its decision. Additionally, the crime of misuse of official information is a criminal statute which outlaws what amounts to insider trading by public official; that is, it makes it a crime for a public employee to acquire a pecuniary interest in, or place a wager upon, property or other matter which would be affected by one of his official actions or by information to which the employee is privy. There was no factual basis in this case to support such an allegation.

Respondent's decision that Complainant violated the Use of Facilities Policy fails to acknowledge that the policy expressly permits certain types of uses, including personal use, and that Complainant's minimal use of the telephone and email system to make his requests falls within that exception. Respondent's decision that the policy was violated represents an unreasonable conclusion, given the facts and given the terms of the policy.

Respondent's consideration of the Use of IT Policy suffers from similar problems. Complainant did not use his administrator access to the IT system. He went through channels to obtain the video feed. Given that the personal use provision of the Use of Facilities Policy allows Complainant to make limited inquiries using the email system, Complainant cannot be said to have used his email for an improper purpose. Complainant's statements that he would pursue his options with a lawsuit was not sufficient to show that there was profit being made from Complainant's emailed request for the video feed. Without being able to show some level of misconduct with the email system or being able to support its contention that Complainant was using the system "for personal profit", Respondent's conclusion that there was a violation of Use of IT Policy is an unreasonable conclusion and, therefore, an arbitrary and capricious decision.

The University's Fiscal Code of Ethics is also ill-suited for these facts. Complainant did not use information to which he had access by virtue of his position. There was no evidence presented at hearing that Complainant allowed his outside financial or personal interests to affect the discharge of his duties or his professional judgment. There was, in fact, no indication of any effect on Complainant's duties. The Fiscal Code of Ethics also requires that Complainant exercise "prudence and integrity in the management of resources in the custody and in all fiscal transactions in which they participate." It is not at all clear how this provision was violated, given that the video feed was neither a resource in Complainant's custody and there were no fiscal transactions at issue in this case.

Respondent's conclusions that there were violations of the three policies cited as the basis for Complainant's discipline, and that there was willful misconduct in this case, are conclusions that reasonable persons would not reach given the facts of this case and the terms of the policies themselves.

### **C. The discipline imposed was not within the range of reasonable alternatives**

Respondent's demotion of Complainant was a severe sanction that was, in Mr. Wishon's view, made necessary by the fact that he felt that Complainant could not be trusted with administrator access to the IT system.

Given that Respondent has not been successful in identifying any policy or standard of conduct that Complainant's actions have violated, any sanction is outside of the range of reasonable alternatives.

Even if a policy violation of some type was found in this case, however, the lack of a factual basis to conclude that Complainant misrepresented anything, the undemanding

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nature of the University's policy for release of the video feeds, and Complainant's desire to document what he viewed to be workplace violence directed against him militates against applying a severe sanction to Complainant.

The credible evidence demonstrates that the appointing authority did not pursue his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The chosen sanction is not within the range of reasonable alternatives under such circumstances.

**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. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Respondent's personnel action against Complainant was the product of a variety of missteps. Respondent found violations of University policies which, by their terms, were not applicable to the circumstances or which, as is the case with the Use of Facilities Policy, actually support Complainant's actions. Respondent also ignored information that demonstrated that Complainant followed the University's policies, such as they were applied by Mr. Brown, to obtain the copy of the tape, and in reached conclusions on Complainant's intent and credibility that were shown to be unwarranted at hearing.

The root of Mr. Wishon's concerns, however, appears to be a desire to protect the University from a lawsuit and to assure Chief Abraham, one of Respondent's clients, that he was taking action to correct a problem about which Chief Abraham was upset. Under such circumstances, the personnel action against Complainant cannot be said to have been instituted in a bad faith, or maliciously, or as a means of harassment. While Mr. Wishon interpreted the evidence in an unacceptably negative manner, his decision to institute a personnel action was not entirely groundless or frivolous given Chief Abraham's objections to Complainant's acquisition of the video footage. There is insufficient evidence to find 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.

**CONCLUSIONS OF LAW**


1. Complainant did not commit the acts for which he was disciplined.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.

4. Attorney's fees are not warranted.

**ORDER**

Respondent's action is **rescinded**. Complainant is reinstated to his position of IT Professional IV with full back pay and benefits. Attorney fees and costs are not awarded.

Dated this 9<sup>th</sup> day of January, 2009.



Denise DeForest  
Administrative Law Judge  
633 – 17<sup>th</sup> 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 12<sup>th</sup> day of Jan., 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:

George C. Price, Esq.

[Redacted]

and

Manuel R. Rupe

[Redacted]

[Redacted]

Andrea C. Woods