STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010G087**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID LIVESAY,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge (ALJ) Denise DeForest held a commencement hearing in this matter on December 23, 2010, and an evidentiary hearing on March 17, 18, 23, and April 6, 2011, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ at the conclusion of the evidentiary hearing. Assistant Attorney General Micah Payton and First Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Robert Haley, Director of Administration for Region 6 of the Colorado Department of Transportation (CDOT or Respondent) and Complainant's Appointing Authority. Complainant appeared and was represented by Elizabeth Lamb Kearney, Esq.

MATTER APPEALED

Complainant, David Livesay (Complainant) appeals Respondent's response to his grievance concerning workplace violence. Complainant seeks an assignment to a Heavy Equipment Operator IV position to remove him from his assignment under supervisor Nick Madrid, compensation for hours of overtime that he was denied, and reimbursement of his attorney's fees and costs.

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

PROCEDURAL ISSUE: RESPONDENT'S C.R.C.P. RULE 41(b) MOTION

As a result of the Board's adoption of the Preliminary Recommendation issued in this matter, Complainant proceeded at hearing on two issues:

1) "[A]s to whether a policy that required mandatory reporting precludes imposition of a performance memo for a good faith claim report made under that policy," and

2) "[A]s to whether [TMIII] Madrid retaliated against [Complainant] for filing the complaint against [TM II Ranger] Geremaia".

At the conclusion of Complaint's evidence, Respondent moved under C.R.C.P. Rule 41(b) to dismiss the first issue concerning whether the policy precluded issuance of a performance document form (PDF). C.R.C.P. Rule 41(b)(1) provides that: "[a]fter a plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the fact and the law the plaintiff has shown no right to relief."

The question to be decided under the general application of Rule 41(b) is not whether plaintiff made a *prima facie* showing but whether a judgment in favor of the defendant was justified on the plaintiff's evidence. *Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc.*, 37 P.3d 458, 461 (Colo.App. 2002), *rev'd on other grounds*, 62 P.3d 142 (Colo. 2003). The court is not to make any special inference in the plaintiff's favor nor concern itself with whether the plaintiff has made out a *prima facie* case. Instead, it is to weigh the evidence, resolve any conflicts in it and decide for itself where the preponderance lies. *Public Service Co. of Colorado v. Board of Water Works of Pueblo, CO*, 831 P.2d 470, 479 (Colo. 1992).

The undersigned granted Respondent's motion because Complainant had not demonstrated by a preponderance of the evidence that Respondent's Workplace Violence policy and procedure precluded the imposition of the PDF issued in this matter after Complainant made a good faith report of workplace violence. The evidence instead demonstrated that Complainant used profanity and other disrespectful language during his argument with Mr. Geremaia, that Respondent's performance expectation for employees was to use respectful language, that the PDF issued to Complainant addressed only the use of disrespectful language, and that the workplace violence policy did not preclude the issuance of such performance documentation. The specific findings of fact that address these conclusions are detailed in the Findings of Fact section, *infra*.

The elimination of the first issue left only the retaliation issue to be addressed at hearing during Respondent's case.

HEARING ISSUES

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

2. Whether an award of attorney fees and costs is warranted.

FINDINGS OF FACT

Introduction and Background:

1. Complainant began working for Respondent as a Transportation Maintenance (TM) Worker I in February 2006. As a TM I, Complainant was assigned to road duties under the supervision of a work leader who would be a TM II, and the formal supervision of a TM III.

2. In November of 2009, Complainant was assigned to Patrol 28 in the Mary Area of CDOT Region 6. Complainant's work leader was TM II Ranger Geremaia. Complainant's TM III supervisor was Nick Madrid. Mr. Madrid supervised both Patrol 28 and Patrol 19 in the Mary Area. Mr. Madrid's direct supervisor was Labor and Trades Craft Operations I (LTC OPS I) David Haley.

3. When Complainant worked different shifts, such as would be necessary when Complainant reported for snow removal duties, Complainant's supervisors included other TM IIs and TM IIIs.

November 17, 2009 Argument:

4. On the afternoon of November 17, 2009, Complainant and TM I Bill Fortt took a truck out to locate cable rail hits on I-76 and to clean drains on Highway 85. Mr. Geremaia called them back to the Patrol 28 shed.

5. When Complainant and Mr. Fortt arrived back at the Patrol 28 shed, TM I Hector Pesina was working in the yard on a plow. Mr. Pesina asked Complainant for a pry bar, and Complainant went into the shed to locate one.

6. Mr. Geremaia was inside the shed. He told Complainant that Complainant and Mr. Fortt had left the shed without telling him what they were doing, and that they were to ask him for permission to do anything, including leaving the yard. Complainant told Mr. Geremaia that Geremaia wasn't Complainant's boss, and that Geremaia was a lead worker who should lead by example rather than sit around the shed. Complainant also told Mr. Geremaia that respect was to be earned, and that Mr. Geremaia needed to stop talking down to Complainant.

7. Mr. Geremaia and Complainant both continued the argument with raised voices. Mr. Geremaia told Complainant that he was a liar when Complainant told him that he and Mr. Fortt left to go do some work. Complainant decided that he had enough of the argument and he turned to walk back out to the yard. At that point, Mr. Geremaia yelled for Complainant to come into his office. Complainant responded by telling Mr. Geremaia, "Shit in one hand and wish in the other. I am done trying to talk to you."

8. Complainant walked outside the shed to where Mr. Pesina and Mr. Fortt were working on the plow. When they asked what was going on, Complainant told them that Mr. Geremaia was getting out of control and was "two French fries short of a happy meal."

9. Mr. Geremaia continued the argument with Complainant while they were outside of the shed. Mr. Geremaia's voice was raised and angry, he was pointing into Complainant's face, and he was positioning himself to be very close to Complainant's face. Complainant attempted to walk away from Mr. Geremaia on several occasions, and Mr. Geremaia followed Complainant.

10. Complainant walked back into the building, and Mr. Geremaia followed him. While they were back in the building, Mr. Pesina and Mr. Fortt came into break up the argument. Mr. Pesina grabbed Mr. Geremaia and pushed him backwards into the office to separate him from Complainant. Mr. Geremaia resisted being separated from Complainant. Complainant was not acting aggressively when Mr. Fortt moved between him and Mr. Geremaia.

Complainant's Filing of a Workplace Violence Complaint:

11. Mr. Pesina reported the incident with Mr. Geremaia to Mr. Madrid on the night of the argument.

12. During the argument between Mr. Geremaia and Complainant, Mr. Geremaia had said that he would write up Complainant. It was Complainant's understanding that Mr. Geremaia would have 24 hours to do so. Complainant decided to wait to see what Mr. Geremaia did before issuing his own complaint about the argument. Mr. Geremaia did not write up Complainant within 24 hours of the argument.

13. On the evening of November 18, 2009, Complainant sent an email to Nick Madrid complaining about Mr. Geremaia's conduct the day before:

> Nick,
>
> I would like to make you aware of an incident that occurred on the above date at the Brighton shed between myself and Ranger Geremaiah [sic]. I understand Hector Pesina has already contacted you about this and I was prepared to so the same today but I knew you were involved in interviews and did not want to interrupt you by phone.
>
> This was serious enough that I feel not only is there a hostile work environment at our shed which is created by Ranger, but I am prepared to file a formal complaint against him for workplace violence in response to this incident.

This is not the first time there has been a problem here with Ranger, as I have witnessed his outbursts on a few occasions and I am aware of two other times when Ranger's hostile behavior has been brought to your attention due to his treatment of others in our shed.

Please let me know as soon as possible when we can meet to discuss this issue. I would appreciate your IMMEDIATE attention to this matter.

14. Complainant also copied three upper level supervisors on the email: Deputy Maintenance Superintendent Gregory Hayes; the Deputy Superintendant of Operations, Roy Smith; and Mr. Madrid's direct supervisor, David Haley.

15. Robert Haley, the Director of Administration for Region 6 and the acting Regional Director, learned of Complainant's email the morning after Complainant sent it. Mr. Haley directed his staff to begin an inquiry into the allegations by first assigning Mr. Smith and David Haley to ascertain if any movement of staff needed to occur immediately.

16. Complainant was asked for a statement of the events of November 17, 2009. Complainant prepared a statement that included a truthful recitation of what he had said and done during the argument with Mr. Geremaia, in addition to information concerning Mr. Geremaia's actions and statements.

17. On or about November 19, 2009, Mr. Geremaia, Mr. Fortt, and Mr. Pesina were also asked to write witness statements about the November 17, 2009 incident.

18. On or about November 20, 2009, Mr. David Haley and Mr. Smith interviewed Complainant and others at the Patrol 28 shed. David Haley observed that Complainant was angry about the incident and that he was expressing his anger during his interview with Mr. Haley through the volume of his voice, his use of profanity, and by hitting the table as he talked. Complainant requested that he not have to work inside the shed entering data on the computer because that work brings him into direct contact with Mr. Geremaia. Mr. Haley made arrangements for Complainant to be excused from having to enter data on the computer.

Respondent's Workplace Violence Directive:

19. Respondent has a policy and procedural directive addressing the workplace violence complaints and incidents. CDOT Procedural Directive 10.1, "Workplace Violence," has as its purpose: "[t]o provide a safe and secure work environment for CDOT's staff, visitors and others. Threats, threatening behavior or acts of violence by anyone will not be tolerated. Violations of this directive will lead to personnel action, which may include dismissal, arrest and prosecution."

20. The directive defines workplace violence to include "veiled or direct verbal threats, profanity or vicious statements that are mean to harm and/or create a hostile

environment" and "any other acts that are threatening or intended to injure or convey hostility."

21. Procedural Directive 10.1 requires that "[a]ny event that violates the Workplace Violence Policy Directive ... must be reported." "Employees failing to report threats or acts of violence that violate the Workplace Violence Policy Directive ... are subject to performance management review... and/or corrective/disciplinary action."

22. The directive requires that "personnel receiving reports of threats or acts of violence must complete an incident report within 24 hours."

23. Policy 10.1 also delegates the decision-making authority for any workplace violence investigation and response to the appointing authority.

Respondent's Investigation:

24. None of the supervisors who received a copy of Complainant's complaint directly from him completed a workplace violence report.

25. Robert Haley also assigned the investigation into Complainant's complaint to Don Benavidez, an experienced investigator with Respondent's Employee Relations and Legal Section.

26. Mr. Benavidez began his investigation into Complainant's complaint by December 16, 2009.

27. By email on November 30, 2009, Mr. Robert Haley instructed staff in the Mary Area that several employees would be contacted by Employee Relations / Legal staff for interviews, and that retaliation by anyone based upon the investigation would not be tolerated.

28. Mr. Benavidez's investigation included his interview of Complainant, Mr. Geremaia, Mr. Pesina, and Mr. Fortt. Mr. Benavidez also interviewed eight others in Complainant's and Mr. Geremaia's chain of command or who were assigned to Patrol 28.

29. Mr. Benavidez completed his investigative report as of February 25, 2010. The report contained summaries of the information he had collected, and did not include any conclusions or recommendations. Mr. Benavidez's report was forwarded to Mr. Robert Haley for his review.

December 2009 PDF:

30. On December 28, 2009, Complainant received a performance document form (PDF) for failing to respond to a snow shift call. TM III Stuart Tashiro was in charge of

supervising the snow shift call on the evening of December 25, 2009. Mr. Tashiro issued the PDF to Complainant, Complaint's wife, and approximately seventeen other Region 6 employees who did not appear for the snow shift.

31. Departmental policy required that employees for snow shift were to be notified of the snow shift by calls to both home and cell phone numbers. Complainant had not been notified of the shift in such a manner.

32. Complainant grieved the imposition of the PDF. Respondent overturned the PDF because of the lack of proper notification. Respondent also determined that the notification process that had been used for that snow shift was deficient and that the lack of notification affected more than just Complainant. As a result, the PDFs were removed from other employee files in addition to Complainant's file.

33. Respondent's issuance of the PDF to Complainant for failing to appear for a snow shift was not motivated or related to Complainant's filing of a workplace violence complaint against Mr. Geremaia.

Complainant's and Mr. Geremaia's Transfers:

34. Respondent did not change the staffing assignments immediately after the November 17, 2009 incident, and Complainant and Mr. Geremaia continued to work at Patrol 28. By early January 2010, Complainant had asked for a re-assignment that would separate him and Mr. Geremaia.

35. On or about January 11, 2010, Complainant was temporarily transferred to a bridge project in Region 6. When the bridge project was placed on hold, Complainant was transferred to Patrol 19 on or about February 1, 2010.

36. Complainant was returned permanently to Patrol 28 on February 8, 2010. On that same date, Mr. Geremaia was assigned to Patrol 19.

Snow Plow Assignment of Truck #1094:

37. On or about January 28, 2010, Complainant received an assignment to the snow shift with Patrol 19.

38. The TM II for Patrol 19 was Timothy Martinez. When Complainant was assigned to Patrol 19 for a snow shift, Mr. Martinez had three snow plows in service with his regular crew, and no additional snow plow for Complainant's use. Patrol 19 obtained truck #1094 from Patrol 28, and Mr. Martinez assigned Complainant to use the borrowed truck.

39. Truck #1094 had been in use by Mr. Fortt on Patrol 28 prior to the point where it was loaned to Patrol 19. Truck #1094 was known by Mr. Martinez and others to be a slow truck that had a top speed of 40 or 45 mph. The truck was not viewed by Mr. Martinez as a safety hazard, given that snow plowing is generally performed at less than 40 mph. No one on Patrol 28 had "red-tagged" the vehicle as defective or having a safety issue prior to the point when Complainant was assigned to the truck.

40. Complainant took truck #1094 out on I-76. Complainant had intended to turn off I-76 at 136th St. When he attempted to slow down, however, the gas pedal on the truck stuck. Complainant continued on I-76 until he could turn off at 144th St.

41. Once Complainant had the truck stopped at the base of the off-ramp at 144th, he was able to get out of the truck and examine the gas pedal. Complainant discovered that the pedal linkage was rusted and had come undone, and he was able to reconnect it.

January 28, 2010 Supervisor Contact:

42. When Complainant left the Patrol 19 shed on January 28, 2010, it was still dark. Complainant thought that Mr. Madrid was following him because there was a vehicle behind him that stayed with him on I-76 even though Complainant was moving no faster than 40 mph. Complainant, however, could not identify the vehicle that was behind him.

43. When Complainant pulled over at the base of the exit ramp at I-76 and west-bound 144th St., the snow plow truck would be difficult to see from the highway except when a vehicle on I-76 was in the lane nearest the shoulder on the overpass.

44. After Complainant had pulled the plow over, worked on the gas pedal to reconnect it, and was in the process of taking a bathroom break, Mr. Madrid backed his pickup truck down the side of the highway access ramp in front of Complainant.

45. Mr. Madrid asked Complainant if everything was fine. Complainant reported to Mr. Madrid that the pedal had stuck and that he had it working. Mr. Madrid left, and Complainant returned to the Patrol 19 shed without further incident. Upon his return to the shed, Complainant reported the gas pedal problem and the truck was taken out of service for repair.

Mr. Madrid's February 7, 2010 Statements:

46. By February 7, 2010, Mr. Madrid had learned of Respondent's plan to move Mr. Geremaia from Patrol 28 and re-assign Complainant to that patrol.

47. The fact that Complainant had filed a workplace violence complaint against Mr. Geremaia did not fit what Mr. Madrid thought should occur. Mr. Madrid made his

feelings clear to his subordinates that he expected such issues to be handled internally and without the involvement of upper-level supervisors.

48. Mr. Madrid was not happy with Patrol 28 over the turmoil that was occurring after Complainant had initiated his workplace violence complaint. Mr. Madrid spoke with TM I Chris Haines and TM I Steve Fenton while he was at Patrol 28 on February 7, 2010.

49. Mr. Madrid told Mr. Fenton and Mr. Haines that Patrol 28 had troublemakers and that the two of them were guilty by association. By the time of this conversation, Mr. Fenton had tested for promotion to a TM II position. Mr. Madrid told Mr. Fenton that Mr. Fenton would never become the TM II at Patrol 28 because of the problems. Mr. Madrid also told the two men that he was going to show Patrol 28 what hard work was all about by giving them the dirtiest jobs.

Complainant's Furlough Day Assignment:

50. Mr. Madrid was the TM III supervisor for Patrols 19 and 28. As such, Mr. Madrid was responsible for implementing Respondent's furlough program for the employees in those patrols.

51. Complainant was told that February 19, 2010, would be his furlough day, and that he could not earn overtime hours during a week for which he was on furlough.

52. Complainant's assignment to take a furlough day on February 19, 2010, was part of the furlough day required of most state employees in February 2010.

53. It was CDOT policy that, during the week in which a CDOT employee took a furlough day, the employee should not be allowed to work overtime hours.

54. Not all of the CDOT employees on Patrol 19 and 28 took their required furlough days in the same week. TM I employees in Patrols 19 and 28 all took a furlough day within a four-week period. Mr. Pesina, Mr. Fortt, and Mr. Haines, however, took their February 2010 furlough days on March 5, 2010. Mr. Fenton took his February 2010 furlough day on February 3, 2010.

Complainant's Retaliation Complaints:

55. Complainant and his attorney met with Mr. Benavidez and Mr. Benavidez's supervisor, Sabrina Hicks, on February 2, 2010, to address Complainant's concern that he had been subjected to retaliation for his filing of the workplace violence complaint against Mr. Geremaia.

56. As a result of the meeting, Mr. Benavidez expanded his investigation to include the circumstances behind the PDF issued to Complainant for missing the snow

shift and Complainant's contention that he had been issued the slow truck as a form of retaliation. He also broadened his investigation to inquire about Complainant's contention that Mr. Madrid had followed him on January 28, 2010, and then had said he was going to have someone lie that they were in the truck with Mr. Madrid. Mr. Benavidez also added Complainant's allegation that Mr. Madrid used profane and rude language toward Complainant and others to his investigation.

57. By email dated March 6, 2010, Complainant reported to Mr. Benavidez that Mr. Madrid had called Patrol 28 a bunch of troublemakers, said that it would be a cold day in hell before anyone on that patrol was promoted to TM II, and told patrol members he would assign them the dirtiest work and the work of other patrols. Complainant also reported that he and others had been assigned by Mr. Madrid to pick up trash along the road during the last blizzard, and that he had been sent home on furlough on February 19, 2010, while others had been permitted to take sick leave instead of a furlough day, which allowed them to earn overtime.

58. Mr. Benavidez enlarged the scope of his second investigation to cover the allegations raised in Complainant's March 6, 2010 email. Mr. Benavidez's investigation involved interviews of sixteen individuals between February 2 and April 23, 2010. Many of the interviewed employees were interviewed twice because of the additional allegations added in the midst of the second investigation.

59. During the winter of 2009, an employee reported to David Haley and other supervisors that Complainant had been talking about the fact that his workplace violence complaint would result in trouble for Mr. Geremaia. Complainant's supervisors considered these comments to be a violation of the confidentiality that the workplace violence complaint process required. Complainant's March 2010 annual review included a comment from David Haley that Complainant should work on keeping his emotions in check when dealing with co-workers and supervisors and to keep confidential matters confidential.

Trash Removal Assignment:

60. Patrols were normally assigned to conduct trash pickups in their areas. On the week that a patrol would be assigned to conduct the trash pickups, the patrol would normally have a trash truck and would collect trash bags for all the patrols within the assigned area.

61. During the week of March 15, 2010, Patrol 28 was assigned to conduct trash pickup for Mary area. Patrol 28 collected much of trash by March 18, 2010, but then was called to perform other work and did not complete the trash pickup.

62. When Patrol 28 stopped its trash pickup, Patrol 28 had not picked up the trash in the area covered by Patrol 19. Mr. Geremaia was the TM I of Patrol 19 at the time.

63. Mr. Madrid believed that Patrol 28 had purposefully failed to pick up all of the trash because the trash was located in Patrol 19's area. A snowstorm was expected in the area, and Mr. Madrid decided that Patrol 28 should finish its trash pickup duties during the afternoon of March19, 2010.

64. Mr. Madrid organized a trash pickup assignment involving three vehicles: an attenuator truck at the rear of the group, Mr. Madrid in his work pickup truck as the second truck in the group, and Complainant driving a one-ton pickup truck that was in the lead position. Mr. Fortt was assigned to get out of the pickup and load the trash bags into the back of the one-ton pickup.

65. It was snowing during the time that the trash removal was taking place, and the roads still had slush on them.

66. The crew picked up trash bags that were next to the road as well as trash bags that were behind the guardrails. The crew filled the pickup truck with approximately 70 trash bags. Mr. Madrid ended the trash pickup when the snowstorm intensified.

67. When later questioned about the assignment, Mr. Madrid untruthfully reported to Mr. Benavidez and to Mr. Robert Haley that it was not snowing while the crew was picking up trash, that there was no snow on the road, and that the crew picked up less than 20 trash bags.

Robert Haley's Review:

68. Mr. Haley reviewed both of Mr. Benavidez's reports. He re-interviewed Mr. Fenton and Mr. Haines to clarify points about Mr. Madrid's statements to them.

69. Mr. Haley made inquiries of senior maintenance staff as to the proper safety protocols to be employed for trash pickups. He determined that trash bags left inside the guardrail could become road hazards if struck by plows or other vehicles, and whether a trash bag pickup should be performed required weighing the potential risk that the bags posed against the safety issues posed by the weather and other conditions. He concluded that the incident with trash pickup was not evidence that Mr. Madrid was retaliating against Complainant by placing Complainant's safety in jeopardy. Mr. Haley found it probative that Mr. Madrid had made certain there was an attenuator truck present, that Mr. Madrid himself was in his pickup as the second vehicle, and the Mr. Madrid did not make Complainant get out and pick up the trash but had Mr. Fortt actually out on the road with Complainant driving the pickup.

70. Mr. Haley reviewed three weeks worth of payroll records to ascertain whether Complainant had been treated differently or unfairly in the manner in which he took his furlough day. Mr. Haley's conclusion was that the members of Patrols 19 and 28 had taken

their furlough days during one of those three or four weeks. Mr. Haley also noted that Complainant had been able to log 33 overtime hours during the weeks in which he had not been on furlough, and that his total number of overtime hours during those three weeks was comparable to the hours logged by the other TM Is for the same period.

71. Mr. Haley was aware that CDOT's overtime policy had not been clearly communicated to supervisors and that the manner in which furloughs had been taken had led to many complaints by employees of unfair or uneven application. Mr. Haley considered Complainant's suspicion that he had been unfairly targeted for furlough to be a product of the overall problems that CDOT experienced in trying to implement the necessary furloughs.

72. Mr. Haley did not find that the assignment of truck #1094 to be an act of retaliation against Complainant because there was a need for a truck to be loaned to patrol 19 when Complainant was assigned to a snow shift at that shed, and the truck was available. Mr. Haley also noted that the truck had not been reported to be defective or unsafe prior to Complainant's assignment to it.

73. Mr. Haley did not consider Mr. Madrid's appearance alongside of the road on January 28, 2010, to be an act of retaliation because he expected that supervisors would be out on the routes to be plowed by TM Is, and that they would be responsive if they saw what appeared to be a disabled CDOT vehicle on the side of the road.

Robert Haley's Conclusions:

74. Mr. Haley was concerned that Mr. Geremaia had behaved aggressively in making his point to Complainant, and that Mr. Geremaia had a history at CDOT of requiring work on anger management. Mr. Haley determined that Mr. Geremaia's actions on November 17, 2009, were unacceptable for a CDOT work leader or supervisor. Mr. Haley issued Mr. Geremaia a corrective action for the incident on June 23, 2010.

75. One of the core values for CDOT is respect in the way that employees treat each other and the public. Mr. Haley determined that Complainant had not maintained that core value during his interaction with Mr. Geremaia on November 17, 2009. On June 10, 2010, Mr. Haley issued a PDF to Complainant concerning his statements during the November 17, 2009 dispute with Mr. Geremaia. The PDF addressed the fact that Complainant and Mr. Geremaia had become angry and had yelled at each other loudly enough that two other employees had to break up the argument. Mr. Haley found that such actions were inconsistent with CDOT values and must not occur again.

76. Mr. Haley held two Rule 6-10 meetings with Mr. Madrid to consider whether there was a basis to conclude that Mr. Madrid was harassing, or retaliating against, Complainant. At the conclusion of the Rule 6-10 with Mr. Madrid, Mr. Haley took no action.

77. Complainant filed a timely appeal of his PDF and his retaliation allegations with the Board.

78. As of November 2010, Complainant was assigned to be supervised by TM III Alan Martinez.

DISCUSSION

I. GENERAL

The Board may reverse or modify the action of an appointing authority if the action is found to have been "arbitrary, capricious, or contrary to rule or law." C.R.S. § 24-50-103(6). Because Complainant's allegations concern non-disciplinary actions, Complainant bears the burden of persuasion that Respondent's decision as to his workplace violence and retaliation complaints should be reversed by the Board. *See Harris v. State Board of Agriculture*, 968 P.2d 148, 150-51 (Colo.App. 1998)(holding that while disciplinary cases require that the burden of persuasion be on the employer, determination of issues other than the factual basis for the disciplinary action should be placed upon the party relying upon the applicability of such issues); *Velasquez v. Dept. of Higher Education*, 93 P.3d 540, 542-44 (Colo.App. 2003)(holding that discharge for job abolishment or reallocation is more administrative than disciplinary in nature, does not involve credibility judgments arising from contested allegations of employee misconduct and, therefore, it was proper to impose the burden of persuasion on the employee in such cases).

II. HEARING ISSUES

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

(1) Arbitrary and capricious action analysis:

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).

Complainant has not demonstrated that Respondent's decision in the handling of Complainant's workplace violence complaint n this case was arbitrary or capricious. Respondent conducted a reasonable investigation into Complainant's allegations. Mr.

Benavidez interviewed the relevant witnesses identified by Complainant and others, and expanded the scope of his investigation to address the issues raised by Complainant as to the issue of retaliation. Mr. Haley also conducted additional investigation to supplement what Mr. Benavidez had collected.

Mr. Haley's evaluation of the evidence presented was also reasonable. Complainant has not demonstrated that Mr. Haley ignored, or otherwise improperly discounted, any of the credible information presented to him.

Finally, Mr. Haley's decision to impose a PDF on Complainant for his statements during the argument with Mr. Geremaia was a reasonable response to the incident, and not the only action taken by Mr. Haley in response to the incident. The conclusion reached by Mr. Haley that Complainant had violated CDOT's core value of respect was the type of decision that reasonable men would make in this case. Mr. Haley's decision to limit the mention to a PDF, which is the lowest level of written admonishment, is also a reasonable one under the circumstances.

(2) Contrary to rule or law:

Complainant argues that he was subjected to retaliation for filing his workplace violence complaint.

(a) Elements of a Retaliation Claim:

Generally, a claim of retaliation requires that an employee demonstrate that: 1) the employee engaged in a protected activity; 2) that an adverse action was taken against him by his employer; and 3) that there is a causal relationship between the activity and the adverse action taken against the employee. *See Molla v. Colorado Serum Co.*, 929 P.2d 1 (Colo.App. 1996)(applying the test to a claim of retaliation for filing a discrimination complaint).

The first element of the retaliation claim is not in dispute. Under Respondent's policy, Complainant was entitled to – and in fact required to – file a workplace violence complaint if he observed a co-worker acting in the manner proscribed by the policy. The policy is broadly drawn and includes statements which are "veiled or direct verbal threats, profanity or vicious statements that are mean to harm and/or create a hostile environment", as well as "any other acts that are threatening or intended to injure or convey hostility." Mr. Geremaia's actions in forcefully confronting Complainant with a loud and angry voice, pointing at Complainant's face, and in not permitting Complainant to disengage from the argument constitute a reasonable basis to believe that the workplace violence policy applied to this case. Complainant's filing of the workplace violence complaint was completed in good faith on Complainant's part, and constituted a protected activity.

The second element of a retaliation claim requires evidence that an adverse action was taken against the employee. In interpreting what types of actions constitute an adverse action for purposes of a retaliation claim, Title VII and Colorado Anti-Discrimination Act retaliation cases provide persuasive precedent. To establish an adverse action in retaliation claims involving discrimination matters, an employee "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a [claim]." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)(internal citations and quotations omitted). Materially adverse actions are ones that exclude the slights and tribulations that all employees experience. *Id.* at p. 68. The standard is also to be applied as an objectively reasonable employee upon consideration of all of the circumstances. *Id.* at p. 68 – 69.

The third element requires that the employee demonstrate that the materially adverse action be causally connected to the employee's protected activity. A causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

(b) Application of the Elements to Complainant's Claims of Retaliation:

Several of the incidents addressed by Complainant were either shown to be the product of other actions or policies without any causal relationship to Complainant's workplace violence complaint, or were not shown to be sufficiently connected to a materially adverse action to qualify as a form of retaliation.

The issuance of the PDF for failing to respond to a snow shift was not shown to be related in any way to Complainant's filing of a workplace violence complaint. The fact that Complainant was one of eighteen or nineteen employees to receive the PDF, and that he was able to have the PDF reversed, demonstrates that Respondent was listening and responding appropriately to Complainant's arguments, and not that Respondent was targeting Complainant.

Complainant was not able to demonstrate the manner in which his furlough date was handled was a form of retaliation. Mr. Haley's inquiry into the issue reasonably concluded that all of the TM Is on Patrols 19 and 28 took a furlough day at some point during a three or four-week period, and that Complainant's overtime during that period was not significantly different than the overtime worked by the other TM Is on those patrols. Complainant was not able to demonstrate that there were variations in the way his furlough day was administered that disadvantaged him in some way.

The evidence concerning Complainant's assignment to truck #1094 also did not demonstrate that Complainant was affected by a materially adverse action causally connected to his claim of workplace violence. The evidence at hearing established that

Patrol 19 required the loan of a truck from Patrol 28 in order to make use of Complainant's day of snow shift assignment to Patrol 19, and that the truck loaned to them was a truck that was in service at Patrol 28. While truck #1094 was known to be a slow truck, and while a slow truck is certainly not as desirable as a normal truck, the assignment of the less desirable truck for a day's use is one of the type of problems that employees normally face. Thus, the assignment of a truck known to be a slow truck does not create a materially adverse action. Moreover, the truck was assigned to Complainant by Mr. Martinez, and no causal connection between that assignment decision by Mr. Martinez and Complainant's workplace violence complaint was demonstrated. Under such circumstances, Complainant has not established that the assignment of truck #1094 was a form of retaliation.

Mr. Madrid's appearance while Complainant was disabled on the side of the road at I-76 and 144th St. was also not shown to be a form of retaliation. Mr. Madrid's backing of his truck down the on-ramp appears to be consistent with him passing over the I-76 bridge, seeing a disabled CDOT vehicle pulled over below the bridge, and stopping to inquire or assist. Complainant was not able to establish that anything more sinister than an attempt to assist was occurring in that incident, and therefore has not shown that a materially adverse action had taken place.

Mr. Madrid's statements to Mr. Fenton and Mr. Haines, as well as his decision to have Patrol 28 continue trash pickup even during a snow storm, are more troubling. These two incidents demonstrate that Mr. Madrid did not like Complainant's reactions to Mr. Geremaia's aggressive actions on November 17, 2009, and that by the time Mr. Madrid spoke with Mr. Haines and Mr. Fenton, he considered Patrol 28 to include troublemakers.

Mr. Madrid's comments to Mr. Haines and Mr. Fenton, however, do not constitute a materially adverse action against Complainant. These statements are instead evidence of Mr. Madrid's state of mind or opinion about Complainant and the others in Patrol 28.

The question, therefore, is whether Complainant has demonstrated that an assignment to pick up trash during a snow storm constituted a materially adverse action causally connected to Complainant's filing of the workplace violence complaint.

The circumstances support that Mr. Madrid's goal, or motivation, in assigning Complainant to be part of a trash pickup assignment was to make sure that Patrol 28 did the work assigned to it. This was not a case where Complainant was tasked with extra work or different work. Patrol 28's responsibility was to pick up the trash that week, and the patrol had stopped prior to completing the job. The evidence at hearing demonstrated that it was reasonable for Mr. Madrid to conclude that at least some of the trash bags were potential safety hazards because they were located inside the guardrails, and there was a snowstorm expected. Additionally, Mr. Madrid's willingness to be part of the crew conducting the trash pickup also militates against this assignment being retaliatory in its purpose. Complainant's job was, in essence, the same as the one that Mr. Madrid adopted for himself: that is, to be a driver in one of the pickup trucks. Mr. Madrid's decision to enforce this job responsibility while it was snowing and while there was slush on the road

was not the wisest or safest course of action. Mr. Madrid, however, took the same level of risk as Complainant, and his willingness to participate directly in the task argues that the task was not a form of retaliation.

Mr. Madrid's willingness to make incorrect statements to Mr. Benavidez about the nature of his trash pickup assignment, while a troubling indication of Mr. Madrid's state of mind, is not sufficient to create a preponderance of evidence that the task was a form of retaliation.

As a result, Complainant has not successfully demonstrated by a preponderance of the evidence that any of the actions alleged to be retaliation for his filing of the workplace violence complaint met the test for retaliation. Respondent's actions in this case, therefore, were not contrary to law because they were not taken in retaliation for Complainant's good faith filing of a workplace violence complaint.

B. An award of attorney fees and costs is not warranted.

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 R-8-38(B), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted. Complainant was not successful in his argument that he was a target of retaliation for filing the workplace violence complaint. Accordingly, there is no basis for an award of attorney fees or costs.

CONCLUSIONS OF LAW

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

2. An award of attorney fees and costs is not warranted.

ORDER

Respondent's grievance decision **affirmed**. No attorney fees or costs are awarded. Complainant's appeal is dismissed with prejudice.

Dated this 20th day of May, 2011.

[redacted]

Denise DeForest
Administrative Law Judge
State Personnel Board
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 23rd day of May, 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** as follows:

Elizabeth Lamb Kearney, Esq.
[redacted]

and

Micah Payton
[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)