

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DEBORAH SKITT,
Complainant,

vs.

UNIVERSITY OF COLORADO - BOULDER, COLLEGE OF ARTS AND SCIENCES,
Respondent.

Administrative Law Judge (ALJ) Robert R. Gunning held the hearing in this matter on May 10 and June 5, 2012 at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on May 10, 2012. The record was closed on June 5, 2012, upon conclusion of the evidentiary hearing. Elvira Strehle-Henson, University Counsel, represented Respondent. Respondent's advisory witness was Bernadette Stewart, Coordinator of Administrative Services, College of Arts and Sciences, CU Boulder. David J. Furtado, Esquire, represented Complainant.

MATTERS APPEALED

Complainant was a certified Administrative Assistant III employed by the University of Colorado at Boulder (CU Boulder or University), College of Arts and Sciences, Academic Advising Center (AAC), prior to her disciplinary termination of employment. Complainant appeals her termination, arguing that she did not commit the acts for which she was disciplined; that Respondent's action was arbitrary, capricious, and contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives.

Through this appeal, Complainant seeks reinstatement to her position at the University as an Administrative Assistant III, back pay, and recovery of reasonable attorney fees. Respondent requests that the State Personnel Board (Board) affirm the action of the appointing authority and dismiss Complainant's appeal with prejudice.

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

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
 2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
 3. Whether the discipline imposed was within the range of reasonable alternatives;
- and
4. Whether Complainant is entitled to the recovery of her reasonable attorney fees.

PROCEDURAL HISTORY

Complainant filed a timely notice of appeal on July 7, 2011 (postmarked July 5, 2011). The notice of appeal included an age discrimination claim. Complainant opted to pursue the discrimination claim with the Colorado Civil Rights Division (CCRD). CCRD issued a No Probable Cause (NPC) Opinion on January 24, 2012. Complainant did not appeal the NPC Opinion to the Board within ten days as required by § 24-50-125.3, C.R.S. Therefore, the issue of discrimination was abandoned, and was not subject to litigation during the evidentiary hearing process.

The ALJ issued a Notice of Hearing and Prehearing Order on February 22, 2012. The Notice set the evidentiary hearing for May 10, 2012. On May 10, 2012, the hearing commenced and the parties conducted an evidentiary hearing. Two additional evidentiary hearing dates were set. However, the parties concluded the evidentiary hearing on June 5, 2012, the second day of hearing. The record was closed at the conclusion of the parties' closing arguments.

FINDINGS OF FACT

General Background

1. Complainant served as an Administrative Assistant III with the CU Boulder AAC from September 22, 2009 to June 23, 2011. In this capacity, Complainant worked in the AAC front office.

2. Prior to serving as an Administrative Assistant III with the CU Boulder AAC, Complainant worked for the University of Colorado Denver (CU Denver) as an Administrative Assistant II from September 23, 2005 until September 2009. As an Administrative Assistant II with CU Denver, Complainant was responsible for scheduling, logistics, correspondence, and email for the CU Privilege and Tenure Committee. The Privilege and Tenure Committee hears faculty grievance appeals from all four CU campuses. On average, the Committee hears about five grievance appeals per semester.

3. Complainant held various non-state employment from 1977 to 2005. She received a bachelor's degree from Colorado State University in 1977.

4. Complainant's appointing authority was Bernadette Stewart. Ms. Stewart has served as the Coordinator of Administrative Services for approximately six years. She previously worked as the AAC Office Manager for one year, and as an AAC Administrative Assistant III and Administrative Assistant II. She worked in the AAC front office for about five years.

5. Complainant's direct supervisor was Alana Davis-DeLaria, AAC Office Manager.

6. Complainant's second level supervisor was Megan Perkins, Assistant Director of Advising Operations, AAC, CU Boulder. Ms. Perkins oversaw the management of the front office and supervised three employees, including Complainant.

7. Prior to her employment with CU Boulder, Complainant consistently received meets expectations and exceeds expectations performance evaluations from CU Denver. She did not receive any corrective actions or disciplinary actions while employed by CU Denver.

Complainant met deadlines and performed her job functions well. By all accounts, she was organized and efficient in her work as an Administrative Assistant II at CU Denver.

8. Complainant applied for several positions with CU Boulder while she was employed by CU Denver. Because she had applied for several positions, she was notified by the CU Boulder Human Resources Department when the subject Administrative Assistant III position became available. Complainant applied for the position, received an offer, and accepted the position. The Administrative Assistant III position had more responsibility and higher compensation than did the Administrative Assistant II position she occupied at CU Denver.

9. When Complainant started her position with CU Boulder in September 2009, Ms. Davis-DeLaria provided her with training. She instructed Complainant as to her work duties, the procedures manuals, and the applicable forms in her first two to three weeks of employment. Complainant also participated in web-based training and computer program training. She shadowed front office employees during this initial period. Complainant then began processing late add and drop petitions.

10. In January 2010, Complainant was retrained on telephones due to issues she was having regarding compliance with student privacy laws.

Complainant's Duties and Responsibilities

11. The AAC is essentially the "Dean's Office" for undergraduate students. There are approximately 18,000 undergraduate students at CU Boulder. Numerous academic advisers work in the office.

12. Complainant worked in the front office of the AAC. As a front office employee, Complainant served as a reference for students and parents. She answered phones and assisted students who appeared in person.

13. Complainant received an average of eight phone calls per day. Typically, the calls were from students requesting the status of petitions. Parents occasionally called with questions.

14. Students typically go to the AAC when they have appointments with academic advisers, have general questions, or need to submit petitions and forms.

15. Complainant served approximately thirty students per day.

16. Complainant was responsible for processing late add and drop petitions. The processing of late add and drop petitions was the most important aspect of Complainant's job. Complainant processed approximately 500 late add and drop petitions each semester.

17. Students can automatically add courses through the second week of the semester. After the second week, students need to submit a late add petition to add a course. Most late add petitions are approved. The biggest issue is whether the classroom has capacity to accommodate additional students.

18. Students may automatically drop courses through the second week of the semester. If a student drops a class during this initial period, the course disappears from the student's record. Students may also drop courses for the third through the tenth week of classes by submitting a drop petition on-line. If a student drops a class during this period, the student receives a "W" (withdraw) on his or her transcript. After the tenth week, students may drop courses by submitting late drop petitions with the AAC. Each semester, the AAC receives hundreds of late drop petitions.

19. After week 10, students are not permitted to drop a class for academic reasons. They need to demonstrate extenuating circumstances, such as medical issues. Documentation is required.

20. When a student sought to drop off a late add or drop petition, Complainant was responsible for reviewing the petition for completeness. If the petition was not complete, Complainant advised the student as to the information needed to complete the form. If the petition was complete, Complainant date stamped the petition, initialed it, and placed it in the inbox.

21. Complainant was then responsible for logging each received petition into an excel spreadsheet, and assigning the petitions to advisers for review. Once assigned, she was charged with retrieving the student's file, clipping the petition to the file, and giving the file and form to the adviser. About half the time, Complainant personally retrieved the file from the file room. The other half of the time, Complainant requested a student worker to obtain the file.

22. Once the adviser reviewed and acted on the petition, the petition was returned to Complainant. She then sent an email to the student advising the student of the action taken. If the petition was approved, she then sent the form to the registrar along with a special action form.

23. The deadline for late drop petitions was 5 p.m. on the last day of classes. If a student sought to submit a late drop petition after this deadline, the front office staff was instructed to refuse to accept the petition. The only individuals who had the authority to accept late filed drop petitions were the Assistant Dean, Associate Directors, and Assistant Directors. The front office staff did not have the authority to accept late filed petitions.

24. If a student is upset that front office staff refuse to accept a late filed petition, the student is directed to complete a "purple sheet," which is an intake sheet intended to advise an academic adviser as to the reason(s) the student believes the AAC should accept the late filed petition. In the alternative, the front office staff may provide the student with Ms. Perkins' business card, and direct the student to contact Ms. Perkins directly.

25. There is a board in the AAC front office which identifies relevant deadlines, such as the late drop petition deadline. The information is also on the petition forms. The AAC staff conducted guessing games each semester. In spring 2011, Complainant won the guessing game pool by coming closest to guessing the number of late drop petitions filed before the deadline. The guessing game was partially intended to reinforce the deadlines to front office staff.

26. There are a variety of ramifications for accepting late filed drop petitions. These include visa/deportation issues, National Collegiate Athletic Association eligibility, academic probation, financial aid qualifications, and graduation status. Acceptance of a petition by front

office staff indicates to students that the petition will be reviewed, when in actuality, it will not be, absent extenuating circumstances.

27. Complainant was also responsible for processing letters of good standing. Students require letters of good standing for various reasons, including if they are transferring to another school or applying for a job or an internship. Students may mail, fax, or drop off the written request for a letter of good standing. Complainant reviewed the requests for completeness and placed them in the inbox. After receipt, Complainant sent emails to the Honor Code and Judicial Affairs offices to determine whether there were any disciplinary issues. She also checked the student's grade point average (GPA), because a letter of good standing requires a minimum 2.0 GPA. If the criteria were met, Complainant processed the letter of good standing. If they were not met, Complainant contacted the student to find out whether the student wanted AAC to release the letter identifying the reason(s) a letter of good standing could not be issued. Complainant processed about 130 letters of good standing each year.

28. Complainant was responsible for processing transfer petitions. When she received a transfer petition from a student, she was required to verify that it was complete. If complete, she initialed the petition and placed it in the in-box. Complainant processed approximately 80-100 transfer petitions per year.

29. Complainant was responsible for processing graduation applications. When she received a graduation application from a student, she was required to verify that it was complete. If it was not complete, she instructed the student as to the missing information. If complete, she initialed the application and placed it in the in-box. Complainant received approximately 1500 graduation applications in the spring semesters, and 500 graduation applications in the fall semesters.

30. Complainant was responsible for processing reinstatement petitions. A student may be dismissed from CU Boulder if the student's GPA falls below a 2.0 for two semesters. If dismissed, a student may attend another accredited school or take continuing education classes to raise his or her GPA. If the student wishes to be reinstated, the student must submit the reinstatement petition, usually by mail. Complainant logged in the reinstatement petitions, ordered the student's file, and gave the petition and the file to the appropriate Dean to review. Complainant received approximately 45 reinstatement petitions each year.

31. The final two to three weeks of classes each semester are the busiest time of the year for the AAC front office, due to the number of late drop petitions, graduation applications, and letter of good standing requests. After the last day of classes and into the summer, the AAC front office workload decreases significantly.

April 2010 Performance Management Evaluation

32. Complainant received an overall rating of 187.5 for the September 22, 2009 – March 31, 2010 evaluation period. This rating was at the very low end of the level 2 – meeting expectations category. The evaluation identified four areas in which Complainant received a level 1 – not meeting expectations rating. These areas were: (1) manages late add and late drop petition processes, (2) communication core competency, (3) accountability core competency, and (4) job knowledge core competency.

June 2010 Letter of Expectation

33. On March 5, 2010, Ms. Stewart conducted a Board Rule 6-10 meeting with Complainant. The meeting addressed allegations regarding Complainant's work performance and compliance with departmental procedures. In particular, the meeting discussed Complainant's alleged failure to obtain prior approval for overtime, mistakes Complainant made in completing time sheets, erroneous advice Complainant provided to students regarding late drop petitions and graduation applications, and the incorrect processing of paperwork.

34. As a result of the Board Rule 6-10 meeting, Ms. Stewart decided not to impose corrective or disciplinary action. Although she found that some of the allegations had merit, the type and severity of the errors substantiated did not warrant formal action. She therefore issued a letter of expectation. The letter of expectation, dated June 10, 2010, summarized the issues discussed, and exhorted Complainant to improve communication with her supervisor.

January 2011 Corrective Action

35. On November 5, 2010, Complainant met with Ms. Perkins and Ms. Davis-DeLaria regarding a late add petition and student file that Complainant improperly tracked and processed.

36. On November 8, 2010, a special action form was given to Ms. Perkins for a student who had submitted a late add petition. Complainant had failed to enter the number of credit hours on the special action form, which resulted in the incorrect number of credit hours appearing on the student's schedule. The student therefore called AAC to express her concern.

37. Ms. Stewart met with Complainant on November 17, 2010 regarding these two issues. Complainant had not previously met with her supervisors about the November 8 issue.

38. Following the meeting, in accordance with Board Rule 6-11, Ms. Stewart issued a corrective action to Complainant on January 4, 2011. Regarding the late add petition/file issue, Ms. Stewart concluded that Complainant had mistakenly returned the file to the records room without forwarding it to the Associate Director, which caused the late add petition to be processed in an inaccurate and untimely manner. There was no dispute that Complainant made a mistake on the special action form. The corrective action stated that it was imperative that Complainant immediately become proficient in all of her work duties, including processing the student petitions for which she was responsible. Complainant did not challenge the corrective action.

March 2011 Disciplinary Action

39. On February 25, 2011, Ms. Stewart conducted a Board Rule 6-10 meeting with Complainant. The meeting addressed Complainant's continued failure to process student petitions accurately and in a timely manner. This meeting also addressed Complainant's failure to provide accurate direction to students regarding other processes.

40. In particular, the meeting focused on seven specific instances in which Complainant did not accurately and timely process late drop petitions, late add petitions, and university transfer petitions. Complainant was expected to process late drop petitions within five business days of receipt from the reviewer. In some of the instances, the decisions on the late drop petitions were unprocessed for a month to six weeks before the students contacted the

AAC because they had not received decisions. Complainant also accepted late add petitions prematurely (before the deadline for the spring 2011 semester).

41. Complainant was out on sick leave from December 23, 2010 – January 3, 2011, and believed her illness contributed to the untimely processing of the late drop petitions. After being confronted with the issue, Complainant began putting the petitions in chronological order for processing.

42. As a result of the Board Rule 6-10 process, Ms. Stewart issued a disciplinary action on March 15, 2011. The disciplinary action reduced Complainant's pay for the month of April 2011 by approximately three days, for a total of \$463.52. Complainant did not appeal the disciplinary action.

43. In the March 15, 2011 Notice of Disciplinary Action, Ms. Stewart concluded that Complainant "performed unsatisfactorily by failing to process late drop petitions in a timely fashion, by failing to inform students and staff of the correct petition deadline, and by failing to take responsibility for knowing routine processes in order to communication (sic) accurate instructions to students." As Complainant had worked for the AAC for five semesters, Ms. Stewart found that the errors were unacceptable, and therefore decided to issue the disciplinary action.

May 2011 Corrective Action/2010-2011 Performance Management Evaluation

44. As a result of Complainant's unsatisfactory performance in specific areas, as reflected in her 2010-2011 annual performance evaluation, Ms. Stewart issued a corrective action to Complainant on May 27, 2011. Complainant did not challenge the corrective action or grieve her performance evaluation.

45. Complainant had met with Ms. Davis-DeLaria for about an hour regarding her 2010-2011 performance evaluation. Although the evaluation reflected a low overall level 2 performance (182.75), it noted unsatisfactory performance in three specific areas. The three areas were: (1) clarifying policy/procedure within the AAC unit, (2) managing student reinstatement petitions, and (3) job knowledge core competency. The evaluation narrative stated that "[w]hile I find that Debbi has met an overall satisfactory score, the fact that she is not meeting expectations in two goals and objectives and one core competency is extremely worrisome to me. The issues that Debbi has had in these areas over the past year have been addressed via meetings with her supervisor and official university actions and must be remedied immediately."

46. The corrective action focused on issues Complainant had with meeting core competencies and in the timely processing of petitions. In particular, the corrective action noted Complainant's difficulty with correctly articulating drop/add deadlines, with accurately and timely processing late add and drop petitions, and with lack of attention to detail and failure to follow policies and procedures.

June 2011 Board Rule 6-10 Meeting

47. On June 6, 2011, Ms. Stewart met with Complainant in a Board Rule 6-10 meeting to exchange information regarding a number of incidents which occurred in April and May 2011.

April 21, 2011

48. Students are required to continue attending classes until their late drop petitions are approved. Therefore, AAC front office staff must quickly turn late drop petitions around. On April 21, 2011, AAC Associate Director Peter Freitag noticed a stack of late drop petitions sitting on Complainant's desk. He realized that he had not reviewed any late drop petitions for several days. Mr. Freitag brought this issue to the attention of Ms. Davis-DeLaria.

49. Ms. Davis-DeLaria directed Complainant to process all petitions received and ensure that the Associates Directors have them that day. According to Complainant, she had not promptly processed the petitions because she was very busy with walk up traffic and paperwork. Complainant had informed Ms. Davis-DeLaria that she was backed up.

April 27, 2011

50. On April 27, 2011, a student inquired about his late drop petition. He had been notified that it was approved; however, he had not seen evidence of the withdrawal on his transcript. Complainant did not timely process the petition or the related special action form, but instead, placed the unprocessed documents in the student's file and returned the file to the records room. As a result, the appropriate grade was not on the student's transcript. Complainant processed the petition and the special action form later that day, after she was instructed to do so.

51. In a second incident on April 27, 2011, a student called Ms. Davis-DeLaria regarding the status of her late drop petition. Ms. Davis-DeLaria could find no record of the petition in the computer system, and informed the student of such. She later determined that the file had been checked out by Complainant and was on Complainant's desk, and that Complainant had not timely logged the petition into the system. Complainant processed the petition after she was notified of her record-keeping error.

May 5, 2011

52. For the spring 2011 semester, the last day of classes, and the late drop petition deadline, was April 29, 2011.

53. At about 5 p.m. on May 5, 2011, a student sought to file a late drop petition with the AAC. Complainant spoke with the student, and attempted to explain the late drop petition deadline and policy. Complainant asked the student to identify the extenuating circumstances. She told the student that the deadline to file a late drop petition had passed, and explained the purple sheet option. The student was very upset, did not want to complete the purple sheet, and told Complainant that she unable to previously turn in the petition because of police involvement. Complainant took the petition from the student and reviewed it.

54. Amy Tabor, the AAC Assistant Director of Advising, overheard the conversation, and was concerned that Complainant was accepting the petition. She requested Mr. Freitag to intervene and help Complainant not accept the petition. Mr. Freitag went into the front office.

55. When Mr. Freitag arrived in the front office, Complainant had the late drop petition in her hand. Mr. Freitag asked Complainant whether she had accepted the petition. Complainant said she had. Mr. Freitag then reviewed the petition for about 20 seconds. Mr. Freitag did not return the petition to the student because it was an uncomfortable situation due

to Complainant's prior physical acceptance of the petition. He instructed Complainant to date stamp and initial the petition with his initials. Mr. Freitag also asked Complainant to get the student's file, and said that he would review the petition.

56. This late filed drop petition was approved several months later. According to Mr. Freitag, had a purple sheet been completed and submitted with this petition, he would have investigated it and would have seriously considered accepting the petition for filing due to the exigent circumstances.

57. Despite the acceptance of and ultimate approval of the petition, Respondent made clear to Complainant that she should not have accepted the petition.

May 6, 2011

58. On May 6, 2011 at about 9:30 a.m., a student came into the AAC. She was upset, and requested that Complainant receive her late drop petition for filing. Complainant explained that she did not have the authority to accept the petition. She also told the student that the professor statement portion of the form was incomplete.

59. The student returned later that morning or shortly after noon, with a typewritten statement by a faculty member attached to the petition. Complainant told the student that late filed drop petitions could be filed only in extraordinary circumstances, and that the student could speak with her supervisor, Ms. Perkins, who was not in the office at that time. Complainant told the student that she could complete the purple sheet, but the student declined, because she had received no response to the purple sheets she filed on prior occasions. The student waited about 30 - 40 minutes. When Ms. Perkins did not appear in that timeframe, the student left.

60. May 6, 2011 was graduation day. Ms. Perkins returned to the AAC office at about 12:30 p.m., and then left with Miriam McGilvray for a Philosophy Department graduation party at the University Memorial Center. Ms. McGilvray was a full-time temporary employee from April 2011 – October 2011, and has worked as a student employee since October 2011. Ms. Perkins and Ms. McGilvray attended the graduation party until about 2 – 2:20 p.m.

61. When Ms. Perkins returned to the office, Complainant did not mention her interactions with the student that morning. Complainant left for lunch after Ms. Perkins returned.

62. At about 3:30 - 4 p.m. that afternoon, Ms. Perkins received a phone call from a parent, who was angry that the front office would not accept a late drop petition his daughter was attempting to submit. During this time, the student returned a third time in an effort to file the late drop petition. While Ms. Perkins was on the phone, Complainant was in Ms. Perkins' office doorway, in an attempt to get her attention. Complainant realized that Ms. Perkins was speaking with the student's father. Ms. Perkins did not acknowledge her, so Complainant returned to the student.

63. Complainant accepted the petition from the student, and told the student that it was late but that she would give it to her supervisor to determine whether it could be accepted. She then placed the petition on Ms. Davis-DeLaria's desk. Ms. Davis-DeLaria was out of the office that week. Complainant put the petition on Ms. Davis-DeLaria's desk because the petition contained confidential information and she wanted to "put it out of the way." Ms. McGilvray witnessed Complainant's interaction with the student and Complainant's placing the petition on

the desk. She then informed Ms. Perkins. After her phone call was concluded, Ms. Perkins picked up the petition, and noticed that it was neither date-stamped nor initialed.

64. At hearing, Complainant testified that she did not accept the petition from the student, but rather, that the student placed the petition on the desk and left. Complainant's testimony in this regard was not credible. The testimony conflicts with not only Ms. McGilvray's recollection, but also a May 20, 2011 email that Complainant sent to Ms. Perkins recounting the incident. The email states that the student "gave me the petition." Additionally, during the Board Rule 6-10 meeting, Complainant never told Ms. Stewart that the student had left the petition on the desk. Rather, Complainant acknowledged that she took the petition from the student.

65. Ms. Perkins confronted Complainant about the petition. Ms. Perkins was angry and upset with Complainant because she had just told the student's father that the AAC would not accept the late filed petition. Complainant told Ms. Perkins that she accepted the petition because the student "insisted on submitting it" and was very upset and desperate about the situation. Ms. Perkins told Complainant that she had to date stamp and initial the petition. She then referred the matter to Ms. Stewart.

66. Because the petition was received, the AAC had to address the petition. This petition was denied on May 9, 2011 because it was filed after the deadline.

May 18, 2011

67. Ms. Davis-DeLaria checked Complainant's drop petition log on May 18, 2011, and discovered that there were 74 unprocessed petitions. Ms. Davis-DeLaria had received a number of phone calls from students in early May 2011. The students had not received decisions on their late drop petitions, and some of the decisions potentially impacted graduation requirements. For instance, if a student received an F instead of a W, the student's cumulative GPA would be adversely affected. The Associate Director had already made the decisions on the petitions, but they had not been processed by Complainant.

68. Over the prior week and a half, Complainant processed between 0 and 17 late drop petitions per day. Historically, 20-30 petitions were processed each day.

69. Ms. Davis-DeLaria was concerned about the slow processing time and the student complaints, and conferred with Ms. Stewart about the issue. Complainant issued the decisions when instructed to do so. No students failed to graduate because of Complainant's errors.

Disciplinary Action – Termination

70. Based on the information exchanged in the June 6, 2011 Board Rule 6-10 meeting, and the prior corrective and disciplinary actions, Ms. Stewart decided to terminate Complainant's employment. The termination decision is set forth in a letter dated June 22, 2011. This letter discusses the May 5 and May 6 incidents as examples of Complainant's failure to timely process paperwork. The letter also addresses the unprocessed petitions. Complainant received the letter on June 23, 2011.

71. Prior to making her decision, Ms. Stewart spoke with Ms. Perkins and Ms. Davis-DeLaria. She considered the information Complainant provided to her orally at the Board Rule

6-10 meeting, along with a May 20, 2011 email Complainant submitted in her defense. Ms. Stewart was frustrated by Complainant's written response.

72. Ms. Stewart found that Complainant had accepted the two late filed drop petitions on May 5-6, 2011, and that she was not authorized to accept those petitions because the students attempted to file them after the deadline.

73. Ms. Stewart found that Complainant was not timely processing late drop petitions, which was her primary job responsibility.

74. Ms. Stewart considered lesser alternatives, but ultimately decided to terminate Complainant's employment. The parties had worked through the progressive discipline process. Despite the progressive discipline, Complainant had not improved her performance. Ms. Stewart therefore concluded that Complainant was unable or unwilling to correct the deficiencies. In particular, Ms. Stewart stated that "despite this progressive discipline and repeated coaching and training, you continue to have performed unsatisfactorily by, among other things, failing to process late drop petitions in a timely fashion, and by failing to enforce the petition deadline." Ms. Stewart further concluded that Complainant's "actions continue to result in students receiving misinformation thus having their time wasted, Associate Directors receiving frustrated student and parent complaints, Ms. Perkins and Ms. Davis-DeLaria spending an inordinate amount of time researching complaints and following up with all parties, and co-workers' frustration and low morale."

75. Lastly, Ms. Stewart found that Complainant's responses demonstrated a lack of comprehension and ability regarding job duties, in addition to a lack of credibility. As a result, Respondent decided to terminate Complainant's employment, effective June 22, 2011.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (1) failure to perform competently;
- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
- (5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*,

886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which she was disciplined. In the termination letter, Ms. Stewart found that Complainant (1) accepted late drop petitions after the deadline, and (2) failed to timely process late drop petitions. The timely and accurate processing of late add and drop petitions was the most important aspect of Complainant's job.

1. Complainant accepted late drop petitions after the deadline.

Respondent proved that Complainant accepted two late drop petitions after the 2011 spring semester deadline. The deadline for accepting late drop petitions for the spring 2011 semester was April 29, 2011. Complainant accepted late drop petitions from students on May 5 and May 6, 2011.

a. May 5, 2011

On May 5, 2011, AAC Assistant Director Amy Tabor overheard Complainant accepting a late drop petition from a student. She summoned AAC Associate Director Peter Freitag to intervene. By the time Mr. Freitag arrived in the front office, Complainant had the petition in her hand. Complainant had told the student that she could not accept the petition after the deadline, but then asked the student about the extenuating circumstances. Complainant then took possession of the petition and read it. Mr. Freitag concluded it was too late to return the petition to the student. He took the petition from Complainant and reviewed it. Then he asked Complainant to date stamp the petition and place his initials on the petition.

Complainant contends that even though she had possession of the petition, she had not accepted it. Rather, Complainant argues that Mr. Freitag made the decision to accept the petition. Respondent demonstrated that Mr. Freitag played no role in Complainant's decision to physically take the paperwork, as she had the petition in her hand when he arrived on the scene. Once Complainant had the petition in hand, the student could have left, leaving Complainant responsible for the petition. In accepting the petition and reading it, Complainant violated office procedures in failing to require the student to either speak with a supervisor directly or to complete the purple sheet explaining the extenuating circumstances.

b. May 6, 2011

On May 6, 2011, a student appeared no less than three times with a late drop petition. After the student's second visit, Complainant told the student that she could speak with a supervisor. When Ms. Perkins returned later that afternoon, Complainant failed to mention the issue, and left for lunch. The student later returned while her father was on the phone with Ms. Perkins, who was in the process of explaining that AAC could not accept the petition.

Respondent proved that Complainant accepted the petition from the student while Ms. Perkins was on the phone with the student's parent. Complainant testified at hearing that the

student simply left the petition on the counter, and that she had no choice but to pick up the petition and place it somewhere safe. This testimony conflicts with Ms. McGilvray's testimony that she witnessed Complainant accept the petition directly from the student. Moreover, Ms. McGilvray's recollection is corroborated by Complainant's May 20, 2011 email, in which she stated that the student "gave me the petition." Lastly, Complainant did not contend that the student left the form on the counter at her Rule 6-10 meeting. The hearing was the first time that Complainant alleged the student simply left the petition and walked away. Given the conflicting evidence, Complainant's testimony in this regard was not credible.

After accepting the petition, Complainant placed it on Ms. Davis-DeLaria's desk, even though Ms. Davis-DeLaria was out of the office that week. She did not date stamp or initial the petition, as required by AAC procedure.

2. Complainant failed to timely process late drop petitions.

Respondent proved that Complainant failed to timely process late drop petitions in April and May 2011. First, Complainant forgot to complete a special action form when a late drop petition had been approved. She then placed the petition and the form in the student's file and returned it to the file room. As a result, the student's transcript failed to report that the course had been dropped. Second, Complainant did not timely process a late drop petition filed by a student, and it remained on her desk until the student inquired as to the status. Ms. Davis-DeLaria could not find a record of the petition in the system, because Complainant had not logged it in.

More critically, the evidence demonstrated that as of May 18, 2011, Complainant had 74 unprocessed late drop petitions. Complainant had been warned on April 21, 2011 that the Associate Directors had complained that they had not received any petitions for days, and that she needed to timely process the petitions so that they could be reviewed and acted upon. Complainant was tasked with processing the petitions within five business days, and was generally expected to process 20-30 petitions per day. However, Respondent's review revealed that Complainant was only processing 0-17 petitions per day in early May, resulting in a substantial backlog. Accordingly, Respondent demonstrated that Complainant failed to timely process late drop petitions.

3. Complainant's prior job performance.

Complainant argued that her prior work performance as an Administrative Assistant II with CU-Denver met and exceeded expectations. However, this prior performance has no bearing on whether Complainant committed the acts for which she was disciplined. Moreover, Complainant's job responsibilities as an Administrative Assistant II at CU Denver were different from her duties and responsibilities as an Administrative Assistant III at CU Boulder. Respondent demonstrated that Complainant failed to adequately perform those duties during her tenure with CU Boulder.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which

it is authorized to act in exercising its discretion; or 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 argues that she was not able to timely process the late drop petitions because her duties increased significantly at the end of the semester, and that therefore, the decision to impose discipline on this basis was arbitrary and capricious. However, classes ended on April 29, 2011, and the period after classes ended was typically very slow due to the absence of walk-up traffic and the fact that the late drop petition deadline had passed. Complainant processed only 0 – 17 petitions per day in the early May timeframe.

Complainant also argues that the termination decision was arbitrary and capricious because Complainant was tasked with many job duties, and that she made mistakes on a small percentage of the work assigned her. However, the evidence demonstrated that the processing of late add and drop petitions was Complainant's primary job function. Complainant violated AAC policy by accepting late filed drop petitions after the deadline, and consistently failed to timely and adequately process late drop petitions. For instance, as of May 18, 2011, Complainant had not processed 74 late drop petitions, despite the fact that classes had ended on April 29, 2011.

Complainant also asserts that the decision to discipline her for the May 5 and May 6 late drop petition issues was arbitrary and capricious because it was natural to handle and review the form, and that she did the right thing in accepting the petitions under the circumstances. The students did not want to complete the purple sheets and urged Complainant to accept their petitions. However, Complainant was instructed on multiple occasions to never accept a late drop petition after the deadline. If a student insisted, she was required to tell the student to complete the purple sheet or wait for a Director or supervisor. Although it was harder than accepting the petitions from the anxious students, Complainant was required to enforce the AAC's policy. Requiring that Complainant do so, and imposing discipline when she failed to do so, was not arbitrary and capricious.

Lastly, Complainant contends that the disciplinary action was arbitrary and capricious because the events addressed in the disciplinary action notice occurred in April and May 2011, and Complainant had received a corrective action on May 27, 2011 that could have covered the April and May 2011 issues. There is, however, no requirement for Respondent to include all prior events in a single corrective action in lieu of a separate disciplinary action. The May 27, 2011 corrective action covered only Complainant's 2010-2011 annual performance evaluation (through March 2011). In contrast, the subject June 22, 2011 disciplinary action addressed Complainant's subsequent April and May 2011 job performance, and therefore did not constitute cumulative discipline for the same incident. See Board Rule 6-8 (an employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature).

Overall, Respondent met its burden to establish that it did not act arbitrarily or capriciously in making the decision to discipline Complainant. Complainant violated several AAC policies and performance objectives. In Ms. Stewart's opinion, Complainant's inability to process late drop petitions adequately and timely was very concerning, given that it was her primary job responsibility and the issue had been discussed many times. The length of time it took Complainant to process the petitions was unreasonable, given that students' graduation

and summer session registration is often dependent on the outcomes. Based on the evidence presented at hearing, Ms. Stewart's decision to impose discipline was not arbitrary or capricious.

Nor was the decision contrary to rule or law. Respondent fully complied with Board Rule 6-10 in providing notice to Complainant and investigating the allegations. Further, Complainant does not allege that Respondent failed to comply with any specific Board Rules or procedural law in the disciplinary process.

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

A certified state employee may be involuntarily dismissed if he or she fails to comply with standards of efficient service or competence, and for willful misconduct. § 24-50-125(1), C.R.S. Under Board Rule 6-12, disciplinary actions may include dismissal for failure to perform competently. The decision to take disciplinary action must be based on the nature, extent, seriousness, and effect, of the act, error or omission; type and frequency of previous unsatisfactory behavior or acts; prior corrective or disciplinary actions; period of time since a prior offense; previous performance evaluations; and mitigating circumstances. Board Rule 6-9. Under the state's progressive discipline system, a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. Board Rule 6-2.

Here, Respondent exercised significant progressive discipline over a one year period. In June 2010, Ms. Stewart issued Complainant a letter of expectation, which identified concerns regarding Complainant's processing of paperwork. In January 2011, Complainant received a corrective action for failing to accurately and timely process late add petitions. Respondent then issued a disciplinary action in March 2011 for Complainant's failure to process late add, late drop, and other student petitions in an accurate and timely manner. This action stated that Complainant was expected to process late drop petitions within five business days. In May 2011, Ms. Stewart issued a corrective action based on Complainant falling below expectations in three areas of her 2010-11 annual performance evaluation. These areas included clarifying policy and procedure, managing late add and late drop petitions, and job knowledge.

These corrective and disciplinary actions are related to the subject disciplinary action. Complainant was disciplined for failing to adhere to late drop petition deadline policy and not timely and accurately processing late drop petitions. This issue was the subject of the letter of expectation, two corrective actions, and one disciplinary action. Respondent exercised progressive discipline in this case.

In determining the proper level of discipline, Ms. Stewart considered lesser alternatives, but ultimately decided to terminate Complainant's employment. Ms. Stewart concluded that Complainant's continued inability to follow policy and timely and accurately perform her primary job duties resulted in students receiving misinformation, wasted time, and Associate Directors receiving frustrated student and parent complaints. Ms. Perkins and Ms. Davis-DeLaria spent a significant amount of time coaching Complainant and following up on student and parent complaints. Complainant had received fairly extensive training in the first few weeks of her employment. Lastly, Ms. Stewart concluded that Complainant's responses in her May 20, 2011 email and in the Rule 6-10 meeting demonstrated a lack of comprehension and ability regarding her job duties.

In reviewing an appointing authority's decision, the issue is not whether the disciplinary action selected was the most appropriate, but rather, whether the discipline imposed was within the range of reasonable alternatives. Here, for the reasons set forth above, Respondent satisfied its burden to establish that the appointing authority's decision to terminate Complainant's employment was within the range of reasonable alternatives. In particular, Complainant was not adequately or timely performing her primary job duties despite the corrective actions and prior disciplinary action. Under Board Rule 6-12, Respondent demonstrated that, based on the extensive progressive discipline already exercised, termination of Complainant's employment was within the range of reasonable alternatives.

D. Complainant is not entitled to the recovery of her attorney fees and costs.

Respondent's action is affirmed, and Complainant's appeal is denied. Therefore, Complainant's request for the recovery of her attorney fees and costs is denied.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Complainant is not entitled to the recovery of her reasonable attorney fees and costs.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 19th day
of July, 2012 at
Denver, Colorado.



Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

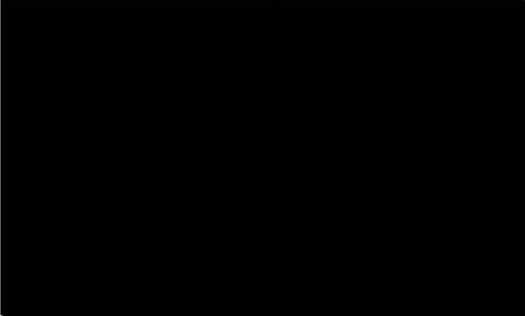
CERTIFICATE OF MAILING

This is to certify that on the 19th day of July, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

David J. Furtado



Elvira Strehle-Henson



Woods, Andrea

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 electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 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.