STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B036**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARTURO HILARIO,
Complainant,

vs.

UNIVERSITY OF COLORADO - BOULDER, UNIVERSITY MEMORIAL CENTER,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on March 2 and 29, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on February 9, 2012. The record was closed on March 29, 2012, upon conclusion of the evidentiary hearing. Special Assistant Attorney General Elvira Henson represented Respondent. Respondent's advisory witness was Carlos Garcia, the Director of University Memorial Center (UMC) and Complainant's appointing authority. Mark Schwane, Esquire, and Timothy Markham, Esquire, represented Complainant.

MATTERS APPEALED

Complainant, Arturo Hilario (Complainant), a certified employee classified as a Custodian I and employed by the University of Colorado at Boulder, University Memorial Center (Respondent), appeals the imposition of a two-month 10% reduction in pay, arguing that he was improperly disciplined for reporting that two of his co-workers were not working when he saw them, and incorrectly disciplined upon allegations that he was harassing and stalking co-workers. Complainant seeks all damages to make him whole, including rescission of the disciplinary action and an award of lost wages. Complainant also seeks an award of attorney fees and costs. Respondent argues that Complainant's actions constituted willful misconduct and warranted to imposition of the pay reduction.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant should be awarded attorney fees and costs.

FINDINGS OF FACT

Background:

1. Complainant is a classified state employee for Respondent, and has worked for Respondent since 1998. In 2011, Complainant worked as a Custodian I at Respondent's University Memorial Center (UMC) building.

2. The UMC is the student union building on campus. It has retail food outlets, student organization offices, and other student services and recreation within the building.

3. The custodial staff at the UMC works on various floors of the building performing cleaning and maintenance duties at pre-determined times in order to support the functions of the UMC. Custodial staff has set break times during their shifts.

4. By November 2003, Complainant had been promoted to Custodian II. In this capacity, Complainant was the lead worker of a group of custodians on the night shift at UMC. This group of custodians included Blanca Rangel.

5. Complainant returned to the Custodian I level in 2009 after a voluntary demotion. The demotion removed all of Complainant's supervisory duties.

6. As of July of 2011, Complainant reported to the UMC Custodial Supervisor Maria Garibay. Ms. Garibay was supervised by Marino Lerma, the UMC Operations Manager. Mr. Lerma's supervisor was Jimmie Baker, the Associate UMC Director. The appointing authority for all of the custodial staff, and Mr. Baker's supervisor, was the UMC Director, Carlos Garcia.

7. The set-up crew at UMC performs different work from the custodial staff. The set-up crew responds to specific reservations for various rooms and for audio-visual equipment. The set-up crew has a more variable break schedule than the custodial staff because of the nature of their work. As of July 2011, Ms. Rangel and Maria Eva Fuentes were assigned to the set-up crew. Ms. Rangel's supervisor was Dale Grisham. Mr. Grisham's supervisor was Mr. Lerma.

8. Management for the set-up crew and the custodial staff asked any employee who saw another employee sitting down on the job or not working to report that fact to management.

July 15, 2011 Incident:

9. On July 15, 2011, Complainant was assigned to the custodial crew at UMC. Complainant reported to work at 4:00 AM, worked on the 2nd floor of UMC until 6:00 AM, worked on the 1st floor dining room area from 6:00 AM until 7:00 AM. From 7:00 AM until 10:00 AM, Complainant worked on the 2nd floor. The break time in the morning for the custodian crew is a 7:00 AM until 7:10 AM.

10. Ms. Rangel and Maria Eva Fuentes were on the set-up crew and were in UMC 227, which is a lounge area.

11. At about 7:45 AM, Complainant opened up the door of UMC 227 and saw that Ms. Rangel and Ms. Fuentes were sitting down and were not engaged in work at the time.

Complainant asked if they had seen Complainant's supervisor, Ms. Garibay. The two women told him no, they had not seen her. Complainant left the room without further comment.

12. As Complainant left the area of UMC 227, he passed Ms. Rangel's and Ms. Fuentes' direct supervisor, Mr. Grisham. Complainant told Mr. Grisham that the two women in UMC 227 had been sitting in the room and not performing work.

13. When Mr. Grisham went to investigate the report, Ms. Rangel and Ms. Fuentes told Mr. Grisham that Complainant had been harassing them for a long time by checking up on them and saying that they did not work.

The 6-10 Process:

14. On July 15, 2011, Mr. Grisham reported to Mr. Lerma that he and his set-up crew felt that Complainant was harassing them by following them at work and while they took breaks.

15. Mr. Lerma is Ms. Rangel's brother-in-law. The fact that Mr. Lerma and Ms. Rangel are related has contributed to the impression by at least some of the custodial staff that Ms. Rangel has been receiving favored treatment.

16. Complainant was called into a meeting on or about July 20, 2011, with Mr. Lerma. In the meeting, Complainant was accused of stalking the UMC set-up crew and harassing them. Complainant was also told by Mr. Lerma in a memo that "if this continues, I will be forced to report the matter to Jimmie Baker for his attention, which could also result in corrective or disciplinary action."

17. Mr. Garcia decided to treat the allegation that Complainant was harassing members of the set-up crew and Mr. Grisham as a potential ground for discipline. He noticed a Board Rule 6-10 meeting with Complainant for September 7, 2011.

18. Complainant attended the Board Rule 6-10 meeting on September 7, 2011, with his representative, Pamela Cress, and an interpreter. Mr. Garcia attended the meeting with Mr. Baker and an interpreter.

19. During the meeting, Complainant told Mr. Garcia that he did not follow Ms. Rangel around, harass, stalk or make negative comments about her. Complainant told Mr. Garcia that he was looking for Ms. Garibay when he walked into UMC 227, and that he had told Mr. Grisham that he should look into what Ms. Rangel and Ms. Fuentes were doing in UMC 227. Complainant also told Mr. Garcia that Complainant was the one who was being harassed. He accused Mr. Grisham of coming into work early to check on him, even though he was not Complainant's supervisor. Complainant told Mr. Garcia that Ms. Garibay had said that Mr. Lerma instructed her to tell other custodial and set-up crew employees not to talk or associate with Complainant.

20. Complainant also told Mr. Garcia that he believed that Ms. Rangel received preferential treatment because she was Mr. Lerma's sister-in-law, and that she had been allowed to just walk around the building not doing any work.

21. Mr. Lerma told Mr. Garcia that he and Ms. Garibay had interviewed Complainant about the July 15 incident on July 20, 2011, and that during this meeting Complainant had admitted to following Ms. Rangel around and checking up on her work and during breaks.

Complainant disputed that he had been interviewed by Mr. Lerma and Ms. Garibay on July 20, 2011, concerning the July 15 incident, and he disputed that he had admitted to following Ms. Rangel around or checking on her work.

22. Mr. Garcia and Mr. Baker decided to interview eleven employees about the issues which were addressed in the September 7, 2011 Board Rule 6-10 meeting. The employees who were interviewed included Mr. Lerma, Ms. Garibay, Mr. Grisham, Ms. Rangel, and Ms. Fuentes. In addition to these five employees, three additional set-up crew staff members and four custodians who work morning shifts were interviewed.

23. The issues to be addressed during these interviews covered the following ten items:

A. If they had any knowledge of Complainant following Ms. Rangel around during work or during her breaks or checking on her whereabouts, or making negative comments about her.

B. If they had any knowledge of Complainant following Mr. Grisham around during work or during his breaks.

C. If they had any knowledge of Mr. Lerma or Ms. Garibay asking other employees to not speak or associate with Complainant.

D. If they had any knowledge of Ms. Rangel not doing her work and just walking around the building or hiding in closets or bathrooms to avoid doing work.

E. If they had any knowledge of Mr. Grisham coming in to work early to specifically check up on Complainant.

F. Mr. Grisham was asked if he comes into work early to specifically check up on Complainant.

G. Ms. Rangel, Ms. Fuentes, and Mr. Grisham were asked why they felt they were being harassed or stalked by Complaint and, if so, how.

H. Mr. Grisham was asked if he felt pressure from anyone to give preferential treatment to Ms. Rangel because she is Mr. Lerma's sister-in-law.

I. Mr. Lerma was asked if he pressured Mr. Grisham to give preferential treatment to Ms. Rangel because she is his sister-in-law.

J. Mr. Lerma and Ms. Garibay were asked if they had indeed met with Complainant on July 20, 2011 to discuss the July 15, 2011 incident.

24. Mr. Garcia did not ask the eleven interviewed employees to provide the dates for any activities that they reported during the interviews.

25. In response to the question concerning Complainant following Ms. Rangel around, four of the employees said that they had seen Complainant checking up on Ms. Rangel or asking about her whereabouts. These four witnesses also said that they had heard Complainant make negative comments about Ms. Rangel. The four employees reporting these actions were Mr. Lerma, Mr. Grisham, Ms. Fuentes, and a set-up crew member and former

custodian, Hugo Gutierrez. The other seven employees did not report any information concerning Complainant following Ms. Rangel around, checking on her whereabouts or making negative comments about Ms. Rangel.

26. Two employees reported that they had seen Complainant checking on Mr. Grisham and following him around, especially on his breaks. The other nine employees reported that they had not seen such activity.

27. Ms. Rangel told Mr. Garcia that she felt harassed because Complainant checked on her during her work and made comments about her to others or to her when she walked near Complainant. Ms. Rangel complained of an incident on September 7, 2011, during which Complainant and Gilberto Hernandez talked about her while in a stairwell, saying that they felt that she gets away with not doing any work.

28. Ms. Fuentes told Mr. Garcia that she did not feel harassed by Complainant but that she could understand why Ms. Rangel felt that way.

29. Mr. Grisham reported that he felt harassed and stalked because Complainant often watched him on breaks and would look at Mr. Grisham while glancing at his wrist, indicating that he was timing Mr. Grisham's breaks. Mr. Grisham also told Mr. Garcia that he came in early to work when he needed to do so for work or personal reasons, and that his early arrival would be authorized in advance by Mr. Lerma. Mr. Grisham informed Mr. Garcia that when he checked on Complainant's work, it would be because he checked on the work of the employees who work on weekends when he is the shift supervisor for both the set-up crew and the custodial staff.

30. Mr. Grisham and Mr. Lerma both also reported that, pursuant to Respondent's policy concerning the supervision of relatives, Mr. Lerma played no role in Ms. Rangel's reviews and evaluations, and that Mr. Lerma did not issue any work assignments to Ms. Rangel.

31. Mr. Lerma told Mr. Grisham that he and Ms. Garibay had interviewed Complainant on July 20, 2011, concerning the July 15 incident. Mr. Lerma said that Complainant initially disagreed that he had been following Ms. Rangel or checking on her, and that Complainant later shrugged his shoulders indicating that he was following Ms. Rangel and checking on her. Ms. Garibay told Mr. Garcia that she felt that Complainant, while not directly acknowledging the conduct, indicated with his body language that he understood what Mr. Lerma was referring to.

32. Mr. Lerma and one other employee told Mr. Garcia that, several years ago, Mr. Lerma had told the employee that the employee should be careful of associating too much with Complainant because Complainant liked to spend time talking and not working and that would get the employee in trouble if he was caught up in such behavior.

33. Mr. Garcia also asked Ms. Garibay if she had been contacted by Complainant at any point on July 15, 2011. Ms. Garibay told Mr. Garcia that she had not been contacted by Complainant in person or by radio. Mr. Garcia concluded that, because of this, he did not believe that Complainant was looking for Ms. Garibay when he entered UMC 227.

34. Mr. Garcia issued Complainant a disciplinary action by letter dated October 4, 2011. Mr. Garcia concluded in this disciplinary action that Complainant's "attempts to mitigate or deny your behavior are not supported by any of the fact or eyewitness accounts. In fact, all

of your assertions that it is in fact you that is being treated unfairly cannot be corroborated by anyone else I interviewed while all of the behavior you have been accused of (with specific regard to the July 15, 2011 incident but also in general) has been observed and confirmed by several sources. I have found your statements pertaining to this matter to be disingenuous and not credible."

35. Mr. Garcia considered Complainant's work history in reaching his conclusion that Complainant had engaged in willful misconduct "by treating fellow UMC employees in an unprofessional, disrespectful and intimidating manner, in complete disregard to several prior attempts to correct your behavior."

36. Complainant's performance as a Custodian has generally been good in terms of the quality of his custodial work. Complainant, however, has a history of warnings and corrective actions for speaking unprofessionally to his co-workers, supervisors, and others:

A. In September of 2000, Complaint received a written warning from his supervisor, Cederic Peebles. Complainant was admonished for "verbally harassing another employee."

B. In Complainant's 2002 – 2003 annual performance evaluation, it was noted that Complainant performed well and "uses appropriate language with others" in his core competency area of Communication. Complainant's score in this area was rated Above Standard. In the core competency of Interpersonal Skills, Complainant's supervisor noted that Complainant needed to "improve relations with others; needs to focus on his issues and not on his co-workers." Complainant's rating in this was at the Satisfactory level.

C. In Complainant's 2004 - 2005 annual performance review, Complainant was rated at a satisfactory level in the core competencies categories of Communication and Interpersonal Skills. Both categories, however, included a notation that Complainant needed to work on communicating with co-workers; one notation noted that Complainant was to work on "communicating with employees in a courteous [manner]," while the other category noted that Complainant needed to improve his "working relationship with co-workers."

D. In October of 2007, Complainant was issued a corrective action by Mr. Garcia. At the time of the corrective action, Complainant was a lead worker/supervisor of custodians Grazyna Krekora, Ms. Rangel, and Sandra Valenzuela. These three custodians had complained about how Complainant had spoken to them when he thought they were not working. Complainant explained to Mr. Garcia that he did not believe he was treating those workers inappropriately but that he speaks loudly and believed that they often slept on the job. Mr. Garcia found that Complainant was not treating the employees respectfully, civilly, or professionally. The corrective action instructed Complainant that he was expected to direct and oversee the workers' work and correct any errors that may occur "in a manner that is respectful and not demeaning to them."

E. In March of 2008, the results of an agency investigation into a sexual harassment complaint filed by Ms. Krekora were released. Mr. Garcia met with Complainant to discuss the results. The investigation did not find a violation of the sexual harassment policy. The investigation, however, found a number of incidents of

Complainant behaving in a way that was inappropriate and unacceptable for a supervisor. Mr. Garcia issued Complainant a letter concerning the results of this investigation.

F. In Complainant's 2007 – 2008 annual performance review, Complainant again received comments with regard to the core competencies of Communication and Interpersonal Skills. In the area of Communication skills, Respondent noted that Complainant "has done well in this area" but that he "needs to work on improving his communication skills with co-workers" and "needs to make sure he uses appropriate language." Complainant received a score of 1 for this objective, indicating that his performance in this area was rated at below expectations. In the core competency are of Interpersonal Skills, Respondent commented that Complainant needed more work on developing good relations with his co-workers. Complainant received a score of 0.5, which was below the level of rating indicating that his performance was below expectations.

G. Complainant received a corrective action dated February 6, 2009, concerning unprofessional statements he had made about a vendor operating at UMC. The Director of UMC, Mr. Garcia, found that Complainant had intentionally humiliated the vendor by making vulgar and inappropriate comments in calling the vendor a "fag," among other things, done in a voice loud enough to be overheard by the vendor.

H. Complainant's 2008 – 2009 annual performance evaluation again noted issues with Complainant's communication with co-workers and others. Complainant's rating on the core competency of "Communication" was at a Below Expectations level, and the comments noted that Complainant needed to work on improving his communication skill with customers, vendors, and co-workers. Complainant's rating for the core competency of Interpersonal Skills was also placed at a Below Expectations level, with the notation that Complainant needed to "improve his professional conduct with not only his co-workers but other constituents of the UMC."

I. Complainant's 2009 – 2010 annual performance review noted that Complainant had "done well" in the core competency area of Communication, but that he needed to "improve [his] appropriate language when speaking." Complainant's rating in the area was 2.5, which was between the level of Meeting Expectations and Exceeding Expectations. In the core competency area of Interpersonal Skills, Complainant's supervisor noted that Complainant had "done well in this are [b]ut needs to still [improve] on his smooth relations with the co-workers." Complainant's rating in this area was also set at 2.5.

J. Complainant was also informally warned in June of 2011 that he had been displaying disrespectful and unprofessional behavior toward his supervisors by responding in sarcastic tones, questioning job assignments, making inappropriate comments at meetings, and lodging unsubstantiated claims of discrimination, mistreatment or harassment by his supervisors.

37. In support of his ultimate conclusion on the issue of discipline, Mr. Garcia referred to his March 2008 letter to Complainant addressing the investigative findings of the allegations filed by Ms. Krekora, and his February 2009 corrective action addressing Complainant's statements to the UMC vendor. Mr. Garcia also referred to the October 2007 corrective action that he issued to Complainant for the manner in which he corrected Ms.

Krekora, Ms. Rangel and Ms. Valenzeula, as well as to the June 2011 warning that Complainant had received concerning disrespectful and unprofessional statements made to Complainant's supervisors. Finally, Mr. Garcia also referred to "the other letters and actions from 2007, 2008, and 2009" as demonstrating "a continued disregard for the manner in which you treat others at work."

38. Mr. Garcia determined that disciplinary action was appropriate under the circumstances, and reduced Complainant's pay by 10% of his gross pay for October and November of 2011.

39. Complainant filed a timely appeal of the discipline with the Board.

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; C.R.S. § 24-50-101, *et seq*; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

(1) failure to 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. *Kinchen*, 886 P.2d at 708. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

The factual basis for Respondent's disciplinary action included two parts: (1) the allegations of long-term stalking and harassment made by Mr. Grisham, Ms. Rangel, and Ms. Fuentes, and (2) the incident which occurred on July 15, 2011.

Long-term Harassment and Stalking:

The factual basis for the allegations of long-term stalking and harassment were not proven by a preponderance of the evidence at hearing. The majority of the potential witnesses

who answered Mr. Garcia's investigative inquiry did not testify at hearing. Ms. Fuentes testified, but did not claim that Complainant was harassing or stalking her. Ms. Fuentes' testimony supported that Complainant had previously said that he did not believe that Ms. Rangel did any work.

Ms. Rangel testified at hearing. Her testimony concerning the allegations of harassment or stalking included very few details, other than her overarching claim that Complainant had complained that she did no work, and that Complainant had been harassing her for a long time. From this general testimony, it is difficult to tell whether the interactions between Complainant and Ms. Rangel rise to the level of something that should be viewed as harassment or stalking, or have remained at the level of a dispute or other report which would not be sufficient to trigger discipline.

Mr. Garcia's investigation results also do not add sufficient information to determine whether there has been a pattern of harassment and stalking by Complainant. The questions asked by Mr. Garcia were general in nature. He asked, for example, if employees had any knowledge of actions by Complainant in following Ms. Rangel around during work or breaks, or checking on her whereabouts, or making negative comments. Mr. Garcia interpreted the answers he received to that question to be reports by four employees of various actions by Complainant. Without any details as to the nature of the incidents or the approximate dates of the incidents, however, it cannot be determined with any assurance that these employees are not all reporting the same one or two incidents. Additionally, the question is phrased as one of whether the employees had knowledge of such occurrences. If these witnesses had testified at hearing, the specific nature of their knowledge could likely have been determined. Without their testimony, however, the information presented by Respondent is too ambiguous to provide sufficient support for Respondent's contention that Complainant has engaged in long-term harassment and stalking of co-workers.

As a result, Respondent has not proven by a preponderance of the evidence that Complainant engaged in a long-term pattern of harassment and stalking of Ms. Rangel or other employee.

The July 15 Incident:

Respondent presented significantly more detailed information supporting the claim that Complainant had engaged in misconduct on July 15, 2011.

Complainant's version of events about why he opened the door of UMC 227 on July 15, 2011, was not adopted as part of the findings of fact because it lacked credibility. That omission, however, does not answer the question of why Complainant opened the door to UMC 227.

The preponderance of the credible evidence at hearing only demonstrated that Complainant went into a room that he was not assigned to clean, spoke briefly with the two set-up crew staff inside that room, and then left the room. Complainant then told Mr. Grisham that the two were not working. The primary debate at hearing concerned whether reporting those two co-workers for sitting down and failing to work is a violation of applicable performance standards. Respondent's second-in-command, Mr. Baker, agreed at hearing that management normally wants and expects to hear such reports from employees. As a result, Complainant's actions would have been consistent with Respondent's performance expectations for employees unless Respondent had changed the performance expectations for Complainant.

The critical question, therefore, is whether Complainant's performance standards had been changed to make it clear to him that, unlike other employees, he was not to report that his co-workers were sitting down and not working. Mr. Garcia concluded in his October 4, 2011 disciplinary letter that he believed Complainant's actions were willful misconduct because the actions were unprofessional, disrespectful and intimidating, and were done in "complete disregard of prior attempt to correct" Complainant's behavior.

The fact that Complainant's report to Mr. Grisham was a true statement and was the type of information that management normally asked for employees to report contradicts the conclusion that this report should be considered to be unprofessional, disrespectful, intimidating, or otherwise improper.

Additionally, Mr. Garcia's conclusion that Complainant's actions in reporting his observation to Mr. Grisham was done "incomplete disregard to several prior attempts to correct your behavior" is not well-grounded in fact.

The record established at hearing is that Complainant has clearly had problems in the past with his choice of language and his demeanor. He has been repeatedly counseled, warned, or given corrective actions concerning his use of language that was demeaning or insulting. Complainant's actions of July 15, 2011, however, did not involve any language from Complainant that was demeaning, insulting, or otherwise unprofessional. He reported to Mr. Grisham that he had seen two of his co-workers sitting down on the job and not working. This was a truthful statement, and it was not delivered to the co-workers but to an appropriate person to be notified of such a sighting.

Under such circumstances, Respondent has failed to demonstrate that Complainant has failed to comply "with standards of efficient service or competence", or committed "willful misconduct, willful failure or inability to perform his duties," or any other lawful basis for discipline. C.R.S. § 24-50-125(a).

This is not to say that Complainant's reporting of his co-workers could not cause a problem that could be addressed by management, under the proper circumstances. It was quite clear from the testimony that Respondent is attempting to address a serious morale problem within the UMC facility work groups. Part of that problem is that some of the staff (including Complainant) believe that other workers are being given advantageous treatment and being permitted not to work, while others believe that Complainant is simply harassing them. Respondent has the discretion to instruct staff members as to what actions are appropriate, and what actions are harmful and not permitted, in order to address this morale problem.

If Respondent intends to impose discipline in this case, however, it must be taken on the grounds that Complainant's actions have violated the applicable performance standards for his job. There was no indication at hearing that, prior to this imposition of discipline, Complainant had been told that his performance standard was different than the performance standard applied to others with regard to reporting non-working employees. In other words, there must be a reason to conclude here that Complainant had been told that, while others should report non-working co-workers, Complainant may not do so because of the history of problems between Complainant and his co-workers. The closest piece of evidence presented that such a message had been communicated to Complainant occurred after July 15, 2011. Mr. Lerma told Complainant that his actions of July 15 had to stop because such actions were harassing to his co-workers. In the absence of that change in Complainant's performance standards prior to the

imposition of discipline, Respondent cannot sustain the claim that Complainant acted unprofessionally or was otherwise in violation of the applicable standards of conduct in making his report to Mr. Grisham.

As a result, Respondent has not proven by a preponderance of the evidence that Complainant stalked or harassed his co-workers prior to July 15, 2011, or that Complainant's July 15, 2011 actions in reporting his observations to Mr. Grisham violated an applicable standard of performance.

B. The Appointing Authority's action was 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).

In this case, Mr. Garcia conducted an investigation. The investigation was too general in nature to provide him with the type of evidence upon which a strong disciplinary case could be built, but does not represent a neglect or refusal to use reasonable diligence to gather information in this case. Mr. Garcia considered the evidence which was before him and reached conclusions that, while too broad to be successful during the Board's *de novo* review, are not so incorrect as to make his decision arbitrary or capricious under the *Lawley* standard.

Respondent's action in taking discipline in this case, however, was contrary to law or rule. The imposition of discipline under these circumstances violates the requirements for progressive discipline under Board Rule 6-2, 4 CCR 801. Board Rule 6-2 provides, in relevant part, "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper..." The purpose of this rule is to establish the use of progressive discipline. The purpose of progressive discipline is to provide an employee with guidance as to how his or her actions meet the performance requirements for the job, and to allow the employee to correct a problem before discipline is employed. *See* Board Rule 6-11, 4 CCR 801 (defining corrective action, in part, as one "intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure").

The facts of the incidents underlying this case are not so extreme as to support a finding under Board Rule 6-2 that the actions are so flagrant or serious so as to justify an immediate imposition of discipline. If Respondent is to impose discipline in this case, accordingly, it must be able to show that Complainant has first been subject to a corrective action meeting the purpose of Board Rule 6-2.

Complainant has had two corrective actions issued to him.[1] The two corrective actions were based upon Complainant's unprofessional language. Such corrective actions do not provide the type of warning and opportunity to place Complainant on notice that he was not to report co-workers when he observed that they were not working. Respondent's imposition of discipline, rather than a corrective action, was therefore contrary to Board Rule 6-2.

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

Given that the requirements of Board Rule 6-2 have not been met in this case because of the lack of a corrective action addressing Complainant's reporting of co-workers or similar issues, Respondent's imposition of any form of discipline rather than corrective action is outside the scope of permissible remedies under the Board's rules. Respondent's choice of a pay reduction was, accordingly, not within the range of reasonable alternatives available to Respondent.

D. Complainant is not entitled to an award of attorney fees.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

A groundless personnel action is one in which "it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-38(A)(3). Frivolous actions, on the other hand, are actions "in which is it found that no rational argument based on the evidence or law is presented." Board Rule 8-38(A)(1).

In this case, Respondent has taken a disciplinary action that has not been sustained on the basis of the evidence offered at hearing. The standard for an award of attorney fees and costs, however, is not merely that Respondent has insufficiently supported its disciplinary claim. Complainant must be able to demonstrate that Respondent's decision to impose a pay reduction upon him was not just incorrect under the law but was also frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless.

Complainant has not shown that Respondent's disciplinary action was frivolous, groundless, malicious, or taken in bad faith. The record established that Complainant's actions on July 15, 2011, and prior to that date, had caused significant discord among his co-workers, and that Mr. Garcia and other members of management were attempting to address a long-standing morale problem within Complainant's work unit which was due, at least in part, to Complainant's actions. Complainant did not demonstrate that that there was no competent evidence to support the disciplinary case against him, or that there was no rational argument presented to support the disciplinary action. Additionally, Complainant did not establish that the disciplinary action was taken in order to harass him, or was imposed maliciously or in bad faith.

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[1] For the purpose of Board Rule 6-2, warnings, performance review comments, and other lesser forms of counseling do not substitute for the existence of a corrective action justifying the imposition of discipline. *See* Board Rule 6-11 (defining the specific requirements for a corrective action).

Under such circumstances, Complainant is not entitled to an award of attorney fees or costs.

CONCLUSIONS OF LAW

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

ORDER

Respondent's disciplinary action is **rescinded.** Complainant shall be refunded the pay that he lost in October and November 2011, along with statutory interest on the amount to be refunded. No attorney fees or costs are awarded to either party.

Dated this 14th day of May, 2012 at Denver, Colorado.

[redacted]

Denise DeForest
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 15th day of May 2012, ~~20--~~, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Timothy Markham

[redacted]

Elvira Strehle-Henson

[redacted]

[redacted]

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.