STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B045**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES R. HEGLER,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, SPRING CREEK YOUTH SERVICES CENTER,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on January 27 and February 10, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on January 27, 2012. The record was closed on March 8, 2012, upon receipt of Respondent's written Closing Argument rebuttal brief. Senior Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Leo Navarro, the Director of the Spring Creek Youth Services Center. Michael J. Belo, Esquire, represented Complainant.

MATTERS APPEALED

Complainant, a certified employee previously classified as a Correctional Youth Security Supervisor (CYSS) III and employed by the Department of Human Services, Division of Youth Corrections, Spring Creek Youth Services Center (Respondent or facility), appeals his demotion to Correctional Youth Security Officer (CYSO) II, arguing that Respondent has failed to properly evaluate the facts of his relationship with CYSO I Edwards, has failed to provide notice of the policy disallowing Complainant's relationship with Ms. Edwards or requiring him to report the relationship, and has failed to employ progressive discipline. Complainant also requests that he be made whole for all losses, including back pay for the difference in salary between CYSS III and CYSO II and reimbursement for all other compensable losses; that his personnel file be expunged of paperwork recording the disciplinary action and demotion; and that he be awarded attorney fees and costs. Respondent argues that the demotion was properly imposed because the conduct warranted the immediate imposition of discipline and Complainant's supervisory status could not be maintained under the circumstances. Respondent asks that the discipline be upheld.

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 is entitled to an award of attorney fees.

FINDINGS OF FACT

Background:

1. Complainant was initially hired by the Division of Youth Services (DYS) as a CYSO I in 1999. After two years, Complainant left state service for other positions. In 2004, he was reinstated as a CYSO I and hired by Respondent.

2. In 2006, Complainant was promoted from CYSO I to the position of CYSS III. Complainant did not serve any time as a CYSO II prior to his promotion to CYSS III. Respondent has seven CYSS III positions. The CYSS III position is the top-ranking security position at the facility.

3. Respondent houses juveniles who are either awaiting hearings in the state juvenile justice system or who have been committed to the custody of DYS after a hearing. The facility has residential units called pods. Each pod serves as the residence for a group of juveniles. Each pod is staffed 24 hours a day, seven days a week, by CYSO and CYSS staff who are responsible for the safety and security of the residents.

4. As a CYSS III, Complainant was in charge of security for one of Respondent's pods. In this capacity, Complainant served as the direct supervisor for the other security staff members assigned to that pod. Complainant performed the performance evaluations of these staff members, as well as supervised the day-to-day operations carried out by these staff members.

5. CYSS III employees also serve as the facility supervisor for the shift to which they were assigned. As the facility supervisor, the CYSS III would make certain that programming was occurring as planned and would sign off on all of the paperwork necessary for all of the pods. The CYSS III on shift also makes facility-wide decisions regarding the security of the facility, and serves as the most senior administrative staff during the times that higher ranking administrators are not present.

6. During Complainant's tenure as a CYSS III, Complainant consistently received good annual evaluations. Complainant received no corrective actions or disciplinary actions prior to the imposition of discipline in this case. Complainant received only one Memorandum of Understanding (MOU) document in May of 2011 for going outside with CYSO I Britt Edwards to smoke in an unapproved location and then permitted Ms. Edwards to return to her pod assignment with cigarettes and a lighter on her person.

Positions held:

7. Prior to April 2010, Complainant was the supervisor for the staff who worked on the Jaguar pod. One of the CYSO I staff members assigned to the Jaguar pod was CYSO I Edwards.

8. In April of 2010, Complainant transferred to the Puma pod. Ms. Edwards remained on the Jaguar pod.

Relationship With CYSO I Edwards:

9. By early in 2010, Complainant was in the process of obtaining a divorce. The divorce was finalized in late April or early May of 2010.

10. In or about February 2010, Complainant and Ms. Edwards appeared at a local restaurant and bar, the Hatch Cover, and were seen there by other facility staff, including Rob and Robyn Suiter. Robyn Suiter is the lead nurse practitioner at the facility. Rob Suiter is a CYSS III at the facility. The Suiters are married, and have complied with the necessary departmental policies to work in the same facility.

11. While at the Hatch Cover, Robyn Suiter saw Complainant lean over and kiss Ms. Edwards. The physical closeness of Ms. Edwards and Complainant made it clear to the Suiters that Complainant and Ms. Edwards were not just friends but were a romantic couple.

12. Shortly after the Suiters saw Complainant and Ms. Edwards at the Hatch Cover, Robyn Suiter spoke with Complainant about why having a romantic relationship with Ms. Edwards was a bad idea. Complainant acknowledged to Ms. Suiter that he was in a relationship with Ms. Edwards. Ms. Suiter noted that Complainant at the time was not yet divorced. Ms. Suiter also told Complainant that he was the supervisor on the Jaguar pod where Ms. Edwards was assigned and, therefore, Ms. Edwards' direct supervisor. Ms. Suiter told Complainant that Ms. Edwards may claim sexual harassment against Complainant if the relationship ended badly.

13. After seeing that Complainant and Ms. Edwards were a couple, the Suiters invited Complainant and Ms. Edwards as a couple to their Fourth of July gathering in July of 2010.

14. Complainant was Ms. Edwards' direct supervisor when Complainant was the CSYS III in charge of the Jaguar pod. After Complainant transferred to Puma pod in April 2010, he still served as the facility supervisor for his shift. While he was acting as facility supervisor, Complainant had sufficient authority over Ms. Edwards to determine if she was performing her job.

15. Complainant rented out the house that he had shared with his ex-wife in December 2010. In mid- December 2010, Complainant signed a lease with Ms. Edwards to jointly rent Ms. Edwards' home from Ms. Edwards' landlord, Ann Berket. Once Complainant signed the lease with Ms. Edwards, he changed his home address in Respondent's system to reflect Ms. Edwards' home address as his new address. Complainant did not file any other form of notification with Respondent concerning his living arrangements.

First Conversation with Kenneth DeLeon:

16. In either late 2010 or early 2011, Assistant Director Kenneth DeLeon told Complainant that other staff members had reported seeing Complainant and Ms. Edwards kissing and holding hands in the facility parking lot. Mr. DeLeon specifically asked Complainant if he was involved with Ms. Edwards. Mr. DeLeon warned Complainant that there were policies governing the romantic relationships among facility staff.

17. During his conversation with Mr. DeLeon about the rumors of his relationship with Ms. Edwards, Complainant denied that he had a relationship with Ms. Edwards, and denied that Ms. Edwards was his girlfriend.

Other conversations about Complainant's relationship with Ms. Edwards:

18. In October of 2010, Complainant was coordinating performance reviews with CYSS III Rob Suiter. During this conversation, Complainant asked Mr. Suiter about the policy for staff relationships, and the two of them discussed the facility policy.

19. A number of months prior to June 2011, Monica Ibarra, is a social worker who at the time was an assessment supervisor at the facility, had a discussion with Complainant in which she told Complainant that there were rumors at the facility about a relationship he was having with Ms. Edwards. Ms. Ibarra told Complainant that he needed to address the issue with his chain of command. Complainant's response to Ms. Ibarra's concerns was to say that he wasn't doing anything wrong, and that no one could prove that he was doing something wrong.

Process Server Incident:

20. On or about June 20, 2011, CYSO I Tamra Drake was contacted by another employee, CYSO I Carlos Sanchez. Mr. Sanchez needed to serve legal papers on Ms. Edwards concerning an alleged debt that Ms. Edwards owed to Mr. Sanchez. Mr. Sanchez wanted to hire Ms. Drake to serve the papers for him. Ms. Drake reported the contact to Complainant.

21. Complainant was on duty as the facility supervisor at the time he learned of the plan to serve Ms. Edwards with legal papers. As the facility supervisor, Complainant's duties included handling any conflicts that arose.

22. Complainant contacted Monica Ibarra. Ms. Ibarra was not part of the security staff or in the chain of command for the security staff. Ms. Ibarra was one of the more senior administrative staff members on duty at the time. Complainant told Ms. Ibarra that the service issue was the type of issue that needed immediate attention because there was the possibility of retaliation and workplace violence.

23. Ms. Ibarra initially told Complainant that it was his responsibility to take care of the issue with Mr. Sanchez. Complainant declined to do so, telling Ms. Ibarra that he did not think he could because of the threat of violence in the workplace. Complainant told Ms. Ibarra that he did not feel comfortable talking with Mr. Sanchez about the issue. Complainant did not tell Ms. Ibarra that the staff member to be served was his domestic partner.

24. Once Complainant had declined to address the issue with Mr. Sanchez, Ms. Ibarra spoke with CYSO I Sanchez and told him that he could not recruit staff members to serve other staff members.

25. CYSO I Sanchez did not recruit other staff members to serve Ms. Edwards. He eventually had a discussion with Complainant in July of 2011 in which Complainant agreed that he would pay Ms. Edwards' debt.

Staff Suggestion Box:

26. On or about July 18, 2011, an anonymous comment was received in the staff suggestion box. This note complained that several staff members who were in relationships. With regard to the relationship between Complainant and Ms. Edwards, however, the anonymous note writer directed these specific comments to the issue:

> At what point is Administration going to look at addressing staff relationships? Never in my short career time have I seen so many relationships in a building with staff dating staff. Not to mention a Facility Sup dating a line staff. I am sure you are all aware of who is this. It is only obvious! They live together, transport each other to work, and call off when the other has a holiday. This happened today! We talk about morale...when you have a facility sup who calls off because his girlfriend is on a holiday, this is great leadership! Leading by example. Other concern relation to this is if you dare have a conflict with her (B.E.), there is going to be retaliation with her boyfriend (J.H.). Seen it happen, and it continues...

Second Conversation with Mr. DeLeon about Ms. Edwards:

27. On or about July 19, 2011, Mr. DeLeon called Complainant into a meeting to address the information about Complainant's and Ms. Edward's intimate relationship contained in the anonymous suggestion in the staff suggestion box.

28. In this meeting, Complainant acknowledged that he was in a relationship with Ms. Edwards. Complainant told Mr. DeLeon that he had been in this relationship for only six months.

The 6-10 Process:

29. In August of 2011, Complainant was transferred to work at another DYS facility, Zebulon Pike. Complainant remained there until November 1, 2011.

30. Complainant's appointing authority, Leo Navarro, Director of Spring Creek Youth Services Facility, conducted an investigation into the allegation that Complainant was in a romantic relationship with Ms. Edwards. He collected short statements from Robyn and Rob Suiter acknowledging that they both were aware of the relationship with Ms. Edwards. Mr. Navarro obtained information from CYSO I Alicia Lujan that she had seen Complainant and Ms. Edwards with Complainant's daughter while at a store in early 2011, and that during the conversation Ms. Edwards had asked Ms. Lujan to not mention that she had seen Ms. Edwards and Complainant together. Mr. Navarro collected information from Mr. DeLeon about his questions to Complainant concerning the rumors of the relationship, and he had information concerning the manner in which Complainant had handled the issue with Mr. Sanchez concerning service of legal documents on Ms. Edwards.

31. Complainant participated in a Board Rule 6-10 meeting on October 6, 2011. Mr. Navarro held the meeting in his office. Nancy Schmeltzer, the Southern District Human Resources Manager, participated in the meeting as Mr. Navarro's representative. Complainant appeared at the meeting without a representative.

32. Complainant admitted in the Rule 6-10 meeting that he was in an intimate relationship with Ms. Edwards. He untruthfully represented to Mr. Navarro that the relationship had become an intimate relationship only in the previous six months. Complainant admitted during the meeting that he had not reported the relationship within the ten days of its start, as required by Respondent's policy.

33. Complainant admitted during the Rule 6-10 meeting that he had told Ms. Edwards to have another facility supervisor sign off on her paperwork.

Disciplinary Decision:

34. Respondent's policy on staff relationships is DHS Policy VI-2.17, "Family / Intimate Relationships As A Factor In Employment and Supervision." The policy notes that state law includes the following definition of unfair or discriminatory work practices in C.R.S. § 24-34-402:

> (1) It shall be a discriminatory or unfair employment practice:
>
> > (h) (I) for any employer to discharge an employee or to refuse to hire a person solely on the basis that such employee or person is married to or plans to marry another employee of the employer...
> >
> > > (II) It shall not be unfair or discriminatory for an employer to discharge an employee or to refuse to hire a person for the reasons stated in subparagraph (1) of this paragraph (h) under circumstances where:
> >
> > (A) One spouse directly or indirectly would exercise supervisory, appointment, or dismissal authority or disciplinary action over the other spouse;
> >
> > (B) One spouse would audit, verify, receive or be entrusted with moneys received or handled by the other spouse; or
> >
> > (C) One spouse has access to the employer's confidential information, including payroll and personnel records.

35. DHS Policy VI – 2.17 establishes a policy addressing relationships within a facility that includes the following provisions:

> A. No CDHS employee shall be placed in a supervisory/subordinate relationship with another CDHS employee with whom they are in a family or intimate relationship. This policy prohibits a CDHS supervisor in a family or intimate relationship with another CDHS employee from decisions related to the CDHS employee's supervision...work assignment, work schedule, leave approval, performance plan or evaluation, rewards or incentives... grievances... corrective action... or other action wherein one of the CDHS employees would benefit....
>
> D. Nothing in this policy prohibits employees in a family or intimate relationship form working within CDHS or within the same Office, Division, or

work site, unless it results in the supervisory/subordinate relationship described above or in [C.R.S.] §24-34-402(1)(h)(ii)(A)(B) or (C)).

E. Supervisors in a family or intimate relationship with a CDHS employee in their chain-of-command shall not participate in employment decisions affecting the CDHS employee and shall have no input or influence on supervision over the CDHS employee. Further the supervisor shall implement a written procedure to resolve supervisory matters (described in section A above) via a different, objective equivalent level (e.g., a peer) or higher-level authority (e.g., Office Director) within CDHS.

F. If circumstances arise where the result would create a supervisory/subordinate relationship between CDHS employees in a family or intimate relationship (e.g., reorganization, marriage, etc.), the supervisor in the family or intimate relationship is responsible for informing his/her appointing authority no later than 10 days after they become aware of such circumstances. The appointing authority shall work with the affected CDHS employees to find an agreeable resolution by reviewing the facts of the situation for the purpose of determining what actions shall be taken to bring the staffing relationship into compliance with the policy…

36. The policy defines family, intimate, and supervisory relationships in the following manner:

Family or Intimate Relationship: Family includes spouse, child, parent, sibling, grandparent, grandchild, aunt, uncle, niece nephew, or cousin, including those related by marriage, adoption or foster care. Intimate relationship is defined as an intimate relationship that includes regular/frequent dating, sharing of living quarters, living as family in a common household or domestic partners.

Supervisory/Subordinate Relationship: A CDHS employee, their immediate supervisor and second level supervisor, if one of the supervisors is an appointing authority. May include higher-level supervisors to reach an appointing authority (the person who has been delegated the authority to affect an employee's base pay, status, or tenure).

37. Respondent's employees are also expected to comply with the state ethics code found in Executive Order D 001 – 99. This code requires that:

2. All elected officers, appointees and employees of the Executive Department:…

(b) Shall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire public confidence in and trust in government;…

(i) shall not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government…

38. As one of Respondent's employees, Complainant was required to know and adhere to all of the CDHS policies. Each year, employees would be asked to certify at the time of their annual performance evaluation that "I understand that it is also my responsibility to know and adhere to all rules and policies of the Department and of the facility in which I work. I understand that I may access these rules and policies on line at http://www.cdhs.state.co.us/ea/CDHSPolicies and by requesting them from my supervisor." Complainant signed one of these certifications on or about April 21, 2010.

39. From the information he had collected, Mr. Navarro concluded that Complainant had not admitted to his intimate relationship with Ms. Edwards when he was first specifically questioned about the matter by Mr. DeLeon. Mr. Navarro also concluded that Complainant had not taken any of the steps necessary to place Respondent on notice of the existence of this relationship so that the proper policies could be placed into effect to prevent violation of DHS Policy VI-2.17 policy. Mr. Navarro also considered these actions to create a conflict of interest for Complainant.

40. Mr. Navarro considered Complainant's work history at the facility and considered the work history to be good. Mr. Navarro decided that the appropriate response to both Complainant's failure to abide by the department's policy, as well as Complainant's actions in falsely denying and hiding his relationship with Ms. Edwards from Mr. DeLeon and others, was to remove Complainant from his duties as a supervisor.

41. By letter dated October 25, 2011, Mr. Navarro informed Complainant that he would be demoted to the level of CYSO II effective November 1, 2011. Complainant's pay was reduced by 5%, from $4,038 per month to $3,836 per month. Complainant was also permitted to return to the Spring Creek facility.

42. Complainant filed a timely appeal of his demotion 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 704. 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 committed the acts for which he was disciplined.

The core evidentiary issue presented at hearing concerned whether or not Respondent could prove that Complainant had been an intimate relationship with Ms. Edwards earlier than late December of 2010.

Complainant admitted at hearing that he had not reported his intimate relationship with Ms. Edwards within the ten-day period required under CDHS policy VI – 2.17. Complainant disputes, however, that his intimate relationship with Ms. Edwards began any earlier than when he moved into Ms. Edwards' home in December of 2010. He contended at hearing that his first statement to Mr. DeLeon that Ms. Edwards was not his girlfriend, and that he was not in an inappropriate relationship with her, was true when he made the statement. Ms. Edwards additionally testified that she was not in an intimate relationship with Complainant until after he moved into her house in mid-December of 2010.

After evaluating the credibility of all of the witnesses, however, Complainant's and Ms. Edwards' version of events concerning the start date of their relationship is not credible. Ms. Suiter, Mr. Suiter, Ms. Ibarra, and Ms. Lujan all presented detailed and credible accounts of conversations that they had had with Complainant or Ms. Edwards concerning the relationship, and which dispute Complainant's and Ms. Edwards' version of events. Complainant and Ms. Edwards either deny these conversations took place or testified that they did not recall such conversations.

Complainant's testimony was also not consistent with his claim that his intimate relationship only began around Christmas of 2010. Complainant, for example, testified that he asked Rob Suiter about the nature of the policy concerning staff relationships in October of 2010, which would have been months before he says that his relationship with Ms. Edwards began. Such a discussion is far more consistent with Complainant already being in a relationship at that time than Complainant simply wondering about an esoteric point of policy. Complainant's credibility was also shaken by the successful impeachment of his explanation that he was not living at living at Ms. Edward's home prior to the end of December 2010 by Ms. Edward's landlord's credible testimony that Complainant was spending enough time at Ms. Edward's home that she used him as a contact for contractors doing repairs in Ms. Edwards' unit as early as June of 2010.

The credible and persuasive evidence at hearing also demonstrated that Complainant's relationship with Ms. Edwards fits Respondent's definition of an intimate relationship under Respondent's policy. Complainant admitted to Ms. Suiter prior to April of 2010 that was in a dating relationship with Ms. Edwards, and that status concerned Ms. Suiter because of the possibility of a sexual harassment issue arising from such a relationship. Ms. Suiter also knew that the relationship continued after that first conversation, to the point where she and her husband invited Complainant and Ms. Edwards to their 4th of July party as a couple. This type

of dating relationship constitutes "regular/frequent dating" included within the scope of the definition of intimate relationship.

The credible and persuasive evidence at hearing established that Complainant and Ms. Edwards were in an intimate relationship prior to April of 2010. The credible evidence was that Complainant had several discussions with other staff members about the problems of having a relationship with a subordinate staff member, and that Complainant was aware of the fact that there were rules which governed such relationships significantly prior to the point when he was asked for an explanation of that policy in his Rule 6-10 meeting.

Most importantly, the persuasive and credible evidence at hearing established that Complainant did not tell Mr. DeLeon the truth when Mr. DeLeon first asked Complainant about the rumors concerning Complainant and Ms. Edwards being seen kissing an and holding hands.

Accordingly, Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined.

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).

Respondent's actions leading up to the imposition of discipline in this case were not arbitrary or capricious. Mr. Navarro proceeded carefully by soliciting information from staff and then scheduling and holding a Rule 6-10 meeting in which Complainant was asked questions about his relationship with Ms. Edwards and asked to address the critical information provided by the staff members, such as Ms. Suiter, Ms. Ibarra, and Ms. Lujan. Mr. Navarro considered the information before him and reached the conclusion that Complainant had engaged in an unreported intimate relationship that was contrary to policy, and that Complainant had not been truthful with his chain of command about that relationship. The evidence at hearing has established that Complainant was in a prohibited supervisor/supervisory relationship with Ms. Edwards while he was her direct supervisor on the Jaguar pod. The evidence has also established that, at the very least, Complainant had an obligation as one of the supervisors in Ms. Edward's chain of command to comply with CDHS Policy IV-2.17, paragraph E, for all matters in which he was not acting as Complainant's immediate supervisor, and for those matters in which he performed the duties of an immediate supervisor over Ms. Edwards to comply with the prohibitions in paragraph A. Complainant also had a duty under paragraph F to timely report his relationship so that an adequate plan could be created. Complainant complied with none of these provisions.

Mr. Navarro's conclusions that Complainant had violated DHS Policy VI-2.17 were well-grounded in the information that Mr. Navarro collected from staff and from Complainant. Mr. Navarro's conclusions that Complainant had not acted ethically in the manner that he allowed a

conflict of interest to exist by creating an unreported intimate relationship with Ms. Edwards, and in the manner that he handled the issue, was also warranted on the facts that Mr. Navarro's investigation produced. His disciplinary action was not arbitrary or capricious under the Lawley standard.

Complainant argues that he was never placed on notice that his relationship may be against departmental policy, and that therefore it would be error to discipline complainant for any breach. Complainant's claim that he was completely unaware of any policy prohibition is not credible. A number of individuals told Complainant that there were policies which were implicated if he were in a relationship with Ms. Edwards, including Ms. Suiter's comment made more than a year before Complainant finally admitted to the relationship. Complainant may or may not have gone to look at the specific policy after these conversations, but any failure of Complainant's to discover the terms of the policy is not controlling here. Complainant had an obligation to find out what the policy said because he was obligated to obey it. Any willful blindness as to the details is not a defense in this case.

Other than Complainant's arguments concerning the failure to implement progressive discipline, which are addressed below, Complainant does not specifically argue that any of the Board's rules or applicable law were violated in this case. Complainant argues instead that he was promised copies of the witness statements in his Rule 6-10 meeting, and that he was not provided those statements until discovery in preparation for the hearing. A review of the disciplinary hearing recording shows that Ms. Schmeltzer did recommend that the materials used in the 6-10 meeting by Mr. Navarro be provided to Complainant. This recommendation was not, however, driven by the Board's rules. Board Rule 6-10 provides only that an appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. Board Rule 6-10, 4 CCR 801. The Board's determination that the source of the information had to be disclosed, unless prohibited by law, rather than copies of all materials or investigative files, is the product of the Board weighing the needs of the employee being able to present a full explanation of events, and the desire not to impede the investigation or permit an employee to tailor his or her version of events to the specific information already collected. While the Board's rules do not prevent Mr. Navarro from deciding to provide such materials to an employee, there is no rule or law violation in deciding not to provide the materials.

Mr. Navarro's action in this case was not arbitrary or capricious, and was not contrary to rule or law.

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

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Complainant has no prior discipline or corrective actions in her employment with Respondent. Respondent did not present any information that would demonstrate that progressive discipline was imposed in this case.

The rule, of course, does not demand progressive discipline in every case. There is an exception within the rule permitting immediate discipline, including termination, for serious or flagrant actions.

Complainant argues that the demotion instituted in this case was too serious for the cause of the discipline, and that progressive discipline should have been employed. If this case represented merely the failure of an employee to report a romantic relationship within the required ten-day period, Complainant's argument may have had some merit.

The actions taken by Complainant, however, are not limited merely to a failure to timely report a relationship. The evidence has shown that Complainant was in a romantic relationship with a subordinate who was one of his direct reports for a period of time, and that Complainant did not tell his supervisor the truth about that relationship which specifically asked about that relationship because of the rumors of Complainant and Ms. Edwards kissing and touching. The evidence presented at trial also supports the conclusion that Complainant had no apparent intention of reporting his relationship with Ms. Edwards. Complainant's late disclosure was forced by the anonymous complaint filed in July of 2011. Finally, the evidence at hearing supports that Complainant has still not told the truth about the nature of his relationship with Ms. Edwards. These factors, combined with Complainant's prior status as one of the highest-ranking security staff at the facility, justify the finding that the violations in this case were both serious and flagrant breaches of Respondent's policies. A corrective action would not suffice in this case. Under such circumstances, no progressive discipline is required under Board Rule 6-2.

Complainant argues that the demotion is overly harsh given that Respondent has not shown that there was any actual favoritism shown to Ms. Edwards by Complainant. This argument is not persuasive. While the policy at issue in this case is founded upon the problems that can occur when staff members are in a position to supervise an intimate partner or family member, the policy does not require that Respondent wait for a demonstration of favoritism to occur. It is also important to remember that staff suspicion of favoritism can be as much a blow to morale and good order as an actual incident of favoritism. The policy is designed to prevent both actual and perceived favoritism by prohibiting certain supervisory relationships and requiring the reporting of those relationships so that adjustments in supervision can be created before there is a problem.

Complainant also contends that the demotion is unfairly harsh given that there are other couples at the facility. The policy that was violated in this case, however, does not attempt to prevent relationships from forming. The policy prohibits certain supervisory structures. If there is a prohibited relationship that is reported, the policy expects an appointing authority to make whatever changes that are reasonably available to reconcile the supervisory structure to accommodate that relationship. The fact that there are couples working at the facility, accordingly, is not an indication that the policy is not enforced or that there is some inequity in enforcing it against Complainant.

The final question, then, is whether a demotion from CYSS III to CYSO II is within the range of reasonable alternatives available to Mr. Navarro. The effect that Complainant's violation of the relationship policy has been demonstrated by the problems listed in the anonymous complaint left in the staff suggestion box in July 2011. Complainant's willingness to violate one of the basic policy rules governing staff relationships while he was a security supervisor created a highly visible morale and discipline problem for the facility. Mr. Navarro decided that he could not continue to place Complainant in a supervisory position because of his failure to adhere to the relationship policy restrictions. These reasons are sufficient to place demotion as one of the reasonable options available to Mr. Navarro in this case.

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's actions have been fully upheld as well grounded in fact and in law. Complainant has not demonstrated that Respondent's decision to demote him was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Complainant is not entitled to an award of attorney fees.

CONCLUSIONS OF LAW

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

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

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

4. Complainant is not entitled to attorney fees.

ORDER

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

Dated this 13th day of April, 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 24th day of April, 2012 electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Michael Belo
[redacted]

Joseph Haughain, S.A.A.G.
[redacted]

[redacted]
Andrea Woods

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.