

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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DEBE BELL,  
Complainant,

vs.

BOARD OF TRUSTEES FOR METROPOLITAN STATE COLLEGE,  
Respondent.

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Administrative Law Judge (ALJ) Robert R. Gunning held the hearing in this matter on May 1 – 3, 2012, at the State Personnel Board, 633 17<sup>th</sup> Street, Denver, Colorado. The case commenced on the record on May 1, 2012. The record was closed on May 3, 2012, upon conclusion of the evidentiary hearing. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Judith Zewe, Metropolitan State College Associate Vice President of Human Resources. Elizabeth Lamb Kearney, Esq., represented Complainant.

**MATTERS APPEALED**

Complainant was a certified Laboratory Coordinator III employed by Respondent Metropolitan State College of Denver (Respondent, College, or MSCD) prior to her disciplinary termination. Complainant appeals her termination, arguing that she did not commit the acts for which she was disciplined, that the Respondent's action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent contends that Complainant committed the acts for which she was disciplined, its action was not arbitrary, capricious or contrary to rule or law, and that the termination was within the range of reasonable alternatives.

Through this appeal, Complainant seeks reinstatement to her position at the College as Laboratory Coordinator III, back pay, benefits, recovery of reasonable attorney fees, a letter of apology from Dean Foster, and any other relief lawfully available. 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For the reasons set forth below, Respondent's disciplinary action is **rescinded**.

**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 and costs.

## FINDINGS OF FACT

### General Background

1. Complainant was employed by the College from 1982 to January 2012.
2. Complainant received a B.S. degree in Chemistry from MSCD. From 1982 to 1996, Complainant served as a part-time MSCD Chemistry Department faculty member. Complainant held employment with other employers over this time period. She also received an "all but dissertation" (ABD) degree in Chemistry from the Colorado School of Mines during this time frame.
3. Complainant entered the state personnel system in August 1996 when she accepted a full-time Laboratory Coordinator (LC) III position from the College. She held this position until her termination in January 2012.
4. As an LC III, Complainant was responsible for budgeting, ordering, scheduling, preparing laboratories, and ensuring safety of operations. According to Complainant's Position Description Questionnaire (PDQ), the position exists to "provide advanced technical work to systematize laboratory space, equipment and supplies in teaching laboratories; assure availability of all necessary material, equipment and supplies for students in teaching laboratories; ensure safe and proper storage, handling and disposal of chemicals and waste; and ensure proper use and maintenance of laboratory equipment." The safety operations represented a significant portion of the duties outlined in Complainant's PDQ.
5. At the time of her termination, Complainant supervised 14 work-study students, who assisted in preparing the laboratories and safety compliance.
6. The College's Chemistry Department student population increased greatly during Complainant's tenure. By the time of Complainant's termination of employment, there were approximately 2,300 students each semester in the Chemistry labs. The number of MSCD labs went from 15 in 1998 to 53 in 2012. This increasing population led to a variety of challenges in the areas for which Complainant had responsibility.
7. Complainant's direct supervisor was the Chair of the MSCD Chemistry Department. From December 2010 to the present, the MSCD Chemistry Department Chair was Professor Russell Barrows. Dr. Barrows has been an MSCD faculty member since 1998, and has experience in laboratories dating to 1981.
8. Complainant's appointing authority was Judith Zewe, MSCD Associate Vice President of Human Resources.
9. Complainant consistently received overall high performance ratings during her tenure, from several supervisors. For instance, Complainant received a level IV (out of IV) rating in 2004-05, and a level III (out of III) rating in 2007-08, 2008-09, and 2010-2011. Complainant received a level II (out of III) rating for 2009-10.

10. The performance evaluations (PMAP) occasionally noted Complainant's need to enhance safety performance. For instance, the 2004-05 PMAP stated that Complainant should keep a "close watch" on hazardous materials. The 2007-08 PMAP stated that Complainant needed to improve compliance with waste disposal regulations. None of the PMAP evaluations for the time period 2008-2011 raised any concerns about Complainant's performance in the area of lab safety, however. Indeed, the 2009-10 PMAP noted that Complainant improved lab cleanliness and waste disposal for the second year in a row.

11. In the 2003-04 timeframe, Complainant's prior supervisor, Professor Charles Tindall (Complainant's direct supervisor from October 2004 – April 2010), informed Complainant that it was imperative that waste containers be consistently labeled. This direction followed an inspection by the Colorado Department of Public Health and Environment (CDPHE) of the Auraria campus chemical store room. Complainant committed to do this, and the labeling of waste containers improved over time. Complainant's 2010-11 PMAP stated that Complainant was working to catalog/inventory chemicals within the department, and initiated an effort to clean, organize, and make the chemical stockroom safer. Respondent did not issue a disciplinary action, corrective action, or any written notice to Complainant regarding the stockroom issue.

12. The MSCD Chemistry Department moved into a new Science building on the Auraria campus in 2010. The new building is shared with the University of Colorado Denver (UCD) and Community College of Denver (CCD) Chemistry Departments. The Auraria Higher Education Center (AHEC) is the landlord and handles the facilities management at the Auraria campus. AHEC bears the responsibility for the overall safety and proper functioning of the campus buildings, including the Science building.

13. AHEC Environmental Health and Safety personnel include Brian O'Connor, AHEC Environmental Health and Safety Specialist, and David Krajccek, AHEC Environmental Health and Safety Manager.

14. Both Mr. O'Connor and Mr. Krajccek have education and extensive experience in the field of environmental health and safety, including hazardous waste management. They are employees of AHEC, and have no direct supervision over MSCD employees. However, in their role as AHEC health and safety specialists, they advise MSCD on environmental health and safety issues. They also are responsible for picking up and disposing of chemical wastes generated by the AHEC colleges' Chemistry labs, including MSCD's labs. Mr. Krajccek met with the Auraria Colleges' Lab Coordinators, including Complainant, about six times a year to address general safety and hazardous waste management issues.

#### Complainant's Safety-Related Job Duties and Responsibilities

15. According to Complainant's PDQ, updated in October 2010, Complainant's safety-related job responsibilities generally included waste management, labeling, storage, and disposal of chemicals. The nature of Complainant's job duties remained fairly consistent since her initial employment.

16. In particular, the PDQ required Complainant to store and inventory instruments, equipment and chemicals, and update databases accordingly. Complainant was also charged with inspecting department-owned and shared stockroom space to verify cleanliness and organization, and take appropriate action to remedy problems. The PDQ further tasked Complainant to oversee safe laboratory conditions by inspecting facilities and reporting unsafe

conditions, and to categorize, label, and store spent chemicals and hazardous materials/waste for proper disposal.

17. Other than the general safety related responsibilities outlined in the PDQ, Respondent did not provide Complainant with a set of safety regulations, policies, or practices which she was required to follow. No matrix or safety checklist was provided.

18. While Complainant was charged with overseeing safe laboratory conditions, safety was a duty shared by Lab Coordinators, professors, and students. Professors are responsible for ensuring the safety of laboratories while their class is using the lab. Likewise, students are required to follow safety protocol and return chemicals to their proper location when they are no longer in use.

19. AHEC also shared safety obligations in its role as landlord and facilities manager. AHEC representatives coordinated and worked regularly with Complainant and other Laboratory Coordinators on chemical labeling, storage, and waste disposal issues.

20. Due to an ongoing interpersonal conflict with Dr. Schelble, an MSCD organic chemistry professor, Dr. Barrows instructed Complainant to minimize the time she spent in the organic chemistry labs during the fall 2011 semester. Complainant therefore infrequently inspected the organic chemistry labs and preparation rooms during fall 2011.

#### Other Safety Guidelines and Requirements

21. Under CDPHE Hazardous Waste Regulations, a "generator" is anyone that offers regulated substances for disposal. During all relevant time periods, MSCD was classified as a "conditionally exempt small quantity generator."

22. As a conditionally exempt small quantity generator, MSCD was required to "identify all hazardous waste generated." 6 CCR 1007-3, § 262.11. Further, MSCD was obligated to maintain and operate its facility to "minimize the possibility of fire, explosion, or any unplanned release of hazardous waste." 6 CCR 1007-3, § 261.5(b)(5). Complainant was not specifically instructed to follow the CDPHE regulations, however, she was aware of the regulations which MSCD had to comply with by virtue of its status as a small quantity generator.

23. At or following the time of Complainant's termination, MSCD was in the process of being reclassified as a "small quantity generator" due to the increasing number of labs and students. The reclassification to a "small quantity generator" will significantly increase the College's hazardous waste identification and disposal requirements.

24. In helping to assure the safety of the Auraria Science building, Mr. Krajicek relied on a publication authored by the National Research Council of the National Academies, entitled "Prudent Practices in the Laboratory" (Prudent Practices document). According to Mr. Krajicek, the document is a common industry standard for safety in chemical laboratories and has been used by all the employers he has worked for.

25. Complainant was not instructed to comply with the "Prudent Practices" document, nor was it referenced in her PDQ. However, she was generally familiar with the document.



## Chemistry Department Factions

26. The College's Chemistry Department faculty has polarized, or fractured into two "camps." The severity of the division was revealed by Ms. Zewe's reference to the issue, including a Colorado State Employee's Assistance Program (CSEAP) mediation aimed at reducing the divisiveness, in Complainant's January 2012 termination letter.

27. Complainant was associated with one of the camps. While Complainant contributed to the divisiveness and polarization of the Chemistry Department, she was far from the sole cause of the discord.

28. The termination decision was not based on Complainant's interactions with her colleagues. However, as set forth below, the fact that the faculty was divided and Complainant was strongly associated with one of the factions is relevant in evaluating Respondent's decision to terminate Complainant's employment.

## 2011 Corrective Actions

29. Respondent issued a corrective action to Complainant on January 18, 2011. The corrective action was issued by Joan Laura Foster, Dean of School of Letters, Arts and Sciences (Dean Foster). The corrective action asserts that Complainant engaged in increasingly unprofessional behavior, including misrepresentation, overstepping authority, and creating divisive, non-collegial relationships, which actions led to the polarization of the Chemistry Department. This was the first corrective action that Complainant received.

30. Complainant did not grieve or otherwise appeal the January 2011 corrective action. The January 2011 corrective action did not cite or refer to safety issues.

31. Complainant received a second corrective action from Dean Foster on June 24, 2011. The corrective action noted that Complainant made a number of improvements in the area of professional behavior since the first corrective action. This corrective action was issued because Complainant, at the request of at least one faculty member, opened an administrative assistant's office and searched her desk drawers for a file cabinet key. Several classes of students were waiting to take final examinations that morning, and the examinations were locked in a file cabinet in the administrative assistant's office. A faculty member asked Complainant to open the office and obtain the file cabinet key so that the professors could timely administer the examinations to their students. The corrective action asserts that Complainant's actions were an example of overstepping boundaries and showed a lack of professional judgment.

32. Complainant did not grieve or otherwise appeal the June 2011 corrective action. The June 2011 corrective action was unrelated to safety issues.

33. Following this corrective action, during the fall 2011 semester, Complainant participated in bi-weekly meetings with Professor Barrows and Rae Shevalier, the MSCD Associate Dean of Personnel. Although the meetings touched on issues associated with waste containers and other safety issues, the meetings were focused on other issues impacting the Department, such as the theft of materials and supplies from the organic chemistry labs.

34. Dean Shevalier assumed that Complainant was complying with her job duties, and had no evidence whether Complainant was or was not doing her job. She provided no

formal feedback to Complainant during these meetings, and did not express any complaints about Complainant's performance.

35. In Dean Shevalier's opinion, the Chemistry Department Chair (Dr. Barrows) was responsible for Complainant's performance management. Dr. Barrows did not raise concerns about Complainant's job performance in these meetings.

36. Professor Barrows was not involved in the decision to issue either of the corrective actions. Except for the corrective actions and disciplinary action taken against Complainant, he was not aware of any other instances when Dean Foster issued a corrective action or disciplinary action to a member of the Chemistry Department.

#### October 2011 Anonymous Student Complaint

37. On October 24, 2011, an MSCD student sent an anonymous email to the College. The email states that the student was attending a general chemistry course at MSCD, and that the labs were very dangerous. The email describes coffee mugs on dish racks where containers are washed, messy rooms, and plastic bottles with suspicious things. Overall, the email describes a "very unclean and very messy and dangerous attitude to have with students around." The student attached 14 photographs of chemistry preparation rooms and labs to the email.

38. The email was routed to Mr. O'Connor, who forwarded the email to Mr. Krajicek.

39. Upon his receipt of the information, Mr. Krajicek contacted Dean Foster.

40. Mr. Krajicek promptly visited the chemistry labs in question, and spoke with Dr. Schelble. Mr. Krajicek testified that he went by Complainant's office to discuss the student's concerns with her, but that Complainant was not in her office. He did not email or call Complainant. Mr. Krajicek then went to discuss the issue with Dr. Barrows. He later spoke with the student who sent the email.

41. In his review of the chemistry labs and preparation rooms within the day or two following his receipt of the email, Mr. Krajicek believed that the conditions of the rooms were consistent with the photos. Mr. Krajicek had some concerns about safety issues as a result of his visual inspection. He took no notes from this inspection.

#### November 2011 AHEC Audit

42. As a result of the student complaint and Mr. Krajicek's informal inspection, Dean Foster tasked Mr. Krajicek with performing an audit of MSCD's chemistry labs and preparation rooms. Mr. Krajicek performed this audit from November 10-16, 2011. He recalls that there were no laboratory classes that week, as labs had concluded for the semester. Neither Complainant nor Professor Barrows was provided with notice of this audit.

43. To perform the audit, Mr. Krajicek prepared a checklist to use for the 18 rooms in question. Mr. Krajicek compiled the checklist himself, and it was not directly based on any published safety regulations or policies. This was the first chemistry lab audit he ever performed.

44. The audit reviewed numerous safety aspects, many of which were not related to

Complainant's job. Of particular relevance to Complainant's job duties and responsibilities, the audit revealed issues relating to hazardous waste containers, chemical inventory, flammable materials, and peroxide forming chemicals.

45. Mr. Krajicek reported the results of the audit to Dean Foster through an email on November 29, 2011. In this email, despite the issues noted in the audit, Mr. Krajicek "found the laboratories in good shape with evidence of proactive management." He did notice "that some attention should be given to general housekeeping particularly in some of the prep rooms." Mr. Krajicek also had a phone conversation with Dean Foster that day.

46. Dean Foster responded later in the day with an email recounting her understanding of the audit results. When Mr. Krajicek did not reply to this email, Dean Foster sent an email on December 5, 2011. This email stated:

I'm guessing that you didn't realize that my reply to you last week was more than an acknowledgment of the lab safety audits and also had some questions in it. Most importantly, "So the overview is that while there is plenty to 'fix' (items 1-6), you don't see anything that should really concern me – even with #2 and #3 and possibly #6 above?" and my question about the peroxides. Could you please give me your professional opinion? I really want our labs to be safe.

47. Mr. Krajicek responded later that day, and concluded that #2 (storage of incompatible materials) and #6 (peroxide forming chemicals) were the most serious of the findings.

48. Dean Foster forwarded this email to Ms. Zewe on January 10, 2012.

### Complainant's Compliance with Safety Procedures

#### Hazardous Waste Management

49. Hazardous waste disposal companies will not pick up hazardous waste that is not properly labeled. In the past, MSCD and AHEC have had issues with unlabelled waste containers in the chemical stock room shared by the three Auraria schools. As an example, the Denver bomb squad was required to dispose of certain unlabelled waste containers at the time of the move to the new Science building in 2010.

50. Complainant was responsible for ordering the MSCD chemicals. Once ordered, the chemicals were first delivered to AHEC, and then taken to MSCD. Chemicals arrive on the Auraria campus sealed in their original container. The chemicals are then generally transferred to other containers when they are used in the laboratories. Following their use in experiments, the waste generated by the chemicals is transferred to waste containers in the laboratories, and placed in the ventilation hoods. When the waste reaches the "fill line" of the containers, the containers are sealed and delivered to the satellite disposal room in the Science building. Typically, this work was performed by the work study students, whom Complainant oversaw.

51. AHEC personnel disagreed on whether hazardous waste containers had to be labeled before they reached their "fill line." According to Mr. Krajicek, to assist first responders in the event of an accident or emergency in the laboratories, the hazardous waste containers must always be labeled, even when in use in the laboratories. However, according to Mr.

O'Connor, the hazardous waste containers did not need to be labeled until the container was sealed before its delivery to the satellite disposal room.

52. The photographs attached to the student email indicated that there were unlabelled containers in the general chemistry preparation room. Mr. Krajicek's informal inspection confirmed that there were unlabelled containers in at least some of the laboratories and preparation rooms.

53. The November 2011 audit indicated that there were unlabelled containers in the 18 rooms that Mr. Krajicek inspected.

54. CDPHE regulations do not require waste containers to be labeled if they do not, in fact, contain hazardous waste. For instance, if a container contained only water, soap, or acids/bases requiring a pH balance before disposal, there is no CDPHE requirement mandating that the container be labeled as hazardous waste.

55. Respondent did not prove by a preponderance of the evidence that the unlabeled containers depicted in the photos of the preparation room contained hazardous waste. Mr. Krajicek did not test the materials in the subject containers for hazardous waste. No credible evidence was presented to indicate that these containers did, in fact, contain hazardous waste.

56. Indeed, the evidence presented demonstrated that many of the subject containers did not contain hazardous waste. Several Chemistry Department faculty members, including Dr. Barrows, testified that the containers in the photographs, all but one of which were taken in the general chemistry preparation room, contained either water or soap. The general chemistry course is an introductory course, and the students typically do not use hazardous chemicals. Students often manufacture soap and "silly putty" in these labs. Common chemicals used in this course result in acids, bases, and salts. Thus, these chemicals do not generate hazardous waste. There are no heavy metals in the general chemistry preparation room or laboratory. Indeed, Dr. Barrows testified that the only danger from the open soap containers shown in the photographs was that someone would come out "smelling pretty."

57. Respondent did not prove that Complainant failed to label hazardous waste containers before they were transported to the storage room for disposal. Ian Jessup, a work study student who worked for Complainant from spring 2007 – spring 2011, offered credible testimony that Complainant instructed the work study students to always securely cap, identify, and label the hazardous waste containers before they were placed on the cart for the satellite disposal room. In his four years as a work study student, he never observed a hazardous waste container that was unlabeled once it had reached its capacity and was ready for transport and disposal.

58. Mr. Jessup's testimony was corroborated by several faculty members, who testified that Complainant instructed them to identify and label hazardous waste containers. These faculty members did not observe unlabeled hazardous waste containers, and were never informed that there was an issue with unlabeled hazardous waste containers.

59. At most, Respondent demonstrated that there were some hazardous waste containers that were not labeled while they were located in the ventilation hoods in the laboratories. However, Respondent did not prove that there was any requirement made known to Complainant that would mandate these containers be labeled prior to the time they were sealed and made ready for disposal. The practice of not labeling hazardous waste containers

until they were filled and ready for disposal had existed for about ten years. Complainant had spoken with Mr. Krajicek about problems in labeling the containers during use due to the fact that spills often obscured the labels, and Mr. Krajicek did not require Complainant to label the containers while they were still in use in the labs. While it may have been a better practice to label the containers prior to the time they were sealed for disposal, Complainant was not put on notice that such labeling was required.

#### Chemical Inventory issues

60. Several years ago, AHEC and MSCD instituted a CisPro bar code labeling system for chemicals. According to Mr. Krajicek and Mr. O'Connor, a bar code label is to be affixed to chemicals when they arrive on campus, and the location of the chemicals should be input into the computer system each time the chemical is moved. This labeling ensures that all chemical containers can be tracked and identified, assists first responders in an emergency, and assists in the identification of hazardous wastes.

61. Auraria campus Lab Coordinators were expected to obtain the labels from AHEC and properly affix the labels. The bar code scanner and printer were purchased by AHEC in early 2010, and are located in the AHEC facilities management building. AHEC offered training on the CisPro system to the Lab Coordinators. Complainant infrequently accessed the CisPro system, the last time being in October 2009, before MSCD moved to the new Science building.

62. Prior to using the CisPro system, the AHEC chemical inventory was maintained on excel spreadsheets. Under Mr. O'Connor's direction, the data was migrated to the CisPro database. In approximately 2010-11, Mr. O'Connor volunteered to assist Complainant with the inventory system. Over time, Mr. O'Connor and Complainant worked together to improve chemical labeling.

63. According to the CisPro system log, the use of the CisPro system by Auraria campus science faculty and staff was sporadic. Some faculty and staff used it often, while many never used it at all.

64. Complainant's PDQ does not specifically mention the CisPro system. At no time did AHEC or MSCD provide Complainant with written notice that she was not properly using the CisPro system.

#### Flammable Storage issues

65. Mr. Krajicek's November 2011 audit indicated that flammable compounds were not properly stored in the storage containers. Little detail was provided in the audit report or at hearing as to the nature of these flammable compounds.

66. To reduce the risk of explosion and fire, flammable compounds were to be returned to their storage containers following use.

67. No credible evidence was presented to demonstrate that Complainant was responsible for failing to segregate and store flammable chemicals. The safety of the labs was jointly shared by Lab Coordinators, faculty, and students. Faculty and students were also responsible for ensuring the proper segregation and storage of flammable compounds. For instance, Professor Schonbeck testified that instructors are responsible to ensure that their students return chemicals, including flammable compounds, to their proper locations following a



lab. The majority of the flammable chemicals were in the organic chemistry laboratories, in which Complainant was instructed to limit her time for the fall 2011 semester.

68. Until the disciplinary action, neither the College nor AHEC provided Complainant with notice that the flammable compounds were not properly being stored in the cabinets.

#### Peroxide Forming Chemicals

69. The term "peroxide forming chemicals" refers to chemicals which can, over time, become unstable and cause a fire or explosion risk. If opened and stored for too long a period of time, crystals can form, and exposure to sunlight or movement of the chemical may cause an explosion. The explosion can be severe enough to sever appendages or destroy a portion of a building. The CDPHE publishes a list of peroxide forming chemicals. The MSCD chemistry labs contain certain peroxide forming chemicals, such as diethyl ether.

70. To reduce the risk of explosion, the container holding peroxide forming chemicals should be dated when opened. Periodically, the chemicals should also be tested. If the tests detect peroxide, peroxide inhibitors can be added to the chemical to prevent an explosion.

71. Depending on the chemical, peroxide forming chemicals should be used within 3-12 months of the date they are opened. Most of the MSCD peroxide forming chemicals are used in the organic chemistry labs.

72. The November 2011 audit found undated cans of diethyl ether. Mr. Krajicek believed this was a significant safety issue, because without a date, it could not be determined whether the diethyl ether was reaching an age where it could be volatile. Dating of these chemicals also helps to ensure that the oldest chemical is used first.

73. Complainant did not date the peroxide forming chemicals because Complainant only ordered enough to last for a semester (approximately 16 weeks), which is not a length of time to be concerned about the formation of crystals. Ms. Cathy Rathbun, the UCD Lab Coordinator, also agreed to order only the amount of peroxide forming chemicals that UCD could use in a semester, to decrease the risk that the schools stored unlabeled peroxide forming chemicals in the storeroom. Dr. Barrows agreed with Complainant that ordering small quantities of the chemicals at a time reduced the need to date the containers.

74. According to Dr. Barrows, Complainant, and Mr. Krajicek, peroxide forming chemicals do not need to be dated if they are not opened and the seal is intact. Mr. O'Connor believed that unopened peroxide forming chemicals should be opened and tested periodically. Respondent did not prove that unopened, sealed containers of peroxide forming chemicals should be dated.

75. Another peroxide forming chemical issue exists in the Auraria Science building stockroom, which is shared by the three schools. Some of the chemicals in the stock room are old, and certain containers are not labeled. Some of the unlabeled containers could contain peroxide forming chemicals. Over the years, Complainant worked with Ms. Rathbun to identify, test, and dispose of these chemicals. In approximately 2005, Mr. O'Connor met with Complainant, Ms. Rathbun, and Professor Tindall in the stockroom to address the issue.

76. According to Professor Tindall, the stockroom labeling issue improved over time with Complainant's assistance.



77. Mr. Krajicek's audit did not address the stock room. The evidence demonstrated that the peroxide forming chemical issue in the stock room existed for years, and improved substantially with the move to the new Science building. Complainant continued to work with Ms. Rathbun, her UCD counterpart, to address the stock room peroxide forming chemical issue.

78. Mr. Krajicek's November 2011 audit revealed some containers of diethyl ether, which is on the peroxide forming chemical list, that were opened and undated. Complainant and Dr. Barrows did not believe these needed to be dated given the small quantities ordered. Mr. Krajicek acknowledged that if the stock is used within 0-6 months of opening, it is not necessary to test for crystals. Further, Mr. Krajicek was fairly comfortable with the new stock of peroxide forming chemicals, because Complainant was ordering small quantities.

#### Other Safety Issues

79. Complainant proactively raised a safety issue with the fire suppression system in the new Science building's first floor storeroom when the building opened in 2010. The fire suppression system installed by AHEC was water based. Due to the nature of the chemicals stored in the room, a water based fire suppression system enhances the likelihood of explosion. AHEC agreed that the system should be replaced with a carbon dioxide suppression fire suppression system. It took AHEC approximately two years to obtain the procurement approval necessary to replace the fire suppression system.

80. Dr. Schelble testified that there was an ongoing problem with broken thermometers in the labs, and that this issue was Complainant's responsibility. This testimony was not corroborated by other witnesses, nor was it raised in the November 2011 audit or in the Board Rule 6-10 meeting. Due to the lack of corroboration and the fact that this issue was not included in the list of safety concerns which formed the basis of the termination or otherwise documented in writing, no weight is accorded to this testimony.

81. Mr. Krajicek testified that several of the photos taken by the student showed broken glass, which he observed in his walk-through a day or two after the email. Several faculty members and Complainant disputed that the photos depicted broken glass, but rather, powder. The color photographs do not plainly reveal broken glass. Moreover, the audit did not cite broken glass as an issue. Accordingly, no weight is given to Mr. Krajicek's testimony regarding broken glass.

82. Mr. Krajicek also was concerned regarding the presence of drinking mugs in the chemical storage area, as shown on the photos. Several faculty members, including Dr. Ball, credibly testified that the area shown was the general chemistry preparation room, which did not contain hazardous chemicals, and that the proximity of the mugs to the materials in the room did not pose a safety hazard.

#### Overall Safety Issues

83. No third party, such as CDPHE or the Denver Fire Department, identified safety issues associated with the Chemistry Department labs. No citations for safety violations were issued. The termination resulted from the anonymous student complaint, which prompted the AHEC audit relied upon by Dean Foster and Ms. Zewe in making the determination to terminate Complainant's employment.

84. Mr. Krajicek occasionally raised safety issues with Complainant in their monthly safety meetings. Mr. Krajicek was unable to recall any instances when Complainant failed to address or fix safety issues when they were brought to her attention.

85. It was undisputed that Complainant is very knowledgeable about safety issues. Ms. Zewe acknowledged her safety expertise, and noted that Complainant testified before a legislative committee to advocate for the new Auraria Science building.

86. Several professors credibly testified that Complainant did an excellent job organizing and preparing the labs, and ensuring the safety of the labs and facilities. In general, the people with whom Complainant worked on a day to day basis over many years believed that she was diligent and effective in addressing safety issues. Complainant was very knowledgeable about chemical handling. Chemicals were consistently marked. Complainant's colleagues observed few if any significant safety issues that were her responsibility during Complainant's long tenure as a Lab Coordinator. The testimony further established that Complainant was a constant presence in the labs and prep rooms, and that she was generally responsive and diligent in addressing concerns.

87. Respondent relied on the Prudent Practices document for applicable safety standards. There is no evidence that the College ever adopted this document as a governing standard, or that it was provided to Complainant prior to the Board Rule 6-10 Meeting.

88. Critically, Dr. Barrows did not believe that Complainant was failing any essential safety related duties. Indeed, Dr. Barrows first became concerned for the safety of the labs when he learned that Complainant was terminated. Several professors, including Dr. Barrows and Dr. Schonbeck, considered canceling student laboratories when the spring 2012 semester began due to the concern about Complainant's absence and the timing of the termination. Dr. Barrows told Ms. Zewe, "Oh no, Debe is the only one who knows what to do with the labs."

89. Respondent did not produce evidence of any specific safety regulations that Complainant was personally instructed to follow. Ms. Zewe acknowledged that she was not aware of any specific regulations that the College provided to Complainant.

90. No one, including professors with over 30 years of experience in laboratories, had previously seen the particular form that Mr. Krajicek used to perform the safety audit. The audit form was not tied to any specific set of safety regulations or practices. No opportunity was provided for Complainant or other MSCD faculty or staff to fix the problems identified prior to Complainant's termination.

91. No credible evidence was presented to indicate that the work study students who worked under Complainant's direction were improperly trained or supervised. In fact, Complainant's 2010-11 PMAP stated that Complainant's work with the work study students was exceptional.

#### Board Rule 6-10 Meeting

92. On January 6, 2012, Dean Foster requested Ms. Zewe to consider disciplinary action against Complainant based on work issues, including personnel conflicts, insubordination, and laboratory safety concerns.

93. Ms. Zewe caused a Board Rule 6-10 Meeting Notice to be hand-delivered to

Complainant on January 11, 2012. Complainant was immediately escorted from the Auraria Science building and placed on paid administrative leave pending Respondent's decision. Despite the three categories of issues communicated by Dean Foster to Ms. Zewe, the Notice stated that the potential need to administer disciplinary action related only to "violation of safety regulations and practices."

94. The Board Rule 6-10 Meeting was held on January 19, 2012. Respondent was represented by Ms. Zewe and Nicole Tefft, Assistant Director of Human Resources. Complainant attended with her counsel, Elizabeth Lamb Kearney.

95. The parties reviewed Complainant's job description at the meeting, and Complainant acknowledged that the duties discussed were part of her job description. Complainant was presented with a copy of the student photographs and the audit results for the first time at the Rule 6-10 Meeting. The parties reviewed the audit results at this meeting. Complainant told Ms. Zewe that fixing the problems identified would be "effortless," and that she would address the issues if provided a checklist of the concerns. Ms. Zewe concluded that Complainant was very knowledgeable and experienced about safety issues, but believed that Complainant didn't take responsibility to perform her job. Complainant provided Ms. Zewe with letters and emails of support provided by faculty and staff.

96. At the meeting, Complainant told Ms. Zewe that peroxide forming chemicals could explode, but it was very rare. Ms. Zewe believed that Complainant exhibited a cavalier attitude through this statement.

#### Disciplinary Action

97. Following the Rule 6-10 meeting, Complainant drafted a letter which addressed the issues raised by the audit and discussed in the Rule 6-10 meeting. The letter also noted that several of the issues identified were AHEC's responsibility because they were facility issues. Complainant sent this letter to Ms. Zewe on January 22, 2012.

98. Ms. Zewe reviewed Complainant's written response and the information she provided during the Rule 6-10 meeting. She felt it was a valid response, and had no reason to believe it was inaccurate. Ms. Zewe also reviewed the audit results, the emails between Dean Foster and Mr. Krajcek regarding the audit results, Complainant's PDQ, Complainant's PMAPs, the CDPHE publication regarding generator requirements of the Colorado Hazardous Waste Regulations, the Prudent Practices document, and emails regarding the installation of cabinets for the storage of flammable chemicals.

99. Ms. Zewe spoke with Mr. Krajcek about the audit results and the training Complainant had received regarding the CisPro inventory system. She also conferred with Dean Foster, Dean Shevalier, and the MSCD Environmental Safety Coordinator.

100. Ms. Zewe did not speak with any Chemistry Department faculty members before making the decision to terminate Complainant's employment. All of the input she received in writing from Chemistry Department faculty and staff was supportive of Complainant.

101. On January 25, 2012, within six days of the Rule 6-10 meeting, and within three days of receiving Complainant's written response to the issues identified in that meeting, Ms. Zewe issued the disciplinary termination notice to Complainant.

102. The notice states that in making her decision, Ms. Zewe weighed the tolerance for risk. She stated that although the "audit notes may not appear to be severe," "the probability of an accident or exposure is not a risk that the College wishes to take." The notice further states that Complainant "disregarded the importance of your responsibilities to maintain the laboratories, equipment, and supplies and relied on others including students to carry out this responsibility. This disregard has resulted in a potential safety risk to the College's students, faculty, and staff."

103. Despite the fact that the Rule 6-10 Meeting Notice identified only safety concerns, the termination letter also states that Complainant's "disruptive behavior by confronting supervisors, faculty, and co-workers has resulted in the polarization of the department."

104. In making the decision to terminate Complainant's employment, Ms. Zewe placed some weight on the two 2011 corrective actions. She believed that they demonstrated a "commonality of pattern" in that they indicated Complainant was not doing her job. Ms. Zewe believed that the College complied with progressive discipline based on the prior corrective actions.

105. However, despite considering and placing "some weight" on the prior corrective actions, Ms. Zewe testified that she terminated Complainant's employment based solely on the conclusion that Complainant did not adhere to safety regulations.

106. Ms. Zewe is a Human Resources specialist and does not possess any scientific degrees. She relied on Mr. Krajcek and Dean Foster, who has a Ph.D. in Biology, for their chemistry expertise.

107. Ms. Zewe considered other options, but believed that lesser forms of discipline, such as a demotion or suspension, would not improve the conditions of the labs. She believed that the chemical labeling, storage, and disposal issues identified were common sense issues, and that Complainant was not performing her job based on the audit results.

108. Dr. Barrows, Complainant's direct supervisor, was not involved in the disciplinary action decision-making process. He was surprised by Respondent's decision to terminate Complainant's employment. Dr. Barrows did not support the decision to terminate Complainant's employment.

109. Ms. Zewe testified that she believed Dean Foster was more knowledgeable than Dr. Barrows regarding Complainant's job performance and adherence to safety protocol. Dean Foster was an infrequent visitor to the Chemistry Department. Indeed, the consistent testimony established that Dean Foster was physically in the MSCD Chemistry Department on one or two occasions over the past several years. In contrast, Dr. Barrows was the Chair of the Chemistry Department and Complainant's immediate supervisor who observed her job performance on a nearly daily basis. Ms. Zewe's position that Dean Foster was more knowledgeable than Dr. Barrows regarding Complainant's job performance did not reflect a reasonable evaluation of the evidence.

## 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 did not commit the acts for which she was disciplined.

Respondent has not proven by preponderant evidence that Complainant committed the acts for which she was disciplined. Although the termination notice also addressed interpersonal issues, the January 11, 2012 Board Rule 6-10 Notice stated that Respondent may need to administer disciplinary actions "based on violation of safety regulations and practices." At hearing, Ms. Zewe, the appointing authority, confirmed that the termination was based solely on Complainant's alleged violations of safety regulations and practices.

##### 1. Applicable safety regulations and practices.

In determining whether Complainant violated safety regulations and practices, the applicable safety regulations and practices must first be ascertained. Critically, Respondent did not plainly identify an applicable set of safety regulations and practices that were provided to Complainant. There was no evidence that, prior to the disciplinary action, either the College or AHEC notified Complainant of the objective safety regulations and standards to which she was required to adhere.

In terminating Complainant's employment, Respondent primarily relied on the safety audit conducted by Mr. Krajcek, an AHEC employee. This was the first Chemistry Department audit that Mr. Krajcek performed. Mr. Krajcek created the audit form himself. This form was



not tied to any specific safety regulations or practices. The form and the standards therein were not provided to Complainant until the Board Rule 6-10 meeting. Indeed, none of the MSCD Chemistry Department faculty, including the Chair, Dr. Barrows, had previously seen the form. Complainant was never placed on notice that the form provided the safety benchmark required of her position.

At hearing, Respondent also relied on the Prudent Practices document. Mr. Krajicek testified that he had this document in his office, and that it was a widely accepted manual in chemistry labs. There was no evidence, however, that MSCD or AHEC ever informed Complainant that the document contained the safety regulations and practices that were pertinent to her job. The document was also not referenced in Complainant's PDQ.

As support for its decision, the College also cited the CDPHE Guide to Generator Requirements of the Colorado Hazardous Waste Regulations. During Complainant's tenure, MSCD was classified as a conditionally exempt small quantity generator of hazardous waste. As a conditionally exempt small quantity generator, MSCD was required to "identify all hazardous wastes generated." 6 CCR 1007-3, § 262.11. Further, as of April 2008, the College was required to "maintain and operate their facility to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste." 6 CCR 1007-3, § 261.5(b)(5). Respondent did not demonstrate that it ever explicitly informed Complainant that she was required to abide by these particular regulations. Complainant did, however, express knowledge of and understanding that these hazardous waste standards applied to the MSCD labs.

Complainant's PDQ required her to "ensure safe and proper storage, handling and disposal of chemicals and waste" and to categorize, label, and store spent chemicals and hazardous materials/waste for proper disposal.

Therefore, in determining whether Complainant committed the acts for which she was disciplined, it must be determined whether she (1) failed to identify all hazardous wastes generated (CDPHE Regulations); (2) failed to maintain and operate the Chemistry labs to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste (CDPHE Regulations); (3) failed to ensure safe and proper storage, handling, and disposal of chemicals and waste (PDQ); or (4) failed to categorize, label, and store spent chemicals and hazardous materials/waste for proper disposal (PDQ).

**2. Respondent did not prove that Complainant violated the applicable safety standards.**

To support Complainant's alleged violation of safety regulations and practices, Respondent asserted that Complainant failed to (1) label or otherwise identify hazardous waste, (2) keep an adequate inventory of chemicals, (3) properly label peroxide forming chemicals, and (4) segregate and properly store flammable chemicals.

**a. Hazardous waste identification.**

The CDPHE regulations required MSCD to identify all hazardous wastes generated, and to minimize the unplanned release of hazardous waste. Complainant's PDQ required Complainant to ensure the safe and proper storage, handling, labeling, and disposal of waste. Mr. Krajicek's audit results alleged that there were unlabelled hazardous waste containers in the Chemistry labs and preparation rooms.



Respondent did not, however, prove that Complainant, or any of the work study students acting under her supervision, failed to properly label hazardous waste containers. Although the audit demonstrated that there were unlabeled containers in the labs and preparation rooms, other than the containers in the ventilation hoods, Respondent did not prove that these containers actually contained hazardous waste. The audit findings failed to identify any specific hazardous compound or chemical that resided in the unlabelled containers.

Moreover, the credible testimony of Dr. Barrows and Chemistry Department faculty members revealed that most of the unlabeled containers contained non-hazardous chemicals such as non-toxic acids and bases. Most of the anonymous photos that prompted the audit depicted containers in the general chemistry lab and preparation room. The evidence demonstrated that this basic course does not employ hazardous chemicals, but rather, the experiments typically yield water and soap.

At most, the Respondent demonstrated that there were unlabeled chemical waste containers in the ventilation hoods in the laboratories. However, the College did not identify any regulation or written standard which required that the containers be labeled before they were filled and ready for disposal. The CDPHE regulation does not address the issue of when the containers must be labeled. The historical practice of the Chemistry Department was to label the containers once they were full and ready for disposal. Respondent did not identify any written warning or notice provided to Complainant mandating the labeling of the waste containers before they were ready for disposal.

Complainant and other witnesses established that once the containers in the ventilation hoods reached their fill line, they were sealed and labeled before delivery to the satellite disposal room. Respondent did not prove that Complainant or her work study students failed to do this. While there was evidence that unlabeled hazardous waste containers were previously found in the storage room of the old building, requiring the Denver bomb squad to destroy the chemicals, there was no evidence that these containers were the responsibility of Complainant, as the stock room was shared by the three Auraria schools. Moreover, Respondent never issued Complainant written notice of responsibility for this situation, which was largely resolved by the time the Chemistry Department moved to the new Science building in 2010.

#### **b. Chemical Inventory**

Complainant's PDQ required her to ensure the proper storage and handling of chemicals. The audit results alleged that Complainant failed to properly inventory chemicals, and Respondent asserted that Complainant did not adequately use the CisPro inventory system.

The evidence demonstrated that Complainant did not regularly use or access the CisPro inventory system. Instead, Mr. O'Connor took the lead on chemical inventory, particularly since the bar code scanner and printer were in AHEC's offices. Respondent, however, failed to prove that Complainant violated any applicable safety regulations or practices by not using the CisPro system. Complainant's PDQ required her to ensure the proper storage and handling of chemicals – it did not discuss or reference the inventory system Complainant was required to use. Nor did Respondent show that it ever put Complainant on written notice that her job duties entailed the regular use of the CisPro inventory system, or that failure to use the system resulted in violation of safety regulations and practices.

The credible testimony demonstrated that chemicals were generally labeled and easily

accessible. Dr. Barrows and several faculty members testified that the labs were well stocked and ready for classes. Accordingly, Respondent did not prove that Complainant's lack of use of the CisPro inventory system violated any applicable safety regulations or standards.

### **c. Peroxide Forming Chemicals**

The CDPHE regulations require exempt small waste generators such as MSCD to maintain and operate facilities to minimize the possibility of fire or explosion. Complainant's PDQ required her to ensure the safe and proper storage and handling of chemicals.

The audit results reveal that Complainant did not date opened containers of diethyl ether, which is a peroxide forming chemical. If peroxide forming chemicals are opened for an extended period of time, crystals may form which increase the likelihood of an explosion when they are handled. The evidence demonstrated that the greatest risk occurs when the chemicals are opened and allowed to stand for more than six months. Respondent contended that not labeling and dating the chemicals when they are opened increases the risk of explosion.

The testimony of Complainant and Dr. Barrows established that Complainant ordered small quantities of peroxide forming chemicals to decrease the likelihood that they would be allowed to sit long enough to form crystals. Complainant offered undisputed testimony that she ordered only enough for a single semester, so that the chemicals are opened for a period less than six months. The audit did not identify any opened containers of peroxide forming chemicals that had actually formed crystals, or that were close to the point of explosion risk.

While it may have been the better practice to date every opened container of peroxide forming chemicals, prior to the subject disciplinary action, Complainant was not placed on notice that all opened peroxide forming chemical containers had to be dated, even if the supply was small enough to be consumed within a sixteen week period (one semester). Indeed, her supervisor, Dr. Barrows, was aware of Complainant's practice, and did not require her to date the opened containers. In the absence of this explicit requirement, based on Complainant's ordering of small quantities of peroxide forming chemicals to reduce the risk of explosion, Respondent did not prove that Complainant failed to comply with the CDPHE regulations applicable to small waste generators or the rather nebulous safety requirements in her PDQ.

It should also be noted that while there were unlabeled containers of peroxide forming chemicals in the stock room prior to, and possibly after, the 2010 move to the new Science building, there was no evidence that the containers were unlabeled due to the fault of Complainant. There were multiple levels of responsibility for the storage of chemicals in the shared stock room. Moreover, Respondent never issued Complainant a written notice, corrective action, or disciplinary action related to this issue.

### **d. Flammables**

The audit revealed containers of flammable containers that were not properly stowed in the flammable cabinets. However, the audit results did not specifically identify such flammables, nor did Respondent provide credible evidence that the containers were not properly stored due to the fault of Complainant. Most of the flammable chemical containers were located in the organic chemistry labs, which Dr. Barrows had directed Complainant to steer clear of due to her acrimonious relationship with Dr. Schelble. Moreover, Chemistry Department faculty members consistently testified that the storage of chemicals, including their return to the proper locations, was the responsibility of both the faculty members conducting the labs and the

students. Prior to this disciplinary action, Respondent never notified Complainant that she failed to properly store flammable chemicals. Without more, Respondent did not meet its burden to prove that Complainant, or the work study students under her direction, failed to ensure the proper storage of flammable chemicals.

**e. Overall Safety Issues/Summary**

To prove that Complainant committed the acts for which she was disciplined, Respondent was required to prove that Complainant failed to abide by applicable safety regulations and practices. No outside agency cited MSCD or AHEC regarding the condition of the Chemistry Department labs. Aside from a couple of sentences stressing the importance of safety issues in performance reviews over her many years of service, before the instant action, Respondent had not issued written notice to Complainant regarding the overall safety of the labs. Dr. Barrows and several Chemistry Department faculty and work study students, who are in the labs on a regular basis, credibly testified that the labs and prep rooms were safe and that they were unaware of any significant safety issues.

The anonymous student email and photos prompted Mr. Krajicek's audit. Testimony from Dr. Barrows and other faculty members established that the photos did not depict any significant safety concerns. At most, they revealed that the general chemistry prep room was in need of "housekeeping," as stated in Mr. Krajicek's initial email to Dean Foster. The November 2011 audit revealed certain safety issues, as identified above. However, Mr. Krajicek, in his email summary to Dean Foster, stated that he "found the laboratories in good shape with evidence of proactive management."

Even with the audit findings, Dr. Barrows, the Chair of the Chemistry Department, did not have any significant concerns regarding the safety of the labs. Indeed, according to Dr. Barrows, he did not have concerns regarding lab safety until he learned that Complainant had been terminated in January 2012. Dr. Schonbeck also had concerns about Complainant's absence, prompting a discussion with Dr. Barrows about whether to cancel labs when students returned.

Respondent did not meet its burden to demonstrate that Complainant failed to abide by applicable safety regulations and practices.

**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).

As set forth above, Respondent did not prove that Complainant committed the acts for which she was disciplined. On that basis alone, the appointing authority's decision to discipline Complainant is arbitrary and capricious.

The subject disciplinary action is arbitrary and capricious on other bases, as well. First, Ms. Zewe neglected to use reasonable diligence and care to procure the necessary evidence. The Board Rule 6-10 Notice advised Complainant that she was subject to disciplinary action for alleged safety regulation and practice violations. However, the Rule 6-10 meeting discussed other issues, including Complainant's interpersonal issues with other Chemistry Department faculty and staff. Likewise, the termination letter referred to interpersonal issues, including a CSEAP mediation. Although these issues were discussed in the Rule 6-10 meeting and cited in the termination letter, Ms. Zewe testified she relied solely on the alleged safety violations as a basis for the termination. The reference to the issues in the January 25, 2012 notice as a potential basis for the disciplinary action therefore is arbitrary, capricious, and contrary to Board Rules.

Additionally, as mitigating information at the Rule 6-10 meeting, Complainant provided letters of support from many faculty and staff, along with her strong performance evaluations. On January 22, 2012, Complainant sent Ms. Zewe a detailed letter in response to the audit results, which were provided to her for the first time at the January 19, 2012 Rule 6-10 meeting. A mere three days later, Ms. Zewe issued the termination letter. Dr. Barrows, Complainant's supervisor, was not invited to actively participate in the decision-making process. Ms. Zewe did not speak with any Chemistry Department faculty members before making her decision. These facts demonstrate that the appointing authority did not use reasonable diligence or care to procure the necessary evidence.

Second, the appointing authority failed to give candid consideration of the evidence before her, and failed to properly exercise discretion, in making the decision to impose discipline. Dr. Barrows, who worked with Complainant on a daily basis, did not agree with the decision to terminate Complainant's employment. Rather, it was Dean Foster, who did not testify at hearing, who believed that Complainant should be disciplined. The undisputed testimony established that Dean Foster was rarely at the Chemistry Department, perhaps once or twice over a period of several years. Dean Foster's awareness of the pertinent safety issues was limited to the audit conducted by Mr. Krajicek and the anonymous student email and photos. Yet Ms. Zewe believed that Dean Foster's knowledge of Complainant's job performance was greater than was Dr. Barrows', because Dr. Barrows, who had worked with Complainant on a daily basis for many years, had been Complainant's supervisor for only about a year. This assessment reveals a failure to candidly consider the evidence, and was therefore arbitrary and capricious.

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

Based on the conclusion that Complainant did not commit the acts for which she was disciplined, the discipline imposed was not within the range of reasonable alternatives. Moreover, even if discipline were warranted by the facts, the evidence demonstrates that Respondent failed to exercise progressive discipline, and that the decision to terminate Complainant's employment was excessive.

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, 4 CCR 801. 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, 4 CCR 801.

Here, Dean Foster issued Complainant a corrective action in January 2011. The corrective action was issued for unprofessional behavior, overstepping boundaries, and creating divisiveness within the Chemistry Department. Dean Foster issued a second corrective action in June 2011. This corrective action, which noted overall improvement in professional behavior and interpersonal relations, was issued in response to the May 2011 incident involving Complainant's unlocking the administrative assistant's office and obtaining a file cabinet key to permit several faculty members to access the final examinations. The bi-weekly meetings with Dean Shevalier and Dr. Barrows which followed the corrective actions did not focus on safety issues.

At hearing, Ms. Zewe testified that although the corrective actions did not address safety concerns, they exhibited a "commonality of pattern" by not performing her job, and demonstrate that Respondent employed progressive discipline. The ALJ disagrees. The corrective actions were limited to interpersonal relations, professionalism, overstepping boundaries, and creating a polarized Chemistry Department. In contrast, the subject disciplinary action was issued solely for Complainant's alleged failure to abide by safety regulations and practices. Any connection between the prior corrective actions and the instant disciplinary action is too tenuous to support a conclusion that the corrective actions were related to the disciplinary action.

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. The corrective actions previously issued were not related to this disciplinary action. Based on the findings and conclusions above, Respondent did not demonstrate that Complainant committed an act that was so flagrant or serious that immediate discipline was proper.

Furthermore, Respondent did not show that termination, the most severe form of discipline, was proper or within the range of reasonable alternatives. Complainant received excellent performance reviews over her 16-year career as a certified Laboratory Coordinator III. She was not provided with proper written notice regarding safety issues. Many Chemistry Department faculty and work study students supported her and believed that she strongly adhered to safety protocol. Complainant's supervisor, the Department Chair, disagreed with the decision to terminate Complainant's employment. Under these circumstances, even if discipline were warranted, the decision to terminate Complainant's employment was too severe, and not within the range of reasonable alternatives.

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

Complainant seeks recovery of her attorney fees and costs under Board Rule 8-38, 4 CCR 801, because Respondent's disciplinary action was frivolous and groundless. Section 24-50-125.5, C.R.S. provides that if a personnel action was "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless," the department taking the personnel action shall be liable for the employee's attorney fees. The party seeking an award of attorney fees bears the burden of proof, and the non-moving party shall be given an opportunity to present evidence on the issue before an award is issued. Board Rule 8-38(B), 4 CCR 801.



Respondent's decision to terminate Complainant's employment was arbitrary and capricious, and not within the range of reasonable alternatives. However, Complainant has not demonstrated that the action was instituted frivolously, in bad faith, maliciously, groundlessly, or as a means of harassment. A student sent an email, expressing concern about the safety of the MSCD labs. The student attached photographs, which depicted opened containers and potential safety hazards.

To ensure the safety of the labs, the College reasonably decided to conduct a safety audit. Although the audit was not very clear in its results, it did reveal overall safety concerns related to hazardous waste management, chemical storage, peroxide forming chemicals, and flammable chemicals. As an LC III, Complainant was responsible to ensure safe and proper storage, handling and disposal of chemicals and waste. Under these circumstances, Respondent's decision to explore corrective or disciplinary action against Complainant was not frivolous or groundless.

Based on the evidence from the audit and the Board Rule 6-10 investigation, Respondent's decision to issue disciplinary action in the form of termination was not reasonable. However, this conclusion is not equivalent to a conclusion that the decision was frivolous or groundless, or made in bad faith or maliciously. Although there was scant evidence to support the decision, the audit and investigation did reveal general safety concerns such as hazardous waste containers that were not labeled until they were filled and ready for disposal, and undated containers of peroxide forming chemicals. While Respondent had not previously provided Complainant with adequate notice about these issues, and failed to provide an objective set of applicable safety regulations and standards, the underlying safety issues identified defeat a conclusion that the disciplinary action was frivolous or groundless. Accordingly, the ALJ concludes that Complainant is not entitled to recovery of her attorney fees and costs under Board Rule 8-38.

#### **CONCLUSIONS OF LAW**

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



**ORDER**

Respondent's action is **rescinded**. Complainant is to be reinstated as a Laboratory Coordinator III, and receive back pay and benefits, with statutory interest, retroactive to the termination date of January 25, 2012.

Dated this 14<sup>th</sup> day  
of June, 2012, at  
Denver, Colorado.



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

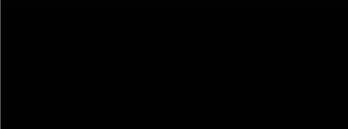
**CERTIFICATE OF MAILING**

This is to certify that on the 15<sup>th</sup> day of June, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Elizabeth Lamb Kearney



Joseph F. Haughain A.A.G.



Sprague, Jane

**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.