STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2013B003**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VINITA BIDDLE,
Complainant,

vs.

DEPARTMENT OF PERSONNEL & ADMINISTRATION, DIVISION OF HUMAN RESOURCES,
Respondent.

Administrative Law Judge (ALJ) Robert R. Gunning held the hearing in this matter on September 11, 2012, and September 20, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on September 11, 2012. The record was closed on September 20, 2012, upon conclusion of the evidentiary hearing. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Deborah Layton-Root, Chief Human Resources (HR) Officer, Department of Personnel & Administration. Nora Kelly, Esquire, represented Complainant.

MATTERS APPEALED

Complainant was a certified General Professional (GP) VI employed by Respondent, Department of Personnel & Administration (Respondent or DPA), 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 DPA as a GP VI, back pay, benefits, and recovery of reasonable attorney fees. Respondent requests that the State Personnel Board (Board) affirm the action of the appointing authority and dismiss Complainant's appeal with prejudice.

For the reasons set forth below, Respondent's disciplinary action is **rescinded**.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 recovery of her reasonable attorney fees.

FINDINGS OF FACT

Complainant's Employment History With DPA

1. Complainant began employment in the DPA employee benefits unit in October 2001. She was hired as a GP II, Benefits Specialist. Complainant was promoted to a GP III position about six months later. In 2006, she was promoted to a GP V, Benefits Supervisor position. This position was later reallocated to a GP VI classification.

2. Complainant served as Benefits Supervisor until fall 2009. In fall 2009, it was mutually agreed that the job should be split because of increased work related to the implementation of House Bill 1335. Complainant therefore transitioned into a GP VI Benefits Strategist position. Complainant's supervisory duties were removed.

3. Complainant served as a Benefits Strategist until her termination in June 2012. As a Benefits Strategist, her job duties included the recommendation of benefits strategies, drafting requests for proposal (RFPs) and contracts, ensuring compliance with state and federal statutes and regulations, and managing contracts. The work involved highly specialized technical competency in insurance principles and operations, including contract administration and financial and data management of benefits.

4. Deborah Layton-Root was Complainant's appointing authority at the time of Complainant's termination. Ms. Layton-Root began her tenure as Chief Human Resources Officer on April 9, 2012.

Complainant's Work Relationship With Sue Huang

5. Sue Huang has been a state employee for 26 years. Ms. Huang and Complainant were work colleagues since Complainant began employment in October 2001. Although they were not employed in the same unit until 2011, Complainant and Ms. Huang worked together on a number of projects. Despite possessing contrasting personalities, over time, they developed a friendship. They felt free to discuss issues with each other, and often had lively, spirited discussions regarding work related issues.

6. Ms. Huang holds strong opinions about certain matters, and has a very direct communication style. She has walked away from other employees when she disagreed with them. Several employees left DPA due to Ms. Huang's management style. They felt that she was controlling and often made demeaning comments to them and other staff members, including Complainant.

7. Despite their friendship, Complainant often became frustrated with Ms. Huang, and believed that she was not a good listener and that she often changed her focus on a topic. Additionally, they held different philosophical points of view regarding benefits.

8. Ms. Huang was named Interim Benefits Manger following Karen Fassler's retirement on September 30, 2011. Ms. Huang did not have extensive experience in the benefits area. Rather, Ms. Huang had previously served as the Manager of the HR Data/Analytics Unit. Ms. Huang became Complainant's direct supervisor.

9. The relationship between Complainant and Ms. Huang deteriorated once Ms. Huang became Complainant's supervisor. They had less face to face communication, and more communication by email. Complainant felt cut off and became frustrated.

Complainant's Performance Evaluations/Overall Job Performance

10. Over the years, Complainant consistently received meeting expectations performance evaluations. No issues were noted regarding hostility towards co-workers.

11. Complainant possessed substantial expertise and was by all accounts a subject matter expert in the HR benefits arena. She cared deeply for her work, and strove to ensure that state employees had the best benefits that could be provided in a fiscally responsible manner. She was very knowledgeable about the regulatory environment and insurance issues.

12. For the 2008-09 performance cycle, Complainant received a "needs improvement" in the area of HR management. At the time, she served as the Benefits Supervisor. In particular, she struggled with managing tensions between exempt and non-exempt employees, and did not thrive in the leadership role. This evaluation also cautioned Complainant about her "emotional volatility" and stated that she was trying to "manage her emotions."

13. The 2008-09 evaluation also rated Complainant as exceptional in the job knowledge core competency. It stated that she was "becoming a recognized leader in the field, bringing recognition to Colorado for some initiatives." The rater comments section stated that Complainant's "dedication and expertise are exceptional, as evidenced by appointments to community groups, the Governor's Office seeking her advice, and invitations to present at conferences, which reflects positively on DPA's reputation and image." The comments also noted that DPA was "fortunate to have Vinita's expertise in DPA."

14. For the 2011-12 performance cycle, Complainant received an overall level II evaluation. The evaluation did not identify any issues regarding unprofessional behavior. Nor did the evaluation note any areas for "needs improvement." Under the communication core competency section, the evaluation stated that Complainant communicated effectively with team members. Externally, Complainant was well recognized for her "vast knowledge in benefits and her passion for health reform." In the customer service/interpersonal skills core competency, the evaluation stated that Complainant is "patient in working with customers on complicated benefit issues." Ms. Huang prepared the evaluation and signed it as the rater. Ms. Layton-Root signed the evaluation as the reviewer on May 22, 2012.

15. Complainant received commendations over the course of her career. For instance, in 2008, Complainant received an administrative leave benefit related to a commendation. The commendation stated that her "incredible talent and dedication to getting the best deal for employees is often invisible to the workforce but the State and employees are fortunate to have her working so hard on their behalf." Complainant was also a Fellow in the International Society of Certified Employee Benefit Specialists, and was actively involved in other professional organizations.

16. Complainant's job duties began to change in 2011. In particular, her autonomy and authority decreased. Her job duties became less defined. Complainant's Position Description Questionnaire (PDQ) was in the process of being revised and implemented at the

time of her termination.

17. In late 2011, Tom LeBlanc, the HR Division Director at the time, told Complainant that she was no longer permitted to speak publicly for the state in the benefits area. This had constituted a significant portion of her job duties.

18. Until 2012, Complainant did not have any documented incidents in which she "lashed out," threatened, or yelled at other employees. However, Complainant was emotionally sensitive, and on occasion, cried about work events while at work. In meetings, she occasionally became frustrated and defensive when she felt challenged.

Complainant's Personal Issues

19. Complainant has an anxiety disorder and has also been treated for depression. The anxiety disorder can make it difficult for Complainant to breathe when she becomes stressed. Stress exacerbates the anxiety disorder. She takes medication on an as needed basis. The medication helps ease this condition.

20. In August 2011, Complainant applied for Family Medical Leave Act (FMLA) leave. She requested intermittent leave to care for her father, mother and brother in Grand Junction. Her mother was ill, her father required 24/7 care, and her brother is disabled and requires 24/7 caretaker services. DPA HR approved her request for intermittent FMLA leave.

21. Following the FMLA leave approval, Complainant periodically took leave to provide respite care for her family.

22. In February 2012, Complainant's mother broke her hip and was hospitalized. Complainant applied for extended FMLA leave. This request was approved.

23. Complainant's mother was moved to hospice care later in February 2012. Her mother died on March 19, 2012.

24. Complainant returned to work in April 2012.

25. Complainant's dog became sick, and had to be put down in May 2012.

26. Complainant sought and obtained Colorado State Employee Assistance Program (CSEAP) counseling in an effort to decrease her emotional sensitivity at work. Her first contact with CSEAP was on February 2, 2012, and the first session occurred on February 7, 2012. Following the extended FMLA leave, she contacted CSEAP on April 20, 2012. However, she was unable to schedule a counseling session because she was very busy due to the benefits open enrollment period and her extended absence from work. She later resumed counseling, and had further CSEAP sessions on June 13, 2012; June 25, 2012; June 27, 2012; and July 11, 2012.

27. At the June 13, 2012 session, Complainant signed a release, authorizing CSEAP to release information to her appointing authority.

Incidents For Which Complainant Was Disciplined

28. As set forth below in more detail, Respondent based its decision to terminate Complainant's employment primarily on Complainant's actions on June 22, 2012. However, the appointing authority also based the decision on other incidents, which were not specifically identified in the Board Rule 6-10 notice or the notice of disciplinary action. Each of these incidents is set forth below, in chronological order.

Jennifer Okes Phone Conversation (2003-04)

29. Jennifer Okes worked with Complainant for approximately ten years. Ms. Okes has served as the DPA Deputy Executive Director since January 2007.

30. In 2003 or 2004, Ms. Okes and Complainant had a phone conversation. In the conversation, Complainant became emotional and raised her voice at Ms. Okes. Ms. Okes believes Complainant hung up the phone on her. Complainant denies she hung up the phone on Ms. Okes.

31. There is no contemporaneous report of this incident. No personnel action was taken against Complainant at the time. Due to the conflicting evidence and lack of written record of the conversation that occurred nearly ten years ago, Respondent did not meet its burden to prove that Complainant hung up the phone on Ms. Okes.

Jamie Thornton Arm Touching (2009)

32. Jamie Thornton worked with Complainant from March 2004 until January 2010. Complainant was her supervisor during part of this period.

33. In December, 2009, Ms. Thornton and Complainant were in a meeting with other employees. Complainant called the meeting in an effort to resolve tension between certain exempt and non-exempt employees. Judy Kohler became angry with Ms. Thornton. The two engaged in finger pointing and yelling. Complainant tried to keep Ms. Thornton and Ms. Kohler apart from one another. Ms. Thornton then left the room. Complainant followed her in an effort to de-escalate the situation, and grabbed Ms. Thornton's arm in an effort to speak with her. Ms. Thornton told Complainant to let go of her arm. Complainant did so.

34. Complainant and Ms. Thornton were both placed on paid administrative leave while the incident was investigated by HR. No personnel action was taken against Complainant at the time. Ms. Fassler, Complainant's supervisor at the time, did not believe Complainant was at fault in the incident.

February 2, 2012 Conversation With Sue Huang

35. Complainant agreed to serve on a committee that was being formed within the benefits unit. She previously spoke with Ms. Huang about the identity of the committee members, and believed that they had come to an agreement on this issue.

36. In early 2012, Ms. Huang often worked from home and from a hospital because her mother was terminally ill.

37. On February 2, 2012, Ms. Huang was in the hospital visiting her mother.

Complainant called her on her cell phone. While Complainant knew that Ms. Huang was out of the office and that her mother was dying, she was not aware that Ms. Huang was at the hospital at the time of their conversation.

38. In the phone conversation, Ms. Huang and Complainant discussed the committee membership. Their recollections of the identity of the committee members were not consistent. Complainant became upset, and said "are you calling me a liar?" Complainant then terminated the conversation by abruptly hanging up the phone.

39. Later that morning, Complainant sent Ms. Huang an email, apologizing for "inappropriately lashing out at you on the phone." The email states that Complainant made an appointment with CSEAP because the frustration she was feeling was affecting her ability to work.

40. No personnel action was taken against Complainant at the time. In an email response, Ms. Huang stated her opinion that there was no need for Complainant to apologize.

May 23, 2012 Team Building Exercise

41. On May 23, 2012, Ken Johnson, DPA Director of Statewide Training & Development, conducted analytics/benefits unit teambuilding exercises. One of the exercises required employees to design a family coat of arms and to explain the significance of the coat of arms to the group. During this exercise, Complainant felt an anxiety attack when she had to present to the group. She became very emotional, went into tears, and abruptly left the training room. Mr. Johnson took an unscheduled break to defuse the situation.

42. Complainant took anti-anxiety medication and returned to the room. She apologized to Mr. Johnson for leaving the meeting. She then completed the exercise.

43. Mr. Johnson later spoke with Ms. Layton-Root about Complainant's behavior at the meeting. Ms. Layton-Root considered it to be disruptive to the team building exercise.

May 2012 Coaching Sessions

44. On May 17, 2012, Ms. Layton-Root met with Complainant about job duties and work issues. Complainant cried during the meeting because she believed she should be able to continue to attend leadership discussions and benefits meetings and conferences. Ms. Layton-Root responded that DPA was concerned about Complainant expressing her personal opinions at the conferences, and therefore did not want her to attend. Ms. Layton-Root also told Complainant that her emotional outbursts were disruptive to the staff.

45. On May 30, 2012, Ms. Layton-Root and Complainant discussed her job duties and the May 23 teambuilding incident. Complainant expressed her belief that she was no longer being fully utilized, and that she was unsure what was expected of her. She cried during this meeting. Ms. Layton-Root told Complainant that she may need to request a fit for duty examination, due to Complainant's emotional state. Complainant said that she was under significant stress and had periodic anxiety attacks, but acknowledged that she needed to decrease her disruptive behavior. Complainant did not specifically tell Ms. Layton-Root about her family issues, including her mother, brother, or dog.

46. Ms. Layton-Root did not issue any written documentation to Complainant

following these meetings. Complainant understood that Ms. Layton-Root was concerned about her crying episodes, but she did not interpret the meeting as a reprimand.

47. During the meetings, Ms. Layton-Root encouraged Complainant to seek CSEAP counseling. Complainant told her that she would address CSEAP privately. Ms. Layton-Root did not order Complainant to obtain CSEAP counseling.

48. Ms. Layton-Root did not become aware of Complainant's CSEAP counseling sessions until she received an email from Complainant on June 13, 2012. The email stated that Complainant had given Yvonne Garber at CSEAP permission to discuss work-related behavior with Ms. Layton-Root.

49. On June 5, 2012, Complainant, Ms. Huang, and Ms. Layton-Root met to discuss revisions to Complainant's PDQ. The conversation was productive, and Complainant did not have any emotional outbursts. Complainant and Ms. Huang agreed to meet and finalize the job description in the next 30 days and to then present it to Ms. Layton-Root for review.

June 22, 2012 Argument With Sue Huang

50. On Friday, June 22, 2012, at approximately 8 a.m., Complainant stopped by Ms. Huang's office. Complainant had chronic back and hip pain, and had taken the previous day off to treat her back. Ms. Huang asked Complainant about her back problem.

51. They next discussed the federal Affordable Health Care Act and the annual compensation survey. Their unit was responsible for the benefits analysis component of the annual compensation survey. In an email, Ms. Huang had stated she needed information from Complainant by 9 a.m. that morning. Complainant sought clarification from Ms. Huang regarding the request.

52. Specifically, Ms. Huang had asked Complainant about the estimated cost of the default plan, and the reasons for the cost. In their conversation, Complainant responded that she could not price it without knowledge of the selected approach, and asked Ms. Huang which approach the cost was to be based on. Ms. Huang responded that she just wanted to talk about rates, and said that Complainant "should have anticipated this." Ms. Huang believed that the request for the cost estimate should not have struck Complainant as a surprise.

53. Complainant became frustrated with Ms. Huang, and was not sure why the cost component was so urgent. Complainant then told Ms. Huang that the request for information without additional information or time "was not fair." Ms. Huang replied that Complainant was being unfair.

54. Ms. Huang then left her office to take her lunch to the kitchen. Complainant followed her in an effort to continue the discussion. Ms. Huang told Complainant that they would talk about the issue later, because Complainant was upset. In the hallway, Complainant and Ms. Huang spoke in loud, argumentative voices.

55. The office environment of the DPA benefits unit is largely open, with many cubicles. Ms. Huang and Complainant each had fixed wall offices. Their offices were next to each other.

56. Complainant continued to follow Ms. Huang through the hallway and out of the

kitchen. Complainant then headed back to her office, and Ms. Huang said, "at least you're walking better." This struck Complainant wrong, and in the open hallway, Complainant shouted "Fuck you, Sue." The statement was heard by several DPA employees, including Simone Richardson, Administrative Assistant to the Chief Human Resources Officer; Tracy Creekmore, DPA FMLA Coordinator; and Barbara Ring, DPA Benefits Eligibility Specialist.

57. Complainant then told Ms. Huang that she didn't listen. Ms. Huang and Complainant went into their respective offices. Complainant closed her office door and wept.

58. Ms. Huang drafted an email to send to Complainant at 8:35 a.m. She did not send the email to Complainant, but rather, sent it to Holly Caro for review and editing. The email stated that Complainant's behavior was unprofessional, insubordinate, and disrespectful. Ms. Huang stated her intent to write up the incident for a corrective action.

59. Later that morning, Complainant went to Ms. Huang's office to apologize. Ms. Huang was not there.

60. Complainant was upset with herself for having lost control. Although she had cursed in prior discussions with Ms. Huang, it was the first time she had sworn at Ms. Huang. Complainant acknowledges there was no excuse for the explicit language she used, and that the statement was offensive and hurtful to Ms. Huang.

61. Ken Johnson went to the benefits unit later that morning. Both Complainant and Ms. Huang were visibly upset by the incident. Mr. Johnson recommended to Ms. Huang that action be taken before Ms. Layton-Root returned to the office the following Monday. Mr. Johnson asked Complainant if she needed to go home. Complainant said she would try to work in her office.

62. Ms. Okes was informed of the incident by Mr. Johnson, and Monica Cortez-Sangster, DPA HR Director. Ms. Okes then spoke with Ms. Huang about the incident. Ms. Huang was very upset.

63. Neither Ms. Huang nor Ms. Layton-Root reports to Ms. Okes. Ms. Okes has general authority over DPA employee matters.

64. Ms. Okes determined that Complainant was emotionally unstable and a security threat. Ms. Okes decided that Complainant should be escorted out of the building that day.

65. Ms. Okes requested the DPA employees who observed the incident to provide written statements to Ms. Layton-Root. They did so, and the witness statements were sent to Ms. Layton-Root over the weekend.

66. Ms. Okes drafted a letter placing Complainant on paid administrative leave and providing notice of the Board Rule 6-10 meeting. The letter stated the possible need to administer disciplinary action "based on your interaction with your supervisor on Friday, June 22, 2012 and other interactions you have had with your supervisor and coworkers." Ms. Okes delivered the letter to Complainant about 11 a.m. accompanied by a patrol officer. Complainant was escorted from the building.

Board Rule 6-10 Process

67. Ms. Okes set the Board Rule 6-10 meeting for Monday, June 25, 2012, at 9 a.m.

68. Complainant was unable to find a representative or attorney over the weekend.

69. Complainant attended the Rule 6-10 meeting without a representative or attorney. She did not request a continuance of the meeting. Ms. Layton-Root attended the meeting on behalf of Respondent. There is no recording of the meeting.

70. The witness statements obtained on June 22, 2012 were not provided to Complainant at the Rule 6-10 meeting. Ms. Layton-Root did not identify the witnesses or relay what they had said. She did, however, walk through a collective summary of their statements.

71. During the Rule 6-10 meeting, Complainant admitted to cursing at Ms. Huang on June 22, and to following Ms. Huang to her office. She brought a letter with her to the meeting. The letter provided a written apology for verbally "lashing out" at her supervisor and acknowledged there was no excuse for her behavior. Further, the letter stated that while Complainant was willing to accept the discipline Ms. Layton-Root deemed appropriate, she hoped to be given a chance to redeem herself.

72. Complainant and Ms. Layton-Root also discussed other interactions Complainant has had with co-workers over the years, including the Jennifer Okes phone conversation, the arm touching incident with Ms. Thornton, the February 2012 phone conversation with Ms. Huang, and the May 2012 teambuilding exercise.

73. During the Rule 6-10 meeting, Complainant stated that she was depressed and suffered from anxiety, and that these feelings were exacerbated by the loss of her mother.

Disciplinary Action

74. Prior to the subject disciplinary action, Complainant never received a disciplinary action or corrective action.

75. Ms. Layton-Root decided to terminate Complainant's employment. The written notice of action was issued to Complainant on Friday, June 29, 2012.

76. The notice of action states that Respondent decided to issue disciplinary action under Board Rule 6-12 due to Complainant's "willful misconduct based on your interaction with your supervisor, Sue Huang, on Friday, June 22, 2012 and other interactions you have had with your supervisor and coworkers." The notice does not detail the other interactions relied on. Additionally, the notice states that while Complainant's personnel record contained positive statements about her performance, it contained "a few statements of concern related to the pattern of the behaviors you have displayed most recently with your supervisor, coworkers and me [Ms. Layton-Root] over the last two months." The notice does not specify the statements of concern or the behaviors. It does, however, state that Complainant "acknowledged the misconduct you displayed in the two instances we discussed." The letter does not identify or describe the two instances.

77. The notice also states that co-workers "have expressed a range of concerns about you because of these incidents. Some employees are uncomfortable in your presence

while other employees are afraid of you."

78. At hearing, Respondent did not prove that any employees were afraid of Complainant. For instance, although Respondent asserted that Ms. Huang felt threatened by Complainant, at hearing, Ms. Huang did not testify that she felt threatened or was fearful of Complainant.

79. In making the decision to terminate Complainant's employment, Ms. Layton-Root primarily relied on the June 22, 2012 incident. She reviewed witness statements from the incident. Ms. Layton-Root also reviewed Complainant's personnel file and supplemental information Complainant provided at the meeting. She believed that the incident alone was sufficient to support a decision to terminate Complainant's employment because the behavior was unacceptable and aggressive. Complainant used egregious language, and Ms. Layton-Root considered it terminable behavior for a first offense. Ms. Layton-Root was aware that Complainant had previously been on FMLA leave.

80. In making the decision, Ms. Layton-Root also considered the February 2012 phone conversation between Ms. Huang and Complainant, the 2009 incident with Ms. Thornton, Ms. Okes' recollection of the 2003-04 call with Complainant, Complainant's personnel record, and her May 2012 counseling sessions with Complainant.

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 Board Rule 6-12, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed some of the acts for which she was disciplined. The June 29, 2012 termination notice states that Complainant was terminated for "willful misconduct based on your interaction with your supervisor, Sue Huang, on Friday, June 22, 2012 and other interactions you have had with your supervisor and coworkers."

The appointing authority placed primary reliance on Complainant's outburst on June 22. This incident led to Complainant's immediate placement on paid administrative leave, and was the focus of the June 25 Board Rule 6-10 meeting. It is the only incident specifically referenced in the termination notice, and was the crux of Respondent's case at hearing.

Respondent proved that Complainant committed the June 22 acts for which she was disciplined. There is no dispute that Complainant and Ms. Huang engaged in a heated argument in the open area of the DPA benefits unit the morning of June 22. Ms. Huang attempted to end the conversation, and Complainant followed her to the kitchen and back towards their respective offices. Complainant's voice was loud and angry. Most importantly, there is no dispute that towards the conclusion of the incident, Complainant said "Fuck you, Sue" in a voice that was loud enough for several DPA employees to hear. The statement distressed other DPA employees, particularly Ms. Huang.

Respondent also disciplined Complainant for "other interactions you have had with your supervisor and coworkers." With regards to other interactions with Ms. Huang, Respondent proved that Ms. Huang and Complainant had a tense conversation regarding the committee membership that resulted in Complainant hanging up the phone on Ms. Huang. At the time of the conversation in February 2012, Ms. Huang was in the hospital visiting her terminally ill mother. However, Complainant was unaware that Ms. Huang was in the hospital at the time of the conversation.

The May 23, 2012 team building exercise was also discussed at the Rule 6-10 meeting. At hearing, Respondent proved that Complainant became very emotional, cried, and abruptly left the May 23 meeting. Respondent also proved that over the years, Complainant occasionally became emotional and cried, which had an adverse effect on her co-workers. She also cried during the May 2012 coaching sessions with Ms. Layton-Root.

Respondent proved that in 2009, Complainant facilitated a meeting in which Ms. Thornton and Ms. Kohler engaged in a very heated argument that resulted in Ms. Thornton leaving the room. Complainant grabbed Ms. Thornton's arm to speak with her, and Ms. Thornton asked Complainant to release her, which Complainant did. No corrective action or disciplinary action resulted from this incident. Ms. Fassler, Complainant's supervisor at the time, did not believe that Complainant was at fault for the incident.

Lastly, Respondent did not prove that Complainant hung up the phone on Ms. Okes in 2003 or 2004. There was conflicting testimony regarding this conversation, and in the absence of a written record, Respondent did not prove this action by a preponderance of the evidence.

In summary, Respondent proved that Complainant cursed at her supervisor in an open area on June 22, 2012. Further, Respondent demonstrated that Complainant hung up the

phone on Ms. Huang on February 2, 2012, following a tense conversation. Respondent proved that Complainant became very emotional and cried on different occasions over the past few years, including at the May 23, 2012 teambuilding exercise. Lastly, Respondent demonstrated that Complainant grabbed Ms. Thornton's arm in an effort to speak with her after a meeting in 2009.

B. The appointing authority's action was arbitrary, capricious, and 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).

The Appointing Authority's Action Was Arbitrary And Capricious

Respondent's action was arbitrary and capricious under *Lawley.* First, Respondent did not use reasonable diligence and care in its investigation. Complainant received the Board Rule 6-10 notice at approximately 11 a.m. on Friday, June 22. The written notice set the Board Rule 6-10 meeting for the following Monday, June 25, at 9 a.m. This immediate setting did not provide Complainant with a meaningful opportunity to obtain representation or otherwise prepare for the meeting. Because Complainant was already on administrative leave[1], there was no compelling reason to hold an immediate Rule 6-10 meeting.

The Rule 6-10 notice did not provide Complainant with much detail about the topics to be discussed at the meeting. While the Rule 6-10 notice specifically referenced the June 22 incident, it generally noted "other interactions you have had with your supervisor and coworkers" as a basis for possible discipline. The notice did not detail the other interactions which would be discussed at the meeting.

The Rule 6-10 meeting suffered from several problems. There is no recording of the meeting. By Ms. Layton-Root's admission, she did not identify the witnesses or the specific witness statements at the meeting. Rather, she provided Complainant with a summary of the witness statements regarding the June 22 incident. At the meeting, in addition to discussing the June 22 incident, Ms. Layton-Root and Complainant discussed various other interpersonal issues, including incidents dating back nearly a decade to 2003-04. At the time these incidents occurred, Respondent did not issue Complainant a corrective action or disciplinary action. Respondent did not provide Complainant with contemporaneous notice that corrective action or disciplinary action could result from these particular incidents.

The termination notice also failed to fully explain the bases for the decision to terminate Complainant's employment. Within the week of the Rule 6-10 meeting, Ms. Layton-Root made

[1] Immediately following the June 22 incident, Ms. Okes placed Complainant on paid administrative leave. Given Complainant's language and emotional outburst, her immediate placement on administrative leave was reasonable.

the decision to terminate Complainant's employment. Despite the fact that other incidents formed the basis for the decision, the only incident specifically referenced in the termination notice is the June 22 confrontation. Like the Rule 6-10 notice, the termination letter generally referred to other incidents, but did not identify them.

Accordingly, when the Rule 6-10 process is viewed in its entirety, Respondent did not use reasonable diligence and care in its investigation.

Second, Respondent failed to give candid and honest consideration of the evidence before it on which it was authorized to act in exercising its discretion, and exercised its discretion in such a manner after consideration of evidence before it as clearly to indicate that its action was based on conclusions from the evidence such that reasonable individuals considering the evidence must reach contrary conclusions. *Lawley*, 36 P.3d at 1252. In particular, as set forth below in detail, Respondent's decision to terminate Complainant's employment failed to comply with Board Rule 6-9. The decision did not take into account significant mitigating circumstances, Complainant's satisfactory work history, and the absence of any corrective or disciplinary actions in Complainant's personnel file. In light of all the factors required to be considered under Board Rule 6-9, the decision to terminate Complainant's employment was excessive.

Moreover, Respondent's reliance on interpersonal issues that were not specifically identified in the notices, some of which dated back years, rendered the action arbitrary and capricious. For instance, the incident with Ms. Thornton occurred nearly three years before the subject action. The incident was fully investigated, and Complainant did not receive a corrective action or disciplinary action from it. Likewise, the February 2012 conversation with Ms. Huang did not result in any contemporaneous personnel action. Respondent's use of these incidents to bolster its decision was arbitrary and capricious.

Respondent Violated Board Rule 6-10, But The Violation Constituted Harmless Error

As set forth above, Respondent provided Complainant with one-half of a work day to obtain representation for the Rule 6-10 meeting. Complainant, however, did not request a continuance of the meeting or state that she wished to retain a representative for the meeting. Because Complainant did not request a continuance of the meeting, the timing of the meeting did not violate Board Rule 6-10 or procedural due process. *See Berumen v. Dep't of Human Services*, 2012 COA 73, 11CA0640, ¶ 28 (Colo. App. 2012) (the required notice need not be given far in advance of the meeting to satisfy procedural due process).

The Rule 6-10 notice only identified the June 22 incident with specificity. While the better practice would have been to specifically identify the other interactions to be discussed, the absence of such a description in the notice did not violate the terms of Rule 6-10. *Berumen*, 2012 COA 73, at ¶ 21 (Board Rule 6-10 requires notice at the meeting of the reason for potential discipline).

At the Rule 6-10 meeting, the appointing authority did not provide the witness names to Complainant. In failing to identify the sources of information, Respondent violated Board Rule 6-10, which requires the appointing authority to disclose the source of the information unless prohibited by law. *Berumen,* 2012 COA 73, at ¶ 29 (by its terms, Rule 6-10 provides for notice of the charges, an explanation of the reason for the potential discipline, disclosure of the source of that information, and an opportunity for the employee to respond).

Although the failure to identify the sources of information constituted a technical violation of Board Rule 6-10, in this case, it was harmless error. Prior to the meeting, Complainant drafted a letter apologizing for her actions on June 22. She presented this letter to Ms. Layton-Root at the meeting. Although some of the details regarding the incident were disputed by the parties, the essence of the incident was never in dispute. Complainant had an opportunity to respond to the reason given for potential discipline. Under these facts, any violation of Board Rule 6-10 was harmless error.

In short, Respondent violated Board Rule 6-10 in not identifying the sources of information. However, due to the fact that Complainant did not dispute swearing at Ms. Huang, the violation was harmless.

Respondent Did Not Violate Board Rule 6-2

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. In her ten year career with the state, Complainant had not previously received a corrective action or disciplinary action. Accordingly, under Board Rule 6-2, the issue is whether the act or acts for which she was disciplined were so flagrant or serious that disciplinary action was proper.

In contending that progressive discipline was unnecessary in this case, Respondent argued that Complainant's action on June 22 was flagrant and serious enough, in and of itself, to warrant immediate discipline. Complainant cursed at her supervisor in an open area in a loud voice heard by several of her co-workers. As Complainant acknowledged, there was no excuse for the vulgar and abusive language. The language is patently offensive and inappropriate. Employees should not be exposed to expletives in the workplace. Additionally, Ms. Huang had attempted to stop the conversation, but Complainant followed her to the kitchen and back. Under these facts, Complainant's action on June 22 was sufficiently serious and flagrant under Board Rule 6-2 to warrant immediate discipline.

Respondent Violated Board Rule 6-9

The decision to take disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, 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.

As set forth above, Complainant's behavior on June 22 was serious and caused distress to her co-workers. Complainant acknowledged that there was no excuse for her behavior on June 22. In the first place, Complainant's yelling at her supervisor in a hallway was unacceptable behavior. Second, the profane word uttered by Complainant was egregious, offensive, and hurtful. The words caused Ms. Huang significant distress.

At hearing, Respondent attempted to demonstrate that Complainant previously engaged in similar behavior. However, the other incidents relied on by Respondent are different in nature. In particular, while the incidents demonstrate that Complainant occasionally became emotional and cried, they generally do not reveal that she verbally abused her colleagues. Prior to the subject disciplinary action, Complainant did not receive notice that these incidents constituted significant work performance issues. Moreover, to the extent Respondent relied on

other actions to support the termination decision, the actions were not serious enough to warrant termination under Board Rule 6-9.

First, in the 2009 incident involving Ms. Thornton, Complainant was attempting to calm Ms. Thornton down when she touched her arm in an effort to get her attention. The matter was investigated and no disciplinary or corrective action resulted. Ms. Fassler, Complainant's supervisor at the time, did not believe Complainant was at fault.

Second, in the February 2012 telephone conversation with Ms. Huang, Complainant was unaware that Ms. Huang was at the hospital visiting her mother. The two disagreed over the committee membership makeup. Although it was not appropriate for Complainant to hang up the phone on Ms. Huang, following the incident, Ms. Huang wrote that there was no need for Complainant to apologize. Complainant did so, and also sought CSEAP counseling to help manage her work frustrations. No corrective or disciplinary action was taken after the incident. Additionally, the incident was not noted in Complainant's 2011-12 performance evaluation, prepared by Ms. Huang.

Third, in the May 2012 teambuilding exercise, Complainant became emotional and abruptly left the training room. After she composed herself and took anti-anxiety medication, Complainant returned to the room and completed the exercise. This session shortly followed the significant personal issues Complainant confronted in spring 2012. The exercise which prompted Complainant to lose her composure was an exercise requiring Complainant to create and discuss with the group a family coat of arms. Although Complainant met with Ms. Layton-Root in late May regarding the incident, no written reprimand or any similar action followed.

The discipline imposed must also take into account Complainant's previous performance history and evaluations. Complainant never previously received a corrective or disciplinary action. She consistently received satisfactory performance reviews over her ten year career with DPA. Although Respondent argued that prior actions demonstrated Complainant's interpersonal failings, she never received a written reprimand for such actions. Moreover, other than a "needs improvement" in the 2008-09 performance evaluation related to her supervisory struggles with certain employees, Complainant's performance evaluations did not put her on notice that her interpersonal relations with co-workers were a significant issue. For instance, the most recent evaluation, signed by both Ms. Huang and Ms. Layton-Root, stated that Complainant communicated effectively with team members. Moreover, her performance evaluations and commendations manifest her extensive knowledge and subject matter expertise in the benefits arena.

Here, there were also significant mitigating circumstances. Complainant suffers from anxiety and depression. In fall 2011, she was approved for intermittent FMLA leave to care for three family members – her father, mother, and brother. Complainant's mother broke her hip in February 2012 and was moved to hospice care. Complainant then went on full FMLA leave to care for her mother, who passed away in March 2012. Two months later, Complainant put her dog down. These life events, coupled with Complainant's diagnosed anxiety and depression, must be considered.

Additionally, the stresses affecting Ms. Huang must be taken into account. Ms. Huang's mother was also terminally ill and passed away in spring 2012. In her role as Interim Benefits Manager, and due to significant personnel changes in DPA, Ms. Huang was under considerable stress. The work environment was very tense. On June 22, both Ms. Huang and Complainant raised their voices at each other in the hallway. They were arguing with one another.

In short, Respondent's actions in terminating Complainant's employment violated Board Rule 6-9. Although Complainant's actions on June 22 were serious enough to warrant discipline, the decision to terminate Complainant's employment did not adequately consider her overall performance history, performance evaluations, and the abundant mitigating circumstances.

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

As set forth above in discussion section (B), the termination of Complainant's employment was not within the range of reasonable alternatives because it failed to take mitigating circumstances, the lack of prior adverse personnel actions, and Complainant's work history into consideration. Moreover, at hearing, Respondent provided little information to suggest that the appointing authority adequately considered lesser alternative forms of discipline.

Board Rule 6-12(B)

Under Board Rule 6-12(B), 4 CCR 801, if an ALJ finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified. As set forth above, the decision to terminate Complainant's employment was arbitrary and capricious and contrary to Board Rule 6-9. In light of Complainant's solid performance history over ten years, and the significant mitigating circumstances, Respondent's decision to terminate Complainant's employment was too harsh and not within the range of reasonable alternatives.

Board Rule 6-12(B) authorizes the Board or an ALJ to order that the discipline imposed be modified. Here, based on the totality of the circumstances, the ALJ concludes that a disciplinary action up to a suspension without pay for 30 days is the maximum discipline permitted by the range of reasonable alternatives. The appointing authority may therefore consider disciplinary action up to the level of a suspension without pay for no more than 30 days. Because more than 30 days have elapsed since the termination, the amount of back pay shall be reduced accordingly if the appointing authority imposes a suspension without pay.

Additionally, the appointing authority may require Complainant to attend CSEAP counseling sessions. If necessary, the appointing authority may also require Complainant to obtain a fitness to return certificate prior to reinstatement.

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

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).

Complainant did not demonstrate that the action was instituted frivolously, in bad faith, maliciously, groundlessly, or as a means of harassment. Complainant lost her temper and cursed at her supervisor in the earshot of co-workers. Over the years, although not disciplined for it, Complainant has struggled to maintain her emotions resulting in disruptive crying. Under

these circumstances, Respondent's decision to impose disciplinary action against Complainant was not frivolous or groundless. Although the decision to terminate Complainant's employment violated Board Rule 6-9 and was outside the range of reasonable alternatives, it was not frivolous or groundless for Respondent to issue a disciplinary action given the egregious nature of Complainant's speech against Ms. Huang.

In short, the conclusion that Respondent's decision was arbitrary, capricious, contrary to rule or law, and outside the range of reasonable alternatives is not equivalent to a conclusion that the decision was frivolous or groundless, or made in bad faith or maliciously. Complainant did not demonstrate that Respondent's actions or decisions met any of these criteria. 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 committed some of 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.

ORDER

Respondent's action is **rescinded.** Complainant is to be reinstated to her former position as a GP VI, Benefits Strategist. Complainant is to receive back pay and benefits, with statutory interest, retroactive to the date of June 29, 2012. Respondent may, however, issue a disciplinary action in the form of a suspension without pay for up to 30 days. In such an event, the amount of back pay and benefits shall be reduced accordingly. Complainant is responsible for her attorney fees. Respondent may require Complainant to attend CSEAP counseling, and if necessary, may require a fitness to return certificate prior to Complainant's reinstatement.

Dated this 2nd day of November, 2012 at Denver, Colorado.

[redacted]

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

CERTIFICATE OF MAILING

This is to certify that on the 2nd day of November, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Nora V. Kelly, P.C.

[redacted]

Joseph F. Haughain A.A.G.

[redacted]

[redacted]

Andrea C. 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.