STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B029

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RANGER GEREMAIA,
Complainant,

vs.

COLORADO DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on December 13 and 21, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. Sabrina Jensen, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Robert Haley, formerly the Region 6 Director of Administrator and Complainant's appointing authority. Complainant appeared and was represented by Nora V. Kelly, Esq.

MATTERS APPEALED

Complainant, a certified Transportation Maintenance II (TM II), appeals the termination of his employment on the grounds that the decision was arbitrary, capricious, and contrary to rule or law. Complainant asks for reinstatement to his position, back pay, and other relief as determined by the ALJ. The Colorado Department of Transportation (Respondent or CDOT) argues that the termination was properly imposed after Complainant improperly used state resources by filling the water tank on his personal vehicle to take water to his horses, not being truthful about the issue with his appointing authority, and using unsafe pothole filing procedures on several occasions. Respondent asks that the discipline be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**.

ISSUES

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

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of reasonable alternatives; and

4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

Background:

1. Complainant was first hired by Respondent as a Transportation Maintenance I (TM I) in December of 2000. In 2007, Complainant was promoted to heavy Equipment Operator III (HEO III). Complainant was promoted from the position of a HEO III to a TM II in August of 2009.

2. Complainant was employed by CDOT in Region 6. Region 6 of CDOT covers the Denver metro area. The Mary area is within Region 6, and includes the territory between 6th Avenue and State Highway 7, and from State Highway 93 to Lochbuie.

3. There are patrols working within areas of Region 6. Each patrol has its own shed or facility building. TM I, TM II, and TM III employees are assigned to a patrol. Complainant worked at patrol 5 while he was a TM I. Complainant has worked as a TM II in several patrols in the Mary area. Complainant worked at Patrol 28 until early in 2010, when he was transferred to Patrol 19. Complainant was then transferred to Patrol 5 as a TM II.

4. At all times during the timeframe material to this appeal, Robert Haley was the Region 6 Director of Administration and Complainant's appointing authority.

5. David Haley, who is no relation to Robert Haley, was the Labor and Trades Craft Operations I (LTC Ops I) for the Mary area, which meant that he was the highest-ranking CDOT official in that area.

Workplace Safety for a Highway Work Site:

6. TM IIs are trained to organize a safety plan called a Method of Handling Traffic, or MHT, for each work site. The MHT is created by the employee who is serving as the Traffic Control Supervisor, or TCS, for the work site.

7. As the TM II on work crews assigned to highway repairs, Complainant was responsible for creating a safety plan for the work, and communicating that safety plan in a tailgate meeting with all of the employees who will be working on the site prior to the start of the work. A tailgate meeting is to include a job safety analysis, a method for handling traffic, references to the policies, procedures, written and verbal directions applicable to the job, and the preparation of a material safety data sheet. The tailgate meeting report is to be provided to the direct supervisor for approval and filing.

8. The safety plan for any highway repair included details such as lane closure plans and the positioning of vehicles, such as an attenuator truck. An attenuator truck is a vehicle that is built to absorb some of an impact from a vehicle that collides with it. The trucks have arrow boards on the back so that works can set the lights to indicate that cars should move over.

9. Respondent's policies instruct that mobile operations on expressways and freeways are to utilize advance warning signs and lane closures, unless the Region Transportation Director waives that requirement. Emergency work on freeways, expressways and arterials "may be conducted without a lane closure when a uniformed law enforcement office in a marked vehicle is present with their warning lights flashing."

10. In repairing a pothole with a law enforcement officer present, an attenuator truck is to be positioned behind the hole, with the law enforcement vehicle behind the truck. Another vehicle,

such as a one-tone pickup truck, should be positioned in front of the hole. This arrangement of vehicles creates a protected space where the workers can repair the hole without having to move into a lane with traffic.

11. Respondent's policies do not permit workers to not close the lanes to be worked on, wait for pauses in traffic in order to quickly move over to the pothole, unload a shovel of patching material into the hole, and head back to the shoulder. Such a procedure places workers in the position of entering and working in lanes of traffic while they are unprotected by any vehicle. This method of patching holes, known as "throw and go's," have been disallowed by Respondent's management as an unsafe procedure.

12. Training on proper safety procedures, including the fact that "throw and go's" were not permissible, had been made a regular part of Respondent's training of patrol members. Complainant has been trained on work zone awareness and gone through Respondent's safety academy.

Workplace Complaint:

13. A TM I, Robert Gonzales, left Respondent's employment in October of 2011. In his unemployment insurance hearing, Ms. Gonzales argued that he had quit his employment because of a hostile work environment created by Complainant. When Respondent learned of the hostile work environment claim, Respondent assigned Don Benavidez of the Employee Relations /Legal section top investigate the allegations.

14. Mr. Gonzales' claims included that he had been told by Complainant to perform unsafe work, that Complainant had made threats of violence, and that Complainant had called him rude names and made fun of his ethnicity.

15. Mr. Benavidez interviewed seven individuals about Mr. Gonzales' claims: Complainant, four members of Complainant's patrol (R. Jones. C. Beaver, J. Gutierrez, and H. Hayhurst), and two of Complainant's supervisors (D. Spenser and D. Haley). Mr. Benavidez' interviews were completed between February 14 and March 15, 2012.

16. Complainant admitted to Mr. Benavidez that he had performed a "throw and go" without a lane closure and without law enforcement as recently as a few weeks before his interview.

17. Two patrol employees reported that Complainant had them perform "throw and go's" to patch potholes. The third patrol member reported that Complainant had told him to use a "throw and go" method, but that he had told Complainant that he would not because they were not supposed to do so. This employee reported that Complainant had called him a "rat" after he had refused to use the method. The fourth patrol employee did not report an unsafe instruction from Complainant. Complainant's supervisors denied any knowledge of unsafe patching practices by Complainant.

18. On the issue of ethnic harassment and rude names, Mr. Benavidez asked all of his interviewees if Complainant had subjected them to ethnic harassment or heard Complainant subject others to such harassment. One of the patrol employees reported that Complainant had made racial comments in his presence about others, such as African Americans and Hispanics. A second patrol employee reported that Complainant had called him rude names, such as rat, lazy, and worthless. The remaining four interviewees, including Complainant's supervisors, reported no knowledge of Complainant using rude names or ethnic harassment.

19. On the issue of threats of violence, Mr. Benavidez found that five of the employees interviewed reported no threats of violence directed at them by Complainant or witnessed by them. The sixth employee, a patrol member, reported that he had not been threatened by Complainant, but that there were times when Complainant's voice and language had been aggressive, and that Complainant would use derogatory comments at times.

20. Mr. Benavidez issued his report on Robert Gonzales' allegations to Robert Haley on or about March 15, 2012.

21. After reviewing the report, Robert Haley assigned the Region 6 Safety Officer, Giovanni Ciddio, to examine the descriptions of the work being performed by Complaint's patrol, and to investigate whether the events are consistent with appropriate safety measures. Mr. Ciddio was also asked to evaluate a sample of work orders from Patrol 5 to determine if the appropriate safety related documents were developed by the TM II and reviewed and approved by a supervisor.

22. Mr. Ciddio looked for tailgate talk paperwork from January and February 2012 for roadway patches performed by Patrol 5. Of the 21 work orders that met that description from that ti4m period, Mr. Ciddio pulled nine files to check for the appropriate tailgate meeting paperwork. Mr. Ciddio found no paperwork supporting that a tailgate meeting had been held in any of the nine work orders.

June Safety Complaint:

23. On Friday, June 15, 2012, a driver on eastbound Interstate 76 complained to CDOT that a maintenance worker had jumped out in front of her vehicle from the side of the road with a shovel full of asphalt to fill a pothole that was located between the lanes on eastbound I-76. The complaint placed the workers near the Pecos exit on I-76.

24. The complaint was assigned to the Region 6 Safety Officer, Giovanni Ciddio, for investigation and training recommendations. The LTC OPS for Complainant's area, David Haley, was also assigned to participate in the investigation.

25. Upon investigation, Mr. Ciddio and David Haley determined that Complainant and a second TM II, Tim Martinez, had been filling potholes in two spots in the area.

26. Complainant and Mr. Martinez had been picking up debris in that area. TM III Alan Martinez had instructed Complainant and Tim Martinez to fill the two sets of potholes while they were working in the area. There were five potholes in those two spots. The potholes had been present for some time by the time TM II Martinez had instructed Complainant and TM II Martinez to address the issue.

27. Complainant and Mr. Martinez took a one-ton pickup truck along with an attenuator vehicle.

28. The first pothole group was located in a traffic lane near the right shoulder of I-76. Complainant and Mr. Martinez did not close the lane. They put up caution signs of roadwork. Complainant and Mr. Martinez came across a Colorado State Patrol (CSP) officer making a traffic stop. The officer agreed to park his cruiser with lights behind the attenuator truck. The attenuator truck, in turn, was parked so that it blocked a portion of the right hand lane that was

just in front of the pothole. This arrangement provided a space for both workers to fix the pothole while not being in an active lane of traffic.

29. The second pothole area was close to the Federal Boulevard exit on I-76. The potholes in this area were located in the right hand lane, not far from the centerline with the left hand lane. The far right exit lane for Federal Boulevard was also beginning not far from where the CDOT trucks were parked.

30. Complainant and Tim Martinez parked the one-ton pickup and the attenuator truck on the shoulder, with a little bit of the attenuator parked into the right traffic lane. The CPS officer initially parked behind the attenuator truck. No lane closure was created. Complainant and Tim Martinez took turns walking out to the pothole when traffic was not coming to fill the hole using buckets of filler and then shovels of filler. While the second man was out in the roadway filling the pothole, the first man watched traffic.

31. As the hole was filling, the CSP officer moved from his spot and told Mr. Martinez that he had an emergency call and he had to go. The CSP officer left. After the CSP officer left, Complainant and Mr. Martinez continued to fill the pothole.

32. Mr. Ciddio concluded that Complainant and Mr. Martinez were performing unsafe "throw and go" pothole repairs, which was not an approved CDOT method to repair potholes. Mr. Ciddio and David Haley issued his report to Robert Haley by memo dated August 14, 2012.

33. Tim Martinez received a corrective action for unsafe actions with regard to his work on June 15, 2012.

Personal Use of State Resources:

34. On Saturday, July 14, 2012, Complainant was not on duty. He drove his personal truck to Patrol 21, which is a CODT facility located near his residence. Complainant has a 300 gallon water tank mounted to the back of his personal truck.

35. Complainant leases 38 acres of pastureland near the Patrol 21 shed. Complainant has four to seven horses, and two to four head of cattle on the land. The property does not have a well or other water source on it. Complainant hauls water out to his livestock each time he goes to the property. Complainant has a tank that holds 325 gallons mounted on the back of his pick up truck.

36. While at Patrol 21, Complainant opened the bay door and filled up the water tank water tank with water from CDOT.

37. Another CDOT employee, TM I David Livesay, saw Complainant at Patrol 21 while he was filling up the water tank on his truck. Mr. Livesay reported his observation to his supervisor, TM III Alan Martinez. Mr. Martinez passed the information on to his supervisor, LTC Ops 1 David Haley.

38. David Haley began an inquiry into the allegations by asking for written statements from Mr. Livesay and Mr. Martinez.

39. Mr. Haley also requested that the electronic logs which show which employee badges were used to open doors at Patrol 21 for the time period in question.

40. The electronic log information confirmed that Complainant's badge was used to enter Patrol 21 at about 12:36 PM on July 14, 2012.

41. On July 19, 2012, David Haley told Complainant that he needed Complainant to come to his office.

42. Mr. Haley asked Complainant whether he had been at the Patrol 21 shed. Complainant agreed that he had been there. Mr. Haley asked Complainant why he was at the shed, Complainant explained that he was obtaining water for his horses by filling his water tank. Mr. Haley asked how big Complainant's water tank was, and Complainant told him that it was a little over 300 gallons.

43. Mr. Haley asked Complainant how often he filled up at the shed. Complainant told Mr. Haley that he had done so in the past, but that the time in July was probably the first time that year.

44. Complainant asked Mr. Haley if this was a problem. Mr. Haley told Complainant that it could be problem for him because it was like stealing. Complainant's reply was that it was just water that he had taken.

45. Mr. Haley repeated back the main details to Complainant, which were that he had taken the water was for his horses and that he had a 300 gallon tank. Complainant agreed with Mr. Haley's summary statement.

46. Complainant did not mention having his son with him during the visit to the shed.

The Board Rule 6-10 Process:

47. By memo dated July 23, 2012, Robert Haley informed Complainant that a Board Rule 6-10 meeting would be held on July 30, 2012. The basis for the meeting was information on theft of state property and safety violations.

48. Complainant attended the meeting without a representative. Complainant brought a document with him to provide to Mr. Haley. Robert Haley attended the meeting with a representative from Human Resources, Fred Longs.

49. At the beginning of the meeting, Mr. Haley showed Complainant a three page outline of the purpose of the meeting and the issues to be discussed. This outline listed the three incidents to be discussed: the allegations by Robert Gonzales that Complainant had the patrol working in an unsafe manner and that Complainant had used rude names and ethnic harassment; the June 15, 2012 "throw and go"; and the July 14, 2012 obtaining state water for personal uses.

50. During the Board Rule 6-10 meeting, Complainant denied that he had been taking state water for his horses on July 14 2012. Complainant instead explained that he had gone to Patrol 21 on his day off to allow his son to use the restroom, and that they had taken only enough water to fill two personal water bottles.

51. Complainant also denied that the descriptions of his actions and instructions that had been provided by the patrol members to Mr. Benavidez were accurate representations.

Complainant admitted during the meeting that he had performed a throw and go on June 18, 2012.

52. At the conclusion of the meeting, Robert Haley told Complainant that Complainant could submit whatever other information he wanted Mr. Haley to consider by August 96, 2012. Complainant submitted an email memo dated August 6, 2012.

53. After the Board Rule 6-10 meeting, Robert Haley communicated with David Haley to make certain that the information he had received was correct. Robert Haley told David Haley that Complainant had said that David Haley misunderstood him. David Haley told Robert Haley that he had been very specific in his questions with Complainant, and that Complainant had admitted to taking the water.

The Decision To Terminate Complainant's Employment:

54. Robert Haley concluded that Complainant's prior admission to David Haley that he had taken water for his horses was the truth, and that such action represented a misuse of state resources. Mr. Haley also considered Complainant's later denial to him during the Board Rule 6-10 meeting to represent a credibility problem for Complainant.

55. Mr. Haley also concluded that Complainant had been using unsafe work practices with his patrol, including a pothole repair that had resulted in a citizen complaint in June 2012, and instructions to members of Patrol 5 to use similar unsafe practices.

56. Mr. Haley did not consider the allegations by Mr. Gonzales concerning ethnic slurs or workplace violence to be sufficiently supported to constitute a basis for discipline.

Complainant's Performance History:

57. Mr. Haley considered the events at issue to be too severe to warrant imposition of only a corrective action.

58. Mr. Haley considered all of Complainant's prior performance history in reaching his decision on the level of discipline to impose.

59. Mr. Haley reviewed Complainant's Region 6 personnel file. Complainant's annual performance reviews have given Complainant an overall rating of at a least a level 2 on a three-point scale, or an overall rating of good (or second) level in the years when the review used a four-point scale. For the performance review period of 2008 – 2009, Complainant received an overall score of 3 on a three-point scale.

60. Complainant has also received a prior disciplinary action, several corrective actions, and several negative performance documentations.

61. Complainant was disciplined in 2003 for using a state snowplow on March 19, 2003, to plow his girlfriend's apartment complex. The incident was revealed when Complainant had an accident with a parked car at the apartment complex parking lot. During the investigation of that incident, Complainant had denied that he had plowed the lot, suggested instead that the lot had been hand shoveled by the residents, said that he had slid sideways off the surface street and

into the lot, and argued that the fact that the accident occurred in his girlfriend's apartment complex was a coincidence. Further investigation revealed that Complainant's version of his accident was not credible. Complainant was disciplined through imposition of a disciplinary suspension without pay for nine days.

62. Complainant had received a performance documentation form in 2003 that noted that he needed to improve his working relationships with team members.

63. Complainant received a corrective action in September 2006 for participating in the escalation of an argument with a co-worker to the point where Complainant told the co-worker that he would fight him any time and any place.

64. Complainant received a performance documentation form in January 2010 for using an unsafe procedure while working on a plow blade.

65. Complainant received a corrective action in June 2010 for having an unprofessional interaction with a subordinate employee, David Livesay, during an argument.

66. Complainant was also transferred in 2010 from Patrol 28 to Patrol 5 because of a traffic control plan that Complaint implemented that several other workers found to be unsafe. The incident did not result in Complainant being given a corrective or disciplinary action for the safety plan. Instead, Robert Haley and David Haley attempted to resolve the issue by transferring Complainant to a patrol that did less work on major highways.

67. Complainant had an accident in September of 2010 in which he scratched a car while making a turn.

68. Complainant also received a performance document for an incident in which he thought he was raising the plow of the truck but instead was raising the bed of the truck, causing the box on the back to break free of its restraining straps and slide off the truck.

69. Robert Haley considered these incidents to create a pattern of using state resources inappropriately, interacting inappropriately with co-workers, and engaging in unsafe behavior and disregarding safety protocols. Mr. Haley was also concerned that Complainant appeared to have a credibility issue in both the 2003 incident concerning the use of the plow for his girlfriend's parking lot, as well as the use of state water resources for his horses.

70. Mr. Haley considered lesser sanctions such as transfers, reductions in pay, or a demotion, but concluded that such sanctions would be unlikely to change Complainant's patterns of behavior. Mr. Haley had also previously tried to resolve an issue with a transfer and that transfer did not seem to result in a change in behaviors.

71. Mr. Haley determined that Complainant's behavior in the incidents under review, combined with his history of behavior, warranted termination of employment.

72. By letter dated September 6, 2012, Robert Haley informed Complainant that he had found his actions to be a failure to perform competently, and a willful violation of the rules that affects Complainant's ability to perform the job. Mr. Haley informed Complainant that his employment would be terminated at the end of September 6, 2012.

73. Complainant filed a timely appeal of the termination of his employment with the Board

DISCUSSION

I. GENERAL

A. Burden of Proof

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

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

Complainant argued at hearing that he had not taken water from Patrol 21 in the manner described by David Haley. One of the core evidentiary issues, therefore, concerns whether or not Respondent could prove by a preponderance of the evidence that Complainant had taken water from Patrol 21 for his personal use.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer").

The water issue posed a factual dispute requiring a credibility assessment. Respondent's case was founded upon the assertion that Complainant had confessed to taking the water to David Haley, and then changed his story when interviewed by Robert Haley during the Board Rule 6-10 meeting, and at hearing. Respondent's version of events was credible at

hearing. David Haley was a persuasive witness who had a clear memory of asking Complainant about filling up the water tank on his personal truck. Mr. Haley understood the potential seriousness of the issue when he asked Complainant about his visit to Patrol 21. This was not a casual interaction with Complainant that became important only after the conversation. Mr. Haley also memorialized his interview with Complainant in an email to Robert Haley shortly after the interview. Additionally, there was no indication that David Haley had any history with Complainant or other reason which might negatively bias him against Complainant.

Complainant's testimony, on the other hand, did not appear to remain consistent throughout his presentation of the facts, and his demeanor on the stand did not support a finding of credibility. As a result, Respondent has been able to demonstrate by a preponderance of the evidence that Complainant filled his water tank at Patrol 21 for his own personal use, and then did not tell the truth about the incident when questioned later by Robert Haley and at the hearing.

On the issue of whether Complainant had been using an unsafe "throw and go" method for filling potholes, Complainant challenged only the conclusion that he had been working in an unsafe manner. The testimony of the Region 6 Safety Officer, Mr. Ciddio, and the experience of LTC Ops David Haley, however, were persuasive explanations of how the safety regulations for Complainant's functions were intended to be applied. The evidence at hearing demonstrated by a preponderance of the evidence that Complainant was using an unsafe throw and go method for filling potholes. Complainant's own insistence that this method of completing the work was legitimate also supports that he had been telling his patrol members to use such methods as well. Respondent, therefore, has been able to demonstrate by a preponderance of the evidence that Complainant used an unsafe procedure when addressing some of the potholes on I-76 on June 15, 2012, and that he had been expecting members of his patrol to use such as procedure as well.

As a result, Respondent has successfully demonstrated by a preponderance of the evidence that Complainant has committed the acts for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule, although it was contrary to law in one regard.

(1) Respondent's decision to impose discipline was neither arbitrary nor capricious:

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's actions in this case were neither arbitrary nor capricious. The evidence at hearing demonstrated that Robert Haley took the steps that were necessary to thoroughly

investigate Complainant's performance. He gathered and reviewed all of Complainant's personnel file from Region 6. He ordered investigations of various allegations by Region 6 personnel with expertise in the subject matters at issue, such as Mr. Ciddio's review of safety practices and Mr. Benavidez' review of Robert Gonzales' allegations. The evidence at hearing supported that Mr. Haley carefully reviewed the reports that he had received. Mr. Haley also allowed Complainant to submit materials to him, and reviewed those materials as part of his consideration.

Additionally, the evidence introduced at hearing demonstrated that Mr. Haley gave candid and honest consideration to all of the information he had collected, including the information that Complainant had presented to him. Moreover, the conclusions that Mr. Haley reached as to the facts of the incidents were reasonable conclusions based upon the evidence he had reviewed.

Accordingly, Respondent's decision to discipline Complainant was neither arbitrary nor capricious.

(2) Respondent's action was not contrary to rule or law:

A. Board Rule 6-9:

Respondent's action in taking disciplinary action comports with Board Rule 6-9, 4 CCR 801, which requires that a decision to take disciplinary action "shall be based on the nature, extent, seriousness, and effect of the act, the 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. Information presented by the employee must also be considered."

The evidence at hearing demonstrated that Robert Haley took Complainant's work history with Respondent into account in reaching his decision. The record established that Mr. Haley had taken Complainant's good work reviews and performance documentation into account when considering whether to take disciplinary action in this case. It was reasonable, however, for Mr. Haley to consider that Complainant had now twice demonstrated a willingness to use state resources for his own purposes, and then to not be truthful about those incidents when pressed. It is also not unreasonable for Mr. Haley to consider Complainant's denials that he had performed any unsafe activities when he use a "throw and go" method for filling potholes to be a significant safety issue and an indication that Complainant's performance as a TM II was significantly deficient.

There was no violation of Board Rule 6-9 in Respondent's decision that the nature, extent, and seriousness of the violations in the case required the imposition of discipline.

B. Progressive Discipline:

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper."

Complainant argues that Complainant's performance history does not include a corrective action for sufficiently similar acts that would allow Respondent to impose discipline in this case rather than a corrective action.

Board Rule 6-2, however, does not require that there be a corrective action in every instance prior to the imposition of discipline. In this case, the two types of incidents that Complainant was found to have committed were violations that were flagrant and serious, particularly because of Complainant's reactions to the issues being raised. The matter of taking water from Patrol 21 includes both the use of state property for personal use as well as Complainant's willingness not to tell the truth when challenged on the issue. Complainant's improper use of state property is compounded when he also chooses not to be truthful when confronted with the problem to the point of making the issue into a serious and flagrant violation of Complainant's obligations to the state. The matter of using unsafe "throw and go" procedures is also a significant matter when the employee is a TM II charged with maintaining the safety of work zones. Complainant's continued insistence that the procedures were not unsafe, however, creates a flagrant and serious safety issue to which Respondent must respond.

Under such circumstances, Respondent's decision to impose discipline is not a violation of Board Rule 6-2.

C. Board Rule 6-10:

Board Rule 6-10, 4 CCR 801, provides, in relevant part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Complainant objected at hearing to two aspects of Respondent's compliance with Board Rule 6-10.

First, Complainant objected to not being told at the Board Rule 6-10 meeting that TM I David Livesay was the one who had spotted him at Patrol 21 and had informed Alan Martinez. Complainant and Mr. Livesay had previously had an argument/altercation that had resulted in a corrective action being lodged against Complainant. Complainant contends that the fact that it was David Livesay who had reported him should have been disclosed to him as part of the Board Rule 6-10 as the "source of that information."

At the Board Rule 6-10 meeting, Complainant and Robert Haley talked only about what David Haley had reported about Complainant's version of events. At hearing, only David Haley testified about the water issue. It was David Haley's first-hand version of Complainant's statements to him, along with the results of David Haley's investigation into the issue, that was the basis for the finding that Complainant had admitted to taking the water from Patrol 21 for his own personal use. As a result, the important information on the water use allegation comes from David Haley, and not from Mr. Livesay. Under such circumstances, it was a reasonable decision that David Haley should be disclosed as the source of the information for purposes of the Rule 6-10 meeting.

Second, Complainant also argued at hearing that David Haley's investigation into Complainant's actions at Patrol 21 was a violation of Board Rule 6-10 because it did not involve the procedural steps which the rule requires for a Board Rule 6-10 meeting, such as a proper notice and the involvement of the appointing authority. Complainant's reading of Board Rule 6-10, however, is overly broad and too restrictive. The rule comes into play only once an appointing authority has determined that there may be a reason to impose discipline. That

reason will often be the product of the investigation conducted by a lower-level supervisor, as was the case here. There is nothing in Board Rule 6-10, however, which prevents or limits the ability of lower-level supervisors from making their own inquiries or conducting investigations into performance issues that have come to their attention.

There was no violation of Board Rule 6-10 in this matter.

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

The final issue is whether termination was within the range of reasonable alternatives available to Respondent.

Complainant argues that the seriousness of the events here has been overstated and do not support the sanction of termination. Complainant points to the fact that Tim Martinez received only a corrective action for his role in the June 15, 2012, filling of potholes using a throw and go method, and to Complainant's evaluation that buying 300 gallons of water would only cost a dollar or so.

Complainant's argument does not take into account his previous disciplinary and corrective action history, as well as the fact that Complainant has compounded his problem by falsely denying some of the fact and by arguing that, no matter what the safety regulations say, he does not believe that his actions were unsafe. Under such circumstances, Robert Haley's conclusion that no lesser sanction would be likely to improve Complainant's performance is a reasonable conclusion to reach. Termination of employment is within the range of reasonable alternatives available to Respondent in this case.

D. An award of attorney fees and costs is not warranted.

Attorney fees are warranted in a personnel action has been instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party who requests the award bears the burden of proof.

In this matter, Complainant has not been successful in persuading the ALJ that his version of events was correct, or that there was material reason to doubt Respondent's version of events. Complainant has also not shown that any action taken by Respondent was unreasonable, given what Respondent was learning and being told about the events in question. As a result, there are no grounds to award Complainant attorney fees and costs.

CONCLUSIONS OF LAW

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

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

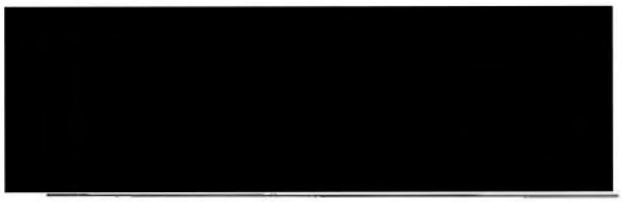
3. The discipline imposed was within the range of reasonable alternatives.

4. An award of attorney fees and costs is not warranted in this case.

ORDER

Respondent's disciplinary action is **affirmed.** The termination of Complainant's employment is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 4th day of February, 2013 at Denver, Colorado.



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

CERTIFICATE OF MAILING

This is to certify that on the 5th day of February, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Nora V. Kelly, Esq.

[redacted]

Sabrina Jensen

[redacted]

[redacted]

Andrea Woods

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.