STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B049

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ISIS RICH,
Complainant,

vs.

COLORADO DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES, DRIVER'S LICENSE SECTION,

Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on March 1, 2013 and May 10, 2013, at the State Personnel Board, 633 17th Street, Denver, Colorado. The record was closed on May 13, 2013, after preparing Complainant's exhibits for inclusion in the record and copying. Sabrina Jensen, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Laurie Benallo, Operations Director of the Driver's Licensing Section and Complainant's appointing authority. Complainant appeared and represented herself.

MATTERS APPEALED

Complainant, a certified Driver's License Examiner I, appeals the termination of her employment on the grounds that the decision was arbitrary, capricious, and contrary to rule or law. Complainant also alleged that her termination was a violation of the State Employee Protection Act (Whistleblower Act). Complainant asks for reinstatement to her position, back pay, and other relief as determined by the ALJ. The Colorado Department of Revenue (Respondent or DOR) argues that the termination was properly imposed after Complainant was heard quoting improper costs to potential customers over the phone, and then failed to charge a DOR investigator the proper cost for a license and processed the investigator's payment as if he had paid a dollar less than he actually paid to Complainant. Respondent argues that such information makes it more likely than not that Complainant was taking small amounts of money from customers by overcharging them and keeping the money. Respondent also argues that Complainant failed to present any evidence to support her Whistleblower Act claim. Respondent asks that the termination be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**, and that other terms related to the discipline are **modified**.

HEARING 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; and

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

FINDINGS OF FACT

Background:

1. Complainant began her employment as an Examiner Intern in December of 2009. She was promoted to Driver's License Examiner I (DLE I) by July of 2010.

2. Complainant worked in the Steamboat Springs Driver's License office with the office manager, John Holland. Mr. Holland's direct supervisor was Pamela Hardwick, the Region IV manager. At all relevant times, Complainant's appointing authority was Laurie Benallo, the Driver's License Operations Director.

3. As a DLE I, Complainant handled the office work related to requests for driver's licenses and other similar documentation. She would answer phone calls for information on driver's licenses. Complainant would also process the entire transaction when someone arrived at the office for a driver's license or related document, such as a non-driver's license identification card. As a DLE I, Complainant was responsible for a cash drawer. Complainant would start the day with a drawer with $50 in cash. The office manager, Mr. Holland, would also have a cash drawer. At the end of each day, DOR policy required the drawers to be counted and reconciled with the computer system accounting of the amounts paid to the office that day.

4. DOR sets specific fees for each type of service. At all relevant times in this matter, a driver's license cost $21. A motorcycle endorsement on that license cost an additional $2. The office accepted only cash or checks. The DOR computer system tracked the costs of each type of service automatically. The employee handling the financial part of the transaction would not need to enter the amount to be paid into the system for the service because the system would recognize the fee associated with the specific transaction.

5. DOR also required each employee to ask customers if they wished to donate a dollar or more to the Donor Awareness Fund (DAF). Employees are instructed that they are simply to ask if the customer would like to make a donation, and then move on to the next question. When customers agree to donate to the fund, the employee handling the financial part of transaction would be responsible for entering the amount donated into the system so that the added amount would register in the computer as a DAF contribution. If the employee did not add the donation amount to the computer, then the system would not recognize that a donation had been made. If no entry had been made to record the donation, then employee's drawer should show an overage of the donation amount at the end of the day when the drawer was counted.

Substitute Staffing:

6. In July of 2012, Mr. Holland was absent from the Steamboat Springs office for two days. During the period that the office was understaffed, Ms. Hardwick arranged for an employee from the Craig office to assist Complainant in the Steamboat Springs office.

7. The Craig employee, Kelly Corson, was a trainee at the time of her assignment. Ms. Corson was assigned a $50 cash drawer, and she performed the other functions necessary to process a driver's license such as taking photos and fingerprinting.

8. While Ms. Corson was in the Steamboat Springs office with Complainant, she overheard Complainant on the phone quoting customers an incorrect fee amount for a driver's license and endorsements. The amount that Complainant was quoting to customers for a driver's license was $22, which is a dollar more than the authorized fee for the license.

9. Ms. Corson asked Complainant why Complainant provided an incorrect price for services over the phone. Complainant told Ms. Corson that she quoted people a cost that higher than the DOR fee so that when they arrived at the office they would have enough money with them to make a DAF donation.

10. Ms. Corson reported what she had overheard, and Complainant's explanation, to Ms. Hardwick when Ms. Corson was asked to work again at the Steamboat Springs office in early August of 2012.

11. Ms. Hardwick reported her conversation with Ms. Corson to Ms. Benallo. Ms. Benallo held a phone meeting with Ms. Corson so that Ms. Corson could tell Ms. Benallo what she had overheard and been told while working at the Steamboat Springs office.

12. After speaking with Ms. Corson, Ms. Benallo took the matter to the DOR investigation division for an investigation into whether there was a problem of overcharging at the Steamboat Springs office.

DOR investigation:

13. On August 7, 2012, DOR Chief Investigator Francine Mendez assigned three investigators to go to the Steamboat Springs Driver's License office and apply for driver's license services from Complainant. Ms. Mendez told the investigators that she had received information that led her to believe that Complainant was collecting one dollar more than was required by the State of Colorado for each document that she processed. The investigators were provided with photos of Complainant and Mr. Holland.

14. Investigators Darin Icardi, Briana Hemming, and Toni Casper drove to Steamboat Springs on August 8, 2012.

15. Mr. Icardi entered the Steamboat Springs office at about 9:55 AM on August 8, 2012. He recognized Complainant from her photo. Complainant was the clerk who handled Mr. Icardi's transaction.

16. Mr. Icardi told Complainant that he needed to replace his lost driver's license and needed a new driver's license with a motorcycle endorsement. Complainant asked Mr. Icardi if he had proof of identity and proof of address. Mr. Icardi provided her with his vehicle registration and vehicle insurance card.

17. The fees in effect at the time for a driver's license and a motorcycle endorsement were $21 for the license and $2 for the endorsement. Complainant asked Mr. Icardi if he had check or cash for $24, and he assured her that he did. Complainant asked Mr. Icardi if he wanted to donate to the Donor Awareness Fund, and Mr. Icardi told her that he did not want to donate.

18. Complainant made entries into the computer system and then had Mr. Icardi take the Department of Motor Vehicles eye test. After Mr. Icardi completed the eye test, Complainant asked him for $24 cash or check. Mr. Icardi pulled out two $20 bills from his front pants pocket and handed the bills to Complainant. Complainant took the $40 and returned a total of $16 to Mr. Icardi.

19. Complainant handed Mr. Icardi a paper temporary driver's license document and asked Mr. Icardi to verify his information on the document. Mr. Icardi told her that it was correct, and Complainant had him sign the document. Complainant took a fingerprint of Mr. Icardi's right index finger. Complainant then took Mr. Icardi's photo for his permanent license, and returned the paper temporary license document to him.

20. The paper temporary license document (also known as the "dec form") lists the fees that the computer system shows have been paid beneath the applicant's signature line. The document that was prepared for Mr. Icardi showed that there was a fee assessed of $23.00 and that there had been no donation made to the Donor Awareness Fund. Complainant is listed as the examiner for the license.

21. Investigator Hemming entered the Steamboat Springs office at approximately 10:10 AM. Ms. Hemming was served by Mr. Holland. Mr. Holland did not overcharge Ms. Hemming for the replacement driver's license that he provided to her.

22. Investigator Casper entered the Steamboat Springs office at approximately 12:55 PM on the same date. Complainant handled Ms. Casper's request for a replacement driver's license. Complainant did not overcharge Ms. Casper for the license.

23. The DOR investigators returned to Denver after completing the license requests. Mr. Icardi created a report documenting the results of the three requests for replacement driver's licenses.

Administrative Leave and the Board Rule 6-10 Process:

24. Once Ms. Benallo learned of the results of the DOR investigation into Complainant's actions, she determined that Complainant should be placed on paid administrative leave.

25. By letter dated August 8, 2012, Ms. Benallo informed Complainant that she was on administrative leave. In the same letter, Ms. Benallo also scheduled a Board Rule 6-10 meeting with Complainant for 4:00 PM on August 13, 2012. Ms. Benallo informed Complainant that the purpose of the meeting was "to discuss information that has come to my attention involving your possible involvement in overcharging customers for their driver's licenses."

26. Ms. Benallo sent the letter to Mr. Holland on August 8, 2012, for Mr. Holland to provide to Complainant. Mr. Holland requested that the meeting be held prior to 4 PM because Complainant would need to return to Steamboat Springs that evening after the meeting, and a late afternoon meeting would mean it would be likely to cause a nighttime return. Ms. Benallo agreed to move the meeting, and rescheduled it for 2 PM.

27. Mr. Holland lent Complainant his car to make the trip from Steamboat Springs to Denver for the August 13, 2012 meeting.

28. At the Board Rule 6-10 meeting, Ms. Benallo had Andrew Gale, Respondent's Director of Human Resources, attend the meeting as her representative. Complainant attended and had her mother, Laura Rich, present as her representative. Complainant also brought her young daughter to the meeting.

29. During the meeting, Complainant told Ms. Benallo that she didn't recall overcharging a customer. Complainant told Ms. Benallo that she did not take the funds. Complainant also talked about the need for better cash controls in the office, and said that the officer manager had a practice of putting IOUs into the cash drawers.

30. Ms. Benallo provided Complainant with three days to offer any additional information that she wished to present.

The Investigation Of The Missing Bank Bag:

31. Shortly after August 17, 2012, Mr. Holland reported to his superiors that the bank deposit from August 6, 2012, had not been deposited and was missing. The missing amount totaled approximately $855. Bank deposits were one of Mr. Holland's responsibilities at the office.

32. Investigator Icardi was assigned to interview Mr. Holland and Complainant concerning the missing deposit bag. Investigator Icardi travelled to Steamboat Springs on August 24, 2012.

33. Complainant, Complainant's mother, and Complainant's young daughter had just moved to a new home at the time of the interview. Complainant provided Investigator Icardi with instructions on how to find her new home. The interview was conducted in Complainant's living room.

34. At the start of the interview Complainant handed Investigator Icardi a $1 bill, and told him to take the money and that she was sorry she overcharged. At first, Investigator Icardi refused to take the bill. He explained that providing him with a dollar was not the way to handle the situation. Complainant then dropped the dollar bill into Investigator Icardi's lap. Investigator Icardi took the dollar and later provided it to Ms. Benallo.

35. Respondent did not suspect that Complainant was responsible for the missing bank deposit. Shortly after the missing bank bag investigation was completed, Mr. Holland was relieved of his duties because of a lack of effective financial controls in the office.

The Decision To Terminate Complainant's Employment:

36. Ms. Benallo conducted additional investigation into the allegation that Complainant was overcharging customers.

37. Ms. Benallo had the IT department run the contributor data for the period of May 1 through July 31, 2012, to determine who had been the examiner providing services at the Steamboat Springs office and the number of donations received by each examiner during that period. Ms. Benallo compiled the raw data provided to her by the IT department.

38. Ms. Benallo's compilation of the data resulted in her determination that Complainant performed services for 1218 customers during that period, and that she had

entered donation amounts from 17 of those customers. Those figures meant that Complainant had performed 60.4% of the transactions for the office, and collected donations from 1.4% of her customers.

39. Ms. Benallo also compiled the data for Mr. Holland. Mr. Holland produced 789 transactions during the same period. He collected donations from 296 of his customers, which meant that Mr. Holland collected donations from 37.5% of his customers.

40. Ms. Benallo also compiled different data from the daily log lists for the same time period concerning the daily deposits made, the daily shortages and overages, the number of documents issued by Complainant and Mr. Holland, and the number of donation contributions logged by each staff member. This compilation of information indicated that, for the period of May 1, 2012 through July 31, 2012, Complainant logged a total of $23.00 in donations, while Mr. Holland logged $324.00 in donations. The records also showed that, in that three-month time period, the daily accounting figure showed that the office was short on three dates, and was over on only one date during that period.

41. Ms. Benallo also reviewed the donation percentage records from two other offices in Delta and Montrose, and found that the employees of those offices had collected from a low of $451 to a high of $1826 for the same three-month time frame.

Complainant's Performance History:

42. Ms. Benallo considered that Complainant's performance history had been good, with the exception of an incident in 2011 for which Complainant received a disciplinary action.

43. By letter dated March 2, 2012, Ms. Benallo had issued a disciplinary letter to Complainant concerning Complainant's statements made as part of her application appeal for insurance coverage for her daughter. Ms. Benallo found that Complainant had submitted a fraudulent document to support her application for insurance coverage for her daughter.

44. Ms. Benallo found that the use of a fraudulent document in support of Complainant's benefits appeal was an extremely serious matter for an employee who was expected to watch for, and report, any attempted fraudulent activity. In determining the severity of her disciplinary response to the incident, Ms. Benallo took into account that Complainant's performance in the previous two years had been good and without disciplinary incident, and that her supervisor spoke highly of her and her character and did not believe that the incident was an indicator of Complainant's character. Ms. Benallo also noted that Mr. Holland had told her that he had not seen transactions processed by Complainant, "that he found questionable, suspicious, or deliberately contrary to procedure."

45. Ms. Benallo concluded that the appropriate disciplinary sanction was to delay Complainant's scheduled promotion to DLE II for a six-month period of time. Complainant was to be eligible for promotion again as of July 31, 2012.

46. Complainant did not appeal the March 2, 2012 disciplinary action.

47. When Ms. Benallo considered Complainant's disciplinary history along with the allegations in this incident, she was concerned that Complainant had been involved in two incidents in a year that involved Complainant making false statements to benefit herself. Ms. Benallo considered this incident to be Complainant's second attempt at committing a fraud, and

that such actions were sufficiently untrustworthy to bar Complainant from working with money. Ms. Benallo did not have a position to which Complainant could be demoted that did not involve the handling of money.

48. Ms. Benallo concluded that termination of Complainant's employment was the most appropriate response to Complainant's involvement in overcharging customers.

49. By letter dated September 14, 2012, Ms. Benallo informed Complainant that she had concluded "that you were overcharging customers for the DL services and keeping the money," and that such actions constituted "willful misconduct resulting in the theft of state property." Ms. Benallo announced that the appropriate disciplinary action was to terminate Complainant's employment effective close of business on September 20, 2012.

Delivery of the Termination Letter:

50. On August 24, 2012, Complainant's mother, Ms. Rich, had called Ms. Hardwick shortly after the conclusion of Mr. Icardi's interview with Complainant concerning the missing bank deposit. Ms. Rich told Ms. Hardwick that John Holland had not provided Mr. Icardi with the correct address and telephone number for Complainant's new home. Ms. Rich provided Ms. Hardwick with a phone number and the address of "Whitehaven #17." Ms. Hardwick passed this information along to Mr. Icardi, Ms. Benallo and Ms. Mendez by email.

51. Mr. Icardi recognized the name Whitehaven as the name of the trailer park where he had interviewed Complainant. He informed Ms. Hardwick, Ms. Benallo, and Ms. Mendez that the street address for Complainant's new home would be Whitehaven Mobile Home Park, 29935 West US Highway 40, #17, Steamboat Springs, CO 80488.

52. Respondent sent the termination letter to Complainant via certified mail on September 14, 2012. The address on the envelope was the address that Investigator Icardi had confirmed as the place where he had met Complainant and her mother for the interview on August 24, 2012.

53. The U.S. Postal Service returned the letter to Respondent with the notation "Unable to Forward."

54. On or about September 27, 2012, Complainant received a Fed Ex package that contained a payroll check, but no explanation for the money. Complainant's mother, Ms. Rich, called Mr. Gale and told Mr. Gale that Complainant had received a payroll check and that she didn't understand why she had received it. Mr. Gale told Ms. Rich that he needed to speak with Complainant.

55. On the same day, Complainant emailed Mr. Gale to inquire about the reason for the check. Mr. Gale informed Complainant that her employment had been terminated and that the check was her final check that accounted for her annual and sick leave. Complainant told Mr. Gale that she had not received a termination letter.

56. Mr. Gale sent Complainant a copy of the termination letter by email on September 27, 2012.

57. The version of the letter that Mr. Gale provided to Complainant on September 27, 2012, had an incorrect date in the first paragraph indicating that the discipline was to be

effective September 9, 2012. The final paragraph of this version of the letter listed September 20, 2012, as her final day of employment, and provided Complainant with a correct statement of her appeal rights and appeal deadline. This version of the termination letter was the first version of the termination letter that had been sent to Mr. Gale for inclusion in Complainant's file. Mr. Gale had also received a corrected copy of the termination letter, but he did not send the corrected version to Complainant.

58. Complainant filed an appeal of the termination of her employment with the Board. Complainant's appeal form was postmarked on October 4, 2012. Complainant included with her appeal a statement from the Steamboat Springs Postmaster that provided the correct street address for Complainant's home as 2453 Lincoln Avenue, #17, Steamboat Springs, CO 80487-4902.

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. XII, §§ 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 some of the acts for which she was disciplined.

Ms. Benallo found, as the factual basis for her decision to impose discipline, that Complainant was "overcharging customers for the DL services and keeping the money."

Complainant argued repeatedly at hearing that she had not improperly charged customers, and that she had had not lied, cheated and stolen from the agency. Two of the core evidentiary issues, therefore, concern whether or not Respondent was able to prove by a preponderance of the evidence that Complainant had incorrectly charged customers for license

fees, and whether Respondent has proven by a preponderance of the evidence that Complainant kept the money.

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"). As the finder of fact, an administrative law judge may accept parts of a witness' testimony and reject other parts. *Gordon v. Benson*, 925 P.2d 775, 778 (Colo. 1996)(noting that "[a] witness can be correct in remembering one fact and incorrect in remembering another based on factors such as differences in opportunity to perceive and tricks of memory. A witness also may falsify some parts of his or her testimony while otherwise testifying truthfully").

Overcharging Allegation:

Respondent presented two sources of evidence in support of its charge that Complainant was overcharging customers.

First, another DOR employee, Kelly Corson, testified that she overheard Complainant on the phone telling potential customers the wrong prices for licenses. She also testified that, when she asked Complainant why she had made such statements, Complainant told Ms. Corson that she did so that the customers would come with extra money to make a donation. Ms. Corson's testimony at hearing was credible. There was no reason to believe that Ms. Corson had any history with Complainant that biased her against Complainant. Ms. Corson's affect and demeanor at hearing were also as a truthful witness. Just as importantly, Complainant presented no persuasive reason to believe that Ms. Corson's recollection was incorrect or mistaken. Additionally, Complainant did not present any persuasive reason to believe that there was an innocent explanation for her statement in answer to Ms. Corson's question.

Second, Respondent presented the testimony of a DOR investigator, Darin Icardi. Complainant argued at hearing that Mr. Icardi's testimony showed that he did not correctly remember all of the details of his visit to the Steamboat Springs office. Additionally, Complainant objected that he had not said anything when he had paid $24.00 and received a receipt for $23.00, even though she asked him as part of her processing whether everything was correct. Mr. Icardi, however, was a credible witness at hearing. He knew when he entered the Steamboat Springs office that he intended to apply for a license service that would cost a total of $23. He was also aware that the allegation was that Complainant overcharged by a dollar, so he knew in advance that his job would be to determine if he had been overcharged as little as a dollar. Mr. Icardi's decision to allow Complainant to process his request the way she wanted to do so, and his failure to object to the overcharging, were intentional parts of the investigation.

Additionally, Mr. Icardi testified to Complainant's admission during the investigation interview on August 24, 2012, when Complainant returned the dollar to Mr. Icardi. This interaction took place after the August 13, 2012 Board Rule 6-10 meeting and, therefore, after Complainant had been told she was suspected of overcharging. Complainant's return of the

dollar is an admission that she did overcharge Mr. Icardi.

This evidence persuasively demonstrates that, in July and August of 2012, Complainant was knowingly and purposefully overcharging at least some customers of the Steamboat Springs office.

Allegation that Complainant Kept The Money:

Ms. Benallo did not limit her claim merely to that Complainant was overcharging customers. Ms. Benallo also included the allegation that Complainant was keeping the money that she overcharged, and that Complainant's actions had "result[ed] in the theft of state property."

Ms. Benallo's main testimony on this point at hearing was that the accounting system at Respondent's offices has a gap in the way that it accounted for donations to the organ donor awareness fund. The system is designed so that it requires the employee to specifically add the donation amount to the computer system. Such a system allows for the possibility that an employee does not add the donation to the record but instead keeps the donation amount out of the system.

Respondent also attempted to prove this point through the submission of computer records on donations. Specifically, Respondent presented evidence drawn from two data bases concerning the relative rates of donations to the organ donor fund. Complainant argues that these records are unreliable and pointed to a number of instances in which the records appear to be incomplete or to contain inconsistent details. The records do appear to include some inconsistencies within the data, and are also inconsistent when the two sets of records are compared. Ms. Benallo, however, was a credible witness when she testified that the data was provided to her by Respondent's information technology section, and that the data originated from the Steamboat Springs office. It is likely that the methods used by the Steamboat Springs office to enter the data in the first place have created the discrepancies noted in the records. As a result, while there may be some data which is off on some dates, the reports still appear to be accurate overall reflections of what the employees of the Steamboat Springs office reported to DOR.

As a result, Respondent presented credible evidence that Complainant's recorded donation level was significantly below the level of donations processed by the office manager, Mr. Holland, and was significantly below that of the donation levels in two other western region offices.

Such evidence, however, does not show the essential elements of a theft claim; that is, that there was money missing from DOR and that Complainant was the one who kept the money.

The investigation conducted by DOR concerned whether Complainant would overcharge a customer. The investigation did not move to a second step and determine that there was money taken from the office, and then determine who had taken it. Respondent did not introduce persuasive evidence, for example, that Complainant's drawer was counted on the date that Investigator Icardi provided Complainant with an extra dollar in order to investigate whether that dollar was still in the drawer or not. There was also no evidence produced that Complainant's drawer contained any checks for higher amounts than expected, with the implication being that cash must have been taken out of the drawer to produce an overall

accounting of the drawer for the expected amount.

It is also important to note that Complainant was not the only employee in the office with access to customer payments, and that the office suffered a loss of a daily deposit in roughly the same time period that Complainant is accused of keeping customer funds for herself. The apparent lack of effective financial controls at the office creates an additional reason to investigate more fully whether any money provided to Complainant was actually missing from her drawer, and whether any loss can be traced back to her handling of the money rather than Mr. Holland's handling of the funds.

Respondent's conclusion that such theft had occurred is based upon the suspicion that, if Complainant was overcharging, she must also have been keeping the extra funds. Such a suspicion is not an unreasonable reaction to the evidence, and it is a good reason to investigate further. In order to be successful in sustaining the claim of theft at a *de novo* hearing requiring proof by a preponderance of the evidence, however, Respondent must produce more than just an uncorroborated suspicion that Complainant was committing theft in addition to overcharging customers.

In short, while there is some reason to suspect that Complainant kept some of the money that she collected from customers, Respondent did not establish this point by a preponderance of the evidence at hearing. For the same reason, Respondent's statement in the termination letter of September 14, 2012, which refers to the conduct as "resulting in the theft of state property," was also not supported by sufficient evidence at hearing.

As a result, Respondent has successfully demonstrated that Complainant was overcharging at least some of her customers in July and August of 2012, but not that she was keeping the money for herself or that a theft had occurred. The remainder of the analysis of whether Respondent's action was arbitrary, capricious or contrary to rule or law must be examined in light of the proven allegation only.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

(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 Ms. Benallo took reasonable steps to investigate the information offered by Ms. Corson, and that she gathered a variety of types of information to attempt to determine whether the allegations were true. Complainant has not persuasively demonstrated

that Respondent failed to examine any important information related to the allegation that Complainant was overcharging customers.

Additionally, the evidence at hearing demonstrated that Ms. Benallo fairly and carefully evaluated the evidence that was collected during the entire investigation process related to the allegation of overcharging customers, including the information she gathered from Complainant and Complainant's supervisor, Mr. Holland. The evidence at hearing also demonstrated that Ms. Benallo reached a reasonable conclusion with regard to the issue of whether Complainant was overcharging customers.

Respondent's conclusion that Complainant was overcharging customers was neither arbitrary nor capricious.

(2) Respondent's action was not contrary to rule or law, except for the notice requirements of C.R.S. § 24-50-125(2):

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 Ms. Benallo met the requirements of Board Rule 6-9 in that she considered the extent and seriousness of the events under review in this matter, as well as by taking Complainant's prior disciplinary action into account in determining whether discipline should be imposed in this case.

Complainant objected at hearing to Ms. Benallo's use of the March 2012 disciplinary letter and the facts that she had found in that earlier incident as part of the consideration in this case. Complainant argued that she should be able to contest those matters from the earlier discipline. Complainant, however, neither appealed the earlier disciplinary matter nor won a revision of the facts as a result of a challenge. It is too late, and beyond the scope of the current hearing, for Complainant to attempt to challenge her earlier discipline. *See* C.R.S. § 24-50-125(3)("If the employee fails to petition the board within ten days [of the receipt of a disciplinary notification],... the action of the appointing authority shall be final and not further reviewable"). Ms. Benallo is entitled to use the facts that she found in that prior proceeding as part of her analysis of the present incident.

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 her 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 misconduct was a willful abuse of the DOR fees system through Complainant's knowing and purposeful provision of incorrect information to customers and charging an extra amount to customers. That type of willful misconduct constitutes acts which are so flagrant and serious that the imposition of immediate discipline is justified under the rule.

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

C. State Employee Protection Act Claim:

Complainant included a State Employee Protection Act ("Whistleblower Act") claim in her appeal, and that claim was initially part of the hearing in this case.

To create a *prima facie* showing of a violation of the Act, an employee should be able to demonstrate at least four points: 1) that she made a "disclosure of information" as that term is defined in C.R.S. § 24-50.5-102(2) and case law; 2) that she suffered a "disciplinary action," as that term is defined in C.R.S. § 24-50.5-102(1); 3) that the discipline was "on account of" her disclosure of information; and 4) that she made a good faith effort to provide her supervisor or appointing authority or member of the general assembly with the information to be disclosed prior to the disclosure. *See Ward v. Industrial Comm'n*, 699 P.2d 960, 996 - 998 (Colo. 1985). *See also Ferrel v. Colo. Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007)(holding that disclosures of information "must relate to information about agency conduct contrary to the 'public interest.' Therefore, disclosures that do not concern matters in the public interest, or are not of 'public concern,' do not invoke [the protection of the Whistleblower Act]").

Complainant bore the burden of proof of her Whistleblower Act claim. Complainant did not offer any evidence or testimony concerning a disclosure of information, or concerning a good faith effort to provide the information to a supervisor or other authorized person, during her direct testimony or during Respondent's cross-examination of Complainant. Complainant began to offer testimony regarding a disclosure of information during her re-direct testimony, but that re-direct testimony was not permitted because it was beyond the scope of Complainant's direct testimony and Complainant was already over the time limit for her testimony. .

Once Complainant rested her case-in-chief, Respondent moved under C.R.C.P. Rule 50 for dismissal of Complainant's Whistleblower Act claim. C.R.C.P. Rule 50 provides that a "party may move for directed verdict at the close of the evidence offered by an opponent..."

A directed verdict is appropriate when a review of all the evidence establishes that there is "no basis upon which a verdict in favor of plaintiff may be supported as a matter of law." *Montes v. Hyland Hills Park and Recreation Dist.*, 849 P.2d 852, 853 (Colo.App. 1992). In reviewing the evidence, the court is to view the evidence in the light most favorable to the party against whom the motion is directed. *Safeway Stores, Inc. v. Langdon*, 532 P.2d 337, 340 (Colo. 1975). When a claimant makes out a *prima facie* case, even when the facts are in dispute, the issuance of a directed verdict would be error. *Romero v. Denver & R.G. W. Ry.*, 514 P.2d 626, 629 (Colo. 1973).

By the time that Complainant closed her case-in-chief, Complainant had presented no evidence regarding any protected disclosures of information that she had made, had offered no evidence that she had alerted her supervisor or other appropriate person of the information to be disclosed, and had not offered any evidence to support a causality argument. A directed verdict on the Whistleblower Act claim was appropriate under such circumstances. Respondent's motion for directed verdict was GRANTED, and the Whistleblower Act claim was dismissed.

D. Notice Requirements of C.R.S. 24-50-125(2) and Board Rule 6-15:

State statute requires that an agency provide an employee with timely notice of any disciplinary action, or face the imposition of a sanction for failing to follow the law:

> Any certified employee disciplined under subsection (1) of this section shall be notified in writing by the appointing authority, by certified letter or hand delivery, no later than five days following the effective date of the action, of the action taken, the specific charges giving rise to such action, and the employee's right of appeal to the board. The notice shall include a statement setting forth the time limit for filing an appeal with the board, the address of the board, the requirement that the appeal be in writing, and the availability of a standard appeal form. Upon failure of the appointing authority to notify the employee in accordance with this subsection (2), the employee shall be compensated in full for the five-day period and until proper notification is received.

C.R.S. § 24-50-125(2). *See also* Board Rule 6-15, 4 CCR 801 ("Written notice of disciplinary action must be sent to the employee's last known address, by certified mail, or may be hand-delivered to the employee").

In this case, a written notice of disciplinary action meeting the substantive requirements of C.R.S. § 24-50-125(2) was generated by Ms. Benallo, but it was sent to a wrong address for Complainant. That incorrect address was inserted into this matter with a phone call from Complainant's mother, Laura Rich, when Ms. Rich called Respondent to inform the agency that there was a new address for Complainant. Ms. Rich provided the trailer park name, along with the trailer number and a phone number for Complainant. Ms. Rich's information was correct, but required additional information to be serviceable as a delivery address. It was Mr. Icardi's additional information which was incorrect. He added an incorrect road name and an incorrect zip code. The address that Respondent attempted to use to provide Complainant with a certified copy of the termination letter, therefore, was not the last known address for Complainant. Respondent's attempted delivery of the termination letter to Complainant by certified mail did not meet the requirements of Board Rule 6-15.

Additionally, Respondent was to deliver proper notification to Complainant within five days of the effective date of the disciplinary action, which meant in this case that Respondent was to notify Complainant of the disciplinary action by September 25, 2012. Respondent did not do so in this case. The first time Respondent was successful in providing Complainant with any version of the termination letter was when Mr. Gale emailed a copy of the letter to Complainant on September 27, 2013. The version of the letter that Mr. Gale sent included an error in the date listed on the first page. Complainant argues that, because of this error, she has never received a proper copy of the termination notice. In evaluating whether a letter constitutes "proper notification", however, reference to the statutory requirements in C.R.S. § 24-50-125(2) is in order. A letter which contains the required elements described in the

subsection should constitute proper notification. In this case, the letter that Mr. Gale sent to Complainant on September 27, 2012, did contain all of the elements listed in C.R.S. § 24-50-125(2), notwithstanding the typographical error on the first page.

When there has been a failure to provide the statutorily-required notice to an employee in a timely manner, the statute imposes a sanction upon the agency in the form of a requirement to provide "compensation in full" to the employee "for the five-day period and until proper notification is received." Respondent, accordingly, owes Complainant compensation in full for the period starting September 21, 2013, through and including September 27, 2013. The phrase "compensation in full" shall mean a payment to Complainant of the base pay and the value of the state-funded benefits that Complainant was entitled to as of September 20, 2013. This payment also serves as the appropriate equitable remedy for Respondent's violation of Board Rule 6-15.

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 by Respondent and does not support the sanction of termination.[1] Respondent was faced with a difficult problem, however. Overcharging customers creates several different types of issues for Respondent. It violates the basic trust that customers should have in state agency actions. It also suggests that there is active theft of funds occurring and creates a lack of trust in the involved employee. Moreover, the overcharging of a small amount of money is the type of misconduct that could be quite difficult to catch and for which it is difficult to gauge the true scope of the problem. One proven instance of overcharging could represent the totality of the issue, or could simply be the one instance that someone noticed within a practice that is quite widespread.

Ms. Benallo's conclusion in this case was that this type of willful misconduct (along with another recent issue of an additional reason to doubt Complainant's credibility) constituted sufficient reason to prohibit Complainant from handling money for DOR. This decision is a reasonable conclusion well-grounded in the facts of this case. Moreover, the fact that no other type of position was available for Complainant supports that Complainant could not continue her employment with Respondent.

Under such circumstances, termination of employment is within the range of reasonable alternatives available to Respondent in this case.

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[1] Complainant also argued at hearing that she had no notice of the Executive Order which requires ethical conduct from state employees, Executive Order D001-99, "Executive Department Code of Ethics," and should not be held to its standards. This argument is not persuasive for several reasons. First, this is a willful misconduct case. The question of whether a state employee can ever overcharge a customer is not a technical question requiring reference to policies and procedures. It is not reasonable to conclude that Complainant has never understood that she had to be honest in the way she dealt with the public and the charging of fees. Second, Complainant signed several certifications that she understood that she was required to read and know a variety of DOR policies, including the Executive Order imposing an ethical code on employees. It may well have been the case that Complainant did not take this requirement seriously, but she is bound to the terms of those policies nonetheless.

CONCLUSIONS OF LAW

1. Complainant committed part of the acts for which she was disciplined;

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law, except that the notice of Complainant's termination was delivered late, contrary to the requirements of C.R.S. § 24-50-125(2) and was not delivered to Complainant's last known address as required by Board Rule 6-15; and

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

ORDER

Respondent's termination of Complainant's employment is **affirmed.** Respondent is responsible for a payment of Complainant's base salary and benefits from September 21, 2012 through and including September 27, 2012, as a consequence of failing to provide timely notice under C.R.S. § 24-50-125(2) and for violating Board Rule 6-15. Respondent shall modify the termination letter in Complainant's personnel file to redact the reference to Complainant "keeping the money" and the reference to the conduct "resulting in the theft of state property." The payment to Complainant and the redaction shall be completed no later than 20 calendar days from the date when this Order becomes a final agency order of the Board.

Dated this 27th day of JUNE, 2013 at Denver, Colorado.

[redacted]

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

CERTIFICATE OF MAILING

This is to certify that on the 27th day of June, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Isis Rich

[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.