STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2013B092(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUG WANKER and MARK GALLEGOS,
Complainants,

vs.

COLORADO DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge ("ALJ") Tanya T. Light held the hearing in this matter on September 26, 2013, and on October 8, 9, 15, and 16, 2013 at the State Personnel Board, 633 17th Street, Denver, Colorado. Complainant Mark Gallegos' case commenced on the record on May 8, 2013. Complainant Doug Wanker's case commenced on the record on May 20, 2013. The cases were consolidated. The record closed on November 12, 2013. Senior Assistant Attorney General Stacy L. Worthington and Assistant Attorney General Heather J. Smith represented Respondent. Respondent's advisory witness was Sabrina Hicks, Manager of Employee Relations/Legal for the Colorado Department of Transportation ("CDOT"). Keith A. Shandalow represented Complainants.

MATTERS APPEALED

Doug Wanker and Mark Gallegos, Complainants, both worked as Transportation Maintenance Worker III's ("TM3's") for CDOT, prior to their disciplinary demotions to Transportation Maintenance Worker IIs ("TM2s") and corresponding reductions in pay. The demotions and pay reductions are permanent. Complainants appeal their demotions, arguing they did not commit the acts for which they were disciplined, that Respondent's actions were arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent argues that Complainants committed the acts for which they were disciplined, that its actions were not arbitrary, capricious, or contrary to rule or law; and that the demotions were within the range of reasonable alternatives.

Through this consolidated appeal, Complainants seek reinstatement to their TM3 positions, back pay, and recovery of attorney's fees. Respondent requests that the State Personnel Board ("Board") affirm the action of the appointing authority and dismiss Complainant's appeal with prejudice.

For the reasons set forth below, Respondent's disciplinary action concerning Complainant Doug Wanker is **affirmed in part and modified in part.** Respondent's disciplinary action concerning Complainant Mark Gallegos is **rescinded**.

ISSUES

1. Whether Complainants committed the acts for which they were disciplined;

2. Whether Respondent's actions were arbitrary, capricious, or contrary to rule or law;

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

4. Whether Complainants are entitled to recovery of their reasonable attorneys fees.

FINDINGS OF FACT

Complainants' Employment History with CDOT

Complainant Doug Wanker

1. Mr. Wanker began working for CDOT on December 4, 1994, and has been employed by CDOT for 18 years.

2. Mr. Wanker began as a Transportation Maintenance Worker I ("TM1"), an entry-level position, and remained a TM1 until 1998, when he was promoted to a TM2. TM1s work to ensure the safety and maintenance of roads in a defined area. Their responsibilities include trash removal, snow and ice removal, lane closures after traffic accidents, paving projects, and guard rail repairs. TM2s are the "lead" workers who work alongside the TM1s and determine and plan which projects will be accomplished on any given shift. TM2s create and submit monthly work plans to their immediate supervisors, the TM3s.

3. Mr. Wanker worked as a TM2 for seven years. Mr. Wanker was promoted to a TM3 in 2005.

4. The job description for TM3s is as follows:

> CONCEPT OF CLASS: This class describes the first-supervisory level . . . Regular work contacts with others outside the supervisory chain, regardless of the method of communication, are for the purpose of any [of] the following: Detecting, discovering, exposing information, problems, violations or failures by interviewing or investigating where the issues or results of the contact are not

known ahead of time. Advising, counseling, or guiding the direction taken to resolve complaints or problems and influence or correct actions or behaviors. The elements of formal supervision must include providing documentation to support recommended corrective and disciplinary actions ...

5. Mr. Wanker worked as a TM3 for roughly eight years until he was disciplinarily demoted to a TM2 on February 1, 2013. TM3s supervise the TM1s and TM2s, who are divided into work units called "patrols." TM3 duties include approving paperwork, performing employee reviews, reviewing construction plans, ensuring road projects are done correctly, and attending training. TM3s also respond to citizen complaints and supervise traffic control. TM3s are the first supervisory level.

6. Mr. Wanker supervised two employees whose actions will be discussed in more detail below, Rick Smith, a former TM2 who was demoted to a TM1, and Patricio Ortega, a TM1.

7. As a TM3, Mr. Wanker was responsible for two patrols of TM1s and 2s, and he had approximately 13 employees who reported directly to him.

8. TM3s have offices in "sheds," which are buildings located near or in their physical areas of responsibility. TM1s and TM2s park their personal vehicles at the sheds when they are on duty. Mr. Wanker always worked the night shift as a TM3, which was from 7:30 P.M. until 6:00 A.M. the next morning. Mr. Wanker received extra pay, known as a pay "differential," for working the night shift.

9. Mr. Wanker supervised Patrol 11. He conducted classes for Patrol 11 TM1s and 2s in order to help them promote up through the ranks of CDOT, including classes on lane closures, snow removal, and CDOT's timekeeping system. He also conducted mock job interviews with his TM1s and 2s.

10. Mr. Wanker held monthly safety meetings with Patrol 11 employees.

11. Mr. Wanker also led nightly "tail gate talks" where he and his employees discussed safety issues.

12. Mr. Wanker's immediate supervisor was Mark Carrillo, a Labor and Trades Craft Operations employee ("LTC OPS") with CDOT, who became his supervisor in 2007.

13. As a supervisor, Mr. Wanker, as well as Mr. Gallegos, underwent drug and alcohol training. They also received training concerning what kinds of indicators were necessary to give supervisors the "reasonable suspicion" required to conduct drug and alcohol testing of employees.

Complainant Mark Gallegos

14. Mr. Gallegos began his employment with CDOT on December 1, 2000 as a TM1.

15. Mr. Gallegos worked as a TM1 for six years, and was promoted to a TM2 during the 2006-2007 fiscal year.

16. In December of 2008, Mr. Gallegos was promoted to a TM3. His job description is identical to Mr. Wanker's, as quoted above in paragraph 4.

17. Mr. Gallegos supervised one employee, Albert Savala, whose actions will be discussed in more detail, who was a TM1 and has since resigned from CDOT.

18. Mr. Gallegos also worked the night shift, and his duties were identical to Mr. Wanker's. He was also demoted to a TM2 on February 1, 2013.

19. Mark Carrillo was Mr. Gallegos' immediate supervisor.

Early Rumors of CDOT Employees Drinking While on Duty and/or on CDOT Property

20. Rumors of CDOT employees drinking while on duty and/or while on CDOT property began as early as the first half of 2011. Some of the rumors began when Jamie Perez, a TM1, was investigated by the Colorado Bureau of Investigations ("CBI") for stealing large quantities of CDOT fuel.

21. During an interview with a CBI investigator, Mr. Perez stated that CDOT employees, including supervisors, frequently drank alcohol while on duty and on CDOT property. Mr. Perez was convicted of theft of the fuel and parole violation, and was fired from CDOT. He was incarcerated and is currently in prison.

22. Ms. Hicks was made aware of Mr. Perez's allegations but did not investigate because she did not find Mr. Perez credible given the fact that he was a convicted felon, and because his allegations were vague and did not include specific names or facts.

Discovery of Beer Bottles

23. In or around 2011, two CDOT employees, Randy Richards, currently an LTC OPS, and Cliff Corwin, a TM3, discovered empty beer bottles and cans on CDOT property in the King area and reported their findings up the CDOT chain of command through written reports. Any written reports that Mr. Richards or Mr. Corwin wrote about finding beer cans and bottles on CDOT property had been lost or destroyed by the time of the hearing.

24. In 2011, Bob Haley, Acting Director of Operations in Region 6, heard about Mr. Perez's allegations of employees drinking on the job. He also saw three or

four reports about empty beer cans found on CDOT property, which may be the same reports that Mr. Richards and Mr. Corwin submitted.

25. Ultimately, Mr. Haley decided that the information he received about employees drinking on the job in 2011 was not specific enough to be actionable, and therefore did nothing further.

Confirmed Incidents of CDOT Employees Drinking on the Job and/or on CDOT Property

A. The April 2011 Rockies Home Opener Night Incident

26. Rick Smith, who was supervised by Mr. Wanker, was a TM2 who worked the night shift in the King area in 2011.

27. As a lead worker in 2011, Mr. Smith's TM2 duties included organizing the TM1s and helping them prepare for the jobs each night.

28. In April of 2011, Mr. Smith was scheduled to work the night shift along with a TM1 in his patrol, Patricio Ortega, who was also supervised by Mr. Wanker.

29. On this night, Mr. Smith needed to pick up his wife's car, which was parked near Coor's baseball field in downtown Denver.

30. This night was the first Rockies home game of the 2011 season, and the bars and restaurants in the downtown area near Coors field were full of people drinking and celebrating.

31. Mr. Smith asked Mr. Ortega, whom he supervised as a lead worker, if Mr. Ortega would like to join him in calling in sick to CDOT (even though neither Mr. Smith nor Mr. Ortega were sick), and spend the night drinking instead of working.

32. Mr. Ortega agreed to do so. The two men picked up Mr. Smith's wife's car and proceeded to buy a 12-pack of Budweiser beer. They began drinking at around 8:30 P.M. in bars and in a parking lot near Coors field. They first drank the 12-pack, and then around 11:00 P.M. they bought an 18-pack of beer. Between the two of them they drank 30 beers. They consumed additional alcohol while they were in the bars. They finished drinking around 3:00 or 4:00 A.M.

33. During the time the two men were drinking, Mr. Smith's personal vehicle and Mr. Ortega's personal vehicle were parked at the shed where Mr. Wanker and Mr. Gallegos had their offices.

34. At some point in the night, Albert Savala, a TM1 in Patrol 4, and a friend and co-worker of both Mr. Smith's and Mr. Ortega's, called one of them and asked for a ride to a local hospital because his young daughter had been hurt and he needed to go to the hospital to be with her.

35. Mr. Savala was supervised by Mr. Gallegos.

36. Although it is undisputed that Mr. Smith and Mr. Ortega helped Mr. Savala get to the hospital, it is unclear who drove.

37. After dropping Mr. Savala off at the hospital, the two men eventually drove back to the shed after they finished drinking at 3:00 or 4:00 A.M. They went to the shed in order to sober up before returning home, and also because that is where their personal vehicles were parked. Because of their intoxication, neither Mr. Smith nor Mr. Ortega remembers driving back to the shed.

38. Both Mr. Smith and Mr. Ortega were still intoxicated and on CDOT property when they returned to their personal vehicles which had been parked at the shed. Mr. Ortega left the shed in his car around 5:00 A.M. When Mr. Ortega left the shed, Mr. Smith was still at the shed in his car.

39. When Mr. Smith arrived back at the shed he passed out and slept in the passenger seat of his vehicle.

40. During that night Mr. Wanker was at the shed doing paperwork until 6:00 A.M.

41. Mr. Wanker saw Mr. Smith asleep in his vehicle, which he thought was strange. Mr. Wanker walked over to Mr. Smith's side of the car and told him it was time to go.

42. Prior to that morning, Mr. Smith would sometimes nap in his car at the end of his shift for 10 to 15 minutes because once he arrived home in the mornings, he was responsible for watching his children, and he wanted to be somewhat rested before returning home.

43. When Mr. Ortega returned to work on his next scheduled work night, Mr. Wanker and Mr. Gallegos told him and Mr. Smith they wanted to meet with them about what had happened on their previous shift.

44. Mr. Wanker and Mr. Gallegos told Mr. Ortega and Mr. Smith at the Monday night meeting that they could have called the Colorado State Patrol on the two men for driving while intoxicated.

45. Mr. Wanker and Mr. Gallegos required Mr. Ortega and Mr. Smith to apologize to the other men in their patrol units for calling in sick when they were not in fact sick, but they did not require them to apologize for drinking.

46. Mr. Ortega apologized to several men on that Monday night.

47. Mr. Ortega thanked Mr. Wanker and Mr. Gallegos for not calling the State Patrol.

48. Mr. Wanker did not discipline Mr. Smith or Mr. Ortega for calling in sick when they were not really sick, or for being drunk on CDOT property.

49. Mr. Wanker did not issue corrective actions or Performance Documentation Forms ("PDFs") to Mr. Smith or Mr. Ortega for the events that occurred in April of 2011.

50. Mr. Wanker did not document the events of that evening other than possibly in a personal diary Mr. Wanker kept at his desk in the shed. When Mr. Wanker was demoted, he no longer had access to his desk or to the diary that was in the desk. When he finally was able to access the desk after several months of not being permitted to do so, the diary was gone.

51. As the direct supervisor of Mr. Smith and Mr. Ortega, it was Mr. Wanker's responsibility to issue PDFs, corrective actions, or discipline to them when necessary.

52. Mr. Smith was eventually demoted to a TM1 for his involvement in the activities of that night and other activities which will be discussed below.

53. Mr. Ortega was also disciplined.

B. The April 2012 Beer Behind Mr. Savala's Tire Incident

54. The second confirmed alcohol-related incident occurred in April of 2012.

55. In late April of 2012, Rick Smith, Patricio Ortega, and Albert Savala met together to celebrate Mr. Savala's birthday. They were not scheduled to work, nor were they meeting on CDOT property.

56. Mr. Smith purchased a 12-pack of Budweiser Light Lime beer. After that get-together approximately half of the 12-pack was gone, leaving about six cans of Budweiser Light Lime in the 12-pack container.

57. Mr. Smith drove to work with the remaining six beers in his personal vehicle the next time he worked his regularly-scheduled CDOT night shift.

58. The beer remained in Mr. Smith's vehicle for several days and nights.

59. Mr. Smith was planning on giving the leftover beer to Mr. Ortega. However, Mr. Ortega had left work after taking a class. Therefore, Mr. Smith instead left the remaining six beers in the 12-pack container for Mr. Savala by leaving the container behind the front driver-side tire of Mr. Savala's personal vehicle, which was parked on CDOT property when Mr. Smith left the beer for Mr. Savala.

60. Before Mr. Savala found the beer, another CDOT employee, Mr. David Quinones, saw the beer behind Mr. Savala's tire and told Mr. Gallegos, who was on duty that night, that there was something Mr. Gallegos should see because "it looks bad for CDOT."

61. Mr. Gallegos saw the beer and immediately called his supervisor, Mr. Carrillo, at home. He also called Mr. Savala and asked him to come to his office. These calls occurred around 3:00 or 4:00 A.M.

62. Mr. Carrillo told Mr. Gallegos to take pictures of the beer and to get statements from the employees who were involved, which Mr. Gallegos did. Mr. Carrillo also told Mr. Gallegos that he was conducting an investigation concerning employees drinking on duty, and asked Mr. Gallegos to "keep his eyes open" and let him know if he saw anything.

63. Mr. Savala came to Mr. Gallegos' office within 15 to 20 minutes of being called, and there was no indication that he had been drinking. Mr. Savala was angry when he discovered beer had been left behind his truck tire.

64. Mr. Smith told Mr. Gallegos that he had put the beer there. Mr. Gallegos instructed Mr. Smith to talk to Mr. Carrillo.

65. Mr. Carrillo asked Mr. Smith to write a summary of what happened, which he did. Mr. Smith admitted that he knew it was wrong to bring beer onto CDOT property.

66. Mr. Wanker did not issue a PDF, a corrective action, or discipline to Mr. Smith for bringing beer onto CDOT property. Mr. Wanker believed Mr. Carrillo was handling the incident.

C. Other Confirmed Instances of Employees Drinking While On-Duty or on CDOT Property

67. Mr. Smith admitted that he used to drink when he was on duty and on CDOT property, mainly in the summer and at the end of his shift before leaving in the mornings.

68. In the morning he would drink with Mr. Ortega immediately before quitting time but still during work hours. Mr. Smith also admitted to drinking with Mr. Savala two or three times either while on duty or on CDOT property. Mr. Smith never drank in a CDOT vehicle.

69. Mr. Smith also drank at what is known as the "super shed," located near I-76 and Federal Boulevard. When Mr. Smith first started at CDOT, it was a common practice for CDOT employees to sit by the river near the super shed, not on CDOT

property, and drink. Many of the CDOT employees Mr. Smith used to drink with have retired or otherwise left CDOT.

The "Mysafeworkplace.com" Anonymous Tip and the Launch of the First Official CDOT Investigation into Employee Drinking

70. On March 5, 2012, an anonymous post was left on a CDOT website entitled "Mysafeworkplace.com."

71. The post stated in part the following:

> Some of my coworkers and I discovered empty beer cans in a vehicle. The vehicle was a company vehicle used to transport for maintenance work. I do not know who left the beer cans in the vehicle. It seems clear that someone was drinking on the job. We reported this information to the foreman, Mark Carrillo. Mark said, 'Prove that it was my guys that left these beer cans in there.' The issue with Mark is that he is denying any association with the beer cans being in the car and what they suggest. He won't investigate the issue to see who it was. Drinking on the job is a serious safety concern.

72. Around this same time, CDOT management received pictures of beer in or around CDOT vehicles. One picture was of a beer left in a cup holder in a CDOT vehicle, and the second picture was of the beer left behind Mr. Savala's tire. Due to the pictures, the post, and the past rumors about drinking, Ms. Hicks and other CDOT upper management decided to launch an official investigation into employees drinking on the job.

Mr. Smith, Mr. Ortega, and Mr. Savala Disappearing from the Job

73. Mr. Smith, Mr. Ortega, and Mr. Savala worked quickly and would complete their work within two to four hours of the beginning of their shifts. For the remaining six to eight hours, Mr. Smith, Mr. Ortega, and Mr. Savala would "goof off" by driving to other sheds to visit with other employees, go out to eat, go to gas stations and have coffee, or just drive around killing time.

74. During the time the three employees were "goofing off" there were CDOT projects they could have been working on.

75. These three employees should have been reachable by a CDOT radio in the CDOT trucks, as well as by a CDOT cell phone that Mr. Smith kept.

76. There were about a dozen times in the past two years when Mr. Wanker could not find Mr. Smith or Mr. Ortega when they were supposed to be working.

77. When Mr. Wanker could not find his employees, he would call other supervisors looking for them. He would also drive around looking for them at the places they were supposed to be working, as well as at gas stations, restaurants, and other sheds.

78. Mr. Wanker never noticed any signs of alcohol use by Mr. Smith or Mr. Ortega on the nights he could not reach them.

79. Mr. Wanker informed his supervisor, Mr. Carrillo, about not being able to locate his employees. Mr. Carrillo told him to "keep an eye on it."

80. Mr. Wanker suspected Mr. Smith and Mr. Ortega might have been drinking but he did not do anything to confirm his suspicions.

81. Mr. Wanker confronted Mr. Smith three to four times about Mr. Smith's disappearances, and Mr. Smith told him they were out checking roads and performing their CDOT work.

82. Mr. Wanker verbally admonished Mr. Smith for not being reachable, but did not issue a PDF, corrective action, or discipline to him concerning his disappearances.

83. There were times when Mr. Gallegos could not find Mr. Savala when he was supposed to be working.

84. When that happened, Mr. Gallegos would drive around trying to find him. When he could not find him, Mr. Savala usually called him back within one hour, and his explanations for why he had not answered the phone or radio were credible to Mr. Gallegos. He was told by Mr. Savala that the three men were out of the truck picking up trash.

85. Mr. Gallegos never noticed any signs of alcohol use by Mr. Savala on the nights he could not reach him.

86. After late April 2012, Mr. Gallegos increased his level of supervision by driving around to make sure his employees were where they were supposed to be, and to make sure they were not hiding out. He checked different sheds and dumpsters, and did so in part because Mr. Carrillo had also asked him to keep an eye out.

87. Mr. Gallegos never heard employees joking about drinking on the job.

88. Mr. Gallegos did know that only Mr. Savala disappeared during his shifts; his other employees did not disappear.

89. Before the beer was left behind Mr. Savala's tire, Mr. Gallegos did not suspect Mr. Savala of drinking on the job. However, after that incident, he suspected Mr. Savala may have been drinking on the job.

90. Mr. Gallegos did not issue a PDF, corrective action, or discipline to Mr. Savala concerning his disappearances.

91. Mr. Wanker gave many reasons why he did not issue PDFs, corrective actions, or discipline when he could not find Mr. Smith and Mr. Ortega, including that the employees had good excuses for not being reachable; that Mr. Carrillo had told him he would handle the situation; that he felt his supervision was being undermined by CDOT's "open door" policy; that issuing PDFs or corrective actions would not do any good anyway; and that it was difficult to know where all employees were at any given time, especially when he was the only TM3 supervising numerous sheds.

Employees Sleeping on the Job

92. Mr. Wanker caught two of his employees, Mr. Smith and Mr. Ortega, sleeping while they were on duty on a couple of occasions.

93. Utilizing progressive discipline, Mr. Wanker gave Mr. Ortega a verbal warning, and Mr. Ortega was never caught sleeping on the job again, so Mr. Wanker did not issue any other discipline to him.

94. Mr. Wanker found Mr. Smith sleeping in his car twice: once on duty, and once off. One of the times was the morning after the Rockies incident. Mr. Wanker spoke to Mr. Smith both times.

95. After Mr. Wanker spoke with Mr. Smith the second time, Mr. Wanker never found Mr. Smith asleep on duty again. Therefore, Mr. Wanker did not issue any PDFs, corrective actions, or discipline to Mr. Smith.

96. Mr. Gallegos found employees sleeping in their cars a couple of times in the mornings right before the end of their shifts. He gave them verbal warnings and he never caught them again, so he did not issue any additional progressive discipline.

Mr. Wanker and Mr. Gallegos' Awareness of Employees Drinking on the Job

97. Prior to March of 2012, Mr. Wanker heard rumors about CDOT employees drinking on the job. Upon hearing these rumors, he looked in sheds, dumpsters, and other places for evidence of drinking, such as beer cans and bottles, but did not find anything.

98. Mr. Wanker, however, knew that Mr. Smith and Mr. Ortega had called in sick and went drinking the night of the Rockies incident. As stated earlier, he did not issue any discipline for the events of that night.

99. Mr. Gallegos heard rumors about CDOT employees drinking on the job as well. He did not think the rumors gave him the reasonable suspicion necessary to act upon. His understanding of reasonable suspicion is that there would have to be odors of alcohol, or other physical indications that employees had been drinking.

Beckham Investigation

100. Sometime in 2012 CDOT management received complaints of racial discrimination and workplace violence among CDOT employees. CDOT was concerned for the safety of its employees, and therefore decided to hire an outside, neutral investigator to investigate these complaints.

101. Ms. Hicks contacted the Colorado Bureau of Investigations ("CBI") for help in investigating the workplace violence and discrimination issues, as well as the issue of employees drinking on the job. The CBI recommended Ron Beckham as the investigator.

102. Ms. Hicks met with Mr. Beckham in April of 2012 and hired him to conduct two investigations: one into workplace violence and discrimination, and the second into rumors of employees drinking on the job.

103. Mr. Beckham began the investigation into workplace violence and discrimination the first week of May 2012.

104. After completing the first investigation, Mr. Beckham began investigating the rumors of employees drinking on the job on July 24, 2012. Mr. Beckham's instructions were to find out if there had been alcohol consumed on duty, and if so, by whom.

105. Mr. Beckham interviewed numerous CDOT employees about the rumors of employees drinking on the job, including interviews with Mr. Wanker, Mr. Gallegos, Mr. Smith, Mr. Ortega, Mr. Savala, and others.

106. Mr. Beckham reported his findings through a lengthy investigative report ("Report") that he submitted to Ms. Hicks in late September, 2012.

Report Conclusions

107. Mr. Beckham concluded in his Report that alcohol was consumed by CDOT employees on CDOT time, and that there were management and supervision problems with King area supervisors, specifically Mr. Wanker and Mr. Gallegos.

108. Mr. Beckham stated in his Report that his most serious concern was the failure of the supervisors to take action.

Tim Harris and the Rule 6-10 Meetings

109. Mr. Beckham gave his completed Report to Ms. Hicks, who in turn distributed it to a limited number of CDOT upper management employees, including Tim Harris, the Chief Engineer for CDOT and Mr. Wanker and Mr. Gallegos' appointing authority.

110. Ms. Hicks and Mr. Harris met in early November 2012, prior to the 6-10 meetings, to discuss the Report and to decide who should be called in for 6-10 pre-disciplinary meetings with Mr. Harris.

111. Ms. Hicks drafted a series of questions for Mr. Harris to use when he conducted the 6-10 meetings, which she based on Mr. Beckham's Report.

112. Mr. Harris decided he would conduct 6-10 meetings with the TM1s and TM2s first, and then continue up the chain of command and conduct 6-10 meetings with Mr. Wanker and Mr. Gallegos.

The 6-10 Meeting Letters to Mr. Wanker and Mr. Gallegos

113. Mr. Harris sent 6-10 meeting letters to Mr. Wanker and Mr. Gallegos on November 15, 2012.

114. The letters stated the reason for the meeting as follows for both men: "I have received information that indicates the possible need to administer disciplinary action based on alleged dereliction of your supervisory role with regard to longstanding employee issues. Additional issues may be addressed if I receive further information prior to the meeting."

115. Despite receiving the 6-10 letter, Mr. Wanker did not know or understand what the 6-10 meeting would be about.

116. Prior to the November 15, 2012 letter, Mr. Gallegos did not know that his supervision was inadequate, and he was surprised to be called in for a 6-10 meeting.

Mr. Harris's 6-10 Meetings with Mr. Smith and Mr. Ortega

117. Mr. Harris conducted 6-10 meetings first with TM1s and TM2s, then with the TM3s. At least two or three TM1s and 2s told him that Mr. Wanker and Mr. Gallegos were not around supervising their employees, and that their employees had free reign to do whatever they wanted.

118. During Mr. Harris's 6-10 meeting with Mr. Ortega, Mr. Ortega told him that he, Mr. Smith, and Mr. Savala disappeared during their shifts but were not worried about their supervisors finding them. Mr. Harris found Mr. Ortega's statements inconsistent. Despite that fact, Mr. Harris found Mr. Ortega, as well as Mr. Smith, more

credible than Mr. Wanker or Mr. Gallegos, in part because they told him things that were against their own interest.

119. In Mr. Harris's 6-10 meeting with Mr. Smith, Mr. Smith told Mr. Harris that he was looking for supervision and leadership and there was none.

Mr. Harris's 6-10 Meetings with Mr. Wanker and Mr. Gallegos

120. Mr. Beckham's investigation and Report were the source of Mr. Harris's information concerning the allegations Mr. Wanker and Mr. Gallegos.

121. Mr. Harris conducted separate 6-10 meetings with Mr. Wanker and Mr. Gallegos on November 21, 2012.

122. Neither Mr. Wanker nor Mr. Gallegos brought an attorney or any representative with them to their 6-10 meetings.

123. Neither Mr. Wanker nor Mr. Gallegos knew there was a report that contained conclusions about the quality of their supervision prior to the 6-10 meetings.

124. Neither Mr. Wanker nor Mr. Gallegos knew that Mr. Beckham had concluded in the Report that lack of supervision was one of the most serious problems at CDOT.

125. At the 6-10 meetings, Mr. Harris told Mr. Wanker and Mr. Gallegos that whatever they discussed would be considered by him.

126. At the 6-10 meeting, Mr. Wanker expressed his frustration with the lack of chain of command and with employees going over his head. Mr. Harris believed that Mr. Wanker was part of the chain of command, and therefore should take some responsibility for changing it.

127. Based on this comment, Mr. Harris concluded that Mr. Wanker felt powerless to perform his supervisory duties.

128. Mr. Harris interpreted some of Mr. Wanker's statements during the 6-10 meeting to mean that he was just going to "coast" until he retired in two years. Mr. Harris was offended that Mr. Wanker was going to coast for two more years. What Mr. Wanker actually said to Mr. Harris was that he just wanted to do his job and in 2 years "coast on out of here."

129. Mr. Wanker told Mr. Harris that when he could not find some of his employees, he always went looking for them.

130. Mr. Harris believed Mr. Wanker was too low-key in his supervision. He felt Mr. Wanker should have been more assertive and should have used progressive

discipline with Mr. Smith and Mr. Ortega.

131. Mr. Harris felt Mr. Wanker's demeanor was respectful at the 6-10 meeting.

132. Mr. Gallegos was upset during the 6-10 meeting because he thought he was doing a good job as a supervisor, and yet he was being charged with dereliction of duty.

133. Mr. Gallegos told Mr. Harris at his 6-10 meeting that he and Mr. Wanker could not locate some employees for a couple of hours or more.

134. Toward the end of the 6-10 meeting, Mr. Harris asked Mr. Gallegos if there were any other issues Mr. Gallegos wished to discuss. At that time, Mr. Gallegos raised a concern that his salary was 10% less than his colleagues, as well as his concern regarding how the 6-10 meeting would affect him being promoted at CDOT. Mr. Harris had never had an employee complain about salary issues at a 6-10 meeting, and thought Mr. Gallegos' comments to that effect were inappropriate during a meeting that could possibly end in discipline for Mr. Gallegos.

135. Mr. Harris believed that Mr. Gallegos displayed a "victim mentality" when he brought up his salary concerns.

136. Mr. Gallegos told Mr. Harris during their 6-10 meeting that he did not know that CDOT employees had been drinking. Mr. Harris thought that Mr. Gallegos was not being truthful because Mr. Smith had told Mr. Harris that Mr. Wanker and Mr. Gallegos saw him the morning following the Rockies incident when he was passed out.

137. During the 6-10 meeting, Mr. Savala's name was mentioned, and there was a lengthy discussion about Mr. Savala. Some of Mr. Gallegos' comments about Mr. Savala indicated to Mr. Harris that Mr. Gallegos displayed a low level of accountability or sense of duty as a supervisor.

138. Mr. Harris believed that Mr. Gallegos was deflecting his responsibilities as a supervisor, and was not being very proactive as a supervisor.

139. During the 6-10 meetings with Mr. Wanker and Mr. Gallegos, Mr. Harris got the impression that they were sitting back and letting things happen and not actively supervising their employees.

140. Mr. Harris believes that a supervisor's responsibility if he hears rumors is to investigate the rumors to find out if they are true, and then take action if they are true. He believes supervisors are supposed to get involved, and if necessary, supervisors need to change their supervisory habits to fit the situation.

Mr. Harris's Deliberations

141. After the 6-10 meetings, Mr. Harris was considering a 10% reduction in pay for five or ten months for both Mr. Wanker and Mr. Gallegos as discipline.

142. Ms. Hicks gave Mr. Harris a range of disciplinary options for the employees involved. She informed Mr. Harris that her decision would be to terminate Mr. Wanker and Mr. Gallegos because their supervision was poor, and because CDOT was not holding them accountable and should.

The January 7, 2013 Meeting Between Mr. Harris and CDOT Upper Management

143. On January 7, 2013, Mr. Harris held a meeting with CDOT upper management to discuss and brainstorm discipline options for the employees involved in the drinking problem at CDOT, including disciplinary options for Mr. Wanker and Mr. Gallegos.

144. Present at the meeting were Mr. Harris, Ms. Hicks, Randy Furst, CDOT Regional Manager, Tony Devito, Acting Regional Transportation Director in Region 6, Dennis Allen, Acting Superintendent, Greg Hayes, Deputy Maintenance Superintendent, and Gary Goldsberry, Deputy Maintenance Superintendent.

145. Mr. Harris told the group at the meeting that Mr. Wanker denied the Rick Smith incident (about finding Mr. Smith drunk in his car the morning after the Rockies incident); that Mr. Wanker expressed frustration about how things were handled at CDOT; that he could not manage TM1s anymore; and that he was going to cruise for two years and retire.

146. Also at the meeting, Mr. Harris stated that Mr. Gallegos denied the story about finding Mr. Smith drunk; that he was frustrated with his salary; and that he was frustrated with how CDOT handled things.

147. Ms. Hicks told the group at this meeting that management should be held to a higher standard and that there should be more serious consequences for Mr. Wanker and Mr. Gallegos.

148. At the meeting, Mr. Allen told the group about an incident concerning a selection process dispute in which Mr. Wanker and Mr. Gallegos had offended Mr. Allen by being disrespectful.

149. Mr. Allen said at that meeting that he would terminate Mr. Wanker and Mr. Gallegos.

150. Several of the other people who were present at the January 7, 2013 meeting were also advocating for termination of Mr. Wanker and Mr. Gallegos.

Factors Mr. Harris Considered When Making his Final Discipline Decision

A. Rule 6-12

151. Mr. Harris reviewed rule 6-12 before deciding what discipline was warranted for Mr. Wanker and Mr. Gallegos.

B. The Beckham Report

152. Mr. Harris re-read the Beckham Report four or five time before deciding Mr. Wanker and Mr. Gallegos' discipline. The Report was a major factor in his decision to demote Mr. Wanker and Mr. Gallegos.

153. Parts of the Report especially troubled Mr. Harris, including Mr. Smith's story about calling off sick and driving around drinking (the April 2011 Rockies home opener incident); and Mr. Smith sleeping and/or being passed out in his car and being awakened by Mr. Wanker in the morning.

154. Mr. Harris was also bothered by Mr. Smith and Mr. Ortega's story in the Report that Mr. Wanker and/or Mr. Gallegos told the two men that they could have called the state patrol on them for driving off CDOT property still intoxicated the morning after the Rockies home-opener incident. The events of the Rockies home opener night played a significant role in Mr. Harris's decision.

155. Mr. Harris was further troubled about the Report's primary conclusion that supervisors were not engaged.

156. Mr. Harris concluded after reading the Report that Mr. Wanker and Mr. Gallegos were lax in their supervisory duties.

C. Mr. Wanker and Mr. Gallegos' Comments During their 6-10 Meetings

157. Some of the comments Mr. Wanker and Mr. Gallegos made during their 6-10 meetings factored into Mr. Harris's decision.

158. Mr. Harris's belief that Mr. Wanker was going to "coast" was a factor in Mr. Harris's decision to demote Mr. Wanker.

159. Mr. Gallegos's statement that he and Mr. Wanker could not locate some employees for a couple of hours or more was a factor in Mr. Harris's decision to demote Mr. Gallegos.

160. Mr. Gallegos' comments about his salary played a small role in Mr. Harris's decision to demote Mr. Gallegos, but "not very much."

D. Mr. Wanker and Mr. Gallegos' Performance History

161. Mr. Harris did not review Mr. Wanker's or Mr. Gallegos' personnel files prior to demoting them. Instead, Ms. Hicks gave Mr. Harris a list of Mr. Wanker and Mr. Gallegos' performance ratings for past five to six years, and she informed him if either man had received any corrective actions. Neither Mr. Wanker nor Mr. Gallegos had received any prior discipline or corrective actions.

162. In the past several years, Mr. Wanker had received all "2"s and one "3" on a three-point scale, in his performance ratings from Mr. Carrillo, with three being the highest rating.

163. In recent years, Mr. Wanker received a rating of "3" in the "Safety" category for designing an efficient traffic control truck.

164. For the 2011-2012 fiscal year, Mr. Wanker did not receive the required evaluation from Mr. Carrillo.

165. From 2009 through 2012, Mr. Carrillo rated Mr. Gallegos a level 3 twice, and a level 2 once.

166. Mr. Carrillo failed to conduct an evaluation with Mr. Gallegos for the 2012-2013 fiscal year. However, CDOT supervisors are required to approve ratings of either 1s or 3s, and Mr. Carrillo's supervisor informed Mr. Gallegos that Mr. Carrillo had rated him a 3 for the 2012-2013 fiscal year.

E. The Role of the January 7, 2013 Meeting in Mr. Harris's Decision

167. Mr. Allen's comments at the January 7, 2013 meeting played a small role in Mr. Harris's decision to permanently demote Mr. Wanker and Mr. Gallegos.

168. The fact that some of the CDOT managers advocated terminating Mr. Wanker and Mr. Gallegos at the January 7, 2013 meeting played a role in Mr. Harris's decision to make the demotion permanent.

F. Other Factors Mr. Harris Considered

169. Mr. Gallegos' demeanor during his 6-10 meeting played a role in Mr. Harris' decision to demote him because Mr. Harris thought Mr. Gallegos was being disrespectful.

170. Mr. Harris testified that other issues he considered when he permanently demoted Mr. Wanker and Mr. Gallegos were their lack of documentation as supervisors; their lack of supervision; employees disappearing on the job and sleeping in vehicles and Mr. Wanker and Mr. Gallegos not documenting those occasions.

171. Mr. Harris felt that because each man supervised 15-20 employees as TM3s, if they were permitted to remain in their supervisory positions, the public would not be protected.

172. Neither Mr. Wanker nor Mr. Gallegos submitted additional information for Mr. Harris to consider after their 6-10 meetings. Mr. Wanker did not submit any additional materials because he did not believe he had done anything wrong.

173. Neither Mr. Wanker nor Mr. Gallegos gave Mr. Harris any information that indicated things were going to improve if they stayed in their current supervisory positions.

The Discipline Imposed on Mr. Wanker and Mr. Gallegos

174. Mr. Harris considered less serious discipline, but decided to permanently demote Mr. Wanker and Mr. Gallegos to TM2s, with a corresponding permanent reduction in their salaries, and the main reason was because of the lack of supervision they were exhibiting.

The January 31, 2013 Letters

The letter to Mr. Wanker

175. On January 31, 2013, Mr. Harris sent a letter to Mr. Wanker explaining the reasons he was demoting him. His letter to Mr. Wanker states in relevant part:

> You admitted to knowledge of employees disappearing, but the action you took was to search for them on one occasion and talk with the employees. There was no closer monitoring or accounting for their whereabouts, work performed or performance documentation. The information collected during the investigation indicates the problem was more prevalent, having occurred within the past year, and you indicated knowledge of it. When we discussed the reports of employees drinking, you denied knowledge. There was information collected stating you directly witnessed employees drunk, woke up employees with another supervisor when they were passed out in their vehicle, and indicated you were satisfied with his explanation even though it was during work hours...

The Letter to Mr. Gallegos

176. Mr. Harris also sent a letter to Mr. Gallegos on January 31, 2013 explaining the reasons he was being demoted. The letter to Mr. Gallegos states in relevant part:

> You admitted to knowledge of employees disappearing, but the action you took indicated was to have one talk with the employee. The information

collected during the investigation indicated the problem was more prevalent, having occurred within the past year, and you indicated no knowledge of it. When we discussed the reports of employees drinking, you denied knowledge. There was information collected stating you directly witnessed employees drunk, and woke up employees with another supervisor when they were passed out in their vehicle in a maintenance yard. You did admit to finding employees sleeping in their vehicle. Again, the action you took was to talk with them.

Mr. Wanker and Mr. Gallegos' Appeal

177. Mr. Wanker and Mr. Gallegos had ten days from the date of their demotion to appeal. Both men timely appealed on February 7, 2013.

DISCUSSION

I. GENERAL

A. Burden of Proof

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

(1) failure to perform competently;

(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;

(3) false statements of fact during the application process for a state position;

(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and

(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency bears the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *See Kinchen*. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6).

II. HEARING ISSUES

A. Did Complainants Commit the Acts for Which they were Disciplined?

(1) Doug Wanker Committed the Acts for Which He was Disciplined

Respondent has proven by a preponderance of the evidence that Complainant Doug Wanker committed the acts for which he was disciplined. TM3s are first level supervisors for CDOT, and as such are responsible for discovering, correcting, and documenting problems in the patrols they supervise. The TM3 job description expressly includes those responsibilities.

(a) Employees Disappearing on the Job

Mr. Wanker failed to properly investigate, discipline, and document his employees who were disappearing during work hours. Mr. Wanker testified that he could not reach Mr. Smith and Mr. Ortega about a dozen times in the past two years. It is significant that Mr. Wanker could not reach them on at least twelve different occasions. Twelve is a significant number of times, and while it might have been acceptable for Mr. Wanker to believe their explanations the first few times he could not reach them, at some point the frequency of Mr. Smith and Mr. Ortega not being reachable should have triggered some disbelief or skepticism on Mr. Wanker's part, and he should have begun taking more serious actions. He began progressive discipline by issuing verbal warnings to the men when he could not reach them, but he stopped there. The verbal warning was clearly not effective discipline given the fact that the men disappeared at least 11 more times. Mr. Wanker should have continued progressive discipline with the next steps instead of stopping at a verbal warning.

Moreover, there is indication that Mr. Wanker knew where Mr. Smith and Mr. Ortega were when he could not reach them. While he testified that the two men had good explanations for not being reachable, which is part of the reason he did not issue corrective actions or discipline to them, he also testified that when he could not find them, he would drive around looking for them at gas stations, other sheds, and the like. The fact that Mr. Wanker drove around looking for Mr. Smith and Mr. Ortega at the very locations these men admitted to frequenting when they were "goofing off" indicates that Mr. Wanker had some knowledge that the men were not out of the truck picking up trash as they explained to him.

Also, while it may be true that CDOT's new open door policy frustrated Mr. Wanker, and while he was credible when he described his frustration with CDOT upper management's handling of PDFs that he issued, the fact remains that Mr. Wanker's job description did not change during this time. Mr. Wanker's job description mandated that he properly investigate and correct problems, and also document problems in such a manner that would support corrective or disciplinary action. The fact that Mr. Smith and Mr. Ortega were not reachable on twelve separate occasions indicates there was a problem. At hearing there was conflicting testimony concerning whether TM3s could

issue corrective or disciplinary action, but the job description in place during this time was clear that TM3s could and should when necessary. Mr. Wanker did not issue any PDFs, corrective actions, or disciplinary actions to Mr. Smith or Mr. Ortega, and he should have. As a first level supervisory, it was his responsibility to ensure that his employees were working a full night's shift.

Mr. Wanker also failed to document Mr. Smith and Mr. Ortega's disappearances in a manner that would support corrective or disciplinary action. He may have documented their disappearances in the diary that disappeared, but keeping notes in a personal diary does not properly document the disappearances in a manner that would have supported corrective or disciplinary action. In conclusion, Mr. Wanker failed to properly investigate, discipline, and document the incidents of employees disappearing during work hours.

(b) Employees Drinking on the Job

Mr. Wanker testified that there was no indication whatsoever that Mr. Smith was intoxicated the morning after the Rockies incident, and that he, Mr. Wanker, thought this was just another night in which Mr. Smith was taking a nap prior to returning home. This testimony is not credible, however, because Mr. Smith had called in sick earlier in the evening. There was no reason for Mr. Smith to be sleeping in his car on CDOT property after calling in sick. There was testimony that Mr. Smith and Mr. Ortega had not called in sick; that instead they had just failed to show up for work that night. In either case, as Mr. Smith's direct supervisor, Mr. Wanker was required by his job description to investigate either why they failed to show up for work without calling in sick, or why Mr. Smith's car was parked at the shed when he was supposed to be home sick. In both scenarios, Mr. Wanker failed to investigate or to document that there was something suspect about Mr. Smith being asleep on CDOT property that morning.

Moreover, both Mr. Smith and Mr. Ortega remember either Mr. Wanker or Mr. Gallegos stating that they could have called the Colorado State Patrol on them during a Monday evening meeting following the Thursday night/Friday morning that the incident occurred. Mr. Smith and Mr. Ortega were consistent in their testimony concerning the state patrol comment to Mr. Beckham, Mr. Harris, and to this court. Their versions of events were more consistently believable and more credible than Mr. Wanker's denial that he had known Mr. Smith was drunk or that he made reference to the Colorado State patrol. The fact that the Colorado State Patrol was brought up is persuasive evidence that Mr. Wanker understood the seriousness of the nature of the problem.

In conclusion, CDOT has shown by a preponderance of the evidence that Mr. Wanker committed the acts for which he was disciplined. He were disciplined for his failure to do anything when he discovered that Mr. Smith and Mr. Ortega had spent a night drinking after calling in sick, being on CDOT property while drunk, and driving off CDOT property while still intoxicated. Mr. Wanker did nothing other than instruct the two men to apologize when he instead should have thoroughly documented the event, and then issued corrective and/or disciplinary action. Mr. Wanker was also disciplined

for his failure to do anything more than give a verbal warning when Mr. Smith and Mr. Ortega disappeared. The facts show by a preponderance of the evidence that Mr. Wanker failed to properly investigate, document, and correct Mr. Smith and Mr. Ortega for disappearing on numerous occasions.

(2) Mark Gallegos Committed Some of the Acts for Which He was Disciplined

Mr. Gallegos committed some of the acts for which he was disciplined. Concerning employees disappearing on the job, Mr. Gallegos admitted not being able to locate some of his employees only a "few" times in the past two years. The court does not find this testimony credible due to the fact that his employee, Mr. Savala, was with Mr. Smith and Mr. Ortega when they were out "goofing off." The credible and persuasive evidence in this case was that the three employees were absent during their shifts on numerous occasions. Like Mr. Wanker, the only action Mr. Gallegos took was the first step of progressive discipline: he gave a verbal warning to Mr. Savala. However, the disappearances did not stop after the verbal warning, and Mr. Gallegos should have then taken the disappearances more seriously as a supervisor. He did not document the disappearances whatsoever, and he should have, nor did he issue any PDFs, corrective actions, or disciplinary actions, and he should have done that as well. It was Mr. Gallegos' responsibility as a first level supervisor to ensure his employees were working a full night's shift, and the testimony was clear that Mr. Savala was not.

However, concerning the night of the Rockies home opener incident, Mr. Gallegos direct supervisee, Mr. Savala, was only tangentially involved. He called Mr. Smith and Mr. Ortega and asked them to drive him to the hospital, which they did. That was the end of Mr. Savala's participation in the events of that night. By all accounts, Mr. Savala was not out drinking with Mr. Smith and Mr. Ortega that night, nor did he leave his car at the shed, nor did he call in sick when he was supposed to be working. Because of Mr. Savala's limited role in the events of that night, Mr. Gallegos' culpability for the events of that night is also limited. He admitted that he saw Mr. Wanker walk up to Mr. Smith's car at around 6:00 A.M. and talk with him, and that Mr. Wanker told Mr. Gallegos to just let Mr. Smith be. He denied telling Mr. Smith and Mr. Ortega that he could have called the Colorado state patrol on them. Whether or not Mr. Gallegos made that comment, his supervisory duties did not include disciplining Mr. Smith and Mr. Ortega for their actions; that was Mr. Wanker's responsibility.

Furthermore, concerning the incident where beer was found behind Mr. Savala's tire, which is the only incident of beer being associated with one of Mr. Gallegos' supervisees, by all accounts Mr. Gallegos properly handled that incident. Ms. Hicks testified that Mr. Gallegos handled that incident correctly when he called Mr. Carrillo at home and when he called Mr. Savala and ordered him to immediately come to the shed. Mr. Harris testified that he did not discipline Mr. Gallegos for that incident because Mr. Gallegos had handled it properly.

Mr. Gallegos did commit some of the acts for which he was disciplined; namely, he did not thoroughly investigate or document the times when Mr. Savala disappeared during the night shift and he should have; nor did he issue PDFs, corrective actions, or discipline to Mr. Savala for disappearing, which he should have as well. However, Mr. Gallegos did not fail as a supervisor concerning employees drinking on the job. His employee, Mr. Savala, was not one of the employees who got drunk during the Rockies home opener incident, and the one incident when beer was associated with one of his employees, the beer left behind Mr. Savala's tire, he properly handled that incident. Therefore Mr. Gallegos should not have been disciplined for employees drinking on the job.

Finally, Respondent did not establish at hearing that there was any other supervisory obligation that Mr. Gallegos would have had for employees who were not within his chain of command. Mr. Gallegos, therefore, is not responsible as a supervisor for the actions of Mr. Smith and Mr. Ortega.

B. The Appointing Authority's Action was Not Arbitrary, Capricious, or Contrary to Rule or Law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) or 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).

Mr. Harris Used Reasonable Diligence and Care to Procure Evidence

Ms. Hicks was authorized to hire Mr. Beckham to thoroughly and neutrally investigate the issue of employees drinking on the job. Mr. Beckham interviewed numerous CDOT employees and compiled a lengthy and exhaustive Report that was eventually given to Mr. Harris to review. Mr. Harris's reliance on Mr. Beckham's Report was reasonable given the fact that as Chief Engineer, Mr. Harris would not have had the time to conduct the investigation himself. It was also reasonable for Mr. Harris to consider the Report as reliable because the Report was thorough, highly documented with exhibits, and exhaustive. Mr. Harris read the Report four to six times total, which indicates that he spent a considerable amount of time trying to ensure that he completely understood all of the information the Report uncovered.

Mr. Harris also used reasonable diligence and care to procure evidence when he met with all of the persons named in the Report during the 6-10 process. He gave them time to tell their sides of the story, as well as submit additional information after the 6-10

meetings. At the hearing, there was a great deal of testimony concerning how Mr. Wanker and Mr. Gallegos were not told the source of the allegations against them in violation of Rule 6-10. However, at the beginning of Mr. Harris's 6-10 meetings with Mr. Wanker and Mr. Gallegos, he showed them the Report and told them that the Report was the source of the allegations against them, which it was. Mr. Harris made that clear during the 6-10 meetings. He also asked Mr. Wanker and Mr. Gallegos specific questions that would have put them on notice of what the allegations against them were. For example, he asked both men specifically if they had ever seen Mr. Smith drunk in 2011, which was a reference to the Rockies night incident. He specifically asked them both if any of their employees disappeared during their shifts. Every incident that Mr. Harris cited in his subsequent disciplinary letters to Mr. Wanker and Mr. Gallegos, he first asked them about and gave them an opportunity to respond to during their 6-10 meetings with him.

Thus, Mr. Harris did use reasonable diligence and care to procure evidence.

Mr. Harris Gave Candid and Honest Consideration of the Evidence Before Him

Mr. Harris's testimony at the hearing concerning his consideration of all of the evidence presented to him was credible. He considered Mr. Wanker's and Mr. Gallegos' past reviews; he read the Beckham Report multiple times as indicated above; and he listened to Mr. Wanker and Mr. Gallegos' frustrations and to their reasons for not issuing PDFs, corrective actions, or discipline to their employees at the 6-10 meeting. Mr. Harris met with Ms. Hicks, his Human Resources advisor, several times to discuss the situation, and he met with CDOT upper managers to gather input from a variety of perspectives on January 7, 2013. Mr. Harris did give candid and honest consideration of the evidence before him.

Mr. Harris's Actions Were Reasonably Based on Conclusions From The Evidence

The evidence in the Report indicated that CDOT employees were drinking on CDOT time and on CDOT property, and that lack of supervision was a large part of the problem. The discipline Mr. Harris issued to Mr. Wanker and Mr. Gallegos as supervisors was directly based on the Report's conclusion that lack of supervision was a key problem within CDOT. Mr. Harris testified that he would have issued more severe discipline if Mr. Wanker and Mr. Gallegos's performance reviews not been as good as they were, evidencing that he took their reviews into account prior to making his final decision.

Mr. Harris's conclusions and actions were reasonable under the circumstances of this case. Under *Lawley*, Mr. Harris's discipline decision was therefore not arbitrary and capricious.

C. The Discipline Was Not Within the Range of Reasonable Alternatives.

The Personnel Board Rules mandate that progressive discipline must be used unless an act is so serious as to require immediate discipline. Board rule 6-2, 4 CCR 801, states:

> A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

According to this rule, Mr. Harris was required to use progressive discipline starting with a corrective action prior to demoting Mr. Wanker and Mr. Gallegos unless their acts were so flagrant or serious as to proceed immediately to discipline. Neither Complainant has been issued corrective actions related to their supervisory duties. The issue therefore is whether either Complainant's actions are sufficiently flagrant or serious to meet the exception to progressive discipline.

Mr. Gallegos

Mr. Harris did not issue Mr. Gallegos a corrective action for his failure to supervise Mr. Savala but immediately and permanently demoted him. Mr. Harris's action in demoting him without first issuing a corrective action is proper if Mr. Gallegos' acts were flagrant or serious. The court found that Mr. Gallegos' employee, Mr. Savala, disappeared numerous times and Mr. Gallegos did not document the disappearances, nor did he issue PDFs, corrective actions, or discipline for his disappearances. There was no evidence that Mr. Savala was drinking or in any other way potentially harming the public when he disappeared. He wasted taxpayer money by "goofing off" and spending time at gas stations and restaurants for hours on end instead of working, but no one was directly placed in harm's way through Mr. Savala's "goofing off." Because of this fact, Mr. Gallegos' failure to do anything about Mr. Savala's disappearances is not so serious and flagrant as to justify skipping corrective action and immediately demoting Mr. Gallegos.

Moreover, CDOT did not put on any evidence indicating that Mr. Gallegos had a supervisory duty to discipline Mr. Wanker's employees, Mr. Smith and Mr. Ortega, for their behaviors the night of the Rockies incident. Therefore, the only acts Mr. Gallegos should have been disciplined for was his failure to document or discipline Mr. Savala for his disappearances; he should not have been disciplined for his failure to do anything about Mr. Smith and Mr. Ortega's actions. With only Mr. Gallegos' failure to do anything about Mr. Savala's disappearances being actionable, and with that failure not being so flagrant or serious, Mr. Gallegos should have received progressive discipline in the form of a corrective action. Therefore, Mr. Gallegos' demotion is hereby rescinded, and CDOT shall instead issue a corrective action to Mr. Gallegos for his failure to document Mr. Savala's disappearances, and for his failure to issue a PDF, corrective action, or discipline to Mr. Savala for disappearing. Mr. Gallegos shall be reinstated to his former

TM3 position, his former salary as a TM3 shall be reinstated, and he shall receive back pay for the period of time he was paid as a TM2 instead of a TM3.

Mr. Wanker

Mr. Harris did not issue Mr. Wanker a corrective action for his failure to supervise his employees but rather immediately and permanently demoted him. Mr. Harris's action in demoting him without first issuing a corrective action is proper if Mr. Wanker's acts were flagrant or serious. The court found that Mr. Wanker's employees, Mr. Smith and Mr. Ortega, disappeared numerous times and he did nothing other than issue a verbal warning to Mr. Smith. This failure on Mr. Wanker's part, on its own, would not amount to so serious or flagrant an act such that progressive discipline could be skipped. However, two of Mr. Wanker's employees were drinking on at least one occasion – the night of the Rockies incident – and that fact changes the severity of the consequences of Mr. Wanker's failure to supervise.

Mr. Wanker's failure to discipline or even document Mr. Smith and Mr. Ortega calling in sick and spending the night drinking, passing out drunk on CDOT property, and driving away while intoxicated, could have directly caused serious harm to the public. This failure on Mr. Wanker's part was so serious as to justify Mr. Harris disciplining Mr. Wanker without progressive discipline, and instead immediately demoting him, and his demotion is affirmed.

However, the "permanent" part of Mr. Harris's demotion of Mr. Wanker seems excessively punitive given the fact that Mr. Wanker had been a long-time CDOT employee for 18 years; he had received good performance reviews throughout his entire career; he genuinely cared about his employees' careers and well being, as evidenced by the safety and "tail gate" talks and the mock job interviews he conducted with them; he genuinely cared about CDOT; and he had never received any corrective actions or discipline in the past. Moreover, the Board's rules do not contemplate permanent discipline, which does not mean it is not permitted, but it does indicate that permanent discipline is not typical. Indeed, Rule 6-12 lists "prohibitions of promotions for a specified period of time" as one form of acceptable disciplinary action, indicating that the norm is for limiting the time an employee is not permitted to promote as opposed to making that promotion bar permanent. Therefore, the "permanent" part of Mr. Wanker's demotion and corresponding reduction in pay is deemed excessive, and needs to be stricken from Mr. Wanker's disciplinary letter. Furthermore, Mr. Wanker needs to be permitted to compete for TM3 positions that become available in the future. This disciplinary action against Mr. Wanker may be considered when he applies for promotions, but it should not be used as a permanent bar against him ever promoting back up to a TM3 position.

D. An Award of Attorney Fees is Not Warranted in this Action

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-215.5; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action was frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

Complainants are seeking an award of attorney's fees and therefore bear the burden of proof. Despite the fact that Mr. Gallegos' discipline was rescinded, and that the "permanent" portion of Mr. Wanker's discipline was likewise rescinded, there was no evidence at the hearing that Respondent's demotions of Mr. Gallegos and Mr. Wanker were done in bad faith, maliciously, as a means to harass the Complainants, or that the discipline was otherwise groundless. Rather, Mr. Harris may have analyzed Mr. Wanker and Mr. Gallegos' actions as an intertwined whole, as opposed to two separate supervisors with two separate lines of authority and two separate sets of supervisees. Such a combination is understandable and does not warrant attorney's fees.

Also, Complainants did not prove by a preponderance of the evidence that Mr. Harris's "permanent" demotions were instituted frivolously, in bad faith, maliciously, in order to harass, or for other groundless reasons. Mr. Harris had good reason to be concerned about the quality of Mr. Wanker and Mr. Gallegos' supervision, given that the Report implicated "lack of supervision" as the biggest problem for CDOT. Given that some of CDOT's upper management were advocating termination of Mr. Wanker and Mr. Gallegos, it is understandable that Mr. Harris might try to use discipline that was less harsh than termination, but more severe than a temporary demotion. Thus, attorney's fees are not warranted.

CONCLUSIONS OF LAW

1. Complainant Doug Wanker committed the acts for which he was disciplined; Complainant Mark Gallegos committed some of the acts for which he was disciplined;

2. Respondent's actions were not arbitrary, capricious, or contrary to rule or law concerning both Mr. Wanker and Mr. Gallegos;

3. The discipline imposed against Mr. Wanker and Mr. Gallegos was not within the range of reasonable alternatives; and

4. Complainants are not entitled to recovery of their reasonable attorney's fees.

ORDER

Respondent's disciplinary demotion of Mr. Gallegos is **rescinded**. Mr. Gallegos is reinstated to his previous position as a TM3 with his corresponding former TM3 salary. Mr. Gallegos shall receive full TM3 back pay from the date of his demotion to a TM2 to the time he is reinstated to a TM3. Respondent shall issue Mr. Gallegos a corrective action for his failure to document Mr. Savala's disappearances, as well as for his failure to issue PDFs, corrective actions, or discipline to Mr. Savala for the disappearances. Respondent shall issue the corrective action within 30 days of the issuance of the Final Agency Order in this matter.

Respondent's disciplinary demotion of Mr. Wanker is **affirmed** and **modified**. Mr. Wanker's demotion shall not be permanent. The disciplinary letter sent to Mr. Wanker shall be changed accordingly, and Mr. Wanker shall be eligible to compete for promotion back to his previous TM3 position as soon as a TM3 position, or any position that he wishes to promote to, becomes open. This discipline may be considered when Mr. Wanker competes for a promotion. Respondent shall issue a new disciplinary letter to Mr. Wanker deleting any references to "permanent" within 30 days of issuance of the Final Agency Order in this matter.

DATED this 27th day
of **December, 2013,** at
Denver, Colorado.

[redacted]

Tanya T. Light
Administrative Law Judge
State Personnel Board
1525 Sherman Street
Denver, CO 80203

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.

CERTIFICATE OF MAILING

This is to certify that on the 30 day of **December, 2013**, I electronically served a true and correct copy of the foregoing Initial Decision of the Administrative Law Judge, as follows:

Keith A. Shandalow

[redacted]

Stacy L. Worthington

[redacted]

Heather J. Smith

[redacted]

[redacted]n

[redacted]