

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2015B045

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**GARY GARCIA,**  
Complainant,

vs.

**DEPARTMENT OF LAW, ATTORNEY GENERAL'S OFFICE,** Respondent.

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Administrative Law Judge (ALJ) Pamela Sanchez held the commencement hearing on April 9, 2015, and the first part of the evidentiary hearing on September 15, 16 and 17, 2015, in this matter at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. ALJ Sanchez scheduled the continuation of this hearing for March 15-18, 2016. On January 4, 2016, Respondent filed a motion to reschedule this hearing due to the unavailability of his advisory witness during March 15-18, 2016, and asked that this hearing be reset in May 2016. Complainant opposed this motion.

Following ALJ Sanchez's departure from the Board in early January 2016, this case was transferred to ALJ Susan J. Tyburski. On January 6, 2016, ALJ Tyburski issued an Order informing the parties that she needed to reset this hearing on her calendar and review the extensive evidentiary record in this case; therefore, she rescheduled this hearing for April 11-14, 2016. On February 11, 2016, Respondent filed a stipulated motion to reset this hearing for June 20-23, 2016, which motion was granted.

After ALJ Tyburski reviewed the recordings of the hearing held on September 15, 16 and 17, 2015, and the exhibits admitted during these hearing dates, the evidentiary hearing continued on June 20, 21, and 22, 2016. The record was closed on June 22, 2016, after the exhibits admitted during the hearing were reviewed and redacted for inclusion in the record. Throughout the evidentiary hearing, Complainant appeared in person and was represented by his attorneys, Donald C. Sisson and Zachary D. Wagner. Respondent was represented by Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness was Sean Clifford, First Assistant Attorney General for the Financial Fraud Division.

**MATTER APPEALED**

Complainant, a certified employee, appeals the termination of his employment on December 1, 2014. Complainant argues that this termination decision was arbitrary and capricious. He seeks rescission of the disciplinary action, reinstatement to his position of Criminal Investigator II, and an award of back pay and benefits. Respondent argues that the action of the appointing authority and Respondent should be affirmed, that Complainant's appeal be dismissed with prejudice, and that all relief requested by Complainant be denied.

For the reasons discussed below, Respondent's decision to discipline Complainant is reversed.

## ISSUES

1. Whether Complainant committed the act(s) for which he was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant is entitled to an award of attorney fees and costs.

## FINDINGS OF FACT

### Background

1. Complainant was a certified state employee in the position of Criminal Investigator II (Investigator) for the Department of Law. Complainant was hired into this position in August 2005, and worked in the Financial Fraud Unit, which was part of the Criminal Justice Enforcement Section, until the termination of his employment on December 1, 2014.

2. Most units, like the Financial Fraud Unit, have a First Assistant Attorney General who supervises the unit. Complainant's initial supervisor was Jean Woodford (aka Jean Woodford Walters), First Assistant Attorney General of the Financial Fraud Unit, from the beginning of Complainant's employment in August 2005 through August 2012, when she was appointed to the Jefferson County Court.

3. Sean Clifford, First Assistant Attorney General of the Financial Fraud Unit, became Complainant's supervisor in September 2012, and remained his supervisor through the termination of Complainant's employment on December 1, 2014. At all times relevant to this appeal, Mr. Clifford supervised 8 Investigators, 5 attorneys, 3 legal assistants, 1 forensic auditor and 1 administrative assistant.

4. Matthew Dougherty served as Deputy Attorney General of the Criminal Justice Section in 2011 and 2012, and was Complainant's appointing authority during this time.

5. Matthew Durkin served as Deputy Attorney General of the Criminal Justice Section from January 2013 through February 4, 2015, and was Complainant's appointing authority at the time of his termination. Complainant's supervisor, Mr. Clifford, reported to Mr. Durkin.

6. Prior to working for Respondent, Mr. Durkin and Mr. Clifford worked together at the First Judicial District, where they became friends. They have run several marathon races together, have socialized outside the office and continued to keep in touch after Mr. Durkin left Respondent's employment in 2015.

7. Respondent's Financial Fraud Unit investigates and prosecutes cases involving securities fraud and insurance fraud. At all times relevant to this appeal, Complainant and his co-worker, Nathan Poplinger, were the only two Investigators in the Financial Fraud Unit who investigated cases involving securities fraud. The other 6 Investigators in the Financial Fraud Unit investigated cases involving insurance fraud.

8. The daily essential functions of securities fraud investigators, comprising 70% of their total work, are described as follows in the Position Description Questionnaire signed by Complainant on September 27, 2005:

- (25%) Identify, collect, preserve, analyze, summarize and present physical evidence which includes complex documentary and computerized financial records, business records and bank records to aid in the analysis of whether a securities fraud has been committed.
- (20%) Identify, contact, interview/interrogate witnesses to and suspects of criminal activity related to securities fraud.
- (25%) Draft comprehensive reports of investigations, draft affidavits, warrants, witness/suspect interview memorandum and correspondence.

#### Securities Fraud Investigations and Case Preparation by Investigators

9. The Attorney General has jurisdiction to investigate and prosecute allegations of securities fraud under the Colorado Securities Act. §§ 11-51-603(3) and 11-51-603.5, C.R.S. The investigation of criminal violations of this Act is the primary responsibility of the Attorney General, concurrently with the district attorneys of the state of Colorado. § 11-51-603.5(1), C.R.S.

10. Potential securities fraud cases were forwarded to the Financial Fraud unit via letters, complaints submitted to a website and referrals from other law enforcement agencies.

11. Complainant investigated potential securities fraud cases that were assigned to him by his supervisor. Mr. Poplinger was similarly assigned potential securities fraud cases to investigate. These preliminary investigations involved interviewing witnesses with knowledge of the potential securities fraud violations, and gathering, reviewing and organizing relevant documents.

12. Complainant and Mr. Poplinger were expected to review the statute of limitations for each potential case they investigated, and to prioritize their investigations based upon, in part, when the statute of limitations would expire. The statute of limitations for a criminal violation of the Colorado Securities Act is five years. § 11-51-603(5), C.R.S. For each case, Complainant and Mr. Poplinger looked for the date of the relevant investment or fraudulent conduct to determine whether the five-year statute of limitations had already expired, and if not, how soon before such expiration would occur.

13. Once Complainant or Mr. Poplinger completed a preliminary investigation of a potential securities fraud case, the results of the preliminary investigation would be shared with Mr. Clifford to determine whether a case should be opened. Once a case was opened, the Investigator to whom the case was assigned worked with the attorney assigned to the case to complete any additional investigation and to prepare the case for trial.

#### Complainant's Performance History Prior to September 2012

14. On Complainant's first performance evaluation by Ms. Woodford in May 2006, he earned a "successful" rating, or Level 2 out of 4, in job knowledge, and "commendable" ratings, or Level 3 out of 4, in communication, interpersonal skills, accountability, customer service and individualized competencies, including meeting "deadlines for the completion of assigned tasks

and investigations,” keeping the “assigned attorney ... briefed as to progress on cases,” prioritizing “tasks to avoid emergencies” and identifying “legal concepts, including elements of contemplated charges” and identifying “evidence for every element.” Ms. Woodford describes a letter received from a DEA supervisor “recognizing and praising [Complainant’s] response and investigation concerning a financial fraud tip,” and quotes the following comments: “[Complainant’s] response and subsequent actions in this matter were truly outstanding. I was very impressed with his professionalism, financial fraud acumen, and his ‘can-do’ and enthusiastic attitude.”

15. On Complainant’s second performance evaluation by Ms. Woodford in May 2007, he was once again rated “successful” in job knowledge, and “commendable” in communication, interpersonal skills, accountability, customer service and individualized competencies. Ms. Woodford notes: “In addition to his assigned active cases, [Complainant] has investigated over twenty five incoming securities fraud complaints which were submitted to this office by mail or via the Colorado Attorney General’s Office’s internet website.” She also notes: “[Complainant] is cheerful and approachable and offers assistance throughout the office. ... [Complainant] never has an attitude of ‘that’s not my job’ – which is greatly appreciated by his supervisor.”

16. For Complainant’s third performance evaluation, the rating system was changed from four levels to three levels. Beginning with the 2007-2008 performance cycle, a Level 2 performance rating was defined as follows:

This rating encompasses a range of expected performance. It includes employees who are successfully developing in the job, employees who exhibit competency in work behaviors, skills and assignments, and accomplished performers who consistently exhibit the desired competencies effectively and independently. These employees are meeting all the expectations, standards, requirements, and objectives on their performance plan and, on occasion, exceed them. This is the employee who reliably performs the job assigned and may even have a documented impact beyond the regular assignments and performance objectives that directly supports the mission of the organization.

17. Beginning with the 2007-2008 performance cycle, a Level 3 performance rating was defined as follows:

This rating represents consistently exceptional and documented performance or consistently superior achievement beyond the regular assignment. Employees make exceptional contribution(s) that have a significant and positive impact on the performance of the unit or the organization and may materially advance the mission of the organization. The employee provides a model for excellence and helps others to do their jobs better. Peers, immediate supervision, higher-level management and others can readily recognize such a level of performance.

18. On Complainant’s third performance evaluation by Ms. Woodford in May 2008, he earned a Level 2 / Successful rating in Communication, Accountability, Job Knowledge and individualized Competencies, and a Level 3 / Exceptional rating in Interpersonal Skills and Customer Service. In this evaluation, Ms. Woodford notes: “[Complainant] continues to be an asset to the Securities Fraud Unit. ... This year, [Complainant] has been the lead investigator on

a few large cases. ... He ... ensures that the prosecutor assigned to the case is kept updated and in the loop concerning what direction the case is headed." In a large grand jury case that was expected to result in a "significant indictment in the near future," Ms. Woodford notes that the prosecutor "reports that [Complainant] has been very pro-active in both contacting and keeping in touch with victims in the case and does a good job keeping the prosecutor updated and advised on developments." Ms. Woodford concludes: "This reviewer appreciates how [Complainant] has consistently stepped in to help on cases that had been worked on by another Securities Fraud Investigator who left the office. ... [Complainant's] positive attitude and willingness to step in to help wherever he can is appreciated greatly."

19. On Complainant's fourth performance evaluation by Ms. Woodford in May 2009, he earned a Level 3 / Exceptional rating in Communication and Interpersonal Skills, and a Level 2 / Successful rating in Accountability, Job Knowledge, and Customer Service. In this evaluation, Ms. Woodford notes:

In addition to his assigned active cases, [Complainant] has investigated over twenty incoming securities fraud complaints which were submitted to the Colorado Attorney General's Office by mail or via the Colorado Attorney General's Office's internet website. He has handled several requests by this reviewer to follow up on complaints that come through the Office of the Attorney General and is always prompt in responding to such requests.

20. On Complainant's fifth performance evaluation by Ms. Woodford in May 2010, he earned a Level 3 / Exceptional rating in Communication and Interpersonal Skills, and a Level 2 / Successful rating in Accountability, Job Knowledge, and Customer Service. In this evaluation, Ms. Woodford notes:

This year, [Complainant] has been the lead investigator on a grand jury investigation that was referred to this office by the SEC. He has been the liaison between the offices and has done numerous interviews in preparation for the upcoming indictment. Additionally, he has been active in assisting local DA offices with their investigations to give expertise to the local investigations.

His positive attitude and pleasant demeanor is appreciated by all of his colleagues, and especially by this reviewer.

21. On January 12, 2011, Complainant received a written reprimand from former Deputy District Attorney Michael Dougherty for identifying himself as an Investigator with the Attorney General's Office and being interviewed for two videos appearing on a real estate consulting company's website without seeking prior permission from his supervisor. This written reprimand, which was not to be placed in Complainant's personnel file, includes the following comments:

Your acceptance of responsibility is commendable. Additionally, you are a valued and outstanding employee for this office. Your current supervisor and your past supervisor both speak highly of you and you are currently defined as one of the very best employees in Financial Fraud.

22. On Complainant's sixth performance evaluation by Ms. Woodford in May 2011, he earned a Level 3 / Exceptional rating in Communication and Interpersonal Skills, and a Level

2 / Successful rating in Accountability, Job Knowledge, and Customer Service. In this evaluation, Ms. Woodford states that Complainant was the lead Investigator for two large indictments, and served "as the conduit for information sharing between the agencies" involved in one of these indictments, which was referred by the SEC. Ms. Woodford also notes:

[Complainant] has reviewed numerous complaints submitted to this office by mail and the office website, he also maintains contact with the Consumer Protection Unit to ensure communication about common issues to the office.

.....

[Complainant] has a positive, upbeat personality that makes him a pleasure to work with.

23. On Complainant's seventh performance evaluation by Ms. Woodford in April 2012, he earned a Level 3 / Exceptional rating in Communication, Interpersonal Skills and Customer Service, and a Level 2 / Successful rating in Accountability and Job Knowledge. In this evaluation, Ms. Woodford notes:

During the past year, [Complainant] worked with the Jefferson County D.A.'s office on a case we referred to them. [Complainant] stayed with the case and was the lead... The Jefferson County prosecutors contacted the undersigned to express their appreciation for [Complainant's] hard work.

[Complainant] was also the advisory witness for a trial with the undersigned in Larimer County. ... [Complainant] worked with the SEC in developing the case and put a lot of time and effort into making it a successful prosecution.

.....

[Complainant's] positive demeanor and willingness to help his colleagues is always appreciated.

#### Complainant's Performance History After September 2012

24. In September 2012, Mr. Clifford became Complainant's supervisor.

25. On Complainant's first performance evaluation by Mr. Clifford in April 2013, he earned a Level 3 / Exceptional rating in Interpersonal Skills and Customer Service, and a Level 2 / Successful rating in Communication, Accountability and Job Knowledge. In this evaluation, Mr. Clifford notes:

[Complainant] has a positive attitude and is an asset to the Securities Fraud Unit.

[Complainant] has investigated six cases in 2012 that were opened. One case was put into the grand jury which resulted in an indictment. In addition, another 7 investigations were conducted where a case number was not assigned. Both this supervisor and the other attorney in the unit find [Complainant] to be pleasant to work with and attentive to his cases.

[Complainant] has taken on a difficult benefits fraud case that was assigned to him by the last Deputy Attorney General in Criminal Justice. [Complainant] took this case on without complaint and has been conducting interviews and collecting information. [Complainant] has kept this supervisor apprised of the

investigation and has set up a number of interviews. [Complainant] has good ideas about the case and how it should proceed. [Complainant] has made appropriate strides on this case.

.....

[Complainant] has a positive demeanor and a willingness to assist colleagues. [Complainant] always projects a professional appearance inside as well as outside the office.

[Complainant] has a number of open investigations that are assigned to this supervisor. A goal for the coming year is to see more regular information sharing on pending investigations with attorneys.

26. On February 10, 2014, Complainant received a written reprimand from Mr. Durkin for inappropriately using his Investigator title in a personal legal matter.

27. On Complainant's second performance evaluation by Mr. Clifford in April 2014, he earned a Level 3 / Exceptional rating in Interpersonal Skills, a Level 2 / Successful rating in Customer Service and Job Knowledge and, for the first time, a Level 1 / Needs Improvement rating in Communication and Accountability. As a result, Complainant's overall rating was 1.7, which was just below the lowest rating (1.8) considered to be Successful. In his narrative comments, Mr. Clifford explains:

While [Complainant] has been with the Office for a significant period of time and is engaged in some valuable supplementary projects that benefit the Office, overall performance this year has been below expectations. [Complainant] has a couple of securities fraud and other financial crime cases that have been assigned to him. Unfortunately, these cases have languished and not had proper attention paid to them. It is unclear to this supervisor why this is occurring despite conversations on the topic with [Complainant]. On some occasions it seems the cause is a lack of attention and others a lack of knowledge on how to proceed. Despite repeated attempts and assurances that investigative work or tasks would be completed in a timely manner, they were still neglected and work not completed. After several meetings, it was determined by this supervisor that in order to attempt to remedy this situation, weekly meetings would be held between [Complainant] and this supervisor. It does appear that this has helped as some of the cases now appear to be moving forward to some extent.

Another concern of this evaluator is communication. While [Complainant] is very personable within the office, communication between [Complainant] and the attorneys and support staff is lacking. On several occasions, after being specifically instructed, [Complainant] initiated meetings on a case without this supervisor's involvement as the lead prosecutor on the case. This was frustrating and duplicated work. In addition, a miscommunication occurred between [Complainant] and the previous paralegal of the Unit which led to a box of materials not being discovered for a jury trial that was located the week prior to the start of the trial. As a result the case was continued at the last minute. It is unclear where fault lies in this situation but at a minimum it is the responsibility of the assigned investigator to make sure that documents are appropriately handled on a case set for trial that could most likely have been remedied by better communication and attention to detail.

28. As a result of this 2014 evaluation, on April 29, 2014, Mr. Clifford issued Complainant a Performance Improvement Plan (PIP) that was approved by Mr. Durkin. This plan addressed performance deficiencies identified in Complainant's performance evaluation, and included the following specific instructions about handling cases:

6. [Complainant] shall exercise sound professional judgment by prioritizing his duties and assignments in a manner that incorporates, but is not limited to, the following factors:

- the seriousness of the alleged offenses,
- any and all relevant time constraints of an investigation such as the applicable statute of limitations,
- meeting the pre-established assignment due date as set by the assigned attorney,
- the complexity of the issue or matter being handled, and
- logically completing one task which much [sic] be completed before the next task can be handled.

7. [Complainant] will ensure that investigations are not neglected. He will ensure that appropriate attention is paid to all investigations or cases. He will seek out guidance or instruction from the assigned attorney if he is unclear as to the next step.

29. Mr. Poplinger testified that Complainant told him that he had communication issues with Mr. Clifford in 2014.

30. Shelly Oxenreider, Human Resources Director for Department of Law, also testified that Complainant contacted her in 2014 to seek assistance with communication issues he was having with Mr. Clifford. Ms. Oxenreider testified that she discussed these issues with Mr. Clifford and the need to continue weekly meetings with Complainant "so that there was clearly an attempt at communication on both of their parts."

31. On August 25, 2014, Mr. Clifford provided Complainant with a Corrective Action addressing his "failure to demonstrate the necessary improvement in the areas discussed," and specifically paragraphs 6 and 7, in the PIP. Mr. Clifford informed Complainant that he "failed to demonstrate appropriate professional judgment in [his] duties and assignments and neglected [his] cases." As a result, Mr. Clifford imposed the following requirements:

1. You will continue to meet with your supervisor weekly to report on the status of your cases and investigations. At these meetings we will also discuss your progress in meeting the expectations set forth in this CA and the PIP. I am happy to field questions from you at any time if you do not understand directions or constructive criticism that is being provided in terms of your cases or the CA or PIP.
2. You will reapply yourself and abide by the terms of the PIP.
3. You will demonstrate initiative and interest in your cases. You will not simply rely on being told what to do on a particular case. You will offer suggestions for investigation and be proactive in utilizing your investigative resources.



4. You will meet with an experienced investigator in the Criminal Justice Section to relearn and refresh yourself on basic interview and interrogation techniques. The investigator will be determined by this supervisor.
5. It is expected that you will demonstrate the care and attention to cases as is expected of an experienced criminal investigator II. You will properly prioritize your cases and investigations and take timely action. Should you have questions you should contact this supervisor if you are not clear. This supervisor expects appropriate independent decision making and the autonomy expected of a seasoned investigator. This supervisor cannot and will not micro-manage your cases by telling you each detailed step to conduct an investigation but will provide general recommendations on how to proceed.

#### Case No. 4<sup>1</sup>

32. On March 27, 2014, Case No. 4 came into the Financial Fraud Unit via a tip provided to Mr. Garcia. Mr. Poplinger agreed to handle the investigation and obtained case files from a prosecutor who had tried and convicted three defendants in Indiana. A fourth potential defendant was located in Colorado. After Mr. Poplinger determined that the statute of limitations was not an immediate issue in this case, he put it aside and focused on a Grand Jury case that was about to result in an indictment.

33. Mr. Poplinger testified that Investigators were "typically very busy" when a case was before the Grand Jury. They were also very busy when they were in a trial. In addition to assisting the assigned attorney with trial preparation, they would attend the trial, which would typically last one to two weeks, and could sometimes last over a month. Investigators would not work other cases while they were in trial.

34. In August 2014, Mr. Poplinger was feeling overworked, and asked Mr. Clifford to reassign Case No. 4 to Complainant.

35. On September 3, 2014, Mr. Clifford "grabbed a box" from Mr. Poplinger's office with approximately 400 pages of documents relating to Case No. 4, and gave this box to Complainant, assigning him this case. Mr. Clifford instructed Complainant to "appropriately triage this case with the others." When Mr. Clifford provided this instruction, he assumed that Complainant would assess "where the case stood with regard to statute of limitations."

36. Mr. Poplinger's office was next door to Complainant's office. Complainant testified that, upon receiving Case No. 4, he briefly stopped by Mr. Poplinger's office to find out whether there were any urgent issues, such as statute of limitations, he needed to worry about. Mr. Poplinger responded, "No." Complainant relied on this information to place Case No. 4 on the back burner and focus on other, more urgent work, such as a Grand Jury appearance he had the next day.

37. Mr. Poplinger testified that he did not remember having a conversation with Complainant in September 2014 concerning the statute of limitations, and believed that conversation occurred in November 2014, one month before Complainant was terminated. Mr.

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<sup>1</sup> To protect the confidentiality of criminal investigation documents pursuant to the Colorado Criminal Justice Records Act, § 24-72-301, *et seq.*, C.R.S., as well as information for presentation to the Grand Jury, pursuant to Crim. P. 6-6.9, this case, as well as some others, are referred to by number only.

Poplinger informed Complainant that there were still "a few years left" on the statute of limitations.

38. On November 3, 2014, Mr. Clifford received a telephone call from an attorney checking on the status of the investigation of Case No. 4.

39. On November 4, 2014, during his regular weekly meeting with Complainant, Mr. Clifford asked Complainant about the status of Case No. 4. Complainant informed him that, because of other more urgent work, he had not yet begun to investigate this case. While Mr. Clifford said that he asked Complainant "if he had done a preliminary evaluation for statute of limitations concerns," Complainant denied that Mr. Clifford asked him that question.

40. On November 4, 2014, Mr. Clifford instructed Complainant to prioritize Case No. 4. Complainant set aside November 7, 2014, to work on Case No. 4.

41. On November 7, 2014, Complainant realized that he was missing crucial information concerning Case No. 4 that prevented him from completing a preliminary assessment. On November 10, 2014, he contacted Mr. Poplinger and subsequently received an email from Mr. Poplinger providing numerous documents that were missing from the box originally provided to Complainant on September 3, 2014.

42. During a follow-up conversation with Mr. Clifford on November 7, 2014, Complainant informed Mr. Clifford that he had started to investigate Case No. 4, and "reported that the investigation appeared to be presumptively within statute of limitations."

43. After receiving the additional documents from Mr. Poplinger on November 10, 2014, Complainant was able to complete his preliminary assessment of Case No. 4, which he provided to Mr. Clifford on November 12, 2014.

44. Complainant's testimony was clear, consistent and credible.

45. Mr. Clifford subsequently verified that there was no urgent statute of limitations issue in Case No. 4.

46. Mr. Clifford admitted that it was ultimately the responsibility of the supervising attorney to make a determination whether a case was within the applicable statute of limitations.

47. Mr. Clifford concluded that Complainant intentionally disregarded his implied instructions to specifically determine the statute of limitations deadline on Case No. 4 as part of his required "triage" of this case when it was assigned on September 3, 2014.

48. Mr. Clifford's testimony was, at times, vague, obtuse, confusing, combative, and inconsistent, rendering his testimony not credible.

#### Investigation and Rule 6-10 Meeting

49. Mr. Clifford's conclusion that Complainant intentionally disregarded his instructions concerning Case No. 4 prompted him to prepare a five-page memorandum to Mr. Durkin, dated November 12, 2014, detailing Complainant's "[p]erformance and competence ... issues that are impeding the performance and reputation of the Financial Fraud Unit." This memorandum reviewed numerous events leading up to the August 25, 2014 Corrective Action,

and then listed three categories of "Post CA Conduct": "Continued Neglect of Investigations," "Lack of Job Knowledge," and "Lack of Attention to Responsibilities."

50. In "Continued Neglect of Investigations," Mr. Clifford explained his conclusion that Complainant intentionally disregarded his instructions on September 3, 2014 to specifically determine the statute of limitations deadline on Case No. 4 as part of his required "triage" of this case.

51. In "Lack of Job Knowledge," Mr. Clifford described his directive to Complainant on September 16, 2014, to obtain refresher training concerning the use of National Crime Information Center (NCIC) after Complainant commented that he was "uncomfortable" with using this database. Mr. Clifford stated: "This assignment was completed."

52. Complainant testified that he initiated the request to Mr. Clifford for refresher training concerning use of the NCIC database.

53. Mr. Poplinger testified that, in September 2014, he did not have access to the NCIC database because he did not want it. He explained that this database was very rarely used and was just another password he would have to deal with. At some point before Complainant's employment was terminated, Mr. Clifford realized that Mr. Poplinger did not have NCIC access and directed Mr. Poplinger to obtain it. Mr. Clifford did not take any corrective or disciplinary action against Mr. Poplinger for failing to have NCIC access.

54. Mr. Poplinger's testimony was clear, consistent and credible.

55. Mr. Durkin testified that he "accepted" Complainant's statement, during the Rule 6-10 meeting, that he requested NCIC refresher training. He was not aware of whether or not Mr. Poplinger had access to the NCIC database, and did not review Mr. Poplinger's work load or consider how he processed his cases before terminating Complainant's employment. Mr. Durkin testified that Complainant's request for NCIC refresher training "did not play much of a role" in his decision to terminate Complainant's employment.

56. In "Lack of Job Knowledge," Mr. Clifford also described an October 24, 2014 meeting he had with Complainant concerning a previously assigned "task list" concerning investigative work on Case No. 2. Mr. Clifford expressed frustration that Complainant was pursuing new alleged criminal conduct by the target of this investigation, rather than immediately completing the task list he was assigned for this case. Mr. Clifford did not indicate whether or not Complainant complied with his instructions and completed the "task list" he assigned to Complainant for this case.

57. Mr. Durkin testified that he never saw the "task list" assigned to Complainant by Mr. Clifford for Case No. 2. He did not know, and did not attempt to find out, whether Complainant completed the "task list." This "task list" was not entered into evidence during the hearing.

58. In "Lack of Attention to Responsibilities," Mr. Clifford described a witness interview he was scheduled to conduct on September 19, 2014, for which Complainant was required to be present both as a witness and to operate the video recording equipment. On September 18, 2014, Mr. Clifford realized that he had granted Complainant's request to take September 19 off. When Mr. Clifford contacted Complainant, Complainant apologized for forgetting this appointment and agreed to come in to work on September 19.

59. Mr. Durkin testified that this oversight by Complainant did not play "any significant part" of his decision to terminate Complainant's employment and, in fact, "was actually a source of mitigation," as Complainant took responsibility for forgetting the September 19 interview and attended the interview instead of taking the day off.

60. In "Lack of Attention to Responsibilities," Mr. Clifford also commented that, on September 30, 2014, Michael Bellipani, an attorney in his unit responsible for prosecuting securities fraud cases, reported that Complainant "still seems to be slow in providing investigative reports to him in a timely manner." Mr. Clifford further commented: "Some of these reports have been recently provided." Other than this brief comment in Mr. Clifford's memorandum, no evidence concerning these "slow investigative reports" was provided during the evidentiary hearing.

61. Mr. Duran testified that he did not talk with Mr. Bellipani concerning Complainant's work or whether Mr. Bellipani had any communication issues with Complainant. Mr. Duran admitted that he receive no complaints concerning Complainant's work from Mr. Bellipani.

62. Immediately upon receiving Mr. Clifford's memorandum on November 12, 2014, Mr. Durkin gave Complainant a copy of this memorandum with a letter notifying Complainant that he was scheduling a Rule 6-10 meeting with Complainant for November 20, 2014.

63. Complainant, his representative Donald Sisson, Esq., Mr. Durkin, and Ms. Oxenreider attended the Rule 6-10 meeting held on November 20, 2014.

64. During the Rule 6-10 meeting, Mr. Durkin stated that "the specific information that caused this meeting to be held is contained within [Mr. Clifford's] November 12, 2014 memorandum." Mr. Durkin then invited Complainant "to present any information you have regarding the situation," and "to provide me with reasons that I should or should not take action, and provide any details that may mitigate what my eventual decision may be."

65. During the Rule 6-10 meeting, Complainant addressed every allegation contained in Mr. Clifford's November 12, 2014 memorandum, starting with all of the listed events that occurred prior to the Corrective Action issued on August 25, 2014. Complainant explained that it was difficult for him to communicate with Mr. Clifford. When Mr. Clifford issued his Corrective Action on August 25, 2014, he told Complainant that communication was a "one-way street," and that he expected Complainant to approach him with any issues or questions. Complainant stated he was afraid to ask questions of Mr. Clifford, as it seemed as though any question he asked was used as a ground for disciplinary action, which "makes it hard to do my job. It absolutely does."

66. During the Rule 6-10 meeting, Ms. Oxenreider clarified: "[I]f you look at Mr. Clifford's memo, that we're talking about post-corrective action that has caused Mr. Durkin to schedule today's meeting." Ms. Oxenreider explained that the events outlined by Mr. Clifford in his November 12, 2014 memorandum that preceded the August 25, 2014 corrective action are "not going to be the basis for discipline. ... What Mr. Durkin is considering taking disciplinary action on is post-corrective action conduct."

67. Ms. Oxenreider's testimony was clear, consistent and credible.

68. Mr. Durkin admitted that he did not directly supervise Complainant or observe his performance. Instead, he primarily relied on the information provided by Mr. Clifford to reach his decision to terminate Complainant's employment.

69. Mr. Durkin testified that he was not aware of the calendaring process used by Mr. Clifford in his Financial Fraud Unit. He never asked Mr. Clifford what calendaring system he used to track statutes of limitation on pending cases, and did not consider what responsibility Mr. Clifford, as the attorney supervising a non-lawyer, had to track such legal deadlines and provide guidance concerning legal strategies as a case was investigated.

#### Termination Decision

70. Complainant's employment was terminated by Mr. Durkin via a letter dated December 1, 2014. Mr. Durkin testified that he included the information he considered in reaching this decision in this letter.

71. Mr. Durkin's December 1, 2014 letter states the following reasons for the termination of Complainant's performance:

...I have determined that your actions constitute a willful failure to perform and a failure to perform at a competent level. .... Despite significant efforts to help you improve, you have consistently failed to demonstrate appropriate professional judgment in your duties, consistently neglected your cases that prevented criminal prosecutions, and failed to perform at a competent level. Furthermore, termination is necessary due to your continued failure to take responsibility for your inability to perform at a competent level, and the negative repercussions your unsatisfactory performance has had on the Criminal Justice Section of the Department of Law and its ability to fulfill its core mission.

72. As a basis for these conclusions, Mr. Durkin's December 1, 2014 letter reviews Complainant's April 29, 2014 "needs improvement" performance evaluation and Performance Improvement Plan (PIP), and Complainant's August 25, 2014 Corrective Action. Following these documented efforts to improve Complainant's performance, Mr. Durkin's letter identifies Complainant's failure to "appropriately triage" Case No. 4 assigned to him on September 3, 2014, as the precipitating reason for the termination of his employment. In discussing this failure, Mr. Durkin commented that Complainant "could have simply asked [Mr. Poplinger] for an update of his review," and concluded that Complainant failed to take this "very easy step."

73. Mr. Durkin's December 1, 2014 letter acknowledges that Complainant told him that he had communication issues with Mr. Clifford. At Complainant's request, Mr. Durkin asked Mr. Poplinger whether he had communication issues with Mr. Clifford, which Mr. Poplinger denied. Mr. Durkin did not ask Mr. Poplinger whether he had any conversation with Complainant about Case No. 4 when it was transferred to Complainant in September 2014.

74. Mr. Durkin testified that, in reaching his decision to terminate Complainant's employment, he considered "a pattern of conduct" addressed with progressive discipline, which was considered in conjunction with his understanding that "no work ... was done on case four between September and November of 2014." He stated that Complainant's "troubles" concerning Case No. 4 "were absolutely at the heart of my decision to terminate," and explained:

Specifically what he was terminated for was a whole pattern of conduct culminating with the events from September to November of 2014, primarily what was going on with case number four.

75. Mr. Durkin's testimony was generally credible.
76. Complainant filed a timely appeal of this termination decision on December 10, 2014.

## **DISCUSSION**

### **I. 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.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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.

Board Rule 6-8 further provides: "An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature."

In this *de novo* disciplinary proceeding, Respondent 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 706-708. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because "the appointing authority is the party attempting to overcome the presumption of satisfactory service" by the employee. *Id.* at 708, citing *State Civil Service Comm'n v. Hoag*, 293 P. 338, 342 (1930). The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

### **II. COMPLAINANT DID NOT COMMIT THE ACT(S) FOR WHICH HE WAS DISCIPLINED.**

Under Board Rule 6-8, a certified employee can only be subject to a corrective or disciplinary action once for a specific act or incident. Therefore, Complainant could only be terminated for something that he did, or failed to do, that was not covered by the August 25, 2014 Corrective Action or prior corrective measures.

The precipitating incident that led to Mr. Clifford's November 4, 2014 memorandum to Mr. Durkin, and then to Mr. Durkin's decision to terminate Complainant, was the conclusion reached by Mr. Clifford that Complainant failed to follow Mr. Clifford's directions concerning Case No. 4. While a few other minor post-Corrective Action incidents were described in Mr. Clifford's memorandum, Mr. Durkin repeatedly emphasized during his testimony that his decision to terminate Complainant's employment was prompted by his conclusion that Complainant failed to follow Mr. Clifford's instructions in processing Case No. 4.

Case No. 4 was originally assigned to Mr. Poplinger. Mr. Poplinger checked the statute of limitations as applied to this case, determined that there were a few years left before this statute of limitations would expire, concluded that this case was not a priority, and put Case No. 4 aside while he worked on other, more urgent assignments. On September 3, 2014, Mr. Clifford transferred Case No. 4 from Mr. Poplinger to Complainant, instructing Complainant to "appropriately triage this case with others." When Mr. Clifford provided this instruction, he assumed that Complainant would immediately assess "where the case stood with regard to statute of limitations."

Complainant credibly testified that, upon being assigned Case No. 4, he asked Mr. Poplinger whether there was an urgent need to begin investigation of this case because of a rapidly approaching statute of limitations deadline. Complainant was informed by Mr. Poplinger that there were no urgent issues; Complainant believed he could rely on this information to triage Case No. 4, placing it on the back burner and focusing on other, more urgent work. While Mr. Poplinger testified that he did not remember that this brief conversation occurred in September 2014, he did remember having a conversation in which he informed Complainant that the statute of limitations was not an issue in Case No. 4. In his December 1, 2014, termination letter, Mr. Durkin acknowledged that simply asking Mr. Poplinger about his review of Case No. 4 would have been sufficient to meet Complainant's obligation to appropriately triage this case. Mr. Durkin did not ask either Complainant or Mr. Poplinger whether such a conversation occurred, and erroneously assumed that Complainant did not check with Mr. Poplinger before moving on to more urgent assignments.

Mr. Clifford subsequently verified that there was no urgent statute of limitations issue in Case No. 4. Instead of concluding that Complainant properly triaged and prioritized Case No. 4, however, Mr. Clifford concluded that Complainant willfully disregarded his expectation to specifically check the deadline for the statute of limitations applicable to this case as soon as it was assigned, which Mr. Clifford believed was implicit in his instruction on September 3, 2014, to "triage this case with others."

Respondent had the burden to prove, by a preponderance of the evidence, that Complainant willfully failed to perform by disregarding a clear directive from Mr. Clifford regarding Case No. 4. A careful review of the evidence presented during the hearing establishes that Complainant did, in fact, triage Case No. 4 appropriately, and was making his best efforts to comply with the sometimes vague, obtuse and contradictory instructions provided by Mr. Clifford. Because Respondent failed to prove by a preponderance of the evidence that Complainant willfully failed to perform by disregarding the instruction he received from Mr. Clifford concerning Case No. 4, there were no grounds to impose any disciplinary action on Complainant, much less terminate Complainant's employment.

### **III. THE DECISION TO TERMINATE COMPLAINANT'S EMPLOYMENT WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO RULE OR LAW.**

In determining whether an agency's decision to discipline an employee 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 that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons 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 arbitrary and capricious, as those terms are defined in *Lawley*, 36 P.3d at 1252. Mr. Clifford elevated an erroneous assumption concerning Complainant's willful failure to follow a directive concerning Case No. 4 into a terminable offense, and attempted to bolster this conclusion with a five-page memorandum relying heavily on events that had already led to an August 25, 2014 Corrective Action. Mr. Durkin failed to use reasonable diligence and care to investigate the allegations of post-Corrective Action conduct alleged by Mr. Clifford, and failed to give candid and honest consideration to the evidence provided by Complainant, including his numerous years of satisfactory, commendable and exemplary performance reviews prior to being supervised by Mr. Clifford. Mr. Durkin also failed to ascertain and consider all of the work Complainant was engaged in following the August 25, 2014 Corrective Action to determine whether he was, in fact, improving his performance, and to fairly consider Complainant's frustrated efforts to improve his communication with Mr. Clifford. A fair and honest consideration of the evidence presented in this case compels a conclusion contrary to Mr. Durkin's decision to terminate Complainant's employment.

Mr. Durkin's decision also relies heavily on the conduct detailed by Mr. Clifford in his November 12, 2014 memorandum that occurred prior to the August 25, 2014 Corrective Action. The majority of the lengthy Rule 6-10 hearing conducted in this matter concerned a discussion of these events that had already been subject to corrective measures, prompting Ms. Oxenreider to clarify that these pre-corrective action events could not serve as the basis for Mr. Durkin's subsequent decision to impose discipline. Respondent's substantial reliance on this conduct, which was already addressed by corrective measures, as a basis for subsequent discipline violates Board Rule 6-8.

The preponderance of the evidence presented by the parties establishes that Respondent, under *Lawley*, acted arbitrarily and capriciously, as well as contrary to rule or law, in deciding to terminate Complainant's employment on December 1, 2014.

### **IV. THE DISCIPLINE IMPOSED WAS NOT WITHIN THE RANGE OF REASONABLE ALTERNATIVES.**

In reviewing the decision to impose discipline, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within a range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "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." Board Rule



6-9.

Because the ALJ finds that Complainant did not commit the act(s) for which he was disciplined, no discipline was appropriate in this case; therefore, Respondent's termination of Complainant's employment was not within the range of reasonable alternatives.

**V. COMPLAINANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.**

§ 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). In *Coffey v. Colorado School of Mines*, 870 P.2d 608, 609 (Colo. App. 1993), the Colorado Court of Appeals held that § 24-50-125.5(1), C.R.S., mandates an award of attorney fees where an employer has no grounds to seek an employee's discharge.

As discussed above, Respondent failed to establish that Complainant committed the act(s) for which he was disciplined. Therefore, Respondent had no grounds to seek Complainant's discharge, rendering its decision groundless. Respondent also failed to advance a rational argument, based on the evidence and law presented, justifying Complainant's discharge, rendering its discharge decision frivolous. Finally, Respondent's decision to terminate Complainant, based upon Mr. Durkin's reliance upon Mr. Clifford's erroneous assumption that Complainant disregarded his instructions concerning Case No. 4, was disrespectful of the truth, and thus was made in bad faith.

Because Respondent's decision to terminate Complainant's employment was groundless, frivolous and rendered in bad faith, under § 24-50-125.5(1), C.R.S., an award of attorney fees and costs to Complainant is mandated. *Coffey*, 870 P.2d at 609.

**CONCLUSIONS OF LAW**


1. Complainant did not commit the act(s) for which he was disciplined.
2. Respondent's termination of Complainant's employment was arbitrary, capricious, and contrary to rule or law.
3. Complainant's termination was not within the range of reasonable alternatives.

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

**ORDER**

Respondent's action is **reversed** and the termination of Complainant's employment is rescinded. Complainant should be reinstated with full back pay and made whole for all lost benefits, with statutory interest. Complainant is also awarded all reasonable attorney fees and costs incurred in pursuing this appeal.

Dated this 5<sup>th</sup> day  
of August, 2016.



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Susan J. Tyburski  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, CO 80203  
(303) 866-3300

**CERTIFICATE OF MAILING**

This is to certify that on the 5<sup>th</sup> day of August, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Donald C. Sisson  
Zachary D. Wagner  
501 South Cherry Street, Suite 920  
Denver, CO 80246  
[dsisson@elkusandsisson.com](mailto:dsisson@elkusandsisson.com)  
[zwagner@elkusandsisson.com](mailto:zwagner@elkusandsisson.com)

Eric W. Freund  
Senior Assistant Attorney General  
Civil Litigation & Employment Law Section  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10<sup>th</sup> floor  
Denver, CO 80203  
[Eric.Freund@coag.gov](mailto:Eric.Freund@coag.gov)



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Jenrey Reed

## **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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.

