

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2015B108

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GREG GOLDMAN,
Complainants,

vs.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing by telephone on October 15, 2015, and the evidentiary hearing on December 21 and 22, 2015, and January 12, 2016, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on January 20, 2016, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared in person and was represented by Mark Schwane. Respondent was represented by Joseph Haughain, Assistant Attorney General. Respondent's advisory witness was Herman Stockinger, who was the delegated Appointing Authority in this matter.

MATTER APPEALED

Complainant, a former certified employee, appeals the disciplinary termination of his employment by Respondent, effective May 21, 2015. Complainant argues that this termination was not within the range of reasonable alternatives, considering his excellent work record, the failure of Respondent to apply progressive discipline, and the dysfunctional work environment that existed. Complainant further argues that the authority to investigate and make a determination concerning discipline was not properly delegated to Herman Stockinger by the appointing authority, and that such discipline constituted retaliation for protected disclosures Complainant made under the State Employee Protection Act, § 24-50.5-101 *et seq.* C.R.S. Complainant seeks all damages to make him whole, including but not limited to reinstatement to his position at the current classification or front pay in lieu of reinstatement, back pay from the effective date of the disciplinary action to the date of the final agency order, front pay from the date of the final agency order to the date of reinstatement to his position, reinstatement of all lost back benefits, including but not limited to PERA service credits, and an award of attorney fees and costs.

Respondent argues that its decision to terminate Complainant was not arbitrary, capricious or contrary to rule or law; that the authority to investigate and make this disciplinary decision was properly delegated; that this termination was not retaliation for protected disclosures Complainant made under the Whistleblower Act; and that this termination was within the range of reasonable alternatives, and should be affirmed. Respondent argues that all relief sought by Complainant should be denied.

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

ISSUES

1. Whether Complainant committed the act for which he was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;
 - a.) Whether Respondent failed to properly delegate authority to Herman Stockinger to investigate and reach a decision concerning the incident on April 30, 2015;
 - b.) Whether Respondent's decision to terminate Complainant's employment was in retaliation for protected disclosures Complainant made under the Whistleblower Act;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant is entitled to an award of attorney fees.

FINDINGS OF FACT

Background

1. Complainant was a certified state employee. Complainant began his state employment in July 2005 as an Accountant II for the Colorado Department of Human Services (DHS). He transferred to the Colorado Department of Labor and Employment in December 2007, and remained employed there until February 2010.

2. In March 2010, Complainant was hired into the position of Business Manager for the Division of Aeronautics (Division), Department of Transportation (DOT), and remained in that position until the termination of his employment, effective May 21, 2015.

3. In August and September 2011, Complainant's position was reallocated upward from an Accountant II to a General Professional IV. Complainant applied for and was given a promotion by Respondent to the reallocated position classification of GP IV.

4. The Division of Aeronautics administers a grant program for airports located around the state, which are encouraged to apply for funding for projects. The grants are funded by fuel taxes collected by the State of Colorado into an Aviation Fund; disbursements are approved by the Colorado Aeronautical Board (CAB).

5. As Business Manager for the Division, Complainant was responsible for managing tax revenues and disbursements to grant recipients, as well as developing and managing the Division's budget. Division aviation planners Todd Green, Kaitlyn Westendorf, Christine Eldridge and Scott Storie were responsible for soliciting grant applications from airports and recommending them for approval.

6. Mr. Gordon left the position of Division Director in early December 2014, and Scott Cuthbertson, Deputy Director of DOT, was temporarily put in charge of the Division. In January 2015, Stanley Buck was named interim director of the Division, and was Complainant's

appointing authority.

7. From July 2013 until Complainant was terminated on 2015, Thomas Kelly (T.K.) Gwin was the Division's Grant Program Manager and Complainant's immediate supervisor, as well as the aviation planners' supervisor.

Complainant's Performance History

8. Prior to his termination, Complainant had never received a corrective or disciplinary action.

9. While employed by DHS, Complainant received a Level III, or "Very Good, Commendable, Exceeds Expectations," rating on his annual performance evaluation in April 2007. His supervisor, Charlotte Anderson, noted: "[Complainant] has demonstrated exceptional skills in managing the technical side of the County Employees Data Store system as well as offering research to county personnel. He has shown a high degree of cooperation with team members and he works closely with other CDHS accounting units. He exhibits a strong attention to detail when performing analysis of the Tac Intercepts."

10. After being hired into the position of Business Manager at DOT's Aeronautics Division, Complainant received a Level III, or exceptional, rating on his annual performance evaluation in February 2011.

11. Complainant received a Level III, or exceptional, rating on his annual performance evaluation in March 2012.

12. Complainant received a Level II, or successful, rating on his annual performance evaluation in March 2013. Complainant attached a response to this rating detailing his numerous achievements over the past year, including his early identification and correction of a shortfall in Aeronautics Division revenue, and questioning why his rating was lowered from "exceptional" to "successful."

13. Complainant received a Level III, or exceptional, rating on his annual performance evaluation in May 2014. This evaluation noted: "[Complainant] continues to exceed expectations. His knowledge of accounting and budget coupled with his analytical ability is an essential part of our success as a Division. He has gained the full trust of not only our staff but the Aeronautical Board as well." Mr. Gwin testified that the CAB was happy with his work.

14. Complainant's May 2014 performance evaluation includes a "Communications / Interpersonal Skills" rating of 2+, and a 2 ("successful") rating for the specific skills of "Supports and respects others to promote a positive work environment" and "Actively listens and effectively interacts to create effective working relationships." (Emphasis in original omitted.) This section includes the following comment: "[Complainant] continually strives to improve reports that communicate accurate financial information. He presents reports to the staff and to the Aeronautical Board. We depend on his information and his ability to communicate it."

15. This performance management plan for Complainant notes that "[Complainant's] ability and willingness to communicate is the largest barrier to him improving his rating" and "Improved communication by [Complainant] is a high priority for his future job success."

16. The 2015 performance management plan for Complainant identifies the following goal: "Work to improve communication with staff, the Board, and the public. As a result of the 2014 revenue downturn there is an increased demand for timely and accurate financial information. Develop new reports and processes to place data on the website, in Board presentations, and staff notifications."

17. The final rating for Complainant's 2015 performance management plan was entered after the termination of Complainant's employment in May 2015, and states: "[Complainant's] goals for this quarter were to improve communication with staff, the Board, and the public. [Complainant's] willingness and method to keep staff informed has been minimal. Since our discussions for this goal [Complainant's] communication has not improved and unwillingness to provide information has decreased."

Complainant's Disclosures

18. On December 1, 2014, Complainant submitted a memorandum to Human Resources outlining his specific concerns regarding the mismanagement of the Division of Aeronautics grant program, resulting in the exacerbation of the existing financial crisis experienced by the Division. Complainant copied Director Gordon and Len Kiziuk, DOT Employee Relations, on this memorandum. Shortly afterwards, Mr. Gordon left the position of Division Director for undisclosed reasons.

19. Mr. Kiziuk testified that he talked with Complainant about his complaint and explained the grievance process to him. He recommended that Complainant document his concerns about the Division management of the financial crisis and provide a copy to Director Gordon. He did not know what happened to the complaint after it was submitted.

20. Mr. Kiziuk's testimony was credible.

21. Eric Richardson, a Budget and Policy Analyst in DOT's Finance Department, testified that, in January 2015, he was asked by Maria Sobota, DOT's Chief Financial Officer, to work with Complainant in sorting through the Aeronautics Division's financial problems. He was not involved in any conversations with anyone at DOT placing blame on Complainant for these problems or expressing a desire to terminate his employment for reporting problems concerning management of the Division. Complainant was presented to him as someone with financial expertise and a helpful resource.

22. Mr. Richardson's testimony was credible.

23. Ms. Sobota testified that no one in DOT blamed Complainant for the Division's financial problems in 2014 and 2015. In working to find solutions to these problems, she "welcomed" Complainant's input. Ms. Sobota testified that she had never seen Complainant's December 1, 2014 complaint.

24. Ms. Sobota's testimony was credible.

April 30, 2015¹ Incident

25. Beginning in October 2014, decreasing fuel tax revenue created serious deficiencies in the aviation fund, which created problems with grant disbursements requested by airports. These financial problems exacerbated existing tensions between Complainant and the aviation planners in the Division's office. Complainant believed the planners were irresponsibly over-committing dwindling tax revenue to potential grant recipients, while the planners were frustrated with Complainant's failure to provide complete and timely information about available tax revenue and the status of the aviation fund balance.

26. Todd Green testified that, on the morning of April 30, 2015, he arrived at the office around 7:00 a.m. to prepare for a training at a local airport scheduled at 9:00 a.m. The other planners - Mr. Storie, Ms. Westendorf and Ms. Eldridge - and Mr. Gwin gathered in his office as they arrived at work, and began discussing various matters, including the current status of the aviation fund balance. Complainant arrived around 8:20 a.m. and stood in the doorway of Mr. Green's office.

27. Mr. Green testified that, as the planners questioned Complainant about the aviation fund balance, the discussion became "very heated, and Complainant became defensive." At some point, Mr. Storie left the office.

28. Eventually, Mr. Green "had enough of the conversation" as it "wasn't going anywhere." He turned around to work on his computer and prepare for the training scheduled that morning. He sent a document to the printer located outside of his office and stood up to go to that printer. As Mr. Green passed Complainant in the doorway, Complainant "wound up and kicked straight at his legs," causing Mr. Green to stumble into the hallway. He caught himself on a wall, turned around and told Complainant, "Don't ever fucking touch me again." As Complainant walked down to his office, he called Mr. Green a "punk ass bitch." He subsequently yelled, "Way to manage your staff, T.K."

29. Mr. Green's testimony was credible.

30. Ms. Eldridge testified that, as the discussion on the morning of April 30, 2015 between Complainant and the planners became heated, Mr. Green expressed his unhappiness to Complainant, saying something like "we were screwed." Mr. Green got up to leave the room; she was sitting by the doorway and Mr. Green walked by her. As Mr. Green walked past Complainant, who was standing in the doorway, Complainant "lifted his leg as if to trip him," causing Mr. Green to stumble. Mr. Green caught himself on the side wall; if the wall had not been there, he would have fallen onto the floor. One of them called the other a "punk ass bitch." As Complainant walked to his office after this incident, he yelled, "Way to supervise your employees, T.K."

31. Ms. Eldridge described a look of "rage" on Complainant's face: "he was pissed, absolutely pissed." Ms. Eldridge testified that she was shocked; because the incident "was so alarming," she was "afraid" and "fearful," and did not feel comfortable around Complainant.

¹ While this date was identified as April 29 during the recorded Rule 6-10 meetings with Complainant, Mr. Green and Mr. Gwin, and in the statement submitted by Mr. Gwin to Mr. Buck, the testimony under oath at the evidentiary hearing, as well as the five other witness statements and the letter terminating Complainant's employment, consistently identified this date as April 30, 2015.

32. Ms. Eldrige's testimony was credible.

33. Ms. Westendorf testified that, towards the end of the discussion in Mr. Green's office on the morning of April 30, 2015, Mr. Green stopped participating and was doing some work at his desk. While the prior discussion had been tense, Ms. Westendorf described the atmosphere at that point in time as calmer and the conversational level as normal. This calmer level of conversation continued for approximately five minutes. As Mr. Green was leaving his office to go to the printer, Ms. Westendorf heard something hit the metal door frame, and saw Mr. Green fall into the wall across the hall. Complainant was standing on the left side of the door frame.

34. Ms. Westendorf's testimony was credible.

35. Mr. Gwin testified that Complainant and Mr. Green "didn't care a lot for each other and had a hard time communicating," resulting in "tense communications." During the heated discussion between Complainant and the planners on the morning of April 30, 2015, Mr. Green expressed his frustration to Complainant concerning the status of the aviation fund and said, "You really fucked us on this one, Greg."

36. Mr. Gwin testified that he "observed" the heated discussion and did not do anything to de-escalate the situation, as it "de-escalated on its own." As Mr. Green subsequently left the room, Complainant attempted to kick Mr. Green's legs out from under him. Mr. Green stumbled out into the hall and used the wall to keep from falling down.

37. Mr. Gwin's testimony was credible.

38. Mr. Storie testified that he was present for part of the initial discussion on the morning of April 30, 2015, but left Mr. Green's office shortly after Complainant arrived because he "didn't see the discussion going cordially." Soon afterwards, Mr. Storie observed Complainant walking away from Mr. Green's office "visibly upset, using vulgar language" and "pacing between his office and the kitchen." Mr. Storie heard Complainant call Mr. Green "a punk ass bitch." Mr. Storie "wasn't sure what happened" and "wasn't sure if there was a threat."

39. Mr. Storie's testimony was credible.

40. Complainant testified that he was solely responsible for the fiscal management of the Division and had no help from anyone in DOT; this responsibility caused him a great deal of stress. Beginning in January 2015, the atmosphere in the Division office was "very tense and abusive," and the complexity of his work increased exponentially due to increasing financial problems caused by the decrease in fuel tax revenues. Complainant was subjected to disrespect and hostility by the planners, who blamed him for the Division's financial problems. He discussed his frustrations over this treatment with Mr. Gwin, but Mr. Gwin did not take action to alleviate this frustration.

41. Prior to April 30, 2015, there was an apparent misunderstanding about the amount of monies in the Aviation Fund available for disbursements to airport grantees. Complainant informed Mr. Gwin that there were insufficient funds available to make these disbursements.

42. When Complainant arrived at work on the morning of April 30, 2015, Mr. Gwin and the planners were assembled in Mr. Green's office. Mr. Gwin asked Complainant to join them. He replied that he needed to start work, but Mr. Gwin said, "We need to talk as the

planners need to leave." Complainant stood in the doorway of Mr. Green's office. The planners began questioning Complainant about the Aviation Fund balance and expressed their frustration that they did not have accurate information about this balance to relay to the grantees who were expecting payment.

43. Complainant felt "ambushed" by the planners' questions and accusations. The conversation grew heated, and Complainant described very "direct," "aggressive" and "assaultive" language being directed at him, especially by Mr. Green, who used profanity. Mr. Gwin took no action to calm the planners or explain the prior conversation he had with Complainant about the Aviation Fund monies. This discussion went on for about five to seven minutes.

44. Complainant testified that the angry words directed at him rang in his ears. Mr. Green got up from his desk and came towards Complainant in what he perceived to be an aggressive manner. Complainant's back was against the wall, and he felt threatened, so he kicked at Mr. Green as he was passing through the doorway. He testified that this was "a visceral reaction." He admitted that he "was not happy" and felt "terrible" about his actions, and described it as a "momentary lapse."

45. Complainant did not remember what he may have said or done immediately after kicking Mr. Green; he may have called Mr. Green a "punk" or a "bitch." Complainant remembers that he went to his office and closed the door in order to cool down. Mr. Gwin came by soon afterwards and said, "Congratulations, you've earned yourself a trip to HR." Complainant packed his bags and drove to the Human Resources office. He never returned to the Division office, as he was placed on administrative leave and ultimately terminated.

46. Complainant's testimony was credible.

Investigation and Rule 6-10 Meeting

47. On April 30, 2015, Mr. Buck collected written statements concerning the incident that occurred between Complainant and Mr. Green from Ms. Eldridge, Ms. Westendorf, Mr. Storie, Mr. Gwin, Complainant, and Mr. Green. He forwarded these statements to Rose Estrada and Kevin Fuhrman in DOT's Human Resources department.

48. On May 1, 2015, Mr. Buck delegated appointing authority in writing to Herman Stockinger, Director, Office of Policy and Government Relations, DOT, during Mr. Buck's absence "from Wednesday, May 6 through Wednesday, May 13, 2015 to conduct necessary business of the Division." The Division of Aeronautics is not in Mr. Stockinger's chain of command.

49. Following this delegation of authority, Mr. Stockinger received a packet of information from Rose Estrada in DOT's Human Resources department. This packet included the six witness statements Mr. Buck collected on April 30, 2015.

50. On May 4, 2015, Shahn Sederberg, Communication Manager for the DOT's Aeronautics Division, submitted a written statement to Rose Estrada in DOT's Human Relations Section concerning the lack of leadership in the Aeronautics Division, resulting in an "overly toxic" office environment caused by "the aeronautics planners and their supervisor." As a result, Mr. Sederberg renewed a prior request he had made to transfer out of this office.

51. Mr. Sederberg testified that, while he was not present during the April 30, 2015 incident and did not witness the events at issue in this case, he described the environment in the Aeronautics Division as very tense. An unhealthy and unproductive atmosphere was exacerbated by a lack of leadership in the Division. Mr. Sederberg testified that he has never observed Complainant to act in the way he was reported to have acted on this date.

52. Mr. Sederberg's testimony was credible.

53. On May 12, 2015, Mr. Stockinger conducted a Rule 6-10 meeting with Complainant. Kevin Fuhrman, Director of DOT's Human Relations Section, was present as Mr. Stockinger's representative, and Tim Markham was present as Complainant's representative. During this meeting, Mr. Stockinger acknowledged Complainant's excellent work record. Complainant admitted that, on the morning of April 30, 2015, he was standing in the doorway of Mr. Green's office. Complainant explained that he felt "ambushed" by the planners' questions about the available balance in the Aviation Fund. As Mr. Green approached him on his way out of the office, Complainant admitted kicking Mr. Green because he felt threatened. Complainant commented that he was "thankful" that he had his hands full at the time. He admitted that he made a mistake, misinterpreted Mr. Green's actions and "reacted poorly." Complainant explained that the financial problems experienced by the Division, and the disrespectful treatment he experienced from the planners, created a great deal of tension and frustration in the office.

54. Near the end of this Rule 6-10 meeting, Complainant mentioned the December 1, 2014 complaint he filed with Human Resources. Mr. Stockinger indicated he was unaware of this complaint. Mr. Fuhrman stated that he was familiar with this complaint, and told Mr. Stockinger he would give him a copy.

55. After Mr. Stockinger received and reviewed Complainant's December 1, 2014 complaint, he gave a copy to Mr. Buck, who had not previously seen it, on May 14, 2015. Mr. Stockinger testified that he did not have any conversation with Mr. Cuthbertson, or anyone else, about this complaint.

56. Mr. Stockinger testified that he did not have any conversations with the prior Division Director, Mr. Gordon, or the interim Director, Mr. Buck, about Complainant.

57. On May 20, 2015, Mr. Stockinger held a Rule 6-10 meeting with Mr. Green, and a Rule 6-10 meeting with Mr. Gwin, concerning the events of April 30, 2015.

Applicable DOT Policies

58. DOT Policy Directive No. 2 concerning CDOT Values, effective November 14, 2007, identifies "Respect" as a value that guides DOT and its employees.

59. DOT'S Workplace Violence Policy No. 10, effective March 17, 2011, defines "Workplace Violence" as:

Conduct in the workplace or on state property involving employees, or persons who have an employment-related connection with CDOT that include: (1) physical acts against persons or property in the workplace, or against CDOT property; (2) domestic violence occurring in the workplace or on state property; (3) veiled conditional or direct verbal or nonverbal threats, profanity or statements

that harm and/or create an intimidating work environment; (4) written threats, profanity, cartoons or notes, or other written conduct that threatens or creates an intimidating work environment; or (5) any other acts that threaten to injure or convey intimidation.

60. DOT'S Workplace Violence Policy No. 10 provides:

The Colorado Department of Transportation intends to provide a safe and secure workplace free from violent behavior. Any employee who threatens to commit an act of violence, or actually commits an act of violence, including domestic violence on the work site or on state property will be subject to corrective and/or disciplinary action up to and including termination of employment; and, where appropriate, shall be referred for prosecution by legal authorities.

61. Section II(F) of DOT'S Workplace Violence Procedural Directive No. 10.1, effective January 6, 2011, requires that "[p]ersonnel receiving reports of threats or acts of violence must then complete a CDOT Threat/Violence Incident Report form 1277 immediately thereafter." This report must be submitted to the Manager of Employee Relations/Legal Section within three business days of the incident.

62. No CDOT Threat/Violence Incident Report form 1277 was prepared concerning this incident.

Discipline Decisions

63. On May 21, 2015, Mr. Stockinger hand delivered a letter to Complainant, terminating his employment for violating DOT's Workplace Violence Policy and Procedural Directives by engaging in "physical acts against persons or property in the workplace" on April 30, 2015.

64. In reaching the decision to terminate Complainant's employment, Mr. Stockinger testified that he considered the statements from Ms. Eldridge, Ms. Westendorf, Mr. Storie, Mr. Gwin, Complainant, and Mr. Green, as well as Complainant's explanations during the Rule 6-10 meeting. Mr. Stockinger also considered Mr. Sederberg's May 4, 2015 statement, but "in the end, it did not affect [his] decision." While he reviewed Complainant's complaint submitted to Mr. Gordon and Mr. Kiziuk on December 1, 2014, he based his decision to terminate Complainant on the April 30, 2015 incident of workplace violence.

65. Mr. Stockinger testified that, while he understood that Complainant felt frustrated, he allowed his frustration to escalate to a physical act, which was unacceptable. As a result of Complainant's actions on April 30, 2015, Complainant's co-workers felt nervous and uncomfortable being in the same office environment with Complainant. He considered, and rejected, Complainant's descriptions of mitigating factors. While there is no policy mandating termination for workplace violence, Mr. Stockinger concluded that Complainant's admitted physical action of kicking Mr. Green on April 30, 2015 was serious enough to warrant discharge.

66. On June 12, 2015, Mr. Stockinger issued a corrective action to Mr. Green, finding that, on April 30, 2015, he "participated in" the aviation planners' criticism of Complainant and "directed" his criticism "in a personal way using profanity." He was instructed to "work to improve" his communication "with coworkers in difficult situations," and to attend a "Crucial Conversations" class.

67. Mr. Stockinger testified that Mr. Green “participated in the argument” that occurred in his office on April 30, 2015; “did not do enough to remove himself,” and “used foul language before and after the incident.” Mr. Green was issued a corrective action, rather than being disciplined, because he did not engage in a physical act, as Complainant did.

68. On June 12, 2015, Mr. Stockinger issued a corrective action to Mr. Gwin, finding that, on April 30, 2015, he supervised both Mr. Green and Complainant, and was present during their encounter. Mr. Stockinger concluded that, “by not taking any steps to defuse the incident and allowing the heated discussion to play out, [Mr. Gwin] failed to perform [his] duties competently as a supervisor.”

69. Mr. Stockinger’s testimony was credible.

70. Complainant filed a timely appeal of the termination decision on May 29, 2015.

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 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The Board may reverse or modify Respondent’s decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Respondent terminated Complainant’s employment for committing a physical act of violence against a co-worker on April 30, 2015, in violation of DOT’s Workplace Violence Policy. While a Threat/Violence Incident Report form was not prepared concerning this incident, as required by DOT’s policy, the lack of a written report does not negate the acts that occurred, which were admitted by Complainant.

Complainant admitted that, on April 30, 2015, he kicked Mr. Green as Mr. Green walked past him in the doorway of Mr. Green’s office, causing Mr. Green to lose his balance. Mr. Green

testified that Complainant then called him “a punk ass bitch.” Both Ms. Eldridge and Mr. Storie heard this comment, and Complainant admitted he may have called Mr. Green a “punk” or a “bitch.” In addition, Mr. Storie credibly testified that he saw Complainant pacing up and down the hallway, “visibly upset, using vulgar language.” Therefore, Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined.

III. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS OR 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 men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001). A court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Respondent’s actions in this case were neither arbitrary or capricious, as those terms are defined in *Lawley*. Mr. Stockinger held a Rule 6-10 meeting with Complainant on May 12, 2015. During his testimony, Mr. Stockinger described a thorough and thoughtful review of the events of April 30, 2015, including the statements of five witnesses who were present during some or all of these events and Complainant’s explanation, including the mitigating factors he described. A reasonable person, after considering all of the evidence surrounding Complainant’s physical assault on Mr. Green on April 30, 2015, would not “honestly and fairly be compelled to reach a different conclusion” than Mr. Stockinger’s decision to terminate Complainant’s employment. *Id.* Therefore, the decision to terminate Complainant’s employment was not an abuse of discretion.

A.) Respondent’s Delegation of Appointing Authority Was Not Contrary to Rule or Law

Director’s Administrative Procedure 1-8 provides, in pertinent part: “An appointing authority may delegate in writing any and all human resource functions, including the approval of further delegation beyond the initial designee.”

Board Rule 6-14 provides:

The person conducting the meeting in accordance with Board Rule 6-10 is responsible for the decision to take disciplinary action. The decision is made after consideration of all written and verbal information collected.

Mr. Stockinger was provided written delegation of authority from interim Director Buck from May 6 through May 13, 2015. Mr. Stockinger held the Rule 6-10 meeting with Complainant on May 12, 2015, the day before his written delegation of authority expired. However, Board Rule 6-14 required Mr. Stockinger to complete the disciplinary investigation and issue a decision concerning Complainant. Because Board Rule 6-14 provided the necessary authority for Mr.

Stockinger to issue a disciplinary decision in this matter, this decision was not contrary to agency or Board Rules concerning the delegation of appointing authority.

B.) Complainant Failed to Prove That He was Terminated Because of His Protected Disclosures

The purpose of the Whistleblower Act, set forth in the legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." § 24-50.5-101, C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo. App. 1987). The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985). To establish a *prima facie* violation of the Whistleblower Act, Complainant must demonstrate that his disclosures are "protected" under this statute, that he suffered a disciplinary action as defined by the statute, and that his protected disclosures were a substantial or motivating factor in the disciplinary action taken by the agency. *Ward*, 699 P.2d at 968.

For the first prong of a whistleblower claim, Complainant must show that he made a "disclosure of information," defined as "the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. To warrant protection under the Whistleblower Act, the disclosure of information must involve a matter of public concern. *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). In addition, Complainant must demonstrate that he made "a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. If Complainant makes a disclosure about a matter of public concern to one of these persons or entities, a single disclosure is sufficient to satisfy the requirements of the Whistleblower Act. *Gansert v. Colorado*, 348 F. Supp. 2d 1215, 1226-28 (D. Colo. 2004).

Complainant's December 1, 2014 complaint, raising concerns about fiscal management at the Aeronautics Division, submitted to the Division Director, meets the first prong of a whistleblower claim. In addition to establishing that protected disclosures occurred, Complainant must also demonstrate that he suffered a disciplinary action by Respondent, as defined in § 24-50.5-102(1), C.R.S. The termination of Complainant's employment on May 21, 2015 meets this definition, establishing the second prong of a whistleblower claim.

To meet the third and final prong of a *prima facie* case, Complainant must demonstrate that his protected disclosures were "a substantial or motivating factor" in the agency's adverse actions taken against him. The Whistleblower Act prohibits the initiation or administration of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. This requires establishing a causal connection between the protected disclosure and the adverse actions. *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985). Complainant must produce evidence linking the adverse actions to his protected speech. *Maestas v. Segura*, 416 F. 3d 1182, 1188-89 (10th Cir. 2005). No such link was established in this case.

Neither Mr. Buck nor Mr. Stockinger had ever seen Complainant's December 1, 2014 complaint prior to the May 12, 2015 Rule 6-10 meeting, and Mr. Stockinger credibly testified that

it had no bearing on his decision to terminate Complainant. Further, after Complainant submitted this complaint, DOT officials such as Ms. Sobota welcomed his input concerning solutions to the Division's financial problems, and Mr. Richardson was encouraged to work with Complainant on those solutions.

The evidence submitted in this case fails to establish a causal link between Complainant's December 1, 2014 complaint and the termination of his employment on May 21, 2015. As discussed above, Complainant's physical assault of a co-worker, and not the complaint he submitted four months earlier, prompted this disciplinary action.

Thus, Respondent did not act arbitrarily or capriciously, or contrary to rule or law, in deciding to terminate Complainant's employment on May 21, 2015.

IV. THE DISCIPLINE IMPOSED WAS 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. Board Rule 6-2 provides:

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.

As discussed above, Complainant admitted to kicking Mr. Green and expressed remorse, describing his actions on April 30, 2015 as "a mistake." Unfortunately, these actions constitute more than "a mistake." Complainant's admitted assault on Mr. Green exacerbated an already tense situation, and could have caused serious physical harm. Mr. Green testified that, if he had not succeeded in catching himself on the wall in the hallway outside his office, he would have fallen and most likely injured himself. In addition, Ms. Eldridge described a look of "rage" on Complainant's face, and credibly testified that that this "alarming" incident caused her to feel "afraid" and "fearful." Shortly after Complainant assaulted Mr. Green, Mr. Storie saw him pacing angrily in the hallway and "wasn't sure if there was a threat." Complainant admitted that, after he kicked Mr. Green, he had to go to his office and close the door in order to calm down.

The mitigating circumstances described by Complainant, including the terrific stress he was under, the dysfunctional office environment in which he worked, the lack of leadership displayed by his supervisor to address these existing problems, and his consistently excellent work record over the previous several years, do not excuse the volatile behavior he displayed on April 30, 2015. DOT's Workplace Violence Policy authorizes the imposition of disciplinary action "up to and including termination of employment" of an employee who commits an action of violence. Because Complainant's physical assault of Mr. Green on April 30, 2015 created a threatening and potentially unsafe situation, Respondent's decision to terminate Complainant's employment was within the range of reasonable alternatives.

V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-103(6), C.R.S.; 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 is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

Because Respondent's actions in this case are upheld, Complainant is not entitled to attorney fees and costs.


CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Complainant is not entitled to attorney fees and costs.

ORDER

Respondent's termination of Complainant's employment is **affirmed**. Complainant is not entitled to an award of attorney fees and costs.

Dated this 4th day
of March, 2016.


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

CERTIFICATE OF MAILING

This is to certify that on the 12 day of March, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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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.