

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2016B013(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EILEEN RODGERS,
Complainant,

v.

METROPOLITAN STATE UNIVERSITY OF DENVER,
Respondent.

Administrative Law Judge ("ALJ") Rick Dindinger held the evidentiary hearing in this consolidated matter on November 1-3, 2016, at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. Mark S. Bove, Esq., of Mark S. Bove, P.C., represented Complainant. Davin Dahl, Esq., Assistant Attorney General of the State of Colorado, represented Respondent. Complainant Eileen Rodgers attended the entire proceeding. Angela Bender from Respondent's Human Resources Division served as Respondent's party representative and attended the entire proceeding.

MATTER APPEALED

Complainant, a certified state employee, appeals two disciplinary pay reductions and argues they were both arbitrary, capricious, or contrary to rule or law. Complainant requests reversal of the two disciplinary actions, back pay and benefits, interest, and an award of attorney fees.

Respondent argues that the disciplinary actions were not arbitrary, capricious, or contrary to rule or law. Respondent requests this tribunal to affirm the discipline, deny all relief sought by Complainant, and dismiss the appeal with prejudice.

For the reasons discussed below, Respondent's disciplinary actions are **modified**.

ISSUES

- A. Whether Complainant committed the acts that resulted in the disciplinary actions;
- B. Whether the discipline administered was arbitrary, capricious, or contrary to rule or law; and
- C. Whether an award of attorney fees to Complainant is appropriate.

FINDINGS OF FACT

Background

1. The parties stipulated that Complainant began working for Metropolitan State University of Denver on or about May 14, 2001.
2. The parties stipulated that Complainant's position when she began her employment with Respondent was Administrative Assistant III.
3. Complainant continues to work for Respondent as an Administrative Assistant III.
4. At all times relevant to this consolidated appeal, Complainant worked in Respondent's Office of Financial Aid.
5. All of Complainant's annual performance ratings were satisfactory or higher prior to her annual evaluation from March of 2016.
6. At all times relevant to this consolidated appeal, Nicole Tefft was Respondent's Director of Human Resources and Complainant's Appointing Authority.
7. At all times relevant to this consolidated appeal, Cindy Hejl was Complainant's supervisor. Ms. Hejl is Metropolitan State University's Director of Financial Aid.
8. At all times relevant to this consolidated appeal, Paul Morales was a Financial Aid Counselor in Respondent's Office of Financial Aid.
9. Beverly Brown was a Program Assistant in Respondent's Office of Financial Aid. Ms. Brown worked for Respondent for 26 years and retired in 2015.
10. Samuel Allen is Complainant's friend. Mr. Allen is not an attorney. Mr. Allen is not a state employee. Mr. Allen acted as Complainant's representative during the Board Rule 6-10 meetings that are discussed below.

Verbal warnings and the 2014 Corrective Action

11. Ms. Hejl met with Complainant more than once to verbally express concerns regarding Complainant's unprofessional and negative interactions in the office. Some of those discussions happened as far back as 2007. One of those discussions occurred in March of 2014.
12. The parties stipulated that prior to October 31, 2014, Respondent had never issued Complainant any disciplinary or corrective actions.
13. Respondent issued a corrective action to Complainant on October 31, 2014 (herein, the "2014 Corrective Action").
14. Ms. Hejl authored the 2014 Corrective Action.
15. The 2014 Corrective Action lists four incidents of negative and unprofessional behavior at work. One of those incidents involved interactions between Complainant and Paul Morales.

16. The 2014 Corrective Action directed Complainant as follows:

I expect you to immediately stop any conversations which could result in a negative outcome. This includes how the employee is made to feel in the Office of Financial Aid & Scholarships from your negative comments.

I expect you to stop having negative conversations regarding any employee within this office. This includes stopping any negative comments regarding this office with other staff member [sic] of MSU Denver.

I expect you to show respect toward the running of this office and my position within it. This also includes any directors within our office.

Events between November 1, 2014 and November 10, 2015

17. Complainant communicated with Mr. Morales about the 2014 Corrective Action during the first part of November 2014. Complainant requested Mr. Morales to state that the 2014 Corrective Action's description of certain interactions between Complainant and Mr. Morales was "not correct," had "been resolved," and was being "blown out of proportion."

18. After Complainant communicated with Mr. Morales, he sent an email to Ms. Hejl on November 12, 2014. In turn, Ms. Hejl forwarded Mr. Morales' email to Ms. Tefft. The email described the communications between Complainant and Mr. Morales that occurred during the first part of November of 2014.

19. Neither Ms. Hejl nor Ms. Tefft took any contemporaneous action to address Complainant's communications with Mr. Morales that occurred in November of 2014.

20. Respondent gave Complainant an annual performance evaluation on or about March 30, 2015 (herein, the "2015 Performance Evaluation").

21. The 2015 Performance Evaluation appraised Complainant's performance from April of 2014 through March of 2015.

22. The 2015 Performance Evaluation rated Complainant overall as Level II, meaning her performance was satisfactory and met expectations. The 2015 Performance Evaluation rated Complainant as Level II in the competencies of Communication, Interpersonal Skills, Customer Service, Accountability, Job Knowledge, and Supervision.

23. By the 2015 Performance Evaluation's embedded instructions, a Level II in the competency of Communication means that Complainant was (a) maintaining sensitivity to the feelings and efforts of others; (b) communicating with staff, student employees, and students in a positive, professional, and nonjudgmental manner; and (c) responding in a prompt and friendly manner to requests and inquiries.

24. The narrative to the 2015 Performance Evaluation states:

Eileen acknowledges the contribution of others. She demonstrates flexibility by adapting to changes in priorities and the work environment. There were a handful of incidents this past year in August and September with interpersonal

issues, but since then she has contributed to a positive work environment through interactions with office staff. I have seen a marked improvement in her interpersonal skills with staff. She has been working on her verbal and written skills to show more positive interaction. Eileen needs to continue working on her daily interactions with staff.

25. The narrative to the 2015 Performance Evaluation also states: "She has worked the past few months and has shown an improvement on her approachability and positive responsiveness to staff."

26. The parties stipulated that on or about June 18, 2015, Complainant spoke to Mr. Morales in or near an elevator.

27. The communication between Complainant and Mr. Morales on June 18, 2015, related to the 2014 Corrective Action.

28. At the time Complainant spoke to Mr. Morales on the elevator, he was on his way to a meeting to discuss his interactions with Complainant as described in the 2014 Corrective Action.

29. There were two other people on the elevator, George Middlemist and Beth Christensen.

30. Complainant whispered to Mr. Morales on the elevator. Two other people on the elevator could hardly hear Complainant. Mr. Middlemist did not hear "the exact words" spoken by Complainant; Ms. Christensen did not "remember anything [Complainant] actually said."

31. Complainant told Mr. Morales to "tell the truth." Complainant did not demand that Mr. Morales change his statement.

32. The elevator ride lasted less than a minute.

33. Ms. Hejl gave Ms. Tefft a memorandum dated August 7, 2015, titled: "Request for a Disciplinary Action against Eileen Rodgers." The memorandum discusses the elevator incident and recommends "that Eileen Rodgers be terminated effectively [sic] immediately."

34. On August 11, 2016, Ms. Tefft gave Complainant a notice of a Rule 6-10 meeting. The notice states: "I have received information that indicates the possible need to administer disciplinary action based on interference with an investigation and retaliating against an employee who reported a complaint against you to your supervisor." Further, "you attempted to influence an individual who filed a complaint with your supervisor to change his statement regarding the events that had previously transpired and was cited in [the 2014 Corrective Action]."

35. Complainant showed the notice of a Rule 6-10 meeting to a co-worker, Amy Moody. Ms. Moody then discussed the notice with her supervisor, Vaughn Toland.

36. Ms. Moody called Complainant to see how Complainant was doing. Complainant expressed being upset that Ms. Moody had discussed the notice of the Rule 6-10 meeting with Mr. Toland. Complainant, however, did not swear or make inappropriate comments during her phone conversation with Ms. Moody.

The first Rule 6-10 meeting, including Ms. Tefft's receipt of information from Ms. Brown

37. Ms. Tefft held a Board Rule 6-10 meeting with Complainant on August 17, 2015. During that meeting, Complainant had a thorough opportunity to respond to the allegations regarding her communications with Mr. Morales on the elevator.

38. Between August 28, 2015, and September 15, 2015, Beverly Brown, Amy Moody, Mia Kitch (a/k/a Mia Allmeyer), Michael Nguyen, Dean Wilson, and other employees wrote or gave statements about Complainant. These statements generally describe unprofessional and negative conduct by Complainant. These statements included allegations about Mr. Wilson's social security number, a political paper, comments of a religious nature, and writing words in an email with all capitalized letters. Ms. Hejl requested these statements. Ms. Tefft reviewed these statements prior to making her decision to discipline Complainant.

39. Ms. Brown provided information to Ms. Tefft that Complainant utilized an inappropriate tone of voice and created an uncomfortable work environment for Ms. Brown.

40. Complainant and Ms. Brown were co-workers but reported to different supervisors.

41. Ms. Brown suffers from a hearing impediment.

42. On more than one occasion, Complainant shouted at Ms. Brown in an inappropriate manner "did you hear what I said?" Ms. Brown felt that Complainant was putting her down because of her disability. Other employees did not yell at Ms. Brown in order for her to hear them.

43. After Respondent took certain measures at the financial aid front desk to assist Ms. Brown see students' faces and listen to them, Complainant questioned Ms. Brown about the measures. Ms. Brown explained to Complainant that the measures helped her listen to students. In response to this explanation, Complainant said that if you quit doing "this" (making hand motions), then maybe you can help students better. Ms. Brown was offended by Complainant's statement and hand motions, and told Complainant "that wasn't nice" and was "kinda discrimination." In turn, Complainant apologized, but the apology was done with an "attitude."

The reconvened, first Rule 6-10 meeting

44. Ms. Tefft reconvened with Complainant pursuant to Rule 6-10 on September 21, 2015. During the September 21, 2015, meeting, Ms. Tefft gave Complainant the employee statements. Complainant requested to continue the meeting so Complainant could review the employee statements. Ms. Tefft agreed to this extension.

45. Ms. Tefft reconvened the Rule 6-10 meeting on October 22, 2015. During that meeting, Complainant had a thorough opportunity to respond to the allegations against her.

46. During the reconvened Rule 6-10 meeting on October 22, 2016, Ms. Tefft asked Complainant questions about the alleged comments of a religious nature. Complainant denied making any comments of a religious nature.

47. Prior to making her decision to discipline Complainant, Ms. Tefft interviewed Beverly Brown, George Middlemist, Amy Moody, Paul Morales, and Ricardo Sarabia. Ms. Tefft also

spoke to Ms. Hejl. In addition, Ms. Tefft reviewed Complainant's personnel file. This included a review of Complainant's performance history.

The 2015 Disciplinary Action

48. Ms. Tefft issued the first Disciplinary Action to Complainant on November 10, 2015.

49. The 2015 Disciplinary Action charges Complainant as follows:

- Communications with Mr. Morales "would be considered attempting to influence a complainant's statement," "you unduly attempted to coerce and influence an individual," and "you unduly attempted to manipulate an individual . . . into changing his statement."
- "[Y]ou raised your voice and made inappropriate comments to Amy Moody during a conversation you had with her after she reported to her supervisor that you had discussed with her about receiving the previous R 6-10 notice."
- "[Y]ou made inappropriate gestures to your supervisor and/or co-workers."
- "Ricardo Sarabia reported to me that you used an inappropriate tone of voice and made inappropriate comments to him when he asked you about a fax."
- "[Y]ou asked a profoundly hard of hearing employee if she could hear you in a disrespectful manner by raising your voice and using an inappropriate tone of voice." Additionally, "Beverly Brown reported to me that you 'shouted' at her 'Did you hear what I said?' She felt this was an inappropriate comment due to the fact that she has a profound hearing impairment and that you used an inappropriate tone of voice."

50. The 2015 Disciplinary Action consisted of a five percent (5%) pay reduction for six months, from December 1, 2015, through May 31, 2016.

Events related to the 2016 Disciplinary Action

51. On December 8, 2015, Ms. Hejl scheduled a meeting with Complainant to discuss Complainant's mid-year performance evaluation.

52. Shortly after 8:00 am on December 8, 2016, Ms. Hejl sent an email to Complainant setting a meeting time. Complainant proposed a different time. In total, Ms. Hejl and Complainant exchanged four emails about the meeting time. Complainant's emails did not mention any reason for proposing alternate times.

53. Following the email exchange, Ms. Hejl went to Complainant's cubicle and asked Complainant why she could not meet at the time set by Ms. Hejl. Complainant did not answer that question in a forthright manner. Instead, she answered in an evasive and crafty manner. The result of this conversation was that Ms. Hejl and Complainant agreed to meet at 1:00 pm on December 8, 2015.

54. During the email and verbal communications between Ms. Hejl and Complainant about the meeting time, Complainant did not mention that she wished to accommodate Mr. Allen's schedule so he could attend the meeting.

55. In advance of the meeting, Complainant convened with Mr. Allen in a "student relaxation" part of the building and proceeded to take him to the meeting area. Mr. Allen did not need to pass any security check points to get to the meeting place. Nonetheless, a receptionist unlocked the door so that Mr. Allen could enter the area.

56. Respondent keeps confidential student information throughout the area surrounding the meeting place. Nonetheless, non-employees (including employee family members and friends) occasionally access this area.

57. When Complainant and Mr. Allen arrived at the meeting place, Ms. Hejl told Complainant "he can't be here." Complainant, however, did not believe it was a problem for Mr. Allen to be in the area.

58. Complainant did not follow Ms. Hejl's instructions. Instead, Complainant argued with Ms. Hejl. Ms. Hejl repeated her instruction to Complainant that Mr. Allen was not permitted in the area.

59. Richard Balbag and Thomas Hernandez both work for Respondent. Mr. Balbag and Mr. Hernandez were in the vicinity of the interaction between Complainant and Ms. Hejl. They observed Complainant being "adamant" and "repeatedly questioning" Ms. Hejl.

60. Complainant and Mr. Allen finally left the area. Mr. Allen made an inappropriate and inflammatory comment as he exited.

61. Ms. Hejl gave Ms. Tefft a memorandum dated December 9, 2015, titled: "Request for a Disciplinary Action against Eileen Rodgers." The memorandum discusses the events on December 8, 2015, and states that the "interactions yesterday showed [Complainant's] insubordination to me as the Director of this office and her supervisor." The memorandum recommends termination of Complainant's employment.

62. Complainant worked on two travel authorization forms on December 9, 2015. One of those forms was for travel expenses incurred by Ms. Hejl; the other was for travel expenses incurred by a co-worker.

63. Ms. Hejl had authority to sign the travel authorization form for the travel expenses incurred by the co-worker. Ms. Hejl signed the co-worker's travel authorization form on December 9, 2015.

64. Complainant attempted to get the approval signature on the travel authorization form for the travel expenses incurred by Ms. Hejl. Complainant informed Ms. Hejl that she was "getting" the travel authorization form signed. Complainant, however, did not succeed in obtaining the signature.

65. At some point on December 9, 2015, Ms. Tefft gave Complainant a letter placing her on Administrative Leave effective December 10, 2015.

66. Before leaving on Administrative Leave, Complainant put both travel authorization forms in a top "in" tray inside her cubicle. Complainant used this top tray for work in progress.

67. One of Ms. Hejl's subordinates found the travel authorization forms in the tray inside Complainant's cubicle.

68. Lori Hester signed the travel authorization form for the travel expenses incurred by Ms. Hejl on December 14, 2015. Both travel authorization forms were fully signed and processed by December 14, 2015.

69. Ms. Hejl reviewed Complainant's emails while Complainant was on Administrative Leave.

70. During the review of Complainant's emails, Ms. Hejl discovered an email from Complainant to her husband and to Mr. Allen sent on September 9, 2015. The email included a student's name and student identification number.

71. Prior to September 9, 2015, Respondent instructed Complainant (and other employees) not to share student information outside of the university. Respondent had not provided formal training to Complainant regarding the Family Educational Rights and Privacy Act ("FERPA"). However, Respondent sent out emails to its employees regarding FERPA.

72. Complainant knew about FERPA, knew that FERPA protected privacy, and knew that "you don't give out other people's information." Complainant knew that she could not share student information outside the university without permission. Complainant herself directed her work-study students to not share information.

The second Rule 6-10 meeting

73. On December 23, 2015, Ms. Tefft notified Complainant about a second Rule 6-10 meeting. The notice references the possible need to administer disciplinary action based on the following: (a) refusing to meet with supervisor regarding the mid-year performance evaluation at times requested by the supervisor; (b) not informing supervisor of intent to bring a representative to the meeting; (c) using an inappropriate tone and arguing with supervisor in front of several other staff members; (d) a FERPA violation regarding sharing confidential student information; and (e) failure to process travel authorization forms and putting the forms in a place they would not be easily found.

74. Ms. Tefft met with Complainant pursuant to Board Rule 6-10 on January 8, 2016. Complainant had a thorough opportunity to respond to the allegations made against her.

75. Prior to issuing the second disciplinary action, Ms. Tefft reviewed emails and other documentation regarding the events of December 8, 2015. She also reviewed the email with confidential student information that Complainant sent outside the university. Additionally, Ms. Tefft interviewed Richard Balbag, Jackie Bullard, Thomas Hernandez and Dean Wilson, and conferred with Ms. Hejl. Moreover, Ms. Tefft reviewed Complainant's history and performance evaluations. Ms. Tefft also reviewed a video recording of the meeting area.

The 2016 Disciplinary Action

76. Ms. Tefft issued the second Disciplinary Action to Complainant on March 10, 2016.

77. The 2016 Disciplinary Action charges Complainant as follows:

- “[Y]ou refused to meet with your supervisor regarding your mid-year performance evaluation at times requested by your supervisor, did not inform your supervisor prior to meeting with her that you planned to have your representative attend, used of [sic] an inappropriate tone of voice and argued with your supervisor in front of several other staff members.” In addition, “you refused multiple times to answer your supervisor’s direct question regarding why you were not available to meet at the time requested.”
- “You forwarded an e-mail containing confidential information regarding a student to your representative thereby violating FERPA.”
- “You withheld documents to process a travel authorization for your supervisor and a co-worker by placing the documents in a location whereby the documents would not be easily found when you were informed of being placed on administrative leave and after you told your supervisor that you had processed the documents.”

78. The 2016 Disciplinary Action consisted of a five percent (5%) pay reduction for six months, beginning March 1, 2016.

79. As part of the 2016 Disciplinary Action, Ms. Tefft also reassigned Complainant to a new department (Enrollment Management) and new supervisor (Sarah Hunsinger).

80. In conjunction with the 2016 Disciplinary Action, Ms. Tefft issued a corrective action to Complainant.

81. Also in conjunction with the 2016 Discovery Action, Ms. Tefft lifted Complainant's Administrative Leave. Respondent directed Complainant to report back to work on March 21, 2016.

82. The Administrative Leave was longer than twenty days. Respondent did not report the Administrative Leave to the Colorado State Personnel Director as required by Director's Administrative Procedure 5-15(A).

Procedural background

83. Prior to filing her appeal of the 2015 Disciplinary Action, Complainant filed various documents with the State Personnel Board. On October 23, 2015, Administrative Law Judge Pamela Sanchez entered an Order To Cease Filing Correspondence With Board And Board Requirement That Representation Must Be By Attorney. In pertinent part, that order states: “If there are any other filings signed by Samuel R. Allen on behalf of Complainant, Mr. Allen must provide a copy of an active Colorado license or documentation to establish that he has been approved for the practice of law by the Colorado Supreme Court.”

84. On November 19, 2015, Complainant timely appealed the 2015 Disciplinary Action.

85. Administrative Law Judge Pamela Sanchez entered a procedural order on December 11, 2015. In pertinent part, that order states: “the ALJ will not consider any of the documents or materials in the case file submitted prior to Complainant’s November 19, 2015 appeal to the Board.”

86. On March 17, 2016, Complainant timely appealed the 2016 Disciplinary Action.

87. On March 29, 2016, Complainant attempted to appeal the corrective action issued in conjunction with the 2016 Disciplinary Action. On April 1, 2016, Administrative Law Judge Susan Tyburski entered an Order Striking Appeal By A Non-Attorney Representative. In pertinent part, that order states that "Mr. Allen has failed to provide the required documentation establishing that he is an attorney authorized to represent Complainant under Board Rule 8-50. Mr. Allen is therefore ORDERED TO CEASE filing pleadings on behalf of Complainant, who is currently represented by counsel." (Capitalization in the original.) Further, "the Consolidated Appeal/Dispute Form filed by Samuel Allen on March 29, 2016 concerning Complainant is STRICKEN." (Capitalization in the original.)

88. Administrative Law Judge Susan Tyburski entered an Order To Show Cause Why Appeals Should Not Be Consolidated on April 1, 2016. In pertinent part, that order required the parties to "show cause in writing, on or before April 15, 2016, why Complainant's November 19, 2015 notice of appeal and March 17, 2016 notice of appeal should not be consolidated." Further, "if a timely response is not received, these cases shall be consolidated under case number 2016B013(C)."

89. Neither party responded to the Order To Show Cause Why Appeals Should Not Be Consolidated. As a result, the appeal of the 2015 Disciplinary Action was consolidated with the appeal of the 2016 Disciplinary Action.

ANALYSIS

I. THE ACTS UNDERLYING THE DISCIPLINARY ACTIONS.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII § 13(8); *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994) ("A central feature of the state personnel system is the principle that persons within the system can be subjected to discharge or other discipline only for just cause"); *Colorado Ass'n of Public Employees v. Dep't of Highways*, 809 P.2d 988, 991 (Colo. 1991) ("discharge or other discipline only for just cause"). "Implicit in the requirement that the appointing authority have just cause is that the appointing authority must prove its reasons for [discipline] before a neutral decision-maker." *Kinchen*, 886 P.2d at 708.

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Id.* at 705, 708. At the hearing, "the scales are not weighted in any way by the appointing authority's initial decision to discipline the employee." *Id.* at 706. "The employer must bear the burden of establishing just cause for [discipline] by a preponderance of the evidence at the hearing before the Personnel Board." *Id.* at 708. The judge makes "an independent finding of whether the evidence presented justifies [a disciplinary action] for cause." *Id.* at 706 n.10; *see also* § 24-4-105(14)(a), C.R.S. ("[I]nitial decision shall include a statement of findings and conclusions upon all the material issues of fact . . ."). If Respondent does not meet its burden of proving the underlying facts as charged in the discipline, then Respondent has not met its burden of establishing just cause for the discipline. *Kinchen*; § 24-50-125(2) and § 24-50-125(3), C.R.S. (hearing relates to the disciplinary action taken and the matters specifically charged); *Reeb v. Civil Serv. Comm'n*, 503 P.2d 629 (Colo. App. 1972) (failure to prove charges set forth in the "bill of particulars" requires reversal of discipline).

Reasons for discipline listed in Board Rule 6-12 include:

1. failure to perform competently;
2. willful misconduct or violation of . . . 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 of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if the employment is continued.

See also § 24-50-125(1), C.R.S. (listing reasons for discipline, including failure to comply with standards of efficient service or competence); § 24-50-116, C.R.S. (employees shall perform duties and conduct themselves "in accordance with generally accepted standards").

Respondent made multiple charges against Complainant. Each of these charges related to Complainant's work performance. As discussed below, Respondent established that Complainant committed some of the acts underlying the disciplinary actions.

A. The 2015 Disciplinary Action.

1. COMMUNICATIONS WITH PAUL MORALES

Respondent disciplined Complainant as a result of certain communications between Complainant and Mr. Morales regarding the 2014 Corrective Action. The 2015 Disciplinary Action concludes that Complainant's communications with Mr. Morales "would be considered attempting to influence a complainant's statement," "you unduly attempted to coerce and influence an individual," and "you unduly attempted to manipulate an individual . . . into changing his statement."

There is nothing inherently wrong with attempting to influence another person. To support discipline, there must be a preponderance of evidence that Complainant *unduly* attempted to influence Mr. Morales.

In the main, Respondent supports this ground for discipline on the interaction between Complainant and Mr. Morales on June 18, 2015. The interaction occurred on or near an elevator. This ALJ concludes that Complainant's interaction with Mr. Morales was not an undue attempt to influence him. This ALJ reaches his conclusion based on the following: (a) While Respondent's Prehearing Statement asserts that Complainant "cornered Mr. Morales in the elevator," Mr. Morales testified that conversing with Complainant on an elevator was a "natural occurrence." (b) While Respondent's Prehearing Statement asserts that Complainant demanded Mr. Morales to "change his story," there was no evidence to support that assertion. There were four people on the elevator; nobody testified to this supposed demand. (c) Complainant testified that she told Mr. Morales to tell the truth. Mr. Middlemist corroborated Complainant's testimony; he heard Complainant tell Mr. Morales to "tell the truth." Appealing to someone's honesty and sense of truth is not an inappropriate request. (d) Mr. Morales described Complainant's demeanor as "scared;" Mr. Morales did not describe Complainant as being threatening or even demanding. (e) While Mr. Morales described that he was nervous, he attributed those nerves to the optics of whispering on the elevator with other people around. Mr. Morales did not attribute his nervousness to an illicit request. (f) The conversation between

Complainant and Mr. Morales was a whisper. There was no evidence that Complainant raised her voice. (g) Mr. Morales did not testify that Complainant was coercive, intimidating or confrontational. Mr. Morales did not testify that Complainant made him any promises if he would change his statement. Mr. Morales did not testify to any false representations or trickery.

Respondent also supports this ground for discipline on some communications between Complainant and Mr. Morales about the 2014 Corrective Action that took place in November of 2014. Mr. Morales sent Ms. Hejl a description of those communications via email on November 12, 2014. This ALJ concludes that the communications by Complainant to Mr. Morales in November of 2014 were not an undue attempt to influence him. This ALJ reaches his conclusion based on the following: (a) Ms. Hejl received the email from Mr. Morales about the communications on November 12, 2014. Ms. Hejl did not take any action against Complainant; there is no contemporaneous verbal warning, corrective action, performance improvement plan, or other written warning in regards to the November of 2014 communications. This lack of contemporaneous action suggests that Ms. Hejl did not feel that the November of 2014 communications warranted correction. In the same vein, the time delay between when Mr. Morales sent the email (November 12, 2014) and the 2015 Disciplinary Letter (November 10, 2015) belies that the communications from November of 2014 warranted discipline. (b) In Complainant's 2015 Performance Evaluation, Ms. Hejl rated Complainant's performance as Level II in the core competencies of Communication and Interpersonal Skills. While the 2015 Performance Evaluation refers to "a handful of incidents this past year in August and September with interpersonal issues," the 2015 Performance Evaluation makes no mention of the communications between Complainant and Mr. Morales in November of 2014. To the contrary, the 2015 Performance Evaluation states that since August and September of 2014, Complainant "has contributed to a positive work environment through interactions with office staff." Respondent gave Complainant the 2015 Performance Evaluation on or about March 30, 2015. Both the satisfactory rating and the omission of anything related to November of 2014 indicate that Ms. Hejl was not particularly bothered by Complainant's actions. (c) During the hearing, Mr. Morales did not testify that Complaint acted coercively during the November of 2014 communications. (d) Complainant testified that she asked Mr. Morales to say "what actually happened."

Respondent failed to meet its burden with respect to this ground for the disciplinary action.

2. INTERACTION WITH AMY MOODY

The 2015 Disciplinary Action states: "you raised your voice and made inappropriate comments to Amy Moody during a conversation you had with her after she reported to her supervisor that you had discussed with her about receiving the previous R 6-10 notice."

Respondent introduced a summary prepared by Ms. Tefft of an interview between Ms. Moody and Ms. Tefft about the interaction between Ms. Moody and Complainant. This ALJ does not give much weight to that summary. First, it is a hearsay summary prepared by Ms. Tefft; Ms. Tefft did not have personal knowledge of the underlying events. Second, Ms. Moody testified that portions of the summary were "not accurate." Third, while Ms. Tefft testified that there was nothing wrong with Complainant showing Ms. Moody the notice of the Rule 6-10 meeting, Ms. Tefft's summary states: "It was not appropriate for Eileen to be showing something like that to Amy."

Both Ms. Moody and Complainant testified about their conversation. Ms. Moody did not testify to Complainant making any inappropriate comments during the conversation. To the contrary, Ms. Moody testified that Complainant did not swear during the conversation. Ms. Moody did not testify that Complainant yelled or raised her voice. Complainant testified that she did not raise her voice with Ms. Moody during the conversation. Both Ms. Moody and Complainant testified from their personal knowledge of the conversation.

Respondent did not provide credible evidence that Complainant made inappropriate comments to Ms. Moody or raised her voice. Respondent failed to meet its burden with respect to this ground for the disciplinary action.

3. FLIPPING FINGER AT SUPERVISOR AND/OR CO-WORKERS

The 2015 Disciplinary Action concludes in part: “you made inappropriate gestures to your supervisor and/or co-workers.” Respondent’s Prehearing Statement states that Mai Kitch “witnessed multiple occasions of Complainant flipping people off as they walked by her desk.”

Respondent called eleven witnesses at the hearing. None of them testified that Complainant flipped people off. Remarkably, Ms. Kitch (who had supposedly “witnessed multiple occasions of Complainant flipping people off as they walked by her desk”) testified that she had never personally observed Complainant flipping someone off. Ms. Kitch further testified that she had never observed Complainant making any inappropriate gestures.

In making the disciplinary decision, Ms. Tefft considered an email by Ms. Kitch dated September 4, 2015. That email says: “In the past [Complainant] has been known to flip people off as they walk by.” Ms. Tefft testified that this was the only evidence she had of Complainant flipping people off. Ms. Tefft also testified that she did not know when this flipping happened. Ms. Kitch testified that the flipping “in the past” occurred in 2007. Respondent did not offer any evidence to explain the eight year delay between the flipping and Ms. Kitch’s email about it.

During Ms. Kitch’s testimony, Respondent attempted to introduce statements by individuals to Ms. Kitch about Complainant. Presumably, Respondent intended to offer those statements to prove that Complainant had flipped her finger at her supervisor and/or co-worker. Complainant objected on hearsay grounds and this ALJ sustained the objection. The statements in question were oral, not written or signed or attested. There was no way for this ALJ to determine the credibility of the individuals who made statements to Ms. Kitch. Complainant did not have any way to cross-examine those individuals. Respondent did not offer any explanation for its failure to call the individuals. It is unknown whether the individuals were disinterested. Most important, while the Administrative Procedure Act permits an Administrative Law Judge to accept hearsay evidence (§ 24-4-105(7), C.R.S.), there is nothing in the Act mandating an Administrative Law Judge to do so. An Administrative Law Judge may admit or refuse hearsay evidence as the judge sees fit, “in accordance with [the judge’s] own determination of the question whether the evidence supporting the findings should be deemed reliable and substantial in the circumstances.” *Indus. Claims Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13, 17 (Colo. 1989) (citing K.C. Davis, *Administrative Law* 16:6 (2d ed. 1980)).

Complainant’s supervisor (Ms. Hejl) did not testify about Complainant flipping her finger or using any inappropriate gestures. Complainant denied flipping people off.

Respondent failed to offer any credible evidence that Complainant flipped off her supervisor and/or her co-workers. Respondent's allegation is groundless.

4. INTERACTION WITH RICARDO SARABIA ABOUT THE FAX MACHINE

The 2015 Disciplinary Action states: "Ricardo Sarabia reported to me that you used an inappropriate tone of voice and made inappropriate comments to him when he asked you about a fax."

Respondent introduced a hearsay email attributed to Mr. Sarabia. The email discusses certain interactions between Mr. Sarabia and Complainant related to a fax machine. The email observes that "Desiree happened to [sic] in the area and overheard the conversation." Neither Mr. Sarabia nor "Desiree" testified at the hearing. The hearsay email is confusing: in one paragraph the author states he asked Complainant "*who* took the faxes," but in another paragraph the author states that he asked "*where* are the faxes kept." This confusion is of consequence because the email faults Complainant for not listening to the question. On the other hand, Complainant testified at the hearing from personal knowledge that her actions with Mr. Sarabia about the fax machine were not rude. Complainant's testimony at hearing is more persuasive than the hearsay email.

Respondent failed to meet its burden with respect to this ground for the disciplinary action.

5. INTERACTIONS WITH BEVERLY BROWN

The 2015 Disciplinary Action indicates that Ms. Tefft interviewed Beverly Brown and that Ms. Brown was one of the individuals who alleged Complainant "made inappropriate comments towards co-workers, and used an inappropriate tone of voice towards co-workers." The 2015 Disciplinary Action also states: "you asked a profoundly hard of hearing employee if she could hear you in a disrespectful manner by raising your voice and using an inappropriate tone of voice." Additionally, "Beverly Brown reported to me that you 'shouted' at her 'Did you hear what I said?' She felt this was an inappropriate comment due to the fact that she has a profound hearing impairment and that you used an inappropriate tone of voice."

Ms. Brown suffers from a hearing impediment. Ms. Brown testified that on more than one occasion, Complainant shouted at her in an inappropriate manner "did you hear what I said?" Ms. Brown testified that Complainant was putting her down because of her disability. Ms. Brown's testimony was consistent with a statement she prepared describing several interactions with Complainant. Ms. Brown's corroborating statement concludes "[h]er behavior towards me has been abusive. It hurts my feelings and I do not appreciate it. I don't think that she is doing this because she really thinks I can't hear her. I talk with the other people in the office without them shouting at me."

Ms. Brown testified that Respondent took certain measures at the financial aid front desk to assist Ms. Brown see students' faces and listen to them. Complainant questioned Ms. Brown about the measures. Ms. Brown explained to Complainant that the measures helped her listen to students. In response to this explanation, Complainant said that if you quit doing "this" (making hand motion), then maybe you can help students better. Ms. Brown was offended by Complainant's statement and hand motions, and told Complainant "that wasn't nice" and was "kinda discrimination." In turn, Complainant apologized, but Ms. Brown testified the apology was done with an "attitude."

Ms. Brown was credible. She is retired; as such, she has less at stake in this case than might be attributed to someone who still works for Respondent. Ms. Brown did not have a reason to spin her testimony in a particular direction. Ms. Brown's testimony was consistent with her written statement. Ms. Brown personally observed (and experienced) Complainant's actions. While Complainant denied shouting at Ms. Brown, Complainant's testimony about her interactions with Ms. Brown was vague. Complainant was often evasive and non-responsive during the course of her testimony. This ALJ gives more weight to Ms. Brown's testimony than to Complainant's version of events.

The timing of Complainant's various interactions with Ms. Brown is somewhat unclear. Nonetheless, there is no evidence that either Ms. Hejl or Ms. Tefft knew about these interactions until sometime after August 17, 2015, the date of the first Rule 6-10 meeting. Ultimately, Ms. Brown's credible testimony about these events leads to the finding that Complainant utilized an inappropriate tone of voice and created an uncomfortable work environment for Ms. Brown.

Respondent met its burden with respect to this ground for the disciplinary action.

6. OTHER MISCONDUCT ALLEGED AT THE HEARING

Respondent introduced other evidence in support of the 2015 Disciplinary Action. The evidence related to: (a) interactions with Dean Wilson; (b) impressions formed by Michael Nguyen; and (c) using all capitalization in certain words in an email to Theresa Godinez. Complainant objected to this evidence as outside of the scope of the disciplinary action. The alleged interactions between Complainant and Mr. Wilson involved Mr. Wilson's social security number, a political paper, and comments of a religious nature. Mr. Nguyen testified that he did not directly observe any unprofessional or discriminatory conduct by Complainant. Ms. Godinez did not testify at the hearing.

The 2015 Disciplinary Action refers to Complainant's interactions with specific individuals; namely, Ms. Brown, Ms. Kitch, Ms. Moody, Mr. Morales, and Mr. Sarabia. The 2015 Disciplinary Action states: "These individuals alleged that you have made inappropriate gesture [sic] towards your supervisor, made inappropriate comments toward co-workers, and used an inappropriate tone of voice towards co-workers." On the other hand, the 2015 Disciplinary Action does not refer to any interactions between Complainant and Mr. Wilson, Mr. Nguyen, or Ms. Godinez. The 2015 Disciplinary Action does not refer to anything related to social security numbers, political papers, comments of a religious nature, or using all capitalization in an email. Ms. Tefft had statements about these matters prior to issuing the 2015 Disciplinary Letter. Therefore, the 2015 Disciplinary Action's omission of these supposed wrongdoings indicates that whatever happened, Ms. Tefft discounted its import.

An appointing authority issuing discipline must make written findings of the specific grounds for the discipline. See Colo. Const. art. XII, § 13(8) ("A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon *written findings* . . .") (emphasis added); § 24-50-125(2), C.R.S. ("Any certified employee disciplined . . . shall be notified in writing by the appointing authority . . . of the action taken, the *specific charges giving rise to such action*, and the employee's right of appeal to the board") (emphasis added); State Personnel Board Rule 6-15 (the notice of disciplinary action "must state the *specific charge*") (emphasis added). Respondent did not make written findings or charges about Complainant's supposed interactions with Mr. Wilson,

Mr. Nguyen, or Ms. Godinez. This omission evidences that these other interactions did not rise to the level of disciplinable conduct.

Respondent's Prehearing Statement has a four page statement of facts, with 24 separately numbered paragraphs. Respondent's statement of facts in its Prehearing Statement does not discuss social security numbers, political papers, comments of a religious nature, or using all capitalization in emails. To the degree Respondent wished to establish just cause for discipline based upon these charges, Respondent should have included them in its Prehearing Statement. *See, e.g.*, Board Rule 8-54(B) and (C). This comports with notions of fairness and due process.

Respondent failed to meet its burden with respect to this ground for the disciplinary action.

B. The 2016 Disciplinary Action.

1. INCIDENT ON DECEMBER 8, 2015

The 2016 Disciplinary Action describes an incident between Complainant and Ms. Hejl on December 8, 2015. The description includes the following: "you refused to meet with your supervisor regarding your mid-year performance evaluation at times requested by your supervisor, did not inform your supervisor prior to meeting with her that you planned to have your representative attend, used of [sic] an inappropriate tone of voice and argued with your supervisor in front of several other staff members." In addition, "you refused multiple times to answer your supervisor's direct question regarding why you were not available to meet at the time requested." The 2016 Disciplinary Action concludes that Complainant's actions "would be considered being insubordinate to your supervisor and creating an uncomfortable work environment."

Ms. Hejl testified credibly that Complainant did not forthrightly answer Ms. Hejl's direct question about why Complainant could not meet at the time set by Ms. Hejl. Instead, Complainant craftily evaded the question. Ms. Hejl's testimony is supported indirectly by the email exchange about the meeting time. In that email exchange, Complainant does not offer any explanation for requesting an alternative time or make any mention of a representative attending the meeting. When Complainant testified about her lack of forthrightness in answering Ms. Hejl's question, Complainant did not deny it but rationalized her evasiveness on grounds that she could not trust Ms. Hejl.

Ms. Hejl also testified credibly that Complainant did not follow her instructions and instead argued with her. Ms. Hejl testified that she repeatedly instructed Complainant that Mr. Allen was not permitted in the area. Ms. Hejl's testimony was substantiated by both Richard Balbag and Thomas Hernandez. Both Mr. Balbag and Mr. Hernandez testified that while they could not hear Complainant's words, they heard Ms. Hejl repeating her instructions. Mr. Hernandez wrote a contemporaneous email asserting that Complainant was "repeatedly questioning what Cindy had instructed her to do." Similarly, Mr. Balbag wrote a contemporaneous email asserting that Complainant "was adamant that her 'guest' could be in the office." On the other end of the scale, Mr. Allen testified that Complainant stood as a "statue," that he could not hear anything Complainant and Ms. Hejl said, and that the only part of the conversation that he heard was Ms. Hejl screaming "he cannot be here." Complainant testified that Ms. Hejl was hollering "he can't be here."

Complainant's refusal to forthrightly answer her supervisor's question is unprofessional and insubordinate. Complainant's craftiness in proposing other times to meet without explaining that she wished for Mr. Allen to attend the meeting also evidences insubordination and disrespect. Complainant is responsible for following Ms. Hejl's instructions even if Ms. Hejl raised her voice. Complainant's persistence in arguing with her supervisor constitutes insubordination; doing so in front of other employees is defiant and insolent.

Respondent met its burden with respect to this ground for the disciplinary action.

2. DISCLOSURE IN VIOLATION OF FERPA

The 2016 Disciplinary Action concludes: "You forwarded an e-mail containing confidential information regarding a student to your representative thereby violating FERPA."

Complainant sent an email to her husband and to Mr. Allen on September 9, 2015. The email included information about a student; namely, the student's name and student identification number. Respondent introduced the email into evidence. Complainant did not introduce any authorization for disclosing the student information outside of the university. Complainant also did not offer any credible evidence that the email was somehow fabricated.

Complainant stated during the January 8, 2016 Rule 6-10 meeting that she knew about FERPA, that FERPA protected privacy, and that "you don't give out other people's information." Complainant admitted on cross-examination that she could not share student information outside of the university without permission. Complainant also admitted that student information should not be shared with her husband and Mr. Allen. Complainant's transmission of an email to her husband and to Mr. Allen was contrary to her own understanding of her confidentiality obligations.

FERPA protects the privacy of certain student information. In general, schools must have written authorization before releasing a student's education records. The Code of Federal Regulations require educational institutions to obtain written consent from a parent or student before disclosing "personally identifiable information." 34 C.F.R. § 99.30. In turn, 34 C.F.R. § 99.3 defines "Personally Identifiable Information" to include "the student's name" and also "the student's social security number, student number, or biometric record." While institutions may disclose certain "directory" information under FERPA, (a) "directory" information does not include student identification numbers; (b) students and parents must receive a reasonable amount of time to opt out; and (c) Complainant's disclosure to her husband and to Mr. Allen was unrelated to any directory. Complainant's transmission of a student's name and student identification number outside the university runs afoul of FERPA's regulations.

Respondent met its burden of proof with respect to this ground for the disciplinary action.

3. THE TRAVEL AUTHORIZATION FORMS

The 2016 Disciplinary Action concludes: "You withheld documents to process a travel authorization for your supervisor and a co-worker by placing the documents in a location whereby the documents would not be easily found when you were informed of being placed on administrative leave and after you told your supervisor that you had processed the documents." This withholding of documents allegedly occurred on December 9, 2015, the day Respondent notified Complainant that it was putting her on administrative leave.

Ms. Hejl testified that Complainant told her she was "getting" the travel authorization form signed. Ms. Hejl's testimony, therefore, reflects that Complainant reported a task in progress. Ms. Hejl did not testify that Complainant reported that the task had actually been completed. This is consistent with Complainant's own testimony that she made "multiple trips" to get the signature, but was not successful. While Ms. Hejl understood that Complainant had fully processed the travel authorization forms, her understanding stems from a miscommunication rather than a misrepresentation.

Complainant testified that she put the travel authorization forms in a top tray inside her cubicle, in a place where others could access it. Complainant also testified that when she put the forms in the tray, there were only a few other documents in it. Respondent did not provide any persuasive evidence to refute Complainant's testimony. While Ms. Hejl testified that her subordinate found the travel authorization forms underneath a pile, Ms. Hejl did not have personal knowledge about where the forms were actually found (much less personal knowledge of where Complainant put the forms). In contrast, Complainant testified from her personal knowledge. Further, Respondent did not provide any evidence as to what occurred with Complainant's cubicle (including who had access to it and who might have placed other documents in the tray) between the time Complainant left on administrative leave and the time someone went looking for the forms.

Both forms were fully signed and processed by December 14, 2015. Thus, only three business days elapsed between when Complainant supposedly hid the forms and when they were finalized. Respondent did not offer any evidence that anyone was harmed. The person who found the forms did not testify as to where he or she found them. Ms. Hejl admitted during testimony that she did not have any evidence that Complainant intended to hide the forms. Complainant testified that the forms were not hidden but in her top tray.

Respondent failed to meet its burden with respect to this ground for discipline.

II. THE DISCIPLINE ADMINISTERED.

A. The decision to administer some discipline was not arbitrary, capricious, or contrary to rule or law.

The Board may reverse or modify the level of discipline if Respondent's decision is arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. *See also* Board Rule 6-12(B) ("If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified"). In determining whether an agency's decision to discipline an employee is arbitrary or capricious, this Board must determine whether: (1) the agency neglected or refused to use reasonable diligence and care to procure evidence to consider in exercising its discretion; (2) the agency failed to give candid and honest consideration of the evidence before it; or (3) reasonable persons fairly and honestly considering the evidence must reach a contrary conclusion. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

The evidence at the hearing demonstrated that Ms. Tefft reached her decision to discipline Complainant after a thorough investigation into the allegations, numerous interviews, review of co-worker statements, and a review of Complainant's work history, including her prior corrective action and performance evaluations. Complainant had a thorough opportunity to respond to the allegations against her during the Rule 6-10 meetings and to present mitigating

information. Ms. Tefft considered the information presented by Complainant before reaching her decision. It appears that as part of her review of the underlying events, Ms. Tefft disregarded some of the allegations made against Complainant, for example the allegation involving the comments of a religious nature.

Ms. Tefft correctly found that Complainant should be disciplined for her improper actions. Disrespecting a disabled co-worker is intolerable. Complainant's actions resulted in Ms. Brown feeling degraded. Complainant's misconduct inhibits teamwork, lowers productivity, and can subject Respondent to liability. Similarly, refusing to follow a supervisor's instructions and arguing with a supervisor is unacceptable. Complainant's actions resulted in Ms. Hejl feeling disrespected; the visible nature of Complainant's actions toward Ms. Hejl undermined her authority to everyone observing the interaction. Failure to truthfully and forthrightly answer a supervisor's questions is insubordinate. Additionally, Complainant's disclosure of protected student information shows a disrespect and disregard of Respondent's instructions. Ms. Tefft testified that Complainant's actions were inappropriate, insubordinate, and created a negative work environment. Ms. Tefft's conclusion that Complainant's actions should result in discipline was not arbitrary or capricious. Candid and honest consideration of the evidence before Ms. Tefft, however, should have led her to drop some of the allegations made against Complainant; for example, the allegation that Complainant flipped people off.

Complainant has a history of disrespecting her co-workers and supervisor. Ms. Hejl met with Complainant more than once to verbally express concerns regarding Complainant's unprofessional and negative interactions. Respondent issued a Corrective Action to Complainant on October 31, 2014. The 2014 Corrective Action concerned similar performance issues as the misconduct giving rise to the disciplinary actions in this consolidated matter. The total time between the 2014 Corrective Action (October 31, 2014) and the 2016 Disciplinary Action (March 10, 2016) was approximately eighteen months. Ms. Tefft reasonably believed that disciplinary action was necessary to influence Complainant in the right direction. The disciplinary actions administered by Ms. Tefft were both on the low end of the range of potential discipline. The disciplinary actions reflect an attempt by Respondent to correct and remediate Complainant's conduct. The level of discipline imposed is consistent with the general principle of affording progressive discipline. *See, e.g.,* Board Rule 6-2.

Complainant did not show or express any remorse about her actions during the hearing or during the Rule 6-10 meetings. Complainant did not present any evidence that she has learned something from this process. Complainant's failure to take any responsibility further supports imposing discipline.

B. Modification to the level of discipline.

Respondent did not prove by a preponderance of the evidence that Complainant committed many of the acts for which discipline was imposed. Because the level of discipline administered was based on the collective charges, the proper action here is to modify the discipline administered rather than completely reverse it. § 24-50-125(4), C.R.S. (following the hearing, the ALJ may affirm, modify, or reverse the action of the appointing authority); Board Rule 6-12(B).

The 2015 Disciplinary Action consisted of a five percent (5%) pay reduction for six months, from December 1, 2015, through May 31, 2016. This ALJ modifies the 2015 Disciplinary Action to a one percent (1%) pay reduction for six months. While the serious nature of Complainant's interactions with Ms. Brown could alone warrant a five percent reduction in pay

for six months, Respondent issued its discipline based on the collective charges. This ALJ reduces the level of discipline because: (a) Respondent failed to prove most of the charges underlying the discipline administered, including the initial charge that Complainant attempted to unduly influence Mr. Morales; and (b) Respondent's allegation that Ms. Kitch had "witnessed multiple occasions of Complainant flipping people off as they walked by her desk" was groundless.

The 2016 Disciplinary Action consisted of a five percent (5%) pay reduction for six months, beginning March 1, 2016, and a reassignment to a new department (Enrollment Management) and new supervisor (Sarah Hunsinger). This ALJ modifies the 2016 Disciplinary Action to a four percent (4%) pay reduction for six months but does not modify the reassignment. In making this modification, this ALJ believes that the original level of discipline should be reduced because Respondent failed to prove one of the three charges underlying the 2016 Disciplinary Action. Additionally, a reduction is warranted because Respondent did not report Complainant's Administrative Leave to the Colorado State Personnel Director as required by Director's Administrative Procedure 5-15(A). The notification procedures help insure that Departments do not impose Administrative Leave as a substitute for corrective or disciplinary action. Director's Administrative Procedure 5-15 ("Administrative leave is not intended to be a substitute for corrective or disciplinary action").

III. ATTORNEY FEES.

Complainant requested attorney fees in her Prehearing Statement.

Section 24-50-125.5, C.R.S., governs Complainant's request for attorney fees. That statute provides for an award of fees and costs: "if it is found that *the personnel action* from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." (Emphasis added.) Similarly, Board Rule 8-33 provides, in pertinent part:

Pursuant to § 24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee, or department, upon final resolution of a proceeding against a party if the Board finds that *the personnel action* from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, was a means of harassment, or was otherwise groundless.

(Emphasis added.) The phrase "the personnel action" refers to "the particular disciplinary action that was taken." *Coffey v. Colorado Sch. of Mines*, 870 P.2d 608, 610 (Colo. App. 1993).

In this consolidated matter, Respondent issued the 2015 Disciplinary Action and the 2016 Disciplinary Action. "The personnel actions" in both of these were five percent reductions in pay for six months. The issue, therefore, is whether Respondent had grounds to impose each of the five percent reductions in pay.

Respondent proved a basis for each of the five percent reductions in pay. With respect to the 2015 Disciplinary Action, Respondent proved that Complainant used an inappropriate tone and created an uncomfortable work environment for Ms. Brown. This alone could warrant a five percent reduction in pay for six months, particularly given the 2014 Corrective Action that Respondent had previously issued. With respect to the 2016 Disciplinary Action, Respondent proved that Complainant was insubordinate to her supervisor and disclosed information outside

of the university in contravention of her own understanding of her confidentiality obligations. Both of these, standing alone, could support a five percent reduction in pay for six months.

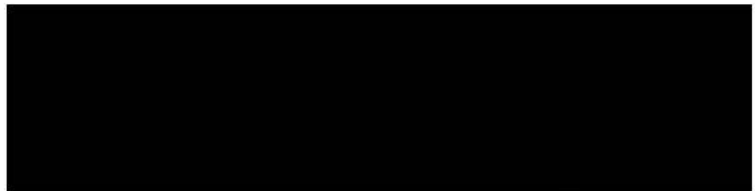
CONCLUSIONS OF LAW

1. Respondent met its burden of showing that Complainant committed some of the acts giving rise to the discipline. However, Respondent did not prove some of the acts underlying the discipline.
2. Administering some discipline was not arbitrary, capricious, or contrary to rule or law.
3. The level of discipline administered should be modified as set forth herein.
4. Complainant did not establish grounds for an award of attorney fees and costs.

ORDER

The disciplinary actions are **modified** as set forth herein. There is no award to Complainant of her attorney fees.

Dated this 12th day
of December, 2016,
Denver, Colorado.



F. J. "Rick" Dindinger-II J
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 12th day of December, 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.