

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2018B079

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOANIE ISRAEL CLEVELAND,
Complainant,

v.

DEPARTMENT OF REVENUE, DIVISION OF GAMING,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on July 13, 2018, and the evidentiary hearing on November 1 and 2, 2018, at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. Complainant appeared in person and was represented by Sean P. Paris, Esq. Respondent was represented by Eric Freund, Esq., Senior Assistant Attorney General. Respondent's advisory witness was Donia Amick, Complainant's Appointing Authority.

The following exhibits were admitted into evidence: Complainant's Exhibits A, B, and Respondent's Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13.1, 14, 15, 16, 17, 18, 19, 23, 24, 25, 29, 30. The record was closed on November 2, 2018.

MATTER APPEALED

Complainant, a certified employee, appeals her disciplinary demotion. Complainant argues that she did not commit all of the acts for which she was disciplined, and that Respondent's decision to demote her was therefore arbitrary, capricious, and contrary to rule or law. Complainant seeks rescission of the disciplinary demotion and reinstatement to the Auditor III position; an award of back pay, with statutory interest; reinstatement of any lost benefits from the date of her demotion; reinstatement of her flexible work arrangement and telecommute privileges, and an award of attorney fees and costs.

Respondent argues that its decision to demote Complainant was appropriate, and was not arbitrary, capricious, or contrary to rule or law. Respondent seeks affirmance of its disciplinary decision, denial of all relief requested by Complainant, and dismissal of Complainant's appeal with prejudice.

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

ISSUES

1. Did Complainant commit the act(s) for which she was disciplined?
2. Was Respondent's disciplinary demotion of Complainant arbitrary, capricious or contrary to rule or law?

3. Was the discipline imposed within the range of reasonable alternatives?
4. Is Complainant entitled to an award of attorney fees and costs?

FINDINGS OF FACT

Background

1. Complainant is a certified state employee.
2. On March 23, 2009, Complainant was hired as an auditor within the Division of Gaming at the Department of Revenue (DOR). (Stipulated fact.)¹ Complainant had previously been employed as an auditor within the gaming industry, and has valuable experience and expertise.
3. During her employment with Respondent, Complainant earned consistently satisfactory performance reviews, with some exceptional ratings.
4. Prior to June 6, 2018, Complainant had not been the subject of any corrective action or disciplinary action under the Board Rules while employed with Respondent. (Stipulated fact.)
5. The Division of Gaming ensures that licensed casinos comply with gaming rules, regulations and procedures, and properly report and pay gaming taxes.
6. Prior to the disputed discipline at issue in this appeal, Complainant was an Auditor III. Complainant was assigned to the Division of Gaming's Golden office. (Stipulated fact.)
7. At all relevant times, Complainant's supervisor was Roger Pinson, Audit Manager.
8. At all relevant times, Complainant's appointing authority was Donia Amick, Director, Division of Gaming.
9. An Auditor III is the lead auditor in completing revenue audits and compliance inspections for licensed gaming operations. An Auditor III also serves as a work leader for other auditors assigned to them.
10. Stephanie Johnson was hired within two weeks of Complainant in 2009, and is also an Auditor III. Over the last nine and a half years, Ms. Johnson and Complainant have developed a close working relationship.
11. Complainant completed Respondent's anti-fraud training in 2009, 2010 and 2013. According to acknowledgments signed by Complainant after this training, Respondent's auditors are "responsible for complying with all State of Colorado and Department of Revenue policies, statutes and rules," and that "[f]raud includes making inaccurate statements or misrepresenting information." Respondent's auditors are expected "to report suspected fraud and required to report actual fraud," and to conduct all their "activities in a lawful and ethical manner, consistent with State and local laws and DOR policies." Respondent's auditors are required "to demonstrate the highest standards of personal integrity, truthfulness, and honesty

¹ The parties stipulated to certain facts, which are indicated with this parenthetical note.

in order to maintain public confidence and trust in DOR and the State.” Respondent’s auditors are warned that “acting unlawfully” or “committing fraud ... may result in disciplinary action, including termination of employment and criminal prosecution.”

12. On April 19, 2017, Complainant acknowledged a Statement of Understanding, which provides in part: “I understand that integrity and ethical values are of chief concern to the mission of the Colorado Division of Gaming, and as a Gaming employee I will adhere to the written policies and unwritten norms in regards to ethical standards of behavior expected of me as a Gaming Employee.” (Stipulated fact.)

The Cleveland Family Vehicles

13. Complainant and her husband, Jeffrey Cleveland, are partners in a log furniture business. Mr. Cleveland does the “dirty work” of building the furniture, and Complainant does the administrative work. Since at least 2016, their business office and shop have been located in Golden, Colorado, in Jefferson County.
14. At all relevant times in 2018, Complainant and her husband owned or leased at least eight vehicles. These vehicles included a 2006 Ford F350 truck used by Mr. Cleveland, a BMW used by Complainant, and a Corvette titled to Mr. Cleveland, as well as a flatbed truck, a large white car trailer and a smaller black trailer used by Mr. Cleveland in the Clevelands’ log furniture business. Two other vehicles were leased by Mr. Cleveland for two of their children to use.
15. Mr. Cleveland handled the purchase and initial registration of the family’s vehicles. Complainant handled many of the vehicle registration renewals every year.
16. Complainant and her husband have resided in Arvada, Colorado, in Jefferson County, since August 2016.
17. Prior to moving to Jefferson County, Complainant and her husband resided at 221 Gap Road in Blackhawk. This address is in Gilpin County. Complainant and her husband sold this Gilpin County property in 2014.

Chevy Corvette Registration

18. On or about May of 2017, Mr. Cleveland took delivery of a 2017 Chevy Corvette. This vehicle was registered on August 30, 2017, in Gilpin County to the 221 Gap Road address. (Stipulated facts.)
19. Registering the Corvette in Gilpin County rather than in Jefferson County resulted in \$3,849.10 in sales tax savings.
20. Prior to Mr. Cleveland’s purchase of the Corvette, the Clevelands’ log furniture store at the Colorado Mills mall was heavily damaged by a devastating hailstorm. Because the Clevelands’ garage in Jefferson County was filled with goods salvaged from that store, the Corvette was stored at a neighbor’s property in Gilpin County until January 2018. The address of this property was not 221 Gap Road.
21. Mr. Cleveland completed the initial registration of the Corvette in Gilpin County. As of November 1, 2018, his driver’s license still listed 221 Gap Road as his residence.

Ford F350 Truck Registration

22. In October 2017, the registration on the 2006 Ford F350 truck (the "Truck") that Mr. Cleveland drives expired. The Truck had been registered in Gilpin County since the time that Complainant and Mr. Cleveland lived at the 221 Gap Road address. (Stipulated fact.)
23. The Truck is titled to Complainant's mother: Edwine Israel. (Stipulated fact.) At all relevant times, Ms. Israel lived out of state.
24. In early February 2018, Complainant noticed that the Truck had license plate tags that had expired in October 2017. She wanted to get the registration on the Truck renewed as quickly as possible.
25. On Monday, February 5, 2018, Complainant and Ms. Johnson were performing auditing work at the Monarch and Ameristar casinos in Blackhawk and Central City located in Gilpin County. (Stipulated fact.) They traveled together to and from these casinos in a State vehicle.
26. When Complainant and Ms. Johnson finished up their work in Gilpin County mid-afternoon, they planned on returning to the Golden office. (Stipulated fact.)
27. On the way back to Golden, Complainant wanted to stop by the Gilpin County courthouse to take care of a vehicle registration renewal. (Stipulated fact.)
28. Ms. Johnson drove Complainant to the Gilpin County Courthouse. (Stipulated fact.) The Courthouse was only a few blocks away from the Central City office in which they were working.
29. Ms. Johnson initially intended to stay in the vehicle while Complainant went into the Clerk's office. However, Complainant urged Ms. Johnson to accompany her because the weather was cold and snowy. Ms. Johnson then agreed to go inside as well. (Stipulated fact.)
30. When Complainant got out of the vehicle, she mentioned to Ms. Johnson that she needed to renew the registration for a vehicle. (Stipulated fact.)
31. Although the Truck is registered in the name of Edwine Israel, Complainant's husband, Jeffrey Cleveland, is the primary driver of this vehicle. (Stipulated fact.)
32. The registration for this Truck had expired on the last day of October 2017. (Stipulated fact.)
33. Ms. Johnson remarked that she did not know that a person could register a vehicle in a county in which you did not live, to which Complainant replied, "you're not supposed to." (Stipulated fact.)
34. Ms. Johnson accompanied Complainant inside the Gilpin County Clerk's office. (Stipulated fact.)
35. Ms. Johnson pointed out a sign that described the parameters of registering a vehicle in Gilpin County. (Stipulated fact.) This sign contained a warning about illegally registering vehicles in Gilpin County.

36. After seeing the warning sign, Ms. Johnson felt uncomfortable remaining in the office and waited outside the doorway to the office. Ms. Johnson overheard Complainant tell the clerk that she still lived in Gilpin County.
37. As of February 5, 2018, Complainant and her husband had lived in Jefferson County for approximately one and a half years.
38. Complainant completed the registration renewal for the Truck at the Gilpin County Clerk's office. (Stipulated fact.)
39. When Complainant left the Clerk's office, she mentioned to Ms. Johnson that the registration had expired more than thirty days ago. (Stipulated fact.)
40. During the drive back to Golden, Ms. Johnson asked Complainant if she had just committed fraud. Complainant responded that she did not want to lie, and told her husband that she would obtain the renewal for the Truck if she could just pay the renewal fee and did not have to answer any questions. Complainant admitted that she just lied, and told Ms. Johnson: "And this is what I hate about lies, is because there's a lie on top of a lie on top of a lie, and it just gets bigger."
41. Ms. Johnson became concerned that she was required to report the potential fraud she had witnessed. When Ms. Johnson arrived home that evening, she looked for the requirements for registering vehicles on both the Gilpin County and Jefferson County websites. She also reviewed the anti-fraud training she had received.
42. On the morning of February 6, Ms. Johnson contacted Lad Sullivan, the agent in charge of Respondent's Central City office. Ms. Johnson told Mr. Sullivan what she had observed, and asked him whether he thought she needed to report it. Mr. Sullivan informed Ms. Johnson that she needed to put her report in writing.
43. Ms. Johnson called Complainant on February 6 and informed Complainant that she was reporting the incident. At this time, Complainant told Ms. Johnson that she would self-report the incident and she then met with Roger Pinson. (Stipulated facts.)
44. When Ms. Johnson informed Complainant that she had to report the incident, Complainant responded, "I'll probably lose my job over this."
45. Complainant related to Mr. Pinson that she had gone to the Gilpin County courthouse on the previous day to renew the registration on her husband's Truck. (Stipulated fact.)
46. Complainant told Mr. Pinson that she had intended to renew the registration to then transfer the registration to Jefferson County. (Stipulated fact.)
47. Mr. Pinson informed Paul Hogan, the Chief Auditor, of Complainant's self-report.

Investigation of the Truck Registration

48. On February 6, 2018, Ms. Johnson sent Mr. Sullivan the following statement:

Per our conversation, I was up in Central City yesterday and observed Joanie Cleveland complete a vehicle registration renewal for an address that she does not reside at anymore. I saw a sign that I believe indicated that the action was fraudulent but I can't find the statute to confirm. I did point the sign out but she proceeded with the transaction. I've never run into a situation like this before so I want to make sure I'm following proper protocol and adhering to Dept. Policy-046.

49. Mr. Sullivan forwarded Ms. Johnson's statement to Kirsten Gregg, Respondent's Chief of Investigations, who consulted with Senior Director Flavio Quintana. Mr. Quintana instructed Ms. Gregg to proceed with an investigation of Ms. Johnson's statement.

50. Supervisory Investigator Nancy McChesney was assigned to investigate whether Complainant violated the Code of Ethics (Executive Order D 001 99), Division of Gaming Policy TGA-001 and § 42-6-139(1)(a), C.R.S.

51. Executive Order D 001 99 was issued January 15, 1999, and provides, in pertinent part, that Executive Department employees "[s]hall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire public confidence and trust in government."

52. Division of Gaming Policy TGA-001, revised October 31, 2017, provides, in pertinent part, that "the success of limited gaming is dependent upon public confidence and trust... Because the Division demands such a high level of integrity and honesty from the industry it regulates, Division employees are also expected to adhere to a high level of integrity and ethical values."

53. Section 42-6-139(1)(a), C.R.S., defines a person's "residence," for purposes of registering a motor vehicle, as "the person's principal or primary home or place of abode."

54. On February 7, 2018, Ms. McChesney notified Complainant that she was "under Internal Investigation regarding possible false registration of a vehicle."

55. Ms. McChesney interviewed Ms. Johnson on February 8, Mr. Pinson on February 13, and Complainant on February 20, 2018. These interviews were recorded.

56. On March 15, 2018, Ms. McChesney issued her Initial Report, which concluded:

J. Cleveland admitted to registering a vehicle during her work shift for her husband, using a former address that [sic] she used to reside, and no longer owns. J. Cleveland was also found to have a 2010 trailer, 885XIF, registered in her name, registered to 221 Gap Drive [sic], Black Hawk, CO 80422. The trailer was last registered on September 2, 2017. On August 30, 2017, J. Cleveland's household registered a 2017 Chevy Corvette, license plate AOP923, in Gilpin County, using the former address she no longer owns. J. Cleveland has a total of four vehicles that are currently registered to her former address in Gilpin County.

57. As a result of the illegal registration of the Truck and other vehicles, Ms. McChesney determined that Complainant violated DOR's Code of Ethics (DOR Executive Order D 001 99), Division of Gaming Policy TGA-001-General, and § 42-6-139(1)(a), C.R.S.

Disciplinary Demotion

58. After receiving and reviewing Ms. McChesney's investigation report, Ms. Amick held a Rule 6-10 meeting with Complainant on April 3, 2018. During this meeting, Complainant was able to listen to the recorded interviews of Mr. Pinson and Ms. Johnson. She declined to listen to her own interview.

59. After listening to Ms. McChesney's interview with Ms. Johnson, Complainant remarked: "I don't completely agree with everything she said, but I guess it's close enough." Complainant admitted that she did not think what she did "was on the straight line," but she did not think she was "committing a crime."

60. At the conclusion of the Rule 6-10 meeting on April 3, 2018, Ms. Amick allowed Complainant to provide additional information. Later that day, Complainant handed Ms. Amick a copy of an email, with no explanation. This email, dated March 6, 2018, was a response to the following query Complainant made to Manager Brenda Moss at the Jefferson County Motor Vehicle Division: "If we store our trailers in Gilpin county for more than 6 months in a year, but our shop and residence is in Jefferson county, where should we register our vehicles?" Ms. Moss responded: "The State says you are to register your vehicle in the County in which you reside or is kept 51% of the time. If you are registered to vote and reside in Jefferson County, that's where I would register them."

61. Ms. Amick did not find that this March 6, 2018 email, or any of the other information she reviewed, raised any circumstances that would mitigate Complainant's illegal registration of the Truck in Gilpin County.

62. Ms. Amick concluded that Complainant violated § 42-6-139, C.R.S.; the Code of Ethics; Division of Gaming Policy TGA-001, and Respondent's Statement of Understanding concerning adherence to ethical standards of behavior.

63. Ms. Amick reviewed and considered Complainant's consistently satisfactory performance evaluations, as well as the value of Complainant's experience and expertise to Respondent's operations, before reaching her decision concerning potential discipline.

64. On June 6, 2018, Ms. Amick imposed a disciplinary demotion from Complainant's position of Auditor III to Auditor II, which resulted in a decrease in pay from \$5,629 per month to \$4,824.34 per month with an effective date of June 11, 2018. Ms. Amick also terminated Complainant's Flexible Work Arrangement. (Stipulated facts.) Under Respondent's policy, employees who are subject to corrective or disciplinary action are not eligible for a Flexible Work Arrangement.

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. XII, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel

Board Rule 6-12, and generally includes:

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

In this *de novo* disciplinary proceeding, Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 706-08. The Board may reverse or modify Respondent's decision to impose a disciplinary demotion on Complainant if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACT FOR WHICH SHE WAS DISCIPLINED.

The parties stipulated to many of the key facts of this case. There is no dispute that, on February 5, 2018, using a work vehicle and accompanied by a co-worker, Complainant renewed a registration for a vehicle in Gilpin County - a county in which neither she nor her husband lived. Complainant testified that she did not have any conversation with the Gilpin County clerk, but simply handed her the expired registration, paid the fees, and took the renewed registration and tags. However, Complainant's co-worker, Ms. Johnson, heard Complainant tell the clerk that she still lived in Gilpin County. In fact, Complainant and her husband had sold their Gilpin County property in 2014 and, for at least the last year and a half, had been living in Jefferson County.

Ms. Johnson had nothing to gain by fabricating her report concerning Complainant's actions on February 5 and was concerned about damaging her close working relationship with Complainant. It was difficult for Ms. Johnson to come forward, and she was visibly upset during her testimony at the hearing. Nevertheless, Ms. Johnson's testimony was clear, credible, and consistent with her prior statements recorded by Ms. McChesney during the investigation. Complainant acknowledged that Ms. Johnson was a person of high integrity, was very honest and had no reason to lie.

In contrast to Ms. Johnson's clear, consistent and credible testimony, Complainant made numerous conflicting statements. During the initial investigation, Complainant told Ms. McChesney that her husband handled all the vehicle registrations, but that she renewed the registration for the one vehicle she drives. Near the end of this interview, Complainant expressed a concern that she would be blamed for actions by her husband: "I hope you're not going to hold me responsible for everything that guy does? I'm, like, oh, my Lord, I'm sure there's - - no, I don't want to be. I'm, like, I can't be his babysitter."

During the 6-10 meeting with Ms. Amick, Complainant admitted that she may have renewed the registrations on the Truck and trailers used by her husband in their business:

Ms. Amick: Have you registered any vehicles or trailers in Gilpin County since moving from your Gilpin County address?

Ms. Israel-Cleveland: Chances are I might have. I'm not – I couldn't say for sure because I don't have a very good memory anymore, but – and we have quite a few vehicles, so I could have.

Ms. Amick: Okay. Which ones?

Ms. Israel-Cleveland: It would only be his vehicles. So the ones that he uses for business, so either his truck or one of the trailers.

Ms. Amick: Okay. And when did you register them?

Ms. Israel-Cleveland: When they needed to be renewed.

Ms. Amick: So you have done it more than once, more than ...

Ms. Israel-Cleveland: I wouldn't even know where to guess ...

Complainant subsequently told Ms. Amick, "I really had no idea about our – my husband's vehicles, where they're registered or not." When Ms. Amick attempted to clarify Complainant's statements, Complainant said she usually registers her, and her children's vehicles, not her husband's vehicles: "I don't register any of his, or I try not to." Complainant then stated that "even when she registered some of the vehicles," she did not know whether they were maintained "up" (presumably in Gilpin County) or "down" (presumably in Jefferson County).

When questioned about these contradictory statements during the hearing, Complainant explained that her husband did the original purchase or lease, as well as the initial registration, of their various vehicles, but that she would take care of the renewals. These registration renewals included the annual renewal of the Truck, and at least one of the trailers, in Gilpin County after Complainant and her husband moved to Jefferson County.

During her interview with Ms. McChesney, Complainant stated that she did not know that the Truck registration was in her mother's name: "I never really even so much looked at it. I just went there and got it registered." However, during the hearing, Complainant testified that, because her mother was listed on the title, she believed that her mother was the only one who could get the address changed. Because Complainant wanted to get the lapsed registration renewed quickly, she went ahead and did that herself in Gilpin County, and intended to get the address changed afterwards. Complainant explained that she did not think she was doing anything illegal, and simply wanted to renew the expired registration as quickly as possible. Complainant's statements not only contain troubling contradictions, but also reflect a cavalier attitude towards the legal requirements of vehicle registration.

Ms. Johnson's credible report of Complainant's statements to the Gilpin County clerk establish that Complainant lied about her home address. Even if Complainant's allegations that she did not speak with the clerk were credible, handing in an expired registration with an erroneous address, with the expectation that the clerk will renew it without verifying that address, also constitutes a misrepresentation. Section 42-6-139(2)(a)(II), C.R.S., provides that "it is unlawful for a person who is a resident of the state to register ... a motor vehicle at any address other than ... the address of the owner's residence..." Section 42-6-139(3), C.R.S., provides that "a person who knowingly" violates this provision "is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of one thousand dollars." By misrepresenting her residential address

to the Gilpin County clerk when she renewed the Truck registration, Complainant violated this statute.

In addition to finding that Complainant's February 5th registration of the Truck in Gilpin County was illegal and unethical, Ms. Amick concluded that Complainant and Mr. Cleveland purchased and improperly registered a 2017 Corvette using their prior Gilpin County address, resulting in a sales tax savings of \$3,849.10. Complainant argues that Ms. Amick erroneously assumed that Complainant was aware of the use of this Gilpin County address, and that the use of this address was improper. Complainant argues that these erroneous assumptions rendered her decision to discipline Complainant "fundamentally flawed." However, the explanations provided by Complainant and by Mr. Cleveland about the purchase and registration of the Corvette raise troubling questions.

Complainant argues that the registration of the Corvette in Gilpin County was not improper, as it was stored in Gilpin County until January 2018. Mr. Cleveland did not register the Corvette at the address where it was "maintained," however, but used the address of his prior residence in Gilpin County: 221 Gap Road. Using this Gilpin County address saved Mr. Cleveland \$3,849.10 in sales tax on the Corvette's purchase. During his testimony, Mr. Cleveland produced his driver's license, which still erroneously reflected his residence as 221 Gap Road in Gilpin County. Mr. Cleveland's continued maintenance of the Gilpin County address on his driver's license, and his use of this address to register the Corvette, cast doubt on the credibility of his testimony.

Complainant testified that, while she accompanied her husband to the dealer to complete the purchase of the Corvette, she removed herself from Mr. Cleveland's conversation with the financing agent because she did not like being involved in those discussions. Complainant's comments to Ms. Johnson, following her illegal registration of the Truck on February 5th, about not wanting to "lie," and her insistence during the hearing that she simply handed the expired Truck registration to the Gilpin County clerk and paid for the renewal, without any conversation at all, suggest that Complainant was similarly trying to avoid an affirmative misrepresentation of the Clevelands' home address during the purchase of the Corvette. Rather than providing her with plausible deniability, however, the totality of Complainant's statements and actions reflect a suspicion, if not an actual awareness, that Mr. Cleveland was improperly using their prior Gilpin County address to register vehicles. Even if the Clevelands' testimony concerning the Corvette could be considered to be credible, Complainant admitted that she handled the annual renewals for numerous vehicles, and improperly perpetuated the registration of one or more vehicles in Gilpin County, including the Truck.

When compared with Ms. Johnson's consistent and credible testimony, Complainant's shifting explanations are not credible. Ironically, these shifting explanations illustrate the comments Complainant made to Ms. Johnson on February 5, 2018: "And this is what I hate about lies, is because there's a lie on top of a lie on top of a lie, and it just gets bigger."

More importantly, any erroneous assumptions reached by Ms. Amick concerning the Corvette registration do not negate the legal and ethical violations established by the parties' stipulated facts. These stipulated facts provide that, on February 5, 2018, Complainant registered a vehicle in a county in which she did not reside. This act violated § 42-6-139, C.R.S., and constituted a potential misdemeanor. Complainant's illegal registration of this vehicle also violated the Statement of Understanding she signed on April 19, 2017, acknowledging that she "would adhere to the written policies and unwritten norms in regards to ethical standards of behavior expected of me as a Gaming Employee," as well as the Executive Code of Ethics, the

Division of Gaming Policy TGA-001, and the anti-fraud training she received. Moreover, Complainant's admissions concerning her renewal of her family's vehicles in Gilpin County after moving to Jefferson County demonstrate that this illegal registration was not an isolated incident. Therefore, the preponderance of the evidence establishes that Complainant committed the act for which she was disciplined.

III. RESPONDENT'S DISCIPLINARY DEMOTION OF COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW, AND WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused "to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it," 2) failed "to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion," or 3) exercised "its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In reaching her conclusions concerning Complainant's actions on February 5, 2018, Ms. Amick carefully considered the evidence before her, and exercised her discretion in such manner that reasonable persons fairly and honestly considering the evidence would not reach contrary conclusions. *Id.* at 1252. Ms. Amick testified that she took "extra care," reviewing all the information before her and conferring with senior management officials, to ensure that she was making the "right decision." As discussed above, any erroneous assumptions reached by Ms. Amick concerning Mr. Cleveland's Corvette do not negate Complainant's illegal registration of the Truck on February 5, 2018. This illegal registration alone justifies the imposition of discipline.

The Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within the 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.

Contrary to Complainant's argument that Ms. Amick failed to consider mitigating circumstances, Ms. Amick considered Complainant's shifting explanations, and determined that they did not mitigate the seriousness of her actions on February 5, 2018. Complainant not only disregarded the legal requirements for properly registering vehicles, but disregarded her own responsibility as an Auditor III to act with integrity and maintain high ethical standards. Complainant illegally registered a vehicle by misrepresenting her home address, and did so in Central City, where she worked as an auditor for the Respondent. These actions contravened Complainant's duty to act in a way that inspired trust and confidence in Respondent's regulation of the gaming industry, and provided a negative example for other auditors.

Ms. Amick reviewed and considered Complainant's previous performance evaluations, as required by Board Rule 6-9. Ms. Amick also considered Complainant's valuable experience and expertise, and decided not to terminate Complainant's employment, but instead to demote her from an Auditor III to an Auditor II. Complainant's argument that she continues to do

substantially the same work as she did as an Auditor III does not render this penalty inappropriate. The purpose of progressive discipline is to serve as a deterrent and a corrective measure; hopefully, this demotion will have that effect.

For all of these reasons, Respondent's decision to demote Complainant was not arbitrary, capricious or contrary to rule or law, and was well within the range of reasonable alternatives.

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

Complainant seeks an award of attorney fees and costs pursuant to Board Rule 8-33. Attorney fees and costs are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. § 24-50-125.5, C.R.S. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B).

As discussed above, Respondent has proven, by a preponderance of the evidence, that Complainant committed the act for which she was disciplined; that such discipline was not arbitrary, capricious or contrary to rule or law, and that the disciplinary demotion was within the range of reasonable alternatives. Because Respondent's actions were not instituted frivolously, in bad faith, maliciously, or as a means of harassment, Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the act for which she was disciplined.
2. Respondent's disciplinary demotion of Complainant was not arbitrary, capricious, and contrary to Board Rule 6-9.
3. Respondent's disciplinary demotion of Complainant was within the range of reasonable alternatives.
4. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's disciplinary demotion of Complainant is **affirmed**. Attorney fees and costs are not awarded. Complainant's appeal is dismissed with prejudice.

Dated this 13th day
of November, 2018.



Susan J. Tyburski
Senior Administrative Law Judge
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(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 14th day of November, 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and attached **NOTICE OF APPEAL RIGHTS** 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.