STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019B038**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORENZO WRIGHT,
Complainant,

v.

DEPARTMENT OF LABOR & EMPLOYMENT, DIVISION OF UNEMPLOYMENT INSURANCE,
Respondent.

Administrative Law Judge ("ALJ") Rick Dindinger held a commencement on January 8, 2019, and an evidentiary hearing on April 15-16, 2019. The ALJ held these proceedings at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. Angela D. Boykins, Esq., represented Complainant. Stacy L. Worthington, Esq. (Senior Assistant Attorney General) and Vann A. Ellerbruch, Esq. (Fellow) represented Respondent.

MATTER APPEALED

Complainant, a former certified state employee, appeals his dismissal. Complainant asserts the dismissal was arbitrary, capricious, or contrary to rule or law. Complainant requests that the State Personnel Board reverse the dismissal, award him back pay and lost benefits, and award him attorney fees and costs.

Respondent denies Complainant's allegations and maintains that the dismissal was not arbitrary, capricious, or contrary to rule or law. Respondent requests that the Board affirm the dismissal.

For the reasons discussed below, the disciplinary action is **affirmed**.

ISSUES

A. Whether Complainant committed the acts for which he was terminated; and

B. Whether the dismissal was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

Background

1. Complainant started working for Respondent in 2003 as a Labor & Employment Specialist I. (Stipulated fact.)[1]

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[1] The parties stipulated to certain facts as identified with parentheticals.

2. Respondent promoted Complainant to a Labor & Employment Specialist II in 2005.

3. At the time of his termination, Complainant was a Labor & Employment Specialist II. He was a certified state employee. His monthly salary was $4,722. (Stipulated fact.)

4. Aric Miksic was Complainant's direct supervisor in 2017 and 2018.

5. Philip Spesshardt is the Branch Manager of the Unemployment Insurance Operations Branch in Respondent's Division of Unemployment Insurance. Mr. Spesshardt was Complainant's second-level supervisor.

6. Jeffrey Fitzgerald is the Director of Respondent's Division of Unemployment Insurance. Mr. Fitzgerald was Complainant's Appointing Authority.

7. Respondent keeps an online directory of its employees. The directory includes employee names and contact information. The directory also includes pictures of Respondent's employees. All employees have access to the online directory.

Complainant's work attendance

8. From November 2015 until the time of his dismissal, Complainant worked on the ninth floor of 633 17th Street in Denver. The ninth floor is a secured work area protected by an electronically locked door that requires an identification badge for access.

9. Complainant's work schedule was Monday through Friday from 8:00 a.m. to 5:00 p.m., with an hour lunch break from noon to 1:00 p.m. The actual start time for Complainant's lunch break had a degree of flexibility depending on his work responsibilities.

10. On May 22, 2017, Complainant exchanged emails with Mr. Miksic and Mr. Spesshardt regarding his work schedule. Mr. Miksic sent the first email in the exchange to Complainant. Mr. Miksic's email included the following: "Lynn (Audits team) . . . mentioned that you were not in until 8:45 am this morning . . . please ensure you work a full 8-hour day today."

11. Complainant responded to Mr. Miksic as follows: "Aric, when I was assigned over here I notified Jeff at that time that the distance from Capitol Hill, where I park, to 633 should be taken into consideration and I was assured it would. So, if you could let Lynn know that too, thank you."

12. Later on May 22, 2017, Mr. Spesshardt responded to Complainant as follows:

> Lorenzo,
>
> While your parking situation could result in limited occasions where you do not arrive ready to work promptly at 8:00 a.m., the expectation of all employees is that they arrive for work and begin performing work at their regularly scheduled start time. Under certain rare circumstances, it would be understandable that an employee might arrive a few minutes later than anticipated. If that had been the case, Aric would not be communicating with you regarding the need for a leave slip or to perform make-up time. In this case, the arrival appears to be 45 minutes late based only [sic] the information Aric received. Given the delay in arrival, it is proper to request that you either make up the time this week or provide a leave slip for the time, if you were 45 minutes late reporting to work. If the information

received by Aric was incorrect, you need to clearly communicate that to him. If the information is correct, you will need to either make up the time as he has requested or submit a leave request. As public employees, we must always be ethical stewards of the employer taxes that pay our salaries.

13. Respondent's records for 2018 reflect Complainant's arrival times to the ninth floor of 633 17th Street as follows:

	JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUG
Days with a.m. time entries.[2]	16	14	15	19	19	14	20	10
On time	0	2	0	0	0	0	0	0
<30 min. late	2	0	0	1	0	0	0	0
> 30 min. late	9	10	5	5	3	4	13	1
> 60 min. late	4	2	9	9	14	10	7	9
>90 min. late	1	0	1	4	2	0	0	0

14. During the Rule 6-10 meeting on September 18, 2018, Complainant stated that on average, he arrives at work by 8:15.

Complainant's interactions with MG[3]

15. MG works for Respondent as a Labor & Employment Specialist II. MG currently works from home. Prior to the summer of 2018, MG worked at Respondent's location at 251 East 12th Avenue in Denver.

16. MG is a Hispanic female.

17. Complainant and MG met on an elevator sometime in 2015. At the time, Complainant was also working at Respondent's location at 251 East 12th Avenue. When they met on the elevator, MG did not give Complainant her name.

18. Shortly after they met on the elevator, Complainant approached MG at her desk. Complainant gave MG his phone number. MG does not know how Complainant found her desk.

[2] Respondent's records do not reflect arrivals for various workday mornings during this timeframe. This might be explained by leaves, offsite trainings or meetings, another person holding the door open, or by something else.

[3] The name/identity of the co-workers is not relevant to this Initial Decision.

19. Complainant then emailed MG and asked if she would help him practice Spanish. MG agreed to help Complainant with Spanish.

20. Initially, Complainant's association with MG revolved around him practicing Spanish.

21. According to Complainant's testimony at the hearing, his association with MG developed into a consensual, romantic relationship that lasted three weeks to a month.

22. Sometime after the relationship ended, MG told Complainant to leave her alone. MG also blocked Complainant on her phone.

23. After MG told Complainant to leave her alone, she observed him when she went outside during her breaks. MG does not know how Complainant was able to schedule his breaks to coincide with her own breaks. MG continued to see Complainant during her breaks even after Respondent reassigned him to 633 17th Street.

24. MG expressed concerns about Complainant to her supervisor.

Complainant's interactions with BP

25. BP was one of Complainant's female co-workers. Complainant and BP were in a consensual, romantic relationship. The relationship lasted 2 to 3 years. During most or all of the relationship, they both worked at Respondent's location at 251 East 12th Avenue.

26. As a result of issues between Complainant and BP in 2015, BP obtained a temporary protection order against him. In addition, she complained internally about him.

27. The temporary protection order BP received was dismissed and did not become permanent. (Stipulated fact.)

28. Respondent investigated the issues between Complainant and BP. Respondent also placed Complainant on Administrative Leave.

29. In November 2015, following the investigation of the issues between Complainant and BP, Respondent removed him from its office at 251 East 12th Avenue and reassigned him to work at its office at 633 17th Street. The distance between the two offices is one mile.

30. Following the reassignment to 633 17th Street, Respondent generally prohibited Complainant's presence at 251 East 12th Avenue. Respondent only permitted Complainant to be present there for business necessities. "Business necessity" included team trainings and staff meetings, but did not include pot-lucks or work committees.

31. Following the reassignment, Complainant continued to park in the same general area where he had parked when he worked at 251 East 12th Avenue. The area where Complainant parked is located between 13th Avenue and 10th Avenue (north/south boundaries) and Logan Street and Clarkson Street (east/west boundary). The area is often referred to as "Capitol Hill."

Complainant's interactions with CS

32. CS works for Respondent as a Labor & Employment Specialist II. CS works at Respondent's location at 251 East 12th Avenue.

33. CS is a Hispanic female.

34. Complainant and CS met at a training event in June 2016. During the event, they discussed their common affinity for fishing.

35. On June 8, 2016, shortly after the training event, Complainant sent CS texts with pictures of some fish. The texts included a picture of a catfish, walleye and bass.

36. The text exchange between Complainant and CS continued as follows:

WRIGHT:	I have a secret to tell you.
CS:	Ok
CS:	White your secret
CS:	Want
CS:	Wait
WRIGHT:	Lmao![4]
CS:	As Long as you don't have to kill me after you tell me your secret
CS:	Lol[5]
WRIGHT:	I wanted to tell you, I am attracted to you and the only way I could kill you is with affection.
CS:	Lol
CS:	I'm flattered
CS:	😊
WRIGHT:	I do want to stab you, but not with a knife lol Cochino[6]
CS:	Lol
CS:	Alright kid gotta drive
WRIGHT:	Ok be safe
CS:	Thanks

[4] LMAO is a text messaging acronym that stands for "Laughing My Ass Off."

[5] LOL is a text messaging acronym that stands for "Laugh Out Loud."

[6] At the evidentiary hearing, Complainant affirmed his deposition testimony that this text was a "sexual come on."

CS: I hope I didn't give you the wrong impression and if I did I'm sorry.

CS: I'm flattered but also very [cut-off]

WRIGHT: [Cut-off]. Yes, because I am telling myself you are saying that to see if I'm worth it, which I am 😂 but no rush or worries. To be honest I won't even text you unless you text me away from work

CS: And I would never get involved with anybody I work with that only brings drama

WRIGHT: I'm not in that building point to no drama

CS: But we still work together

CS: But regardless I'm happily married

CS: I'm sure you are worth it but not my thing

WRIGHT: In that case everyone in this state works together. I won't bring you any drama, but I'll earn your trust

CS: Lol

WRIGHT: So you can see yourself

WRIGHT: I'm persistent, FYI but mainly because I know you are worth it

CS: To be honest I don't date outside of my race.

CS: Hope that isn't hurtful.

WRIGHT: Lmao seriously?

CS: I'm sorry

WRIGHT: I'm not Latino enough?

WRIGHT: Because I'm bald black?

WRIGHT: Half

WRIGHT: That's cool, I won't bother you anymore and I don't think I can be friends with a person with that view, being that I can't change my color

CS: Your not bald

WRIGHT: I meant half not bald

CS: No no I have lots of black friends that doesn't matter.

CS: It's more cultural differences

WRIGHT: My culture is the same as yours, I make pasteles during the holidays with my mom, you probably make tamales same to a degree

WRIGHT: I have 2 children with a chicana, what are these differences you speak of?

WRIGHT: Did you know before 1974 the term Lationo/Hispanic did not exist? It was called black/Spanish speaking or white/Spanish speaking. Too many [cut off]

37. The text exchange ended when CS stopped responding to Complainant.

38. CS did not immediately report the text exchange.

39. At some subsequent date, CS observed Complainant outside of 251 East 12th Avenue. Complainant's presence startled her. CS reported the encounter to her Lead Worker. CS then waited to exit the building until a friend could accompany her to her car.

40. The next day, the Lead Worker suggested that CS inform her supervisor about the encounter. As a result, CS informed Rudy Calderon (Labor & Employment Specialist IV) of the encounter and also provided him with the text exchange.

41. Mr. Calderon transmitted the text exchange to Scott Bowers in Respondent's Office of Human Resources on July 6, 2016.

Complainant's interactions with SC

42. SC works for Respondent as a Labor & Employment Specialist I. SC works at Respondent's location at 251 East 12th Avenue.

43. SC is a Hispanic female.

44. In July 2017, Complainant sent SC a chat message (or "instant message") asking her for a link to a work-related website.

45. Following SC's receipt of Complainant's message, SC asked her co-workers if they knew Complainant. The co-workers suggested that SC look him up on Respondent's online directory. SC looked him up and viewed his picture. Neither SC nor her co-workers knew Complainant.

46. SC sent Complainant the work-related link.

47. The next day, Complainant sent SC another chat message. The message said he saw her during lunch and she looked mad. The message upset and alarmed SC.

48. In response to Complainant's upsetting chat message, SC sent Complainant a message stating: "Please do not contact me again. I don't want to receive any more messages on [sic] contact from you. Thank you."

49. SC reported her concerns about Complainant's chat message to her second-level supervisor, Jeff Saeger. SC first made this report verbally. In addition, SC sent an email to Mr. Saeger on July 28, 2017 at 4:23 p.m., describing the messages Complainant had sent.

50. On July 13, 2018 at approximately 4:35 pm, Complainant approached SC from behind as she was walking near 14th Avenue and Grant Street. Complainant leaned into her "personal space" and had "like a smirk." Complainant asked SC if she was S (using her first name). She told him to leave her alone and Complainant left. The street encounter frightened SC.

51. The next business day (July 16, 2018), SC reported the street encounter with Complainant to her immediate supervisor, David Kimball.

52. On August 3, 2018, SC sent an email to Mr. Bowers expressing her concerns about Complainant. Among other things, SC stated:

> [O]n 7/13/18 I left the building through the east door around 4:30 pm. I was on my way from work to home. I was wearing my headphones listening [sic] music. Around 4:35 pm in the corner of Grant St and 14th Ave. I was approached from behind by Mr. Lorenzo Wright. He was in my personal space by my left side smiling asking "Are you [S]?" as I'm starting to cross 14th Ave. I removed my headphones and I replied "What?" Again he asked "Are you [S]." I stop [sic] in the middle of the street because I recognized it was him since I have seen his picture before. I was shocked. I asked "Who are you?" He replied "I'm Lorenzo." I replied: "You need to leave me alone." He replied "Okay" and he took off. I was in distress during the weekend thinking I am being stalked because I never met this individual yet he was following me and approached me.

53. SC sought a permanent protection order from the Denver County Court.

54. The Honorable Chelsea Malone, County Judge, held a hearing on September 12, 2018, regarding SC's request for a permanent protection order.

55. On September 12, 2018, SC was granted a permanent protection order against Complainant restraining him from coming within 100 yards of SC's residence or workplace. (Stipulated fact.) That permanent protection order is still in effect. (Stipulated fact.)

56. Among other things, the permanent protection order finds that Complainant "constitutes a credible threat to the life and health of [SC]."

57. Subsequent to the street encounter, SC procured a keychain with an alarm. She also added two locks to her residence door. SC also takes different routes when she commutes home and watches "behind my back all the time."

The investigation and administrative leave

58. As a result of SC's report about Complainant, Respondent conducted an investigation.

59. Respondent tasked Madline SaBell and Deidre Johnson to conduct the investigation. Ms. SaBell is a retired state employee. Ms. Johnson works in Respondent's Human Resources Office as an Investigator and Emergency Preparedness Administrator. This Initial Decision refers to Ms. SaBell and Ms. Johnson collectively as the "Investigators."

60. The Investigators interviewed 20 individuals, including Complainant. The Investigators recorded their interview with Complainant.

61. The Investigators produced a 23-page investigation report dated August 24, 2018. The report also included exhibits such as SC's email to Mr. Bowers dated August 3, 2018.

62. The investigation report contained the following summary analysis:

> The weight of the evidence gathered primarily from interviews of relevant co-workers suggests that [Complainant] has a lengthy history of harassing women and/or baiting women for attention. Even after being told that they are not interested, he continued to either use chat to maintain contact or show up around the area he felt he would see them or be seen by them. [Complainant] mentioned parking his car in that area to save money; however, he also admitted that there are other options available to him. It would appear that he made a passive-aggressive choice to park in that specific area.
>
> [SC] has reasonable and sufficient cause for fear that [Complainant's] behavior (without effective intervention) could escalate to behavior that is even more serious. She, and many others (including supervisors) who know [Complainant] are aware of his history and allegations made against him by other women.
>
> [SC] did not report that [Complainant] threatened her directly with physical harm; however, it was his unnecessary and persistent behavior, together with his reputation, that caused her to suffer psychological harm and fear of physical interaction.
>
> With the exception of [the] subject complaint, much of [Complainant's] reported inappropriate behaviors occurred years ago. Taken individually, they may not have been viewed as cause for formal intervention; however, in totality, it seems there is a pattern of behavior which may escalate to additional workplace disruption and/or unsafe consequences.
>
> All state employees have the right to work in a safe environment, free from unwanted and unwelcome attention from anyone. All state employees are required to treat one another with respect, dignity and professionalism. All employees interviewed confirmed of having had training in these relevant issues.
>
> The weight of reliable evidence (including [Complainant's] interview) indicates that [Complainant's] behavior caused more than one female employee to fear for her safety and has created a work environment in which they experienced emotional and psychological distress. According to information gathered, [Complainant] retaliated against at least four [sic] female co-workers with acts of intimidation when they rejected his advances and/or aggression: [BP, AR, MG, CS, and SC]. All of these women are Hispanic.

63. Following review of the investigation report, Mr. Fitzgerald placed Complainant on Administrative Leave starting on September 11, 2018.

The Board Rule 6-10 meetings

64. Mr. Fitzgerald sent Complainant a letter notifying him of the Board Rule 6-10 meeting. Among other things, the notification states: "[t]he purpose of that meeting is to discuss your time attendance at work as well as concerns with several of your interactions with colleagues."

65. Mr. Fitzgerald conducted a Board Rule 6-10 meeting with Complainant on September 18, 2018. Angela Boykins, Esq., attended the meeting as Complainant's representative. (Stipulated fact.) Mr. Spesshardt attended the meeting as Mr. Fitzgerald's representative. (Stipulated fact.)

66. Mr. Fitzgerald convened a second Board Rule 6-10 meeting with Complainant on October 31, 2018. (Stipulated fact.) Ms. Boykins attended the meeting via telephone as Complainant's representative. Mr. Fitzgerald did not have a representative for this meeting. (Stipulated fact.)

67. In addition to the Board Rule 6-10 meetings, Mr. Fitzgerald read the 23-page investigation report dated August 24, 2018, reviewed the exhibits to that report, listened to the recording of the interview between Complainant and the Investigators, spoke directly with SC, MG, CS, and AR, spoke to one of MG's co-workers who often took breaks with MG, reviewed documentation regarding the issues between Complainant and BP from 2015, gathered and reviewed information showing when Complainant badged into the ninth floor of 633 17th Street, and reviewed Respondent's policies. Prior to issuing his decision, Mr. Fitzgerald also listened to the audio of the Rule 6-10 meetings. Mr. Fitzgerald provided Complainant with an opportunity to provide him additional information. Complainant, however, did not provide any additional information.

The Disciplinary Action

68. Respondent terminated Complainant's employment on November 7, 2018. (Stipulated fact.)

69. Mr. Fitzgerald prepared the termination letter. The termination letter is dated November 7, 2018. (Herein, the "Disciplinary Action.")

70. The Disciplinary Action found Complainant consistently arrived late to work.

71. The Disciplinary Action found Complainant was deceitful with Mr. Fitzgerald and the Investigators.

72. The Disciplinary Action found Complainant violated Respondent's policies, including its policy prohibiting sexual harassment.

73. Respondent transmitted the Disciplinary Action to Complainant via U.S. certified mail. The U.S. postal service delivered the letter to Complainant on November 14, 2018.

Complainant's appeal

74. Complainant filed an appeal with the Board on November 26, 2018.

75. The ALJ held an evidentiary hearing on April 15-16, 2019.

76. The ALJ admitted the following exhibits into evidence: Respondent's exhibits 1 to 13, 19 to 22, and 24 to 29; and Complainant's exhibits F and N. In addition, Respondent offered exhibit 23 but the ALJ did not admit it.

DISCUSSION

I. THE ACTS UNDERLYING THE DISCIPLINARY ACTION.

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 discharge 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 discharge 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 dismissal for cause." *Id.* at 706 n.10; *see also* § 24-4-105(14)(a), C.R.S. ("[I]nitial decision must include a statement of findings and conclusions upon all the material issues of fact . . .").

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

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 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); § 24-50-116, C.R.S. (employees shall perform duties and conduct themselves "in accordance with generally accepted standards").

The Disciplinary Action found that Complainant consistently arrived late at work, was deceitful, and harassed female co-workers. As discussed below, Respondent established by a preponderance of the evidence that Complainant committed the acts underlying the Disciplinary Action.

A. Late arrivals at work.

Arriving on time to work is part of any employee's obligations. The Disciplinary Action finds that Complainant consistently arrived late to work.

Complainant stated during the Rule 6-10 meeting that "I arrive to work by 8:15 on average." Complainant's statement alone establishes that "on average," he was late. Respondent's records also reflect that Complainant was consistently late. Complainant's tardiness is contrary to Respondent's policy titled "General Work Expectations of All CDLE Employees." That policy states: "[a]ll employees are expected to be at work and working at their scheduled start times."

Complainant testified that he had an accommodation to arrive late because of the time it took to walk from the Capital Hill parking area to 633 17th Street. Mr. Fitzgerald credibly denied ever giving Complainant any allowance to arrive late. Even if Mr. Fitzgerald had initially permitted Complainant to count the walk from his parking spot to his office as work time, that accommodation ended on May 22, 2017. On that day, Mr. Spesshardt emailed Complainant and clearly directed him that he needed to arrive at work at 8:00 a.m. Mr. Spesshardt's email terminated any legitimate basis Complainant might have had for arriving late.

Similarly, Complainant testified that he had an accommodation so long as he met quality expectations. For reasons discussed at length below, Complainant's testimony was unreliable. Moreover, Complainant did not introduce any evidence to support his testimony. Additionally, Mr. Fitzgerald denied providing any scheduling accommodation to Complainant if he met productivity goals. Further, Respondent's General Work Expectations policy requires employees "to be at work and working at their scheduled start times." Finally, Respondent presented evidence that Complainant's productivity was below average and at times below a passing grade. Even if Complainant is believed, he was consistently late by more than 15 minutes.

Alternatively, Complainant testified that employees had a 15-minute "grace period." Complainant did not offer any evidence to support his testimony. On the other hand, Mr. Fitzgerald testified that any "grace period" was five minutes. Mr. Fitzgerald also testified that Complainant was late if he arrived at 8:15. In any event, the alleged "grace period" exonerates less than a handful of Complainant's late arrivals.

Alternatively, Complainant testified that he arrived on the ninth floor at the same time as other persons who were arriving or leaving. If so, there should be more than a few ninth floor regulars who could attest to holding the door open for Complainant. However, Complainant did not offer testimony from anyone to support his explanation. Moreover, it is improbable that Complainant consistently arrived to the ninth floor at the exact same time as another person *and* even more improbable that the other person consistently held the door open instead of letting Complainant do the honors. As Mr. Fitzgerald testified, Complainant's explanation is "based upon circumstances that would be impossible to replicate on a near daily basis."

Complainant's own admissions during the Rule 6-10 meeting and Respondent's records of his arrival times demonstrate that Complainant was consistently late for work. The shifting nature of Complainant's explanations belie his credibility. The dubiousness of Complainant's explanations further diminishes his credibility. Respondent met its burden of proving this ground for the Disciplinary Action.

B. Dishonesty.

Respondent's Code of Conduct, Ethics and Values policy provides that employees must perform their duties with integrity and honesty. Appointing authorities rightfully expect that state employees will be truthful with investigators and during Board Rule 6-10 meetings.

The Disciplinary Action asserts multiple instances where Complainant was deceitful. The Disciplinary Action states: "there is overwhelming evidence that you have not been credible in your discussion with me, or CDLE investigators." The Disciplinary Action finds: "you have demonstrated yourself as not credible or truthful on the majority of matters of consequence related to this R-6-10 process." The evidence amply supports the conclusion that Complainant was less than honest:

- During the meeting Complainant had with the Investigators on August 21, 2018, he stated that other than BP and LS, he had not dated, asked out, or approached anyone who worked for Respondent. At the evidentiary hearing, however, Complainant testified of a romantic relationship with MG. He also affirmed his deposition testimony that he had a relationship with CT. In addition, his text exchange with CS demonstrates more than one advance (or "approach").[7]

- Similarly, during the Rule 6-10 meeting on September 18, 2018, Complainant stated that other than BP and LS, he had never approached, asked out, or made overtures to any women who worked for Respondent ("I don't recall any, no"). As discussed in the bullet paragraph immediately above, the evidence at the evidentiary hearing demonstrates Complainant's statement is untruthful.

- During the meeting Complainant had with the Investigators on August 21, 2018, he stated he did not know SC (Question: "Do you know SC?" Answer: "I do not know this individual"). The evidence at the evidentiary hearing, however, demonstrated that Complainant sent a chat message to SC. Complainant testified at the evidentiary hearing that he contacted SC requesting a "my UI link." In addition, SC testified credibly about her street encounter with Complainant.

- Similarly, during the Hearing on Protection Order in Denver County Court on September 12, 2018, Complainant stated that he had "never contacted" SC and also stated that he had "never chatted with her." As discussed in the bullet paragraph immediately above, the evidence at the hearing demonstrates Complainant's statements were untruthful.

- During the Hearing on Protection Order in Denver County Court on September 12, 2018, Complainant testified that SC was seeking a protection order "to get a promotion at work" and because "there is [a] monetary bonus to this." At the evidentiary hearing, however, there was no evidence that SC had an ulterior motive. At the Hearing on Protection Order, the County Court Judge made the following determination: "I also did not find it to be credible that the petitioner would make this up in order to get a raise or a promotion, and so that did harm your credibility, Mr. Wright."

- During the Hearing on Protection Order in Denver County Court on September 12, 2018, Complainant stated that SC "is a co-worker that works in another building three miles away." In reality, however, the distance between 251 East 12th Avenue and 633 17th Street is one mile.

- Similarly, Complainant testified during the evidentiary hearing that he did not know the distance between 251 East 12th Avenue and 633 17th Street. Given that Complainant

[7] CT currently works for Respondent and LS previously worked for Respondent. Both were Complainant's co-workers.

walks from the Capitol Hill parking area to 633 17th Street almost every day, given that Complainant could "easily" cover the distance in seven to eight minutes, and further given that Complainant "runs repetitive miles" and was a college track athlete, Complainant surely knew the distance was approximately one mile, not three.

- During the Rule 6-10 meeting on September 18, 2018, Complainant stated that he never asked MG out (Question: "Ever ask her out?" Answer: "No. She had a boyfriend . . . I remember specifically"). At the evidentiary hearing, however, Complainant testified that he had a romantic relationship with MG that included kissing and other activities.

- Similarly, during the Rule 6-10 meeting on September 18, 2018, Complainant stated he had never dated MG ("I never dated any of these individuals"). This is contrary to Complainant's testimony at the evidentiary hearing that "we dated for approximately three weeks to a month."

- During the Rule 6-10 meeting on September 18, 2018, Complainant stated that he had never been to MG's home (Question: "Have you ever been to her home?" Answer: "No"). At the evidentiary hearing, however, Complainant testified he visited MG's house on two occasions.

- During the Rule 6-10 meeting on September 18, 2018, Complainant stated he did not know CS ("I do not know [CS]"). At the evidentiary hearing, however, both Complainant and CS testified to meeting each other at a training event. In addition, their text exchange demonstrates that Complainant knew her.

- During the Rule 6-10 meeting on September 18, 2018, after Mr. Fitzgerald showed Complainant his text exchange with CS, Complainant stated he did not recall the exchange ("I do not recall this, but I do remember those fish"). Given the nature of the text exchange, Complainant's lack of recollection was not credible.

- During the Rule 6-10 meeting on September 18, 2018, Complainant denied knowing AR. However, Complainant and AR worked on the same team at the same work location. Moreover, at the evidentiary hearing Complainant testified that he knew of AR but not as a friend. Last, AR told the Investigators that she knew Complainant and that her desk was across from his.

- During the evidentiary hearing, Complainant testified that he was not around 251 East 12th Avenue ("not at all"). However, MG, CS, and Mr. Fitzgerald observed Complainant outside of and in the neighborhood of 251 East 12th Avenue. Moreover, Complainant's lunch buddy, Crefton Springer, testified that after Respondent reassigned Complainant to 633 17th Street, they would "meet downstairs, at the corner, or a block over" from 251 East 12th Avenue.

Respondent met its burden of proving that Complainant was deceitful with Mr. Fitzgerald and with the Investigators. As Mr. Fitzgerald testified, Complainant "has many different versions of many different stories . . . it was clear that he was lying."

C. Harassment of female co-workers.

Respondent presented a preponderance of evidence to support the conclusion that Complainant harassed female co-workers in contravention of its policies. Respondent's Sexual Harassment policy provides that "[a]ll employees must treat each other with courtesy, consideration and professionalism." It also provides: "[t]he Department will not tolerate harassment of any employee by any other employee or supervisor for any reason." Respondent's Unlawful Discrimination policy provides that "[t]he Department is committed to providing a workplace free of unlawful discrimination, harassment or illegal behavior of any kind." Respondent's Code of Conduct, Ethics and Values policy provides that "an employee who treats another employee in a threatening or abusive manner or engages the other employee with hostile words/actions will face disciplinary action."

The Disciplinary Action discusses concerns with Complainant's conduct with SC. She testified credibly that Complainant's chat message made her nervous. SC also testified credibly that Complainant's encounter with her on the street caused her to feel frightened and unsafe. SC's testimony is supported by her contemporaneous responses: (1) following receipt of Complainant's upsetting chat message, she told him to "not contact me again"; (2) she reported her concerns about Complainant's chat message to her second-level supervisor, Mr. Saeger; (3) she reported her concerns about the street encounter to her immediate supervisor, Mr. Kimball; (4) she purchased a keychain with an alarm; (5) she added two locks to her door at her residence; and (6) she sought and obtained a permanent protection order against Complainant in Denver County Court. It is extremely unlikely that SC would have taken these steps in response to an inoffensive business contact. There was no evidence that SC had an ulterior motive to fabricate her accusations. SC's testimony was measured: when she described the street encounter, she volunteered that Complainant left her "personal space" after she told him to leave. SC's testimony before the ALJ was consistent with her prior statements, including those in her email to Mr. Bowers dated August 3, 2018, and during her testimony in Denver County Court on September 12, 2018. The County Court Judge found that Complainant "constitutes a credible threat to the life and health of [SC]." In conclusion, the evidence establishes that Complainant harassed SC.

The Disciplinary Action discusses concerns with Complainant's actions with MG. Whatever their relationship actually entailed, Complainant clearly lied about it. Whatever their relationship, it eventually broke down and MG told Complainant to leave her alone. MG also blocked her phone and complained to her supervisor. Despite MG telling Complainant to leave her alone, she continued to encounter him when she went outside for walks during her breaks. She continued to encounter him near 251 East 12th Avenue even after his reassignment. The ALJ finds that Complainant's interactions with MG were consensual at the beginning but were subsequently unwanted.

The Disciplinary Action discusses concerns with Complainant's persistence with CS. It is evident from their text exchange that CS communicated that she was not interested in his advances. After Complainant texted that he wanted to stab her, "but not with a knife," CS apologizes for giving Complainant the "wrong impression." After Complainant texts again, CS expresses she does not get involved with anybody at work because it "only brings drama." After Complainant texts again, she answers that she is "happily married" and that it is "not my thing." After Complainant texts again, CS responds "to be honest I don't date outside of my race." After Complainant texts again, she says "it's more cultural differences." After Complainant texts again, CS stopped communicating with him. At some point, the exchange went from friendly to harassing as CS repeatedly (and even desperately) expressed her disinterest yet Complainant persisted with his advances.

As discussed above, Complainant repeatedly misstated his connections and interactions with his female co-workers. Complainant's deceitfulness supports a finding of harassment. If the interactions were truly innocuous, Complainant would have no reason to conceal them to the Investigators and to his Appointing Authority.

In a similar vein, Complainant's testimony during the evidentiary hearing was often evasive and non-responsive, and at times even self-contradictory. The ALJ gives far more weight to the testimony of the female co-workers than he gives to Complainant's unreliable testimony.

Complainant's conduct with his female co-workers was antithetical to a professional and congenial work environment. Complainant argues that he was "in a relationship with two women complaining." Even so, these female co-workers never consented to harassment in their workplace. Complainant argues that his behavior "does not pose a potential risk to the well-being of others," but the County Court Judge found that Complainant "constitutes a credible threat to the life and health of [SC]." Complainant argues that his behavior was not harassing, but the evidence demonstrated the contrary. Respondent met its burden with respect to this ground for the Disciplinary Action.

II. THE TERMINATION WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

The Board may reverse or modify the 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, the 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).

Mr. Fitzgerald used reasonable diligence and care to procure evidence relating to his decision to terminate Complainant. Prior to making his decision to dismiss Complainant, Mr. Fitzgerald considered the following: (1) the investigation report prepared by Ms. SaBell and Ms. Johnson; (2) the audio of the Investigators' interview with Complainant; (3) conversations Mr. Fitzgerald had directly with SC, MG, CS, AR, and one of MG's co-workers; (4) documentation regarding the issues between Complainant and BP in 2015; and (5) records showing the time when Complainant arrived to work. The investigation report itself is a 23-page page document plus exhibits that reflects a thorough investigation of Complainant's conduct. Additionally, Mr. Fitzgerald held two Rule 6-10 meetings with Complainant and considered his statements during those meetings. Mr. Fitzgerald also gave Complainant the opportunity to provide additional information. While Mr. Fitzgerald might have procured other evidence, his diligence was reasonable.

The evidence at the hearing demonstrates that Mr. Fitzgerald gave candid and honest consideration to the evidence. This is evident from the analysis and discussion in the Disciplinary Action. This is also evident from Mr. Fitzgerald's testimony at the evidentiary hearing. The Appointing Authority made his decision thoughtfully and carefully.

Reasonable persons fairly and honestly considering the evidence may reach the same disciplinary decision as the one Mr. Fitzgerald made. Complainant's actions are sufficiently flagrant or serious that immediate discipline is appropriate. *See* Board Rule 6-2; *see also* § 24-50-125(1), C.R.S. While the Board Rules generally require appointing authorities to utilize progressive discipline, "[w]hen appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination." Board Rule 6-2.

The evidence here supports dismissal rather than progressive discipline. First, the extent of Complainant's late arrivals was so frequent that it provides a reasonable basis for immediate dismissal. Complainant's tardiness went well beyond the occasional discrepancy. It also went well beyond the asserted "grace period" (and the alternatively asserted "accommodation"). Second, Complainant was repeatedly deceitful about matters of serious consequence. Not only was Complainant dishonest to the Investigators and to his Appointing Authority, he also misinformed a Denver County Court Judge. Complainant fabricated facts to avoid getting in trouble at work. His dishonesty is so flagrant it warrants immediate termination. Third, Complainant's harassment of female co-workers was not isolated or trivial. He harassed multiple women. These women testified credibly that his actions unnerved them. Mr. Fitzgerald testified that termination was necessary to protect the "safety and well-being" of his staff. Under these circumstances, Complainant's conduct was sufficiently egregious that immediate dismissal is justified.

Finally, Complainant did not demonstrate remorse for his chronic tardiness, habitual falsehoods, or harassment of female co-workers. In the same vein, Complainant did not accept responsibility for his actions. To the contrary, Complainant expressed to the Investigators that "I'm the victim in this case, always have been." Complainant's attitude supports immediate dismissal because it demonstrates that it would have been difficult, if not impossible, to correct and change his inappropriate conduct.

III. RESPONDENT VIOLATED BOARD RULE 6-15.

Respondent terminated Complainant effective November 7, 2018, but failed to provide Complainant with the Disciplinary Action via certified mail until November 14, 2018.

A. The notice of the dismissal contravenes Board Rule 6-15 and § 24-50-125(2), C.R.S.

Board Rule 6-15 requires the following: "A written notice of disciplinary action must be sent to the employee's last known address, by certified mail, or may be hand-delivered to the employee. The employee must receive the notice no later than five days following the effective date of the discipline." This Rule derives from § 24-50-125(2), C.R.S. In relevant part, the statute provides: "[a]ny certified employee disciplined under subsection (1) of this section shall be notified in writing by the appointing authority, by certified letter or hand delivery, no later than five days following the effective date of the action."

Respondent did not provide the Disciplinary Action to Complainant within five days following the effective date of the discipline. Therefore, Respondent's notification to Complainant violates Board Rule 6-15 and § 24-50-125(2), C.R.S.

B. Respondent shall compensate Complainant pursuant to § 24-50-125(2), C.R.S.

Board Rule 6-15 and § 24-50-125(2), C.R.S., require state agencies to provide notice of discipline no later than five days following the effective date of the action. When the General Assembly enacted this notification requirement, it anticipated that state agencies might fail to comply. As a result, the General Assembly specified a remedy as follows: "[u]pon failure of the appointing authority to notify the employee in accordance with this subsection (2), the employee shall be compensated in full for the five-day period and until proper notification is received." § 24-50-125(2), C.R.S. Here, Respondent failed to comply with Board Rule 6-15 and § 24-50-125(2), C.R.S. Therefore, Respondent shall compensate Complainant for the period from November 7, 2018, through November 14, 2018.

Based on the parties' stipulation that Complainant's monthly salary at the time of his termination was $4,722, Respondent shall pay Complainant $1,180.50. This amount represents ¼ of Complainant's monthly salary at the time of the dismissal (or approximately seven days).

IV. ATTORNEY FEES AND COSTS.

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."

Complainant did not prevail. Therefore, Complainant has not established grounds for an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.

2. The discipline administered was not arbitrary, capricious, or contrary to rule or law.

ORDER

The dismissal is **affirmed**. There is no award to Complainant of his attorney fees and costs. Pursuant to § 24-50-125(2), C.R.S., Respondent shall pay Complainant $1,180.50.

Dated this 21st day
of May, 2019,
Denver, Colorado.

[redacted]

F. J. "Rick" Dindinger II
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of May 2019, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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[redacted]

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 misunderstanding 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.