

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020B047**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GU KIM,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge (“ALJ”) K. McCabe held the commencement hearing on January 29, 2020, and the evidentiary hearing on August 10, 11, and 12, 2020, via web conference. The record was closed on August 12, 2020.

Complainant appeared in person for the hearing and was represented by his attorney, Amy Maestas, Esq. Respondent was represented by Senior Assistant Attorneys General Vincent Morscher, Esq., and Jack Patten, Esq. Director Jeffrey Davis was Respondent’s advisory witness and Complainant’s Appointing Authority.

A list of exhibits offered and admitted into evidence is attached as Appendix A. A list of witnesses who testified at hearing is attached as Appendix B.

I. Matter Appealed

Complainant Gu Kim (“Complainant”), a certified employee, appeals his demotion effective November 14, 2019, arguing that the discipline imposed was not within the range of reasonable alternatives and that progressive discipline should have been utilized. Complainant seeks all damages to make him whole, including but not limited to rescission and removal of the disciplinary action, reinstatement to his position of supervisor, an award of back pay and benefits, and an award of attorney fees and costs.

Respondent Department of Public Safety, Colorado State Patrol (“Respondent”) argues Complainant committed the acts for which he was disciplined, that the discipline imposed was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives. Respondent requests that Director Davis’ discipline be affirmed and Complainant’s appeal be dismissed.

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

II. Issues

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

III. Findings of Fact

Background

1. Respondent hired Complainant on January 8, 2009 as a State Service Trainee at the Denver Communications Center. (Stipulated fact.)¹
2. On January 8, 2010, Complainant was certified in his position. At that time, Respondent promoted Complainant to the position of Police Communication Technician. (Stipulated fact.)
3. On May 1, 2014, Respondent promoted Complainant to the position of Police Communication Supervisor. (Stipulated fact.) Complainant continuously held this position at the Denver Communications Center until the date of his demotion.
4. Although not a Colorado State Patrol Trooper, Complainant is a member of the Colorado State Patrol.
5. During the relevant time period, Tina Buneta, Regional Communications Manager, was Complainant's direct supervisor.
6. Jeffrey Davis, Director of Public Safety and Communications Branch, was Complainant's appointing authority at the time of Complainant's demotion. Director Davis began employment with Respondent in approximately May 2019.
7. Jessica Augustine, at all relevant times, worked for Respondent as a Police Communication Supervisor.² At all relevant times, prior to Complainant's demotion, Ms. Augustine was Complainant's co-supervisor.
8. Although Ms. Augustine and Complainant were co-supervisors, each was assigned direct report subordinates. Complainant and Ms. Augustine were responsible for the performance evaluation of their respective direct report subordinates.
9. Romantic relationships are common between individuals employed by Respondent.

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

² Ms. Augustine is no longer employed by Respondent.

10. Respondent does not have a policy that explicitly prohibits, or explicitly requires disclosure of, romantic relationships between co-workers or supervisors/subordinates.

Complainant's Performance Record

11. In October 2016, Complainant received a "High Achievement Award."

12. In February 2017, Complainant received a "High Achievement Award."

13. Complainant received an overall "Successful" rating on his Performance Evaluation for the April 2016 to March 2017 performance year.

14. Respondent issued Complainant a Corrective Action on September 7, 2017 for exhibiting, "unprofessional and inappropriate behavior toward a caller, in violation of General Orders 5, 6, and 7."

15. Complainant received an overall "Exceptional" rating on his Performance Evaluation for the April 2017 to March 2018 performance year.

16. Complainant received an overall "Exceptional" rating on his Performance Evaluation for the April 2018 to March 2019 performance year.

17. Complainant received Respondent's Supervisor of the Year Award in April 2019.

Complainant's Relationship with S.A.³

18. S.A. began work for Respondent in 2017. S.A. began working in the Denver Communications center in approximately March 2018. Ms. Augustine was S.A.'s direct supervisor when S.A. began in the Denver Communications Center.

19. Complainant became S.A.'s direct supervisor in approximately January 2019.

20. In approximately January 2019, after Complainant invited S.A. to attend church with him and his children, Complainant and S.A. developed a personal relationship outside of work.

21. Complainant and S.A.'s personal relationship developed into a romantic relationship.

22. During the course of their romantic relationship, Complainant and S.A. developed relationships with each other's minor children.

23. Near the beginning of their romantic relationship, both Complainant and S.A. reviewed Respondent's policies for a policy prohibiting romantic relationships between employees and found none.

³ S.A.'s identity is not relevant to this Initial Decision, and her name is excluded to protect her privacy.

24. Prior to being physically intimate, Complainant sent S.A. the following text message,⁴ “Basically, it’s this. We work together and you’re my direct subordinate. It would be inappropriate to move forward with a romantic/physical relationship. That said, I do like you.” Complainant followed with a text message that said, “I enjoy your company and spending time with you. I just have to look at it through a professional lens.”

25. Despite his concerns, Complainant did not seek advice from Ms. Buneta or another supervisor prior to beginning his romantic relationship with S.A.

26. Complainant and S.A. were physically intimate starting in approximately March 2019.

27. Complainant and S.A. chose not to disclose their romantic relationship to anyone at work.

28. During the course of their personal relationship, on March 6, 2019, S.A. and Complainant had a text message conversation:

Complainant: Hey. Hope you’re having a good day. I fell asleep early last night...on the couch. Sorry.

S.A.: It’s okay

S.A.: I don’t think you should see me anymore

Complainant: Through text? That’s a first...

Complainant: Anyway - coming to church?

S.A.: No, didn’t make it

Complainant: [gif with the text “I know”]

Complainant: Kendall wanted me to tell you they missed you and [child’s name] today and thanks for registering for VBS.

S.A.: That’s very nice

Complainant: What’s going on with you?

S.A.: ... I’m in a bad place and I don’t want to be a burden

S.A.: I don’t want to put you through this twice

Complainant: Through what twice?

⁴ The text message evidence does not include the date of this text message. Based upon on the order of text messages, it was sent before March 6, 2019.

Complainant: Why don't you read what you've written to me today - starting with its okay. And let me know if that should make any sense to me whatsoever.

S.A.: I'm sorry, I just don't know what to say. My mind is unstable

S.A.: Sleep sweetly

S.A.: Are you okay

Complainant: I'm fine.

S.A.: Okay

S.A.: Can you come here

Complainant: Why?

S.A.: Idk.. you don't have to

S.A.: I don't want to be alone right now

S.A.: Maybe we would talk, idk

Complainant: Talk about...?

S.A.: It's okay, you don't have to come.

S.A.: Idk what to talk about.

Complainant: I have no idea what's going on with you still.

S.A.: Sorry...I can't really talk about any of it over text

Complainant: So you don't trust me, but you want me to come over?

S.A.: I can't leave paper trails of these things..

29. As a result of the text messages, Complainant contacted S.A. by telephone. During the telephone conversation, S.A. told Complainant she had a gun to her head for five hours. Complainant kept S.A. on the phone until he arrived at her apartment and talked with her for several hours. Complainant took possession of S.A.'s personal firearm prior to leaving her.

30. On March 6, 2019, S.A. made suicidal statements to Complainant. Complainant did not report these suicidal statements to Respondent. Complainant did not contact emergency personnel or other qualified assistance for S.A. Had Complainant received a call of this nature at work he would be required to send emergency personnel to S.A. S.A. asked Complainant not to tell anyone.

31. During the course of their romantic relationship, after March 6, 2019, S.A. repeatedly made statements to Complainant that indicated she was depressed or might harm herself. Complainant returned S.A.'s personal firearm to her in May 2019. S.A. continued to make statements threatening self-harm after Complainant returned her personal firearm. At no point did Complainant report S.A.'s statements threatening self-harm to Respondent or someone qualified to provide assistance to S.A. Complainant did recommend to S.A. that she seek help, and provided her with resources where she could seek help.

32. During the course of their romantic relationship, in his capacity as S.A.'s supervisor, Complainant completed an Aurora Police Department reference questionnaire for S.A. S.A. applied to become an Aurora Police Officer. The reference questionnaire asked for concerns or things that would make S.A. not a good officer. Complainant did not disclose concerns he had that came up during the course of his relationship with S.A. about her mental stability. Complainant did not disclose S.A.'s suicidal statements or threats of self-harm. Complainant's romantic relationship with S.A. influenced what he disclosed in the professional reference.

33. During the course of their romantic relationship, in April 2019, Complainant completed S.A.'s yearly performance evaluation.

34. During the course of their romantic relationship, Complainant and S.A. discussed work related matters. Complainant engaged in work related discussions with S.A. about employees who were his subordinates.

35. During the course of their romantic relationship, Complainant and S.A. broke up and resumed their romantic relationship multiple times. S.A. initiated the break-ups and initiated some of the reconciliations.

Complainant's Post-Relationship Contact with S.A.

36. On or about July 16, 2019, Complainant went on a trip to Korea.

37. While Complainant was in Korea, Complainant and S.A. argued through text messages.

38. On July 19, 2019, while Complainant was still in Korea, S.A. text messaged, "I'm tired of fighting." S.A. followed with the text message, "We can re-evaluate all of this when you get back from Korea. But I don't think this is healthy anymore for either of us."

39. On August 1, 2019, Complainant returned from Korea and texted S.A., "I'm back in the states. Did you want to have an actual conversation at some point?"

40. On the same date, S.A. responded by text message, "Let's just keep it professional from now on." A few hours later, Complainant text messaged, "Just got home. I'm going to wash up and head out. Whether or not you want to meet and talk is up to you, but I try to keep my promises. I'll be dropping some things off at your door."

41. Complainant proceeded to go to S.A.'s apartment, where he ran into her in the apartment parking lot. Complainant and S.A. engaged in a discussion. Complainant hugged S.A. during the discussion, and told her it would be the last one. The hug lasted several

seconds. At some point during the conversation, S.A. told Complainant not to follow her but he continued to follow. Complainant did not block S.A.'s access to her apartment. Ultimately, S.A. went into her apartment and Complainant left.

42. On August 2, 2019, Complainant sent an apology text message to S.A.:

I just wanted to apologize for keeping you today. It's always hard for me to hear you push me away. Thank you for your time and hope we can actually have a real conversation - without the preplanned, canned responses. In the meantime, my heart is broken. None of what I said tonight was a lie. I'm sorry for how badly I treated you - and where I put us. I hope you can eventually forgive me.

I'll keep praying for you and [child's name] as I have been - in all honesty, probably more fervently now more than ever.

I love you - and I don't care that there's written proof of it. That won't change.

Complainant followed this text message with six additional text messages that included a link to photographs.

43. On August 2, 2019, after Complainant's sixth message, S.A. clearly confirmed she was ending her relationship with Complainant:

S.A.: I think I made myself clear, I do not want any more contact from you unless it is a professional interaction at work. Please do not message me anymore unless it is work related

Complainant: It wasn't clear... you made the statement that unless I could just be friends with you right now... sorry, this is all pretty new and unexpected for me. The photos were an olive branch - to be friends. Sure, we have a history, but I am willing to pull back and respect the friendly boundary I thought you set. I was under the impression that the professional thing was if I couldn't stay friendly in my communications with you. Yes, I mentioned our relationship in the previous messages. Yes, I mentioned our interaction last night and thought there was a chance to reconcile based on your words and actions. I am still open to that, but I'll give you space. Sorry I misunderstood - I seem to be doing a lot of that lately.

S.A.: In case you still have any confusion about how last night went, or the intentions, let me make it exceptionally clear - I do not want to be friends with you in any capacity, I do not want you in my life at all. Please do not contact me outside of work by text or phone or in person.

Complainant: See how easy that was? Too bad the same wasn't done FOR me, just TO me. Perfectly clear now. Thanks for the memories.

44. On August 3, 2019, Complainant informed Ms. Augustine that he had engaged in a romantic relationship with S.A. Ms. Augustine agreed to take over direct supervision of S.A.

45. On August 7, 2019, S.A. had to take her child for medical treatment and informed Ms. Augustine she may be late to a scheduled meeting. Ms. Augustine relayed this information to Complainant.

46. Complainant then sent four text messages to S.A. excusing her from the meeting. Complainant sent two of the text messages after S.A. indicated by text message that she would be at the meeting.

Complainant: Jessy let me know you're headed to the hospital. Whatever you're dealing with is probably more important than a meeting. You're excused.

Complainant: Just confirming you received my message. You are excused from the meeting. Please take good care of [child's name].

S.A.: I'll still be at the meeting, I have to drive to a different hospital right now so I might just be a couple minutes late.

Complainant: There are also 4 meetings throughout the day. 1400, 1700, 2000. Do whatever works best. Thanks.

S.A.: I have to meet my grandparents later to sign some documents before they go to Florida, so I'm going to try to make it to the first meeting.

Complainant: Meeting notes will also be sent to everyone outlining the topics discussed - you're excused from this meeting.

47. After S.A. arrived for the meeting, Complainant asked S.A. how her child was doing. S.A. showed Complainant a photo of the child and the child had a visible issue with her eye. Complainant was upset by the photo and decided to send S.A. \$50 by Apple Pay. S.A. received notification of the payment by text message. S.A. and Complainant then had the following text message exchange:

Complainant: Please buy her some ice cream and a good meal from me and the boys.

S.A.: I'm not accepting it, thank you though

Complainant: It wasn't for you - it was for [child's name]. I'll always care for her and it hurts my heart she's going through that.

Complainant: It isn't possible for me to see her, so I'd appreciate it if you could at least do that for me. Thanks

Complainant: ...that's all I'll say

Complainant: I did send an email regarding the mentorship program. Please read and respond by the end of your workweek.

S.A.: I'll get it done.

Complainant: Thank you.

48. Later on August 7, 2019, Complainant asked S.A. for permission to drop a gift off for her child by text message.

Complainant: I've been going back and forth about writing you, but I need to. I understand the possible consequences of this as you laid out your wishes and am fully aware of the threat to my name and - my everything. That said, it didn't sit well with me that you weren't going to use the gift I sent, so I bought [child's name] some things to help her feel better - in the end, that's worth any trouble I may face. I wanted your permission to drop them off though. I don't expect to see her or anything, and I want to at least respect your wishes about contact. I said it earlier, but I care deeply for [child's name] - our current situation doesn't change that fact. I have a gift for her and would really like her to have this. What should I do?

Complainant: I am currently out and about driving around. I'll wait for your response.

Complainant: Here. If you hate me and want to get [sic] in trouble, here's your chance. I'll be dropping this bag off at your place at 00:00. No earlier, no later.

Complainant: I left it in your storage area so it isn't out in the open. Goodnight to you and [child's name].

(Underline in original).

49. S.A. did not respond to any of Complainant's text messages regarding the gift.

50. Complainant accessed S.A.'s unlocked storage unit without S.A.'s permission. Complainant put the gift inside the storage unit. S.A.'s storage unit is across a breezeway from her apartment.

51. On August 8, 2019, there was a funeral for Ms. Augustine's parents, who unexpectedly passed away in an accident. Complainant and S.A. separately attended the funeral. Complainant sat down next to S.A. after she was seated.

52. Following the funeral, Complainant approached S.A. and asked her to talk. S.A. agreed to talk with Complainant. Complainant and S.A. talked for approximately 30 minutes. Most of the conversation was related to how S.A. and Complainant would interact with each other at work.

53. Immediately following the conversation, Complainant sent S.A. two text messages and called her on the telephone. Complainant and S.A. engaged in a polite telephone conversation.

Complainant's Final Post-Relationship Contact with S.A.

54. On August 9, 2019, Complainant and S.A. worked on the same shift. Complainant was the supervisor on duty during the shift.
55. During the shift, Trooper R.S., Communications Officers D.D., C.M., and C.S., S.A., and Complainant were present during a group conversation regarding a policy.⁵
56. Complainant engaged professionally and respectfully with S.A. during the group conversation. S.A. became upset and emotional during the group conversation.
57. After the group conversation ended, Complainant initiated two separate one-on-one conversations with S.A.
58. Both conversations included discussion of topics related to Complainant and S.A.'s romantic relationship. S.A. was emotional and cursed at Complainant during both one-on-one conversations.
59. Complainant took S.A. into the training room and left the door open for both conversations.
60. At the end of the first conversation, S.A. said she could not work with Complainant any more. Complainant got up to leave the meeting and said, "Anything to get off the 5:00 to 5:00, huh?" S.A. responded "F*ck you." Complainant then left the room.
61. At the end of the second conversation, S.A. was crying and Complainant instructed her to go get cleaned up. S.A. then asked to leave work. Complainant gave S.A. permission to leave work.
62. Later, S.A. left and happened to be exiting the building at the same time as Complainant. Complainant observed S.A. exiting, waited a few seconds, and proceeded to exit the building after her. Complainant entered the workplace parking lot while S.A. was still walking to her car. Complainant initiated an exchange with S.A. in the workplace parking lot. Complainant said to S.A., "When are you going to f*cking take responsibility for any of your actions? All the bad stuff that's going on in your life right now has one common factor, and it's you."
63. Complainant sent S.A. a dozen text messages after her departure from work. The text messages were as follows:

Complainant: I'll inform Tina.

S.A.: Okay

Complainant: How much would you like me to tell her?

⁵ The identity of the other individuals is not relevant to this Initial Decision, and their names are excluded to protect their privacy.

S.A.: Just enough so that we don't have to work together. Also tell Jessy I'm sorry.

Complainant: You can talk to Jessy yourself. She doesn't know as much as you're fearing she does.

Complainant: Is it okay if I call you real quick? Business

S.A.: No. I won't answer.

Complainant: Okay

Complainant: I'll speak with Tina, but did you request to not work with/near [D.D.]? Was that a factor in your response?

Complainant: ...since he initially asked me the question..

Complainant: Are you willing to work if I'm not there?

Complainant: I'll take the day off - Sat and Sun.

Complainant: I do need a response to these

S.A.: I'm sick. I can't come in tomorrow.

Complainant: And Sunday?

S.A.: I don't know if I'll still be sick or not.

Complainant: There's sick and a personal day. They aren't the same

S.A.: I'm extremely sick, I can't stop throwing up. I don't care what it's marked as

Complainant: Okay. Hope you feel better.

64. Complainant and S.A. did not work together or communicate after August 9, 2019.

Internal Investigation

65. Following their conversations on August 9, 2019, Complainant and S.A. each reported their romantic relationship to Ms. Buneta.

66. S.A. spoke with Ms. Buneta by phone and followed with an email to summarize their conversation. S.A. sent the email on August 11, 2019. S.A. informed Ms. Buneta that she and Complainant had been involved in a relationship. S.A. explained the events that occurred after the end of her relationship with Complainant including the contact in the apartment parking lot

on August 1, text messages sent by Complainant, the incidents of August 7 with the ApplePay and gifts, the contact at the funeral on August 8, and the August 9 events.

67. On August 11, 2019, Ms. Buneta forwarded S.A.'s email to Director Davis and Captain Joy Grissom from Respondent's Internal Investigations Unit.

68. Director Davis consulted with Captain Grissom about the information received from S.A.

69. Director Davis then determined the matter should be referred to Respondent's Internal Investigations Unit for investigation.

70. On September 9, 2019, Complainant received a written notice of investigation ("Notice") from Respondent's Internal Investigations Unit.

71. The Notice informed Complainant of allegations of Discourteous/Rude/Unprofessional/Inappropriate Behavior or Comments, Abuse of Authority, Harassment, and Off-Duty Misconduct.

72. Captain Grissom assigned Sergeant Michael Ryan, Investigator, to investigate the allegations against Complainant.

73. Sergeant Ryan is a trained interviewer and investigator.

74. Sergeant Ryan's role is to gather facts.

75. Sergeant Ryan interviewed: S.A., Complainant, Ms. Augustine, Ms. Buneta, Communication Officers D.D., C.M., and C.S., and Trooper R.S. The interviews were recorded.

76. S.A. characterized the events during the group conversation differently than all of the other individuals interviewed and asked about the group conversation.

77. Sergeant Ryan conducted two interviews with Complainant. Complainant requested the second interview to make clarifications.

78. Sergeant Ryan reviewed text messages between Complainant and S.A.

79. Sergeant Ryan reviewed videos of the workplace parking lot recorded on August 9, 2019. The video did not include any audio.

80. Although Complainant informed Sergeant Ryan he could likely still access the reference questionnaire he provided for S.A. to the Aurora Police Department, Sergeant Ryan did not obtain the reference questionnaire. Sergeant Ryan relied on Complainant's statements to make his findings related to the reference questionnaire to the Aurora Police Department.

81. Sergeant Ryan issued an Investigation Report on October 7, 2019. Sergeant Ryan made the following findings:

Based on the facts of the case obtained, it is my professional opinion as the investigator that I find it **more likely than not** KIM engaged in a personal and romantic relationship with his direct report subordinate, [S.A.]. Both KIM and [S.A.] admitted to being in a personal/romantic relationship during their interviews with PSS.⁶ KIM advised he knew it was inappropriate to engage in a romantic relationship with one of his direct report employees, because he was responsible for [S.A.]’s performance management at work.

Based on the facts of the case obtained, it is my professional opinion as the investigator that I find it **more likely than not** KIM attempted to continue his pursuit of a personal/romantic relationship with [S.A.], after KIM and [S.A.]’s personal/romantic relationship had ended, and after [S.A.] communicated to KIM on several occasions her desire to keep their relationship exclusively professional. KIM’s continual attempts to pursue a personal/romantic relationship with [S.A.] were considered unwelcomed behavior by [S.A.]. KIM also took actions at work, involving [S.A.], which were personal in nature and not professionally related.

Based on the facts of the case obtained, it is my professional opinion as the investigator that I find it **more likely than not** KIM was dishonest. KIM did not communicate his personal/romantic relationship with a direct report subordinate to his supervisor, DRCC Regional Manager Buneta, despite his belief he should not have engaged in such a relationship as her direct report supervisor. KIM also admitted to making statements to his supervisor, DRCC Regional Manager Buneta, which indicated dishonesty. These statements included, “She [S.A.] made me lie for her and keep secrets.” and “I’ve [KIM] been hiding a lot of stuff for her [S.A.]” KIM admitted to knowingly omitting information about [S.A.] in a questionnaire to the Aurora Police Department, while acting as a CSP supervisor, because he was involved in a personal/ romantic relationship with [S.A.].

Based on the facts of the case obtained, it is my professional opinion as the investigator that I find it **more likely than not** KIM engaged in several actions, both on and off-duty, which were inappropriate and not professional and did not reflect positively of a CSP supervisor and member of the organization. KIM admitted to being in a personal/romantic relationship with a direct subordinate. KIM admitted to continuing to pursue a personal/romantic relationship with his direct subordinate, after she told him on multiple occasions to keep their relationship professional. KIM admitted to engaging in communication at work with [S.A.], which was personal in nature and not professional. KIM was aware that [S.A.] had communicated a threat to harm herself, while they were both off-duty, and KIM did not make any notifications to CSP or to emergency responders. KIM advised during his interview he would have notified both CSP and emergency responders if he had not been involved in a personal/romantic relationship with [S.A.].

⁶ PSS is not defined in Sergeant Ryan’s Investigative Report.

Based on the facts of the case obtained, it is my professional opinion as the investigator that I find it **more likely than not** KIM abused his authority. KIM admitted to knowingly omitting information about [S.A.] in a questionnaire to the Aurora Police Department, while acting as a CSP supervisor, because he was involved in a personal and romantic relationship with [S.A.].

(Bold in original).

82. In the Investigative Report, Sergeant Ryan included an incorrect description of Complainant's entry and exit times from the building on August 9, 2019 from the August 9, 2019 parking lot videos.

83. Sergeant Ryan provided his Investigative Report to Director Davis.

84. Director Davis reviewed the Investigative Report, listened to the interviews, and reviewed the evidence in the investigation file, including the text messages between Complainant and S.A.

85. Director Davis did not have access to the August 9, 2019 parking lot videos during his review.

86. Based upon information in the Investigative Report, and because of Complainant's admitted violations of Respondent's policies during Complainant's interviews with Sergeant Ryan, Director Davis determined it would be appropriate to initiate a Rule 6-10 Meeting with Complainant.

Board Rule 6-10 Meeting

87. Director Davis issued Complainant Notice of Rule 6-10 Meeting by hand delivery on October 14, 2019.

88. The Rule 6-10 Meeting occurred on October 18, 2020. Director Davis, Captain John Ehmsen, as Director Davis's representative, and Complainant attended the Rule 6-10 Meeting. The meeting was recorded.

89. During the Rule 6-10 Meeting, Director Davis provided Complainant the Investigative Report and provided Complainant an opportunity to review it.

90. During the Rule 6-10 Meeting, Complainant reviewed the Investigative Report.

91. During the Rule 6-10 Meeting, Director Davis questioned Complainant.

92. During the Rule 6-10 Meeting, Complainant admitted to having a romantic relationship with S.A. Complainant also admitted to knowing it was wrong to have a romantic relationship with S.A.

93. During the Rule 6-10 Meeting, Complainant admitted to failing to report S.A.'s suicidal comments. Complainant also acknowledged he should have reported S.A.'s suicidal comments.

94. During the Rule 6-10 Meeting, while discussing why Complainant did not report S.A.'s threats of self-harm, Director Davis asked, "Do you think your judgment was influenced by this personal relationship?" Complainant responded, "Yes."

95. During the Rule 6-10 Meeting, Complainant admitted he was not completely truthful on the reference questionnaire he provided for S.A. to the Aurora Police Department. Director Davis specifically asked Complainant if he was truthful on the reference questionnaire. Complainant stated, "For the most part, yes." Upon further questioning, Complainant clarified, "There was one specific question that asked if there were any concerns; and I put a concern, but there were more. But I didn't put them on the...". Director Davis interrupted the response. Again, Director Davis asked, "Judgment influenced by the personal relationship?" Complainant responded, "Yes, sir."

96. During the Rule 6-10 Meeting, Complainant admitted to continuing to attempt/have personal contact with S.A. after she told him she wanted to keep it professional.

97. During the Rule 6-10 Meeting, Complainant admitted to placing an item in S.A.'s storage unit.

98. During the Rule 6-10 Meeting, Complainant presented the following in mitigation:

- Complainant was concerned about S.A. following his return from Korea. In July 2019, an individual who worked with Complainant and S.A. passed away unexpectedly. There was some speculation that the death may have been caused by suicide. S.A. was significantly affected by the passing of this individual and sobbed at work as result of the passing although she was not very close to the individual. S.A. accused Complainant of not being there for her when she needed him following the passing of this individual.
- S.A. was "standoffish" in the past and Complainant wanted clarification.
- Complainant attempted to give gifts to S.A.'s child after learning she had a medical issue and seeing a picture of the child, because he had developed a relationship with the child and cared about her.
- Complainant had previously exchanged items with S.A. by placing them in the storage unit.
- In regard to addressing the suicidal statements/threats of self-harm, Complainant had dealt with someone who behaved similarly to S.A. in the past, and was doing what he thought was best.

99. During the Rule 6-10 Meeting, Complainant was apologetic and acknowledged that he made mistakes.

100. The day after the Rule 6-10 Meeting, October 19, 2019, Director Davis wrote a memorandum to his supervisor, Lieutenant Colonel Barry B. Bratt. Lieutenant Colonel Bratt is Director Davis' supervisor. The subject of the memorandum was, "Conclusion of Fact for Allegation of Misconduct (Case # L12019-041)."

101. Director Davis could have amended his memorandum to Lieutenant Colonel Bratt had Complainant provided additional information after the Rule 6-10 Meeting.

102. Complainant did not provide any additional information to Director Davis following the Rule 6-10 Meeting.

Notice of Disciplinary Action

103. Director Davis spent a significant amount of time considering what discipline was appropriate and drafting the Notice of Disciplinary Action.

104. Director Davis had the discretion whether to administer discipline, up to and including termination. After considering the information before him, Director Davis decided to demote Complainant to a Police Communication Technician effective November 14, 2019. Director Davis appreciated the seriousness of his decision and the potential impact it could have on Complainant. Director Davis did not make the decision lightly.

105. On November 14, 2019, Director Davis issued Complainant the Notice of Disciplinary Action.

106. In the Notice of Disciplinary Action, Director Davis wrote, in part:

This letter is the formal disciplinary action pursuant to Personnel Board Rules 6-11 and 6-12. For the reasons set forth below, I have decided to demote you from Communications Supervisor to a Communications Technician, effective November 14, 2019. Your pay will be reduced from \$5346.00/month to \$4400.00/month.

On October 18, 2019, pursuant to Personnel Board Rule 6-10, I held a meeting with you, at my request, regarding a complaint filed against you on August 11, 2019. The complaint was filed by a member of the Colorado State Patrol (CSP), Communications Officer [S.A.], alleging that your actions and behavior towards her (a subordinate under your charge) constituted inappropriate and unprofessional workplace behavior, abuse of authority, harassment, off-duty misconduct, and sexual harassment. Specifically, the complainant and allegations related to your behavior and actions that occurred between February and August 2019.

In early August 2019, I was made aware of allegations against you by complainant. The complainant initially brought the allegations to the Denver Communications Center Regional Manager, Tina Buente, who subsequently informed me. Because of the serious nature of the allegations, I asked for and received assistance from the CSP Office of Professional Standards. The

investigation was initiated by the CSP Office of Professional Standards on August 12, 2019 and was completed on October 7, 2019.

The details of the allegations and the outcome of the investigation into those allegations are as follows:

Between February and August 2019, you engaged in a romantic, intimate relationship with a direct report subordinate. During this time you did not report the multiple suicidal statements and actions made by this same subordinate; did not report these suicidal statements of this same subordinate to the Aurora Police Department when asked to respond on their employment reference questionnaire; trespassed on this same subordinate's private property after she asked to end the romantic, intimate relationship; initiated physical contact with this same subordinate after she asked to end the romantic, intimate relationship; sent gifts and money to this same subordinate after she asked to end the romantic, intimate relationship; and continued to pursue a romantic, intimate relationship with this same subordinate after she asked you to stop.

In the Office of Professional Standards investigation, you were asked about your actions and behaviors listed above, and you acknowledged you committed all these actions and behaviors. You admitted knowing these actions and behaviors were wrong, making mistakes, and admitted that you should have better judgment.

At our Personnel Board Rule 6-10 meeting on October 18, 2019, you stated that all your prior statements in this matter were truthful and accurate, and did not wish to correct or amend any statements you had previously made...You offered no excuses for your actions. You admitted that your judgment was influenced by your romantic, intimate relationship, and your feelings and desire to help her daughter. You offered remorse for your actions and behaviors and took full responsibility for them.

I have concluded that the allegations of unprofessional behavior, inappropriate workplace behavior, violations of multiple CDPS and CSP policies and orders, including sexual harassment, and off-duty misconduct are substantiated...

I have reviewed the results of our meeting; carefully considered information presented by you and by others; the nature, extent, seriousness, and effect of your acts and behavior; the type and frequency of your acts and behavior; previous unsatisfactory conduct or performance; the period of time that has elapsed since prior unsatisfactory conduct or performance; prior corrective action, discipline, or counseling; any mitigating circumstances; performance evaluations; other factors listed in Personnel Board Rule 6-9; and the necessity of impartiality in relation to members. I have listened to and considered your explanations and mitigations in this matter. I have also reviewed Personnel Board Rule 6-2, discussing flagrant and serious conduct as it relates to progressive discipline in the state personnel system. I have reviewed your personnel file, and

any documents I could locate regarding your workplace performance and corrective/disciplinary actions.

I find that your behavior and actions demonstrate unprofessional behavior, inappropriate workplace behavior, off-duty misconduct, and sexual harassment. The gravity of your behavior is more severe when viewed through your expected role and responsibilities as a supervisor, charged with completing fair and impartial evaluations of employees, enforcing standards of conduct and performance, and emulating exemplary performance and behavior for them. After carefully considering all the information available to me, as discussed above, I find that your conduct and actions are egregious and violate the following CDPS and CSP policies [sic] and orders:

CDPS Policy 1.02.005-Equal Employment Opportunity, on-Discrimination and Harassment.

CSP Policy 1.01.0102-Code of Ethics.

CSP Policy 1.01.0103-General Order #1.

CSP Policy 1.01.0103-General Order #2.

CSP Policy 1.01.0103-General Order #3.

CSP Policy 1.01.0103-General Order #6.

CSP Policy 1.01.0103-General Order #7.

CSP Policy 1.01.0103-General Order #8.

CSP Policy 1.01.0106-Core Values (Honor, Duty, Respect).

CSP Policy 2.01.0310-Sexual Harassment.

It is my responsibility to ensure all members of the State Patrol obey applicable policies and orders, and can work in an environment that is free from sexual harassment. Your inappropriate behavior towards a subordinate under your charge was incongruent with the CDPS and CSP core values, policies and orders, and goals of ensuring a workplace free of sexual harassment for our employees.

I have determined that the violations of policy and orders listed above are so flagrant and serious that immediate discipline is proper. Not only did your conduct violate numerous significant policies, abuse the supervisor/subordinate relationship, and commit sexual harassment, your actions and behavior were incongruent with the Core Values and Code of Ethics of our organization, which are cornerstones of law enforcement and public trust. Additionally, your conduct placed your subordinate in danger, and you were less than truthful and complete

in your statements to the Aurora Police Department. By your own admission, you knew your actions were wrong and deliberately and willfully decided to go forward on that path.

This letter is notice pursuant to Personnel Board Rule 6-15 that I have decided to take disciplinary action.

107. Complainant timely appealed his discipline.

Respondent's Policies

108. Respondent has two policies related to sexual harassment. The first policy is the Equal Employment Opportunity, Non-Discrimination, and Non-Harrasment Policy. The second is a Sexual Harassment Policy.

109. The Equal Employment Opportunity, Non-Discrimination, and Non-Harrasment Policy, defines harassment as:

Repeated or pervasive verbal, non-verbal or physical behavior based on a person's age, gender, gender identity, genetic information, race, color, marital status, disability, national origin/ancestry, religion, veteran status or sexual orientation that adversely affects work performance or otherwise creates an intimidating, hostile or offensive work environment. Examples of possible harassing behavior are insults, ridicule, teasing, demeaning or suggestive jokes, gestures or comments, touching, the display or circulation of offensive material, threats, intimidation, and physical assaults.

110. The Equal Employment Opportunity, Non-Discrimination, and Non-Harrasment Policy, defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, unequal treatment and other unwelcome verbal or physical conduct based on an employee's sex, when:

- Submission to the conduct is made either explicitly or implicitly a term or condition of employment; or
- Submission to or rejection of the conduct is used as the basis for making employment decisions; or
- The conduct has the purpose or effect of substantially and unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

111. The Sexual Harassment Policy defines sexual harassment as:

There are two types of Sexual Harassment. The first is "***Quid pro quo***" (***an exchange of something for something***). This occurs when submission to or

rejection of sexual advances is used as a basis for employment decisions such as hiring or firing, pay increases, performance appraisals or promotions.

The second type of Sexual Harassment is known as “**hostile work environment sexual harassment.**” In this situation, unwelcome words, actions or displays of a sexual nature interfere with the ability of a person to perform his or her job. A hostile work environment may be created by sexual pictures, calendars, and graffiti or by offensive language, jokes, gestures or comments. Whether or not a behavior or action creates a hostile environment depends on how it makes another person feel. If such behavior or actions makes a person feel uncomfortable and is unwelcome, a hostile environment is created, even if that is not what was intended.

(Emphasis in original).

112. Respondent has a Core Values policy that lists three core values: Honor, Duty, and Respect. Honor is defined as: “the essence of a person’s veritable integrity based on the representation of moral character and ethical actions.”

113. Respondent has a Code of Ethics “to assist [employees] in making ethical decisions and judgments throughout their career.” The Code of Ethics applies to all members of the Colorado State Patrol. The policy is as follows:

As a member of the Colorado State Patrol, my fundamental duty is to uphold the Constitutional rights of all persons; to serve mankind; to safeguard life and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, and ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and professional life, I will be exemplary in obeying the laws of the land and the regulations of the Colorado State Patrol. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will uphold the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of the Colorado State Patrol as a symbol of public faith. Through unwavering professionalism and loyal adherence to our core values I dedicate myself to my chosen profession. I will strive to achieve these ideals through my commitment to the tenets of Character, Integrity, Knowledge, Judgment, Honor, Loyalty, and Courtesy.

114. Respondent has 10 General Orders. The General Orders apply to all members of the Colorado State Patrol. The General Orders are:

The following are the ten general orders of the State Patrol that apply to all members. Any deviation from these orders could result in corrective and/or disciplinary action, up to and including termination.

1. Members will obey the law.
2. Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.
3. Members will be truthful and complete in their accounts and reports.
4. Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
5. Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.
6. Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
7. Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
8. Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.
9. Members will see to the proper care and maintenance of all property and will make no unauthorized alterations.
10. Information pertaining to this organization, its operations, members, and the police profession will be communicated and otherwise distributed appropriately both internally and externally through proper channels with due regard for security and confidentiality as appropriate.

115. Each of Respondent's these policies applied to Complainant.

116. Complainant acknowledged and received the policies.

117. Complainant's position description required him to, "adapt and conform to ever-changing policies, procedures, directives, and equipment through ongoing specialized education and continuing education training."

IV. Analysis

Certified state employees have a property interest in their positions and may only be disciplined for just cause. See Colo. Const. Art. XII, § 13(8); § 24-50-125, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994).

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Kinchen*, 886 P.2d at 705-08. "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. Respondent bears the burden of establishing just cause for discharge. *Id.* at 707-08. The Board may reverse or modify Respondent's decision to discipline Complainant if the action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

State employees are required to, "conduct [themselves] in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." § 24-50-116, C.R.S. Pursuant § 24-50-125(1), C.R.S., Respondent may administer discipline to a certified state employee for, "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined." See *also* Board Rule 6-12.

Director Davis chose to discipline Complainant for engaging in a romantic relationship with a direct report subordinate, failing to report the multiple suicidal statements and actions made by that subordinate, failing to report suicidal statements of that subordinate to the Aurora Police Department when completing a reference questionnaire as her supervisor, trespassing on that subordinate's private property after she ended the romantic relationship, initiating physical contact with that subordinate after she ended the romantic relationship, sending gifts and money to that subordinate after she ended the romantic relationship, and continuing to pursue a romantic relationship with that subordinate after she ended the relationship. Director Davis concluded Complainant's behavior and actions demonstrated unprofessional behavior, inappropriate workplace behavior, off-duty misconduct, and sexual harassment.

As discussed below, Respondent has proven by preponderance of the evidence Complainant committed the acts for which he was disciplined, that Respondent had just cause to discipline Complainant as a result of those actions, that Respondent's decision to demote Complainant was not arbitrary, capricious, contrary to rule, or law, and that demotion was within the range of reasonable alternatives for discipline.

I. RESPONDENT ESTABLISHED, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

A. Romantic Relationship with Direct Report Subordinate

Respondent's Code of Ethics required Complainant to have "unwavering professionalism." Respondent's General Order 6 required Complainant to, "avoid any conduct that may bring discredit upon, or undermine the credibility of [himself], the Colorado State

Patrol, or the police profession.” Respondent’s General Order 7 required Complainant to “conduct [himself] to reflect the highest degree of professionalism and integrity.”

Complainant had a romantic relationship with a direct report subordinate. Complainant knew this conduct was inappropriate as evidenced by his text message to S.A. about beginning the relationship. Complainant text messaged, “We work together and you’re my direct subordinate. It would be inappropriate to move forward with a romantic/physical relationship.” Complainant’s conduct was unprofessional in violation of Respondent’s Code of Ethics and General Order 7.

Complainant’s relationship with S.A. also undermined his credibility as a supervisor in violation of General Order 6. Complainant completed a performance evaluation for S.A. while he was engaged in a romantic relationship with her. The romantic relationship would cause a reasonable person to question Complainant’s ability to fairly evaluate the performance of that subordinate. If other subordinates became aware of the romantic relationship, it would likely also cause those subordinates to question Complainant’s credibility and fair evaluation/treatment at work. Complainant’s conduct violated Respondent’s General Order 6.

Respondent met its burden to prove, by a preponderance of the evidence, that Complainant engaged in a romantic relationship with a direct report subordinate and violated multiple policies by engaging in that relationship.

B. Failure to Report Multiple Suicidal Statements of Subordinate

General Order 8 required Complainant, “to conduct [himself] so that no other person [was] endangered unnecessarily and [to] perform only those specialized tasks for which [he was] authorized and properly trained, or certified.” Respondent’s Code of Ethics required Complainant not to, “permit personal feelings, prejudices, animosities, or friendships to influence [his] decisions.”

Complainant failed to report S.A.’s suicidal statements and threats of self-harm to Respondent or to contact qualified professionals. Complainant is not qualified to provide care for someone who is threatening to harm themselves. Complainant’s failure to report S.A.’s suicidal statements, particularly on March 6, 2019, unnecessarily endangered, at least, S.A. who may have harmed herself without proper care. Further, Complainant placed himself in a position where he was caring for S.A., when he was not qualified to provide that care.

Complainant argued he learned about S.A.’s threats of self-harm in the course of their romantic relationship and dealt with the statements in a way he thought was appropriate. However, Complainant is a member of the Colorado State Patrol and is bound by a Code of Ethics that regulates off-duty conduct. At a minimum, the March 2019 incident was credible enough for Complainant to take away S.A.’s personal firearm and Complainant had an obligation under Respondent’s policies to do more than he did to ensure S.A.’s safety. In fact, had the same statements been made to Complainant during a call while he was at work, he would have been required to call emergency personnel to assist S.A.

Complainant, by his own admission, allowed his relationship with S.A. to influence his judgment and his decisions about reporting S.A.'s suicidal statements and threats of self-harm in violation of Respondent's Code of Ethics.

Respondent met its burden to prove, by a preponderance of the evidence, that Complainant failed to report Complainant's suicidal comments to Respondent or a qualified professional and violated General Order 8 and Respondent's Code of Ethics.

C. Failure to Report Suicidal Statements of Subordinate When Providing a Professional Reference to Another Law Enforcement Agency

Respondent's General Order 3 required Complainant to "be truthful and complete in [his] accounts and reports." Respondent's Code of Ethics required Complainant not to, "permit personal feelings, prejudices, animosities, or friendships to influence [his] decisions." Complainant failed to report S.A.'s concerns about S.A.'s mental stability when completing a reference questionnaire for the Aurora Police Department in his professional capacity as S.A.'s supervisor. Complainant violated General Order 3 by not fully reporting his concerns to the Aurora Police Department. Complainant also violated Respondent's Code of Ethics by not reporting his concerns and allowing his relationship with S.A. to influence his judgment on what he reported.

Complainant was required by the Code of Ethics to have "unwavering professionalism, by General Order 6 to, "avoid any conduct that may bring discredit upon, or undermine the credibility of [himself], the Colorado State Patrol, or the police profession," and by General Order 7 to "conduct [himself] to reflect the highest degree of professionalism and integrity," and by the Core Values to conduct himself with integrity. Complainant's failure to fully report concerns brought discredit upon Complainant, could bring discredit upon Respondent, and does not reflect the highest degree of professionalism or integrity in violation of the Code of Ethics, General Order 6, General Order 7, and the Core Values. Complainant did not disclose known threats of self-harm, that would be relevant to a law enforcement agency hiring a person entrusted with a firearm. Complainant's failure to disclose that information was unprofessional, undermined Complainant's credibility, potentially undermined Respondent's credibility, and compromised Complainant's integrity.

Further, General Order 8 required Complainant, "to conduct [himself] so that no other person [was] endangered unnecessarily." Complainant's failure to report S.A.'s threats of self-harm to the Aurora Police Department violated General Order 8 and could have endangered members of the public. S.A. was applying to become a police officer, a position of public trust, where the individual carries a firearm and may have to use that firearm as part of their job duties. The information about S.A.'s threats of self-harm would have been important for the Aurora Police Department to have in making the decision to hire S.A. as a police officer.

Respondent met its burden to prove, by a preponderance of the evidence, that Complainant failed to report suicidal statements when he provided a reference for a subordinate employee and violated multiple policies by failing to report those statements.

D. Trespass on Subordinate's Property

General Order 1 required Complainant to obey the law. Complainant trespassed on the property of S.A. in violation of the law and violated General Order 1 when he placed a gift in her storage unit without permission. Third degree criminal trespass is defined by § 18-4-504(1), C.R.S.:

A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another.

Although Complainant previously exchanged items with S.A. by placing them in the unlocked storage unit, S.A. revoked any permission Complainant may have had when S.A. ended her relationship with Complainant. Further, Complainant specifically asked for permission to drop something off in the storage unit and did not receive it. Despite not receiving permission, Complainant entered S.A.'s storage unit and placed a gift in it. Complainant's entry into the storage unit was unlawful. Complainant knew this behavior was inappropriate as evidenced by his text message that stated he was willing to accept the possible consequences of his actions.

Respondent met its burden to prove, by a preponderance of the evidence, that Complainant trespassed in violation of the law and violated General Order 1.

E. Initiated Physical Contact with Subordinate, Provided Gifts and Money to Subordinate, and Continued to Pursue a Romantic Relationship with Subordinate After Conclusion of Relationship

Respondent's sexual harassment policies prohibited Complainant from sexually harassing another employee. As discussed below, Complainant's behavior and interactions with S.A. after the conclusion of their romantic relationship were violative of Respondent's sexual harassment policies. Complainant's non-work related contacts, and many of his work related contacts, after the text message of August 1, 2019, were clearly unwelcome by S.A. Complainant's continuation of any personal communication, including attempting to provide gifts to her child, was done on the basis of his past romantic relationship with S.A. and was unwelcome treatment of S.A. on the basis of her sex. Complainant's behavior created an intolerable work environment for S.A. and was sexual harassment as defined by Respondent's sexual harassment policies.

Complainant initiated physical contact with S.A. after S.A. terminated her romantic relationship with Complainant. Complainant made contact with Complainant in her apartment parking lot and initiated a hug. Complainant defied S.A.'s request to keep the relationship professional by contacting her in the apartment parking lot. Complainant further defied that request by hugging S.A., and continuing to follow her after she asked him not to follow her.

Complainant attempted to provide money to S.A. after the conclusion of their romantic relationship and provided gifts. Complainant's intention of giving the money and gifts for the benefit of S.A.'s child does not nullify that Complainant continued to engage in personal contact with S.A. through the gifts. S.A.'s child was a minor and Complainant could not provide the gift to the child without involving S.A. Complainant unequivocally knew he should not be attempting

to provide the gifts. Complainant wrote, "I understand the possible consequences of this as you laid out your wishes and am fully aware of the threat to my name and - my everything. That said, it didn't sit well with me that you weren't going to use the gift I sent, so I bought [redacted] some things to help her feel better - in the end, that's worth any trouble I may face. I wanted your permission to drop them off though." Complainant proceeded to drop the gifts off without S.A.'s permission. S.A. was Complainant's subordinate, S.A. had clearly terminated the romantic and personal relationship, and the money and gifts were not welcomed by S.A.

Even Complainant's "work" related communications after August 2, 2019, constitute sexual harassment. After August 2, 2019, Complainant text messaged S.A. four times to excuse her from a meeting that she clearly did not want to be excused from, initiated two one-on-one conversations with S.A. on August 9 where he engaged in communications about his personal relationship with S.A., and then sent her an unreasonable number of work related text messages following the August 9, 2019 events. The incident on August 9 degraded to the point where Complainant launched personal attacks on S.A. and swore at S.A. as she was leaving work. Professional logic would dictate ceasing all communication with S.A. after this occurred. It was unreasonable for Complainant to send S.A. a dozen text messages, although work related, after the August 9 incident. The total of Complainant's conduct after the end of his relationship was necessarily tied to his romantic relationship with S.A. and created a hostile work environment for S.A. in violation of Respondent's sexual harassment policies.

Respondent met its burden to prove, by a preponderance of the evidence, that Complainant sexually harassed S.A. through his behavior following the end of his personal relationship with S.A. in violation of Respondent's sexual harassment policies.

F. Conclusion

Complainant committed the acts for which he was disciplined. The acts for which Complainant was disciplined constitute willful misconduct and failure to perform Complainant's duties, including an obligation to follow Respondent's policies. See § 24-50-116, C.R.S., § 24-50-125(1), C.R.S., and Board Rule 6-12. Therefore, Director Davis had just cause to discipline Complainant.

II. RESPONDENT'S DEMOTION OF COMPLAINANT'S EMPLOYMENT 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).

Director Davis used reasonable diligence and care to procure evidence relating to Complainant's conduct. Prior to making his decision to discipline Complainant, Director Davis reviewed the following: (a) the Investigative Report, (b) recordings of the interviews conducted by Sergeant Ryan, (c) the information available in the investigation file, including the text messages between Complainant and S.A., and (d) Complainant's personnel file. The Investigative Report is a 21-page document that reflects a thorough investigation of the allegations that led to discipline of Complainant. Additionally, Director Davis held a Rule 6-10 Meeting with Complainant and considered the statements made by Complainant during that meeting. While Director Davis might have procured additional evidence, his diligence was reasonable.

Director Davis gave candid and honest consideration to the evidence. This is evident from the analysis and discussion in the Notice of Disciplinary Action. This is also evident from Director Davis's testimony at the hearing about his evaluation of Complainant's actions.

At the hearing, Complainant contended his interview with the investigator was flawed because of a medical issue he experienced during the interview. Prior to being issued discipline, Complainant never informed Director Davis or Sergeant Ryan about his concerns. Complainant's medical issue does not reflect on the diligence or carefulness of Director Davis' evidence collection. Moreover, there was ample evidence to support Director Davis' decision. Even if Complainant had a medical issue during the interview with Sergeant Ryan, the evidence is more than sufficient to uphold the decision.

At hearing, Complainant contended that Director Davis had a bias in favor of S.A. and against Complainant. Director Davis' testimony indicated he spent a significant amount of time reviewing evidence and contemplating his decision. The disciplinary action reached by Director Davis does not indicate there was any bias in the process. It would have been irresponsible for Director Davis to allow Complainant to continue as a supervisor following Complainant's conduct that led to disciplinary action. The evidence demonstrates that Complainant had significant lapses in judgment and violated many of the policies that he was responsible for enforcing as a supervisor.

Reasonable persons fairly and honestly considering the evidence may reach the same disciplinary decision as the decision made by Director Davis. Complainant's misconduct here is sufficiently flagrant and serious that immediate and substantial discipline was appropriate. See Board Rule 6-2; see also § 24-50-125(1), C.R.S. Demotion, rather than the more severe disciplinary action of termination, evidences that Director Davis gave considerable value to Complainant's exemplary performance history and his willingness to accept responsibility for his actions during the investigation and in the Rule 6-10 Meeting.

At hearing, Complainant emphasized the lack of a policy explicitly prohibiting a romantic relationship between Respondent's employees and the prevalence of romantic relationships in his workplace. Despite an explicit policy and the existence of other relationships, Complainant knew he should not participate in a romantic relationship with a direct subordinate. Complainant wrote in a text message, "We work together and you're my direct subordinate. It would be inappropriate to move forward with a romantic/physical relationship." Complainant also acknowledged he knew it was wrong during his Rule 6-10 Meeting.

Further, Complainant's conduct that resulted in disciplinary action extended beyond just being in a relationship with a subordinate. As discussed above, Complainant sexually harassed that subordinate following the conclusion of the relationship, disobeyed the law, initiated a second one-on-one conversation at work on August 9 when the first conversation degraded into a personal conversation, and swore at S.A. in the workplace parking lot on August 9, saying, "When are you going to f*cking take responsibility for any of your actions? All the bad stuff that's going on in your life right now has one common factor, and it's you."

Finally, Complainant did not raise concerns about other workplace relationships during the Rule 6-10 Meeting or in the time Complainant had to provide additional information after the meeting. Complainant did not present Director Davis information about other workplace relationships as mitigation.

Complainant raised S.A.'s behavior and the nature of his relationship with S.A. in his defense. Regardless of S.A.'s behavior or the nature of his relationship with S.A., Complainant was S.A.'s supervisor and risked the type of scenario that occurred by entering a romantic relationship with S.A. During the course of that romantic relationship and after its conclusion, Complainant allowed the relationship to cloud his judgment and in doing so violated numerous of Respondent's policies. Complainant was the individual in a supervisory position, not S.A.

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

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

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

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

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C).

Because the ALJ finds that Respondent's disciplinary demotion of Complainant should be affirmed, as discussed above, this action was not "instituted frivolously, in bad faith,

maliciously, or as a means of harassment or was otherwise groundless.” Therefore, Complainant is not entitled to an award of attorney fees and costs.

V. Conclusions of Law

1. Complainant committed the acts for which he was disciplined.
2. The disciplinary demotion was not arbitrary and capricious or contrary to rule or law.
3. The disciplinary demotion was within the range of reasonable alternatives.
4. Complainant is not entitled to an award of attorney fees and costs.

VI. Order

Respondent’s action is **affirmed**. Attorney fees and costs are not awarded. Complainant’s appeal is **dismissed with prejudice**.

Dated this 28th day,
of September, 2020,
at Denver, Colorado.

/s/ [REDACTED]

K. McCabe
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 28th day of September, 2020, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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APPENDIX A

EXHIBITS

Respondent's Exhibits Admitted:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

Complainant's Exhibits Admitted:

A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING

The following is a list of witnesses who testified at hearing:

S.A.

Jessica Augustine

Director Jeffrey Davis

Gu Kim

Sergeant Michael Ryan

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.