

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GU KIM,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL, COMMUNICATIONS,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on May 3 and May 4, 2021. The hearing was conducted remotely through a web conference. The record was closed on May 19, 2021. Complainant Gu Kim represented himself. Respondent Colorado Department of Public Safety (CDPS), Colorado State Patrol (CSP), was represented by Vincent E. Morscher and Jack D. Patten, III, Senior Assistant Attorneys General. Respondent's advisory witness, and Complainant's appointing authority, was Jeff Davis, CSP's Director of Communications.

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

MATTERS APPEALED

Complainant appeals Respondent's decision to terminate his employment, arguing that the discipline was not reasonable; was arbitrary and capricious or contrary to rule or law; that Respondent violated the Colorado State Employee Protection (Whistleblower) Act; that Respondent was retaliatory in violation of the Colorado Anti-Discrimination Act (CADA); and the decision constituted unlawful discrimination on the basis of race in violation of CADA.

Complainant requests reinstatement "with all applicable compensatory and punitive damages with the provision that I am no longer under Director Davis' chain of command. If that is not a feasible option, all applicable compensatory and punitive damages."

Respondent argues that Complainant committed the acts for which he was disciplined; that Respondent's decision to terminate Complainant's employment was not arbitrary or capricious or contrary to rule or law; that Respondent did not violate the Whistleblower Act; that Respondent did not retaliate against Complainant in violation of CADA; that Respondent did not discriminate against Complainant on the basis of race in violation of CADA; and that the decision to terminate Complainant's employment should be upheld and Complainant denied any of his requested relief.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined.
2. Whether Respondent's decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law.
3. Whether Respondent violated the Whistleblower Act.
4. Whether Respondent retaliated against Complainant in violation of CADA.
5. Whether Respondent discriminated against Complainant on the basis of race in violation of CADA.

FINDINGS OF FACT

Background

Facts and Conclusions From Complainant's Previous Board Case (2020B047)

1. Respondent hired Complainant on January 8, 2009 as a State Service Trainee at the Denver Communications Center.
2. On January 8, 2010, Complainant was certified in his position. At that time, Respondent promoted Complainant to the position of Police Communication Technician.
3. On May 1, 2014, Respondent promoted Complainant to the position of Police Communication Supervisor.
4. Complainant received favorable performance evaluations while working at the Denver Communications Center.
5. In or about January 2019, Complainant became the supervisor of S.A.¹
6. Complainant and S.A. began an intimate relationship within a couple of months of Complainant becoming S.A.'s supervisor.
7. During the period of March through May 2019, Complainant took several actions that were inappropriate, tainted by his intimate relationship with S.A. These actions included not reporting S.A.'s comments on several occasions that she was depressed and might harm herself; failing to express his concerns about S.A.'s mental health in response to a reference request from the Aurora Police Department pursuant to S.A.'s application for a position there; completing S.A.'s annual performance evaluation; and discussing work-related matters and subordinates with S.A.
8. 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.

¹ To protect this individual's privacy, she will be referred to by her initials in this decision. Her identity is not relevant to the issues addressed in this case. Others mentioned in this decision whose identity is irrelevant are also referred to by their initials.

9. On or about August 1, 2019, S.A. ended her relationship with Complainant. On August 2, 2019, Complainant texted S.A. multiple times, after which S.A. informed Complainant by text, in no uncertain terms, that she did not want to communicate with Complainant on any basis other than a professional one.

10. Despite S.A.'s expressed wish to keep their relationship strictly professional, Complainant continued to contact her on personal matters, by text and in person.

11. An email from S.A. describing Complainant's conduct was forwarded to Director Davis and Captain Joy Grissom, a supervisor in CSP's Professional Standards (PS) section.

12. Director Davis referred the matter to the PS section for investigation.

13. Captain Grissom assigned Sgt. Ryan Barba, an investigator in the Professional Standards section, was assigned to conduct the investigation.

14. Sgt. Barba conducted an investigation and issued an Investigation Report on October 7, 2019.

15. Sgt. Barba reached the following material conclusions:

KIM engaged in a personal and romantic relationship with his direct report subordinate, [S.A.].

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.

KIM did not communicate his personal/romantic relationship with a direct report subordinate to his supervisor despite his belief he should not have engaged in such a relationship as her direct report supervisor.

KIM admitted to knowingly omitting information about [S.A.] in a questionnaire to the Aurora Police Department, while acting as a CSP [Colorado State Patrol] 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 abused his authority.

16. After a Rule 6-10 meeting and considering the information he obtained about Complainant's conduct and mitigating factors, Director Davis decided to demote Complainant to a Police Communication Technician effective November 14, 2019.

17. Director Davis disciplined 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.

18. Director Davis concluded Complainant's behavior and actions demonstrated unprofessional behavior, inappropriate workplace behavior, off-duty misconduct, and sexual harassment.

19. Complainant appealed his demotion to the State Personnel Board (Board), contending that the discipline imposed was not within the range of reasonable alternatives and that progressive discipline should have been utilized. Complainant sought monetary damages to make him whole, a rescission of the demotion, reinstatement to his supervisory position, and attorney's fees and costs.

20. The evidentiary hearing in Complainant's demotion case was conducted in August 2020 before ALJ McCabe, who issued her Initial Decision on September 28, 2020, affirming Respondent's decision to demote Complainant.

21. In her Initial Decision, ALJ McCabe concluded that Complainant committed the acts for which he was disciplined; that the acts for which Complainant was disciplined constituted willful misconduct and failure to perform Complainant's duties; the disciplinary demotion was not arbitrary and capricious or contrary to rule or law; and the disciplinary demotion was within the range of reasonable alternatives.

22. Complainant filed an appeal of the ALJ's Initial Decision with the Board, but abandoned it prior to the Board's consideration of the appeal.

Facts in This Matter

Director Davis Transfers Complainant to the Executive Security Unit

23. On February 10, 2020, Director Davis handed Complainant a written Notification of Transfer, notifying Complainant of Director Davis' decision to transfer Complainant from the Denver Communications Center to the Executive Security Unit (ESU) Communications Center across the street from the State Capitol, commonly referred to as "power plant," "to ensure a more productive and amicable working environment within the Communications Branch." The object of this transfer was to remove Complainant from S.A.'s workplace.

24. The ESU was responsible for protecting state government buildings and government personnel, such as the Governor, in and around the Capitol Complex. There are multiple cameras mounted throughout the Capitol Complex area that allow Respondent's employees to monitor the area.

25. Complainant's duties at the ESU were to observe, through the monitoring of the Capitol Complex cameras, and report any matters requiring law enforcement intervention. He was not authorized to independently investigate something he observed that concerned him.

26. At all times relevant to this matter, Daniel Greenmyer supervised the ESU.

Cori Garcia

27. At the time Complainant was transferred to the ESU, Cori Garcia had been working there for about a year.

28. Ms. Garcia had worked at the Denver Communications Center, but accepted to accept a demotion and a transfer to the ESU because of her conflicts with Complainant and another supervisor, [J.A.]

29. When Ms. Garcia learned that Complainant was being transferred to the ESU, she considered resigning. However, she was dissuaded by Mr. Greenmyer, who promised that he would closely monitor the situation and protect her if necessary.

Complainant's Job Performance at the ESU

30. Complainant was considered a successful employee at the ESU, and his interpersonal relationship with Ms. Garcia improved. At the ESU, Ms. Garcia found Complainant to be cooperative and pleasant, in contrast to her experience of him at the Denver Communications Center.

31. In his Performance Management Program (PMP) evaluation for the review period April 1, 2019 to March 31, 2020, Complainant was given an overall "Successful" rating.

Events of the Night of June 30, 2020

32. After George Floyd was murdered by a policeman in Minneapolis in May 2020, demonstrators rallied around Colorado's State Capitol on a daily and nightly basis.

33. Complainant perceived the demonstrators as anti-law enforcement.

34. The demonstrators vandalized buildings around the Capitol and spray painted graffiti on the Capitol and other government buildings in the Capitol Complex.

35. Demonstrators were present on the west side of the Capitol building on the night of June 30, 2020.

36. During the night of June 30, 2020, Complainant worked at the ESU, along with Ms. Garcia and Colorado State Patrol Trooper Randy Noftsgger. His regularly scheduled work hours were 4:00 p.m. to 12:00 a.m.

37. It was a relatively peaceful gathering, and Ms. Garcia and Trooper Noftsgger considered it just a normal night.

38. At approximately 9:39 p.m., the following text exchange occurred between Complainant and Mr. Greenmyer:

Complainant: FYI – district 1 is here. Protestors set up 7 tents and ltc [Lt. Colonel] downing wants them gone. Denver PD refused.

Complainant: Been dealing with the field – sorry for the delay.

Complainant: Tents are on the west Capitol lawn near the circle

Greenmyer: I understand. Call me if you need help. Do you know what LtC Downing is planning on doing?

Complainant: I think they're going to make contact and ask them to remove the tents. If they refuse s93 said they'll be cited for trespassing.

Greenmyer: Okay thank you for the update

Greenmyer: If things get crazy are you able to stay? I can come in if not

Complainant: I can stay – no worries.

Greenmyer: Okay thank you I truly appreciate it. Just let me know if you do

(Punctuation and spellings in the original.)

39. Although the protest crowd got smaller, then larger, then smaller again, it was a relatively normal night with no indication that the situation on the west side of the Capitol constituted an emergency.

40. Because of the lack of the need for law enforcement intervention that night, the extra state troopers on stand-by close to the Capitol were sent home just before midnight.

41. Shortly before midnight, Complainant noticed a protestor on the west side of the Capitol who he believed might be S.A.

42. Complainant began focusing on the individual he thought was S.A. zooming the camera in and out, and becoming more and more agitated.

43. Complainant stated that he was almost sure the protestor he was focusing on was S.A. Complainant believed that it was inappropriate for a CSP member to participate in what he considered an anti-law enforcement protest.

44. Complainant contacted a supervisor at the Denver Communications Center, Heather Carper, and shared footage of the subject individual. Ms. Carper did not raise any objections to Complainant's focus on "[S.A.]."

45. Complainant's chain of command required him to contact ESU's supervisor, Mr. Greenmyer, when he encountered an issue he needed to discuss. Complainant did not contact Mr. Greenmyer during the night and early morning of June 30 and July 1, 2020. By custom and practice, Mr. Greenmyer was on-call anytime, any day.

46. At approximately 12:15 a.m., Complainant walked around the Capitol building to the west side, and walked within 10 feet or so of the individual he believed was S.A. He walked past "[S.A.]" going South, but subsequently turned around and walked past "[S.A.]" again. He then reentered the power plant. He returned to the cameras and focused once again on "[S.A.]."

47. As the protest crowd was breaking up, Complainant noticed that "[S.A.]" was leaving the Capitol grounds. Complainant left the power plant and positioned himself so that "[S.A.]" would pass him on the street. When Complainant saw "[S.A.]" he said, "[S.A.]?" "[S.A.]," who turned out to be a man, replied, "Huh?" and walked on.

48. Complainant returned to the power plant at approximately 1:30 a.m. and informed Ms. Garcia, Trooper Noftsgger and Ms. Carper that the individual in question was not [S.A.], and was a man.

49. Shortly thereafter, at 1:56 a.m., Complainant quit for the day.

50. Complainant stated before he left that he would report that he worked until midnight.

51. Both Ms. Garcia and Trooper Noftsgger viewed Complainant's conduct as obsessive, and "stalker-ish," and disturbing.

52. Ms. Garcia had heard rumors about Complainant's relationship with S.A., and that it did not end well.

53. Ms. Garcia was upset by Complainant's conduct that she witnessed on the night of June 30, 2020.

54. After a couple of days, Ms. Garcia reported Complainant's behavior to Mr. Greenmyer, who reported the incident to Director Davis.

55. Director Davis submitted the matter to the CSP's PS unit.

Events Subsequent to June 30/July 1, 2020

56. A PS case was opened on July 6, 2020 and assigned to Sgt. Barba. Sgt. Barba investigated. The investigation was completed on August 20, 2020, and an investigation report was issued shortly thereafter.

57. As part of his investigation, Sgt. Barba interviewed Complainant, Ms. Garcia, and Trooper Noftsgger.

58. On July 30, 2020, Mr. Greenmyer handed Complainant a document entitled "Administrative Notification of Allegations," for PS Case # L12020-028. The document informed Complainant that an alleged act of misconduct was filed against Complainant and was under investigation. The allegations included, "Discourteous/Rude/Unprofessional/Inappropriate Behavior or Comments," "Abuse of Authority," and "Lying/Dishonesty."

59. When Mr. Greenmyer gave Complainant the notification of allegations against him, Complainant referred to S.A. as "a crazy bitch."

60. The PS investigation report defined the scope of the investigation as follows:

Communication Officer Kim is alleged to have worked approximately one hour and fifty-six minutes past his scheduled time off, observing a female he thought was a current member of the Colorado State Patrol near the west steps of the Capitol. Communication Officer Kim's behavior and mannerisms were described as "*obsessive and stalker-ish*."

Communication Officer Kim is alleged to have made inappropriate comments about the female party, reportedly referring to her as a "*crazy bitch*." Communication Officer Kim is alleged to have made the comment he was going to have his supervisor, Communication Supervisor Dan Greenmeyer,

clock him out at 1230 hours. However, Communication Officer Kim recorded on his KRONOS timesheet an off-duty time of 01:56 hours.

Communication Officer Kim is also alleged to have used state property, (ESU security cameras) for personal gain by trying to identify the female he thought was Communication Officer S A .

61. The investigation report's primary conclusions were as follows:

It is **more likely than not** KIM's actions and comments were inappropriate, and unprofessional. This conclusion is based upon the following information: On the night June 30, 2020 and early morning of June 31, 2020 [sic], two (2) state employees who were present in front of KIM observed what they described as "*obsessive and stalker-ish behavior*" from KIM. The two (2) state employees also stated the level of aggression KIM displayed while observing a person he (KIM) thought was S A was "*disturbing*." One (1) of the employees who had knowledge of KIM and S A 's past stated they were concerned for the safety of S A based off of KIM's behavior.

Additionally, it was reported KIM called the person he thought was S A a "*crazy bitch*."

Based off the facts of the case, I am **unable to render a professional opinion** regarding the allegation of lying/dishonesty. This conclusion is based upon the following information:

KIM's KRONOS timesheet was analyzed for the month of June. Of the eighteen (18) days KIM worked, eight (8) days were worked over his normally scheduled shift. An explanation for this is the protests at the capitol have required more time of CSP members, to include communication officers, to handle the demands of public safety at the capitol. Had this been a singular event, it would merit more questioning; however, there is a pattern of KIM working beyond his scheduled shift by approximately two (2) hours.

Based off the facts of the case, I am **unable to render a professional opinion** regarding the allegation of abuse of authority. This conclusion is based upon the following information:

KIM explained while he did use one (1) camera for the purpose of attempting to identify a person he believed to be S A, he also was responsible for two (2) other cameras on June 30, 2020. A review of the cameras KIM was assigned to confirms he was scanning the area of the west side of the capitol in addition to observing the person. KIM stated he would have used to same tactics and operation of the camera if he thought it was "*any*" member of the patrol. However, according to a witness [GARCIA], KIM has prior relationship with S A , and KIM's actions during this incident were described by two (2) witnesses to be inappropriate and his actions appeared to be targeting a person who KIM believed at the time to be S A .

It is **more likely than** not KIM failed, neglected, or was incompetent to perform his duties during this incident. This conclusion is based upon the following information:

According to Garcia, on the night of the incident, the communications officers were supposed to be maintaining visual observation of a person that had a machete, which presented a potential safety risk.

KIM also advised a large portion of his responsibility was focusing in on specific individuals with potential weapons. However, KIM focused for several hours on a female party he believed to be S A, a communications officer who would have been off-duty. KIM's concerns about S A attending a protest does not rise to the same level as the potential safety risk the person with the machete posed.

Furthermore, KIM left his communication post to investigate the female party he believed to be S A, despite the potential safety risk that posed. He also abandoned his primary duty responsibilities as a communication officer to conduct his investigation of the female party. KIM, by his own statements, advised communications officers are required to report or make note of incidents; however, in this incident KIM actually began his own investigation into the matter.

62. On August 21, 2020,² Complainant was handed a Notice of Rule 6-10 meeting, which meeting was scheduled for August 31, 2020. The notice informed Complainant that:

At that meeting, we will discuss the information that causes me to believe that disciplinary action may be appropriate, which includes, but is not limited to, the following: statements you made during your CSP 240 interview; information obtained from witnesses, video cameras, and your time card regarding your actions and behavior; your understanding of appropriate duty behavior; your understanding of time card procedures; your understanding of your chain of command; your understanding of the scope of your authority and use of government resources; and your understanding of CDPS and CSP Policies, including CSP General Orders, Core Values, and Code of Ethics and the requirement to adhere to them.

63. Prior to the Rule 6-10 meeting, Director Davis reviewed the investigation report, and the transcripts and audio associated with investigative interviews. He also interviewed Mr. Greenmyer and Ms. Garcia.

64. During the Rule 6-10 meeting on August 31, 2020, Complainant maintained that all his actions were justified and necessary. He alleged that he focused on the individual he believed to be S.A. as he would have focused on any CSP employee who was involved in an "anti-law enforcement" demonstration because he believed it was inappropriate for any CSP employee to do so. He also contended that his two hours of overtime were necessary to monitor the demonstrators, and to ascertain whether S.A. was a participant.

² The Notice is mistakenly dated August 21, 2019.

65. On September 1, 2020, Complainant was handed a Notice to reconvene Rule 6-10 Meeting, which meeting was scheduled for September 10, 2020. Prior to the September 10, 2020 Rule 6-10 meeting, Director Davis reviewed all video and audio from the night in question and interviewed Mr. Greenmyer and Ms. Garcia again.

66. The second Rule 6-10 meeting occurred on September 10, 2020.

67. On September 17, 2020, Complainant sent an email to Mr. Davis providing additional information. Complainant wrote, in pertinent part:

An additional reason I stayed later that night was Cori's ineptitude in handling incidents and in performing her basic job duties. As I tried to explain in our meeting prior to being interrupted, she had little to no experience handling protests and came in to observe one day and was taking notes while the rest of us worked. In addition, she missed a lot of work prior to demoting a few years ago. When she came back, she was noticeably mentally deficient in remembering even the most basic tasks at work. She had to write notes about everything and basically had no short term memory. I assumed she was doing better, but I wasn't confident in her ability to handle a protest situation. The lack of notes and critical officer safety information in the CAD reports leads me to believe this is still the case. I also heard her in one of several follow-up investigation recordings conducted by Director Davis (bypassing professional standards) where she had to refer to her notes and was allowed to.

Communications Supervisor Greenmyer was also interviewed directly by Director Davis and appeared in two recordings.

I mentioned I had little to no personal interaction with Cori Garcia - strictly professional interactions at shift change and supervisor meetings with witnesses present, yet she seemed to have some major issues with how I and [J.A.] interacted with her even though we were never told that we were being unprofessional by witnesses in our monthly supervisor meetings. The extent of her dislike for the both of us became apparent when Communications Officer Carlos Palazon returned from a trip to assist PRCC with coverage after carpooling with Cori Garcia (after she transferred to ESU) and Carlos stated that Cori really hates you guys (J.A. and I). The initial conversation I had with Communications Supervisor Dan Greenmyer after being transferred to ESU included a question on whether I was going to be able to work with Cori. Surprised at the question, I responded that I would and that I didn't have any personal issues with her - I just had an expectation that she do her share of the work. When I asked why, he responded that he heard we had a history.

It appears by statements made by Cori and the Trooper interviewed by professional standards that they were engaged in gossip the evening in question and if it included the false accusation made against me, it would have tainted both of their abilities to see the situation objectively. This is now the fourth occasion I'm referring to the statements made by Communications Officer [S.A.] as a false allegation to Director Davis with no follow-up investigation or action taken (the previous three were in person with at least 3 separate witnesses total).

Timesheet

Although it is true I do miss clock-in punches sometimes, there are alternative ways to find whether or not I was present for my shift on time - namely, the work schedule. For additional evidence on whether or not I was present for work, the Hirsch system records badge/code entries and there are cameras at two of the three entrances into the building. If this subject was raised to allege I was not at work during the times shown on my timesheet, thereby stealing time and committing a fraudulent act, an investigation is warranted and appropriate.

If this is just a question about following policy by punching in and out, my direct supervisor has only gone as far as "admonishment" - so I find it unusual that this specific topic has raised to the level of disciplinary action without any progressive discipline occurring first. As I tried to explain during previous meetings, missing a time card punch, in the grand scheme of my duties and responsibilities, falls pretty low since it is easily corrected and as a supervisor, I corrected several timesheets on a daily basis. Dispatchers are not assigned a specific position to themselves, so we often have to wait until the previous dispatcher finishes their duties, gives pass-along information, punches out, logs out and physically moves. Most employees have a dedicated computer they use daily, so our circumstances are unique. I have never heard of anyone getting so much as a counseling form for this if the employee was present and working during the times/dates question - please refer to CSP 2.02.0301(B)(2)(f). I already proved I had prior approval to work beyond my regularly scheduled shift due to protest activities at the Capitol.

Abuse of Authority / Using State Equipment for personal gain

Based on the video evidence Director Davis and I reviewed on September 10, it is clear that my primary focus remained on the protestors that we were asked to keep an eye on. V211 was primarily focused on the group as a whole and specific individuals as needed throughout the night. V64 was left on who I thought may be a member of the State Patrol, but as the video showed - my primary focus was not on that camera since that person walked out of the picture and the camera view remained unchanged for a prolonged period until it was ultimately returned to its home position facing the North Gate entry at the Capitol.

CSP240 "meeting"

CSP240 (Administrative Notification of Allegations) according to policy is given as a notification. Policy 2.02.0302 never refers to this notification as an official meeting. The "CSP240 meeting" was merely a notification by definition and not an official meeting. The subsequent conversation between Communications Supervisor Greenmyer and myself in this case, should fall under the "informal grievance" section of DPA rules since the main topic of the conversation we had was about the Communications Director's actions, attitude toward me and how it appeared Director Davis was retaliating against me for appealing his prior disciplinary decision and potential personal bias. By appearance, it seemed he was viewing my appeal as a personal attack instead

of seeing it as a protected right all members of this agency and employees of the State of Colorado are allowed. The informal grievance section of the DPA rules states these informal grievance interactions should be held as informally as possible. This conversation took place behind a closed door with only the two of us present; therefore, with an expectation of privacy.

Bias

When I asked Director Davis if he would be able to consider this case without bias during the first of two R6-10 meetings regarding this complaint, the response was, "I'll do my best." I believe the answer should have been, "I will be completely unbiased or I will find someone else who is" but that is not the answer that was given.

CDPS 1.06.002 (IV) - "...CDPS is committed to ensuring that all workplace investigations are conducted in a thorough and impartial manner, with a commitment to fairness and accuracy, in compliance with all applicable personnel rules and laws."

I formally request that this complaint be handled by someone other than Director Davis.

68. Complainant's request that the matter be handled by someone other than Director Davis, allegedly because Complainant believed Director Davis was biased against him, was not granted.

69. On October 9, 2020, Director Davis handed Complainant a disciplinary action letter informing Complainant of Director Davis' decision to terminate Complainant's employment, effective immediately.

70. Director Davis' ultimate conclusions, memorialized in his disciplinary letter, were that "the allegations of unprofessional behavior, violations of CDPS and CSP timekeeping policies, failure/neglect to perform your duty, failure to adhere to multiple CSP General Orders, the CSP Core Values, and the CSP Code of Ethics" were established. Director Davis did not sustain allegations of abuse of authority and lying/dishonesty.

71. Director Davis found Complainant's conduct to be flagrant and serious and a violation of many CDPS and CSP policies and orders, such as CDPS Policy 7.1.02.017-Time and Leave Management; General Orders 2, 3, 7, and 8; CSP Policy 1.01.0106-Core Values; and CSP Policy 1.01.0102-Code of Ethics.

72. CDPS Policy 7.1.02.017 – Time and Leave Management and CSP Policy 2.01.0103 – Work Time, Including Overtime and Compensatory Time, govern time-keeping protocols and overtime policy. Director Davis concluded that Complainant violated these policies by not always clocking in and out, and by working overtime without authorization or need.

73. CSP Policy 1.01.0103 – General Order #2 provides, "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." Director Davis concluded that Complainant violated time and leave and overtime policies.

74. CSP Policy 1.01.0103 – General Order #3 provides, “Members will be truthful and complete in their accounts and reports.” Director Davis concluded that Complainant was not truthful and complete in his reports.

75. CSP Policy 1.01.0103 -- General Order #7 provides, “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.” Director Davis concluded that Complainant violated this policy by referring to S.A. as a “crazy bitch,” and acting outside the scope of his duties.

76. CSP Policy 1.01.0103 -- General Order #8 provides, “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.” Director Davis concluded that Complainant violated this policy by endangering himself when he went to investigate whether S.A. was among the demonstrators, and by his surreptitious surveillance, for which he was not authorized or trained.

77. CSP Policy 1.01.0106 – Core Values provides, “**Duty** is the dedication of moral commitment to a mission that involves sacrifice of immediate self-interest for the betterment of public safety in Colorado.” (Emphasis in original.) Director Davis concluded that Complainant violated this policy because his surveillance of the person he believed to be S.A. was conducted for his own self-interest.

78. CSP Policy 1.01.0102 – Code of Ethics provides, “All members will read, sign in PowerDMS, and abide by the State Patrol Code of Ethics.” Director Davis concluded that Complainant violated this policy by failing to obey CSP rules and regulations.

79. Complainant timely appealed the termination of his employment to the Board.

DISCUSSION

A. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause based on constitutionally-specified criteria. Colo. Const. Art. XII, §§ 13-15; §§ 24-50-101, *et seq.* C.R.S.; *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Just cause for disciplining a certified state employee is outlined in Board Rule 6-12, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board’s rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

See also, Department of Corrections v. Stiles, 477 P.3d 709, 715 (Colo. 2020) (“Rule 6-12 outlines what constitutes just cause to discipline a certified state employee”).

Burden of Proof

Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-8.

The Board may reverse or modify Respondent's disciplinary decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.; *Stiles*, 477 P.3d at 717.

I. Complainant Committed the Acts for Which He Was Disciplined

The first question to be determined is whether Complainant committed the acts for which he was disciplined. *Stiles*, 477 P.3d at 717. Respondent disciplined Complainant because of his actions on the night of June 30, 2020 and the early morning of July 1, 2020. Those actions included staying

beyond your scheduled shift without authorization, justification, or providing subsequent required notification to your supervisor, and by doing so, were dishonest about your work timekeeping on these dates. On these same dates you also allegedly stated to your coworker that you were going to have your supervisor, Dan Greenmyer, clock you out at midnight, but you stayed until approximately 0156 hours. On these same dates, you allegedly abused your authority to using ESU Communications Center cameras for your own gain or benefit by surveilling a female in the crowd of protesters, which [sic] you believed to be a current CSP member, S.A., who was involved in a previous secret, intimate, sexual relationship with you when you were her direct supervisor and whom was the victim in a previous investigation by PS that led to your demotion in November 2019.

At hearing, Respondent established by a preponderance of the evidence that Complainant violated CSP timekeeping policies by staying nearly two hours past the scheduled end of his shift for no justifiable reason, and that he used ESU cameras for his own interests in surveilling an individual he believed to be S.A.

Complainant argued that he was justified in staying nearly two hours past the end of his shift because he was implicitly given permission to do so, that the situation that night on the west side of the Capitol constituted an emergency, and that he would have surveilled any CSP member who he saw participating in what he considered an anti-law enforcement demonstration.

Complainant's attempts to justify his actions are unpersuasive.

Complainant was not provided permission to stay after midnight on the night of June 30, 2020. He failed to follow directive of his supervisor, Mr. Greenmyer to inform him if Complainant worked overtime. He consulted with a Denver Communications Center supervisor, who was not in his chain of command, instead of his direct supervisor, Mr. Greenmyer.

Complainant had no reason to focus on the individual in question, even if it was S.A., because that individual bore no indication of any relationship with the CSP, and as such was free to exercise that individual's First Amendment rights of free speech and peaceful protest.

Complainant's emotional reaction to spotting the person he believed to be S.A., witnessed by Ms. Garcia and Trooper Noftsgger, and his actions in twice leaving the power plant to investigate, belie Complainant's assertion that he would have conducted himself in the same manner if he spotted any other member of the CSP at the Capitol protest.

There was no emergency on the west side of the Capitol that night that justified Complainant's working an additional two hours.

In short, Respondent proved by a preponderance of the evidence that Complainant committed the acts for which he was disciplined: staying beyond his scheduled shift without authorization or justification; failing to notify his supervisor that he stayed for an extra two hours; using ESU cameras for his own interests by surveilling a female protestor he believed to be S.A., with whom he had an intimate relationship when he was her supervisor, and who was the victim of Complainant's actions that resulted in Complainant's demotion in November 2019.

II. Respondent's Decision to Terminate Complainant's Employment was Not Arbitrary, Capricious, or Contrary to Rule or Law

The second question to be determined is whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law. *Stiles*, 477 P.3d at 718 ("if the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's disciplinary action in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule of law").

A. Arbitrary and Capricious

In determining whether an agency's decision is arbitrary or capricious, the ALJ 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 after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Stiles*, 477 P.3d at 718; *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

1. Reasonable Diligence and Care in Procuring Evidence

Complainant's appointing authority, Director Davis, used reasonable diligence and care to obtain the evidence he was authorized to consider in determining whether, and what, discipline should be imposed on Complainant. He carefully reviewed Sgt. Barba's investigation report, conducted follow-up interviews with Ms. Garcia, Mr. Greenmyer, and Trooper Noftsgger, to fill in any gaps he perceived in the evidence included in the investigation report, he conducted two Rule 6-10 meetings with Complainant and considered additional information Complainant provided, he reviewed Complainant's personnel file, and he reviewed video of the night in question.

2. Candid and Honest Consideration of the Evidence

In discussing this prong of the arbitrary and capricious standard, the Colorado Supreme Court in *Stiles* explained:

The second *Lawley* prong focuses on whether the appointing authority “candid[ly] and honest[ly] considered the evidence.” *Id.* (quoting *Van De Vegt*, 55 P.2d at 705). This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence, including the evidence related to the factors that an appointing authority must consider under Rule 6-9 in exercising its discretion on disciplinary matters.

Stiles, 477 P.3d at 719.

Complainant alleges that Director Davis’ disciplinary decision was tainted by bias. More specifically, Complainant contends that Director Davis was biased against him as evidenced by Director Davis’ decision to demote Complainant in November 2019. Complainant also contends that Ms. Garcia was biased against him as evidenced by her voluntary demotion and transfer away from the Denver Communications Center to ESU.

Complainant’s attempts to establish that Ms. Garcia, who made the initial report of Complainant’s inappropriate conduct on the night of June 30, 2020, was biased against him, and that Director Davis was biased against him, thus leading to bogus complaints about his conduct, are unavailing.

Trooper Noftsfer was not accused of bias, and what he observed of Complainant’s behavior confirms Ms. Garcia’s report and the video evidence admitted at the hearing. Ms. Garcia was credible when she testified that, although she had problems with Complainant while at the Denver Communications Center, she found Complainant to be pleasant and easy to work with at the ESU. Director Davis’ thorough and careful review of all the material he obtained relating to this matter is indicative of a commitment to get to the right decision, and is not the result of a biased review.

Respondent proved by a preponderance of the evidence that Director Davis candidly and honestly reviewed the relevant evidence in this matter.

3. Reasonable Persons Compelled to Reach Contrary Conclusions?

The Colorado Supreme Court’s *Stiles* opinion addressed the third prong of the arbitrary and capricious test as follows:

The third prong of *Lawley*’s arbitrary or capricious test assesses the appointing authority’s weighing of the evidence and the reasonableness of the appointing authority’s disciplinary action. ... But that inquiry doesn’t simply ask whether the disciplinary action was reasonable. It asks whether “reasonable [people] fairly and honestly considering the evidence must reach contrary conclusions” regarding the propriety of the disciplinary action. *Id.* at 1252 (quoting *Van De Vegt*, 55 P.2d at 705).

Stiles, 477 P.3d at 720.

With the evidence Director Davis collected and carefully considered, given the totality of circumstances, and the conclusions Director Davis arrived at upon which Director Davis’ termination of Complainant’s employment was based, reasonable people fairly and honestly considering the evidence would *not* be compelled to reach contrary conclusions.

B. Contrary to Rule or Law

Complainant argued that the termination of his employment was too severe a disciplinary action, and that Respondent's decision was retaliatory in violation of the Whistleblower Act and CADA. These allegations invoke several Board Rules.

1. Board Rule 6-2

Board Rule 6-2 provides that “[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper.” The purpose of this rule is to require that an employee be warned and corrected about improper conduct before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary action.

In and of itself, considered in a vacuum, Complainant's actions on the night of June 29, 2020, and the early morning of June 30, 2020, might not warrant the termination of his employment. However, Complainant had recently been demoted for his harassment of S.A., and Complainant's conduct at issue here, when viewed in context, displays a continued inability to function appropriately as a member of the CSP when dealing with anything related to, or believed to be related to, S.A. Complainant had already been disciplined for inappropriate conduct concerning S.A. Complainant's behavior on the night of June 30 demonstrates that Respondent disciplining Complainant for inappropriate conduct concerning S.A. failed to remedy the situation. Accordingly, principles of progressive discipline warrant Respondent's decision to terminate Complainant's employment.

2. Board Rule 6-9

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. Board Rule 6-9 provides that “[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.”

Respondent established by a preponderance of the evidence that Director Davis carefully considered each of the Board Rule 6-9 factors in making his disciplinary decision. He concluded that the nature of Complainant's misconduct was “egregious,” it was very serious, and the effect was to demonstrate Complainant's unprofessionalism regarding S.A. Complainant manifested the same type of unprofessionalism with respect to S.A. the year before, and despite being disciplined by demotion, he repeated the misconduct. Director Davis acknowledged Complainant's superior job performance, but Director Davis found Complainant's attempts to justify his actions and cast others as biased – Complainant's mitigating information – to be unpersuasive and disingenuous.

3. Board Rule 6-12

As noted above, just cause for disciplining a certified state employee is outlined in Board Rule 6-12. Director Davis' conclusions concerning Complainant's conduct establish that such conduct falls within the parameters of Rule 6-12 behavior justifying discipline. In this incident,

Complainant failed to comply with standards of efficient service or competence, and willfully violated several policies and rules of the CDPS and the CSP.

Complainant's allegations that Respondent's decision to terminate his employment was contrary to law – specifically, the Whistleblower Act and CADA – are discussed immediately below.

III. Respondent Did Not Violate the Whistleblower Act

Complainant alleges that Respondent violated the Whistleblower Act. Complainant alleged that his “disclosures” protected by the Whistleblower Act consisted of allegations that Director Davis was biased against him.

In order to show that his disclosures fall within the protection of the Whistleblower Act, Complainant must establish that he made a “disclosure of information,” as that term is defined in § 24-50.5-102(2), C.R.S., and applicable case law. The Whistleblower Act defines “disclosure of information” as “the written provision of evidence to any person ... regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” § 24-50.5-102(2), C.R.S. “[D]isclosures that do not concern matters in the public interest, or are not of ‘public concern’, do not invoke this statute.” *Ferrel v. Colo. Dep’t of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). “In deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.” *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996).

Complainant's allegations of bias against him do not constitute disclosures of public concern. They involve only him, and do not address “any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” § 24-50.5-102(2), C.R.S. Complainant's allegations are personal in nature, not a public concern. Accordingly, Complainant failed to establish that Respondent violated the Whistleblower Act.

IV. Respondent Did Not Retaliate Against Complainant in Violation of CADA

Under CADA, it is a “discriminatory or unfair employment practice ... [f]or any person, whether or not an employer ... [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article.” § 24-34-402(1)(e)(IV), C.R.S. The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964.

Here, on August 31, 2020, and on September 17, 2020, Complainant requested that Director Davis not handle this matter because of Complainant's perception that Director Davis was not unbiased.

Three weeks later, Director Davis terminated Complainant's employment.

Complainant's retaliation in violation of CADA claim fails because Complainant offered no evidence that Complainant opposed any action made unlawful by CADA. Nowhere does

Complainant tie his allegation of bias against Director Davis to Complainant's membership in a protected class. Complainant fails to establish the first prong of a *prima facie* case of retaliation in violation of CADA. Therefore, Complainant's claim is unsubstantiated.

V. Respondent Did Not Discriminate Against Complainant on the Basis of Race

Prior to the hearing of this matter, Complainant claimed that Respondent discriminated against him on the basis of his race, Asian. Section 24-50-125.3, C.R.S., confers jurisdiction on the Board to consider discrimination claims in the state personnel system.

At hearing, Complainant stated that he believed the Respondent's decision to terminate his employment was based on racial bias. However, Complainant admitted he could provide no facts to support that belief. A complainant must present evidence of discrimination, other than a mere "belief" that discrimination occurred. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). Accordingly, this claim is denied and dismissed.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's decision to terminate Complainant's employment was not arbitrary, capricious, or contrary to rule or law.
3. Respondent did not violate the Colorado State Employee Protection Act.
4. Respondent did not retaliate against Complainant in violation of the Colorado Anti-Discrimination Act.
5. Respondent did not discriminate against Complainant on the basis of race in violation of the Colorado Anti-Discrimination Act.

ORDER

Complainant's appeal is **dismissed** with prejudice.

Dated this 6th day
of July 2021,
at Denver, Colorado

/s/ [REDACTED] _____
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of July 2021, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Gu Kim

[REDACTED]

Vincent E. Morscher, Esq.
Jack D. Patten, III, Esq.
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Jack.Patten@coag.gov

[REDACTED]

APPENDIX A: Exhibits stipulated to or admitted at hearing

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 8, 9, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36

Complainant's Exhibits: None

APPENDIX B: Witnesses who testified at hearing

Randy Noftsger

Daniel Greenmyer

Ryan Barba

Cori Garcia

Jeff Davis

Gu Kim

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 Rule 8-63, 4 CCR 801.

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 8-67, 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 of receipt of the decision. 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.

The parties may file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at Board Rule 8-6(C).