

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JHAMELE ROBINSON,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH SERVICES,
Respondent.

Administrative Law Judge (“ALJ”) McCabe held the evidentiary hearing on May 1, 2023. The record closed on May 1, 2023. The ALJ conducted the hearing remotely through Google Meet. Jhamele Robinson (“Complainant”) appeared for the hearing on his own behalf. Kerry Ferrell, Esq., and Jack Patten, Esq., represented the Department of Human Services, Division of Youth Services (“Respondent”). Jill Sherepita, Complainant’s Appointing Authority, appeared as Respondent’s advisory witness.

A list of exhibits offered and admitted into evidence, and a list of witnesses who testified, are attached in an Appendix.

MATTER APPEALED

Complainant, a certified state employee, appeals Respondent’s disciplinary demotion of Complainant. Complainant’s prehearing statement argues he did not commit the acts that resulted in discipline and the discipline administered was not reasonable. Complainant requests Respondent return Complainant to Complainant’s pre-discipline position.

Respondent argues Complainant committed the acts for which it disciplined Complainant, and that its decision was not arbitrary, capricious, or contrary to rule or law. Respondent requests its decision to disciplinarily demote Complainant be upheld.

For the reasons discussed below, Respondent’s decision to disciplinarily demote Complainant is **AFFIRMED**.

ISSUES

1. Did Complainant commit the acts for which Respondent disciplined Complainant?
2. Was Respondent’s decision to disciplinarily demote Complainant arbitrary, capricious, or contrary to rule or law?

FINDINGS OF FACT

BACKGROUND

1. Complainant was a Correctional Youth Security Officer (“CYSO”) III at the Department of Human Services, Betty K. Marler Youth Services Center, from March 16, 2019 to February 11, 2023. (Stipulated).
2. CYSO III is a supervisory position.
3. Complainant supervised the Front-End Overnights Team. Respondent also had a Day Team.
4. Taylor Lemuz is the Director of the Betty K. Marler Youth Services Center.
5. Jill Sherepita is the Assistant Director of the Betty K. Marler Youth Services Center.
6. At all times relevant to this matter, Assistant Director Sherepita was Complainant’s appointing authority. (Stipulated).
7. Assistant Director Sherepita was Complainant’s supervisor for approximately 9 months.
8. A “Supervision” is a time when a supervisor sits down one-on-one with a staff member to touch base. The supervisor and staff member might discuss any performance concerns, what is going on in the facility, if the staff member needs support, training opportunities, or goals of the staff member. It is best practice, but not a requirement, to have a Supervision with each staff member once per month.¹
9. Assistant Director Sherepita had three documented Supervisions with Complainant while she was Complainant’s supervisor.
10. A “Crucial Conversation” is a conversation with staff about performance concerns or implemented policies.²
11. Respondent has a Professional Conduct Policy, Division of Youth Services (“DYS”) Policy 3.30. The policy sets forth expectations for employees, including: “All Division of Youth Services employees are expected to conduct their duties with the highest standards of integrity and professionalism...”. The policy also sets forth the expectation that “[e]mployees shall role model behaviors that are expected from youth as defined by the Division of Youth Services’ behavior expectations, demonstrating self-control and self-discipline.”
12. Respondent has an Employee Code of Conduct. The Employee Code of Conduct requires employees to “[s]erve as a positive role model to others.” It also requires employees to “[a]ccept responsibility for their own work, behavior, and actions.”

¹ Supervisions appear to be a practice of Respondent. Supervisions are not included in the Board Rules.

² Crucial Conversations appear to be a practice of Respondent. Crucial Conversations are not included in the Board Rules.

COMPLAINANT'S PERFORMANCE HISTORY

13. On March 10, 2020, Complainant received a Confirming Memorandum regarding DYS policies 11.1 and 11.3. (Stipulated).
14. Respondent issued the March 2020 Confirming Memorandum to multiple CYSO IIIs following a sanitation and risk assessment that revealed violations in Complainant's work unit.
15. On December 21, 2021, Complainant received a Corrective Action regarding the duty to self-report initial contact with Law Enforcement. (Stipulated).
16. Complainant received overall level 2 (successful) performance ratings in the 2019-20, 2020-21, and 2021-22 Performance Years.
17. During his time as a CYSO III, Complainant demonstrated the ability to successfully perform his job duties. Complainant modified his schedule to attend trainings and led his team during his time as a CYSO III.

CORRECTIVE ACTION AND INCIDENTS LEADING TO DISCIPLINE

18. On December 1, 2022, Assistant Director Sherepita issued Complainant a Corrective Action ("2022 Corrective Action") regarding violations of the DHS Employee Code of Conduct and DYS Policy 3.30 – Professional Conduct. (Stipulated).
19. Assistant Director Sherepita issued the 2022 Corrective Action to Complainant in person. Director Lemuz was also present.
20. The 2022 Corrective Action required Complainant to communicate truthfully and appropriately with co-workers, directing concerns to Assistant Director Sherepita or Complainant's direct supervisor.
21. The 2022 Corrective Action required Complainant to schedule a team training with the Front-End Overnights Team as well as the Day Team to address the negative impact that malicious gossip has on workplace culture and DYS Policy 3.30 no later than December 15, 2022. (Stipulated).
22. The 2022 Corrective Action further required Complainant to review and sign DYS Policy 3.30 and send an email to Assistant Director Sherepita to confirm Complainant reviewed and understood DYS Policy 3.30 no later than December 15, 2022. (Stipulated).
23. These three requirements constitute the "Corrective Action Plan" for the 2022 Correction Action.
24. During the meeting, Complainant was upset about the 2022 Corrective Action. At the end of the meeting, Complainant said, "where do I sign, I don't care about this." Assistant Director Sherepita then informed Complainant that Assistant Director Sherepita did not need Complainant's signature and that the copy of the 2022 Corrective Action was Complainant's to keep. Assistant Director Sherepita then asked Complainant if Complainant wanted to have a Supervision. Complainant said no and left the room.

25. Shortly after the meeting, Assistant Director Sherepita documented the meeting in an email. Assistant Director Sherepita noted concerns about Complainant's behavior during the meeting. Assistant Director Sherepita did not note anything related to a grievance.
26. Following receipt of the 2022 Corrective Action, Complainant had a discussion with the Front-End Overnights Team staff about gossip and rumors.³ The conversation was not a formal training, and Complainant did not use sign-in sheets to document attendance.
27. On December 12, 2022, Assistant Director Sherepita sent Complainant an email reminding Complainant that his Corrective Action Plan tasks were due. Assistant Director Sherepita wrote, "I just wanted to reach out and remind you that you have assigned action plans from our meeting on December 1, 2022 that are due on December 15, 2022. Please let me know if you need help or have questions."
28. On December 14, 2022, Complainant replied and informed Assistant Director Sherepita he would like help with the process of grieving the 2022 Corrective Action. Complainant asserted that during the December 1, 2022, he mentioned that he wanted to appeal the 2022 Corrective Action, and that it had "false documentation" against him.
29. On December 14, Assistant Director Sherepita replied to Complainant, and copied Sean Morrow, Respondent's Employee and Labor Relations Specialist:

During our initial meeting for the corrective action, it was not mentioned that you would like to grieve the corrective action. Per the guidelines in the corrective action...you have 10 days to file a grievance with your supervisor or chain of command. That deadline was on December 10, 2022. I reached out to our HR representative today (December 14), for further guidance and we can hear your concerns if you would like, however I want to reiterate that it is not a grievance. With that being said, you are still held to the timelines within the corrective action and your action items are to be completed by close of business on December 15, 2022.

I have included HR (Sean Morrow) in this email as well if you would like further clarification from them.

Please reach out if you have any questions.

30. On the same date, Complainant replied, and provided, in part, "I asked to appeal this corrective action in my initial meeting...I was not comfortable going to Jill or Taylor with the grievance as they were the ones doing the meeting." Complainant asked for clarification on the grievance process.
31. On the same date, Labor Relations Specialist Morrow emailed Complainant regarding the grievance process.
32. Complainant did not schedule or hold the required training with the Day Team on or before December 15, 2022. (Stipulated).

³ The parties did not provide information establishing the date of the conversation, or detailed information about the content of the discussion. Complainant admitted during the evidentiary hearing that the conversation did not constitute a training.

33. Complainant did not schedule or hold the required training with the Front-End Overnights Team on or before December 15, 2022.
34. Complainant failed to send the required email to Assistant Director Sherepita on or before December 15, 2022. (Stipulated).
35. Complainant failed to complete the Corrective Action Plan as required.
36. Assistant Director Sherepita reviewed her email to see if Complainant sent confirmation of the completed Corrective Action Plan tasks. Complainant did not.

BOARD RULE 6-10 MEETING

37. On December 16, 2022, Assistant Director Sherepita sent a Notice of Rule 6-10 Meeting for failure to adhere to the Corrective Action to Complainant, scheduling the meeting for January 5, 2023. (Stipulated).
38. The December 16, 2022, Notice of Rule 6-10 Meeting communication complied with all applicable items required under Board Rule 6-9. (Stipulated).
39. On December 30, 2022, Complainant sent an email to Assistant Director Sherepita. Complainant asked her to “recant” the Rule 6-10 Meeting, and said he would go forward with the signing of the documents required by the 2022 Corrective Action.
40. Assistant Director Sherepita declined to “recant” the Rule 6-10 Meeting.
41. The Rule 6-10 Meeting was held January 5, 2023, with Complainant, Assistant Director Sherepita, and Labor Relations Specialist Morrow present. (Stipulated).
42. Assistant Director Sherepita conducted the meeting virtually at Complainant’s request.
43. During the Rule 6-10 Meeting, Assistant Director Sherepita asked Complainant, “Can you please explain why you did not complete the assigned action plans that were given to you on December 21st, 2022?”⁴
44. Complainant responded:

Well, I wanted to go forth with the grievance, but I didn't do my due diligence in getting that grievance in on time or going to the appropriate parties on time. Because I just felt like I was attaching my name to something that was not true, and I just didn't do my due diligence in getting that grievance on time.

So when the time did run out, I was trying to get some kind of grievance or something filed, but it was apparently too late, of course.

45. During the Rule 6-10 Meeting, Complainant informed Assistant Director Sherepita he had a discussion with his staff regarding spreading rumors and getting kids up on time. Complainant

⁴ This is the date as it appears in the transcript of the Rule 6-10 Meeting. The meeting Assistant Director Sherepita is referencing occurred on December 1, 2022, not December 21, 2022.

explained he did not have a training sign-in sheet for the discussion. Complainant informed Assistant Director Sherepita he did not meet with the Day Team. Complainant was unsure of the date of the discussion, but guessed at possible days the discussion may have occurred. Complainant was not at work on the days he guessed the discussion might have occurred.

46. After the Rule 6-10 Meeting, Assistant Director Sherepita asked three employees on Complainant's Front-End Overnights Team questions about if they had recently received any training. The three employees informed Assistant Director Sherepita they had not recently received any training.
47. Complainant was given the opportunity to provide additional oral or written information in the seven days following the Rule 6-10 Meeting. (Stipulated).
48. Complainant provided no additional information in the seven days following the Rule 6-10 Meeting. (Stipulated).

DISCIPLINARY ACTION

49. On January 27, 2023, Assistant Director Sherepita issued a Disciplinary Action to Complainant, demoting Complainant to CYSO II effective February 11, 2023. (Stipulated).
50. The demotion included a reduction in pay from \$5,835 to \$4,729 per month.
51. Per the Disciplinary Action, Assistant Director Sherepita concluded that Complainant "failed to complete [his] action plans from the corrective action." Particularly, meeting with Complainant's "...team (Front End Overnights) and the day team to conduct a training around the CDHS Employee Code of Conduct, Division of Youth Services (DYS) Policy 3.30, and the negative implications that gossip has on a facility's culture."
52. Per the Disciplinary Action, Assistant Director Sherepita concluded that Complainant's actions violated "DYS Policy 3.30 Professional Conduct" and the "Employee Code of Conduct." Assistant Director Sherepita further concluded Complainant's Actions constituted "willful misconduct, and a failure to comply with the Board Rules, Director's Procedures, department's rules and policies, state universal policies, and other departmental directives as set forth in Board Rule 6-12B2 and 6-12B3."
53. Assistant Director Sherepita explained in the Disciplinary Action, "In making this decision, I considered the factors in Board Rule 6-11...". Assistant Director Sherepita listed each of the factors set forth in Board Rule 6-11(A)(1-6) in the Disciplinary Action. The Disciplinary Action explained Assistant Director Sherepita's considerations for the factors in Board Rule 6-11(A)(1-5).
54. As to Board Rule 6-11(A)(1), Assistant Director Sherepita considered the potential harm to the employee and youth community because of Complainant's actions. Assistant Director Sherepita concluded that Complainant's willful failure to complete the Corrective Action Plan, created an environment where staff does not have to follow the directive of a supervisor and could result in an unsafe environment for staff and youth.
55. As to Board Rule 6-11(A)(2), Assistant Director Sherepita considered the Confirming Memorandum, the December 2021 Corrective Action, Complainant's Performance Reviews, Supervisions she had with Complainant, and the 2022 Corrective Action. Assistant Director

Sherepita believed Complainant was unable to accept feedback provided to him and to have Crucial Conversations with subordinate employees. Assistant Director Sherepita also considered Complainant to have an ongoing issue with policy compliance.

56. As to Board Rule 6-11(A)(3), Assistant Director considered the period of time since Complainant's prior unsatisfactory performance or conduct, which was the 2022 Corrective Action.
57. As to Board Rule 6-11(A)(4), Assistant Director Sherepita considered that Complainant received a 2.0 for core competencies, a 2.0 for goals, and 1.0 for position description on Complainant's 2021-2022 Performance Evaluation.
58. As to Board Rule 6-11(A)(5), Assistant Director Sherepita considered that Complainant presented as mitigation that Complainant completed the training⁵ required by the Corrective Action Plan. Assistant Director Sherepita, however, concluded the training did not occur as there was no sign-in sheet to document the training, the team members she questioned did not confirm there was a training, and Complainant was not at work on the dates Complainant stated the training might have occurred.
59. As to Board Rule 6-11(A)(6), Assistant Director Sherepita found that Complainant failed to take responsibility for his actions.
60. Assistant Director Sherepita decided to demote Complainant because Complainant was in a CYSO III position where he needed to demonstrate a high level of integrity and act as a role model for lower level positions. Assistant Director Sherepita felt that Complainant's lack of responsibility and inability to demonstrate the highest levels of integrity and act as a role model made Complainant unfit to be in the CYSO III position. Assistant Director Sherepita demoted Complainant to CYSO II rather than a CYSO I, because she believed Complainant exhibited some leadership and mentorship ability and that Complainant could develop into a CYSO III.
61. Assistant Director Sherepita did not issue the lesser action because Complainant failed to comply with the Corrective Action Plan from the 2022 Corrective Action and Complainant had previously received another Corrective Action.
62. On February 4, 2023, Complainant timely appealed Respondent's disciplinary demotion of Complainant.

ANALYSIS

A. BURDEN OF PROOF.

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." Colo. Const. Art. XII, § 13(8). "Once an employee acquires this right by being certified, the employee may be discharged only for just cause based on constitutionally specified criteria." *Dep't of Insts. v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

⁵ In the Rule 6-10 Meeting, Complainant stated that he had a discussion with the Front-End Overnights Team. In the Disciplinary Action, Assistant Director Sherepita used the word "training" to describe what Complainant called a "discussion" in the Rule 6-10 Meeting.

Section 13(8) lists the following specific criteria upon which discipline may be based:

A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of 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.

Colo. Const. Art. XII, § 13(8).

Board Rule 6-12(B) includes the following as bases for discipline: “1. Failure to perform competently; 2. Willful misconduct; 3. Failure to comply with the Board Rules, Director’s Procedures, department’s rules and policies, state universal policies, or other departmental directives...”.

In this *de novo* disciplinary proceeding, Respondent had the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred. *Kinchen*, 886 P.2d at 706-09. “[A]n appointing authority must establish a constitutionally authorized ground in order to discharge...an employee.” *Id.* at 707. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because “the appointing authority is the party attempting to overcome the presumption of satisfactory service and to discipline the employee.” *Id.* at 708.

The Colorado Supreme Court clarified the two-part inquiry required in an ALJ’s review of a disciplinary action:

[I]n reviewing an appointing authority’s disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; and, if it did, (2) whether the appointing authority’s disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

Dep’t of Corr. v. Stiles, 477 P.3d 709, 717 (Colo. 2021). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the appointing authority establishes that the conduct on which the discipline is based occurred:

[I]f 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 or law.

Id. at 718. See also § 24-50-103(6), C.R.S.

B. REVIEW OF THE 2022 CORRECTIVE ACTION AND GRIEVANCE.

Much of Complainant’s argument against the disciplinary decision during the evidentiary hearing, in Complainant’s Prehearing Statement, and Complainant’s Consolidated Appeal and

Dispute Form was that he attempted to grieve the 2022 Corrective Action. However, the Board does not have jurisdiction to review the merits of the 2022 Corrective Action.

First, Complainant did not timely appeal the 2022 Corrective Action and did not timely request Board review of Respondent's notification it would not review Complainant's grievance. Pursuant to Board Rule 8-7(A), an appeal is timely if it is postmarked or received within 10 days after receipt of the written notice of action. As of the date of the hearing, more than 10 days after issuance of the 2022 Corrective Action and Respondent's notice to Complainant it would not review Complainant's grievance,⁶ Complainant had not filed an appeal of the 2022 Corrective Action or denial of the grievance process with the Board. The Board does not have jurisdiction to review an action that is not timely appealed. See also *State Pers. Bd. v. Gigax*, 659 P.2d 693, 694 (Colo. 1983) ("The ten-day limitation set forth in section 24-50-125(3), C.R.S. 1973 is mandatory. Filing of a petition for appeal with the Board or a request for an extension of time in which to file an appeal within the ten-day period is a condition precedent to further action.").

Second, even if Complainant had timely appealed the 2022 Corrective Action or denial of the grievance process, the Board would have limited jurisdiction to review, as neither is an action that results in an automatic hearing before the Board. See Board Rule 8-16.

As discussed below, Complainant's disagreement with the 2022 Corrective Action and his asserted attempt to grieve the 2022 Corrective Action do not demonstrate by a preponderance of the evidence that Complainant did not engage in the misconduct for which he was disciplined or that Respondent's disciplinary decision was arbitrary, capricious, or contrary to rule or law.

C. COMPLAINANT ENGAGED IN THE MISCONDUCT FOR WHICH HE WAS DISCIPLINED.

Assistant Director Sherepita disciplined Complainant for failing to complete the Corrective Action Plan from the 2022 Corrective Action. Complainant admitted during the evidentiary hearing that he did not complete the Corrective Action Plan. Complainant's failure to timely complete the Corrective Action Plan was willful misconduct. The conduct was willful, because as discussed below, Assistant Director Sherepita reminded Complainant twice of his obligation to complete the Corrective Action Plan prior to the date it needed to be completed. Complainant's Conduct also violated DYS Policy 3.30 and the Employee Code of Conduct that required Complainant to act as a role model. Complainant's failure to complete an assigned task, the Corrective Action Plan, does not role model acceptable behavior.

As discussed above, Complainant argued he filed a grievance of the 2022 Corrective Action. Even if Complainant had demonstrated by a preponderance of the evidence that he initiated the grievance, nothing in the Board Rules suspends an obligation to complete a Corrective Action Plan during a grievance process. See Board Rule 6-9 and Board Rule 8-13. Finally, and more importantly to a finding of willful misconduct, Assistant Director Sherepita

⁶ The contemporaneous documentation supports that no grievance was filed at the 2022 Corrective Action meeting, including Assistant Director Sherepita's summary email that did not include anything related to a grievance, Complainant's written statement he did not feel comfortable addressing the grievance with Assistant Director Sherepita or Director Lemuz, and Complainant's statements during the Rule 6-10 Meeting that he had not done his diligence in filing a grievance. Complainant did not demonstrate by a preponderance of the evidence that he initiated a grievance during the December 1, 2022, Corrective Action meeting. Therefore, it appears Complainant did not timely initiate the grievance process with Respondent and Respondent properly declined to review Complainant's grievance.

informed Complainant there was no pending grievance and that the Corrective Action Plan was due with enough time for Complainant to complete it. Despite these clear instructions, Complainant failed to complete the Corrective Action Plan. Therefore, the preponderance of the evidence establishes that Complainant engaged in the misconduct for which he was disciplined.

D. RESPONDENT'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

After determining a person has committed the act for which they were disciplined, the second question to be determined is whether the decision to discipline Complainant was arbitrary, capricious, or contrary to rule or law. 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. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

1. Assistant Director Sherepita used reasonable diligence and care to procure evidence.

As to the first *Lawley* factor, Respondent established by a preponderance of the evidence that Assistant Director Sherepita used reasonable diligence and care to procure evidence related to Complainant's misconduct. Assistant Director Sherepita took steps to confirm Complainant did not comply with the Corrective Action Plan. Those steps included reviewing her email to see if Complainant sent the required emails to confirm completion of the Corrective Action Plan, and speaking with team members to see if Complainant had conducted the required training. Assistant Director Sherepita also conducted a Rule 6-10 Meeting as required, and gave Complainant an opportunity to provide additional information following the meeting. Therefore, Assistant Director Sherepita used reasonable diligence and care to procure evidence.

2. Assistant Director Sherepita gave candid and honest consideration to the evidence.

As to the second *Lawley* factor, Respondent established Assistant Director Sherepita gave candid and honest consideration to the evidence. "This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence..." including the factors set forth in Board Rule.⁷ *Stiles* 477 P.3d at 719. Board Rule 6-11 (A)(1-6) lists the following factors to be considered by the appointing authority:

1. The nature, extent, seriousness, and effect of the performance issues or conduct;
2. Type and frequency of prior unsatisfactory performance or conduct (including any prior performance improvement plans, corrective actions or disciplinary actions);
3. The period of time since any prior unsatisfactory performance or conduct;
4. Prior performance evaluations;

⁷ *Stiles* references Board Rule 6-9, which was amended. Language similar to the old Board Rule 6-9 is now included in Board Rule 6-11.

5. Mitigating circumstances; and
6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.

It is evident from Assistant Director Sherepita's testimony, as well as the analysis and discussion in the Disciplinary Action that Assistant Director Sherepita considered the evidence before her and the factors set forth in Board Rule 6-11 in good faith. The Disciplinary Action demonstrates that Assistant Director Sherepita considered each of the factors set forth in Board Rule 6-11. Respondent proved by a preponderance of the evidence that Assistant Director Sherepita candidly and honestly considered the relevant evidence in this matter.

In the Rule 6-10 Meeting, Complainant explained his failure to complete the Corrective Action Plan was based upon his disagreement with the 2022 Corrective Action and his desire to file a grievance. Fair and honest consideration of that information is not mitigating, because Assistant Director Sherepita told Complainant in advance of the Corrective Action Plan's due date that he had not filed a grievance and he was required to comply with the Corrective Action Plan.

Complainant presented evidence that during his time as a CYSO III, he complied with administrative directives, adjusted his schedule to attend trainings, and performed satisfactorily as a CYSO III during multiple evaluation periods. Complainant's satisfactory performance does not establish a lack of fair and honest consideration of the evidence by Assistant Director Sherepita, because the preponderance of the evidence establishes Complainant demonstrated unsatisfactory performance through Complainant's willful failure to timely complete the Corrective Action Plan. Assistant Director Sherepita did not administer discipline without prior corrective action, as Complainant had received the 2022 Corrective Action, and another Corrective Action in December 2021, before Respondent took disciplinary action against Complainant.

Complainant offered to comply with the Corrective Action Plan after Assistant Director Sherepita initiated the Rule 6-10 process. Complainant also requested an opportunity to comply during the Rule 6-10 Meeting. Complainant's willingness to comply with the Corrective Action Plan after the initiation of the Rule 6-10 process does not mitigate his willful failure to timely complete the Corrective Action Plan.

3. *Assistant Director Sherepita did not exercise her discretion in such a manner that reasonable persons, after fair and honest consideration of the evidence, must reach a contrary conclusion.*

As to the third *Lawley* factor, the evidence in the record does not support that reasonable persons, after fair and honest consideration of the evidence, must reach a contrary conclusion to that of Assistant Director Sherepita.

Assistant Director Sherepita gave Complainant the 2022 Corrective Action with a Corrective Action Plan. Assistant Director Sherepita even reminded Complainant that he needed to complete the Corrective Action Plan approximately three days, and the day, before it needed to be completed. Complainant did not complete the Corrective Action Plan. It is worthy of note that the steps to complete the Corrective Action Plan were straightforward – schedule training and review policy/confirm review by email. Despite Complainant's successful performance evaluations, Complainant previously received a Confirming Memorandum and two Corrective Actions. Further, Complainant's conduct reasonably caused Assistant Director Sherepita concern for his ability to supervise others, making demotion from a supervisory position a reasonable action.

Complainant argued that Assistant Director Sherepita's discipline was harsh. Indeed, a demotion with a significant reduction in pay is a substantial action. The standard set forth under the third prong of *Lawley*, however, is that a different conclusion *must* be reached after fair and honest consideration of the evidence. Although demotion is a substantial action, Assistant Director Sherepita fairly and honestly considered the evidence and decided demotion was an appropriate action. The Board must give deference to that decision. *See Stiles* 477 P.3d at 714. The preponderance of the evidence does not support that reasonable persons fairly and honestly considering the evidence *must* reach contrary conclusions.

4. *Assistant Director Sherepita's decision was not contrary to rule or law.*

Finally, Respondent established that Assistant Director Sherepita's decision was not contrary to rule or law. The parties stipulated that the Notice of the Rule 6-10 Meeting complied with the requirements set forth in Board Rule 6-9. Respondent had cause to discipline Complainant under Board Rule 6-12 and the Colorado Constitution as Complainant engaged in willful misconduct. Complainant failed to identify any rule or law to which Assistant Director Sherepita's decision was contrary.

Therefore, Respondent proved by a preponderance of the evidence that Assistant Director Sherepita's disciplinary decision was not contrary to rule or law.

CONCLUSIONS OF LAW

1. Complainant committed the misconduct for which Respondent disciplined Complainant.
2. Respondent's decision was not arbitrary, capricious, or contrary to rule or law.

ORDER

1. Respondent's disciplinary decision is **AFFIRMED**.

Dated this 7th day, of
June, 2023, at,
Denver, Colorado.

/s/ [REDACTED]

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of **June, 2023**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Jhamele Robinson

[REDACTED]

Kerry Ferrell, Esq.

Kerry.Ferrell@coag.gov

Jack Patten

Jack.Patten@coag.gov

[REDACTED]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated: A, D-G, I, J, L, and N-P. The following exhibits were stipulated as to authenticity and admitted: B, C, H, and M.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated: 1 – 13.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Jill Sherepita

Taylor Lemuz

Stacy Crump

Jhamele Robinson

Marcus Coleman

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).