

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2024B019**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

OSCAR QUINONES-COLON,
Complainant,

v.

BOARD OF DIRECTORS FOR AURARIA HIGHER EDUCATION CENTER, FACILITIES SERVICES,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing via web conference on January 17-18, 2024. The record was closed at the conclusion of the hearing on January 18, 2024.

Throughout the hearing, Complainant appeared in person and through his attorney, Mark A. Schwane, Esq. Respondent appeared through its attorneys, Assistant Attorneys General Monica Manning, Esq.; Dayna Zolle Hauser, Esq., and Stephen J. Woolsey, Esq. Respondent's advisory witness was Taylor Lewis, Respondent's Director of Facilities.

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

MATTER APPEALED

Complainant, a certified employee, appeals Respondent's imposition of a one-week disciplinary suspension without pay. Complainant argues that he did not commit the acts for which he was disciplined, and Respondent's disciplinary action was arbitrary, capricious, and contrary to rule or law. Respondent argues that Complainant committed the acts for which he was disciplined, and its disciplinary action was not arbitrary, capricious, or contrary to rule or law.

For the reasons discussed below, Respondent's decision to impose a one-week disciplinary suspension without pay on Complainant is **affirmed**.

ISSUES TO BE DETERMINED

- 1.) Did Complainant commit the acts for which he was disciplined?

- 2.) Was Respondent's disciplinary action arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?
- 3.) Is Complainant entitled to attorney fees?

FINDINGS OF FACT

Background

1. Complainant Oscar Quinones-Colon ("Complainant") began employment with Respondent Auraria Higher Education Center ("Respondent" or "AHEC") on February 21, 2022. (Stipulated)
2. Complainant is a black heterosexual man with conservative Christian values.
3. Complainant is classified as a Pipe Mechanical Trades II working in the Facilities Services unit of Respondent. (Stipulated)
4. The Facilities Services unit is responsible for preventative and corrective maintenance throughout the AHEC campus.
5. The Facilities Services unit is located in two buildings on campus. One building, known as the Facilities Annex, houses grounds and vehicle maintenance crews. A second building houses the trades divisions, including structural, painting, plumbing, electrical, access control, carpentry, sign shop and HVAC divisions.
6. Complainant's effective duties are those of a plumber. Complainant speaks Spanish and English fluently. (Stipulated)
7. Complainant's monthly base pay was \$4,837 after July 1, 2023. (Stipulated)
8. Skippere Spear is the Chief Administrative Officer and General Counsel to Respondent. (Stipulated)
9. As Chief Administrative Officer, Mr. Spear oversees the Campus Police Department, the Human Resources Department and the Early Learning Center.
10. From November 2022 through August 1, 2023, Respondent did not have a Human Resources Director. During this time period, Mr. Spear took over a lot of responsibilities of a Human Resources Director, including investigating employee complaints.

11. Liz Mendez has been Respondent's Chief Operating Officer since approximately July 2023. Respondent's Board of Directors delegated appointing authority to Ms. Mendez for all of Respondent's employees.

Complainant's Performance History

12. Ramon Vidal has been Complainant's direct supervisor since Complainant was hired at AHEC. (Stipulated)
13. Complainant was rated as "Proficient" in his 2021-2022 annual performance evaluation by his supervisor, Ramon Vidal. (Stipulated)
14. Complainant was rated as "Effective" by Ramon Vidal in his 2022-2023 annual performance evaluation. (Stipulated)
15. Complainant has no prior corrective or disciplinary actions at AHEC. (Stipulated)

Respondent's Workplace Policies

16. At all relevant times, AHEC maintained a written Workplace Violence Policy. (Stipulated)
17. AHEC's Workplace Violence Policy provides:

The Auraria Higher Education Center will not tolerate violent behavior or threats of violent behavior directed at a co-worker, supervisor, subordinate, client or any other employee, state property or public facilities. Such behavior may result in corrective and/or disciplinary action and criminal charges when appropriate.

Violent behavior is defined as any threat or act of verbal, psychological, or physical aggression, or the destruction or abuse of property by any individual. Threats include veiled, conditional or direct verbal or written threats intended to harass, endanger or harm the safety of another.

Employees who believe they have been subjected to these behaviors should report the incident to their supervisor or other appropriate authority immediately. The supervisor, or appropriate authority, will investigate and take action when deemed necessary. All threats to employee safety from any source will be taken seriously and addressed in a timely fashion.

18. At all relevant times, AHEC maintained a written Weapons Policy. (Stipulated)

19. AHEC's Weapons Policy prohibits the possession of handguns on campus, with the exception of individuals with a Concealed Carry permit.

20. At all relevant times, AHEC maintained a written Discrimination and Harassment Policy. (Stipulated)

21. AHEC's Discrimination and Harassment Policy states, in part:

AHEC is firmly committed to maintaining a work environment free from discrimination of any kind and such behavior is neither permitted nor condoned. All employees, including supervisors, are expected to treat each other with respect, to accept personal responsibility for complying with this policy and to immediately report any noncompliance with these provisions. Appropriate corrective and/or disciplinary action, up to and including termination, may be taken against any employee who violates this policy.

22. AHEC's Discrimination and Harassment Policy defines "Harassment" as follows:

Verbal and/or physical conduct designed to threaten, intimidate, or coerce another person. This includes taunting, degrading, threatening or otherwise offensive or hostile remarks or behavior; including slurs, jokes, offensive stereotypes or any kind of behavior which, in the employee's opinion, impairs his/her ability to perform his/her job if such actions are based on ... sexual orientation...

23. AHEC's Discrimination and Harassment Policy lists "sexually suggestive comments" as an example of verbal sexual harassment.

24. AHEC's Discrimination and Harassment Policy provides the following "Investigation Process" for a complaint:

The AHEC Equal Opportunity Office shall determine the most appropriate means for addressing the report or complaint. Options include but are not limited to: (a) investigating the report of complaint; (b) with the agreement of the parties, attempting to resolve the report or complaint through a form of alternate dispute resolution (e.g. mediation); or (c) determining that the facts of the complaint or report do not warrant investigation.

The AHEC Equal Opportunity Office may designate another individual (either from within AHEC or from outside the agency) to conduct or assist with the investigation or to manage an alternate dispute resolution process. ... Anyone designated to address an

allegation will adhere to the process of this guideline and confer with the Equal Opportunity Office throughout the investigation.

25. AHEC's Discrimination and Harassment Policy provides the following instruction concerning the conclusion of an investigation:

At the conclusion of the investigation, the investigator shall prepare a written report that includes a summary of factual findings. These findings shall be forwarded to the AHEC appointing authority and AHEC Human Resource Office for appropriate action.

26. In 2023, Respondent's AHEC Equal Opportunity Office was not staffed.

Complainant's Relationship with Michael Matovina

27. Michael Matovina was classified as a Plumbing Maintenance Technician II and also worked as a plumber for Respondent. Mr. Matovina was first employed with AHEC in February 2023 and resigned from employment on or about November 10, 2023. (Stipulated)

28. Mr. Matovina is an openly gay man.

29. Complainant and Mr. Matovina frequently worked together. They often bickered about what was right and wrong, especially concerning relationships between men and women and relationships between men and men.

30. On June 13, 2023, Complainant and Mr. Matovina were installing a sink in the break room for the grounds crew in the Facilities Annex. They were arguing about the best plan for installing the sink.

31. The argument between Complainant and Mr. Matovina escalated. Mr. Matovina went to AHEC's Human Resources (HR) Department to complain about Complainant.

32. Mr. Matovina made a verbal report of discrimination and harassment by Complainant to AHEC's HR Department. Mr. Matovina also alleged that Complainant brought a gun to work and was brandishing it.

The Events of June 14, 2023

33. After learning of Mr. Matovina's allegations concerning Complainant, Mr. Spear contacted AHEC campus police and asked them to search Complainant to see whether he was bringing a gun to work.

34. Mr. Spear also asked AHEC campus police to find out whether Complainant had a concealed carry permit for a gun. Mr. Spear provided the police with a

letter placing Complainant on administrative leave if campus police discovered that Complainant was carrying a gun at work without a concealed carry permit.

35. On the morning of June 14, 2023, AHEC campus police contacted Complainant at the Facilities Annex and searched him.
36. The AHEC campus police determined that Complainant was not carrying a gun. Complainant informed the police that he did own a gun, occasionally brought it to work and did have a concealed carry permit. However, Complainant told the police that he did not brandish his gun in the workplace.
37. The AHEC campus police concluded that Complainant did not illegally carry a weapon. In a subsequent email to Mr. Spear, the AHEC campus police described Complainant as “very cooperative during the entire encounter.”
38. The sudden contact with, and search by, AHEC campus police was very upsetting to Complainant.
39. After Complainant returned to the Facilities Annex, he angrily made a comment about “bashing” someone’s head in. Arborist Braxton Seidel and Grounds Supervisor Aaron Wadkins witnessed this statement and understood that Complainant was referring to Mr. Matovina.
40. Later on June 14, 2023, Thomas Johnson, Assistant Director of Facilities, saw Complainant sitting at his desk in the plumbing shop. Complainant was very angry. Mr. Johnson asked Complainant why he was so upset. Complainant replied that he didn’t want to work with a “faggot.”

Mr. Spear’s Investigation

41. On June 26, 2023, Mr. Matovina filed a written complaint against Complainant, alleging discrimination and harassment by Complainant because of Mr. Matovina’s sexuality. Mr. Matovina also alleged that Complainant asked another co-worker, Yadira Meza, if “she was trying to participate in a wet tshirt contest.”
42. Mr. Matovina described Complainant as “homophobic and misogynistic,” and stated that he feared retaliation from Complainant. As relief, Mr. Matovina requested “Disciplinary action up to termination.”
43. Mr. Matovina filed a supplemental statement on July 12, 2023, stating that he had learned about “threats” against him made by Complainant following Complainant’s encounter with the AHEC campus police on June 14, 2023. As a result, Mr. Matovina requested “a formal investigation.”

44. Based on allegations made by Mr. Matovina concerning statements and behaviors of Complainant, Mr. Spear initiated an investigation on behalf of AHEC. (Stipulated)
45. Mr. Spear interviewed Complainant and a number of other employees concerning the allegations made by Mr. Matovina.
46. On September 18, 2023, Mr. Spear completed his investigation and issued a written investigation report. (Stipulated)
47. Mr. Spear concluded that there was insufficient evidence to sustain a violation of AHEC's Weapons Policy. Mr. Spear concluded that it was "more likely than not" that Complainant violated AHEC's Workplace Violence Policy and Discrimination and Harassment Policy.
48. In his investigation report, Mr. Spear made the following recommendation:

[I]t is recommended that Mr. Quinones-Colon be disciplined in accordance with the State Personnel Board Rule 6-12.B.3 (failure to comply with AHEC policies) and 7 (threats of violence). It is recommended that, at a minimum, Mr. Quinones-Colon be suspended for one-week without pay. It is further recommended that the entire plumbing shop undergo in-person training regarding workplace violence and diversity, equity, and inclusion. This training should occur as soon as possible.
49. A statement of appeal rights was attached to the end of Mr. Spear's investigation report, which states, in part: "Classified employees have the right to appeal this decision to the State Personnel Board."

Delegation of Appointing Authority

50. Prior to the summer of 2023, delegations of authority at AHEC were made informally and were not memorialized in writing.
51. On September 18, 2023, Mr. Spear sent his report to Complainant, Mr. Matovina, Ms. Mendez, and Director of Facilities Taylor Lewis.
52. Complainant forwarded Mr. Spear's investigative report to Pam Cress, a Colorado WINS representative. At 11:30 a.m., Ms. Cress sent Mr. Spear the following email, with a copy to Ms. Mendez and Mr. Lewis:

Oscar has forwarded us the investigative report you have completed and we appreciate the thoroughness that you have brought to the process.

Of course I'm sure you realize that a disciplinary action such as a week without pay must be the result of an R-6-10 interview and that a pre-determined outcome is not allowed until there is a discussion in the 6-10 with the appointing authority. And the appointing authority takes your investigation under advisement but ultimately they have the only authority to dispense disciplinary action.

We will look forward to continued communication about this situation.

53. At 12:05 p.m. on September 18, 2023, Ms. Mendez emailed Mr. Spear and Mr. Lewis: "Who is the appointing authority in this situation? What is an R-6-10 interview?"
54. A written delegation of appointing authority from Ms. Mendez to Mr. Lewis to, among other things, administer disciplinary actions was dated September 14, 2023, four days before Ms. Mendez's email.

Respondent's Disciplinary Action

55. On September 27, 2023, Complainant received a written "Notice of a Rule 6-10 Meeting" to be held on October 5, 2023. (Stipulated) The subject of the meeting was "Report on Complaints of Discrimination / Harassment dated September 18, 2023."
56. The 6-10 Notice stated:
- The reason for this meeting is to gather all relevant information and to provide you with an opportunity to present any information and mitigating circumstances you would like me to consider before I make a decision. You have the right to present information at this meeting and to have a representative of your choice accompany you to the meeting. You may also bring any documents that you want me to review prior to making my decision. You will be allowed seven (7) days after the meeting to provide me with any additional information relating to the issues we will discuss.
57. The 6-10 meeting was attended by Complainant, Mr. Lewis, Ramon Vidal, and Complainant's union representative, Lee Mestas. (Stipulated)
58. The 6-10 meeting was not recorded. (Stipulated)
59. During the 6-10 meeting, Complainant did not provide any response to the investigative report. Mr. Mestas stated that all of the evidence was circumstantial and denied the claims against Complainant.

60. Mr. Lewis again informed Complainant that he had seven days, or until October 12, 2023, to provide any additional information before final disciplinary actions would be decided.

61. Following the 6-10 meeting, Complainant had numerous conversations with Mr. Lewis about the investigative report, attempting to reach some kind of resolution.

62. Mr. Lewis considered a lesser penalty than the recommended one-week suspension, but concluded that the one-week suspension was appropriate because he needed to send a message that Complainant's conduct was not appropriate.

63. On October 12, 2023, Mr. Lewis issued a letter to Complainant entitled "Disciplinary Actions [sic] as a result Investigation and Rule 6-10 Meeting" which included a one-week, unpaid suspension. (Stipulated)

64. In the letter, Mr. Lewis stated:

After careful consideration of the information presented in the Report of Complaints of Discrimination / Harassment dated September 18, 2023, and the Rule 6-10 Meeting on October 5th, 2023 I have concluded that the behavior and language reported were in violation of State Personnel Board Rule 6-12.B.3 (failure to comply with AHEC policies) and 7. (threats of violence). The specific AHEC policies include Discrimination / Harassment and Workplace Violence. Further violations of these policies will not be tolerated in the AHEC Facilities Department.

65. Complainant received a disciplinary action resulting in a pay reduction in the amount of \$1,099.32, representing a one-week unpaid suspension, along with a corresponding reduction in PERA contributions for the same period. (Stipulated)

66. On October 19, 2023, Complainant filed a timely appeal of the disciplinary action.

ANALYSIS

A. BURDEN OF PROOF

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service." Colo. Const. Art. XII, § 13(8). A certified state employee may be disciplined "only for just cause based on constitutionally specified criteria." *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

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

... 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).

The Colorado Supreme Court has clarified certified employees' rights in two crucial decisions. In *Kinchen*, the Supreme Court held that Respondent has the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred in a *de novo* hearing. *Kinchen*, 886 P.2d at 706-708. In discharging an employee, an appointing authority must establish a constitutionally authorized ground. *Id.* at 707. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706. 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" by the employee. *Id.* at 708.

The Colorado Supreme Court recently 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 Corrections v. Stiles, 477 P.3d 709, 717 (Colo. 2020). 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:

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 decision in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

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

B. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Mr. Lewis imposed a one-week unpaid suspension on Complainant for making the following statements in violation of Respondent's Workplace Violence Policy and Discrimination and Harassment Policy: (1) Complainant said he wanted to "bash" a co-worker's face in, (2) Complainant said he would not work with a "faggot," and (3) Complainant told a female co-worker that her attire was like something worn for a wet T-shirt contest. The preponderance of the evidence establishes that Complainant made these statements.

On June 14, 2023, Complainant was angry about being confronted and searched by the AHEC campus police, and made comments about "bashing" someone's face in. There were two witnesses to this statement: Braxton Seidel and Aaron Wadkins. Both witnesses testified credibly about hearing this statement, and both witnesses understood that the "someone" Complainant was referring to was Mr. Matovina. The ALJ finds that this statement constitutes a threat "of violent behavior directed at a co-worker" and violates AHEC's Workplace Violence Policy.

Mr. Johnson credibly testified that, on the afternoon of June 14, 2023, he saw Complainant sitting at his desk in the plumbing shop. Complainant was very angry. Mr. Johnson asked Complainant why he was so upset. Complainant replied that he didn't want to work with a "faggot." The ALJ finds that this offensive statement, based on a co-worker's sexual orientation, violates AHEC's Discrimination and Harassment Policy.

Complainant testified that he did not recall making a statement about "bashing" someone's face in, but admitted that he was very upset after his encounter with the AHEC campus police. Complainant denied ever using the term "faggot." Complainant explained that English was his second language, he would not use the words "bash" or "faggot," and did not even know what those words meant. Complainant also testified about his concerns with women being "objectified" and "sexualized" in American society. The ALJ finds that Complainant has a sophisticated understanding of the English language and does not find Complainant's testimony that he did not understand the terms "bash" and "faggot" to be credible.

Ms. Meza credibly testified that Complainant confronted her about a T-shirt she wore to work one day, commenting that it looked like something from a wet T-shirt contest. Ms. Meza testified that she found Complainant's comment to be offensive. Complainant admitted that he admonished Ms. Meza about her attire, telling her it was like something from a wet T-shirt contest. Complainant explained that he considered Ms. Meza to be like a sister; therefore, he was being protective of her. The ALJ finds that Complainant's statement to Ms. Meza about wearing something like a wet T-shirt was sexually suggestive and therefore constitutes sexual harassment, in violation of AHEC's Discrimination and Harassment Policy.

In a written complaint submitted to Respondent on July 26, 2023, Mr. Matovina made a number of other allegations concerning Complainant's discriminatory and

harassing comments to him. Complainant denied making these comments. Mr. Matovina did not testify, and there were no other witnesses to these alleged statements. While Mr. Lewis was aware of these alleged statements, his disciplinary decision was primarily based on the three statements confirmed by other witnesses.

Respondent established that Complainant committed the acts for which he was disciplined. Therefore, Respondent met its burden of proof to establish Complainant's misconduct as defined in Colo. Const. Art. XII, § 13(8) and *Kinchen*, 886 P.2d at 706-708.

C. RESPONDENT'S IMPOSITION OF A SUSPENSION WITHOUT PAY WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

1. Was Mr. Lewis' Disciplinary Decision 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 persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Board Rule 6-11, "Factors to Consider in Taking Discipline," provides, in pertinent part:

- A. The decision to take disciplinary action of a certified state employee shall be based upon:
 - 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;
 - 5. Mitigating circumstances; and
 - 6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.

The ALJ finds that Mr. Spear appropriately investigated Mr. Matovina's allegations concerning Complainant. Mr. Lewis reviewed the resulting investigative report and also received copies of emailed statements by Mr. Braxton and Mr. Wadkins concerning the alleged threat Complainant made on June 14, 2023. Mr. Lewis informed Complainant at least twice that he could submit any additional information he wished to Mr. Lewis before

a disciplinary decision was made. Both Complainant and Mr. Lewis testified about Complainant's numerous conversations with Mr. Lewis in an attempt to avoid a disciplinary penalty.

Complainant argued that Mr. Lewis was pressured into adopting Mr. Spear's recommendation of a one-week suspension without pay. However, Mr. Lewis credibly testified that he considered lesser discipline. Mr. Lewis was aware of Complainant's prior performance evaluations and the lack of prior discipline in Complainant's record. Mr. Lewis testified that he was looking for Complainant to take some responsibility for his comments, but Complainant categorically denied making any of the statements described by witnesses. Mr. Lewis concluded that the imposition of a one-week suspension without pay was appropriate because he needed to send a message that Complainant's conduct in the workplace was serious and was not appropriate. Thus, Mr. Lewis properly considered the Rule 6-11 factors outlined above.

The ALJ finds that Mr. Spear and Mr. Lewis used "reasonable diligence and care to procure" evidence concerning Complainant's actions, and that Mr. Lewis gave "candid and honest consideration" to this evidence. *Lawley v. Dep't of Higher Educ.*, 36 P.3d at 1252. The ALJ finds that Mr. Lewis' decision to impose a one-week suspension without pay on Complainant was not "based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions." *Lawley*, 36 P.3d at 1252. Therefore, the ALJ finds that Respondent's decision to discipline Complainant was not arbitrary or capricious. C.R.S. § 24-50-103(6).

2. Was Mr. Lewis' Disciplinary Decision Contrary to Rule or Law?

Complainant argues that Respondent failed to properly follow the process required by Board Rule 6-10 in disciplining Complainant. The preponderance of the evidence indicates that there was initial confusion concerning who had authority to discipline Complainant. While Mr. Spear's investigative report "recommends" a one-week suspension without pay, it also outlines Complainant's appeal rights and includes the statement: "Classified employees have the right to appeal *this decision* to the State Personnel Board." (Emphasis added.)

On the morning of September 18, 2024, Mr. Spear forwarded his report to Complainant, as well as to Ms. Mendez and Mr. Lewis. Complainant immediately forwarded the report to union representative Pam Cress. Upon review of the report, Ms. Cress emailed Mr. Spear, informing him that only Complainant's appointing authority could impose discipline, and only after a Rule 6-10 meeting with Complainant. Upon receipt of Ms. Cress' email, Ms. Mendez emailed Mr. Spear and Mr. Lewis, asking them: "Who is the appointing authority in this situation? What is an R-6-10 interview?" These questions are curious in light of a written delegation of authority from Ms. Mendez to Mr. Lewis dated September 14, 2023 – four days prior to the exchange of emails on September 18, 2023.

Despite this initial confusion over the disciplinary process, Ms. Mendez did delegate appointing authority to Mr. Lewis, and Mr. Lewis did hold a Rule 6-10 meeting with Complainant. Union representative Lee Mestas attended the 6-10 meeting as Complainant's representative. During the hearing, Mr. Mestas testified that Complainant was not permitted to make any statements during the 6-10 meeting. However, Mr. Mestas also erroneously testified that Ramon Vidal was not present at the 6-10 meeting. Thus, Mr. Mestas' recollection of the 6-10 meeting was unreliable. In contrast, Mr. Lewis testified that Complainant was offered the opportunity to respond to the investigative report, but declined to do so. Mr. Lewis gave Complainant seven days to provide any additional information before Mr. Lewis made his decision concerning discipline. Mr. Lewis' notes from the 6-10 meeting support his testimony.

Both Mr. Lewis and Complainant testified about Complainant's numerous conversations with Mr. Lewis after the 6-10 meeting concerning potential disciplinary action. Mr. Lewis credibly testified that he considered imposing lesser discipline than the one-week suspension recommended by Mr. Spear, but believed that Complainant's comments concerning Mr. Matovina and Ms. Meza justified the one-week suspension.

Because a Rule 6-10 meeting was ultimately held by Mr. Lewis, and because Complainant had numerous conversations with Mr. Lewis before Mr. Lewis made his decision, the ALJ finds that Mr. Lewis' decision to discipline Complainant was not contrary to rule or law. C.R.S. § 24-50-103(6).

Even if the evidence had established that Respondent failed to follow the Rule 6-10 process and allow Complainant a chance to respond to the investigative report, Complainant was provided the opportunity to confront the allegations against him during the evidentiary hearing. As discussed above, the ALJ found that the preponderance of the evidence established that Complainant made a statement about "bashing" a co-worker's head in, referred to Mr. Matovina as a "faggot," and confronted Ms. Meza about attire that qualified for a "wet T-shirt contest." These statements violated Respondent's Workplace Violence and Discrimination and Harassment policies, and justify the imposition of a one-week suspension without pay.

D. COMPLAINANT'S CLAIM FOR ATTORNEY FEES AND COSTS.

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

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

A frivolous personnel action is an action for which “no rational argument based on the evidence or law was presented.” Board Rule 8-51(B)(1). Personnel actions that are “in bad faith, malicious, or as a means of harassment” are actions “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-51(B)(2). A groundless personnel action “means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory.” Board Rule 8-51(B)(3).

As discussed above, the ALJ finds that Complainant committed the acts for which he was disciplined. Complainant failed to establish that Respondent’s disciplinary decision was arbitrary, capricious, or contrary to rule or law. Therefore, under C.R.S. § 24-50-125.5(1), Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent’s decision to impose a one-week disciplinary suspension without pay was not arbitrary, capricious, or contrary to rule or law.
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

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

Dated this 28th day
of February, 2024, at
Denver, Colorado.

/s/ [REDACTED]
Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February, 2024, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and the attached **NOTICE OF APPEAL RIGHTS** addressed as follows:

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APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: A-L, N, O, Q, R, U-Y. The following additional exhibits were admitted into evidence without objection: P.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1-19.

WITNESSES

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

Skippere Spear, Chief Administrative Officer & General Counsel
Thomas Johnson, Assistant Director of Facilities
Braxton Seidel, Arborist
Yadira Meza, Maintenance Painter
Donovan Dowling, Project Planner I
Aaron Wadkins, Grounds Supervisor
Taylor Lewis, Director of Facilities
Ramon Vidal, Plumbing Supervisor
Lee Mestas, Union Steward
Oscar Quinones-Colon, Complainant

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).