

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2002B075(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL A. MIRANDA,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge (ALJ) Stacy L. Worthington held the hearing in this matter on June 27, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General John August Lizza represented Respondent. Respondent's advisory witness was Major Ronald L. Adams, the appointing authority. Complainant appeared *pro se*.

MATTER APPEALED

Complainant appeals a disciplinary pay reduction and removal from his position on the Colorado State Patrol (CSP) Accident Reconstruction Team (ART). For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law.
2. Whether the actions were motivated by discrimination.

PRELIMINARY MATTERS

This appeal challenged two actions. The first action was a January 8, 2002 disciplinary pay reduction of 5% for three months, beginning February 1, 2002. The second action was the appointing authority's January 11, 2002 decision to remove complainant from the ART. On the morning of hearing, CSP's counsel raised the issue whether the State Personnel Board (Board) had jurisdiction to hear complainant's challenge to the adverse grievance decision.

The ALJ reviewed the Board's records and discovered that complainant had actually filed three appeals with the Board. Case No. 2002B075, complainant's appeal from the disciplinary action, reached the Board on January 16, 2002.

On the same day, complainant filed a grievance form concerning his removal from the ART. That petition was assigned Case No. 2002G059, and the parties were notified that the Board would not take any action until the Department of Public Safety (DPS) had completed its grievance process.

On March 6, 2002, the Board received another petition for hearing, which asked the Board to review the final agency decision denying complainant's grievance. That petition did not refer to the earlier grievance filing, so it was assigned Case No. 2002G086. Some time later, however, the ALJ determined that the second petition for hearing related to the issues raised in Case No. 2002G059. She consolidated those cases under Case No. 2002G088(C) and referred them to the Colorado Civil Rights Division for investigation.

On April 29, 2003, the Board received the CCRD's investigation report. That report addressed both the disciplinary pay reduction and the removal from the ART. However, it did not include any Board case numbers, so it was filed with Case No. 2002B075 and the hearing was scheduled.

The parties did not complete the preliminary review process for Case No. 2002G088(C), and the Board did not consider whether to grant or deny a hearing on complainant's grievance. However, Board Rule R-8-51 states, "If an employee files a petition for hearing and an appeal asserting a constitutional or statutory right to a hearing and the mandatory and discretionary appeals relate to the same or closely related matters, the administrative law judge or Board Director may consolidate the cases if it is determined that consolidation would be more efficient and would not unduly prejudice any party." The parties agreed at hearing that it would be more efficient to hear both issues at the hearing. Based upon the statements of the parties at the hearing, the ALJ concluded that it would be more efficient and would not prejudice any party to hear both issues, and therefore consolidated all three cases under Case No. 2002B075(C).

FINDINGS OF FACT

The ALJ has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence:

1. Major Ronald L. Adams supervises District 2 of the Colorado State Patrol (CSP), which is staffed by approximately 100 sworn officers and 8 to 10 support staff. Complainant is a trooper in District 2.
2. On January 8, 2002, Major Ron Adams issued complainant a disciplinary action consisting of a 5% pay reduction for three months, beginning February 1, 2002.
3. On January 11, 2002, Major Adams issued complainant a memorandum removing him from the Accident Reconstruction Team (ART), effective January 14, 2002. Complainant

initiated a grievance, asking that he be reinstated to the ART. The grievance was denied on February 28, 2002, with the notation that complainant's position as a member of the team could be re-evaluated if his performance were to improve.

Accident Reconstruction Team

4. In late 2000 or early 2001, the Colorado State Patrol (CSP) received some criticism from district attorneys for the quality of CSP's investigations into felony accidents.

5. Major Adams and another Major, Larry Holestine, consulted with command staff about creating Accident Reconstruction Teams (ARTs) made up of highly qualified employees who could work without supervision. The primary duty of the ARTs would be to investigate accidents, but they would also perform regular patrol duties when they were not involved in an investigation.

6. Complainant participated in a presentation to command staff describing the ART concept.

7. The suggestion was accepted, and ARTs were formed in each district of the state.

8. In District 2, a panel recommended troopers to be selected as the members of the first ART team. Major Adams accepted the recommendation and appointed complainant, Ron Quintana, Mike Halpin, and Dave Dolan. This group functioned as an independent team. The members were assigned to the busiest areas, Pueblo and Colorado Springs, but they worked in every part of the district.

9. The ART members were highly specialized. They were to be the lead investigators in all fatal accidents and other accidents that could result in felony charges. Major Adams wanted them to be on-scene on all felony investigations, to do complete and thorough investigations of all felonies, determine the rate of speed and position of vehicles, interview witnesses, and perform other investigative duties. The team members were all level 4 investigators. They had attended a number of specialized classes and were required to complete the difficult ACTAR test within 3 years to remain on the team. Complainant did pass that test.

10. Because the team only had four members who were working with less supervision than other troopers, they were free to work their own schedules and make themselves available when they were called. Because they had specialized skills, they were eligible to become technicians after completing a set of qualifications, which would increase their pay by 10%. In return, they were required to be on-call; at times when there was no relief available, they could be on call 24 hours a day during their duty days.

11. The ART members knew from the outset that they would be expected to be on call, and that at times their duties would interfere with their personal or family plans.

12. The ART reported to Captain Wilcoxon but was supervised by a sergeant. At first, CSP planned to create a corporal position to supervise the teams, and Ron Quintana was the acting corporal for a time. However, the CSP Chief decided against having corporals assigned to the ARTs, so that position was not made permanent.

Disciplinary Action

13. On October 31, 2001, complainant was scheduled to be on call. He took himself off call and put Trooper Brian Lyons on call by calling dispatch. Lyons was not notified that he was supposed to be on call and missed a call to respond to an accident during that time.

14. On November 2, 2001, complainant went to a hockey game at the world arena and took his pager with him. He was paged during the game, but his pager did not work in the arena. He missed that call, and Trooper Halpin had to respond to the call after working a long day.

15. On November 15, 2001, Capt Wilcoxon talked to Troopers Halpin and Lyons about scheduling problems, and on that day he decided that all requests for schedule changes would have to go through him. Capt. Wilcoxon notified the ART members, including complainant, that they were to make schedule changes only with his approval.

16. At 8:30 a.m. on December 8, 2001, complainant called Sergeant Machesky at home and asked if he could change schedules so he could attend a concert at the Air Force Academy that day. He said that because of heightened security, the Academy was not letting cars into the grounds, so he would not be able to respond to calls. Sgt. Machesky told complainant that he did not have the authority to make schedule changes; only Capt. Wilcoxon could make changes.

17. Complainant said he had tried to call Capt. Wilcoxon and was unable to reach him. Complainant asked Sgt. Machesky who could make the scheduling decision since Capt. Wilcoxon was unavailable, and Sgt. Machesky did not know. Complainant told Sgt. Machesky that Trooper Lyons was also working and wondered if he could have Trooper Lyons take his calls for six hours while he attended the concert. Sgt. Machesky told complainant very explicitly that he did not have the authority to make that decision, that only Capt. Wilcoxon could make that decision.

18. Complainant asked Sgt. Machesky what he should do if he could not reach Capt. Wilcoxon. Sgt. Machesky said he did not know, perhaps complainant could work something out with Trooper Lyons but he had to call Capt. Wilcoxon.

19. Complainant called Trooper Lyons at about 3:30 that afternoon. Complainant told Trooper Lyons that his father-in-law had just gotten tickets to a concert at the Air Force Academy for that night and he wanted Trooper Lyons to cover his areas 3 and 4 for five hours that evening. Trooper Lyons told complainant that he was trying to finish two fatality files from the previous week, that he also had calls for areas 1 and 2, and that complainant should check with Capt. Wilcoxon before Trooper Lyons would agree to anything. Complainant told him that he had tried to contact Capt. Wilcoxon all day with no success, but that Sgt. Machesky had advised it was okay for

Trooper Lyons to take his calls. Trooper Lyons agreed only because he believed he had no choice since a supervisor had authorized it.

20. When Trooper Lyons called dispatch, he was told that he was taking complainant's calls until 11 p.m. Complainant had asked him to take calls until 10 p.m.

21. That evening, Trooper Lyons was called out to an accident in area 3. On his way to the call, he was rear-ended by an SUV. When he reached the Colorado Springs office, dispatch told him to contact Sgt. Machesky. He called Sgt Machesky, and they discussed complainant not taking calls again on a weekend so he could go to a concert. Sgt. Machesky told Trooper Lyons that he had not approved complainant asking Trooper Lyons to take his calls.

22. Trooper Lyons wrote a memorandum outlining the events of December 8, 2001. That memorandum concluded, "I am very angry with [complainant] and have come to the conclusion I no longer wish to work with him nor will I ever take calls for him. I take pride in my job and enjoy being on the District 2 Accident Reconstruction Team but I am tired of taking calls for [complainant]."

23. Two members of the ART team had told Capt. Wilcoxon that complainant was not pulling his fair share, and that complainant does not care about the team, only about himself.

24. When Major Adams learned of the December 8, 2001 incident, he directed Capt. Wilcoxon to investigate other issues such as the timeliness and quality of complainant's reports. Capt. Wilcoxon went to the four Troop offices in District 2 and reviewed accident reconstruction binders of the ART members. Capt. Wilcoxon found that complainant's reports were less complete than those of the other ART members because of a lack of follow-up interviews, lack of witness statements, lack of chemical test results, lack of photos, and late reports. Capt. Wilcoxon reported these findings to Major Adams.

25. Capt. Wilcoxon also reported that complainant was apparently unwilling to be a part of the team, as evidenced by his repeated requests for other team members to take calls so he could attend another function. Capt. Wilcoxon believed this had a negative effect on the team and created bad feelings toward complainant.

26. Capt. Wilcoxon reported that the team members had been asked to monitor and control their overtime by taking comp time when necessary. The other team members did so, but complainant did not; he turned in more overtime than any other team member.

27. Finally, Capt. Wilcoxon reported that support staff in all four offices told him it takes longer to get a report from complainant than it does from any of the other ART members, which has caused problems for the attorneys in the cases and for other state officials who are charged with compiling statistics.

28. Capt. Wilcoxon concluded that, though complainant had the technical expertise to do an outstanding job, he lacked the concept of being a team player and created discontent among the other ART members.

29. Major Adams conducted a predisciplinary meeting pursuant to Board R-6-10 on December 21, 2001. At the meeting, Major Adams and complainant discussed the issues around complainant missing calls and the quality and timeliness of complainant's reports.

30. Major Adams considered mitigating information, including complainant's commendable or good performance evaluations, commendatory letters, service to the community and CSP, his work to get high-level accident investigation skills before it was a popular thing to do, and his 22 years as a trooper.

31. Major Adams believed that complainant's longevity should also have made him able to work independently without having to take up supervisor time checking what he has done.

32. Major Adams reviewed complainant's disciplinary history. On April 23, 2001, Major Adams issued complainant a disciplinary suspension for having a civilian ride along with him while he took calls. In taking that action, Major Adams was concerned because complainant's captain had specifically told complainant that CSP policy did not allow troopers to have civilians ride along on calls, and ordered him not to do it again. Complainant took the civilian along on another call shortly thereafter. Major Adams believed this demonstrated that complainant flagrantly disobeyed his captain's orders on that occasion. He issued a three-day disciplinary suspension, which complainant did not challenge.

33. Major Adams believed the December 8, 2001 incident also showed flagrant disregard for Capt. Wilcoxon's order that all requests for schedule changes had to go through him.

34. Major Adams concluded that the appropriate response was a disciplinary pay reduction of 5% for three months, which is the monetary equivalent of a 3-day suspension.

Removal from ART

35. On January 11, 2002, Major Adams removed complainant from ART and reassigned him to a trooper position in troop 2B. He had a lengthy list of reasons for making this decision. Those reasons included:

- a. Complainant disobeyed the order not to have civilian passengers in his patrol car.
- b. Complainant failed to monitor his annual leave, so he had to take leave at the end of the year. At that time, another ART member was out on sick leave for an injury. This caused scheduling problems for the rest of the team.
- c. Complainant had other troopers take his calls to an unwarranted extent.

- d. Complainant made improper use of state property by making about 200 copies on a CSP copier for a teacher friend, whose copier had broken down.
- e. Complainant failed to meet report deadlines.
- f. Complainant submitted a blotter report that contained errors.
- g. Complainant failed to provide information that Sgt. Rasnake had requested.
- h. Complainant damaged his patrol car at a car wash after a memorandum had been distributed telling all troopers not to use that car wash.
- i. Complainant submitted poor quality work.
- j. Complainant failed to take a pager to a concert when he said he would.
- k. Complainant failed to give correct information to Trooper Lyons and dispatch about the hours when Trooper Lyons would be taking his calls.
- l. CSP had received citizen complaints that complainant was driving too fast when he was responding to accidents. High speed is unnecessary because medical responders, other troopers, and all necessary equipment will be on the scene before the ART members arrive.
- m. Complainant failed to follow policies in ordering and paying for ART shirts.
- n. Complainant failed to follow the chain of command.
- o. Complainant failed to follow notification procedures.

36. In deciding to remove complainant from the ART, Major Adams considered both issues that had resulted in disciplinary action and also issues that had not been part of the disciplinary action process.

37. The memorandum stated that complainant could reapply to the ART. Complainant did reapply after Ron Quintana left, about 4 or 5 months after he was removed, but Major Adams did not believe sufficient time had elapsed to observe positive changes in complainant's behavior.

Allegations of Discrimination and Retaliation

38. When the ART team was established, it had four members. Two were Hispanic, two were Anglo. The team currently consists of four members and a sergeant, all of whom are Anglo.

39. Major Adams approved and appointed the original ART members, based upon recommendations from a review committee. Major Adams also selected the two Anglo members who replaced complainant and Trooper Quintana. When Trooper Lyons was selected, he and complainant were the only applicants. When Trooper Flippen was selected, he was the only applicant.

40. One Hispanic ART member, complainant, was removed from the team. The other Hispanic ART member, Ron Quintana, voluntarily resigned from the team.

41. Major Adams submitted complainant's application for technician about 4 or 5 months after the first disciplinary action. When he submitted the application, Major Adams's letter of recommendation included a discussion of his concerns about the disciplinary action and complainant's ability to follow orders.

42. Major Adams submitted two other technician applications, one before and one after complainant's. Major Adams did not hold those applications up. Those applicants had not recently received a disciplinary action.

43. Complainant had filed a grievance against Major Adams related to complainant's request to move to Cripple Creek. Major Adams denied complainant's request, his decision was upheld by the Lieutenant Colonel and Chief, but was reversed by the Executive Director. Complainant's grievance played no part in Major Adams's decision to issue either of the actions at issue in this appeal.

44. Sgt. Scott Beauvais has had negative dealings with Major Adams, including a grievance for hostile work environment and harassment. He believes Major Adams retaliated against him for his grievance by refusing to give him special services or assignments, taking him off committees, changing his overtime, and not appointing him acting captain.

45. There was no evidence concerning Sgt. Beauvais's racial or ethnic background. There was no evidence regarding any other sergeants who had not been denied special services or assignments, committee assignments, or overtime.

46. Trooper Quintana was selected to be the acting corporal for the ART while he was out on injury leave. He testified that Major Adams said he gave the position to Trooper Quintana because he did not believe Trooper Quintana would return from his injury. However, Major Adams testified that he told Trooper Quintana he was making the selection because Trooper Quintana was highly qualified and could do the job. Major Adams worried whether Trooper Quintana would be able to return to work, but was willing to take the risk because Trooper Quintana was working hard on rehabilitating from his injury. Major Adams's testimony makes more sense than Trooper Quintana's on this point, and the ALJ finds that Major Adams's description of the conversation is correct.

47. Major Adams told Trooper Quintana that there were complaints against complainant, which Trooper Quintana would have to address as acting corporal.

48. Trooper Quintana did not have problems with complainant's work while he was the acting corporal, other than scheduling problems caused by complainant's disciplinary suspension and the need to use his annual leave at the end of the fiscal year.

49. Trooper Quintana believed that Anglo officers were allowed to go over his head and have Major Adams reverse his decisions concerning comp time.

50. After he resigned from ART, Trooper Quintana was invited to be part of a National Transportation Safety Board (NTSB) task force representing law enforcement. He forwarded the paperwork to attend a conference to Major Adams, but never heard anything back. Later he learned that Trooper Halpin had gone to the conference. Trooper Halpin is Anglo.

51. Major Adams received a call from the NTSB representative asking for Trooper Quintana to represent CSP on the task force. Major Adams told him that Trooper Quintana had resigned from ART and he would rather have an active ART member involved. Major Adams recommended Trooper Halpin because he is a master mechanic and had worked with NTSB on the "black box" that records speed, rpm, and other information about a truck that is involved in an accident. Major Adams believed this experience made Trooper Halpin a logical person to go to the conference.

52. Trooper Quintana was the lead investigator in a bus accident, but as the investigation progressed, Trooper Halpin seemed to take over as lead. Trooper Quintana believes that Trooper Halpin got along well with the NTSB representative, and that race played a part in that.

53. Major Adams issued a special commendation to Trooper Quintana and the others involved in the bus accident investigation because they did excellent work. Major Adams had no input as to who would be the lead investigator. Trooper Quintana was the lead investigator because he was the first to respond to the accident scene, and he was never taken off the lead. The NTSB had a meeting at Colorado Springs to which all the investigators were invited, and Troopers Quintana and Halpin both attended.

54. Major Adams met with Trooper Quintana and asked if he was friends with complainant. When Trooper Quintana said he was, Major Adams asked if their friendship would affect his ability to investigate the complaints against complainant impartially. Trooper Quintana felt excluded after that conversation. He believes he was discriminated against.

55. Trooper Quintana believes that Troopers Lyons and Flippen were accused of driving too fast in response to emergency calls, but were not disciplined or corrected. Trooper Quintana knows of other incidents where Anglo officers could not be reached when they were on call, but were not disciplined or corrected.

56. When Trooper Quintana was considering leaving ART, Major Adams told him he was a good team member and asked him to continue. In a conversation, Trooper Quintana seemed to believe Major Adams had decided to eliminate the corporal position, even though Major Adams explained that it was the Chief's decision. Major Adams tried to talk Trooper Quintana out of leaving ART and told him he valued him as a team member, but that the final decision was his. Major Adams was disappointed when Trooper Quintana left the team.

DISCUSSION

Standard of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13(8); § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In this *de novo* disciplinary proceeding, the agency has the burden to prove by a preponderance of the evidence that the acts or omissions for which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found to be arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.

The decision to remove complainant from the ART was not a disciplinary action and did not adversely affect complainant's current base pay, status, or tenure. Complainant therefore has the burden of proving that the decision to remove him from the ART was arbitrary, capricious, or contrary to rule or law.

Complainant claims that the actions were discriminatory, based on his race or ethnicity. On this claim, complainant bears the initial burden of proving a *prima facie* case of discrimination, and he bears the ultimate burden of proof that the action was discriminatory.

The Colorado Anti-Discrimination Act, C.R.S. § 24-34-402, provides:

- (1) It shall be a discriminatory or unfair employment practice:
 - (a) For an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of ... race, ... national origin, or ancestry....

To establish a *prima facie* case, complainant must establish that: (a) he belongs to a protected class; (b) he was qualified for the job at issue; (c) despite his qualifications, he suffered an adverse employment decision; (d) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000). If complainant establishes a *prima facie* case, there is a presumption that the employer unlawfully discriminated against the employee. *Id.* The employer may rebut that presumption by producing evidence of a legitimate, non-discriminatory reason for the adverse employment action. However,

the burden of proof never shifts to the employer. *Id.* at 297-98. If the employer produces evidence of a non-discriminatory reason, the employee must prove that the asserted reason was a pretext for discrimination. *Id.* at 298.

Complainant's Discrimination Claim

Complainant has established that he is a member of a protected group, that he was qualified for his position, and that he suffered an adverse employment decision when he received the disciplinary action. However, the evidence in the record does not support an inference of unlawful discrimination. CSP provided persuasive evidence that the appointing authority's actions were based upon legitimate, nondiscriminatory reasons, and complainant did not provide sufficient evidence of pretext to meet his burden of proof that those reasons were a pretext for discrimination.

CSP produced persuasive evidence that complainant committed the acts for which he was disciplined. Complainant, who did not testify in his own behalf, produced nothing to rebut CSP's evidence that he had repeatedly requested his teammates to take his calls so he could participate in activities he found more desirable than his job. Complainant also did not rebut CSP's evidence that complainant's conduct caused disruption and unhappiness to the team. The evidence is clear that complainant's teammates believed complainant was not pulling his weight and was not being a team player. The ART concept requires that its members be cooperative and able to work responsibly and independently. Complainant's refusal to carry his share of time on call did not meet that requirement.

CSP also produced persuasive evidence that complainant's reports were substandard, in terms of both their quality and their timeliness. Complainant did elicit some testimony that other ART members made occasional mistakes on their reports, but did not produce any evidence that other ART members' mistakes were of the same caliber as those in complainant's reports. Moreover, CSP produced evidence that complainant was the slowest of all the ART members in filing his reports, which caused problems for other CSP staff, as well as people in other government agencies. Complainant did not rebut this evidence.

The testimony by Trooper Quintana was not sufficient to create an inference of pretext. He testified to several circumstances in which he perceived that he was treated less favorably than an Anglo colleague. However, those circumstances do not bear up under examination. For example, he wanted to go to the NTSB conference and attributed a racial motive to Major Adams's decision to send Trooper Halpin instead. However, Major Adams explained that he wanted Trooper Halpin to go because he was still a member of ART and he has specialized training and experience that was directly relevant to the conference. There was no evidence that Trooper Quintana had equivalent training and experience, and it was reasonable for Major Adams to send an ART member to the conference.

Trooper Quintana testified that he believed he was removed from the bus accident lead investigator role for racial reasons. However, his own testimony about that situation shows at most that an federal NTSB employee preferred to work with Trooper Halpin. Major Adams had nothing

to do with that decision.

Trooper Quintana supported Major Adams's testimony that complainant's failure to monitor his annual leave, which required him to use up his leave at the end of the fiscal year, caused or contributed to scheduling problems with the team.

Trooper Quintana apparently believed that Major Adams did not consider him to be a valuable part of the team. However, based upon the testimony by him and by Major Adams about conversations between the two of them, it is more likely that Trooper Quintana misunderstood or misinterpreted Major Adams's statements. Trooper Quintana's testimony that Major Adams offered him the acting corporal position because he did not think Trooper Quintana would return from injury leave makes no sense, when there were other able-bodied ART members who would have gladly accepted that assignment. It seems probable that Trooper Quintana's misunderstanding during that conversation set the stage for a continuing series of miscommunications between him and Major Adams. The simple fact is that it would make no sense at all for Major Adams to select Trooper Quintana and complainant for the ART, then to select Trooper Quintana to be acting corporal for that team, if he had a racial bias against Hispanic troopers.

There was some evidence that other, Anglo troopers made occasional mistakes in reports, or that they sometimes drove too fast when they were responding to accidents. However, there was no testimony that any other trooper's performance suffered from the same quantity or quality of defects as complainant's.

Likewise, there was no evidence that any of the other troopers had received recent disciplinary actions. Complainant admitted that he had received a disciplinary suspension only 8 months before the disciplinary action at issue in this appeal, and that he did not challenge that action. Board Rule R-6-6 requires the appointing authority to consider a number of factors, including prior disciplinary actions and the period of time since a prior offense, in deciding whether to administer disciplinary or corrective action. Complainant's prior disciplinary action was close in time to the one at issue in this appeal. It concerned complainant's failure to follow a direct order from his captain, which was also an issue in this action.

In conclusion, there was no testimony that any Anglo trooper was similarly situated to complainant. There was ample persuasive evidence that complainant's performance was unsatisfactory. There was also evidence that Major Adams had selected Hispanic troopers to be members of the elite ART team, and in fact had selected a Hispanic trooper to be the acting corporal and supervisor for that team. That evidence is inconsistent with the argument that Major Adams discriminated against complainant because of his race or ethnicity.

The Disciplinary Action Was Not Arbitrary, Capricious, or Contrary to Rule or Law.

In Colorado, arbitrary and capricious agency action is defined as:

- (a) neglecting or refusing 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; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising 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 Education, 36 P.3d 1239, 1252 (Colo. 2001). Major Adams based his findings and conclusions on substantial evidence, including written reports by Captain Wilcoxon and Trooper Lyons. Major Adams considered the factors he was permitted or required to consider, including complainant's prior disciplinary history, period of time since a prior offense, type of prior and current acts, performance evaluations, mitigating circumstances, and other relevant facts. Major Adams's decision to administer a 5% pay reduction for three months, equal to a 3-day suspension, was not such that reasonable people would be compelled to reach a contrary conclusion. CSP therefore proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. *See Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

The Removal from the ART Was Not Arbitrary, Capricious, or Contrary to Rule or Law.

Because the decision to remove complainant from the ART did not adversely affect complainant's current base pay, status, or tenure, he had the burden of proving that the removal was arbitrary, capricious, or contrary to rule or law. The memorandum removing complainant from the ART was not put in evidence by either party, nor was it provided with complainant's petitions for hearing, nor does it appear anywhere in the Board's files. From the testimony of witnesses and the grievance documents contained in the Board's file, it appears that the memorandum was not a corrective action, but was merely notice that Major Adams had decided to remove complainant from the ART.

Board Rule R-1-6 provides that appointing authorities' powers include defining the job, determining work hours and conditions of employment, and other human resource functions. Major Adams had the authority to assign complainant's job site and duties. An appointing authority can reassign an employee for any legitimate business reason. *See Department of Human Services v. May*, 1 p.3d 159, 168 (Colo. 2000) ("agencies must have the flexibility ... [to] transfer[] workers to different positions as circumstances warrant."). Here, Major Adams testified to a lengthy list of reasons why he concluded that complainant was not suited to remain on the ART, and why he believed complainant should be returned to a traditional trooper position, where he would have more supervision and accountability.

Complainant argued that Major Adams used the same reasons to support the disciplinary action and the removal from the team. Board Rule R-6-5 states, "An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature." That rule does not preclude complainant's removal from the ART for two reasons: (1) There is no evidence that the removal memorandum was anything other than

notice of a change in job duties. It was neither a disciplinary nor a corrective action. (2) The list of reasons supporting Major Adams's decision to remove complainant from the ART included the reasons spelled out in the disciplinary actions, but it also included improper use of state property, failure to provide information that Sgt. Rasnake had requested, damage to a patrol car, citizen complaints about complainant's driving speed, failure to follow policies in ordering and paying for distinctive ART shirts, and other misdeeds. Major Adams's decision to remove complainant from ART and place him in an assignment where he could be more closely supervised was supported by these reasons.

CONCLUSIONS OF LAW

1. The disciplinary action was not arbitrary, capricious, or contrary to rule or law.
2. The decision to remove complainant from the ART was not arbitrary, capricious or contrary to rule or law.
3. Neither action was motivated by illegal discrimination.
4. Neither party is entitled to an award of attorney fees.

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

Dated this ____ day
of **August, 2003**, at
Denver, Colorado

Stacy L. Worthington
Administrative Law Judge
1120 Lincoln St., Suite 1400
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the ___ day of **August, 2003**, I served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** by placing same in the United States mail, postage prepaid, addressed as follows:

Michael A. Miranda
805 Panorama Drive
Colorado Springs, Colorado 80904

And in the interagency mail to:

John August Lizza
Assistant Attorney General
Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods