

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL MCKIM,

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES,
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,**

Respondent.

The five day hearing was held on June 14, August 1, September 4, 17 and 26, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board and the Division of Administrative Hearings, 1120 Lincoln, Suites 1400 and 1420, Denver, Colorado. Respondent was represented by Assistant Attorney General Susan Trout with Chief Lee Smith, appointing authority for Complainant, serving as Respondent's advisory witness. Complainant appeared representing himself.

MATTER APPEALED

Complainant, Michael McKim ("Complainant" or "McKim") appeals his demotion by Respondent, Department of Human Services ("Respondent" or "DHS"). Complainant also alleges retaliation and discrimination.

For the reasons set forth below, Respondent's action is **affirmed.**

PROCEDURAL MATTERS

A. Witnesses

Respondent called the following witnesses:

1. Officer Lylia Vezzani
2. Lieutenant Steve Anderson
3. Captain Louis Archuleta
4. Chief Lee Smith

5. Officer Nancy Bravo
6. (Retired) Lieutenant Steve J. Delatorre

Complainant called the following witnesses:

1. Complainant testified on his own behalf.
2. Chief Lee Smith
3. Captain Louis Archuleta, Jr.

B. Exhibits

Respondent's Exhibits 1 to 7; 9; 10; 13, 14, 16 - 20; 25 - 32 were admitted by stipulation. Exhibit 12 was admitted without objection. Exhibits 8, 11 and 15 were admitted over objection.

Complainant's Exhibits A, B and C were offered but not admitted.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law, including:
 - a. Was Complainant retaliated against by the Respondent;
 - b. Was Complainant discriminated against by the Respondent;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

Background Information

1. Complainant was a SSOII at Colorado Mental Health Institute of Pueblo ("CMHIP") working in the Department of Public Safety. As a SSOII, Complainant served as a work leader for his shift.
2. Complainant's direct supervisor is Lieutenant Anderson. Lt. Anderson's direct supervisor is Captain Louis Archuleta.
3. Complainant does not have a good relationship with Captain Archuleta.

2001B077

4. Chief Lee Smith is Complainant's appointing authority and Chief of Public Safety for CMHIP.
5. Officer Vezzani has been employed by CMHIP for ten years, was previously married to Captain Archuleta and has two daughters from that marriage who are living with Captain Archuleta.
6. Officer Louis Archuleta is Captain Archuleta's father and works as an SSOI at CMHIP.

Anecdotal Note for Leaving a Resident Unattended

7. In May 2000, Complainant volunteered to work in Admissions. During one shift there were two patients going through the admissions process, one a geriatric patient, the other a juvenile in restraints.
8. The geriatric patient had a large sum of money on her. When the Patient Accounts Department is closed, the procedure is to have a supervisor escort the security officer and the money to the Patient Accounts Department to place the money in a vault.
9. The Complainant called Captain Archuleta to come and escort him. When the Captain did not come right away, the Complainant became agitated and called him again. The Captain told him to put the money in a post locker.
10. At the end of his shift at the Admissions Center, Complainant left the juvenile in the admission room unsupervised and in restraints, while he transported the money to a post locker.
11. Complainant was concerned about properly securing the money and left at the end of his shift, forgetting about the unattended juvenile in restraints.
12. The following day Complainant was told by Captain Archuleta that he should not have left a patient unattended and in restraints. Complainant received an anecdotal note for this incident.

Corrective Action for Insubordination and Assignment of Wheelock Days Off

13. Sergeant Wheelock, an SSOII, retired from CMHIP, leaving vacant a position with Sundays and Mondays off.
14. Officer Archuleta requested Wheelock's days off and, because Captain Archuleta was in the chain of command, he passed on Officer Archuleta's request for the temporary assignment of the days off.

2001B077

15. On July 21, 2000, Complainant asked to meet with Captain Archuleta in the Patrol Office.
16. When he arrived, Complainant asked Captain Archuleta why he was not being given Wheelock's days off.
17. When Captain Archuleta stated that the reasons had already been discussed with Complainant, he became upset, raised his voice, knitted his eyebrows, clenched his teeth and his eyes began to blink. He told the Captain that there was a "pile of shit that was about to come down on [the Captain]" and in that pile was Complainant's "bag of tricks," including nepotism and racism.
18. The Captain told Complainant that he was threatening him, that he, the Captain, felt threatened and that the conversation was over.
19. When Complainant left Captain Archuleta's office, he approached Chief Smith, who was outside the building, to discuss the matter. Also present were Deputy Chief Pinelle, Major James Mason and Captain Archuleta.
20. While speaking with Chief Smith, Complainant was visibly upset and accused Captain Archuleta of nepotism and of being racist and stubborn.
21. After this confrontation, Complainant asked for and received a long weekend. When he returned to work the schedule had been posted and Officer Archuleta had been given Wheelock's days off.
22. Chief Smith had two options for Wheelock's position, either down grade the position to a SSOI and post the position with Wheelock's days off or post the position as a SSOII sergeant position, allow current sergeants to apply for the position, then downgrade the successful applicant's former position with the successful applicant's former days off. Chief Smith chose the second option.
23. Chief Smith approved Officer Archuleta's request on a temporary basis while the position was assessed for a possible downgrade of the classification.
24. Officer Archuleta was awarded Wheelock's days off because, historically, temporary assignment of days off is granted to whomever first requests those days off.
25. Complainant filed a grievance over the temporary assignment of days off with Chief Smith. Chief Smith told him that if there were allegations of retaliation it would have to go to the Department of Personnel. Complainant then withdrew his grievance.
26. As a result of Complainant's behavior during his confrontation with Captain Archuleta and then Chief Smith, he was issued a corrective action by Chief Smith.

2001B077

The corrective action was for violating the policies against insubordination.

27. Once Chief Smith decided that Wheelock's position would remain as a SSOII classification, then Complainant, as the senior applicant for the position, was awarded the position and Wheelock's days off on a permanent basis.

Visitors in Restricted Area Incident

28. On August 15, 2000, Captain Ramirez found Complainant in a restricted area, having lunch in his personal vehicle with his girlfriend and her children.

29. Captain Ramirez told Complainant he was not allowed to have unauthorized personnel in a restricted area without authorization.

30. Complainant told Captain Ramirez that he, Complainant, had given the authorization, to which Captain Ramirez replied Complainant did not have such authority and that only he (Captain Ramirez) could give such authorization.

31. Complainant corrected Captain Ramirez, stating that only Chief Smith could give such authorization.

Sarcastic Whisper Incident

32. On October 18, 2000, Complainant and two other officers were asked to come to Captain Archuleta's office to discuss a special assignment.

33. While waiting for one of the other officers to arrive, Complainant asked Captain Archuleta why he had been checking up on him earlier in the day.

34. Captain Archuleta responded that when he did not see Complainant at his post, he paged the Complainant who had responded by saying that he was with a patient.

35. Complainant stated that he was being harassed and the Captain was not checking up on anyone else.

36. As the conversation progressed, the Complainant's voice got louder and louder, he clenched his teeth, his eyebrows knit and his eyes were blinking.

37. When Captain Archuleta told him that he needed to lower his voice and calm down, Complainant moved closer and said, in a sarcastic whisper, "Is this better, Captain?" and blew the captain a kiss.

Performance Evaluation

38. Complainant received a "Needs Improvement" rating overall on his performance

2001B077

evaluation covering the time period of May 1, 2000 to November 26, 2000, due to his insubordination during that time period.

39. The confrontation between Complainant and Captain Archuleta regarding the temporary assignment of Wheelock's days off occurred during this evaluation period but was not considered in reaching Complainant's "Needs Improvement" rating.
40. No corrective or disciplinary action was attached to the evaluation.
41. Complainant did not grieve the performance evaluation.

Request for Supervisor's Phone Number

42. During December 2000 and January 2001, Complainant repeatedly asked Vezzani for Archuleta's home phone number.
43. On one occasion when Vezzani asked Complainant why he wanted Archuleta's phone number, Complainant stated that he wanted to "fuck with his life the way he fucks with mine."
44. Complainant told Vezzani that he would have his wife or daughters call Archuleta's wife so that Archuleta could worry about his marriage falling apart rather than about Complainant.
45. On January 2, 2001, in front of Officer Richard Graston, Complainant asked Vezzani if she would give him the number and she refused. After Complainant left, Vezzani explained to Graston that Complainant wanted Captain Archuleta's phone number.
46. On January 8, 2001, after considering the matter, Vezzani reported the January 2nd discussion with Complainant. She was concerned about the safety of her children and, if Complainant did obtain Archuleta's home phone number, that she would be blamed in some fashion. In addition, because of Graston's presence, she now had a witness to Complainant's requests for Captain Archuleta's phone number.
47. Vezzani waited six days to file her statement because she hoped that Complainant would cease asking her for the phone number.
48. Prior to filing her statement, Vezzani did not feel threatened by Complainant, only harassed when he repeatedly asked her for the phone number.
49. On January 7, 2001, the day before preparing her statement, Vezzani called Captain Archuleta and told him that Complainant wanted his phone number so he could harass Archuleta by calling his wife.
50. After speaking with Vezzani, Captain Archuleta, concerned for his family's safety,

2001B077

immediately called Deputy Chief Pinelle at his home.

51. To date, Captain Archuleta has not received a call at home from Complainant.

52. After Vezzani filed her statement, Complainant was hostile and intimidating towards her. Four months after Vezzani filed her statement, Complainant and Vezzani worked together for an eight-hour shift for the first time since Vezzani filed her statement. During that shift Complainant:

- a. slammed doors and clipboards;
- b. glared at Vezzani;
- c. would not relay information to Vezzani;
- d. yelled at Vezzani when she attempted, at Lt. Anderson's orders, to review some new policies with Complainant;
- e. clenched his teeth, had a red face and was breathing heavily.

53. Because of Complainant's behavior during the shift, Vezzani was intimidated and scared.

54. Towards the end of the shift, Vezzani called Lt. Anderson and told him she would not be returning to her post because of the uncomfortable situation. Anderson offered to cover the rest of her shift but, because there were only twenty minutes left in the shift, Vezzani returned to her post, accompanied by Anderson.

55. Anderson was at the post earlier in the shift, before Vezzani complained about Complainant's behavior. He did not notice any problems until he returned to the post later with Vezzani.

56. After that shift, Vezzani filed a statement with her supervisor and requested that she not be assigned to work with Complainant again.

Metal Cup Investigation

57. On January 9, 2001, Captain Archuleta was called by either Officer Bravo or Complainant to the maximum-security ward because a metal cup had been taken into the ward by a nurse. On a maximum-security ward, a metal cup would be considered contraband because it could be fashioned into a weapon.

58. When Captain Archuleta arrived, Complainant was the roving officer and Officer Bravo was in the control room.

59. The nurse who brought the cup onto the ward told Captain Archuleta that she had brought the cup to the ward on a number of other occasions.

60. Captain Archuleta approached Complainant and asked him what was up, to which

2001B077

Complainant, indicating Officer Bravo, replied didn't she tell you.

61. Archuleta asked Complainant how many times the cup had been allowed onto the ward and Complainant replied he didn't know and walked away.
62. As Complainant walked away, Captain Archuleta asked him how often he (Complainant) had allowed the cup onto the ward. Complainant turned around, walked back to Captain Archuleta and, in an aggressive posture with clenched teeth, twitching eyes and knitted brows, stated that he had answered Captain Archuleta and that Captain Archuleta was harassing Complainant.
63. Captain Archuleta then called for backup for himself, because he felt threatened by Complainant, and for someone to handle Complainant's duties while he and Complainant left to talk to Deputy Chief Pinelle.
64. While Complainant and Captain Archuleta were talking to Pinelle, Pinelle told Complainant to lower his voice and that he had been insubordinate when he had walked away from Captain Archuleta.
65. Complainant responded to Pinelle by stating that Captain Archuleta was "looking up [his] asshole to [his] tonsils."

Meeting with Lt. Anderson

66. On January 5, 2001, when taking over his new duties as shift supervisor, Anderson discussed his expectations with various officers he was now supervising.
67. At Captain Archuleta's request, Anderson also discussed with each of his employees the use of the radio to request canteen breaks.
68. When Anderson discussed the use of the radio with Complainant, Complainant became agitated, his voice went up, his hands shook and his eyes twitched.
69. When Anderson told Complainant to calm down, Complainant told him that he and Captain Archuleta had been butting heads for a long time and Captain Archuleta was out to get Complainant.
70. Complainant stated that he did not care what Captain Archuleta did because he (Complainant) was going to "nail his ass to the wall."
71. Throughout the discussion, Anderson repeatedly had to tell Complainant to calm down.
72. Anderson reported the conversation after learning Complainant was trying to get some information from Vezzani in order to harass Captain Archuleta.

2001B077

73. Prior to formally reporting the conversation, Anderson told Captain Archuleta about Complainant's statement that he was going to nail Archuleta's ass to the wall.
74. Captain Archuleta later asked Anderson to prepare a statement on Complainant's comment.
75. Anderson did not perceive Complainant's statement as a violent threat until he heard about Complainant's attempts to get Captain Archuleta's phone number from Vezzani.

Disciplinary Action

76. On January 18, 2001, Chief Smith held an R-6-10 meeting with Complainant. Chuck Williams of CAPE and Mary Young were also present.
77. During the meeting, Complainant raised his voice and had to be told to quiet down.
78. Complainant admitted, during the meeting, to having been out of control with Captain Archuleta and stated that he wanted counseling for himself and Captain Archuleta.
79. Prior to imposing discipline for insubordination, workplace violence and failure to perform competently, Chief Lee Smith considered Complainant's behavior and his prior disciplinary history, including:
 - a. leaving a resident unattended;
 - c. his outbursts to Captain Archuleta regarding the temporary assignment of Wheelock's days off;
 - d. his insubordination to Captain Archuleta, including during the metal cup investigation;
 - e. bringing unauthorized visitors into a secured area;
 - f. his statement to Anderson that he would "nail [Archuleta's] ass to the wall";
 - g. his stated reason to Officer Vezzani for requesting Captain Archuleta's phone number; and
 - h. his whispered response to an order by Captain Archuleta.
80. After reviewing Complainant's personnel file, conducting the R-6-10 meeting and conducting an investigation, Chief Smith determined that Complainant had violated the Department of Human Services Policy Numbers VI-3.5 and 22.62 on workplace violence and CMHIP's Department of Public Safety policy on insubordination and, therefore, had violated Board Rule R-6-9(1) (failure to perform competently).
81. Chief Smith, in reaching his decision to discipline Complainant, determined that the seriousness of Complainant's behavior was destroying the teamwork of CMHIP's

2001B077

Department of Public Safety.

82. Chief Smith considered mitigating factors such as Complainant's longevity with Respondent, past commendations and past performance evaluations but he did not believe that they overcame the serious nature of the various incidents.
83. Chief Smith considered termination because, prior to this disciplinary action, Complainant had received counseling, anecdotal notes and a corrective action and because of the increasing frequency of Complainant's insubordination.
84. Chief Smith decided to demote Complainant as a last chance for Complainant. Chief Smith determined Complainant had demonstrated that he could not perform as a work leader, a function of the SS011 position (his position at that time). The SS01 position to which he was demoted did not require that Complainant be a work leader.
85. Chief Smith included a corrective action of attending workplace violence training because he believed that Complainant did not comprehend the seriousness of his behavior.
86. On January 29, 2001, Chief Smith imposed a combined corrective and disciplinary action against Complainant based upon insubordination, workplace violence and, therefore, failure to perform competently.

Lee Archuleta and the Syringe Needle

87. In February 2001, Complainant was unhappy with the condition of the post when he took over the shift from Officer Archuleta, Captain Archuleta's father.
88. On that occasion, a nurse left a syringe needle protruding one inch from a hazardous material disposal box and the lights and TV had not been turned on by Officer Archuleta.
89. The protruding needle would have been a safety hazard, not a security issue. However, because it was early in the morning, no patients were yet awake or moving around the area, therefore it was not a great safety hazard. The TV and lights being off was not a security issue, but it may have upset one of the patients.
90. Disposal of the needles is the responsibility of nurses. Security within a post is the responsibility of the assigned security officer.
91. Officer Archuleta and Complainant had an argument about the needle, lights and TV.
92. Complainant brought the deficiencies to the attention of his immediate supervisor,

2001B077

Lt. Anderson, who, in turn, had a counseling session with Officer Archuleta.

93. Anderson reported the incident to Captain Archuleta who told him to discipline Officer Archuleta as he saw fit.

Marcos Rodriguez and Handcuffed Patient

94. On two separate occasions, Patient Jerry Coolbroth, a patient with low cognitive ability, was handcuffed by Sergeant Marcos Rodriguez and Lt. Anderson, respectively, and given a set of keys with which to play.

95. Coolbroth was not unruly or a threat on either occasion.

96. The rationale for doing this, on both occasions, was because Coolbroth was loud, the handcuffs and keys pacified him and he enjoyed playing with them.

97. Respondent's policy is not to handcuff a patient without a doctor's order or to allow a patient to play with a security officer's keys.

98. Complainant brought the incident involving Rodriguez to Anderson's attention who in turn reported it to Captain Archuleta.

99. When Anderson handcuffed the patient, Complainant objected and Anderson removed the handcuffs and reported himself to Captain Archuleta.

100. When Chief Smith was informed of the incident, he ordered the practice to cease because of the possibility of a false restraint charge.

101. Captain Archuleta did not give either Sergeant Rodriguez or Captain Archuleta a corrective action or an anecdotal note for putting handcuffs on Coolbroth because, at the time, he did not think it was a serious incident. Captain Archuleta received counseling from his supervisor that handcuffs, even as a form of entertainment or pacification, should never be put on a patient without prior authorization.

Treatment of Other Employees

102. Typically the procedure for correcting a person's performance is done initially by the immediate supervisor, progressing from counseling to an anecdotal note then to a recommendation, through the chain of command, for a corrective and/or disciplinary action.

103. Captain Archuleta may only recommend to Chief Smith as to whether corrective or disciplinary action should be taken in a case. He does not have the authority to take such actions.

2001B077

104. Officer Archuleta has been counseled by Captain Archuleta and Lieutenant Delatorre on customer service, his directness and abrasiveness and on allowing a patient to leave maximum security without restraints, but Officer Archuleta has not received an anecdotal note from either of them.
105. The head of housekeeping reported Officer Archuleta as a workplace violence incident when he was abrasive about assisting her with a full wastebasket. He was counseled by Lt. Delatorre and apologized to the housekeeper.
106. Officer Archuleta was counseled by Chief Smith about an insubordination incident. Chief Smith later found out that the incident was falsely reported but by then the counseling session had already occurred.
107. Officer Archuleta has no prior corrective or disciplinary actions and has always complied immediately whenever corrected by a superior.
108. Vezzani has not been counseled or received an anecdotal note from either Captain Archuleta or Lieutenant Delatorre.
109. Rodriguez has no prior corrective or disciplinary action history.
110. Officer Archuleta, Vezzani and Rodriguez have never, in the workplace, clenched their teeth, advanced on a supervisor or pointed fingers at a supervisor.
111. Captain Archuleta had no input into the hiring of either Officer Archuleta or Officer Vezzani.
112. Until January 2001, Lieutenant Delatorre was Vezzani and Officer Archuleta's direct supervisor. After January 2001, Lieutenant Anderson was their direct supervisor. Throughout both of these time periods, Captain Archuleta, in turn, was Delatorre and Anderson's direct supervisor.
113. Anderson was given a corrective action for past workplace violence (not for the incident with Patient Coolbroth and the handcuffs) and, as a result of that action, had to go to training and have performance objectives not to raise his voice.
114. There are a number of relatives working at CMHIP. Chief Smith does not allow relatives in his department to directly supervise each other.
115. Chief Smith has never heard Captain Archuleta make a comment favoring Officers Archuleta or Vezzani nor has he witnessed any employee granting privileges to another employee who is a relative.
116. Complainant has consistently complained about nepotism, racism or

2001B077

retaliation to Chief Smith but has never initiated the complaint process, despite being told to do so. Complainant told Chief Smith that he did not want to initiate the complaint process but would rather deal with the issues within the department.

117. Because Complainant has not filed any formal complaints regarding his allegations of nepotism and racism, no formal investigation was initiated. However, Chief Smith spoke with Captain Archuleta about the allegations and found no basis for them.

Remedies Requested

118. Complainant seeks reinstatement to his original position as a SSO II.
119. Respondent requests affirmation of the appointing authority's action, dismissal of Complainant's appeal with prejudice and an award of Respondent's costs and attorney fees.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Complainant bears the burden of proof on his claims of retaliation and/or discrimination. Kinchen, *id.* The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeck v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

2001B077

B. Credibility

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

The fact finder is entitled to accept parts of a witness's testimony and reject other parts. United States v. Cueto, 628 P.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995). In determining credibility of witnesses and evidence, an administrative law judge is guided by the factors set out in CJI 3:16, which include: a witness' means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted, any bias, prejudice or interest, and their demeanor while on the witness stand.

Complainant, during the hearing, attacked Officer Vezzani's credibility. However, Officer Vezzani's testimony is found to be credible given Officer Graston's corroborating statement concerning Complainant's request to Vezzani for Captain Archuleta's phone number. Graston's statement supports Officer Vezzani's version of the conversation, not Complainant's, therefore Vezzani's testimony is found to be credible.

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

1. Workplace Violence

The Respondent Department of Human Services' workplace violence policy states that it does not tolerate threats, harassment or intimidation. Threats, harassment or intimidation are defined as including "oral or written statements, gestures, or expressions that communicate a direct or indirect intent to commit physical and/or psychological harm." DHS Policy Number VI-3.5. CMHIP's Department of Public Safety has a policy stating that violent behavior is any act or threat of verbal aggression. The definition of threat includes veiled, conditional or direct verbal or written threats intended to harass the safety of another person. Department of Public Safety, CMHIP Policy Number 22.62.

Complainant was disciplined for engaging in two instances of workplace violence – requesting Captain Archuleta's home phone number and in his discussion of Captain Archuleta with Lt. Anderson. In each instance he used physically forceful language when referring to Captain Archuleta. In other incidences, Complainant would use obscenities or physically forceful language to express himself. Numerous witnesses testified that during the two workplace violence incidences and various other incidences for which Complainant was disciplined, Complainant would clench his teeth, his face would turn red, his eyes would blink or twitch and/or the volume of his voice would increase. Complainant, himself, testified that he displays this behavior whenever he is upset. Captain Archuleta and

2001B077

Vezzani testified that when Complainant behaved in this manner they each felt threatened. Captain Archuleta, on one occasion, put a chair between himself and Complainant. Vezzani, after one confrontation with Complainant, requested that she no longer be assigned to work with him.

While it is human nature to get angry on occasion in the workplace, it is not permissible to display anger in the manner in which Complainant did. Complainant, in his role as a work leader, was a model for other workers on his shift. As a work leader, his behavior towards Officer Vezzani when she reported his statements was unjustifiable. He expressed such hostility towards her that she was no longer assigned to work with him. In addition, as both a subordinate and as a work leader, his behavior towards Captain Archuleta was not professional and would have helped to breed an atmosphere of violence in the workplace. If Complainant had problems with Captain Archuleta's management procedures or style, then the appropriate forum for discussing his allegations would have been the grievance process. Shouting at him and using profanity and physically aggressive language is not.

Complainant's gestures or behavior when he was upset, coupled with the language he used and the aggressive statements he made, leaves little room for doubt that he intended to communicate a direct or indirect threat of either physical and/or psychological harm towards Captain Archuleta. Such threats constitute workplace violence under the policies of both the Department of Human Services and CMHIP.

2. Insubordination

CMHIP's Department of Public Safety has two relevant policies on insubordination. The first states that insubordination will not be tolerated and is "being disrespectful to a superior officer or employee in any matter. Department of Public Safety, CMHIP Policy Number 1.08(9). The second policy states that "all employees are to conduct themselves in a professional manner, refraining from loud, boisterous, or profane language." Department of Public Safety, CMHIP Policy Number 1.09(III).

On three separate occasions, Complainant was disrespectful, using profanity or loud language, often in combination with physical signs of extreme distress, when talking about Captain Archuleta. On three other occasions he used the same type of language when talking to Captain Archuleta. Complainant himself told his direct supervisor, Lt. Anderson, that he and Captain Archuleta had been "butting heads" for a long time. Employees will often engage in discussions about their supervisors or have disagreements with supervisors. However, it is one thing to disagree with your supervisor and use the grievance process to deal with that disagreement. It is another to allow the level of disagreement to escalate to a point of using profanity and/or raising your voice and physically displaying your anger when talking to or about a supervisor. Complainant chose the later course of action, allowing his feelings and actions to get out of hand, rather than utilizing procedures put in place to resolve such issues before they escalate. If even just a few of CMHIP's Public Safety work leaders or other employees behaved as Complainant

2001B077

has whenever they have disagreements with a superior, then the functions of the Public Safety Department would begin to breakdown.

It is apparent that Complainant does not view his behavior or language as insubordinate. Complainant argued that while his “tonality” may have been high on various occasions, he was not insubordinate or disrespectful to his superiors, in particular Captain Archuleta. The definition of “tonality” is “the character of tone.” The Concise Oxford Dictionary of Current English, 5th Edition. Complainant’s tonality argument fails in that, even if he kept his volume down and used the Captain’s title, he still, by his very tone, showed disrespect to Captain Archuleta. The incident in which Complainant, after being told by Captain Archuleta to lower his voice, spoke in a sarcastic whisper, saying, “Is this better, Captain?” is a prime example of disrespectful tonality.

Complainant displayed the behavior for which he was disciplined. Complainant’s use of profanity and/or shouting when talking to or about Captain Archuleta, was a violation of CMHIP’s prohibition against showing disrespect in any manner towards a superior officer. Complainant’s behavior is insubordinate and is a violation of Respondent’s enunciated policies.

B. The Appointing Authority’s action was not arbitrary, capricious, or contrary to rule or law.

1. Complainant was not treated arbitrarily, capriciously or contrarily to rule or law.

Complainant presented evidence of Officer Archuleta (Captain Archuleta’s father) not complying with proper procedures at the end of a shift and of being discourteous and having a disagreement with a housekeeper. Complainant also alleged that, on two separate occasions, against proper procedure, Lt. Anderson and Sgt. Rodriguez put patient Coolbroth in handcuffs and gave him security keys with which to play. He alleged that all of these incidents showed that Complainant was retaliated against because each of the employees was treated favorably and wasn’t disciplined.

However, Respondent showed that each of those employees received counseling for their actions. In the case of Officer Archuleta there was no evidence of even a mild security issue, due to the protruding syringe or the lights and TV being off. As for Officer Archuleta’s discussion with the housekeeper, he apologized to her and received counseling. Initially, Complainant, too, received counseling. However, his behavior continued to escalate. In the case of Patient Coolbroth there was no evidence of violence, threats or intimidation used against Coolbroth. There was testimony that the handcuffs and keys soothed him and he viewed them as toys. However, given his vulnerability, both officers involved received counseling and Chief Smith ordered the practice to cease.

Complainant presented no evidence of any employee, including Officer Archuleta, who was treated differently. Complainant was not disciplined until he had repeatedly used physically aggressive language, profanity and/or made verbal threats against superiors

2001B077

and/or other employees. The Respondent, in disciplining Complainant for his escalating behavior, has not acted arbitrarily, capriciously or contrary to rule or law.

2. Complainant was not retaliated against by Respondent.

Complainant has alleged that Respondent, in particular Captain Archuleta, has engaged in retaliatory behavior against him. The triggering event for retaliation claims is the employee initiating some type of formal complaint or investigation process which is protected under statute, including but not limited to claims involving Title VII, whistle blower claims or federal or state discrimination claims. In this case, Complainant has not taken any such initial step. Therefore, he does not prevail on his retaliation claim.

3. Complainant was not discriminated against by Respondent.

Complainant has alleged that he was discriminated against by Respondent, in particular Captain Archuleta, on the basis of his race. Because Complainant is a white male, his discrimination allegation is subject to a reverse discrimination analysis. In a discrimination analysis, the Complainant carries the initial burden of establishing a prima facie case. Bodaghi v. Dept. of Natural Resources, 995 P.2d 288 (Colo. 2000). After a prima facie case has been established, the burden of production moves to the Respondent. *Id.* If the Respondent articulates a legitimate, non-discriminatory reason for the adverse employment decision, the burden of production shifts to the Complainant. *Id.* A reverse discrimination analysis requires a prima facie showing of either “background circumstances which demonstrate that the [Respondent] is that unusual employer who discriminates against the majority . . . or, alternatively, that but for the [Complainant’s] status the challenged employment decision would not have occurred.” Archuleta v. State, Probation Department, 12th Judicial District, 46 F. Supp. 2d 1100, 1104 (D. Colo. 1998).

Complainant presented no evidence to establish a prima facie case of reverse discrimination under the circumstances of this case, no evidence to show that any management decision was made on the basis of Complainant’s race. In addition, as set forth above, Respondent presented evidence of a legitimate business reason, without a showing of pretext, for its decision to demote Complainant. Therefore, Complainant does not prevail on his claim of discrimination.

C. The discipline imposed was within the range of reasonable alternatives

It was not unreasonable for Chief Smith to conclude that a lesser discipline would have no effect on Complainant. Complainant had been progressively disciplined. He had received counseling and anecdotal notes, around the areas of insubordination and workplace violence, on his interactions with Captain Archuleta. He had received a corrective action for his behavior during the temporary assignment of Wheelock’s days off. Chief Smith had suggested and urged Complainant to file a complaint if he believed he was being retaliated or discriminated against by Captain Archuleta.

2001B077

Despite this history and counseling as high up as his appointing authority, Complainant has not corrected or improved his performance or behavior. Instead his behavior has steadily escalated. Initially, it was only in his one-on-one interactions with Captain Archuleta himself that Complainant violated the policies on workplace violence and insubordination. However, when Officer Vezzani reported an incident, she was included as a recipient of Complainant's anger. In front of a co-worker, Complainant was insubordinate to Captain Archuleta, speaking to him sarcastically and blowing him a kiss. When Complainant spoke to Chief Smith about the temporary assignment of Wheelock's days off, he did so in front of other superior officers and was insubordinate, yelling and using profanity. Chief Smith could have considered suspension, however, Complainant has refused to accept any responsibility for his behavior, claiming that it is appropriate to behave as he has because of Captain Archuleta's behavior. There is no indication that a suspension would induce Complainant to modify his behavior. The situation was serious enough to require Chief Smith to take more drastic action than he had in the past, to impose a stronger check on Complainant's behavior.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as complainant's individual circumstances. The conclusions of the disciplinary letter were sufficiently supported by credible evidence. The appointing authority did not abuse his discretion and the discipline imposed was within the reasonable range of alternatives. See Board Rules R-1-6, R-6-2, R-6-6, R-6-9 and R-6-10, 4 CCR 801.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

This is not a proper case for the award of attorney fees.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. The discipline imposed was within the range of reasonable alternatives.
3. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
4. Attorney's fees are not warranted.

ORDER

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

Dated this 13th day of November, 2001.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1400
Denver, CO 80203
(303)764-1400

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/4 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

2001B077

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of November, 2001, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Michael McKim
1516 Sandpiper
Pueblo, Colorado 81006

and in the interagency mail, to:

Susan J. Trout
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
