

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2005B052(C)**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEO BELLIO,
Complainant,

vs.

DEPARTMENT OF REVENUE, LIQUOR & TOBACCO ENFORCEMENT DIVISION,
Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on March 9, 2005; April 18, 19, and 20, 2005; and May 4, 2005 at the State Personnel Board, 1120 Lincoln Street, Suite 1420, Denver, Colorado. Assistants Attorney General Valerie Arnold and Rick Dindinger represented Respondent. Respondent's advisory witness was Matt Cook, the appointing authority. Complainant appeared and was represented by Lawrence Katz. The parties, after extensions of time, filed written and electronic proposed findings of fact and closing arguments. The record was closed on November 22, 2005.

MATTER APPEALED

Complainant Leo Bellio ("Complainant" or "Bellio") appeals his suspension, demotion and the imposition of a corrective action by Respondent, Department of Revenue, Liquor & Tobacco Enforcement Division ("Respondent" or "DOR"). Complainant seeks rescission of the corrective action, rescission of the disciplinary action, restoration to the rank of Criminal Investigator I in the Liquor & Tobacco Enforcement Division, an award of back pay for the three day suspension and the difference in pay between the rank of Criminal Investigator I and Criminal Investigator Intern during the period of demotion, entry of a cease and desist order to require DOR from enforcing any current work plans issued against Bellio under Board Rule R-9-6 and the initiation against Cook and Peterson for engaging in unlawful discrimination against Complainant based upon his age under Board Rule R-9-6.

For the reasons set forth below, Respondent's action is **modified** with regards to the November 2004 disciplinary action and **rescinded** with regards to the April 2004 corrective action.

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;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant, a certified state employee, was employed by the Department of Revenue as a Criminal Investigator I, until November 8, 2004, in the Liquor and Tobacco Enforcement Division (the "Division"), for seventeen years. At the time of the hearing, he was seventy years old and, since July 2003, the only investigator over the age of sixty in the Division.
2. The Division is responsible for the enforcement of the Colorado Liquor Code throughout the state of Colorado. As a Criminal Investigator I, Complainant is responsible for conducting investigations of possible Liquor Code violations, inspections of liquor licensed businesses and offering training classes to local liquor licensing authorities, law enforcement agencies and liquor licensees.
3. In the investigations area, the Division places priority on cases involving fatalities and sale to minors.
4. Ken Peterson is a Criminal Investigator IV. He became Complainant's direct supervisor as of January 7, 2004, upon the resignation of David Sauter, Complainant's former supervisor. Sauter resigned due to drunk driving charges.
5. Matt Cook is the Director of the Division. He directly supervises Peterson and is Complainant's delegated appointing authority. He is also the Director for the Racing Division.
6. David Dechant is the Senior Director of DOR's Enforcement Division, which includes the Divisions of Racing and Liquor & Tobacco Enforcement. He directly supervises Cook.
7. From 1998 to 2003, Complainant received satisfactory annual performance evaluations. In March 2001, he received a "fully competent" evaluation, the highest

2005B052(C)

evaluation given by Larry Porter, Complainant's supervisor at that time.

8. In early 2002, during a meeting with Sauter, Peterson told Sauter that Complainant and another investigator, who were ages 67 and 69 respectively, were too old and they should retire.
9. In April 2002, Complainant received an "outstanding" evaluation and he was nominated for the DOR Employee of the Year award. Peterson submitted Complainant's nomination for this award to a selection panel. In addition, as a standard part of DOR's evaluation process, Peterson had to submit Complainant's "outstanding" evaluation to a panel in order to justify it as a rating.
10. In May 2003, Complainant received an "above standard" evaluation. Complainant did not receive an "unsatisfactory" rating in any performance category of his 2003 evaluation.
11. In 2003, Peterson told Complainant that he should retire and play golf. Complainant replied that he didn't like to play golf and enjoyed his work.
12. Two of Complainant's former supervisors, Porter and Sauter, viewed Complainant as being cooperative and accepting of constructive criticism. In addition, both of them evaluated him as utilizing computer software programs satisfactorily; completing his investigations in a timely fashion; and as having good time management skills.
13. Descriptions of Peterson's behavior in the workplace by co-workers, subordinates and supervisors range from "emotional" to "yelling, using profanity and exhibiting angry behavior." Peterson describes himself as having, while at work, yelled at employees, used profanity and displayed anger.
14. All of the Division's employees are trained in the use of "Outlook," a computer scheduling program, and are required to schedule their activities in this program for two weeks in advance.

January and March 2004 Work Plans

15. On January 8, 2004, the day after becoming Complainant's supervisor, Peterson met with Complainant and gave him a memorandum stating that he conducted a review of the criminal investigators' work product for the five-month period August 2003 to December 2003 and found that Complainant was the lowest producer in DOR. In addition, Peterson stated that Bellio avoided paperwork and use of computers, his reports were untimely, Complainant did not use good time management skills and he did not accept constructive criticism from his supervisors. Peterson stated that these problems were noted by several of Complainant's supervisors.
16. Criminal Investigator Is are evaluated on four areas: training classes; inspections;

2005B052(C)

cases closed; and hearings.

17. The performance standards for Criminal Investigator Is in the DOR included completion of 80 investigations each year, 20 inspections each month and 15 training classes per year. For the five-month period reviewed by Peterson, Complainant completed 37 investigations, 123 inspections and 10 training classes – meeting the productivity standards in all three areas during this five-month period.
18. Peterson then gave Complainant a performance improvement plan regarding scheduling, use of the case management system and prioritizing assignments (the “January 2004 Plan”). The January 2004 Plan restricted Complainant to an 8:00 a.m. to 5:00 p.m. work day. Complainant did not grieve the January 2004 Plan.
19. Normally, criminal investigators have discretion to choose their days and hours of work as long as they work 40 hours each week. This flexibility is necessary to conduct investigations and inspections during evenings and weekends.
20. From January to February 2004, Complainant met with Peterson weekly to discuss his cases and review his schedule. Complainant showed marked improvement in his performance.
21. On March 2, 2004, Peterson met with Complainant. According to Complainant, Peterson used profanities and screamed at him regarding an audit of DOR.
22. On March 4, 2004, Complainant filed, with Cook and Dechant, a workplace violence charge against Peterson based upon Peterson’s behavior in the March 2nd meeting. Dechant forwarded a copy of the email to Neil Peters, Human Resources Manager, requesting review by the Threat Assessment Team.
23. On March 9, 2004, Peterson placed Complainant on a more restrictive work plan (the “March 2004 Plan”) than the January 2004 Plan, requiring Complainant to reopen all of the investigations he closed in February 2004 and supply Peterson with lists of his cases, inspections and a written time schedules to complete outstanding cases. In addition, Complainant was confined to an 8:00 a.m. to 5:00 p.m. workday, which could not be altered without written approval from Peterson. Complainant could also not leave the Lakewood office without Peterson’s permission. Finally, the March 2004 Plan required Complainant to use the Outlook calendar to outline his work schedule for at least two weeks in advance and turn the schedule into Peterson each Monday morning.
24. Complainant did not grieve the March 2004 Plan.
25. Peterson believed Complainant had poor computer skills and wanted Complainant to comply with DOR policies regarding the use of computer programs to perform his work.

26. All DOR investigators, including Complainant, were required to submit monthly activity reports by the fifth day of the following month. In the year 2004, the monthly activity report included a list of all cases closed that month and all cases that were opened at the end of the month.
27. On or before March 5, 2004, Complainant submitted his February 2004 monthly activity report with an accurate typed list of his open cases. This list was accurate as of March 11, 2004.
28. DOR investigators account for their daily activities on Outlook, turning in their calendars electronically and projecting their schedules two weeks in advance. DOR investigators also prepare their investigative reports and monthly activity reports on computer programs purchased by DOR and turn in their investigative and activity reports electronically. The electronic reports and calendars are maintained on a network. Supervisors, including Peterson and Cook, have electronic access to these reports and calendars from their computer terminals and they can print copies of all portions of any report or calendar. DOR procedures do not require investigators to submit hard copies of their reports or calendars.
29. From March 8, 2004 to April 7, 2004, Complainant outlined his work schedule for at least two weeks in advance and electronically turned in the schedule to Peterson each Monday morning. Peterson reviewed the work schedules in weekly meetings with Complainant. At no point did Peterson inform Complainant that the schedules should be submitted in any other format.
30. Complainant is the only investigator who has been placed on a performance improvement plan after getting an "above standard" rating.
31. Kurt VandenBoogaard, another DOR investigator was placed on a performance improvement plan during 2004. In November 2001, he had filed a workplace violence complaint against Peterson that was subsequently upheld.

April 2004 Corrective Action

32. On April 7, 2004, Peterson issued a corrective action (the "April 2004 Corrective Action") to Complainant for failing to satisfy the following 6 requirements of the January and March 2004 Plans. Under the April 2004 Corrective Action, complainant was to perform the following tasks:
 - a. Submittal of a written list of all activity that had not been entered into the computer by March 11, 2004;
 - b. Submittal of a written list of all open cases by March 11, 2004;
 - c. Reopen all closed cases on Complainant's February monthly activity report;
 - d. Establish a two week planning sequence to be entered into Outlook

2005B052(C)

- and submittal to Peterson every Monday morning;
- e. Outline a time schedule to correct deficiencies in older cases;
- f. Establish a timeline and work schedule to complete presently assigned cases.

33. On April 7, 2004, Peterson gave Complainant an addendum to his work plan because Complainant was not accepting constructive criticism.
34. On April 10, 2004, Complainant filed a grievance against Peterson with Cook, seeking to have the April 2004 Corrective Action and the January and March 2004 Plans removed from his file and a written apology from Peterson. Cook told Complainant to attempt to resolve the grievance at the lowest possible level by discussing the disputed issues with Peterson.
35. On April 16, 2004, Complainant filed a formal DOR grievance form.
36. On April 20, 2004, Complainant met with Peterson. Complainant told Peterson he wanted the April 2004 Corrective Action removed. When Complainant did not provide Peterson with any "documentation," Peterson walked out of the meeting. Peterson issued a memo on April 20, 2004, upholding the issuance of the April 2004 Corrective Action.
37. On April 27, 2004, Complainant supplemented his grievance by submitting an additional memorandum.
38. On April 26, 2004, in an email to Complainant, Cook told him that he (Cook) would not consider Complainant grievance with regards to the work plans because they "are not grievable." He further stated that if an employee has a grievance it must be initiated within ten days of the action, therefore, with regards to the work plans, Cook "will not consider acceptance of a grievance." Cook also requested again that Complainant attempt to resolve the grievance at the lowest possible level by discussing the disputed issues with Peterson.
39. On May 5, 2004, Complainant and Peterson again met, but they were unable to resolve the matter. On May 11, 2004, Peterson issued a memo stating ". . . I still feel the corrective action is warranted and my position has not changed."
40. On May 14, 2004, Complainant submitted a memorandum of grievance in support of the April 10 and 27, 2004 grievances.
41. During May 2004, Complainant received an annual performance evaluation of "proficient" from Peterson.
42. On June 7, 2004, Peterson gave Complainant an updated performance improvement plan (the "June 2004 Plan"). Under this plan Complainant was required to

list his planned schedule for a two-week period in Outlook. In addition, it stated that “[t]his plan will be followed until **August 4, 2004** and then be reviewed.”

43. On June 10, 2004 a report was issued (the “June 2004 Report”) regarding Complainant’s workplace violence complaint against Peterson, finding that Peterson’s behavior (being loud and using profanity), while disruptive under DOR’s Workplace Violence Policy, was not threatening or violent under that policy. Peterson was interviewed in conjunction with the investigation of the complaint and the preparation of the report. The June 2004 Report recommended that Peterson’s appointing authority continue to coach and mentor him. Cook discussed the report with Peterson.
44. On June 10, 2004, Complainant, Delores Atencio (Complainant’s attorney), Peterson and Cook met to discuss the allegations contained in the April 2004 Corrective Action and Complainant’s requested remedy as detailed in the grievance. Cook believed that the Step I process had not been satisfactorily performed by Complainant and requested that both Step I and II be combined at this meeting in an attempt to facilitate communications between Complainant and Peterson, and to determine the merits of the April 2004 Corrective Action. All present agreed to proceed in this manner.
45. At the June 10, 2004 meeting, the parties discussed the six areas in the April 2004 Corrective Action. In addition, Cook explained to Complainant that an investigative report on a Hard Rock Café was incomplete and lacked detail to provide a foundation for many of the allegations. The report was returned to Complainant for additional work.
46. On June 25, 2004, Cook issued a memo, listing the six areas of alleged noncompliance outlined in the April 2004 Corrective Action. Cook found that Complainant failed to comply with the following four areas of the March 2004 Plan:
 - a. Submittal of a written list of all open cases by March 11, 2004;
 - b. Establish a two week planning sequence to be entered into Outlook and submittal to Peterson every Monday morning – Cook found that Complainant attempted partial compliance by entering the planning sequence into Outlook, but did not provide the information to Peterson every Monday morning for discussion;
 - c. Outline a time schedule to correct deficiencies in older cases;
 - d. Establish a timeline and work schedule to complete presently assigned cases.
47. Cook found that these deficiencies justified the imposition of a corrective action since these mandates were designed to give Complainant the opportunity to improve his performance and behavior. He further found these four mandates of the March 2004 Plan were accepted by Complainant as reasonable, possible to accomplish and necessary to return Complainant performance to a proficient level.

48. Cook did not review whether Complainant should have been placed on either the January 2004 Plan or the March 2004 Plan. He also did not review whether the plans were appropriate.
49. On July 7, 2004, Complainant timely filed a request for a hearing with the Board regarding his appeal of the corrective action, alleging age discrimination for the first time in the grievance process and requesting rescission of the April 2004 Corrective Action and the various work plans.
50. Prior to this matter, Complainant had never received a corrective action or a disciplinary action.
51. On August 3, 2004, Complainant prepared a memo which set forth the status of nine investigations, eight of which were either closed or would be closed upon approval.
52. Complainant and Peterson met sometime around August 6, 2004 and discussed that Complainant had completed all of the cases he was required to complete by August 4, 2004. After this meeting, Complainant believed that his work plan(s) were terminated.
53. After the August 2004 meeting, there was no new performance plan put in place for Complainant. However, Complainant and Peterson met weekly to discuss Complainant's cases.
54. During August, September and October 2004, Complainant was not assigned any investigations. During August and September 2004, he initiated five investigations.

Complainant's Use of Sick Leave

55. On October 4, 2004, Peterson and Complainant met to discuss Complainant's use of sick leave as he had taken 137 hours of sick leave since June 20, 2004 and 191 to date during 2004. Peterson was concerned that Complainant was abusing sick leave. He wanted to determine out whether Complainant qualified for FMLA and whether he was fit for work (in other words, able to carry a firearm or drive a state car).
56. During the meeting, Peterson questioned Complainant's use of sick leave. Complainant refused to answer Peterson on the grounds that questioning his sick leave violated the law.
57. At no time did Peterson explain to Complainant that he was asking about Complainant's use of sick leave in order to determine whether it should be designated as FMLA leave or to determine whether Complainant was fit for work as an investigator.
58. After this meeting, both Peterson and Complainant filed workplace violence complaints against each other, based upon the events during the meeting. On October 5, 2004, Cook advised Complainant that his workplace violence complaint needed to be

2005B052(C)

directed to Cook as the Director of the Division and Complainant's appointing authority. Complainant refused, saying that Cook had done nothing before, and filed the complaint without directing it through Cook.

Complainant's Reassignment to Racing Division

59. On October 14, 2004, Cook looked for Complainant as he wanted to reassign him to the Racing Division. However, he was unable to contact Complainant because Complainant was out conducting inspections in Georgetown, Colorado. When Cook accessed Complainant's schedule in "Outlook," he found only a few entries and that Complainant had not projected his schedule two weeks out.
60. On October 15, 2004, Cook met with Complainant to inform him that because of the workplace violence incidents, Complainant was being reassigned from the Liquor Division to the Racing Division.
61. Complainant brought a tape recorder to the meeting to tape the conversation. Cook directed Complainant to turn the machine off. When Complainant refused to do so unless his attorney was present, Cook terminated the meeting, taking Complainant's gun and badge and placing him on administrative leave.
62. Cook requested that Dechant, the appointing authority for the entire Enforcement Division, address Complainant's behavior.

R-6-10 Meeting and Disciplinary Action

63. On October 29, 2004, after proper notice, Dechant held a R-6-10 meeting with Complainant. Also present at the meeting were Complainant's attorney and Mark Wilson, Director of the Division of Gaming, who was present as Dechant's representative.
64. During the meeting, Complainant told Dechant that he had not answered the questions about his sick leave because they violated HIPAA and that he was being discriminated against based on his age. He also explained that he only had two open investigations and, therefore, was unsure of his schedule for certain dates during this period.
65. On November 8, 2004, Dechant issued a disciplinary action against Complainant, suspending him for three days without pay, demoting him to the rank of Criminal Investigator Intern and transferring him to DOR's Division of Racing. The demotion, salary reduction and transfer would be reviewed every three months to determine if his performance and compliance would merit returning him to his former status.
66. The disciplinary action was based upon Complainant's insubordination with regards to answering questions about his sick leave, taping the conversation with Cook when he

2005B052(C)

had no right to representation, and Complainant's failure to enter a two week schedule.

67. Dechant also found that there was an ambiguity in DOR's workplace violence policy with regards to filing complaints with the possibility of several venues for filing. Therefore, Dechant found that Complainant had not been insubordinate in filing his complaint with Dechant. However, he stated that each act of insubordination was a terminable event "but when viewed with [Complainant's] long record of outstanding service demands a less severe conclusion." Dechant further stated that Complainant had been unwilling to work with his supervisors, Cook and Peterson, in a cooperative and productive way, which had caused his work to be scrutinized more closely and had created interpersonal conflict with his supervisors.
68. Dechant did not take into consideration the possibility that because Cook was transferring Complainant to Racing, Complainant may have had a lower case load.
69. While discrimination had been discussed during the R-6-10 meeting, Dechant did not find any evidence that it had occurred.
70. Terry Marsh, age 58, replaced Complainant in the Liquor Enforcement and Tobacco Division.
71. Complainant was reinstated to Criminal Investigator I, effective February 2005, in the Racing Division. A few weeks after Complainant was to be reviewed in February 2005, he contacted his supervisor who told him that he did not know what was going on. At the end of March 2005, Complainant's paycheck reflected a raise of \$480 – the difference between a Criminal Investigator Intern and a Criminal Investigator I's salary. Soon after this Complainant received a separate check for \$480. DOR's Human Resources was unable to explain to Complainant the basis for the separate check.
72. Under the disciplinary action, Complainant lost \$4000 to \$5000 in pay due to his three suspension and his demotion.
73. As of the hearing in this matter, Complainant has not been returned to the Liquor & Tobacco Enforcement Division.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined 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 Rule 6-12B, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;

2005B052(C)

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

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, including both the April 2004 Corrective Action and the November 2004 Disciplinary Action. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant did not commit all of the acts for which he was disciplined.

1. April 2004 Corrective Action

Complainant received a corrective action in April 2004 that he grieved and which was consolidated with his disciplinary action. The grounds for the April 2004 Corrective Action was failure to perform under the January and March 2004 Work Plans. While the number of areas of Complainant's alleged poor performance, as outlined in the April 2004 Corrective Action were reduced from six to four by Cook, the April 2004 Corrective Action itself was upheld.

Under the modified April 2004 Corrective Action, Complainant's performance was found to be defective in the following areas:

- He failed to submit a written list of all his open cases by March 11, 2004;
- He failed to establish a two-week planning sequence in Outlook to be submitted to Peterson weekly;
- He failed to outline a time schedule to correct deficiencies in older cases;
- He failed to establish a timeline and work schedule to complete presently assigned cases.

As noted above, Respondent bears the burden of proof with regards to the corrective action. The credible evidence established that Complainant did the following:

- On March 5, 2004, Complainant submitted, as part of his February 2004 monthly activity report, a list of all open cases – a list that was accurate as of

2005B052(C)

March 11, 2004.

- Complainant met with Peterson on a weekly basis to discuss his cases and review his schedule. In addition, Peterson had electronic access to Complainant's Outlook entries. Yet Peterson never told Complainant during any of those weekly meetings that, despite Peterson's ability to access Complainant's Outlook entries, Complainant did not meet the requirements of the work plans to submit his two-week planning sequence to Peterson.
- Again, Complainant was making entries into Outlook – entries that would project his handling of his current caseload. In addition, he and Peterson were meeting weekly to discuss his cases. At a minimum, his Outlook entries could be easily characterized as a timeline.

Therefore, Respondent has not established that Complainant committed the act(s) which were the basis for the April 2004 Corrective Action.

2. November 2004 Disciplinary Action

Complainant was disciplined in November 2004 for three acts. First, he was disciplined for failing to project out his schedule for two weeks in Outlook. Second, he refused to answer Peterson's questions about why he was out on sick leave. Third, he refused to turn off his tape recorder during his meeting with Cook.

While Complainant's Outlook calendar was not filled out for the two-week period that Cook reviewed it, there was a legitimate reason for this – Peterson wasn't assigning him work. He only had two open cases. Without the ongoing assignment of any investigations, Complainant, very understandably, is unable to project a full two-week schedule. Complainant certainly should not pad his Outlook entries or manufacture appointments if he did not have the assigned investigations. In addition, Respondent provided no credible evidence demonstrating that there were any other ongoing investigations or activities that Complainant should have been placing on his Outlook calendar. Therefore, Complainant had completed his Outlook schedule appropriately.

Complainant did commit the acts of refusing to answer Peterson's questions about why he was out on sick leave and refusing to turn off his tape recorder when Cook told him to do so. Whether or not this was appropriate behavior is discussed below.

B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court 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; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate

2005B052(C)

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. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

1. April 2004 Corrective Action

In imposing the April 2004 Corrective Action, there was no credible evidence presented that Cook failed to gather all of the necessary evidence. However, Cook did not fairly consider all of the evidence before him and, given the gathered evidence, did not reach a reasonable conclusion.

Peterson, during his testimony, made the following observations:

- Investigators had flexible hours in order to facilitate after hours investigations and that Complainant's work plans were not punitive, as they required nothing more of Complainant than any of the other investigators. Yet those work plans restricted Complainant's work day, making it difficult for him to perform as the other investigators;
- He (Peterson) did not become the Denver office supervisor until January 2004, yet he imposed a work plan to improve Complainant's performance within one day of becoming the Denver office supervisor and having daily contact with Complainant;
- Complainant is the only investigator who has been placed on a performance plan after receiving an "above standard" rating; and
- Complainant showed "marked improvement" under the January 2004 Work Plan, yet Peterson put him on a more restrictive work plan in March 2004.
- He wanted Complainant to utilize Outlook

Cook, in his April 26th email to Complainant, stated that he would not consider the appropriateness of the work plans, as they were "not grievable."¹ Given that the terms of the work plans themselves were the basis of the April 2004 Corrective Action, they should have been reviewed to determine whether the standard being set for Complainant was reasonable. Looking only at whether or not Complainant achieved that standard and ignoring whether that standard was even appropriate is not reasonable.

If those work plans had been examined then at least one of the items on Complainant's work plans, the restriction on Complainant's work day, should have been cause for concern by Cook. Peterson himself testified that the investigators had flexible hours so that they could conduct after hours investigations. Yet Complainant was expected to work a restricted work schedule. He was not given the flexibility given to other

¹ Pursuant to Board Rule R-8-5 (this action occurred before the July 1, 2005 effective date of a major revision to the Board's rules, therefore, all cites are to the rules in effect at the time of this action), the only issues which are not grievable are issues involving leaving sharing, discretionary pay differentials or a pay evaluation and its components that do not result in a corrective or disciplinary action.

investigators that was necessary to perform his job. Another red flag for Cook should have been the imposition of the work plan within one day of Peterson becoming Complainant's day-to-day supervisor. Cook should have also noted that even though, again by Peterson's own testimony, Complainant showed a "marked improvement" under the January 2004 Work Plan, Peterson placed him on a more restrictive work plan in March 2004.

Another red flag for Cook should have been Complainant's productivity for the five month period that Peterson reviewed prior to imposing the January 2004 Work Plan. As set forth above², Complainant, in that five-month period, under DOR's performance standards for Criminal Investigator Is, should have completed 34 investigations, 100 inspections and 7 trainings. He had completed 37 investigations, 123 inspections and 10 training classes. He met these performance standards yet he was placed first on the January 2004 Work Plan and then on the March 2004 Work Plan. If there was a problem with how he completed those investigations, inspections and/or training classes then those problems should have been clearly articulated, addressed in the Work Plans and, if they continued, addressed in the April 2004 Corrective Action. But that was not the focus of either the January or March Work Plans or the April 2004 Corrective Action.

Finally, Complainant received a "proficient" performance rating a month and a half after the April 2004 Corrective Action. It seems axiomatic that, if a supervisor gives an employee a corrective action for performance within two months of an annual evaluation and places that employee on not one but two separate work plans within four months of the annual evaluation, the supervisor would view and rate the employee's performance as "Needs Improvement."

The combination of Peterson's statements, outlined above; the creation of standards within the work plans which made it difficult for Complainant to actually perform his duties; Peterson's evaluation in May 2005 of Complainant as "proficient;" and Complainant's long history of performing well, call into serious doubt whether Complainant poorly performed under the January and March 2004 Work Plans. This doubt should reasonably raise grave concerns as to whether his performance merited the April 2004 Corrective Action. Given that Respondent bears the burden of proof in this matter, such doubt results in finding that Cook's upholding of the modified April 2004 Corrective Action was not a reasonable conclusion.

2. November 2004 Disciplinary Action

Dechant met the first prong of *Lawley*, gathering all of the necessary evidence to make his decision. However, he did not meet the second and third prongs of *Lawley*.

This is a clear case of poor communication between a supervisor and a subordinate. There was no evidence that Dechant considered the history of Complainant's and

2 Finding of Fact No. 17

Peterson's interactions – a huge factor in the chain of events. This history was evidenced by the testimony of many of the witnesses, including Cook, of Peterson's loud and angry interactions with subordinates and co-workers; the filing of two workplace violence reports by Complainant against Peterson and one by Peterson against Complainant; Peterson's immediate imposition of a work plan on Complainant within one day of becoming the Denver office supervisor; and his subsequent inability to have a more professional relationship with Complainant, e.g. "walking out" on his April 20th meeting with Complainant to discuss the April 2004 Corrective Action. This history led to the lack of assignments of investigations to Complainant by Peterson, which resulted directly in a lack of entries by Complainant into Outlook. Prior to disciplining Complainant, Dechant should have considered this history. There is no evidence that he did. By failing to do so, he did not consider all of the evidence in front of him, nor did he reach a reasonable conclusion to discipline Complainant regarding his Outlook entries.

If Peterson was trying to determine whether Complainant's prior sick leave should have been designated as Family and Medical Leave ("FML"), he failed to comply with the Director's Procedures for such a designation. It is an appointing authority's responsibility to designate and notify an employee whether leave is FML. Director's Procedure P-5-30, 4 CCR 801. FML cannot be designated retroactively once an employee has returned to work unless the appointing authority was unaware of the reason for the leave. Director's Procedure P-5-30, 4 CCR 801. No evidence was presented that Peterson was Complainant's appointing authority or had been authorized to act in such a capacity with regards to Complainant's sick leave. Therefore, if his questions were based upon an attempt to determine whether the sick leave used during 2004 should have been designated as FML, then Peterson did not have the authority to ask them.

If Peterson was trying to determine whether Complainant had abused sick leave, he did not go about it in an appropriate manner. Respondent's sole legal citation in support of Peterson's authority to question Complainant is that "Board (sic) Procedure P-5-1" provides this authority. Director's Procedure P-5-1 provides that employees must request leave as much in advance as possible, providing the general reason for the leave and that appointing authorities are responsible for approval of leave. While Complainant did take a fair amount of leave between June and October 2004, there was no evidence that it was submitted improperly for approval or that any of the leave had not been approved. In addition, if there was a suspicion of Complainant abusing sick leave, an act which could trigger a disciplinary action, then before Peterson questioned Complainant about the act, he would need to comply with the Board rules regarding the disciplinary process, including arrangements for a 6-10B meeting with Complainant's appointing authority.

With regards to whether Complainant was fit for work (to carry a firearm or drive a state car), if this was the basis for Peterson's questions, there was no evidence provided that Complainant's performance had demonstrated in any way that he was not fit for work. Therefore, Peterson had no basis for questioning Complainant as to whether he was fit for work.

Dechant concluded that Complainant's refusal to answer Peterson's questions about Complainant's sick leave was insubordinate. But given Peterson's lack of authority or basis for questioning Complainant, Dechant's decision to discipline Complainant on this basis was not reasonable.

Cook, while not having as tense a history with Complainant, had, in matters involving Complainant and Peterson, always supported or appeared to support Peterson, while overlooking the significant problems Peterson created through his management style and his lack of communication. There was no credible evidence presented that Complainant was made aware of why the meeting with Cook was being held. It would have been reasonable to believe that, given the recent confrontation with Peterson, he was going to be disciplined and wanted a record of the meeting. It is equally understandable that such an action would, at best, be uncomfortable or even highly irritating, especially to someone like Cook with an investigatory background. However, there was no credible evidence or even legal argument provided for Cook's authority to simply order that the tape recorder be turned off. It is also noteworthy that he did so without providing any explanation to Complainant for the demand. This, as well as Complainant's history with Peterson, should have been considered by Dechant in making his decision.

Complainant, however, is not entirely blameless in this matter. Peterson's actions had created a tense working environment. Complainant also has an obligation to respond to his supervisors. There is no evidence that he asked why Cook wanted to meet with him, or why Peterson was asking about his sick leave. If either party in any of these discussions had asked such questions of each other, the meetings may not have degenerated. Given that Complainant did contribute to the situation, some level of discipline is merited.

3. Discrimination Allegations

Complainant has argued that he was discriminated against based on his age, a violation of §24-34-402(a), C.R.S. and Board Rule R-9-3, 4 CCR 801. To establish a *prima facie* case of employment discrimination, Complainant bears the overall burden of proof and must initially present evidence that tends to show:

1. He belonged to a protected class
2. He was qualified for the position
3. He suffered an adverse employment decision, and
4. The circumstances gave rise to an inference of discrimination.

Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997) citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Upon establishing a *prima facie* case of discrimination, the burden would shift to the Respondent to show that the adverse employment action was taken because of a legitimate, non-discriminatory reason. *Dep't of Natural Resources v. Bodaghi*, 995 P.2d 288 (Colo. 2000). Complainant has not established a *prima facie* case of age discrimination.

The undisputed evidence establishes that Complainant meets the first three prongs of the *Big O Tires* test. However, the only credible evidence that Complainant provided from which an inference of age discrimination may possibly be established was the two comments by Peterson in 2002 and 2003, as set forth above in Findings of Fact Nos. 8 and 11. The remaining evidence and/or proposed findings of fact submitted by Complainant was either not credible or was simply not established at hearing. Based upon the credible evidence presented by Complainant, it does not rise to the level of being an inference of discrimination. There is a difference between discrimination and the consequences of poor communication skills. In this action, there is a long history of Peterson having a confrontational style. In addition, there were at least two other people (Cook and Dechant) involved in making decisions about Complainant. There was no credible evidence presented that either of them behaved in any way that may be deemed age discrimination. Therefore, the circumstances of this matter do not give rise to an inference that Complainant was discriminated against because of his age.

C. The discipline imposed was not within the range of reasonable alternatives

Pursuant to Board Rule 6-9, 4 CCR 801, an appointing authority, in imposing discipline must consider all of the circumstances of a situation as well as a complainant's individual circumstances. As established by Complainant's performance evaluations, as well as his nomination for a prestigious state government award, Complainant was a valued employee who had worked for the state for over seventeen years without any prior communication or interpersonal problems with supervisors or a disciplinary history. These are strong mitigating factors to be considered prior to imposing discipline. The issues in this action arise out of a lack of clarity of the standards imposed and flawed communication between supervisor(s) and a subordinate. Given that it is Respondent's burden of proof with regards to the corrective action and the disciplinary action, the lack of clarity and the poor communication results in a modification of the November 2004 Disciplinary Action and a rescission of the April 2004 Corrective Action.

Given the mitigating factors outlined above; the evidence that Complainant showed a marked improvement during the first quarter of 2004; and the lack of a basis for the imposition of the corrective action, the modified April 2004 Corrective Action imposed in June 2004 is removed.

With regards to the disciplinary action, even if the three grounds for imposing discipline were not arbitrary and capricious, the discipline imposed was not within the range of reasonable alternatives. For failing to answer personal questions about his health without any authority or explanation as to why those questions were being asked; attempting to tape a meeting at which he believed he was going to be disciplined and not making Outlook entries because his assigned caseload did not warrant it, Complainant lost \$4000 to \$5000 in pay. The combination of these actions, let alone any one of them individually, does not merit such a severe discipline.

Pursuant to Board Rule R-6-2, employees must be subjected to progressive
2005B052(C)

discipline, receiving a corrective action before a disciplinary action, unless they behave in a matter so flagrant or serious that immediate discipline is proper. In this matter, at the time of his interactions with Peterson and Cook in October 2004, as noted above, Complainant contributed to the confrontational atmosphere. But his behavior in October 2004 does not rise to the level of flagrant or serious nor does it merit a "penalty" of \$4000 to \$5000. Therefore, given his, albeit it minor, contribution to the situation, a corrective action, rather than a disciplinary action, is warranted. In addition, while it is not within the authority of the Board to order it, hopefully there will be an addressing of the lack of open and professional communication between the parties.

The only credible evidence presented with regards to Complainant's transfer to the Racing Division was that it was based on the cross filings of the workplace violence complaints by Complainant and Peterson and was not a part of the November 2004 disciplinary action. This is an appropriate response to such a situation, pending an investigation into and resolution of the matter. Therefore, Complainant's request for reinstatement to the Division is denied.

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. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B)(3), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. Respondent, while not prevailing, presented rational arguments and evidence to support its imposition of its personnel actions against Complainant. In addition, there was no evidence that would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

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

ORDER

2005B052(C)

The April 2004 Corrective Action is rescinded and the November 2004 Disciplinary Action is modified to a corrective action. Complainant is awarded full back pay and benefits for the period of his suspension and demotion. Attorney fees and costs are not awarded.

Dated this 5th day of January, 2006, nunc pro tunc 23rd day of December, 2005.

Kristin F. Rozansky
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.); Board Rule 8-68B, 4 CCR 801. If a written notice of appeal is not received by the Board 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).

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

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 appellant may file a reply brief within five days. An original and 8 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 1/2 inch by 11 inch paper only. Board Rule 8-73B, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule R-8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days 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 ALJ's decision. Board Rule R-8-65B, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of January 2006, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Lawrence Katz
410 Seventeenth Street, Suite 1300
Denver, Colorado 80202

and in the interagency mail, to:

Valerie Arnold
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Jane F. Sprague