

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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MILTON YARBROUGH,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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Hearing was held on May 9, June 19, and August 9, 2001 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by Assistant Attorney General Susan J. Trout. Complainant represented himself at the May 9 hearing, and was represented by Michael O'Malley at the June and August hearing dates.

**PRELIMINARY MATTERS**

Witnesses

Respondent's witnesses were: Michael L. Beckham, Fleet Manager, Colorado Department of Transportation ("CDOT"); Milton Yarbrough, former Auto Tech II, CDOT; and Jeffery R. Kullman, Regional Transportation Director, CDOT.

Complainant's witnesses were Charley Brinkmeyer, Heavy Equipment Mechanic III, CDOT; Daniel Witt, Heavy Equipment Mechanic III, CDOT; Louis Cross, Materials Supervisor, CDOT; and himself.

Exhibits

Respondent's Exhibits 1 - 10, 12, 14, 18 - 21, 23, 25, 26 (pages 1 and 2 and the top of 3 through Citation #014), and 27 - 49 were admitted by stipulation.

Procedural Matters

Complainant filed a motion to continue the hearing on May 8, 2001, stating that his prospective counsel (Colorado Association of Public Employees, "CAPE") had just informed him on that day that it would not represent him. At the outset of the May 9 hearing, the parties presented argument on the motion. Complainant explained that he had spoken with the executive director of CAPE about his case to initiate the appeal process, and needed more time to enable him to retain CAPE or private counsel. Complainant listed witnesses he intended to call if given a continuance. The May 9 hearing date was the first setting for this matter.

Respondent argued that filing a motion for continuance one day before the hearing provided insufficient notice and was prejudicial to its witnesses, who had arranged their schedules to attend. The undersigned granted Complainant's motion in part, ordering that only Respondent would present its case on May 9, and that the case would be set for a second day of hearing at which Complainant would present his case.<sup>1</sup>

### **MATTER APPEALED**

Complainant appeals his termination from employment on March 21, 2001. For the reasons set forth below, Respondent's action is **affirmed**.

### **ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

### **STIPULATED FACTS**

1. On August 1, 1993, Complainant, Milton Yarbough, was appointed to the position of Automotive Mechanic at CDOT. On September 1, 1993, Complainant's position title was changed to Auto Service Tech II (via system maintenance study).
2. On July 1, 2000, Complainant's position was again changed to that of

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<sup>1</sup> Respondent used more than the first day of hearing to present its case-in-chief.

Equipment Mechanic II (via system maintenance study).

### **FINDINGS OF FACT**

1. Complainant worked in a mechanics' shop that serviced Colorado state vehicles. The shop consisted of approximately five heavy equipment mechanics and one auto tech mechanic, Complainant. The majority of vehicles that came into the shop were "heavy equipment," meaning over one ton in weight.
2. At all times relevant, the other mechanics worked exclusively on heavy equipment. Complainant worked on both heavy and light equipment.
3. Michael Beckham was Complainant's first immediate supervisor in the shop, along with Roy Foreman.
4. Complainant's 1994 -1995 evaluation was an overall Good. Beckham noted that Complainant had been on modified duty for a period. He also stated, "Milton still needs improvement in his quality and quantity of work. Extra effort in paperwork would help improve reading, writing, and comprehension." Complainant signed "Agree" on this evaluation.
5. During this period of 1994 to 1995, Complainant filed a grievance against Beckham for treating him unfairly. Respondent found the grievance to be warranted, and removed Beckham from having direct supervisory authority over Complainant and the other mechanics in the shop.
6. Roy Foreman became the sole immediate supervisor over Complainant and the other mechanics.
7. Complainant's 1995 - 1996 evaluation was an overall Good. Foreman noted as strengths, "Milton has worked hard toward an upgrade to heavy equipment mechanic. To date he is rated among the top qualified Ast II's for promotion. Milton has improved in the performance of his duties and his efforts are unmatched." He noted as areas for development, "Milton needs to work toward eliminating outside interferences and concentrate on improving documentation." Complainant signed "Agree" on this evaluation.
8. Foreman rated Complainant an overall Needs Improvement on his 1996 - 1997 evaluation. Foreman attached a lengthy written narrative explanation to the evaluation form. It stated in part:

"You frequently fail to be attentive during meetings and you rarely remain awake." [He had been found asleep on the job on August 6, 1996.] "Your leave record reflects less than one hour accumulated and on more than one occasion you have gone on LWOP status . . . You have refused to fill out leave papers when late . . .

Your time sheets, work orders, and leave papers are rarely accurate or legible, and almost always have to be redone.

Your behavior has become increasingly more confrontational when asked to perform duties, and you frequently want to debate whether or not your assigned duties are in your job description. You have refused to perform assigned duties and when tasks are not to your liking your performance is unacceptable.

On 8-6-96 you made comments to your supervisor that 'you will get yours,' which is in violation of the Policy Directive . . . Threat Situations.

Your timeliness for the completion of tasks, quantity of tasks completed, and quality are unacceptable and this is made worse by your frequent absenteeism and attitude toward assigned duties. You rarely perform assigned duties without argument, and on occasion, direct refusal."

9. Complainant signed "Agree" on this performance evaluation.
10. On August 23, 1996, Respondent issued Complainant a Corrective Action for receiving the Needs Improvement evaluation, containing the text from Foreman's evaluation, nearly verbatim.
11. Complainant received an overall "Good" on his 1997 - 1998 evaluation. Foreman noted as a strength that he was "gaining experience with heavy equipment and trucks." He noted as areas for development, "Paperwork has to be completed as instructed and reported more accurately. Attendance needs improvement, and leave time should have prior approval. Assignments need to be completed more timely. Writing skills need improvement." Complainant signed "Disagree" on this evaluation.
12. Foreman rated Complainant "Fully Competent" on his 1998 - 1999 evaluation. He drafted a number of Individual Performance Objectives ("IPO's") for Complainant at that time, which included the following:
  - "Work toward completing assignments in a timelier manner."
  - "Improve the accuracy, neatness and completeness of paperwork."
  - "Commit to and attend additional training to improve written work and documentation skills."
13. On October 19, 1998, Foreman issued Complainant a Performance Documentation Form. It stated in part:

"During my review of the daily progress reports I noticed a hydraulic swivel block that had been cut through on the right wing. When I asked why you cut through this block instead of disconnecting the hoses, you replied that it took too much time. By not disconnecting the hoses, which would have taken less time, you destroyed a \$517 block assembly, several hoses, and contaminated \$6000 worth of hydraulic system components with metal filings. This will require an extensive tear-down which could have been avoided by your using proper maintenance procedures.

This is not the first time you have been cautioned about not using proper maintenance procedures. If you have any problems or questions about proper procedures, ask. This type of work is unacceptable, and I do not want it repeated."

14. On April 19, 1999, Foreman wrote a memo to Complainant regarding "Safety." It stated in part,

You were assigned the job of repairing the oil leaks on unit 3337. Part of this process required a separation of the engine and cab assemblies. In separating these assemblies you failed to follow proper safety procedures. You did not block or support these assemblies prior to removing the bolts holding them together. This resulted in the two halves breaking apart causing damage to the left upper bolt eye on the transmission case.

Failure of (sic) to use supplied safety equipment, devices, and procedures can cause damage to CDOT, equipment and possible injury to yourself or coworkers. . . Your explanation of the circumstances did not justify your not using the most basic of safety precautions."

15. In mid-1999, Beckham was re-installed as Complainant's and the other mechanics' direct supervisor in the shop.
16. Beckham rated Complainant an overall Needs Improvement on his 1999 - 2000 evaluation, with Needs Improvement ratings in the Administration (consisting of all paperwork involved in the position, including daily work orders, leave slips, payroll documents, etc.), and Professional/Technical areas. Beckham had not warned Complainant that his performance was at a Needs Improvement level.
17. Complainant signed "Agree" on this evaluation and did not grieve it.
18. Beckham attached a separate statement to the evaluation. He listed six IPO's that Complainant had met. He then listed four IPO's that he hadn't met, noting in part, "Employee takes an excessive amount of time to complete assigned work. Jobs that should take weeks to complete will extend into months and there is not any acceptable reason for this time delay. Quality of work has improved during the last year, but still needs much more improvement in this area. The improved quality does not justify the amount of time to complete an assigned work order."
19. The evaluation also stated, "In the last 11 months you were late a

minimum of 37 times, major improvement needs to be made in this area. Time sheets have improved but the accuracy and total time does still needs improvement. (sic) Work orders need to have accuracy and quality completion addressed. Time for paperwork becomes excessive and the amount of time captured on work order work does not come close to the amount of time unit [vehicle worked on] was in the shop. (sic)"

20. Lastly, the evaluation stated, "Employee has a lot or (sic) areas that need improvement and if there are any outside courses in advance reading, writing math, or comprehension he would like to do during non working hours I believe that CDOT could work with him to help defray the tuition cost."
21. There is no evidence that Complainant took advantage of this tuition offer.

May 2000 Corrective Action.

22. On May 11, 2000, Chuck Loerwald, Beckham's direct supervisor, issued Complainant a Corrective Action ("CA") based on his Needs Improvement evaluation. (Beckham had no authority to issue a corrective action).
23. The CA noted Complainant's Needs Improvement ratings in Administration and Professional/Technical areas, and noted Complainant's recent problems in being on time for work and his over-utilization of Leave Without Pay.
24. The CA stated that Complainant had to improve his performance to Fully Competent within 60 days. It stated, in part, "I have instructed your supervisor to reevaluate your job performance at the end of each workweek to identify your strength and/or weakness and to monitor your leave practice and balances for the next 60 calendar days. It is imperative that your job performance improve to at least 'Fully Competent' and that you maintain enough leave to be able to take off work when needed without going on 'Leave Without Pay.'"
25. The CA concluded, "If your job performance and leave balances does (sic) not improve it will leave me no alternative but to refer the matter to the Appointing Authority and ask that the matter be reviewed for possible corrective and/or disciplinary action up to and including termination."
26. Complainant did not grieve the CA.

Corrective Action Period: May 12 - July 11, 2000.

27. Beckham and Complainant met weekly to review Complainant's job performance throughout the CA period of May 12 through July 11, 2000. In addition, they often had daily meetings to review Complainant's work. Beckham generated a computerized summary of Complainant's performance on Performance Documentation Forms ("PDF's"), which they reviewed and signed after each meeting.

Unit #3948.

28. Complainant offered to take on extra work at the outset of the CA period, having noticed he had less work assigned to him than the others in the shop. Beckham assigned him Unit #3948, a tractor mower, for Preventive Maintenance ("PM") and "full service."<sup>2</sup>
29. Upon inspection of the unit, Beckham listed seven "items of concern" in his weekly evaluation of Complainant's performance. Two of the items were not legitimate problem issues: "rear lights not installed" and "rear reflectors not installed." A third was questionable: replacing bolts with pins on the unit. The remaining four items were legitimate performance problems.
30. Unit #3948 was a very old tractor. As such, it had never had rear reflectors, and reflectors had never been Original Equipment for the unit. Beckham did not make it a regular practice to require the installation of reflectors on a tractor such as this as part of PM. Complainant tried to tell Beckham that it didn't need reflectors.
31. Unit #3948 had not had lights on it for 10 or 15 years. It was not customary to install a new lighting system on a tractor as part of PM.
32. Complainant spent at least two days installing an entirely new wiring system on Unit #3948, including turn signals and reflectors.
33. Beckham also listed as an item of concern the fact that the bolts on the vehicle were not flush with all of the nuts holding them in place. Unit #3948 had functioned well with the bolts for many years, and there was no indication that they were failing at that time. Replacement of the bolts with pins was not a routine PM task for Unit #3948.
34. Nonetheless, it may have been a wise precautionary measure for Beckham to have Complainant replace the bolts with pins, since some of the bolts were not flush with the nuts.

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1. Full service included "AA," a grease job, and "BB," an oil and filter change.

35. It took Complainant at least two extra days to replace the bolts with pins. First, he had to use a torch to remove the bolts. Then, because the pins he received were too big for the holes, he had to use an enormous drill to increase the size of the holes in order to install the new pins.
36. Beckham also listed as items of concern Complainant's failure to change the fuel filters, to grease the unit, and to replace the main engine belts. Complainant informed Beckham that he had forgotten to change the fuel filter and grease the unit. These were routine full service items that Complainant should have performed.
37. During the week of May 22, Beckham asked Complainant to perform a hydraulic valve replacement on Unit #3948. Beckham explained the valve and each of its section functions to Complainant. Two other mechanics helped Complainant "with explanation of this type of hydraulic system" and with "some technical information." By May 23 Complainant had spent eight hours on the valve replacement, which was excessive.
38. Beckham states in his summary of that week, Milton "still needs to improve his annual, sick, on time, quality of workmanship, and time needed to complete each phase of a job."

#### RTD Vehicle Maintenance.

39. On June 14, Beckham assigned Complainant an RTD vehicle to service as needed. Complainant was ordered to check whether the "service" sign was displayed on the dash of the vehicle every morning at 7 a.m., and, if so, to service it (taking no longer than an hour).
40. Complainant neglected to check the RTD vehicle for the next week.
41. On June 28 Beckham was informed by an RTD driver that he had left the vehicle with a "fuel" sign on it the week prior, and five working days later it had not been fueled. He had had to use his personal vehicle.
42. Complainant routinely neglected to check and service the RTD vehicle thereafter.

#### Unit #962.

43. On June 9, 2000, Complainant started work on the next vehicle, Unit #962, a 1989 Chevy one-ton dump truck. His assignment was to remove the engine, replace it with a long block, take off parts, and put on a new

engine, as well as "AA" [grease job], "BB" [oil and filter change], and PM, including lights, breaks, etc.

44. Complainant took between 160 and 171 hours to complete the work on the unit. This was approximately three or four times as long as it should have taken him.

Paperwork problems.

45. During the period of the CA, Complainant took leave without pay on a number of occasions. When Beckham requested the necessary paperwork, Complainant failed to start working on it right away, took an excessive amount of time to complete it, and usually filled it out incorrectly more than once.
46. During the week of May 22, Beckham had to correct Complainant's paperwork (leave slips and time sheets) at least five times.
47. Complainant kept no records of his work on May 31 and June 1, 2000.
48. Complainant often made fundamental errors on his daily work order forms. He failed to date and sign forms, left spaces such as "date out" blank, and used improper codes for parts and labor, including inserting four-digit codes into three-digit spaces.
49. Complainant took an extreme amount of time dealing with paperwork required for the job, tracking down verification for leave without pay, and correcting daily work order forms which he repeatedly filled out improperly. Such excessive time on paperwork reduced his availability to perform mechanical duties.

Interim Colorado Peak Performance Form

50. After the close of the Corrective Action period, Beckham gave Complainant an Interim Performance Evaluation of Needs Improvement, finding he was still at a Needs Improvement level in the Administration and Professional/Technical areas.

51. Beckham stated in part,

"During the 60 (sixty) day period we have had a meeting every week and in a lot of cases daily on items of concern. I have not found enough improvement to justify a 'Fully Competent' in the areas of 'Administration and Professional/Technical.' The following documentation that you and I

have agreed upon should justify my position on this matter. Time on completion of assigned work has been extreme and the administration portion has shown very little improvement. There are some areas of improvement and are so noted on the following pages."

52. Beckham attached a Summary to the Interim evaluation. He indicates that Complainant spent 145.5 hours working on Unit #3948 and 171.5 hours on Unit #962.
53. Beckham appears to have failed to account for some of Complainant's time in this Summary. It appears he failed to credit Complainant for their weekly (and sometimes daily) meetings, which the evidence demonstrates took up to at least four hours per week, for a total of at least sixteen hours per month. Beckham also failed to account for the extra work involved in installing the wiring system and replacing the bolts with pins on Unit #3948.
54. Nonetheless, even accounting for these factors, Complainant took an excessive amount of time to complete the work on Units #3948 and #962.
55. Beckham indicates that Complainant was late for work on at least 14 occasions during the two-month Corrective Action period, and used leave without pay twice.
56. Complainant checked "Disagree" on this Interim Performance Evaluation.

#### Second Corrective Action

57. As a direct result of the interim evaluation, Chuck Loerwald issued another Corrective Action to Complainant on September 8, 2000.
58. This CA mandates that Complainant improve to Fully Competent within 60 days, directs him to use the TEAMS System computerized daily log to track his work progress, and offers Complainant help and/or training in completing work orders, daily logs, and other paperwork.
59. The CA also requests that Complainant present Loerwald with a list of training classes he would attend to improve his professional and technical abilities on the job.

#### Corrective Action Period: September 8 to December 30, 2000

60. Complainant never sought out assistance in completing his paperwork required for the job, nor did he present Loerwald with a list of training

classes he would attend to improve his professional and technical abilities.

61. Complainant requested two vehicles during this corrective action period in order to improve his efficiency. Beckham assigned him two identical 1995 one ton dump trucks, Units #1954 and #2136, which needed identical work.
62. At the outset of this CA period, Beckham decided to try a new teaching method with Complainant. He and Complainant met on September 11 and each gave estimates of how long each task should take.
63. Complainant and Beckham agreed that the ten required tasks on the vehicles should take 35 hours to complete.
64. Complainant worked on Unit #1954 first. During the week of September 11, he erroneously switched two wires while reinstalling the transmission, which prevented the unit from down-shifting into lower gears. Beckham had taught Complainant to mark each part as he disassembled the vehicles he worked on. Complainant's failure to do this resulted in his switching the wires.
65. Complainant checked off a number of items on the PM list as being functional that were not functional, and had to address those.
66. Complainant reinstalled a door hinge upper bushing backward (from the bottom up instead of from the top down).
67. Complainant failed to date the PM form, and failed to sign and date the Customer Satisfaction form.
68. In his meeting with Beckham that week, Complainant attributed his errors to the stress of being under another Corrective Action and of Beckham monitoring his work so closely, as well as Beckham's "badgering and ridiculing" of him.
69. In mid-September, 2000, Complainant went to see the EEO officer for CDOT about Beckham's use of time estimates, explaining that it was unfair to impose them on him and not on the other mechanics in the shop. He then confronted Beckham about it. Beckham started using time estimates sporadically with the other mechanics even though this was unnecessary, in order to avoid the appearance of unfairness.

Break in Corrective Action Period: September 28 - November 30, 2000.

70. On September 27, 2000, Complainant was admitted to the hospital with pancreatitis; he was released on September 30. Complainant was in recovery, on funeral leave, or on modified light duty (performing cleaning tasks) for the remainder of the period through November 30, and therefore not under the terms of the CA during that time.

Return to Corrective Action Period: December 2000

71. When Complainant returned to his normal duties on December 1, 2000, Beckham reminded him he was again responsible for the RTD vehicle. He nonetheless failed to check the vehicle on December 4, 2000.
72. At the close of the CA period, Beckham estimated Complainant's time spent on unit #1954 as 152.5 hours. Subtracting time spent in meetings with Beckham, it was more likely to have been approximately 140 hours.
73. Complainant and Beckham had agreed that Unit #1954 should take 35 hours. However, Complainant had to re-install the transmission two extra times, through no fault of his own, adding 24 hours to the 35-hour estimate. In addition, Complainant had to remove the radiator two extra times, through no fault of his own, one of which was probably not necessary (testimony of Roy Foreman and Complainant), adding 6 hours to the 35-hour estimate. The total hours necessary for completing Unit #1954, using Beckham's and Complainant's own estimates, was 65 hours.
74. Even taking into account the 30 hours of additional legitimate time to work on Unit #1954, Complainant took 140 hours to complete a task that should have taken 65 hours. This was excessive.
75. Complainant took 89 hours to complete the work on Unit #2136. Complainant had estimated it would take a total of 29 hours, and Beckham had estimated 43 hours.
76. Complainant stated to Beckham that his time road testing Unit #2136 should not be counted against this total. Even accounting for that time, as well as his time meeting with Beckham, Complainant spent an excessive amount of time working on Unit #962.
77. Complainant attended a diesel emission certification training in January 2001.
78. Complainant was scheduled to attend a training class on clutches in January, 2001, but forgot to attend.

## Driver's License Issue

79. All CDOT employees are required as a condition of employment to hold a valid Colorado Driver's License.
80. On February 11, 1999, Chuck Loerwald issued a memo to all Section 5 Employees with a Commercial Drivers License, attaching the Fleet Safety Compliance Manual. Respondent's rule requires that any employee who has a driver's license suspended or revoked or who loses the right to operate a commercial motor vehicle must notify his or her employer no later than the day after the day of suspension.
81. On April 2, 1999, Respondent imposed a Disciplinary Action of a seven-day suspension without pay against Complainant for having a suspended Colorado Drivers License for over seven months. A routine CDOT check of employees' license status had revealed the suspension for failure to maintain car insurance. (Complainant had been in an accident and had been required to make restitution to the insurance company before his insurance would be reinstated. He had not done so.) The letter stated in part,

"Clearly, you have been operating CDOT's vehicles without a valid driver's license for some seven months. Just as clearly, you should have known that your license was suspended, given the circumstances surrounding the July, 1998 accident. You also knew that possessing and maintaining a valid driver's license is a condition of your employment."
82. On November 27, 2000, the Colorado Department of Revenue, Driver Services Division, sent Complainant an Order of Suspension at his proper address (he has resided at this address for over ten years). The Order informed him that the Department had not received notification from his car insurance company of his continued insurance coverage, and that unless it received proof of coverage immediately his license would be suspended effective December 17, 2000.
83. Complainant received this Order.
84. Complainant did not receive his December paycheck on time due to his having recently taken leave without pay.
85. Complainant did not pay his car insurance on time. Having previously had his driver's license suspended for failure to pay car insurance, he knew that it would be suspended in December.

86. A routine check of CDOT employees' driver's licenses revealed that Complainant's drivers license was suspended on December 17, 2000. It was not reinstated until March 1, 2001.
87. Complainant did not inform his supervisor that his driver's license had been suspended.
88. Terri Bridges was hired as a mechanic in the shop in the fall of 1999. As a condition of her employment, she was required to obtain a Commercial Drivers License ("CDL") within six months of her employment. This license was required on a daily basis to enable the mechanics to test drive the heavy equipment they serviced.
89. Bridges earned a learners permit during the first six months of employment, but for the next year she still did not possess a Commercial Drivers License. As a result, another mechanic rode with her on the test drives of vehicles she serviced.
90. Beckham knew that Bridges did not have her CDL during this year-and-a-half period. The record does not reveal why this occurred or what Beckham planned to do about it. It appears that Bridges may have been one of Beckham's "favorites" in the shop.

Tardiness.

91. Complainant was routinely late to work by five or ten minutes.
92. The other mechanics were not late to work.
93. Beckham gathered in the break room with some employees for the first five or ten minutes of each work day, between 7:00 a.m. and 7:10 a.m. During this time some employees changed their clothes.
94. Beckham warned Complainant about being late in each monthly report during both corrective action periods.
95. Daniel Witt, a 28-year mechanic in the shop, routinely arrived ten minutes early to work. Once, during Complaint's Corrective Action period, he was late by one minute, and Beckham counseled him for it. Beckham said he had to "spread it around." To Witt this meant that Beckham felt he did not want to appear to hold Complainant to a double standard.
96. Complainant was late for work, usually by four to ten minutes, the

following number of times:

May 2000	4
June 2000	7
July 2000	11
August 2000	6
September 2000	8
October 2000	2 (out of 6 days worked)
November 2000	4
December 2000	6
January 2001	4
February 2001	5

Rule R-6-10 Meeting.

97. On March 5, 2001, Chuck Loerwald sent Complainant a letter notice of a pre-disciplinary meeting with appointing authority Jeffery Kullman, Region I Transportation Director, CDOT, on March 12, 2001.
98. On March 12, 2001, Complainant attended the pre-disciplinary meeting with Roy Foreman as his representative. Cotty Martinez, the EEO Officer, Chuck Loerwald, and Kullman were also in attendance.
99. Kullman first addressed the driver's license suspension issue. He explained that a routine check for drivers licenses found that Complainant had been suspended in December of 2000 due to failure to maintain insurance, and that, upon reviewing the DMV records, he had also discovered that Complainant had been suspended another time in October of 1999.
100. Kullman confirmed Complainant's address. He then asked him if he had received any notice of the suspension. Complainant denied receiving any such notice.
101. Complainant's position at the meeting was that his insurance company must have made a mistake, because he had sent in his premium for another six-month renewal of his policy, perhaps late. Kullman agreed to give him time to present more information on this issue.
102. Roy Foreman provided minor mitigating information to Kullman at the R-6-10 meeting. He said that he believed that Beckham had no legitimate reason to order Complainant to replace the transmission and radiator on Unit #1954, both of which extended the time spent on the unit. He also stated, "Perhaps Milton does have some problems with his technical abilities, but I think that is being compounded by the fact that he is being

micro-managed around every corner."

103. Complainant attempted to convince Kullman that he had not spent an excessive amount of time on the units he had serviced during the corrective action periods. He had a large notebook with work orders and time sheets in it, to which he repeatedly referred during the meeting. However, he was unable to provide any hard data to rebut the time totals Beckham had calculated, using Complainant's own time sheets to do so (with the exception of a one-week period).
104. At the close of the meeting, Foreman, speaking as Complainant's representative, offered to use the work order information containing time spent on the units to run a computerized summary of Complainant's work.
105. With regard to the issue of being late to work, Complainant provided no mitigating information, and did not deny having been routinely late for work.
106. Kullman gave Complainant five additional days to assemble additional information he thought should be considered prior to rendering his decision.
107. Complainant provided Kullman only with a one-page letter dated March 17, 2000, which discussed the circumstances under which he spent extra time on Unit #1954.
108. Neither Complainant nor Foreman provided Kullman with any additional information or data rebutting the documents showing his total hours spent on the units he serviced.
109. Kullman asked Chuck Loerwald to conduct additional investigation on the drivers license issue. Loerwald contact the DMV office, which informed him that its office sends out notification letters routinely to those suspended.
110. Complainant provided no proof (either to Kullman or at hearing) that he paid his car insurance in December 2000. The only evidence in the record demonstrates that he paid it in March of 2001, when he was reinstated.
111. Kullman reviewed all of Beckham's written material generated during the corrective action periods, including the daily Performance Documentation Form notes and meeting summaries, and the interim performance review. He also reviewed his personnel file.

112. Kullman concluded that three corrective actions had not resulted in Complainant improving his performance. Despite being given the opportunity to do so, Complainant had provided no meaningful documentation to rebut Beckham's documentation of his performance.
113. Kullman also concluded that one prior disciplinary action for a driver's license suspension had not prompted Complainant to maintain car insurance so as to avoid another suspension. In fact, Complainant's failure to maintain his car insurance had resulted in two additional suspensions since the 1999 disciplinary action. Kullman viewed this pattern of suspensions as a willful disregard of CDOT's driver's license policy.
114. He concluded that Complainant had done nothing to improve his performance on any of the issues for which he had been corrected and disciplined. Kullman felt that Complainant had offered him no mitigating information to consider.
115. Prior to terminating Complainant, Kullman checked on the availability of janitorial jobs at CDOT, as a potential transfer opportunity for Complainant. None was available at that time.
116. On March 19, 2001, Kullman sent a termination letter to Complainant. The letter cited Complainant's April 1999 disciplinary action for his drivers license suspension, as well as two additional drivers license suspensions in October of 1999 and December of 2000; his job performance being at a Needs Improvement level since May of 2000 and failure to improve; his problems with punctuality; and his going on leave without pay on a recurring basis.
117. Complainant seeks rescission of the discipline, reinstatement, consideration for an upgrade to heavy equipment mechanic, and removal of the corrective actions from his personnel file.

## **DISCUSSION**

In this *de novo* disciplinary proceeding, the burden is on the agency 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 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. McPeak v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

### 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). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

Both Complainant and Beckham had problems with credibility. Beckham testified that he did not recall having been grieved by Complainant in 1994 or 1995, and thereafter having been removed from his shop floor line supervisor duties. He also testified that he spent the same amount of time reviewing the other mechanics' work as he did reviewing Complainant's work during the corrective action periods. This testimony was not credible - it was self-serving, in an attempt to make himself appear unbiased.

The fact that Beckham held Complainant accountable for two types of extra, questionable work on Unit #3948 (the wiring for lights and replacement of bolts with pins) indicates that he may have held Complainant to a higher standard on that unit. If this had been a pattern of evidence, it would have been very damaging to Beckham's credibility on the issue of Complainant's performance as a mechanic. However, it was not a pattern, and it appears only to have occurred with these two projects on one unit.

The evidence in the record corroborates Beckham's testimony regarding Complainant's performance issues. First, Complainant's own witness, Daniel Witt, testified that Complainant was routinely late to work by five or ten minutes, confirming Beckham's daily notes recording his arrival time as being five to ten minutes late.

Roy Foreman's record as Complainant's immediate past supervisor also corroborates all of the performance problems to which Beckham testified. (Foreman was Complainant's representative at the pre-disciplinary meeting, demonstrating his allegiance to him.) Foreman rated Complainant Needs Improvement in 1997, stating that his paperwork was "rarely accurate or legible, and almost always [has] to be redone," and citing problems with timeliness in completing work, as well as with attitude. In October of 1998 and April of 1999, Foreman issued performance documentation forms citing Complainant's serious problems in performing basic mechanical duties. In 1998, when Foreman rated Complainant at Fully Competent overall, he nonetheless listed as IPO's: "work toward completing assignments in a timelier manner," "improve the accuracy, neatness and completeness of paperwork," and "commit to and attend

additional training to improve written work and documentation skills."

It is also noted that when Beckham rated Complainant "Needs Improvement" on his 1999-2000 evaluation, he offered to have CDOT assist with the tuition for "advanced reading, writing, math, or comprehension" courses. This offer was clearly made in an attempt to help Complainant improve his performance, demonstrating a lack of bias on Beckham's part at the time he issued the critical evaluation.

Turning to Complainant, he testified that he had not been adequately trained by Respondent to perform his job properly. However, his personnel file demonstrates that Respondent repeatedly encouraged him to obtain training to improve his performance, and that he failed to do so. When Loerwald specifically directed Complainant in the second Corrective Action to provide him with a list of training that would assist him in the professional/technical aspect of his duties, Complainant never provided this list to Loerwald. In January of 2000, Complainant forgot to attend a training course in clutches that he had been enrolled in. This is not the behavior of an individual who seeks out additional training and is refused it by his employer. Complainant's testimony regarding Respondent's lack of training therefore had little weight.

Complainant testified that he paid his car insurance late because he received his paycheck late, but that "I was under the impression I caught it in time." However, he offered no documentary evidence that he paid it any earlier than in March of 2001, three full months late. In view of the fact that he had been suspended previously for failing to pay his car insurance, there is no question that in December of 2000 he knew his license would be suspended. His testimony therefore lacked credibility.

**A. Complainant Committed the Acts for Which He Was Disciplined.**

Board Rule R-6-9, 4 CCR 801 (2001) states in part,

"Reasons for discipline include:

1. failure to perform competently;
2. willful misconduct or violation of these or agency rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform . . . ."

Complainant was terminated for a number of reasons: his repeated failure to maintain a valid drivers license; his routine lateness to work; his longstanding inability to fill out paperwork correctly; and his ongoing failure to perform the mechanical work in a timely manner. Complainant had demonstrated problems in all four of these areas for years. Respondent provided him with full notice of his performance problems, and

Complainant failed to improve his performance. The evidence demonstrates conclusively that Complainant committed the acts for which he was terminated, and that these acts constitute violations of Rule R-6-9.

Lateness. As indicated above, even Complainant's own witness, Daniel Witt, testified that Complainant was "routinely" late to work. Complainant testified, "Sometimes I was late. Most of the time I had a doctor's statement [due to his caring for his wife]. . . . Every now and then I get caught in traffic." Complainant introduced no evidence demonstrating that he was caring for his wife on the days he was documented as being late. Respondent had warned him in performance evaluations for years that his lateness was a problem. He failed to correct it. When placed on a Corrective Action, Beckham noted the high incidence of lateness on every monthly evaluation form. Even when under two successive Corrective Actions, Complainant still did not change his behavior. He failed and refused to arrive at work on time.

Such a longstanding pattern of lateness, in the face of repeated warnings, constitutes willful misconduct as well as willful failure to perform, under Board Rule R-6-9(2) and (4).

Complainant's witness, Daniel Witt, testified that he felt Beckham imposed a double standard on the lateness issue, since he allowed his employees to gather in the break room for the first five or ten minutes on the job each morning. However, the evidence demonstrated that Beckham expected all employees to arrive at work no later than 7:00 a.m., and that they all did, with the exception of Complainant. Had Complainant arrived on time, he would also have been free to spend the first few minutes of his day with co-workers in the break room. It was within Beckham's managerial discretion to allow his employees to congregate each morning prior to starting their work; such gatherings can boost morale. It was not unfair for Beckham to expect Complainant to be at work by 7 a.m. and to hold him accountable for being five or ten minutes late.

Failure to Maintain a Valid Driver's License. Complainant had lost his drivers license twice prior to December 2000 for failure to maintain his car insurance. When he failed to make his car insurance payment in December of 2000, he knew his license would be suspended. In January and February of 2001, he knew he was test driving CDOT vehicles without a license, thereby subjecting the agency to liability. CDOT's policy required not only that he maintain his drivers license, but also that he inform his supervisor within one working day of the suspension thereof. Complainant's violation of both of this rule constituted "willful misconduct or violation of these or agency rules or law that affect the ability to perform the job." Board Rule R-6-9(2).

It is troubling that Terri Bridges was allowed to continue to work at CDOT without consequence without her Commercial Drivers License, during the same period in which Complainant was disciplined for having his drivers license suspended. There is no

evidence demonstrating why Bridges was permitted to delay in obtaining her license.

A number of factors distinguish Bridges' situation from that of Complainant. First, her immediate supervisor knew Bridges' situation; Beckham testified that she was in the process of "getting it," and clearly felt her situation was an acceptable temporary one (for reasons not in the record). By marked contrast, Complainant concealed his suspension from Beckham. Secondly, Complainant had received a prior disciplinary action for a license suspension, so his failure to maintain insurance was a willful act he knew would result in further disciplinary action.

Perhaps most important is the fact that there is no evidence demonstrating that Kullman, the appointing authority, knew about Bridges' situation. He therefore was not in a position to address the apparent inequity. To find that the appointing authority treated Complainant unfairly in relation to Bridges, it must first be shown that he knew about her situation.<sup>3</sup>

Failure to Properly Fill Out Paperwork. Complainant's failure to accurately fill out paperwork was not a minor issue. Reviewing and correcting Complainant's paperwork took up an excessive amount of his supervisor's time. The evidence also suggests that one of the reasons Complainant was so slow in performing his mechanical duties was the enormous amount of time he spent repeatedly correcting forms he had filled out improperly.

The daily work orders required of the mechanics in the shop are a routine and essential part of the position. Complainant offered no evidence to rebut this. Roy Foreman required as an IPO in Complainant's 1995 - 1996 evaluation that he improve his performance in filling out paperwork, suggesting that he obtain further training in reading and writing. Complainant failed to do so, and the following year received a Needs Improvement in this and other areas. In 1999, when Beckham rated him at Needs Improvement in this area again, he offered to have CDOT assist in paying the tuition for classes that would improve his performance in this area. Complainant failed to take advantage of this opportunity. The evidence demonstrates conclusively that Complainant never improved his performance above a Needs Improvement level, and never attempted to do so. He therefore "failed to perform competently" under Rule R-6-9(1).

Professional/Technical. Complainant testified that the fundamental source of his problems in performing his technical duties as a mechanic was Beckham's decision to move him from heavy equipment to light equipment. He testified, "It had been over 15

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<sup>3</sup> Nevertheless, Beckham should have kept Kullman apprised of the situation with Bridges, and should have taken action to assure the uniform application of agency rules. While the record does not reveal much about how Beckham handled this situation, the testimony of Complainant and two of his co-workers demonstrates that there is an appearance of favoritism by Beckham in the shop. CDOT has a duty to avoid even the appearance of disparate enforcement of its rules.

years since I'd worked on the small trucks. I got no training. These trucks got very technical in 15 years." He further testified that he "never had any performance problems working on heavy equipment."

The weight of the evidence demonstrates that Complainant worked on both light and heavy equipment prior to 1999. Further, Complainant's personnel file rebuts this version of events. Foreman rated Complainant at a Needs Improvement level in 1997 in the professional/technical area, noting his untimeliness among other problems. In 1998 and 1999 he placed performance documentation forms in Complainant's personnel file for fundamental mechanical errors. When Foreman rated Complainant at Fully Competent in 1998, he listed as an IPO, "work toward completing assignments in a timelier manner." Complainant's problems in completing his mechanical duties in a timely manner and in accordance with industry standards pre-dated Beckham's resumption of his supervisory duties in 1999.

Under Beckham's direction, Complainant's untimeliness became more serious, and he continued to make fundamental mistakes, such as switching wires when installing a transmission, reinstalling parts upside down, and failing to perform routine PM tasks prior to checking them off as accomplished. He also neglected to service the RTD vehicle as directed, a simple task that he simply failed to do.

Complainant argues that Beckham's close monitoring of his work and his use of the time estimates demonstrate that Beckham held him to a higher standard than the other mechanics. Beckham does appear to have a more invasive, "micro-management" style of supervision than Foreman, which Complainant found to be offensive. However, during a Corrective Action period it was not only appropriate but necessary for Beckham to closely monitor Complainant's work. Prior to the Corrective Actions, Beckham was able to document in his evaluation that he took months on projects that should have taken weeks. In order to provide an accurate record of Complainant's performance, particularly in the area of his untimely performance of his mechanical duties, it was essential that Beckham closely monitor and document his progress on each unit. Without such a record, it would have been difficult for an appointing authority to make an objective, informed decision regarding whether to take disciplinary action. Complainant's untimely completion of his duties constituted "failure to perform competently" under Rule R-6-9(1).

**B. The Discipline Imposed Was Within the Range of Alternatives Available to the Appointing Authority.**

Complainant has a long history of performance problems. Respondent provided him with repeated IPO's and warnings that his performance needed to improve in a

number of areas. It encouraged him to obtain the training necessary to perform at a satisfactory level. Respondent utilized both the performance management process, as well as the progressive discipline process, to prompt Complainant to improve his performance. Complainant failed to take the actions necessary to do so.

Respondent issued Complainant a disciplinary action in 1999 for failure to maintain a valid drivers license due to lapsed car insurance. Complainant allowed his car insurance to lapse again in October of 1999 as well as in December of 2000, resulting in the certain suspension of his license. CDOT cannot countenance this type of willful misconduct which subjects it to potentially serious liability. This issue alone provides sufficient grounds to terminate Complainant's employment. When viewed in the context of Complainant's longstanding history of performance problems, which he failed to address, the termination is even more appropriate. Termination was within the range of alternatives available to the appointing authority.

**C. Respondent's Action was Not Arbitrary, Capricious, or Contrary to Rule or Law.**

Complainant argues that Beckham held him to a higher standard than the other mechanics, constituting arbitrary and capricious treatment. He points to Beckham's list of concerns on Unit #3948 and his use of time estimates with Complainant as evidence of such treatment. Beckham did impose some extra work on Complainant on Unit #3948; the installation of a new lighting system was not a routine part of preventive maintenance. However, the replacement of bolts with pins, while questionable, was a reasonable response to the safety problem posed by the bolts not being flush with the nuts. Further, this extra work was extremely minor when viewed in the context of all work performed by Complainant during the corrective action periods. Beckham's use of time estimates with Complainant was a reasonable method of increasing Complainant's efficiency, as well as of monitoring his work during a corrective action period. The preponderance of the evidence demonstrates that Beckham did not hold Complainant to a higher standard than the other mechanics.

It is noted that Kullman relied on some slightly inaccurate information regarding the amount of time Complainant spent performing mechanical duties during the Corrective Action periods. However, the Findings of Fact make it clear that this inaccuracy was not material, since the conclusion drawn, that Complainant did not perform his work in a timely manner, was still accurate. Therefore, Kullman's reliance on Beckham's slightly inflated numbers it did not render his ultimate decision arbitrary and capricious. McPeak v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996). Complainant presented no evidence or argument that Respondent's actions were contrary to rule or law.

**CONCLUSIONS OF LAW**

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

### **ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
September, 2001, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, Colorado 80203

### **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. The notice of appeal must be received by the Board no later than the 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 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).

### **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 2 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.

#### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of September, 2001, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Michael O'Malley  
1444 Stuart Street  
Denver, Colorado 80204

and in the interagency mail, addressed as follows:

Susan J. Trout  
Assistant Attorney General  
Personnel and Employment Law Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

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