

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID RUCHMAN,

Complainant,

vs.

DEPARTMENT OF REVENUE, ENFORCEMENT GROUP, HEARINGS DIVISION,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 9 and 10, 2005, at the State Personnel Board, 633 17th Street, Suite 1320, Denver, Colorado. S. Kato Crews, of Rothgerber Johnson and Lyons LLP, represented Complainant. Eric W. Freund, Assistant Attorney General, represented Respondent.

MATTER APPEALED

Complainant, David Ruchman (“Complainant” or “Judge Ruchman”) appeals his disciplinary termination of employment by Respondent, Department of Revenue, Enforcement Group, Hearings Division (“Respondent” or “Hearings Division”). Complainant seeks reinstatement, back pay, benefits and attorney fees and costs.

For the reasons set forth below, Respondent’s action is **modified**.

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 Respondent terminated Complainant based on his exercise of First Amendment political association rights;
5. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Respondent hired Complainant as a Hearings Officer in March 1998. He was certified in the position that year.
2. In April 1999, Complainant received the Pinnacle Award from the Director of the Department of Revenue, for the most creative suggestion on department procedures.
3. In mid-November, 1999, Complainant asked Chief Hearing Officer Kenneth Wynkoop for permission to run for a four-year term on the nonpartisan Regional Transportation District ("RTD") Board.
4. Permission was granted. Complainant's district was uncontested; he was elected to a seat on the RTD Board.

2000 Corrective Action

5. The Hearings Division office policy regarding use of the fax machine and telephone is to allow limited personal use, so long as such use does not interfere with the job.
6. On October 10, 2000, Complainant received an unsolicited fax at work concerning a water rights district that pertained to his previous residence. It was unrelated to Complainant's service on the RTD Board or any political activity. Complainant's immediate supervisor, Assistant Chief Hearing Officer Arthur Julian, intercepted the fax, and viewed it as "political." On October 16, 2000, Julian issued Complainant a Corrective Action for releasing the office fax number "for political or personal matters."
7. The Corrective Action directed Complainant to inform all persons and agencies with which he has political or personal affiliation that he cannot receive documents at the Hearing Section fax number, to refrain from engaging in any political activities during duty hours or on any property used by the department, and to refrain from using the department's resources, equipment or vehicles either directly or indirectly in any political activity. Julian gave Complainant approximately one month to complete the corrective action and to immediately cease using any state equipment or property for other business or political use.
8. Complainant explained to Julian that the water rights district applied to his previous residence and was unrelated to any political activity he was currently involved in. Julian agreed to remove the Corrective Action from his personnel file in a year if there were no similar incidents.
9. There were no similar incidents. Complainant fully complied with the Corrective Action.
10. On June 18, 2001, Julian sent an email to the DOR Human Resources office

2005B085

directing that the October 2000 Corrective Action be removed from Complainant's personnel file. Julian copied Complainant and appointing authority Wynkoop on the email. Wynkoop, as appointing authority, never objected to this directive.

11. The HR office erroneously neglected to remove the Corrective Action from Complainant's personnel file.

12. On May 16, 2000, Julian sent Complainant a memorandum regarding "Political Matters at work" which prohibited Complainant from using "the office for any activities related to politics, not telephone, fax, e-mail, computer, nor copier."

2001 Corrective Action

13. On February 21, 2001, Julian imposed a Corrective Action/Performance Improvement Plan upon Complainant. The Corrective Action directed him to change his schedule to 8 hours 5 days per week, to perform all hearings with review of notice issues when appropriate, and to commit less than 15% errors of law or procedure on cases reviewed by Julian. Complainant was to immediately perform hearings with review of notice issues when appropriate and he was given a year to bring his error rate to less than 15%.

14. Complainant had been unaware of a specific legal issue he had to address in his opinions and he immediately improved his work product to bring it into compliance with the Corrective Action.

RTD Board

15. In January 2002, Wynkoop began questioning Complainant about his association with the RTD Board. Wynkoop informed Complainant that he believed he could not, under the Code of Judicial Conduct, ethically serve on the RTD Board and be a DOR Hearing Officer.

16. Complainant provided a memo outlining his legal position on the issue. Respondent asked the Colorado Office of the Attorney General ("AG") to examine whether Complainant was running afoul of the Code through his membership on the RTD Board. In a legal memorandum dated May 28, 2002, the AG opined that he was. The AG concluded, "[a] time limit must be given to [Judge Ruchman] to end his employment as a (sic) RTD director." Mr. Wynkoop issued a letter to Ruchman that same day giving him 30 days to end his political association with RTD.

17. On June 27, 2002, the United States Supreme Court issued a decision holding that the prohibitions a state places on judicial candidates and judges must pass strict scrutiny, i.e., be narrowly tailored to serve a compelling state interest.¹ The Court determined that a

¹ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

state's judicial cannon prohibiting incumbent judicial candidates from stating their views on "disputed legal or political issues" violated the First Amendment.

18. The AG immediately advised Respondent to rescind its ultimatum to Judge Ruchman to end his political association with RTD. Accordingly, in an e-mail dated July 3, 2002, Respondent asked Judge Ruchman to "please disregard the letter instruction from [Mr. Wynkoop] that you resign from the RTD Board."

2002 and 2003 Performance

19. During the period of 2001 through most of 2004, Complainant's performance as a Hearing Officer was solid. He received a Satisfactory overall rating on his May 2001 – April 2002 evaluation. He received an Above Standard evaluation for the period May 2002 - April 2003. Julian noted on the 2002-2003 evaluation that Complainant was disdainful of supervision and became defensive when criticized. However, the following year Julian noted that Complainant had "improved" in several criteria including, "Supports and treats co-workers and supervisors with respect."

2004 RTD Re-Election Campaign

20. Complainant often discussed RTD, Fast Tracks, and other public policy issues with co-workers during break time at work. These conversations were a normal part of the hearing officers' workday, initiated by others as often as by Complainant.

21. In 2004, Complainant sought re-election to his nonpartisan position as a Director on the RTD Board. Complainant discussed the fact he was up for re-election with some co-workers. He asked some of his work friends whether they would assist him in distributing campaign literature on weekends.

22. A staff member in the Hearings Division reported to Julian that she had overheard Complainant discussing his campaign with a co-worker. Julian followed up on this information by requesting written reports from Complainant and co-workers on the issue. Complainant submitted a long, detailed report to Julian. Co-workers submitted statements to Julian as well.

2004 Disciplinary and Corrective Action

23. Following the appropriate pre-disciplinary procedures, on October 20, 2004, C. Stephen Hooper, Acting Chief Hearing Officer, suspended Complainant for three weeks without pay, for (1) violating the state statute prohibiting state employees from using state resources in support of a candidate and campaigning actively for a candidate on state time; (2) violating State Personnel Board Rule 1-13 prohibiting state employees from utilizing state time or property for political activities; and (3) engaging in a course of conduct in violation of standing instructions that he cease using state equipment, including telephones, for matters related to the RTD.

2005B085

24. The Corrective Action mandated that Complainant "refrain from communicating in any manner while at work, on the premises, during work time, or utilizing work resources that either references or furthers his involvement in political activities, campaigning, or your service in any political capacity, including but not limited to your involvement with the Regional Transportation District. If any of the topics come up in casual communication, you must politely decline to participate in the communication." The Corrective Action further mandated that Complainant ensure that all of his time at work is expended for the benefit of the state, and to "restrict communications with respondents, attorneys, witnesses, and co-workers to that which is necessary for social cordialities and for the disposition of the merits of the matter at hand."

25. Complainant did not appeal the disciplinary or corrective action.

26. He has fully complied with the Corrective Action.

2004 Evaluation

27. Complainant received a Standard or Proficient performance rating for the period May 2003 to April 2004. Complainant received high ratings in Accountability and Job Knowledge, and Julian noted that Complainant's written documents were "excellent." Julian also stated that Complainant still interrupted others and preferred to avoid supervision, and that while Complainant was respectful to co-workers and supervisors most of the time, he was "sometimes arrogant and demeaning to fellow workers."

Pierce Street Emergency Action Plan

28. In September 2004, DOR issued an Emergency Action Plan for the Pierce Street DOR employees, which included the Hearings Division. In the same month, Arthur Julian circulated the plan to all employees, including Complainant, and held a training for the Hearings Division on the Plan. Complainant was familiar with the Plan and attended the training.

29. Under the Plan, Julian was the designated Floor Warden for the Hearings Division in cases of emergency. As Floor Warden, it was Julian's job to assure the immediate evacuation of the floor in the event of an emergency, including activation of the fire alarm. Complainant was aware of this.

30. Under the Emergency Action Plan, instructions for evacuation in the event of an emergency are as follows:

- "All employees shall follow the instructions of their assigned *Floor Wardens and Building Warden.*"
- "When a fire alarm sounds in their area, the occupants immediately evacuate

2005B085

the building and proceed to their evacuation site."

- "Upon initiation of a fire alarm in the building, mechanical electronic locks on doors will unlock allowing reentry to all areas. Every tenant was assigned an evacuation site. Strict adherence to this plan must be maintained."
- "Upon activation of a fire alarm all occupants of the affected floors will immediately begin an evacuation of their area, proceeding to their designated evacuation site, where the wardens will perform occupant accountability. Occupants shall remain at the evacuation site, if safe to do so, until Building Management with Fire Department authorization gives notification either to return to the building and normal operations or some other instruction."

Complainant's January 19, 2005 Driver's License Revocation Hearing and Fire Alarm

31. On January 19, 2005, Complainant commenced a driver's license revocation hearing at 3:09 p.m. The hearing was held in his office. The respondent and her attorney were present.

32. The hearing involved the potential revocation of the respondent's driver's license for her failure to participate in a blood alcohol test, upon arrest, following a hit and run incident. The respondent had been involved a three-car accident and had fled the scene to her home.

33. The hearing lasted approximately thirty minutes.² Eight and a half minutes into the hearing, the respondent, a young female, testified about police misconduct during the arrest. She testified that when the police arrived at her home in the early hours of the morning, she had been asleep, and she was wearing only a bathrobe. The police had initially used a tazer gun to subdue her. When she asked to get dressed and put on shoes, they denied the request. They then placed handcuffs on her, behind her back, making it impossible to close the bathrobe. Her body was exposed. As this was occurring, she overheard one police officer state to another that they should just have her give them all blow jobs and be done with it.

34. The respondent testified that she was completely terrified when she heard this statement, and immediately became submissive. She also testified that she was very scared because she was unable to keep her robe closed in front of her. She stated that she reported the officer's comment when she arrived at the jail, wearing nothing but an open bathrobe.

35. Complainant believed the respondent's report about the police misconduct, and he could see from her demeanor that this had been a traumatizing experience for her.

² A recording of the entire hearing is in evidence.

36. Following this testimony, respondent's attorney reviewed the police reports and made several legal arguments to Complainant. When the respondent and her attorney were finished presenting her case, Complainant made findings of fact and procedural rulings, incorporating some discussion of police misconduct into this portion of the proceedings.

37. Then, at twenty-four minutes into the hearing, Complainant rendered his ultimate decision. He concluded that the respondent had received the express consent advisement by the police, and that he must therefore revoke her driver's license for a period of one year. Complainant rendered his decision in a quiet and subdued voice. His verbal demeanor at this time makes it clear he was attempting to soften the blow of the revocation.

38. After answering a few questions by the respondent's attorney, Complainant then became very serious. In a soft voice, he spoke to the respondent about the seriousness of her offenses and her situation. He earnestly discussed the issue of whether to continue drinking alcohol. He stated that she was at a decision point, "Where you go from here, you just have to decide." He stated, "You have to think this through."

39. As Complainant counseled the respondent in this manner, a fire alarm sounded. Respondent's attorney spoke about the case over the fire alarm. Complainant interrupted him, stating, "I think we have a fire alarm." Complainant then stated, "I'm going to quick type this up before I get zapped." He immediately began to type up his order very quickly. A few seconds later he stated, "Yup, someone's going to be back here in a minute."

40. One minute and twenty seconds after the fire alarm started, Arthur Julian entered Complainant's office and stated, "We have a fire alarm. We have to evacuate the building right now." Complainant immediately responded, "All right. I'm ending the hearing," and at that moment turned off the tape recorder.

41. As Julian walked down the hall, he ran into William A. Cowles, the newly appointed Chief Hearing Officer of the Hearings Division. Cowles had been appointed to the position on November 8, 2004.³

42. Cowles asked Julian if everyone was out of the building. Julian stated that everyone was out except for Complainant and the litigants in his office. Julian allowed one employee to return to her office for her coat. Julian checked the men's bathroom, and exited the building.

43. Cowles immediately walked down to Complainant's office and ordered everyone to immediately vacate the building. Complainant was focused on bringing closure and resolution to the difficult and highly emotional hearing. He anticipated that it would take just

³ Cowles had previously served as Director of Human Resources for the 18th Judicial District for twenty-three years.

a few additional seconds. Complainant stated to the respondent and her attorney that he was printing the orders so they could sign one copy and receive one copy for their records. Complainant then printed the orders, obtained one signature, gave one copy to the attorney, and exited the building with them. This took approximately one minute.

44. Complainant did not look up at Cowles when he ordered him to leave. This snub made Cowles very angry.

45. When Julian arrived outside the building, he performed a head count and confirmed that everyone, including Complainant and his litigants, were there.

46. In the late afternoon, Cowles asked Julian to speak with Complainant about why he had not immediately vacated the building. Julian did so, and Complainant said something about it being an unusual hearing, and that he had made a seat of the pants decision he needed an extra minute or so to bring it to resolution. This conversation did not convince Julian that Complainant appreciated the seriousness of the situation.

47. On Thursday, January 20, 2005, Julian sent an email to Cynthia Wunderlich, a DOR staffer, "RE: Fire alarm procedure compliance." Julian stated in part, "Yesterday, I had one of my employees who dragged his feet getting out of the building with the people in his office when the fire alarm went off. It took about 2 minutes or more from the time the alarm went off for him to evacuate his office. I prompted him and so did my boss, Mr. Cowles. I am not sure what would be appropriate to do to emphasize to him the importance of evacuating immediately. I have scolded him, but I'm not sure he was impressed with the importance of the issue. Do we have any guidelines or things we are supposed to do? If not, I'm sure I can think something up. Thanks."

48. Wunderlich responded by requesting the individual's name. Julian stated he preferred not to release the name, and to "handle it internally, at least for now." Wunderlich again requested the name, stating, "Dave Dechant wants to know who is not cooperating in an evacuation. If you handle it, I'm good with that." Dechant is Senior Director of the Enforcement Division at DOR.

49. Julian responded, "It was Dave Ruchman. Dave Dechant already knows about it. I talked with him on the sidewalk already. I'll handle it internally and keep Dave in the loop. I'm mainly going to fire a warning shot across the bow of the ship. Thanks, Art."

50. Julian felt that a "warning shot" was appropriate to address Complainant's actions on January 19, 2005.

Preparation for Disciplinary Process

51. Shortly after Cowles' arrival as the new appointing authority over the Hearings Division in November 2004, he reviewed the personnel files of all employees under his supervision. As he read Complainant's personnel file he noted with concern the 2000

2005B085

Corrective Action that erroneously remained in his file. He became extremely concerned with the fact that Complainant had apparently violated the terms of the 2000 Corrective Action in 2004, when he campaigned for re-election to the RTD Board. In fact, the Corrective Action was no longer in effect.

52. Cowles discussed Complainant with Hooper, acting appointing authority prior to Cowles' appointment. Hooper informed him that Complainant had the best written findings and conclusions of anyone in the Division, was the smartest of the group, and had a fine legal mind.

53. Cowles was unfamiliar with the State Personnel Board rules prior to January 19, 2005. He read them thoroughly, and discussed how to conduct the entire pre-disciplinary process, including the meeting, with other managers at DOR, prior to taking any action in connection with Complainant.

54. Prior to the pre-disciplinary meeting, Cowles listened to the tape recording of the January 19, 2004 hearing Complainant was presiding over at the time of the fire alarm.

Pre-Disciplinary Meeting

55. By letter dated January 24, 2005, Cowles informed Complainant that a pre-disciplinary meeting pursuant to State Personnel Board Rule R-6-10 was scheduled for February 2, 2005. The discussion was to address whether Complainant willfully:

- Placed two non-employees in a potentially life-threatening situation by failing to cease the hearing he was conducting and escort them out of the building upon becoming aware that the building fire alarm had engaged;
- Failed to follow DOR Emergency Action directives that require occupants to evacuate the building when a fire alarm sounds in their area;
- Acted in an insubordinate manner by failing to immediately follow the order of his supervisor, who is a building Fire Warden authorized to direct the evacuation of the building;
- Acted in an insubordinate manner by failing to immediately follow the subsequent direct order to evacuate the building given by the Chief Hearing Officer; and
- Continued to exhibit an attitude of insubordination and indifference to rules and policies.

56. On February 2, 2005, Complainant attended the pre-disciplinary meeting with Cowles, Julian, and Complainant's representative, Greg Mahoney, another hearing officer. Cowles presided over the meeting, informing Complainant of the Board Rules pertaining to

2005B085

disciplinary actions, and inviting Complainant to provide mitigating information.

57. Complainant began by stating he understood there were emergency procedures and he had read them, and that Julian was the fire warden. He stated that shortly after they had all re-entered the building on January 19, he had informed Julian that it was “a difficult hearing. It was a refusal hearing. There were one or two things that were extraordinary about it that I just hadn’t run into before, and I tried to explain to him – I made a seat-of-the-pants decision at the end of the hearing to spend what I felt would be a few more moments bringing this to resolution.” Complainant continued,

“What was extraordinary was that this woman in the midst of dealing with the police, said she heard an officer - - she overheard an officer say, ‘Why don’t we just take her back inside and have her give us all a blow job and then have done with it.’ She also said that she asked if she could put clothes on, because when she came to the door and the officer contacted her there she was in the bathroom, and before leaving for the station she asked to put on some clothes, and she said basically, ‘I was terrified, first from the comment, and also I was very scared because I was only in a bathrobe and I couldn’t keep it closed when my hands were handcuffed behind me.’

Now, I made a seat-of-the-pants decision. I made a decision that I now understand was wrong, to try to bring closure and resolution. I was trying to do what I thought was the right thing in this hearing and spend a few more moments doing it. I didn’t know, I didn’t anticipate that a few moments would become a significant number of moments.

And so my answer to you is, I was at work. I was working on a hearing. I was trying to do the right thing with a citizen in Colorado who was about to have a drastic action, and I thought that would take but a few more moments. It didn’t, and I was wrong.”

58. Complainant explained to Cowles, “I think what happened here is I was careless, or thoughtless, or heedless, in part because my mind was so focused on the extraordinary comment I had heard from the respondent in the hearing. It just charged the hearing office with a special emotionality that I don’t - - a special emotion that I very rarely see. I mean, I’ve never run into that before, and I wanted to do what I could to bring a measure of resolution and explain my thinking before we left the building.

59. Complainant explained that in reviewing the tape of the hearing, “the time just got away from me, and in hindsight I made a mistake. But this was a mistake that was not willful, that was not willful insubordination, that was – well, I wasn’t trying to do the wrong thing. I was trying to do the right thing, and I was trying to do it in ways where I now see it was careless or thoughtless, but not insubordinate, or reckless, or willful.”

60. Complainant argued that his attempt to bring closure to the hearing in an appropriate

2005B085

manner, the fact he got “caught up in the case,” was a justifiable excuse for his actions.

61. Complainant stated it would never happen again, and concluded by stating that he took the matter very seriously.

62. Cowles found Complainant to lack credibility. He was very disturbed by the fact Complainant had not said anything to him when he had ordered him to leave his office on January 19, 2005; he viewed this conduct as insubordination.

63. At hearing, Cowles testified that the information Complainant supplied at the pre-disciplinary meeting constituted no mitigation at all.

64. Cowles considered no lesser disciplinary action than termination.

65. By letter dated February 8, 2005, Cowles terminated Complainant’s employment at DOR for his conduct on January 19, 2005.

66. The letter concluded:

“Based on the foregoing, I find that you willfully ignored Departmental rules concerning your responsibility during a fire alarm, that you willfully and needlessly placed others in harm's way by delaying their exit from the building, and that you willfully ignored the direct and explicit orders from supervisors on two different occasions to evacuate the building. Based on that conduct, your previous failure to modify your behavior in response to corrective/disciplinary actions, and a complete lack of mitigation for any of the charges delineated above, I am terminating your employment with the Department of Revenue effective at 5:00 PM this date.”

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 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 R-6-9, 4 CCR 801⁴ and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board’s rules or of the rules of the agency of employment;

⁴ As of July 1, 2005, substantial amendments have been made to the Board Rules. However, given the time period covered by this action, the Board Rules in effect prior to July 1, 2005 have been applied and all references within this Initial Decision to the Board Rules are to the rules in effect prior to July 1, 2005.

- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent did not meet its burden of proving that Complainant willfully violated the Emergency Action Plan and the two orders of his superiors to immediately evacuate the building. While Complainant took longer than he should have to evacuate, approximately two minutes does not equate to a willful refusal to evacuate. Complainant and his two litigants were outside the building in time for the fire warden's head count. Complainant may have been negligent in complying with the Emergency Action Plan; however, he did not willfully violate or ignore it.

When Arthur Julian entered Complainant's office and ordered him to leave the building, Complainant immediately responded, "Alright, I'm ending the hearing," and instantly turned off the tape recorder. This is not the response of an employee willfully defying or ignoring his supervisor's order. Complainant's response to Julian's directive was to acknowledge it and to immediately take action. Complainant and the litigants left the building within approximately one minute. When Cowles came in, seconds later, Complainant spent some additional seconds printing the order, then left the building with the litigants. Complainant complied with the order within less than a minute.

The preponderance of evidence demonstrates that Complainant proceeded in good faith on January 19. Complainant's explanation of his conduct in attempting to bring appropriate closure to the hearing is corroborated by the hearing transcript. To listen to the hearing reveals that Complainant was earnestly engaged in counseling the respondent at the time the fire alarm sounded. He did not manufacture the explanation for his conduct -- his tone of voice, his entire demeanor evinces he took the situation seriously and attempted to make a graceful exit.

During the time Complainant wrapped up his hearing, Julian allowed one woman to return for her coat, and checked the men's bathroom. By the time Julian was outside performing his head count as fire warden, Complainant and the litigants in his hearing were outside, ready to be counted. Under these circumstances, Complainant's lapse in judgment may be viewed as a serious one, but not so egregious as to constitute willful misconduct.

2005B085

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 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).

No reasonable appointing authority would terminate the employment of a hearing officer for taking approximately two minutes to vacate a building under the circumstances presented herein. *Lawley, supra*. Complainant was on the record presiding over a hearing at the time the fire alarm began. He made a judgment based on the unique circumstances of the hearing to wrap it up with respondent and her attorney present, instead of immediately leaving the room. It was not a good judgment. However, he had no intention to willfully flaunt the emergency evacuation plan or the orders of his superiors.

Respondent failed to give candid and honest consideration to the significant mitigation before it in this matter, in violation of the *Lawley* standard. The appointing authority testified that Complainant provided no mitigation at all in the pre-disciplinary meeting. A transcript of that meeting reveals that Complainant accurately portrayed the hearing as he experienced it; the transcript of the January 19 hearing fully corroborates his description. Complainant's attempt to do the right thing in a sensitive situation constitutes significant mitigation. Respondent's simplistic conclusion that he "willfully" violated the evacuation plan and the orders of his supervisors is therefore arbitrary and capricious. *Lawley, supra*.

Lastly, while it is understandable that the new appointing authority was troubled by Complainant's disciplinary history, he erroneously considered the 2000 Corrective Action in rendering his decision. Further, the termination letter repeatedly states that Complainant had failed to modify his behavior after previous corrective and disciplinary action. The undisputed evidence demonstrated that Complainant immediately complied with the 2001 corrective action after its issuance, and that he has fully complied with the restrictive terms of the November 2004 corrective action as well. See Findings of Fact #14 and #26.

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

Termination is not within the range of reasonable alternatives for the conduct at issue herein. While it is appropriate to hold Complainant accountable for his role as the authority figure in the hearing, to terminate him for his conduct is far too drastic an action.

2005B085

Julian's response, to fire a warning shot across the bow, was the appropriate one. The termination must be rescinded and modified to a lesser form of discipline or corrective action.

D. Respondent did not violate Complainant's First Amendment rights in imposing discipline.

Complainant contends that Respondent discharged him because of his service on the RTD Board, in violation of his right to free association guaranteed by the First Amendment of the U.S. Constitution. The First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation, unless their work requires political allegiance. *Snyder v. City of Moab*, 354 F.3d 1197, 1184 (10th Cir. 2003). An employee can establish a violation of his First Amendment association rights if he demonstrates that 1) "political affiliation and/or beliefs were substantial or motivating factors behind [his or her] dismissal; and 2) the position did not require political allegiance." *Bass v. Richards*, 308 F.3d 1081, 1090 (10th Cir. 2002). There is no meaningful distinction for First Amendment purposes between nonpartisan political alignment and membership in a political party. *Id.* at 91.

Complainant has failed to meet his burden of demonstrating that Respondent discharged him due to his political activity. There is no question that Respondent has had a history of discomfort with Complainant's service on the RTD Board. However, it is also undisputed that Complainant violated the state statute and Personnel Board rules governing political activity and campaigning on state time; hence, Respondent's worst fears were realized over time.

Complainant contends that because the November 2004 disciplinary and corrective action so egregiously abridges his freedom of speech, in violation of the *White* case cited above in Footnote 1, his termination must have been motivated by the same illegal animus. However, Complainant did not appeal that action; hence, its merits, including the question of whether the adverse action imposed can withstand constitutional scrutiny, are not before the Board herein. Complainant has failed to establish a nexus between his RTD Board activity and his termination. For these reasons, Complainant's First Amendment claim fails.

D. Attorney fees are not warranted in this action.

Attorney fees and costs shall be awarded if a personnel action or appeal thereof is instituted frivolously, in bad faith, maliciously, 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 evidence does not establish a factual basis for an award of attorney fees herein. Complainant's request for fees and costs is denied.

CONCLUSIONS OF LAW

1. Complainant did not commit the acts for which he was disciplined;

2005B085

2. Respondent's action was arbitrary, capricious, or contrary to rule or law;
3. Respondent's action was not within the range of reasonable alternatives;
4. Respondent did not terminate Complainant in part for exercising his First Amendment political association rights;
5. Attorney fees are not warranted.

ORDER

Respondent's action is **modified**. Respondent shall rescind the termination and may impose alternate disciplinary or corrective action on Complainant, not to exceed a thirty-day suspension without pay. Complainant is entitled to back pay and benefits to the date of reinstatement.

Dated this 26th day of September, 2005.

Mary S. McClatchey
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.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

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

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 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 original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 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 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

2005B085

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of September, 2005, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

S. Kato Crews, Esquire
Rothgerber Johnson and Lyons LLP
Wells Fargo Bank Tower
90 South Cascade, Suite 1100
Colorado Springs, CO 80903-1662

and in the interagency mail, to:

Eric W. Freund
Assistant Attorney General
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods