STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B013(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENNIS E. JOHNSON,
Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on January 25, 2012 at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on January 25, 2012. The record was closed on January 25, 2012 upon conclusion of the evidentiary hearing. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Anthony DeVito, Region 1 Transportation Director, Colorado Department of Transportation (CDOT). Complainant appeared and represented himself.

MATTERS APPEALED

Complainant, a certified Transportation Maintenance (TM) II employed by CDOT, appeals his disciplinary termination of employment, arguing that he did not commit all of the actions upon which discipline was based.

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

PROCEDURAL HISTORY

On August 1, 2011, Complainant resigned from his position at CDOT. Complainant filed an appeal of the resignation with the State Personnel Board alleging constructive discharge. Respondent later reinstated Complainant to his position and placed him on administrative leave with pay effective August 1, 2011, pending the predisciplinary process. Respondent terminated Complainant's employment on September 14, 2011 and Complainant timely appealed. After consolidating the appeals, on October 5, 2011, the ALJ issued an order that the constructive discharge claim was rendered moot by the disciplinary termination, clarifying that the evidentiary hearing would address only Complainant's appeal of the disciplinary action.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and

3. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

1. Complainant worked for CDOT for seventeen years prior to his disciplinary termination in September 2011. After performing temporary work for CDOT, he was hired as a TM I in 1996, and promoted to TM II in 2001.

2. As a TM II, Complainant was lead worker over a small crew of TM I's in Winter Park, Colorado. The area is isolated and there is little on-site supervision by CDOT personnel above Complainant in the chain of command.

CDOT Policy on Borrowing Tools

3. One of the unwritten rules of working for CDOT is that if an employee seeks to borrow a tool for personal use, he or she may do so with permission of a supervisor.

4. Complainant did not possess authority to grant permission to borrow tools from CDOT. That authority resides at the TM III level and above.

5. Any item borrowed from CDOT must be returned immediately after use.

Oil Drum Theft

6. In December 2010, Vince Estreich, TM III and Complainant's immediate supervisor, directed Complainant to have his crew clean out the garage area. Among the items to be moved were several used tires with low treads and large 55-gallon drums of new motor oil. Complainant, George O'Neil, Equipment Operator, and a temporary worker, John Zeleznikar, started to clean out the area, using a forklift.

7. On the next shift, Complainant and Mr. Zeleznikar were the only two employees working to clear out the garage. Mr. Zeleznikar drove the forklift as they removed several drums of oil and delivered them in another shop.

8. Complainant set one drum of oil aside while they worked. When they were finished, Complainant directed Mr. Zeleznikar to load the 55-gallon drum of new oil into the back of Complainant's personal truck; Complainant then drove home with it after work. Mr. Zeleznikar complied with this directive because Complainant was his work leader and he was fearful of the consequences of challenging Complainant. Mr. Zeleznikar decided that when his contract with CDOT was up, he would report Complainant's apparent theft of the motor oil to authorities at CDOT.

9. At the direction of Complainant, Mr. Zeleznikar also put some of the used tires, still mounted to rims, aside while they cleared out the garage area. Complainant stated to Mr. Zeleznikar that he planned to take some of those home as well.

10. Shortly before leaving employment at CDOT, in April 2011, Mr. Zeleznikar informed Mr. Estreich about the apparent theft of the oil drum by Complainant. Mr. Estreich asked him to write a statement, which he did. Mr. Estreich then reported the alleged theft to his supervisor, Mark Gocha. Mr. Zeleznikar's statement recounts the events described above.

11. At hearing, Complainant testified that the drum he took home from CDOT contained used oil. However, this testimony was not credible. CDOT does not store used oil in

55-gallon drums; it is drained into pans. Pursuant to Department of Health regulations, a third-party vendor drives a large tanker truck onto the worksite, pumps the used oil out of the work area, and disposes it off site. Complainant's own statement to an investigator in July 2011 confirms this method of disposal.

Missing Tires

12. Complainant's coworkers and supervisors were aware that he had started a logging business in 2007, and that he owned a large logging truck that could use discarded tires from CDOT snow plows and trucks.

13. In early spring 2011, Complainant's crew removed all ten tires and wheels from a CDOT tandem truck. The old front tires were saved for spares; the right rear outside tire was not worth saving and was sent to Aurora headquarters to be disposed of; the right rear wheel was also not worth saving so it was placed into the metal bin at the shop; and, the other right rear tire and wheel were placed in the storage shed for use as a spare.

14. The remaining six tires and wheels were unaccounted for after removal.

A-Frame Chain Hoist

15. In approximately 2007, Mr. Estreich was present when Complainant's crew was cleaning out old unusable items from the garage. Mr. Estreich stated the crew should either place the A-frame chain hoist in the trash or, if anyone wanted it, they could have it. The A-frame was no longer usable on CDOT equipment. Complainant took the A-frame home.

March 2011 Performance Improvement Plan

16. On March 15, 2011, Complainant attended a meeting with several supervisors concerning complaints by TM I's in his shop about his work style. At the meeting, he was asked his opinion of Mr. Estreich. He provided his honest assessment, which was not completely positive. Respondent placed Complainant on a Performance Improvement Plan after this meeting.

CBI Investigation of Theft

17. CDOT referred Mr. Zeleznikar's allegation of theft to the Colorado Bureau of Investigation (CBI) for investigation. The case was assigned to Doug Pearson, Agent Investigator in the Major Crimes Unit. Mr. Pearson had 19 years of law enforcement experience at that time, having served as a police officer and detective in the Las Vegas and Greeley police departments.

18. Agent Pearson interviewed Mr. Zeleznikar on July 22, 2011. Mr. Zeleznikar repeated the information provided previously to the CDOT authorities, and clarified that the barrel of oil contained new oil, not used oil. With regard to tires, he informed Agent Pearson that when he changed the tires off of a snow plow truck, Complainant directed him and others to roll the old tires off to the side.

19. On July 28, 2011, Agent Pearson interviewed Mr. Estreich, Mr. Gocha, Charles Carrol, TM I, and Mr. O'Neil. Mr. O'Neil provided detailed information on the spring 2011 removal of all ten tire and wheel sets from the CDOT tandem truck by Complainant's crew, how

four sets were handled on site, and how the remaining six sets were unaccounted for after removal. The other witnesses provided no additional information.

20. On July 28, 2011, Agent Pearson interviewed Complainant. When asked if he had taken tires from CDOT for his personal use, Complainant stated that he did take some used tires approximately a year ago, he had put them on his trailer truck, but he no longer had them because they had worn out. Complainant stated he had been given permission to take the tires by a mechanic at CDOT, but did not want to identify him by name.

21. Complainant stated that he had an A-Frame chain hoist he had been given permission to take by Mr. Estreich five years ago, which he ultimately sold for scrap metal. He said that he had a pair of pliers and a pair of gloves that were still at his home. And, he indicated that while he had never taken windshield wiper blades, other CDOT staff had taken those home.

22. Agent Pearson asked about a 55-gallon drum of oil that was placed in the back of his personal pickup truck. Complainant confirmed that he had taken a 55-gallon drum of oil from CDOT home in his personal truck. He said it was used oil, and he did not recall who had placed the barrel in his truck.

23. Agent Pearson asked how CDOT disposes of the used motor oil. Complainant responded that a large tanker truck comes and pumps the oil out of the work area and disposes of it. He also stated that Mr. Estreich knew that employees were taking the used motor oil and had informed Complainant that it was alright to do so.

24. Agent Pearson asked if Complainant had a logging business and a logging truck, and whether he had used tires or rims belonging to CDOT. Complainant denied having any tires or rims belonging to CDOT, and said he had bought the rims and tires for his logging truck at Centennial Tire Company. When asked, he said he might have the receipt.

25. Agent Pearson stated that all tires are registered with the National Transportation Safety Board. He then said that this was Complainant's opportunity to tell the truth, and that he would hate to learn the whole truth later and find out that Complainant had left out some important information.

26. Complainant then stated that he remembered taking two tires from behind the fuel shed at CDOT. He said they were "junk tires" and that was all he had at his house.

27. Agent Pearson lied to Complainant by informing him that there was video surveillance equipment at the Winter Park CDOT office, and asked him if he had seen anything he was not telling him about. Complainant stated that there was a transmission jack at his house which he had borrowed approximately 5 – 6 years ago, and that he had every intention of returning it. He added that CDOT had stopped doing transmissions, if they needed it he would return it, and a CDOT mechanic named Wagner had given him permission to borrow it. When asked why he had not returned it, Complainant stated that the state doesn't use them anymore.

28. Agent Pearson mentioned that several cordless drills had come up missing lately. Complainant responded, "Oh I do have one of those." He stated he had borrowed it when he was on vacation in June of 2011, to fix the snaps on his boat cover. He said the shop has another one. He stated he didn't recall where it was, but would return it after the weekend.

29. Agent Pearson asked why Complainant had not returned the drill, and he responded that he had not completed the project.

30. Agent Pearson asked Complainant if it was possible he still had some CDOT tires on his truck. Complainant stated, "I would say a few of them on there are CDOT tires." Agent Pearson asked how many there were. Complainant stated that they were used tires that barely passed inspection. After additional discussion, Complainant stated that there were four CDOT tires on his truck. Complainant estimated they were worth about $70.00 each, versus new tires at $260.00 each.

31. When asked if he had ever taken a new drum of oil from CDOT, Complainant said, "I did it many years ago." He stated that in 1994 he had taken a damaged drum of oil that had dropped and was leaking, to get rid of the mess in the shop.

32. Agent Pearson asked Complainant if he would be willing to allow his boss to come out to his house and retrieve all the CDOT property. Complainant said he would not object to this. He then stated that he would not allow them to search his house but wanted to cooperate and had nothing belonging to CDOT in his house.

33. Agent Pearson asked again if Complainant had taken anything else. He responded that he had a snow shovel on his property in his yard which he had taken the previous fall, and promised to return that as well.

34. Agent Pearson then recapped the items Complainant had taken from CDOT as: a shovel, cordless drill, transmission jack, pliers, tires, A-frame hoist, oil, and a flashlight. Complainant promised to make arrangements to return all of the items still in his possession.

35. Agent Pearson also received an August 22, 2011 email from Alfonso Martinez, Region 1 Deputy Superintendent, CDOT, regarding the value of some of the items Complainant had taken from CDOT. The email stated in part, "We don't purchase used oil and do not store used oil in Barrels we are governed by Department of Health to store in large tanks and have a vendor haul off to recycle."

36. Agent Pearson wrote reports summarizing his interviews and forwarded the information to the Grand County District Attorney's Office to determine whether to file criminal charges against Complainant. Criminal charges were filed against Complainant and the case had not gone to trial at the time of this hearing.

37. On August 18, 2011, Mr. DeVito, Region 1 Transportation Director, sent Complainant a letter notifying him that Mr. DeVito had received information about Complainant regarding potential theft of state property and performance issues. He scheduled a predisciplinary meeting for August 24, 2011, and informed Complainant that he was entitled, and was encouraged, to bring a representative to the meeting.

Predisciplinary Meeting

38. On August 24, 2011, Complainant attended the predisciplinary meeting with Mr. DeVito. Civil Rights Manager Micki Perez-Thompson attended as Respondent's representative. Complainant's wife attended as his representative.

39. At the meeting, Mr. DeVito asked Complainant if he and his wife owned a logging

company; Complainant responded that he had a small tree cutting company that was operational through the summer of 2011, at which time he had laid everyone off.

40. Mr. DeVito presented Complainant with the CBI investigative reports written by Agent Pearson and gave him time to review them. Complainant spent approximately twenty minutes reading the documents. Mr. DeVito informed Complainant that the documents were going to be filed with Grand County, and that it was up to the District Attorney to decide whether to file criminal charges. He then asked Complainant whether he was comfortable proceeding with the meeting. Complainant indicated that he was.

41. Complainant opened the meeting by stating that he never said he stole anything from CDOT. Mr. DeVito reviewed Agent Pearson's report in detail, starting with the interview of Complainant. He started by focusing on the four CDOT tires Complainant admitted to having on his truck. Complainant stated that he had obtained permission from a man named "Larry" to take the tires and that they were worn out. Mr. DeVito asked, "So what is the count?" Complainant responded that there were six used CDOT tires he had taken for personal use. When asked if they were mounted, Complainant stated they were not.

42. Complainant reiterated that Mr. Estreich had given him permission to take the A-frame.

43. Complainant confirmed that he had borrowed the transmission jack from CDOT five years ago, indicating he had received permission from Jack Wagner. He said the state had stopped performing transmission changes, so it no longer had any use for it. Mr. DeVito asked if Complainant had ever offered to bring it back, and he responded that he had not. Complainant noted that he had brought it with him to the meeting to return it to CDOT.

44. Mr. DeVito reviewed a recent spreadsheet of equipment ordered for Complainant's shop. Complainant admitted that as TM II he was responsible for ordering and receipt of the equipment.

45. Mr. DeVito asked about the cordless drill. Complainant stated that he had borrowed it for the entire month of June 2011 while he was on vacation. Mr. DeVito asked why he had not returned it in July. Complainant stated that he was still not finished with the project on his boat. He also admitted that no one else was aware he had taken the drill.

46. Mr. DeVito reviewed the report containing the statements of Mr. Zeleznikar. Complainant denied it was a new barrel of oil that Mr. Zeleznikar had loaded onto his truck.

47. At the conclusion of the meeting, Mr. DeVito and Mr. Martinez took delivery from Complainant of the following items: the transmission jack; the DeWalt cordless drill; one pair of gloves; one pair of pliers; and one lantern-style flashlight. The cordless drill was in good working condition.

48. Following the predisciplinary meeting, Mr. DeVito concluded that anyone who had a commercial driver's license, as Complainant did, would not take the risk of having a bald tire on his truck. Therefore, he deduced that the tires Complainant had taken from CDOT were not bald and thus had value.

49. Mr. DeVito was extremely concerned about Complainant having used his position of authority as lead worker to have Mr. Zeleznikar assist him in stealing the drum of oil. He was

also concerned about what he viewed as an escalation in the value of the items Complainant was stealing, from gloves and a flashlight to a cordless drill. Mr. DeVito was not concerned about the safety-related items such as gloves and flashlight, because CDOT workers are often called to duty in the middle of the night on snowy highways.

50. Mr. DeVito was also troubled by the fact that as lead worker, Complainant nonetheless took no personal responsibility for his theft of state property, instead responding to the situation by minimizing the value of the items he had stolen.

51. Mr. DeVito concluded that he could no longer trust Complainant as a CDOT employee, because Complainant had been untruthful to Agent Pearson and to Mr. DeVito in the predisciplinary meeting. Mr. DeVito felt that Complainant had breached the trust necessary to serve as a CDOT employee. Therefore, he concluded that demotion or a lesser form of discipline would not be appropriate.

Termination Letter

52. On September 14, 2011, Mr. DeVito issued a termination letter to Complainant. Complainant timely appealed.

53. In the termination letter, Mr. DeVito stated that Complainant had placed Mr. Zeleznikar in the extremely unfortunate position of having to either remain silent on Complainant's removal of state property or report Complainant, his immediate supervisor, to upper management.

54. Mr. DeVito stated in his letter that regardless of the outcome of the CBI investigation filed with the Grand County District Attorney's office, he had weighed the information collected and made the following conclusions:

- Complainant knowingly took state property for his private use that provided value to his personal business;

- Complainant's actions indicated unacceptable performance and violated State Personnel Board Rule 1-16, which states, "It is the duty of state employees to protect and conserve state property. No employee shall use state time, property, equipment, or supplies for private use or any other purpose not in the interests of the State of Colorado";

- Complainant's actions also violated § 24-50-116, C.R.S., Standards of Performance and Conduct: "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority";

- Complainant's statements were not credible. He was not forthcoming with information in the investigations. As the investigations progressed, Complainant disclosed additional detail such as the actual count of tires he had taken;

- Mr. DeVito found the statements of Mr. Carroll and Mr. Zeleznikar to be credible;

- Complainant's actions as a lead worker in a position of trust for the Patrol

violated CDOT Policy 2.0, Values;

- Complainant took no responsibility for his actions and showed no remorse. He never offered to reimburse the state for the property he took and could not return. The magnitude and value of the items he took increased over time, culminating in the Dewalt cordless drill;

- Complainant's statement to Agent Pearson and Mr. DeVito that he was still "eyeing" a tire in the scrap yard led Mr. DeVito to believe that Complainant could no longer be trusted as an employee of the Department.

DISCUSSION

I. GENERAL

A. Burden of Proof

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

(1) failure to perform competently;
(2) willful misconduct or violation of these or department 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; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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 or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed most of the acts for which he was disciplined. Complainant held a position of trust as a TM II lead worker in an isolated area of the state. In this position, Complainant was expected and trusted by CDOT to act as a role model for the employees subordinate to him.

Complainant ordered a temporary worker under his direct supervision to place a 55-gallon drum of new motor oil on his personal vehicle during work hours, and drove home with it. He also commented that he planned to take used CDOT tires home as well. Complainant's actions demonstrated a striking lack of awareness of or concern for the difficult position in which

he placed Mr. Zeleznikar. His actions were a gross violation of his position of trust and constitute willful misconduct. When confronted about the incident, Complainant made the implausible claims that the drum contained used oil, and he forgot who had helped him steal it.

Complainant also stole six used tires from CDOT and placed them on his personal vehicle. Complainant's statements about the tires changed several times as the investigation ensued. By the end of the meeting with Agent Pearson, after being confronted by several scenarios that would have tracked the tires to him personally, Complainant admitted to having taken four of the tires for personal use. Then, in his meeting with Mr. DeVito, he admitted to having taken six CDOT tires. Complainant compounded the theft of the tires by lying about it repeatedly.

Complainant also took a cordless drill home for the month of June 2011 and did not return it after his vacation. Aware that no one from CDOT knew he had the drill, Complainant ordered a new drill for his shop in his capacity as TM II. The preponderance of evidence demonstrates that Complainant ordered a new drill to replace the one he had taken from CDOT for personal use. This theft also represents another egregious breach of the trust CDOT placed in him as TM II. Complainant also took a transmission jack home and kept it for five years, clearly intending never to return it to CDOT. Even if CDOT had stopped performing transmission changes, the jack was state property and Complainant was not entitled to take it.

Respondent did not prove that Complainant stole the A-frame chain hoist from CDOT. Complainant was given permission at the TM III level to take that piece of equipment home permanently.

All employees of the State of Colorado have a duty to protect and conserve state property, and are prohibited from using state property, equipment, or supplies for private use. State Personnel Board Rule 1-16, 4 CCR 801. Employees in a leadership role such as Complainant have an additional duty to model responsible compliance with these expectations. Complainant breached his duty several times over the years, culminating in the most flagrant incident with Mr. Zeleznikar. Complainant repeatedly minimized the seriousness of his thefts by stating the items had no real value. However, these claims demonstrate Complainant's failure to appreciate the nature or seriousness of his breach of trust.

Complainant's actions violated § 24-50-116, C.R.S., Standards of Performance and Conduct, which provides, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." CDOT maintains a generous policy of permitting its workers to borrow tools with permission of a supervisor for personal use, if the equipment is returned immediately. Complainant did not have permission to take any of the items at issue in this case (with the exception of the A-frame). Further, he did not return any of them immediately. The preponderance of evidence shows that Complainant had no intention of returning them. Complainant's actions violated this generally accepted standard.

B. The Appointing Authority's action was not 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; or 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).

Respondent used reasonable diligence and care to procure all appropriate evidence in this matter. Once CDOT managers became aware of a potential theft issue through the report of Mr. Zeleznikar, they referred the investigation to the CBI, which conducted an objective, professional investigation. Agent Pearson interviewed all of the individuals who may have had personal knowledge of the situation, and then provided Complainant with multiple opportunities to tell the full truth about the items he had taken from CDOT. Once Mr. DeVito reviewed all of the pertinent information, he provided Complainant with another opportunity to take responsibility for his actions and demonstrate that he could be trusted. Mr. DeVito appropriately concluded that Complainant had committed willful misconduct and could no longer be trusted as a CDOT employee.

Complainant asserts that he has been retaliated against by Mr. Estreich for expressing his beliefs about him at the March 15, 2011 meeting. However, Complainant did not provide any specific information regarding his statements made about Mr. Esteich.[1] Further, and most importantly, there is no evidence that Mr. Estreich instigated the investigation of Complainant's theft of CDOT property. To the contrary, Mr. Zeleznikar, an unbiased third party, came forward with the information as he left CDOT employment. In addition, there is no evidence demonstrating that Mr. Estreich influenced Mr. DeVito in making his decision. Finally, Mr. DeVito had no apparent bias or prejudice against Complainant.

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

Board Rule 6-2, 4 CCR 801, requires corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The Rule further provides that the nature and severity of discipline depends upon the act committed; and, when appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination. *Id.*

Complainant directed a subordinate to help him steal state property by loading it onto his truck, and then drove home with it. The brazen nature of this act demonstrates that Complainant was unconcerned about the possibility of being held accountable for his misdeed. Complainant maintained this belief that his thefts would not be discovered until well into the meeting with Agent Pearson.

Complainant's willful misconduct was flagrant and serious, thus warranting immediate discipline. In addition to the thefts themselves, after being confronted by the appropriate authorities, Complainant was not forthcoming with the truth and minimized the seriousness of his misconduct.

Had Complainant engaged in a one-time incident, for which he took responsibility and showed remorse, then perhaps a demotion would have been appropriate. However, in this case, Complainant purloined CDOT property for personal use several times over a period of years. Once confronted, Complainant denied his conduct unless and until confronted with

[1] Exhibit V, the recording of this meeting, was unintelligible.

evidence he believed would prove him wrong. Further, he never understood the seriousness of the misconduct. Based on this complete lack of accountability, Mr. DeVito correctly concluded that he could no longer trust Complainant to serve CDOT in any capacity. Thus, despite the absence of previous corrective or disciplinary action during his tenure, Complainant's conduct was flagrant and serious enough to warrant termination. Respondent's action was within the range of reasonable alternatives.

CONCLUSIONS OF LAW

1. Complainant committed most of the acts for which he was disciplined.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

ORDER

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

Dated this 12th day
of March, 2012 at
Denver, Colorado.

Mary S. McGlatchey
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 13th day of March 2013~~20~~, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Dennis E. Johnson
[redacted]

Eric Freund A.A.G.
[redacted]

[redacted]

Andrea Woods

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.