STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B016**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

WILLIAM A. BUCKLEY,
Complainant,

vs.

FRONT RANGE COMMUNITY COLLEGE,
Respondent.

Administrative Law Judge (ALJ) Robert R. Gunning held the evidentiary hearing in this matter on February 2 and February 7, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on December 15, 2011. The record was closed on February 7, 2012, upon conclusion of the evidentiary hearing. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Therese Brown, Front Range Community College Vice President, Westminster campus. William P. Buckley, Esq. and Michael J. Belo, Esq. represented Complainant.

MATTERS APPEALED

Complainant was a certified Security Guard I employed by Respondent Front Range Community College (Respondent or College) prior to his disciplinary termination. Complainant appeals his termination, arguing that Respondent's action was arbitrary, capricious, and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent contends that its action was not arbitrary, capricious or contrary to rule or law, and that the termination was within the range of reasonable alternatives.

Through this appeal, Complainant seeks reinstatement to his position at the College as Security Guard I, back pay, restoration of seniority, retirement, vacation, and sick leave. Complainant further requests the termination and associated documents be expunged from his personnel record, and that he be reimbursed for his attorney fees expended in the appeal. Respondent requests that the State Personnel Board (Board) affirm the action of the appointing authority and dismiss Complainant's appeal with prejudice.

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 Respondent's action was arbitrary, capricious or contrary to rule or law;

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

4. Whether Complainant is entitled to recovery of his reasonable attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant began his employment with the State in 1994. From September 1994 until June 2000, he worked for the University of Colorado Health Science Center as a Security Guard I. Complainant commenced his employment with the College in June 2000.

2. Complainant was certified into the position of Security Guard I on December 1, 2000. At the time of his discharge, Complainant was classified as Security Guard I.

3. Complainant's appointing authority was Therese Brown, Vice President, Westminster campus. Andrew Dorsey, College President, delegated appointing authority to Ms. Brown for Westminster campus employees in August 2009.

4. Complainant's direct supervisor was George Smith, Chief, Public Safety. Complainant's second level supervisor was Patrick O'Neil, Director of Facilities and Services. Mr. O'Neil oversees the custodians and public safety officials. He reports directly to Ms. Brown.

5. Complainant generally worked the second shift Tuesdays through Fridays.

6. Complainant is POST (Peace Officer Standards and Training) certified.

7. As a security guard, Complainant's job was to maintain the safety and security of the College premises and property, to prevent theft, misuse or damage of State property, and to protect College staff and students. In particular, Complainant's Position Description Questionnaire (PDQ) describes several of Complainant's job duties as:

- To promote and provide the general public with a safe educational environment and to protect state and personal property while they are on campus.
- Security of building.
  - -Prevent theft, misuse or damage of state property.
  - -Secure all buildings at designated times and facilities checks/reports to avert crisis or personal injury.
- Report writing and Basic Investigation.
  - -Document incidents occurring on campus.
  - -Provide professional referrals to local law enforcement agencies or campus disciplinary process if appropriate.

8. In his position, Complainant had access to buildings and rooms within buildings at the College. As a security guard, Complainant had a master key to the buildings and access to every room.

9. Complainant was required to log his activities on an hourly basis, and to create incident reports for anything out of the ordinary, such as allegations of theft, missing property, assault, or a fire alarm.

10. If there was anything out of the ordinary, Complainant was required to question it, log it, and create an incident report.

11. Complainant was provided with Mr. Smith's mobile number, and was required to contact Mr. Smith after hours if circumstances required it.

12. Complainant's performance evaluations from April 2007 through March 2010 reported that he consistently exceeded expectations. For the April 2010 through March 2011 period, Complainant's performance evaluation placed him at the upper range of meeting expectations. Over the years, Complainant volunteered for extra assignments, including drafting an employee manual with Mr. Smith, creating public safety brochures and training materials, assisting with computer programs, and helping to set up the security cameras. Complainant did not receive extra compensation for these activities.

July 2011 Disciplinary Action

13. Complainant received his first disciplinary action on July 5, 2011. The disciplinary action placed Complainant on one day of unpaid leave. Complainant did not appeal the disciplinary action.

14. The disciplinary action followed a Board Rule 6-10 meeting held on June 29, 2011. The meeting was attended by Ms. Brown, Mr. O'Neil, Complainant, and Myra Pasco, the College's HR Director.

15. Complainant received the disciplinary action for yelling profanities at a custodian, Jim Eggert, while at work on June 17, 2011. Complainant was upset that Mr. Eggert was in the building after his shift was over. The disciplinary action states that Complainant behaved in an unprofessional manner and violated the College's non-harassment policy. This notice also states that Complainant failed to report the incident and withheld the full truth from his supervisors, not having admitted the use of offensive language until asked a second time at the Board Rule 6-10 meeting.

16. Respondent issued a Corrective Action Plan relating to this incident on July 7, 2011. The corrective action stated that Complainant must cease and desist from using profanity or otherwise violating the College's anti-harassment policy. The plan also states that Complainant "must report all incidents as required by your position." Further, Complainant was instructed to demonstrate a high level of professionalism and "maintain good judgment" when interacting with all customers. The plan concludes by stating that "[A]ny subsequent violation of the College Anti-Harassment Policy or any future misrepresentation of the facts will result in the recommendation of disciplinary action up to and including the termination of your employment with the College." Complainant did not grieve the corrective action.

17. On July 13, 2011, Ms. Brown and Mr. O'Neil met with Complainant again because Ms. Brown wanted to impress upon Complainant that he was held to a higher level of trust and authority as a security officer, and to emphasize his role to report all incidents.

August 5, 2011

18. Mark Eller, the College's Program Director for Physical Education, led a College sponsored backpacking trip the weekend of August 5-7, 2011. On August 4, Mr. Eller had rented eight sleeping bags from REI. Each bag rental also included a "stuff sack" and storage bag. When Mr. Eller rented the bags, he was told the bags were new for the season.

19. On the morning of Friday, August 5, Mr. Eller's class assembled in the fitness center (gym) to gather the sleeping bags and stuff sacks for the camping trip. The eight cloth storage bags were left on a small table near the shelving unit in the gym. The storage bags contained REI logos approximately eight inches long. They were also marked with inventory numbers.

20. Mr. Eller locked the gym doors when the class left. The gym was closed through the weekend.

21. Mr. Eller notified the College Dean's office about the trip. He did not notify the Security office about the trip.

22. Complainant was the only security officer on duty during the second shift on August 5. He had not been informed about the backpacking trip.

23. In the afternoon, custodian R.D.[1] used his key to enter the locked gym. R.D. saw the storage bags on the table. He called custodian M.A. into the gym, and told M.A. that the bags were surplus and free for the taking. R.D. and M.A. proceeded to remove six of the bags from the gym.

24. Later that day, R.D. gave one of the bags to T.C., the lead custodian. R.D. handed the bag to T.C. downstairs by her office. R.D. told T.C. that the bag had been in the trash. The bag was a little dirty. T.C. gave the bag to custodian Jim Eggert.

25. R.D. handed another storage bag to custodian J.N. in the locker room adjacent to the gym. R.D. indicated that the bag was left for trash. J.N. left campus with the bag.

26. At approximately 8:45 p.m., Complainant saw R.D. in the hallway outside the gym. R.D. told Complainant that he and a few other employees had taken bags, which he said were laundry bags available to anyone who might need them. R.D. told Complainant that they were to be thrown away.

27. R.D. did not tell Complainant how many bags had been taken or the identity of the custodians who took the bags. Complainant did not ask R.D. how many bags had initially been on the table, or who had taken the bags.

28. Complainant and R.D. then entered the locked gym. Complainant picked up the

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[1] In accordance with the Order Granting Respondent's Motion for Protective Order, dated November 22, 2011, the identities of custodians R.D. and M.A. are protected due to disciplinary action taken against them by Respondent. Additionally, at the evidentiary hearing, the Protective Order was modified to protect the identities of custodians J.N. and T.C., due to the fact that Respondent also took disciplinary action against them.

two remaining storage bags from the small table in the gym. There was no sign stating that the bags were free or trash.

29. Complainant had known R.D. for about seven years, and considered him a friend. Complainant trusted R.D.

30. Complainant testified that he did not believe the bags were the property of REI, as he perceived the logo to be an advertisement.

31. Complainant was aware that the video camera system was always activated, and knew where each camera was aimed, having assisted with setting up the video cameras. When he departed the gym with the bags, he did not try to hide the bags from view of the camera located outside the gym doors. There are no video cameras located inside of the gym.

32. After finishing his shift on August 5, Complainant took the two bags home. (*Stipulation*, ¶ 3).

<u>August 6, 2011</u>

33. The following day, Saturday, August 6 was Complainant's scheduled day off. On that afternoon, Complainant returned the two bags to the gym. (*Stipulation*, ¶4). Complainant used his keys to enter the gym, because it was locked over that weekend. He did not notify anyone that he was in the building, or that he returned the bags. The video footage from the camera located outside the gym doors shows Complainant walking close to the far wall, ducking his head, and raising a hand to block his face as he walks by on his way out of the gym.

34. Complainant testified that he returned the bags because he realized he did not have a need for them, since he had washer and dryer facilities in his condominium unit. He lived about six to seven miles from the campus. Complainant testified that he returned the bags on his day off because he thought someone else may have use for them, and he was in the area running errands. He did not specify the errands. Complainant occasionally stopped by the campus on his days off (approximately two times per year). The campus is open on weekends.

35. Complainant was next scheduled to work on Monday, August 8 at 2 p.m.

36. The ALJ finds that Complainant's explanation for returning the storage bags on August 6 is not credible for the following reasons:

- If Complainant's motivation to return the bags was driven by his lack of use for them, there was no plausible reason why Complainant could not have returned the bags on Monday, August 8, his next day at work.

- Complainant lived several miles from the College, and never specified the errands he stated he had to run in the area that Saturday.

- Complainant walked close to the wall away from the camera, and he attempted to briefly hide his face as he went past the camera after exiting the gym.

August 7, 2011

37. On August 7, the camping group returned from its trip, and Mr. Eller discovered that several of the REI bags were missing. (*Stipulation*, ¶ 7). The gym was locked when the group returned. The two bags on the table were folded; they had not been folded when the group left. The other six bags were missing.

38. Mr. Eller called Public Safety to report the missing bags. Troy Stafford, Security Guard, reported to the gym in about ten minutes. Mr. Eller then returned the rental items to REI, and paid $57 for the lost bags. When the bags were ultimately recovered, Mr. Eller returned them and was reimbursed for the lost bag charge.

39. Following Mr. Eller's report, Mr. Stafford reviewed footage from the security cameras. He first witnessed two custodians, R.D. and M.A., leaving the gym with bags. He then saw the footage of Complainant leaving the gym with two bags. Mr. Stafford told Mr. Eller that he saw who took the bags, and that he needed to confer with his supervisor.

40. Complainant did not create an incident report, log, or otherwise document the storage bag incident. Complainant testified that he did not consider the events to constitute an incident that need to be reported.

College Practice Governing Free Items

41. The College occasionally gave away free items to students and staff. For instance, about twice a year, the College would place books and other supplies on tables in the hallways or in the assistant dean's office. When it did so, the College placed a sign on the table indicating that the items were free for the taking.

42. The College also occasionally gave away items such as filing cabinets and lamps. When these items were given away, the College administration sent emails to students and staff or taped notes to the items to indicate they were free. Certain items, such as office supplies, were to be used by employees on campus.

43. On about three occasions, Mr. Eller gave away old editions of textbooks to students. When he did so, he put them in a box labeled "free" and placed the box on the control desk located close to the front entrance of the gym. When the number of books in the box dwindled to one or two, staff might have placed the remaining book(s) on the table.

44. Additionally, Mr. Eller maintained a box of "recycled" gym clothes in a box within the gym office in case students forgot their gym clothes. The used gym clothes were supposed to be returned. However, while students usually returned the shoes, they typically did not return the shirts and shorts. The shirts and shorts were all gone by early 2012. The College has not pursued the lost shirts and shorts.

45. Mr. Eller never placed free items on the small table where he had stashed the storage bags.

46. The College administration typically sent emails to students and staff before it planned to give away free items.

47. Free items were not displayed in locked areas. They were set out in areas

generally accessible to students and staff.

August 8–17, 2011 Investigation

48. On Monday, August 8 at 7 a.m., Mr. Stafford told Mr. O'Neil about the storage bag incident. They viewed the August 5 videos with Ms. Brown. Mr. O'Neil instructed Mr. Stafford to save the video clips. Later that morning, Mr. Smith viewed the video clips with Mr. Stafford. He then met with Mr. O'Neil, Ms. Brown, and College President Dorsey. The decision to contact the police was made, as state property[2] was missing. Mr. Smith requested Mr. Stafford to contact the Westminster Police Department. Mr. Stafford then drafted an incident report.

49. Officer Pettee arrived in the afternoon. He interviewed R.D., M.A., and T.C. individually. He also interviewed T.C., J.N. and Mr. Eggert in the hallway.

50. Ms. Brown and Mr. O'Neil called Ms. Pasco about the incident. The decision was made to immediately place Complainant, R.D., and M.A. on administrative leave, pending completion of the investigation.

51. When Complainant arrived for work on Monday afternoon, Mr. Smith escorted him to Mr. O'Neil's office. They presented him with the letter from Ms. Brown regarding his placement on administrative leave. Complainant stated, "I know what you're talking about, does it matter that I brought them back?"

52. No one informed Complainant about the investigation before he arrived on campus that afternoon. Therefore, Complainant's statement reveals that he was already aware he should not have removed the storage bags from the locked gym, and was hoping that he could avoid adverse consequences by returning the bags when the building was largely deserted.

53. At Mr. Smith's direction, Mr. Stafford viewed videotape from August 6. This video showed Complainant returning the two bags.

54. All six bags were returned by the custodians once they were informed of the police investigation.

55. Officer Pettee interviewed Complainant on August 9. According to Officer Pettee, Complainant's version of events was consistent with R.D.'s. Specifically, both R.D. and Complainant explained that R.D. had told Complainant that the bags were to be thrown away, and that they were free for the taking. Both R.D. and Complainant acknowledged that Complainant left the gym with the two remaining bags.

Pre-Disciplinary Meetings

56. Ms. Brown conducted Board Rule 6-10 meetings with R.D. and M.A. on August 9. During M.A.'s meeting, he stated that he had some question as to the legality of taking the bags because they contained the REI logo and there was no sign stating that they were free. Ms. Brown and Mr. O'Neil also spoke informally with J.N. and T.C. that date regarding the

[2] Because a College employee had rented the equipment for a College sponsored event, and the College was legally responsible for the equipment, the bags were considered state property.

incident.

57. The College terminated the employment of R.D. and M.A. These employees were terminated for unauthorized removal and theft of property.

58. Officer Pettee picked up four video clips on August 10. The College did not provide the video clip showing J.N. taking the storage bag to Officer Pettee. Officer Pettee informed Mr. Smith and Mr. O'Neil that based on his August 8 interviews, R.D. and M.A. would be issued Municipal Summonses for theft. Officer Pettee stated that he viewed Complainant as a victim, and that Complainant would probably not be charged with theft. According to Officer Pettee, Complainant was not charged because he was led to believe the items were trash, and there was no intent to deprive the state of the bags. He also stated that T.C., J.N., and Mr. Eggert would not be charged. Mr. Smith and Mr. O'Neil reported this information to Ms. Brown prior to Complainant's Board Rule 6-10 meeting.

59. Ms. Brown conducted a Board Rule 6-10 meeting with J.N. and T.C. on August 17, 2011. The College decided not to take disciplinary actions against these employees, but rather, issued corrective actions. The notices and Corrective Action Plans state that J.N. and T.C. removed rented property from a secure area in the College, and that they failed to exercise good judgment by accepting property from coworkers that had an unknown origin. J.N. and T.C. did not receive disciplinary actions because R.D. gave them the bags outside of the gym, they were not cited, and they fully admitted their roles in the incident.

Complainant's Board Rule 6-10 Meeting

60. Respondent conducted the Board Rule 6-10 meeting with Complainant on August 10, 2011 at about 4:30 p.m. Complainant attended the meeting with his uncle, William P. Buckley, Esq. Respondent was represented at the meeting by Ms. Brown, Ms. Pasco, and Mr. O'Neil.

61. At the meeting, Complainant stated that R.D. asked him whether he needed some laundry bags. R.D. and Complainant went into the gym, and R.D. told Complainant that anything left on the table was free for the taking. Complainant admitted that he then took the two storage bags off the table. When he took them, Complainant said that he noticed the REI logo and a number on each bag. Complainant didn't know R.D. to be a liar, and stated that he trusted him. He assumed that someone had told R.D. that the storage bags were free.

62. Complainant stated that he had never picked up free items at the College before.

63. Complainant acknowledged that he had heard rumors that custodians had participated in unauthorized activities, including cooking in the kitchen, taking food, playing basketball, and watching television. R.D. was not specifically mentioned in these rumor allegations. Complainant stated he did not consider these rumors at the time of his conversation with R.D. near the gym.

64. At the Board Rule 6-10 meeting, Complainant acknowledged that it was clear from the July 2011 corrective action that he had an obligation to report anything that was suspicious.

65. Complainant was provided with several opportunities to provide additional or mitigating information. He did not do so.

August 15, 2011 Termination

66. After the Board Rule 6-10 meeting with Complainant, the College terminated his employment by letter dated August 15, 2011. (*Stipulation*, ¶8).

67. Before making the decision to terminate Complainant's employment, following the Board Rule 6-10 meeting, Ms. Brown conferred with President Dorsey, Ms. Pasco, Mr. O'Neil, and Mr. Smith.

68. The termination letter states that Ms. Brown found evidence of unauthorized removal of property from the College. This letter references the July 7, 2011 Corrective Action Plan, which stated, "[Y]ou must report all incidents as required by your position. You must fully disclose and not withhold any details in the reporting of incidents. You must demonstrate a high level of professionalism and maintain good judgment when interacting with any and all customers." Ms. Brown determined that Complainant's actions of August 5, 2011 were in direct violation of the corrective action, and therefore concluded that termination of employment was the appropriate action.

69. Ms. Brown decided to terminate Complainant's employment because she believed that he failed to perform his primary role to protect state property and question unusual activity. As a security officer, Complainant was held to a higher standard of trust than the custodial staff; therefore, he should have questioned the removal of the bags from the locked gym when there was no sign indicating that the items were surplus or trash. Instead of participating in the removal of the items, Ms. Brown believed that Complainant should have stopped it, and then reported and documented the incident. At a minimum, she determined that Complainant exercised very poor judgment. Ms. Brown also believed that Complainant was less than forthcoming during the investigation. In particular, Ms. Brown believed that Complainant's explanation for returning the bags over the weekend did not ring true because there was no reason for him to return the bags on his day off when no one else could have taken them until the gym was re-opened on Monday, August 8.

70. In making the decision to terminate Complainant's employment, Ms. Brown considered the July 2011 disciplinary action as an aggravating factor.

71. Ms. Brown considered Complainant's overall positive work history as a mitigating factor. However, she did not review Complainant's personnel file before making the decision.

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(8); *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707, n.13 (Colo. 1994); *Colorado Dep't of Human Services v. Maggard*, 248 P.3d 708, 712 (Colo. 2011). Such cause is outlined in 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.

See also § 24-50-125(1), C.R.S. (cause for discipline, including dismissal, includes (1) failure to comply with efficient service or competence, (2) willful misconduct, (3) willful failure to perform the employee's duties, and (4) inability to perform the employee's duties).

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. *Kinchen*, 886 P.2d at 707. 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 the acts for which he was disciplined.

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Indeed, in closing argument, Complainant's counsel conceded that this was not a contested issue.

Complainant was disciplined for entering the gym, removing the storage bags from the campus, failing to question R.D., and failing to report the incident. There is no factual dispute that Complainant did in fact commit these acts and omissions. Therefore, as acknowledged by Complainant, Complainant committed the acts for which he was disciplined.

While the proper level of responsibility that Complainant bears in this matter was a matter of great contention at the hearing, there was no significant dispute as to the events of early August 2011.

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. Dep't of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001). When reviewing disciplinary actions, ALJs are to make independent findings of whether the evidence presented justifies a dismissal for cause. *Kinchen*, 886 P.2d at 706, n.10.

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally split into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

Here, the ALJ concludes that the College has met its burden to establish that it did not act arbitrarily or capriciously, or contrary to rule or law, in making the decision to discipline Complainant regarding the storage bag incident. As a security guard, one of Complainant's primary responsibilities was to protect state property and prevent theft and misuse of state property. Complainant was also required to question suspicious activity, and report and document all incidents. Through the July 2011 disciplinary and corrective actions, Respondent emphasized that Complainant was to maintain good judgment and report all questionable activity. Complainant was held to a high degree of trust due to his role as a security guard and his access to every room on the College campus.

On August 5, 2011, the evidence demonstrates that Complainant did not protect state property, question suspicious activity, or report and document suspicious incidents. R.D. told Complainant that the bags were to be thrown away and were free for the taking. Although Complainant trusted R.D., it was unreasonable for Complainant to assume the bags were surplus trash. The bags were located on a table in the locked gym. They were not in the trash. There was no sign indicating that the bags were free, as was the College's practice with surplus items. The bags had an REI logo of about eight inches, and were also marked with identification numbers. In his Board Rule 6-10 meeting, custodian M.A. admitted that he should have questioned the legality of taking the bags. Complainant's job was to question. That evening, Complainant did not question R.D.'s assertion that the bags were giveaways. Instead, Complainant removed two of the bags from campus. He also was aware that other employees had taken bags that day, and therefore permitted the other bags to be removed from the locked gym. Complainant did not log or otherwise report the incident.

Complainant's decision to return the storage bags on August 6, his day off, indicates that he recognized that the bags were not trash or surplus. His explanation for returning the bags that day is not convincing, and his exit from the gym is marked by an effort to avoid the security camera to the extent possible. Further, Complainant's statement to Mr. O'Neil on August 8 that he knew what he was talking about, and wondered whether it mattered that he "brought them back" demonstrates that Complainant was aware that the bags should not have been removed from the College. While Complainant's decision to return the bags shows that he did not intend to keep state property for personal use, his job as a security guard required him to report all questionable activities. Complainant should have contacted his supervisor, Mr. Smith, on his mobile phone that weekend to report the incident. However, Complainant did not do so, and never indicated that he intended to make a report when he returned to work the following Monday.

Complainant also asserts that the College's decision to terminate Complainant's employment, while issuing only corrective actions to custodians T.C. and J.N., demonstrates that the disciplinary action against Complainant was arbitrary and capricious. However, the positions held by Complainant and the custodians are not comparable. Complainant's primary job responsibilities included the protection of state property. His job was to question and report any suspicious activity. Moreover, there was no evidence provided to indicate that either T.C. or J.N. had previously received a corrective action or disciplinary action. In contrast, Complainant

had received a combined disciplinary action and corrective action one month prior to the incident, directing him to maintain good judgment and report all incidents required by his position.

In summary, Complainant failed to stop the theft of the bags and exercised poor judgment in not questioning R.D. about his representation that the storage bags were free. It was reasonable for the College to expect that Complainant would question R.D. and, at a minimum, report the incident through the log or an incident report. Further, Complainant's explanation for returning the bags on his day off was not credible. Therefore, Respondent's decision to impose discipline was not arbitrary, capricious, or contrary to rule or law.

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

The decision to take disciplinary action must be based on the nature, extent, seriousness, and effect, of the act, error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Board Rule 6-9, 4 CCR 801. Under the state's progressive discipline system, a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. Board Rule 6-2, 4 CCR 801.

Here, Complainant received a disciplinary action (one day unpaid suspension) and a corrective action in July 2011, only one month prior to the subject incident. The July 2011 disciplinary action was issued for Complainant's violation of the College's anti-harassment policy (through yelling profanity at a coworker). However, the Corrective Action Plan also emphasized Complainant's obligation to report all incidents as required by his position, and to exercise good judgment. Through the Corrective Action Plan, Respondent placed Complainant on notice that he was held to a position of trust as a security guard, and that his position required him to question and report any suspicious activity. The July 2011 disciplinary action and corrective action therefore are related to the August 2011 incident, in which Complainant did not question or report the removal of the REI bags from the locked gym. Thus, Respondent employed progressive discipline in this case.

In not questioning R.D., Complainant permitted several employees to participate in the removal of state property from the campus. As Ms. Brown noted, instead of questioning and stopping the activity, Complainant participated in removing the bags from the locked gym. Although the bags had little monetary value and were all ultimately returned, the incident provoked a Westminster Police Department report, the issuance of two criminal summonses, and the termination and discipline of several College employees. Complainant's act, or failure to act, therefore had serious ramifications.

Further, the appointing authority partially based her decision to terminate Complainant's employment on his explanation for returning the bags over the weekend. Ms. Brown testified that Complainant's explanation provided at the Board Rule 6-10 meeting "did not ring true." The evidence presented at hearing supports Ms. Brown's assessment. Moreover, the corrective action required Complainant to fully disclose and not withhold any details in the reporting of incidents. Complainant did not disclose or report the incident at all.

The evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the College and for Complainant's circumstances. In making the decision to terminate Complainant's employment, Respondent considered

Complainant's strong performance history prior to June 2011 as a mitigating factor. However, the appointing authority concluded that despite Complainant's historical performance, his actions and decisions in the summer of 2011 led her to conclude that termination was the appropriate disciplinary action given the high level of trust required for security guards.

In reviewing an appointing authority's decision, the issue is not whether the disciplinary action selected was the most appropriate, but rather, whether the discipline imposed was within the range of reasonable alternatives. Here, for the reasons set forth above, Respondent met its burden to establish that the appointing authority's decision to terminate Complainant's employment was within the range of reasonable alternatives.

D. Complainant is not entitled to the recovery of his attorney fees and costs.

Respondent's action is affirmed, and Complainant's appeal is denied. Therefore, Complainant's request for the recovery of his attorney fees and costs is denied.

CONCLUSIONS OF LAW

1. Complainant committed 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.

4. Complainant is not entitled to recovery of his attorney fees and costs.

ORDER

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

Dated this 23rd day
of March, 2012, at
Denver, Colorado.

Robert R. Gunning
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 23 day of March, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

William P. Buckley Esq.
[redacted]

Michael J. Belo Esq.
[redacted]

Eric Freund A.A.G.
[redacted]

[redacted]
Woods, Andrea

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.