

State Personnel Board, State of Colorado

Case No. 2000 B 045

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Lawrence Gavell,

Complainant,

v.

Colorado Department of Public Safety, Colorado Bureau of Investigation,

Respondent.

Hearing on this matter was commenced on January 10, 2000 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. Hearing in this matter continued on February 16 and was completed on February 17, 2000.

MATTER APPEALED

Complainant, Lawrence Gavell (“Complainant” or “Gavell”) appeals his three-day disciplinary suspension and assessment of \$297.61 by the Colorado Department of Public Safety, Colorado Bureau of Investigation (“Respondent” or “CBI”).

For the reasons set forth below, the actions of Respondent are affirmed, in part.

PRELIMINARY MATTERS

Respondent was represented by John A. Lizza, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Respondent’s Advisory Witness for the proceedings was Peter Mang, Deputy Director, CBI, Denver, CO.

Complainant was represented by Douglas Jewell, Esq., Bruno, Bruno, & Colin, P.C., Denver, CO. Complainant was present for the evidentiary proceedings.

1. Procedural History

Complainant filed his Notice of Appeal on October 22, 1999. Complainant appealed his disciplinary suspension of three days without pay and the requirement to pay back to the state of Colorado the amount of \$297.61 which was the amount charged by Complainant on the state credit card for personal travel to Montrose, Colorado.

Respondent failed to file a prehearing statement timely and requested an opportunity to submit one out of time in mid-December. On December 21, 1999, Complainant filed Complainant's Response to Motion for Extension of Time; Motion to Dismiss; or in the Alternative, Motion to Order Show Cause for Refusal to Provide Discovery ("Complainant's Motion"). Complainant subsequently filed a supplement to this motion on December 27, 1999. Complainant argued a number of issues including that: (1) the matter should be dismissed because the agency failed to cooperate in discovery; and (2) the matter should be dismissed because Respondent failed to file prehearing statements.¹ A procedural order was issued on December 29, 1999, after providing the parties an opportunity to argue their respective positions by way of a status conference, which ruled in part that Respondent was (1) precluded from filing a prehearing statement as a sanction for failure to timely file a prehearing statement; and (2) only allowed to call the acting appointing authority as a witness. In addition, Respondent was directed to file a written response to Complainant's Motion, no later than January 5, 2000, addressing the arguments related to dismissing the action.

On January 7, 2000, an order was issued which stated:

This Board is amazed at the continuing problems which are occurring at the Department of Law (ADOL) vis-a-vis this matter. First, it has already been established that Respondent's Prehearing Statement was untimely filed, 30 days past its due date. The proffered explanation for such was, primarily, the mail room at DOL and the fact that Respondent's counsel was continually being moved within DOL. Next, after providing a status conference at the request of Respondent in which all dates were agreed upon for the filing of pleadings, Respondent again fail[ed] to meet a deadline based on DOL's office logistics.

This administrative law judge is at a loss as to why Respondent is repeatedly (sic) unable to comply with court-imposed or agreed-upon deadlines. In order for the Board's rules to have any effect, and to be enforceable, there is no choice but to deem Respondent's Response as filed out of time.

Nevertheless, Complainant's Motion to Dismiss is DENIED. The sanctions imposed in the Procedural Order of December 29, 1999 remain in effect.

Hearing on this matter was commenced on January 10, 2000. At the conclusion of the day of hearing, Complainant moved for a directed verdict based

¹ While Complainant moves for the matter to be "dismissed", it should be noted that it is Complainant's cause of action. As a result, it is interpreted that Complainant was seeking reversal of the appointing authority's disciplinary action.

primarily upon the argument that Complainant was denied due process during the disciplinary process. Complainant also moved for directed verdict with regard to the allegation that Complainant had misused the state vehicle and state credit card. The latter grounds for directed verdict was summarily denied. The continuation of the hearing having been set for the middle of February, Complainant was directed to file a written motion and to provide supporting authority for his position. Respondent was also allowed to file a response to the Complainant's written motion.

On February 1, 2000, Complainant filed a Motion for Directed Verdict in Favor of Complainant Based Upon Denial of Due Process ("Complainant's Motion for Directed Verdict"). Complainant argued that:

- Mang was a witness to some of the alleged disciplinary violations and, as a result, he was biased and unable to appropriately impose discipline upon Complainant;
- Mang was unable to make credibility judgments about the parties;
- Mang's participation in the R-6-10 meeting caused a failure to provide a neutral environment; and
- Mang was not a detached investigator.

Based on the above, Complainant argued that Mang, as the delegated appointing authority should have appointed a different, neutral and detached decision-maker to consider all the "evidence" in the case. It was Complainant's contention that such action would have afforded complainant adequate due process. Complainant's Motion cited a number of cases which generally stand for the proposition that due process of law requires administrative agencies to separate their investigative-advocate functions from their decision making functions.

On February 9, 2000, Respondent filed its Response to Motion for Directed Verdict. Respondent argued, in part, that Complainant had misperceived the role of the appointing authority within the state personnel system. It maintained that the R-6-10 meeting is not a "hearing" and thereby, the due process requirements as argued by Complainant are not strictly applicable. Respondent further maintained that if one were to apply Complainant's analysis within the personnel system, any eyewitness within the system would be prohibited from imposing discipline. Thus, supervisors, managers, and appointing authorities would not be able to impose discipline even in cases involving poor performance.

The matter was re-convened on February 16, 2000. At that time, the administrative law judge denied Complainant's Motion for Directed Verdict and indicated a written order would be forthcoming. Instead, the ruling is incorporated into this Initial Decision.

Complainant's Motion for Directed Verdict is denied. It is clear that a R-6-10 meeting is not a hearing or trial. Rather, such a meeting, as defined by Rule R-6-10, is for the purpose of allowing an appointing authority to gather information, including information from an employee, and determine if discipline needs to be imposed. Such a meeting is required by law. However, the appointing authority's role in the meeting is not to adjudicate. As argued by Respondent, it is the Board's role to adjudicate the imposition of discipline *de novo* if an employee appeals such discipline. Under Complainant's theory for a directed verdict, any time an appointing authority observed behavior which might warrant disciplinary action, including poor performance, that appointing authority would have to abstain from an R-6-10 meeting because the meeting would be a "trial" and the appointing authority would be a "bias" adjudicator. Such a theory cannot be condoned because the result would be that the appointing authority would be unable to fulfill its constitutional obligations. See: Colo. Const., Art. XII, Sec. 13. The case law cited by Complainant is not persuasive because it relies upon the assumption that the R-6-10 meeting constitutes a "trial" or "hearing."

Subsequently, the hearing was concluded on February 17, 2000.

2. Witnesses

Respondent, as a result of the above cited prehearing order called one witness during its case-in-chief: Peter Mang, Deputy Director, Colorado Bureau of Investigation, Department of Public Safety, Denver, CO. During Respondent's rebuttal case, the following witnesses were called: (1) Mark Wilson, Agent-in-Charge, Colorado Bureau of Investigations, Department of Public Safety; and (2) Peter Mang.

Complainant called the following witnesses in its case-in-chief :

Name	Position and Location
Robert Cantwell	Director, Colorado Bureau of Investigation Denver, CO
Charles E. Davis	Criminal Investigator, CBI Denver, CO
Complainant Larry Gavell	Criminal Investigator II, CBI Denver, CO
Larry Brown	Agent, CBI Denver, CO
Scott Mundine	Agent, CBI Denver, CO

3. Exhibits

The following exhibits were introduced by Complainant during its case-in-chief (unless otherwise noted):

Exhibit #	Type	Comments
A	Correspondence Cantwell to Gavell 7/30/99	No objection
B	Correspondence Wilson to Mang 7/30/99	No objection
D	Correspondence Mang to Gavell 9/3/99	No objection
E	Correspondence Mang to Gavell 10/8/99	Offered by Respondent during Mang's testimony in Respondent's case in chief.
J	Lakewood Police Dept. Offense 5/7/98	No objection
K	PACE Form 7/15/98	No objection
N	Transcript of R-6-10 Meeting 9/23/99	No objection
O	State Fleet Management Program Operator's Manual	No objection
R	Executive Order D0010 96 Workplace Violence	No objection
T-1	Memo re: FMLA	No objection
T-4	Memo re: Moving Expenses	Offered by Respondent during Respondent's rebuttal case
T-6	Memo Wilson to Mang RE: Hearsay statement	Offered by Respondent during Respondent's rebuttal case
U	Memo Kitchen to Mange 6/22/99	No objection
W	PACE (signed with handwritten responses by Gavell) 6/30/98	No objection

4. Sequestration Order

By way of stipulation on the second day of hearing, a sequestration order was entered. The attorneys were advised to notify all witnesses that such an order was put in place and that the witnesses were not to discuss their testimony with each other until completion of this matter.

ISSUES

As described by Complainant, the issues in this matter are: (1) he did not act in a threatening, insubordinate manner with AIC Wilson and (2) he did not improperly drive his state vehicle on dates alleged. Complainant also states that

the penalty imposed was unfounded, unsupported, and disproportionate to the offenses as alleged. In addition, Complainant has requested an award of attorney fees, presumably under CRS 24-50-125.5 (1999).

For the purposes of this administrative hearing, the issues are characterized as follows:

1. Did the Complainant commit the acts for which discipline was imposed?
2. Was the discipline imposed within the reasonable range of available alternatives to the appointing authority?
3. Were the actions of the Respondent arbitrary, capricious, and/or contrary to rule or law?
4. Is Complainant entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999)?

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

I. Background of Department of Public Safety, Colorado Bureau of Investigation

1. The Colorado Bureau of Investigation ("CBI") is an agency with the Colorado Department of Public Safety ("DPS"). It employs numerous agents whose responsibilities include being sworn peace officers, upholding the laws of the State, conducting criminal investigations and associated laboratory work. Agents are armed with firearms. (Mang, Ex. R).
2. CBI, while having offices throughout Colorado, has an office in Montrose as well as in the Denver area. As a general practice, agents report to agents-in-charge ("AICs"). The AICs, in turn, report to superiors in the chain of command. (Mang, Gavell, Cantwell). Lead agents may direct certain units.
3. Agents are sometimes required to complete Fitness for Duty ("FFD") evaluations during the course of their employment with CBI. Such evaluations can be ordered by a supervisor in the event concerns arise as to an agent's ability to perform his duties, the agent's safety or safety of others, or if an agent's behavior compromises the integrity or the law enforcement role of the agency. These evaluations are distinct and separate from any type of performance planning and evaluation program. Often, CBI would retain a private psychologist, Richard C. Wihera, Psy.D.,

to conduct FFD evaluations. (Mang, Cantwell).

4. The current director of CBI is Robert Cantwell. Cantwell replaced Director Carl Whiteside recently after having served with the Department of Corrections. Prior to working with DOC, Cantwell was with the Denver Police Department. (Cantwell).
5. As Director of CBI, Cantwell observed that rifts among agents sometimes occurred as a result of some agents having been police officers in the past while other agents had never been police officers. It is the expressed policy of CBI to minimize and eliminate such rifts. In part, it is necessary to facilitate camaraderie amongst agents given the nature of their roles in law enforcement. (Cantwell).
6. Recently, some internal investigations had been conducted based on allegations of sexual harassment and racism within CBI. Because the allegations reached across various sections of CBI, Cantwell was primarily responsible for conducting investigations into such matters and retained his appointing authority. However, at times, Cantwell delegated appointing authority to deputy directors. (Cantwell, Mang).
7. Peter Mang is a Deputy Director within CBI. He reported directly to Cantwell. Mang has been with CBI since 1979 and has been a Criminal Investigator III Agent, an Agent-in-Charge, and Inspector. During the course of his career with CBI, Mang has had the opportunity to directly supervise agents' activities, cases, and performance.
8. The Denver office of CBI, was staffed in part by the following agents: Complainant, Charles E. Davis, Larry Brown, Scott Mundine, and Mark Wilson. Complainant and Wilson had begun working with CBI at approximately the same time but had initially been stationed at different CBI offices. (Mang, Brown, Mundine, Davis, Wilson, Gavell).
9. CBI agents use vehicles from the Fleet Services unit of Central Services, General Support Services. Central Services provides that use of a state vehicle is only to be for official state business and may not be used for personal errands. (Mang, Ex. O). Commuting with a state vehicle may be used under certain conditions if allowed by the appointing authority. (Cantwell).
10. Executive Order D0010-96 provides that the state will not tolerate workplace violence or violent behavior. "Violent behavior" is defined in part "as any act or threat of physical, verbal or psychological aggression or the destruction or abuse of property by any individual. Threats may include veiled, conditional, or direct threats in verbal or written form, resulting in intimidation, harassment, harm or endangerment to the safety

of another person. (Ex. R).

11. CBI has extensive internal regulations on a number of behavioral matters. They provide, in relevant part:

Performance of Duty	Employees shall perform their duties in a calm and firm manner acting together
Incompetence	Employees may be deemed incompetent when acting in a manner tending to bring discredit to themselves or the Bureau
Conduct Towards Others	Employees shall conduct themselves in a manner to foster the greatest cooperation between themselves; and shall not intentionally antagonize any person
Insubordination	Failure to acknowledge authority of any supervisor by disrespect or disputing lawful orders; conduct that impairs supervisors' ability to maintain discipline; speech or conduct toward a supervisor or command person that is discourteous, disrespectful, abusive, or threatening
Harassment	Conduct which denigrates or shows hostility or aversion to any individual; harassment is to be reported immediately by supervisor and/or employees

(Ex. R)

II. Complainant's Service to CBI and Background

12. Larry Gavell has a Bachelors Degree in Political Science and History from the University of Nebraska. In 1989 he joined CBI as a part of CBI's recruitment of narcotic investigators. After being hired, Gavell attending training at Camp George West for a period of 10 weeks, had 3 weeks of service training, and then was assigned to the CBI office in Montrose. (Gavell).
13. While assigned to the Montrose office, Gavell had filed a grievance of

another agent's actions. The grievance was not resolved until after Gavell had been suspended and subject to a FFD evaluation. (Gavell). It was determined that such treatment of Gavell was not warranted. (Gavell).

14. Contemporaneously, it was determined that some level of intervention had to occur at the Montrose facility because of management problems. (Cantwell, Mang). In December 1993, a less than positive evaluation of the Montrose office was produced. (Gavell).
15. Gavell was transferred to the Denver CBI office in 1994. Initially, he was transferred as a narcotics investigator, but was subsequently assigned to the Gaming (legalized gambling) Unit of CBI. (Gavell).
16. Despite being transferred in early 1994, Gavell's wife and three children continue to reside in their home in Montrose, CO. The family has not relocated because of child care issues associated with the three children and the inability to sell the family home. (Gavell).

III. The Relationship Between AIC Wilson and Complainant and Events Leading to Discipline

17. The AIC of Gavell while assigned to the Denver CBI office was Mark Wilson. Prior to working with CBI, Wilson was employed with the Lafayette Police Department. Upon joining CBI, Wilson was first assigned as an agent in the Pueblo CBI office and then promoted and transferred to the Denver CBI office as AIC.
18. Wilson's reputation as an AIC among other agents (some of who had been supervisors at some time during their careers) was less than complimentary. On occasion, Wilson had been observed to lose his temper, use profanity, and make disparaging comments regarding co-workers. (Brown, Gavell, Davis, Mundine). Wilson was characterized as being a "competent" supervisor by his superior Mang. (Mang.)
19. Complainant's reputation amongst other agents was also less than complimentary. Complainant was characterized by others as in perpetual "foul moods." (Mundine, Ex. T-6).
20. Gavell was known to carry additional weapons in addition to that required by regulation. Gavell never specifically threatened anyone but once commented about using his extra firearm. (Gavell, Mundine, T-6). Upon learning of the comment a year after it was made, the appointing authority had concerns about workplace violence but eventually took no action. (Mang).

21. Prior to April 1998, the relationship between Complainant and Wilson can be characterized as negative. Various small incidents had occurred between the 2 individuals including rough-housing with wrist locks by Wilson upon Gavell and assignment of menial tasks to Gavell. (Gavell).
22. On or about April 21, 1998, after completing some firing range training/practice, Complainant and Agent Chuck Davis had a conversation about the range practice. At that time, AIC Wilson approached the two agents, engaged in some conversation, and then trapped Complainant in a "bear hug." Agent Wilson stated to Complainant "you can really fuck with a guy in this position." (Gavell, Wilson, Davis, Ex. J). Complainant, while still in the bear hug, was forced into a wall. Subsequently, the individuals dispersed. (Gavell, Davis).
23. Agent Davis had been with CBI for approximately 5 years. Prior to such, Davis was a federal agent with the U.S. Air Force involved in investigations of computer crimes and forensic analysis of computer evidence. In addition to being an investigator for the Air Force, Davis was a law enforcement officer in the military branch. (Davis).
24. The bear hug incident reflected escalating tension between Complainant and AIC Wilson. Davis characterized the behavior as "stupid macho bullshit." (Davis). Complainant characterized the behavior as demonstrating tension between himself and Wilson. (Gavell).
25. On or about May 7, 1998, Gavell filed an Offense Report – Harassment with the Lakewood Police Department in which Complainant alleged Mark Wilson had grabbed Complainant in a "bear hug" and then shoved him into the wall (Ex. J). Gavell wrestled with his conscious for weeks in deciding whether or not to lodge the police report. Gavell chose to file the report because based on his prior experiences with CBI management at the Montrose office, he did not anticipate filing a grievance of Wilson's behavior would resolve the issue. (Gavell, Ex. R).
26. A supplement to the Offense Report indicated that the prosecution of the offense had been declined. (Ex. J).
27. Tension again surfaced in November 1998 between Gavell and Wilson when Gavell raised the issue of being reimbursed for moving expenses by the state for his transfer from the Montrose office. (Ex. T-5). An exchange of memos demonstrated the increased contempt between the two agents.
28. In January 1999, AIC Wilson conducted a performance progress review with Complainant. (Ex. W). For the period of July 1998 through January 1999, Wilson addressed the following performance factors and provided the following comments, in part:

FACTOR	COMMENT
<ul style="list-style-type: none"> Occupational/Professional Competence 	<p>Strengths: Gavell is bright and intelligent</p> <p>Areas for Improvement: Gavell “drag(s) his feet” on reports and some cases</p>
<ul style="list-style-type: none"> Problem Analysis 	<p>Strengths: Ability to make good decisions on case work. Provides good ideas for case development</p> <p>Areas for Improvement: Gavell had identified that he did not respect a Lead Agent (Brown) in the Gaming unit</p>
<ul style="list-style-type: none"> Planning, Organizing & Coordinating 	<p>Strengths: Gavell submits well written reports with cases that interest him; they are well thought out</p> <p>Areas of Improvement: None identified</p>
<ul style="list-style-type: none"> Organizational Commitment & Adaptability 	<p>Strengths: None identified</p> <p>Areas of Improvement: Gavell has no apparent interest in CBI; he dislikes certain members; he lacks commitment to other co-workers</p>
<ul style="list-style-type: none"> Communications 	<p>Strengths: Gavell is a good communicator and is a good, concise, well-reasoned public speaker</p> <p>Areas of Improvement: Gavell fails to work with lead agent</p>
<ul style="list-style-type: none"> Interpersonal Relations 	<p>Strengths: None identified</p> <p>Areas of Improvement: Failure to have a “smooth” working relationship with fellow employees; obnoxious and name calling; hatred for current or past employees</p>

29. Areas of continued development were also identified including: closer adherence to the CBI dress code policy, complying with policy associated with Lead Agent Designation and remaining compliant with the responsibilities associated therewith; and maintaining an acceptable level of interpersonal relations in the office setting . (Wilson, Ex. W).

30. Complainant provided written comments of the performance progress review. In so doing, Gavell notes of himself the following:

- He acknowledges the problem with timely completing case work and argues he is not the only one who is untimely;
- He has professional differences with the Lead Agent in the Gaming Unit and that the Lead Agent leadership is weak;
- He states he is overly possessive of his case work and does not like to communicate aspects/information related to his cases to others; he has agreed to become more flexible;
- His particular sense of humor does not appeal to certain employees and he will change but also expects AIC Wilson to demonstrate “reciprocity” in these matters. (Gavell, Ex. W).

31. Complainant further admits of having an “abrasive personality.” (Gavell).

32. In May 1999 Complainant and Wilson again conflicted with each other in resolving issues associated leave and Family Medical Leave. Both individuals expressed animosity for each other as exemplified by Gavell stating that Wilson had “administrative shortcomings” and by Wilson stating that Gavell would rather “attack (Wilson’s) credibility and be insubordinate.” (Gavell, Ex. T-1).

33. On or about June 30, 1999, Wilson conducted a year-end performance appraisal of Complainant. The overall rating was “good.” In the factors of (1) Planning, Organizing and Coordinating; and (2) Interpersonal Relations, Complainant was rated Needs Improvement. In the factors of Occupational/Professional Competence; Problem Analysis and Decision-Making; Organizational Commitment and Adaptability; and Communications, Complainant was rated Good. (Ex. W). In rating Complainant, Wilson provided a number of narrative comments (Ex. W, Ex. B).

34. The evaluation was conducted in AIC Wilson’s office. Gavell brought a tape recorder to the meeting. He intended to tape the performance review/evaluation. (Wilson, Gavell).

35. Upon being handed the evaluation, Complainant quickly reviewed the overall rating(s) and indicated he intended to grieve the evaluation. (Gavell). The parties never reviewed all of the factors nor discussed thoroughly the ratings or reasons for such ratings. (Wilson, Gavell, Ex. B).

36. Both Gavell and Wilson admit to becoming agitated and contentious at the beginning of the evaluation. After both individuals became frustrated with each other, Gavell initially refused to sign the evaluation despite having the opportunity to sign the evaluation and disagree with the rating.

- (Wilson, Gavell). Gavell was entitled to review the evaluation prior to signing it which Wilson initially refused.
37. At no time did Gavell acknowledge that he should or could be rated “needs improvement” in any factor or subfactor. (Gavell).
 38. Eventually, Gavell did sign the evaluation but disagreed with the rating. (Wilson, Gavell).
 39. In concluding the evaluation session, Wilson insisted on taking possession of the tape of the meeting. Gavell was defiant and refused to provide the tape at that time. (Wilson, Gavell). He was concerned that the tape would be “balderdized” after having experienced a similar problem in January 1999. (Gavell).
 40. At this point, the meeting became hostile. (Gavell, Wilson, Ex. B). Wilson’s account is that he asked for the tape, that Gavell stood up leaned across the desk and challenged Wilson to get a warrant. Complainant’s account is that Wilson asked for the tape, got up from around the desk and approached Complainant from the side, demanding the tape. Gavell was verbally aggressive by refusing to produce the tape. The parties argued about whether or not the tape was state property. While not loud enough to attract attention by staff, the growing hostility was significant enough that Wilson and Gavell wanted to resolve the issue and speak with Peter Mang. (Gavell, Wilson).
 41. Gavell was not fostering great cooperation between himself and Wilson. (Gavell, Ex. R). While Gavell insisted he would provide a copy of the tape after making a copy, no copy was ever produced. Eventually, it was discovered that the original tape was blank. (Mang, Gavell).
 42. Once at Mang’s office, the parties outlined the events of the evaluation session. Additionally, Gavell requested a copy of his personnel file. (Mang, Gavell). Mang directed Gavell to return to his office and directed Wilson to document the proceeding. (Mang, Ex. B).
 43. The appointing authority acknowledged that at the time of Complainant’s July evaluation, “bad blood” existed between Complainant and AIC Wilson. (Mang). Mang proceeded to discuss the matter with Robert Cantwell. (Mang, Cantwell).
 44. Based on concerns of workplace violence, and after meeting with Mang and Wilson, Cantwell placed Complainant on administrative leave with pay. (Mang, Cantwell, Ex. R). Cantwell documented the administrative leave in correspondence to Complainant stating that because of the concerns an investigation would be conducted. (Cantwell, Ex. A).

45. Sometime during the events leading up to the imposition of administrative leave, Cantwell became aware of the bear hug incident and fact that Gavell had filed a harassment complaint. In evaluating matters that might raise concerns of workplace violence, Cantwell believed that the bear hug incident was not violent and did not rise to the level of assault. (Cantwell). Cantwell distinguishes the incident of the bear hug from the evaluation meeting as not having happened in the employment context (i.e., during a mandatory meeting and evaluation) and that the bear hug incident reflected the camaraderie of CBI agents.
46. Cantwell subsequently delegated appointing authority to Deputy Director Peter Mang to investigate and take what ever action deemed necessary as a result of the events of the evaluation. (Mang, Ex. D.)
47. Complainant was ordered to complete a FFD evaluation. The FFD evaluation was meant to (1) ensure Complainant could continue with his duties, and (2) as part of Mang's investigation of the conflict between Gavell and Wilson. (Mang). Dr. Wihera conducted the FFD examination and found Complainant fit for duty. (Mang).
48. Mang provided notice to Complainant of an R-6-10 meeting and identified that the following issues would be addressed: (1) insubordinate behavior; (2) disruptive conduct; and (3) abuse of a state vehicle. (Ex. D).
49. The R-6-10 meeting was held on September 23, 1999. Complainant was represented by counsel during the meeting. During the course of the meeting, Complainant admitted that he had driven a state vehicle to the Montrose area and charged gas for the trip on the state credit card. Complainant maintained (1) that he had been conducting an investigation which accounted for some of the trips; and (2) that CBI was unclear about its policy with regard to use of state vehicles and that years prior he had asked for clarification and received none. (Ex. N). Gavell had also stated that he believed other individuals had used state vehicles under similar circumstances. (Gavell, Ex. N, Mang). He also believed that in order to assure accurate accounting and fuel use, the fuel for this vehicle had to be charged to the state credit card.
50. As part of Mang's investigation, he determined that Complainant had traveled to the Montrose area, on Fridays or during weekends, approximately 10 times. (Mang).
51. As part of the investigation, Mang directed another CBI staff member to estimate the charges on the state credit card which *could* be allocated to personal use. (Mang). Such an amount equaled \$297.61 and was based on interpretation of daily activity reports by Complainant and mileage.

52. After reviewing Complainant's personnel information, the history of Complainant at the CBI Montrose office, the FFD examinations, discussing FFD examination findings with Dr. Wihera, and reviewing the transcript of the R-6-10 meeting, Mang issued a disciplinary action in which Complainant was suspended without pay for 3 days and assessed \$297.61 as an estimated reimbursement for use of the state credit card for fuel in commuting. Mang also assigned Gavell a new supervisor. (Mang, Ex. E).

53. Mang imposed discipline for the following reasons:

Violation	Grounds
<ul style="list-style-type: none"> • Violation of the Dept. of Public Safety's Policy and Procedure on Harassment 	Gavell negatively affected the working environment
<ul style="list-style-type: none"> • CBI Policy on Performance of Duty 	Gavell failed to be efficient
<ul style="list-style-type: none"> • CBI Policy on Incompetence 	Gavell acted in a manner which discrediting himself and the bureau
<ul style="list-style-type: none"> • CBI Policy 91-3 addressing conduct towards others 	Gavell failed to treat other employees in a manner to inspire confidence and respect; foster greatest cooperation between themselves; and Gavell antagonized persons
<ul style="list-style-type: none"> • CBI Policy 91-4 with regard to obeying all lawful orders issued by a supervisor or command personnel and refraining from making any disrespectful, or insolent/abusive remarks to a supervisor 	Gavell failed to acknowledge authority of his supervisor by obvious disrespect; and his speech and/or conduct toward supervisor was discourteous, disrespectful, abusive and threatening.
<ul style="list-style-type: none"> • Executive Order 96-10 (sic) re: workplace violence 	Gavell threatened violent behavior directed toward AIC as defined by Executive Order
<ul style="list-style-type: none"> • Use of a state vehicle and credit care for personal use 	Gavell used vehicles for other than official state business

(Ex. E).

54. In imposing discipline, Mang considered the environment of the CBI office, previous personal issues between Wilson and Gavell, gravity of use of the state credit card, Gavell's history of interaction with his peers, Gavell's sense of entitlement from CBI, Gavell's previous performance evaluations (which rated him as Good or better), whether or not to issue a corrective action, and Gavell's family situation (involving the family living apart and

children with health issues). (Mang, Ex. E, Ex. N).

55. No personnel actions were taken towards AIC Wilson for his interpersonal relations.

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) 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; (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 disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge, Inc.*, 972 P.2d 707 (Colo. App. 1999). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;

7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

All of these factors were considered in evaluating witnesses' testimony. Additionally, all evidence introduced was considered.

II.

1. The Acts for Which Discipline was Imposed

In determining whether or not the acts for which discipline was imposed occurred, and based on the evidence, one is forced to make a number of credibility determinations.

A. The Performance Evaluation, Violations of CBI Policy and Executive Order

First, it is well established by both parties that CBI has experienced problems with management during Complainant's tenure with the agency. It is clear that the culture at CBI during the period in question was in need of reform. This is exemplified by at least 3 notable events. The events at the Montrose CBI office involving Complainant with the fact that an investigation and negative report was issued with regard to that office's management practices support the notion that some level of reform or improvement was needed. Additionally, as admitted by the Director of CBI, allegations of racism and sexual harassment have, at times, been raised. While this cannot be viewed as a condemnation of CBI, it does suggest issues within the agency's culture. As the un-controverted evidence suggests, rifts among agents existed based on cliques defined by whether or not individuals had previous law enforcement experience.

Second, the evidence is primarily un-controverted that AIC Wilson has a disagreeable style of managing his personnel. The testimony of Agents Brown, Gavell, Davis, and Mundine supports the characterization that Wilson was gruff, would lose his temper, and would often make disparaging comments about agents. Such a style cannot be interpreted to facilitate camaraderie amongst all the agents and can be viewed, at times, as divisive. Yet, it must also be noted that Wilson fulfills his supervisory functions. The evidence supports that he appropriately conducts performance planning and evaluations. And, it further supports that his performance evaluations, with regard to Complainant, are balanced, reflecting Complainant's strengths and weaknesses.

Third, it is un-controverted that Complainant has an abrasive style. He admits to being abrasive. His co-workers have characterized him as

sometimes demonstrating that he is in a foul mood. Moreover, as Complainant's own testimony suggests, he sometimes has a disproportionate sense of entitlement. Such is supported by Complainant's testimony that CBI was *responsible* for his having to move away from his family and for his having to continually travel back to Montrose to visit his wife and children. While it is clear that CBI transferred Gavell from Montrose as a result of the management/culture issues associated with the Montrose office, it is unreasonable to continue to blame CBI for correcting a bad situation (by instituting the transfer) 4 years after it occurred. Complainant has had ample opportunity to either relocate his family, accept the living situation, or make other decisions which would facilitate his family being together. Yet, it should not be ignored noted that Gavell is a good agent. His performance evaluations demonstrate his proficiency at investigating cases and fulfilling his responsibilities.

Fourth, while accounts of various incidents may vary, both parties admit that tension existed between Wilson and Gavell. Such is exemplified by the "rough housing" involving use of wrist locks, assignment of menial tasks, the "bear hug" incident, jokes regarding the concealment of extra firearms, and discussions associated with relocation expenses and use of leave.

While the four factors outlined above clearly define the atmosphere, it is less clear as to what actually happened during the performance evaluation of Agent Gavell. The testimony of the only two witnesses, Gavell and Wilson, consistently contradicts one another. AIC Wilson maintains that it was Gavell who became threatening during the course of the performance evaluation and posed a workplace violence issue. Wilson suggests in his testimony that Gavell refused to review the entire evaluation and refused to produce the tape. He insists that Gavell stated that he would not produce the tape without being served with a warrant. Complainant Gavell, on the other hand insists it is Wilson who became aggressive during the meeting and posed a threat. Complainant is dedicated to believing that Wilson at first forced his signature on the evaluation and, subsequently, upon requesting the tape, physically approached Gavell. All that is credibly established is that the parties had the potential, personalities, and opportunity to be hostile during the evaluation.

In examining the parties' credibility, one cannot help but note Complainant's bias and prejudice against CBI. Complainant's sense of entitlement, dating back years, forces one to conclude he is bias against the agency. During his testimony, Gavell chided the agency for failing to provide proper training, for manifesting a poor work culture, for promoting individuals who he perceived as not to be qualified, for causing his family and himself to be separated, for causing him the expense of commuting back and forth to Montrose, and for failing to make policies clear. He *expressed* nothing less than disdain. Clearly, Complainant is frustrated with the agency and its

culture. The determination that such frustration exists is supported by Complainant's comments during the R-6-10 meeting.

At the same time, the evidence demonstrates Wilson had *less* bias and prejudice for Complainant than Complainant did for the agency. This is principally demonstrated by the performance progress form and performance evaluation. In both documents, Wilson acknowledges Complainant's contribution to CBI, his ability to investigate, his ability to communicate, and his intelligence. While both men may not have interacted well together, Wilson demonstrated an ability to still provide candid, honest, and positive evaluations of Gavell despite having had charges filed against him with the Lakewood police. His credibility was enhanced by these actions.

Thus, for issues associated with the performance evaluation and Complainant's behavior during the performance evaluation, Respondent has met its burden to show Complainant violated the agency rules which affected his ability perform his job.

B. The Use of State Vehicle and State Credit Card

Respondent failed to meet its burden in demonstrating that Complainant misused a state vehicle. While Complainant's own exhibit suggests that the use of a state vehicle can only be for official purposes and not for personal use, little evidence was introduced to show what constitutes personal use of vehicle by a CBI agent. Moreover, while the Fleet manual suggests that commuting is not allowed unless approved in accordance with Administrative Rule 6.00, no evidence was offered as to the requirements of this administrative rule. Gavell testified that some of his travels to the Montrose area were on state business. Testimony was provided that other CBI agents had been granted permission to use fleet vehicles for commuting purposes. Yet, the parameters of how and when such permission was granted remained undefined. In only one example was it demonstrated that an agent could commute more than 100 miles based on a state need.

Gavell testified that he had requested information on the issue of using his state vehicle for more than one year and never received a formal response. This testimony was not rebutted nor was any information solicited to show that Gavell's query had been answered. In essence, CBI only argued that a guideline existed for the use of fleet vehicles and exceptions to that guideline existed.

Given that the evidence was not persuasive in defining when one can and cannot use a state vehicle, it also remains unclear as to when charges associated with fueling such a vehicle would be disallowed. While Mang used an appropriate methodology for calculating the cost of such fuel, Respondent was not persuasive in arguing when the use of such

methodology would be appropriate.

2. Regarding Performance Evaluation, the Discipline Imposed was Within the Reasonable Range of Alternatives

As discussed above, and given the culture of the agency and Wilson's and Gavell's displayed personalities, Mang was forced to determine what level of corrective action or discipline should be imposed. From Mang's testimony, it is evident that Mang considered a number of factors in imposing discipline and balanced Rules R-6-2, 4 CCR 801 (1999), R-6-6, and R-6-9 which respectively provide:

A certified employee except employees in the Senior Executive Service shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

[and]

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the 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. Information presented by the employee must also be considered.

[and]

Disciplinary action adversely affects current base pay, status, or tenure. Disciplinary actions may include, but are not limited to, an adjustment of base pay to a lower rate in the pay grade, demotion, dismissal, and **suspension** up to 30 days,

Mang considered the nature, extent, seriousness and effect of the act by reviewing the various CBI regulations regarding agent conduct, the policy regarding harassment, and the Governor's executive order. Mang also considered Complainant's previous performance record, and Complainant's history in interpersonal relationships with Wilson and others. Finally, and by admission, Mang considered mitigating circumstances that could have helped account for Gavell's behavior including stressors related to family.²

² In engaging in such an analysis, it is important to note that the Board must be wary of second guessing an appointing authority's imposition of the type of discipline. While the Board's rules provide for progressive discipline, it is not mandated that corrective action be imposed prior to disciplinary action. An appointing authority has flexibility in instituting the level of discipline. See: *Ramseyer v. Dept. of Social*

3. Regarding Performance Evaluation, Actions of the Respondent were not arbitrary, capricious, and/or contrary to rule or law

The facts support that the appointing authority did not act arbitrarily, capriciously, or contrary to rule or law. As stated in *Van de Vegt v. Board of Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936):

Capricious or arbitrary exercise of discretion by an administrative board can arise in only three ways, namely: (a) By neglecting or refusing 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; (b) By failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) By exercising its discretion in such a 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.

Applying this test in the circumstances related to the performance evaluation, the appointing authority demonstrated diligence and care in procuring evidence in determining whether or not to issue discipline. Mang insisted the parties document the events at the time it happened. Information was also gathered by ordering the FFD and having the parties meet, pursuant to rule, to discuss the alleged acts. Mang also demonstrated that he gave appropriate consideration to the information his investigation collected. Finally, given the agency culture, the admitted personalities involved, the employee's performance history, and the employee's history with relationships and supervisors, reasonable individuals could not fairly and honestly reach a different conclusion other than the acts occurred and some level of discipline was necessary.

Mang did not act contrary to rule or law. Mang provided an opportunity for Gavell, a certified employee, to present information about the reason for potential discipline and gave the employee an opportunity to respond. See: Board Rule R-6-10, 4 CCR 801 (1999). The R-6-10 meeting occurred in compliance with Board rule. Respondent did not pre-determine the discipline to be imposed. It was amply demonstrated that the decision to impose discipline was made after information had been collected, both written and verbal. Finally, the delegated appointing authority appropriately noticed Complainant of discipline and the grounds of such discipline.

While Mang had other agents research the matter of use of a state

Services, 895 P.2d 1188 (Colo. App. 1995); and *Hughes v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. (1997)). See also: *John Rodgers v. Dept. of Human Services*, 98CA2409, (Colo. App. 12/9/99), not selected for publication.

vehicle and the state credit card, such was insufficient to prevent arbitrary, capricious, or contrary to rule of law action in imposing the monetary assessment. The proof is simply that insufficient guidelines exist to erase any ambiguity in use of the vehicle. Reasonable persons could honestly conclude differently as to whether or not Complainant misused a state vehicle or credit card.

4. Complainant is not Entitled to an Award of Attorney Fees and Costs pursuant to CRS 24-50-125.5 (1999).

Given the above findings of fact, Respondent's action of imposing discipline based on the acts of the Complainant do not demonstrate that Respondent acted frivolously, in bad faith, maliciously, as a means of harassment, or that its actions were groundless. See: CRS 24-50-125.5 (1999) and Board Rule R-8-38, 4 CCR 801 (1999). Complainant failed to show that the action was not based on evidence or the law as presented. Nor did Complainant show that the personnel action was pursued to annoy or harass, was abusive or stubbornly litigious. It cannot be said that the action was disrespectful of the truth. And, it is clear both sides provided competent evidence in litigating the action.

CONCLUSIONS OF LAW

1. Complainant, by violating CBI regulations in the course of his performance evaluation and the Executive Order, did commit the acts for which discipline was imposed. However, Complainant did not violate CBI regulations with regard to the use of the state vehicle or use of the state credit card.
2. The discipline imposed was within the reasonable range of available alternatives to the appointing authority with the exception of the monetary assessment.
3. Respondent's actions related to the events of the performance evaluation were not arbitrary, capricious, and/or contrary to rule or law. With regard to the use of the state vehicle and state credit card charges, the actions were arbitrary, capricious, and contrary to rule or law.

4. Complainant is not entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999).

ORDER

Respondent's actions are AFFIRMED, IN PART. The discipline imposed in the form of the 3 day suspension is upheld. The assessment of the \$297.61 for use of the state vehicle and credit card is reversed.

Dated this 3rd day of
April 2000

G. Charles Robertson
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, CO 80203

Certificate of Service

This is to certify that on the _____ day of January, 2000, I placed a true copy of the foregoing Initial Decision of the Administrative Law Judge and Notice of Appeal rights in the United States mail, postage prepaid, addressed as follows:

Doug Jewell, Esq.
Bruno, Bruno, & Colin, P.C.
One Civic Center Plaza
1560 Broadway, Suite 1099
Denver, CO 80202

and by interdepartmental mail to:

John Lizza
Assistant Attorney General
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