

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT BOYCE,

Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY,
COLORADO STATE PATROL,**

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on February 6, 2002 and April 2, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General John A. Lizza represented Respondent. Respondent's advisory witness was Major Larry Holestine, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant Robert Boyce ("Complainant" or "Boyce") appeals the five percent reduction in his pay for two months and the corresponding corrective action imposed by Respondent, Department of Public Safety ("Respondent" or "DPS"). Complainant seeks revocation of the disciplinary and corrective actions and back pay.

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 alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. DPS has divided Colorado into three regions, each overseen by a lieutenant colonel and consisting of two districts each. Each district is overseen by a major and is divided into three troops that are, in turn, overseen by captains. Each troop is divided into two or three units, consisting of troopers that are overseen by sergeants.
2. Majors handle the administrative duties for each district and are the delegated appointing authorities for their district.
3. Captains investigate citizen complaints against troopers and issue corrective actions. However, they must refer disciplinary actions, on the basis of a recommendation from them, to their majors to review, investigate and issue if necessary.
4. Complainant was a trooper within a unit overseen by Sergeant Driscoll. Captain Myers was in charge of Complainant's troop. Major Holestine was in charge of Complainant's district and Complainant's appointing authority.
5. When Complainant transferred to Myers' troop in March 2001, his interim evaluation rating from his previous position was "commendable." His strengths were listed as "meticulous," developing "as a leader and a trainer," and "strongly committed to job excellence."
6. Complainant is viewed by his various supervisors as hardworking, proactive in his job duties and committed to DPS.
7. When a citizen files a complaint, it is investigated; and the captain of the troop, the major for the district and the lieutenant colonel who oversees the region review the results.
8. If, after investigation, any portion of a complaint is found to be true, it is deemed a "founded" complaint and appropriate action is taken against the officer against whom the complaint was filed. Letters are also sent to all complaining citizens, telling them whether their complaints are founded or unfounded.
9. During 2001, nineteen complaints were filed in Complainant's district. Fourteen of those complaints were determined to be founded complaints.
10. In implementing progressive discipline, DPS typically begins with giving a verbal warning to the employee or doing an evaluation; the next step is to send the employee

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to some type of course and/or issue a corrective action; and the next step is to take disciplinary action.

Johnson Complaint (May 11, 2001 Accident)

11. On May 11, 2001, Complainant was on duty at the scene of an accident involving Randall Johnson.
12. While Complainant was talking to the people involved in the accident, Johnson was on the cell phone talking to his wife. Complainant told him to get off the phone, which Johnson did.
13. Johnson then finished smoking his cigarette, threw it on the ground and put it out with his foot. Complainant asked Johnson what he was doing and told him that littering was a \$1000 fine.
14. A citizen complainant was filed by Johnson's wife alleging that while she was speaking to him on the cell phone, Complainant had spoken in a harsh tone and had cursed at Johnson.
15. After interviewing the other witnesses at the scene, Myers found that Complainant had not cursed but did have an inappropriate demeanor and tone, and displayed anger and tone of voice when he spoke to Johnson.
16. Complainant was given a verbal counseling by Myers on how to handle people who have just been involved in an accident and taking violations of the law personally. In addition, Myers told Sergeant Levere, Complainant's supervisor, to take the incident into consideration on Complainant's yearly evaluation.
17. Complainant did not grieve the verbal counseling.

Rodriguez' Family Complaint (May 1, 2001 Careless Driving Ticket)

18. In late April 2001, Complainant, while off-duty, witnessed a neighborhood teenage boy speeding through Complainant's neighborhood.
19. Complainant went over to the boy's home and, when a teenage girl answered the door, asked to speak to her parents. She told him that her parents were not home. Complainant asked the girl how old she was and who was taking care of her, mentioning the possibility of child neglect charges. Complainant was not in uniform.
20. The following day, Complainant, while in uniform, went back over to his neighbor's house and gave teenage boy a ticket for careless driving.

21. The boy's mother filed a complaint, not contesting the ticket, but addressing Complainant's demeanor.
22. After Myers investigated the complaint, he found that Complainant's demeanor had been inappropriate, discourteous and unfriendly.
23. Complainant was given a written warning by Myers and instructed to attend a conflict management course. In addition, Myers told him that the next founded complaint would likely result in a corrective or disciplinary action.
24. Myers sent a memo to Lt. Colonel Troestel outlining the complaint and the action taken. He also stated that Complainant's performance evaluation would reflect a "needs improvement" rating in the area of interpersonal relations.
25. Complainant did not grieve the written warning.

Complainant's Discussion with Lt. Colonel Troestel

26. During a troop meeting, Chief Westphal and Lt. Colonel Troestel told troopers that they had an open door policy and would like to hear from troopers whenever they were in Denver.
27. At some point after this meeting, Complainant went to speak to Lt. Colonel Troestel about being harassed by his supervisors on complaints from citizens.
28. On August 24, 2001, Major Holestine met with Boyce and gave him a verbal warning to go through the chain of command in the future with such issues.
29. Complainant did not grieve the verbal warning.

Kutlak Complaint (May 20, 2001 Accident)

30. On May 20, 2001, Complainant investigated a two-car crash and issued a citation to Levent Kutlak with a court appearance for July 30, 2001.
31. Complainant did not interview an occupant in Kutlak's car regarding the accident, did not fully interview those witnesses he did speak to, and failed to address the injury received by Kutlak in the accident.
32. Complainant was late for the court appearance because he had mixed up the court appearance date. He was unprepared for the hearing, because he did not have his notes or case file with him. Therefore, the charges were dismissed.
33. Kutlak filed a complaint that, after investigation, Captain Myers determined to be founded.

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34. On September 17, 2001, Captain Myers issued Complainant a corrective action, ordering him in the future to interview all occupants of a vehicle to determine their identity, if they have any injuries, if they were using a seatbelt and to determine what happened. He was also ordered to put all required passenger information on the final crash report and to appear for court cases on time and fully prepared to give testimony.
35. Complainant did not grieve the corrective action.

Lafayette Officer and Smith Complaints (August 19, 2001 Accident)

36. On August 19, 2001, Complainant investigated a three-car accident on Interstate Highway 25, which was blocking a southbound lane.
37. Present at the scene was an off-duty Lafayette officer, Gardner Mendenhall.
38. In an effort to clear the scene and prevent secondary accidents, Complainant told Mendenhall to get in one of the vehicles and remove it from the highway. When Mendenhall was hesitant, Complainant told him that if he was not going to help he should leave immediately.
39. Complainant yelled while investigating the scene and was abrupt and demanding with the various drivers.
40. Complainant issued a citation to Scott Smith, one of the drivers in the accident but refused to explain to Smith why the ticket was being issued to him but none of the other drivers.
41. Mendenhall filed a complaint, which, after investigation, was determined by Captain Myers to be founded with regards to Complainant's inappropriate demeanor. Captain Myers also determined, as a result of the investigation, that Mendenhall had not identified himself and that Complainant had not been aware he was addressing an off-duty police officer.
42. On September 26, 2001, Captain Myers sent a memo to Lt. Colonel Trostel stating that he would handle the Mendenhall complaint through verbal counseling.
43. One month later, on October 22, 2001, Smith filed a complaint against Complainant. Captain Myers gave the complaint to Sergeant Driscoll to investigate.
44. Sergeant Driscoll investigated the complainant and found that Complainant properly exercised his discretion in issuing the citation. However, after interviewing Complainant and the various drivers present at the scene, he found that the drivers present at the scene felt that Complainant's demeanor had been authoritarian and angry throughout the investigation of the accident scene.

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45. Sergeant Driscoll outlined the findings of his investigation in a memo to Captain Myers.

R-6-10 Meeting and Disciplinary Action

46. On November 27, 2001, Captain Myers sent a memo to Major Holestine outlining the series of founded complaints filed against Complainant and referring the Smith complaint to Major Holestine for possible disciplinary action against Complainant. After receiving the memo, Captain Myers notified Complainant of the scheduling of a R-6-10 meeting.
47. After receiving the letter notifying him of the R-6-10 meeting, Complainant became despondent and less proactive at work. His behavior concerned his fellow team members, especially his supervisor, Sergeant Driscoll.
48. After discussing the matter with the other team members, Sergeant Driscoll talked to Captain Myers about his concerns. Captain Myers told him to put all of the information into a memo.
49. On November 30, 2001, Complainant was placed on administrative leave by Major Holestine, who had scheduled an appointment for Complainant with Dr. Wihera to evaluate Complainant's fitness for duty.
50. Dr. Wihera examined Complainant on December 6, 2001 and pronounced him fit for duty. Complainant was called back in for active duty with DPS on December 7, 2001.
51. Prior to the R-6-10 meeting, Major Holestine discussed with Captain Myers the verbal warning, written warning, and corrective action that Complainant had previously received.
52. During the R-6-10 meeting on December 17, 2001, Complainant explained that when he arrived at the scene of Smith's accident, it was very loud. He shouted as he asked general questions as to whether anyone was hurt.
53. Complainant told Major Holestine he had used his voice at the scene of the accident in order to get the scene cleared, explaining that he is result oriented, not customer oriented.
54. Prior to imposing disciplinary action, Major Holestine reviewed Complainant's personnel file, including his performance evaluations, the November 27, 2001 memo from Captain Myers outlining the various founded complaints against Complainant and memos submitted to him by Complainant during the R-6-10 meeting. He also called Theresa Wojahn in DPS' human resources section; described for her the previous founded complaints and the current complaint, then asked how DPS had handled other

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employees in similar circumstances.

55. As mitigating factors, Major Holestine considered Complainant's overall interim performance rating of "competent" received before his transfer and that Complainant was an active trooper with some strong overall strengths, a very high number of drunk driving arrests and at least one award resulting from those arrests. Overall, Major Holestine viewed Complainant as a good trooper who he would like to see rise through the ranks.
56. As aggravating factors, Major Holestine considered that Complainant had already been instructed to attend a confrontational anger management class before as a result of one of the complaints.
57. Major Holestine also considered that Complainant had received four founded complainants between May 14, 2001 and September 26, 2001 and this was his fifth complaint in a six-month period. Complainant had received 30% of the total founded complaints for his district that year. Typically a trooper would receive one complaint, at the most, every four years.
58. On December 19, 2001, Major Holestine issued a disciplinary and corrective action letter, finding that Complainant had violated Board Rule R-6-9(1) by violating DPS' General Order Nos. 4 and 7 which state as follows:
 - a. General Order No. 4: Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
 - b. General Order No. 7: Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
59. As disciplinary action, Major Holestine reduced Complainant's pay 5% for two months, which equates to a total of two days pay. Major Holestine also imposed a corrective action whereby Complainant is to view all videotapes of his contacts; review selected videotapes with his supervisor; and attend four anger management classes administered by Colorado State Employees Assistance Program (CSEAP).
60. After Complainant received this disciplinary and corrective action, a video cam was installed in Complainant's car. It is activated by turning on the patrol car's red lights, has a straight forward view, can record everything that Complainant says and, often, what the driver in the car is saying.
61. Complainant has received no complainants since December 19, 2001

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 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.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

II. HEARING ISSUES

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

As found above in the Findings of Fact, Complainant engaged in the acts for which he was disciplined. His demeanor at the Smith accident was inappropriate and abrasive for the circumstances and did not comport with DPS' General Orders mandating effective performance and the treatment of others with professionalism, courtesy and respect. Complainant's abrasiveness at the scene of an accident or whilst issuing a citation may clear a scene quickly, however, it ignores the customer aspect of DPS – escalating or antagonizing people who are shaken from an accident or receiving a citation. Complainant's demeanor while investigating the Smith accident violated DPS' General Orders 4 and 7.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion 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 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. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

Captain Myers delegated investigation of the Smith complaint to Sergeant Driscoll, Complainant's direct supervisor. Sergeant Driscoll thoroughly investigated the factual background for the complaint, interviewing all of the witnesses present at the scene of the accident. Captain Myers, given that this was the fifth founded complaint in a six month period against Complainant, referred the matter to Major Holestine to determine if disciplinary action was appropriate. Major Holestine reviewed all of the information before him, including information given to him by Complainant, a history of the founded citizen complaints against Complainant and the results of Sergeant Driscoll's investigation. There is no indication that any witness or evidence was overlooked. Throughout all of this information was a common theme – Complainant's abrasive and inappropriate demeanor when faced with violations of the law and/or accident scenes.

As set forth in the discussion above, Complainant's demeanor violated two of DPS' General Orders. Because Complainant had violated two department rules, he may be subjected to disciplinary action. Board Rule R-6-9 (1), 4 CCR 801. In addition, Complainant was responsible for 30% of all founded complaints and over 25% of the filed complaints in his district for the year. Yet Complainant had only been in the district for half of that time, for only six months. In that time his supervisors had attempted to correct his interpersonal relations performance problems with two verbal warnings, one written warning and, finally, a corrective action that included attendance at a conflict management class.

Certified employees must be subjected to progressive discipline, except when they engage in such flagrant or serious conduct that they must be disciplined immediately. Board Rule R-6-2, 4 CCR 801. Such a requirement recognizes the property rights that certified state employees hold in their employment pursuant to Colorado's Constitution while balancing the needs of state agencies to address promptly egregious behavior by employees.

Under the requirement of progressive discipline, state agencies are engaging in a managerial best practices act of providing employees, whose performances are otherwise commendable and in whom the state has invested time, money and training, an opportunity to improve their performance. Such a practice benefits not just the state employee on

whom it is exercised. It also benefits state agencies that are, under such a practice, better able to focus valuable time and resources on serving Colorado citizens rather than the continual process of hiring and training new employees. Finally, such a practice benefits Colorado citizens who can be served by employees, who, while not perfect, have a number of skills that are difficult to replace on a continual basis.

Complainant is well respected by his peers. Every witness that was questioned on this matter testified that Complainant was a proactive employee, someone who was committed to performing well. His supervisors all testified, in one fashion or another, that Complainant was the type of trooper they would expect to rise through the ranks. In an effort to retain such an employee, DPS has engaged in progressive discipline, providing Complainant with at least three previous opportunities to improve the interpersonal relations aspect of his performance. Under such circumstances, it was reasonable for Major Holistine to impose a disciplinary action against Complainant.

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

As set forth in the discussion above, the credible evidence demonstrates that Major Holistine, prior to imposing discipline, pursued his decision thoughtfully and with due regard for the circumstances of the situation, as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801. He consulted with someone in DPS' human resources section about how other employees in similar situations had been treated. In light of Complainant's previous history, it was appropriate to impose a disciplinary action. A 5% reduction in pay for two months, the financial equivalent of a two-day suspension without pay, is one of the least severe disciplinary actions that Major Holistine could have imposed. Given Complainant's otherwise commendable performance, it was an appropriate disciplinary action to impose.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Respondent provided no evidence that Complainant instituted this action for any such reason. Therefore, attorney fees are not warranted in this action.

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. Attorney's fees are not warranted.

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ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 8th day of May, 2002.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

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

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of May, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Robert Boyce

and in the interagency mail, to:

John A. Lizza
Assistant Attorney General
Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods