

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2004B073**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**BRUCE RENSEL,**

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, OFFICE OF INFORMATION TECHNOLOGY SERVICES,**

Respondent.

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Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on January 12, 2004; March 9, 2004; May 5, 2004 and June 1, 2004 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. The parties submitted written closing arguments and the hearing record was closed on July 12, 2004. Assistant Attorney General Monica Ramunda represented Respondent. Respondent's advisory witness was Steve Swanson, the appointing authority. Complainant appeared and was represented by Charles Free.

**MATTER APPEALED**

Complainant, Bruce Rensel ("Complainant" or "Rensel") appeals his termination by Respondent, Department of Human Services, Office of Information Technology Services ("Respondent" or "DHS"). Complainant seeks reinstatement, back pay and benefits and attorney fees and costs. In addition, if reinstated, Complainant wishes to have a new supervisor.

For the reasons set forth below, Respondent's action is **rescinded**.

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

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4. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant, at the time of the termination of his employment, was an Information Technology Professional III (“IT III”) for DHS. He had worked as a contract employee for DHS for three years and as a certified state employee for nine years.
2. In January 2000, Complainant was the Local Area Network (LAN) Administrator, responsible for: a) all of the servers at DHS’ headquarters and some of the outlying facilities; b) virus control; c) serving as the lead worker for ARCServe, software which backs up DHS’ data, on a nightly basis, from its computers to a tape.
3. In February 2003, there was a reorganization at DHS. Complainant’s title did not change but his duties did. He no longer oversaw the servers but had the added duties of asset management and the handling of more complex technical questions and continued his duty of being the lead worker for ARCServe.
4. Larry Collins was an IT III for DHS who handled computer issues for specific DHS nursing homes, including the Homelake nursing home. Each nursing home had one on-site person to handle simple computer issues. If that person were unable to handle the problem, he or she would contact the IT person assigned to the nursing home (e.g., Larry Collins) for assistance with the problem. If the IT person were unable to resolve the problem he or she would contact an IT lead worker on the issue (e.g., Complainant for ARCServe issues).
5. Barbara Gilmore is DHS’ Regional Support Services Manager and is classified as an IT IV, the classification above Complainant’s IT III classification. She was Complainant’s direct supervisor at the time of his employment termination and has an extensive background and training in information technology.
6. Kelly Eich, DHS’ Network Services Manager, is Gilmore’s supervisor. Eich and Gilmore have a close working relationship, with Eich serving as Gilmore’s mentor.
7. Steve Swanson, DHS’ Chief Technology Officer, was Complainant’s appointing authority. He has an extensive background and training in information technology.
8. Ron Huston, DHS’ Chief Information Officer, oversaw the IT area, along with Swanson, and was also an appointing authority.

9. Complainant signed a standard DHS form signed by all DHS employees stating that he would use state property only to conduct state business and that he would not use state property for personal business.

### **January 31, 2000 Corrective Action**

10. On January 31, 2000, three or four months after Gilmore was hired, she gave Complainant a corrective action for poor performance in the areas of professional/technical competence; communications; and organizational commitment (the "January 31<sup>st</sup> Corrective Action"). Complainant was given twelve business days to demonstrate fourteen corrective measures in order to comply with the terms of the corrective action.
11. Complainant complied with the corrective measures set forth in the January 31<sup>st</sup> Corrective Action.
12. Complainant discussed with other employees grieving the January 31<sup>st</sup> Corrective Action but, based upon their feedback, decided that it would cause him problems later if he did grieve it.
13. Complainant did not grieve the January 31<sup>st</sup> Corrective Action.

### **Complainant's Performance Evaluations**

14. Prior to Gilmore's supervision of him, Complainant had, in over six years as a DHS employee, never received any corrective or disciplinary actions.
15. For the performance year covering May 2000 through April 2001, Gilmore gave Complainant an overall rating of "Fully Competent" in a three level rating system. His numerical rating was well within the "fully competent" rating range. During Complainant's review, Gilmore told Complainant that the January 31<sup>st</sup> Corrective Action would be removed from his personnel file.
16. For the performance year covering May 2001 through April 2002, Complainant received an overall rating of "Meets Expectations" in a four level rating system. His numerical rating was 1.31 above the cut-off for a "Meets Expectations" rating. Gilmore gave him "Needs Improvement" ratings in the categories of accountability, job knowledge and communications. In response to a request from Gilmore to comment on Complainant's performance, Complainant's customers provided very positive feedback on Complainant in the areas of customer service, professional/technical competence, communication and organizational commitment.
17. For the performance year covering May 2002 through April 2003, Gilmore gave Complainant an overall rating of "Meets Expectations" in a four level rating system. His numerical rating was well within the "Meets Expectations" rating range. In response to a request from Gilmore to comment on Complainant's performance, Complainant's customers provided

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very positive feedback on Complainant in the areas of customer service, professional/technical competence, communication and organizational commitment.

18. Gilmore thought that it was important to receive feedback from customers on Complainant's performance. However, she disagreed with their assessments of his skills.

### **Homelake Computer Problems**

19. On Wednesday, May 21, 2003, Collins learned that ARCServe was not backing up the Homelake server (a frequent problem with ARCServe). When Collins learned of the Homelake/ARCServe problem, he first called Gilmore, told her there was a problem with the ARCServe backup on the Homelake server and asked her if she wanted him to fix it or whether he should call Complainant. She told Collins to call Complainant.
20. The DHS Help Desk was in the process of implementing a ticketing system to track calls from its clients. Under that system, Priority 1 tickets call for a four-hour response; Priority 2 tickets call for a seventy-two hour response. Collins was unsure whether he should fill out a ticket or resolve the ARCServe problem, so he called Gilmore for direction.
21. Collins had two supervisors, Gilmore and Mark Fuller, the Director of State Nursing Homes. In performing his IT duties, Collins spoke with Gilmore, his IT supervisor, on a daily basis.
22. After Collins called Complainant, Complainant called Gilmore and told her Collins had called him.
23. Late in the afternoon, on May 21, 2003, Collins emailed Complainant asking if Collins should reload ARCServe. Gilmore was cc'ed on the email.
24. Complainant spent four hours on May 21<sup>st</sup> working on the Homelake/ARCServe problem, checking the configuration files. He then replied to Collins' email, directing Collins to restart the Homelake server.
25. Gilmore told Complainant to go to Swanson's home the next day (May 22<sup>nd</sup>) and set up a wireless configuration so that Swanson could, during strategic planning meetings with his managers at his home, send a document to print from a laptop downstairs to the printer upstairs in his home.
26. Swanson holds these types of meetings at his home in order to have the managers focus on the meeting and because he cannot afford to pay for them to meet in any other location.
27. When Complainant told Gilmore he was working on a number of issues, Gilmore still insisted Complainant do the work at Swanson's home on May 22<sup>nd</sup>.
28. On Thursday, May 22, 2003 at 7:00 a.m., Complainant went to Swanson's home. He spent

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seven and a half hours there working on the wireless configuration.

29. When Complainant left Swanson's at 2:30 p.m. he went into his office at DHS and checked to see if the Homelake/ARCServe problem had been resolved by his efforts the day before.
30. When Complainant found that there was still a problem, he and Collins made some more changes and Collins, once again, restarted the Homelake server.
31. On May 22, 2003, Collins sent an email to Gilmore, Complainant and Bob Townley (the LAN Manager who oversaw the network team), stating that the Homelake and Florence servers were having problems but that after rebooting both of them, only the Homelake server continued to have problems.
32. On Friday, May 23, 2003, when Complainant arrived at work, he found that the Homelake/ARCServe problem was still not resolved, so Complainant deleted all of the ARCServe software and reinstalled it. Collins was then to restart or reboot the Homelake server.
33. On Sunday, May 25, 2003, Complainant went into the office and found that the Homelake/ARCServe problem was still not resolved. He also discovered that the network team was running DSRepair, network software that synchronizes servers and thereby optimizes server speeds.
34. While DSRepair is being run, it cannot be interrupted to reboot or work on a server. Therefore, the Homelake server had not been rebooted after Complainant had completely reinstalled ARCServe on Friday, May 23, 2003.
35. Complainant did not work on Monday, May 26, 2003 (Memorial Day) or Tuesday, May 27, 2003 (his flex day off).
36. On Wednesday, May 28, 2003, when Complainant arrived at work, he found that the DSRepair software was still running on the Homelake server.
37. After talking to Townley (who oversaw the running of DSRepair), Complainant learned that it wasn't just ARCServe that was problematic at Homelake, that the server itself was having problems and that was why DSRepair was being run.
38. Complainant told Townley and Collins that the Homelake server needed to be rebooted.
39. On Wednesday, May 28, 2003, Christa Davis, Homelake's CPA and its on-site contact for computer problems, called the DHS IT Help Desk and reported that the Homelake data was not being backed up. A Priority 1 ticket was issued. Gilmore subsequently learned of the ticket's issuance.
40. On Wednesday night, May 28, 2003, the Homelake server was finally rebooted and the

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Homelake/ARCServe problem was resolved. While no backups were performed from May 21, 2003 until May 28, 2003, none of Homelake's data was lost as a result of the Homelake/ARCServe problem.

41. During the time that Complainant and Collins were attempting to resolve the Homelake/ARCServe problem, Gilmore was aware that Complainant was reinstalling ARCServe and that there was a problem with the Homelake server and ARCServe.
42. From May 21, 2003 to May 28, 2003, Complainant tried simple solutions first and then increasingly complex solutions. All of them were solutions that had been utilized in the past to resolve an ARCServe problem. When none of the solutions worked, he resorted to the most drastic solution, completely reinstalling ARCServe on May 23, 2003. Reinstallation is not the preferred method for fixing an ARCServe problem because there is a possibility that some of the data may not be backed up. In order to complete the process of reinstalling software on a server, it is necessary to reboot the server.
43. The only reason to reinstall ARCServe is if there is a malfunction of that software. The only ARCServe malfunction that occurs is data not being backed up - because the sole function of ARCServe is as data backup software.
44. If a server is not being backed up, then it is a Priority 1 problem. Backing up computer data in the area of nursing home administration is important because they are heavily regulated by federal and state governments which both require extensive documentation.

#### **Gilmore's Supervision of Collins**

45. In the past, during a discussion with Collins, Gilmore stated that Huston had said he could pay for three IT Is from the cost for one IT III.
46. Soon after the Homelake/ARCServe problem, Gilmore told Collins that she (Gilmore) had been told to prepare documentation so that Complainant could be fired.
47. Soon after Collins' conversation with Gilmore, Gilmore sent Collins a memo outlining what she thought had occurred on the Homelake/ARCServe problem and Collins' poor work performance in connection with that problem.
48. When Collins received a copy of Gilmore's memo to him, he contacted Gilmore and told her that a number of her assertions were false. He explained the efforts he and Complainant had made to fix the Homelake/ARCServe problem and the numerous ways in which they had communicated with her concerning the Homelake/ARCServe problem.
49. Gilmore refused to revise her memo in response to Collins' assertions.
50. Collins also tried to contact Swanson and Eich, leaving them messages that there were

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inaccuracies in Gilmore's memo. Eich told him that she couldn't and wouldn't do anything about the memo. Swanson did not respond to Collins' calls.

51. Collins consulted with a DHS human resources staff member at his Fitzsimmons office and was told that he could file a grievance over Gilmore's memo but that it would most likely cause him problems in the future.
52. Given Eich's and Gilmore's response to his comments on Gilmore's memo, the lack of a response from Swanson, and Gilmore's statements about Huston's comments, Collins became concerned about his future with DHS and submitted his resignation on June 16, 2003.

### **June 2, 2003 Corrective Action**

53. On June 2, 2003, Gilmore gave Complainant a corrective action for his "lack of professional, technical and communicative competence" in connection with the May 2003 Homelake server backup problem (the "June 2<sup>nd</sup> Corrective Action").
54. The June 2<sup>nd</sup> Corrective Action stated that Complainant "did not provide any communication" to Gilmore via voicemail, email, in person and/or the weekly status update regarding the Homelake problem; he did not enter a Priority 1 Help Desk ticket; and he did not communicate with the Homelake Director or Administrator regarding the backup issues.
55. The June 2<sup>nd</sup> Corrective Action states that Complainant had been advised to improve his performance on numerous occasions "via verbal discussions, PMAP narratives, previous Corrective Action and face-to-face meetings."
56. Under the terms of the June 2<sup>nd</sup> Corrective Action, the following corrective measures were to be taken by Complainant:
  - a. Any "issue that need to be raised with management" was to be discussed immediately with Gilmore and he was to keep her apprised of the status of the issue;
  - b. Provide a comprehensive Regional Support Services Weekly Status Report;
  - c. Copy Gilmore and Eich on all of his outbound email correspondence.
  - d. Complainant's work schedule was to be changed to 8:00a.m. to 5:00 p.m., Monday through Friday with no flex day;
  - e. Only to work on assignments that came to him through a supervisor's directive, a Help Desk ticket or through assignment;
  - f. Provide a detailed summary of ARCserve information in order to "get a better handle on the ARC Serve issues";
  - g. Provide a daily confirmation that all backups had been successfully completed and, if not, enter a Priority 1 ticket;
  - h. Coordinate with a representative of Computer Associates for ARC Serve support services being offered from June 4 to 6, 2003; and

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- i. Prepare an ARC Serve issue list for presentation to the Computer Associates representative from June 4 to 6, 2003.
57. The June 2<sup>nd</sup> Corrective Action was cc'ed to Eich and Swanson.
58. The purpose of having Complainant copy Eich and Gilmore on emails was to track whether he was dealing with computer issues.
59. Gilmore, if she were in Complainant's position, would have pulled in Collins and Townley on the Homelake/ARCServe problem and insured that the files were backed up.
60. Complainant was informed that he would be reevaluated within thirty days and that if he failed to comply with the corrective measures, such failure would result in a disciplinary action.
61. Swanson expects his managers, when following up on corrective actions, to follow up promptly with feedback to an employee rather than waiting until the last minute to discuss issues with the employee. Swanson wants the employee to understand the problem, expectations, timeline and possible consequences.
62. Complainant did not agree with the June 2<sup>nd</sup> Corrective Action because he thought he had informed his manager and he had handled the problem. However, he did not grieve the June 2<sup>nd</sup> corrective action because he was concerned that Gilmore would retaliate against him if he did grieve it.
63. Collins did not receive a corrective action because Gilmore did not think he had the same performance issues as Complainant.

#### **August 13, 2003 Disciplinary Action**

64. A number of the facilities were having issues with ARCServe, therefore Computer Associates sent a technician to DHS for a few days, beginning on June 4, 2004, to provide technical support.
65. On June 2 and 3, 2003, Complainant was busy from 6:30 a.m. to 5:00 p.m. getting ready for the Computer Associates visit. He explained to Gilmore that he did not have time to do that preparation and all of the items listed in the June 2<sup>nd</sup> Corrective Action. Gilmore told Complainant that he had to do it all, so Complainant prioritized his workload, first preparing the list of eight or nine issues for Computer Associates' review.
66. Just after lunch on June 4, 2003, less than forty-eight hours after giving Complainant the June 2<sup>nd</sup> Corrective Action, Gilmore gave Complainant a memo stating that he was failing to meet the corrective measures by not discussing with Gilmore two tickets that he entered regarding problematic ARCServe backups; not cc'ing Gilmore on two emails; entering tickets as Priority 2s rather than Priority 1s for an ARCServe problem; and not preparing an issue list for

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the Computer Associates representative.

67. The memo stated that failure to comply with the corrective measures would lead to a disciplinary action and was cc'ed to Eich and Swanson. It was the first time that Gilmore, as a supervisor, had followed up within a two-day period on a corrective action that she had given to an employee.
68. On July 7, 2003, thirty-five days after issuance of the June 2<sup>nd</sup> corrective action, Complainant and Gilmore met to discuss his progress on the corrective measures. It was agreed that he had complied with some but not all of those measures.
69. On July 28, 2003, Gilmore gave Complainant a memo stating that he had not complied with all of the June 2<sup>nd</sup> corrective measures and, therefore, Gilmore "will be proceeding with disciplinary action." The memo reflects that he complied with all of the work schedule corrective measures and three of the eight communications and professional accountability corrective measures.
70. On August 4, 2003, Swanson sent a letter to Complainant, notifying him of a R-6-10 meeting on August 12, 2003 to discuss Complainant's non-compliance with the June 2<sup>nd</sup> Corrective Action.
71. On August 8, 2003, Eich sent Gilmore an email, cc'ed to Swanson, that attached "the outcome memo for your R-6-10 meeting with Bruce" and an "informational memo." In the email Eich gave Gilmore the following instructions:
  - To give Complainant the informational memo after the R-6-10 meeting;
  - The purpose of the R-6-10 meeting was to allow Complainant to present any mitigating facts, that they did not need to tell Complainant what actions were being considered but "would prefer to simply thank him for his time and tell him that we will get back to him. Thus the R610 Outcome Memo attached (we will need to review for accuracy AFTER your meeting)."
  - To contact payroll to find out when to submit the payroll deduction for Complainant's September paycheck.
  - "We will the [sic] need to monitor his performance and should he not improve, we will move forward with termination."
72. On August 12, 2003, Swanson held the R-6-10 meeting with Complainant.
73. On August 13, 2003, Swanson imposed a disciplinary action against Complainant by reducing Complainant's salary by \$500 for the month of September.
74. On August 14, 2003, the day after the \$500 disciplinary action letter, Gilmore gave Complainant a memo stating that his performance was continuing to be monitored and he would need to meet certain performance objectives, in addition to his performance plan for 2003/2004.

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75. The performance objectives outlined by Gilmore were almost identical to those outlined in the June 2<sup>nd</sup> Corrective Action and included a list of ongoing assignments or tasks on which he was to provide a status report.

76. Complainant did not appeal the August 13<sup>th</sup> disciplinary action.

### **Draft Termination Letter**

77. On Monday, September 15, 2003, Eich sent Gilmore an email, cc'ed to Swanson, in which she instructed Gilmore to perform the following tasks:

- Review the attached letter (a letter dated September 26, 2003, with a signature block for Swanson, which terminated Complainant's employment for poor performance) and provide the letter to Peggy Valdez-Olivas for final HR approval;
- Conduct a PMAP Interim Rating for Complainant within a week. Eich also stated that Gilmore would "need to indicate "Needs Improvement" for several factors in Job Knowledge, Accountability, and Communications Measurement Factors" and that Eich would sign as Reviewer
- Schedule a meeting between Complainant and Swanson for September 26, 2004 at 4:00p.m., noting "[b]ecause this is not an official R-6-10 meeting, there does not need to be a witness, HR advises that neither you nor I are in the meeting, and the meeting does NOT have to be recorded;"
- Make arrangements to have Complainant's computer access disabled and his building access revoked while he is in the September 26<sup>th</sup> meeting with Swanson;
- "Get as much info from Bruce as you can before the meeting w/Steve!"

78. A substantial portion of the draft September 26<sup>th</sup> termination letter makes references to Complainant's poor performance. The balance of the letter terminates his employment and provides him with appeal rights.

79. The only draft of a letter prepared for Swanson was a termination letter. There were no drafts that would demote Complainant, reduce his pay, etc.

80. On Wednesday, September 17, 2003, Complainant returned to his desk and found a floppy disk on his chair. After utilizing computer software to repair the disk (it was damaged), he accessed the disk and found a document entitled "Bruce Rensel Termination Letter." Complainant was only able to read three paragraphs of the letter because the remainder of the document was damaged.

81. Complainant has a heart problem called Sudden Death Syndrome that is controlled through an implanted defibrillator. After receiving the disk he began to have chest pains and his blood

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pressure skyrocketed.

82. On Saturday, September 20, 2003, at 7:00 a.m., Complainant went to his office at DHS and, utilizing his system administration access, searched the network for a document entitled "Bruce Rensel Termination Letter."
83. Complainant found the document in Eich's directory, copied it to a disk and discarded the damaged disk. He did not search Eich's directory any further nor did he access anyone else's directory.
84. Complainant conducted the search because he wanted to mitigate the effect it had been having on his health.

#### **R-6-10 Meeting and Disciplinary Action**

85. Brian Keith was DHS' Western Area LAN manager and an IT II who was familiar with ARCServe. One of the requirements in Gilmore's August 14<sup>th</sup> memo was that Complainant provide extensive documentation in order to facilitate getting "a better handle on the ARCServe issues." Complainant completed this documentation. However, because Gilmore was busy, Keith reviewed Complainant's documentation at Gilmore's request. Keith made a few minor changes and then it was placed on the server for access by other technicians.
86. On Friday, September 26, 2003, Complainant arrived at work at 6:30 a.m. and found that his access rights to all of the department servers had been terminated.
87. Complainant went to Swanson and asked why his access rights had been terminated, Swanson stated that Complainant was on administrative leave until further notice and that Complainant was viewed as a security risk because he was "digging around" on DHS' server.
88. Later in the day on September 26, 2003, Complainant, Complainant's brother and Swanson held the meeting referenced in Eich's September 15<sup>th</sup> email to discuss Complainant's performance objectives and expectations. At the beginning of the meeting Swanson advised Complainant that it was a R-6-10 meeting to discuss Complainant's work performance in connection with Gilmore's August 14<sup>th</sup> memo.
89. During the R-6-10 meeting, Swanson and Complainant discussed the three areas listed in Gilmore's August 14<sup>th</sup> memo (communication, work schedule and professional accountability). A total of nine items were listed within these three areas.
90. Without any discussion, Swanson stated that Complainant had complied fully with two of the nine items. Complainant explained to Swanson that he thought he had complied with at least four additional items and that he had received no communication from either Eich or Gilmore, since August 14<sup>th</sup>, indicating otherwise. On the final three items Complainant, when presented with information by Swanson, explained what he had done to comply with those items, that he

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had received no communication since August 14<sup>th</sup> from Eich or Gilmore that he wasn't complying and, given Swanson's information, he may not have complied with those three items.

91. At the end of the meeting, Swanson informed Complainant that he was, as previously advised that morning, on administrative leave.
92. There was no discussion during the R-6-10 meeting of the allegation that Complainant was "digging around" on the DHS server or the termination of his computer access rights before the R-6-10 meeting.
93. Swanson got information and documentation from Eich and Gilmore and took it into consideration, along with Complainant's comments during the R-6-10 meeting, Complainant's prior evaluations, the previous corrective and disciplinary actions and the events from May 2003 to September 2003.
94. Swanson, because he is not Complainant's direct supervisor, relies on information that Eich and Gilmore provide him.
95. Swanson, by letter dated September 29, 2003, terminated Complainant's employment with DHS, stating that he was doing so based on Complainant's failure to "comply with the performance objectives and expectations noted in the August 14, 2003 memorandum, nor did [Complainant] provide sufficient justification as to why [Complainant] did not comply." It was the first time in over twenty-one years that Swanson had terminated someone's employment for poor work performance. Swanson had only terminated an employee in the past for workplace violence.
96. Prior to May 2003, Swanson does not think that there was any basis for terminating Complainant's employment. Swanson based his decision to terminate Complainant's employment on the events occurring from May 2003 until September 2003.
97. Swanson did not demote Complainant because a particular job function needed to be performed and there was a limited budget. At the time of the conclusion of the hearing, Complainant's former position had been vacant for eight months.
98. During 2003, CHS employed four IT IIIs. One was terminated for workplace violence, one was terminated for poor work performance (Complainant); and two resigned (Collins and one other employee). Since Complainant's termination there have been no IT IIIs at DHS.
99. Complainant timely filed an appeal of his termination with the State Personnel Board, requesting reinstatement, back pay, benefits and attorneys fees. If reinstated, Complainant wishes to have a new supervisor.

### **Credibility of Gilmore's and Collins' Testimony**

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100. Gilmore and Collins gave directly conflicting testimony.
101. Gilmore's testimony with regards to Complainant's work performance regarding the Homelake/ARCServe problem and subsequent events is not credible.
102. Gilmore's demeanor and testimony were vague and evasive. She was unable to communicate what she knew and when, often providing contradictory or conclusory statements, refusing to provide explanations. Gilmore managed Complainant for over three years but within a few days she did an 180° turn in how she managed Complainant. Based on the documentation she prepared from June 2<sup>nd</sup> through August 14<sup>th</sup>, Complainant did nothing right – even though Gilmore had in the past three years rated him as “Meets Expectations” or “Commendable.” She testified that reinstalling ARCServe would be necessary if there was a malfunction of the software and that the sole malfunction for ARCServe would be data was not backing up. In separate testimony (corroborated by Collins, Complainant and exhibits containing emails), she states that she knew there was a problem with ARCServe and the Homelake server and that Complainant was reinstalling ARCServe. Given this knowledge she should have known data was not being backed up properly at Homelake. Yet she is insistent that she was not informed of the Homelake/ARCServe problem.<sup>1</sup>
103. Collins' testimony regarding both the events surrounding the Homelake/ARCServe problem and Gilmore's statements concerning the economies of hiring IT Is to replace IT IIIs and preparing documentation to terminate Complainant is credible.
104. Collins demeanor and testimony were straightforward and clear. Collins has had no contact with Complainant since he left DHS. At the time of his testimony he had been gone from DHS' employment for almost a year and had left of his own accord. Finally, Collins' testimony was corroborated by Gilmore's actions towards Complainant surrounding the Homelake/ARCServe problem and throughout the summer of 2003.

## **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 includes, among other grounds, failure to comply with standards of efficient service or competence. Board Rule R-6-9(1), 4 CCR 801.

#### **A. Burden of Proof**

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant

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<sup>1</sup> This analysis is strictly for purposes of assessing Gilmore's credibility and does not negate the unappealed June 2<sup>nd</sup> Corrective Action.

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

## **II. HEARING ISSUES**

### **A. Complainant did not commit the acts for which he was disciplined.**

Complainant was terminated for his failure to perform competently under the objectives and expectations of Gilmore's August 14<sup>th</sup> memo. Failure to perform competently is an allowable basis for discipline under Board Rule R-6-9, 4 CCR 801. However, under Board Rule R-6-5, an employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Given the disciplinary action on August 13, 2003, it would need to be demonstrated that Complainant, after the August 13<sup>th</sup> disciplinary action and, under the directives of Gilmore's August 14<sup>th</sup> memo, continued to perform poorly. Respondent has not met its burden with regards to this issue.

There was no credible evidence, either through testimony or exhibits, as to Complainant's performance from August 14, 2003 through September 26, 2003. During the course of the three-day hearing, Respondent did not present notes or documents of progress review meetings between Complainant and his supervisor(s). Respondent did not present any documentary evidence that Complainant did not perform the objectives and expectations outlined in Gilmore's August 14<sup>th</sup> memo (e.g., help desk tickets not resolved appropriately; outgoing emails not cc'ed to Eich and Gilmore; copies of insufficient status reports or inadequate or poor documentation of ARCServe issues). Respondent did not present any type of evaluations of Complainant's performance during this time period.<sup>2</sup>

Gilmore, in Respondent's rebuttal case, testified that she could not recall any specific performance issues from August 14<sup>th</sup> through September 26<sup>th</sup>. She then testified that she had reviewed some of Complainant's status reports but they were not up to par. Respondent's counsel presented her with a list of those status reports but she was unable to recall which reports she had reviewed. What little testimony there was, would, at best, amount to a bald assertion that Complainant was not performing well. In short, Respondent did not present adequate evidence of how Complainant was not performing well. Therefore, Respondent has not met its burden of establishing that Complainant failed to meet the objectives and expectations of the August 14<sup>th</sup> memo. Complainant did not commit the act(s) for which he was disciplined.

### **B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.**

In determining whether an agency's decision is arbitrary or capricious, a court must

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<sup>2</sup> There are references to meetings and documents in the Respondent's written closing argument. However, there was no offering of such evidence during the presentation of the parties' cases and, therefore, have not been considered by the ALJ.

determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Given the lack of evidence regarding Complainant's performance from August 14<sup>th</sup> through September 26<sup>th</sup>, it is not possible to determine that Respondent diligently and carefully procured all the necessary evidence regarding Complainant's performance for that time period and candidly and honestly considered it. Again, simply asserting that Complainant did not perform objectives does not meet the burden imposed upon Respondent. There must be some explanation and showing of how he did not meet those objectives and that all of that information was gathered. Respondent has not met its burden with regards to the first two prongs of *Lawley*.

In addition, given the dearth of evidence on Complainant's performance for the relevant time period, it is difficult to determine that Swanson reached a reasonable conclusion in terminating Complainant's employment. While Swanson took into account information he received from Eich and Gilmore, there was no credible evidence as to what that information was. The bald assertion that documentation and information has been considered without providing evidence as to what that information was does not meet the burden of proof with regards to the second or third prongs of *Lawley*. Rather, as set out below, based on the evidence that was in the record - Gilmore and Complainant's history and the statements made by Complainant during the R-6-10 meeting regarding his compliance with the directives of Gilmore's August 14<sup>th</sup> memo and her lack of feedback – the only reasonable conclusion would have been not to discipline Complainant.

Gilmore supervised Complainant for over three years before the Homelake problem. The evidence clearly establishes that it was the Homelake incident that was the downward turning point in their interactions. Swanson himself testified that nothing occurred prior to May 2003 that would warrant terminating Complainant's employment. Gilmore, in over three years of rating Complainant, gave Complainant ratings of "fully competent" and "meets expectations." One of those ratings occurred just seven days before the Homelake/ARCServe problem arose.

Given that the June 2<sup>nd</sup> Corrective Action and the August 13<sup>th</sup> Disciplinary Action were not grieved or appealed, their validity is not at issue and they may not be revised at this point. However, the process by which they occurred and the people involved provides a basis for analyzing Complainant's performance and the termination of Complainant's employment. The disturbing aspect of those events is not that Gilmore set performance standards. The setting of such standards is the prerogative of managers. If the standards are set too high, are outside the scope of an employee's job or punitive, there are avenues for addressing such issues.

Rather, the disturbing aspect of those events is the conduct of the oversight of Complainant's work performance. In common parlance, after Homelake, Gilmore was "on Complainant's case."

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Gilmore's first assessment is within less than forty-eight hours of the June 2<sup>nd</sup> Corrective Action. The second assessment is a July 7<sup>th</sup> meeting. There is a write-up of that meeting three weeks later, on July 28, 2003. Then there is the August 13<sup>th</sup> disciplinary action and Gilmore's August 14<sup>th</sup> memo setting out performance objectives and expectations for Complainant and informing Complainant that she was continuing to monitor his performance.

Then there is nothing from August 14, 2003 until September 26, 2003. In three days of hearing there was no testimony of any follow-up with Complainant, no exhibits offered which would document Complainant's compliance or non-compliance with those tasks set out in Gilmore's August 14<sup>th</sup> memo, no evidence of meetings with Complainant to review his performance. There is no evidence of the timeline, consequences, or follow-up which Swanson himself testified that he expects from his managers when they are monitoring an employee's performance – the explicitly stated purpose of Gilmore's August 14<sup>th</sup> memo. There is nothing until the R-6-10 meeting on September 26<sup>th</sup>.

Complainant told Swanson, during the R-6-10 meeting, that he thought he had substantially complied with Gilmore's August 14<sup>th</sup> directives, in large part because she never told him otherwise. Given Gilmore's approach to managing Complainant after the June 2<sup>nd</sup> Corrective Action, Complainant's view of his performance was reasonable. Gilmore's silence was very telling.

Under the R-6-10 process, an employee is provided with information about the allegations against him or her and then is allowed to provide the appointing authority with mitigating facts concerning those allegations – with the purpose of the meeting being the exchange of information before a final decision is made. Board Rule R-6-10, 4 CCR 801. Actions that predetermine the outcome of a pre-disciplinary meeting or make an employee's attempts to present mitigating information during such a meeting futile violate both the spirit and the letter of the R-6-10 process. *Schumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo. App. 1974). The R-6-10 process has a two-fold purpose – it allows the employee to present his or her side of the story and provides the employer with the necessary information to make a balanced decision.

The only documentary evidence in the record for the August 14<sup>th</sup> through September 26<sup>th</sup> time period is a detailed September 15<sup>th</sup> email from Eich to Gilmore, cc'ing to Swanson. The email instructs Gilmore to terminate Complainant's computer and building access, while he is in the meeting with Swanson – an instruction that presumes the outcome of the R-6-10 meeting.

Eich's instruction, presuming the outcome of the meeting and cc'ed to Swanson, renders the September 26<sup>th</sup> meeting a meaningless exercise with a foregone conclusion. Respondent argues that Eich did not have the authority to make the decision regarding Complainant's discipline, that she was merely being "proactive." With regard to this issue, two of Respondent's exhibits were enlightening – Eich's August 8<sup>th</sup> email and Eich's September 15<sup>th</sup> email. The format of Eich's September 15<sup>th</sup> email and the sequence of events following it bear a strong resemblance to her August 8<sup>th</sup> email and the events occurring after that email:

- Both emails concerned Complainant's potential discipline,

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were sent to Gilmore by her supervisor with specific instructions and cc'ed to Swanson;

- Both emails attached follow-up documents setting out the results and determination of an R-6-10 meeting before the meeting occurred;
- Both emails instructed Gilmore to take certain steps to effectuate the disciplinary actions contemplated in the email attachments before the R-6-10 meeting occurred or while it was occurring;
- In both instances Eich's "recommended" disciplinary action was taken against Complainant.

In addition, statements by Complainant's supervisors and Respondent's actions are also enlightening in assessing the validity of the September 26<sup>th</sup> R-6-10 meeting. Gilmore's statement regarding the economies of employing IT Is compared to IT IIIs and the instructions she received to prepare the documentation necessary to terminate Complainant provides a relevant context for assessing the atmosphere in which the September 26<sup>th</sup> meeting was held. In addition, DHS, since Complainant's termination, has not filled any of the four vacant IT III positions. While it is within an agency's discretion to determine, under personnel rules, how to structure its organization, in light of the events in this case, Respondent abused that discretion.

Swanson himself testified that because he is not Complainant's direct supervisor he relies on the information provided by Eich and Gilmore. This is a reasonable approach for a manager and an appropriate delegation of duties. However, given the manner in which Gilmore and Eich handled the oversight of Complainant's performance, Swanson was not provided with adequate information and, therefore, did not reach a reasonable conclusion in deciding to terminate Complainant.

Respondent argues that Complainant's search of the DHS system for Eich's "draft" termination letter was a gross breach of trust and security and a violation of the policies and rules against using state assets for personal use. Complainant argues that he conducted the search to mitigate the severe health issues he was experiencing with his heart, a direct result of the draft termination letter. He also argues that Respondent arbitrarily applies the policies and rules regarding state assets being used for personal use, as demonstrated by the installation of a wireless configuration at Swanson's home for use during any strategic planning meetings which might be held there.

As discussed above, the circumstances surrounding the preparation of Eich's draft termination letter were, in this matter, inappropriate at best. Complainant's accessing of the system to search for the letter were also, at best, inappropriate as he could have obtained the same information through a discovery request. The evidence did establish that Respondent was aware of Complainant's actions before the September 26<sup>th</sup> R-6-10 meeting but chose to respond by terminating his computer access rights the morning of September 26<sup>th</sup>, placing him on administrative leave and not discussing the matter during the R-6-10 meeting. Finally, there was no evidence as to how Respondent had discovered that Complainant had accessed the document; what prompted them

towards this discovery; and whether the disk was left on Complainant's chair by someone who was concerned about him or by someone who was setting him up. This is not an issue of after-acquired evidence whereby an employer discovers information about other acts by an employee after a disciplinary action.

While Complainant's actions appear to be a violation of his computer access privileges, in mitigation he testified, and Respondent did not refute through testimony or documentary evidence, that he searched only for this document and did not search for any other documents pertaining to him or his performance. Respondent did not advocate or argue that those actions necessitated termination of Complainant's employment, only that they were a serious breach of trust and a violation of state policies and rules. Given the lack of fully developed evidence surrounding Complainant's accessing of the computer and the lack of any evidence of an investigation into this matter once Respondent became aware of it, Respondent has not met its burden of establishing that it was a disciplinable act.

The termination of Complainant's employment by Respondent was arbitrary and capricious and contrary to rule or law.

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

Given the factual findings and legal discussion set forth above, Respondent's decision to terminate Complainant's employment was not within the range of reasonable alternatives.

### **D. Attorney fees are warranted in this action.**

If it is found that a personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, then attorney fees shall be awarded. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees to Complainant is warranted. Such an award is not made lightly. A groundless personnel action is defined by Board rule as an action "in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule R-8-38(3), 4 CCR 801. A personnel action that is made in bad faith is defined by Board rule as an action "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth." Board Rule R-8-38(2), 4 CCR 801.

The lack of credible evidence as to Complainant's performance from August 14<sup>th</sup> to September 26<sup>th</sup> renders Complainant's termination groundless. As noted before, conclusory statements do not establish grounds for discipline. Gilmore's comments regarding the economy of replacing IT IIIs with IT Is and the direction she had received to document Complainant's performance paired with the subsequent events resulting in Complainant's employment termination

and all four IT III positions becoming vacant and, to date, not filled is disrespectful of the truth and renders Respondent's personnel action against Complainant an act of bad faith.

Finally, it is noted that three supervisors ignored Collins' calls and his attempt to correct Gilmore's written documentation of the Homelake/ARCServe problem. This refusal to investigate a matter in which an employee's performance (Collins) was being documented as a poor performance, despite the employee's statements to the contrary, is disrespectful of the truth and renders groundless the allegations of Complainant's continuous poor performance and his termination of employment an act of bad faith.

## **E. Remedy**

As a remedy, in addition to attorney fees, Complainant has requested reinstatement, back pay, benefits and assignment of a supervisor other than Gilmore. Under the State Personnel System Act, the Board is empowered to affirm, modify or reverse the action of the appointing authority, but specific remedies are not enunciated. §24-50-103(6) and 125(4), C.R.S. Other statutes and the Board's own rules provide an expansive role for the Board in crafting remedies.<sup>3</sup> This expansive role is central to the principle that an employee prevailing in an employment action not be awarded a hollow victory, but rather is entitled to a remedy that will make him or her whole. *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo. App. 1987). The scope of such a remedy is limited in that an employee is not entitled to an economic windfall. *Dep't of Health v. Donahue*, 690 P.2d 243 (Colo. 1984).

Based upon these principles and the history of events in this matter, Complainant is entitled to reinstatement to either his former position or a position over which Gilmore and Eich have no supervisory authority. Complainant is also entitled to back pay and benefits, as well as interest from the date of termination. While Respondent presented no evidence that Complainant has earned compensation from other sources, if Complainant has earned such compensation, then, in keeping with the principle of *Donahue*, Respondent is entitled to offset that compensation against the amount of back pay it owes Respondent.

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<sup>3</sup> In discrimination cases, the Board may order "cease and desist orders; hiring, reinstatement, or upgrading of the employees, with or without back pay and compensation; referral of applicants for employment; . . . and, altering terms and conditions of employment as appropriate." Board Rule R-9-6, 4 CCR 801. In whistleblower cases, the Board has the authority to reinstate an employee not only to his or her former position but also to "a comparable position" and to award interest when awarding back pay. §24-50.5-104(2), C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo. App. 1987); and *Lanes v. State Auditor's Office*, 797 P.2d 764 (Colo. App. 1990).

### **CONCLUSIONS OF LAW**

1. Complainant did not commit the acts for which he was disciplined.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Attorney's fees are warranted.

### **ORDER**

Respondent's action is **rescinded**. Complainant is reinstated to his former position or a comparable position with full back pay and benefits. Attorney fees and costs are awarded.

Dated this 26<sup>th</sup> day of August, 2004.

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Kristin F. Rozansky  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-764-1472

## **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 1/4 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.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of August, 2004, 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:

Charles Free  
Regency Commons  
12605 E. Euclid Drive  
Centennial, CO 80111

and in the interagency mail, to:

Monica Ramunda  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods