

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2005B010

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEPHEN BULLOCK,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

Administrative Law Judge Mary s. McClatchey held the hearing in this matter on June 6 and 7, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Complainant appeared pro se. First Assistant Attorney General Stacy L. Worthington represented Respondent.

MATTER APPEALED

Complainant, Stephen Bullock ("Complainant" or "Bullock") appeals his disciplinary termination by Respondent, Department of Human Services ("DHS" or "Respondent"). Complainant seeks reinstatement.

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 reasonable range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant began his employment with DHS in March 2000 as an Administrative Assistant II. Mr. O'Dell Pickett, Deputy Director of the

Division of Disability Determination Services (“DDS”), became a mentor to Complainant during this period.

2. Complainant worked in the DDS division, which is the agency responsible for determining eligibility for Social Security Benefits.
3. Complainant’s performance in the Administrative Assistant II position was unsatisfactory. He was terminated during the probationary period in October 2000.
4. A few months later, in January of 2001, Mr. Pickett recruited Complainant for a General Professional I (GP I) position in DDS. Pickett promoted the idea to the DDS Director, Bill Starks, at the time. Starks agreed to give Complainant another chance at the agency and approved the hire.
5. Complainant tested for and was selected for the GP I position. He and Director Starks developed a strong relationship, and Starks mentored Complainant.
6. Jeffrey Roberts was Complainant’s immediate supervisor during the period 2001 to July 2002. The two initially had a good relationship, and even socialized outside of work together. However, over time, Complainant developed a strained relationship with Roberts and did not trust him.
7. On March 15, 2002, Roberts sent Complainant an email concerning “an alleged verbal harassment” incident involving Complainant and a female co-worker. Roberts quoted the sexual harassment definition from the DHS harassment policy, and stated to Complainant, “Should it occur again, there will be greater administrative involvement.”
8. Roberts did not file a written report concerning the sexual harassment allegation against Complainant. The matter was dropped.
9. Complainant had some difficulties in the GP I position, primarily in the area of timely completion of his duties. In January 2002, Starks placed Complainant on a corrective action through April 2002. Complainant did not appeal the corrective action.
10. Complainant was unable to bring his job performance up to standard level. On June 1, 2002, he took a voluntary demotion from GP I to Technician I. He was given saved pay, enabling him to maintain his salary level.
11. In August 2002, Complainant transferred out of Roberts’ section. Tom Knight became Complainant’s new immediate supervisor. Complainant no longer worked on Roberts’ floor.

12. During the period 2002 through 2003, Complainant made periodic complaints to Pickett about Roberts' sexual harassment of various women at DDS. Complainant never submitted any of these complaints in writing.

2003 Promotions

13. In 2003, Complainant was promoted back to GP I. During this calendar year, both Starks and Pickett mentored Complainant.
14. Starks promoted Complainant to GP II, and then to GP III, in 2003.

2004; Complainant's Allegations about Roberts

15. At all times relevant, Complainant worked in the Aurora office of DDS.
16. In early 2004, Roberts transferred to a position on the 4th floor of the Aurora office. Complainant also worked on the 4th floor.
17. Complainant had an uneasy feeling about Roberts' physical proximity to him. He was troubled by seeing Roberts more often in the parking lot, and he made a report to the security staff that Roberts was driving too fast in the parking lot and had attempted to run him over. Complainant also began to believe that Roberts was entering his office when he was not present.
18. On at least two occasions, Complainant thought that Roberts walked by him in the parking lot and in hall at work, pointed his hand and finger at him, bent like a gun, and stated, "bang bang, termination."
19. On February 26, 2004, Complainant reported Roberts' alleged conduct to Pickett. Pickett asked what Complainant had done in response. Complainant stated that he was alarmed and thought that Roberts was going to shoot him. He informed Pickett that he could take care of himself, that he was an excellent marksman, and that he did not have any guns but had access to them.
20. Pickett was extremely concerned by Complainant's reference to the use of guns. He immediately informed Starks of the comment.

Roberts' Transfer to Another Office

21. Pickett also informed Starks of Complainant's allegation about Roberts. Starks spoke to Roberts about it. Roberts was incredulous, and indicated that he had had no recent contact or personal interactions with

Complainant. Roberts was therefore at a loss to explain the allegation. He denied the allegation.

22. Roberts suggested that in order to avoid any future problems, he transfer to the Denver office. As it happened, an equivalent supervisory position had just opened up in the Denver office of DDS, due to a retirement. Starks approved the transfer and within one week, Roberts had left the Aurora office permanently.

Complainant's Review of Personnel Files

23. During this period, Complainant became intensely preoccupied by a desire to learn whether any written complaints of sexual harassment or workplace violence had ever been filed against him at DHS.
24. Complainant found it difficult to remain focused on his work. He made several trips to other DHS offices in order to search for written complaints filed against him. He did not obtain prior approval from his direct supervisor for these absences from work.
25. On February 27, 2004, Complainant went to the DDS headquarters to review his personnel file there. He met with Security and Safety Officer Jerry Kean, to discuss whether there had been any workplace violence or sexual harassment complaints filed against him. Kean indicated that he was not aware of any complaints filed against Mr. Bullock, and that such complaints, if any existed, would have been filed either with him or with other offices.
26. After this meeting, Complainant saw Kean talking with Starks, Pickett, and Roberts in the hall.
27. Kean reported his conversation with Complainant to Starks. Starks then sent an e-mail message to Complainant, assuring Complainant that he should continue to feel free to come to Starks with any concerns about complaints filed against him, or regarding any concerns, business or personal, he may have.
28. Starks also informed Complainant that Pickett had reported Complainant's concerns about Roberts to him. Starks mentioned that Pickett had informed Starks that he was troubled by Complainant's reference to his ability to take care of himself and his access to weapons. Starks directed Complainant to come see him to discuss the Roberts issue and the reference to weapons.

29. On March 1, 2004, Complainant took time away from his work duties in order to visit the Fort Morgan office to view his personnel file. He did not obtain prior supervisory approval for this visit.
30. Complainant found no complaints in his file. He was informed that any EEO or workplace violence complaints or investigations would be at the Human Resources office, and that Sabrina Hicks was the contact person.
31. Complainant then visited the office of Ms. Hicks, unannounced. She advised him there were no complaints against him in the HR office file. Complainant informed Hicks of Roberts having pointed his hand at him like a gun, and informed her he wanted to discuss Roberts' history of harassing women. She scheduled a time for him to meet with her regarding those allegations the next day. However, Complainant did not return for that meeting.

March 1, 2004 Meeting with Starks

32. Complainant attended a meeting with Starks on March 1, 2004. Complainant tape-recorded the meeting, without Starks' prior knowledge or approval.
33. At the time of this meeting, Starks believed that he had resolved the issue with Roberts, because Roberts was permanently transferring to the Denver office within a few days. From that time forward, Complainant would have no more contact with Roberts.
34. Starks reported to Complainant that Roberts denied having made any hostile gestures or statements to Complainant, and that Roberts had indicated he had had no recent conversations or contact with Complainant.
35. Complainant stated that Roberts was not being truthful and that he had carried on an ongoing campaign of physical intimidation of him.
36. Starks informed Complainant that Roberts would be transferring to the Denver office. He stated that because there was no way to prove the allegations against Roberts, he could not be held accountable for the alleged conduct. He further indicated that even if the allegation were proven, the most that would happen to Roberts would be a corrective action, because of Roberts' clean personnel record.
37. Starks informed Complainant during this meeting that in order to proceed with the issue further, Complainant would have to file a written complaint against Roberts containing the allegations.

38. Starks and Complainant had developed a close personal rapport over the years, and Starks spoke frankly to Complainant in this March 1 meeting. He asked Complainant why he would allow Roberts to intimidate him, or words to that effect, noted that they were the same size, and suggested that Complainant should have asserted himself more in the situation. He told Complainant to stay away from Roberts and to come to him if he had any further trouble.
39. During this meeting, Complainant made reference to an incident from 2002, wherein Roberts had accused Complainant of stating he was going to "shoot up the agency." Starks indicated that he had never heard anything about this incident.
40. Complainant left the meeting with Starks feeling that Starks did not take the situation seriously and had provided no relief.
41. Complainant felt strongly that Roberts' transfer out of the Aurora office was not a sufficient response to the situation.
42. On March 2, 2004, Complainant met with Pickett and informed him he was not pleased that Roberts was transferring out of the Aurora office. He discussed several old allegations about Roberts having sexually harassed women in the DDS office, and expressed his opinion that Roberts should be fired.
43. Complainant felt strongly that it was unfair for Starks and Pickett to have allowed Roberts to get away with his history of sexual harassment.
44. During this period of time, Complainant talked to several women at DDSA about filing sexual harassment charges against Roberts. None of them did so.

Events of March 3, 2004

45. On March 3, 2004, Complainant met with his direct supervisor, Knight. He reported that he had needed to take care of some business at Fort Logan and the Human Resources offices. Knight responded that he should have requested leave for these trips.
46. Complainant informed Knight that he may not be in for the next day or possibly for some time, as he was going to go to the Veterans Administration medical center to see if a bed was available and have himself admitted. Knight did not ask for what purpose he would be admitted.

47. Knight responded that if he did so, Complainant should call Knight in the morning and request sick leave. Complainant stated to Knight that there was a group at DDS out to get Knight, whose purpose was to promote African Americans. (Complainant, Starks, Roberts, and Pickett are African American; Knight is not.) He also stated that Roberts and Pickett had called Knight a "racist." This was not a true statement.
48. On March 4, 2004, Complainant called Knight and reported he would like to take sick leave, and was unclear how long he would be requesting leave. Knight then cleared out some files from Complainant's office and made the necessary arrangements to assure that his work was covered during his absence.
49. On March 4, 2004, Knight prepared an incident report regarding Complainant's March 3 and 4 conduct and gave it to Starks.

**Starks' Decision to Place Complainant on Administrative Leave;
Complainant's Grievance**

50. Starks was troubled by Pickett's report about Complainant having made statements about defending himself, being an excellent marksman, and having access to firearms. He was in receipt of Knight's reports that Complainant was spending unauthorized time out of the office, and having difficulty staying at his workstation and focusing on his work. He was also aware that Complainant was spending excessive time discussing Roberts' history of alleged sexual harassment with others at work.
51. Starks believed that Complainant's intense preoccupation with Roberts was causing disruption in the workplace.
52. Starks contacted a Human Resources staff member, Sabrina Hicks, to discuss his concerns.¹ Ms. Hicks advised Starks to place Complainant on administrative leave with pay, pending investigation of the issues raised by Complainant's recent alleged conduct. She also recommended that he order Complainant to refrain from coming to any of the DHS offices and from contact with DHS employees, in order to maintain an independent atmosphere for the investigation, and to stop the disruption to the workplace.
53. On March 4, 2004, Complainant visited the downtown DHS office, where Executive Director Marva Livingston Hammons's office was located. He brought a grievance with him. He filed the grievance and waited outside Hammons' office to meet with her.

¹ Starks also informed Hicks of another incident involving Complainant, which Ms. Hicks considered in recommending that Complainant be placed on administrative leave. This other incident was not substantiated to Starks and therefore did not form the basis for the ultimate disciplinary action.

54. Complainant's grievance stated,

"This statement of grievance is to address the sexual harassment, psychological aggression/intimidation that has been, and continues to be perpetrated by supervisor Jeffrey Roberts and condoned/tolerated by Deputy Director O'Dell Pickett and Director Bill Starks on or before my arrival to the DDS. Throughout my three year tenure at the DDS I have been provided information to, and have been a witness of sexual harassment Quid Quo Pro, psychological intimidation and retaliation perpetrated by Jeffery Roberts and condoned/tolerated by . . . [Pickett] and . . . Starks. I am requesting a relief of equal proportionments for the injuries inflicted by DDS management to include but . . . [not] limited to, all disciplinary action available for a correction of this behavior. Discrimination is not alleged but not excluded from any investigatory findings."

55. As Complainant waited to see Ms. Hammons, he called Mr. Knight to request additional leave in order to review additional personnel records.

56. Mr. Knight informed Complainant that all requests for leave had to be made directly to Mr. Starks.

57. Complainant called Starks on his cell phone as he sat in the Executive Director's waiting area. Complainant informed Starks that he had filed a grievance regarding Roberts' actions.

58. Starks informed Complainant that he was placing him on paid administrative leave, pending investigation into his grievance and his recent conduct. In this conversation, Starks ordered Complainant not to visit any DHS office or talk to any DHS personnel during his administrative leave period, until after the investigation had been completed.

59. Complainant remained in the office of Director Hammons. He was soon escorted out of the office.

60. On March 4, 2004, Starks mailed a letter to Complainant. He stated he was placing him on "paid administrative leave pending the completion of an investigation to be conducted regarding several workplace issues of concern, including allegations of psychological intimidation, allegations of threats of violence, and moral turpitude. You will remain on Administrative Leave until the completion of the investigation. During this period you are prohibited from visiting your workplace or any other Colorado Department of Human Services campus, including but not limited to Ft. Logan or 1575

Sherman Street. If at any point in this process you have any questions you may contact me directly by telephone at [#] or Sabrina Hicks [HR office] at [#].”

61. On March 6 and 8, 2004, Complainant visited the DHS office for the purpose of seeing Ms. Jane Beveridge, Interim Office Manager in the DHS Executive Director’s office. He sought to discuss the validity of his administrative leave. He was escorted out of the building by a security guard.
62. On May 26, 2004, Complainant came to the Aurora DDS office. Mr. Starks was alerted to his presence outside the building and saw Complainant on the sidewalk, speaking on his cell phone. Starks asked security guards to accompany him outside to see Complainant. Starks asked Complainant if he understood he was not to come onto the premises or any DHS building. Complainant responded that he had other business to attend to in the building, but did not state what it was. Starks asked him to leave. Complainant stated that he would not leave, laughed, and informed Starks that he had him on tape.
63. This was the first time Starks learned that Complainant had tape-recorded his conversation with him on March 1, 2004.
64. On May 26, 2004, Complainant also visited the downtown DHS facility. Outside the building, he asked a DHS employee he knew to deliver documents to Executive Director Hammons.
65. On April 1, 2004, Starks sent a certified letter to Complainant, stating in part, “I am aware of at least three violations of the requirements in your suspension letter to avoid visiting any CDHS campus or to attempt contacting any CDHS employee. The Attorney General’s Office has asked that I advise you once again of these requirements. Should you choose to violate these terms again, the Department will take whatever action(s) it deems appropriate in response.”

Complaint against Starks

66. In the early spring of 2004, a female employee at DDS filed a sexual harassment complaint against Starks. In the course of the investigation, Complainant was interviewed.

Whistleblower Complaint

67. On March 8, 2004, Complainant filed a whistleblower complaint with the State Personnel Board, alleging that his administrative suspension was in

retaliation for having participated as a witness in the investigation of allegations of sexual harassment against Director Starks.

Investigations

68. Respondent hired an independent third-party agency, Mountain States Employers Council (MSEC), to investigate Complainant's allegations made in his March 4, 2004 grievance, as well as the matter of Complainant's own statements concerning access to firearms.
69. Ms. Beveridge was responsible for setting up the meetings between MSEC and Complainant and others to be interviewed. Beveridge set up a meeting between Complainant and the investigator assigned to the case.
70. Complainant did not appear for the first or second meeting with the investigator. He expressed concern to Ms. Beveridge, via e-mails, that having the same investigator conduct two investigations, one in which he was the complaining party, and the other in which he was the subject of the investigation, presented a conflict.
71. Respondent acknowledged Complainant's concerns and arranged for MSEC to separate the two investigations.
72. On April 13, 2004, Ms. Beveridge sent Complainant a letter confirming that there would be two separate investigations, conducted by two different investigators. She sent the letter via e-mail, regular mail, and certified mail. She stated, "In order to ensure fairness and respect your concerns, we have requested two independent investigations." She informed Complainant of the names of the two investigators, and of the date, time, and place of his two meetings with them. Because Complainant was on paid administrative leave, he was expected to be available to attend those meetings during regular business hours. She closed her letter by stating that Complainant's failure to appear would constitute insubordination, rendering him subject to corrective or disciplinary action.
73. Complainant did not attend the next meeting with the MSEC investigator assigned to investigate Complainant's comments about being an excellent marksman and having access to firearms. This was the third scheduled meeting that Complainant did not attend, without prior notice of his anticipated absence.

Meetings with MSEC Investigator

74. Complainant had three meetings with the MSEC investigator assigned to investigate his March 4, 2004 grievance. This investigator was unaware

- that another investigation into Complainant's comments about weapons was occurring.
75. During the second meeting, Complainant became upset and made statements about other investigations that were ongoing, expressing frustration that his grievance had not been resolved previously. The investigator informed him that he was unaware that other investigations were ongoing.
 76. Complainant indicated that his mother was dying and he needed to go to see her but that his employer was keeping him from doing so. The investigator stated he did not think that his employer knew his mother was dying, and Complainant responded, "They fucking know." At the end of the second meeting, Complainant stated that he had to leave because he was not thinking clearly.
 77. At the third meeting, pursuant to standard protocol, the investigator asked Complainant to review his written summary of Complainant's statements. Complainant reviewed it and asked the investigator to e-mail it to him so that he could edit it on his own time. The investigator explained that this would not be acceptable. Complainant picked up the copy of his statement and put it inside his briefcase. The investigator asked for the statement back. Complainant stated that he would not return it, and that if the investigator touched his briefcase or him, he would call the police. He stated that he could handle himself. Then he left with the statement.
 78. The investigator closed the investigation into Complainant's grievance allegations due to Complainant's lack of cooperation with the investigation.
 79. The MSEC investigator wrote a memo regarding Complainant's conduct and submitted it to DHS. Starks received a copy of the memo.

Pre-Disciplinary Process

80. On May 19, 2004, Starks sent Complainant a letter. The letter first advised him that the investigation of his grievance had concluded, and would be handled consistent with agency policy. The letter also advised Complainant that Starks' primary concern at that time was Complainant's behaviors during and subsequent to the onset of the investigations.
81. Starks advised Complainant that he was considering disciplinary action against Complainant, and ordered Complainant to call him no later than May 25, 2004, to schedule a pre-disciplinary meeting under State Personnel Board Rule R-6-10. Starks advised Complainant that he could bring a representative to the meeting, and that the purpose of the meeting

- was to explain the reasons he was considering discipline, and to give Complainant the opportunity to offer information in rebuttal or mitigation.
82. Complainant did not contact Starks to schedule the meeting on or before May 25, 2004.
 83. On June 2, 2004, Complainant sent a letter to Starks, setting forth his interpretation of the Board rules governing administrative leave and disciplinary actions. He expressed concern regarding the end of his paid administrative leave on May 31, 2004 and the beginning of leave under the Family Medical Leave Act (FMLA). In the letter, he stated, "As you are probably feeling right now, and rightfully so, rather embarrassed at your continued incompetence in the understanding and application of Board rules."
 84. On June 4, 2004, Starks called Complainant to make another attempt to set a date for the pre-disciplinary meeting, and to discuss the leave issues. Complainant hung up the telephone on Starks in the middle of the conversation.
 85. Starks consulted the personnel department to determine how to proceed. He was advised to send a letter to Complainant setting a date for the pre-disciplinary meeting.
 86. Starks then sent a follow-up letter to Complainant on June 4, scheduling the pre-disciplinary meeting for June 15, 2004, at 1:30 p.m. In his June 4 letter, Starks explained that the leave he had been on since March 4 was administrative in nature, not disciplinary in nature. The letter further explained that the administrative leave had ended on May 31, 2004, and that Complainant had then been placed on FMLA leave in association with his mother's illness.
 87. On June 10, 2004, Complainant sent an e-mail to the HR representative for Respondent handling communications regarding the investigation by MSEC against Complainant. He asked for a status report. The investigator responded, "The investigation was concluded. Although you were scheduled three times to meet with Mark Flynn, you did not appear."
 88. Complainant did not appear for the June 15, 2004 pre-disciplinary meeting. Approximately one hour prior to the meeting time, he faxed a letter to several DHS managers explaining why he would not attend.

DHS Workplace Violence Policy

89. Prior to making a decision on what, if any, disciplinary action to impose, Starks consulted the agency workplace violence policy. DHS Policy

Number VI-3.5, Workplace Violence, prohibits violence, threats, harassment, intimidation, and other disruptive behavior. It states in part, "Threats, harassment, intimidation include oral or written statements, gestures, or expressions that communicate a direct or indirect intent to commit physical and or psychological harm."

90. The policy also defines "Obsessions, such as a grudge against a co-worker or frustrated romantic interests," as an incident not posing an immediate threat that violates the policy.
91. Starks considered Complainant's comments about being an excellent marksman and having access to weapons to be a threat or act of intimidation that violates the policy.
92. Starks also considered Complainant's conduct of raising old allegations of sexual harassment by Roberts to constitute an "Obsession, such as a grudge against a co-worker," which was prohibited conduct under the policy.

June 23, 2004 Letter Regarding Impending Disciplinary Action

93. On June 23, 2004, Starks sent Complainant a letter via certified mail. The letter outlined the behavior and conduct Starks considered a proper basis for disciplinary action. He then gave Complainant ten days from receipt of the letter to deliver mitigating or rebuttal information to Starks.

94. In his letter, Starks stated in part:

"Your numerous, direct violations of clear and specific instructions to not visit any DHS campus or attempt to contact any DHS employee during the period you were on paid administrative leave was insubordinate. Your attempts to recruit employees you had been instructed not to contact, to support your claims under the violence in the workplace rules and procedures, resulted in an unnecessary disruption of DDS operations.

"Your lack of cooperation with me and the assigned investigators from Mountain States Employers Council caused this agency unnecessary disruption and costs. You had three scheduled appointments that you failed to attend.

"There have been instances of untruthfulness. One example is your allegation to Pat Romero at the Colorado DOP that you were placed on a corrective action by the DDS and that it was then posted and publicized to other employees at the agency. Another would be the allegation that O'Dell Pickett had referred to Tom Knight as a racist. A third would be

your reference to an all Black man's support group at the DDS of which I was supposedly a member.

"By your own admission you engaged in the secret taping of private consultations between you, the Deputy administrator, O'Dell Pickett, and you and me. While this action was not in violation of the law, it was morally unconscionable and actionable from a personnel perspective.

"Your conduct in the parking lot of this agency wherein you actually engaged in taunting me was inappropriate and insubordinate. The most egregious of behaviors involve your numerous references to your access to weapons, your capability with them and what was considered by many who encountered you, veiled threats of a willingness to use them. Mr. Pickett quotes you as saying in a conversation in his office, "I am an excellent marksman, and while I do not own weapons, I have access to them."

95. Starks also referenced Complainant having hung up the telephone on him in the middle of a sentence as an instance of insubordination.
96. On July 14, 2004, Complainant sent his response letter to Starks. The majority of the letter provided a history of the written and telephonic correspondence between himself, Starks, and various DHS employees, explaining his reasons for not attending meetings. He asserted that he had not received several of the letters sent by Starks until after deadlines had passed. Complainant stated that Starks knew he was being tape recorded during their March 1 meeting. Complainant denied having hung up the telephone on Starks.
97. With regard to Complainant's visit to the DDS office on May 26, 2004, he stated that he had not taunted Starks. "My presence was explained as, I was attempting to obtain documents showing that supervisor Roberts had attempted to hit me with his car on several occasions."
98. Starks read and considered the July 14, 2004 letter in reaching his decision regarding disciplinary action.
99. Starks concluded that he had no choice but to terminate Complainant's employment at DHS. He determined that Complainant had engaged in a pattern of conduct in which he was disruptive to others in the workplace, untrustworthy, insubordinate, confrontational, and disrespectful of his and DHS's authority over him as an employee. He believed that no lesser disciplinary action would result in a modification of Complainant's behavior, because Complainant had consistently violated his direct orders over a period of months.

100. On July 20, 2004, Starks terminated Complainant's employment. The letter cited Complainant's history of employment with DHS, which included a termination, a corrective action, and the voluntary demotion in 2002. It then outlined the following behavior: willful failures to obey the instructions of management and supervisors; making several false and potentially damaging statements regarding co-workers and supervisors; moral turpitude in tape recording conversations with supervisors and managers without their prior knowledge or consent; failure to attend meetings with the Mountain States Employers Council investigator assigned to investigate his grievance; inappropriate confiscation of documents from the investigator; insubordinate conduct towards Starks; general disruption of the agency; and violation of the workplace violence policy by referring to access to firearms and his willingness to use them.
101. In the termination letter, Starks also cited the following conduct:
- Complainant's willful violation of Starks' direct order not to visit the workplace or any other DHS facility, by visiting the Aurora and downtown offices on March 26, 2004;
 - Complainant's statement that Deputy Director Pickett had stated that Tom Knight was a "racist." Starks found this statement to be untrue;
 - Complainant's statement to a Department of Personnel and Administration staffer that Complainant's 2002 corrective action had been posted and publicized to other employees at DDS; this was untrue;
 - Complainant had hung up the telephone in the middle of one of Starks' sentences when he was seeking information from Complainant; he had taunted Starks in the parking lot on May 26 by stating that he [Starks] had no right to prohibit him from visiting the work site. Starks found those incidents to be insubordination;
 - Complainant had sent three letters to Starks that were insulting and insubordinate in their tone, alleging that Starks was stupid and lacked qualification for his position.
102. Complainant timely appealed his termination.

DISCUSSION

I. Burden of Proof

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, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 708. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. Complainant committed the acts upon which discipline was based

Respondent has proven by preponderant evidence that Complainant committed the acts upon which discipline was based. He willfully disobeyed the directives Starks and other DHS managers issued to him, from March 4 through the time of termination. He repeatedly visited DHS offices and attempted to make contact with DHS employees during the pendency of the investigation, in violation of the express terms of the administrative suspension letter. After being advised that his attendance at the meeting with the investigator regarding his statements about having access to weapons, Complainant did not attend that meeting.

This series of willful violations of directives constitutes a violation of § 24-50-116, C.R.S., which states, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." The conduct therefore constitutes willful misconduct under Board Rule 6-12.

Respondent also proved by preponderant evidence that Complainant engaged in a pattern of conduct that was insubordinate to Mr. Starks. Insubordination is grounds for discipline under Rule 6-12. Lastly, Respondent proved that Complainant violated the workplace violence policy.

III. Respondent's disciplinary action was not arbitrary or capricious; the action imposed was within the range of reasonable alternatives

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and

honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent did not act in an arbitrary or capricious manner in this case. To the contrary, it made extra efforts to procure all evidence that might be relevant to Complainant's grievance and to the issues surrounding his statements regarding weapons. Respondent accommodated Complainant's request to conduct two separate investigations of the workplace issues. Complainant nonetheless failed to attend any of meetings with one investigator, and did not cooperate with the other investigator assigned to investigate his grievance claims.

Respondent's decision to terminate Complainant's employment was a reasonable one under the circumstances. Mr. Starks made three attempts to sit down with Complainant to discuss his issues and his recent behavior. Such a meeting would have provided an opportunity to mend his relationship with Starks and the agency. Complainant did not take advantage of those opportunities. He did not call Starks to set up a meeting; he sent Mr. Starks letters that were unprofessional and insulting in their tone, and he hung up the telephone on him.

While Complainant's frustration with what he deemed to be aggressive and taunting behavior by Mr. Roberts is understandable, his dissatisfaction with DDS managers' response does not excuse Complainant's conduct. Respondent took a reasonable remedial measure by transferring Mr. Roberts out of the Aurora DDS office. Complainant would have been best served by accepting this resolution and moving forward with his career at DDS. Unfortunately, he was unable to do so.

IV. Respondent did not violate State Personnel Board Rule 6-10, 4 CCR 801

Complainant asserts that Respondent violated State Personnel Board Rule 6-10, which requires a pre-disciplinary meeting between the appointing authority and the employee, prior to the imposition of disciplinary action. The Rule states the following:

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. . .

A. When reasonable attempts to hold the meeting fail, the appointing authority must send a written notice, to the last known address of the employee, advising the employee of the possibility of discipline and stating the alleged reasons. The employee has 10 days from receipt of the notice to respond in writing.”

The question presented herein is whether Mr. Starks’ efforts to hold the pre-disciplinary meeting were reasonable. Mr. Starks sent a letter to Complainant, directing him to call him to set up a mutually agreeable date for the meeting. Complainant did not call Mr. Starks during that period of time. Next, Mr. Starks mailed a second letter setting the meeting date. Complainant knew the date and time of the meeting. He elected not to attend. Finally, Mr. Starks called Complainant to make one last attempt to set a date for the meeting and to discuss the issues Complainant had raised in his letter. Complainant hung up the telephone on Mr. Starks during this conversation.

Under these circumstances, Respondent engaged in reasonable attempts to hold the pre-disciplinary meeting with Complainant. However, due to no fault of Mr. Starks, those attempts failed. Under Board Rule 6-10, Respondent was required to send a letter to Complainant, advising him of the possibility of discipline and stating the alleged reasons for considering disciplinary action. Respondent complied with this requirement by sending the letter to Complainant on June 23. Therefore, Respondent did not violate Board Rule 6-10.

V. Respondent did not discriminate against Complainant on the basis of veteran status, age or political affiliation

Complainant asserts that Respondent discriminated against him on the basis of age, political affiliation, and veteran status. Complainant bears the burden of proof on these claims. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

As a threshold issue, neither veteran status nor political affiliation is a protected class under the Colorado Anti-Discrimination Act. The Act protects against discrimination on the basis of “disability, race, creed, color, sex, age, national origin, or ancestry.” Section 24-34-402(1)(a), C.R.S. Therefore, as a matter of law, Complainant has failed to state a claim of discrimination on the basis of veteran status or political affiliation.

To prove intentional discrimination under the Colorado Anti-Discrimination Act, § 24-34-402, C.R.S., one must establish, by a preponderance of the evidence, a *prima facie* case (“*pf*”) of discrimination. The elements of a *pf* of intentional discrimination are:

1. complainant belongs to a protected class

2. complainant was qualified for the position
3. complainant suffered an adverse employment decision despite his or her qualifications
4. circumstances give rise to an inference of unlawful discrimination.

Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397, 400 (Colo. 1997). See also, *Bodaghi*, *supra*.

Complainant offered no evidence at hearing concerning his age. There is no evidence in the record that Respondent considered age in making any of the decisions concerning Complainant's employment. Further, there is no evidence of Respondent having treated Complainant differently than a similarly situated employee, of a lesser age. Therefore, Complainant has failed to establish a *prima facie* case of age discrimination.

VI. Respondent did not retaliate against Complainant in violation of the Colorado State Employee Protection Act

The Colorado Employee Protection Act, section 24-50.5-101 *et seq*, C.R.S., (the whistleblower act) protects state employees from retaliation by their appointing authorities or supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). To prevail, Complainant must demonstrate that his disclosure of information protected by the Act was a substantial or motivating factor in taking adverse action against him. *Id.*

The purpose of the Act appears in the legislative declaration, which states,

"The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." Section 24-50.5-101, C.R.S.

The threshold determination is whether Complainant's disclosures fall within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as the "provision of evidence

to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S. Under *Ward, supra*, the disclosure may be oral and need not be written.

Complainant alleges that he made the following protected disclosures: over a period of several years, he made repeated verbal reports to Pickett and Starks about Roberts' sexual harassment; Complainant's grievance raised those concerns to a new level of visibility which Starks was uncomfortable with; and, in the early spring of 2004, Complainant participated as a witness in the investigation into Starks' alleged sexual harassment.

Complainant's statements about Roberts do not constitute protected disclosures under the Act, because they do not relate to an abuse of authority or mismanagement of the state agency. It is possible that a widespread or long-term pattern of sexual harassment in a state agency, if properly documented, and unaddressed by management, could constitute mismanagement of that agency. However, that is not the case here. Complainant's grievance, unsubstantiated with any eyewitness accounts or specifics about Roberts' alleged misconduct, does not rise to the level of a protected disclosure under the Act. Complainant's participation in the interview, conducted for the investigation into allegations of sexual harassment against Starks, also does not constitute a protected disclosure under the Act. There is little evidence in the record as to what Complainant said during the course of that investigation; there is no evidence of whether any of those statements concerned allegations of mismanagement or abuse of authority.

Even if Complainant had proven that his statements are protected disclosures, he has failed to prove that his disclosures were a substantial or motivating factor in Respondent's decision to place him on administrative leave or to terminate him. *Ward, supra*. Therefore, Complainant has not proven by preponderant evidence that Respondent violated the State Employee Protection Act.

CONCLUSIONS OF LAW

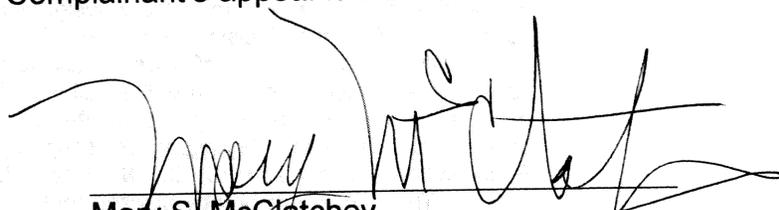
1. Complainant committed the acts for which he was disciplined.
2. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Respondent did not violate the Colorado State Employee Protection Act.

5. Respondent did not discriminate against Complainant.

ORDER

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

Dated this 20th day of July, 2006.



Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

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

BRIEFS ON APPEAL

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 appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 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. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of July 2006, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and **NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, to the following addresses:

Stephen Bullock
4950-11 Dorsey Hall Drive
Ellicott City, Maryland 21042

And via interoffice courier:

Stacy L. Worthington
First Assistant Attorney General
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Andrea C. Woods

