

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MONICA COWAN,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on January 18 and 19 and May 11, 2005 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Christopher Baumann and First Assistant Attorney General Stacy L. Worthington represented Respondent. Nora Nye, Esquire, represented Complainant.

MATTER APPEALED

Complainant, Monica Cowan (“Complainant” or “Cowan”) appeals her two-day disciplinary suspension by Respondent, Department of Human Services, Colorado State Veteran’s Home - Fitzsimons (“Respondent,” “DHS”, or “Fitzsimons”). Complainant alleges that she was discriminated against on the basis of race, and seeks reinstatement of the two days of suspension, reimbursement of lost wages, and an award of attorney fees and costs.

For the reasons set forth below, Respondent’s action is **affirmed.**

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent discriminated against Complainant on the basis of race;
3. Whether Respondent’s action was arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant is employed as an Accounting Technician III in the Business Office at Fitzsimons. She is primarily responsible for timekeeping functions.
2. In December 2003, Pinon Management, a private contractor, took over the management of Fitzsimons. Pinon was brought in to rectify serious problems in the management of the nursing home. While much of the management was private, the vast majority of employees at Fitzsimons remained classified state employees.
3. Complainant had enjoyed the working culture under prior management and felt it was a family atmosphere. The transition to new management, whose mandate was to assess and correct problems, was difficult for many of the employees, including Complainant.

March 2004 Corrective Action

4. At the time Pinon arrived at Fitzsimons, it directed a group of Certified Public Accountants to conduct an audit of all financial functions, including resident trust accounts. Complainant had been responsible for management of resident trust accounts at Fitzsimons.
5. Achieve is the billing software for State of Colorado nursing homes. It tracks all incoming and outgoing funds for residents. Complainant had not maintained the Achieve records accurately. The audit of Fitzsimons revealed that it was impossible to identify certain account transactions totaling approximately \$2000.00; resident ledger reports contained deposit records for the transactions, but they had never been entered in the Achieve database.
6. On March 8, 2004, Respondent issued a Corrective Action to Complainant for her continuing problems associated with her poor accounting practices with the resident trust account funds. The letter stated in part,

“As I have previously discussed with you verbally and in writing, you have been insubordinate on a variety of occasions. For example, you were asked to write a statement regarding your knowledge of time issues surrounding a temporary staff person at Fitzsimons and deliver the statement to me by close of business on November 6, 2003. I never received the statement.

On January 13, 2004, you received instruction in and a copy of the Resident Trust Policy and Procedures for replenishing the Personal Needs Cash Box. We met as an office twice in February to review the policy and procedure for replenishing [it]. It was recently brought to my attention that you are not following this procedure.

You are expected to fully comply with any assignments given by Neal, Pinon

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Management, or myself. If you cannot meet a particular deadline or if you do not fully understand the assignment or the task assigned, you are expected to communicate with me immediately. You are expected to complete all assignments as given and within the specific timeframes. Effective immediately, you will be in full compliance of this corrective action. Should this area of your performance not improve, I will consider taking further corrective and/or disciplinary action, up to and including termination.”

7. Complainant refused to sign this Corrective Action. She did not grieve it.

Timesheet Certification

8. One of the regulations Fitzsimons was found to be out of compliance with was the timely certification of timesheets. Some employees and supervisors were failing to date and sign (certify) them and to turn them in on time. In addition, Fitzsimons had no system for tracking the timesheets for accuracy, certification, and timeliness.
9. One of Complainant’s primary job duties as the staffer responsible for timekeeping was the tracking and filing of timesheets. However, prior to Pinon’s arrival at Fitzsimons, no one held Complainant to a higher standard than simply collecting the timesheets and allowing them to pile up in her workspace.
10. In March 2004, Pinon management worked closely with Complainant to develop a system for tracking of timesheets. Complainant participated with management in creating a timesheet spreadsheet which she would use on her own computer to track timesheets. Complainant approved of this spreadsheet and had no problems using it.
11. In April 2004, Complainant’s timesheet duties were increased to include daily use of the timesheet spreadsheet; further, she was to take an active role in assuring accuracy, certification, and appropriate filing of all employee timesheets she received.
12. The new system for handling of timesheets at Fitzsimons consisted of the following steps:
 - A. staff were to sign and date their timesheets, in order to certify that the information on their timesheet was correct;
 - B. staff were then to turn in the accurate and certified timesheet to Complainant (in her “IN BOX”);
 - C. if the timesheet contained incorrect or incomplete information, Complainant was to immediately send it back for completion (this was usually accomplished by forwarding them to Becky Woodhouse, Business Office Manager, who was Complainant’s direct supervisor);
 - D. if the timesheet was accurate and certified, Complainant was to stamp the timesheet as

received, input the information on the spreadsheet, and file the timesheet in the individual employee's file.

13. Complainant was required to submit the timesheet spreadsheet to Woodhouse on a daily basis. If an employee's box was not filled in as having been completed and turned in, Woodhouse would know that she needed to track down the certified timesheet for that employee.
14. Complainant violated this procedure repeatedly by stamping timesheets as having been submitted as accurate and certified, and filing them in the individual employee's file in her work station, but then failing to enter the information on the spreadsheet.
15. Complainant printed out spreadsheets showing certain staff as not having submitted accurate and certified timesheets, when in fact she had possession of them. The direct effect of this error was to give the impression that individuals had not handed in their accurate and complete timesheets, when in fact they had.

May 13, 2004 Memo Clarifying Duties

16. On May 13, 2004, Woodhouse gave a memo to Complainant clarifying her job duties. She met with Complainant personally to discuss its contents at the time she presented it. The memo stated in part, "This memorandum serves as an outline of your current job duties and responsibilities. You will be expected to perform all of the responsibilities listed below, as well as any additional assignments, timely and competently . . . if you cannot meet a particular deadline or if you do not fully understand the assignment or the task assigned, you are expected to complete all assignments as given and within the specific timeframes."
17. Among the duties listed in the May 13, 2004 memo were the following:

"5. Distribute and track bi-monthly and monthly time sheet certifications timely and accurately. Due back from department heads within 7 days of distribution. Tracking report needs to be turned into me every day until completed."

"7. Filing to be completed timely and accurately every day."

State Audit of Timesheet Certification; Complainant's Lack of Cooperation

18. Mario Marchello, an Accounting Technician III and a co-worker of Complainant, was given the responsibility by Pinon to undertake an ongoing audit of employee timesheets. Much of his work was directed towards assisting State of Colorado auditors in their oversight of Fitzsimons.
19. Marchello and Complainant had a good working relationship. The two discussed the impending audit, and Marchello advised Complainant that one of his new duties would be to send her periodic memos requesting random timesheets, for auditing purposes. On April 28, 2004, he sent Complainant one of these memos. He wrote in his own handwriting on the top,

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“Monica, This is the official memo I am suppose[d] to give you- Mario.” The memo’s subject was “Certified Timesheets,” and it stated in part as follows:

“A recently completed audit of the Department found that some employees and supervisors did not timely certify time worked and leave taken. Personnel Rule P 3-42 requires all employees and supervisors to certify time records.

“The Division of Accounting is instituting a new practice of reviewing a sample of timesheets on a rotating basis to ensure certification. Central Timekeeping will review the timesheets for proper signatures and appropriate dates. All exceptions will be reported to the assigned timekeeper, the appropriate Office Manager, and the Division Director for follow-up.

Please fax Certified Timesheets for the employees listed below to my attention at 303-866-7233 by [May 5, 2004].”

20. Complainant did not provide the timesheets to Marchello.
21. On May 27, 2004, Marchello sent Complainant a second memo concerning the audit of timesheets. This memo requested the exact same five employees’ timesheets that the previous memo requested; he asked that they be given to him by June 2, 2004.
22. Complainant provided the five April 2004 timesheets, but four of the five were not in compliance with regulations, as they were missing a date of signature by either by the employee or the supervisor.
23. In order to show good faith to the state auditors, Marchello was then to request the corrected certified timesheets from Complainant. He made this request of Complainant, but she did not provide them.
24. Fitzsimons staff were scheduled to meet with State of Colorado auditors on June 16, 2004, to review the certified timesheets procedure at Fitzsimmons. In preparation for that meeting, Sue Clem, Payroll/Timekeeping Supervisor, sent an email informing some Fitzsimons employees of the upcoming meeting on June 16, and requesting copies of the corrected April 2004 timesheets. Marchello shared that email with Complainant. She looked at it, gave it back to him without any comment, and stated she knew they still did not have the corrected timesheets.
25. On June 11, 2004, Marchello reported this information to Clem. On June 15, 2004, Clem emailed Woodhouse about Complainant’s failure to provide the corrected timesheets necessary for the June 16 meeting. Clem had requested them by June 15 and still did not have them.

Error with Griffith Leave Request

26. On March 16, 2004, Amy Griffith submitted a leave request form for 56 hours of leave.

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Griffith wrote, "Please use any holiday or comp time first, then annual." Complainant entered the request incorrectly and her error resulted in Griffith being shorted one entire day of pay in her paycheck.

July 2004 Failure to Comply with Timesheet Procedures

27. As manager of the business office, Woodhouse was the liaison with nursing home staff concerning timesheets believed to be missing.
28. On July 19, 2004, Woodhouse sent an email message to Ruth Minnema, Director of Nursing at Fitzsimons, stating, "Attached you will find a list of employees that still have not completed and returned their certified timesheets. Please have the employee complete and return to the business office no later than July 30."
29. Upon receipt of this email message, Minnema researched the missing timesheets and found that the majority had in fact been turned in to Complainant and were accurate and properly certified.
30. Minnema met with Woodhouse to discuss the issue. They agreed that it was a serious problem for nursing staff to be contacted regarding timesheets they had already turned in.
31. On July 21, 2004, Minnema responded to Woodhouse's email and as a follow up to their conversation "about time sheets being lost after they have been turned in." Minnema identified "25 – 30 copies of time sheets that have been turned in but are logged as not completed. Additional staff are saying they have turned in their sheets, but not kept copies. For example, per Margaret Aguda, she has signed and turned in all her sheets but is listed as missing all time sheets for May through July." Minnema acknowledged she had some staff who were delinquent in turning in time sheets, and stated that she wanted to determine who were delinquent, and who were not.
32. Woodhouse responded on July 22, 2004, by asking Minnema for the copies of timesheets turned in but not logged so that she could pursue disciplinary action.
33. Woodhouse informed Project Manager Shelly Uhrig, Fitzsimmons appointing authority, of the problem, and gave her supporting documentation. Woodhouse also gave Uhrig a draft corrective action against Complainant, for use in the pre-disciplinary process.

Laudick Incident

34. Marie Laudick was an administrative assistant who worked at the front desk of Fitzsimons. Part of her job was to assist with Human Resources tasks, including document filing. On July 14, 2004, Laudick was in the HR file room and Complainant approached Laudick, requesting a copy of her CPR license out of her personnel file. Laudick pulled the file, leafed through it with a "rubber finger," then handed the file to Complainant. Complainant asked if she had another

“rubber finger,” and said, “I like to be fingered.” Complainant was shocked to hear herself make this statement, and immediately said, “Don’t take it personally.” Laudick was offended by this statement and thought that perhaps she had been the ongoing subject of gossip regarding her sexuality. She wrote an incident report on it.

35. Complainant did not mean to offend Laudick in making the statement. She made a comment she should not have in the workplace and failed to account for its potential effect on Laudick.

July 16, 2004 Incident

36. Mindy Moskowitz is an Accounting Technician III with a master’s degree in business administration in accounting from Rutgers University. She was hired at Fitzsimmons in April 2003. Moskowitz is a mediating force in the workplace with a strong sense of humor.

37. Moskowitz worked in the accounts payable section of the business office. Complainant was not involved with the accounts payable work.

38. Laurie Hicks was an Accountant II in the bookkeeping section of the business office at Fitzsimmons. She worked with Complainant on a daily basis. The two had a personality conflict and did not get along.

39. One of the problems with the transitions to new management was the failure to provide clear job duties and instructions to Complainant on some tasks. She became frustrated with the lack of clarity regarding some of her duties. Complainant often came to Hicks with questions, many of which Hicks was unable to answer. Hicks was irritated by Complainant’s questions.

40. On July 16, 2004, Complainant entered the office shared by Hicks and Moskowitz in order to ask Hicks a question. Complainant was very frustrated with her inability to work with a computer program on which she had been inadequately trained.

41. Complainant asked Hicks a question, which Complainant had already asked Hicks previously, at least once. Hicks snapped, “I already answered that and I’m not going to tell you again.”

42. When Moskowitz heard Hicks’ response to Complainant, she decided to leave the office because she did not want to be in the middle of a conflict.

43. Complainant was insulted and offended by Hicks’ treatment of her. Complainant said that Hicks was being rude by not answering her question. Hicks was thrown off guard by the situation, stood up, and told Complainant to leave. As she did so she used her arm behind Complainant to usher her out of the office.

44. Complainant felt she had been thrown out of Hicks’ office. She was extremely upset.

45. Hicks reported this incident to Becky Woodhouse either later than day or early the next morning.

July 20, 2004 Incident

46. After the July 16, 2004 encounter with Hicks, Complainant felt she wanted no further contact with her. On July 20, 2004, however, she needed to give some cash receipt documents to Hicks. She walked into the office shared by Hicks and Moskowitz, with both of them present, and approached Moskowitz. Complainant stated to Moskowitz, "Would you please fix these documents, as they do not balance." The job Complainant referred to was not Moskowitz's, so Moskowitz replied to Complainant, "What do you want me to do, as this is not my job?" Complainant responded by asking Moskowitz to hand the documents to Hicks, stating, "I am not talking to her." Hicks stated that if she wanted the work done Complainant had to hand it to her directly. Complainant stated that she didn't like the way Hicks spoke to her.
47. Moskowitz attempted to mediate, stating, "Come on guys, let's be friendly, let's all work together." Hicks responded, Complainant responded, both of them raised their voices, and the situation escalated. Moskowitz heard Complainant say, "I don't need this fucking crap," or words to that effect.
48. Becky Woodhouse met with Complainant and Hicks on that day. Complainant stated to Hicks that she did not appreciate the way she had treated her in her office on July 16. Hicks stated that she did not appreciate the way Complainant had acted and her cursing at her. Complainant denied having cursed. They began to argue about how badly each treated the other.
49. Woodhouse interrupted them and stated that while they did not have to like each other, they did have to learn how to respect each other, treat each other the way they would like to be treated, and get along at work. Both Complainant and Hicks stated that they could put what had happened behind them and move forward in a professional manner.
50. Woodhouse discussed these incidents between Hicks and Complainant with Shelly Uhrig. Uhrig requested that Woodhouse obtain written statements from all involved. Woodhouse asked for statements from all involved. Complainant did not provide a written statement; Moskowitz and Hicks did.

Pre-disciplinary Meeting

51. On August 9, 2004, Uhrig sent a letter to Complainant noticing a pre-disciplinary meeting.
52. On August 13, 2004, Complainant, her representatives, Skye Bruncevik, the Human Resources Specialist at Fitzsimons, and Shelly Uhrig, attended the pre-disciplinary meeting. Ms. Uhrig ran the meeting. She reviewed in detail each performance issue of concern, and gave Complainant the opportunity to refute or provide mitigating information on each item. Early in the meeting, Uhrig made it clear to Complainant she would have the opportunity to submit

supplemental information in writing, as a follow-up.

53. Uhrig opened the meeting by reading the statement by Marie Laudick. Complainant stated that she didn't know anything about a statement regarding a rubber finger. She stated that she had gone into the office to request her license.
54. Uhrig then reviewed the statement of Laurie Hicks regarding the conflict on July 20, 2004. Complainant responded that she recalled the incident, and explained she had acted in that fashion because Hickes had "kicked me out of her office and she told me, 'To get my black ass out of there.'" She further explained that she had previously gone to Hicks to ask her a question on a Medicaid issue, and Hicks had said, "Well why do [you] keep asking me the same thing," and had then hung up the phone on her. Complainant stated, "She was being very rude to me. So instead of me having interaction with her, I asked Mindy to give it to her."
55. Uhrig then moved on to the issue of time sheets. Uhrig stated that on May 13, 2004, Becky Woodhouse had given Complainant a memo containing an outline of her job duties. She read the portion stating, "Distribute and track bi-monthly and monthly time sheet certifications timely and accurately. Go back to Department Heads within seven days of distribution. Tracking Report needs to be turned into me every day until complete." Uhrig also reviewed portions relating to Kronos, leave time keeping, and missed punches [punching in or out on the time card machine by employees].
56. At the pre-disciplinary meeting, Uhrig had in her possession the draft corrective action, written by Woodhouse, which was never sent. Referencing this document, Uhrig stated to Complainant that on May 17, the dietary manager, Don Kessenger, responded to an email by Woodhouse regarding missing timesheet certifications, stating that he turned in timesheet certifications with appropriate signatures for two of his employees. Uhrig stated, "On May 17th review of the spreadsheets were showing up as not complete. And it looks like Monica you researched and found the signed copies of the certified timesheets locat[ed] in the file – in the file pile and then updated the timesheets. That you had said, "It was – that the job had been completed."
57. Complainant requested the date and a copy of the memo. Complainant did not deny the allegations. Uhrig stated that she had the documentation, and read the memo to Complainant. Complainant then recalled the events.
58. Complainant's representative asked if it was standard practice to bring up an issue at so late a date, after the incident. Uhrig responded that it was a pattern that had been established, that she had been spoken to repeatedly about it, to no avail, and that is why they were having the pre-disciplinary meeting.
59. Uhrig then raised the error in processing Amy Griffith's leave slip, resulting in her being docked one day of pay.

60. Uhrig also raised the issue of the 25 to 30 time sheet certifications that had been timely turned in, but had not been logged as completed, citing the Minnema July 17 email. Uhrig stated that after the complaint came in from Minnema, an audit was conducted, which revealed that “32 timesheets were filed on the individual employee files that were not reported as completed on the timesheet certification log.”
61. Uhrig gave Complainant additional time to respond to the allegations in writing.
62. After the pre-disciplinary meeting, Complainant turned in a letter to Uhrig, responding to the allegations. Complainant did not deny making the alleged statement to Laudick, and made allegations of inappropriate statements made by Laudick. Regarding the incidents with Hicks, she reiterated much of her prior version of events. Regarding Amy Griffith, she stated, “Work related issues with Amy Griffith July 10th date has not been recorded. Posting July 10th to Kronos would have put Ms. Griffith into an overtime status. She currently was at 86.07 hour for the week.”
63. Regarding the 25 – 30 timesheets, Complainant stated, “Work related issue with Ruth Minnema regarding the 25-30 Punch Detail Reports that was found on my desk. The Punch Detail Reports did not have a Supervisor Signature or either dates so I returned them to Nicole McDonald. My last day before vacation was July 23, 2004; I did not receive the punch Detail Reports before I left on July 23, 2004.”
64. Complainant’s claim that she returned the timesheets prior to going on vacation was inaccurate. Woodhouse found the timesheets in the individual employee files in Complainant’s workstation; Complainant had left them there prior to departing for vacation.
65. Uhrig followed up on Complainant’s allegation of the racial remark by Hicks by referring it to a civil rights investigator. The investigator interviewed Hicks, Woodhouse, and others, and found the allegation to be unconfirmed.
66. Complainant was generally not credible. Her testimony at hearing conflicted with testimony in deposition. Her allegation that Hicks made a racial remark to her on July 20 and immediately reported it to Woodhouse is rejected as implausible. Complainant raised this allegation for the first time at the pre-disciplinary meeting in an attempt to deflect attention from her performance problems. Complainant repeated this tactic under oath at hearing when she alleged, for the first time, that a senior manager stated he would not increase her pay because “she was a black female.”
67. Complainant alleged that she was placed in a cubicle based on her race. This claim is rejected; seating assignments were based on position and function. For example, Moscowitz shared an office with Hicks because Hicks trained her on Medicaid billing procedures. In addition, each of their predecessors were located in that office. Complainant sat in the same cubicle occupied by her predecessor.

68. Complainant claimed that she was denied training opportunities based on race. Respondent did not deny her any training opportunities. Moscovitz and Hicks invited Complainant to attend one training with them and she chose to go to lunch instead.

Disciplinary Action

69. Prior to imposing disciplinary action, Uhrig spoke at length with Woodhouse and others at Fitzsimons, reviewed all documents relating to the timekeeping functions Complainant had neglected, and reviewed Complainant's personnel file, including evaluations.

70. On August 23, 2004, Nancy Schwalm, Nursing Home Administrator, and Shelly Uhrig, drafted a disciplinary action letter to Complainant. It stated in part,

“After reviewing all of the information you provided during the R-6-10 meeting that was held on Thursday, August 12, 2004, your employment history with our department, and the supplemental information you provided on Monday, August 16, 2004, we have decided to take disciplinary action. We have determined that your actions constitute inappropriate use of staff time, improper interactions with your peers and failure to complete the work assigned to you. . . .

The specific allegations, incidents and facts that caused us to take this disciplinary action are your staff interactions and you were advised that you are not maintaining the spreadsheet for the certified timesheets for employees. This failure will result in employees not being paid in a timely manner. This is the second time you have been cautioned about performance issues. On March 8, 2004 you received a corrective action for failure to comply with work assignments. In response to these allegations, incidents and facts, you provided statements on Ms. Laudick that did not pertain to the issue discussed during the R-6-10 meeting. You reiterated the facts of the confrontation with Ms. Hicks on July 20, 2004. Your explanation for the failure to complete the spreadsheet and process the certified timesheets does not justify your failure to complete your assigned duties.”

71. The August 23, 2004 disciplinary action imposed a 5% pay reduction for three months. On September 20, 2004, Respondent modified the discipline to a two-day suspension, so that it would not bring her at or below the minimum salary for your position.

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 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

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- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision 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 committed the acts for which she was disciplined.

Respondent has met its burden of proving that Complainant committed the acts upon which discipline was based. Complainant's position at Fitzsimons was to oversee timekeeping. When state auditors imposed guidelines to monitor compliance with timesheet certification procedures, she failed to play a supportive role. Instead, she ignored the email directives she received, demonstrating a troubling unprofessional attitude. After Complainant participated in creating the timesheet spreadsheet for use on her computer, she failed to keep it updated on a daily basis as required. Instead, she filed the timesheets she received without logging them into the spreadsheet, with full knowledge that Woodhouse would then ask other employees and supervisors where the purportedly missing timesheets were. This willful misconduct on Complainant's part imposed unnecessary work and frustration for others at her agency. Complainant's pattern of refusing to complete the timesheet certification management tasks assigned to her was serious and flagrant; this alone appropriately subjected her to disciplinary action.

With respect to the incidents with Hicks, it appears that Hicks was equally if not more culpable than Complainant. Hicks treated Complainant with disrespect by flatly telling her she would not answer her questions. This rude response would have caused any co-worker to become upset. While Complainant was understandably angry with Hicks, Complainant should have sought out appropriate assistance up the chain of command. It is never acceptable for employees to allow themselves to engage in a shouting match in the workplace.

In summary, Complainant did engage in "improper interactions" with her peers and failed to complete the work assigned to her.

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

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

determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 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).

Ms. Uhrig conducted a full investigation into all issues before her in this matter. At the pre-disciplinary meeting, she presented the information in detail, inviting Complainant to engage in a thorough discussion of the performance problems at issue. She discussed Complainant's conduct with Woodhouse and others at Fitzsimons; she reviewed all appropriate background documents. Following the meeting, she gave Complainant a full opportunity to provide as much mitigating information she deemed appropriate. Complainant provided scant mitigation for Uhrig to consider. Given the serious nature of Complainant's misconduct, Uhrig's ultimate decision to impose a minimal disciplinary action was a measured, reasonable one.

Complainant argued at hearing that the Respondent acted inappropriately by imposing a new duty on her that was not contained in her job description. Specifically, she argued, the creation and maintenance of a timesheet spreadsheet on her computer was not listed on her job description. This contention has no merit. Complainant's fundamental mission at Fitzsimons was to oversee the timekeeping function. When senior management determined the need to better track and maintain timekeeping information through the spreadsheet, it was reasonable for those managers to impose this new job duty on Complainant. The duty was a fundamental component of accomplishing the timekeeping mission; as such, it was an appropriate exercise of Respondent's discretion to define Complainant's job under Board Rule R-1-6.

C. Respondent did not discriminate on the basis of race.

Complainant contends Respondent's actions were motivated by race discrimination. She has failed to prove this claim. To prove intentional discrimination under the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S., the employee 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 v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

The burden next shifts to the agency to articulate a legitimate, non-discriminatory reason for

the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *pf* is rebutted and drops from the case.

Lastly, the burden then shifts back to the employee to prove that the proffered reasons were in fact a pretext for discrimination. Complainant's *prima facie case*, combined with the factfinder's conclusion that the employer's asserted justification is false or pretextual, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated. *Bodaghi*, 995 P.2d at 298.

Complainant has failed to prove a *prima facie case* of race discrimination; the circumstances of this case do not give rise to an inference of unlawful discrimination. Assuming *arguendo* that Complainant had established a *pf*, Respondent has articulated a legitimate, non-discriminatory reason for its imposition of discipline. Complainant has failed to prove that Respondent's reasons for the action taken were a pretext for discrimination. In fact, Respondent's case was so strong that its action seems a muted response Complainant's the pattern of willful misconduct.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S.; State Personnel Board Rule R-8-38, 4 CCR 801. Because Complainant did not prevail at hearing, she is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Respondent did not discriminate against Complainant on the basis of race;
4. Attorney's fees are not warranted.

ORDER

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

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

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

PETITION FOR RECONSIDERATION

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of June 2005, 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:

N. Nora Nye
Colorado Federation of Public Employees
1580 Logan Street, Suite 310
Denver, Colorado 80203

and in the interagency mail, to:

Stacy L. Worthington
First Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods