

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN K. WILLIAMS,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO
SYSTEM OFFICE, PROCUREMENT SERVICE CENTER,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on December 14, 15 and 22, 2005, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Complainant appeared and was represented by Roger Moore, Esq. and Dwight Pringle, Esq. Special Assistant Attorney General Jeremy Hueth represented Respondent. Respondent's advisory witness was Stephen Webb, the appointing authority.

MATTER APPEALED

Complainant, John K. Williams (Complainant or Williams) appeals his termination by Respondent, Regents of the University of Colorado, University of Colorado System Office, Procurement Service Center (Respondent or PSC). Complainant seeks reinstatement, back pay, benefits, and attorney fees and costs.

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;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was employed by Respondent for fifteen years. Initially, he worked in the purchasing department for the University Health Sciences Center. However, in 1999, the University consolidated all of its purchasing departments into one department known as the Procurement Service Center, or PSC.
2. The PSC is responsible for essentially all of the procurements and bill paying functions for the University, except for payroll.
3. At all times relevant to this appeal, Complainant was employed as a purchasing agent at the PSC. He was a General Professional III.
4. A purchasing agent assists customers (University departments) in achieving their procurement needs.
5. Stephen Webb has been the director of the PSC since 2000, and has been Complainant's appointing authority at all times relevant to this appeal.
6. Complainant has had several supervisors while working at the PSC.

October 26, 2001 Letter of Expectation

7. In October of 2001, Complainant's supervisor was Steve Fincher.
8. On October 26, 2001, Webb issued Complainant a Letter of Expectation, which was issued when Complainant's error resulted in the University's Chemistry Department paying \$3,569.44 more for glassware and equipment than was necessary. The Letter of Expectation also addressed another error Complainant made, which was not knowing or properly applying the difference between permissive and mandatory price agreements.

August 12, 2002 Corrective Action

9. In August of 2002, Complainant's supervisor was Rick Tensley.
10. On August 12, 2002, Webb imposed upon Complainant a Corrective Action based on numerous instances in which Complainant provided less than satisfactory customer service. The Corrective Action was also based on Complainant's unsatisfactory work organization, as well as errors in Complainant's written communications. Finally, the Corrective Action addressed Complainant's pattern of arriving late for work and taking sick leave after a scheduled day off from work.

11. The August 12, 2002 Corrective Action advised Complainant, "Failure to abide by these corrective actions may result in further corrective actions or disciplinary action which could include suspension, reduction in pay, demotion, termination or some other action which may affect your pay, status or tenure."
12. Complainant did not grieve the August 12, 2002 Corrective Action.
13. Complaint requested that he be transferred from Tensley's supervision. Subsequent to Complainant's request, Tensley requested that he be removed as a supervisor as a result of a medical condition. Tensley's request was granted.

Performance Evaluation From March 1, 2002, to February 28, 2003

14. Complainant received an "Unsatisfactory" rating in his Performance Evaluation for the time period from March 1, 2002, to February 28, 2003, in the Core Competency Area of "Accountability." Tensley was Complainant's evaluating supervisor.
15. That evaluation included the following language: "John constantly arrives to work late. He still demonstrates a pattern of call in sick after a vacation day or holiday and coming in late the next day after the sick day. He sometimes gets involved in co-workers business that is really none of his business which sometimes causes animosity between him and other employees."
16. Complainant refused to sign that evaluation.

Hinz's Supervision of Complainant

17. When Tensley stepped down from his supervisory role, Danielle Hinz became Complainant's supervisor in March of 2003.
18. When Hinz took over Complainant's supervision, she did not review his personnel file because she wanted to give him a fresh start and she did not want to be influenced by materials contained in his personnel file.
19. Hinz knew that Complainant had been at the University for a long period of time and she felt that he could succeed as an employee.

August 14, 2003 Corrective Action

20. On August 14, 2003, Webb issued Complainant a Corrective Action. This Corrective Action addressed Complainant's pattern of arriving late for work and taking unscheduled days off from work.
21. The August 14, 2003 Corrective Action advised Complainant, "Failure to abide by this corrective action will result in further corrective actions or disciplinary actions

which could include suspension, reduction in pay, demotion, termination or some other action which may affect your pay, status or tenure.”

22. Complainant did not grieve the August 14, 2003 Corrective Action.

November 20, 2003 Corrective Action

23. On October 21, 2003, Complainant asked Hinz if he could be a member of the Health Science Center's (HSC) Staff Council. Initially Hinz said, "No," because she thought Complainant was not eligible. Complainant checked the by-laws and determined that Hinz was incorrect. Complainant sent an e-mail to HSC Staff Council's vice-president to confirm that he was, indeed, eligible to be a member. Later, when Complainant informed Hinz that he was eligible, Hinz declined to give Complainant permission because she did not feel it was in the best interest of the University because of Complainant's workload issues. She also declined to allow Complainant to join a committee of the Rocky Mountain Purchasing Association for the same reasons.

24. Complainant sent an e-mail to the Chancellor of the Health Sciences Center, and others, regarding Hinz's decision that Complainant could not serve as a member of the University Staff Council.

25. On November 20, 2003, Webb issued Complainant another Corrective Action. The Corrective Action addressed Complainant's lack of professional judgment in sending an e-mail to the Chancellor of the Health Sciences Center and other individuals complaining about Hinz's decision to not allow Complainant to run for a position on HSC's staff council.

26. The November 20, 2003 Corrective Action advised Complainant, "Failure to abide by this corrective action may result in further corrective actions and/or disciplinary actions which could include suspension, reduction in pay, demotion, termination or some other action which may affect your pay, status or tenure."

27. Complainant did not grieve the November 20, 2003 Corrective Action.

March 1, 2004 Corrective Action

28. On March 1, 2004, Webb issued Complainant another Corrective Action. The Corrective Action addressed Complainant's pattern of arriving late for work and his pattern of calling in sick or late after a day off from work.

29. In the March 1, 2004 Corrective Action, Webb again wrote, "Failure to abide by this corrective action may result in further corrective actions and/or disciplinary actions which could include suspension, reduction in pay, demotion, termination or some other action which may affect your pay, status or tenure."

30. Complainant did not grieve the March 1, 2004 Corrective Action.

July 30, 2004 Disciplinary Action

31. On July 30, 2004, Webb issued Complainant a Disciplinary Action letter. The Disciplinary Action letter addressed the following issues: 1) customer service complaints; 2) a continued pattern of arriving late for work and calling in sick or arriving late for work after a three-day weekend; 3) Complainant's need to limit his personal conversations; and 4) Complainant's need to maintain a positive attitude while at work.

32. The disciplinary action Webb imposed was an indefinite 10% reduction in Complainant's pay (a reduction of \$450.00 per month).

33. Complainant appealed the July 30, 2004 Disciplinary Action.

34. The parties reached a settlement regarding the July 30, 2004 Disciplinary Action.

35. On October 15, 2004, Webb drafted a letter memorializing the terms of the settlement of the July 30, 2004 Disciplinary Action. The terms of that agreement were as follows:

- Within fifteen days of the date of the settlement agreement, Complainant would withdraw his State Personnel Board Appeal.
- The disciplinary action taken against Complainant (reduction of his salary of \$450.00 per month) would end after the October pay period.
- Within fifteen days of the date of the agreement, Complainant and Hinz "will seek mediation to resolve unaddressed employment issues," including Complainant's concerns about his workload and the manner by which his performance was evaluated and the relationship between Complainant and Hinz and PSC management and the friction between Complainant and PSC management.
- If Complainant met the expectations set forth in the settlement agreement by the date of his 2005 Performance Evaluation, Webb would give good faith consideration to reassigning Complainant to another supervisor, but only after factoring in all organizational concerns within the PSC. The expectations set forth were:

- You are expected to be at your desk ready to work at your assigned work time which was 8:30 a.m. Your hours are 8:30 a.m. to 5:00 p.m. with a one half hour lunch from 12:30 p.m. to 1:00 p.m. (as of October 18, 2004). You will notify your supervisor in advance if you are going to be late, every time you are late. If you continue to be chronically late, you will be disciplined. Furthermore, if you are more than fifteen minutes late more than twice in any two-week period without a pre-scheduled reason, barring unusual or

unforeseen emergency circumstances, you will be immediately disciplined.

- You will not take unscheduled leave except as medically necessary. If you take unscheduled sick leave the date before or after a scheduled vacation day, holiday or weekend, you will provide a written excuse from a medical health professional. If you do not provide such documentation you will be immediately disciplined.
- You are expected to provide excellent customer service by being responsive to your customers. You will respond to customer inquiries within sixteen business hours of receiving them. If you cannot respond within sixteen business hours, you will inform your supervisor and seek assistance. If you receive more than two customer complaints within any two-week period which I [Webb], in my sole discretion, deem to be material and within your control, you will be immediately disciplined.
- You are expected to cognizant of your influence on office morale and to maintain a positive attitude at all times.
- You are expected to confer with your supervisor if you have questions on policies or procedures. You will communicate with our supervisor through regularly scheduled one-on-one meetings on work-related issues. As noted in your most recent coaching session, your supervisor will review your work product to ensure compliance with policies and procedures either written.
- You are expected to limit the amount of non work-related time you spend out of your office and that you will limit your non work-related conversations in terms of time and frequency.

36. The settlement letter further stated that failure to comply with the above stated expectations "may lead to further discipline, up to and including termination."

37. As a result of the settlement of the July 30, 2004 Disciplinary Action, none of Complainant's Corrective Actions, nor his Disciplinary Action, was removed from his personnel file.

38. Pursuant to the settlement agreement, Complainant and Hinz did attend two mediation meetings.

39. Although Complainant felt the mediation sessions were helpful, Hinz felt they were ineffective and counter-productive. With Webb's consent, Hinz terminated the mediation sessions. The mediation sessions ended in late November or early December of 2004. Hinz sent Complainant a memorandum on December 7, 2004, informing him that she was discontinuing mediation.

40. Complainant sent a memorandum to Webb and others in PSC management saying that he disagreed with the discontinuation of the mediation sessions.

Tote Bag Requisition

41. On or about December 22, 2004, Jennifer McIntyre of the University's Department of Preventive Medicine and Biometrics initiated a requisition to Complainant requesting the procurement of some tote bags. The requisition appeared in Complainant's queue that day and he printed the request. The cost of the tote bags was \$10,435.00. McIntyre wanted the tote bags to be purchased by the end of the year because the money she wanted to use to purchase the tote bags came from a federal grant. If the grant money was not used by the end of the year, it would no longer be available to her department.
42. If a requested procurement exceeds \$5,000, the Complainant, or any other purchasing agent, would have to have commence the bidding process from numerous vendors to ensure that the University received the lowest price on the item.
43. An exception to the bidding process when a requisition exceeds \$5,000, is when the vendor proposed by the requesting party is the only vendor who can supply the requested item. An example would be when the item being requested is proprietary in nature.
44. When McIntyre faxed her requisition for the tote bags, she also faxed Complainant a document entitled "Sole Source Justification," asking that a vendor named AdLink provide the tote bags. Complainant did not instruct McIntyre to complete the Sole Source Justification document.
45. Complainant did not think that tote bags would ever qualify for a sole source justification, and confirmed that understanding with Hinz. However, there was a logo which was to go on the tote bags, which may have made them proprietary in nature, but Complainant never thought a sole source justification was appropriate for the tote bag requisition.
46. On either December 22 or December 23, Complainant informed McIntyre that the tote bags did not qualify for a sole source justification. On December 23, 2004, Complainant faxed McIntyre a copy of the rule concerning emergency procurements, even though he did not believe that the tote bag purchase qualified as an emergency purchase. Although Complainant sent the rule to McIntyre to show her that her the tote bag purchase did not qualify as an emergency purchase, he did not explain that to her. McIntyre misinterpreted Complainant's intention and quickly prepared the paperwork for an emergency purchase of the tote bags. Her request for an emergency purchase was denied.
47. It was against PSC policy for purchasing agents to fax their rules to Departments; it is the purchasing agent's responsibility to interpret the rules and explain them to customers.

48. Complainant's lack of communication with McIntyre regarding the emergency rule caused her unnecessary work and constituted poor customer service.
49. If McIntyre had reduced her requisition to under \$5,000, the requisition did not need to be sent out for bidding even if it did not qualify as a sole source justification. However, Complainant did not give McIntyre that information.
50. Because the money in question came from a grant, Complainant contacted an employee, Anita Johnson, in the Grants and Contracts section to get approval for the requisition.
51. Johnson informed Complainant that she wasn't sure if the requisition contained the appropriate grant code and she needed to research it and get back to him.
52. When Complainant had not heard from Johnson by December 23, he went to see her. Johnson told him that she could not find the grant file and that she needed to look for it.
53. Complainant then told Charlie Geanetta, another supervisor at PSC, that he could not move forward on the tote bag issue because he had not heard back from Johnson. Complainant gave this information to Geanetta because Hinz was out of the office.
54. When Complainant returned to work after the Christmas holidays, he still had not heard from Johnson. When he contacted her, she apologized and said she had been out of the office.
55. By December 28, 2004, the bidding process was no longer a viable option. However, Grants and Contracts had still not approved the use of the funds, so bidding probably could not have been done before that date.
56. The tote bags were not purchased by the end of 2004. Johnson did not provide approval until January 4, 2005.
57. McIntyre was frustrated that the purchase was not made, but did not feel like she knew enough about the process to blame anyone. She did feel that Complainant went out of his way to help her succeed in the procurement of the tote bags. She told him, verbally, that she appreciated his efforts. Complainant responded by telling her that if she was so inclined, she could put her words of appreciation in an e-mail.
58. Complainant was not responsible for the lack of success in procuring the tote bags by the end of the year because Grants and Contracts did not provide approval. However, he did provide incorrect information regarding emergency purchases, which caused McIntyre, a PSC customer, to do unnecessary work.

59. Geanetta provided a memorandum to Hinz concerning the tote bag purchase requisition. In that memorandum, Geanetta incorrectly told Hinz that Complainant instructed McIntyre to prepare a Sole Source Justification document.

60. Complainant did not violate any regulations, rules or statutes in the manner he handled the tote bag requisition.

Veritas Software Requisition

61. On or about December 20, 2004, one of Complainant's co-workers, another purchasing agent, Kerry Boyle, was leaving to go on vacation.

62. During Boyle's absence, Complainant was to act as Boyle's backup. Before leaving on vacation, Boyle gave Complainant a package of documents related to a requisition from one of the University's departments. The requisition was for consulting and training costs from a vendor known as Veritas Software Global Corporation. The requisition had first appeared in Boyle's queue on December 16, 2004.

63. Boyle had completed all of the work on the requisition, but was waiting for a Sole Source Justification document from the requisitioning department. Boyle attached a note to the package, which read, "JW Need SSJ [Sole Source Justification] from Brenda Sinclair [the person who submitted the requisition]. Then forward for Pre-Contract Approval. (DH, SH) Then Give copies to Fincher."

64. In addition to the note, Boyle and Complainant met to discuss the Veritas Software requisition, as well other work issues that may arise in Boyle's absence.

65. The only actions Complainant would have needed to take were to review the Sole Source Justification document, sign it and forward the materials to Hinz.

66. The Sole Source Justification form was faxed into the PSC at 4:51 on December 22, 2004. The person who normally received and delivered the faxes was not in the office at that time.

67. Complainant checked his box, as well Boyle's box, frequently, but did not receive the faxed Sole Source Justification document.

68. Complainant did not receive the fax until January 4, 2005. It is unknown where the fax was between December 22, 2004, and January 4, 2005. Even though Complainant did not receive the fax, he should have called the requisitioning department to see if the Sole Source Justification document had been faxed. Complainant knew he should have made efforts to locate the Sole Source Justification document, but did not because he was working on many other things.

69. An employee from the requisitioning department contacted Webb to inquire about the status of the requisition. It is unusual for a customer to contact Webb about the status of a requisition. The fact that a customer would contact Webb, an Assistant Vice President and Director of the PSC, indicated that there was a problem with customer service and a negative reflection of the PSC.
70. When Boyle returned on January 4, 2005, Complainant returned the packet of materials to him, along with the Sole Source Justification document and told him he had been unable to get complete the process. At that point, Boyle took the packet to Hinz and told her that it was a "rush" job that needed to be processed immediately.
71. Complainant did not violate any statutes, rules or regulations in his handling of the Veritas Software requisition.
72. Complainant did not provide good customer service in his handling of the Veritas Software requisition.

Bear Creek Recreation Center Sound System

73. In September of 2004, Bear Creek Recreation Center (Bear Creek) requisitioned a sound system for its aerobics room. The requisition request appeared in Complainant's queue on or about September 22, 2004. The proposed requisition was \$9,996.10.
74. In an e-mail to Complainant dated September 22, 2004, Iris Rumbley, the person at Bear Creek who interfaces with the PSC, indicated that Bear Creek wanted to have the sound system in place "ASAP" as the recreation center would open on October 18, 2004. In that same e-mail, Rumbley wrote that Bear Creek wanted a vendor, Summit Integrated Systems, to provide the sound system. She further inquired as to whether she needed to complete a Sole Source Justification document.
75. On September 23, 2004, Complainant replied to Rumbley that because the requisition request exceeded \$5,000.00, he would need to get bids from other vendors. He also instructed her to send a Sole Source Justification document, and then he would contact her as soon as possible.
76. Rumbley faxed the Sole Source Justification form to Complainant on September 23, 2004. The next day, Complainant e-mailed her and asked if Summit Integrated Systems was the only vendor who could provide the sound system.
77. Complainant concluded that the requisition did not qualify for a sole source justification because other vendors could also install a sound system for Bear Creek and the requested equipment was widely available.
78. On September 27, 2004, Brennan Wilkins of Summit Integrated System e-mailed Complainant and told him that Summit's proposal included its design system, and

that if the University placed its design out for general bidding, the University would incur a design fee.

79. Without using Summit's design, Complainant could have used the information Summit provided to obtain additional information and put out a bid to vendors. Complainant could have then put out a narrative bid for the sound system without using Summit's design.
80. The expectation at PCS is that a purchasing agent will do whatever he or she can to procure a procurement in a timely manner.
81. Complainant first talked to Hinz about the requisition on October 19, 2004, about a month after the PSC received it. Hinz suggested that Complainant construct a narrative as described above and send it out to vendors for bids. Complainant should have been able to construct a bid based on his experience, and could have received additional information from using the Google search engine.
82. Complainant asked Patti Kish, the coordinator of the aerobics program and the person who would be the primary user of the sound system at Bear Creek for additional specifications, but did not do any independent investigation about what would need to be included in the bid proposal. Complainant first asked Kish for this information shortly after he received the requisition.
83. On November 2, 2004, Rumbley e-mailed Complainant asking him the status of the sound system requisition. Complainant replied, "I have talked with Patty last week and I am waiting for specific specifications from her so that we can put out a documented quote on the State Colorado Bid System. I have also call [sic] today and left a message to follow-up with Patty as to when I will receive the specifications."
84. Complainant left another voice message for Kish on November 11, 2004, and also talked to Wilkins of Summit Integrated Systems regarding the cost of a design fee.
85. On December 9, 2004, Rumbley e-mailed Complainant and told him that Kish was going to design the sound system and send the specific requirements to Complainant so he could send it out for bids. Kish sent the specifications to Complainant on December 15, 2004. Even after receiving that information from Kish, Complainant said he still needed to do additional research before initiating the bid process.
86. On December 30, 2004, Nan Lu, Rumbley's boss at Bear Creek, e-mailed Complainant asking if the Kish's specifications were sufficient and the status of the requisition. Complainant replied, "I am still working on this request. I should hope to have this ready to go out for bid next week."

87. Hinz periodically asked Complainant about the status of the requisition. Each time Complainant would tell her that he hadn't started working on the bid. On January 6, 2005, Complainant told Hinz that he had not yet begun work on the bid for the sound system but would that day. Hinz was concerned because it appeared to her that Complainant was "fumbling" with the requisition, and had been giving her the same answer for three weeks.
88. Hinz called Kish to discuss the requisition on January 6, 2005. Kish told her that she was very frustrated with Complainant and his lack of knowledge about sound systems and how to bid them out to vendors. Kish also said she spent an entire weekend putting together the specifications and Complainant still told her he needed more information.
89. At that point, on January 6, 2005, Hinz took the requisition away from Complainant and began working on it herself. Hinz quickly sent the requisition out for bids. Although Hinz used the specifications Kish sent to Complainant on December 15, 2004, she could have constructed a bid using only the Summit Integrated Systems proposal.
90. The sound system was installed over the University's Spring break.
91. At PSC, it is very rare for a procurement to go unprocessed as long as the Bear Creek sound system requisition did.
92. Hinz was very concerned about the way Complainant handled the Bear Creek sound system requisition. As a fifteen-year employee, Complainant should have been better able to problem solve and he did not utilize the resources available to him. Hinz was also concerned that Complainant kept blaming the customer instead of completing the necessary work to send the requisition out for bids.
93. Complainant did not violate any statutes, rules or regulations in his handling of the Bear Creek sound system requisition.
94. Complainant did not provide efficient or satisfactory customer service in his handling of the requisition for a sound system at Bear Creek.

Tunisia Landers Incident

95. Complainant developed a friendship with a PSC temporary employee, Tunisia Landers.
96. Landers' supervisor, Annette Howard, was concerned with the amount of time that Landers spent in personal conversation while at work.
97. Complainant and Hinz met weekly in one-on-one meetings to discuss work related issues and problems. At the conclusion of one of those meetings on December 21,

2004, Hinz asked Complainant to minimize the amount of time he spoke to Landers during work hours. Complainant did not respond to that request.

98. After Hinz concluded her meeting with Complainant, she went to speak to Howard. Landers' work station was outside of Howard's office.

99. Within a few minutes, Complainant came to talk to Landers. Both Howard and Hinz observed Complainant talking to Landers. The conversation between Landers and Complainant lasted for about ten minutes. Complainant wanted to tell Landers that he had been told not to talk to her so Landers would not think he was snubbing her.

100. Hinz was surprised that Complainant would talk to Landers during work hours immediately after being told to minimize his conversations with her.

101. Hinz felt that by almost immediately talking to Landers, after being told to limit his conversations with her, Complainant was flaunting his disrespect for her and was being insubordinate.

Complainant's Workload and Accountability

102. Complainant frequently asserted, including during his R-6-10 meeting, that his workload was very heavy. Hinz did an analysis and concluded that Complainant's workload was no heavier than that of the other purchasing agents.

103. After the settlement of the July 30, 2004 Disciplinary Action, Complainant was only late to work on two occasions. On both of those occasions, he was either two or three minutes late.

104. Complainant's tardiness on those occasions was the least of Hinz's concerns regarding Complainant.

R-6-10 Meeting

105. In early January of 2005, Hinz conveyed her concerns to Webb regarding Complainant's work performance. Webb asked her to put her concerns in writing, which she did.

106. Webb scheduled a meeting pursuant to State Personnel Board Rule R-6-10 to discuss the issues. Complainant was given notice that the following issues would be discussed during the meeting: 1) customer service, which included the tote bag requisition, the Veritas Software requisition, and the Bear Creek sound system bid; 2) accountability, or tardiness; and 3) the incident surrounding Tunisia Landers.

107. The R-6-10 meeting was held on January 14, 2005. During that meeting, Complainant was given the opportunity to rebut the allegations, or provide mitigating

information regarding each issue. Complainant was represented by an individual from an employee's union.

108. As part of his investigation, after the R-6-10 meeting, Webb called McIntyre about the e-mail she sent praising Complainant's efforts. McIntyre told him that she was appreciative of Complainant's efforts, but was concerned because the procurement did not occur.
109. With respect to the tote bag issue, Complainant told Webb that he sent a copy of the rule regarding emergency procurements to McIntyre, but did not tell her that the tote bags would qualify as an emergency purpose. Complainant told Webb that he "left it up to" McIntyre to decide if the emergency rule was appropriate or not. Webb was concerned by this response because it is the responsibility of a purchasing agent to assist a customer instead of leaving it up to the customer to construe the rules.
110. With respect to the Veritas Software issue, Complainant told Webb that he did not receive the Sole Source Justification document on a timely basis. Webb was concerned that even if Complainant did not receive the faxed Sole Source Justification document, he was aware that it was expected, and should have followed up with the requisitioning department, but did not.
111. With respect to the Bear Creek sound system requisition, Complainant told Webb that he was having trouble getting information from the requisitioning department. In reviewing a timeline regarding the requisition, constructed by Hinz, Webb noted a lengthy period of non-activity by Complainant from the end of September until November 2, 2004. Webb was also concerned that Complainant did not attempt to create a bid based on the information he did have concerning the sound system request.
112. With respect to the Tunisia Landers incident, Complainant told Webb that he did not speak to Landers "immediately" after being told to minimize his conversations with her; instead, he said it was a while later. Complainant also said that he spoke with Landers for two or three minutes instead of ten minutes.
113. Complainant also told Webb that he had a very high workload and asked that his workload be considered.
114. Before making his final decision, Webb spoke to Landers' supervisor, Annette Howard. Howard confirmed that Complainant spoke with Landers almost immediately after Hinz came into her office, and that Complainant and Landers spoke for approximately ten minutes. Webb was concerned that Complainant's behavior showed a lack of respect for management.
115. Webb asked for an analysis of Complainant's workload, and concluded that it wasn't significantly greater when compared to the other purchasing agents.

116. Webb also considered that Complainant was a fifteen-year employee who had a heavy workload.

117. After considering all of the information available to him, as well as the information provided by Complainant and Complainant's history at PSC, Webb decided to discipline Complainant. Webb felt that the PSC had "bent over backwards" to help Complainant conform, but had not been successful.

118. Webb considered a range in discipline, including a reduction in pay, suspension, or termination. After considering the PSC's efforts concerning Complainant, Webb concluded that termination was the best option, considering all of the opportunities the PSC had offered Complainant to improve his performance. In making the decision to terminate Complainant, Webb considered Complainant's history with the Department.

119. On February 4, 2005, Webb sent a letter to Complainant advising him that he had decided to impose discipline in the form of termination. In February 4, 2005 letter, Webb informed Complainant that he was terminating him for: 1) Complainant's handling of the tote bag issue; 2) Complainant's handling of the Veritas Software situation during Boyle's absence; 3) Complainant's handling of the Bear Creek sound system bid; 4) accountability, or tardiness; and 5) the incident involving Landers.

120. Complainant timely appealed Webb's decision to terminate him.

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 Rule 6-12B, 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.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based

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

II. HEARING ISSUES

A. Complainant did commit most of the acts for which he was disciplined.

Complainant provided poor customer service with respect to the tote bag requisition. Complainant did not tell McIntyre to prepare a Sole Source Justification document (as alleged in Webb's letter terminating Complainant). However, he did fax a copy of PSC's rule regarding emergency purchases to McIntyre, without explanation, even though he knew there was no way that tote bags would constitute an emergency purchase. McIntyre, the customer, then spent unnecessary time in preparing an emergency request. Complainant also provided poor customer service regarding the Veritas Software requisition. Complainant knew that the Sole Source Justification document was expected, and did nothing to follow up on its status when he failed to receive it. Complainant's failure to handle this procurement properly prompted the customer to contact Webb, the Department Head, to determine the status of the requisition. Complainant also failed to provide adequate customer service with respect to the Bear Creek sound system requisition. Complainant could have constructed a narrative bid based on the information he had and by using the Internet. Instead, Complainant kept requesting additional information from the customer. Even when that information was received, Complainant did not find it adequate to initiate the bid process. However, Hinz was able to do so immediately based on the information she had. Complainant was also tardy on two occasions (by only two or three minutes) after signing the settlement letter in October of 2004. Finally, Complainant almost immediately disregarded Hinz's instruction to limit personal conversations with Landers, and spoke to Landers for approximately ten minutes in Hinz's presence. This act constituted deliberate insubordination.

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).

Webb used reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant. On the tote bag issue, he reviewed the e-mail sent by McIntyre praising Complainant, and called McIntyre for clarification. He also reviewed the memorandum written to Geanetta from Hinz regarding Geanetta's conversation with McIntyre. Webb incorrectly concluded that Complainant told McIntyre to complete a Sole Source Justification form. However, even if Complainant did not provide that instruction to McIntyre, and was not responsible for the procurement not being completed, he still provided inadequate customer service by faxing a completely irrelevant rule regarding emergency purchases, with no explanation. The customer, McIntyre, then expended time and energy requesting an emergency purchase, which she had no chance of ever receiving.

Webb also gathered and considered all of the relevant information regarding the Veritas Software requisition. He reviewed the relevant documentation, and allowed Complainant to explain his actions during the R-6-10 meeting. Even after giving Complainant the benefit of the doubt that he did not receive the faxed Sole Source Justification document until January 4, 2005, Webb concluded that Complainant had not provided proper customer service. Complainant knew the fax was expected, and did nothing to follow up with the customer when he did not receive it. The delayed processing of the request prompted the customer to contact Webb to inquire about the status of the requisition.

Additionally, Webb reviewed all of the relevant evidence on the Bear Creek sound system requisition. He also gave Complainant the opportunity to explain why he failed to initiate the bidding process for such a long period of time. Complainant failed to provide an adequate explanation. After considering all of the relevant information, Webb determined that Complainant provided poor customer service by not using all of the necessary resources to create a bid himself. Complainant's inaction caused the customer to become frustrated and the installation of the sound system to be delayed.

Finally, Webb gathered all of the relevant evidence concerning the Tunisia Landers incident and Complainant's tardiness. Although, there were conflicting accounts of how quickly Complainant spoke to Landers and the length of time he spoke with her, Webb reasonably concluded that Complainant soon went to speak to Landers and spoke to her for about ten minutes in Hinz's presence. To Webb, such behavior constituted insubordination. Additionally, Webb did determine that Complainant was late by two or three minutes on two separate occasions after settling his prior disciplinary action. However, these incidents of tardiness were very minor to Webb.

Complainant argues that the October 15, 2004 agreement outlining the terms of settlement for the July 2004 disciplinary action constituted a contract between him and PSC. That agreement was made solely to resolve the July 2004 disciplinary action. Complainant further argues that unless he breached the terms of that contract, he could not be disciplined. Complainant reasons that because he did not breach the terms of the October 15, 2004 contract, he could not be disciplined. Complainant alleges that it was PSC, not Complainant, who violated the terms of the agreement. First,

Complainant asserts that Respondent violated the terms of the agreement when Hinz unilaterally terminated the mediation process after only two sessions. This argument is both incorrect and irrelevant. The agreement provided, "you [Complainant] and your supervisor, Danielle Hinz will seek mediation." Complainant and Hinz did seek mediation, and participated in two sessions. There was no obligation in the agreement regarding the length of the mediation process. However, even if Hinz's decision to discontinue mediation was a "breach" of the settlement agreement, it is irrelevant to the issues in this appeal. Complainant was terminated for acts which took place after the October 15, 2004 agreement.

Complainant further argues that he could not be terminated for the three customer service incidents at issue in this case because the October 15, 2004 agreement provides, "You are expected to provide excellent customer service by being responsive to your customers. You will respond to customer inquiries within sixteen business hours of receiving them. If you cannot respond within sixteen business hours, you will inform your supervisor and seek assistance. If you receive more than two customer complaints within any two-week period which I, in my sole discretion, deem to be material and within your control, you will be immediately disciplined." Complainant reasons that because he did not receive more than two customer complaints in a two-week period, Webb could not discipline him. The ALJ disagrees with that reasoning. The letter does not state that Complainant could be disciplined *only if* there were two customer complaints in a two-week period; it simply provided a situation where discipline would be assured. If Complainant's reasoning were followed, he could never be disciplined again for poor customer service as long as there were no more than two customer complaints in two-week period. In this appeal, there were three instances of poor customer service, all of which were properly considered under State Personnel Board Rule 6-9B.

State Personnel Board Rule 6-9B requires an appointing authority to consider the following factors before deciding to take corrective or disciplinary action against an employee: "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Webb, as the Appointing Authority, considered those factors in making his decision to discipline Complainant. Webb had the authority to discipline Complainant for future acts, and was not restricted by the terms of the October 15, 2004 settlement agreement. Webb concluded that discipline was appropriate for Complainant given Complainant's three instances of inadequate customer service, Complainant's insubordination in talking to Landers very soon after being told to limit his conversations with her, and Complainant's tardiness.

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

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well

as Complainant's individual circumstances. Board Rule 6-9B, 4 CCR 801. Complainant received five Corrective Actions and a Letter of Expectation before Webb made the decision to terminate Complainant. Complainant was given ample opportunity to correct his behavior, but failed to do so satisfactorily. Webb considered lesser forms of discipline but concluded that Complainant's behavior was not correctable because of Complainant's failure to correct his behavior after several warnings and under several supervisors.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38B, 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 8-38B, 4 CCR 801.

Complainant requested an award of attorney fees and costs. Because he did not prevail in this matter, there is no basis for such an award.

CONCLUSIONS OF LAW

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

ORDER

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

Dated this 15th day of March, 2006.


Hollyce Farrell
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 8-68B, 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 8-73B, 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 R-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 R-8-65B, 4 CCR 801.

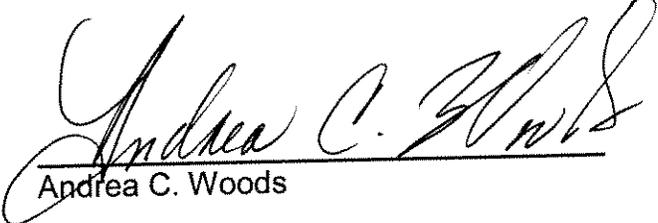
CERTIFICATE OF SERVICE

This is to certify that on the 16th day of March, 2006, 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:

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