

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

---

**TERRY J. MILLER,**

Complainant,

vs.

**DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF NORTHERN COLORADO,**

Respondent.

---

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 20 and 29, 2005, at the State Personnel Board, 633 17<sup>th</sup> Street, Suite 1320, Denver, Colorado. Nora Kelly, Esquire, represented Complainant. Joseph Haughain, Assistant Attorney General, represented Respondent.

**MATTER APPEALED**

Complainant, Terry J. Miller (“Complainant” or “Miller”) appeals his disciplinary demotion by Respondent, Department of Higher Education (“DHE”), University of Northern Colorado (“Respondent” or “UNC”). Complainant seeks reinstatement, back pay, benefits, and attorneys 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 Complainant is entitled to an award of attorney fees and costs.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant commenced employment at UNC in 1985 as a stationary engineer in the boiler plant. In April 2000, he transferred to an HVAC Technician position in the HVAC shop. His position was later reallocated to Pipe and Mechanical Trades II.
2. Complainant performed preventive maintenance on heating and cooling systems on the UNC campus.

### **2003 Performance Issues**

3. Ron Gross was Complainant's supervisor from 2000 through December 2003.
4. Gross rated Complainant an overall Proficient for the 2001/2002 rating period.
5. In 2003, Complainant's performance began to decline. He developed a pattern of lacking focus on the job. He took excessively long to complete the tasks assigned.
6. In March 2003, Complainant was involved in a project to install heating ductwork in Gray Hall, an historic building. Miller had assisted in assembling the heating register grills; the grills were there on the job site. It was Miller's job, with a co-worker, to clear an area where the heating grills would not interfere with the ceiling joists (which support the ceiling and roof).
7. Complainant and his co-worker cleared an area where ceiling joists were located. Therefore, once the mistake was discovered, the entire area had to be re-drywalled, plastered, and re-framed.
8. Gross asked Miller what he could have done differently. Miller responded that he had no experience with ductwork, and did not know that they were doing. Gross asked him why he had not asked questions. Complainant shrugged his shoulders. Gross was very frustrated that Complainant had not asked questions about the project prior to making mistakes based on insufficient information.
9. Gross directed Dave Nalley, a co-worker, to write up notes on this incident.
10. Rocky Mountain Aquatech performed a semi-annual demonstration in how to set automated chemical controls and prime the pump in the large cooling towers. Part of that regular training included pressing a red button on the Model 10 cooling tower in order to prime the pump.
11. Complainant had attended these semi-annual demonstrations for the last three years; priming the pumps on these machines was part of his preventive maintenance

2005B112

duties.

12. However, Miller somehow forgot how to prime the pump for the model 10 cooling towers. In July 2003, Miller asked Gross how to prime one of the towers, and Gross simply pressed the red button. Miller was amazed and asked if all of the model 10 controllers had that button. Gross was stunned that Miller had somehow forgotten this, and asked Miller how many years he had been trained on this piece of equipment and making maintenance rounds on it. Miller shrugged his shoulders and said he didn't know.

13. One of Miller's responsibilities was to change the oil in cooling towers. After draining the oil in two cooling towers, he forgot to re-fill the oil in one of them. Had the problem not been discovered, the gear box on the cooler would have been burnt out and would have had to be replaced, costing thousands of dollars.

14. Another of Miller's responsibilities was to drain the air out of a cooling system so that the pump will work. In July 2003, Miller left the valve closed on a pump, causing pressure to build up. The pump blew open, causing chemicals to spray across the room.

### **2003 Evaluation and Performance Improvement Plan**

15. Ron Gross involved Kirk Lechlitter, then the Director of Facility Operations at UNC, in several meetings with Miller to discuss his performance problems. Gross's goal was to help him improve his performance. These meetings did not succeed in improving Miller's performance.

16. In March 2003, Gross rated Complainant an overall Proficient for his final 2003 evaluation. However, he gave Complainant four Needs Improvement ratings in major performance areas: Job Knowledge; Professional Conduct/Reliability; Motivation/Commitment; and Program Solving/Reasoning.

17. Complainant checked the box, "I agree with this evaluation."

18. On March 27, 2003, Ron Gross gave Complainant a Performance Improvement Plan, to be used to raise his level of performance for the 2003/2004 evaluation period.

19. The Plan included the following: providing technical assistance to others in need; pursue professional development; learn about time management for effective use of time; perform tasks in a more timely manner; learn to ask questions about a task even when the slightest bit unsure of how or what to do; complete goals as assigned; take more responsibility in all phases of work; improve his judgment as a mechanic; improve his self-esteem and his communication with others about the job; assure proper care and location of tools.

20. In July 2003, Gross, Miller, and Lechlitter met to discuss Miller's performance problems. Miller demonstrated little desire to improve. When asked whether he had

2005B112

retained a copy of the Performance Improvement Plan, he responded that he had lost it. Gross gave him another copy.

### **Development of UNC HVAC Evaluation Planning Criteria**

21. Kirk Leichliter has been the Director of Facilities Management at UNC since approximately September 2004. Prior to assuming this position, he was Director of Facility Operations for nine years at UNC; and prior to that he was a maintenance supervisor at UNC. Mr. Leichliter has a dearth of experience evaluating the managers and shop supervisors in the HVAC shop and other shops on campus.

22. Leichliter felt that the performance evaluation form provided by the State of Colorado was so general as to provide little guidance for employees and supervisors, and that it left opportunities for confusion for all involved. In 2003, he convened a working group of UNC shop managers to develop an expanded performance evaluation document.

23. The resulting sixteen-page document, "UNC HVAC Evaluation Planning Criteria," has been in use in the HVAC shop since 2003. The document contains nine Mandatory Goals taken directly from the State of Colorado evaluation form, such as "Job Knowledge/Accountability," "Motivation/Commitment," and "Safety." It then provides a list of specific behaviors that constitute Needs Improvement (a list of 15), Proficient (a list of 16), Exceeds Expectations (a list of 16), and Superior Achievement (a list of 16), in each Goal area.

24. For example, some of the behaviors listed under Job Knowledge/Accountability at a "Needs Improvement" level are: "1. Has little knowledge of policies & procedures . . . 7. Unable to perform all job duties stated on PDQ, 8. Unwilling to perform all job duties stated on PDQ, 9. Frequently needs advice on job assignments."

25. "Proficient" behaviors in Job Knowledge include, "1. Understands policies & procedures involved with job and is able to incorporate them into his/her job with minimal errors, 2. Occasionally needs help in doing tasks . . . , 8. Can perform all job duties stated on the PDQ with little supervision, 9. Seldom complains about job assignment, 10. Seldom needs advice on completing job assignment."

26. "Exceeds Expectations" behaviors in Job Knowledge include, "1. Has thorough understanding of policies & procedures and is able to incorporate them into his/her job assignments rarely making errors, 8. Performs all job duties listed on PDQ at a journeyman level and rarely receives call backs on any work performed, 9. Rarely complains about a job assignment. . . , 10. Rarely needs advice on completing the job assignment. . . ."

27. UNC managers have found the Evaluation Planning Criteria forms to be extremely helpful in the performance evaluation process. Other agencies had adapted it to their own worksites.

## **UNC Performance Pay Program Guide**

28. UNC also encourages its managers to use the Performance Pay Program guide in evaluating employees. This document provides details in how to conduct a thorough and fair evaluation.

29. The section on “Coaching, Feedback and Progress Review” encourages supervisors to give concrete examples of what the employee has done, both positive and negative.

30. The “Evaluation Completion” section encourages supervisors to consider information and feedback received from co-workers, customers, or other sources. In addition, it encourages supervisors to use self-evaluations.

## **Dave Nalley and 2004 Performance Issues**

31. In December 2003, Ron Gross departed and Dave Nalley became supervisor of the HVAC shop. Nalley and Miller had been friends, having socialized together after work.

32. Gross had often asked Nalley to document Miller’s performance problems, prior to Nalley’s promotion. Nalley was aware that Complainant had trouble completing jobs in a timely manner, and focusing on the tasks assigned.

33. At the time Nalley assumed the HVAC shop supervisor position, Ron Gross had already rated Complainant an overall Needs Improvement on his mid-year 2004 evaluation.

34. In December 2003, Complainant had continuing performance problems, which Nalley documented. On December 4, 2003, Miller was assigned to a project; the tools were already at the job site. He initially set up his tools at the wrong job site. Two hours and forty-five minutes after receiving the assignment, he had still not located the job site, but was taking a break. When asked why he had set up at the wrong location, he responded that he had just gotten confused.

35. Twice in December 2003, Miller noticed leaking control valves on the job site on a Friday, but neglected to inform anyone in the HVAC shop until the following Monday. After the first incident, which resulted in a ten-foot wet area on the floor, he had been told to use the radio to report leaks immediately. He did not do so.

36. On December 22, 2003, Miller arrived at work and informed Nalley he had a list of items to work on in the Turner building. Nalley stated that a co-worker was already working on that list at Turner. He directed Miller to give his list to that co-worker and to report for duty with a different co-worker in another building. Miller violated this directive, and went to work on his own list in Turner.

## **Miller's Work Habits**

37. One of Miller's work habits was to take it upon himself to fix all of the maintenance problems he encountered in the course of performing a specific assigned task. For example, while he was fixing one machine, he would hear that another machine was not functioning properly. Instead of informing Nalley of the problem and enabling him to place this item on the list of work items for the shop, Miller made the unilateral decision to fix the problem without informing Nalley of it.

38. This practice caused Miller to stay on the job site for extremely long periods of time. In addition, it deprived Nalley of his ability as supervisor to prioritize the work of the HVAC shop.

39. Miller viewed his work habits as that of a perfectionist. He highly valued his contribution to the HVAC shop, because he believed strongly that to address every problem as he discovered it would save the shop from having to deal with the problem down the road, after it became more serious.

40. Nalley did not approve of Miller's work habits. He wanted Miller to perform specific tasks assigned, then check back with him immediately upon completion.

41. Nalley directed Miller to inform him of problems he encountered while performing assigned duties. Miller could have done so via radio, as all HVAC staff and Nalley had radios in their possession on the job.

42. Nalley repeatedly counseled to Miller about the fact he was not completing tasks fast enough. He ordered Miller to work faster and more efficiently, and to stay focused on the jobs Nalley assigned him.

43. Miller did not comply with Miller's directives. At hearing, Miller testified, "He [Nalley] couldn't understand how I could go from one job to another." Nalley became increasingly frustrated with Miller.

44. In January 2004, Miller took all day to pack control valves, a job that normally took no longer than one hour.

45. On February 2, 2004, Miller attempted to install the wrong sized motor in an exhaust fan. He had not checked it at the warehouse to assure it was the right one.

46. On February 4, 2004, Miller fell asleep during a meeting.

## **Co-workers' View of Miller**

47. Miller's co-workers had no problem with his work habits. They viewed him as a dependable, extremely thorough co-worker. They accepted his approach to the job,

2005B112

appreciating his philosophy that if he took care of problems as he found them, it would minimize problems down the road. There is no evidence in the record they shared Miller's work habits.

48. Nalley did not interview either of the men Miller worked with the most, as part of his process of evaluating Miller's performance.

#### **2004 Needs Improvement Evaluation**

49. Nalley used the UNC HVAC Evaluation Planning Criteria form with Complainant in completing his final 2004 evaluation. He rated Miller at an overall Needs Improvement level.

50. Complainant signed the box on this Needs Improvement evaluation, "I agree with this evaluation." Complainant felt that he could improve in the areas noted.

51. Complainant did not appeal the evaluation through the performance management procedures available to him. He did not submit a self-evaluation.

52. Nalley attached a two-page list of performance problems to the 2004 Evaluation, entitled, "Documentation of Terry Miller, 12-01-03 through 02-04-03." The list included several of the performance problems cited above. It specifically noted his failure to follow orders given by the supervisor containing the priority jobs for the day, and instead working on items he unilaterally determined were more important, and his taking an excessively long time to complete tasks assigned.

#### **Marshall Parks and 2004 Corrective Action**

53. Marshall Parks was the Human Resources Director at UNC at all times relevant. It was his standing policy to require any supervisor issuing a Needs Improvement evaluation to discuss it with him. This assured that he was in the loop and that he could confirm his line supervisors were complying with the personnel rules.

54. Parks knew Miller personally, through community volunteer work they had done together, and through their tenure at UNC.

55. Parks directed Nalley to issue a Corrective Action to Complainant in connection with the Needs Improvement evaluation, per State Personnel Board Rule R-6-4. Nalley issued it on April 12, 2004, after having Kirk Leichliter review it. It stated in part, "As discussed with you on 3-24-04, as an Eighteen-year employee and with four years extensive related experience in HVAC you have not exhibited the qualities, diligence, or initiative that produces superior results. You have not displayed any significant improvements in teamwork, or your own personal accountability/responsibility. Failure to follow instructions and failure to perform duties, assignments in an expedient manner are key components in overall evaluation."

2005B112

56. The Corrective Action required that Complainant bring his performance up to a Satisfactory level, as was noted on his evaluation form. Nalley did not impose a specific date by which Complainant had to improve; he noted, "We will conduct periodic reviews of your progress as needed."

57. Miller did not grieve this Corrective Action. Miller did not ask Nalley for clarity on how to comply with it.

58. Nalley had periodic meetings with Miller. Miller improved his performance in some areas for a period of time. Generally, however, his performance did not improve.

59. Nalley found that the regular meetings with Miller were placing too much pressure on Miller, so he cut back on the meetings. This approach also did not yield the results he sought.

### **July 2004 Evaluation Planning Criteria Meeting**

60. On July 1, 2004, Nalley met with Complainant in order to provide him specific feedback on his job performance deficiencies. He brought a copy of the UNC HVAC Evaluation Planning Criteria form, with Complainant's performance level highlighted in every single category. He gave it to Miller, and reviewed it with him.

61. At this meeting, Miller had the opportunity to ask Nalley any questions he may have had regarding Nalley's concerns about his performance. He did not ask any questions.

62. Miller never requested additional training or education in order to improve his job performance.

63. The HVAC Evaluation Planning Criteria form Nalley gave Miller in July 2004 contained the following information, in part:

- In Job Knowledge/Accountability, he was at a Needs Improvement in several behaviors, including "7. Unable to perform all job duties stated on PDQ, 9. Frequently needs advice on job assignments, 10 Work performed needs to be redone by others or self due to lack of quality., [and] 13. Never volunteers for any type of committee work set up to help the work unit as a whole." The remainder of behaviors were at a Proficient or higher level.
- In Professional Conduct/Reliability, he was at a Needs Improvement level in the following behaviors: "1. Has an 'I don't care' attitude and is usually vocal about displaying his/her apathy for the work place. 3. Eventually gets the job done but takes way over the time allotted due to excessive visiting, shopping around when getting materials, generally lolly gagging, etc., 4. Work place is often in disarray, confusion is displayed, quality of work is lacking, 9. Has trouble completing job

2005B112

assigned. Does not stay focused on task at hand.” The remainder of behaviors were at a Proficient or higher level.

- In Motivation/Commitment, he was at Needs Improvement level in the following: “5. Lags behind at the start of the day. Usually the last one to actually get to work, 7. Usually has forgotten something once he/she arrives on the job and must return to the shop. Has to make an extra trip to the store because of lack of planning.” The remainder of behaviors were at a Proficient or higher level.
- In Safety, Complainant was at Proficient in all categories.

### **2004/2005 Performance**

64. Complainant had continuing problems in his performance. In September 2004, Miller installed the wrong size flange gaskets on a set of valves on a job. Nalley had approved overtime for the job he was performing, and found later that the reason overtime was needed was Miller’s failure to evaluate the project appropriately, prior to starting the work.

65. Nalley made notes on this incident.

66. In late September 2004, Nalley made additional notes about Miller getting little done during the day and not listening to directions. On one day he had directed Miller to inform him if he was unable to get a relief fan running in the gym where he was working. The following Monday, Nalley learned that he had not done so. Miller told Nalley that he had forgotten.

67. In October 2004, Nalley made notes inciding his serious concern about “Terry’s competence and overall well being.” Miller had been working on a pump and asked Nalley whether a high temperature water unit had a safety valve. Nalley wrote, “After working at the heat plant for 14 years one would assume he would know the answer: the reliefs are in the heat plant.”

### **January 2005 Meeting with Parks**

68. In January 2005, Nalley informed HR Director Parks that Miller was still not improving his performance. Parks called Miller and asked him to come meet with him. He wanted Miller to understand the seriousness of his performance problems, and sought to help him turn it around.

69. Parks and Miller met for forty-five minutes. Miller informed Parks that he was the most detailed in his approach to the work of the HVAC shop, more thorough than the other workers, and that his work was at the appropriate level for his position.

70. Parks informed Miller that his perception of his own performance was completely

2005B112

different than that of Nalley, and that he would have to change his work habits in order to meet Nalley's demands. Parks told Miller that in order to tow the line in the HVAC shop, Miller would have to complete tasks faster and he had to improve the quality of his work. Parks counseled Complainant to limit himself to the tasks assigned.

### **February 2005 Meeting and Performance Memo**

71. During the week of February 7 – 11, 2005, Nalley had a meeting with Complainant to address areas he needed to improve in. The most important issue discussed was the excessive amount of time Complainant took to complete assigned tasks. Nalley gave examples of projects that had taken too long to complete. One example involved his having sent Miller to complete a job at 7:45 a.m., only to find that at 11:30 a.m., Miller was still trying to find the right tool for the job. At 1:15 p.m. that day, Miller was finally ready to start the job. Nalley stated in the memo that this job should have been completed by 10:00 a.m.

72. Nalley stated in the memo that if Miller was unable to stay on task and complete assignments in a timely manner, he might face demotion or termination. Nalley sent this memo in order to get through to Miller that he had to change his work habits, or he would be facing disciplinary action.

73. In March 2005, Nalley made additional notes on Miller's failure to perform the jobs assigned in a reasonable period of time. On March 8 and 9, 2005, he had given Miller two specific assignments to complete by the end of the day. Miller completed only one of the tasks on March 8, and did not complete even one of the two jobs assigned on March 9, 2005.

### **2005 Needs Improvement Evaluation**

74. Nalley had met with Miller at least twenty times between December 2003 and March 2005, to address performance issues. He concluded that there was nothing more he could do.

75. On March 31, 2005, Nalley gave Complainant an overall Needs Improvement evaluation for 2005. He attached a highlighted version of the UNC HVAC Evaluation Planning Criteria. The evaluation outlined similar areas of difficulty as that of the previous year. Under Professional Conduct/Reliability, Nalley highlighted, "2. Gets by doing as little as possible. Does not seek out work to do when things are slow." However, Nalley added his own note next to this entry, "works hard but still accomplishes little."

76. Under Motivation/Commitment, Nalley rated Miller at a Needs Improvement, and again made an additional entry, "most amount of effort least amount accomplished."

77. On March 28, 2005, Nalley also imposed a second Corrective Action in connection with the Needs Improvement evaluation. The Corrective Action was nearly identical to the

2005B112

one he had issued a year previously, because the performance issues were nearly identical.

78. Nalley believed that he had tried everything he could to assist Complainant in improving his performance. He discussed this belief with HR Director Parks. Nalley asked for permission to draft a memo to Parks requesting Complainant's termination of employment. Parks gave him approval.

79. On March 28, 2005, Nalley sent an email to Marshall Parks, copying Kelley Gonzales (Nalley's boss) and Kirk Leichter. He attached the Corrective Action. He stated that he had been working with Complainant for a long time, had been trying to get him become more effective in his HVAC mechanic position, but had been unsuccessful. He noted, "This has had no effect and seems, if anything, to be getting worse. His action[s] are taking its toll on the moral[e] and attitude of the shop. I feel that I have done all that I can as a supervisor to help Terry be successful. I would like to suggest termination for Terry as I feel there is nothing else we can do to get him to become a productive employee and be able to perform at a Pipe and Mechanical Trades II level."

80. On March 23, 2005, Parks sent a letter to Miller noticing a pre-disciplinary meeting based on his job performance.

81. Prior to the meeting, Parks reviewed Miller's personnel file, including all evaluations and documentation from Nalley. Parks was particularly interested in assessing whether Miller's performance problems had begun when Nalley became his supervisor. Upon review of the file, he determined that this was not the case. Ron Gross had placed Miller on a Performance Improvement Plan in early 2003, and had given Miller an interim Needs Improvement rating for the 2003/2004 rating period.

### **Pre-disciplinary Meeting**

82. On April 4, 2005, Complainant attended the pre-disciplinary meeting with his union representative. Parks reviewed his evaluations and the pattern of performance problems he saw in his record. Parks also reviewed notes Nalley had made on Miller's performance problems over the years. Miller did not rebut the specifics of those incidents, but made it clear he interpreted his performance differently than Nalley did.

83. Miller asked whether he could return to his old job at UNC. Parks agreed to check into whether that position was open, or would be open any time soon. Miller did not present mitigating information in his defense at this meeting. Therefore, Parks gave him two days to collect his thoughts and submit mitigating information.

84. Parks did check into whether Complainant's old job was open, but it was not, nor would it be any time soon.

85. Miller wrote a six-page, single spaced letter to Parks, rebutting the Needs

2005B112

Improvement evaluation. In the letter, Miller acknowledged some performance issues as being a problem, and denied others. For example, he stated that he had never been informed of what policies and procedures he was not complying with, and he stated that he had no idea what duties on his PDQ he was not performing.

86. In response to the “works hard but still accomplishes little” statement by Nalley, Miller wrote the following: “I definitely do not agree with this statement. I feel that I work very hard and accomplish what I am assigned to do. I am very meticulous about the work I do because I want to make sure it is done correctly. For this reason, it does take me longer to do the work. Also, if I notice that additional work needs to be done (e.g., if a motor is making a noise, I will investigate to see what is the problem). If it is a minor problem, I will proceed to do the work; if it cannot be done at the time, I will record it on the HVAC ‘to do list.’ If I do the work, it has been noted as a detriment . . . as well as losing my focus on the initial project. It is my feeling that if something needs to be repaired or replaced, it is best to do it at the time of discovery rather than to ignore the need and have a bigger problem to deal with in the long run. I can cite a couple of incidences that I reported which were not dealt with in a timely manner that ended up creating disastrous results costing the University additional money.”

87. Miller also wrote, “My supervisor has told me on numerous occasions that I don’t need to inspect everything. I have a hard time ‘looking the other way’ when I detect a leak or a noise that I feel may indicate a problem. I feel my supervisor is considering this as not following instructions and staying focused.”

88. Regarding the issue of being the last one to actually get to work at the start of the day, Miller wrote, “I admit that I have been guilty of this in the past, but I have been making a concerted effort to correct this issue.”

89. Parks read the memo written by Complainant several times. He gave special consideration to Complainant’s long tenure with UNC, in mitigation. He felt that termination was too harsh; he sought to assure Complainant remained employed at UNC and maintained his pension.

90. Parks investigated what other positions at UNC were vacant, which Complainant could fill. He found a General Labor I position he knew Complainant could perform without any problem. He determined that he would demote Complainant to that position.

91. Parks called the President of UNC to obtain permission to pay Complainant at the maximum of the range for the position, in order to minimize the financial impact of the demotion on Complainant. Even at the maximum, Complainant suffered a 43% reduction in pay, from \$4348.00 gross per month to \$2645.00 per month.

92. On April 8, 2005, Parks sent Miller a letter demoting him to General Labor I, at \$2645.00 per month, effective April 12, 2005. He based his decision on his determination Miller had failed to perform competently as a Pipe and Mechanical Trades II.

2005B112

## **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 R-6-9, 4 CCR 801<sup>1</sup> and generally includes:

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

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

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

Respondent has proven by preponderant evidence that Complainant failed to perform at the level required of a Pipe and Mechanical Trades II. Complainant was unable to follow his supervisor's directions. This is one of the most fundamental of job tasks. As supervisor of the HVAC shop, it was Nalley's job to 1. know what jobs needed to be performed; 2. prioritize those jobs, and 3. assign the jobs in the most efficient manner to the staff available. Miller's work habits were such that he deprived Nalley of the ability to effectively manage the HVAC shop.

Nalley explained to Miller repeatedly, both verbally and in writing, that he did not have the discretion to take on extra jobs by himself. Nalley directed Miller to inform him of what jobs needed to be done, and to perform solely the jobs assigned to him. Miller, right up to the end of his employment, refused to modify his work habits to meet Nalley's demands as supervisor. (See Findings of Fact #86 and #87.) Miller also was unable to maintain the focus necessary to complete tasks in a timely manner.

---

<sup>1</sup> The State Personnel Board Rules in effect prior to July 1, 2005, at the time of the events herein, have been applied.

Complainant argues that Nalley never gave him sufficient direction or detail about performance issues in his evaluations. He also argues that Nalley gave him no detail in the Corrective Actions as to how to improve his performance. Complainant has produced no evidence that he asked for clarity or detail on his performance problems during employment. The time for seeking detail and clarity has passed. Complainant signed the 2004, Needs Improvement evaluations, stating that he agreed with it. This signature undercuts the veracity of his argument following disciplinary action that he never understood the factual basis for that evaluation. In addition, Complainant waived his right to challenge the basis for the 2004 Corrective Action by electing not to grieve it.

Complainant also argues that Nalley's failure to ask co-workers for feedback on his performance, prior to evaluating him, demonstrates bias. While Nalley should have asked co-workers for feedback, and would have benefited from that information, his failure to do so does not demonstrate bias on his part. Nalley's problems with Miller concerned Miller's failure to follow orders and to complete jobs in a timely fashion. Nalley's perception of these problems was not dependent on others' opinions of Miller.

Nalley worked hard to help Miller improve, meeting with him over twenty times in a two-year period. He enlisted Parks' and Leightliter's assistance by including them in meetings with Miller. He wrote memos to Miller, warning him that failure to improve would soon result in disciplinary action. None of Nalley's efforts resulted in a change in Miller's work habits. In the end, this was the fault of Miller, not of Nalley.

**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).

Respondent's actions in this case were not arbitrary, capricious, or contrary to rule or law. Marshall Parks demonstrated the highest degree of professionalism in his role as HR Director at UNC. His standing policy of requiring managers to inform him of an impending Needs Improvement evaluation enabled him to proactively assure fairness in the evaluation and disciplinary processes. Parks took the extra step of personally assuring that Miller understood the seriousness of his situation, by meeting with him in January 2005. Parks sought to persuade Miller to change his work habits, in an attempt to stave off

2005B112

disciplinary action.

Parks exercised his discretion carefully in this case by denying Nalley's request to terminate Miller. Parks found another job he felt Complainant could do and placed him in it, at the highest salary level possible. His actions demonstrated the utmost diligence and care to assure the process was not arbitrary, capricious, or contrary to rule or law.

State Personnel Board Rule R-6-4 states,

"An unsatisfactory performance rating may result in a performance improvement plan or a corrective action and a reasonable amount of time must be given to improve. A performance improvement plan is not a corrective action. If performance is still unsatisfactory at the time of reevaluation under a performance improvement plan, a corrective action shall be given. If performance is still unsatisfactory at the time of reevaluation under a corrective action, the appointing authority may take disciplinary action up to and including demotion or termination."

Respondent followed Rule R-6-4 to the letter. In 2003, Ron Gross placed Complainant on a performance improvement plan and held regular meetings with Miller in order to assist him in improving. Miller lost the plan and showed little interest in improving. In 2004, Nalley issued the overall Needs Improvement with the resultant Corrective Action. Over the course of the following year, he met repeatedly with Miller, in an attempt to get him to improve. When Nalley's own efforts to effectively manage Miller failed, he asked HR Director Parks to intervene. Parks met with Miller in January 2005 with the express goal of persuading him to change his work habits. By March 2005, Miller was still performing at a Needs Improvement level. Rule R-6-4 gave Parks the green light to impose disciplinary action. He exercised his decision with moderation.

Complainant argues that demotion was an abuse of discretion because no evidence supported Respondent's decision. This is not a case wherein Respondent has produced no evidence supporting its action. Complainant testified that he signed the 2004 Needs Improvement evaluation because he agreed that he needed to improve in the areas cited. Respondent provided many specific examples of Complainant's failure to follow Nalley's orders and to complete jobs in a timely and efficient manner. There is ample evidence in the record supporting Respondent's action.

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

The above discussion makes it clear that demotion was a reasonable action herein. Parks balanced Nalley's belief that he had no choice available but to terminate, against Complainant's length of service and commitment to the university. Demotion was well within the range of reasonable alternatives available to Respondent.

**D. Attorney fees are not warranted in this action.**

2005B112

Attorney fees and costs shall be awarded if an action was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Because Complainant did not prevail in this matter, he is not entitled to an award of attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Complainant did commit the acts for which he was disciplined;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Respondent's action was within the range of reasonable alternatives;
4. An award of attorney fees and costs is not warranted.

### **ORDER**

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

Dated this 14<sup>th</sup> day of November, 2005.

---

Mary S. McClatchey  
Administrative Law Judge  
633 – 17<sup>th</sup> 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.; 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) 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 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. 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 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

2005B112

**CERTIFICATE OF SERVICE**

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

Nora V. Kelly, Esquire  
1776 Lincoln Street, Suite 810  
Denver, Colorado 80203

and in the interagency mail, to:

Eric Freund  
Assistant Attorney General  
Office of the Attorney General  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

\_\_\_\_\_  
Andrea C. Woods