STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B051(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDWARD LAWRENCE DONALDSON,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on March 12, 15, and 19, 2007, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. The record was left open after the hearing to allow counsel for Respondent to respond to the Addendum to Complainant's Prehearing Statement-Points of Law. The record was closed on April 2, 2007. Complainant appeared and was represented by Sean P. Paris, Esq. Assistant Attorney General Diane Marie Dash represented Respondent. Respondent's advisory witness was Major Ron Woods, who was the appointing authority.

MATTER APPEALED

Complainant, Edward Lawrence Donaldson (Complainant or Donaldson) appeals three actions by Respondent, Department of Public Safety, Colorado State Patrol (Respondent or CSP). Those actions are: 1) a corrective action issued on September 22, 2005; 2) a disciplinary action of five days suspension issued on December 13, 2005; and 3) a disciplinary termination issued on February 15, 2006. The appeals for each action were filed at different times, but were consolidated for hearing on March 15, 2006. Complainant argues that Respondent discriminated against him on the basis of disability, age, race, and national origin. Complainant seeks reinstatement, back pay, benefits, and attorney fees and costs.

Procedural History

On the first day of hearing, March 12, 2007, Respondent attempted to file a revised prehearing statement. A copy of the revised prehearing statement was not provided to counsel for Complainant until 4:45 p.m. on March 9, 2007, which was a Friday. The revised prehearing statement listed exhibits, which had not previously been disclosed to Complainant. Complainant, or his counsel, had not seen many of the exhibits prior to March 9, 2007. Board Rule 8-59 provides, in pertinent part, "The

parties shall file with the Board and serve on each other party, no less than 15 days prior to the commencement of a hearing, a prehearing statement setting forth the following: . . . H. Exhibits." Because Respondent's revised prehearing statement was not timely, Complainant made a motion to strike it, which was granted. Additionally, Complainant objected to the admission of the exhibits listed in the revised prehearing statement, which were not timely provided. The ALJ ruled that each exhibit would be discussed, individually, at the time it was offered for admission. As the late endorsement of exhibits was prejudicial to Complainant, the ALJ admitted only those exhibits that had previously been provided to Complainant or those of which Complainant had reasonable notice.

For the reasons set forth below, Respondent's actions are **modified.**

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's actions were 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, an African-American male, was hired by the State as a security guard in 1997; Complainant and the other security guards in his unit provide security for the Capitol Complex, which consists of the Capitol Building and the surrounding eight state buildings.

2. At the time Complainant was hired, the security guard unit was under the Colorado Department of Personnel and Administration. In 2001, the security guard unit was transferred to the Colorado State Patrol and became part of the Executive Security Unit. In addition to providing security for the Capitol Complex, the Executive Security Unit is responsible for providing security for the governor and his family. The security guard unit's transfer did not affect Complainant's job duties. His duties included foot patrols around the Capitol Complex, noting security issues, and responding to directives from officers in the Command Center if something was seen on one of the 105 cameras in the Capitol Complex. At that time, cameras also monitored then Governor Owens' home in Centennial.

3. The Command Center is staffed twenty-four hours per day, every day of the week. Employees in the Command Center regularly interact with the security guards in the

Executive Security Unit, as communication is essential to security. The Command Center employees monitor the location of the security guards as they do their patrols to ensure the safety of both the security guards and the buildings.

4. Unlike State Troopers, security guards are not armed, have no arrest powers and are not peace officers. State Troopers can provide back up for the security guards if needed during all shifts. Because of budgetary concerns, there are not many State Troopers on duty during the graveyard shift.

5. Until the September 2005 corrective action, which is one of the subjects for this appeal, Complainant worked the graveyard shift. The hours for the graveyard shift are midnight to 6:00 or 8:00 a.m. Complainant's direct supervisor, Ron Rupp, worked during the day and is a civilian security guard who was a member of the security guard unit when it was still under the Department of Personnel and Administration. Rupp was Complainant's supervisor most of the time between 1997 and the time of Complainant's termination.

6. As early as 2001, Rupp made it known to other employees that he did not always like having Complainant as a member of his staff. While still under the Department of Personnel and Administration, Rupp told another security guard, "We need to make Donaldson disappear." Rupp was angry about a complaint Complainant filed against him when he made that statement.

7. In May of 2002, Major (then Captain) Ron Woods took over as Troop Commander for the Executive Security Unit, and as Complainant's appointing authority. Woods also worked the day shift. Complainant had no direct supervision during the graveyard shift.

8. Prior to 2002, Complainant had good performance evaluations, was a peak performer, and was once employee of the quarter. After 2002, Complainant received an overall performance rating of "Meets Standards" on his performance evaluations, with the exception of his evaluation for 2005 where he received an overall performance rating of "Does Not Meet Standards." Complainant never missed work even when he was undergoing treatments for prostate cancer.

Figurine in Complainant's Mailbox

9. In June of 2002, another security guard, Jack McCarty, a White male, put a figurine in Complainant's mailbox. The figurine was an African-American man sitting on a stool, playing a banjo. The figurine could be construed as racist, and Complainant thought it was a disparagement to African-Americans.

10. Complainant did not report McCarty because he did not think that CSP understood racism, and he did not want to retaliate against McCarty by treating hate with hate.

11. Woods heard about the figurine, and asked Complainant and others repeatedly to see it. However, he did not see it until the hearing held in this case.

October 31, 2002 Corrective Action

12. In September of 2002, Complainant got into an argument with a co-worker, Linda Richardson, a White female. Complainant intended to provoke Richardson so she would scream at him, and he could record her screaming. Complainant wanted Woods to know how Richardson sometimes screamed at him, and put a stop to it.

13. The incident began when Richardson told Complainant several times to put on his glasses. Complainant got within two or three inches of Richardson's face, and said, "What did you say?" Richardson then placed her hands on Complainant's chest and pushed him away. Complainant reported the incident to a State Trooper, who requested that all of the parties involved prepare a report regarding the incident. The report Complainant provided to the State Trooper was misplaced.

14. Because Complainant's report was misplaced, his supervisor, Rupp, asked Complainant on September 16, 2002, to provide a report to him. When Rupp had not received Complainant's report by September 23, 2002, he again requested Complainant to provide a copy of his report. On September 30, 2002, Complainant provided the report to Rupp.

15. In response to the incident, Woods conducted a fact-finding meeting with Complainant. After reviewing all of the information regarding the incident and Complainant's statements during the meeting, Woods issued a corrective action to Complainant.

16. Complainant grieved the corrective action; however, it was upheld by Respondent. Complainant filed an appeal with the Board regarding the corrective action, but did not pursue the appeal. The corrective action remained in Complainant's personnel file.

17. Richardson did not receive a written reprimand based on the incident, even though she physically pushed Complainant. Woods determined that when Richardson pushed Complainant she was acting defensively because he was so close to her face. Richardson did, however, receive a verbal reprimand.

June 29, 2004 Disciplinary Action

18. Sometime before June 11, 2004, Complainant filed a federal lawsuit against CSP, which required service upon the Colorado Attorney General.

19. On June 11, 2004, Complainant was doing foot patrols of the buildings in the Capitol Complex during the graveyard shift. One of those buildings is the State Services building, which is where the Attorney General's office is located. Instead of

serving his lawsuit during business hours, Complainant left a copy of his lawsuit on the desk of the assistant of then Attorney General Ken Salazar. He put a stapler and a candy dish from the assistant's desk on top of the envelope. The Attorney General's office reported the incident to the Command Center.

20. Because of the manner in which Complainant served his lawsuit on the Attorney General, Woods conducted a meeting with Complainant pursuant to Board Rule 6-10. After reviewing all of the information, and the results of his meeting with Complainant, Woods determined that Complainant had abused his privilege as a security guard by leaving a copy of his lawsuit on the assistant's desk in the middle of the night; this was a privilege that would not have been available to Complainant if he were not a security guard with the Executive Security Unit.

21. Woods imposed a disciplinary action on Complainant of a two (2) day suspension without pay. In addition, Woods instructed Complainant to re-familiarize himself with two chapters of CSP's operations manual. Finally, at the request of the Attorney General's office, Woods restricted Complainant from entering the Attorney General's office while on patrol while Complainant's lawsuit was pending.

22. Complainant did not appeal that disciplinary action and it remained in his personnel file.

September 22, 2005 Corrective Action

23. During the Spring of 2005, Rupp asked Complainant if he was having any problems with any of his co-workers. Complainant told Rupp that an officer in the Command Center, Steve Hauger, was acting in a discriminatory and racist manner towards him. After Complainant made that allegation, Rupp instructed Complainant to write a report regarding his concerns about Hauger.

24. Complainant did not want to write the report, but did so because Rupp ordered him to do it. Complainant only wanted for Hauger to apologize to him. Complainant's report, dated June 10, 2005, alleged that Hauger was mean-spirited, condescending, belligerent, aggressive and discriminatory. In the report, Complainant alleged that Hauger addressed him in a condescending manner over the radio by saying, "I want" and "I need." Complainant alleged that Hauger did not speak to White employees in the same manner. Complainant alleged that he thought Hauger was mean-spirited because he perceived Hauger to be handicapped. The handicap to which Complainant referred is obesity.

25. Complainant further alleged that Hauger followed him and other security guards around the Capitol Complex with his camera, and that Hauger believed that following security guards with his camera was part of his job. Indeed, following the security guards with his camera was one of Hauger's duties. Complainant also reported that Hauger brought a firearm to work.

26. Complainant's report alleged that Hauger wanted to be in control and that when Complainant tried to joke with him, Hauger accused him of being "high." Complainant wrote in his report, "All Niggers are not violent. All Niggers do not use drugs." Complainant's report also contained information about African-Americans passing for White, and the "rule of hypodescent." Complainant attached two pages of a publication which discussed, in part, African-Americans passing for White.

27. When Woods read the report, he was offended by some of the language Complainant used, such as "Nigger." Woods also did not understand why Complainant discussed hypodescent and African-Americans passing for White in his report.

28. Woods took the allegations Complainant made against Hauger very seriously and instructed Rupp to provide him with a series of random taped radio transmissions between Hauger and Complainant. Woods listened to tapes from fifteen different shifts between May 2, 2005, and July 29, 2005. In listening to those tapes, Woods did not find any improper conduct by Hauger.

29. Woods also had Rupp interview two other African-American security guards, as well as Hauger. Based on the interviews, Woods concluded that there was no evidence to support Complainant's allegations of discrimination, racism or condescending behavior. Instead, Woods found that Hauger was behaving professionally and simply doing his job.

30. Woods also learned that Complainant took a menu from the Waffle House restaurant to Hauger one evening. Because, there is not a Waffle House near the Capitol Complex, and because Complainant thought Hauger was obese, Woods thought that Complainant took Hauger the menu to insult him. However, Complainant did not intend to insult Hauger by giving him the menu; he thought he was being friendly.

31. Complainant did not intend to be offensive when he wrote the word, "Nigger" in his report, nor did he mean to imply that Hauger used the word. Complainant used the word because African-Americans use it to make fun of bigoted White people. Complainant thought Hauger was stereotyping him as an African-American who took drugs when Hauger accused him of being high.

32. Woods held a meeting with Complainant pursuant to Board Rule 6-10 regarding Complainant's allegations. Woods held the meeting based on the information contained in Complainant's report of June 10, 2005. After considering Complainant's statements and all of the relevant information, Woods concluded that Complainant had a pattern of inability to work with others on a professional level and that Complainant had attacked Hauger on a personal, rather than professional, level.

33. Woods further concluded that Complainant needed more direct supervision to correct his behaviors and coaching to deal with what Complainant might identify as a conflict. Woods also reviewed Complainant's personnel history including his yearly

performance evaluations, his prior corrective action and his prior disciplinary action. Woods recognized what he believed to be an unhealthy pattern developing between Complainant and his co-workers and Complainant's decision-making process. Woods further felt that Complainant did not understand the role of a communication officer, which is essential to the safety of the security guards.

34. Woods further found that Complainant had violated CSP's General Order #7, which provides, "Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect."

35. Woods imposed what he believed to be a disciplinary action on Complainant. The basis for the action taken was Complainant's June 10, 2005 report. The action taken by Woods was to place Complainant on dayshift in order to allow Rupp, Complainant's supervisor, the ability to interact with him daily. Although Complainant lost his shift differential by working dayshift, his base pay was not affected. Complainant was to remain on dayshift for four months to receive coaching and supervision. At the end of the four months, Woods intended to review Complainant's status and see if he had met Rupp's expectations. If Complainant had met those expectations, Woods would have placed Complainant back on graveyard shift.

36. Because placing Complainant on dayshift did not affect his base pay, status or tenure, it was not a disciplinary action. Instead, it was a corrective action. After being informed by the Board that the action was not disciplinary, Complainant grieved the corrective action, and went through CSP's grievance process. After his grievance was upheld at CSP, Complainant filed an appeal with the Board regarding the final grievance decision.

37. Complainant tendered his resignation on September 29, 2005, after being informed that he would be placed on dayshift. Complainant then met with Lt. Col. Michael Anthony Padilla, who was Woods' superior, when Padilla initiated the meeting. Padilla asked Complainant if he wanted to go through with his resignation. After meeting with Padilla, Complainant changed his mind and rescinded his resignation on October 7, 2005. Because Complainant waited longer than three days to rescind his resignation, Respondent could have accepted Complainant's resignation and not allowed him to rescind it. However, Respondent did allow Complainant to rescind his resignation.

38. Being placed on the dayshift caused Complainant to experience stress. Because he lost his shift differential, Complainant's financial worries increased. Moreover, working during the day caused Complainant to have interactions with a lot of people, and this was stressful to him. Finally, Complainant did not want to work around Rupp.

December 13, 2005 Disciplinary Action

A. Status Checks

39. Complainant began the dayshift on October 10, 2005. Before he began, Rupp sent him an email which provided, "Your duties on day shift will be basically the same as on any other shift, with the exception of, there will be more people to deal with. . . . You will need to report to the command center just as you would on any other shift. If you have any questions concerning your duties, please feel free to call me at any time."

40. While Complainant was on the graveyard shift, he was required to report to the Command Center hourly. However, Complainant believed that guards working the dayshift were not required to give hourly reports, and on the occasions he had worked dayshift in the past, he did not give hourly reports. Therefore, when Complainant began working the dayshift on October 10, 2005, he did not check in with the Command Center the entire day. Likewise, no communication officers from the Command Center contacted Complainant that day.

41. After October 10, 2005, Rupp told Complainant that he needed to do status checks during the dayshift. Complainant explained that he did not know that giving status checks during the day was required.

42. In support of his assertion that status checks were not required during the day, Complainant relied upon the Executive Security Unit Command Center Standard Operating Procedure with respect to status checks. That Standard Operating Procedure provides, in part, "Communication officers are responsible for conducting status checks on troopers and security officers patrolling the Capitol Complex every half hour between the hours of 9 (nine) pm and 5 (five) am."

43. The Standard Operating Procedure regarding status checks applies to communication officers, not to security guards. Therefore, it did not apply to Complainant.

44. When Rupp spoke to Complainant about not doing status checks, he explained why status checks were important. Thereafter, Complainant did them.

B. Leaving Assigned Work Area Out of Uniform

45. On October 24, 2005, Complainant had a filing due with the State Personnel Board in the case regarding the appeal of his grievance involving the loss of pay differential and being placed on dayshift.

46. Although the security guards did not have a set lunch hour, they are allowed to take breaks for lunch; however, they are not without responsibility during those breaks and must respond to calls.

47. Because he had a filing due, Complainant left his assigned work area to go to the State Personnel Board. Complainant took off his uniform shirt and wore a different shirt when he went to the Board. Complainant had his radio with him, and could have been reached if there had been an emergency.

48. Another security guard, an African-American female, sometimes would wear a hat, which was not the ski hat issued as part of the security guard uniform, when she was on duty. That employee has never been disciplined for wearing a hat that was not part of the security guard uniform.

49. Complainant did not advise Rupp he was leaving, as was required. However, it was not uncommon for guards to leave Capitol Complex campus for lunch; in fact, it was common. When leaving for a lunch break, guards would sign out using the code "10-7" which meant they were out of service and sign back in using the code "10-8" indicating that they were back in service. Security guards were given thirty minutes of leeway, and Complainant had never been counseled or disciplined for signing out 10-7, even when he failed to advise Rupp that he was leaving.

50. When Complainant left to go the State Personnel Board on October 24, 2005, he did not want Rupp to know where he was going because he believed Rupp would make it difficult for him to go. Instead, he told an officer in the Command Center, Lois, that he was going on "state business" and signed out using the code "10-24." The 10-24 code means "assignment completed." Complainant was gone for forty-one minutes.

51. There is no written policy prohibiting security guards from removing their uniforms while on duty; however, it is expected that they will remain in uniform. It is important for security guards to wear their uniforms while on duty so they can easily be identified as a person in authority in the event of an emergency. The burden is on the security guard to identify himself as a person in authority.

C. Insubordination

52. When Complainant returned from the State Personnel Board, Rupp called him into his office to ask Complainant where he had been. Complainant told Rupp that he had been to the State Personnel Board.

53. After years of working with Rupp, Complainant was able to tell when Rupp was going to yell. When Complainant went in Rupp's office, Rupp began to raise his voice and Complainant thought that Rupp was about to yell at him. Thus, he walked out of the office. Rupp had not yet yelled when Complainant walked out of the office.

54. When Complainant walked out the office, Rupp ordered him to return. However, Complainant did not obey Rupp's order. Instead, he waited to talk to Rupp when he felt that Rupp was calmer.

D. Fitness to Return Certificate

55. After Complainant was placed on dayshift, he brought Woods a letter from his primary care physician, Selwyn M. Spray. The undated letter, which was delivered to Woods on October 21, 2005, provided the following, "Due to Mr. Donaldson's medical condition and his psychological status I believe the State would be better served if he were to return to night shift duties. I understand Mr. Donaldson himself believes night shift duties are more suitable to his physical abilities and his personality. I certainly agree with this assessment."

56. When Woods received the letter from Dr. Spray, he became concerned about Complainant's fitness to work. Although Complainant had prostate cancer, which was possibly recurring, Woods was not aware of any medical or psychological condition that Complainant had.

57. On October 31, 2005, Woods wrote a letter to Complainant regarding the letter from Dr. Spray. The letter was given to Complainant on November 1, 2005. Woods attached a copy of Complainant's Position Description Questionnaire (PDQ) and a fitness to return certificate to his October 31, 2005 letter. Woods asked Complainant to take the PDQ and the fitness to return certificate to Dr. Spray, and to have Dr. Spray complete the fitness to return certificate form so he could be assured that Complainant was able to perform the essential functions of his job. Woods requested that Complainant return the completed fitness to return certificate no later than November 7, 2005.

58. Complainant took the fitness to return certificate and the PDQ to Dr. Spray's office on November 1, 2005. Because he was overworked and because he did not realize the urgency of completing the form, Dr. Spray did not complete the certificate until November 18, 2005. Complainant gave Woods the certificate that same day.

59. Woods did not think Complainant was being cooperative because he failed to return the certificate on November 7, 2005. However, the delay in receiving the certificate was not Complainant's fault.

60. On the certificate, Dr. Spray indicated that Complainant was able to perform his job duties without restrictions. Dr. Spray further indicated that Complainant had prostate cancer five to six years prior, which was in remission, but that there were indications that Complainant may be relapsing. Dr. Spray wrote that the cancer probably affected Complainant physically to a minor degree, but that emotionally, it was very challenging.

<u>Rule 6-10 Meeting and December 13, 2005 Disciplinary Action</u>

61. On November 17, 2005, Woods held a meeting with Complainant pursuant to Board Rule 6-10 to discuss: 1) Complainant's failure to notify the Command Center for the entire day on October 10, 2005; 2) Complainant leaving the Capitol Complex on

October 24, 2005, to conduct personal business without notifying Rupp and the fact that Complainant removed his uniform shirt when he left the Capitol Complex; 3) Complainant walking out of Rupp's office after he returned from the State Personnel Board; and 4) Complainant's failure to timely return the fitness to return certificate from Dr. Spray.

62. During the meeting, Complainant explained that Dr. Spray was busy, and it took time to get him to respond to the request, and agreed to go Dr. Spray's office the next day to get the certificate. Woods discounted that information because Complainant previously was able to get an appointment with Dr. Spray on a day's notice.

63. With respect to his failure to do status checks on October 10, 2005, Complainant told Woods that it was his understanding that during daylight hours, status checks were not required. However, Complainant also stated that he may have been incorrect, and that Rupp had written him an email instructing him to check in with the dispatcher at the beginning of the shift. Woods felt that Complainant was elusive when he asked him about this issue during the Rule 6-10 meeting.

64. Complainant admitted to leaving the Capitol Complex on October 24, 2005, to go to the State Personnel Board, but said he did so on his lunch break and that it did not cross his mind to notify his supervisor because he had left to go places like King Soopers before without notifying his supervisor. Complainant also admitted that he changed out of his uniform shirt to go to the State Personnel Board.

65. Following the Rule 6-10 meeting and after reviewing all of the information presented, Woods concluded that Complainant violated several General Orders. Those General Orders provide:

> General Order # 2: Members will obey lawful orders and direction. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules procedures, goals, mission, and vision statements.
> General Order # 3: Members will be truthful and complete in their accounts and reports.
> General Order # 4: Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
> General Order # 7: Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.

66. Woods imposed a disciplinary action of five days suspension without pay. In making his decision, Woods considered Complainant's prior corrective actions and his previous disciplinary action. Woods also considered a situation where one of Complainant's fellow employees, Lisa Franks, reorganized the mailboxes in the

Command Center and Complainant became confrontational with her for moving his mailbox.

67. Complainant appealed that disciplinary action to the Board.

January 2006 Transportation Security Administration Training

68. In January of 2006, members of the Executive Security Unit attended a training course conducted by the Transportation Security Administration (TSA).

69. Complainant was very interested in the training from its outset. Complainant had a previous experience with one of the trainers, and had a great deal of respect for him. Complainant appropriately participated in the TSA training course.

70. However, when Rupp completed Complainant's Performance Evaluation signed by Rupp and Complainant on January 12, 2006, and by Woods on January 10, 2006, he wrote the following, "Edward still falls short when asked to improve on his interpersonal skills as he demonstrated during a training program with Transportation Safety Administration on January 4th and 5th, 2006. Edward sat through the class which lasted approximately 16 hours over a two day period."

71. Although Woods signed the Performance Evaluation, he was unaware that Rupp had raised any performance issues regarding Complainant's conduct at the TSA training.

Disciplinary Termination

72. On January 12, 2006, then Governor Bill Owens was scheduled to give the State of the State address in the Capitol building. The State of the State address is a high security event because the governor and the legislature meet in the same chamber. Security for the event is taken very seriously and all available security personnel were on duty.

73. Because the State of the State address was a high security event, only the south door to the Capitol building was open to the public, who were required to walk through a metal detector, and go through a screening process. Complainant, who came in an hour and a half early for the event, was stationed at the west door of the Capitol building.

74. The west door, which is close to the executive chambers, was designated for the media. The media ran cables through the west door for their video feeds. Although authorized media had a code to the west door, it was Complainant's duty to monitor the door to ensure that unauthorized people did not come in the door and to identify the media people entering the door.

75. Complainant did not sleep properly the night before the State of the State address, and began to feel sleepy while monitoring the west door. Complainant sat down in a chair and took off his shoes because his feet were swelling. Although he put his shoes back on, Complainant remained seated in the chair.

76. Complainant was seated before a camera, and was aware that employees in the Command Center were probably watching him. As a method of staying awake, Complainant began "playing with the camera" by pretending that he was falling asleep. While he was pretending to fall asleep, Complainant actually fell asleep during the State of State address. Complainant did not intend to fall asleep.

77. Woods and other employees were monitoring cameras in the Command Center during the State of the State Address. Woods and two other employees in the Command Center observed Complainant sleeping for about five to seven minutes. Complainant then hit his head on a pillar and was awakened. Woods was stunned to see that Complainant was sleeping. He was also surprised that Complainant was even sitting in a chair instead of standing.

78. As a result of observing Complainant sleeping while on duty at the State of the State address, Woods held a meeting with Complainant pursuant to Board Rule 6-10. Complainant attended the meeting with a representative from the Colorado Association of Public Employees.

79. During the 6-10 meeting, which was held on February 3, 2006, Complainant complained about having to come in early for the State of the State address. He also told Woods that he was bored and started "playing with the camera." Complainant did not deny sleeping on duty. Woods did not believe Complainant was being truthful when he said he was "playing with the camera."

80. Also during the meeting, Complainant complained about his hours being changed, and he was tired because of having to come in early that day. Although Complainant had been sent email about coming in early for the State of the State address, he told Woods that he had no idea why he had been asked to come in early.

81. At the conclusion of the 6-10 meeting, Complainant asked Woods if he was going to be terminated, and Woods responded that one event did not warrant termination. When Woods made that statement, he did not know what action he was going to take, and he did not intend to mislead Complainant.

82. In 2002, before Woods became the Appointing Authority, another security guard, Jack McCarty, a White male, fell asleep while on duty in the Command Center. A fire started behind one of the buildings in the Capitol Complex, and because McCarty was asleep, he did not see the fire and alert anyone. As a result, the security camera behind the building burned. McCarty did not receive a disciplinary action.

83. After reviewing all of the information, including an investigative report authored by Rupp concerning the sleeping incident, Woods decided to terminate Complainant. In making his decision, Woods put together a matrix so he could visually assess Complainant's situation. Woods did not consider the comments Rupp made in Complainant's Performance Evaluation regarding the TSA training. Woods pondered his decision for over a week because he had never terminated anyone, and he wanted to carefully consider the situation.

84. Woods concluded that Complainant had once again violated General Orders 2, 3, 4 and 7, which are referenced in paragraph 65.

85. When Woods decided to terminate Complainant, he looked at the totality of Complainant's corrective and disciplinary actions since 2002, and reviewed all of the relevant documents. After he looked over all of the information available to him, Woods determined that termination was appropriate.

86. Complainant was terminated on February 15, 2006. Complainant appealed his termination to the Board.

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 6-12, 4 CCR 801, and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if employment is continued.

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 some of the acts for which he was corrected and disciplined.

1. September 22, 2005 Corrective Action

The basis for Complainant's corrective action was violation of General Order #7, which provides, "Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect." Woods felt that Complainant needed more supervision and coaching to deal with what Complainant identified as conflict. Complainant did make allegations of discrimination and racism against Communication Officer Steve Hauger. To support those allegations, Complainant alleged that Hauger was rude and condescending to him by saying things such as, "I need" and "I want" in his radio transmissions to Complainant. Complainant also complained that Hauger was constantly watching him. After an investigation, Woods concluded that Hauger was not racist or discriminatory towards Complainant, and was not acting, in any way, improperly. Complainant's perceptions were incorrect with respect to Hauger. However, they were his perceptions and not fabrications. Moreover, Complainant made the allegations against Hauger only after he was asked by Rupp if he was having any problems with anyone, and he did not want to write a report concerning his allegations against Hauger. He wrote the report only after Rupp ordered him to do so.

The report Complainant was ordered to write became the basis for the Corrective Action against him. Although Complainant did write the report, he did not commit the act of "violating General Order #7." Specifically, the report submitted to Rupp did not demonstrate that Complainant was not conducting himself during work hours in a manner that was inconsistent with the highest degree of professionalism or integrity. Additionally, it did not demonstrate that Complainant was not treating others with fairness, courtesy and respect. Complainant did give Hauger a menu from Waffle House, but did so as a friendly gesture, which was misinterpreted; Woods did not mention the menu incident in the September 22, 2005 corrective action letter. Finally, there was no credible evidence that Complainant had an inability to work with Hauger, or anyone else, on a professional level at the time the corrective action was issued. Complainant did not commit the acts for which he was given the September 22, 2005 corrective action. Therefore, there was no basis for the corrective action.

2. December 13, 2005 Disciplinary Suspension

The bases for the December 13, 2005 disciplinary suspension are: 1) Complainant's failure to give status checks during his shift on October 10, 2005; 2) Complainant's leaving the Capitol Complex on October 24, 2005 without approval of or notice to his supervisor; 3) Complainant's changing out of his uniform shirt to run a

person errand on October 24, 2005; 4) Complainant's insubordination upon his return to the Capitol Complex on October 24, 2005; and 5) Complainant's failure to timely return a fitness return certificate from his physician.

Complainant failed give status checks during his first day on the dayshift, October 10, 2005. Rupp had instructed Complainant that he needed to "report to the command center just as [he] would on any other shift." Complainant apparently did not read or understand the email because he still believed that he was not required to give status checks during the day shift. After Rupp coached him on this issue, Complainant gave hourly status checks during the day, as required. Nonetheless, Complainant did commit the act of failing to give status checks.

Complainant also left his assigned work area for forty-one minutes on October 24, 2005, to go to the State Personnel Board, and changed out of his uniform shirt to complete the errand. Complainant did not tell Rupp he was leaving, although he did tell an officer in the Command Center. Thus, Complainant committed the acts of leaving the Capitol Complex without notifying his supervisor and changing out of his uniform shirt while he was running a personal errand.

Complainant also refused to answer Rupp when he returned to the Capitol Complex, and walked out of Rupp's office. Complainant's actions of refusing to answer and leaving Rupp's office constituted insubordination. However, Complainant did return to Rupp's office when he felt that Rupp was calmer. Complainant did commit the act of being insubordinate to Rupp when he returned to the Capitol Complex on October 24, 2005.

Finally, Complainant did not return his fitness to return certificate to Woods by November 7, 2005, as requested. He did not return the certificate until November 18, 2005, because his physician failed to give Complainant the completed certificate before that date. Complainant's failure to return the certificate by November 7, 2005, was not his fault; instead it was Dr. Spray's fault for not returning the certificate to Complainant until November 18, 2005. Complainant submitted the certificate to Woods as soon as he received it from Dr. Spray. Complainant did commit the act of not timely returning his fitness to return certificate, but was not at fault for its late return.

3. February 15, 2006 Disciplinary Termination

The basis for Complainant's February 15, 2006 disciplinary action was Complainant's sleeping during the State of the State address. Complainant did accidentally fall asleep for about five minutes while on duty during the State of the State address on January 12, 2006. The State of the State address was a very high profile and high security event. Complainant did commit the act of falling asleep while on duty at a high security event.

B. The Appointing Authority's actions were 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).

Additionally, pursuant to Board Rule 6-9, 4 CCR 801, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and the effect of the act, the error or omission, type and frequency of previous behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous unsatisfactory behaviors or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances." "If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious or contrary to rule or law, the discipline may be modified." Board Rule 6-12(B).

1. The September 22, 2005 Corrective Action Must Be Rescinded.

Woods used reasonable care and diligence to gather relevant information concerning the allegations against Complainant with respect to the allegations Complainant made against Hauger. When Complainant made the allegations against Hauger, Woods asked Rupp to conduct an investigation. Woods reviewed the results of the investigation, and listened to radio transmission recordings between Complainant and Hauger. He also considered the information Complainant provided to him in the Rule 6-10 meeting. Moreover, Woods gave Complainant the opportunity to explain his actions during the Rule 6-10 meeting.

However, when Woods exercised his discretion regarding this incident, he made a decision based on conclusions that were contrary to those that would be reached by reasonable men fairly and honestly considering the same evidence. *Lawley, supra.* Woods concluded that Complainant's report displayed "a pattern of [his] inability to work with others on a professional level." Complainant's allegations, although incorrect, did not demonstrate an inability to get along with his co-workers on a professional level; he merely had a misperception regarding Mr. Hauger. Complainant's writing of the report did not violate General Order #7. Woods further concluded that Complainant needed to be on dayshift in order to receive more coaching and supervision because Complainant had demonstrated a lack of understanding about the necessity for Hauger to monitor his

activities. The Rule 6-10 meeting, and the resulting corrective action, arose out of a report that Complainant was ordered to write. There was not credible evidence that Complainant wrote the report in bad faith, maliciously or was being untruthful.

Complainant was given a corrective action of working the dayshift for at least four months for making allegations in the report, which were later deemed to be unfounded following an investigation. Woods determined that Complainant's allegations displayed "a pattern of [his] inability to work with others on a professional level" and that "were slanted as a personnel [sic] attack on Mr. Hauger rather than focusing on his professional demeanor" and were a violation of General Order #7. Rupp solicited the allegations Complainant made against Hauger by asking Complainant if he were having trouble with any of his co-workers. When Complainant gave what he believed to be an honest answer about Hauger's actions, he was ordered to write a report. Complainant didn't want to do that; he just wanted Hauger to apologize to him. However, Rupp insisted that Complainant write a report. The report that Complainant wrote became the basis of his corrective action.

To issue a corrective action to someone, acting under direct orders, who perceives and reports those perceptions in good faith, has a chilling effect on future reports of discrimination in the workplace. Strong public policy considerations support employees' ability to maintain discrimination claims based on a reasonable good faith belief that an employer's conduct was discriminatory, without fear of reprisal. *Crumpacker v. Kansas Dept. of Human Resources,* 338 F.3d 1163, 1172 (10th Cir. 2003). Woods failed to adequately consider the fact that Complainant was following Rupp's direct order when he wrote the report. It is fundamentally unfair to correct an employee for following orders. Woods should have considered the fact that Complainant was ordered to write the report as a significantly mitigating factor. Therefore, Woods acted in a manner that was arbitrary and capricious when he issued the corrective action, and it must be rescinded. *Lawley, supra.*

2. The December 13, 2005 Disciplinary Suspension Was Arbitrary, Capricious, and Contrary to Rule or Law and Must be Modified Pursuant to Board Rule 6-12(B).

With respect to the December 13, 2005 disciplinary action, Woods used reasonable care and diligence to gather relevant information and evidence. He provided an opportunity for Complainant to respond to each of the allegations against him. Woods considered all of the information he gathered with respect to each incident which gave rise to the December 13, 2005 disciplinary action. Woods also considered Complainant's statements in the Rule 6-10 meeting, concerning each basis for the discipline. However, it is clear that Woods did not give candid and honest consideration of "the nature, extent, seriousness, and effect" of each act, error or omission, the type of previous behavior or acts, or mitigating circumstances as required by Board Rule 6-9.

When Woods issued the December 13, 2005, disciplinary action, Woods concluded that Complainant had violated four General Orders. Those General Orders

are:

General Order #2	Members will obey lawful orders and direction. Orders May appear as, but not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and, and vision statements.
General Order #3	Members will be truthful and complete in their accounts and reports.
General Order #4	Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
General Order #7	Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.

Woods' decision to impose a disciplinary action of a five-day suspension was arbitrary and capricious given the circumstances surrounding the incidents for which Complainant was disciplined, and violated Board Rule 6-9. While Complainant left the Capitol Complex for forty-one minutes without telling Rupp, he did tell an officer in the Communications Center that he was leaving. It was not uncommon for security guards to leave the Capitol Complex during their shifts to run personal errands, and there was no credible evidence that a security guard had ever been disciplined for leaving the Complex. Imposing discipline on Complainant for leaving the Capitol Complex on October 24, 2005, held him to a different standard than that to which other employees were held, and to which Complainant had been held, in the past. Moreover, Complainant had his radio with him, and could have responded quickly if he had been radioed to provide security services. There was no credible evidence that anyone tried to radio Complainant while he was gone, or that any harm resulted from his absence. Respondent violated the *Lawley* standard by neglecting to consider these facts.

Woods also considered the fact that Complainant wore a shirt, other than his uniform shirt, while he went to the State Personnel Board, in making his decision to impose a five-day disciplinary suspension on Complainant. Complainant violated no rule or policy by removing his shirt, and while there was "an expectation" that the uniform be worn during the entire shift, there was no credible evidence that the expectation was ever communicated to Complainant. There was no adverse effect on Respondent when Complainant changed out of his shirt and the act was far from serious. Complainant had never been disciplined for any similar acts in the past.

Additionally, Woods considered Complainant's behavior towards Rupp when he returned from the Capitol Complex. Rupp, Complainant's supervisor, was questioning Complainant about his whereabouts; Complainant walked away and did not return even after being ordered to return to finish the conversation. Complainant, however, did return a short time later in order to discuss the issue. Complainant was seeking to

avoid Rupp's anger regarding the issue. Nonetheless, Complainant was insubordinate and failed to follow an order of his supervisor.

Woods also considered the fact that Complainant did not return the fitness to return certificate from Dr. Spray when he imposed the disciplinary action on Complainant. Dr. Spray testified that Complainant brought him the fitness to return certificate on November 1, 2005, the same day Woods gave it to Complainant. However, Dr. Spray did not complete the form because of his workload and his lack of understanding that Complainant needed the form back quickly. Complainant was late in returning the certificate to Woods, but it was because Dr. Spray did not timely return the form to Complainant. In short, Complainant's failure to return the form by November 7, 2005, was not his fault. There was no credible evidence that Woods attempted to call Dr. Spray to verify Complainant's claim that it was Dr. Spray who caused the delay of returning the certificate, and not Complainant. Although Complainant told Woods in the Rule 6-10 meeting that it took the doctor "quite a bit of time to respond because he's very busy," Woods disregarded that information because Complainant had been able to get an appointment with his physician on a day's notice. Woods failed to consider the mitigating information provided by Complainant regarding the lateness of the fitness to return certificate.

The final basis for the December 13, 2005 disciplinary action was Complainant's failure to give hourly status checks on October 10, 2005. Complainant's failure to report to the Command Center for status checks was not reasonable. Even though Complainant believed that he was not required to give status checks during daylight hours, Rupp gave him an email prior to October 10, 2005, explaining that status checks would be required just as they were on any other shift. Complainant apparently did not read or understand the email. The Standard Operating Procedure on which Complainant relies did not apply to him, or any other security guard. Instead, it is a procedure directed to communication officers.

While Complainant was at fault for not providing status checks and for being insubordinate to Rupp, he was not at fault for the late submission of the fitness to return certificate. Furthermore, there was no clear communication, if any, that changing out of his uniform shirt was prohibited. Complainant did not leave the Capitol Complex, a fairly routine occurrence for security guards, without notifying anyone, and he did take his radio with him. No credible evidence was presented that any other security guard had been disciplined for leaving the Capitol Complex. When Complainant walked away from Rupp, it was a one-time incident; there was no pattern of Complainant being insubordinate to Rupp.

The acts upon which the suspension was based were not serious. Further, Woods failed to adequately consider important mitigating circumstances. Therefore, his disciplinary action of a five-day suspension was too severe, was contrary to Board Rule 6-9, and was arbitrary and capricious under *Lawley*. The five-day suspension must be rescinded and modified to a one-day suspension. Rule 6-12(B).

3. The February 15, 2006 Disciplinary Termination Was Arbitrary, Capricious, and Contrary to Rule or Law and Must be Modified Pursuant to Board Rule 6-12(B).

Regarding the February 15, 2006 disciplinary termination, Woods personally observed, on camera, Complainant sleeping for five to seven minutes. In addition to his personal observations, Woods considered Complainant's statements, and the fact that Complainant did not deny sleeping while on duty. Woods candidly and honestly considered all of the information and evidence he had gathered before making his decision. Woods, having never terminated anyone before terminating Complainant, gave careful consideration before making his final decision. Woods went so far as to create a matrix so he could have a visual picture of Complainant's disciplinary record before making his final decision. Woods considered all of the relevant information in each instance.

Woods concluded that Complainant had violated the same General Orders he had violated when he received the December 13, 2005 disciplinary suspension. By falling asleep, Complainant failed to obey an order or directive to guard the west door of the Capitol building. Complainant was not truthful when he told Woods he had no idea why his schedule had been changed; he had been advised of the reason in an email from Rupp. Sleeping on duty did not contribute to the common goals of the Colorado State Patrol, nor did it reflect the "highest degree of professionalism and integrity." Therefore, it was not unreasonable for Woods to decide to discipline Complainant based on this incident; however, the level of discipline imposed was arbitrary and capricious and did not reflect the seriousness and effect of the act or the type of previous behavior or acts. Board Rule 6-9.

Complainant is not the only security guard to have fallen asleep while on duty. Jack McCarty fell asleep while monitoring cameras in the Command Center, and slept through a fire at the Capitol Complex that resulted in the security camera being consumed by fire. McCarty, who was working under an appointing authority other than Woods at that time, did not receive any disciplinary action. Woods, himself, agreed that falling asleep on one occasion was not a terminable offense. Because Woods realized that one instance of falling asleep was not a reason to fire Complainant, he thoroughly reviewed Complainant's disciplinary record. Although Complainant's record contains other disciplinary and corrective actions, they were for minor and unconnected occurrences. There was not a clear pattern of any one course of conduct or behavior that had gone uncorrected. There was evidence to indicate that Complainant had a pattern of falling asleep on duty, and unlike the incident where Jack McCarty fell asleep, there was no harm done while Complainant slept for a few minutes. Complainant was held to a different standard that McCarty was, even though the consequences of McCarty's falling asleep were much more serious.

Termination is the most severe disciplinary action that an appointing authority

can take against an employee. Complainant's conduct, in this case, does not warrant termination. The termination was arbitrary, capricious and contrary to rule or law, and must be rescinded and modified to a lesser form of discipline of a thirty-day suspension. A thirty-day suspension is appropriate given Complainant's October 31, 2002 corrective action, his June 11, 2004 two-day suspension, and his December 13, 2005 one-day suspension and the circumstances surrounding each of those corrective or disciplinary actions, as well as his length of employment with the State and his performance evaluations.

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

For the reasons set forth above, the ALJ finds that the discipline imposed in each case was not within the reasonable range of alternatives.

D. Respondent did not discriminate against Complainant on the basis of disability, age, race or national origin.

Complainant alleges that Respondent discriminated against him on the bases of disability, age, race and national origin. Complainant put forth no evidence on the issues of disability, age or national origin discrimination. Accordingly, only the issue of race discrimination will be addressed in this Initial Decision.

Complainant bears the burden of proof in his claim of race discrimination. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000). Complainant asserts that he was disciplined, and ultimately terminated, based on his race. To prove intentional discrimination under the Colorado Anti-Discrimination Act, an employee must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The elements of a *prima facie* case of intentional discrimination are:

a. complainant belongs to a protected class;
b. complainant was qualified for the position;
c. complainant suffered an adverse employment decision despite his or her qualifications; and
d. circumstances gives rise to an inference of unlawful discrimination.

Bodaghi, 995 P.2d at 300.

Once the employee has established a *prima facie* case of intentional discrimination, he has created a presumption that the employer has unlawfully discriminated against him. If the employer does not rebut the presumption, the fact finder is required to rule in favor of the Complainant. *Id.*

The burden next shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *prima facie*

case is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the employer's proffered reasons were in fact a pretext for discrimination. The employee can satisfy this burden of proof through evidence already in the record. Colorado law does not require, in every case, that the complainant offer additional evidence to support an inference of intentional discrimination. *Bodaghi*, 995 P.2d at 298.

Complainant has failed to establish a *prima facie* case of intentional discrimination. The circumstances of his corrective action, his disciplinary suspension and his disciplinary termination do not give rise to an inference of unlawful discrimination. Complainant, an African–American, is a member of a protected class. Because Complainant had successfully performed the job of security guard for over eight years, he was clearly qualified for the position, and he did suffer three adverse employment actions by receiving a corrective action, a disciplinary suspension and a disciplinary termination. However, there are no circumstances that give rise to an inference of unlawful discrimination. No credible evidence was put forth to demonstrate that Woods was ever motivated by racial discrimination when he gave Complainant the corrective action or the two disciplinary actions. Jack McCarty, another security guard, put a figurine in Complainant's mailbox, which could have been construed as racist. Complainant did not report the incident to Woods, or anyone else, because he felt that the individuals at CSP did not understand racism. Nonetheless, Woods heard about the incident and repeatedly asked to see the figurine so he could address the issue; Complainant never showed the figurine to Woods. Woods did not see the figurine until the hearing in this case. Complainant also produced evidence that McCarty, a White employee, slept while on duty, but was not disciplined. However, Woods was not McCarty's appointing authority at the time of that incident, and there is no evidence to demonstrate that any of Woods' decisions were in any way related to Complainant's race. Woods took allegations of racism very seriously as demonstrated by his actions following Complainant's allegations against Hauger. For the foregoing reasons, Complainant has failed to meet his burden of proving that Respondent intentionally discriminated against him.

E. 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. However, Complainant has failed to establish that the actions taken against him were frivolous, in bad faith, malicious, harassing or groundless. Although the disciplinary actions issued against Complainant were not within the reasonable range of alternatives, the credible

evidence established that Woods was acting in good faith. Thus, there is no basis for an award of attorney fees.

CONCLUSIONS OF LAW

1. Complainant committed some of the acts for which he was disciplined.

2. Respondent's actions were arbitrary, capricious, or contrary to rule or law.

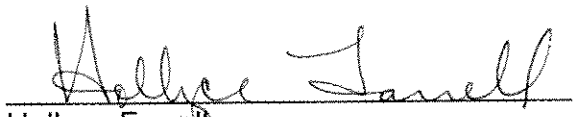
3. The corrective action and two disciplinary actions imposed were not within the range of reasonable alternatives.

4. Attorney fees are not warranted.

ORDER

Respondent's actions are **modified**. Respondent shall rescind the corrective action. Respondent shall rescind the five-day suspension and impose an alternate disciplinary action of a one-day suspension. Respondent shall rescind the termination and impose an alternate disciplinary action on Complainant of a thirty-day suspension. Complainant is entitled to back pay and benefits to the date of reinstatement. Attorney fees and costs are not awarded.

Dated this 16th day of May, 2007.



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

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 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 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of May, 2007, 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:

Sean P. Paris
1775 Sherman Street, 31st Floor
Denver, CO 80203

Diane M. Dash
Assistant Attorney General
POST Board Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

Andrea C. Woods