STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B100**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIMOTHY P. LYBARGER,
Complainant,

vs.

COLORADO STATE UNIVERSITY, HOUSING & DINING SERVICES,
Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on January 24 and February 14, 2007, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Mr. William Liley, the appointing authority in this matter. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Timothy P. Lybarger ("Complainant") appeals the imposition of a day of suspension by Respondent, Colorado State University, Housing & Dining Services ("Respondent" or "Dining Services"). Complainant seeks reversal of the suspension, removal of the disciplinary action from his file, removal of his last two performance reviews from his personnel file, and restoration of sick leave during the investigation period.

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

ISSUES

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

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. Respondent runs nine dining hall centers located on the Colorado State University ("CSU") campus. These dining centers serve 1.7 million meals a year to students and staff at CSU. The budget for Dining Services totals approximately $17 million.

2. Complainant began working for Respondent while still in high school. He was promoted into dining hall management during his twenty-eight year career at CSU. Prior to August of 2004, Complainant served as an Associate Director of Dining Services, which was classified as a Food Service Manger III position. In the year immediately prior to the 2005-2006 academic year, Complainant filled in as the dining hall manager for Durrell Hall while he maintained his title of Associate Director of Dining Services.

3. Prior to the 2004 – 05 performance review period, Complainant had received good or commendable ratings in his performance reviews. (Stipulated fact)

4. Complainant was on Family Medical Leave ("FML") between early July 2005 and September 6, 2005. When Complainant returned to CSU, he was returned to his position as an Associate Director of Dining Services.

5. During the academic year 2005 - 2006, Complainant was one of three Associate Directors of Dining Services. He reported to the Director of Residential Dining Services, Mr. Deon Lategan.

6. As an Associate Director in 2005 - 2006, Complainant supervised the dining hall managers for the south side dining hall units. The south side Dining Services operation was responsible for approximately $7 million each year in revenue for Respondent. Complainant directly supervised the dining hall managers in the south side units. Complainant's assigned units included Braiden Hall and Newsom Hall. The dining hall manager for Braiden Hall was Ms. Rose Price. The dining hall manager of Newsom Hall was Mr. Ted Knauss.

Change In Dining Hall Management and Policies:

7. Prior to 2003, Colorado State University leadership had been concerned for some time that dining hall expenditures were growing, and that it had been difficult to control the budgetary impact of the dining hall program.

8. Mr. Jim Dolak, the Director of Dining and Housing Services, hired Mr. Lategan in March of 2003 to be an agent of change for the unit, and to transform the way that dining services were being delivered to the university. Mr. Lategan was hired

because he was a strong fiscal manager and would implement a number of changes in the management processes for Dining Services.

9. One of Mr. Lategan's objectives was to place additional controls on Dining Services spending by changing the way the labor budget was managed.

10. Dining halls employ both certified state employees and student hourly labor. The labor and expense budget for each hall was initially set with an estimation as to the level of use that is expected for that hall. Students and faculty are not confined to one dining hall facility, however, and the number of meals served in each dining hall vary according to individual preferences and schedules. Mr. Lategan's new budgeting process attempted to shift funding during the academic year toward dining halls that were experiencing increases in use. Once the academic year began, Mr. Lategan's budget process modified the budget for each dining hall so that each hall reflected actual usage patterns. This meant that the dining halls which were not utilized as much as initially forecast were expected to reduce their labor costs below the level initially budgeted for them. The money saved by the labor reduction in underused dining halls could then be used to assist the dining halls where meal service usage was greater than initially forecast.

September 2005 Corrective Action:

11. While Complainant was the dining director for Durrell Hall, a number of issues arose which required managerial response. Mr. Lategan was not satisfied with Complainant's actions in handling these issues.

12. Mr. Lategan requested disciplinary action for Complainant in a memo dated May 12, 2005. Once Complainant was on FML leave for an extended period in the summer of 2005, however, Mr. Lategan changed his request to one for Corrective Action.

13. Once Complainant had returned from FML, Complainant and Mr. Lategan met to cover the issues involved in the Corrective Action. The September 9, 2005, meeting covered number of performance topics, including Complainant's failure of to meet labor budget goals for Durrell Hall. A formal Corrective Action was issued to Complainant on September 9, 2005. The Corrective Action required Complainant to respond to his supervisor's instructions promptly and completely, and to perform work in its entirety as outlined in Complainant's Performance Description Questionnaire ("PDQ") and performance expectations.

Meeting Participation:

14. As an Associate Director, Complainant was expected to participate in the Dining Services Advisory Council ("DSAC") meetings to listen and respond to student concerns over dining hall issues.

15. Complainant was also required to attend and participate in Mr. Lategan's senior staff meetings. These staff meetings were referred to as Council meetings. Mr. Lategan informed his senior staff that he expected each of his senior staff members to actively contribute during Council meetings.

16. Mr. Lategan noted in October of 2005, that Complainant was rarely engaging in discussions during DSAC meetings to talk about his unit operations and to express a desire to fix the issues identified. Mr. Lategan also noted as early as October 2005 that Complainant was also not actively participating in the Council meetings to the level that Mr. Lategan expected of his Associate Directors.

Mid-Year Performance Review:

17. Complainant's mid-year review of November 11, 2005 noted that Complainant was not exhibiting the level of leadership that the position of Associate Director required. Mr. Lategan rated Complainant as not meeting requirements in all categories. The specific comments from that mid-year review noted that Complainant's supervision of manager performance issues had not been adequately documented, that active participation in meetings was still missing, that Complainant was exhibiting difficulty in communicating simple points in discussions with the management staff, and that projects were incomplete and less than timely.

January 11, 2006 Meeting Attendance:

18. Dining Services held a special training week each year which brought all of the Dining Services staff together for several days of classes and meetings during the week before the students returned from winter break.

19. The training week involved extensive planning by the senior staff beginning in October of 2005. For the 2006 training week, Associate Director Norma Long took the lead in coordinating the training week. At least two reports about the training week plans were made at monthly senior staff meetings and reported in the minutes to those meetings, and Complainant was present for at least one of the discussions.

20. In 2006, the training period began on January 9, 2006. That year for the first time, the senior staff and managers were instructed to attend a meeting beginning at 7:30 am on January 11, 2006, for a special session with a nationally-known motivational speaker. Dining Services also published a schedule of events which listed a 7:30 report time and place for "unit directors and supervisors."

21. Complainant reported to his office on the morning of January 11, 2006, and found that none of the other senior management staff was present. Once he discovered that they were at the special meeting, Complainant hurried down to the meeting and walked into the session with about ten minutes remaining. He was the only senior

staff member for Dining Services who had not understood that there was a special appearance required of them that morning.

Meal Checker Training:

22. The dining hall system required students and faculty to present cards issued by CSU in order to purchase their meals through the dining programs. This requirement posed on-going problems for dining hall staff. The machines which read the cards were sometimes broken, and at times individuals did not have their cards with them. When these occasions arose, it was the responsibility of the check-out staff to create a hand-written log with sufficient information to track the purchases.

23. It was not unusual for the handwritten meal check logs to be incorrect or incomplete. Braiden Hall, for example, had experienced a shortage of $371 due to incomplete or incorrect records in September of 2005. This shortage was reported to Complainant. Complainant was not responsible for the shortage reported at Braiden Hall. He was, however, responsible for recognizing that a problem existed at Braiden Hall concerning the meal check process procedures and for attempting to correct that problem.

24. The dining hall check-out process was often staffed by student workers. The use of part-time student workers in this position increased the difficulty for dining hall managers to make sure that every check-out staff member underwent required training about the meal check process.

25. Mr. Lategan asked Complainant in early November 2005 to have Ms. Price review the meal check discrepancies from September 2005 and to have all of the checkers trained on meal check procedures. Mr. Lategan asked for a full report from Complainant on November 11, 2005, describing what has been done to correct the problems at Braiden Hall. As of December 9, 2005, Complainant had not responded to Mr. Lategan's request for an update on the training conducted by Braiden Hall.

26. Additionally, the senior staff agreed to include meal check training as part of the required training week for dining hall workers in January 2006. Each worker was required to attend the training and to sign a roster sheet documenting that they had completed the session. These rosters were to be sent to Associate Director Long.

27. By February 14, 2006, the required rosters for meal check training had yet to be received for Braiden and Newsom Halls. The meal check training rosters for all of the other dining halls had been submitted to Associate Director Long by January 23, of that year.

Budget:

28. Mr. Lategan's budget planning for dining halls required oversight from the beginning of the semester. The fact that Newsom and Braiden Halls were over budget in academic year 2005-2006 became apparent soon after student usage patterns developed. Complainant's role in managing budget issues was to assist his dining hall managers in understanding the problem and in meeting the revised budget numbers as the semesters progressed.

29. In December, 2005, Mr. Lategan saw that Complainant was not effectively working with the Newsome and Braiden Hall managers to reduce their labor expenditures. Mr. Lategan asked one of the other Associate Directors, Ron Pantier, to work with Newsom Hall dining manager, Mr. Knauss, to set up a plan to begin to reduce the Newsom Hall budget deficit. Mr. Pantier met with Mr. Knauss on December 13, 2005, and came up with a plan to reduce total labor by 50 hours a week as well as to add items to the dining hall selections which could assist in pulling students into Newsom Hall for meals.

30. By the middle of the academic year, Newsom Hall customer counts were still reduced by almost 9% from the prior year. Braiden Hall had been the second busiest dining hall in the year prior to the 2005-2006 academic year. In 2005 – 2006, however, Braiden Hall customer counts were reduced by slightly over 17%. Braiden Hall had also exceeded its prior year labor expenditures for a similar period in the previous year.

31. On the morning of January 18, 2006, Mr. Lategan met with Complainant to discuss the continuing problems with both the Braiden and Newsom budgets. Mr. Lategan sent Complainant a follow-up e-mail documenting their meeting.

32. Mr. Lategan noted that voluntary efforts to reduce labor costs at Newsom Hall had not produced the required results and that it was Mr. Lategan's evaluation that Mr. Knauss' actions to reduce the budget would not be sufficient.

33. Mr. Lategan specifically required Complainant to send both Mr. Knauss and Ms. Price an e-mail regarding the labor costs concerns and the need to reduce their labor budgets. Mr. Lategan told Complainant that he was to communicate clear expectations to Mr. Knauss and Ms. Price about what they were to achieve and to set deadlines for modifications to the budget.

34. Mr. Lategan told Complainant that he was to cover a list of seven items in his e-mail to his dining hall managers. Those seven items included that Complainant was to define the problem, to compare last year's labor expense with the current year's expenses to date, to compare the last year's customer count with the present year's customer count, to "explain the impact of the shift of customer counts have on those units that are getting all the new business," to lay out the

responsibility of both managers, to tell the managers why it was essential that dining services meet budget and shift revenue to where the business has moved, and to define how much was to be reduced from each budget and by when.

35. Mr. Lategan also told Complainant that he expected to receive a copy of the e-mails sent to Mr. Knauss and Ms. Price by the end of the day on January 19, 2006.

36. On January 19 and 20, 2006, Complainant called in sick. Complainant did not ask Mr. Lategan for an extension of time to produce the required memos, attempt to delegate the assignment, or inform Mr. Lategan of his plans to complete the work.

37. On Monday, January 23, 2006, Complainant sent out e-mails to Ms. Price and Mr. Knauss. These e-mails covered most, although not all, of the information points that Mr. Lategan required for the e-mails.

Hourly Employee Raise Information:

38. Student employees are eligible to obtain raises when they have worked at least 285 hours with a certain level of performance. These raises are to be approved by Mr. Lategan prior to implementation.

39. In January 2006, Mr. Knauss sent through a request for a large number of student raises. It appeared to Mr. Lategan that Mr. Knauss may have simply given a raise to all of his student hourly workers.

40. By e-mail on January 20, 2006, Mr. Lategan informed Complainant of his concerns about Mr. Knauss' request. Mr. Lategan asked Complainant to provide him with the backup information necessary to support student hourly raises. He told Complainant to include the hourly employee evaluation forms along with the number of hours worked by each employee with all of the appropriate signatures. Mr. Lategan also told Complainant that he was to have this information ready to be discussed at a meeting scheduled for January 30, 2006.

41. At the meeting between Complainant and Mr. Lategan on January 30, 2006, Complainant was not prepared to discuss the student raises request. He did not present the requested information on the justifications for the hourly raises. He told Mr. Lategan that Mr. Knauss was off that day and that Mr. Knauss was getting the information together.

Lack of Written Performance Expectations for Mr. Knauss:

42. During his tenure as Associate Director under Mr. Lategan, Complainant remarked at more than one point that one of his dining hall managers, Mr. Knauss, was not performing well as a manager of the dining hall at Newsom.

43. Mr. Lategan told Complainant in writing in October 2005 that Complainant was to set clear expectations for Mr. Knauss, to make his expectations known in writing, and that Mr. Knauss' performance should be reviewed at the mid-year point with specific management objectives set. Mr. Lategan told Complainant that he wanted to be blind-copied on the written performance feedback that Complainant would provide to Mr. Knauss. Mr. Lategean also told Complainant that he expected Complainant to make use of the performance review mechanisms available to him, including corrective and disciplinary action, if necessary.

44. By the point of the Rule 6-10 meeting with Mr. Liley in early February, 2006, however, Complainant had yet to issue any e-mails to Mr. Knauss or create other written records of meetings in which Mr. Knauss had been given directives about his expected performance. Complainant had also not made any notations of shortcomings in Mr. Knuass' mid-year performance review from November of 2005.

Lategan's Request For Disciplinary Action and Subsequent Investigation:

45. By memo dated December 9, 2005, Mr. Lategan requested that the Director of Human Resources, Carol Shirey, take disciplinary action against Complainant for a series of actions that Mr. Lategan considered to be failures of leadership on Complainant's part.

46. In December of 2006, Mr. Shirey delegated appointing authority over classified staff issues to Mr. William Liley. Mr. Liley had retired as Respondent's Director of Human Resources in 2004. He was working part-time on a variety of issues for Respondent at the time when Mr. Lategan's request for disciplinary action arrived at Human Resources.

47. Mr. Liley began his investigation into the potential disciplinary action by reviewing Mr. Lategan's December 9, 2005, memo and speaking with Mr. Lategan about the issues raised in that memo.

Board Rule 6-10 Meeting:

48. Mr. Liley held a Board Rule 6-10 meeting with Complainant on February 7, 2005. The meeting was originally scheduled for an earlier date, but Mr. Liley provided Complainant with additional time to speak with Respondent's Americans with Disabilities Act ("ADA") coordinator. Prior to the Board Rule 6-10 meeting, Mr. Liley also provided Complainant with a copy of the December 9, 2005, memorandum that Mr. Lategan had authored requesting disciplinary action.

49. Complainant attended the Board Rule 6-10 meeting without a representative. The meeting was taped by Mr. Liley. Mr. Liley and Complainant discussed the performance items identified by Mr. Lategan in his December 9, 2005 memo. The

meeting additionally included discussions of Complainant's Corrective Action, his mid-term evaluation, and other performance documentation prepared by Mr. Lategan.

50. Mr. Liley noticed at the Board Rule 6-10 meeting that Complainant appeared to have a shuffle in his gait, and that he had long pauses in his speaking style and palsied hands. Mr. Liley told Complainant that he thought that Complainant should consider taking a long or short term disability under Public Employee Retirement Association ("PERA").

May 13, 2006 Disciplinary Action:

51. Mr. Liley conducted additional investigation after the Board Rule 6-10 meeting by contacting Mr. Dolak, ADA coordinator Dana Hyatt, and the two other Associate Directors for Dining Services, Norma Long and Ron Pantier, for additional information on the issues raised by Mr. Lategan and by Complainant.

52. After considering all of the information presented, Mr. Liley decided that Complainant had failed on numerous occasions to exhibit behaviors expected of a manger of Complainant's level of experience and authority. Mr. Liley found that Complainant had committed five actions that warranted the imposition of the discipline:

    1) a failure to manage the labor budget issues for two of the dining halls under his supervision until specifically directed to do so by Mr. Lategan via e-mail on January 18, 2006, and that Complainant's e-mail even then was not sent out until January 23, 2006;

    2) a failure to provide Mr. Lategan with the specific information required to support a request for student worker hourly rate increases;

    3) a failure to appropriately manage the performance of one of the subordinate hall managers by a failure to note deficiencies in communications with this manager and a failure to reflect deficiencies in the mid-year evaluation;

    4) a failure to follow-up with a dining hall having continuing problems with meal check procedures, including a failure to make certain that the hall completed required training documentation; and

    5) a failure to actively participate in senior manager's team and group discussions.

53. By letter dated May 13, 2006, Mr. Liley imposed a day of suspension upon Complainant. Mr. Liley decided that a day of suspension was an adequate

response because Complainant had been at CSU for twenty-eight years and had been doing well prior to the point when he was to assist with the implementation of the new management policies for Dining Services. Mr. Liley was not attempting to affect Complainant's income to a great extent but to send a message that his performance issues were serious and needed to be corrected.

54. Complainant filed a timely appeal of the discipline with 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 [the Board's] 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;
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform on the job or may have an adverse effect on the department if employment is continued...

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).

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Mr. Lategan documented many of the instructions that he provided to Complainant in contemporaneous e-mail memos. As a result, the record was not in significant dispute concerning many of the actions taken by Complainant and by Mr. Lategan.

It was undisputed at hearing, for example, that Complainant had not provided meal check training information to Mr. Lategan by December 9, 2005. Additionally, the

record was clear that Complainant had not brought all of the required information to his January 30, 2006, meeting with Mr. Lategan concerning the student hourly rate raises. Complainant also did not persuasively dispute that he had failed to actively participate in Council and DSAC meetings.

Complainant argued at hearing that the identity of the manager who he thought had poor management skills was not known, and that therefore Respondent had not proven that he had failed to take appropriate action with regard to managing performance issues for this unnamed manager. This argument appears to be drawn from the fact that Mr. Liley's disciplinary letter does not identify the unit manager by name. The record, however, contains persuasive and competent evidence that both Mr. Lategan and Mr. Liley spoke with Complainant during the months and weeks prior to the disciplinary action about Mr. Knauss' performance issues at Newsom Hall, about Complainant's expected actions to address those performance issues, and about Complainant's failure to take action with regard to Mr. Knauss' performance. The preponderance of the evidence in this matter demonstrates that Complainant was expected to address Mr. Knauss' performance issues in writing, and that he did not do so.

It was also undisputed at hearing that Complainant had sent the budget analysis e-mails to Ms. Price and Mr. Knauss four calendar days after the deadline set by Mr. Lategan for those e-mails. Complainant argued that Respondent did not take his absence due to illness into account in determining that he had failed to send out the budget e-mails as required. Complainant's argument misses two important, and related, factors. Mr. Lategan's directive to issue the e-mails by a specific date was the end of an on-going process requiring Complainant to monitor the budget status and inform his mangers of reductions that should have been implemented. Additionally, Complainant did not make alternative arrangements with Mr. Lategan as to when the e-mails would be produced once Complainant realized he was going to take sick leave. He did not produce the e-mails before he left on sick leave, did not determine if he could delegate the work, and did not arrange for an extension of time to issue the e-mails. While illness may well be a mitigating circumstance for missing a deadline, illness does not eliminate the fact that the deadline was missed in a case such as this one.

Finally, Complainant argued that he had not known that he was to attend the January 11, 2006 meeting because he did not understand that he was considered to be senior staff. This argument was rejected as incredible, given that Complainant held a second level supervisor position in Dining Services, and that the planning for this training event was coordinated by the senior staff for a number of months prior to the training week.

Respondent was successful in proving by a preponderance of the evidence that Complainant committed all of the actions described in Mr. Liley's disciplinary letter of May 8, 2006.

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

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.

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).

During Complainant's testimony, Complainant argued that Mr. Lategan had unfairly targeted him, and that the skills that had taken him far in the organization were not recognized by Mr. Lategan.

It was clear from the testimony that this case stems from some of the difficulties that can arise with a major policy shift. Dining Services was costing the university a growing amount of money each year. Mr. Lategan was brought in to rein in the spending with new budgetary and management systems. It was also clear that Complainant was not completely in agreement with these new policy and management systems. Ms. Rose Price, for example, testified that she thought that Complainant's budget numbers and evaluation – which had her budget as being within acceptable bounds – was a better assessment than the other numbers produced by Mr. Pantier. This testimony demonstrated one of the essential problems posed by Complainant's performance. Mr. Lategan was trying to have Braiden Hall decrease its employee labor budget to account for a decrease in the number of meals actually served at Ms. Price's dining hall, and Complainant was not effectively communicating to Ms. Price that the new budgeting system required her to make on-going adjustments to her dining hall labor budget.

It was not an arbitrary or capricious demand, however, for Mr. Lategean to expect that Complainant would support and enforce his policy directives. The position held by Complainant is an upper level management position within Dining Services, and it was Complainant's primary function to take the policies enacted by Mr. Lategan and make certain that his dining hall managers implemented those policies. Complainant may not agree with the new policies or the specific performance demands placed upon him by Mr. Lategan, but his position requires that he move those policies forward. An inability or unwillingness to do so is a valid reason to take disciplinary action against a manager in Complainant's level for failure to perform competently.

In a related vein, many of the other issues raised by Respondent concern Complainant's unwillingness or inability to fully engage in the position of Associate Director. Complainant was the only senior staff member to be late to an important meeting because he apparently had not been paying sufficient attention to realize that that there was an important meeting for senior staff at 7:30 am on January 11, 2006. The position of Associate Director required proactive responses from Complainant in determining the causes of dining hall performance problems, yet he was not actively trying to identify why Braiden Hall had suffered a shortage from their meal check system or that required training for meal checkers had actually occurred. When asked to produce information on hourly raise requests, Complainant came to a meeting with only some of the information ready. Even though he recognized that one of his dining hall managers was not performing well as a manager, he did not appear to take the next step and use appropriate tools to try to change that situation.

The fact that Complainant had been on FML for an extended period, and the fact that he appeared to be unwell by the time of the Board Rule 6-10 meeting, also form a part of the record in this case. Complainant did not argue at hearing, however, that Respondent was obligated by law to take any different action in this case because of his illness or leave status. There was no reason presented to find that Respondent's actions were contrary to law having to do with Complainant's leave status or illness

In the end, it does not appear that Complainant was being unfairly targeted by Mr. Lategan. He was being repeatedly told that he needed to be more active and more in command of his operation, and more in support of Mr. Lategan's management policies for Dining Services. For an employee holding an upper level management position in Dining Services, such demands are reasonable and necessary requirements. Respondent's decision that Complainant had failed to perform his position in a competent manner is not arbitrary, capricious or contrary to rule or law.

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

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully after a full investigation and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801.

There was no dispute at hearing that Complainant had received good or excellent performance evaluations in the years leading up to the time period in question. Mr. Liley was aware of that history when he made his decision on discipline.

The record also demonstrates, however, that there had been a Corrective Action placed into effect on at least one similar issue included in this disciplinary action, and that performance issues involving participation levels, timely submission of work product and leadership skills had been discussed with Complainant prior to the imposition of discipline. The sanction of a day of suspension was also a reasonable choice to serve more as a

warning rather than to impose a dramatic effect on Respondent's employment.

Respondent's chosen sanction is within the range of reasonable alternatives available to Respondent to address the performance issues posed in this matter.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 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 8-38(B)(3), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted in this case. Complainant has not demonstrated any persuasive reasons to find that the disciplinary action against him was taken in bad faith or was frivolous, malicious, harassing, or otherwise groundless.

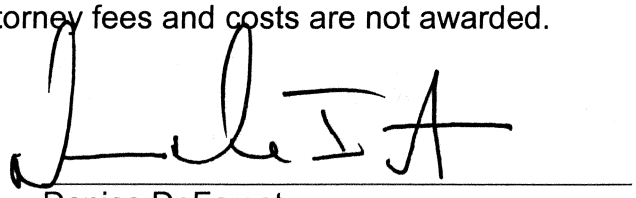
CONCLUSIONS OF LAW

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

ORDER

Respondent's action is **affirmed**. Attorney fees and costs are not awarded.

Dated this 3rd day of April, 2007.



Denise DeForest
Administrative Law Judge
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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); 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.

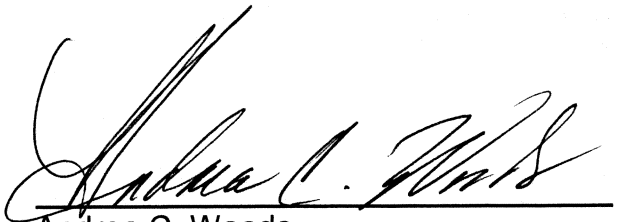
CERTIFICATE OF SERVICE

This is to certify that on the 4th day of April, 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:

Timothy P. Lybarger
1405 Shamrock Drive
Fort Collins, CO 80521

and in the interagency mail, to:

Vincent E. Morscher
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods