STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B107**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN APPLEGATE,
Complainant,

vs.

DEPARTMENT OF PERSONNEL & ADMINISTRATION,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 20, 2006. Complainant appeared through Nora Kelly, Esquire. Respondent appeared through Assistant Attorney General Christopher Puckett.

MATTER APPEALED

Complainant, John Applegate ("Applegate" or "Complainant") appeals his disciplinary demotion by Respondent, Department of Personnel & Administration ("Respondent" or "DPA"), to a Structural Trades I. Complainant seeks rescission of the demotion and reinstatement to his position as a Structural Trades II.

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

ISSUES

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

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

FINDINGS OF FACT

General Background

1. Complainant is a certified state employee. He held the position of Structural Trades II in the Division of Central Services, Capitol Complex work unit, until his demotion.

2. Complainant's Position Description Questionnaire summarizes his position as follows: "This position responds to minor plumbing and piping related work requests for the buildings within the Capitol Complex." Complainant's duties included

replacing broken flushers and faucets, drain cleaning, unclogging toilets, etc. He has had some schooling in plumbing.

3. Complainant received his job assignments either directly from his supervisor or through a written work order. When he responded to a job site, his responsibilities were to assess the problem, obtain all necessary tools for the repair, and then to perform the work. If the job was beyond his abilities, he was to refer the job to a Pipe Trades II on staff, which was the next classification up from him.

4. Complainant's overall evaluation rating for the period April 1, 2005 through March 31, 2006 was a Proficient.

2005 Flood

5. In October 2005, Complainant performed a routine plumbing repair on a toilet in a restroom of the Human Services Building in Denver, Colorado. The plumbing in this building is old. In the course of making the repair, a pipe broke.

6. At the time Complainant performed this plumbing repair, he used the standard protocol of isolating (turning off the water at its source) the fixture being repaired. Complainant did not isolate the entire restroom, which would have stopped the water flow to all of the toilets.

7. In October 2005, it was the customary practice for Capitol Complex employees to isolate only the fixture, and not the entire bathroom, prior to making a plumbing repair. The reason for this practice was that it caused the least disruption to employees working on the floor.

8. When the pipe broke, the entire floor of the Human Services building flooded. The main electrical distribution center in the building was ruined. The electrical system shorted out and exploded, causing a hole to blow through the cabinets surrounding the electrical center on the floor. All of the computers on the floor were ruined.

9. The fiscal loss caused by the October 2005 flood exceeded $500,000.

10. Scott Madsen was Director of the Division of Central Services at the time of the 2005 flood. When he learned what had happened, he asked who was responsible, and if that individual had been following procedures. Madsen was informed that Complainant had been following all applicable procedures in performing the plumbing repair and failing to isolate the entire bathroom.

11. Madsen and his managers determined that Complainant had not been at fault, that the episode could have happened to anyone, and that therefore no corrective or disciplinary action would be imposed.

Corrective Measures Taken After the October 2005 Flood; Directive to Isolate Floor Prior to Performing Plumbing Repairs

12. Madsen directed his managers of the Capital Complex to implement a new procedure that would prevent this type of debacle from occurring again. Those managers included David Belmear, Pipe Trades III, who at that time was Complainant's direct supervisor.

13. The managers determined that the new procedure would be to isolate the entire floor prior to performing a plumbing repair in that bathroom. In the Human Services Building, the shut-off valve for each floor is located in the ceiling of each floor.

14. The day after the October 2005 flood, Belmear met with Complainant and the other two subordinates under his direction who performed plumbing work, Robert Abeyda and Greg Philips, both Pipe Trades I's. He met with each of them separately.

15. In Belmear's meeting with Complainant, he directed Complainant to isolate the entire floor prior to performing any future plumbing work. He had previously shown Complainant where the isolation shut-off valves are located. In addition, Philips had previously shown Complainant where the shut-off valves were located. Belmear asked Complainant if he had any questions, and Complainant had none.

16. The shut-off valves for the floors in the Human Services building are located in the ceiling.

17. From October 2005 forward, Complainant and his co-workers routinely followed the new procedure of isolating the floor prior to performing any plumbing repair work.

18. In December 2005, Belmear was promoted to be Complainant's second level supervisor. Michael Miller, Pipe Trades II, became Complainant's direct supervisor.

April 2006 Failure to Perform Plumbing Isolation

19. On April 10, 2006, Complainant was called to the Human Services Building to perform a plumbing repair.

20. Complainant was extremely busy on that day. He felt under duress.

21. When Complainant arrived at the job site, he determined that he would need to replace the flushometer in the toilet. This was the exact same repair that he had performed in October 2005 that had led to the flood. Flushometer repair was a routine task he had performed several times previously during his tenure.

22. Complainant knew that under policy, he was required to isolate the entire floor prior to repairing the toilet.

23. Since the shut-off valve for the floors in the Human Services Building are located in the ceiling, Complainant would have needed to get a ladder in order to isolate the floor, prior to starting the toilet repair job.

24. Complainant did not leave the job site to get a ladder.

25. He started to perform the flushometer replacement, without first isolating the water in the restroom.

26. Complainant attempted to turn the water off at the toilet he was repairing, when the toilet's shut-off valve snapped and broke. This break caused water to flood into the bathroom.

27. As water leaked onto the floor, Complainant climbed on top of a toilet in order to isolate the water on the floor. In doing so, he risked breaking the toilet off of the wall, causing more severe damage.

28. Complainant called his supervisors. When Mr. Belmear arrived on the scene, Complainant was still standing on top of the toilet. He succeeded in isolating the water on the floor, mitigating against further flooding. He informed Mr. Belmear that he had attempted to isolate the entire floor before commencing the toilet repair, but it must not have held.

29. When Mike Moore, Complainant's direct supervisor, arrived on the scene, Complainant stated to him, "I messed up."

30. Complainant's violation of the isolation policy by failing to isolate the floor prior to performing the plumbing repair caused significant flooding damage. All of the computer servers in the building had to be replaced.

Pre-Disciplinary Meeting

31. When Division Director Madsen learned that the same employee who had caused the October 2005 flood was responsible for the April 2006 flood, he was incredulous. He thought that Complainant was the least likely individual to make the same mistake twice, because he was the most painfully aware of the dire consequences of the October 2005 flood.

32. Madsen sent Complainant a notice of pre-disciplinary meeting. Prior to the meeting, Madsen spoke with Complainant's supervisors and confirmed that they had implemented a new policy requiring floor isolation prior to performing plumbing repairs.

33. On May 24, 2006, Complainant attended the pre-disciplinary meeting with his attorney. Mr. Madsen brought Frank Lombardi, a high level supervisor, with him to

the meeting. Lombardi had been part of the management team that implemented the floor isolation policy after the October 2005 flood.

34. At the meeting, Complainant informed Mr. Madsen that he had used the "exact same procedures I've followed for years in every building" on April 10, and stated that he had isolated "the fixture itself." He said nothing about having first attempted to isolate the floor.

35. Complainant denied having been directed to follow a new procedure after the October 2005 flood, to isolate the entire floor prior to performing plumbing repairs.

36. Mr. Madsen was surprised to hear this, as it contradicted his direct order given in October 2005, and the information he had been given by Complainant's supervisors prior to the meeting.

37. Mr. Lombardi reviewed the corrective measures that had been implemented after the October 2005 flood. He also reviewed the facts of the April 10 incident, as he knew them. He pointed out that Complainant had "had the presence of mind—now that he knew where the isolation valve was—to jump on a urinal and isolate that floor, which kind of mitigated it . . ." He also noted that when Mr. Belmear asked Complainant why he had not isolated the floor, Complainant had responded, "I isolated it but it didn't hold."

38. Mr. Madsen asked Complainant about his statement to Mr. Belmear. Complainant informed Mr. Madsen that he had attempted to isolate the floor prior to isolating the toilet not because it was official policy, but because he thought it would be a good idea. He continued to deny having been directed to implement the floor isolation procedure.

39. Mr. Madsen knew that Complainant had not brought a ladder to the bathroom prior to starting the repair. He therefore did not believe Complainant's claim that he had attempted to isolate the entire bathroom. He also did not believe Complainant's statement that he had never been told to isolate the entire floor.

40. By the end of the meeting, Mr. Madsen was deeply concerned about Complainant's lack of credibility. Mr. Madsen felt that Complainant had shown himself to be an unreliable employee by violating the policy on April 10, and by failing to be honest with Madsen at the meeting.

41. Mr. Madsen determined that he could no longer trust Complainant to operate independently in the position of a Structural Trades II. He felt that to allow Complainant to perform future plumbing tasks on an autonomous basis would expose the Department to serious potential liability.

42. Mr. Madsen felt that Complainant's conduct in April 2006 was grossly negligent.

43. After the pre-disciplinary meeting, Madsen asked Greg Philips and Robert Abeyta, Pipe Trades II's who worked with Complainant, if they had received any new procedural directive after the October 2005 flood. They informed him that Mr. Belmear had ordered them to isolate the entire floor prior to performing any plumbing repair work.

44. Mr. Madsen also spoke with Mr. Belmear and Mr. Moore again, both of whom confirmed that Complainant had been performing the required plumbing isolation procedure for the entire floor prior to performing repairs, since the October 2005 incident. Mr. Moore informed Mr. Madsen that on one occasion after the October 2005 incident, Complainant had shut down an entire building's plumbing in order to repair a toilet.

Performance History

45. Prior to deciding what action to take, Mr. Madsen reviewed Complainant's performance history and personnel file. He found two corrective actions in the file. One was imposed for smoking inside state buildings; the other was for a pattern of inappropriate, hostile conduct towards other employees during meetings.

46. Mr. Madsen noted that Complainant's overall 2006 evaluation was at the Proficient level, and that in 2003, Complainant received an overall Needs Improvement rating. He noted that the June 2003 Performance Improvement Plan addressed his smoking in state buildings after repeated verbal and written warnings, among other issues.

Demotion

47. Mr. Madsen concluded that Complainant's performance history with regard to the ban on smoking in state buildings revealed a pattern of Complainant failing to follow procedures.

48. On June 5, 2006, Mr. Madsen sent a demotion letter to Complainant. The letter reviewed the results of his investigation in detail, including the facts of the October 2005 incident, the corrective measures implemented thereafter, and the events of April 10, 2006. Mr. Madsen concluded that Complainant was aware of the procedure that had to be followed, had followed it on other repairs, understood the magnitude of the damage that could be caused by failure to follow the procedure, and yet had nonetheless failed to follow the procedure on April 10, 2006.

49. Mr. Madsen concluded, "Due to the seriousness of the incident, the gross negligence displayed on your part by not following known procedures in the 2nd incident, and your continued misrepresentations and contradictions, I feel that a disciplinary action is warranted and justified." He demoted Complainant to a Structural Trades I, with a permanent pay reduction from $3,325 per month to $2,825 per month.

50. Complainant's testimony was not credible.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-12, 4 CCR 801 and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, *supra*. The Board may reverse the agency's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS UPON WHICH DISCIPLINE WAS BASED

Respondent has met its burden of proving by preponderant evidence that Complainant committed the acts for which he was disciplined. Following the October 2005 flood causing over half a million dollars in damage, Complainant was directed to follow the new isolation procedure. On April 10, 2006, fully aware of the potential disaster that could result from violating this procedure, Complainant knowingly and intentionally failed to follow the procedure.

III. THE DISCIPLINE IMPOSED WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary

conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's action was not arbitrary or capricious. Mr. Madsen performed a thorough investigation prior to making a decision in this case. He spoke with the managers involved in the follow-up to the October 2005 flood. After hearing a contradictory version of events from Complainant at the pre-disciplinary meeting, he interviewed Complainant's co-workers separately, to be certain that his understanding of the events from 2005 forward was correct. By the time Mr. Madsen made his ultimate decision, he was fully in command of all relevant facts.

Complainant asserts that Respondent violated State Personnel Board Rule 6-2, 4 CCR 801, by imposing disciplinary action without first imposing corrective action, for the error made by Complainant in April 2006. That Rule states,

> "A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination." State Personnel Board Rule 6-2, 4 CCR 801.

Complainant's actions on April 10 were flagrant and serious, warranting immediate disciplinary action. Complainant had caused over $500,000 in damage to state property in October 2005 by failing to isolate the floor prior to making a repair in a bathroom. After that unfortunate incident, Respondent implemented a simple policy, designed to avoid a recurrence of the event. In April 2006, Complainant made a conscious decision to flagrantly violate the simple prophylactic isolation procedure. This decision demonstrated a shocking lack of consideration for the potential consequences of his omission, including the fiscal impact on the State of Colorado. His actions on April 10, 2006 were extremely serious.

Complainant asserts that a corrective action was necessary to provide him with "clear and specific notice of the areas he needed to improve in." The dramatic damage to the Human Services building in October 2005, and the new plumbing isolation procedure, provided clear and specific notice to Complainant of what he was required to do when performing plumbing repairs, and of what the potential consequences were of violating that procedure. Respondent was not required to give Complainant a second warning under these circumstances.

Complainant also asserts that it is unfair to hold him accountable for violating a procedure that was verbal, instead of written. However, there is no requirement that all procedures governing state employment be written. *See*, § 24-50-116, C.R.S. and *Bishop v. Dept. of Institutions*, 831 P.2d 506 (Colo.App. 1992). Under §24-50-116, classified employees must perform their duties and conduct themselves in accordance with generally accepted standards and with specific standards prescribe by law, rule of

the board, or any appointing authority. Here, the isolation procedure was a specific standard prescribed by Mr. Madsen, developed and implemented by Complainant's managers. Complainant was required to comply with that procedure. Complainant's conduct on April 10, 2006, constituted willful misconduct, appropriately subjecting him to disciplinary action. *Bishop, supra.*

IV. THE DISCIPLINE IMPOSED WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES

In view of the serious and flagrant nature of Complainant's decision to place the Human Services building at risk on April 10, 2005, Mr. Madsen's imposition of the demotion was a mild response to the incident, and was well within the range of reasonable alternatives available to him as appointing authority.

CONCLUSIONS OF LAW

1. Complainant committed the acts upon which discipline was based;

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

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

DATED this 2nd day
of **November 2006** at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
633 17th St., Suite 1320
Denver, CO 80203

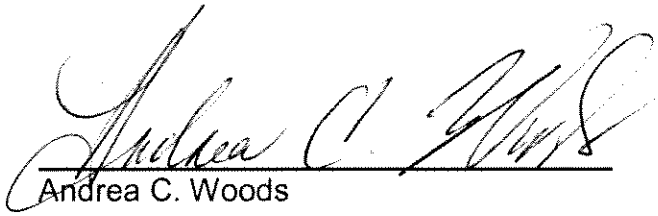
CERTIFICATE OF MAILING

This is to certify that on the 3rd day of **November 2006,** I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
1801 Broadway, Suite 1204
Denver, Colorado 80202

And interagency mail to:

Christopher Puckett
Assistant Attorney General
Employment Section
1525 Sherman Street 5th Floor
Denver, Colorado 80203



Andrea C. Woods

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.