STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B005**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TROY NUSS,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on February 21, 2007. Complainant appeared through Qusair Mohamedbhai, of Riggs, Abney, Neal, Turpen, Orgison & Lewis, P.C. Respondent appeared through Assistant Attorney General Diane Dash. Major David Donaldson was Respondent's advisory witness.

MATTER APPEALED

Complainant, Troy Nuss ("Nuss" or "Complainant") appeals a disciplinary action consisting of working on two vacation days. The action was imposed by Respondent, Department of Public Safety, Colorado State Patrol ("Respondent," "Patrol," or "CSP"). Complainant seeks rescission of the disciplinary action and an award of attorney fees and costs.

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

ISSUES

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

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

3. Whether the discipline imposed was within the range of reasonable alternatives; and

4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant is a certified state employee. He has held the position of Colorado State Trooper for over twelve years.

2. Complainant has received dozens of commendations from members of the public and CSP superiors. He created an educational video for youth regarding safe driving, which has been shown widely.

3. In recent years, Complainant has volunteered to be the informal Public Information Officer for the Patrol with local media, in order to improve community relations between the State Patrol, the media and the public. He writes a regular column on Patrol issues in a local paper. These endeavors have benefited the Patrol.

Events of April 7, 2006

4. On April 7, 2006, Complainant was off duty. He was scheduled to testify in court that afternoon regarding a case arising out of a routine traffic stop as a State Trooper. (Complainant would be paid a minimum of two hours' pay plus travel time to and from the court appearance.)

5. Complainant drove his personal vehicle to court that day, because he planned to do personal errands after appearing in court. Complainant was dressed for court in a white button down shirt, tie, and sport jacket.

6. Complainant drove west on Highway 34, from Kersey towards Greeley, in his red pick-up truck. A Dodge Magnum station wagon driven by Mr. Jeffrey Meeker pulled onto the highway, cutting directly in front of Complainant. In order to avoid hitting Mr. Meeker's vehicle, Complainant had to swerve out of the left lane into the right lane.

7. Mr. Meeker apparently did not notice Complainant's truck when he pulled onto the highway.

8. Complainant passed Meeker on the right. He then moved into the left lane to pass another car, with Meeker close behind him in the left lane. As Complainant pulled in front of Meeker to pass another car, Meeker perceived that Complainant's truck was too close. Meeker gave Complainant "the finger" while his car was directly behind Complainant's truck. Complainant saw Meeker's gesture as he completed the pass.

9. Soon thereafter, Meeker drove his car next to Complainant's truck, and gave Complainant "the finger" with both hands. During this event, both Complainant and Meeker were agitatedly talking to each other.

10. After this incident, Complainant settled behind Meeker's vehicle, and followed him for the next ten miles. Meeker was aware Complainant was following him, and he often drove over the speed limit. Complainant drove over the speed limit in order to remain behind Meeker.

11. During this ten-mile drive, Meeker changed lanes without signaling as he passed a vehicle.

12. Complainant had his cell phone strapped to his belt. Complainant could have accessed his cell phone to report Meeker to the State Patrol if he had desired to do so, by loosening or unbuckling his seat belt, or by pulling over.

13. As Meeker and Complainant approached the intersection of Highway 85, Meeker stopped at a red light behind another car, in the left "through traffic" lane.

14. Complainant stopped directly behind Meeker. Meeker was trapped at the red light, behind one car and in front of Complainant's car.

15. Complainant got out of his truck and walked directly up to Meeker's driver's side window. As he approached, he removed his State Trooper identification card (which resembles a drivers license in size and general format) from his pocket, as well as a cloth state trooper badge.

16. Meeker saw Complainant approach, and rolled down his window part way. Complainant leaned over so that his face was in Meeker's window area, and showed him his State Patrol identification card. Complainant identified himself as an off duty Patrol officer, then stated to him, "You flipped off the wrong person. You'd better think twice before you flip someone off," or words to that effect.

17. Meeker responded angrily that Complainant had cut him off. Complainant denied he had cut off Meeker.

18. Complainant told Meeker to pull over on the side of the road and wait for an on-duty State Trooper to arrive.

19. Meeker rolled up his window and drove away.

20. At the time Complainant walked up to Meeker's vehicle, he had expected Meeker to apologize when he learned he was a State Trooper. Had Meeker apologized, Complainant would have given Meeker a verbal warning and would not have called for an on-duty patrol officer.

21. Prior to approaching Meeker's vehicle, Complainant had not planned to give Meeker a citation for any traffic violation.

22. Complainant did not expect Meeker to respond to him in the hostile manner he did. Meeker's response made Complainant frustrated and angry.

23. As Meeker drove away, Complainant said, "I'm not done talking to you yet," and he hit the driver side window of Meeker's car with his hand, making a loud noise.

24. Meeker then immediately called 911. He stated to the dispatcher, "it's not an emergency, I just, uh, wanted to notify the police that this State Patrolman's harassing me and just punched my window." He also stated, "he just punched my window and got right in my face when I rolled down my window." "He's not on duty, and I want to press charges immediately for punching my window. It didn't break but still."

25. Meeker had by this time parked in the lot of a used auto dealership. He arranged with the dispatcher to remain there until the local police arrived.

26. Complainant soon arrived at the same parking lot, and parked. Meeker informed Complainant that he was on the phone with 911 and that the local police were on their way.

27. Complainant called the State Patrol and requested that they send an on-duty officer to the parking lot. He remained at a distance from Meeker.

28. When the local Evans police arrived, Meeker informed them that he thought Complainant might be impersonating a state patrol officer, and gave his version of events.

29. The local police then spoke with Complainant. They soon departed, with the understanding that a State Patrol officer would arrive shortly.

30. Once the State Patrol officer, Trooper Schwarz, arrived, he took reports from Meeker and Complainant. Schwartz asked Complainant if he sought to have a traffic violation citation issued against Meeker, and Complainant responded that he did.

31. Complainant filled out the citation form against Meeker, citing him with failure to yield the right of way and harassment (for making obscene gestures). Patrol Officer Schwarz signed it.

32. Trooper Schwartz informed Meeker that Complainant was an off-duty State Trooper and he was going to issue a citation to him for driving actions he had witnessed. Schwartz served Meeker the citation for failure to yield and harassment.

33. Meeker asked to speak to Complainant's supervisor and stated that he sought to file a complaint against him.

34. Schwartz called Complainant's immediate supervisor, Sgt. Hunt, to inform him about the situation.

35. Sgt. Hunt arrived at the parking lot and spoke with Complainant and Meeker. Hunt gave Meeker the complaint form to fill out.

36. On April 9, 2006, Complainant wrote a memo to one of his supervisors, Sgt. Demers, regarding the events of April 7. He characterized Meeker's conduct as "road rage," and detailed the sequence of events as it is outlined above.

37. On April 11, 2006, Meeker submitted his complaint form against Complainant. Meeker raised three main issues: Nuss had changed lanes, almost striking Meeker's vehicle; Nuss had failed to properly identify himself at the red light; and Nuss had slapped the window of Meeker's car.

38. Pursuant to Patrol policy, Sgt. Demers, one of Complainant's direct supervisors, conducted an investigation into the allegations in Meeker's complaint against Trooper Nuss.

39. In his April 11, 2006 memo to Captain Matzke, summarizing the results of his investigation, Sgt. Demers concluded that he was unable to verify that Nuss had pulled in front of Meeker in a dangerous manner. Demers also found that because Meeker had identified Complainant as a state trooper in his statement to the 911 dispatcher, Meeker's claim that Nuss had not properly identified himself lacked credibility. And lastly, Sgt. Demers concluded that while Complainant had admitted to hitting Meeker's car window, this was not a rule violation, and "was at most unprofessional."

40. Sgt. Demers suggested that no action be taken against Nuss, and stated that he had been advised to use his metal Trooper badge instead of his cloth badge in the future. He noted, "Trooper Nuss felt that the driving actions of this individual were so egregious that action had to be taken. He stated to me that had this fellow accepted that his driving was poor he would have probably just let it go with a warning and request that he drive more safely. Trooper Nuss stated that the reporting party had a very poor attitude and denied all allegations."

41. Captain Matzke, Sgt. Demers' superior, then conducted his own investigation into Meeker's complaint against Trooper Nuss. Captain Matzke's May 12, 2006 memo to the appointing authority, District 3 Commander Major David G. Donaldson, contains his conclusions and recommendations. Captain Matzke focused on the same issues, as well as whether the use of the cloth badge (instead of an official metal badge) was compliant with State Patrol regulations. Captain Matzke concluded that Operational Procedure II(A)(1) authorizes the use of either metal or cloth badge. He made the same general factual findings that Sgt. Demers had, adding that "Trooper Nuss's use of his palm to strike Meeker's window as he drove off, was in my opinion,

a natural reaction as well as an attempt to get Meeker's attention. Had it been anger, I believe a fist would have been used."

42. Captain Matzke found Meeker "to be an aggressive driver and not truthful," and stated, "I find that Mr. Meeker has no credibility in his accounts of what transpired between himself and Trooper Nuss on the date in question." He found that Trooper Nuss had not violated any operational policies or procedures, and suggested that the complaint be classified as "exonerated."

State Patrol Regulations

43. State Patrol Operations Manual, Chapter 302.1, "Patrolling in General," contains a section entitled "General guidelines for patrolling." Subsection G states, "While in class B, C, or D uniform, officers in an unmarked car should refrain from making traffic contacts. Should an officer be compelled to make a contact while in class B, C, or D uniform, the officer's badge and identification card should be displayed to the motorist for the purpose of identification."

44. Complainant was aware of the policy that he was to refrain from making traffic contacts in anything but a marked Patrol car.

45. Chapter 302.2, "Professional Traffic Stops," defines a "traffic stop" as "a pro-active traffic stop initiated by an officer to conduct an enforcement action." The "Policy" section of this procedure states,

> Officers should contact and take appropriate enforcement action, objectively, against all persons they observe violating traffic laws. Officers will not use factors such as ethnicity, social background, culture, attitude, or intent when deciding to initiate a contact. Enforcement action may consist of an oral or written warning, the issuance of a citation, or a physical arrest. In enforcing the laws, officers must bear in mind that a violation is not an act directed against themselves but against the law of the people of the State of Colorado; and they must therefore make every official act an impersonal duty. Officers will be courteous but firm during enforcement contacts. In the interests of safety, officers are expected to maintain control of all contacts. On occasion, special circumstances may exist where officers should exercise discretion when taking enforcement action.

46. Policy 302.2, "Stopping Violators" states in part, "Make no comments as to the validity of the motorist's statements, do not argue with the motorist, and avoid any display of anger, arrogance, egotism or superiority."

47. Patrol General Orders include the following:

5. Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.

6. Members will avoid any conduct which may bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.

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.

48. Major Donaldson reviewed all pertinent documents compiled in response to Meeker's complaint. He closely read the memos prepared by Captain Matzke and Sgt. Demers, the memo prepared by Complainant describing the events of April 7, 2006, the citation issued to Meeker, Meeker's complaint, the applicable Patrol regulations, and Complainant's personnel file.

49. Major Donaldson's review of the April 7 events was more expansive than that of Sgt. Demers and Captain Matzke. They had limited their review of Complainant's conduct solely to the issues raised by Meeker in his complaint. By contrast, Major Donaldson focused on the broader issues of whether Complainant should have conducted a traffic stop while off duty, in his personal vehicle, and whether Complainant had erroneously permitted himself to become personally involved in the situation with Meeker.

50. Complainant's personnel file revealed a 2003 corrective action for damaging a patrol car in an accident; a 1996 disciplinary action (working two holidays) for using profane language and making an inappropriate arrest of a hostile citizen at the scene of an accident; and a 1995 disciplinary action for damaging a patrol car in an accident.

51. After reviewing the documents, Major Donaldson prepared a list of detailed questions that were raised in his mind by the April 7 incident. He then sent Complainant a notice of pre-disciplinary meeting to discuss the events of April 7, 2006.

Pre-disciplinary Meeting

52. Major Donaldson and Complainant attended the pre-disciplinary meeting on June 28, 2006. Complainant waived his right to have a representative present.

53. Donaldson opened the meeting by informing Complainant that he had several questions about April 7, and inviting him to speak first.

54. Nuss gave a lengthy and full explanation of the events of April 7. The two then discussed several of the details.

55. Major Donaldson asked Complainant why he had stopped someone while driving his personal vehicle. Nuss responded that he did not make a habit of it, but he had been unable to access his cell phone. He stated that once they were at the red light, he felt he was "kind of running out of time, I thought I will have a quick talk with him, maybe he just didn't see me and he is just having a bad day. . ."

56. Major Donaldson asked Complainant if the Patrol has a policy that allows him to perform a traffic stop in his personal vehicle. Complainant responded that he had the policy with him, and "it says you will refrain from that and if you feel basically obligated to do it, make sure you identify yourself. It has, it says an unmarked car."

57. The Major agreed with Complainant that the phrase "unmarked car" was "a little vague," because it did not expressly include, "personal vehicle."

58. Major Donaldson asked Complainant why he had not, for the entire ten-mile trip following Meeker, simply taken his seatbelt off in order to access his cell phone. Complainant stated that he could have accessed his phone by removing his seatbelt and opening his coat.

59. Donaldson asked Complainant if he had been armed and whether he was wearing a bulletproof vest. Complainant stated that he had been armed, and had no vest on.

60. Major Donaldson then confirmed that when he stopped behind Meeker, he had been in the left, "through traffic" lane. Donaldson asked if Complainant would do that in a patrol car. Complainant responded that in a patrol car he would have had his flashing lights, which would have prompted Meeker to pull over on the side of the road.

61. Donaldson asked what the traffic conditions were like, and Complainant stated there was one car ahead of Meeker, and when he walked back to his truck, there was one vehicle behind him. He also confirmed that there had been four or five cars in the right lane.

62. The Major then asked if he had cursed. Complainant denied cursing. He stated, "The only time I raised my voice to him at all was when he rolled up the window. And I just raised my voice and said I am not done talking to you yet." The Major asked if he was "pretty frustrated at that point?" Complainant responded, "I wasn't really frustrated, I just, I thought the guy didn't really care . . . I wasn't really that mad . . ."

63. Donaldson asked Complainant if he had taken the Kersey traffic infraction personally. In the course of responding, Complainant stated, "And I am thinking, this guy thinks I am Jo Carpenter, you know, Joe Q. Citizen and he can get away with this. I thought it was, you know, you don't, you don't do that. We get called all the time, and he won. He caused, you know, as far as the act, the traffic issue, the near collision, he caused that and doesn't even care. And then he is the one, basically

bullying the public thinking that I am just John Q. Citizen. So, I think he is a bully and I think he is an aggressive driver and it is very evident in that road rage. Did I take it personal? No, but I thought, you know, I am a servant of the people and will, you know, I will do what I can. And like I said, I couldn't get to my cell phone, but we'll have a little talk with him."

64. Complainant made it clear to Major Donaldson that he thought it would be a quick conversation, and that once Meeker learned that Complainant was a State Trooper, he would be remorseful and apologize. Once he had received that apology, Complainant intended to merely tell him to "watch your driving a little bit," and to drive away.

65. Major Donaldson concluded that there was an element of aggression in Complainant's behavior on April 7, because he had followed Meeker for ten miles, speeding at times in order to keep up with him, and had then gotten out of his vehicle in the through traffic lane, walked up to the vehicle, and had verbally confronted Meeker.

66. Donaldson asked Complainant if he understood that someone in Meeker's position, sitting at the red light, waiting for an individual in street clothes to appear at his driver's side window, not knowing what that approaching individual was going to do, would probably get "pretty uneasy." Complainant acknowledged that he understood this.

67. At the end of the meeting, Donaldson informed Complainant that he was never again to make a traffic stop in his personal vehicle. He also advised Complainant that he had just taken disciplinary action against another Trooper in the district who had done the same thing. He reminded Complainant that with people impersonating Troopers (with fake cloth badges readily available over the internet), it is dangerous to the Trooper to make a stop without the visible recognition of a patrol car and a uniform. He underscored that the statistics on law enforcement officer deaths bear this out.

68. Major Donaldson also noted, "you are not operating under the colors of the Colorado State Patrol when you are driving your personally owned vehicle." Complainant responded, "Right."

69. At the end of the meeting, Major Donaldson informed Complainant that he had concluded that Complainant had taken Meeker's actions personally, and that after Meeker had cut him off and he made a lane change to avoid a collision, that should have been the end of the story. He said, "Troy, I think you do great work." He noted that he wished it had been handled differently, that he had put himself in a dangerous position, and that the incident had not helped the reputation of the State Patrol, not only with Meeker, but with the local Evans police.

Disciplinary Decision

70. On the basis of the meeting with Complainant, Donaldson concluded that there was insufficient evidence to support the charges against Meeker. In addition, he felt that Complainant had acted improperly by taking a personal interest in Meeker's conduct on April 7, instead of simply calling it in to an on-duty patrol officer.

71. Major Donaldson contacted the Assistant District Attorney assigned to the case against Meeker and informed him of his opinion that the charges should be dropped for insufficient evidence and due to the circumstances on April 7, 2006. The prosecutor appreciated the information and agreed that the charges should be dismissed.

72. On July 3, 2006, Major Donaldson wrote Meeker to inform him that the investigation into his complaint against Trooper Nuss had been completed. He advised Meeker that he had met with Nuss, that he had concluded Nuss's actions were not consistent with the Patrol Operations Manual, and that administrative action had been taken to assure that future traffic contacts would be appropriate. He also informed Meeker that the charges filed against him were being dropped "due to the fact that I believe that they were not written under ideal circumstances," and that it was unnecessary to make further court appearances.

73. On July 3, 2006, Major Donaldson imposed disciplinary action against Complainant in the form of having to work on two holidays without compensated time off. The letter noted that Complainant had violated CSP Policy 302.1(I)(G), 302.2 (Policy Statement), 302.2(I)(A-4), and General Orders 5, 6, and 7. Donaldson found that Complainant's conduct "was in error and in need of improvement to ensure that traffic contacts are made in a professional manner. Contacts will always be made from a state-owned vehicle, and, normally, while in a Class A uniform. Contacts will be made without displaying anger or frustration and in a manner that will not bring discredit upon yourself or the Colorado State Patrol."

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 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. Complainant's conduct on April 7, 2006, violated CSP Policy 302.1(I)(G), 302.2 (Policy Statement), 302.2(I)(A-4), and General Orders 5, 6, and 7.

Complainant was aware that Policy 302.1 mandated that officers in unmarked patrol cars should refrain from making traffic contacts unless an officer is compelled to make such a contact. Complainant knowingly violated this rule on April 7, 2006. There was no reason for Complainant to make a stop on that date; no legitimate reason "compelled" him to make the contact with Meeker. Complainant was required by Policy 302.1 to use his cell phone to report Meeker's conduct, thereby enabling an on-duty patrol officer in a marked Patrol vehicle to make an appropriate, safe, professional contact. Complainant would then serve as a fact witness to the citations issued to Meeker.

Complainant asserts that Policy 302.1 does not apply to him, because he was not in an unmarked patrol car. This argument is rejected based on common sense. The purpose of the policy is to establish the general rule that on-duty state troopers, who have the protections of uniforms, bulletproof vests, and officially marked cars with flashing lights, shall make traffic stops. Policy 302.1 does not describe situations using personal vehicles precisely because traffic stops in personal vehicles are not within CSP policy. For the reasons discussed at hearing involving the safety of both officers and citizens, an off-duty trooper, not in uniform, wearing no vest, in a personal vehicle that is not a marked patrol car, without flashing lights, operates outside CSP policy by making a traffic stop.

Respondent proved by preponderant evidence that Complainant did not undertake his contact with Meeker as "an impersonal duty," in violation of Policy 302.2. The evidence demonstrates that Complainant allowed himself to become personally invested in handling Meeker's poor conduct and hostile attitude. He became so consumed by the situation that he made the serious error in judgment of stopping at a red light, in the midst of traffic, to confront Meeker with the fact of his State Trooper status. Stopping in the middle of traffic is dangerous in and of itself. To approach a hostile citizen at his driver's side window, in street clothes, is reckless, and demonstrates the degree to which Complainant had lost his professional composure in the situation.

Complainant's conduct on April 7, 2006 violated General Orders 5, 6, and 7. His confrontation with Meeker was an inappropriate use of his Patrol authority. As stated by Major Donaldson at the pre-disciplinary meeting, Complainant was not acting under color of the Patrol on April 7, 2006. His aggressive conduct was such that it could bring discredit on the Patrol or the police profession; his conduct did not reflect a high degree of professionalism.

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. Major Donaldson performed a thorough investigation, using the utmost diligence to procure the evidence necessary to make an informed decision. His pre-disciplinary meeting with Complainant was detailed and comprehensive. At the meeting, he disclosed all of his concerns to Complainant, and gave him a full opportunity to rebut, refute, and provide mitigating information on every aspect of the situation.

Complainant asserts that Major Donaldson failed to give adequate consideration and weight to the conclusions reached by Sgt. Demers and Captain Matzke. For several reasons, including consistency in the enforcement of agency standards of practice and morale, it is generally preferable that appointing authorities share the perspective of line and mid-level supervisors regarding issues of employee misconduct. Consistency in enforcement of agency rules is essential to fairness in the disciplinary process.

This case presents a rare situation where the subordinate managers focused on different potential policy violations than the appointing authority. Therefore, inconsistency in enforcement is not implicated here. Sgt. Demers and Captain Matzke limited their investigation to the issues raised by Meeker in his complaint (cutting Meeker off, failing to properly identify himself, and slapping his window). By contrast, Major Donaldson focused on Nuss's violation of policies of which Meeker was unaware, namely, making a traffic stop in a personal vehicle while off duty, and under dangerous circumstances at a red light. Given the safety concerns raised by Complainant's

conduct on April 7, it was necessary and appropriate for Major Donaldson to address Complainant's conduct in the manner he did.

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

The discipline imposed in this case, working during two paid holiday leave days, was one of the mildest available to the Respondent. Major Donaldson's choice of discipline matched the seriousness of the offense by Complainant. It was sufficiently serious to warrant disciplinary action, but minor enough to warrant an action comprising a warning. The action was well within the range of reasonable alternatives available to him as appointing authority.

V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS

Complainant requested an award of attorney fees and costs. Because he did not prevail at hearing, he is not entitled to such an award.

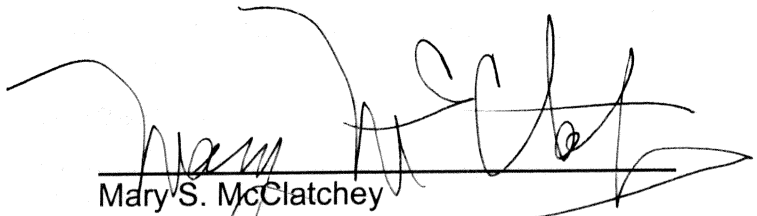
CONCLUSIONS OF LAW

1. Complainant committed the acts upon which discipline was based;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Respondent's action was within the range of reasonable alternatives; and
4. Complainant is not entitled to an award of attorney fees and costs.

ORDER

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

DATED this 30th day
of **March 2007** at
Denver, Colorado.



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

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 MAILING

This is to certify that on the 2nd day of **April 2007,** I placed true copies of the foregoing **INITIAL DECISION; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

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