STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B009**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FELICIA CATHOLIC,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF DISABILITY DETERMINATION SERVICES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on November 29, 2006, and January 10 and 17, 2007 at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. First Assistant Attorney General Stacy Worthington and Assistant Attorney General Michael D. Scott represented Respondent. Respondent's advisory witness was Vickie Johnson, the appointing authority, for the hearing dates in January 2007, and Ms. Linda Rutter, Supervisor of Human Resources for Respondent, at the hearing date in November 2006. Complainant appeared and was represented by David R. Fine and Katherine Swan.

MATTER APPEALED

Complainant, Felicia Catholic ("Complainant") appeals her termination by Respondent, Department of Human Services ("Respondent" or "DDS"). Complainant seeks reinstatement, back pay, attorney fees and costs, and an apology.

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

ISSUES

1. Whether Complainant committed the acts for which she 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. Complainant, Felicia Catholic, worked in the accounts processing section of the Division of Disability Determination Services section. At the time of the events at issue, the accounts processing section was administratively joined to the mail center, and the unit was generally referred to as the AP/Mail Center. Complainant was certified to the position of Administrative Assistant II within the accounts processing section.

2. As an Administrative Assistant II, Complainant was responsible for processing medical and invoice documents sent to the office by claimants and the medical personnel who examined claimants. The work required that Complainant enter information into Respondent's computer system and route documents to the appropriate individuals for further processing.

3. Complainant's direct supervisor was, until early February, 2006, Arthetta Martin. After that point, Sally Hinojosa served as the acting office manager and Complainant's direct supervisor. Ms. Hinojosa reported to Carlyle Kanzanbach.

4. The Deputy Director of Support Services, Lori Koch, was Ms. Kanzanbach's direct supervisor. Ms. Koch reported to Complainant's appointing authority, Vicki Johnson, the Director of Disability Determination Services.

The Decision on The Upgrade of The Administrative Assistant II Positions

5. In late 2005 or early 2006, the staff of the accounts processing section was told that their Administrative Assistant II positions were being converted to Data Specialists because of a change in the duties. This change was an upgrade of the position title and an increase in pay.

6. In implementing the change in position title and pay, however, Respondent chose to promote three of the six section Administrative Assistant II employees first. Word spread in the unit that the promotion was going into effect initially for only some of the staff. Complainant was in the group that was not to receive the promotion initially.

7. Complainant, and the other two employees who were not to receive the promotion at the same time as the other three employees, found out that they were not to receive the promotion at the same time as the others from the other staff members of the section. Complainant was upset at this development. She and Shirley Simmons, another AP/Mail Center employee who was not to receive the promotion

initially, went to talk with Ms. Kanzanbach about the issue.

8. Complainant voiced her concerns about the promotional decision in December 2005.

Respondent's Change In Phone Call Policy and Review of Complainant's Phone Usage

9. Prior to when Ms. Johnson became the appointing authority for DDS, employees had been permitted to make long distance personal calls on their office phones, and then to reimburse the department for the cost of those calls.

10. One of Ms. Johnson's initial changes to the Division polices when she became the Director was to eliminate this practice and to work to reduce personal time on phone calls. Ms. Johnson issued an e-mail to the staff of DDS on August 9, 2005, which informed them that DDS personnel were no longer authorized to make personal long distance phone calls from the DDS phone system and then repay DDS. This same e-mail also informed staff that they were to limit personal local calls to not more than 5– 10 minutes each. Complainant's direct supervisor, Ms. Martin, also issued an e-mail at the same time to her staff in which she explicitly warned the staff that management could and would be monitoring their calls.

11. On or about January 6, 2006, Ms. Koch conducted a review of the phone call usage of the staff in the AP/Mail Center from the previous day. The computer-generated run tracked the call time, the phone number called if it was dialed from the AP/Mail Center extension, and the total numbers of calls and time on the calls for each phone extension in the unit. Ms. Koch's program in analyzing the phone call time compared the phone numbers stored in the system for providers and claimants with the phone numbers dialed at the extensions in an attempt to leave out the calls that were directed for work purposes. While this limitation could effectively screen out many of the calls which were clearly work-related, the system could not identify, and therefore eliminate, work-related numbers that had not been entered into the system.

12. The result of the review showed that Complainant had phone usage times well in excess of the rest of the staff in the AP/Mail Center on January 5, 2006. Complainant's extension was used to make or receive a total of 36 calls, with a total call time of slightly more than 2 hours and 48 minutes. Will Wilson, on the other hand, placed 5 calls for a total time of approximately 17 minutes. Shirley Simmons' extension was used for 13 calls for a total call time of nearly 13 minutes. Rita Klatecki and Shirley Rozsa logged in less than 5 calls each and less than 4 minutes for those calls.

13. The results of the call review of the AP/Mail Center led Ms. Koch to conduct a more detailed review of Complainant's phone usage. Ms. Koch ran a report on January 9,

2006, of Complainant's phone usage during the week of January 3, 2006. The result of that review showed that Complainant had received or placed a total of 93 calls during the week, for a total call time of slightly more than 8 hours and 53 minutes during five work days.

14. Ms. Koch then generated a review of Complainant's phone usage between August 16 and December 30, 2005. The result of that review was that Complainant's extension showed a total of 1,082 calls for a total call time of nearly 94 hours.

15. Ms. Johnson had Ms. Martin retrieve Complainant's time card information for the same time period to compare her hours worked to the phone usage data. Complainant's time cards from that period showed that she was often clocking in around 9:00 am or later for a work schedule in which she was to report at 8:00 am. The time cards also showed that Complainant would often not log in her break times, and would sometimes not include the time of her lunch break.

16. Ms. Johnson also decided that there had been some problems with billing in the AP/Mail Center and that a review was necessary to determine if work was being held at individual employee desks. On January 24, 2006, Ms. Koch and Ms. Kanzanbach stayed after normal office hours to conduct a review of each desk in the accounts processing section.

17. Complainant's desk was one of the desks reviewed on January 24, 2006. Ms. Koch and Ms. Kanzanbach found original bills with original notes in a shredder bin, along with a number of unfinished medical records and invoices, travel claims, and other invoices at or around Complainant's desk.

The February 7, 2006 Rule 6-10 Meeting

18. The results of the phone usage review concerned Ms. Johnson, particularly since she also would see Complainant talking on her cell phone during the day. By letter delivered by hand on February 3, 2006, Ms. Johnson announced that she intended to hold a Rule 6-10 meeting with Complainant on February 7, 2006, concerning several workplace issues, including the amount of time spent on personal phone calls.

19. The Rule 6-10 meeting was held as planned on February 7, 2006.

20. During that meeting, Complainant did not dispute that she had been on the phone excessively during the previous months, and that she had not been aware until the numbers were produced as part of Ms. Koch's review of how much time she was spending on the phone. Complainant also explained that her twin sister had been very ill and was in the hospital and that she had been calling and receiving a number of calls from Little Rock, AR, in relation to that problem.

21. Complainant disputed that any unfinished work, other than invoices which could not be paid at the time, had been left on her desk on January 24, 2006. She informed Ms. Johnson that she had left nothing on her desk that evening and had the documents to prove that point.

22. During the Rule 6-10 meeting on February 7, Complainant also told Ms. Johnson that she had taken photos of the items on her work area and had made copies of her work. She also indicated that she had taped a conversation she had with Ms. Kanzanbach without Ms. Kanzanbach's knowledge. Complainant also indicated that her attorney had faxed a document to Ms. Martin concerning her performance.

23. Complainant requested a chance to review the documentation on phone calls and other matters, and that material was gathered and given to Complaint after the meeting. Complainant was given until March 9, 2006, to provide additional responsive materials. Complainant's attorney, Mr. Fine, filed a written response with Ms. Johnson on March 8, 2006.

24. Ms. Johnson decided not to institute any disciplinary action concerning the issues that were discussed in the February 7, 2006 meeting in part because it appeared to Ms. Johnson that Complainant's prior supervisor had not provided the necessary supervision to monitor and follow up on behavior issues. Ms. Johnson reported that she would not take disciplinary action at that time in a letter to Complainant dated March 20, 2006.

25. Ms. Johnson decided that she would require several actions of Complainant. Complainant was, for example. to return any confidential documents in her possession which she had shared with her attorney. Complainant was also to produce a copy of the tape she said she had made of a conversation with Ms. Kanzanbach by March 31, 2006.

26. The March 20, 2006 letter to Complainant also informed Complainant that the performance issue discussed would be reflected in the upcoming yearly performance evaluation and monitored through a performance plan. The letter also included a warning that "[a]ny further breech of the phone policy (desk phone or cell phone), the State and Federal confidentiality policies, including HIPPA, inappropriate use of State assets, or other inappropriate behaviors will result in corrective and/or disciplinary action up to and including termination."

Complainant's Statements During The March 30 AP/Mail Center Staff Meeting

27. In the morning on March 30, 2006, Ms. Hinojosa called a meeting of the AP/Mail Center staff. She informed them that she was not going to apply for the permanent position of the unit's supervisor because she was not happy with the communication levels within the unit and with management.

28. Ms. Hinojosa's announcement sparked multiple loud and angry discussions among the staff, with many of the employees taking the opportunity to vent angrily about the situation in the unit. Ms. Hinojosa allowed the staff to complain freely about the unit and management and ignored much of what they were saying. Complainant also complained loudly about her working conditions.

29. At the conclusion of the meeting, Complainant told Ms. Hinojosa something to the effect that they should just bring in guns and take care of the problem, referring to management. Not everyone in the meeting heard Complainant say this because members of the staff were talking to one another and at the same time.

The Decision To Place Complainant on Administrative Leave

30. Shortly after 10:00 a.m. on March 30, 2006, Ms. Klatecki sent an e-mail to Ms. Koch expressing that she was not comfortable with a statement that Complainant had made during an AP/mail Center staff meeting. Ms. Klatecki reported that the statement had to do with bringing in a gun and shooting people.

31. Ms. Koch called a meeting with Ms. Klatecki in the early afternoon of that day. Linda Rutter, from Human Resources, also attended the meeting.

32. Ms. Koch also interviewed Ms. Hinojosa and Ms. Anderson about Complainant's comments during the meeting. Ms. Hinojosa did not recall any comments about shooting or guns. Ms Anderson, however, reported that Complainant had said something about shooting all of them.

33. Ms. Johnson was not in the office on March 30, 2006. In the morning of March 31, 2006, however, Ms. Koch told Ms. Johnson that she had initiated an investigation into Ms. Klatecki's allegation. Ms. Johnson called Scott Bowers of the Department of Human Services Risk Management Unit for advice on handling the investigation.

34. Ms. Johnson decided that, as part of the workplace violence investigation, she would place Complainant on paid administrative leave pending the result of the investigation. Ms. Johnson prepared a letter stating as much for Complainant.

Events of March 31, 2006:

35. Ms. Johnson asked Ms. Koch to have Complainant report to Ms. Johnson's office, and Ms. Koch communicated that message to Ms. Hinojosa.

36. Ms. Hinojosa located Complainant a short while after she spoke with Ms. Koch, and told Complainant she was to call Ms. Koch and report to Ms. Johnson's office. Complainant called Ms. Koch and told Ms. Koch that she would not go to Ms. Johnson's office, and that her attorney had told her not to talk with management unless the attorney was present.

37. Once Ms. Johnson found out that Complainant had refused to come to her office, Ms. Johnson and Ms. Koch decided that the letter of administrative leave would be delivered to Complainant in Complainant's cubicle. In order to have some privacy, Ms. Koch arranged for the supervisors in that area to call everyone but Complainant into a meeting.

38. About month before this point, there had been another employee who had been escorted out of the building. At that point, Complainant had made a joking comment to the security guard on the 5th floor, Rudy Romero, that, if they ever decided to escort her out of the building, it was going to take more than one of them to do it. Officer Romero decided that he needed to report the comment to his supervisors, whether or not it was said in a joking manner, and he did so.

39. Ms. Johnson and Ms. Koch were aware that Complainant had previously told Officer Romero that taking her from the building would take more than one person. Medicaid fraud investigator Special Agent ("SA") Carla Meredith had come to the office earlier that day for an unrelated meeting with Ms. Johnson, and she agreed to be present when Complainant was placed on administrative leave. SA Meredith also agreed to accompany Ms. Koch and Ms. Johnson down to Complainant's cubicle when it became clear that the administrative leave letter would need to be hand-delivered to Complainant at her desk.

40. SA Meredith is an investigator with the federal Social Security Administration. She was dressed in a suit coat-style jacket rather than a uniform. Prior to going down to Complainant's cubicle, she put on a black vest that contained identifying information that she was with a federal agency. SA Meredith also had handcuffs with her.

41. The three women, Ms. Johnson, Ms. Koch, and SA Meredith, proceeded down to the fourth floor to Complainant's cubicle. As planned, Complainant was by herself at her desk when they arrived.

42. Ms. Johnson entered Complainant's cubicle to speak with Complainant and, at least initially, Ms. Koch and SA Meredith waited by the entrance to the cubicle. Ms. Johnson began to tell Complainant that was being placed on administrative leave and that Ms. Johnson had a letter that she needed to take.

43. Complainant's reaction to Ms. Johnson's presence and initial attempts to speak with her was to tell Ms. Johnson in an upset and angry tone that she couldn't talk with Ms. Johnson and to become visibly upset. Complainant told Ms. Johnson that she was calling her attorney. Complainant then picked up her cell phone and dialed. Ms. Koch, who was standing directly outside of the entrance to the cubicle at the time, noticed that Complainant had only dialed three numbers. Ms. Koch asked Complainant who she was calling. Complainant told them that she was calling 9-1-1. By the time Complainant began her call to the police, Ms. Johnson had done no

more than step inside of the cubicle entrance and tell Complainant that she was going to give Complainant a letter placing Complainant on administrative leave. Ms. Koch and SA Meredith were standing outside of the cubicle entrance when Complainant began her call to the police.

44. At this point, Ms. Johnson moved over and SA Meredith stepped into Complainant's cubicle. SA Meredith reached out to Complainant's phone, saying to Complainant to give her the phone. SA Meredith did not directly contact Complainant when she did this, although she may have bumped the phone. If SA Meredith did bump the phone into Complainant, the amount of contact was so minor that neither Ms. Johnson nor Ms. Koch noticed that there had been any contact. When SA Meredith moved for the phone, Complainant told the 9-1-1 dispatcher that she was being assaulted.

45. Complainant moved so that SA Meredith did not either obtain the phone or turn the power off on the phone. Complainant continued to speak with the dispatcher and told the dispatcher that she had been assaulted by a federal agent, that she had been hit in the lip, and that she wanted both the police and an ambulance sent to the building.

46. SA Meredith got out her handcuffs at some point after Complainant reported an assault to the 9-1-1 operator, but she did not attempt to use them on Complainant.

47. Ms. Koch had a walkie-talkie which connected her with Officer Romero on the 5th floor. Ms. Koch told Officer Romero to come down to Complainant's cubicle.

48. When Officer Romero arrived at Complainant's desk, Complainant's manner calmed immediately. She then quietly packed a box with her personal belongings and accompanied Ms. Johnson, Ms. Koch, SA Meredith, and Officer Romero to the 5th floor to meet with the responding police officers and paramedics. During this interaction prior to the arrival of Officer Romero, however, Complainant 's tone of voice had been loud and accusatory.

49. The responding officers interviewed Complainant briefly and spoke with some of the other individuals involved in the incident. The officers did not take statements or otherwise file a report. The responding paramedics looked at Complainant's lip and took no action. Neither Ms. Koch nor Ms. Johnson noticed any problem with Complainant's lip. The police asked Ms. Koch if the department wished to press trespassing charges for Complainant's refusal to leave the premises once told to do so, but Ms. Koch declined to do so. The officers escorted Complainant from the building.

Complainant's 2005-2006 Annual Performance Evaluation

50. After Complainant had been placed on administrative leave, her supervisors

completed Complainant's annual review for the April 2005 to March 2006 period. Ms. Kanzanbach completed the evaluation, and Ms. Koch completed the review of the evaluation.

51. Ms. Kanzanbach rated Complainant as needing improvement in four core competency categories. The reason that Ms. Kanzanbach decreased Complainant's ratings in these areas was because of the performance issues discussed during the February 7, 2006 Rule 6-10 meeting, and because of the events of March 30 and March 31. Ms. Kanzanbach rated Complainant at a level 2 ("Good") for her overall rating in that period.

The June 29, 2006, Rule 6-10 Meeting and Disciplinary Process

52. Ms. Johnson ordered a workplace violence investigation. The investigation was completed by Mr. Bowers and was ready for review by May 8, 2006.

53. Ms. Johnson notified Complainant by letter dated May 15, 2006, that she intended to hold a Rule 6-10 meeting on May 30, 2006. That meeting date was eventually changed to June 29, 2006. Complainant and her attorney, Mr. Fine, attended the June 29, 2006 Rule 6-10 meeting.

54. The June 29, 2006 Rule 6-10 meeting was taped by Ms. Johnson. The tape recorder was turned off by consent of the participants at a point early in the discussion, and then failed to re-start when Ms. Johnson attempted to turn it on again.

Disciplinary Decision

55. By letter dated July 19, 2006, Ms. Johnson terminated Complainant's employment. Ms. Johnson cited four grounds supporting termination: 1) Complainant's most recent performance evaluation with four "Needs Improvement" ratings in core competencies; 2) Complainant's failure to comply with the requirement that she return confidential documents and provide a copy of a tape she had recorded of a conversation with Ms. Kanzanbach; 3) Complainant's violation of the CDHS workplace violence policy for her statement during the March 30, 3006 AP/Mail Center staff meeting; and 4) Complainant's conduct while being placed on administrative leave.

56. Complainant's employment was terminated effective July 19, 2006.

57. In making her disciplinary decision, Ms. Johnson reviewed Complainant's performance and disciplinary history, including all of Complainant's performance ratings and performance documentation. Complainant's record includes the following performance issues and performance reviews from prior years:

a. Complainant's performance evaluation from May 2001 noted that Complainant was rated in the "Needs Improvement" range with regard to her working relationships, support and respect for others, and in her expression of diplomacy and tact. Complainant was also issued a performance improvement plan in August 2001 for attendance issues and abuse of leave issues.

b. Complainant's May 2002 performance evaluation noted that Complainant was on a corrective action that year due to being in a leave without pay status.

c. Complainant was placed on a performance improvement plan in March 2003 for work performance and excessive internet and e-mail time.

d. Complainant was issued a corrective action in April 2003 for misusing the agency's timekeeping and leave policies. Complainant also received a final year evaluation in May 2003 at a "Needs Improvement" level, with the primary notation that there had been a continuous misuse of timekeeping and leave policies.

e. Complainant received a corrective action from her appointing authority at the time, Bill Stark, in August 2003 regarding the use of the time clock, excessive use of leave, not reporting absences form the work station, and leave without pay status. This corrective action was issued after Complainant's first and second level supervisors, along with the deputy director, recommended termination because of leave and time issues.

f. Mr. Stark held a Rule 6-10 meeting with Complainant concerning her compliance with the August 2003 corrective action. At the conclusion, of that process Mr. Stark decided that, while he was not satisfied with the explanations provided by Complainant, he would not impose discipline at that point in time.

g. Complainant was rated at level 2, which is a "Good" rating, for the yearly performance rating of May 2004. In September of 2004, she was released from the terms of the corrective action

h. The performance evaluation dated in May 2005 again rated Complainant an overall level 2, which is a "Good" rating. The commentary noted that Complainant needed to limit the length of her personal phone calls.

i. Complainant's mid-year evaluation from October 2005 included a "Needs Improvement" notation in accountability, with the narration

noting that Complainant appeared to spend an excessive amount of time on the phone.

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

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the majority of the acts for which she was disciplined.

Complainant did not dispute that she had used the phone excessively prior to the point when she had been told what her usage had been.

Complainant argued at hearing that she had been able to clock in whenever she wished to do so as long as she had 40 hours of work at the end of the week. This version of events was not found to be credible, and the credible and persuasive evidence presented at hearing was that Complainant had continued to have problems reporting to work on time and in using the time system to log her breaks and meal time.

Complainant did not dispute that she had failed to turn over records and tapes that she had referenced during the February 7, 2006 Rule 6-10 meeting, and had been directed to produce to Ms. Johnson. Complainant instead argued that these records and materials did not amount to much and did not contain confidential information.

Complainant disputed that she had referred to a gun during the March 30, 2006, staff meeting. Complainant's version of the events of that date, however, was not credible. The persuasive and credible evidence presented at hearing supported that Complainant did talk about bringing in a gun during the March 30, 2006 AP/Mail Center staff meeting.

As to the events of March 31, the description offered by Complainant as to what occurred and why she called the police was not credible. Complainant knew that Ms. Johnson wanted her to report to her office, and Complainant refused to go to that meeting. When Ms. Johnson appeared in her cubicle shortly thereafter and began to tell her that she was being placed on administrative leave, Complainant initiated her phone call to the police. This call to the police was not made because Complainant believed that Ms. Johnson or anyone else was physically attacking her, about to attack her, or otherwise about to commit a criminal act against her. By reacting in such a volatile manner, however, Complainant has created legitimate concerns about her willingness and capacity to work in a professional, respectful, and truthful manner.

Respondent also presented evidence on the claim that Complainant's work production had been under its standards, both in terms of numbers of claims processed and in terms of violating a requirement that the claims be processed within 24 hours. The evidence presented at hearing was not persuasive, however, that Complainant was in violation of performance standards that had been applied to the section. There was, accordingly, insufficient evidence to support these specific claims of performance deficits, and this matter will be analyzed without those contentions.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

While the appointing authority cited four matters to support her decision to terminate Complainant's employment, the events of March 30 and 31 constituted the primary reason

that Ms. Johnson decided to terminate Complainant's employment. The performance problems that Complainant had exhibited prior to that point were, in fact, not even subject to disciplinary action, even though the opportunity was present for such action after the February 7, 2006 Rule 6-10 meeting. The question, then, is whether the events of March 30 and 31 constitute just cause for discipline. The undersigned concludes that they do present cases of Complainant's failure to perform competently and of willful misconduct.

Complainant's statement in an angry meeting about bringing in a gun was inappropriate, unprofessional, and a violation of the state's workplace violence prevention policies.

Complainant's actions in calling the police immediately upon Ms. Johnson's arrival in her cubicle on March 31 also fall well below the standards of professional conduct expected of state employees. Complainant's insistence that she had been assaulted by SA Meredith under the circumstances of this case, and that both police and paramedics were expected to respond to her call, was a continuation of her unprofessional and volatile conduct. This is not to say that a state employee who is, in fact, being threatened with physical assault could not call for assistance, or that there will not be some show of acceptable emotion when an employee is being placed on administrative leave. This case presents facts far removed from those situations. Complainant's insistence on calling the police and insisting that she had been assaulted was designed to create a spectacle and make it difficult and uncomfortable for her appointing authority to place her on administrative leave. Such actions represent a gross departure from the standards of competent performance expected of state employees.

Complainant has argued that the investigation into the performance matters addressed at the February 7, 2006 Rule 6-10 meeting was retaliatory and lacking in credibility because it was motivated at least in part by Complainant's willingness to challenge the promotional decision. No credible evidence at hearing supported this contention, however, and the credible evidence shows that performance problems were an on-going issue for Complainant. Moreover, it did not appear that Complainant was specifically targeted for any special review until the results of the initial reviews showed that Complainant had a higher incidence of potential problems than the remainder of the unit. If the decision on promotions had any connection to the events in this matter, it was that the decision (and the manner in which it communicated to staff) fed the level of anger and mistrust that was in the unit at the time of these events.

Complainant has also argued that Complainant's termination violates the Board rules requiring progressive discipline. Insofar as the termination decision was based upon performance issues, there is clear evidence in the record that Complainant had been subject to multiple corrective actions and performance plans on very similar issues. As for the actions of March 30 and 31, 2006, these acts were of such flagrant or serious nature to warrant immediate disciplinary action. *See* Board Rule 6-2 ("A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper..."), 4 CCR 801.

The appointing authority in this matter conducted an investigation and inquiry in this matter with reasonable diligence and care, and gave candid and honest consideration of the evidence before her. Her conclusions concerning the four areas of conduct which were the factual basis for her decision to terminate Complainant's employment were not conclusions that reasonable men would have decided differently. The undersigned concludes that the decision to impose discipline in this case was 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 her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Termination, while certainly not the only alternative available to an appointing authority, is within the range of reasonable alternatives in large part because of the unacceptably volatile and unprofessional nature of Complainant's actions both in the meeting in Ms. Hinojosa's office on March 30 and on while she was being placed on administrative leave on March 31, 2006. These actions, combined with Complainant's history of at least some performance problems, bring the sanction of termination into the range of reasonable alternatives.

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. Respondent has demonstrated that Ms. Johnson had a rational basis upon which she based her decision to terminate Complainant's employment. There was no competent evidence presented which would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Complainant committed the majority of the acts for which she was disciplined.

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

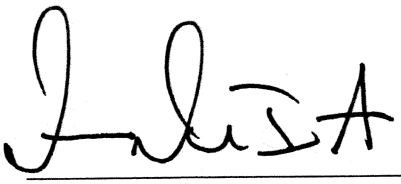
3. The discipline imposed was within the range of reasonable alternatives.

4. Attorney fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 7th day of March, 2007.



Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of March, 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:

David R. Fine, Esq.
Kelly Haglund Garnsey + Kahn, LLC
1441 Eighteenth Street
Suite 300
Denver, CO 80202

and in the interagency mail, to:

Stacy Worthington
First Assistant Attorney General
and
Michael D. Scott
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods