STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B015(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID ROMERO,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT BOULDER, HOUSING FACILITIES SERVICES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on October 1, November 27, and December 4, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed after the submission of Respondent's Reply To Complainant's Closing Argument on January 4, 2008. Senior Associate University Counsel and Special Assistant Attorney General Elvira Strehle-Henson represented Respondent. Respondent's advisory witness was Steve Hecht, Complainant's previous supervisor. Complainant appeared and was represented by Nora V. Kelly, Esq.

MATTER APPEALED

Complainant, David Romero ("Complainant") appeals the imposition of a ten percent pay reduction for a period of twelve months, imposed by letter dated August 11, 2006, and the termination of his employment effective October 26, 2006 by Respondent, Housing Facility Services at the University of Colorado at Boulder ("Respondent"). Complainant seeks reinstatement of his employment, removal of the disciplinary actions from his file, back pay and interest, attorney fees and costs, and any other relief deemed just and proper.

For the reasons set forth below, Respondent's disciplinary action in reducing Complainant's pay is **affirmed**, and Respondent's action in terminating Complainant's employment is **rescinded**.

ISSUES

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

2. Whether Respondent's disciplinary action of August 11, 2006 was arbitrary, capricious or contrary to rule or law;

3. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;

4. Whether the pay reduction imposed was within the reasonable range of alternatives available to the appointing authority;

5. Whether the termination of employment was within the reasonable range of alternatives available to the appointing authority;

6. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. Complainant was originally hired as a Project Planner I with the Housing and Dining Services Department, University of Colorado at Boulder, on December 1, 2000. At the time of the termination of his employment, Complainant was certified as a Project Planner I. His direct supervisor in 2006 until late-September 2006 was Steve Hecht, Manager of the Design & Projects Group for Housing Facilities Services. Complainant's second-level supervisor and appointing authority was Curtis Huetson, Director of Housing Facilities Services. Complainant's third-level supervisor was the Assistant Vice Chancellor of Student Housing, Deborah Coffin.

2. As a Project Planner I, Complainant was a Project Manager on construction projects for the University's Housing and Dining Services Department ("Respondent"). The Housing Facilities Services group does five to six million dollars per year in capital improvement projects related to the housing and dining facilities on campus.

3. A Project Manager is the University's representative during a construction project. The position is responsible for serving as the single point of representation for the University in dealing with design and construction professionals and in keeping construction projects moving under the terms of the project agreements, on time, and within budget.

Complainant's Overall Performance 2000 through 2006:

4. Complainant had consistently received overall ratings of Outstanding, Peak Performer, or Above Standard for his work as a Project Manager during the years 2000 through 2006.

5. In March of 2006, for example, Complainant was evaluated by Mr. Hecht as having an overall performance at a Level 3, "Above Standard," rating. Complainant reached this level by obtaining ratings of Above Standard or higher on several goals or objectives, such as following standard procedures for each project, moving projects forward without unnecessary delay, completing projects within budget, and maintaining overall client satisfaction levels.

6. Complainant was consistently praised for his level of technical knowledge on his projects. Complainant's 2002 supervisor, Tom Carson, reported in Complaint's annual review for that year that Complainant's "knowledge base, technical skills, and commitment to perfection should serve as an inspiration to others who wish to advance within Housing Services." Complainant's 2003 annual review noted that Complainant "remains deeply skilled in technical project management issues and administrative tasks." Complainant's March 2006 evaluation comments note that "Dave has exceptional job knowledge as a master plumber. He is a benefit for the department. His project manager job knowledge is commendable." Similar comments about Complainant's technical knowledge and ability to interpret and apply applicable rules and policies appear in the other performance evaluations in the period of 2002 through 2006.

7. Complainant's performance reviews also indicate that Complainant needed to improve his interpersonal communication style. Complainant's earliest performance reviews as a Project Manager noted that Complainant should work on establishing positive relationships with co-workers and contractors, and that he needed to maintain a tone to his discussions which was not overly critical or accusatory. Later reviews are more pointed and speak toward Complainant working to improve the collaborative nature of his working relationships, and in keeping his communications calm, clear and concise.

Communication and Interpersonal Issues:

2005 Corrective Action:

8. By letter dated August 22, 2005, and later amended as of March 22, 2006, Mr. Huetson issued Complainant a corrective action based on several incidents of negative or hostile interactions that Complainant had with members of the Housing and Dining Services staff.

9. The corrective action addressed Complainant's on-going difficulty in maintaining good interpersonal relationships with co-workers, supervisors, and others.

10. Mr. Huetson's corrective action letter recounted that: 1) several members of the Housing maintenance staff had reported that they had difficulty working with Complainant on a day-to-day basis; 2) that the management of one of the contractors had contacted Mr. Huetson on more than one occasion to complain of Complainant's rude and disrespectful manner in dealing with their on-site manager and sub-contractors, and 3) that, in late June of 2005, Complainant had refused to provide requested information to Mr. Hecht and instead sent him an insubordinate e-mail. Mr. Huetson also recounted that, during a meeting on the day before the corrective action was initially issued, Complainant had been hostile, negative and uncooperative during a discussion with Mr. Amin Gheysar concerning a project. Mr. Huetson additionally found that, during that same day, Complainant had been insubordinate, rude, hostile and aggressive in a meeting with Mr. Hecht during which Mr. Hecht had asked Complainant to provide him with information concerning an invoice.

11. The terms of the corrective action provided that Complainant was to maintain professional interactions between himself and others with whom he worked. Complainant was also required to maintain a positive and professional demeanor in meetings at all times and to offer solutions and alternatives as appropriate and to accept responsibility for work that fell under his position. Complainant was required to recognize that Mr. Hecht was his supervisor, to willingly follow his direction, and treat Mr. Hecht with civility and respect. Complainant was directed to provide all pertinent project information in a cooperative and timely manner to his supervisor and others who needed to know that information. Finally, Complainant was directed to take responsibility and ownership of project issues, problems, and their solutions.

12. The corrective action did not identify or address any issues with Complainant's technical skills as a Project Manager, or his adherence to construction plans or Respondent's policies as to construction issues.

Complainant's 2006 Interactions with Ms. Pushparaj, Ms. Jannatpour and Mr. Gheysar:

13. Complainant had an interaction with Ms. Gnanamani Pushparaj on March 7, 2006. Ms. Pushparaj's position required her to issue keycards to contractors after issuance of the cards had been authorized by the appropriate Project Manager. The Project Manager is responsible for authorizing the issuance of keys and contractor badges. On the date in question, a contractor contacted Complainant to obtain necessary key cards and Complainant went to Ms. Pushparaj's office to complete the paperwork.

14. The tenor and content of the conversation between Complainant and Ms. Pushparaj

were not clear from the evidence produced at hearing. After the interaction, however, Ms. Pushparaj was upset and complained about Complainant belittling her during the conversation.

15. Complainant's third-level supervisor, Ms. Coffin, held a meeting with Complainant to discuss Ms. Pushparaj's complaint and to speak with Complainant about avoiding situations where other employees are offended by the manner in which he speaks to them.

16. In May of 2006, Complainant was responsible for a project involving the re-commissioning the College Inn building. As part of this work, Complainant had to make certain that the elevator in the building was functioning properly and was certified for use.

17. Complainant went to an administrative assistant, Ms. Virginia Jannatpour, and told her to use the standing service contract to obtain a certification for the elevator. This was not the correct procedure to be used for this type of project. Instead, Complainant was expected to use the procurement process to find a service provider who could perform the repairs, inspections and certifications necessary to bring the elevator back into service.

18. Ms. Jannatpour contacted Mr. Gheysar to complain that Complainant was asking her to order a level of service that should not have been placed under the terms of the standing agreement for elevator service work. Mr. Gheysar informed Complainant's supervisor, Mr. Hecht, as well as Complainant's second-level supervisor, Mr. Huetson, of the request to use the standing service contract for the elevator re-certification.

19. After Complainant learned that Mr. Gheysar had gone to Complainant's supervisors about the elevator certification issue, Complainant spoke with Mr. Gheysar. During this conversation, Complainant referred to Mr. Gheysar's actions as backstabbing. Complainant was red-faced and angry with Mr. Gheysar during this interaction.

Complainant's Interaction with Dave Willower regarding the heating tests in Hallett Hall:

20. In May of 2006, Complainant was assigned to a project renovating the heating system in Hallett Hall. The testing of the work was being performed during the day, and the heat was causing problems that were brought to the attention of Ms. Coffin. Ms. Coffin directed that the testing should be conducted in the late afternoon or evening in order to address the problems. David Willower, Manager of Maintenance and Ground Operations for Housing Facilities Services, communicated the message to Complainant that Ms. Coffin had directed a change in the timing of the testing. Complainant became agitated, argumentative, and very forceful when he heard the instruction.

Complainant's Interactions with Steve Hecht:

21. In mid- 2006, Mr. Hecht had a series of exchanges with Complainant during which Complainant was sarcastic, or angry and defensive.

22. In mid-June of 2006, Mr. Hecht asked Complainant to commit to whether he was going to submit financial project data on time for the close of the fiscal year. Complainant gave Mr. Hecht a sarcastic reply. Complainant did provide the data to Mr. Hecht in a timely manner.

23. On or about June 23, 2006, Mr. Hecht asked Complainant for a project check list on a grease trap project. Complainant became angry and defensive and told Mr. Hecht that he didn't have it and that Hecht "could hang him out to dry" if he wanted.

24. During the first part of 2006, Complainant was also acting in a rude, confrontational, and unproductive manner during staff or project meetings through such actions as making gestures, talking loudly over others, audible sighs, and tapping pens. Complainant's conduct during these meetings was disruptive to the group.

25. Mr. Hecht also noticed during this period that Complainant was not conducting good meetings on his own projects, and that he was not engaged in leading the group, but was permitting others to step in and take over the meetings. Complainant was allowing the meetings to deteriorate into confused discussions of who was responsible for what items, and Complainant was not providing clear tasks and deadlines.

The 6-10 Process On The Complaints of Communication and Interpersonal Relationship Issues:

26. On July 19, 2006, Mr. Huetson issued a notice of a Board Rule 6 -10 meeting to speak with Complainant about the complaints which had come in from Ms. Pushparaj, Mr. Gheysar, Mr. Hecht, and Mr. Willower, as well as allegations concerning statements that Complainant made concerning an administrative assistant, Ms. Bigelow. The notice scheduled the meeting for July 26, 2006.

27. Complainant attended the meeting with his representative, Miller Hudson. Mr. Huetson brought a representative from Human Resources, Ron Rodriguez, and Mr. Hecht with him to the meeting. Mr. Gheysar was also originally expected to attend the meeting as well, but Complainant objected to Mr. Gheysar's presence at the meeting and Mr. Gheysar was not permitted to attend.

28. At the Board Rule 6-10 meeting, Complainant took the position that the complaints against him were not a product of his behavior. Complainant also denied ever becoming angry or agitated during his interactions with the individuals who had

complained.

29. Mr. Huetson found that Complainant was not credible when he denied that he was interacting with others in angry, hostile, or disrespectful ways. Mr. Huetson imposed a disciplinary action because Complainant was already under a corrective action from 2005 for communicating in a negative and uncooperative way with a variety of individuals, including co-workers, his supervisor, and contractors. The actions discussed at the Board Rule 6-10 meeting represented violations of that corrective action.

30. Mr. Huetson was concerned that Complainant took no personal responsibility for actions. Mr. Huetson was also concerned that, as a Project Manager, Complainant's job was to facilitate the efficient completion of projects and to be the University's problem-solver on projects. Mr. Huetson saw Complainant's unwillingness to acknowledge or modify a communication style that others saw as disrespectful, hostile, and unprofessional as a significant hindrance to successful work as a Project Manager.

31. By letter dated August 11, 2006, Mr. Huetson imposed a twelve-month pay reduction on Complainant's salary. Starting on September 1, 2006, Complainant's new monthly salary was to be $4,854.60

32. Complainant filed a timely appeal of this disciplinary action with the Board.

Kittredge Commons Groundwater Remediation Project

33. The Kittredge Commons building had a long-standing water drainage problem that resulted in the entry of water into the basement. This was of particular concern because the basement of that building contained a significant amount of electrical equipment that could be harmed by water.

34. The Kittredge Commons Groundwater Remediation Project ("Kitt Commons Project") was designed to install wells to catch water before it entered the basement, and then have the water drain to the ponds. This new drainage plan required the construction of two trenches. These trenches would be eight feet deep and would run past several different types of trees.

35. The Kit Commons Project construction contractor was Milestone Construction Services. The University's engineer of record for the project was John Frazzee of JVA Consulting Engineers.

36. The construction work on the project began in early June 2006. Respondent wanted the Kitt Commons Project be completed by the time students moved back into the dorms for the fall semester. The project was expected to end in the middle of August 2006 to prevent having on-going construction on the lawns and sidewalks

in the Kitt Commons area while students were moving into dorms.

The University's NTP / ATP Process:

37. The start of construction activities for any project at the University required that the project have a Notice to Proceed ("NTP') issued for the project, as well as an Authorization to Proceed ("ATP").

38. An NTP document is issued once a project contract is signed with the project contractor and the required bond and insurance certifications have been received by the University. The NTP requires the contractor to begin work on the project within ten days of the date of the NTP.

39. The issuance of the NTP, however, is not the only step that must occur prior to the beginning of construction. A Project Manager is responsible for ensuring that the ATP is also issued for each project before the commencement of work on the project.

40. The City of Boulder does not issue building permits for University projects. Instead, the University has its own permitting process using its ATP process. The ATP is the document that Respondent uses to ensure that all projects at the University meet the statutory requirements for construction set forth by the State.

41. In order for an ATP to be issued, all of the Authorities Having Jurisdiction ("AHJ") must sign off in their individual areas of expertise as having reviewed the project plans and agreeing that the plan complies with the applicable codes. The University's designated plumbing inspector, for example, would review a project involving plumbing and certify as part of the ATP process that the plan meets the applicable plumbing code requirements. An ATP must be issued before building permits can be issued.

42. The issuance of an executed ATP is one of the items on a Project Manager's project checklist. The Project Manager is responsible for alerting an administrative assistant that the ATP form is ready to be completed. The administrative assistant then routes the document electronically to the AHJs and collects the signatures. The Project Manager is responsible for following this process and making certain that a fully authorized ATP is completed and the necessary building permits are issued. The contractor can then pick up the building permits.

43. One of the other Projects Managers in Complainant's work group, Dave Olson, had failed to obtain an ATP by the start of construction on a different project a year or so prior to the Kitt Commons Project. Once the lack of an ATP was discovered, Mr. Olson was told by management that the ATP needed to be obtained prior to the start of construction, and that it was his job as Project Manager to make certain that the ATP was in place by that time. No corrective action or disciplinary action was

instituted against Mr. Olson for this lapse.

Kitt Commons Project ATP Process:

44. The NPT for the Kitt Commons Project was signed on June 5, 2006. The issuance of this document required that the contractor start construction within ten days of that date.

45. As the Project Manager for the Kitt Commons Project, Complainant was responsible for ensuring that the fully authorized ATP had been signed by the beginning of construction and that appropriate permits had been issued for the contractor to pick up from the office. While much of the actual routing of documents was to be performed by an administrative assistant, it was Complainant's responsibility to make sure that the ATP process was completed properly.

46. Construction on the Kitt Water Remediation project began approximately four weeks before the ATP was signed. Complainant did not ensure that the ATP form was circulated for signature until the last week in July 2006, after Mr. Hecht had told Complainant to make the issuance of the ATP his top priority. The Kitt Water Remediation project contractor, Milestone, had also not gone to the office to pick up building permits at the beginning of the construction phase, and had to be reminded to go obtain the permits.

Tree Protection Issue:

47. The planning for the Kitt Commons Project involved a number of meetings requiring input from a variety of University departments and officials as to how the project should be organized. As part of that planning, Ann Mullins of the Campus Landscape Architect's office had called for the inclusion of tree protection requirements into the project agreement in order to protect some aesthetically significant trees that were located near the project. These protections included a requirement that there was to be handwork done in all excavations within the drip lines of trees, with a requirement to keep the exposed roots wet until backfill was provided. Tree protection requirements were integrated into the project agreement.

48. As the Project Manager, Complainant was responsible for ensuring that the tree protection requirements were met by the contractor.

49. The original plan connected wells into a drainage pipe that followed under the sidewalk and was away from trees that were to be protected. During construction, problems developed with the plan because of the existence of underground steam tunnels that had not been shown on the maps. There were concerns that the construction would require a different routing of the north storm water drain pipe than originally planned in order to maintain the necessary pitch of that drain pipe as it traveled through the steam tunnel. After consultation with Facilities Management

and other involved entities, the decision was made to issue a change order so that the original routing of the trench would be moved in order to make use of existing penetrations into the steam tunnel.

50. Once the change order was issued to change the routing of the drain pipe so that it would make use of existing penetrations in the steam tunnel, Complainant and the contractor brought Dave Willower into the discussion about how to solve the rest of the routing for the north storm water drain. Mr. Willower was asked for ideas about how to re-route the drain. His advice to Complainant was that he would angle the pipe off 45 degrees and run it through an open patch over to the pond. Complainant told Mr. Willower that the project couldn't be done that way.

51. Complainant decided that a routing which took the drain pipe trench with a foot or two of the trunk of a large 40-year old pin oak tree would be an acceptable solution to the problem of maintaining the necessary pitch on the drainage pipe.

52. The tree protection requirements in the Project Agreement required that, should the trench go within the drip line of a tree, the trench would be hand dug to preserve the root ball of the tree. The re-routing of the trench brought the trench inside the drip line of the pin oak, which was a large tree that was not to be removed as part of the Kitt Commons Project. Complainant, however, decided that hand digging the trench would not be reasonable and could create an unsafe condition within the trench. The contractor also thought that the requirement for hand digging the trench was unreasonable.

53. Complainant's job as the Project Manager required him to enforce the requirements placed into the project agreement, and to make certain that any changes in the construction plan met those restrictions. If the project agreement requirements could not be met, Complainant was to make sure that the other involved University entities were alerted to the problem and that an alternate plan devised, if possible.

54. Complainant did not notify any of the other entities involved in the planning of the project, such as the Campus Landscape Architect's office or Complainant's supervisor, Mr. Hecht, of the problem with maintaining the root ball of the pin oak once the trench was re-routed. Complainant permitted the contractor to dig the trench within a foot or so of the pin oak without hand digging the trench.

55. The placement of the trench for the drain pipe severed nearly half of the root ball of the pin oak. The tree was irreparably damaged by the trenching and is likely to require removal in the next few years because it will create a safety issue or will die of its own accord in that time. An appraisal of the damage done to the tree estimated that the cost of the damage to the pin oak and the replacement cost for the tree was approximately $15,000.

56. Ann Mullins of the Campus Landscape Architect's office was no longer working at

that office when the trench was dug. Richelle Reilly had taken her place and was the AHJ on the Kitt Commons Project for the Landscape Architect's office. Ms. Reilly was called to the project site to examine the trench and pin oak. During that visit to the site, Ms. Reilly spoke with Complainant and asked him why the trench was constructed next to the tree. Complainant had no answer for Ms. Reilly, and he was condescending and rude to her during their conversation.

Hiring of the Independent Testing Engineering Firm:

57. One of the functions of a Project Manager can be to arrange for the services of an independent testing agency to maintain quality control over the construction process.

58. The project agreement for the Kitt Commons Project required the construction contractor to cooperate with an independent testing procedure. When the contractor reached specified points in the construction, it was to alert Complainant or others that the site was ready for testing, such as testing of concrete and for soils compaction. Complainant's role as Project Manager was to make certain that a qualified independent tester was under contract and would perform the necessary checks once the contractor had reached these points in the construction process.

59. On or about August 2, 2006, the contractor was ready to begin to backfill trenches, which required a soils testing procedure.

60. Complainant had not retained an independent contractor at the outset of the construction process. Instead, Complainant waited until the construction process was underway to decide on an independent testing firm. Complainant decided that the fastest method to bring an independent contractor on board was to make use of the change order system and to allow the project engineering firm, JVA, to sub-contract with a testing engineering firm that Respondent had pre-approved for such uses.

61. Complainant asked for, and received, a change order authorized by JVA for the independent construction materials engineering and testing services for the Kitt Commons Project. The change order authorized Scott Cox & Associates to act as a sub-contractor on the project and to conduct the independent testing authorized in the project agreement.

62. Complainant asked for the change order shortly before August 2, 2006, and received the order as of August 2, 2006. Independent testing was conducted at the worksite as early as August 4 and 14, 2006. No delay in the construction process resulted from the August 2, 2006 retention of a subcontractor for independent testing services.

63. Mr. Hecht preferred that an independent testing firm be under contract earlier in the

process than the point of the first test. There was no performance standard in place at the time which prevented Complainant from using his discretion as Project Manager to retain the independent testing firm shortly before its services were needed, or in using the change order process to retain the services of a firm pre-approved by the University for this type of work.

Coaching Meetings During August 2006:

64. During the last week of July and the first week of August, Mr. Hecht was contacted by a series of individuals who had complaints or concerns about the Kitt Commons Project. These concerns involved the lack of an ATP prior to construction, the routing of the drain pipe trench next to the pin oak tree so that the half of the root ball of the tree was cut, and the lack of retention of an independent soils and concrete testing firm by the beginning of August.

65. Mr. Hecht provided Complainant with three coaching meetings in August of 2006. The first coaching occurred on August 1, 2006 concerning the failure to obtain the ATP prior to the start of construction on the Kitt Commons Water Remediation Project. The action plan designed by Mr. Hecht for this issue was to inform Complainant how important the ATP is to the process and that Complainant is to ensure that all projects have ATPs and inspection cards prior to the start of construction.

66. The second coaching occurred on August 8, 2006 concerning Complainant's decision to allow the drain pipe trench to be run so that it cut the roots of the pin oak. Mr. Hecht's action plan for the issue was to inform Complainant that his job was to review all construction documents and change orders to determine the campus impact and to coordinate with the consultant to reduce the effects of the impact as much as possible. Complainant was also told that, should he not be certain of the possible impact of the construction document or change order, he was to seek the advice of his supervisor and other appropriate campus entities to assist him in determining possible solutions.

67. The third coaching occurred shortly after the second coaching. This third meeting addressed the fact that the independent testing agency to be retained on the Kitt Commons project had not been retained by the time that the contractor was ready to backfill trenches. Complainant was told that part of the action plan was to obtain the services of an independent testing agency or consultant in a timely manner, if a contract calls for the hiring of such an entity.

68. All three meetings were recorded by Mr. Hecht on Respondent's Employee Communication Meeting forms. Complainant indicated on all three forms that he disagreed (or, in one case, both disagreed and agreed) with the coaching. The forms were filed in Complainant's personnel file and copies of the forms were sent to Mr. Huetson.

Reassignment of Complainant's Supervisor and the September '06 Evaluation:

69. On September 11, 2006, Complainant complained to Mr. Hecht by e-mail that Hecht had been addressing him in an offensive manner. When Mr. Hecht received Complainant's e-mail, he came out into the main part of the office to confront Complainant about it. Mr. Hecht was angry and red-faced, and he began pointing his finger at Complainant while he told Complaint what he thought about the allegations in the e-mail.

70. Shortly after this exchange, Mr. Hecht reported to Mr. Huetson that he had "lost his cool" with Complainant. Mr. Huetson issued Mr. Hecht a corrective action concerning the incident. Mr. Huetson also decided that Complainant should be re-assigned from reporting to Mr. Hecht, at least on a temporary basis. As of September 22, 2006, Complainant was re-assigned to report directly to Mr. Huetson.

71. At the time of the re-assignment, Mr. Hecht provided an evaluation for the period of April 1, 2006 through September 22, 2006. ("September '06 Evaluation") This evaluation period included several projects in addition to the Kitt Commons Project, and included the period of time during which Complainant received the August 2006 disciplinary action based on his interactions with staff and contractors.

72. Mr. Hecht rated Complainant's work at an overall Level 2, "Satisfactory," rating for the September '06 Evaluation because the total score for Complainant's progress on goals and on core competencies totaled 218 points, which is within the Satisfactory performance range. The overall rating was a product of the various ratings that Mr. Hecht provided for specific goals or objective to be met by a Project Manager, as well as the ratings in various skill areas.

73. Mr. Hecht rated Complainant at a Level 2 rating for the goal or objective of following standard procedures and moving projects forward. This rating included Complainant's performance on a variety of projects. The problems with the Kitt Commons Project that Mr. Hecht observed were included in the evaluation calculation and those issues were noted in the comments for that goal. Complainant was rated at level 2.5 – between satisfactory and above standard -- for completing projects within the approved budgets. Mr. Hecht noted that Complainant had received feedback from project clients, including departmental representatives, contractors and consultants, on a total of 28 surveys. These survey results provided Complainant with an average satisfaction score sufficient to provide Complainant with a Level 2 score on client satisfaction. Complainant also received a Level 3, "Above Standard," rating for his setup and maintenance of project information, and a Level 3 rating for his training and certifications for the year.

74. In the areas of core competencies, Mr. Hecht rated Complainant at Level1,

"Unsatisfactory", in the areas of communication and interpersonal skills. Mr. Hecht's notations in these areas concerned his evaluation that Complainant was not exhibiting good listening skills, that his manner had been brusque, abrasive and loud, and that he showed a disregard of his fellow workers' feelings and needs. Complainant was given a Level 2 rating on accountability, with a comment that Complainant had had difficulty taking ownership and responsibility for his actions and for the issues that had occurred with his projects. The comment also noted that Complainant was knowledgeable about institutional policies. Mr. Hecht rated Complainant at a Level 2 rating for job knowledge. He included a comment that Complainant worked in a satisfactory manner, but was not exhibiting the personal skills that are critical to a project manager. Complainant was rated at a Level 2 for his customer service, with the notation that he was helpful to most of his internal and external customers. Finally, Complainant was rated at a Level 3 for safety.

75. In the evaluation narrative, Mr. Hecht explained that Complainant needed to see himself as the owner's representative on a project and that the project's problems were his to facilitate and solve with assistance from others as needed. Mr. Hecht noted that Complainant needed to learn to work with others in a cooperative and goal-oriented manner and seek help before issues grow. Finally Mr. Hecht wrote that Complainant should become a better listener, communicator, and problem solver.

76. Mr. Hecht and Complainant signed the September '06 Evaluation on October 18, 2006. Mr. Huetson also signed the review as the evaluation reviewer on the same date.

Board Rule 6-10 Meeting and Disciplinary Action

77. Complainant began to report to Mr. Huetson soon after the September '06 Evaluation.

78. Mr. Huetson was aware of the fact that the Kitt Commons Project had developed problems and that Complainant had been counseled about his performance on that project. Mr. Huetson knew that others within the University had expressed concerns about the progress of the project and some of the decisions that had been made. Mr. Huetson continued to investigate the matter after he became Complainant's direct supervisor.

79. By letter dated September 26, 2006, Mr. Huetson informed Complainant that he intended to hold a Board Rule 6-10 meeting concerning three issues related to the Kitt Commons Project. Those issues were the timing of the completion of the ATP, the decision that allowed the severance of part of the root ball of the pin oak, and the retention of the independent testing agency.

80. The Board Rule 6-10 meeting was held on October 4, 2006. Mr. Huetson did not

tell Mr. Hecht about the meeting and did not involve Mr. Hecht in the disciplinary process or the decision to terminate Complainant's employment.

81. During the meeting, Complainant told Mr. Huetson that he believed that the contractor was capable of picking up the ATP, and that he had done everything he could without actually checking on the issuance of the ATP. Complainant also told Mr. Huetson that others had been involved in deciding that the drainpipe routing should be changed requiring the trench to be run close to the pin oak. Complainant told Mr. Huetson that the fact that tree roots would be cut with the new routing was something he understood and that cutting tree roots was common in such situations. Complainant also explained that the retention of independent soils testing agent was optional under the contract.

Respondent's Decision to Impose A Sanction Of Termination of Employment:

82. Mr. Huetson was concerned that Complainant had offered the excuse that others were to blame for the problems on the Kitt Commons Project. He continued his investigation after the Board Rule 6-10 meeting to see if any other university official had authorized the routing of the drain pipe trench so close to the pin oak tree and located no one who had given the contractor permission to dig the trench in the location and manner that was completed.

83. Mr. Huetson knew that Complainant had been given a Level 3, "Above Standard," overall evaluation in March of '06, and that, even with the problems associated with the August '06 disciplinary action and the Kitt Commons Project, he had received a Satisfactory evaluation for the year to date from Mr. Hecht in September '06.

84. Mr. Huetson considered the Kitt Commons Project to be an indication that there were continuing problems with Complainant in terms of his taking ownership of projects as a Project Manager and with his interpersonal skills. Mr. Huetson also considered Complainant's blaming others for the lack of an ATP and for the routing decision constituted an unwillingness to take responsibility for his actions. Mr. Huetson had a discussion with the University's Labor Relations staff about what he should do with Complainant in order to move forward. Labor Relations recommended that Complainant be terminated.

85. Mr. Huetson was Complainant's direct supervisor for about five weeks before he terminated Complainant's employment by letter dated October 26, 2006. The termination of employment was effective immediately.

86. Complainant filed a timely appeal of the decision to terminate his employment with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, *et seq.*; *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) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) 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. *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. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

1. August 2006 Discipline:

Respondent presented a preponderance of the evidence that Complainant engaged in a series of unprofessionally rude, confrontational or disrespectful communications in 2006. Of the eight incidents discussed in the August 11, 2006 disciplinary action, Respondent produced sufficient evidence of six of the incidents. Respondent demonstrated that Complainant had acted in an unprofessionally angry and confrontational way with Mr. Gheysar after Mr. Gheysar had e-mailed Complainant's supervisors about Complainant's request for elevator servicing. Respondent demonstrated that Complainant had reacted in an unprofessionally angry manner with Mr. Willower with regard to an order to change the steam testing in Hallet Hall, and that he had been sarcastic and unprofessionally aggressive in response to Mr. Hecht's requests for information on two occasions. Additionally, Respondent provided a preponderance of the evidence that Complainant was rude and disruptive during staff meetings with Mr. Hecht, and that Complainant was not running his own staff meetings well.

Respondent did not present sufficient evidence at hearing to support two of the eight allegations in the August 11, 2006 disciplinary action. Respondent did not provide sufficient evidence to prove that Complainant's interaction with Ms. Pushparaj was unprofessional or in any other way a violation of standards of efficient service or competence, or willful misconduct. Additionally, Respondent presented no evidence related to allegations that Complainant criticized a staff member in front of a student employee. These two unproven incidents cannot, therefore, be used as a legitimate basis for discipline. The lawfulness of the reduction in pay imposed upon Complainant by the August 11, 2006 disciplinary action will be decided without these two allegations.

2. Termination of Complainant's Employment:

Additionally, Respondent has proven by a preponderance of the evidence that Complainant was responsible for ensuring that the Kitt Commons Project ATP was fully executed prior to the start of construction on the project, and that the ATP was not executed until weeks after construction had begun. Complainant's arguments that others are involved in the ATP process are correct. However, the fact that the administrative assistant routes the paperwork and the contractor is expected to pick up the permits available at the end of the ATP process does not change the responsibility carried by the Project Manager to ensure compliance with that process.

Respondent has also proven by a preponderance of the evidence that there was a change order put into place in the Kitt Commons Project that routed the north drain pipe so that it made use of existing penetrations into a steam tunnel, and that this change modified the routing of the drainpipe trench. The persuasive and credible evidence in this matter demonstrated that Complainant understood that the new proposed routing of the drain pipe trench was to run within the drip line of a large, mature pin oak that originally was to be protected, that Complainant did not believe that the hand digging provision of the project agreement for trenching within a tree drip line was feasible. The credible evidence also established that Complainant allowed the contractor to sever half of the root ball of the pin oak with a trench placed within a foot or so of the tree without bringing the issue to the attention of the entities who had agreed upon the original trenching plan. Respondent has demonstrated by a preponderance of the evidence that it was Complainant's job to facilitate a discussion with the relevant decision makers as to what should happen with the new trench routing and the pin oak.

While Respondent did prove that the independent testing agency for soils and concrete was not retained until immediately prior to the testing to be done on the project, Respondent did not prove by credible and persuasive evidence that, at the time of Complainant's actions, the delay in retaining an independent testing agency violated a performance standard for the position of Project Manager or would otherwise be a proper subject of a disciplinary action.

B. The Appointing Authority's action in assessing discipline on August 11, 2006 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).

Respondent disciplined Complainant in August of 2006 for a series of interactions in which Complainant demonstrated some level of inappropriate communication, such as hostility or anger. A demonstration of hostility or anger in the worksite under the conditions described by the witnesses in this matter is inappropriate and would severely undercut the effectiveness of a Project Manager. The only incident from the August 2006 disciplinary action which does not demonstrate an inappropriately hostile reaction was Mr. Hecht's observation that Complainant was failing to lead his staff meetings and allowing others to fill the leadership void. That type of interaction in a staff meeting also would constitute a failure to perform competently. The events described in the August 2006 disciplinary action, and proven at hearing, may therefore be properly considered to be failures to comply with standards of efficient service or competence and valid issues for the imposition of discipline.

The record of this matter demonstrates that Mr. Huetson followed an acceptable procedure in procuring and considering evidence related to these incidents, interviewing Complainant about the allegations, and in reaching a decision. There was no persuasive evidence or argument presented that Complainant was prevented from exercising his ability to present the information he chose as part of the Board Rule 6-10 meeting, or that Complainant was unaware of the issues to be discussed when notified of the pending Board Rule 6-10 meeting.

Respondent's disciplinary decision of August 2006 was not arbitrary, capricious or contrary to rule or law.

C. The Appointing Authority's action in terminating Complainant's employment was arbitrary and capricious, and was contrary to rule or law.

1. Mr. Huetson did not apply the principle of progressive discipline, in violation of Board Rule 6-2:

Board Rule 6-2, 4 CCR 801, requires:

> A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper.

This provision is often referred to as the Board's progressive discipline requirement. Progressive discipline is a process through which an employer applies a lower level of correction prior to applying higher levels of discipline in order to encourage employees with performance deficits to correct those deficits. The goal of progressive discipline is to improve employee performance rather than punish an employee, and to provide employees with a chance to correct issues prior to the imposition of discipline.

The Board's rule requires the use of progressive discipline except in certain circumstances involving flagrant or serious acts which justify the immediate imposition of discipline rather than the imposition of a lesser form of corrective action. There has been no persuasive evidence presented in this matter that complainant's actions with regard to the Kitt Commons Project were sufficiently serious or flagrant to warrant immediate discipline.

As the findings demonstrate, Respondent has repeatedly addressed its concerns about Complainant's rude, aggressive and angry communication style, particularly during interactions with other University staff and departments. That process has gone from repeated mention in performance reviews and discussions after incidents (including a discussion of the issue by Complainant's third-level supervisor), to corrective action, and then to imposition of a significant disciplinary action. The requirements of Board Rule 6-2 are satisfied by Respondent's handling of Complainant's demonstration of problems with his skills in maintaining good interpersonal relationships and using positive communication skills.

Respondent has not, however, treated Complainant's unilateral decision to overrule the tree protection requirements and the failure to ensure that the ATP was in place at the start of construction in the same manner. As the performance evaluations show, Complainant has a history of being praised for his attention to detail and his willingness to follow proper protocols. There is no indication that performance deficits similar to the ones experienced in the Kitt Commons Project had ever surfaced prior to that project. It is also important to note that the Kitt Commons Project issues are not issues of Complainant behaving in an angry, aggressive or rude manner. The technical issues with Complainant's

management of the Kitt Commons Project are different than the performance issues previously addressed in performance evaluations, a corrective action, and a disciplinary action.

Mr. Hecht issued counseling memos to Complainant for failing to enforce the tree protection requirements and for failing to obtain a timely ATP on the Kitt Commons Project. This level of correction is appropriate, under Board Rule 6-2 and the principles of progressive discipline, for a performance issue which has not surfaced previously.

Mr. Huetson's decision to make the problems with the Kitt Commons Project a career- ending issue is unreasonable because it fails to apply the principles of progressive discipline. While some corrective action is permissible because there were performance problems to be addressed in Complainant's unilateral decision to ignore the tree protection requirements and in Complainant's handling of the ATP, Board Rule 6-2 requires Respondent to take corrective action, rather than disciplinary action, under such circumstances.

2. Mr. Huetson's conclusion that termination was warranted because of Complainant's performance as a Project Manger ignored Complainant's most recent evaluations, in violation of Board Rule 6-9:

Mr. Huetson decided that the Kitt Commons Project problems represented that Complainant was failing as a Project Manager and had not been able to take ownership of the project as required for project managers.

Such conclusions, however, ignore the results of Complainant's other projects and work, as documented by Complainant's March 2006 annual evaluation and Complainant's September 2006 evaluation. Other than the issues noted with the Kitt Commons Project, the evaluations do not show that Complainant was having similar problems with his other projects. Mr. Hecht completed these two evaluations while considering the entirety of Complainant's work in 2005-2006, rather than just one problem project. Even when all of the interpersonal and communication problems associated with the August 11, 2006 discipline and the technical issues of the Kitt Commons Project were considered, for example, Complainant was still within satisfactory performance levels under the performance standards set for Project Managers in his September 2006 evaluation.

Board Rule 6-9, 4 CCR 801, requires that an appointing authority pursue his decision on discipline thoughtfully and with due regard for the circumstances of the situation, as well as Complainant's individual circumstances. Mr. Huetson did not present any persuasive explanation for how he reconciled Complainant's satisfactory (and better) performance evaluations – including one satisfactory evaluation conducted just five weeks before his termination of his employment – with his decision that Complainant's employment as a Project Manger had to be terminated and that nothing less than termination would suffice.

The credible and persuasive evidence demonstrates that Mr. Huetson, the

appointing authority, did not pursue the decision to terminate Complainant's employment with sufficient regard for the circumstances of Complainant's work, in violation of Board Rule 6-9.

D. The August 11, 2006 discipline was within the range of reasonable alternatives.

Respondent imposed a disciplinary pay reduction on Complainant which was to last for an entire year as its response to the series of eight allegations involving Complainant's communication style and interpersonal relationships. This is an unusually extensive disciplinary sanction.

A relatively severe sanction, however, is within the realm of reasonable alternatives available to Respondent because of several factors present in this matter. First, Complainant's August 2006 disciplinary action was only the last of a series of steps taken by Respondent to address Complainant's tendency to react in an angry, confrontational, and unprofessional manner with his peers, his supervisor, and his clients. The record in this case contains multiple references to co-workers and clients who have reported that their interaction with Complainant involved Complainant being rude or confrontational, and of multiple attempts by management to bring those issues to Complainant's attention. Second, the nature of the problem does not permit easy solutions. Changing the manner in which one reacts to the stress of criticism and challenge is not something that can be merely learned in a class and applied without much enthusiasm. It appears from the nature and frequency of Complainant's reactions that he will need to be truly motivated to modify how he responds when he feels provoked. A pay reduction lasting a year, while certainly an extensive and unusual sanction, is still within the realm of reasonable alternatives under the facts of the case.

E. The termination of Complaint's employment for his actions in relation to the Kitt Commons Project was not within the range of reasonable alternatives.

Complainant made two significant mistakes in the way that he handled the technical decisions in the Kitt Commons Project. Complainant failed to ensure that the ATP was fully executed prior to start of construction, which meant that the project was underway before all of the internal reviews of the plans had been completed. Complainant also apparently failed to recognize the importance of the fact that routing the trench next to the mature pin oak tree endangered a tree that was to be protected. Moreover, the decision to route the trench under the drip line of the tree while also deciding that hand digging was not feasible created a violation of the project agreement terms. Such issues should have alerted Complainant to the need to involve all of the appropriate AHJs in a discussion to resolve the conflict between the new routing requirements and tree protection.

Because of these lapses, some form of counseling or corrective action for

Complainant was certainly warranted. Termination of the employment of an employee who had no history of technical lapses such as the ones in the Kitt Commons Project, however, is an unreasonable reaction to these issues. When asked at hearing as to why he terminated Complainant's employment rather than impose some other form of discipline, Mr. Huetson explained that he believed that the Kitt Commons Project was merely an extension of earlier well-documented problems. The facts do not support this argument. Complainant certainly had well-documented problems maintaining a good working relationship with some of his peers and clients. When it came to the issues present in the Kitt Commons Project, however, Complainant had a demonstrated history of very good reviews and remarks concerning his willingness to follow University policies and procedures, his technical knowledge, and the quality of his projects. It is not at all clear from the record why one of the many available lesser responses was not implemented to address these new technical performance issues.

Reasonable persons would not impose such a draconian sanction for the types of lapses demonstrated in this case. As such, the decision to terminate Complainant's employment is not within the range of reasonable alternatives available to Respondent.

F. 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. C.R.S. § 24-50-125.5 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.

An award of attorney fees is not warranted on the facts of this matter. Reinstatement is being ordered here primarily because Respondent had not applied progressive discipline principles to a technical performance problem with Complainant and because Respondent had failed to sufficiently take into account Complainant's recent satisfactory and above standard performance. The record is clear, however, that there were significant and important performance issues with Complainant's work. There was no persuasive evidence presented which would lead to the conclusion that Respondent imposed the decision to terminate Complainant's employment in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Complainant committed many, although not all, of the acts for which he was disciplined.

2. Respondent's action in imposing a pay reduction was not arbitrary, capricious, or contrary to rule or law.

3. Respondent's action in terminating Complainant's employment was arbitrary

capricious and contrary to rule or law.

4. The pay reduction imposed was within the range of reasonable alternatives.

5. The termination of Complainant's employment was not within the range of reasonable alternatives.

6. Attorney's fees are not warranted.

ORDER

Respondent's disciplinary action of August 11, 2006 is **affirmed**. Respondent's termination of Complainant's employment is **rescinded**. Complainant is **reinstated** with full back pay and benefits, with the calculation of back pay to take into account the reduction in pay imposed on August 11, 2006, as well as all other lawful limitations on back pay calculation. Respondent is permitted, if it so chooses, to impose a corrective action on Complainant related to his failure to ensure that the Kitt Commons Project ATP was completed prior to the start of construction, and for his failure to shepherd the construction process in the Kitt Commons Project so that either the terms of the project agreement were met by the contractor, or others with the authority to modify the terms of the project agreement had changed the requirements for the project. Attorney fees and costs are not awarded.

Dated this 19th day of February, 2008.

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 19th day of Feb., 2008, 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:

Nora V. Kelly, Esq.
1801 Broadway
Suite 1204
Denver, CO 80202

and in the interagency mail, to:

Elvira Strehle-Henson
Senior Associate University Counsel
Special Assistant Attorney General
Office of the University Counsel
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Andrea C. Woods

(rev'd. 5/07

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