STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B030**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOSEPH P. MACDONALD,
Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge ("ALJ') Denise DeForest held the hearing in this matter on January 30, 2007 at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Joseph F. Haughain represented Respondent. Respondent's advisory witness was Mr. Jeffrey Kullman, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Joseph P. MacDonald ("Complainant") appeals his termination by Respondent, Department of Transportation ("Respondent"). Complainant seeks reinstatement and other remedies to make him whole.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

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

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

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

4. Whether attorney fees are warranted.

FINDINGS OF FACT

Entry Of A 2003 Settlement Agreement Between Complainant and Respondent:

1. Prior to December 2003, Complainant was employed by Respondent as a Tunnel Maintenance Worker I.

2. Complainant filed a suit against Respondent in federal District Court. On December 11, 2003, Respondent and Complainant entered into a Release and Settlement Agreement ("Settlement Agreement") to resolve that litigation.

3. The terms of that Settlement Agreement provided that, upon presentation of the necessary certifications related to a job position in welding, and that Complainant performed sufficiently on a test administered to him concerning his welding skills and knowledge, "CDOT agree[d] to place Joseph P. MacDonald in the state published job position of Welder I, as described in Attachment A of this agreement."

4. The Settlement Agreement also provided one limitation on Complainant's assignment as a Welder I:

   > The position of Welder I will be located in Clear Creek County, Colorado, or Summit County, Colorado, on, at or near the Eisenhower Tunnel.

5. The Settlement Agreement does not limit Respondent in how it was to arrange or manage Complainant's Welder I position, other than the geographical limitation imposed as to where the position would be located. As a result of the Settlement Agreement, Complainant was provided with a state Welder I position with no material difference between Complainant's position and a state employee holding a similar position, other than the geographical limitation on the position's base location.

6. The Settlement Agreement was intended by the parties to be a final, unchangeable agreement. It included a provision that the signing of the agreement "shall be forever binding, and no rescission, modification or release of the parties from the terms...will be made for mistake or any other reason." The Settlement Agreement was also a fully integrated document.

7. Complainant was given both a written and a practical examination by Respondent to determine if he was qualified to hold the Welder I position described in the Settlement Agreement. Complainant passed the examinations.

8. Neither the Settlement Agreement nor Attachment A, the Position Description Questionnaire ("PDQ") for the Welder I position, required Respondent to offer Complainant any additional training in order for Complainant to perform Welder I

functions. Once Complainant had passed the examinations for the position and had been placed into the new Welder I position, he was expected to be able to perform Welder I functions.

Description of the Job Requirements for Complainant's Welder I Position:

9. Attachment A to the Settlement Agreement was a copy of a PDQ dated December 2, 2003, for position number 4559. The PDQ was for a Machining Trades I – Shop & Field position, with the working title of Welder.

10. Complainant's PDQ includes a job description section. The purpose of the job description section is to provide a list of current, permanent, primary job duties and to estimate the frequency at which such duties are expected to be performed. The job description list does not include temporary assignments or assignments to be performed in the absence of another employee.

11. Complainant's PDQ indicates that the position was expected to use a variety of techniques and welding tools to work on mild steel, stainless, cast iron, aluminum, copper, brass and high carbon steel. Complainant's position also includes fabrication work, which is described as "fabricat[ing] and repair[ing] a wide variety of snow plows and V-box sanders." Complainant's PDQ also includes that the jobholder would be expected to "[p]erform major and minor repairs on V-box and tailgate sanders used within CDOT."

12. Complainant's PDQ additionally noted that there were no additional special qualifications other than the established entry requirements for the class. The PDQ did not note any unusual travel demands for the position.

13. The PDQ also listed a series of special requirements for the jobholder. The position was required to pass a baseline pre-placement physical and to hold a commercial Colorado driver's license with a medical card. The position also required the performance of shift work.

14. Complainant's PDQ indicated that the position had an "Essential Services Designation." The Essential Services Designation is defined in the PDQ as one which requires that the holder "be on duty to perform essential and/or emergency services of the agency without delay and/or interruption."

15. Complainant's PDQ does not expressly reference that Complainant might be expected to perform snowplowing. The PDQ, however, does not attempt to describe specific temporary duties that Complainant may be assigned to perform. Additionally, the PDQ clearly noted that the position was an Essential Services position, and snow removal is the type of essential or emergency service provided by CDOT which would be covered by such a designation.

Dispute Over Snow Plow Training and Welding Repairs at Empire:

16. In late 2005 and early 2006, Respondent was attempting to respond to heavier-than-normal snowfalls on the Interstate 70 ("I-70") corridor through the mountains. Respondent had approximately 26 vacancies in the positions that normally handled snowplowing duties for that portion of the I-70 corridor. To compensate for the increased workload and for the vacancies, Respondent created a rotation system which brought CDOT workers from around the state to perform snowplowing for a limited time period in that area, and then returned those workers to their normal assignments.

17. At times prior to early 2006, CDOT workers holding Welder positions had been assigned to perform snowplowing in order to assist Respondent in meeting snowplowing demands.

18. In January 2006, Complainant's supervisors asked Complainant to perform snowplowing on a temporary basis, and Complainant had refused to do so. At about the same time, Complainant's supervisors also told Complainant to report to the Empire Junction Maintenance yard to weld approximately ten sanders which required repair. The Empire Junction Maintenance Yard is located at Empire, Colorado, in Clear Creek County. Complainant refused to report to Empire to perform the necessary welding.

19. On April 18, 2006, after a discussion with supervisors related to Complainant's annual performance review, Complainant was presented with a Corrective Action which directed Complainant to report for a 40-hour snow removal training beginning on May 1, 2006.

20. Complainant did not grieve the Corrective Action. Complainant also verbally refused to attend the May 1, 2006 training, and did not appear for training at the appointed time.

21. Additionally, Complainant received a second Corrective Action on April 18, 2006 for refusing to report to the Empire Junction Maintenance Yard. The corrective action required Complainant to report to the Empire Junction Maintenance Yard site at 8:00 a.m. on May 15, 2006, and to perform required work on the sanders.

22. Complainant did not grieve the second corrective action. Complainant did not report to the Empire Junction Maintenance Yard at the required time and did not repair the sanders.

23. Complainant's appointing authority, Mr. Jeffrey Kullman, held a Board Rule 6-10 meeting with Complainant on May 10, 2006, to discuss Complainant's refusal to perform snowplowing or attend the 40-hour snow removal course. The meeting

also included a discussion of whether Complainant was refusing to go the Empire Junction Maintenance Yard to perform repairs on sanders. Mr. Kullman, CDOT Region I Civil Rights manager Ms. Micki Perez-Thompson, and Complainant's third level supervisor, Mr. Fred Schultz attended the meeting. Complainant chose to attend the meeting without a representative.

24. Complainant's reason for refusing to perform snowplowing or to attend the snow removal training was that, in his view, the function was not part of the job description he received as part of the 2003 Settlement Agreement. Complainant's reason for not agreeing to go to the Empire Junction Maintenance Yard to repair sanders was similar in nature. Complainant explained to Mr. Kullman that he had refused, and would continue to refuse, to perform the work in Empire because the 2003 Settlement Agreement said that he was to work at the Eisenhower Tunnel.

25. During his Board Rule 6-10 meeting, and subsequent meetings, Complainant referred repeatedly to his "contract." In referencing his contract, Complainant was referring to the 2003 Settlement Agreement.

26. At the Board Rule 6-10 meeting of May 10, 2006, Complainant also discussed the fact that his Welder position was designated as an Essential Services position. Complainant argued that this designation meant that he could be assigned to essential welding duties, but that he could not be assigned to perform snowplowing duties.

27. By letter dated May 12, 2006, Mr. Kullman disciplined Complainant for willfully refusing to perform snowplowing duties and refusing to attend snow removal training. The same letter extended the time for Complainant to report to the Empire Junction Maintenance Yard facility to repair the sanders until May 18, 2006. The discipline imposed for these infractions was a reduction in pay of 2.5% of Complainant's gross salary for a period of three months beginning June 1, 2006.

Complainant's Appeal of the May 12, 2006 Discipline:

28. Complainant filed a timely appeal with the Board of the discipline imposed upon him on May 12, 2006. The appeal was assigned Board case no. 2006B098.

29. Respondent filed for summary judgment in that case. By Order dated September 7, 2006, ALJ McClatchey granted summary judgment in favor of Respondent by finding that the terms of Complainant's PDQ included the disputed duties and upholding the discipline imposed by the May 12, 2006 letter. The September 7, 2006 Order dismissed Complainant's appeal, 2006B098.

30. Complainant filed a timely appeal to the Board of the September 7, 2006 Order.

Respondent's Second Disciplinary Action For Complainant's Refusal To Take Snowplow Training and To Weld at Empire Junction:

31. Mr. Kullman held a second Rule 6-10 meeting with Complainant on July 6, 2006. At this meeting, the parties again discussed whether Complainant was willing to agree to perform the welding at the Empire Junction Maintenance Yard or to attend the snow removal training. Complainant refused to perform the two disputed tasks because he believed them to be a violation of his Settlement Agreement. No disciplinary or corrective action occurred as a result of the July 2006 Board Rule 6-10 meeting.

32. Shortly after the September 7, 2006 Order was issued by ALJ McClatchey, Mr. Kullman scheduled a third Board Rule 6-10 meeting with Complainant. The meeting was held on September 19, 2006. Mr. Kullman, Ms. Perez-Thompson, Mr. Schultz, and Complainant attended the meeting.

33. At the September 16, 2006 Board Rule 6-10 meeting, Complainant informed Mr. Kullman, Mr. Schultz, and Ms. Perez-Thompson that he had objected to the entry to summary judgment and had filed an appeal of the September 7, 2006 Order with the Board.

34. Mr. Kullman addressed ALJ McClatchey's September 7, 2006 Order with Complainant. He then told Complainant that Complainant was to report to snowplow training on October 3, 2006, and that Complainant was to report to the Empire Junction Maintenance Yard to repair sanders on September 25, 2006.

35. Complainant refused to attend snowplow training because he believed that the orders violated his Settlement Agreement and that he had appealed the September 7, 2006 Order by ALJ McClatchey to the Board. Complainant also refused to perform the welding at the Empire Junction Maintenance Yard for the same reason.

36. At the time of the September 16, 2006, Board Rule 6-10 meeting, the Board had not yet issued a Final Agency Order in case no. 2006B098. By letter dated September 25, 2006, Mr. Kullman terminated Complainant's employment effective September 29, 2006. Mr. Kullman determined that Complainant's failure to perform the assigned work was a willful failure to perform assigned work, and that Complainant's unwillingness to accept the September 7, 2006 Order made his refusal worthy of termination of employment rather than lesser forms of discipline.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be

disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

II. HEARING ISSUES

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

There has been no dispute in this matter that Complainant has refused to take snowplow training and refused to go to the Empire Junction Maintenance Yard to perform welding work on sanders located at that site. Complainant has been exceptionally clear since the beginning of the discussions concerning these two job assignments that he was not going to complete them.

The record is also quite clear that the reason Complainant has refused to comply with the orders to weld sanders and to attend snowplow training is that he believes that these orders are in violation of the terms of his 2003 Settlement Agreement.

At his July 6, and September 19, 2006 Board Rule 6-10 meetings, Complainant also refused to comply with the order to weld sanders at the Empire Junction Maintenance Yard because he claimed that he did not have the welding competence to work on the sanders. This explanation was not credible, particularly given that welding sanders is one of the core job requirements for the Welder I position, he had passed a written and performance test to obtain the position, and he had been performing the Welder I job for nearly three years. Complainant did not present persuasive evidence at hearing that he was unqualified to perform the duties required of the Welder I position or that he was incapable of obtaining the licenses and training required to perform snowplowing duties.

B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

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

1. Respondent Did Not Violate The Terms of the Settlement Agreement In Requiring Complainant To Take Temporary Duty Performing Snowplowing, To Take Snow Removal Training, and In Requiring Complainant to Weld Sanders At the Empire Maintenance Yard:

The heart of this dispute concerns Complainant's fear that the job concessions he was awarded in the 2003 Settlement Agreement are now being undermined by Respondent. As a result, it is important to begin this analysis by considering the terms of Complainant's employment, as provided by the 2003 Settlement Agreement, and to determine whether the disputed assignments were in violation of the 2003 Settlement Agreement terms.

A settlement agreement, such as the one involved in this matter, is a contract and is interpreted using normal contract interpretation principles. *See e.g., DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, (Colo.App. 2001)(holding "[a] settlement agreement is a contract to end judicial proceedings" and that "[a] court may summarily enforce a settlement agreement if it is undisputed that a settlement exists"); *Moland v. Industrial Claim Appeals Office of State*, 111 P.3d 507, 510 (Colo.App. 2004)(holding that "[i]nterpretation of a settlement agreement is a question of law, and the agreement must be enforced as written"). "Contractual terms should be given their generally prevailing meaning and an integrated contract should be viewed in its entirety with the end of seeking to harmonize and give effect to all provisions." *Humphrey v. O'Connor*, 940 P.2d 1015, 1018 (Colo.App. 1996).

The terms of the Settlement Agreement in this matter provide that Complainant was to be assigned to a Welder I position, as described in the attached PDQ. The location of his new position was limited in the Settlement Agreement so that the position would be

"located in Clear Creek County, Colorado, or Summit County, Colorado, on, at or near the Eisenhower Tunnel."

A job description found within a PDQ is not intended to provide a comprehensive list of duties. *See e.g.* Board Rule 1-52 (defining the term "job description" to mean "[t]he official document summarizing the primary duties and responsibilities assigned to a position by the appointing authority"), 4 CCR 801. Neither the PDQ in this case nor the Settlement Agreement language limited Complainant's appointing authority's ability to assign temporary duty to Complainant. The PDQ, in fact, notes that Complainant's position carries an Essential Services designation, which makes it more even more likely than normal that the employee holding such a position will be assigned temporary duties to cover needed services. The PDQ additionally does not note that there are unusual travel demands for this position; this language, however, impliedly recognizes that there may well be travel involved in Complainant's position, but not at unusual levels.

In other words, Complainant's 2003 Settlement Agreement provided him with a state position which is the same as other similar state positions, except that the position cannot be based outside of "Clear Creek County, Colorado, or Summit County, Colorado, on, at or near the Eisenhower Tunnel."

Complainant's contention that he is never to be required to work outside of his usual workplace to the west of the Eisenhower Tunnel is not borne out by the terms of the Settlement Agreement. The terms of the Settlement Agreement itself permit Complainant's job location to be on, at or *near* the Eisenhower Tunnel in the counties on either side of the tunnel. Moreover, as noted above, the PDQ does not limit Respondent's ability make temporary assignments to Complainant. As a result of these provisions, Respondent's order to weld sanders at the Empire Junction Maintenance Yard in Clear Creek County is well within the terms of the 2003 Settlement Agreement.

Complainant also contends that Respondent is attempting to change his job description so that he is performing snowplowing duties on a regular basis and that this change would violate the terms of the Settlement Agreement. At hearing, Complainant introduced a draft PDQ prepared by Mr. Schultz that would have modified Complainant's position to include 20% of his time performing snowplowing duties. The proposed job description, however, was presented to Complainant and he refused to agree to it. The new job description has not been implemented. Complainant's refusal to agree to the change was not the basis upon which Respondent imposed discipline. As such, the terms of that proposed PDQ are not relevant to the discipline at issue in this case.

In this case, Complainant initially refused to participate in the temporary snowplowing assignments that were also assigned to numerous other CDOT workers. Complainant then refused to attend a 40-hour snowplow training. These snowplowing assignments are of limited duration and appear to fit within both the temporary assignment category as well as the Essential Services Designation for Complainant's Welder I position. Respondent's order that Complainant accept a temporary snowplowing assignment and

attend snow removal training are also within the terms of the 2003 Settlement Agreement.

2. Complainant Did Not Demonstrate That Any Statements He Made Were Protected Disclosures Or That He Was Retaliated Against For Any Disclosures:

Complainant initially lodged a State Employee Protection Act ("Whistleblower") complaint as part of his appeal in this matter. At hearing, however, Complainant did not testify and he did not present other evidence bearing on his Whistleblower allegations.

In order to invoke the protections of C.R.S. § 24-50.5-103, which prohibits any appointing authority or supervisor form initiating or administering any disciplinary action, as defined by the statute, "against an employee on account of the employee's disclosure of information...", the claimant must establish that his disclosures fell within the protection of the Whistleblower statute and that they were a substantial or motivating factor in the department's decision. *Ward v. Industrial Commission*, 699 P.2d 960, 967 -68 (Colo. 1985). If claimant makes such initial showing, then the department must establish by preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Id.*

At hearing, Complainant failed to demonstrate by competent and persuasive evidence that the disciplinary action taken by Respondent was indeed motivated in whole, or even in part, by any disclosures that Complainant may have made. Accordingly, there is no factual or legal basis to conclude that Respondent's disciplinary action violated the State Employee Protection Act.

Additionally, at the end of his closing argument, Complainant offered two citations as supportive of his argument that his termination was improper: *Lee v. Nichols*, 197 F.3d 1291 (10th Cir. 1999) and *Wells v. CDOT*, 325 F.3d 1205 (10th Cir. 2003).

The *Lee* case evaluates federal First Amendment rights of employees, and it sets forth several standards for evaluating whether a public employee's speech is protected by the First Amendment. Under *Lee*, for example, in order for speech to be protected it must first be found to be speech relating to matters of public concern. *Lee*, 197 F.3d at 1295. This evaluation includes an evaluation of the speaker's motive and a determination of whether the speech was calculated to redress personal grievances or whether it had a broader public purpose. *Id.* at 1296. The record must also support an evaluation of whether the employee's interest in the protected speech is outweighed by the state's interesting in regulating speech to maintain an efficient workplace. *Id.*

Complainant has not presented a record from which the *Lee* test can be evaluated. He has not identified any speech which he believes is protected by the First Amendment. The only speech of Complainant which has been found to be credible in the Findings of Fact is that he believed, and has repeatedly said, that Respondent's orders to go through snow removal training and to weld at the Empire Junction Maintenance Yard were orders

that violated his 2003 Settlement Agreement. It is difficult to see, however, how those comments would be considered to be of public concern and not a part of Complainant's redress of his personal grievances over the interpretation of his work duties. Overall, Complainant has presented an insufficient record to demonstrate that his First Amendment rights have been violated in this matter.

Complainant also offered *Wells* for the proposition that reassignment with significantly different responsibilities is unlawful. *Wells*, however, is a case which discusses claims of Title VII discrimination and retaliation. In the course of that discussion, the case notes that an adverse employment action (one of the *prima facie* elements in a Title VII claim) can take the form of a reassignment with significantly different responsibilities. *Wells*, 325 F.3d at 1213. Complainant, however, has raised no Title VII claim, and the holding of the *Wells* case does not present a basis to invalidate Respondent's disciplinary action.

Accordingly, the undersigned declines Complainant's invitation to hold that his termination was unlawful under either *Lee* or *Wells*.

3. Terminating Complainant's Employment Under The Circumstances Of This Case Violates Board Rule 6–8:

As the factual record in this case amply demonstrates, Complainant and his supervisors were engaged in a protracted dispute over whether Complainant could be assigned to perform temporary snowplowing duties, including attending snow removal training, and whether Complainant could be ordered to perform welding at the Empire Junction Maintenance Yard rather than at his usual work station at the Eisenhower Tunnel. The record also clearly shows that Complainant was disciplined in May 2006 for refusing to carry out those disputed duties.

Complainant appealed that discipline through a timely appeal to the Board. Before that process was complete and a Final Agency Order ("FAO") had been issued by the Board, however, Respondent reopened the issue with Complainant and then fired him for maintaining his original position.

Board Rule 6–8 provides "an employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature." The issue posed by this case is, therefore, whether Complainant's termination on September 29, 2006 represents new discipline for an "additional act of the same nature" or a prohibited second discipline for a single incident.

This case revolves around a dispute over the interpretation of a document which governs both Complainant's and Respondent's obligations as to Complainant's job duties. Respondent could have asked Complainant for his interpretation one time or twenty times while this issue was working its way through the Board's review processes; Complainant's answer would have been same each time. Complainant was in the process of appealing

Respondent's interpretation of the issue to the Board when he was once again asked if he would comply with Respondent's interpretation. His refusal to agree with Respondent's interpretation at that point was the direct cause of his termination. This is not a case where the Board had issued a final decision through an FAO, and then Complainant had decided to ignore the FAO. The presence of a pending appeal to the Board concerning this very issue places Complainant's conduct in a very different light and one under which it would be unreasonable to construe each of Complainant's refusals as separate disciplinary acts.

The undersigned finds that, under the unusual circumstances presented by this case, the September 29, 2006 termination was not for an additional act of the same nature but should be considered as a second assignment of discipline for the same set of refusals. Accordingly, Respondent has disciplined Complainant in violation of Board Rule 6-8, 4 CCR 801.

4. Terminating Complainant's Employment Prior To The Issuance Of A Final Agency Order Is An Action Which Reasonable Men Would Have Decided Differently:

Respondent reopened the question of compliance with Complainant because of the issuance of the September 7, 2006 Order, and it was Complainant's refusal to change his position because of that Order which was the sole reason for termination of his employment. In treating the September 7, 2006 Order as a binding directive, however, Respondent has made an unreasonable assumption and reached an unreasonable conclusion.

In understanding this process, it is helpful to begin the analysis with a short discussion of when administrative orders are effective and binding on the parties, and the circumstances under which they are not.

a. Effective Date of Administrative Orders:

The question of when the order of an administrative law judge is effective immediately is not a simple question, given that the ability to issue a binding order varies along the course of an administrative review process.

The state Administrative Procedures Act provides an ALJ with the authority to run the hearing, *see* C.R.S. 24-4-105(4), and orders issued as part of the hearing process are immediately effective. In terms of sheer numbers, these procedural orders are the most common type of order in the Board's cases and the ones with which the parties will generally be familiar.

Once an ALJ issues an order containing ultimate conclusions of fact and law and law and which determines the outcome of case, however, that rule changes. An agency cannot vest final authority in a hearing officer or an ALJ when the agency's organic act and

the state Administrative Procedures Act do not provide for such a delegation. *See Western Colorado Congress v. Dept. Of Health*, 844 P.2d 1264, 1266-67 (Colo.App. 1992)(interpreting the procedural due process requirements of the state APA to entitle a party to review by the agency of an initial decision issued by an ALJ or hearing officer). Parties are entitled to appeal to the Board for a final decision using the exceptions process outlined in C.R.S. § 24-4-105(14). The Board, in turn, is given an opportunity through the exceptions process to review the initial decision and correct any errors before an FAO is issued in the matter. *See Western Colorado Congress*, 844 P.2d at 1266. The Initial Decision in this case, for example, will not be binding upon Respondent at the time it is issued. Respondent has the right to appeal to the Board, and this Initial Decision will only become a binding order – the FAO -- if and when the Board adopts it as such, or it becomes a FAO as a matter of law after a set amount of time has passed with no action by the Board. *See* C.R.S. §24-4-105(14).

Once an FAO is issued in a case, however, the rule changes a third time. A Board FOA is effective and binding on the parties either immediately or on the date specified by the Board, unless its operation is stayed on appeal. C.R.S. §24-4-106(5)(providing that an agency or reviewing court may, upon a finding of irreparable injury, postpone the effective date of the FAO pending judicial review). *See also* C.A.R. Rule 8 (describing the procedure for obtaining a stay or injunction pending appeal).

In other words, the expected consequences of a failure to obey a Board order will depend upon the type of order. A procedural order or an FOA (for which no stay has been granted) are generally immediately effective; the failure to obey such an order can result in a sanction of an appropriate type. An Initial Decision, or a similar order by an administrative law judge, however, does not have the same effect. Under the state Administrative Procedures Act, parties are able to appeal such an order to the Board without obeying it or having its operation stayed.

b. <u>Respondent's Disciplinary Action Prior To The Issuance Of A FAO Is Arbitrary, Capricious, and Unreasonable Under the Circumstances</u>:

In this case, Respondent misconstrued the nature and effect of the ALJ's September 7, 2006 Order. That Order included findings and conclusions of law, determined the rights of the parties, and dismissed the appeal. It was the type of order which could be appealed to the Board prior to having any binding effect.

Respondent may have felt confident that the Board would uphold the dismissal of the appeal. That confidence, however, would not change the fact that the Board had not yet decided the matter and that the Board's decision would be of significant import as to the disposition of this case.

Respondent also ignored the fact that Complainant had no obligation at that point to obey the Order prior to issuance of an FAO by the Board, and his refusal to change his position in September 2006 is not the same as a refusal to follow a binding order from the

Board. *Cf. Bell v. Industrial Claim Appeals Office of the State of Colorado*, 93 P.3d 584, 586 (Colo.App. 2004)(reversing a finding of insubordination based upon a claimant's failure to accept a settlement offer from her employer; holding that "because claimant was not obligated to settle, her refusal to sign the settlement agreement could not be insubordination").

Once the Board's appellate review process was initiated, Respondent needed to wait until the Board has fully resolved the question before asking Complainant whether he was going to comply with any findings, and then treating a refusal as a more serious form of insubordination than Complainant's previous refusals. Given that Respondent did not await the Final Agency Order from the Board, thereby failing to collect information it should and could have considered in exercising its discretion, Respondent has acted in an arbitrary and capricious manner in making its disciplinary decision. *Lawley*, 36 P.3d at 1252.

Additionally, Respondent construed Complainant's refusal to comply with the September 7, 2006 Order as proof of further willful disobedience by Complainant when a reasonable person would have concluded that Complainant was under no obligation to obey the order at that point, and that Complainant had a right to ask for the Board's decision before any order would be final and enforceable. Reasonable persons fairly and honestly considering the evidence would have reached contrary conclusions to the ones drawn by Respondent concerning Complainant's September 2006 refusal. Such unreasonable conclusions constitute a second reason to conclude that Respondent acted in an arbitrary or capricious manner in disciplining Complainant in September 2006. *Lawley*, 36 P.3d at 1252.

C. The discipline imposed was not within the range of reasonable alternatives.

The credible evidence demonstrates that the appointing authority did not pursue his 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. Given that the appointing authority was told in September 2006 that Complainant's case was still before the Board, the decision to increase the penalty at that time for failing to complete the disputed job assignments from a pay reduction to termination of employment was a fundamentally unreasonable decision. Mr. Kullman made the termination decision because he considered Complainant's refusals in September 2006 to also be a refusal to accept the ALJ's September 7, 2006 Order. Under the state Administrative Procedures Act, however, Complainant had a right to appeal the September 7, 2006 Order to the Board and to await the Board's interpretation before there would be a binding order in place. The increased sanction of termination of Complainant's employment was not within the range of reasonable alternatives available to Mr. Kullman in September 2006.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted in this case. While Respondent based its disciplinary action on an unreasonable position, given the lack of a Final Agency Order from the Board in case no. 2006B098, Complainant has not demonstrated that the action was taken in bad faith or was frivolous, malicious, harassing, or otherwise groundless.

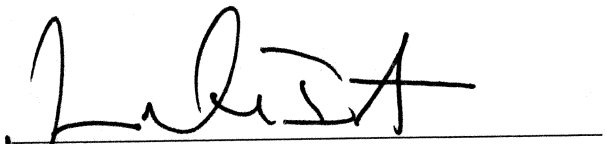
CONCLUSIONS OF LAW

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

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits. Attorney fees and costs are not awarded.

Dated this 16th 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.

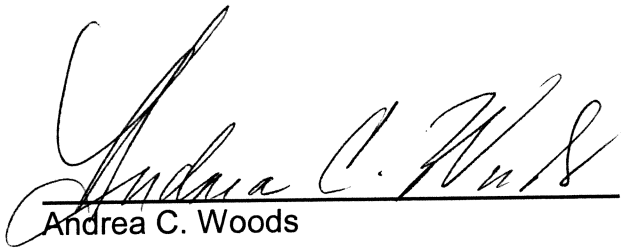
CERTIFICATE OF SERVICE

This is to certify that on the 16th 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:

Joseph P. MacDonald
510 Woodward St.
Silver Plume, CO 80476

and in the interagency mail, to:

Joseph F. Haughain
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods

2007B030