STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B076**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JEFF BAUGHMAN,

Complainant,

vs.

COLORADO STATE UNIVERSITY,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 21, 2007. The record was closed on that date. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Tracy Hutton, Associate Director of Human Resources and Complainant's appointing authority. Complainant appeared and was represented by Steven Francis, of Howard & Francis, LLP.

MATTER APPEALED

Complainant, Jeff Baughman (Complainant or Baughman), appeals the terms imposed in a demotion letter by Respondent, Colorado State University (Respondent or CSU). Complainant does not challenge the demotion and does not seek reinstatement to his former position. Rather, he seeks modification of the provision in the demotion letter stating that a driver would no longer be available to transport him to and from job sites during the revocation of his driver's license. Complainant seeks an order directing Respondent to permit CSU employees to provide transportation to him on the job.

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

ISSUES

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

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

FINDINGS OF FACT

General Background

1. Complainant commenced employment as at CSU as a Grounds Keeper (GK) II in 1990.

2. Complainant's Position Description Questionnaire contains a requirement that he possess a valid driver's license.

3. Complainant worked in the Irrigation Unit of the Outdoor Services division at CSU. The Irrigation Unit is responsible for overseeing all irrigation functions relating to 220 acres of property on the CSU campus. The source of CSU irrigation is a lake located three miles from the CSU campus. Lake water is filtered and pumped through a main line to the campus, dispersed through other main lines, and then sent through pressure reducing valves to sprinkler heads.

4. The irrigation system encompasses over 30 pressure-reducing valves, 1200 individual filter stations, and 25,000 sprinkler heads.

5. Three GK II's staff the entire Irrigation Unit at CSU. Irrigation jobs include: working at the pump station; working at the inlet from the lake; working at the filter house; and repairing and maintaining the pressure reducing valves, the mainline pipes, the station valves, and the individual sprinkler heads.

6. GK II's also perform snow removal, requiring that they arrive at 3:00 a.m., plow parking lots or sidewalks, and groom specific areas on campus.

7. GK II's also do tree trimming. This job entails driving the chipper and chipper truck to the job site, setting up barricades, loading the chipper, and driving the chipper truck to the dump.

8. The GK II's work independently of each other to perform all of these functions. They each have their own truck with tools and parts necessary to perform the tasks at the different worksites. Often, once they arrive at a job site they discover the need to retrieve a special part from another location, prior to performing the necessary work. Immediate mobility is therefore a necessary component of efficiently performing the GK II duties.

2005 DUI Conviction and Corrective Action

9. In 2005, Complainant lost his driving privileges following conviction of an alcohol related offense.

10. Complainant's supervisor was Doug Nagel, Manager of Outdoor Services at CSU. Once Complainant disclosed his conviction, Nagel met with Complainant

to discuss how the matter would be handled. At that meeting, Complainant indicated he thought it would not be a problem to have his driver's license reinstated within one year.

11. On August 4, 2005, Nagel issued a Corrective Action to Complainant. The letter stated in part,

> "The corrective action (s) you must take is/are: Regain your driving privileges with in (sic) one year of the date of this corrective action. Failure to do so will result in a demotion to the Grounds Keeper I level. A second occurrence of this nature will result in a demotion to the Grounds Keeper I level where you will remain until you are able to regain your driving privileges."

12. At the time this Corrective Action was imposed against Complainant, CSU police did not ticket GK II's for driving snowplows or tree trimming or some other work related equipment without a valid driver's license. In addition, Respondent permitted the other two GK II's and, at times, seasonal hourly employees, to drive GK II's with revoked driver's licenses, to and from job sites.

Notice of Revocation

13. In November 2005, Complainant received a copy of the notice of driver's license revocation. The October 28, 2005 notice states that his license would remain under revocation until June 29, 2007.

14. Complainant did not share this information with Doug Nagel.

15. During the period following Complainant's receipt of the August 2005 Corrective Action, Complainant was unable to work as independently as he had when he possessed a driver's license. The scope of his job functions was reduced significantly. Complainant's lack of a driver's license had a negative effect on co-workers at times, as they had to take time away from their work in order to provide Complainant with transportation to and from job sites.

16. Hourly seasonal workers were sometimes available to help drive Complainant to job sites.

17. During this period, Complainant was unable to be on-call for weekend and emergency work. This imposed an additional hardship on his two co-workers, as they absorbed his portion of the on-call and emergency work.

December 2006

18. After the one-year period had expired, it was time for Nagel to conduct Complainant's mid-year review. They met in December 2006. Nagel asked

Complainant for information regarding the return of his driver's license privilege. Complainant stated he had a letter explaining when he would get his license back. Nagel requested a copy of it. Complainant did not provide it to him within the few days following the meeting.

19. After a few days had passed, Nagel asked Complainant a second time for the letter demonstrating that he had received his driving privileges back.

20. Complainant did not provide the revocation order to Nagel.

21. Nagel then turned the matter over to Tracy Hutton, Associate Director of CSU Human Resources.

Pre-disciplinary Process

22. Hutton was Complainant's appointing authority. Hutton first asked Nagel to obtain all pertinent information regarding the return of Complainant's driver's license. Nagel asked Complainant for that information again. When Complainant brought it in, Nagel directed him to give it to Hutton.

23. In the early Spring of 2007, the CSU Police Department informed Nagel that its officers would ticket any CSU employee driving work-related vehicles on campus without a valid driver's license. Nagel informed Hutton of this policy, and she was aware of it when she imposed discipline against Complainant.

24. Hutton sent a notice of a pre-disciplinary meeting to Complainant, regarding his loss of driving privileges and failure to provide timely information to his direct supervisor.

25. On February 15, 2007, Hutton and Complainant attended the pre-disciplinary meeting. Complainant handed Hutton a copy of his revocation order, showing the revocation date of June 30, 2005, effective for two years.

26. At the meeting, Complainant indicated that Nagel had asked him only once for a copy of the revocation documents showing the length of revocation. Hutton felt that in view of the language in the Corrective Action, one request was certainly sufficient because the need for the document was obvious.

27. At the meeting, Complainant informed Hutton that two other CSU employees had lost their driver's licenses and had been treated differently. Hutton followed up after the meeting by examining documents relating to those other employees. The other employees' situations were different; their job responsibilities included less driving, and CSU police did not ticket unlicensed employee drivers during the relevant time period of 2001 - 2002.

28. Hutton considered as mitigation Complainant's length of service to CSU, twelve years.

Hutton's Decision

29. Hutton decided that, consistent with the 2005 Corrective Action, she would demote Complainant for failing to regain his driving privileges. She also determined that Complainant's inability to independently perform the majority of tasks required for his job adversely impacted the university. She decided to demote Complainant to GK I, which also requires a valid driver's license. She considered termination or demotion to a different job that did not require a driver's license, but these positions paid significantly less than GK I. She rejected the prospect of reducing Complainant's salary by more than necessary.

30. Hutton's understanding of the policy on CSU campus was that the CSU police department would ticket employees driving motor vehicles on campus without a valid driver's license.

31. Hutton considered it an imposition on the Irrigation unit to require other workers to drive Complainant to and from job sites.

32. On March 22, 2007, Hutton sent the demotion letter to Complainant. With regard to the issue of permitting co-workers to provide Complainant with transportation on the job, the letter stated as follows:

> "Your position as a Grounds & Nursery II requires that you operate various types of equipment on campus and to travel to various locations by motor vehicle. Your loss of driving privileges prevents you from complying with these requirements and hinders your department's ability to deliver the services for which it is responsible. Requiring another employee be available to transport you to the necessary location is not a viable solution to this matter and creates a hardship for the organization."

33. Complainant seeks an order modifying the language in the demotion letter indicating that requiring another employee to be available to transport him to necessary locations is "not a viable solution." Complainant requests that Respondent be ordered to provide him with a driver for the duration of time he lacks a valid driver's license.

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 these 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; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the 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). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant failed to regain his driver's license within a year of losing it, and neglected to inform his direct supervisor of this fact despite repeated requests for documentation.

B. The Appointing Authority's action of demoting Complainant 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; or 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).

Complainant asserts that it was arbitrary and capricious for Respondent to modify its policy of permitting other workers to drive Complainant to job sites while his driver's license is under revocation. He contends that the August 2005 Corrective Action created a binding agreement between Respondent and Complainant, under

which Respondent would assure that Complainant had a driver available.

Complainant's argument fails for several reasons. First, a corrective action does not constitute an agreement between an employee and employer. A corrective action is a means by which a state agency can clearly set forth areas for improvement, and mandate specific steps the employee must take to demonstrate such improvement. Board Rule 6-11, 4 CCR 801. A corrective action is a directive by the employer to the employee, not an agreement between the two parties.

Second, any factual circumstances in existence at the time a corrective action is imposed are subject to change and are not somehow binding on the agency at a later date. In this case, the policy regarding ticketing of CSU employees on campus was different in 2005 than it was in 2007. It was a reasonable exercise of discretion for CSU to respond to the change in police ticketing policy by modifying its approach to handling transportation for employees with revoked driver's licenses.

Ms. Hutton considered all relevant information necessary to make a decision in this case. She took pains to assure that Complainant did not suffer too great a decrease in salary. Conditions governing campus driving for GK II's had changed between August 2005 and March 2007, and she responded. Hutton deemed it an untenable burden on the Irrigation Unit to continue providing a driver for Complainant in the completion of his duties. The evidence supports this decision as a reasonable one.

CONCLUSIONS OF LAW

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

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

ORDER

Respondent's action is **affirmed**.

Dated this 4th day of October, 2007

Mary S. McClatchey
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 4 day of October, 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:

Steven Francis
Howard and Francis, LLP
P.O. Box 2132 Fort Collins, Colorado 80522

and in the interagency mail, to:

Eric Freund
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Linda Whitaker for
Andrea C. Woods