STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B102**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN MALLOY,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, PLATTE VALLEY YOUTH SERVICES CENTER,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on November 28 and December 11, 2007, and January 14 and 16, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The matter was commenced on October 22, 2007. The record was closed on the record by the ALJ on the last day of hearing. Assistant Attorney General Joseph F. Haughain represented Respondent. Respondent's advisory witness was Jamie Nuss, the appointing authority. Complainant appeared and was represented by Joseph Stengel, Esq.

MATTER APPEALED

Complainant, John Malloy ("Complainant") appeals the 5% reduction in pay for a period of three months imposed by Respondent, Department of Human Services, Division of Youth Corrections, Platte Valley Youth Services Center ("Respondent" or "Platte Valley"). Complainant also asserts that Respondent has violated the Colorado State Employee Protection Act. Complainant seeks removal of the disciplinary action from his personnel file, a return of the monies withheld, a transfer from Platte Valley, and attorney fees and costs.

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

ISSUES

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

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

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

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. Complainant is certified as a Correctional Security Officer ("CSO") III at Platte Valley.

2. Complainant has served for approximately 20 years as a correctional officer, including approximately ten years at Platte Valley at the CSO I, II, and III levels. Complainant was promoted to CSO III in August of 2004.

3. As a CSO III, Complainant serves as the front-end Team Leader for the facility. Complainant coordinates and supervises the CSO I and CSO II staff at the facility who work at the beginning of the week. There is another CSO III who serves as Team Leader for the back-end staff, which is the staff that works at the end of the week.

4. As front-end Team Leader, Complainant is a second-level supervisor for CSO I officers, and a direct supervisor for the CSO II shift supervisors and lead workers. At the end of 2006 and beginning of 2007, Complainant was the direct supervisor for 13 officers.

Complainant's Overall Performance:

5. Throughout his years as a CSO II and CSO III at Platte Valley, Complainant has consistently received high performance marks for his work on safety and security issues, his knowledge of departmental policies and procedures, and for his work as a transport officer.

6. Complainant has also been rated as having good communication skills with residents.

7. Over the previous 10 years, multiple supervisors have rated Complainant on his annual performance reviews. Complainant's reviews have repeatedly noted a need to further develop Complainant's interpersonal style with co-workers and subordinates. Reviews have referred, for example, to Complainant's verbal communication style with staff as one area in which he could improve on tact and diplomacy, and as one of constant struggle because of his abrupt style that does not take others thoughts and feelings into consideration. Complainant's evaluations in the year after he was promoted to the CSO III position mention that he had

improved his communication style and was making efforts to improve his working relationships.

Complainant's Decision To Take Mr. Harris With Him Outside the Facility During A Blizzard:

8. There was a blizzard at the Platte Valley Correctional Facility in December 2006. The staff members who were at the facility prepared to spend the night and next day at the facility.

9. Complainant owned a vehicle with 4-wheel drive. He decided to transport two staff members home and pick up two other staff members to replace them.

10. CSO II Maurice Harris is a tall, large African-American man. Complainant thought that Mr. Harris would be helpful if Complainant's vehicle became stuck in the snow. Complainant told Mr. Harris that Harris was going to go with him to drop staff off and pick up new staff.

11. Mr. Harris did not want to leave the facility during the blizzard and told Complainant that he did not want to go with him. Mr. Harris believed that the roads were unsafe. Complainant ignored Mr. Harris' protest. The facility control center eventually called Mr. Harris on the radio and told him that Complainant was waiting for him. Complainant and Mr. Harris left Platte Valley to drive to the Loveland and Ft. Collins areas.

12. The roads were difficult to traverse. Complainant's car became stuck at one point and Mr. Harris and Complainant had to dig out the vehicle. At another point, the vehicle became wedged up against another vehicle, and they had to maneuver out of that position. Complainant and Mr. Harris returned safely to the facility after four hours.

13. As a CSO II, Mr. Harris did not have any duties or job expectations that required him to make himself available for duty off the facility, or to assist with a transport in severe weather.

The "Willie Lynch" Statements:

14. The term "Willie Lynch" commonly refers to the name of a man who purportedly gave a speech in American colonial times about how to keep control of a slave population by awarding favors and creating favorites. Given the meaning commonly ascribed to the phrase, the use of the phrase 'Willie Lynch" is a racially charged term. As such, Respondent's policy is to eliminate the use of the term from the workplace because it is racially offensive and has the potential to create divisiveness in the staff.

15. Mr. Harris and another African American CSO II, Anthony McAllister, referred to Complainant's actions as Willie Lynch-type actions. When Complainant heard Mr. Harris and Mr. McAllister use the term, he at first did not understand its meaning. Complainant then discovered that the staff believed the term to refer to a slave owner who had advocated a style of supervision of creating friction and division among a slave population in order to control that population.

16. Once Complainant understood the intended meaning of the term "Willie" or "Willie Lynch", he did not take any action to eliminate or discourage the use of the term.

17. After Complainant understood the meaning of the term, Complainant publicly adopted the term "Willie" or "Willie Lynch" as descriptive of himself on at least three occasions. On one such occasion, Complainant was eating lunch with a group of four CSO II's that included three African-American CSO II's. Complainant was asked why he tried to create friction between his subordinates, and Mr. Harris referred to it as a "Willie" tactic. Complainant told the group, "Yep, that's me, Willie."

Summoning Mr. Harris To Re-Staple A Document:

18. As a CSO III, Complainant had the authority to determine how he wanted forms submitted to him. Complainant had instructed the CSO II's that he wanted to receive the shift supervisor's report paperwork so that it had the shift log, then the break sheet, and then the line up sheet, in that order.

19. Complainant told the CSO II's on several occasions that the paperwork was not being submitted to him in the proper order.

20. Mr. Harris was assisting with a move of residents from one of the facility living pods to the dining room. While at the dining room, Mr. Harris received a radio call from Complainant to report to Complainant's office. Mr. Harris left 20 residents with other staff and crossed the facility to reach Complainant's office.

21. Once at the office, Complainant told Mr. Harris to remove the staple from the shift supervisor's report that Harris had provided to him, and to re-staple the document. Mr. Harris asked if Complainant had pulled him into the office just to remove the staple, and Complainant told him that yes, and that if he had to staple everyone's report, Complainant would be there all day.

22. Mr. Harris re-stapled the document and left the office to return to his duties. Mr. Harris considered the call to Complainant's office to re-staple four pages as a demeaning order.

Comments About Officer Brown:

23. Complainant confronted a White officer, CSO I Nathan Welsh, for wearing shoes

that had a red pattern. It was appropriate for Complainant to comment on the shoes because such attire was not permitted for staff because of the association of the color with gangs. Mr. Welsh protested the order to change his shoes by telling Complainant that he, Mr. Welsh, wasn't in any gangs. Complainant replied to Mr. Welsh by saying, "How do I know that? You've been hanging out with Johnny Brown", or using similar language that referred to a friendship with Johnny Brown as a potential indication of gang affiliation. Johnny Brown was an African-American CSO I who worked on the front-end at Platte Valley.

24. On January 16, 2007, Complainant confronted CSO I Christina Dismuke after she had offered to cover Mr. Brown's control center post so that Mr. Brown could take a lunch break. Mr. Brown declined the offer. Complainant told Ms. Dismuke that it was not appropriate to take breaks at the time when Ms. Dismuke was offering to cover Mr. Brown's post because it was a period of time with dinner movement and shift changes. The tone of the rebuke by Complainant made Ms. Dismuke cry.

25. The next day, Complainant heard through Ms. Dismuke's supervisor, CSO III Curtis Medina, that Ms. Dismuke was upset with the way that he had spoken to her on the previous day. Complainant asked Ms. Dismuke to come to his office. During that discussion, Complainant apologized for bringing her into his issues with CSO I Brown. Complainant also told Ms. Dismuke that he did not have a good working relationship with Mr. Brown. It appeared to Ms. Dismuke to be a case of Complainant being upset with her because Complainant had a problem with Mr. Brown.

Comments About CSO II's:

26. CSO II John Fults was present when Complainant referred to Mr. Harris as milking the clock. The terms "clock milker" or "milking the clock" refer to a practice by which an employee stays after the end of a shift in order to clock out a bit late and receive either overtime or compensatory time. Complainant asked CSO II Larson to tell him what time Mr. McAllister and Mr. Harris come into work.

27. Complainant told CSO I Sherri Lohmann that CSO II McAllister may be moved from the front-end team to the back-end team. Complainant gave Ms. Lohmann this information because he was working on the schedule, was frustrated, and needed to vent. Facility management had been considering whether a change in the CSO II staffing might be necessary, but the plan was in preliminary discussions at the management level. Complainant should not have mentioned the possibility before the plan was finalized and was ready to be implemented in order to limit rumors of impending changes.

28. Complainant told Mr. McAllister and Mr. Harris, in the presence of another CSO II officer after a staff meeting, that he had saved the two of them from being written up with corrective actions several times, that he had been told to write them up by

facility administration and that he had gone to bat for them. Complainant's statement regarding instructions to write up Mr. McAllister and Mr. Harris was untrue. Facility administration had not instructed Complainant to corrective actions on Mr. Harris and Mr. McAllister.

29. Complainant made a joke at Mr. McAllister's expense when Mr. McAllister stopped into a room where Assistant Director Dan Casey, Complainant, and CSO III Medina were meeting. Complainant told Mr. Casey that he spent 20 minutes a day on KRONOS issues (the facility timekeeping system), and that 15 of those minutes were dealing with Mr. McAllister's time. Mr. McAllister was alarmed at this comment because he was a candidate for promotion at the time and Mr. Casey was on the final interview panel for the position. Mr. Casey asked Mr. McAllister about KRONOS issues during the panel interview.

30. Complainant asked CSO I Kelley Emmerling, who was assigned to intake and was in a position to see who was entering and leaving the facility, to track the times that the CSO II's on the evening shift took their breaks. Mr. Emmerling was subordinate to the CSO II's on the evening shift, including Mr. Fults, Mr. McAllister, and Mr. Harris. Complainant did not request Mr. Emmerling to track anyone else's time. Mr. Emmerling reported Complainant's directive to CSO II Fults.

31. Complainant made negative comments to CSO II Larson about Mr. McAllister and Mr. Harris punching in a few minutes late at the start of their shifts, and that he did not trust them because of their KRONOS issues.

The Civil Rights Complaints Filed Against Complainant:

32. On or about January 24, 2007, Mr. Humberto Garza, a lead services counselor at Platte Valley, contacted Assistant Director Nuss to report concerns expressed by CSO I Brown. Mr. Brown had spoken with Mr. Garza because Mr. Garza was a violence in the workplace coordinator for the facility. Mr. Brown complained to Mr. Garza that he was being unfairly treated by Complainant. Mr. Brown was referred to Director Brent Nittman, and Mr. Nittman provided Mr. Brown with information concerning how to file a grievance.

33. On January 29, 2007, Mr. Harris and Mr. McAllister met with Assistant Director Nuss regarding their concerns that Complainant was treating them differently and unfairly because of race. Ms. Nuss provided them with materials on how the agency and the state handled civil rights complaints. Ms. Nuss encouraged both men to consider handling the matter internally and informally, but told them that they should file what they thought was necessary and appropriate.

34. Shortly after the meeting, Ms. Nuss called Complainant and told him that complaints had been made by some of his subordinates and that Nuss would be investigating them.

35. On the evening of January 30, 2007, Complainant contacted Mr. McAllister and told McAllister that he wanted to conduct a monthly review meeting. Complainant came down to Mr. McAllister's office and stood in the doorway repeatedly telling Mr. McAllister that he wanted him to come in for a monthly review. Mr. McAllister was alarmed by the unexpected request for a monthly review meeting because Complainant had not been regularly holding such meetings with him since Complainant had assumed Mr. McAllister's supervision in October of 2006. Mr. McAllister was concerned because he had just had his conversation with Ms. Nuss about his complaint of racial discrimination by Complainant, and the timing and urgency of Complainant's decision to hold a monthly review seemed to Mr. McAllister to be directly related to his complaint.

36. Mr. McAllister told Complainant in an e-mail that he did not want to meet Complainant at that point because it made him uncomfortable.

37. On January 31, 2007, Mr. McAllister complained to Ms, Nuss that Complainant's actions on January 30, 2007 were intimidating. Ms. Nuss gave him a set of forms to complete to formally complain about the incident

38. On February 5, 2007, Mr. McAllister filed a Grievance Form with Respondent alleging that Complainant had a pattern of mistreatment of African American employees, and that he had displayed a pattern of discrimination, psychological intimidation, harassment and threats that was unethical and an abuse of authority. Mr. McAllister also filed a workplace violence complaint alleging that Complainant's actions on January 30, 2007 involving Complainant's insistence that there should be on a monthly review meeting were intimidating.

39. Shortly thereafter, Mr. Harris and Mr. Brown also filed grievances against Complainant. Both grievances included allegations of discrimination based upon race.

The January 23, 2007 Confrontation Between Complainant And Kyle Nelson, And The February 5, 2007 Mediation Meeting:

40. On January 23, 2007, Complainant discovered that CSO II Fults was not at his post, but was attending a counseling session held by Youth Services Counselor I Kyle Nelson with a distraught female resident. Mr. Nelson had asked Mr. Fults to stay in the room with the resident and him during the meeting. Mr. Nelson had not told Complainant, however, that he had asked Mr. Fults for assistance.

41. The interaction between Complainant and Mr. Nelson became heated after Complainant entered the room where the counseling was being conducted. Complainant began asking questions about what was occurring. Mr. Nelson wanted Complainant to leave the room because, in his view of the circumstances, the

resident would be more responsive without a third staff member present. Mr. Nelson told Complainant that he should leave. Complainant remained at the door. Mr. Nelson got up and approached Complainant as he stood in the doorway. Complainant left the doorway as Mr. Nelson shut the door.

42. Complainant then attempted to speak with Mr. Nelson about a half-hour later. Mr. Nelson and Complainant entered a counseling office to talk. Mr. Nelson believed that Complainant's initial statements were said in a condescending tone and Mr. Nelson ended the meeting by walking out of the room.

43. That same night, Complainant e-mailed his supervisor, Assistant Director Jamie Nuss, concerning the incident with Mr. Nelson. Complainant told Ms. Nuss in the e-mail that he wanted to speak with Mr. Nelson to review some expectations that he had about using his staff for counseling work, about Mr. Nelson's not telling him information related to safety and security, and about how Mr. Nelson placed his hand on Complainant and attempted to push Complainant out of the office. Complainant explained that he also wanted to talk with Mr. Nelson about statements that Mr. Nelson had made during a briefing in front of the evening shift which Complainant believed had questioned how Complainant had obtained his position. Complainant told Ms. Nuss in the e-mail that if Mr. Nelson was unable to meet with him in a civil manner that he would request formal mediation with an outside individual.

44. On the same night, Mr. Nelson also e-mailed Ms. Nuss and Mr. Casey about the incident.

45. On January 24, 2007, Ms. Nuss e-mailed the policy on workplace violence to Complainant and asked Complainant if he wanted the incident reviewed by the in-house workplace violence coordinator. That same day, Complainant told Ms. Nuss in that e-mail that he would like to have the situation resolved so that he and Mr. Nelson could improve their working relationship at the lowest level possible. Ms. Nuss asked Complainant if this meant that he wanted to meet internally and seek resolution, or was instead asking for the referral to the workplace violence coordinator. Complainant clarified for Ms. Nuss that he wanted to try internal resolution.

46. Ms. Nuss arranged for Mr. Nelson and Complainant to meet with her on February 5, 2007.

47. At the conclusion of the meeting with Ms. Nuss, Mr. Nelson and Complainant had agreed that Complainant was to be informed if staff members are removed from their assigned posts, and that Complainant was not to interrupt counseling sessions and would ask questions at a more appropriate time. Complainant also stated that he did not want to proceed with a workplace violence complaint and could not remember if Mr. Nelson had actually touched him.

Paid Administrative Leave:

48. As Ms. Nuss was receiving the grievances alleging civil rights violations against Complainant, she contacted Colorado Department of Human Services ("CDHS") Civil Rights Program Director, Vernon Jackson, and CDHS Human Resources Director, Brad Mallon, for advice on how to handle the complaints. Mr. Jackson's recommendation was to place Complainant on paid administrative leave status while an investigator from the Civil Rights Program conducted an investigation.

49. On February 6, 2007, Ms. Nuss placed Complainant on paid administrative leave during the investigation of allegations of workplace violence and formal allegations of harassment and discrimination claims made by subordinate staff.

The DeSaussure Investigation:

50. From February 12 through April 16, 2007, Department of Humans Services Civil Rights Investigator, Charles DeSaussure, conducted an investigation of Mr. McAllister's, Mr. Harris' and Mr. Brown's civil rights complaints.

51. Mr. DeSaussure consolidated the three civil rights complaints into 26 different factual allegations concerning Complainant's conduct. Mr. DeSaussure interviewed Complainant, Mr. Harris, Mr. McAllister, and Mr. Brown, and 19 other state employees as part of his investigation.

52. Summaries of those interviews were compiled into a report dated April 16, 2007 that was provided to Ms. Nuss for her consideration.

Board Rule 6-10 Meeting:

53. By letter dated May 3, 2007, Ms. Nuss notified Complainant of a Board Rule 6-10 meeting to be held on May 11, 2007 to discuss the results of the DeSaussure investigation. The notification letter also included a copy of Mr. DeSaussure's report.

54. The meeting was re-scheduled for May 15, 2007. Complainant appeared with his representative Mr. Michael Belo. Ms. Nuss appeared at the meeting with Dan Casey, Assistant Director of the Platte Valley Youth Correctional Center.

55. During the Board Rule 6-10 meeting, Complainant agreed that he had asked CSO I Emmerling to track the break time of CSO II Fults, that he had referred to CSO II Harris as milking the clock to Mr. Fults, that he may have said in jest to CSO II Larson that he cringed when Mr. Harris was in charge of the building, and that he had informed CSO I Lohmann that CSO II McAllister might be moving to a back-end assignment. Complainant acknowledged that he had referenced CSO I Brown

during a conversation with CSO I Welsh concerning whether Welsh would be understood to be affiliated with a gang because of his shoes. Complainant admitted that he had talked about his poor relationship with CSO I Brown to CSO I Dismuke. He admitted to having told Mr. Harris and Mr. McAllister that he had stopped them from receiving corrective actions that had been directed by administration to give to them. Complainant also agreed that he had taken Mr. Harris with him to drop off and pick up staff during the blizzard, and that he had called Mr. Harris into his office to re-staple four pages. Complainant agreed that he had asked Mr. Larson to tell him what time Mr. Harris and Mr. McAllister arrived at work, that he may have vented to Mr. Larson about his frustration with Mr. McAllister's performance, and that he had told Mr. Larson that he didn't trust Mr. Harris or Mr. McAllister because they were misusing the timekeeping system, KRONOS.

56. During the Board Rule 6-10 meeting, Complainant denied that he had ever called himself Willie or Willie Lynch. Complainant told Ms. Nuss and Mr. Casey that he heard Mr. Harris and Mr. Larson joking about Willie Lynch in the presence of Mr. McAllister and Mr. Garza, and that he had told Mr. Harris and Mr. Larson individually to stop using the term because it was inappropriate behavior. Complainant also stated that he didn't know that they were referring to him or what the phrase meant. When he heard it.

57. Complainant provided Ms. Nuss with a supplemental written response to Mr. DeSaussure's report. Complainant also later provided Ms. Nuss with a written summation of his response.

Disciplinary Action:

58. After reviewing the DeSaussure report, Complainant's statements during the Board Rule 6-10 meeting, Complainant's supplemental statement, and the information she had gathered related to staff interviews and from personnel files, Ms. Nuss concluded that many of the factual allegations made by the staff were true.

59. Ms. Nuss also concluded that the incidents described were not a violation of CDHS Policy VI, 1.1. "Employee Civil Rights."

60. Instead, Ms. Nuss concluded that eleven of the incidents described in the civil rights complaints constituted violations of Complainant's supervisory performance standards as a CSO III.

61. Ms. Nuss considered the incidents relating to Complainant's communications with various CSO I staff, as well as the manner in which he interacted with CSO II Harris and CSO II McAllister, to be violations of Department of Youth Corrections ("DYC") Policy 3.7, "Code of Ethics," Part III. A.4. Relationships With juveniles, the Public, Other Professionals and Colleagues, which states in relevant part:

> Employee-to-employee relationships shall promote mutual respect within the facility, the Division of Youth Corrections, and the State of Colorado while maintaining professionalism and facilitating delivery and/or improvement of available services.

62. Ms. Nuss also considered the actions she sustained to be a violation of Part III.A.5 of that policy, which states: "Employee statements which are critical of other employees, the facility, or a program are to be verifiable and constructive in nature."

63. Ms. Nuss was concerned that Complainant was involving CSO I staff in personnel matters that should not have been discussed with them concerning his relationship with CSO I Brown, plans to move CSO II McAllister to the back-end, and involving CSO I Emmerling to track the break times of officers who were his superiors. Ms. Nuss found that these actions were examples of comments and orders which did not promote mutual respect and professionalism, in violation of DYC Policy 3.7, Section III.A.4.

64. Ms. Nuss considered Complainant's decision to take Mr. Harris out during a blizzard when Mr. Harris considered the situation to be unsafe, and against his protest, to also constitute an act violating DYC Policy 3.7, Section III.A.4

65. Ms. Nuss also considered Complainant's order to Mr. Harris to report to Complainant's office solely to re-staple four pages was not a proper supervisory order because it did not promote mutual respect, in violation of DYC Policy 3.7, Section III.A.4.

66. Ms. Nuss decided that Complainant's statement to Mr. McAllister and Mr. Harris that he had saved them from multiple corrective actions ordered by administration was an example of statements by Complainant which were not verifiable and constructive in nature, in violation of DYC Policy 3.7, Section III.A.5.

67. Ms. Nuss decided that Complainant's comment to Mr. Casey concerning Mr. McAllister's KRONOS, and his comment to Mr. Welsh which equated friendship with CSO I Brown to indicate gang affiliation to constitute comments which did not promote mutual respect, in violation of DYC Policy 3.7, Section III.a.5.

68. Finally, Ms. Nuss considered the evidence relating to the allegations that complainant had use the term "Willie" or "Willie Lynch" in reference to himself and determined that the credible evidence supported that Complainant had indeed used the term and had failed to take action to stop others from using the terms. Ms. Nuss considered these actions to be poor supervisory practices and failures to promote mutual respect, in violation of DYC Policy 3.7, Section III.A.4.

69. In deciding the appropriate response to the violations of the Code of Ethics, Ms. Nuss considered that Complainant had completed both the Supervisor Training and Review ("STAR") I and II courses.

70. Ms. Nuss considered that Complainant had scored well on his performance evaluations, but that the area which was repeatedly noted as requiring additional development was in the area of staff communications and maintaining good relations with co-workers.

71. Ms. Nuss considered that Complainant had been issued a corrective action on November 22, 2005, by Assistant Director Casey concerning comments Complainant made during a meeting of the supervisory team at the facility. Complainant was ordered to take a number of classes, review the abuse of authority definition with Mr. Casey, attend all team meetings unless excused, and to attend the CDHS Supervisor Training and Review ("STAR") training program.

72. Ms. Nuss considered that Complainant had been issued a confirming memorandum on December 30, 2004 for making a statement about a confidential personnel matter in front of staff members who were not to have been told the information.

73. Ms. Nuss decided that a disciplinary action was warranted because Complainant's long-term difficulties in maintaining good working relationships with the staff under his supervision. She decided to impose a 5% reduction of pay for three months.

74. Ms. Nuss chose a 5% reduction in pay for three months because it was intended as a minimal disciplinary action. The action resulted in a pay reduction of $257.35 per month for the three months from June 4, 2007 to September 4, 2007.

75. In addition to the reduction in pay, Complainant was assigned to take three courses no later than March 31, 2008. The three courses were Communicating Non-Defensively, Cultural Competence, and Increasing Personal Effectiveness.

76. Ms. Nuss issued a disciplinary letter to Complainant dated June 4, 2007. The letter outlined the actions that Ms. Nuss believed that Complainant had taken which violated the Ethics code and imposed the discipline.

77. Complainant filed a timely appeal of the disciplinary action 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). Complainant, on the other hand, has the burden of proof on the issue of whether Respondent violated the Colorado State Employee Protection Act. *Ward v. Industrial Comm'n*, 699 P.2d 960, 968 (Colo. 1985). 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 acts for which he was disciplined.

Respondent has proven by a preponderance of the evidence that Complainant had taken all of the actions it alleged in the June 2007 disciplinary action letter.

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

1. Respondent's disciplinary action was neither arbitrary nor capricious:

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).

The evidence in this matter established that Ms. Nuss conducted a thorough investigation of the allegations raised by Mr. Harris, Mr. McAllister and Mr. Brown through the use of the civil rights investigation conducted by Mr. DeSaussure as well as her own

inquiries. Complainant has presented no persuasive evidence that there was material information not pursued by Ms. Nuss, or that Ms. Nuss failed to use reasonable diligence in obtaining relevant information in this case. The record also shows that Complainant was given ample opportunity to respond to the allegations against him. Ms. Nuss provided him with a copy of the DeSaussure report prior to the Board Rule 6-10 meeting, and Complainant used his opportunity to supplement Ms. Nuss' information by submitting a written response to the investigation. The evidence in this matter also demonstrates that Ms. Nuss gave candid and honest consideration to the information she had gathered, and reached reasonable conclusions. Ms. Nuss recognized that Complainant had a very good work history on safety and security issues. She was concerned, however, because the supervisory practices revealed by the investigation into Mr. McAllister's, Mr. Harris' and Mr. Brown's complaints demonstrated an unproductive, divisive supervision style that was not in keeping with Respondent's standards for competent supervisory performance.

Complainant argued at hearing that a number of the statements for which he has been disciplined were made in a joking manner and that it was an excessive response to discipline him for humorous statements. Humor at a subordinate's expense, however, is a poor choice for a supervisor because it is so often unclear to the subordinate and others whether a comment represents nothing more than an innocent jest or is an attack or a criticism. Moreover, humor is not a substitute for supervisory skills. When Complainant found out that his subordinates were calling him Willie Lynch, for example, he needed to address that racially divisive issue, not adopt the moniker even in jest.

Complainant also argued that he made some of the comments at issue because he was frustrated or merely blowing off steam. Again, however, the fact that Complainant is a second-level supervisor changes the reaction of the individuals witnessing that behavior. What might have been of little consequence coming from a CSO I has a markedly different effect when the speaker is a CSO III.

Finally, Complainant argued that the claims against him were filed because he held subordinates accountable and it made them angry. Complainant argued that his supervisory duties made all of his actions reasonable because those actions supported his supervision of subordinate staff. It is Complainant's primary role to supervise the activities of the staff on the front-end, and there is no question that Ms. Nuss expected Complainant to effectively supervise his staff using the proper supervisory tools. It is the manner in which Complainant has carried out his supervisory duties, however, which is the focus of the June 4, 2007 disciplinary letter.

It was not an arbitrary or capricious decision on Respondent's part to expect Complainant to refrain from making jokes that could be construed as expressions of personal or racial hostility to subordinate staff, or from expressing his frustration about a subordinate employee's performance to other subordinates, or involving CSO I's in what he perceived as performance problems by CSO II's. As the facts demonstrate, such conduct by a second level supervisor is destructive of staff trust and morale, and leads to divisive suspicions about Complainant's motivation. Respondent was neither arbitrary nor

capricious in determining that Complainant's comments represented a failure to perform competently as a supervisor.

2. Complainant has not proven that Respondent's actions were taken in violation of the Colorado State Employee Protection Act:

Complainant has filed a claim that the disciplinary action taken against him was taken in violation of the Colorado State Employee Protection Act ("Whistleblower Act'), C.R.S. § 24-50.5-101 *et seq.*

The purpose of the Whistleblower Act is that "state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest." C.R.S. § 24-50.5-101. The Act itself is designed to "ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." *Id.* C.R.S. § 24-50.5-103(1) provides that no appointing authority or supervisor shall impose any disciplinary action "on account of an employee's disclosure of information."

For Complainant to prevail, Complainant must establish that his disclosures fell within the protection of the statute and that they were a substantial or motivating factor in Respondent's disciplinary action. *Ward*, 699 P.2d at 968. If Complainant makes such a showing, the burden shifts to the Respondent to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct. *Id.*

a. Complainant has not made a "disclosure of information"

Complainant argues that his e-mail to Jamie Nuss concerning how Mr. Nelson treated him on January 23, 2007, along with his subsequent statements during the mediation of that complaint, qualify as disclosures of information under the Whistleblower Act. He further argues that it was because he made these statements that he was given a 5% pay reduction.

Under the Whistleblower Act, a "disclosure of information" means the provision of evidence regarding "any action, policy, regulation, practice, or procedure, including, but not limited to the waste of public funds, abuse of authority, or mismanagement of any state agency." C.R.S. § 24-50.5-102(2). Although the statutory definition of a disclosure does not use the phrase "public concern", C.R.S. § 24-50.1-101 "clearly contemplates that such disclosures must relate to information about agency conduct contrary to the 'public interest.' Therefore, disclosures that do not concern matters in the public interest or are not of 'public concern' do not invoke this statute." *Ferrel v. Colorado Department of Corrections*, -- P.3d --, 2007 WL 1576046 (Colo.App. June 1, 2007) at *7.

Complainant's description of his interactions with Mr. Nelson, and his allegations that Mr. Nelson's actions may have violated Respondent's violence in the workplace

policies, do not rise to the level of a disclosure of agency action, policy , regulation, practice or procedure. Statements concerning how Mr. Nelson reacted when Complainant entered an on-going counseling session with a resident cannot be said to be matters of public concern or public interest. This was a complaint about the actions of an individual employee, brought to the attention of the Assistant Director of the facility for resolution. There has been no agency action at the time that Complainant filed his report with Ms. Nuss, and Complainant's e-mails and statements do not concern agency action. There is only an allegation that an agency policy has been violated.

Complainant's disclosures related to Mr. Nelson are not within the definition of disclosures of information in C.R.S. § 24-50.1-102(2) and do not constitute a matter of public concern or public interest. His disclosures, therefore, are not within the protection of the statute.

b. Complainant has not demonstrated that his disclosures were a substantial or motivating factor in Respondent's disciplinary action

Assuming, for the purpose of argument, that the disclosures concerning Mr. Nelson's conduct toward Complainant were protected under the Whistleblower Act, Complainant has not demonstrated that such disclosures were either a substantial or motivating factor in Respondent's disciplinary action.

The evidence established that Complainant's subordinates filed formal allegations of civil rights violations and a workplace violence complaint against Complainant on February 5, 2007. The evidence also established that, shortly before these complaints were being filed, Complainant filed his complaint about Mr. Nelson's actions. This timing of events resulted in Complainant's complaint about Mr. Nelson being mediated on February 5, 2007 by Ms. Nuss, and that Ms. Nuss announced her decision to place Complainant on paid administrative leave on February 6, 2007. There was no persuasive evidence offered at hearing, however, that there was any influence or reason to believe that there was a connection between Complainant's allegations concerning Mr. Nelson and Ms. Nuss' decision in June 2007 to impose discipline on Complainant for violating the performance expectations for supervisors.

As a result, there was insufficient evidence to find that Complainant's allegations concerning Mr. Nelson's behavior were a substantial or motivating factor in Respondent's disciplinary action.

c. Respondent has proven by a preponderance of the evidence that it would have taken the same disciplinary action even if Complainant had not filed his complainant concerning Mr. Nelson

Finally, even if Complainant's disclosures are assumed to be within the protection of the Whistleblower Act, and those disclosures were found to be a substantial or motivating factor in the imposition of discipline against Complainant, Respondent has presented a

preponderance of the evidence proving that it would have instituted the same disciplinary action even if Complainant had not filed his complaint concerning Mr. Nelson.

Respondent has sufficiently demonstrated in this case that it took the civil rights complaints filed by Mr. McAallister, Mr. Harris and Mr. Brown seriously. Even though Respondent did not find that there was discrimination by Complainant on the basis of race, it was clear from the testimony that Ms. Nuss was troubled by the decisions that Complainant had made as to what were acceptable comments from him, and the level of supervisory respect he was showing toward Mr. Harris, Mr. McAllister, and Mr. Brown. Respondent has demonstrated by a preponderance of the evidence that, even if Complainant had not filed his complaint concerning Mr. Nelson's behavior, it still would have imposed discipline against Complainant for failing to meet its expectations for a CSO III supervisor.

As a result, Complainant has failed to prove that the disciplinary action taken in this matter was contrary to law because it was a violation of the Colorado State Employee Protection Act.

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

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Ms. Nuss considered the entirety of the investigation by Mr. DeSaussure, and Complainant's work history in her decision to impose a minimal level of discipline. A 5% reduction in pay for a period of three months is a reasonable way to gain Complainant's attention to the problem while still not materially harming him financially. As such, that disciplinary response is within the range of reasonable alternatives available to Ms. Nuss.

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. 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.

Given the above findings of fact, an award of attorney fees is not warranted. Respondent presented rational arguments and competent evidence to support its imposition of a disciplinary action against Complainant, and it successfully defended its disciplinary decision at hearing.

CONCLUSIONS OF LAW

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

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

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

4. Attorney fees are not warranted.

ORDER

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

Dated this 3rd day of March, 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 4th day of March, 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:

Joseph Stengel, Esq.
Benson & Case, LLP
Attorneys At Law
1660 South Albion St.
Suite 1100
Denver, CO 80222

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

(rev'd. 5/07)