STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B009**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DANE I. BRANCH,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on October 10, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The matter was commenced on the first day of hearing. The record was closed at the conclusion of closing statements on October 10, 2007. Assistant Attorney General Diane Marie Dash represented Respondent. Respondent's advisory witness was Major Hal Butts, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Trooper Dane Branch ("Complainant") appeals his two-day (20 hour) suspension by Respondent, Department of Public Safety, Colorado State Patrol ("Respondent" or "Patrol"). Complainant seeks reversal of the suspension and imposition of a lesser form of discipline.

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

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;

FINDINGS OF FACT

General Background

1. Complainant holds the position of Trooper. In May of 2007, Complainant had been a Trooper for about a year and a half. Complainant was assigned to Troop 2D, based in Pueblo, Colorado.

Incident

2. At about 2:30 AM on the morning of May 8, 2007, Complainant was on patrol in a Ford Crown Victoria patrol car. He pulled into a Kicks 66 store off Highway 50 to purchase gas. At the time he pulled into the gas station, the gas tank on the patrol car was about half empty. The tank holds approximately 15 gallons when full.

3. Complainant used a Patrol credit card to begin pumping gas. He also decided to use the store restroom and entered the store while the pump was still running. During the time he was in the restroom, Complainant was not able to observe the patrol car. Once he exited the restroom, Complainant was able to see the patrol car through the store windows. He did not notice anything unusual while he performed some shopping in the store and purchased some small items.

4. While he was paying for his purchased items, Complainant noticed that it looked wet on the on the ground around the patrol car. He thought at first that the liquid was rain, and made a comment about rain to the only store employee on duty at the time, Ms. Jeri Edwards.

5. Complainant then realized that the liquid around the patrol car was gasoline and that the pump had not shut off when the tank had filled. Complainant returned to the patrol car, and gas was running out of the tank. The spill area around the patrol car was about ten yards long and five yards wide.

6. The pump was stopped at a $99.99 fuel cost. This amount represented approximately 30 gallons of gas which had been pumped. With the patrol car gas tank only able to hold approximately 8 additional gallons of gasoline, the remaining 22 gallons or so spilled onto the ground around the pump. There was no indication or reason to believe that any other car or individuals had been at the pump and had taken some of the gasoline.

7. Complainant spoke with Ms. Edwards about whose responsibility it should be that the pump had not shut off the flow of gasoline when the tank was full. He told Ms. Edwards that the Patrol was not going to be happy about the fuel bill, and asked her what she could do about it. Complainant wanted Ms. Edward to refund the excess cost for fuel. Ms. Edwards told Complainant that the spill, and associated cost, was his fault because he had left the pump unattended.

8. Complainant disagreed that the pumping overflow was his fault because he believed that the shut-off valve on the pump should have stopped the flow of gasoline when the tank was full and that the valve had not operated properly. Complainant continued to insist that he be given a refund for the wasted amount of gasoline. Complainant was under the impression, based upon his prior work at a convenience store, that the store could write off an amount given that the pump had not automatically shut off when the tank was full. Complainant asked Ms. Edwards to call her manager if she, Ms. Edwards, was not willing to give him the refund.

9. Ms. Edwards called the store manager, Donna Mays, at home at about 3:00 AM so that Ms. Mays could speak to Complainant about a refund. Ms. Mays and Complainant spoke on the phone about the fact that the pump had not stopped once the tank was full. Ms. Mays took the position that it was Complainant's responsibility to stay with the pump to stop any overflow. Ms. Mays eventually authorized Ms. Edwards to give Complainant a $20 refund.

10. Ms. Edwards ran back and forth between the store and the spill with buckets of kitty litter and covered the spill area with the kitty litter. Complainant watched her but did not assist her in covering the spill. Complainant did not block off any of the area around the spill to prevent others from driving into that area.

11. Complainant reported to Patrol dispatch that he was out of service at the Kicks 66 store, but he did not request any assistance or notify his supervisor of the issue. Complainant did not notify Patrol dispatch, the Patrol hazardous materials team, or the local fire department that there had been a gasoline spill. He assumed that the station had some type of gas spill response procedure that Ms. Edwards would employ. Complainant left the store after receiving the $20 refund, and after having spent approximately 45 to 50 minutes at the store. Ms. Edwards called the local fire department concerning the spill after Complainant had left the Kicks 66 station. The local fire department contacted the Patrol about the spill.

12. Complainant turned in the $20 that he had collected as a refund from the Kicks 66 station to his captain at the time, Capt. Nawrocki. Shortly after the incident, Complainant also wrote a memorandum report for Master Sgt. Mercier about the incident.

Inquiry

13. The command staff for Troop 2D changed during the month of May 2007. Capt. Scott Copley replaced Capt. Nawrocki as the captain for Troop 2D during that month. Before turning the matter over to Capt. Copley for resolution, Capt. Nawrocki returned the $20 refund to the Kicks 66 store.

14. Capt. Copley interviewed Ms. Edwards on the phone about the incident. During this interview, Ms. Edwards told him that there had been a prior incident in August of

2006 in which Complainant had failed to receive money from the ATM in the store and had accused her in front of other customers of having taken his money. Ms. Edwards told Capt. Copley that she thought Complainant owed her an apology for the ATM incident. Capt. Copley did not verify or investigate this information, and did not consider how the ATM incident may have negatively influenced Ms. Edwards' description of the May 2007 incident.

15. Capt. Copley also called and interviewed Ms. Mays about the incident.

16. On June 4, 2007, Capt. Copley interviewed Complainant about the incident. Complainant told Capt. Copley that he could see the car during the time he was in the store. He then clarified that statement by telling Capt. Copley that he had been in the restroom when he first got into the store. Complainant disputed that he had been angry with the store employee and manager in the course of arguing for a refund. He told Capt. Copley that he had gone back out to the pump to check to see if there was a sticker telling him to remain at the car while it was pumping, as Ms. Edward or Ms. Mays had told him during the discussion of responsibility for the spill. He did not find any such sticker on the pump. Complainant agreed that the situation started because he had left the pump unattended and was not present to stop the pumping once the gas began to overflow the tank.

17. Capt. Copley referred the matter to Major Hal Butts for handling, and recommended that disciplinary action be instituted.

Board Rule 6-10 Meeting and Disciplinary Action

18. By memo dated July 2, 2007, Major Butts informed Complainant that he was going to hold a Rule 6-10 meeting for July 11, 2007.

19. On July 11, 2007, Complainant appeared for the Rule 6-10 meeting without a representative. Major Butts had Capt. Copley present with him.

20. Major Butts addressed two incidents with Complainant: the May 8, 2007 fuel spill and an accident resulting in two flat tires during a short pursuit on May 7, 2007.

21. In relation to the fuel spill issue, Complainant confirmed for Major Butts that he had started pumping gas into the car, had gone into the store to use the bathroom and then came out into the store and purchased items. He told Major Butts that he was looking outside of the store almost the entire time the car was parked at the pump, and he clarified for Major Butts that he was not looking at the pump during the time he was in the restroom. Complainant acknowledged that he didn't notice anything was wrong until he had seen that the ground around the car was wet and he at first thought it had rained. He confirmed that he had not contacted his supervisor, the hazardous materials team, or the fire department about the spill.

22. Major Butts was concerned that Complainant's reaction to the gasoline spill was not to address the safety issue posed by such a spill or to act to mitigate the potential environmental issues, but only to insist upon a refund. Major Butts understood that Complainant had undergone the basic hazardous materials training once a year, and that fuel spills are one of the main topics covered by that training because of the frequency that automobile accidents create such spills. Major Butts was concerned that Complainant had also not notified a supervisor that night to report the problem and ask for assistance or advice on how to handle the problem.

23. Major Butts was concerned that Complainant did not immediately and readily acknowledge the night of the spill that he was responsible at least in part for the problem, and that if he had remained with the pump while it was running, he could have caught the overflow well before it reached more than 20 gallons.

24. Major Butts was further concerned that Complainant had been rude or abusive in the way he had demanded the refund. Major Butts also incorrectly concluded that Complainant had initially told Capt. Copley that he had not left the patrol car unattended.

25. Major Butts found that Complainant was in violation of three General Orders:

Order #3: Members will be truthful and complete in their accounts and reports;

Order #5: Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately; and

Order #6: Members will avoid any conduct that many bring discredit upon, or undermine the credibility or themselves, the Colorado State Patrol, or the police profession.

26. In determining the level of discipline to impose, Major Butts considered that Complainant had been found in the past to not sufficiently follow Patrol protocols in a variety of settings. Complainant received a suspension of two days in April of 2007 in part for having violated the rules prohibiting unofficial use of a restricted criminal justice database in order to run information about his spouse. In December of 2006, Complainant had also been rated as Did Not Meet Standards in his annual evaluation for the year 2006 in the specific areas of demonstrating job knowledge and proficiency and performing duties in a timely and accurate manner. The comments associated with that performance review noted that Complainant needed to review policies and other manuals to ensure that he was aware of what he is required to do, and to ask supervisors when he is not sure what he is supposed to do. Also in December of 2006, Complainant received a corrective action because he had failed to apply Patrol protocols in verifying the identity of the person he had arrested on a warrant after a traffic stop and had, instead, simply acted on a dispatcher's information that the named individual was wanted on a warrant under

circumstances when the physical description of the wanted person did not match the driver.

27. Major Butts took into account that Complainant was a relatively new Trooper, and was not surprised or concerned that a new Trooper would not have letters of commendation in his file.

28. By letter dated July 16, 2007, Major Butts ordered that Complainant would be suspended for two ten-hour shifts.

29. Complainant filed a timely appeal of this decision 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.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-08. 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 majority of the acts for which he was disciplined.

Complainant did not dispute the majority of facts presented at hearing. There was no question that he left the gas pump going on the assumption that it would shut off automatically, that it did not shut off, and that a gas spill resulted. There was no real dispute about the fact that about 22 gallons of gasoline spilled onto the ground.

Complainant also did not dispute that he did not notify anyone of the spill or take any actions to mitigate the spill or assist Ms. Edwards in dealing with the spill. The factual disputes in this case focused on less central issues, such as Complainant's tone of voice and manner while asking for the refund and whether he was watching the car the entire time he was away from the car.

There was insufficient evidence presented at hearing to warrant a finding that Complainant was rude or verbally abusive with Ms. Edwards. Ms. Edwards did not testify at hearing and there was insufficient evidence to support that Complainant's tone of voice or manner was more than insistent. The hearing testimony did establish, however, that Complainant made repeated requests and arguments for a refund. It was also clearly established by the evidence that Complainant's insistence upon obtaining a refund eventually generated a 3:00 AM phone call to the store manager, Ms. Mays, and that Complainant was concerned about this incident only because of his perception that the Patrol would be unhappy about a $99 bill for gasoline.

There was also insufficient evidence presented at hearing that Complainant's reporting about this incident was not truthful or complete. Major Butts summarized his concern in the July 16, 2007 discipline letter as follows: "You initially told Captain Copley that you did not leave the car unattended while fueling, but later recanted telling him that you did go inside the station and the car was out your view for a short time." This statement misconstrues Capt. Copley's concern about Complainant's statements. There was never a question of whether Complainant had left the patrol car after starting the pump. Complainant acknowledged from his first accounts of the incident that he had begun pumping gas and then went into the store to use the restroom. Capt. Copley's suspicion that Complainant was not telling the entire truth stemmed from his interpretation of statements made by Complainant in the first few minutes of his interview of June 4, 2007. Complainant initially assured Capt. Copley that he was watching the car the entire time he was away from the car. While Complainant's statements on June 4, 2007 are hardly a model of precision, a reasonable reading of the evidence supports that Complainant attempted to clarify that his first statement that he could see the patrol car the entire time he was in the store meant that he could see the car while he was in the store area, and that he had first used the restroom. This exchange, when placed into its proper context, does not lend itself to a finding that Complainant was untruthful or incomplete in his reporting. Respondent has failed to produce a preponderance of evidence to support that Complainant made untruthful or incomplete statements in his reporting of this incident.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its

discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Respondent took appropriate steps in gathering evidence related to this incident, including interviewing Complainant in a fact-finding meeting prior to initiating a Rule 6-10 meeting. Major Butts also considered all of the information that had been accumulated in the investigation of the incident.

The portions of the discipline which are attributable to the suspicion that Complainant had made an incomplete or untruthful report do not withstand scrutiny, and, as a result, the finding that Complainant violated General Order #3 fails.

The remaining violations, however, are supported by the proven facts of this matter. On the night of the fuel spill incident, Complainant did not take responsibility for his role in allowing the gasoline to overflow the tank, argued at length with store clerk and then the store manager over obtaining a refund, did not pay attention to the fact that a potentially hazardous spill of gasoline had taken place, and did not notify any of the appropriate persons of the issue with the gasoline overflow. These facts are sufficient to support that Complainant violated General Order # 5 in that these actions do not preserve the public trust that the patrol members will react appropriately to safeguard the public safety. Complainant's single-minded focus on obtaining a refund, even though there were safety and environmental issues to be addressed at the time, also is the type of conduct which may bring discredit upon the Patrol, in violation of General Order #6.

Respondent did not act in an arbitrary or capricious manner, or in a manner contrary to rule or law, in assessing discipline for Complainant's violations of General Orders Nos. 5 and 6.

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

Given that the evidence does not support that there had been a violation of General Order #3 in the manner in which Complainant reported this incident, the question is whether a two-day suspension is within the range of reasonable alternatives for Complainant's conduct in violation of General Orders Nos. 5 and 6.

Major Butts concluded that the incident at Kicks 66 represented that Complainant was not following Patrol protocols and represented a breach of the level of professionalism that he expected of troopers under his command. As a result, Major Butts imposed a significant disciplinary penalty against Complainant. Major Butt's conclusions are well grounded in fact. Complainant's first and only concern was to take action to reduce the problem he viewed most acutely, which was what his supervisors would say about his expending $99 for gasoline. He pursued this angle to the point of having the store employee call the store manager at 3 AM so that he could continue to argue for a refund.

Even though Complainant was at the store for 45 minutes or more, and watched Ms. Edwards run back and forth with kitty litter to cover the spill, it did not appear that Complainant had ever considered that there was a more serious problem to be addressed than a fiscal issue. As a result, Complainant did not do even a cursory job in addressing the safety and environmental concerns caused by such a spill. Under such circumstances, it is not unreasonable for Major Butts to assess a level of discipline which would be a wake-up call for Complainant. A two-day suspension, while certainly on the more extreme side of the range of available options, is still within the scope of reasonable alternatives available to Major Butts to address this issue, given the facts of this case and Complainant's performance history.

The credible evidence demonstrates that the appointing authority pursued his decision on level of discipline 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.

CONCLUSIONS OF LAW

1. Complainant committed most, but not all, of the acts for which he was disciplined.

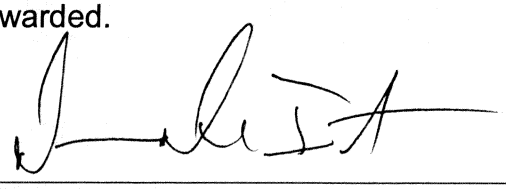
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

ORDER

Respondent's action is **affirmed with modification**. Respondent shall amend the disciplinary letter of July 16, 2007 to remove references to a violation of General Order #3 and to Major Butts' incorrect assertions that Complainant was less than completely truthful regarding whether the patrol car was unattended or not while it was being fueled. The remainder of the disciplinary letter, and the imposition of the two-day period of suspension, are affirmed. Attorney fees and costs are not awarded.

Dated this 26th day of November, 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. 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 27 day of November, 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:

Dane I. Branch
4540 Skylark Road
Colorado Springs, CO 80916

and in the interagency mail, to:

Diane Marie Dash
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Linda Whitaker for
Andrea C. Woods

(rev'd. 5/07)

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