STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B038**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID BUSHROW,

Complainant,

vs.

COLORADO DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on February 6, 2008, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Michael Scott represented Respondent. Respondent's advisory witness was Jeffrey Kullman, the Regional Transportation Director for the Colorado Department of Transportation's Region I and Complainant's Appointing Authority. Complainant appeared and was not represented by counsel.

MATTER APPEALED

Complainant, David Bushrow (Complainant), appeals his disciplinary action of a one-time $500 reduction in pay taken by the Colorado Department of Transportation (CDOT). Complainant seeks rescission of the disciplinary pay reduction.

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; and

3. Whether Complainant's discipline was within the range of reasonable alternatives.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee who works as a Transportation Maintenance Worker II (TM II) for CDOT's Region I Maintenance Patrol 45. TM II employees are lead workers whose duties include overseeing day-to-day operations, helping to train TM I employees, and assisting TM III employees in completing performance evaluations.

2. Complainant has been employed at CDOT since February of 2000. He was promoted to a TM II in September of 2006.

3. Complainant's first level supervisor is Scott Crabtree. His second level supervisor is Roger Anderson, and his third level supervisor is Kenneth Wissel.

4. Complainant has no prior disciplinary or corrective actions.

Events of June 19, 2007

5. On or about June 19, 2007, Complainant was on annual leave. He was driving home from playing golf when he saw a CDOT truck loaded with rock chips, or aggregates, on a county road. The chips are fractured hard rock, which CDOT places on asphalt on highways. They are specifically required by CDOT to meet certain specifications. They are expensive, and not easy to obtain.

6. A member of the patrol, Roy Culver, was driving the truck. About a mile further, Complainant met a CDOT front-end loader driven by another patrol member, Don McCabe.

7. Because of the location where Complainant saw McCabe and Culver, he suspected that they were using CDOT equipment and materials for personal use.

8. Instead of stopping McCabe and Culver himself, Complainant went home and called his immediate supervisor, Scott Crabtree, to report what he saw.

Anonymous Letter and Initial Investigation

9. In early July of 2007, someone sent an anonymous letter to CDOT, signed "Monk," dated July 7, 2007, to CDOT. That letter provided:

> ABOUT A WEEK AGO YOU CAME ACCROSS (SIC) DON MCCABE (45-3) USING STATE EQUIPMENT AT HIS HOME. HERE IS THE REST OF THE STORY. THAT WEEK HE WAS WORKING ON 2 DRIVEWAYS, ONE WAS HIS, THE OTHER DAVE BUSHROW'S (45).

> THE ROAD BASE THEY GOT FROM HWY 103. ABOUT MM [mile marker]. 22-NORTH SIDE. ROTO MILLINGS CAME FROM DOWN NEAR KERMIT'S – HWY G. MAG FROM THE BARN. NEEDED WERE A FRONTEND LOADER, DUMP TRUCK AND ROLLER. FIGURE 10 HOURS ON EACH HOUSE-MAYBE MORE. ON COMPANY TIME, OF COURSE. THE CRIME IS THAT YOU AND I HAVE TO PAY FOR IT ALL.

10. The letter was addressed to Kenneth Wissel, the Operational Manager and Deputy Superintendent for Region I. The letter indicated that the rock chips came from a chip stockpile on Highway 103; the stockpile is CDOT property. The chips in that pile are made from crushed granite, and are gray in color.

11. Because the letter contained allegations of misuse of state equipment, Wissel showed the letter to his supervisor. Wissel instructed Roger Anderson, the Manager for Complainant's patrol, to conduct an investigation into the allegations.

12. Anderson interviewed the members of the patrol, including Complainant. None of the persons interviewed had heard anything about Complainant using the rock chips; some of the witnesses heard rumors that McCabe had used the chips for personal use. Anderson found inconsistencies in the statements made by Culver and McCabe during their interviews.

13. Anderson and Crabtree went to McCabe's residence and noticed a gray material on his driveway, but could not tell what the material was without going onto his property, which they did not want to do. They also went to Complainant's residence, but did not find any evidence to support the allegations made against him in the anonymous letter. Anderson took photographs of McCabe's driveway and Complainant's driveway.

14. Anderson drafted a report regarding his investigation, and provided it to Wissel. After Wissel reviewed the report, he gave a copy of it, which included the photographs, to his supervisor and Kullman. Kullman concluded that the investigation supported the allegation that McCabe was using CDOT property for personal use, but was inconclusive with respect to Complainant.

15. When Kullman looked at the photographs included in Anderson's report, he saw chips in Complainant's driveway that he thought looked similar to McCabe's driveway and to the rocks contained in the CDOT stockpile on Highway 103.

Follow-up Investigation

16. After reviewing all of the information, Kullman asked for an additional investigation by a CDOT employee more senior than Anderson. Kullman wanted the person who conducted the follow-up investigation to make a firm comparison

between the chips in Complainant's driveway and the chips in the Highway 103 stockpile.

17. Wissel was assigned to do the follow-up investigation. On October 3, 2007, he and another CDOT employee, Don Miller, went to Complainant's home. In Complainant's driveway, they found chips that appeared to be the same as the chips in the Highway 103 stockpile. The chips were scattered on Complainant's driveway, and on the edging and behind the edging of the driveway. The heaviest concentration of the chips was found directly adjacent to the driveway.

18. Complainant gave Wissel and Don Miller permission to get a sample of chips from his driveway, which they did. Wissel noticed that the chips had been in Complainant's driveway for "a while." Wissel and Miller took additional pictures of Complainant's driveway.

19. Wissel and Miller also looked at the chips in McCabe's driveway, and saw that the chips in his driveway also appeared to be the same as those found in the Highway 103 stockpile. They also saw other materials that they believed to belong to CDOT.

20. As part of their investigation, Wissel and Miller went to the Highway 103 stockpile, and took a sample of chips from it. Wissel took the chip samples from Complainant's driveway and from the Highway 103 stockpile to CDOT's Materials Lab for evaluation. There are no lab results to indicate that such an evaluation was performed. Wissel wrote a report regarding the follow-up investigation and submitted to Kullman and others.

21. When Kullman looked at the sample from Complainant's driveway and the sample from the Highway 103 stockpile, he concluded that they were virtually identical, and were probably from the same source.

22. After reviewing the samples and Wissel's report, Kullman scheduled a meeting with Complainant pursuant to Board Rule 6-10. The meeting was held on October 25, 2007. Present at the meeting were Complainant; Kullman; Micki Perez-Thompson, the Civil Rights Manager for Region I; and Fred Schulz, the Section Property Maintenance Superintendent for Region I. Complainant did not bring a representative to the meeting.

23. Kullman raised the issue of the anonymous letter, and asked Complainant if he had been using CDOT property on his property. Complainant responded that he had taken some chips from a yard in Empire in February of 2000. Complainant stated that CDOT was throwing those chips away, and was giving them to people who wanted them. Complainant further stated that he took about a half-ton of those chips.

24. Kullman asked Complainant who had given him permission to take the chips from the Empire yard in 2000. Complainant replied by saying, "Now, I'm not going to start pointing fingers." When pressed by Kullman, Complainant stated that two CDOT employees gave him permission. He identified them as "MTs," but did not provide their names. Complainant said the chips from the Empire lot were described as "junk," "contaminated," and "no good."

25. Complainant provided three pieces of correspondence to Kullman to support his explanation about the chips in his driveway coming from the Empire lot instead the Highway 103 stockpile. One was an email from Leonard Olivas, sent to Complainant, which reads, "To, Whom it may concern as I try to remember there was a pile of waste chips at Empire they were junk full of dirt rocks."

26. Another letter, from a detective at the Clear Creek County Sheriff's Office, discussed fill dirt that was placed in Complainant's driveway in July of 2000, and stated that he had noticed no changes in Complainant's driveway or yard since that time. He also stated that he had never known or heard of any acts of impropriety on Complainant's part. That letter did not discuss any rock chips.

27. Another letter from one of Complainant's peers, Joe Lochnikar, stated that there were "excess chips" in the Empire yard, which were contaminated, and could not be used. The author explained that it was decided that the chips be done "away with" and several people removed them. Complainant was described as one of those people.

28. When Kullman looked at the sample chips from Complainant's driveway, he determined that they were not "junk" and were not contaminated. To Kullman, the chips looked usable.

29. The chips taken from Complainant's driveway are identical to the chips taken from the Highway 103 stockpile.

30. Complainant also told Kullman about the incident on June 19, 2007, when he saw Culver and McCabe using CDOT equipment to transport chips, which he believed were going to be used for personal reasons. Complainant told Kullman that he had contacted Crabtree instead of confronting Culver and McCabe because Complainant was on annual leave.

31. Complainant also told Kullman that when he did talk to McCabe and Culver after seeing them with the dump truck and front-end loader, he said to them, "What the hell is your problem? Don't be stupid and do this shit during the daylight when you've got witnesses. Use a little discretion if you have to do this, and damn sure don't use the company equipment." Kullman was surprised by this statement as it indicated to him that Complainant thought it was okay to steal state property, and such statements by a lead worker did not set a good example. Instead, he felt it encouraged bad behavior.

32. Kullman also considered Complainant's explanation that the chips came from the Empire yard, but could not find any evidence that Complainant had permission to remove chips from that source.

33. Kullman also did not think Complainant's failure to stop McCabe and Culver when he saw them with the CDOT equipment and chips was appropriate because Complainant is a lead worker. Even though Complainant was on annual leave, Kullman thought Complainant should have stopped them and asked them what they were doing.

34. Kullman considered all of the information he had gathered, including the letters provided by Complainant and Complainant's statements. He concluded that the value of the chips in Complainant's driveway was about $500. He considered a full range of alternatives and decided that there needed to be clear communication that Complainant's behavior was unacceptable. Kullman did not think a corrective action was a strong enough to get the message across to Complainant. Kullman imposed a disciplinary action of a $500 pay reduction for one month.

35. Kullman disciplined Complainant for using state property for personal use and failing to take action when he observed Culver and McCabe, members of Complainant's patrol, using a state truck and front end loader for what Complainant suspected was for personal use.

36. Complainant timely appealed his disciplinary action.

DISCUSSION

I. GENERAL

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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Complainant was disciplined using state property for personal use and for failing to stop McCabe and Culver when he saw them with CDOT equipment and property.

Respondent has proven by a preponderance of the evidence that Complainant used rock chips which belonged to CDOT to place in his driveway. Because they are identical to the chips in the Highway 103 stockpile, they are most likely from that source. Even if the chips are from the Empire yard, as Complainant claims, Complainant would not provide the names of the individuals who gave him permission to take those chips. Without those names, Kullman could not verify if, indeed, Complainant had permission to remove those chips. Moreover, the chips found in Complainant's driveway were not "junk" or "contaminated" as Complainant claimed. They were good chips, which still had value to CDOT. Respondent has also proven by a preponderance of the evidence that Complainant saw McCabe and Culver using CDOT equipment and materials for what Complainant suspected was for personal use, but did not stop and ask them what they were doing, in order to preserve state property for its proper use and to limit the state's liability in the event that Culver and McCabe were involved in an accident while using state equipment.

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).

Kullman did not neglect or refuse to use reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant. There were two investigations into the allegations against Complainant. The first one was conducted by Anderson, and a follow-up investigation was conducted by Wissel. Kullman reviewed all of the information gathered in both of those investigations. He then held a Rule 6-10 meeting with Complainant, giving Complainant an opportunity to respond to the allegations against him. Kullman carefully considered all of the information he gathered, including Complainant's statements in the Rule 6-10 meeting, before deciding to impose the discipline he did.

As Kullman noted in the November 1, 2007 Disciplinary Action letter, Board Rule 1-16 provides, "It is the duty of state employees to protect and conserve state property. No employee shall use state time, property, equipment, or supplies for private use or any other purpose not in the interests of the State of Colorado." Complainant, by his own admission, did use state property for his private use. In addition, he did not take steps on June 19, 2007, when he saw Culver and McCabe to protect and conserve state property and equipment. As such, it was reasonable for Respondent to impose

some discipline on Complainant.

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

The discipline imposed by Respondent was within the range of reasonable alternatives available to it. Pursuant to Board Rule 6-2, "A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Complainant has not had any prior disciplinary or corrective actions. However, he did take valuable, useable CDOT property and convert it to his own use. The disciplinary action imposed was designed, in part, to repay the state the value of the property taken by Complainant. Hence, it was reasonable.

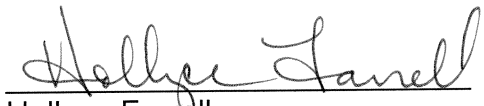
CONCLUSIONS OF LAW

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.

ORDER

Respondent's action is **affirmed.**

Dated this 13th day of March, 2008



Hollyce Farrell
Administrative Law Judge
633 – 17th Street, Suite 1320
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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 8 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 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 13th 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:

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