STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2001G014**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL JEFFERSON,

Complainant,

vs.

DEPARTMENT OF REGULATORY AGENCIES, DIVISION OF REGISTRATIONS,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on May 13, June 25 and 26, August 20 and 28, 2002, at the State Personnel Board (the "Board"), 1120 Lincoln, Suite 1420, Denver, Colorado. After submitting written closing arguments, the record in this matter was closed on October 16, 2002. Assistant Attorney General Luis Corchado represented Respondent. Respondent's advisory witness was Rose McCool, the appointing authority. Complainant appeared and was represented by Jane Ebisch.

MATTER APPEALED

Complainant, Michael Jefferson ("Complainant" or "Jefferson") appeals his corrective action and alleges racial discrimination by Respondent, the Division of Registrations (the "Division"), in the Department of Regulatory Agencies ("Respondent" or "DORA"). Complainant seeks back pay and benefits, damages for emotional distress, punitive damages, and attorneys fees and costs.

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

PROCEDURAL HISTORY

On October 15, 2000, Complainant filed his petition for hearing with the Board. Pursuant to § 24-50-125.3, C.R.S. and based upon Complainant's allegation of racial discrimination, the matter was referred to the Colorado Civil Rights Division ("CCRD"). On November 6, 2000, Complainant filed charges with CCRD, which, in turn, triggered the instigation of the investigative process by CCRD. §24-50-125.3, C.R.S. On November 8, 2000, Rene Ramirez, Director of CCRD, e-mailed the Board's then Executive Director, G. Charles Robertson, and raised concerns about potential conflicts if CCRD investigated Complainant's action. Those conflicts included: 1) the Division (Complainant's place of employment) is within the same department ("DORA") as CCRD; 2) Rose McCool, the Division's appointing authority, had recently worked on a CCRD Task Force; 3)

Ramirez had independent information regarding the Complainant based on previous working relationships; and 4) Ramirez' wife was general counsel for the Dental Board, the same Board for which Complainant conducts investigations.

On behalf of the Board, Director Robertson asked the parties to waive the investigation. In state personnel discrimination cases, whether CCRD makes a finding of probable cause or no probable cause, the Board has the option of setting a case for hearing or adopting CCRD's findings. §24-50-125.3, C.R.S. In short, the Board is not bound by CCRD's investigative findings. Complainant reasserted his right to have an investigation conducted. Director Robertson then tried, unsuccessfully, to hire a third party investigator. On August 27, 2001, Director Robertson notified the parties that the Board had been unable to hire a third investigator and that the case would be proceeding with the preliminary review process, with Complainant's discrimination claim intact. On February 26, 2002, the Board granted Complainant a hearing. As parties to an action set for hearing before the Board, Complainant and Respondent were able to avail themselves of the discovery process. Board Rule R-8-53, 4 CCR 801.

ISSUES

1. Whether Respondent acted arbitrarily, capriciously or contrary to rule or law in issuing Complainant a corrective action;

2. Whether the Respondent racially discriminated against Complainant;

3. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant is employed as an Investigator I by the Complaints and Investigations Division ("C&I") in the Division of Registrations of DORA and is an African American male.

2. The Division of Registrations is a section within DORA that oversees the administration of a wide range of state licensing boards, including the Medical Board, the Dental Board and the Architects Board. A Program Administrator oversees each licensing board's support staff. With a few exceptions, the investigations for each licensing board are done by C&I, which is also overseen by a Program Administrator.

3. Complainant was hired by C&I as an Investigator Intern in 1993. After six months he was promoted to an Investigator I and then certified to that classification one year after starting at C&I. During his time at C&I, Complainant has conducted investigations for eleven licensing boards and is currently the liaison for four licensing boards. Complainant takes medication for his high blood pressure.

4. Bruce Douglas was the Director of the Division of Registrations from 1976 or 1977 until August 31, 2001, when he retired. Rosemary McCool was appointed as the Director of the Division beginning September 1, 2001.

5. Robert Longway was hired to work in C&I in 1979. In 1982 he became C&I's Program Administrator. In 1999, he became the Program Administrator for the State Boards of Accountancy and Architects. In the Spring of 1999, McCool was hired by the Division to be the Program Administrator for C&I. In late 2001 or early 2002, when McCool became the Director of the Division, David Dechant was hired as the Program Administrator for C&I.

Gorham as Team Leader

6. Longway hired Mary Gorham, an African American female, to work as an investigator in C&I in 1982. Gorham has worked part-time for much of her tenure with C&I.

7. In the early 1990s C&I was restructured. Under the restructuring, C&I was split into two teams of investigators, headed up by two team leaders, Peggy Ripko, a Caucasian female, and Gorham. The team leaders were to review all incoming cases, make assignments and review cases with their team members if there were personnel issues. Longway oversaw the support staff and Ripko and Gorham, the two team leaders.

8. Under the restructuring, Ripko and Gorham were promoted to Investigator II classifications. Their teams consisted of either Investigator Interns or Investigator Is.

9. Ripko was chosen as a team leader because she had supervisory experience. Gorham was chosen because she had a strong investigatory background and was the most senior investigator at C&I. In addition, they each had different areas of speciality, Ripko in health and Gorham in other professional licensing fields.

10. When Complainant's position was posted for hiring, Gorham told Longway and Ripko that, in the interests of diversity, she wanted an African American male hired. Ripko stated that she did not care about the applicant's race but she wanted someone who could think.

11. The day before Complainant started at C&I, Longway told Ripko that Complainant would be assigned to her team because Gorham thought he should have a positive experience with a Caucasian supervisor.

12. As time passed there were an increasing number of complaints by Gorham's team members about Gorham's management skills. Many of them asked to be moved to Ripko's team. In addition, five or six of them filed grievances against Gorham. There was also growing tension between the managers, Longway, Ripko and Gorham.

13. From the Fall of 1994 or 1995, through January 1995 or 1996, Longway, Ripko and Gorham attended mediation sessions to discuss issues in C&I. Eventually, the mediation sessions were

abandoned. Longway continued to work with Gorham on issues pertaining to her supervisory duties. However, the number of complaints from her team members was escalating.

14. Eventually, Longway recommended to Douglas that disciplinary action be implemented against Gorham. Douglas decided he wanted to settle the matter instead because, while Gorham had lost the respect of her team members and had tense relations with Ripko, she had made a strong effort to fulfill her supervisory duties.

15. A verbal agreement was reached between Gorham, Longway and Douglas whereby Gorham would continue to be classified as an Investigator II but her supervisory duties would be removed.

16. Complainant does not spend any time with Gorham during work hours. However, he is friendly with other men in the department.

Peggy Ripko as Team Leader

17. Ripko formed coalitions within C&I and gossiped with many of the investigators about Longway. Eventually, many of Ripko's team members were also hostile towards Longway.

18. Ripko frequently takes long morning breaks, lasting over half an hour and often as long as an hour, with two Investigator Is, Martha Maxwell and Marilyn Tomascik.

19. Ripko became very hostile towards both Longway and Douglas when they decided to remove Gorham's supervisory duties, maintain Gorham's classification as an Investigator II and not take any disciplinary action against Gorham.

20. Sometime after Gorham was removed as team leader, Ripko spread holiday sprinkles on the desks of all the investigators with the exception of Gorham. Ripko also held a retirement party for Janet Audette, a C&I investigator, at her home and did not invite Longway, Gorham or Complainant. Ripko held a shower for Complainant when he got married.

21. Douglas and Longway frequently talked to Ripko about her behavior towards Gorham. She responded by stating that she was adamantly opposed to "making nice" with Gorham, that it would not be honest of her to do so and that she did not care if it affected her performance evaluation.

22. After McCool was promoted to the position of Director of the Division, Ripko was appointed C&I's acting Program Administrator until Dechant was hired by McCool as C&I's Program Administrator.

23. McCool had the option of promoting Ripko into the C&I Program Administrator position but chose to open the application process to applicants outside the Department.

24. For three months after Dechant became the Program Administrator, Ripko would not speak to him.

25. When Dechant first became Program Administrator, he had met with some of the investigators in their offices, discussing changes he wanted to make in C&I. During a subsequent staff meeting Ripko was confrontational with Dechant about those meetings.

26. Theresa Griffith, a Caucasian female, was hired by C&I as an Investigator Intern in May 2001. In April 2002 she was terminated. During her tenure at C&I, Ripko was Griffith's direct supervisor.

27. Ripko gave Griffith a "needs improvement" rating and a corrective action. Griffith grieved the corrective action. After filing the grievance, Griffith resigned.

28. Complainant called Griffith at home and told her that she had a few days to rescind her resignation and that most employees got corrective actions and she needed to just handle it. Griffith rescinded her resignation. Three days later, on approximately April 4, 2002, she was terminated.

29. During Griffith's employment at C&I, Ripko told Griffith that no one wanted Gorham's office when she retired because it was "evil" and warned her not to leave anything out on her desk because Gorham had a history of snooping on people's desks.

30. Ripko also told Griffith that Jefferson was "stupid" and made references to his negative work history at C&I.

31. Tomascik, in front of Ripko, referred to Jefferson as a slumlord and a gang member. Tomascik also commented that she thought Complainant was capable of hiring a hit man to kill her.

32. Christine Armstrong, a Caucasian female, began to work for C&I in early July 2001. Ripko was her supervisor.

33. Approximately one month after Armstrong had started, Tomascik came to Armstrong's office and told her that Gorham was evil and paranoid and that Tomascik had not spoken to her in six years. Armstrong, after questioning such comments, was ignored by Ripko and her group of friends.

34. Armstrong resigned on April 5, 2002 for two reasons. First, she thought that Griffith was not fairly evaluated because Ripko and Tomascik were telling her to do her investigative reports one way and Dechant was saying he wanted them done another way. Secondly, Armstrong thought Ripko had started to build up negative reports against Armstrong, partly because she did not like how much Dechant was in Armstrong's office talking to her about his ideas for running C&I.

35. Griffith and Armstrong both perceived Ripko as a critical supervisor who, through gossip and control, created a negative and unpleasant work environment in C&I.

36. Ripko has never been disciplined for her behavior towards Gorham and Complainant.

Deb Ford

37. Deb Ford is an African American female. She was hired by DORA in 1981 as a receptionist. From 1989 to 1991 she worked as the lead clerical support person for C&I, reporting to Longway. Ford left C&I in 1991 to work in other sections of DORA because she did not agree with how Longway was managing the other clerical support person. In 1999, McCool hired her as an Intake Analyst for C&I. Six months later she became an Investigator Intern then an Investigator I.

38. While Ford was an Investigator Intern, McCool was her supervisor but Ripko was her trainer. Ford would choose to whom she would go to for guidance on an issue. This caused some friction with Ripko. She, McCool and Ripko outlined a plan of whom she would approach with what issues.

39. Ford views Ripko as having high standards and, therefore, will have Ripko review many of Ford's reports.

40. While Ford and Ripko do not always see eye to eye, Ford views Ripko as a close personal friend with whom she socializes outside of the office.

41. Ford has never had her work reviewed by Complainant during the peer review process. In fact, she once opted out of having it reviewed by him because of her perception that it was too stressful.

Complainant's Past Performance Evaluations and Disciplinary History

42. For the 12/1/93 to 11/30/94 rating period, Ripko gave Complainant a rating of "good." For the 12/1/94 to 11/30/95 and 12/1/95 to 11/30/96 rating periods, Ripko gave Complainant ratings of "commendable." For all three of these evaluations, Ripko included positive comments about Complainant's work performance and the quality of his work product.

43. In May 1996, Ripko sent a memo to Complainant, discussing his work progress positively, cautioning him to make sure that certain forms were completed and kept with his investigative reports and granting his request to work five or six weekends in lieu of working on weekdays.

44. In October 1997, the Dental Board sent a Customer Service Award Nomination Form for Complainant to Longway commending Complainant on his work for the Dental Board.

45. For the 12/1/96 to 11/30/97 rating period, Ripko gave Complainant a rating of "needs

improvement."

46. In late 1997, two Program Administrators for licensing boards complained about the quality of Complainant's investigative reports. In addition, Ripko observed Complainant arriving late for work and noted that he was signed out of the office far more frequently and for longer periods of time than all of the other investigators.

47. As a result of these complainants and Ripko's observations, in December 1997, Longway issued a six-month corrective action against Complainant for poor performance, citing his untimely arrivals and departures to and from the office, the quality of his investigations and his failure to follow the peer review rotation.

48. In the December 1997 corrective action, Longway states that Susan Miller, the Program Administrator had requested that Complainant no longer do investigations for the Medical Board, due to the poor quality of his investigations.

49. Longway specifically stated, in the corrective action, that Complainant would have been given more leeway on the issue of timeliness if the quality of his cases had been meeting client needs.

50. Under the December 1997 corrective action, Complainant's work schedule was changed from 6:30 a.m. to 3:00 p.m. to 7:30 a.m. to 4:00 p.m.; business trips outside the office were to be pre-approved by Ripko or Longway; Complainant was to be removed from the peer review process for the six month period of the corrective action while Ripko or Longway reviewed his investigative reports; and there were to be no more delinquent balances on Complainant's state issued Diner's Club card.

51. Complainant did not grieve the December 1997 corrective action.

52. Douglas and Longway discussed Complainant's performance and Ripko's supervision of Complainant under the December 1997 corrective action. Both Douglas and Longway thought that Ripko was being heavy handed in her oversight of Complainant and was overlooking any improvement by Complainant. Douglas told Longway that he wanted him to take over the direct supervision of Complainant.

53. In March 1998, Longway took over the direct supervision of Complainant.

54. Also during March 1998, Longway sent Complainant a memo stating that a Medical Board complainant complained about Complainant's handling of the case. Complainant denied the allegations made by the Medical Board complainant.

55. In April 1998, one month later, Longway gave Complainant a rating of "needs improvement" for the 12/1/97to 4/30/98 rating period.

56. During the ensuing year, Longway's and Complainant's relationship improved.

57. In July 1998, Longway issued a disciplinary action against Complainant of a two month reduction in pay for using a state vehicle to travel to his son's basketball game during work hours and for having a delinquent balance on his Diner's Club card. Complainant did not appeal the disciplinary action.

58. Don Oelke, a Caucasian investigator, received a three month down grade in pay for similar conduct.

59. In approximately August 1998, Susan Miller, the Program Administrator for the Medical Board complained to Longway about Complainant spending time talking to two Medical Board employees during work hours about non-business matters. After Longway, Miller and Complainant met to discuss the matter, Complainant agreed not to take breaks in the Medical Board's offices and the Medical Board staff wouldn't visit Complainant regarding non-business issues.

60. For the 5/1/98 to 4/30/99 rating period, Longway gave Complainant a rating of "good."

61. For the 1999/2000 and 2000/2001 performance periods, McCool gave Complainant ratings of "Fully Competent."

Longway as Supervisor

62. While Program Administrator for C&I, Longway hired four African Americans, three females (Gorham, Brenda Handy and Gloria Parsons) and one male (Complainant). After receiving a recommendation from Longway, Handy was promoted to work on licensing boards within the Division. Parsons, after ten years and progressive discipline, was fired on the basis of her performance.

63. Over the course of a few days in August 1998, Longway and Ripko exchanged e-mails regarding the possibility of a staff meeting to discuss concerns about Complainant's and Gorham's performances and Gorham's classification as an Investigator II.

64. Ripko believed that Gorham was getting preferential treatment in the form of a lighter caseload and no supervisory duties, despite having a classification of Investigator II, a classification held by no other investigator other than Ripko.

65. In these e-mails, Longway offered to meet with Ripko one-on-one to discuss these issues. Ripko refused, insisting that Longway should be meeting with the investigators as a group. Longway refused, stating that the investigators who Ripko wished to include in the meeting were all "card-carrying members of [Ripko's] gossip group" and that he would most likely be "put on trial by an angry lynch mob."

66. Because Gorham and Jefferson were not included in any of the e-mails, Longway forwarded the series of e-mails to them. In sending them to Gorham and Jefferson he refers to them as "hate-mail, " referring to the hostility of the group towards him, not Gorham and Jefferson.

67. In August 1998, Longway held a meeting with a number of the investigators, all Caucasian, to discuss their concerns regarding Complainant and Gorham. Douglas was present at the meeting and was vocally supportive of Longway.

68. After the meeting, Longway and Ripko met periodically to discuss various issues within C&I. As a result of those meetings, Longway, in mid-October 1998, sent out a memo which clarified what constituted acceptable office behavior for all employees. Included were expectations for arrival, departure and break times; how time should be spent out of the office; and keeping non-work related activities to a minimum during business hours.

69. During his tenure with C&I, Longway had trouble with a number of the Caucasian investigators in C&I. He was not invited to the retirement for at least two of those investigators – Audette (whom he hired) and Barbara Williams.

70. During Longway's tenure as the C&I Program Administrator, Gorham frequently complained to him about feeling isolated, socially and professionally, within the C&I workplace, stating that she viewed it as a result of her race.

71. It was Gorham's practice to tell Longway whenever she would be out of the office. She would also obtain a leave slip for that time. Complainant, however, would simply leave.

McCool as Supervisor

72. When McCool started as C&I's Program Administrator, Gorham and Complainant met with her and told her that they thought there was an issue of race discrimination in C&I. McCool responded by saying that was old history and she wanted to move forward with a clean slate.

73. Soon after starting as C&I's Program Administrator, McCool arranged for both Complainant and another investigator to attend an out of state advanced training course for investigators.

74. Whenever McCool was going to be out of the office she would send Douglas a written memo that Ripko would be acting in McCool's place. McCool would also send a second memo that, during her absence, Gorham would be reporting directly to Douglas.

75. In the Fall of 2000, Tomascik reviewed Complainant's investigative reports. She and Complainant had a disagreement about those reports and eventually met with McCool. McCool, after reviewing the investigative reports, decided that as of December 2000, Complainant would not be in the peer review process and that she would review his cases.

76. In July 2001, after discussing the matter with McCool and reaching an agreement as to who

would review his cases, Complainant was placed back in the peer review process.

77. While McCool was the C&I Program Administrator she hired at least two African Americans who were ultimately promoted to other positions in DORA. She did not, during that same time period, issue a disciplinary action against anyone.

Work Hours

78. In May 1999, while McCool was out of the office on a family emergency, she delegated authority to Ripko to manage C&I. During this time, Ripko tracked Complainant's arrival time at the office and when he was absent from the office.

79. On June 4, 1999, after McCool's return to the office, Ripko gave McCool a memo outlining Ripko's observations of Complainant's comings and goings while McCool was out of the office. In a twenty-one day period, including weekends, Complainant was late eleven times, anywhere from ten minutes to an hour. On ten occasions he left the office at 11:00 a.m. or earlier and did not return until 1:00 p.m. or later. In addition, Complainant was not present at a Board of Nursing meeting that he was supposed to attend.

80. On June 11, 1999, McCool met with Complainant, showed him Ripko's memo and discussed the issues outlined therein. On June 18, 1999, McCool sent Complainant a memo, which he signed, outlining the agreement they had reached. Under that agreement Complainant's schedule was to be 7:30 a.m. to 4:00 p.m. with a 30 minute lunch period; he was to attend all board meetings when he had a case on the agenda; and he was to notify McCool whenever he was going to be out of the office.

81. McCool met with Complainant in August 1999 and November 1999 regarding his late arrival at work. In April 2000 she told him that, if he was late again, his arrival time would be changed to 8:00 a.m. Complainant usually did not call in when he was going to be late nor did he make up for the time he was late. Other investigators who were late would call in and/or make up the time.

82. On April 3, 2000, Complainant gave McCool a memo requesting that his hours be reduced to 80% or 32 hours a week. He stated in the memo that he was requesting the change because his wife was applying to medical school and taking prerequisite college courses, which necessitated him taking greater responsibility for the care of his three-year old son. At the end of his memo he stated that it was "quite important" to support his wife in achieving this goal and also would allow him to be more involved with all three of his children.

83. McCool informed Complainant that she was reluctant to grant the request because she wanted a full time investigator.

84. Douglas told McCool that Complainant's request should be granted because, in the past, female investigators who gave similar reasons to those cited by Complainant had had their

requests for part-time work schedules accommodated. Ultimately, Complainant's request was approved. On January 1, 2001, Complainant began to work 80% or 32 hours a week.

Diners Club Card and Grievance Process

85. On June 10, 1999, all state employees holding a state authorized credit card received a memo (the "Memo") from Art Barnhart, the State Controller, setting out new state travel card policies to be effective July 1, 1999. One of the policies stated, in part, "The State of Colorado authorized travel card shall be used for official state government travel only. . . . Personal use will result in cancellation of the travel card and may result in disciplinary action."

86. The Memo further stated that "any personal use of the travel card must stop" and that all cardholders were required to "cease making any personal charges on the travel card." It went on to state that newly formatted reports, provided to agency controllers, would make it easier to determine whether charges were authorized or not.

87. On July 16, 1999, during a C&I staff meeting, it was stated that use of the Diner's Club card for personal reasons was strictly prohibited.

88. In June 28, 2000, Complainant took a vacation with his family. When he and his family arrived in Dallas they went to Alamo to pick up their rental car. The attendant asked for a driver's license and a credit card. Complainant assumed that the request was for identification purposes and submitted the only credit card he had with him, his state-issued Diner's Club card.

89. When Complainant returned the rental car at the end of his vacation, he paid for the cost of the rental with cash.

90. On the morning of July 31, 2000, McCool prepared a notice to Complainant of an R-6-10 meeting. When she went to find him, at 7:45 a.m., he was not yet in the office.

91. Later on the morning of July 31, 2001, McCool hand delivered to Complainant a revised R-6-10 notice stating that it was alleged he had violated the state policy on personal use of his Diner's Club card and failed to adhere to his work schedule. The notice went on to set a R-6-10 meeting for August 1, 2000 and stated that it might be determined, after the R-6-10 meeting, it was necessary to administer disciplinary action.

92. Within a few hours, Complainant went to McCool's office and asked for information or evidence on his alleged violation. McCool refused, stating that Complainant would be provided with that information at the August 1, 2000 meeting.

93. After requesting the information or evidence from McCool and being refused, Complainant returned to his office and researched the state personnel rules. After reviewing them, he was concerned that he may be terminated so he immediately initiated the process for obtaining a $100,000 mortgage in order to cover living expenses for his family in the event he was

terminated.

94. When Complainant arrived home on July 31, 2000, he received, in the mail, his Diner's Club statement, dated July 25, 2000. The statement showed both a charge and a credit by Alamo, resulting in a billing balance of $0.

95. At the R-6-10 meeting on August 1, 2000, Complainant explained that he had believed that the card was only used for identification and was unaware when he used it for that purpose that a charge had been placed on it by Alamo.

96. After the R-6-10 meeting, at Complainant's request, Complainant's Diner's Club card was canceled.

97. Prior to making a final decision, McCool discussed interpretation of the Memo with Norm Wilson at State Travel Management. She told Wilson that Complainant had viewed the use of the card as only for identification purposes and had paid cash for the transaction.

98. On August 2, 2000, McCool sent Complainant an e-mail requesting a detailed explanation of what he had been doing while out on an inspection because he was only signed out from 9:00 a.m. to 1:00 p.m. and when she left at 2:15 p.m. he had not yet returned to the office. Complainant provided a response on August 3, 2000, outlining what he had done on the inspection from 9:00 a.m. until he returned to the office at 2:15 p.m.

99. On August 3, 2000, Complainant sent McCool a memo, with a copy to Bruce Douglas and Fran Armstrong, responding to the allegations raised in the R-6-10 meeting. He explained that he had been late on July 31, 2000 because of diarhea caused by a prescription hypertension medication he was taking and that his use of the Diner's Club card had been for identification purposes only. He ended the memo questioning McCool's "hard-nosed" attitude towards him, asking if it was possibly "the way I look."

100. On August 4, 2000, McCool gave Complainant a memo stating that his work schedule was being changed to start at 8:00 a.m. rather than 7:30 a.m.

101. On August 11, 2000, McCool issued a corrective action against Complainant for violating the state's policy on use of the Diner's Club card for personal reasons. In issuing the corrective action, McCool did not consider Complainant's past corrective action for a delinquent balance on the Diner's Club card.

102. On September 8, 2000, Complainant filed a formal grievance against McCool for revising his work hours, issuance of the corrective action and racial discrimination. Complainant provided examples of discrimination, including McCool's handling of his schedule, her handling and issuance of the corrective action, her questioning of his hiring a consultant for an investigation, his handling of an investigation and, finally, her ignoring Complainant and Gorham's complaints about past discriminatory practices within the Division.

103. On October 10, 2000, Bruce Douglas, Director of the Division of Registrations, denied Complainant's grievance. Complainant timely filed an appeal of the denial of his grievance to the Colorado State Personnel Board.

Actions Subsequent to Complainant's Grievance

104. On October 12, 2000, McCool issued a corrective action against Complainant for calling Helen Brown rather than Ripko when he was late. McCool, who was going to be out of the office, had outlined the call-in procedures to all C&I staff in an e-mail. In the same e-mail McCool had also appointed Ripko acting Program Administrator while McCool was out of the office.

105. McCool discussed the corrective action with Douglas and reviewed both Complainant's explanation that he called Brown rather than Ripko because the memo offered such a procedure as an alternative and his statement that another investigator, Deanne Murphy, a Caucasian female, had also called Brown rather than Ripko and not been issued a corrective action.

106. Murphy did not receive a corrective action because she did not have a history of being late. However, McCool talked to Murphy who was very upset about McCool's response. Murphy wrote McCool a "strong" memo voicing those concerns. McCool responded with a memo that clarified the issues.

107. Ultimately, McCool withdrew the corrective action against Complainant on October 31, 2000, because Complainant and Murphy had misinterpreted her instructions.

108. Both Complainant and Murphy had to complete vacation leave requests as a result of being late. McCool, after signing the requests, wrote a note on them stating that, in the future, failure to follow proper procedure would result in leave being denied.

DISCUSSION

A. Burden of Proof

In this appeal of the final agency decision on Complainant's grievance, alleging claims of racial discrimination resulting from disparate treatment and hostile work environment, Complainant bears the burden of proof as to whether Respondent discriminated against him.1 *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994) and *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288 (Colo. 2000).

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1 It should be noted that there was no allegation of a violation of an agency rule by DORA pertaining to harassment. Therefore, the only analysis of harassment that is addressed in this opinion is under Colorado's Anti-Discrimination Act.

B. <u>Respondent did not racially discriminate against Complainant</u>

Complainant alleges that he has been discriminated against on the basis of his race as a result of his disparate treatment in comparison to Caucasian investigators in the C&I Division. Colorado's Anti-Discrimination Law makes it illegal for an employer to harass an employee based on race. § 24-34-402 (1)(a), C.R.S. Given the similarity between this statute and its federal counterpart, 42 U.S.C. §20003 – 2(a) (1994), Colorado courts look to federal courts for interpretation of racial discrimination claims arising under Colorado's Anti-Discrimination Act. See *Colorado Civil Rights Com'n v. Big O Tires*, *Inc.,* 940 P.2d 397 (Colo. 1997).

Colorado's Supreme Court has enunciated a three-step analysis for evaluating claims of employment discrimination that accommodates various kinds of employment decisions and various forms of discrimination. *Big O Tires,* 940 P.2d at 400 and *Bodaghi*, 995 P.2d at 297. Initially, Complainant must establish by a preponderance of the evidence a *prima facie* case of discrimination. *Big O Tires*, 940 P.2d at 400. The burden of production then shifts to Respondent to provide a legitimate non-discriminatory reason for the adverse employment decision. *Bodaghi*, 995 P.2d at 297. The Complainant must then show the presumptively valid reason(s) is false, a pretext for discrimination, and is not worthy of credence. *Big O Tires*, 940 P.2d at 401.

1. <u>Complainant has not established a prima facie case of discrimination</u>

The elements of a *prima facie* case include a showing that (1) Complainant belongs to a protected class; (2) Complainant was qualified for the job at issue; (3) Complainant suffered an adverse employment decision despite his qualifications; and (4) the evidence supports an inference of unlawful discrimination. *Big O Tires,* 940 P.2d at 400-01.

Complainant has established the first two elements of a *prima facie* discrimination. He is an African American and he is qualified for his position as an Investigator I. Complainant alleges that he suffered adverse employment decisions in that his work hours were changed to an unwanted starting time, he received a corrective action for his use of the Diner's Club card, and the constructive reduction of Complainant's job from 100% to 80% because of the stress, tension and high blood pressure he experienced. Complainant alleges an inference of discrimination can be found in that other employees were not held to the same standards and in the history of comments and behavior by co-workers and investigators.

Typically, adverse employment decisions are decisions by an employer regarding an employee's compensation or decisions by an employer to terminate or demote, refusal to hire or failure to promote. A mere inconvenience is not an adverse employment action. *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993). See also *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 (10th Cir. 1998). However, an adverse decision need not be "material" in order to meet the third prong of the *prima facie* test for discrimination. *Jeffries v. State of Kansas,* 147 F.3d 1220 (10th Cir. 1998).

Balancing these two ends of the spectrum, only one of the decisions cited by Complainant

may be found to be adverse employment decisions – the Diner's Club corrective action. The Diner's Club corrective action provides the basis for less than favorable performance evaluations and/or the basis for a disciplinary action in the future. Board Rule R-6-6, 4 CCR 801. Therefore it is a decision that adversely affects Complainant's employment.

Complainant's change in work hours and his request to reduce his time simply do not meet the requirements of adverse employment decisions. Complainant made no showing that the change in work hours resulted in any type of hardship, burden or, even, inconvenience to him. In fact, prior to August 2001, during the preceding two years, Complainant had already had his hours changed twice with no apparent ill effect.

As set forth above in the findings of fact, the reduction of Complainant's work hours was done at his own request, in opposition to McCool's preference for a full-time investigator. The substantial evidence did not bear out that Complainant was forced by his employer to make this request for a reduction in his work hours or that he made the request for anything other than the reasons he articulated in his memo to Douglas and McCool. There was no substantive evidence linking Complainant's high blood pressure problems with his perception of his work environment, beyond Complainant's assertion that it stressed him.

While Complainant suffers from high blood pressure and is on medication, there was no showing of a causal connection between either the onset of this condition or a worsening of this condition and the circumstances in Complainant's workplace. Given the circumstances surrounding Complainant's request, it is difficult to infer racial discrimination was the motivation for Complainant's request for a reduction in work hours or that it was an adverse employment decision.

Complainant argues that the actions of Respondent give rise to an inference of a claim of racial discrimination. Taking the only adverse employment decision suffered by Complainant (the Diner's Club corrective action), it is not possible to infer discrimination, based upon the evidence in the record. A corrective action does not rise to the level of a disciplinary action, but is rather intended to correct and improve an employee's performance without affecting the employee's pay, status or tenure. Board Rule R-6-8, 4 CCR 801.

Complainant argues that the manner in which the corrective action was administered was discriminatory. Under the Board Rules, if an appointing authority is considering discipline against an employee then he or she must first meet with the employee (a "R-6-10 meeting"). Board Rule R-6-10, 4 CCR 801. During that meeting the employee must be provided with information about the reason for potential discipline and the source of that information. Board Rule R-6-10, 4 CCR 801. The employee must also be given a chance to respond.

In this matter, McCool gave Complainant written notice of the date and time of his R-6-10 meeting and that the meeting was regarding his personal use of the Diner's Club card and adherence to his work hour schedule. There is nothing in the written notice that "threatens" Complainant with termination. This perception arose out of Complainant's research of the personnel rules. Given that

it was a meeting concerning the possibility of disciplinary action, termination was certainly an option within the range of disciplinary alternatives open to McCool as an appointing authority. It was not, however, a threat made by her in the R-6-10 meeting notice.

Complainant argues that he was concerned about the subject matter of the meeting and that when he approached McCool with these concerns she should not have informed him that she was busy and would discuss the matter with him at the meeting. While it would have been helpful to the Complainant to know ahead of time the details of the allegations, he was not harmed by that lack of knowledge. After the R-6-10 meeting was held, Complainant submitted, and McCool considered, a detailed explanation concerning his use of the Diner's Club card and his untimeliness. Complainant was not denied any information, nor was he refused an opportunity, after learning of the details of the allegations, to provide an explanation. An inference of discrimination cannot be found from the process or manner in which Complainant's R-6-10 meeting was held.

Finally, there is no inference of racial discrimination surrounding the issuance of the Diner's Club corrective action. There was no showing of Caucasian employees similarly situated who received less "discipline" than Complainant. There was no showing that the reason provided by Respondent was patently false. Given the potential range of alternatives for discipline available to McCool as the appointing authority, it is not beyond the scope of that discretion to impose a corrective action. While it is more "severe" than a verbal or written reprimand, it is not, in light of all the circumstances, a completely unreasonable decision by McCool. The circumstances do not rise to the level of inferring racial discrimination.

Complainant also argues that an inference of discrimination can be found in how his performance was evaluated. With regards to Complainant's poor performance evaluations in 1997 and 1998, there is documentation that Complainant was not performing well. In late 1997, there were two different program administrators who complained about the quality of his investigative reports. One program administrator even went so far as to request that Complainant no longer do investigative reports for her board. In addition, Complainant was not timely in arriving at work and was signed out more often and for greater periods of time than other investigators. It should also be noted that during the 1997 rating period, Complainant did receive a commendation from the Dental Board. However, this did not outweigh the complainants of the other program administrators.

During the 1998 rating period, Complainant also received a disciplinary action of a two month reduction in pay for misuse of a state vehicle and for having a delinquent balance on his Diner's Club card. Another investigator who was Caucasian, Oelke, received a three-month reduction in pay for similar conduct. Since the 1997 and 1998 ratings, Complainant has received three ratings of "good" or "fully competent". After the first "needs improvement" rating, Longway took over Complainant's supervision from Ripko, in order to make sure that Complainant received a fair rating. Despite the change in supervisors, Complainant still received a poor rating. In the ensuing years, Complainant's ratings have gone up – a strong indication that the two years of poor performance ratings has not harmed Complainant. Complainant, since receiving those ratings, has not be terminated nor has Respondent refused to promote him.

Complainant's arguments concerning the inference of discrimination arising from Ripko's "isolation" tactics, the hostile personal comments about Complainant and the standards for black employees as supervisors are discussed below under the claim of hostile work environment.

Complainant has not made a *prima facie* case of discrimination.

2. Respondent has provided a legitimate non-discriminatory reason for its actions

Even if Complainant had made a *prima facie* case of discrimination, Respondent has provided a legitimate non-discriminatory reason for its actions. Once the *prima facie* case is established, there is a presumption that Respondent unlawfully discriminated against Complainant. *Bodaghi,* 995 P.2d at 297. Respondent may rebut this presumption by providing a legitimate non-discriminatory reason for the adverse employment decision. Even if Complainant had made a *prima facie* case of discrimination, Respondent is able to articulate legitimate non-discriminatory reasons for acting as it did.

With regards to the change in Complainant's work hours and his evaluations, Respondent provided extensive evidence of Complainant's problems with tardiness and his poor work performance. Complainant's poor performance evaluations have been discussed above in the context of the *prima facie* case and do not warrant further discussion.

During McCool's tenure as his direct supervisor, Complainant's work hours were changed a total of three times. Each time, Complainant's untimeliness in arriving at the office was discussed with him and he was warned of the consequences of not complying with his new work hours. Respondent also provided extensive testimony that other investigators, including Gorham, would call when they were going to be late and would make up the time. There was no evidence that Complainant made these same efforts.

The circumstances surrounding Complainant's change in work hours and performance evaluations are not the type of circumstances that give rise to an inference of discrimination, demonstrating disparate treatment. Rather, they are indicative of supervisors providing an employee with the opportunity to improve his performance.

Respondent provided a legitimate, non-discriminatory reason for issuing Complainant a corrective action regarding his use of the Diner's Club card. Complainant was on notice of the policy concerning the personal use of the Diner's Club card. He was given notice of this policy both in the form of a memo from the State Controller and during a staff meeting, of the policy on the personal use of the Diner's Club cards. It was clearly Complainant's intent to only use the Diner's Club card for identification purposes and not to place any charges on the card. This was borne out by the fact that the only charge placed on the card by Alamo was reversed. However, Complainant did use the card for a personal purpose, albeit for the minor purpose of identification, and this use violated the policy on the use of that card. In light of the lack of any outstanding balance on the card and Complaiannt's lack of intent, McCool issued no more than a corrective action, rather than any form of disciplinary action.

Respondent provided a legitimate non-discriminatory reason for reducing Complainant's work hours. There was extensive testimony regarding Complainant's request for a reduction in his work hours. That testimony showed, as stated above in the findings of fact, that Complainant requested the change in work hours and that it was granted, despite McCool's reluctance to lose 0.2 FTE. As set forth above, Complainant's written request gives a detailed explanation of why he wants the reduction in work hours – due to his wife's desire to attend medical school and his desire to care for their children during this time period. Complainant's request was granted after Douglas had pointed out to McCool that such requests were routinely granted to female investigators who wanted to care for their children. Gorham was an example of such an instance. But for Complainant's request, Respondent would not have reduced Complainant's work hours.

Respondent has provided legitimate non-discriminatory reasons for both its adverse and non-adverse employment decisions concerning Complainant.

3. Complainant has not shown that Respondent's reason was pretextual

Pretext may be proven through indirect evidence. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 257 (1981) and *Bullington v. United Air Lines, Inc.,* 186 F.3d 1301, 1317 (10th Cir. 1999). In proving pretext on a disparate treatment claim, Complainant must show that he was treated differently from other employees who are not members of the protected class and who are similarly situated. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804 (1973). *Elmore v. Capstan, Inc.,* 58 F.3d 525 (10th Cir. 1995). In comparing the treatment of employees who are members of the protected class and those who are not, the comparison need not be based on identical violations of identical work rules; the violations need only be of "comparable seriousness." *Elmore,* 58 F.3d at 530.

Often apparently irrational differences in treatment between different employees may be explained by the fact that different supervisors administered the discipline or that the circumstances surrounding the other employees' violations offered mitigation for the infraction imposed. *E.E.O.C. v. Flasher Co.,* 986 F.2d 1312, 1320 (10th Cir. 1992).

Complainant's two "needs improvement" evaluations were given over four years ago. Since then Complainant has received three evaluations, all three of which give Complainant ratings of "good" or "fully competent." Given Ripko's heavy-handed response to Complainant in early 1998, Douglas and Longway appropriately made the decision to have Complainant supervised by Longway. The basis for Complainant's "needs improvement" ratings has been extensively discussed above. It should be also noted that under Longway's supervision, Complainant's performance and his ratings improved, as did his relationship with Longway. The substantial evidence did not show that Respondent's reason for giving these ratings was pretextual.

Given the discussion on the *prima facie* case and in this section, Complainant has not shown that the reasons provided by Respondent for the change in his work hours, the Diner's Club

corrective action, his performance evaluations and the reduction in Complainant's work hours were pretextual. Complainant has not met his burden of proof regarding his claim of racial discrimination.

C. Hostile Work Environment

In proving his hostile work environment claim, Complainant must show, objectively and subjectively, "that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Penry v. Federal Home Loan Bank of Topeka,* 155 F.3d 1257, 1261 (10th Cir. 1998) (emphasis added). In reviewing the evidence, the adjudicator must look at the totality of the circumstances to determine whether there is a hostile work environment as the term "environment" indicates a need to look at the entirety of the workplace, rather than just isolated incidents. See *Penry,* 155 F.3d at 1262. Therefore, the Complainant must provide evidence of discriminatory hostility in the general work atmosphere, as well as evidence of discriminatory hostility directed at Complainant himself. *Penry,* 155 F. 3d at 1262.

In assessing the environment under the totality of the circumstances test, there must be evidence of a high frequency of the discriminatory conduct, a demonstration of its severity and that it is humiliating, rather than merely offensive utterances and that the conduct interferes with the Complainant's work performance. *Rahn v. Junction City Foundry,* 161 F. Supp. 1219 (Kan. 2001), (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993)) and *Robinson v. City and County of Denver,* 30 P.3d 677 (Colo. App. 2000), *cert. denied*.

Complainant clearly worked in an unpleasant environment. Ripko's behavior reflects a lack of professionalism. As found above, she has created an unpleasant work environment for at least four Caucasians - Longway, Dechant, Griffith and Armstrong. Ripko's behavior with each of these individuals follows the same pattern that it did with Complainant and Gorham. Initially, she is able to work with them. However, at some point she disagrees with their approach, they disagree with her in some way or they do not join her personal group. The disagreements fester and eventually result in her refusal to speak with the individuals or include them in office social events. Ripko's approach is reminiscent of the "if you aren't with me, you are against me" mentality. It is an approach she applies universally, regardless of race.

Ripko's refusal to "play nice" spills over to her team members many of whom, unfortunately, follow her lead and behave in the same manner. Tomascik's comments regarding Gorham and Complainant are reflective of this trend. Ripko's behavior, while indicative of an extremely unpleasant style of personal interactions and/or management, was not behavior motivated by a discriminatory intent. Rather it was an approach she applies to many of her co-workers and supervisors.

The comments made by Ripko and Tomascik over, approximately, the past ten years were not of such a frequency that they permeated the workplace. In addition, while being petty, offensive and unprofessional, they did not rise to the level of discriminatory comments. There was not the "steady

barrage of activity" contemplated for successful hostile work environment claims. *Robinson*, 30 P.3d at 683. From an objective standpoint, it cannot be concluded that the conduct of Complainant's co-workers was severe, pervasive and discriminatory.

Complainant has not met his burden in proving a hostile work environment.

D. <u>Attorney fees are not warranted in this action</u>.

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

Given the above findings of fact an award of attorney fees is not warranted. Complainant presented rational arguments and competent evidence to support his claims. In addition, there was no showing that Complainant pursued his request for a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Respondent did not racially discriminate against Complainant.

2. Respondent did not create a hostile work environment for Complainant.

3. Attorney's 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 2nd day of December, 2002.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

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.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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 decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. 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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

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 original and 7 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 inch by 11-inch paper only. Rule R-8-64, 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. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of December, 2002, 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:

Jane G. Ebisch
Pearson & Horowitz, P.C.
1999 Boardway, Suite 2300
Denver, Colorado 80202

and in the interagency mail, to:

Luis Corchado
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____
Andrea C. Woods