STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2002B084**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

HUBERT BARTON,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter. At Respondent's request this matter was commenced on March 25, 2002 with the evidentiary hearing held on July 30 and 31 and August 7, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General John A. Lizza represented Respondent. Respondent's advisory witness was Major Anthony Padilla, the appointing authority. Complainant appeared and was represented by Andrew Carafelli, Bruno, Bruno & Colin, P.C.

MATTER APPEALED

Complainant, Hubert Barton ("Complainant" or "Barton") appeals his termination by Respondent, Department of Public Safety, Colorado State Patrol ("Respondent," "DPS," or "CSP"). Complainant seeks reinstatement, back pay and benefits.

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

ISSUES

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

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

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

4. Whether an award of attorney fees to Respondent is warranted.

FINDINGS OF FACT

General Background

1. Complainant was hired by CSP in 1994. At all times pertinent to this action, Complainant was a certified state employee, working for the CSP as a trooper for Troop 6A in District 6, based in Golden.

2. Major Anthony Padilla was the appointing authority for Complainant's district. Captain Karavolas was the most senior supervisor for Complainant's troop. Sergeant Derek Kemper was Complainant's direct supervisor.

3. When the Complainant was initially hired, he trained at the CSP Academy for twenty weeks. Part of his training included the use of force and the use of firearms.

4. During Karavolas' tenure, he began a practice in his troop of "six-minute briefings." These briefings were intended to disseminate information to all troopers quickly and consistently by having all of the troopers on a shift come in, on a daily basis, to the Golden office from their respective patrols to attend the briefings.

5. Under the six-minute briefing practice, Karavolas would meet with the sergeants under his command; give them information, which they, in turn, were to pass on to the troopers.

6. Kemper's practice was to take notes in his day timer during meetings between Karavolas and the sergeants. Kemper would then use his day timer notes as an agenda for the briefings with the troopers. If Karavolas gave the sergeants a memo that contained information to be disseminated during a six-minute briefing, Kemper would use the memo itself, rather than notes in his day timer, as a reminder to discuss an issue with troopers.

7. If a trooper missed a six-minute briefing because he was handling some type of situation, it was Kemper's practice to meet with that trooper, preferably during the same shift, and review all of the issues discussed during that shift's six minute briefing. For these meetings, as well, Kemper would utilize his day timer notes and hard copies of any memos to remind him of all the issues which needed to be discussed with the trooper who had been absent.

8. Troopers are required to periodically renew their qualifications in the use of guns. As part of that periodic qualification, they engage in target practice. Such practice consists of shooting at silhouettes of people, not inanimate objects such as vehicles.

9. Under CSP's policy concerning pursuit of vehicles, troopers should only terminate a pursuit using the following continuum of force (listed from least aggressive to most aggressive):

- Officer termination;
- Supervisor termination;
- Violator termination;
- Channelization;
- Mechanical tire deflating device;
- Boxing;
- Soft barriers (pylons, signs, or cones, or any combination thereof);
- Firearms;
- Tactical vehicle intervention;

10. It is accepted practice within CSP that if a driver of a vehicle poses an immediate threat to a trooper or the public, and the trooper has appropriately drawn his gun in response to that threat and proceeds to fire his gun, that the trooper should shoot the driver, not the vehicle.

11. One year prior to the incident that is the subject of this action, Karavolas' son was involved in an accident. Karavolas, in his role as a father, was called by his son. When Karavolas arrived at the scene and learned that there was the possibility of criminal charges being filed, he removed himself from the scene. Complainant arrested Karavolas' son and prepared the report recommending certain criminal charges be filed against him by the Jefferson County District Attorney's Office.

Padilla's e-mail

12. During August 2001, in Canon City, Trooper Jacobs of the CSP was involved in a pursuit of a stolen car carrying four possible gang members. The driver repeatedly and deliberately collided with Jacobs' patrol car. After one such collision, the driver took off down the highway, with Jacobs in pursuit. Jacobs then attempted to shoot the right rear tire of the vehicle. During these shooting attempts, ricocheting bullets injured Jacobs. Ultimately the vehicle was stopped and the people in the car were apprehended (the "Jacobs Incident").

13. As a result of the Jacobs Incident, Chief Westphal issued a directive to CSP's upper level management, including Padilla, to be disseminated to all troopers prohibiting officers from firing at vehicles except in extreme circumstances.

14. On August 10, 2001, Padilla sent an e-mail to the three captains in District 6, Captains Mitchell, Karavolas and Eicher. The memo stated that there had been a statewide increase in the number of incidences in which, as a result of feeling threatened, troopers were pulling their guns and firing at vehicles. Padilla went on to state that a policy would be forthcoming prohibiting officers from shooting at cars, with exceptions, and officers should only resort to such tactics in extreme situations.

15. Padilla asked the three captains to discuss the issue of shooting at vehicles with those reporting directly to the captains and insure that the information was passed on to all troopers.

16. On August 10, 2001, Karavolas forwarded Padilla's e-mail to Kemper, Complainant's direct supervisor.

17. On August 10, 2001, Kemper gave the evening and graveyard shift troopers in Complainant's unit a briefing on Padilla's directive regarding shooting at vehicles.

18. Complainant was working on August 10, 2001 but was not present at Kemper's briefing because he was covering an accident.

19. When Complainant returned to the office on August 10, 2001, Kemper gave him a briefing on the topics discussed at the briefing earlier in the shift, including the briefing on shooting at vehicles.

20. To date, no written policy regarding shooting at vehicles has been published by CSP.

21. Since August 2001 when Padilla notified his captains of the forthcoming policy, only one other trooper has been disciplined for firing his weapon during a pursuit. That trooper was suspended for one day.

Complainant's Use of His Gun

22. On December 1, 2001 at 10:00 p.m., while Complainant was on patrol in his car and was passing a truck, he noticed that the truck's rear license plate lights were out and the rear license plate was improperly mounted. He pulled the vehicle over to the side of the road in a residential area.

23. Complainant approached the vehicle, explained to the driver why he had pulled him over and asked for the driver's license, proof of insurance and registration information. While looking for those documents, the driver kept his back to Complainant and was bent slightly forward. Complainant was able to see the glove compartment when the driver opened it and searched for the documents.

24. The driver gave Complainant a Colorado Identification Card and told Complainant his driver's license was expired and that he did not have the other documents. Complainant then asked the driver for the truck's keys, placed them on the toolbox in the bed of the truck and told the driver to remain in the vehicle until the Complainant returned.

25. Complainant returned to his patrol car and ran a check on the driver and the vehicle. He found that the driver had an outstanding warrant and that his driver's license was revoked.

26. Complainant walked back to the truck, approaching from the driver's side. He stopped when he reached the rear post of the cab window, because that is a safer position than standing directly next to the window.

27. As Complainant stopped at the cab window's rear post, two things occurred simultaneously. First, the driver looked at Complainant, lifted his right arm and Complainant saw something metallic. Second, and simultaneously, the truck's engine started.

28. Complainant yelled, "Don't do it, stop," drew his gun and ran, bent over, towards the rear of the truck, firing twice towards the left rear tire of the fishtailing vehicle.

29. The driver drove away, accelerating to a high speed. Complainant ran back to his patrol car, radioed in a report of the incident and then tried to pursue the vehicle but lost sight of it soon thereafter.

30. Soon thereafter, Complainant heard that the Jefferson County Sheriff's Office had found the vehicle. When he arrived at the vehicle's location, Kemper was already there.

31. Upon arrival, Complainant identified the vehicle, told Kemper what had happened and told Kemper that a weapon may have been pointed at him (Complainant).

32. Soon after Complainant's arrival at the vehicle's location, the Jefferson County Sheriff's Office ("JCSO") began to conduct a search of the area for the driver. The search was directed by JCSO and initially involved other CSP troopers, a helicopter from a local law enforcement agency and deputies from JCSO.

33. Karavolas arrived soon after Complainant. Soon after arriving, Karavolas ordered the troopers to cease their participation in the search and instructed Kemper to order Complainant to return to the patrol headquarters in Golden and prepare a statement on the incident.

34. Kemper relayed Karavolas' order to Complainant and told Complainant that Caravels was unhappy with Complainant because he had violated policy by shooting at the vehicle.

35. Subsequent to the incident, Sergeant Micciche of CSP inspected the truck and found that it had been wired to run without the use of a key.

36. It is common with stolen vehicles for them to be wired in such a manner that a screwdriver, rather than keys, can start the vehicle.

Complainant's Statements Regarding the Incident

37. When Complainant returned to the Golden office, pursuant to Karavolas' order, he drafted a statement of the incident ("Incident Statement").

38. Kemper arrived at the Golden office soon after Complainant and reviewed and made comments on Complainant's various drafts of the Incident Statement. Karavolas also reviewed and made comments on Complainant's Incident Statement, prior to it being submitted to the Jefferson County District Attorney.

39. The final version of the Incident Statement, dated December 2, 2001, states:

- Complainant perceived "something metallic object/weapon;" and
- Complainant pulled his gun and shot the tire because he perceived a threat that the driver might shoot Complainant as he (the driver) was fleeing and Complainant wanted to contain this threat to the current location.

40. The Incident Statement does not state that Complainant informed the driver he was under arrest.

41. After preparing the Incident Statement, Complainant prepared and filed an Affidavit for Arrest Warrant with the Jefferson County District Attorney. This document is the basis for requesting that a judge, based on probable cause, issue an arrest warrant The Affidavit for Arrest Warrant states:

- Complainant advised the driver of the warrant;
- Complainant perceived "some metal object/weapon;" and
- Complainant pulled his gun and shot the tire.

42. The Affidavit for Arrest Warrant does not state why the Complainant shot his gun.

43. On December 7, 2001, Complainant prepared an offense report, listing the various parties involved in the incident, the offenses with which the driver was charged and describing the incident ("Offense Report"). The Offense Report was filed with the Jefferson County District Attorney and states:

- Complainant advised the driver of the warrant;
- Complainant observed "some metallic object/weapon;"
- Complainant drew his gun and shot the tire and that he perceived a threat from the vehicle and its tire.

44. When the driver was taken into custody by the Jefferson County Sheriff's Office, Complainant prepared an Affidavit in Support of Warrantless Arrest dated December 11, 2001 to support the circumstances for arresting the driver. It stated:

- Complainant advised the driver of the warrant;
- Complainant perceived "some metal/object weapon;" and
- Complainant pulled his gun and shot because he perceived a threat from the vehicle.

45. The driver was charged with eight crimes. One of those charges was resisting arrest (§18-8-103(1)(A)(B), C.R.S.), one of the elements of which includes a person knowingly preventing or attempting to prevent his own arrest. Another charge was reckless driving (§42-4-1401, C.R.S.), one of the elements of which includes a person driving a vehicle with reckless disregard for the safety of other people.

46. Typicall when there is the discharge of a firearm (also referred to as an "officer involved shooting"), Chief Westphal instigates an investigation. Therefore, CSP's Internal Affairs unit ("IA") conducted an administrative investigation of this incident.

47. On December 11, 2002, Sergeant Colley, from IA, interviewed Complainant (the "IA Interview").

48. During the IA Interview Complainant stated:

- He advised the driver of the warrant against him;
- He saw "something metallic" which he initially thought was a screwdriver and then, when the driver accelerated the vehicle away from the Complainant, thought that it might be a gun;
- He ran along the side of the truck because, based on his training, that was the area of safety if the driver had a gun;
- He drew his gun and shot because he perceived a threat from the driver possibly having a gun and from the vehicle itself.

R-6-10 Meeting and Disciplinary Action

49. Complainant received an overall "Good" rating for the evaluation period covering July 1, 2000 to March 31, 2001. Kemper was the rater and Karavolas was the reviewer.

50. Complainant received an overall "Does Not Meet Standards" rating for the evaluation period covering April 1, 2001 to March 31, 2002. Kemper was the rater and Karavolas was the reviewer. The evaluation was dated February 7, 2002, after Complainant was terminated, and was not reviewed or signed by Complainant.

51. In the past Complainant received internal CSP commendations for particular arrests that he made.

52. In the past eight years, Complainant has received five disciplinary and/or corrective actions. Four of those actions were for filing reports late. One of those four actions included failure to follow orders and insubordination. The fifth action was for failing to qualify for firearms for two quarters.

53. There are a series of General Orders published by CSP that are intended to guide the conduct of CSP employees. The General Orders are viewed as the foundation from which all CSP employees are to be guided.

54. On January 15, 2002, Karavolas sent a memo to Padilla requesting Padilla conduct a fact finding meeting to decide whether Complainant had violated CSP's General Orders.

55. On January 25, 2002, Padilla conducted an R-6-10 meeting with Complainant. Present at the meeting were Complainant, his attorney, Padilla and Captain Eicher.

56. During the R-6-10 meeting, Complainant stated:

- He advised the driver of the warrant;
- He saw something metallic in the driver's hand and initially thought that it was a screwdriver, then thought that it might be a gun;
- He drew his gun and shot the tire because of a threat from the both the driver and the vehicle.

57. Prior to imposing discipline, Padilla reviewed Complainant's personnel file and all of the statements made by Complainant regarding the incident.

58. Prior to imposing discipline, Padilla spoke to the following people:

- Lt. Col. Wolfe (a superior who had been involved in numerous officer involved shootings, many of whom had died);
- Theresa Wojahn (director of Respondent's Human Resources unit);
- John Lizza (legal counsel in the Attorney General's office);
- Colley (investigator from IA who interviewed Complainant);
- England (sergeant who conducted accident reconstruction of the incident);
- Kemper and Karavolas (Complainant's supervisors)

59. On January 31, 2002, Padilla notified Complainant, via certified letter, that Complainant was terminated for his use of a gun and for the changing nature of his statements about the incident. Padilla went on to state that Complainant's use of

deadly physical force under the existing circumstances, violated his departmental training, departmental policy and state statutes.

60. In particular, Padilla cited violations of the Board Rule (R-6-9(1)) on competent performance and violation of certain CSP General Orders, including:

- Members will obey the law.
- Members will obey the lawful orders and directions of those appointed above them. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals and vision statements.
- Members will be truthful and complete in their accounts and reports. Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
- Members will conduct themselves in a manner that will preserve the public trust and utilize their authority appropriately.
- Members will avoid any conduct which would bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
- Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
- Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.

61. Finally, Padilla stated that Complainant might be in violation of state statutes regarding reckless endangerment and use of physical force in making an arrest or preventing an escape (§18-3-208, C.R.S.).

Stop by Trooper Guddat

62. On April 7, 2002, Trooper Jeremy Guddat, who is stationed in District 6's Golden office, was on patrol looking for drunk drivers.

63. Sometime after dark, Guddat stopped Complainant because Complainant's right tires were touching the fog line on the right hand side of the road.

64. When Guddat walked up to the window he realized that he had pulled over Complainant. He jokingly told Complainant that all he needed was Complainant's identification, so long as Complainant wasn't drunk or did not have any outstanding warrants.

65. Guddat requested Complainant's identification so that he could properly document the stop.

66. After he checked Complainant's identification and approached the vehicle for a second time, he noticed that Complainant was taking notes.

67. Complainant took notes on the encounter with Guddat.

68. After Complainant had driven away, Guddat returned to the Golden office and reported the contact to Kemper because he was aware that there had been problems with Complainant.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 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) willful failure or inability to perform duties assigned; and
(4) 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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

B. Credibility

The credibility of witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato,* 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness' testimony and reject other parts.

United States v. Cueto, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness' testimony, even if uncontroverted. *In re Marriage of Bowles,* 916 P.2d 615, 617 (Colo. App. 1995). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

II. HEARING ISSUES

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

Complainant was terminated for using deadly force during the December 2001 incident and for not being truthful or complete in his statements about the incident. The undisputed evidence, corroborated by both the Respondent's witnesses and Complainant himself, is that Complainant did draw his weapon and fire it at the vehicle. Therefore, Complainant committed the act of using deadly force.

Complainant prepared four written accounts and gave two verbal statements of the incident. Initially, in the Incident Report, Complainant stated that he perceived a threat from the driver shooting him. By his third written report, the Offense Report, Complainant is stating that he perceived a threat from the vehicle. By the time he gave his first verbal statement, in the IA investigation, Complainant is stating that he perceived a threat from both the driver shooting him and the vehicle itself.

Initially, in the Incident Report, Complainant did not report that he had advised the driver of the warrant. It was not until Complainant was preparing documentation and recommending the charge of resisting arrest that Complainant makes the statement that he advised the driver of the warrant.

The one thing that Complainant consistently reported is that he saw something metallic and was unsure whether or not it was a gun.

Complainant's reporting of the incident evolved over time, from the stage of reporting the incident to the stage of preparing a statement upon which charges against the driver were based to the stage at which Complainant was preparing a statement in response to possible discipline. While it is realistic to expect someone involved in such an incident to fine tune his statement, it is disconcerting to note the difference in the statements based upon the circumstances under which Complainant was operating.

When the incident is just a few hours old, Complainant does not include the important detail that he advised the driver he was under arrest. This detail is not included until Complainant is preparing a list of possible criminal charges to be filed against the driver, including resisting arrest.

Complainant initially reports perceiving a threat from the driver himself who may

have a gun. When preparing a list of possible criminal charges against the driver, including reckless driving, Complainant states that he perceived a threat from the vehicle and does not mention the driver. When an investigation is initiated against Complainant himself and he must provide a rationale for drawing and firing his weapon, Complainant reports that he perceived a threat from both the driver having a gun and the vehicle.

The reports prepared at each of the three different stages (incident reporting, arresting and charging the driver and responding to a possible disciplinary action), serve an important function. The difference in Complainant's reporting at each stage was a material difference and had an impact on the outcome of that particular stage.

Complainant committed both of the acts for which he was disciplined.

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

An appointing authority's arbitrary or capricious exercise of discretion can arise in only three ways, namely:

> (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as he is by law authorized to consider in exercising the discretion vested in him;
> (b) by failing to give candid and honest consideration of the evidence before him on which he is authorized to act in exercising his discretion; or
> (c) by exercising his discretion in such manner after a consideration of evidence before him as clearly to indicate that his action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Educ., 36 P.3d 1239 (Colo. 2001).

There was no credible evidence that Padilla failed to procure or consider any of the evidence before him prior to imposing discipline. Rather there was substantial evidence of the amount of material obtained and reviewed by Padilla, including statements by officers regarding the August briefing on shooting at vehicles, Complainant's written reports, personnel file and verbal statements during the two interviews. There was no evidence that Complainant provided Padilla with information before or during the R-6-10 meeting that Padilla failed to consider. Complainant argues that Padilla was given and reviewed false information during his investigation. However, the credible evidence did not support this argument.

The issue then centers on the third prong of the *Lawley* analysis, whether Padilla, after considering the evidence, acted contrary to the behavior of a reasonable person in disciplining Complainant. Respondent argued that Complainant's judgment in reacting to the situation was flawed, he violated departmental policy and training, and his reports of the incident were, at best, incomplete and varied. It is based upon these allegations that Respondent terminated Complainant for failure to perform competently, Board Rule R-6-9(1), 4 CCR 801. Complainant argued that, given the possibility of the existence of a weapon, he acted appropriately. In addition, he argued that Respondent's actions were motivated by Karavolas' animus towards Complainant and that CSP retaliated against Complainant, even after he was terminated.

The two primary policies which Respondent alleges that Complainant violated are (1) the policy on obeying orders and directions of superiors and (2) preparing truthful and complete accounts and reports.

Major Padilla's e-mail to his captains was an order from a superior. This order was passed on to the sergeants and subsequently the troopers. It falls within the scope of CSP's General Order stating that troopers must obey verbal directives. As found in the findings of fact, Complainant received this order. This finding is based upon an assessment of witnesses' credibility, in particular Kemper and Complainant, an assessment that is, as set forth above, within the purview of the fact-finder.

Kemper had a habit and practice of taking notes on topics that he was to discuss with his troopers. If he was given a memo to discuss with the troopers, in this case a copy of Padilla's e-mail, then he used a copy of that memo to prompt him to discuss the issue with the troopers. In this case, all but one or two of Kemper's troopers recalled the briefing in August on the directive and the forthcoming policy. It was undisputed that Kemper and Complainant had a one-on-one briefing when Complainant returned to the office. Given Kemper's method of setting the agenda for his briefings, he would have briefed Complainant on the same topics on which he had just briefed the other troopers. Therefore, Complainant was briefed on the order from Padilla.

The issue then becomes whether Complainant violated that order. Padilla's e-mail states that troopers are only to fire their weapons in extreme situations. In this matter, Complainant perceived a threat. However, it was not a clearly articulated threat. He was never sure that he saw a gun. Rather, it was some metallic object/weapon, <u>possibly</u> a gun. Complainant's reports continually state that it was only a possibility. He also states that because he knew the driver did not have the keys, that the object was possibly a screwdriver. In fact, that is his initial reaction. Yet by drawing his weapon and firing, Complainant immediately creates a situation in which there is now a very real possibility that someone will be seriously hurt, possibly by Complainant's own weapon. His reaction to the situation was the most aggressive possible – it jumped over all other methods of containing the situation as set forth in CSP's continuum of force.

In addition, Complainant's reaction is counter-intuitive given the perceived threats. If the perceived threat was the driver, shooting the vehicle's tire does not deal with the threat. It still allows the driver to possibly get away (with a gun) or, if stopped, to have a better opportunity to shoot Complainant. If the perceived threat is the vehicle hitting Complainant, shooting the vehicle's tire increases the threat from the vehicle. Now the fishtailing vehicle is no longer accelerating forward and away from Complainant but rather has an increased possibility of hitting Complainant.

Complainant argues that Karavolas was retaliatory and acted arbitrarily and capriciously. It was Karavolas who requested a fact-finding investigation of this matter. Complainant attempts to link this request to Complainant's arrest of Karavolas' son. On the continuum of force, pulling a gun is a more drastic response by a trooper than other alternatives. Firing that weapon immediately escalates the situation. Whenever there is an officer involved, at Westphal's instigation, there is typically an investigation. In this case, Colley of IA conducted the investigation. He interviewed Complainant on December 11, 2001. The possible consequences that flow from an officer drawing and firing his gun against a civilian provides a rational basis for CSP's practice of investigating such incidents.

In this case, there was no credible evidence that Karavolas acted arbitrarily or capriciously or in a retaliatory fashion when he requested a fact-finding investigation. His request was made on January 15, 2002, well <u>after</u> Colley had conducted his interview of Complainant. There was no credible evidence that Karavolas had any influence over that investigation or its outcome. It was Padilla, not Karavolas, who reviewed the investigative reports and other relevant documents. It was Padilla, not Karavolas, who discussed the matter with other upper level management supervisors. And, ultimately, it was Padilla and Padilla alone, who made the decision to terminate Complainant. In addition, there was no credible evidence that, in the year after his son's arrest and prior to this incident, Karavolas displayed any type of animus towards Complainant. In fact, Complainant's performance evaluation, completed within a few months of the arrest of Karavolas' son, was reviewed by Karavolas and Complainant received a "Good" rating.

Complainant also argues that Respondent continued to retaliate against him after Complainant was terminated. As evidence of this Complainant points to the "Needs Improvement" evaluation prepared after he was terminated and Guddat's stopping Complainant. However, the credible evidence does not support either of these allegations. Both of these events occurred <u>after</u> Complainant's termination. There was no showing of a commonly held animus by the three different people (Guddat, Kemper and Karavolas) involved in these two incidents.

Complainant presented evidence of lesser discipline being imposed against other troopers involved in shooting incidences. However, only one of those incidences occurred after the August 2001 shooting incident in Canon City and the ensuing directive by Chief Westphal and the resulting discussions with the troopers. In addition, there was no

evidence of the circumstances surrounding any of those other disciplinary actions. There was no evidence presented as to whether there was an actual sighting of a weapon drawn against those troopers, whether other alternatives on the continuum of force were attempted, the location of the incidents, whether there was a pursuit or the danger imposed by the person being pursued. Because of that lack of evidence the only comparison which may be drawn between those actions and the instant action is that disciplinary action arose out of those shooting incidents. Such a comparison is not meaningful.

As discussed above in Section A, Complainant's reports were not complete. The omitted and/or added details of those reports were material to the events occurring at the stages during which those reports were being completed. The omitted or added details had an impact on the outcome of each of those particular stages. Complainant's omission or addition of those details was a failure to perform competently.

Complainant was terminated for failing to perform competently, pursuant to Board Rule R-6-9, 4 CCR 801. Respondent has met its burden of proof in showing, by preponderance of the evidence, that it did not act arbitrarily or capriciously in imposing a disciplinary action against Complainant.

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

Complainant was terminated from his employment with CSP. Respondent argues that Complainant has demonstrated a lack of judgment in a potentially dangerous situation and that no amount of training can teach him the judgment to respond appropriately in the future. Complainant argues that the disciplinary action is too severe and is unwarranted under the circumstances. In deciding whether to impose discipline an appointing authority must take mitigating and aggravating factors, including a person's disciplinary history, into consideration. Board Rule R-6-6, 4 CCR 801.

Complainant's drawing and firing his weapon could have potentially escalated the situation beyond control if the driver had indeed had a gun. The "what-ifs" that might have ensued as a result of a first shot being fired emphasize the potential gravity of the situation.

As discussed above, there was no credible evidence of like circumstances in which discipline was imposed after Chief Westphal's directive came out and was passed on to the troopers in 2001. Therefore, the discipline imposed is reviewed only in the context of the range of disciplinary actions available to appointing authorities.

Complainant's termination of employments was the most severe sanction that could have been imposed in this personnel action. However, given the circumstances, such a sanction was warranted. While some supervisors in the same circumstances may have imposed a lesser disciplinary action, that is not the litmus test for reviewing an imposed action. The test is not an individualized reaction to the circumstances, an analysis by the reviewing person or body of what they would have done. Rather, it is whether a reasonable person, when reviewing the evidence of this record, would be compelled to reach a different

conclusion. *Paroske v. State Bd. Of Accountancy*, 39 P.3rd 1283 (Colo. 2001).

The credible evidence demonstrates that the appointing authority made his decision with due regard for the circumstances of the situation as well as Complainant's individual circumstances. The discipline imposed was within the range of reasonable alternatives.

D. Attorney fees are not warranted in this action.

In this matter, Respondent requested attorneys 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, Respondent has not met its burden and an award of attorney fees to Respondent is not warranted. Complainant presented rational arguments and competent evidence to support his claims. In addition, there was no evidence that would lead to the conclusion that Complainant pursued his constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

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

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

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

4. Attorney'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 23rd day of September, 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 September, 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:

Andrew J. Carafelli
Bruno, Bruno & Colin, P.C.
1560 Broadway, Suite 1099
Denver, Colorado 80202-5143

and in the interagency mail, to:

John A. Lizza
Assistant Attorney General
Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____
Andrea C. Woods