STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B079**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DALE R. MYERS,

Complainant,

vs.

DEPARTMENT OF PERSONNEL & ADMINISTRATION, DIVISION OF INFORMATION TECHNOLOGIES, NETWORK/COMMUNICATIONS SERVICES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on July 24, August 16, August 22, and September 25, 2006 at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Vincent E. Morscher represented Respondent. Respondent's advisory witness was Paul Nelson, the appointing authority. Complainant appeared and was represented by Thomas J. Arckey, Esq.

MATTER APPEALED

Complainant, Dale R. Myers ("Complainant") appeals his termination by Respondent, Department of Personnel and Administration ("Respondent" or "Department"). Complainant seeks reinstatement, back pay and benefits, attorney fees and costs, and reimbursement for uninsured medical expenses.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

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

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

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

4. Whether attorney fees are warranted;

5. Whether Complainant can recover additional expenses incurred after his termination.

FINDINGS OF FACT

General Background

1. Prior to working for the state, Complainant ran his own electronics business named Myers' Electronics. Myers' Electronics performed a variety of electronics services including working on two-way radios, work involving radio frequencies ("RF"), radio towers and work on sound systems.

2. Complainant was hired by Respondent on September 1, 1999. His initial job title was Telecom/Electronic Specialist II, and he was promoted to Telecom/Electronic Specialist III in 2000. Complainant worked for the state until his employment was terminated on March 16, 2006, and was a certified employee at the time of his dismissal.

3. Complainant worked at the Alamosa, Colorado, and radio shop facility for Respondent. That office consisted of two employees: Complainant and Complainant's direct supervisor, Mr. Arthur Atencio. Mr. Atencio held the position of Telecom/Electronic Specialist IV, and was Complaint's direct supervisor.

4. In October 2002, June 2004 and October 2004 Dale Myers was nominated for the Division of Information Technologies Employee of the Month. In October 2004, Dale Myers was selected as the Division of Information Technologies Employee of the Month.

5. Complainant and Mr. Atencio had a strained relationship in 2005 and 2006. Both men spoke with their supervisors about a number of problems in their working relationship. Mr. Atencio complained that Complainant failed to abide by his instructions and treated him with little or no respect. Complainant complained that Mr. Atencio used offensive language, would avoid work by shifting it to him, had poor technical skills, was doing outside work on the job, and was taking advantage of long lunch and coffee breaks.

6. Kerry Mulford was the regional manager of all of Respondent's radio shops and was Mr. Atencio's direct supervisor. (Prior to Mr. Mulford's hiring as regional manager, Mr. Steve McGuinn held that position.) By the time Mr. Mulford assumed supervision of the Alamosa shop in 2005, the Alamosa shop was experiencing increasing problems with the working relationship between Mr. Atencio and Complainant.

7. Mr. Mulford asked Complainant to let him know when Complainant had concerns about Mr. Atencio's work. Complainant e-mailed Mr. Mulford several times in 2005 to let Mr. Mulford know about such observations as excessively long coffee and lunch breaks and occasions when Mr. Atencio appears to have borrowed state equipment for private use.

8. Ray Nelson was the Maintenance Manager for Communication Services and directly supervised Mr. Mulford. Paul Nelson was the Manager of Network Services, directly supervised Ray Nelson [no relation] and was Complainant's delegated appointing authority.

<u>The 2005 Corrective Actions For Complainant and Mr. Atencio</u>:

9. In early March 2005, Complainant received information about the change in his payroll status from exempt to non-exempt. Complainant was instructed by Mr. Mulford to appear at Buena Vista, CO, to help with a project on March 8, 2005 and not take compensatory time off. Mr. Atencio directed Complainant to take compensatory time off. On Friday, March 4, 2005 Mr. Atencio and Complainant argued over the change in compensatory time policy. The argument ended with Mr. Atencio yelling across the facility yard at Complainant as Complainant walked to his car at the end of his shift. Complainant raised his middle finger toward Mr. Atencio, and kept walking.

10. On Monday, March 8, 2005, Complainant and Mr. Atencio were to drive together to Buena Vista. Mr. Atencio was driving. Complainant got into the truck and put on his headphones. During the two-hour ride to Buena Vista, Mr. Atencio shouted at Complainant about issues such as Complainant ignoring Mr. Atencio.

11. While in the truck, Complainant used his cell phone to call Mr. Mulford. Mr. Mulford was not in his office at the time. When Mr. Mulford returned to his office, however, there was a voice mail recording awaiting him which was a recording of Mr. Atencio shouting angrily and abusively at Complainant.

12. By the time Mr. Atencio and Complainant had reached Bueno Vista, Mr. Mulford had already called ahead and directed another employee to separate Mr. Atencio and Complainant and to drive Complainant back to Alamosa.

13. On March 18, 2005, Complainant and Mr. Atencio received almost identical discipline in the form of formal corrective actions from Paul Nelson, the appointing authority in this matter.

14. As part of the corrective actions against both men, they were to engage in weekly individual supervisory training and mentoring sessions with Mr. Mulford. These sessions, when held, were informal in nature and did not

result in any documentation. Both men were also assigned to complete CSEAP counseling.

Complainant's Performance Review in March 2005:

15. Mr. Mulford rated Complainant for the March 31, 2005 Performance Management Form. Mr. Mulford rated Complainant as a "Needs Improvement" in the core competency of "Communication" because of the problems he had been having communicating with Mr. Atencio. The core competency of "Customer Service/Interpersonal Skills" was rated at "Commendable," and the core competency of "Credibility/Accountability/Job Knowledge" was "Commendable." All of Complainant's performance objectives were rated as "Commendable" or "Proficient".

16. Despite the Commendable or Proficient ratings in all of the Performance Objectives and two of the three Core Competencies, Mulford gave Complainant an overall rating of "Needs Improvement" because Paul Nelson ordered him to, irrespective of the ratings Complainant earned in other areas.

17. Throughout the remainder of 2005, no further disciplinary incidents occurred with either Mr. Atencio or Complainant. No other incidents occurred between the two men that required any counseling or any interaction by Mr. Mulford or other supervisory personnel.

The Monte Vista Digital Trunk Radio ("DTR") project:

18. In the weeks prior to January 19, 2006, Mr. Mulford decided to assign Mr. Atencio to a large digital trunk radio ("DRT") installation project in Monte Vista, Colorado. Mr. Mulford understood that Mr. Atencio's technical skills associated with DTR installation were not well developed, and he viewed this project as a good way for Mr. Atencio to improve his technical skills.

19. Mr. Mulford informed Mr. Atencio that the Monte Vista DTR project was his project to complete.

20. Mr. Atencio spoke with Complainant about whether he wanted to assist with the installation, and Complainant agreed that he would like to be part of the project. On the day before a scheduled in-person meeting between Mr. Mulford and Mr. Atencio on January 19, 2006, Mr. Atencio sent Mr. Mulford an e-mail requesting that Complainant be involved in the project as well.

January 19, 2006 Incident:

21. Mr. Mulford and Mr. Atencio met on the morning of January 19, 2006, in the

Alamosa shop. As part of that meeting, they discussed Mr. Atencio's request to involve Complainant in the Monte Vista DRT installation project.

22. Mr. Mulford decided that having Complainant assist Mr. Atencio would be a good idea. He told Mr. Atencio that Complainant could assist him with the project so long as Mr. Atencio would be doing the lion's share of the work and learning from Complainant.

23. After Mr. Mulford left the Alamosa shop at the conclusion of his meeting with Mr. Atencio, Complainant returned to the shop to meet with Mr. Atencio. Mr. Atencio brought a copy of Complainant's prior corrective action to the table with him for this meeting.

24. Mr. Atencio told Complainant that he had good news: Mr. Mulford had agreed that Complainant should work on the Monte Vista installation project. Mr. Atencio informed Complainant that this project was a way for Complainant to improve his performance rating to commendable. Mr. Atencio also told Complainant that Complainant would be taking the lead on the Monte Vista DTR project and that he, Mr. Atencio, would be doing Complainant's support work.

25. Mr. Atencio intentionally shifted the bulk of the Monte Vista DTR project to Complainant, against Mr. Mulford's explicit instructions. He used the fact that he was in control of Complainant's performance rating and that Complainant had a prior corrective action as leverage to try to obtain Complainant's agreement to do the bulk of the work on the Monte Vista DTR project.

26. Mr. Atencio's presentation of the Monte Vista DTR project upset Complainant. He viewed Mr. Atencio's plan as a way for Mr. Atencio to shift all of the harder technical work on the Monte Vista installation project to him.

27. Complainant told Mr. Atencio that he did not appreciate being used as Mr. Atencio's pawn and did not appreciate Mr. Atencio using his performance rating as a means to manipulate Complainant into doing Mr. Atencio's work.

28. Complainant did not yell at Mr. Atencio, or point or shake his finger at Mr. Atencio, while protesting Mr. Atencio's plan. Complainant understood that he was under a corrective action for how he had previously interacted with Mr. Atencio, and that he could not react angrily to Mr. Atencio.

Investigation of the January 19, 2006, Incident:

29. Mr. Atencio called Mr. Mulford to report the meeting with Complainant. Complainant also called Mr. Mulford to report the meeting.

30. Mr. Ray Nelson asked Mr. Mulford to go to the Alamosa shop and talk with both Mr. Atencio and Complainant about what had occurred on January 19, 2006. Mr. Mulford talked with both men on January 30, 2006, and filed a report with Ray Nelson the next day.

31. During his conversation with Mr. Mulford, Mr. Atencio told Mr. Mulford that Complainant's prior corrective action had said that Complainant would be fired for any outbursts and that Complainant should be fired because Complainant had stood up, pointed a finger at Mr. Atencio, yelled at him, and walked out of the meeting.

32. Complainant informed Mr. Mulford that Mr. Atencio was attempting to shift his work onto Complainant. Complainant denied yelling at Mr. Atencio or pointing or shaking a finger at him.

33. At the conclusion of his investigation, Mr. Mulford concluded that Mr. Atencio was not telling the truth about what happened during the meeting.

Allegations Concerning Complainant's Outside Employment:

34. On March 4 and 5, 2005, Mr. Ray Nelson came to the Alamosa radio shop and held meetings with Complainant and Mr. Atencio. The direct supervisor for the shop was, at the time, Steve McGuinn. Mr. McGuinn was also present for these meetings.

35. The meetings addressed continuing problems in the working relationship between Mr. Atencio and Complainant. The meeting also addressed outside employment policies.

36. None of Complainant's supervisors issued a written directive on the type of outside work that they considered to be permissible or impermissible for Complainant. Complainant was informed orally by his supervisors that work in the two-way radio field could pose a conflict of interest. Paul Nelson intended that the two-way radio work he intended to bar included work on two-way radio tower sites, two-way radio buildings, two-way radio transmitters including pack sets and walkie talkies, two-way mobile radios, pager systems, and light bars. Respondent's working interpretation of which types of work posed conflicts of interest and when prior authorization was necessary was inconsistently applied.

37. Complainant understood from his discussions with his supervisors that he needed to submit notification to gain approval for any two-way radio work that he wished to perform as secondary employment. He also understood that he needed to petition for approval if he intended to change his work hours to accommodate a secondary employment position or otherwise affect his work

for the state. Complainant did not willfully or knowingly violate Respondent's secondary employment policies on obtaining approval for his KWIG work.

KGIW Tower Work:

38. Alamosa radio station KGIW is a private radio company and is not involved in two-way radio communications.

38. In August 2005, Complainant performed work for KGIW. The station's radio tower was struck by lightning and Complainant climbed the tower to inspect it for damage and to change a light bulb. Complainant was paid for this work.

39. Complainant did not seek prior approval from his appointing authority to perform work for KGIW. The first time he notified supervisors of this assignment was during his March 2006 Rule 6-10 meeting after being asked about outside work.

The Monte Vista Ambulance and Fire Protection District Project:

40. In mid-to-late January 2006, Complainant was approached by Sgt. Duane Oakes of the Monte Vista Police Department. Complainant had performed some work for Monte Vista prior to his employment with the state. Sgt. Oakes informed Complainant that the police department and the ambulance and fire district needed to have their VHF antennas removed from an old tower so they could be placed on a new tower. He told Complainant that the city had asked two other private vendors for a quote to remove the antennas, but that the city had not yet received a response.

41. Complainant was asked to submit a written bid for the cost of moving the antennas. Complainant submitted a written bid for $300 to perform the work

42. On Wednesday, February 1, 2006, Arlene Oakes left a message on the Alamosa shop's answering machine for Complainant. Ms. Oakes worked with the Monte Vista Ambulance and Fire Protection District ("District"). The message indicated that the District had voted to approve Complainant to move the city VHF antennas for $300. The message also indicated that the city needed to have the antennae moved more quickly than originally anticipated. Mr. Atencio reported this message via email to Mr. Mulford. Mr. Atencio also intercepted the message, took the tape, and did not inform Complainant of the message.

43. On Friday, February 3, 2006, Complainant learned from Sgt. Oakes that his wife, Arlene, had called Complainant about the work. Complainant also realized that, if he were to get the job done within the time frame requested by the District, he had to perform the work that weekend.

44. Complainant called Mr. Mulford on Friday, February 3, 2006, and requested permission to perform the work, and Mr. Mulford passed the information along to Paul Nelson. Ray Nelson called Complainant and denied approval on Friday, February 3, 2006.

45. Once the work was not approved by Respondent, Complainant contacted Monte Vista and declined the contract to perform the work. Complainant did not perform the work on the Monte Vista tower antennae project, and was not paid or employed by the city for such work.

Board Rule 6-10 Meeting and Disciplinary Action

46. Mr. Paul Nelson issued a written notice dated March 3, 2006, to Complainant of an upcoming Rule 6-10 meeting. The notice stated that Mr. Mulford and Mr. Nelson had completed a preliminary investigation on charges of hostility in the work place and unapproved outside employment.

47. Mr. Paul Nelson held a Rule 6-10 meeting with Complainant on March 9, 2006. Cindy Kong of Respondent's Human Resources department attended the meeting as well.

48. By letter dated March 14, 2006, and delivered March 16, 2006, Mr. Nelson terminated Complainant's employment as of March 16, 2006.

49. Mr. Nelson found that Complainant had provided a quote to the Monte Vista Police Department to perform work at a communications site, and that Complainant did not ask Mr. Atencio or Mr. Mulford to approve the use of State personnel to perform this service. Mr. Nelson also found that Complainant had provided a written quote to perform the work and that the explanation provided by Complainant about intending to obtain approval was inadequate.

50. Mr. Nelson found that Complainant had admitted to performing "tower work" for a local radio station, KGIW, without any prior approval. He concluded that Respondent had deliberately and knowingly ignored Respondent's policy regarding outside employment and acted in an insubordinate manner toward the outside work instructions provided to Complainant by Ray Nelson and himself on that issue.

51. Mr. Nelson further found that Complainant had stood up, pointed his finger, and yelled at Mr. Atencio during a meeting between the two of them on January 19, 2006, and that this action was a violation of Respondent's Violence Prevention and Security policy.

52. Mr. Nelson considered that a decision to terminate Complainant's employment was a difficult decision because Complainant was a highly skilled employee working in a position that has been hard to fill. Mr. Nelson concluded that termination was appropriate because Complainant had committed acts of insubordination, willful misconduct and outbursts of anger. Mr. Nelson considered that the dangers of the position require co-workers to work together and, based on Complainant's insubordination and workplace violence violation, it was a risk to keep him employed. He believed that termination was the only option under the circumstances.

53. Mr. Atencio also had a Rule 6-10 meeting with Mr. Paul Nelson for his role in the January 19, 2006 meeting. Mr. Atencio also received a disciplinary action from Paul Nelson for his actions on January 19, 2006. The disciplinary action demoted Mr. Atencio to a non-supervisory position.

54. At the time of his termination, Complainant's gross monthly pay was $4,796.00. His cost for medical insurance was $297.40 per month, with a state-paid benefit for health insurance of $333.96.

55. After his termination, Complainant and his spouse incurred over $11,000 in medical bills.

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 Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the

action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed only one of the three acts for which he was terminated.

Complainant's employment was terminated because Mr. Paul Nelson, the appointing authority, believed that Complainant had violated the terms of his 2005 Corrective Action by yelling and pointing at Mr. Atencio on January 19, 2006, had violated the rules on outside employment by engaging in employment with the City of Monte Vista, and had violated the secondary employment policy by changing a light bulb at the top of a radio tower without prior approval. Respondent also believed that, by failing to obey the terms of the Corrective Action and the discussions on secondary employment, Complainant had also been insubordinate to his supervisors.

As the Findings of Fact demonstrate, however, only one of the three underlying acts were proven at hearing.

Respondent's primary witness on the issue of Complainant's conduct at the January 19 meeting was Mr. Atencio. He proved to be a less than a credible witness at hearing. The credible testimony and other evidence in this matter supports that Mr. Atencio manipulated the situation to his own advantage, and used the January 19 incident as his way to terminate Complainant's employment by unfairly and untruthfully exaggerating what occurred on that date. The credible testimony supports that Complainant did not take the angry actions described by Mr. Atencio later. There is, accordingly, no factual basis to conclude that Complainant has violated Respondent's Violence Prevention and Security policy on January 19, 2006.

On the issue of secondary employment, Mr. Nelson considered the process of submitting a written bid for the job of moving the antennas for Monte Vista to be a form of employment. As the findings show, though, Monte Vista did not contract with Complainant and did not pay him. The appropriate factual finding on the relationship is that Complainant was not employed on this project. (Mr. Nelson also made a broader argument as to how pre-employment actions would be covered by the secondary employment rules. That broader argument is addressed below in section II.B as a matter of legal interpretation on the scope of the secondary employment rules.)

The only action charged in the termination letter that was supported by a preponderance of the evidence was the undisputed fact that Complainant had been paid to climb the KGIX tower to inspect it and change the light bulb, and that he had performed this work without prior approval from Respondent.

The validity of Respondent's action in terminating Complainant's employment must

be examined in light of the secondary employment issue only, and not as a matter concerning violation of the Violence Prevention and Security policy.

B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

The Board is empowered to reverse Respondent's decision if it is contrary to rule or law. *See* C.R.S. § 24-50-103(6). Additionally, the Board may reverse an appointing authority's decision if that decision is arbitrary or capricious. *Id.* A decision is arbitrary or capricious if the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

1. Respondent's decision that Complainant violated secondary employment rules with the Monte Vista project is contrary to rule:

Respondent has not presented sufficient authority for its position that attempting to obtain a contract for a business opportunity triggered the need to obtain Respondent's prior permission.

Respondent argues that the preparatory work necessary to win a contract or obtain the opportunity to perform secondary work is, in itself, something that requires notification and permission under the application outside employment rules. Under Respondent's view, the fact that Complainant was talking with Monte Vista about performing the job, and then submitted a bid for review, was an action which triggered Complainant's obligation to obtain prior permission. The fact that Complainant did ask for permission after the bid was awarded, and then declined the offer of a contract once Respondent's permission was withheld, was not sufficient to met Respondent's interpretation on the limits on secondary employment.

The outside employment rules, however, are not written so broadly that they support Respondent's argument.

State law prohibits state employees from engaging in any "employment or activity which creates a conflict of interest with his duties as a state employee." C.R.S. §24-50-117. The Board has been given the authority to promulgate rules "on incompatible activities, conflicts of interest, and employment outside the normal course of duties of state employees." *Id.*

The Board, in turn, has enacted a notification procedure which is to be followed by state employees, as well as a substantive standard defining which types of activities or employment are construed as a conflict of interest. It is the notification portion of the requirements that is of concern in this matter.

Board Rule 1-14, 4 CCR 801, allows employees "to engage in outside employment with advance written approval from the appointing authority." The appointing authority is to base his or her approval "on whether the outside employment interferes with the performance of the state job or is inconsistent with the interests of the state, including raising criticism or appearance of a conflict." Board Rule 1-13(B), 4 CCR 801, also requires state employees to give "advance notice" to their appointing authority and take necessary steps to "avoid any direct conflict between the employee's state position and outside employment or other activity."

Neither the state statute nor the Board Rule prevents Complainant's actions in this matter. An employee is expected to avoid engaging in outside employment without prior permission, but the language of the rules as currently written is not so broad as to prevent an employee from searching for, or trying to obtain, secondary employment opportunities without prior approval. Under the current Board rules, the critical question is whether Complainant attempted to obtain approval prior to point when he would "engage in outside employment." In this case, Complainant asked for approval at the point immediately prior to when he was asked to agree to a contract for the work, and he declined the contract opportunity once Respondent's permission was withheld. The timing of Complainant's request for permission was reasonable under the terms of the applicable rules.

Respondent also argues that the Executive Department Code of Ethics also applies in this case and would prohibit Complainant from submitting a bid without prior permission.

Executive Order D001 99, the Executive Department Code of Ethics, provides that employees of an executive department "shall not engage in outside employment unless: (1) the outside employment is disclosed to the Governor or, in the case of an employee, the employee's immediate supervisor; and (2) the outside employment does not interfere with the performance of state duties." Again, this provision applies itself to engaging in outside employment, and does not create a notification requirement for the range of pre-employment activities which may occur as part of searching for opportunities to engage in outside employment.[1]

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1 Respondent has also introduced a copy of Respondent's employee handbook for FY 2006-07 as having a bearing on this question. State statute has given the Board, rather than Respondent, the duty to define outside employment limitations through its rulemaking authority, and the primary question presented by this issue is whether Complainant's actions have violated the Board's rules on outside employment rather than whether the action violated the DPA handbook. It is important to note, however, that the DPA employee handbook does not further Respondent's argument. The handbook includes one paragraph describing the employee's obligations under the conflict of interest rules. These obligations include that an employee must obtain advance written approval from the appointing authority before engaging in outside employment. (The testimony in this case demonstrates that the appointing authority

As a result, Respondent has acted in a manner contrary to rule or law in interpreting the secondary employment rules so broadly so as to prohibit Complainant's contact with Monte Vista.

2. Respondent's consideration of Complainant's actions regarding secondary employment to be insubordination is contrary to law:

The Board (and its predecessor agency) has permitted insubordination charges to be a basis for termination in the past. *See Paris v. Civil Service Commission*, 519 P.2d 323 (Colo. 1974)(affirming a termination of an employee in part on insubordination grounds). *See also State Personnel Board v. Lloyd*, 752 P.2d 559 (Colo. 1988)(noting that the Board had denied a full hearing to an employee who had been terminated on insubordination grounds and other charges, thereby allowing the termination to stand). Neither the Board rules nor the associated case law, however, define the term for purposes of Board action.

The inclusion of insubordination under other similar statutory schemes, however, provides the Board with persuasive definitions and applications of such a concept. Insubordination has long been listed as a specific ground for discipline under the Colorado Teacher Tenure Act, as well as under the current statutory teacher disciplinary process. *See* C.R.S. § 22-63-301. The Teacher Tenure Act described administrative disciplinary procedures which are analogous in many ways to the Board's processes, and the case law interpretation of insubordination does not appear to require that the employee be a teacher. As a result, the case law development of the concept can be reasonably applied to the Board's processes as well.

The Colorado Supreme Court has held that insubordination, as used under the Teacher Tenure Act, "imports a willful or intentional refusal to obey a reasonable order of a lawful supervisor on a particular occasion." *Ware v. Morgan County School District No. RE-3*, 748 P.2d 1295, 1300 (Colo. 1988). *See also School District No. 1, City and County of Denver v. Cornish*, 58 P.3d 1091, 1095(Colo.App. 2002)(applying the *Ware* definition of insubordination from the Teacher Tenure Act to the current statutory requirements in the Colorado Teacher Employment, Compensation, and Dismissal Act). The *Ware* court noted that some courts in other jurisdictions have interpreted the term "insubordination" to require a constant or persistent course of willful defiance. In effectuating the purposes of the Act, however, the *Ware* court held that a school board would have grounds to discipline a teacher for just one act of defiance to a reasonable order. *Id.*

The *Ware* standard requires evidence of intentional conduct on the part of the employee. Insubordination, however, "does not require proof that [the employee]

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was not exclusively using a written system for approval and would accept and provide oral requests and approvals.) As is true for the state statute and the Board's rules, the handbook does not attempt to define pre-employment steps – applying for a job, discussing potential contract terms, submitting a bid, etc. – as a stage before which an employee must petition for approval.

specifically intended to violate the directions of superiors." *Board of Education of West Yuma School District RJ-1 v. Flaming*, 938 P.2d 151, 159 (Colo. 1997)(affirming a finding of insubordination because a teacher acted intentionally, as opposed to accidentally, in hitting or tapping a child in the head with a wooden pointer because the child was not paying attention after being directed not to use physical interventions, and rejecting the argument that the teacher had to be found to have intended to violate the directive given to her).

In this case, Respondent has considered Complainant's actions in failing to ask for, or to obtain, prior approval of two projects as a form of insubordination.

While Respondent is correct that the failure to petition for approval is a violation of the rule, *see* section II.B.3 below, the evidence at hearing demonstrated that Respondent's policies and interpretation on secondary employment were confusing and not consistently applied. There was sufficient confusion on this point, for example, to prevent detailed findings on the specific rules applied and enforced by Respondent. More importantly, there was a significant difference between what the appointing authority intended and what Complainant understood. The lack of any written directives from Respondent also has led to a fair amount of confusion as to what was required under the rules.

Given that insubordination requires a willful or intentional refusal to obey a reasonable order of a supervisor, Complainant's non-willful violation of the secondary employment rules does not amount to insubordination.

3. Respondent's decision that Complainant had violated the secondary employment rules as to the radio tower work is not arbitrary, capricious or contrary to rule or law:

Respondent has correctly applied the notification provision to Complainant's work for KGIW. Complainant was employed to perform that work, and such employment triggers the prior notification requirements under the Board rules. It does not matter under the rule if the secondary employment would pose a conflict of interest or not; the notification process is required so that the appointing authority has a chance to decide that question.

C. The discipline imposed was not within the range of reasonable alternatives

Mr. Paul Nelson made what he considered to be a very difficult decision to terminate Complainant's employment. He decided on termination because he considered Complainant to have committed acts of insubordination, willful misconduct, and outbursts of anger. He took this action even though it was undisputed that Complainant was a highly competent technician, and that the state has had significant problems finding workers with these technical skills.

As the analysis of this case has shown, however, the facts established during the Board's *de novo* hearing process have failed to establish any of those actions. The evidence has established only that Complainant violated the prior notification procedure for

the work he performed in climbing the KGIW radio tower. Additionally, given the confusing and changeable nature of Respondent's application of the secondary employment rules, this violation cannot be reasonably said to have been done willfully or knowingly.

Under such circumstances, termination of employment is not within the reasonable range of alternatives. The credible and persuasive evidence demonstrates that the appointing authority did not pursue his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is not warranted in this case. While much of Respondent's case against Complainant was found to be grounded in an impermissibly broad reading of the applicable rules and an incorrect assessment of the credibility of Respondent's primary witness, these errors were not of such a nature as to represent bad faith by Respondent, a means of harassment by Respondent, or otherwise represent a groundless action by Respondent.

E. Complainant is not entitled to reimbursement of medical expenses on this record.

Complainant argued that, given that his termination was not supported by just cause, he is entitled to reimbursement of $11,000 in medical expenses because he lost his health insurance upon termination, in addition to any other remedy.

When a state employee "is wrongfully terminated, he is entitled to receive an amount of damages which will make him whole." *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987)("*Lanes I*"). The Board's remedy need not be limited to redress of economic damages for the legal injury. *See, e.g., Ehrle v. Department of Administration*, 844 P.2d 1267, 1270(Colo.App. 1992)(finding that the Board could, in an appropriate case, order an appointment to a particular type of position and award back pay and benefits).

State case law has defined at least two requirements that must be met in making an employee whole.

First, the remedy awarded must have a relationship to the legal wrong committed. *See Beardsley v. Colorado State University*, 746 P.2d 1350, 1352 (Colo.App. 1987)(holding

that a public employee is not entitled to an award disproportionate to the "legal wrong that he has sustained"). In the case of state employees before the Board, the legal wrong generally would be an improper change in pay, status, or tenure for an employee. The usual remedy for such a problem is to place the employee as he would have been in his employment relationship if the wrongful action by his employer had not occurred. *See, e.g., Department of Health v. Donahue*, 690 P.2d 243, 249-50 (Colo. 1984)(holding that "[a]ny remedy fashioned in this case should equal, to the extent practicable, the wrong actually sustained by [complainant]" and holding that the appropriate remedy in a case where a predisciplinary meeting was not held "should do no more than place [the complainant] in the same situation she would have occupied if her right to a predisciplinary meeting had not been violated"); *Beardsley*, 746 P.2d at 1352(approving the Board's refusal to place an employee in a "better position than he would have occupied had he not been terminated improperly").

Where a legal injury is of an economic character, legal redress in the form of compensation should be equal to the injury. *Donahue*, 690 P.2d at 250. This compensation may include the assessment of statutory interest under C.R.S. §5-12-102. from the date of the wrongful action. *Rodgers v. Colorado Department of Human Services*, 39 P.3d 1232, 1237 (Colo.App. 2001). *See also Lanes v. State Auditor's Office,* 797 P.2d 764, 767 (Colo.App. 1990)*("Lanes II")*(approving the award of moratory interest based upon the equities of the case).

An award of back pay is to provide an employee with no more and no less than what would have been received if the employment had not included the wrongful act. An employee is to be given the advantage of all of the pay raises which were adopted during the back pay period. In the same way, however, the employee is entitled only to benefits as those benefits existed during that back pay time period, even if that means that there is a reduction in the benefit due to a change occurring during the back pay period. *See Lanes II*, 797 P.2d at 767. A back pay award should also include a deduction for compensation that the employee earned from other sources which, but for the termination, he would not have earned. *See Ehrle*, 844 P.2d at 1272-73; Lanes I, 746 P.2d at 1373. An employee may offset that deduction for other pay with the expenses he incurred in seeking the other employment. *Lanes II*, 797 P.2d at 767.

A related second consideration imposed by the law is that the Board's remedy cannot represent a windfall for the employee. A public employee is not entitled to an award that bestows "an economic windfall vastly disproportionate to the legal wrong sustained." *Donahue*, 690 P.2d at 250; *Rodgers*, 39 P.3d at 1236 (holding that the Board's order requiring a terminated police officer to reimburse the department for a previous payment of back pay and benefits once it was determined on appeal that the officer had not been wrongfully terminated was proper because retaining the money would create a windfall for the officer in the absence of a legal wrong).

Applying these principles to Complainant's request for reimbursement of medical

expenses, the result is that the record does not support that these expenses should be included as a Board remedy. While the record contains basic information about the amount of health expenses incurred and the rate at which Complainant paid (and had paid by the state) for health insurance prior to his termination, the record does not contain sufficient persuasive and competent evidence to demonstrate that payment of these expenses would place Complainant in the same position he would have been if his termination had not occurred, or that the payment of such expenses would not constitute a windfall for Complainant.

As such, Complainant's request for reimbursement of medical expense must be denied.

CONCLUSIONS OF LAW

1. Complainant committed only some of the acts for which he was disciplined.

2. Respondent's action was arbitrary, capricious, or contrary to rule or law, except when Respondent found that Complainant had violated secondary employment rules as to the KGIW tower work.

3. The discipline imposed was not within the range of reasonable alternatives.

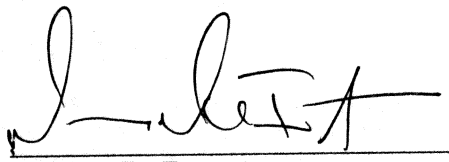
4. Attorney's fees are not warranted.

5. Complainant is not entitled to reimbursement of medical expenses.

ORDER

Respondent's action is **rescinded**. Complainant's is reinstated with full back pay, benefits and statutory interest, as discussed in section II.E. Attorney fees and costs are not awarded.

Dated this 27th day of November, 2006.



Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of Nov., 2006, 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:

Thomas Arckey, Esq.
Arckey & Reha, L.L.C.
26 W. Dry Creek Circle
Suite 800
Littleton, CO 80120

and in the interagency mail, to:

Vincent E. Morscher
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods