

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2006B071

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SCOTT HORAK,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on September 10, 11, and 12, 2007, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Rich Kolecki, the State Hatchery Chief. Complainant appeared and was represented by Patricia Cookson, Attorney at Law.

MATTER APPEALED

Complainant, Scott Horak (Complainant) appeals his four-month disciplinary pay reduction of ten percent by Respondent, Department of Natural Resources, Division of Wildlife (Respondent). Complainant seeks rescission of the disciplinary action, back pay, corresponding benefits, and attorney fees and costs.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
3. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee who works as a Wildlife Technician III for Respondent. At all times relevant to this appeal, Complainant worked at the Poudre Rearing Unit fish hatchery (Poudre hatchery) in the Poudre Canyon. Complainant has worked for Respondent for approximately five years. Complainant has since transferred to a different facility.
2. The Poudre hatchery is a brood facility which is used to maintain stocks of fish. One of the functions of the hatchery is to take eggs from the fish, or spawn them. The eggs are then shipped to other facilities. The spawning season runs from March to July.
3. The Poudre hatchery is managed by Arlene Ganek, who was Complainant's work leader. Ganek has the authority to give Complainant work assignments. The Poudre hatchery maintains three full-time employees, which included Complainant. Complainant also lived at the Poudre hatchery.

MS-222

4. A method of spawning fish is to anesthetize them with an FDA approved chemical, or drug, known as Tricain Methane Sulfonate, Finquel, or MS-222 (hereinafter MS-222). MS-222 comes in a powder form, and is diluted with water. When the fish are placed into water with MS-222 in it, they go to sleep in about two to three minutes. This allows a fish culturist, such as Complainant, to remove the eggs without the fish being stressed or moving. Once the fish are placed back into water without MS-222 in it, they awaken.
5. Individuals who work with MS-222 are advised by its manufacturer to avoid inhaling it or getting it into their eyes. The Material Data Safety Sheet (MSDS) for MS-222 provides that it may be "harmful by inhalation, ingestion or skin absorption," and that it causes eye and skin irritation and is "irritating to mucous membranes and upper respiratory tract."
6. The MSDS further provides that the effects of overexposure to MS-222 are not known and that users of the chemical should wear: 1) chemical resistant gloves; 2) chemical safety goggles; 3) a self-contained breathing apparatus or respirator and; 4) impervious clothing to minimize prolonged use or repeated contact.
7. There are other methods of anesthetizing fish, but none are as effective as MS-222. One such method is to give the fish CO₂. This method works by depriving fish of oxygen, which is stressful to them. There is another chemical known as AQUI-S, which also anesthetizes fish, but it has been taken off the market and is

not FDA approved. Respondent has found that using MS-222 is the gentlest method for spawning fish, and has been using it since at least 1997.

8. The two other brood fish facilities in Colorado also use MS-222, and the non-brood facilities use it intermittently.
9. At the Poudre hatchery, MS-222 is normally kept in a jar, or in sealed vials, in a cabinet in the kitchen/lab area. It is also kept on shelves in the area where the employees change into their boots. Workers also sometimes store vials of MS-222 in their boots.

Complainant's History with MS-222

10. Many people work with MS-222 and report no negative side effects. However, Complainant believes that his exposure to MS-222 has caused him to suffer from many health problems, including headaches, dizziness, shakiness, numbness, sleep disorders, hair loss, anxiety, memory loss, and impairment of cognitive ability. Complainant also has wondered if MS-222 is a mind altering drug. He believes that exposure to MS-222 has hindered his career advancement because he cannot perform well on some tests because of his memory loss. There is one study which documents an individual who had vision problems associated with MS-222, which dissipated after he discontinued exposure to it.
11. In the Spring of 2006, Complainant began experiencing headaches, dizziness and numbness when he would use MS-222. When he reported this to Respondent, Respondent sent him to Concentra, its workers compensation health provider, for an evaluation on April 6, 2006. The doctor at Concentra, Rosalinda Pineriero, issued a report stating that she could not state to a reasonable degree of medical probability that Complainant's headaches were related to MS-222. She released him to his regular duties, and advised that he see his primary care physician to be evaluated to determine the cause of his headaches.
12. On June 15, 2006, Complainant went to see a different doctor, Alan Lichtenberg, who wrote a report opining that Complainant's symptoms were caused by MS-222. Lichtenberg recommended that Complainant avoid working with MS-222.
13. Lichtenberg did not physically examine Complainant because Complainant's symptoms were "pretty much gone" on the day of the office visit. Lichtenberg did review several articles regarding MS-222 and the Materials Safety Data Sheet for MS-222. Complainant provided a copy of Lichtenberg's report to Respondent in June of 2006. Respondent chose to rely on Dr. Pineriero's report as she was the approved workers' compensation doctor.
14. Complainant went to see another doctor in Florida, Scott Van Lue, in June of 2007 (after the disciplinary action which is the subject of this appeal). On July 2,

2007, Van Lue gave the opinion that Complainant had the symptoms and history consistent with hypersensitivity to MS-222. However, Van Lue said that the only definitive testing was beyond the scope of his practice.

15. On at least two occasions, Ganek asked Complainant to check the fish for spawning without the use of gloves because she felt that Complainant squeezed the fish too hard when he used gloves. She made this request at least one time after Complainant told her that exposure to MS-222 affected him physically. Complainant explained that he had developed a feel even with the use of gloves. However, Complainant has spawned fish bare-handed at Ganek's request on some occasions. About five to ten percent of Complainant's work duties include the use of MS-222.
16. Complainant believes that Ganek has increased his exposure to MS-222 since he reported that he had symptoms related to his exposure to it. He also believes that Ganek treated him unfairly in comparison to how she treated other employees. Complainant and Ganek have a history of conflict in their relationship, and Complainant felt like Ganek often mocked him.
17. Throughout Complainant's tenure, Respondent did provide him with gloves and eye protection to use when he worked with MS-222, as well as the necessary protective clothing. Additionally, they provided Complainant with a respirator, which he used only once. Complainant did not like the respirator because it fogged up his glasses.
18. Since the Spring of 2006, Complainant continued to complain to Ganek and others at the Department about symptoms which he related to his exposure to MS-222. Complainant also has concerns about MS-222 contaminating the ground water and food fish released into Colorado's fishing waters. He is concerned that food fish are being released too soon after being exposed to MS-222.

March 25, 2005 Corrective Action

19. On January 21, 2005, Complainant participated in a meeting with Kolecki; David Smeltzer; the supervisor for the Bellvue, Watson and Poudre facilities; and Eric Hughes, the Aquatic Section Chief for the Colorado Division of Wildlife. The meeting was held in response to Complainant's request to discuss his frustrations related to his perceived barriers to career advancement within Division of Wildlife, specifically a promotion to a criminal investigator with a Title 33 Law Enforcement commission.
20. At the beginning of the meeting, Complainant presented a document entitled "Peacemaking Responses," which included a continuum described as the "Slippery Slope." Complainant specifically pointed out murder and suicide as

possible alternatives in the conflict resolution process, and stated that he wanted to work out an acceptable resolution to his issues.

21. Kolecki, Smeltzer, and Hughes all perceived the document, coupled with Complainant's outward expression of frustration, to be an implied threat. They specifically felt threatened by Complainant's implication that the Division of Wildlife needed to work out an acceptable solution to address his issues or the outcome could potentially result in either violence towards others or himself.

22. Hughes considered the Department's workplace violence policy and Complainant's actions and statements in the meeting, and required Complainant to submit to a psychological evaluation to assess his potential risk for violent behavior. The assessment results indicated that Complainant did have a low to moderate risk of being physically violent and a moderate to high risk that he would engage in non-violent, but disruptive behavior in the workplace.

23. Hughes also administered a corrective action to Complainant, which required him to seek counseling with a focus on anger management, stress management, interpersonal problem solving, verbal and non-verbal communication skills, and dealing with frustration. The corrective action further required Complainant to participate in conflict resolution training and to "immediately refrain from interactions with others in which [he] exhibit[ed] verbal or non-verbal behaviors that are intimidating, threatening, or hostile in any way. Prohibited behaviors include but are not limited to the use of threatening language and/or non-verbal actions such as accusatory statements or assignment of blame; presentation of biblical conflict resolution processes, tools or materials; and/or pursuit of your concerns about career advancement outside the administrative processes established to address such concerns (i.e. grievance and appeal processes)."

24. That corrective action remains in Complainant's personnel file.

February 15, 2006 Corrective Action

25. On January 17, 2006, Smeltzer received a letter from Complainant, which was addressed to the "Chain of Command." The letter, which was dated January 26, 2006, made demands related to the selection process for a position, overtime compensation, restoration of annual leave and compensation for work. Smeltzer forwarded the letter to Hughes.

26. Hughes found Complainant's demands to be inappropriate because Complainant failed to use the administrative process to address his concerns, which he had been advised to use in the March 25, 2005 corrective action. Hughes also found the language used by Complainant in the letter was antagonistic, was also in violation of the March 25, 2005 corrective action.

27. On February 15, 2006, Hughes issued a corrective action to Complainant based on Complainant's letter. In that corrective action, Hughes reminded Complainant of his obligations under the March 25, 2005 corrective action. He further advised Complainant, "This corrective action serves as a second and final warning to this type of behavior. You must comply with the March 25 corrective action and this corrective action. Failure to comply may result in a disciplinary action."

28. That corrective action remains in Complainant's personnel file.

December 18, 2006 Corrective Action

29. On November 29, 2006, Complainant attended a pre-disciplinary meeting pursuant to Personnel Board Rule 6-10, with his appointing authority, Gregory Gerlich. Gerlich held the meeting in response to emails Complainant had sent to other Division of Wildlife personnel, which Gerlich considered to be accusatory, in violation of Complainant's previous corrective actions and the Department's workplace violence policy.

30. On December 18, 2006, Gerlich issued a corrective action to Complainant regarding the emails. Gerlich reminded Complainant of his obligations under the previous corrective actions and issued the following corrective actions: 1) Complainant was required to review the Department's policies on email and workplace violence, a copy of which was provided to him, with sections highlighted by Gerlich; 2) Complainant was required to attend training on email use and protocol as soon as the training was arranged; 3) Complainant was told that he should consult with a Human Resources specialist regarding how to administer complaints regarding hiring processes that he felt were unfair and discriminatory; and 4) Complainant should consult the State Personnel Rules regarding dispute resolution.

31. Sometime prior to the issuance of the corrective action, Kim Burgess of the Department's Human Resources Office, asked Ganek to list things that concerned her about working with Complainant because the Department was concerned about safety issues with Complainant. On November 12, 2006, Ganek submitted a four-page email to Burgess with the subject being, "idiosyncrasies of behavior-Horak."

32. The December 18, 2006 corrective action remains in Complainant's personnel file.

Events of February 5, 2007

33. On February 5, 2007, Ganek came to work after being gone for three days. Before she left, she had outlined a list of tasks she wanted Complainant and the other technician to complete.

34. When Ganek came into work, she noticed that some of the tasks she had asked Complainant to complete had not been done, and she was curious as to how Complainant spent his time while she had been gone.
35. When Complainant came into the office around 8:00 a.m., Ganek asked him to check the Hofers (a type of fish) for spawning purposes. Complainant asked if checking the Hofers would require the use of MS-222. When Ganek responded that it would, Complainant told her that he would not do it, and threw down his gloves. Ganek told Complainant that it was his assignment to check the Hofers that morning and that his refusal would constitute insubordination, but did not ask him the basis for his refusal because she just needed to get the work done.
36. Because Ganek was concerned because the tasks had not been completed in her absence, she asked Complainant to document what he had done in her absence, hour-by-hour. Complainant refused to document his time hour-by-hour because that task was not included in his Pay for Performance Plan.
37. Ganek then drafted a blank schedule, which listed every hour from 7:30 a.m. to 4:00 pm. for February 2, 3, and 4, 2007, and asked Complainant to fill it in to account for his time. Complainant again refused. No other employees have been asked to account for their time hour-by-hour.
38. During their exchange, Complainant told Ganek, "We are not spawning fish with MS anymore," or words to that effect. He further told her that the MS-222 was "gone" and that he had removed all of the MS-222 and put it in a locked sealed container.
39. One of the reasons Complainant gathered up the MS-222 and put it in a central location was that he had, at times, found it places where it wasn't supposed to be. For example, he once found an open vial in the seat of a vehicle belonging to the Poudre hatchery. Complainant had also seen open vials of MS-222 near the raceways (the areas where the fish are kept). Complainant was concerned that the MS-222 was not always safely contained. Complainant also wanted to prevent the use of MS-222 at the Poudre hatchery.
40. Ganek asked Complainant in a voice that was slightly raised and reflected anger, "What did you do with the MS?" Complainant responded by telling her that she needed to help him with a project he was doing for CSU that involved a study of MS-222 and its effects on humans. Complainant also told her that they did not need to check the Hofers because it was only February, and they would not be ready for spawning. Complainant thought it would be unnecessary, redundant exposure to MS-222 to check the fish when he thought it was too early to spawn them.

41. Complainant then asked why they were not using the anestheticizer known as Aqui-S. Ganek explained that they needed to run further tests, but until then, and possibly after, they would be using the MS-222.
42. Ganek went to the cabinet where the MS-222 was normally kept in the hatchery's kitchen/lab area, and discovered that it was missing. Complainant continued to talk to Ganek about needing her support for the MS-222 study at CSU. Ganek became frustrated and told Complainant, "I make the decisions about what goes on here on a daily basis. I'm not talking with you about any experiment at CSU." Ganek then told Complainant that she was going to call Kolecki.
43. Ganek called Kolecki and told him that Complainant had not complied with her directive to check the Hofers, and that he told her they were not using MS-222 anymore, that he had removed it, and she did not know where it was. Kolecki then asked Ganek to put Complainant on the phone.
44. Kolecki asked Complainant if he had refused to check the fish and document his time. Complainant responded by saying something about MS-222. Kolecki reminded Complainant that the MS-222 was state property.
45. Kolecki placed Complainant on administrative leave and instructed him to leave the work site in order to diffuse the situation. Kolecki further instructed Complainant to show Ganek where the MS-222 was before he left. Complainant retrieved the MS-222 which was in a tool box in a storage area above all of the cabinets in the lab/kitchen area. The MS-222 was normally kept in one of the cabinets. Complainant then locked the box and handed Ganek a key to it. As he left, Complainant told Ganek, "This is the most dangerous place I have ever worked," or words to that effect. Kolecki reported the situation to Gerlich.
46. Complainant's actions were willful and disruptive to the Department.
47. A few minutes after Complainant left, Ganek drafted a narrative of her encounter with Complainant that morning.

Rule 6-10 Meeting

48. Gerlich, the Chief of Fisheries and Complainant's appointing authority, scheduled a pre-disciplinary meeting pursuant to Board Rule 6-10 (Rule 6-10) with Complainant. The meeting was held on February 23, 2007. Present at the meeting were Gerlich; Jeff Ver Steeg, Assistant Director for Wildlife Programs; and Complainant. Ver Steeg is Gerlich's supervisor. Prior to the meeting, Gerlich read a copy of Ganek's written account of the events of February 5, 2007.
49. At the outset of the meeting, Gerlich told Complainant that they were there to discuss the allegations that: 1) Complainant directly refused an assignment to

check fish; 2) Complainant refused to document his time in the manner requested by Ganek; and 3) Complainant removed the MS-222 from its normal storage place and refused to return it until Kolecki intervened.

50. During the meeting, Complainant stated that he did not check the Hofers. However, he said that he did not refuse to check them, but did refuse to use MS-222, and was not given a chance to explain to Ganek. He further stated that he wanted to show Ganek alternative methods of checking the fish, but she went "ballistic" on him. He stated that he would have checked them, even with MS-222, but was placed on administrative leave.

51. Complainant also admitted that he did not document his time hour-by-hour as requested by Ganek. He expressed that other employees were not required to document their time in that fashion and that employees normally document their time in the hatchery's log book or in Kronos (the state's timekeeping system). Complainant also says he couldn't remember what he had done over the past six days (although Ganek had requested that he only document for the past three days).

52. Complainant admitted to consolidating all of the MS-222 into the tool box and moving it to another location without indicating where it had been relocated. Complainant also admitted to telling Ganek that they did not need to use MS-222 anymore.

53. During the meeting, Complainant expressed several complaints about Ganek and her management style that had existed over the past five years, and that one week out of the month had female hormonal issues and he couldn't even talk to her. Gerlich expressed confusion over these statements because Complainant told him during the November 2006 Rule 6-10 meeting that he had no problems at work.

Complainant's Disciplinary Action

54. After the meeting, Gerlich and Ver Steeg met to decide what action they should take. Gerlich listened to the tape of the Rule 6-10 meeting. He also looked at all of the relevant information, including Complainant's past evaluations and work history.

55. After reviewing all of the relevant information and considering the information provided by Complainant, Gerlich determined that Complainant had a pattern of disruptive behavior. Specifically, he found that Complainant: 1) directly refused to complete an assignment from Ganek to check the trout in the raceways which was a "clear demonstration of insubordination"; 2) refused to document his time in a manner requested by Ganek; and 3) removed the MS-222 from its normal place of storage and refused to return it to Ganek until Kolecki intervened. Gerlich further concluded that Complainant's actions, along with his previous

similar acts, showed "a continued pattern of disruptive behavior which diminishes the effective operation of the Poudre Rearing Unit and the management of the state's aquatic resources."

56. Gerlich also considered the Department's Workplace Violence and Safety Policy which states, in part, "Violent behavior is defined as the infliction of threat or any bodily injury, harmful psychological contact or the destruction or abuse of property. This includes, but is not limited to: threatening or hostile behaviors; jokes or offensive comments which are veiled, conditional, direct, written, or verbal; physical abuse; vandalism; arson; sabotage" Gerlich correctly determined that Complainant's act of hiding the MS-222 supply, and his refusal to tell Ganek where it was, was willful sabotage and a violation of the Workplace Violence and Safety Policy.
57. In making his final decision, Gerlich did not consider Ganek's November 12, 2006 email to Burgess, and he never saw it prior to making his decision.
58. Gerlich imposed a disciplinary action of a ten percent pay reduction for four months, from March 1, 2007, through July 1, 2007. The date of the disciplinary action letter is March 5, 2007. Gerlich showed a draft of the letter to Burgess and Ver Steeg before sending the final copy to Complainant.

March 12, 2007 Email from Kolecki

59. After the Rule 6-10 meeting, and after the disciplinary letter was issued, Ganek listened to the tape of the Rule 6-10 meeting.
60. When Ganek heard the allegations Complainant made about her during the meeting, she felt frustrated, disbelief, hurt, anger, and embarrassment. She sent an email to Kolecki on March 11, 2007, expressing her feelings and stated that she would be willing and happy to respond to everything Complainant said during the meeting.
61. In an effort to comfort Ganek, Kolecki replied to her email on March 12, 2007. In his reply, Kolecki wrote, in part, "As I said when I gave you the tape you must consider the **SOURCE**. NO ONE took anything that Scott [Complainant] said seriously and the fact most of the time I think Scott doesn't know what he is talking about confirms this Please do not think you need to justify anything or try to respond to the statements that Scott made because all of us have just ignored the comments by Scott"
62. Kolecki wrote the statements in the March 12, 2007 email without consulting anyone else. Kolecki does not believe that Complainant is a very credible person, and does not believe that exposure to MS-222 has affected Complainant's health.

63. Complainant timely appealed his disciplinary action.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Complainant was disciplined for refusing to check the Hofers and refusing to document his time as requested by Ganek, which was deemed insubordination. Complainant was also disciplined for removing the MS-222 from its normal storage place and refusing to return it until Kolecki intervened. Gerlich considered that act to be sabotage in violation of the Department's Workplace Violence and Safety Policy. Respondent has proven by a preponderance of the evidence that Complainant did refuse to check the fish and did refuse to document his time. Respondent has further proven by a preponderance of the evidence that Complainant also removed the MS-222 from its normal storage place and did not tell Ganek where it was until after Kolecki instructed him to do so. In fact, Complainant admitted to having committed most of those acts in the pre-disciplinary meeting.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Gerlich did not neglect or refuse to use reasonable care and diligence to gather

all of the relevant information concerning the allegations against Complainant. He reviewed the written narrative from Ganek concerning the events of February 5, 2007. Additionally, he gave Complainant the opportunity to respond to all of the allegations during the Rule 6-10 meeting. Gerlich also reviewed Complainant's prior corrective actions and his evaluations. Finally, Gerlich reviewed the Department's Workplace Violence and Safety Policy.

Gerlich carefully and honestly considered all of the information he had gathered before he made his decision to discipline Complainant. After the Rule 6-10 meeting, Gerlich listened to the tape of the meeting again, and considered all of the information Complainant provided to him during that meeting. Although Kolecki wrote in an email to Ganek that nobody took Complainant seriously and that everyone ignored Complainant, he was not speaking on behalf of Gerlich, nor is there evidence that Kolecki influenced Gerlich's decision. In addition to carefully considering all of Complainant's actions of February 5, 2007, Gerlich considered Complainant's corrective actions and past evaluations before making his decision. The credible evidence demonstrates that Gerlich pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's mitigating circumstances. Board Rule 6-9, 4 CCR 801.

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

The discipline imposed by Respondent was within the range of reasonable alternatives available to it. Complainant stated during the Rule 6-10 meeting (and to Ganek on February 5, 2007) that he did not want to check the fish because he felt it would constitute unnecessary and redundant exposure to MS-222. Whether MS-222 caused Complainant's physical symptoms is unknown, but Complainant honestly believes that it has a significant negative impact on his health. Given that belief, it is understandable that Complainant wanted to avoid the chemical, and had expressed that desire many times to Ganek and others at the Department. He had also shown them Dr. Lichtenberg's report which recommended that he avoid exposure to MS-222. However, Complainant's response to Ganek when she asked him to check the fish was not appropriate. Complainant chose to stay in his position at Poudre hatchery, knowing that some of his duties would expose him to MS-222. Complainant's refusal to check the fish constituted insubordination. Likewise, it was insubordination for Complainant to refuse to document his time for the days Ganek was gone. Because Complainant had not completed many of the tasks assigned to him, it was not unreasonable for Ganek to have Complainant document how he spent his time.

With respect to relocating the MS-222, Complainant stated during the Rule 6-10 meeting that he merely wanted to consolidate the MS-222. While it is true that Complainant consolidated the MS-222, it is also true that he moved it from its regular storage place and stated they were not going to use MS-222 anymore. Complainant would not tell Ganek where the MS-222 was until she got Kolecki on the telephone. Complainant's actions and words indicate that he wanted to prevent the use of MS-222 at the Poudre hatchery. Complainant's action of consolidating and moving the MS-222

disrupted the work place and constituted sabotage of the hatchery's operations in violation of the Department's Workplace Violence and Safety policy.

Complainant's disciplinary action of a four-month ten-percent pay reduction is within the range of reasonable alternatives given his actions of February 5, 2007, and his prior corrective actions.

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, 4 CCR 801. Because Complainant did not prevail, attorney fees are denied.


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 fees are not warranted.

ORDER

Respondent's action is **affirmed**. Attorney fees and costs are not awarded.

Dated this 18th day of October, 2007



Hollyce Fattell
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 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 18 day of October, 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Patricia L. Cookson



and in the interagency mail, to:

Vincent Morscher



Linda Whitaker