

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIMOTHY NAWROCKI,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 30, 2007. The record was closed on that date. Assistant Attorney General Diane Dash represented Respondent. Respondent's advisory witness was Major Hal Butts, appointing authority. Complainant appeared and was represented by Michael T. Lowe, Bruno, Colin, Jewell & Lowe, P.C.

MATTER APPEALED

Complainant, Timothy Nawrocki (Complainant or Nawrocki) appeals his disciplinary demotion and transfer by Respondent, Department of Public Safety, Colorado State Patrol (Respondent, CSP, or the Patrol). Complainant seeks reinstatement to the position of Captain and a rescission of the transfer.

For the reasons set forth below, Respondent's action of demoting Complainant is **affirmed**, and the transfer is **rescinded**

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's actions imposed were arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant commenced employment as a Trooper with the Patrol in 1986.
2. Complainant was steadily promoted up the ranks over the years, and in 1996 he became a Captain.
3. From 1996 through 2004, Complainant commanded the Trinidad office. He resided in Trinidad during this period.
4. In January 2005, as part of a reorganization, Complainant was transferred to the Pueblo office. He assumed command over three Patrol offices, and the number of Troopers and supervisors he commanded doubled. Complainant found the transition to the Pueblo office to be a challenge.
5. Complainant's appointing authority in Pueblo was Major Hal Butts, the District 2 Commander for the Patrol.
6. Major Butts' first evaluation of Complainant was at the "Meets Standards" level. At the meeting to review this evaluation, Complainant made it clear that he disagreed with this rating. Nonetheless, he signed the form to indicate he agreed with it. The conversation between Complainant and Major Butts centered in part around the issue of whether the Major appreciated the work Complainant had put into the reorganization. Major Butts countered with his perception Complainant had not put in the hours necessary for the job.
7. A few weeks after this discussion regarding Complainant's evaluation, Major Butts issued Complainant a memo requesting that he account for time on 20 – 30 dates.
8. Complainant had indeed neglected to submit a leave slip for several days of absence from work.
9. On June 6, 2005, Major Butts issued Complainant a Corrective Action for failing to submit leave slips for five days in which he was absent from the office. Four were annual leave days, each in a different month, and one was a sick leave day.

Complainant's History of Corrective and Disciplinary Actions

10. On August 9, 2002, Complainant received a disciplinary suspension for three days for violating a direct order. The circumstances giving rise to the disciplinary action were the following: At a Captains meeting, Lieutenant Colonel Gary Coe informed those present, including Complainant, of a pending criminal investigation of a Patrol member. (The chain of command in the Patrol consists

of: Chief; Lt. Colonel; Major; Captain; Sergeant Major; Master Sergeant; Sergeant; Corporal; Trooper.) The allegation against the Trooper concerned off-duty conduct resulting in a charge of sexual assault. At the meeting, Coe ordered the Captains to keep this information "inside this room."

11. That evening, Complainant called the Trooper being investigated at home. Complainant's motivation was to provide emotional support for the man, who had been a co-worker in the past. The effect of the call was to further traumatize him.
12. In the August 9, 2002 disciplinary action letter, Lt. Colonel William Wolfe informed Complainant, "Any future violations of instructions and/or the Operations Manual may result in further corrective or disciplinary action." He also prohibited Complainant from teaching ethics in the future to any member of the Patrol without the approval of his regional commander.
13. On March 31, 2003, Complainant received a Corrective Action for a Patrol car accident.
14. On December 13, 2005, Complainant received a disciplinary action of working on three holidays. This disciplinary action was imposed for Complainant's violation of a direct order by using his Patrol car to pick up his children from school and taking them to get haircuts. Complainant's wife was ill, following surgery. Major Butts issued the letter, which included the statement, "You also need to carefully consider your actions as a troop commander to determine if they could be undermining your credibility in your troop."
15. On May 17, 2006, Complainant received a Corrective Action for violating a state statute and Patrol Special Event Permit requirements. Complainant had permitted a company to obtain a special event permit without submitting prior payment and proof of insurance. Major Butts issued the corrective action.
16. It is unusual for Captains in the Patrol to receive multiple corrective and disciplinary actions.

Events Leading to Disciplinary Action

17. During the period of late 2006 and early 2007, Complainant and his administrative assistant, Ms. Lay, had some verbal disagreements that Ms. Lay found distressing. One involved Complainant's directive to Ms. Lay that she disclose her computer password to a co-worker, which she refused to do.
18. Ms. Lay raised her concerns about what she felt was an uncomfortable working environment with other superiors, including Major Butts. He suggested that she and Complainant meet informally to discuss the issues. Someone informed Ms. Lay of her right to file a complaint with the Internal Affairs (IA) office of the Patrol.

19. Ms. Lay opted to file a complaint with IA. Once her complaint was filed, the Chief of the Patrol had discretion as to whether it would be handled by IA or by someone else in the Patrol. Because the complaint involved a commissioned officer (Captain or above), he opted to have IA conduct the investigation.
20. Captain James Colley, the top-ranking official in the IA division, was assigned to investigate Ms. Lay's complaint against Complainant. Colley contacted Major Butts to inform him of the investigation and of his role.
21. On March 15, 2007, Major Butts called Complainant on his cell phone and informed him about the investigation that would be conducted by IA. Major Butts ordered Complainant not to discuss the investigation with anyone.
22. Captain Colley also contacted Complainant on March 15, and informed him of the investigation. He indicated that per the order of the Chief of the Patrol, Complainant was not to discuss the investigation with anyone except himself, Major Butts, and the Lieutenant Colonel.
23. Prior to receiving both calls on March 15, Complainant had been informed in a telephone call from a different administrative assistant that Ms. Lay had complaints against Complainant, and that other Troopers were aware of her complaints. Complainant found it disconcerting that others in the Patrol were aware of Ms. Lay's concerns.
24. On March 15, Captain Colley interviewed Sergeant Brian Lyons concerning his observations and knowledge of a conversation he may have witnessed between Ms. Lay and Complainant. At the completion of that interview, Captain Colley ordered Sergeant Lyons not to discuss the investigation with anyone.
25. Sergeant Lyons was a friend of Complainant at work. Although he was in the same office as Complainant, Lyons did not directly report to Complainant. Complainant often discussed personal matters and workplace issues with Sgt. Lyons; he considered Lyons to be a close confidant at work.
26. Complainant expected the investigation to take approximately a week. Therefore, by the end of March 2007, he was becoming increasingly impatient and uneasy about waiting for the process to end.
27. On March 29, 2007, Complainant entered Sergeant Lyons' office and asked him what he knew about the pending investigation into the complaint filed by Ms. Lay against him. Complainant was unaware that Captain Colley had interviewed Sgt. Lyons as a witness.
28. Sgt. Lyons did not respond to Complainant's question about the investigation. Complainant therefore continued talking. He told Lyons that he had first learned about Ms. Lay's complaints about him from another administrative assistant, and

that other Troopers were also aware of Lay's complaints about him. Complainant stated that someone had told Ms. Lay about her option of contacting IA, but he didn't know whom. Complainant then stated that he felt things were going well in the Troop but apparently he was wrong, and that he thought he had some work to do to get things back on track.

29. When Sgt. Lyons did not respond to Complainant by discussing the investigation with him, Complainant moved on to other subjects.
30. Sgt. Lyons felt that it was Complainant's aim in this conversation to try to learn who had referred Ms. Lay to IA. Lyons also felt that Complainant was simply venting his frustration about the investigation.
31. After this March 29 contact, Sgt. Lyons called Captain Colley to report that Complainant had inquired about the investigation. Sgt. Lyons made this report because he feared he could face disciplinary action for violating the direct order not to discuss the investigation.
32. Captain Colley directed Sgt. Lyons to write up a report of the contact, which he did on April 6, 2007. Sgt. Lyons' memo stated in part,

"Captain Nawrocki asked me if I was aware of or knew anything about an issue going on within the Pueblo Office regarding Julie Lay filing a complaint against him through Internal Affairs. I did not tell Captain Nawrocki I was aware of nor knew about this issue and said nothing further since I had been given a directive from Captain Colley, with Internal Affairs, on March 16, 2007, not to discuss this issue with anyone. Captain Nawrocki went on to say he had found out about this complaint three days after Corporal Jeremy Montano's funeral and had received a telephone call from Administrative Assistant June Torres to tell him about it. According to Captain Nawrocki, June told him about the formal complaint after she had heard about it from several Trinidad Troopers after attending the funeral. Captain Nawrocki also told me Julie had spoken with someone about the issue and had been told to call Internal Affairs but didn't know whom. Captain Nawrocki continued to say he thought things were going good in the Troop but apparently he was wrong and now had some work to do within the Pueblo Office to get things back in order. Captain Nawrocki then stopped discussing this issue and we went back to talking about other personal and professional issues. Based on this conversation, I felt Captain Nawrocki was 'venting' his frustration to me about the issue but most of all was feeling me out to see if I had anything to do with Julie calling Internal Affairs and filing the complaint against him."

33. Captain Colley contacted Major Butts and informed him of Complainant's contact with Sgt. Lyons concerning the pending investigation. The two determined that

Captain Colley would investigate Complainant's apparent violation of the orders from Butts and Colley not to discuss the investigation with anyone.

34. On April 2 or 3, 2007, Complainant drove to Denver for a meeting. He had lunch with his best friend in the Patrol, Captain Sheetz. Complainant and Sheetz are close friends; their families socialize together and the two formerly worked together in the Patrol. Sheetz had previously supervised Ms. Lay. During lunch, Complainant told Sheetz about the pending investigation against him and the complaint by Lay. He asked Sheetz for advice and guidance on how to work effectively with Ms. Lay in the future.
35. Major Butts reviewed Sgt. Lyons' memo about Complainant's March 29 discussion of the investigation. He then invited Complainant to come to his office to discuss Complainant's ongoing concerns about other Troopers being aware of the investigation. In the course of this meeting, Major Butts stated that he had not discussed the investigation with anyone. The Major then asked Complainant if he had discussed the investigation with anyone. Complainant responded no, he had not discussed it with anyone.
36. Major Butts felt he had just been lied to by Complainant. Butts then called Captain Colley and informed him of Complainant's denial of having discussed the investigation with anyone.
37. On April 12, Captain Colley called Complainant to ask him if he had discussed the investigation with anyone other than the investigators. Complainant said he had not, because that was the agreement he had with Major Butts.
38. On April 20, Captain Colley called Complainant again. He first confirmed that Complainant had denied discussing the investigation with anyone else in their previous conversation on April 12. Colley then asked Complainant why he had not disclosed his conversation with Sgt. Lyons about the investigation. Complainant paused on the telephone. He then responded by downplaying the content of that conversation.
39. Captain Colley then confronted Complainant with details of his conversation with Sgt. Lyons, using actual quotations from Sgt. Lyons' April 6 memo. Complainant confirmed the accuracy of Sgt. Lyons' account of the conversation in the April 6 memo. He then stated that his intent had not been to violate the order not to discuss the investigation. He stated that he shouldered the responsibility for the conversation himself, and did not realize that he had put Sgt. Lyons in a bad position.
40. At the end of the April 20 conversation with Complainant, Captain Colley asked if there was anyone else with whom Complainant had discussed the investigation. Complainant responded that there was not.

41. Approximately twenty minutes later, Complainant called Colley back and informed him of his conversation with Captain Sheetz in Denver.
42. Captain Colley wrote a report summarizing his investigation and submitted it to CSP Chief Trostel. Major Butts reviewed the report in detail. He then sent Complainant a notice of pre-disciplinary meeting.

Pre-disciplinary Meeting

43. On May 4, 2007, Complainant attended the pre-disciplinary meeting with Major Butts. Major Butts opened by asking if Complainant had received the personnel regulations governing the meeting. Complainant confirmed he had received and reviewed them, and indicated that he did not wish to have a representative present.
44. Major Butts informed Complainant that the investigation was complete. He then reviewed his March 15 call to Complainant, confirming the following facts: in that March 15 call, Butts had informed Complainant that Ms. Lay had filed a grievance, that IA would be investigating it, that Captain Colley would be getting in touch with Complainant soon, and that Major Butts had ordered Complainant not to discuss the investigation with anyone other than Butts or Colley. Butts also confirmed that Complainant had responded that two days previously he had been informed by another administrative assistant that she and other Troopers were aware of Lay's grievances against him. Complainant had expressed his concern about it being "public knowledge" at the Patrol.
45. Major Butts then reviewed additional facts with Complainant. On April 4 or thereabouts, Complainant had emailed Butts, asking if the investigation was completed and when he could expect a final determination. Complainant had also asked Butts what investigation had been conducted into the leaking of the complaint to other members of the Troop. Butts had followed up by inviting Complainant into his office the next day. On April 5, Major Butts had informed Complainant that Butts had asked Ms. Lay whether she had talked to anyone about it. She replied that she had not. Butts had then asked Complainant if he had discussed it with anyone. Complainant confirmed that he had said no, he had not discussed it with anyone.
46. Complainant confirmed at the meeting that on March 29, he had in fact asked Sgt. Lyons what he knew about a grievance filed by Ms. Lay. He further confirmed that on April 3, he had discussed the grievance issue with Sheetz as well.
47. Major Butts informed Complainant that he had spoken to Sgt. Lyons personally about his March 29 interaction with Complainant, and that Sgt. Lyons had indicated it made him very uncomfortable to be asked what he knew about the pending grievance.

48. Major Butts pointed out that Complainant was able to "remember with clarity things that happened three, five, seven years ago," and only seven days had passed between his conversation with Sgt. Lyons and his meeting with Butts.
49. Complainant responded by talking at length about having no explanation for his failure to recall the conversation with Lyons. He stated, "I honestly did not remember having those conversations when the questions were asked. I don't know why."
50. At the meeting, Complainant also explained how difficult and frustrating it was to wait three weeks for the investigation to be complete, when he knew that many Troopers were aware of it, and when he had to work with the complaining party every day.
51. Major Butts asked Complainant what he discussed with Sheetz. Complainant stated that he had expressed his frustration with not having heard anything for such a long period of time, that it was weighing on him, and that he needed someone to talk to about it.
52. Complainant asked Major Butts how Ms. Lay had first brought the communication problem with Complainant to Butts' attention. Butts stated that she had called him directly, indicating that she had been asked to give her password out to another employee, and asked him what to do. Butts told her that it was never appropriate to give out a password, but that she needed to work it out with Complainant directly first.
53. Major Butts also informed Complainant that it was his intention to have Complainant and Lay sit down and have a talk about any concerns she had. Major Butts said that she must have felt that both Complainant and Butts were not listening to her, or taking her concerns seriously, and that that was the ultimate reason for her filing a grievance with IA. In the course of the meeting, he informed Complainant that after Lay had gone to IA, he called her and said, "I thought we were going to discuss this together, you and I and the Captain [Nawrocki]. And she said 'I just, I felt like I needed to call them. I had that avenue to do it, and I did it.' I told her at that time that Captain Colley would be investigating it, and I ordered her not to discuss it with anyone."
54. Complainant stated, "I guess my frustration is that I'm being focused upon because I'm talking to two friends about my own personal situation, and I didn't lay out the details of why the grievance was filed with Sergeant Lyons, but I'm the one under attack here."
55. Major Butts responded by explaining that he was not under attack. He indicated that he thought it was best for IA to make all of the decisions on how to conduct

the investigation because he was aware that Complainant felt Butts had a vendetta against him.

56. Complainant explained he had no problem with IA conducting the investigation, he simply felt it was unfair for him to be placed under a "gag order" when others weren't and it was already "in the public domain." Butts indicated that everyone involved in the investigation was under the gag order.

57. Butts also stated to Complainant, "I shouldn't have to think that well I'm going to tell you not to do something, and then you're going to turn around and walk out the door and do it. You mentioned an incident that happened in 2002 where a Lt. Col. gave a direct order not to discuss a confidential investigation, and what did you do? You picked up the phone and call the person. My God, what am I supposed to think of that? A Lt. Col. gives you an order not to, not to discuss it. You decide, well you take it upon yourself to make that phone call because he's your friend."

58. Complainant stated that he had his reasons for doing that. Butts responded that there shouldn't be any reasons. He stated, "When you're given an order not to do something, you just obey the order. Especially as a commissioned officer because you give orders, you expect the people under your command to obey those orders, and I can give you rationalizations for violating your orders."

May 4, 2007 Memo

59. After the meeting, Complainant decided to submit additional mitigating information to Major Butts.

60. In his May 4, 2007 memo, Complainant highlighted the following: he had no intent to deceive when asked if he had discussed the investigation with anyone; he has a documented history of truthfulness and honesty; he unilaterally reported the conversation with Captain Sheetz; his conversations with Lyons and Sheetz were "an attempt to vent the high level of stress and did not damage any outside parties"; the investigation had already been discussed by others at the Patrol; the confidentiality directive has not been consistently imposed in similar employee complaints against a commissioned supervisor; and, the investigation was classified as a grievance and hence did not mandate confidentiality under the CSP operations manual.

61. Complainant also asserted in his May 4 memo that the purpose of the confidentiality policy is to protect the accused. Further, he had no idea that Sgt. Lyons had any involvement in the investigation. Had he known, he would have made sure not to include him as a confidant.

The Major's Decision

62. Major Butts supervised four captains, one of whom was Complainant. He often had meetings with his team of captains where they discussed sensitive issues that required confidentiality. Major Butts felt that if there were someone in that room of five people whom he could not trust, he could not do business.
63. Major Butts felt that Complainant had betrayed his trust by violating his direct order not to discuss the investigation, and by lying to him about it. Butts felt he could no longer trust Complainant to serve him and the Patrol in a leadership position at the commissioned officer level, because he could not count on Complainant to follow orders and be truthful.
64. The Major also considered Complainant's unusually high number of corrective actions and his disciplinary action in deciding what action to impose. He considered the fact that captains are expected to ensure compliance with Patrol policies, and that Complainant's pattern of violating policies and orders undercut his ability to set the right example. Most aggravating was the fact that in 2002, in violation of a direct order from Lt. Colonel Coe, Complainant had unilaterally decided to breach the confidentiality imposed at the Captains meeting.
65. Major Butts discussed the situation with Chief Trostel. He also discussed it with the Human Resources director for the Patrol.
66. The Major considered imposing a suspension on Complainant. However, Complainant's history of receiving corrective actions for violating Patrol regulations, and his disciplinary actions for violating a direct order, led him to believe that a suspension would not change Complainant's pattern of behavior.
67. Major Butts considered Complainant's disclosure about his conversation with Captain Sheetz to be mitigation.
68. Major Butts reviewed Complainant's evaluations prior to making a decision. Most of his evaluations were at the "Frequently Exceeds Standards" level. Complainant received a rating of "Meets Standards" for the periods of July 2000 through March 2001, November 2003 through March 2004, and April through December 2005.
69. Major Butts determined that the appropriate disciplinary action was to demote Complainant from Captain to the next position down in the chain of command, Master Sergeant.
70. Major Butts also decided to transfer Complainant out of the Pueblo office. His primary reasons for imposing the transfer were to "take his feelings into consideration" and to remove him from the "rumor mill." The Major felt that providing Complainant with a fresh start, away from those he had previously

supervised, would be in Complainant's best interest. Further, because the Major's District included Colorado Springs, he chose Denver in order to assure that Complainant was beyond Butts' jurisdiction.

71. On May 8, 2007, Major Butts issued the disciplinary action letter to Complainant. The letter reviewed the facts giving rise to the demotion, namely, his "failure to follow orders and tell the truth regarding an Internal Affairs investigation." In addition, the letter concluded that Complainant had violated several General Orders within the Patrol Operations Manual, including:

"Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.

" Members will be truthful and complete in their accounts and reports.

"Members will avoid any conduct that may bring discredit upon, 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.

"Information pertaining to this organization, its operations, members, and the police profession will be communicated and otherwise distributed appropriately both internally and externally through proper channels with due regard for security and confidentiality as appropriate."

72. Complainant still owns his former home in the Trinidad area. When his family moved to Pueblo for the January 2005 reorganization, he was unable to sell the Trinidad home. Complainant bought a new home in Pueblo in 2005; his family resides there and his children go to school there. Complainant's transfer to Denver has resulted in his being away from his family for an additional five hours every day. His commute to Denver results in his inability to assist his wife with many child-rearing responsibilities he previously performed.

73. Major Butts did not consider Complainant's duties to his family, and his absence from his family for five hours every day, when imposing the transfer. Major Butts did not discuss the potential impact of the transfer with Complainant prior to making the decision to transfer him to Denver.

74. Complainant appealed his disciplinary demotion and transfer to the Denver office.

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 perform competently;
- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
- (5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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.

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. In fact, Complainant does not deny having engaged in the conduct for which he was disciplined.

B. The Appointing Authority's action of demoting Complainant 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; 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).

Respondent's decision to demote Complainant was not arbitrary or capricious. Major Butts used reasonable diligence and care to consider all relevant evidence prior to making the decision to demote Complainant. In addition, he seriously considered all mitigating information available to him, including that which was provided by Complainant.

Despite his commissioned officer status, Complainant engaged in a long pattern of violating Patrol regulations. Captains are expected to lead by example. Complainant's repeated violation of Patrol rules and direct orders demonstrated that he did not possess the leadership qualities necessary to serve as a Captain.

In addition, Complainant had received two previous disciplinary actions for violating orders of superiors at the highest levels of the organization. To be disciplined twice for violating direct orders and not modify one's behavior constitutes willful misconduct. Moreover, Complainant's violations of direct orders demonstrate insufficient deference to the Patrol's paramilitary culture: state Troopers' ability and commitment to follow orders is central to the Patrol's ability to function.

Complainant lacked the judgment necessary to understand the adverse effect of his actions on the integrity of the investigation. Internal agency investigations are deemed to be confidential for several reasons. First, when witnesses are prohibited from discussing the events under investigation with each other, it preserves the clarity of their own recollections and avoids the "sharing of stories." Second, when the subject of an investigation is barred from talking to witnesses, it minimizes his or her ability to exert influence over the evidence in his or her favor.

Any breach of confidentiality in the investigation taints the integrity of the fact finding process, because it gives the appearance of attempting to influence the investigation's outcome. Complainant created an appearance of impropriety when he asked Sgt. Lyons what he knew about the pending investigation. As the top commander in the Pueblo office and the subject of the investigation, Complainant's question of Sgt. Lyons placed the entire investigation under a cloud and put Lyons in an untenable position in which his integrity was impliedly compromised. Complainant inappropriately placed his personal needs above his professional duty to the agency.

Lastly, Major Butts concluded that he could no longer trust Complainant to keep confidential matters to himself, and to be honest in all of his dealings with Butts. Under these circumstances, it was appropriate to conclude that Complainant could no longer serve in Butts' inner circle. Major Butts' ultimate decision to remove Complainant from the Captain position was a reasonable one.

C. The Appointing Authority's action of transferring Complainant to Denver was arbitrary, capricious, or contrary to rule or law.

State Personnel Board Rule 6-12(B), 4 CCR 801, states, "If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified." As noted above, Respondent had ample justification for the imposition of the disciplinary demotion in this case. However, the record does not support the imposition of the transfer to Denver.

Major Butts's decision to transfer Complainant out of the Pueblo office was arbitrary and capricious under *Lawley, supra*. Complainant had just moved his family from Trinidad to Pueblo in early 2005. To transfer Complainant one hundred miles from where his family is now settled and his children attend school is an enormous imposition. Complainant is now away from his family for five additional hours every day. Major Butts failed to take any of the personal consequences of the transfer into account, prior to making the decision. Moreover, the transfer had no factual relation to the Major's finding that Complainant had violated a direct order and had been untruthful with him. Lastly, Major Butts imposed the transfer primarily for altruistic purposes, to give Complainant a fresh start in the organization. No reasonable appointing authority would impose a 100-mile transfer for altruistic purposes. *Lawley*. Therefore, the transfer must be rescinded.

D. The demotion was within the range of reasonable alternatives; the transfer was not.

Complainant asserts that demotion was an unduly harsh response, and that the Board should modify the discipline to a lesser sanction such as a suspension. Complainant contends that his disciplinary history at the Patrol is not serious enough to warrant demotion. The evidence contradicts this argument, however. It is extremely unusual for commissioned officers to receive disciplinary action at any level. In the case of Complainant, he received two previous disciplinary actions as a Captain, as well as two corrective actions. Under these circumstances, and in view of the unique importance of trust and confidentiality at the captain level, a demotion was well within the range of reasonable alternatives available to Respondent.

As the discussion above illustrates, the transfer was an unduly harsh response to the actions of Complainant, and was not within the range of reasonable alternatives.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's demotion of Complainant was not arbitrary, capricious, or contrary to rule or law.

3. Respondent's transfer of Complainant was arbitrary and capricious.
4. The demotion was within the range of reasonable alternatives; the transfer was not.

ORDER

Respondent's action of demoting Complainant is **affirmed**. Respondent's transfer of Complainant out of the Pueblo office is **rescinded**.

Dated this 4th day of October, 2007



Mary S. McClatchey
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 4 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:

Michael T. Lowe

[REDACTED]

and in the interagency mail, to:

Diane Marie Dash

[REDACTED]

[REDACTED]

Andrea C. Woods