STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B029**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRANCISCO BUSTAMANTE,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT BOULDER, DIVISION OF FACILITIES MANAGEMENT,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on January 30, 2008, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Senior Associate University Counsel Rebecca Currey represented Respondent. Respondent's advisory witness was John Morris, Director of Facilities Operations and Complainant's Appointing Authority. Complainant appeared and was not represented by counsel. Karla Loaiza acted as the Spanish-English interpreter.

MATTER APPEALED

Complainant, Francisco Bustamante (Complainant), appeals his termination by the Regents of University of Colorado, University of Colorado at Boulder, Division of Facilities Management (Respondent or the University). Complainant seeks rescission of the termination and reinstatement to his position at the University.

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 Complainant's discipline was within the range of reasonable alternatives.

FINDINGS OF FACT

General Background

1. Complainant was a certified employee who worked as a Custodian I at the University. Complainant held that position from 1984 until the date of his termination.

April 13, 1989 Corrective Action

2. On April 13, 1989, Complainant received a corrective action for misusing the University's time and property by using the telephone in a private office to place harassing calls to a co-worker. This behavior was documented by a police report dated March 8, 1989.

3. Complainant's corrective action terms were: 1) when he needed to use the telephone for personal calls during work hours, he would use the telephone in his supervisor's office and with the supervisor's permission; and 2) Complainant would not harass co-workers in any way.

4. The length of Complainant's corrective action was 180 days. Complainant did not grieve that corrective action.

July 18, 1989 Corrective Action

5. On July 18, 1989, Complainant received another corrective action. The basis for that corrective action was Complainant's failure to return to work after two weeks of annual leave, which had depleted all of his annual and personal leave. Complainant called into work stating that he had "car problems." He missed four days of work, and his pay was deducted for those days.

6. The terms of the corrective action were: 1) Complainant was expected to be present and on time for his regularly assigned shift. If he was going to be late, he needed to call in and give the reason for his tardiness and his estimated time of arrival; 2) Complainant was expected to obtain approval prior to taking time off from work, and if sick, to call in no more than one hour after his shift was to begin, and state the reason for his absence and the estimated time he would return to work; and 3) Complainant was expected to maintain an annual/personal leave balance of not less than zero.

7. The length of Complainant's corrective action was forty-five days.

September 5, 2000 Corrective Action

8. Complainant received a corrective action on September 5, 2000. That corrective action was issued after it was found that Complainant engaged in inappropriate behavior of a sexually harassing nature.

9. The terms of Complainant's corrective action, which was indefinite, required him to refrain from "such behavior" in the future and to avoid contact with the person he had harassed, except for contact that was incidental to their work.

10. Complainant did not grieve that corrective action.

January 31, 2002 Corrective Action

11. Complainant received a corrective action on January 31, 2002. Complainant received that corrective action after he sliced a hole in a soda container that one of his coworkers was carrying. Complainant then hit the coworker's arm in an attempt to get the soda to spray onto the coworker.

12. The incident was reported to the University Police Department, who completed a report. An officer from the University Police Department met with Complainant and discussed the legal ramifications of tampering with others' property and the University's policy on work place harassment.

13. The terms of Complainant's corrective action were: 1) Complainant was to adhere to the University's Zero Tolerance Policy; 2) Complainant was to adhere to the University's and the Facilities Management Department's policies on work place harassment; 3) Complainant was never to use a knife near a coworker in a harassing, teasing or threatening manner; 4) Complainant was to represent his work unit in a credible manner; and 5) Complainant was never to tease, harass or threaten coworkers.

14. The corrective action stated that if there was any variance of the terms of the corrective action, it could lead to further corrective or disciplinary action up to and including termination.

15. Complainant did not grieve that corrective action.

Complainant's March 2005 Evaluation

16. In mid-March of 2005, Complainant received an evaluation, which evaluated his work from March 1, 2004 to February 28, 2005. Although Complainant received an overall rating of "Satisfactory" on his evaluation, he received a rating of "Unsatisfactory" in the core competency area of Communication. It was noted in

that area of his evaluation that Complainant "has to learn to use appropriate language and terminology with co-workers and others."

March 2, 2005 Disciplinary Action

17. On March 2, 2005, Complainant received a disciplinary action of a ten-day suspension without pay from March 3, 2005, through March 16, 2005. Complainant received the corrective action for making an obscene gesture (grabbing his crotch area) that was directed towards one of his male coworkers. The coworker, who felt that the gesture was inappropriate and disrespectful, reported the incident to Complainant's supervisor.

18. During a predisciplinary meeting, Complainant admitted to making the gesture and stated that it was the "kind of thing Latino men do." Complainant expressed no remorse for his action, nor did he assure his appointing authority that he would refrain from similar behavior.

19. Complainant's then Appointing Authority, John Bruning, wrote in the Notice of Disciplinary Action, "This pattern of inappropriate and harassing behavior is quite serious and unacceptable, particularly since you have received previous corrective actions." Bruning further wrote, "You are to return to work on Thursday, March 17, 2005 with the expectations that you will refrain from making any obscene gestures or otherwise harassing your coworkers or other members of the campus community. Failure to abide by these expectations could lead to further disciplinary action, up to and including termination of your employment."

20. Complainant did not appeal that disciplinary action.

July 8, 2005 Disciplinary Action

21. Complainant received a disciplinary action of five days leave without pay on July 8, 2005. The basis of the disciplinary action was Complainant sleeping during work hours on June 2, 2005, and taking an extended break. Complainant's Appointing Authority, John Morris, also noted that there had been complaints about Complainant inappropriately looking at women at one of the campus buildings.

22. Complainant did not appeal that disciplinary action.

Complainant's March 2007 Evaluation

23. Complainant received an evaluation in April of 2007. That evaluation covered the time period from October 1, 2006, to March 31, 2007.

24. Although Complainant received an overall "Satisfactory" evaluation, in the area of "Interpersonal Relations" Complainant received one mark of "Unsatisfactory."

The circled paragraph for that "Unsatisfactory" mark provides "Lacks respect for others. Discourages a positive work environment."

Events of September 7, 2007

25. On or about September 7, 2007, employees in Complainant's work unit were asked to complete a self-evaluation of the cleanliness of the areas assigned to them.

26. One of Complainant's coworkers, Aurelia Saenz, completed a self-evaluation. Saenz's supervisor told her that she had filled out the form incorrectly, and asked her to do another one, which she did. In one of the self-evaluations, Saenz evaluated the cleanliness of some windows cleaned by Complainant.

27. Later that day, Saenz was in the break room with another coworker, Scott Myers. Complainant came into the break room, and was very upset with Saenz about the way she had completed the self-evaluation form because it indicated that the windows he had cleaned were dirty. Complainant has no supervisory authority over Saenz.

28. Complainant was very aggressive and raised his voice while speaking with Saenz. At one point, Complainant told Saenz that she was meddling into things that were none of her business. Saenz was becoming very nervous, to the point that she couldn't even hear what Complainant was saying. In Spanish, Complainant said, "I am going to get you. Not now, but later," or words to that effect. Saenz told Complainant three times to calm down. When he didn't, she suggested that they go talk to their supervisor, and Complainant agreed.

29. The supervisor was not in her office, but the lead custodian, Maria Arroyo, who was in charge that day, was there.

30. When Saenz and Complainant came to Arroyo's office, Saenz was very upset, and close to crying. She told Arroyo that she needed to talk to Complainant because he was so upset. Arroyo said that the self-evaluation form was "no big deal" and they could just do a different one. Arroyo also told Complainant not to tell Saenz what to do.

31. The following workday, September 10, 2007, Arroyo met with the supervisor, Chanhome Keovilay, to tell her about the incident between Complainant and Saenz on September 7, 2007.

32. The supervisor met with Complainant, Saenz and Arroyo. She then wrote a Documentation of Verbal Warning to Complainant instructing him not to talk to Saenz or get near her. He was further instructed that if he needed to talk to Saenz about work, he was to let the lead worker or supervisor know before contacting her.

Rule 6-10 Meeting and Investigation

33. The incident was also reported to Tara Weachter, the Environmental Services Manager. Weachter then reported the incident to the Director of Facilities Management, John Morris, who is Complainant's Appointing Authority. Weachter requested Morris to hold a meeting with Complainant pursuant to Board Rule 6-10.

34. Morris reviewed Complainant's personnel file, and issued a notice for a Rule 6-10 meeting, which was held on September 26, 2007. During the meeting, Complainant denied making any intimidating comments to Saenz, and said he was merely trying to explain to Saenz that she was not expected to rate the cleanliness of an area that was assigned to someone else.

35. After meeting with Complainant, Morris met with Saenz, Scott Myers, and Arroyo. After meeting with those individuals, and reviewing Complainant's personnel file, Morris determined that Complainant was confrontational with Saenz and made a threatening comment to her.

36. Morris determined that Complainant's behavior during his interaction with Saenz violated University policies, Departmental Policy 1.22, as well as some of Complainant's past corrective and disciplinary actions. Morris also determined that Complainant failed to perform competently, had engaged in willful misconduct, and/or willfully failed to perform.

Disciplinary Termination

37. After considering all of the information he had gathered, including Complainant's statements during the Rule 6-10 meeting and Complainant's prior disciplinary and corrective actions, Morris made the decision to terminate Complainant.

38. Morris provided Complainant with a Notification of Termination Due to Disciplinary Action on October 4, 2007.

39. Complainant timely appealed the 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 terminated for being loud and intimidating in a conversation he had with a coworker, Aurelia Saenz, and for making an unacceptable comment to Saenz. Respondent has proven by a preponderance of the evidence that Complainant was loud and intimidating during his conversation with Saenz, and that he made an unacceptable comment to that her. Complainant's comment and his actions were a threat to Saenz, which is inappropriate. Saenz was so shaken by Complainant's behavior that she sought the help of the lead custodian. Saenz's level of distress was obvious to the lead custodian who noticed that Saenz was on the verge of crying following her encounter with Complainant.

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).

Morris did not neglect or refuse to use reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant. He held a Rule 6-10 meeting with Complainant, giving Complainant an opportunity to respond to the allegations against him. In addition, he interviewed Saenz and another worker who witnessed at least a portion of the incident. He also interviewed the lead custodian who spoke with Complainant and Saenz immediately after their confrontation in the break room. Morris reviewed Complainant's personnel file, which contained his prior disciplinary and corrective actions. Because the April 13, 1989 corrective action had a 180 day limit and the July 18, 1989 corrective action had a 45 day limit, Morris could not consider them in taking a personnel action against Complainant. *See* Board Rule 6-11.

Even without considering those corrective actions, at least two of Complainant's prior corrective actions resulted from his inappropriate behavior towards coworkers. One of his disciplinary actions was a result of Complainant's inappropriate behavior towards a coworker. Complainant's personnel file also contained an evaluation, where

Complainant was rated as "Unsatisfactory" in the areas of Communication, and it was noted that Complainant had "to learn to use appropriate language and terminology with co-workers and others." In another evaluation contained in Complainant's personnel file, Complainant received an "Unsatisfactory" rating in the area of Interpersonal Relations, and it was noted that Complainant lacked respect for others and discouraged a positive work environment. Morris also reviewed the Department's policies and the State Personnel Board Rules.

Morris carefully and honestly considered all of the information he had gathered before he made his decision to terminate Complainant. In addition to carefully considering all of Complainant's actions of September 7, 2007, Morris considered Complainant's corrective actions and past evaluations before making his decision. The credible evidence demonstrates that Morris pursued his decision thoughtfully and with due regard for the circumstances of the situation. Board Rule 6-9, 4 CCR 801.

In the Notice of Disciplinary Action, Morris wrote that Complainant violated Department Policy 1.22. Department Policy 1.22 was not introduced as an exhibit, and the Notice of Disciplinary Action does not provide the language of that Policy. However, it is sufficient that Complainant violated generally accepted of standards of performance. *Bishop v. Department of Institutions, Division of Youth Services*, 831 P.2d 506 (Colo. App.1992). Morris reasonably determined that Complainant's repeated acts of inappropriate interactions with coworkers constituted "failure to perform competently" and that Complainant had engaged in willful misconduct, and/or willfully failed to perform. Accordingly, pursuant to Board Rule 6-12, Complainant could be properly disciplined.

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 had established a documented pattern of having inappropriate interactions with his coworkers. He had been given several opportunities over the years to correct his inappropriate behaviors, but did not. Because Respondent had repeatedly warned Complainant about his behavior, and given him ample opportunity to correct his behavior and he failed to do so, it was not unreasonable to terminate him. This is especially true given the threatening nature of Complainant's words towards Saenz.

D. Respondent did not discriminate against Complainant on the basis of race, creed or color.

Complainant alleged on his Appeal Form that Respondent discriminated against him on the bases of "Race/Creed/Color" and "Employment Favoritism." Complainant put forth no evidence on the issues of race, creed or color discrimination. Accordingly, that issue is considered abandoned. Complainant did testify that there was employee favoritism, but did not testify, or produce evidence, that it was based on "disability, race, creed, color, sex, sexual orientation, religion age, national origin, or ancestry." *See*

Section 24-34-402, C.R.S. (2007).

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.

ORDER

Respondent's action is **affirmed.**

Dated this 27th day of February, 2008

Hollyce Farrell
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 27 day of Feb., 2008, 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:

Francisco Bustamante
[redacted]

Rebecca Currey
[redacted]

[redacted]

Andrea C. Woods