STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B012**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ZELDRA BRYANT,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO DENVER, SCHOOL OF MEDICINE,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on July 27, 2009, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on August 26, 2009, by written order after submission of the final written brief by Respondent. Special Assistant Attorney General and Senior Associate University Counsel Rhonda McKinnis Thornton and Katie Goodwin, Research Associate Attorney, represented Respondent. Respondent's advisory witness was Robert Feinstein, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Zeldra Bryant ("Complainant") appeals her termination by Respondent, University of Colorado Denver, School of Medicine ("Respondent" or "University") as arbitrary, capricious or contrary to rule or law. Complainant also appeals her termination as a form of unlawful discrimination on the basis of race. Complainant seeks reinstatement, back pay and benefits, and attorney fees.

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

ISSUES

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

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

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

available to the appointing authority;

4. Whether attorney fees are to be awarded.

FINDINGS OF FACT

General Background

1. In March of 2007, Complainant was employed by Respondent in the Education Development and Research ("ED&R") department as a full- time Administrative Assistant III. Complainant's working title in ED&R was that of Administrative Evaluation Support. Complainant was certified to her Administrative Assistant III position. Complainant's racial heritage is both African-American and Native American.

2. Complainant's supervisor in ED&R was Dr. Carol Hodgson, Associate Dean of Educational Research and Development for the School of Medicine. Complainant performed clerical and administrative tasks to assist Dr. Hodgson, such as assembling materials for audits of Respondent's medical school educational offerings and placement of students.

3. During 2007, Dr. Hodgson assigned another professional in her office, Dr. Guiton, to provide Complainant with tasks and with supervision. Complainant and Dr. Guiton had significant difficulties working together, and the arrangement was eventually ended by Dr. Hodgson.

4. Prior to her March 2007 acceptance of a position with ED&R, Complainant's annual reviews show that Complainant's work was well-regarded. Complainant's performance reviews from 2000 through 2007 show that her work was rated as at least fully competent or satisfactory, with a number of specific areas rated as above standard or outstanding.

5. In late November or early December of 2007, Complainant filed a grievance with her supervisory chain concerning a corrective action that had been issued to her. Complainant engaged in discussions with her appointing authority, Dr. Robert Feinstein, in an attempt to resolve the grievance issues. Dr. Feinstein and Complainant reached an oral agreement in which Dr. Feinstein agreed not to place the corrective action in Complainant's file in exchange for Complainant's agreement that she would look for another position and would leave her position by June of 2008. After she filed the grievance, Complainant felt that her workload was being unfairly increased by Dr. Hodgson and that she was not being given sufficient time or information to complete her projects.

6. Complainant's position's duties were modified, and a new position of evaluation specialist opened for application, in late spring of 2008. Complainant applied for the newly designed position. She found out when the successful applicant was introduced to the staff on June 2, 2008, that she had been found not to have qualified for the revised position. Complainant was told that her application did not document that she had at least

four years of experience and knowledge of a specific database computer program, New Innovations, as required by the minimum qualifications for the revised position.

7. In June of 2008, Dr. Hodgson was unsatisfied with the way that Complainant was performing some of her tasks. Dr. Hodgson made inquiries of Greg Rowe in Respondent's Human Resources department as to how to address the deficiencies she was observing. Dr. Hodgson received advice that she should document the issues in a Letter of Instruction to Complainant.

8. In June of 2008, Complainant was experiencing pain and discomfort in her wrist and neck, and she decided to pursue an ergonomic evaluation of her work station. She used the worker's compensation system for a medical visit to Dr. Eric Tentori on June 19, 2008. Complainant reported to Dr. Tentori that the pain was so severe that she was ready to snap, and that comment was recorded on Dr. Tentori's evaluation form that Complainant later submitted to Dr. Hodgson. Dr. Tentori diagnosed Complainant with cervical and trapezious muscle strains, and bilateral wrist tendonitis. Dr. Tentori recommended that Complainant work on repetitive tasks for only 45 minutes at a time and have a 15 minute breaks on such tasks.

9. On June 20, 2008, Dr. Hodgson and Complainant met in Dr. Hodgson's office. Dr. Hodgson presented Complainant with a Letter of Instruction dated June 19, 2008. In the Letter of Instruction, Dr. Hodgson told Complainant that she had been taking too much personal time during the work day in the previous few weeks, that an assignment had been completed in the wrong format, and that Complainant had not contacted a particular person to document a meeting for Dr. Hodgson. Complainant provided Dr. Hodgson with the recommendation by Dr. Tentori concerning Complainant's work on repetitive tasks. Dr. Hodgson asked Complainant to clarify the work restrictions.

10. The meeting on June 20, 2008, between Complainant and Dr. Hodgson ended after approximately 15 minutes when Complainant left the meeting after telling Dr. Hodgson that she was not going to let Dr. Hodgson play with her mind. Complainant did not take her copy of the Letter of Instruction with her when she left Dr. Hodgson's office.

11. Complainant then left work and went back to Dr. Tentori's office, even though she did not have an appointment scheduled with him. Dr. Tentori saw Complainant as a walk-in patient.

12. Dr. Tentori noted that Complainant was agitated and tearful. Complainant explained that she needed clarification of her work restrictions. She also described her working relationship with Dr. Hodgson as being tense. Complainant told Dr. Tentori that no one should be forced to work in the conditions she was facing with Dr. Hodgson.

13. Complainant then told Dr. Tentori that she had to leave Dr. Hodgson's presence because she felt she had the potential to hurt Dr. Hodgson. Complainant told Dr. Tentori that she might hurt Dr. Hodgson and other unnamed individuals at work if they continued to

treat her in the manner that they had. Complainant additionally told Dr. Tentori that she felt like she might harm Dr. Hodgson or others if she was forced to return to work.

14. Dr. Tentori had Complainant rest and wait in a separate room, and he checked on Complainant intermittently for the next hour. After about an hour, Dr. Tentori noted that Complainant had calmed down but still seemed to be enraged about how she was being treated at work. Dr. Tentori asked Complainant is she wanted to take back what she had said about hurting Dr. Hodgson or others, and Complainant declined to do so. Dr. Tentori pressed Complainant for details of any plans she might have to harm others, and Complainant told Dr. Tentori that she had no specific plans and that it was a passing idea. Dr. Tentori also asked Complainant about thoughts of suicide, and Complainant denied any current specific ideas concerning suicide. Dr. Tentori made the decision that Complainant was safe to be released from the clinic and he recommended that she not return to work. Complainant went to her home after she left the doctor's office.

15. Dr. Tentori contacted Dr. Hodgson because he thought Complainant's statements required him to alert Dr. Hodgson and others of the threat that had been made. Dr. Tentori also spoke with Respondent's risk management section later in the day on June 20, 2008, concerning Complainant's statements.

16. When Dr. Hodgson heard what Dr. Tentori's report, she was frightened by the information reported to her. Dr. Hodgson sent her staff home early on June 20, 2008, and she also left the office to work at home. Dr. Hodgson also asked for the locks to be changed in the office. It was a reasonable reaction by Dr. Hodgson to be frightened by the report that Complainant was so angry that she had thought about hurting her or others in the office.

Respondent's Anti-Violence Policy

17. Respondent has a Campus Administrative Policy which proscribes violent or threatening behavior and provides management with instructions on how to respond to such behavior on campus.

18. The Anti-Violence Policy is directed toward maintaining a campus "free of intimidating, threatening, or violent behavior, including but not limited to, verbal and/or physical aggression, attack, threats, harassment, intimidation, or other disruptive behavior in any form or by any media, which causes or could cause a reasonable person to fear physical harm by an individual(s) or group(s) against any person(s) and/or property." The policy provides examples of prohibited conduct, including "engaging in intimidating, threatening, or hostile statements or actions that unreasonably disrupts the work or learning environment, causes undue emotional distress to another, or creates a reasonable fear of injury to a person."

19. Respondent's Anti-Violence Policy warns students and employees that, should they commit or threaten to commit prohibited behavior, they can be dismissed or expelled.

20. The policy also requires anyone witnessing or receiving a report of prohibited behavior to immediately notify one of the authorities listed in the policy statement. The policy provides that any supervisor who fails to make such a report shall be subject to corrective or disciplinary action. The policy further provides that all reports of threatened, potential, or actual violent behavior or possession, display or use of any weapon are to be investigated and that, if verified, the conduct is to be confronted.

Respondent's Actions Upon Learning of Dr. Tentori's Information

21. In the afternoon of June 20, 2008, Greg Rowe of Respondent's Human Resources section learned of Complainant's statements to Dr. Tentori. He decided that Complainant should be barred from the campus until more was known. Mr. Rowe authorized the deactivation of Complainant's University access card.

22. On June 20, 2008, Complainant's appointing authority, Dr. Robert Feinstein, also learned of the issue from Dr. Hodgson and others. Dr. Feinstein is the Senior Associate Dean of Education, and the direct supervisor of Dr. Hodgson.

23. Dr. Feinstein authorized a search of Complainant's office for weapons. No weapons were found in Complainant's workspace by Respondent's police department. Dr. Feinstein also authorized the issuance of a written order barring Complainant from the campus. Dr. Feinstein's plan was to not permit Complainant back on campus until there had been a psychological exam completed.

24. Dr. Feinstein also called Complainant at home during the afternoon and early evening and left her a voice mail. Dr. Feinstein explained in the voice mail that he was checking on how she was, that she needed to call him, and that she would not be able to return to work until after several steps had been taken.

25. An officer from Respondent's police department also arrived at Complainant's home in the afternoon of June 20, 2009, to serve her with a written notice barring her form campus. The notice stated that the conduct or violation prompting the barring notice had been that "Bryant has made some threats towards a particular person, stating I am going to hurt her. Bryant was given an opportunity to take back some statements about this particular person & she refused. "

26. Complainant next communicated with Dr. Feinstein by e-mail on Monday, June 23, 2008. In her e-mail, Complainant noted that she had received a voice mail from Dr. Feinstein on June 20, 2008, and provided a description of the message left for her. The e-mail acknowledged that she had been served with a barring order and provided the content of the order. Complainant's e-mail noted that Dr. Feinstein had called her and not left a voice mail message later that day. Complainant also stated that she had received a phone call telling her that Dr. Feinstein had called "a special meeting to inform my co-workers that I was a threat and that I would not be returning to campus."

27. Complainant concluded her e-mail to Dr. Feinstein with this conclusion statement:

> As a state employee of 9.5 years I am surprised in the manner in which decision were made. I believe that these series of decisions, albeit inevitable due to your organization's priority and needs, could have been made in a more professional manner. As a result of these decisions, I am [not] comfortable speaking with you or any one else of your organization without a representative being present. For years I have been a proud member of AFSCME. Please contact my AFSCME representative at 303-355-6504.

28. By letter dated June 23, 2008, Dr. Feinstein placed Complainant on paid administrative leave pending the outcome of an investigation into her comments.

29. Sam John, Respondent's Director of Training and Employee Relations, coordinated an investigation into Complainant's actions and whether there was sufficient evidence of an anti-violence policy violation to be referred to Dr. Feinstein for possible disciplinary action. The investigation was conducted by Greg Rowe. It included a phone conference interview with Dr. Tentori concerning his observations of Complainant's behavior on June 20, 2008. This phone conference was attended by Dr. Feinstein and others. Mr. John referred the matter to Dr. Feinstein for possible disciplinary action.

Board Rule 6-10 Meeting and Disciplinary Action

30. Dr. Feinstein issued a letter to Complainant dated July 2, 2008, in which he announced a Rule 6-10 meeting to discuss "comments you made on Friday, June 20, 2008, [referring to] harming Carol Hodgson, PhD, your supervisor and other unspecified individuals (at work)."

31. The Rule 6-10 meeting was held on July 15, 2008. Complainant attended with counsel, Jim Abrams. Dr. Feinstein attended with Respondent's counsel, Rhonda Thornton.

32. Complainant maintained during the Rule 6-10 meeting, and in written comments that she filed with Dr. Feinstein after the meeting, that she had not threatened anyone and that this action had been taken in retaliation for the grievance that she had pursued in the beginning of 2008.

33. Dr. Feinstein asked Complainant during the Rule 6-10 meeting how she intended to repair her working relationships. Complainant seemed to be surprised that any repair would be needed and presented no plan to address the disruption and fear that her statements had caused.

34. After considering the results of Respondent's investigation and the information

provided at the Rule 6-10 meeting, and after review of Complainant's file, Dr. Feinstein concluded that Complainant's denials that she had issued a threat to Dr. Hodgson or others were not credible and that Dr. Tentori's statements about Complainant's comments constituted a credible report.

35. Dr. Feinstein also considered the nature of Complainant's comments to constitute a violation of Respondent's Anti-Violence Policy because the comments constituted threats of violence that reasonably caused fear and a disruption of the work site. Dr. Feinstein additionally found that Complainant's work performance had deteriorated over the previous month.

36. By letter dated July 24, 2008, Dr. Feinstein terminated Complainant's employment with Respondent effective that day, and imposed a permanent exclusion from the campus.

37. Complainant filed a timely appeal of her termination with the Board.

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; C.R.S. §§ 24-50-101, *et seq.*; *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

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

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. *Kinchen*, 886 P.2d at 708. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

Complainant has also raised a claim of unlawful discrimination on the basis of race. The burden of persuasion of such a claim remains on the Complainant. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1247-48 (Colo. 2001).

II. HEARING ISSUES

A. Respondent has proven that Complainant made threats of physical harm against her supervisor, Dr. Hodgson, but not that Complainant's work performance was deficient.

Respondent raised two grounds in support of termination of Complainant's employment: violation of the workplace violence policy and work performance issues.

The majority of facts involved in the workplace violence issue were not disputed at hearing.

Complainant's primary contention at hearing was that she had never threatened her supervisor, and that the allegation that she had done so was issued in retaliation for her prior grievance filings.

The persuasive and credible evidence at hearing, however, was that Complainant had been under significant stress prior to the June 20, 2008, and felt that Dr. Hodgson was treating her very unfairly; that Dr. Hodgson's attempt to give Complainant a corrective action on June 20, 2008, angered Complainant; that at her medical visit on June 20, 2008, Complainant made the statements attributed to her during that visit; and that Complainant was contacted by Respondent's police department shortly after her medical visit and accepted a barring order without immediate protest that she had been misunderstood. Complainant's e-mail to Dr. Feinstein on June 23, 2008, is also particularly revealing as to Complainant's state of mind at the time. The June 23, 2008 e-mail was Complainant's first contact with Dr. Feinstein after learning that she was being accused of making threats. Complainant's e-mail clearly records that Complainant understands that she was being accused of being a danger. Rather than protest these assertions, however, Complainant merely argues that Dr. Feinstein's attempts to call her on June 20, 2008, were not as professional as they should have been. This was not the response of someone who was confused about why anyone would accuse her of making threats. It was only significantly after June 20, 2008, that Complainant would insist that she had never made the threatening statements attributed to her and that she was confused by the allegations.

Complainant has also not presented any reason to believe that Dr. Tentori's testimony, presented through his preservation deposition, was not a credible statement. Dr. Tentori appears to have had a very limited history with Complainant, and to be completely uninvolved with Complainant's issues with her work. Additionally, the scenario described by Dr. Tentori is not a matter of a passing comment by Complainant that would be likely to be misconstrued. The evidence at hearing supported that Dr. Tentori had given Complainant about an hour to calm down after the initial statements, and that, even after that break in time, Complainant was still angry enough to maintain her original position.

The credible evidence of Complainant's statements made to an independent

medical professional, the undisputed evidence of Complainant's behavior directly after the allegations of her threats, and Complainant's demeanor and testimony at hearing constitute persuasive evidence that she did indeed make the threats against Dr. Hodgson (and unspecified others at work) that were attributed to her. Respondent has also persuasively established that such threats resulted in a reasonable fear by Dr. Hodgson that Complainant intended to injure her, and that the statements disrupted the workplace. As such, Respondent has demonstrated that the threats constituted violations of Respondent's anti-violence policy.

Respondent's evidence at hearing of performance issues, however, did little to document problems that would violate the standards of efficient service or competence. It was clear from the parties' testimony that Complainant and Dr. Hodgson were not working well on Complainant's projects, and that Dr. Hodgson thought that Complainant was making mistakes. Sufficient credible evidence was not presented at hearing, however, to demonstrate by a preponderance of the evidence that Complainant's work performance was deficient or a proper basis for disciplinary action.

As a result, Respondent's disciplinary action must be evaluated in light of only the threats and without reference to the alleged performance issues.

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

1. Respondent's disciplinary action did not violate CADA:

In order to prove intentional discrimination under the Colorado Anti-Discrimination Act ("CADA"), C.R.S. §24-34-402, a complainant must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The factors of a *prima facie* case of intentional discrimination are: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the position; (3) that the complainant suffered an adverse employment decision despite his qualifications; and (4) that the circumstances gave rise to an inference of unlawful discrimination. *Lawley,* 36 P.3d at 1247-48. Although the burden of proof always remains on the complainant, the employer has the burden of producing an explanation to rebut a *prima facie* case of discrimination: that is, the employer must provide a non-discriminatory explanation for its action. *Lawley*, 36 P.3d at 1248. A nondiscriminatory reason is one that is not prohibited by the Colorado Anti-Discrimination Act, namely, a reason that is not based on factors such as disability, race, creed, color, sex, age, national origin, or ancestry. *St. Croix v. University of Colorado Health Sciences Center*, 166 P.3d 230, 236 (Colo.App. 2007).

If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support its legitimate purpose, the presumption created by the employee's *prima facie* case is rebutted and drops from the case. *Lawley, 36 P.3d at 1248.* If the employer meets its burden of producing a legitimate

reason for the adverse employment action, the employee must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment action were in fact a pretext for discrimination. The employee may use the evidence already in the record as part of his or her *prima facie* case and need not present additional evidence in every case. *Id.* Pretext may be demonstrated by establishing that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999), *overruled on other grounds*, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 n. 11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

Although a *prima facie* case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it permits the fact finder to infer intentional unlawful discrimination. *See Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995). On the other hand, a finding of pretext does not necessarily compel the conclusion that discrimination is the true cause for the disputed action. A fact finder is not required to find discriminatory animus from pretext, and each case will rest on an evaluation of the facts of that case as to whether discrimination should be inferred. *See Randle*, 69 at 451 n. 14 and n. 15; *Ingels v. Thiokol*, 42 F.3d 616, 622 n. 3 (10th Cir. 1994)("Pretext may support a factual conclusion of discrimination but it does not compel such a conclusion. Pretextual reasons may be offered for reasons other than to conceal a discriminatory motivation"), *abrogated on other grounds*, *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003).

In this case, Complainant has not presented sufficient evidence to present a *prima facie* case of unlawful discrimination. Complainant has met the first, second and third elements of her *prima facie* showing because she is an African-American and Native American who was well-qualified for her position, and she suffered the termination of her employment. Complainant has not shown, however, that the circumstances under which she was terminated suggest that her race had played any role in that decision. There was no persuasive evidence presented at hearing that race was a factor in any stage of the proceeding. As a result, Complainant has presented insufficient evidence to support a *prima facie* showing of unlawful discrimination on the basis of her race.

Assuming, *arguendo*, that Complainant had provided a *prima facie* showing of race discrimination, the burden of production shifts to Respondent to articulate a non-discriminatory explanation for its action. As noted above, Respondent presented evidence that its decision was predicated upon Dr . Feinstein's finding that Complainant violated the University's workplace violence policy as well as the fact that she had demonstrated performance problems. These two reasons constitute non-discriminatory reasons for the termination decision. More importantly, Complainant has not been able to demonstrate why the threats issue should be considered to be mere pretext. There was persuasive evidence presented that Complainant made the threats attributed to her. While Complainant may not, in retrospect, believe that her statements should have been construed as actual threats of physical harm, Dr. Tentori's reactions to Complainant's

statements (and Dr. Hodgson's fear created by the statements) were reasonable reactions to the situation presented to them on June 20, 2008. Complainant's termination was based upon Dr. Feinstein's reasonable and understandable assessment that Complainant had been threatening Dr. Hodgson, and that Complainant's actions violated the workplace violence provisions of University policies. Complainant has not shown that the University's explanation of its response was mere pretext in this case.

Accordingly, Complainant has not presented sufficient evidence to prevail on her claim of unlawful discrimination under C.R.S. § 24-34-402. Respondent's decision to terminate Complainant's employment was not a violation of the of the Colorado Anti-Discrimination Act.

2. Respondent's disciplinary action 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).

The persuasive evidence at hearing demonstrated that Complainant's appointing authority made several attempts to contact Complainant as soon as the allegations were raised, and that these attempts were rebuffed by Complainant. The evidence demonstrated that Respondent conducted a reasonable investigation into this matter. The evidence also supports that Dr. Feinstein also provided Complainant with an opportunity to explain her viewpoint concerning the incident, and that he took her statements as well as other information into consideration prior to reaching his final decision on discipline. Respondent's decision in this matter was not made in an arbitrary or capricious manner.

It also appears that Respondent has complied with the applicable personnel rules in investigating this matter and deciding whether to impose discipline.

Under Board Rule 6-2, 4 CCR 801, "a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. ...When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination." Respondent did not present evidence that Complainant had been subject to progressive discipline in this case. As the rule allows, however, there is no need to impose a corrective action first when the act is sufficiently flagrant or serious to warrant immediate discipline. Complainant's threats of physical harm to her supervisor and possible harm to her co-

workers constitute the type of conduct that warrants immediate discipline under Rule 6-2.

Complainant argued in her written closing statement that Respondent has violated the Board rules defining appointing authority, and that because of contradicting testimonies by Dr. Hodgson and Dr. Feinstein, Complainant was not sure who was her appointing authority. None of Complaint's arguments concerning Respondent's violation of personnel rules in the decision to terminate her employment are persuasive interpretations of the rules or well grounded in fact established at hearing.[1]

Dr. Feinstein testified without contradiction that he was Complainant's appointing authority, and Complainant has presented no persuasive evidence upon which to base a conflicting conclusion. Complainant's arguments at hearing of a confusion surrounding her appointing authority appear to be founded upon on her belief that Dr. Hodgson should never have delegated supervisory duties to Dr. Guiton, as had occurred for a period of time in ED&R during 2007. Dr. Hodgson's decision to create a team leader or other informal supervisory structure within the ED&R department, however, does not require appointing authority and does not change the identity of Complainant's appointing authority. The persuasive and competent evidence at hearing was that Dr. Feinstein was Complainant's appointing authority at the time of the termination of her employment.

Respondent's decision to discipline Complainant for her threatening statements related to her supervisor was not arbitrary, capricious or contrary to rule or law.

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

The final question before the Board is not one of what level of discipline would the Board impose under these circumstances. The question is whether the appointing authority has considered all of the relevant factors in making a decision on the level of discipline to impose, and whether reasonable persons fairly and honestly considering the evidence would reach a contrary conclusion that the offense at issue constitutes good cause for termination. *See Lawley*, 36 P.3d at 1252. Under the Board's analysis, that standard is analyzed in terms of whether the chosen level of discipline is within the range of reasonable alternatives for the appointing authority.

While Complainant never accepted responsibility for issuing threats to the safety of her supervisor, Complainant argued at times that she had been badly treated by Respondent generally and her direct supervisor in particular, and that these actions had placed her under severe stress. The evidence at hearing also supported that Complainant

[1] Several of Complainant's arguments in her written closing statement concern the propriety of actions which occurred well before the termination of her employment. These events were not appealed to the Board at the time at which they occurred and, as a result, these incidents have not been consolidated into the hearing on Complainant's termination. The prior incidents, therefore, are part of Complainant's case only to the extent that these incidents provide evidence relevant to the credibility of testifying witnesses and provide a historical background to the events of June 20, 2008.

had been under considerable stress at the time leading up to this incident. Such evidence presents mitigating circumstances and could potentially affect whether the discipline of termination of employee is too severe a response once the mitigating circumstances are taken into account.

The undersigned is not persuaded, however, that even the presence of severe levels of stress are sufficiently mitigating to warrant a lesser sanction in this matter. Complainant's reaction to her supervisor crossed the acceptable boundaries of dissent and disagreement and moved into a clearly improper reaction of physical threats against her supervisor and others. The stress that Complainant was experiencing may well explain why Complainant felt the need to issue such threats, but it does not excuse the conduct. It is also quite troubling that, even at hearing, Complainant has not seen fit to apologize or even acknowledge that she frightened people or that she needs to re-build any trust that she may have once had with those individuals. Such a reaction makes it even less likely that Complainant will be able to be successfully re-integrated in Respondent's workplace.

The credible and persuasive evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Termination of employment, under the demonstrated facts of this case, is within the range of reasonable alternatives available to the appointing authority.

D. An award of attorney fees is not warranted in this action.

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

Complainant appeared *pro se* at hearing and did not present evidence at hearing of having incurred attorney fees. The Board's file also does not reflect an entry of appearance on behalf of Complainant at any stage of this proceeding. Assuming, however, that she has incurred such fees prior to hearing, Complainant has not been able to demonstrate that this matter warrants an award of fees. Respondent's disciplinary action was not instituted frivolously, in bad faith, maliciously, or as a means of harassment. Respondent's case was also well supported by the credible facts presented at hearing and, therefore, was not groundless. *See* Board Rule 8-38(A)(3)(defining a groundless personnel action as one "in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense), 4 CCR 801. As a result, an award of attorney fees is not warranted in this matter.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she 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. An award of attorney fees is not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 5th day of October, 2009.

Denise DeForest
Administrative Law Judge
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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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 6th day of October, 2009, I electronically served copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** addressed as follows:

Zeldra Bryant

[redacted]

Rhonda McKinnis Thornton

[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)