STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B018**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT GONSER,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION, REGION FOUR,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on December 22 and 29, 2008, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ on the last day of hearing.[1] Assistant Attorneys General Brook Meyer and Christopher Puckett represented Respondent. Respondent's advisory witness was Robert Garcia, the appointing authority. Complainant appeared and was represented by Thomas D. Grant, Esq.

MATTER APPEALED

Complainant, Robert Gonser ("Complainant") appeals his termination by Respondent, Department of Transportation ("Respondent" or "CDOT"). Complainant seeks reinstatement to his previous position of Professional Engineer I ("PE I"), effective June 1, 2008, back pay and benefits calculated at the level of PE I, interest on lost wages based upon an rate of 1% computed quarterly, accommodations to allow Complainant to perform work duties as stated in his original Position Description Questionnaire, attorney fees and legal expenses.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

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

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

[1] Counsel for the parties agreed that four witnesses originally to be called in Complainant's case could be released from their subpoenas and that stipulated testimony would be submitted instead of live testimony. The hearing ended, however, without the submission of any such stipulated testimony.

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

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. At the time of the termination of his employment, Complainant had been employed by Respondent as eitehr a Professional Engineer I ("PE I") or an Engineer In Training III ("EIT III") for approximately ten years. Complainant was a certified employee.

The Prior Disciplinary Action and Other Consequences of Complainant's DUI

2. On April 18, 2007, Complainant was involved in an accident while he was driving his CDOT assigned truck. The accident occurred after Complainant had attended a meeting on state time and had consumed enough alcohol that his blood alcohol content tested at 0.186 g/ 100 ml of blood. The legal limit of blood alcohol content in the state is 0.08g / 100 ml. Complainant damaged the vehicles of private parties, as well as his assigned truck in the accident.

3. Complainant was arrested for driving under the influence of alcohol. Complainant eventually pled guilty to a criminal charge in Mesa County Court.

4. Complainant surrendered his driver's license in May of 2007, and received a temporry permit that was valid until June 14, 2007. Complainant's license was revoked July 5, 2007. The revocation of Complainant's driving privileges was expected to last until July 5, 2008.

5. By disciplinary letter dated May 10, 2007, Complainant's appointing authority at the time, Region Four Transportation Director Karla Harding, imposed a demotion and several other disciplinary provisions upon Complainant for the drinking and driving incident. The demotion was from Professional Engineer I to an Engineer In Training III, with a salary reduction of 15%. The demotion was effective June 1, 2007 and the letter informed Complainant that he would not be eligible for promotion back to PE I for a minimum of one year.

6. The discipline imposed by Ms. Harding also included a 30 day disciplinary suspension, a requirement that Complainant pass at least six random drug tests within a year, a requirement to take any drug or alcohol counseling recommended by a substance abuse professional, a restriction which prohibited Complainant from taking any in-state overnight travel trips for one year form the date of the discipline, and a requirement to notify his Region Program Engineer if the status of his driver's license changed.

7. Complainant appealed the discipline to the Board, and the Board upheld the discipline in State Personnel Board case no. 2007B098.

8. Complainant sucessfully worked as an EIT III after his driver's license was revoked. Complainant's direct supervisor, Gary DeWitt, felt that Complainant could perform all but 1% - 2% of his duties without having a license or while being restricted from driving state vehicles. During the time when Complainant did not have a driver's license, Complainant was able to find rides to work sites with other workers going to the same job site on those occassions when he had to leave the office for his work.

State Fleet's Demand Letter

9. By letter dated April 24, 2007, Robert Giovanni, the Fleet Management Accident Respresentative for the Division of Central Services, Colorado Department of Personnel and Administration, sent Complainant a demand letter for payment of $6,075 to recover the cost of the CDOT truck damaged in the accident of April 18, 2007. Mr. Giovanni viewed pictures of the damaged truck taken the morning after the accident and decided, based upon his assessment that the frame appeared to be damaged along with the age and mileage on the truck, that the truck was totaled.

Complainant's June 1, 2007 Letter to State Fleet

10. After receiving the demand letter from State Fleet, Complainant spoke with Mr. Giovanni on the phone on May 16, 2007. During that conversation, Mr. Giovanni told Complainant that the damaged truck was going to auction on June 7, 2007.

11. Complainant sent a letter to Mr. Giovanni dated June 1, 2007.

12. Complainant's letter was three pages long. In it, he objected to several aspects of the bill from Fleet Services.

13. Complainant initially noted that the truck in question was a 1998 GMC truck, and not a 1998 Chevrolet, as stated in the demand letter.

14. Complainant also argued that Mr. Giovanni did not have sufficient time to review the facts and calculate a reasonable value for the truck in the short time between the accident and the demand letter. Complainant pointed out that the demand letter had stated that an estimate supporting the claim was to have been attached, but that the only attachment was a copy of the N.A.D.A. Used Car Guide value of $ 6,075 for a 1998 Chevrolet C2500 Pickup in clean retail condition. Complainant also noted that the state was selling undamaged trucks of a similar type to his damaged truck for $1,000 to $3,000 on an Ebay web auction site.

15. Complainant further argued that, as state employee, he should be covered by the

state insurance for the accident. Complainant acknowledged that Mr. Giovanni told him during their phone conversation of May 16, 2007, that if Complaint had broken the law, then all of the damages were his to pay. Complainant asked for any written policy or guidelines that supported that assertion.

16. Complainant also objected to the fact that he was not informed where the truck was located, and neither he nor his insurance agency was able to inspect the vehicle or to gather his possessions from the vehicle.

17. Complainant also objected to the state billing him for the total value of the truck when it was also selling the truck at auction.

18. Complainant's June 1, 2007, letter ended with two different proposals for resolution of the truck damage:

> Based on this situation, we feel that one of two things should happen:
>
> > State Fleet sells the truck at auction as indicated on June 7, 2007 and I am absolved of any costs, damages, or repayment.
> >
> > Or
> >
> > We come to an agreement on the fair value of the truck before the accident or repair costs due to the accident. If I remit any money personally to the State at that point, the vehicle's ownership is transferred to me.
>
> Please answer, clarify, or comment on these issues so that I can continue to update my lawyer. I would also appreciate any other information or suggestions that you might have. Thank you.

19. Mr. Giovanni reviewed the letter when he received it. Mr. Giovanni felt that Complainant did not know what he was talking about, and he decided not to answer the letter. Mr. Giovanni did not provide Complainant with any additional information about state fiscal rules, other than his initial statement that the state would expect Complainant to pay for the damage because he was doing something illegal.

20. It was within Mr. Giovanni's authority to arrange for Complainant to purchase the vehicle from Fleet Management. Mr. Giovanni did not make such arrangment upon receiving Complainant's letter of June 1, 2007.

21. On June 5, 2007, Complainant sent an email to Mr. Giovanni checking to make certain that Mr. Giovanni had received his letter of June 1, 2007. Mr. Giovanni did not respond to the email.

22. Mr. Giovanni referred the matter to the State's Central Collections Services.

State Collections Demands

23. Complainant watched the web site which the state uses for vehicle auctions after he learned that the truck he had been assigned would be auctioned. Complainant saw an auction of a truck which appeared to have his truck's tailgate attached to it. Complainant heard nothing further from Fleet Management, however, until he was contacted by Central Collections Services, Division of Finance and Procedurement, Colorado Department of Personnel and Administration on January 31, 2008.

24. Central Collection Services sent Complainant a bill dated January 31, 2008, in the amount of $6,986.25. The bill explained that its client was Fleet Management, but did not explain how it had reached the figure of $6,986.25 other than to note that the bill included no assessment of interest or credit for payment. The bill also provided that Complainant had thirty days to dispute the debt or any portion of it, and provided him with a due date for payment of the debt of March 1, 2008.

25. Central Collection Services also sent Complainant a letter dated February 7, 2008, in which the office alleged that it had sent Complainant a bill 30 days prior and had not heard form him. This letter referenced a debt to Fleet Management, but it assigned a different account number to the debt, and the debt amount was listed as $13,972.50. No explanation was provided for why the amount had nearly doubled from the prior bill.

26. Complainant called Central Collection Services on February 13, 2008, and left a voice mail. Complainant also faxed and mailed a letter dated February 14, 2008, to Central Collection Services objecting to the debt. Complainant explained in his February 14, 2008, letter that he had asked Fleet Management for an explanation of the debt and had not received any answer, and had not heard from anyone concerning the debt until the two bills from Central Collections Services arrived. Complainant attached a copy of his June 1, 2007, letter to Fleet Management to his February 14, 2008, letter to Central Collection Services.

27. Central Collection Services wrote a letter to Complainant dated February 19, 2008. In this letter, Central Collection Services identified the debt as having been referred to it by Fleet Management, and that the account balance was $6,986.25. Central Collections Services did not attempt to explain how that debt figure had been calculated, and did not address the issues raised in Complainant's June 1, 2007, letter to Fleet Management.

28. Central Collection Services transferred the matter to a local law firm to pursue collection. The amount claimed by the law firm as of August 21, 2008, was $7,593.75. Complainant has disputed the amount of the debt as inflated. At the time of hearing, Complainant was in the process of litigating the value of the truck and damage with the intention of paying for the damage once a reasonable value was established.

State Fleet's Opportunity to Receive Restitution Through The Mesa County Criminal Case:

29. On or about May 11, 2007, Mr. Giovanni completed a Victim Impact Statement ("VIS") form on behalf of State Fleet for Mesa County Court in Complainant's criminal case. The VIS form noted that the statement would be used to arrive at a dollar amount for restitution, and informed the victim that he or she was to the attach copies of all documentation of all losses. Mr. Giovanni requested full restitution of $6,075.00 because the vehicle was totaled.

30. Complainant's March 26, 2008, sentence order in his criminal case required Complainant to pay $500 in restitution to one of the individuals whose vehicle was damaged in the accident, but did not require Complainant to pay any restitution to the state.

31. The Mesa County Court noted that the state had not filed a VIS by the time of Complainant's sentencing/restitution hearing on March 26, 2008. The court left open the decision on restitution for an additional 90 days from the original restitution hearing date to allow the state to submit its request. At the end of the 90 day period, however, the court had not received a request from the state and had not ordered Complainant to pay resittuion to the state.

Change In License Status October 2008:

32. Complainant received notification that his driver's license might be able to be restored to a probationary license as early as May 2008. Complainant attended a hearing on May 2, 2008 at the Department of Motor Vehicles concerning a probationary license.

33. Complainant informed his Program Engineer, Rick Gala, of the impending change in his driver's license status.

34. Complainant's appointing authority had changed since his earlier disciplinary action. Complainant's new appointing authority, Robert Garcia, decided to hold a Board Rule 6-10 meeting to discuss the change in license status.

35. Mr. Garcia met with Complainant in a Board Rule 6-10 meeting on May 16, 2008. Mr. Gala was also present. Complainant brought his direct supervisor, Gary DeWitt, to the meeting as his representative. Complainant and Mr. Garcia discussed Complainant's license status at that meeting.

36. Mr. Garcia decided to hold another Board Rule 6-10 meeting on June 27, 2008. Complainant and Mr. Garcia discussed Complainant's license status. By this time,

Complainant had been informed by the Colorado Department of Motor Vehicles tht he needed to use an interlock device on every vehicle that he drove for a period of time after his license was restored. The parties discussed whether this requirement amounted to a restriction on Complainant's driver's license.

37. At the second Board Rule 6-10 meeting, Complainant also explained to Mr. Garcia that he had beendemoted for at least a year in the disciplinary action take by Ms. Harding, and that he was anxious to go through the reallocation process so that his position could be restored to PE I. The application that he and Mr. DeWitt had completed for the reallocation, however, had been denied. Complainant asked for the reason for that denial. Mr. Garcia explained to Complainant that he wasn't going to agree to any upgrade of Complaniant's position until he had completed a full and thorough investigation of the status of Complainant's ability to perform his job.

Board Rule 6-10 Meeting

38. On July 29, 2008, Mr. Garcia held his third Board Rule 6-10 meeting with Complainant to discuss the status of his license, the ability to perform his assigned duties without accommodation, and the status of his payment for the damage to the truck arising from the accident.

39. During the meeting, Complainant was asked about whether he had paid the state for the damage. The following exchange occurred:

> Bob [Garcia]: Okay. Have you paid your financial responsiblity to the State of Colorado for the damage that was done to the CDOT vehicle?
>
> Todd [Gonser]: Um, I haven't made any payments to the State of Colorado Fleet Management. That was all decided through the court system in Mesa County and restitution was closed on that. In other words, as part of the civil case over in Mesa County, um, they directed me as to my sentence, you know the requirements of everything I needed to take care of, all financial obligations, everything, they laid that out at my sentencing back in, that was, was in March.
>
> Bob: A follow-up question, hang on a second.
>
> Todd: Sure.
>
> Bob: So as part of, what you're saying is as part of your civil case in Mesa County they absolved you of your debt?
>
> Todd: Right.
>
> Bob: Okay.

Todd: And they did that quite some time ago actually and I've been in discussions with State Fleet Management, Central Collections, everything, trying to get that squared away and apparently nothing happened with that because the District Attorney in Mesa County Court decided I wasn't financially responsible for anything other than what they already assigned for me which was, you know Court costs, fines, damages to one of the ladies, one of the vehicles that I, that I contacted, and so they assigned final restitution at the time my sentencing back in March and that, that was the last time I'd heard anything about restitituion issues.

40. Complainant asked Mr. Garcia at the meeting if he wanted to see anything different from Mesa County than what had already been provided. Complainant told Mr. Garcia that he would try to obtain a clearance letter, or something similar, that would show that restitution had been closed and finalized in his case.

41. When Complainant told Mr. Garcia that he had been absolved of the debt, Complainant was under the mistaken impression that the state had waived opportunity to pursue the damages claim against him by failing to file a completed VIS. While the state's failure to file the VIS with the Mesa County Court ended its opportunity to pursue Complainant for criminal restitution for the damage, the state's civil options remained open. Complainant did not understand that the state's civil options for pursuing the debt were still open. Complainant did not intend to tell Mr. Garcia incorrect or false information in answering Mr. Garcia's questions about the status of the damages claim.

42. After the meeting, Complainant called Mesa County Court and confirmed that he had not been ordered to pay the state for the damage to the truck. Complainant asked if the court could send something to him stating that he did not owe the state for the truck, but the clerk told him that they could not send out anything other than what was already in the file.

43. Mr. Garcia had CDOT's human resources staff call the Mesa County Court and ask if the sentencing had absolved Complainant of having to pay for the truck. The courthouse staff told her that there was no determination that Complainant did not owe the state for the damage to the truck.

44. Mr. Garcia also spoke with Mr. Giovanni, who told him that Complainant had sent him a letter which denied liability for the truck, and that Complainant had not paid for the truck.

Disciplinary Action

45. By letter dated August 12, 2008, Mr. Garcia terminated Complainant's employment as of the end of that day.

46. Mr. Garcia cited to five rules promulgated by Central Services, Colorado Department of Personnel and Administration, concering use of state vehicles. This included a citataion to Rule 4.71, which provides that "state agencies and/or indivdiuals may be held financially accountable for all costs resutling from the violation of these rules relating to the misuse of state-owned motor vehicles."

47. Mr. Garcia informed Complainant that the state Collections Office had determined that the debt was a valid debt, that Complainant had not been absolved of the debt to the state as part of his sentence in the criminal case, and that Complainant had refused to pay for the truck. Mr. Garcia decided that Complainant had "refused to make restitution of state funds and [had] deliberately made false statements of fact" as to the status of the debt. Mr. Garcia objected that "You have proven to me that you are dishonest and have acted in a cavalier manner as it applies with state resources, and have been uncooperative and argumentative in your conduct with Fleet Management and the State Collections Office."

48. Mr. Garcia concluded that such actions violated the requirements in the Governor's Executive Order, Code of Ethics, that employees "shall serve the public with respect, concern, courtesy and responsiveness; and ... shall demonstrate the highest standards of personal integrity, truthfulness and honesty, and shall through personal conduct inspire public confidence and trust in government." Mr. Garcia noted that Respondent's values statement, Policy 2.0, states that the values of the department included the protection of human life and preservation of property, that the employees are honest and responsible in all that they do and the hold themselves to the highest moral and ethical standards. Mr. Garcia also found that such actions constituted willful violation of the values of the department, the Code of Ethics, a flagrant disregard of ethical standards, and a disregard for the expenditure of state funds and "a shocking lack of professionalism."

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, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

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

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-8. 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).

II. HEARING ISSUES

A. Complainant did not commit the acts for which he was disciplined.

Mr. Garcia's decision that Complainant had violated departmental values, the code of ethics, and had willfully violated other ethical standards and professionalism stems from two critical factual conclusions: that Complainant had intentionally lied to him about the status of the debt and that Complainant had already been found to be liable for the truck damage and had refused to pay it.

Neither one of these factual conclusions was supported by a preponderance of the evidence at hearing.

The preponderance of evidence at hearing established that Complainant raised reasonable and timely objections to the manner in which Fleet Services decided that he owed more than $6,000 for damage to the truck. Complainant objected, for example, to the fact that the state was billing him for the full value of the truck and, at the same time, selling the truck or truck parts at auction. These are issues that Complainant is entitled to pursue with Fleet Management and with Central Collection Services before agreeing to pay for the damage.

Complainant has also argued that he was not liable for the debt because he was on state business and the state's insurance policy should cover the damage to the truck. This argument is not well-grounded in the state fiscal rules because the rules provide that unlawful behavior in a state vehicle that results in damage to the vehicle can lead to an assessment of the damages against the driver or the agency. Mr. Garcia's termination letter, however, reflects the first and only time in the record of this matter that anyone provided Complainant with a specific rule refuting his argument concerning the state's insurance coverage. It was not unreasonable for Complainant to ask that such authority be provided to him. Moreover, the provision of that authority does not address Complainant's other issues with the measurement of the amount of damages to be paid.

Mr. Garcia's understanding of the debt collection process assumes that a demand letter must be paid without question or delay. This assumption ignores the debt collection process. Unlike the restitution order from Complainant's Mesa County criminal case, the collection system does not create a judgment or other binding order that Complainant was obligated to obey without question or appeal. If there are questions as to the validity of the debt, then those objections should and can be raised. If the dispute cannot be resolved by the parties, the intervention of a neutral third party such as a court is required. The

preponderance of the evidence in this matter established that Complainant's dispute of the debt was reasonable and that he is disputing the debt appropriately. Mr. Garcia's conclusion that Complainant has failed to pay the debt is incorrect give the evidence in the record.

Mr. Garcia's conclusion that Complainant had intentionally made false statements to him during the Board Rule 6-10 meeting was similarly flawed. Complainant did not understand the various ways that the state could pursue its claim for damages against him. He reported to Mr. Garcia that the state had, in essence, waived its chance to go after him for the damages by failing to produce a victim impact statement for the Mesa County Court. Insofar as it went, that statement was true; the state had lost its option of pursuing the claim against him through the criminal justice system. It was not, however, the complete "absolution" about which Mr. Garcia asked Complainant. Complainant's answer to the absolution question was a mistake born of Complainant's lack of understanding. Complainant's statement, however, was not a lie or an intentional false statement, and Mr. Garcia's conclusion that Complainant had been dishonest with him is not founded in fact.

The factual basis for Complainant's termination, therefore, was not supported by a preponderance of the evidence at hearing.

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

1. Respondent's failure to recognize that the debt amount was reasonably in dispute, and that the issue of he debt had not yet been resolved, constitutes a failure to give candid and honest consideration to the evidence before it:

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).

Mr. Garcia understood that Complainant was disputing the debt with Fleet Management and with Central Collection Services. Mr. Garcia appeared to believe, however, that such a dispute was nothing more than a lack of professionalism and ethics, that Complainant was required to pay whatever amount Fleet Services or the State Collection Services billed to him, and that Complainant had no legitimate ability to question the calculation of the amount or whether he was personally responsible for the damage under state law. As a result, Mr. Garcia did not recognize that Complainant's questions about the debt were reasonable and resolved before any claim would be valid.

Complainant raises valid and reasonable questions about the manner in which the damage to the truck was calculated. Mr. Garcia failed to provide candid and honest consideration to Complainant's objections to the assessment of more than $6,000 in damages to him and the process by which disputed debts are resolved. As a result, Mr. Garcia's decision that Complainant's failure to have immediately paid the amount demanded by Fleet Management and Central Collection Services constituted a breach of Respondent's values was an arbitrary and capricious decision.[2]

2. Respondent's conclusion that Complainant's dispute of the debt implicates an enforceable professional standard is an unreasonable interpretation of the lawful basis for discipline:

The permissible grounds for discipline of a certified employee such as Complainant are listed in the state constitution:

> Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law. ... A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude..."

Colo. Const. Art. XII, Sec. 13 (8). *See also* C.R.S. § 24-50-125(1)(same); Board Rule 6-12(same).

Complainant's challenge to the assessment of liability and amount of liability for the truck damage has no effect on his duties or performance as an Engineer In Training III. Complainant's dispute over the amount to be paid is, accordingly, not something affecting the standards of efficient service or competence for his job, and does not represent a failure or inability to perform his duties. A dispute over the amount of damages to be paid to the state is also not a basis to find willful misconduct when the dispute is conducted in good faith and upon a reasonable basis, as was the case here. Finally, the instant matter does not describe the conviction of a felony or conviction for any other offense involving moral turpitude.

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2 The evidence at hearing was not entirely clear as to when Mr. Garcia reviewed Complainant's June 1, 2007, letter to Fleet Management. Given that Mr. Garcia quoted some of the letter in his termination letter, it is reasonable to conclude that Mr. Garcia reviewed Complainant's letter prior to writing the termination letter. If Mr. Garcia did not review the entirety of the letter until after he had made his termination decision, however, the disciplinary decision would still qualify as an arbitrary and capricious decision for Mr. Garcia's failure to "use reasonable diligence and care to procure such evidence as it is by law authorized to consider" in understanding Complainant's dispute of the debt. *Lawley*, 36 P.3d 1252.

Respondent's disciplinary action for failing to pay according to the demand letter sent to Complainant by Fleet Services (and, later, Central Collection Services) does not describe the type of act that can lawfully trigger discipline under Colo. Const. Art. XII, Sec. 13(8), C.R.S. §24-50-125(1) or Board Rule 6-12. Accordingly, Complainant's discipline based upon his dispute of the debt is contrary to rule or law and must be rescinded.

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

Respondent's termination of Complainant's employment was a severe sanction that was, in Mr. Garcia's view, made necessary by the fact that he felt that Complainant had lied to him and had failed to take responsibility for damages that he owed to the state.

Given that Respondent has not been successful in identifying any policy or standard of conduct that Complainant's actions have violated, any sanction would be outside of the range of reasonable alternatives available to the appointing authority. Even if a performance standard violation was found in this case, however, the lack of a factual basis to conclude that Complainant had been dishonest with Mr. Garcia as to the status of the debt, as well as the reasonable objections that Complainant has raised as to the state's assessment of more than $6,000 in damages militates against applying a severe sanction to Complainant.

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

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. 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).

Given the above findings of fact, an award of attorney fees is not warranted. While Mr. Garcia's decision failed to take critical information into account in his evaluation of whether Complainant had acted properly with reagard to the state's demand for payment, and he reached an unwarranted conclusion that Complainant was not telling the truth in the final Board Rule 6-10 meeting, the decision made by Mr. Garcia cannot be said on this record to have been imposed to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth. Complainant has not demonstrated that attorney fees are waranted in this case.

E. Complainant's Remedy Is For Reinstatement To The Position From Which He Was Terminated:

Complainant requests that his remedy include an order which restores him to the position of PE I, including an order of accommodations so that Complainant can perform the work of his original PE I Position Description Questionnaire.

The fact that Complainant was serving as an EIT III at the time of his termination, however, is the controlling fact in terms of Complainant's reinstatement. The prior disciplinary action did not limit Complainant's demotion to EIT III to only a year; the disciplinary action required that Complainant serve at least a year at the level of EIT III and did not provide for any automatic re-instatement to his former position. Complainant was terminated from the EIT III position, and reinstatement under such facts is warranted only to the position from which he has been terminated.

Additionally, Complainant has not persuasively argued any need or authority for the Board to order Respondent to adopt accommodations for the position to which Complainant is reinstated. Complainant has been successfully completing his work as an EIS III without having a license for the past year. Even if some modification was needed for him to continue, however, Complainant has not provided any argument as to why the Board would have the authority to order a modification of the position description questionnaire or other description of Complainant's position. Under Board Rule 1-9, 4 CCR 801, the appointing authority is responsible for defining the job that an employee is to complete. Complainant has provided insufficient cause or authority for the Board to modify that general rule in this case.

Under such circumstances, the remedy of reinstatement to the EIS III position, as it was structured at the time of Complainant's termination, is warranted.

F. An Award Of Interest Is Warranted:

Complainant has also requested an award of interest on lost wages, and proposes that the rate of interest should be calculated at the rate paid by the Colorado State Employee Credit Union's published interest rate of 1% on a quarterly basis.

Pre-judgment interest on money awarded as part of a State Personnel Board order has been approved in *Rodgers v. Colorado Department of Human Services*, 39 P.3d 1232 (Colo.App. 2001). In *Rogers*, a former employee had been reinstated by the Board and awarded back pay and benefits. Upon appeal, that reinstatement decision was reversed by the Colorado Court of Appeals and the matter was remanded to the Board. The state agency petitioned the Board on remand for, among other items, an order that the employee was to reimburse the state for the money previously paid to him pursuant to the Board's prior reinstatement order, as well as an award of interest on the money. The Board granted the request for reimbursement but did not grant the request for interest. On appeal

from the order for reimbursement and the denial of interest, the *Rogers* court held that C.R.S. § 5-12-102(1)(b) was applicable to the reqeust. "[T]he inquiry is whether money or property was wrongfully withheld from the nonbreaching party and not whether the nature of the conduct of the breaching party brings him or her within the ambit of the statute. The wrongfulness of the breaching party's conduct will have already been determined by the finding of liability in which the damages award was predicated." *Rogers*, 39 P.3d at 1238. Wrongful withholding, for purposes of C.R.S. § 5-12-102, is to be given a broad liberal construction. *Rogers*, 39 P.3d at 1237. *See also Goodyear Tire & Rubber Co. v. Holmes*, -- P.3d __, 2008-CO-1007.634 at *8 (Colo. October 6, 2008)("'Wrongful withholding' indicates that the aggrieved party lost or was deprived of something to which she was otherwise entitled"). In *Rogers*, wrongful withholding was found on the part of the employee, even though the employee had been awarded back pay and benefits pursuant to a Board order, because that order was later found to be incorrect.

Under *Rogers*, a party who has had money wrongfully withheld is entitled to the statutory interest rate of 8% per annum "for all moneys... after which they are wrongfully withheld or after they become due to the date of payment or to the date judgment is enered, whichever first occurs." C.R.S. § 5-12-102(1)(b). An award of statutory interest to Complainant under C.R.S. § 5-12-02(1)(b) on the value of the back pay and benefits due to him upon reinstatement is, therefore, warranted.

CONCLUSIONS OF LAW

1. Complainant did not commit the acts for which he was disciplined.

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

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

4. Attorney's fees are not warranted.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits to the position of EIT III. Attorney fees and costs are not awarded. Statutory interest on Complainant's back pay and benefits is awarded purusant to C.R.S. § 5-12-102(1)(b).

Dated this 12th day of February 2009.

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

2009B018

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 12th day of February, 2009, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Thomas D. Grant, Esq.

[redacted]

and in the interagency mail, to:

Brooke Meyer

[redacted]

[redacted]

Andrea C. Woods