STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B038**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARCUS A. UMSTEAD,

Complainant,

vs.

COLORADO DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on February 17 and 18 and March 30 and March 31, 2009, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Following the submission of written arguments by the parties, the record was closed on April 20, 2009. Assistant Attorney Diane Dash represented Respondent. Respondent's advisory witness was Major Kris Meredith, the District 6 Commander for the Colorado State Patrol, and Complainant's Appointing Authority. Complainant appeared and was represented by Douglas Jewell, Esq.

MATTER APPEALED

Complainant, Marcus Umstead (Complainant), appeals his disciplinary termination. Complainant seeks reinstatement, back pay and benefits, and attorney fees and costs. Respondent, Colorado Department of Public Safety, Colorado State Patrol (Respondent or CSP) seeks to have Complainant's termination affirmed.

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;

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

4. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant was a certified Trooper, employed by Respondent. Complainant was originally hired by CSP to work in its photo lab in 1994. He was hired as a Photographer I and eventually promoted to an Arts Professional III. Complainant received good job performance ratings while working in the photo lab.

2. In July of 2007, Complainant went to CSP's academy to become a Trooper. Complainant attended twenty-two weeks of training at the academy, which included training in firearms. Complainant then rode with a supervisor for eight weeks, and was told that he did an excellent job during that training. Complainant was allowed to drive solo in March of 2008.

3. In August of 2008, Complainant received three days of training which was specific to the security issues surrounding the Democratic National Convention (DNC). Complainant primarily was trained on how to deal with protesters.

4. Complainant was assigned to provide security for the DNC, and worked twelve-hour shifts six or seven days in a row. Complainant's normal shift was ten hours long for five days, and then he would have four days off from work.

Events of August 28, 2008

5. On August 28, 2008, the last day of the DNC, Complainant finished his shift at approximately 11:00 p.m. After being bused back to the academy, Complainant got in his personal car to drive to his girlfriend's house.

6. Complainant was not the traditional CSP uniform; instead, he was wearing a battle dress uniform, which is a special uniform which is used in potential riot situations. The uniform consists of a black shirt and black pants. All of the badges and other markings are soft and sewn on to the uniform. Complainant's name was sewn on to the uniform in one-inch high letters. Complainant was wearing a duty belt, but it did not contain his cell phone or flashlight, as it would have with his traditional CSP uniform.

7. Complainant was driving eastbound I-70 at approximately 75 miles per hour. A full-size pick-up truck was also merging onto eastbound I-70 from Kipling. The driver, Daniel Siebels, did not see Complainant coming when he merged onto the highway, but was surprised when he perceived that Complainant almost side-swiped him. Complainant was unaware of any impact his actions had on Siebels.

8. Shortly before midnight, both Complainant and Siebels exited onto northbound Wadsworth. Siebels was driving behind Complainant. Siebels, who had not been drinking, was somewhat aggravated with Complainant and was tailgating him with his high beam lights in the "on" position. Both vehicles were in the far left lane. There were no other vehicles around the intersection.

9. When they arrived at the second light on Wadsworth, they were stopped by a red light. Siebels had a passenger in his vehicle, Steven Stebbins, who was intoxicated. Stebbins was also irritated with Complainant, and threw a plastic Mountain Dew bottle at Complainant's car. The bottle was not more than one-quarter full of liquid.

10. When the bottle hit Complainant's car, Complainant heard a loud "thud," which startled him. Complainant thought that the occupants of the truck had gotten out of the truck and had hit his car with a fist. Complainant believed that the occupants of the truck wanted to start a fight with him, and were possibly attacking his vehicle.

11. Complainant immediately jumped out of his car and drew his weapon, but did not see anyone. He decided to approach Siebels' truck. As Complainant walked towards the truck, he pointed in weapon in the direction of the truck's windshield. As he was walking, Complainant saw the Mountain Dew bottle on the ground and concluded it was the object which had hit his car.

12. Because Siebels had his high beam lights on, Complainant was somewhat blinded as he walked towards the truck. Complainant had genuine concerns for his safety.

13. When Complainant got to the driver's window, he could see that there were at least two individuals in the truck. Complainant yelled at Siebels to roll down his window, and thought he saw Siebels smiling at him. Complainant became very angry because he felt like Siebels was disrespecting him. Siebels turned to Stebbins to say something like, "What have you gotten us into?" Complainant was pointing his gun at the driver's window of the truck, and the weapon was visible to both Siebels and Stebbins. Complainant was holding the gun with both hands straight out in front of him with his elbows locked.

14. When Siebels turned away, Complainant knocked on the window of his truck with his left fist. Siebels then rolled down the window, and Complainant asked Siebels and Stebbins why they threw the bottle. Siebels said nothing, but Stebbins denied having thrown it. It was clear to Complainant that Stebbins was intoxicated. Complainant was no longer in fear of his safety, but was very angry.

15. Complainant told Siebels and Stebbins that they were lucky to have thrown the bottle at a police officer instead of a gang member or someone else who may

have reacted differently. Complainant did not identify himself by name, or provide Siebels with his card. Complainant's name was visible, however, on his uniform. Complainant put his gun back in his holster and began walking towards his car. As he was walking back to his car, Complainant picked up the Mountain Dew bottle, and threw it at Siebels' truck. The bottle hit the truck's windshield, but did no damage to it. Complainant immediately regretted throwing the bottle. The entire incident took place before the light changed to green again. The light changed to green as Complainant was walking back to his car.

16. Complainant then drove away as the light was changing from green to yellow. Siebels and Stebbins stayed at the intersection until the light turned green again. They were both nervous about having a gun pointed at them.

17. Because it was late, Complainant decided not to call his sergeant to report the incident; he decided to tell him first thing in the morning. Because he had contact with the Arvada Police Department, a law enforcement agency, Complainant should have reported the incident immediately, or as soon as practicable, to his supervisor even if the incident occurs in the middle of the night.

18. Stebbins was concerned that Complainant was not actually a police officer because he was in his personal vehicle, and not a patrol car. Because Stebbins had doubts as to whether Complainant was an actual police officer, he called 911, and reported the incident. He provided the dispatcher with Complainant's license plate number. Stebbins did not want to get Complainant in trouble. Siebels was opposed to the idea of calling 911 at all.

Arvada Police Department Investigation

19. Officer Kate Herrlinger of the Arvada Police Department called Stebbins back to get more information following his 911 call. Stebbins told Herrlinger that he did not throw the bottle and that Complainant drew his weapon when he got out of his car. Stebbins told her that he did not want to press charges.

20. Herrlinger ran the license plate number provided by Stebbins and discovered that the vehicle was registered to Complainant, a state trooper. At around 4:30 a.m., she called CSP and confirmed that Complainant was indeed a trooper. The dispatcher from CSP connected Herrlinger to Complainant's cell phone at approximately 4:45 a.m.

21. Complainant was sleeping when the phone rang, but told Herrlinger that he knew why she was calling him. He did not sound sleepy, and had a calm demeanor. When he described the bottle being thrown at his car. Complainant told Herrlinger that he had pulled his weapon for officer safety, which she found to be understandable. She also believed that he told her that

he had tapped on Siebels' window with his "pistol." Herrlinger thought that tapping on a window with a gun was unprofessional and she put that information in quotes. In Herrlinger's opinion, tapping on the window with a gun could be considered criminal menacing.

22. After speaking with Complainant, Herrlinger spoke with her supervisor who asked her to type a memorandum regarding the incident to turn into their internal affairs department, and then pass it on to CSP. Although Herrlinger had concerns that Complainant's conduct could be considered felony menacing, the Arvada Police Department declined to take any action beyond contacting CSP.

Complainant's Report of Incident

23. On the morning of August 29, 2008, those officers who had been assigned to work at the DNC were to turn in the equipment they had been issued for that assignment. Complainant wanted to be the first one there to make sure he saw his sergeant so he could tell him what happened the previous night.

24. Complainant saw Major Meredith at the turn-in, and Meredith noticed that Complainant looked worried, and asked Complainant if everything was okay. Complainant replied that he had a bad night, and wanted to talk to his sergeant. Complainant did not tell Meredith what happened because he felt it was appropriate to go through his chain of command.

25. Complainant's sergeant and chain of command during the DNC was Sergeant Wheeler. Wheeler arrived at the turn-in about 11:00 a.m., and Complainant told him about the events of the previous evening. Wheeler asked Complainant to write a report regarding the incident, but did not give him a deadline to complete the report.

26. Complainant did not write the report for five days because he was off work, and did not have access to a computer. Complainant had a lap top computer in his patrol car which he used to type his report and email it the afternoon before his next shift. The report was written on September 6, 2008, and addressed to Sergeant Jeff Lytle. Wheeler instructed Complainant to send the report to Lytle.

27. In the report, Complainant wrote, "At no time did I point my weapon at the occupants, but rather kept it at a low ready position."

Internal Affairs Investigation

28. Herrlinger's report was forwarded to CSP's Internal Affairs, and was assigned to Sergeant Dana Reynolds for investigation. Reynolds also received a copy of Complainant's September 6 report. When Reynolds received Herrlinger's

report, he scheduled interviews with Siebels and Stebbins. While in-person interviews with those individuals were both possible and preferable, Reynolds interviewed them by telephone.

29. When Reynolds interviewed Stebbins, Stebbins denied several times throwing the bottle at Complainant's car. He also said that Complainant had his gun up and pointed at the windshield of Siebels' vehicle as he walked towards it. He described Complainant holding the gun with both hands with his arms out straight. He stated that the gun was pointed at them for approximately 30 seconds.

30. As an interview or interrogation technique, Reynolds untruthfully told Stebbins that there were traffic cameras at all of the intersections in Arvada, and that he was going to request a video of the altercation between Complainant and Siebels and Stebbins from the Arvada Traffic Engineering Department. He asked Stebbins if he thought the video would match with what Stebbins reported in the interview. He also mentioned the possibility of a person being charged for making false claims. He further told Stebbins that the most serious allegation he made was whether Complainant pointed the gun at Stebbins and Siebels.

31. When Reynolds made these statements to Stebbins immediately changed his story. He admitted to throwing the bottle at Complainant's car, but maintained that Complainant had pointed the gun at them. Stebbins later said, while still believing there was a videotape of the incident, "Well, I can tell you honestly that as far as the gun being pointed at us, it was pointed in our direction." He repeatedly said that the gun was pointed at the windshield of the truck.

32. When Reynolds interviewed Siebels, Siebels said that Complainant had his gun drawn "the second he hopped out of his car." Siebels indicated that Complainant's gun was drawn and pointed at his windshield as Complainant walked towards his car. He stated that Complainant was holding the gun with both hands and his elbows were locked. Siebels told Reynolds that Complainant banged on the window with his left hand, not the gun, and Siebels rolled down the window of his truck. Siebels reported that the gun was still up and pointed in his face.

33. Siebels agreed to take a polygraph if asked, and said that he knew from Stebbins that there was a videotape of the incident. Siebels stated that he was a "hundred percent" confident that the gun was pointed into the interior of the vehicle.

34. Reynolds recorded his interviews with Siebels and Stebbins.

Complainant's Internal Affairs Interview

35. After having interviewed Siebels and Stebbins, Reynolds scheduled an in-person interview with Complainant for September 18, 2008. Complainant was not told of the interview until September 17, 2008. It was the first thing he had heard regarding the incident since submitting his report to Lytle.

36. During his interview with Complainant, Reynolds wanted to find out whether Complainant had pointed the gun at Siebels and Stebbins and whether Complainant had tapped on the window of Siebels' truck with his firearm. Reynolds wanted to focus on in these issues because Complainant's report indicated that he had kept the gun down and did not mention tapping the window with the gun; there were discrepancies between that information and the information provided by Siebels, Stebbins and Herrlinger.

37. Reynolds' interview with Complainant lasted for over three hours, which included three short breaks, and evolved into an interrogation over that time. Reynolds employed three techniques while questioning Complainant. Those techniques were: 1) Minimization, where the severity of the act is reduced to make it seem common so the defensiveness of the person being questioned is lowered; 2) Polygraph suggestion if the weight of the evidence says one thing, but the person continues to deny it; and 3) Deception, where Reynolds insinuated that there was videotape showing Complainant pointing the weapon when such evidence did not exist.

38. At the outset, Reynolds emphasized to Complainant the importance of telling the truth during his interview. Before asking Complainant any questions, Reynolds asked him to tell him what happened on the evening of August 28, 2008.

39. While giving his account of what happened, Complainant was able to provide minute details concerning the incident. He stated repeatedly that he drew out his weapon, but held it down to be as non-threatening as possible. He also said that he used his left hand to knock on Siebels' window. He admitted to throwing the bottle, and expressed regret for doing so.

40. After Complainant gave his narrative of what transpired that evening, Reynolds began to ask him questions.

41. When Reynolds asked Complainant how angry he was during the incident on a scale of one to ten, Complainant stated that he was "like eight or nine." He stated that he was angry that something was thrown at his personal vehicle and got even angrier when he perceived Siebels to be smiling at him as he approached the truck.

42. Reynolds asked Complainant to explain how he was holding his weapon when he got out of his car. Complainant again stated that he was pointing it at the ground, but said was possible that if could have come up briefly from Complainant's car to Siebels' truck. Complainant denied again tapping the window with his gun even after being told that Herrlinger wrote that he said he had done so; he stated that he did not tell her that he did.

43. Early in the interview, Reynolds told Complainant that there were cameras at the intersection, and then asked, "What would you say if I told you that, upon review, your weapon was actually up and trained on the vehicle as you approached and then made initial contact with . . . the driver and—and the passenger . . . ." Complainant replied that he would be surprised because he didn't think he did that.

44. When Reynolds told Complainant that Stebbins and Siebels said the gun was up and pointed, Complainant said he didn't remember pointing it at them, and then asked if the videotape showed him with the gun down and then suddenly moving up. Complainant repeatedly stated that he did not remember having the gun up and pointed. He stated that even under a polygraph, he'd say he didn't remember doing it because he didn't remember doing it.

45. Eventually, Complainant said it was possible that he had pointed his gun in front of him as he walked towards Siebels' truck and "pretty possible" that he was holding the weapon with both hands. Eventually, Complainant admitted pointing the weapon at the cab of Siebels' truck. Complainant stated that he remembered thinking that he had to "stop pointing this gun," and get back to his car and end the confrontation.

46. Reynolds also falsely told Complainant that Herrlinger had recorded her conversation with him, but he had not listened to the recording yet. Complainant admitted that he thought about tapping the window with his gun, but didn't think he did it, but that if he told Herrlinger he did, he must have.

47. After Reynolds questioned Complainant for about two hours, he left and Captain Elder, who worked with Reynolds, came into the room and questioned Complainant. Elder told Complainant he was not being honest about the position of the gun and tapping on the window with the gun. Complainant stated that he did not remember those things. Elder told Complainant it was not believable that he remembered many specific details about the incident, but did not remember whether he pointed the gun or tapped on the window with his gun. Elder was confrontational in his questioning of Complainant.

48. After Elder repeatedly told Complainant that he did not believe him, and that he knew Complainant pointed the gun, Complainant admitted doing so. Complainant also admitted to tapping on the window with his gun. Complainant was exhausted at the end of the interview, and wanted it to end.

49. It is unusual for an internal affairs interview to last over three hours; they normally take about two hours. At times, Reynolds and Elder steered the interview instead of letting Complainant provide the information.

50. Complainant's Internal Affairs interview was audio- and video-recorded.

51. The day after he interviewed Complainant, Reynolds interviewed Herrlinger by telephone. Herrlinger told Reynolds that Complainant told her that he had tapped on the window of Siebels' truck with his gun. Reynolds inappropriately commented to Herrlinger about the investigation instead of just gathering facts as he was supposed to do. Reynolds recorded his interview with Herrlinger.

Complainant's Complaint to Captain Prater

52. Complainant was upset after his interview and felt that it was unprofessional. He requested a meeting with his captain, Ron Prater, to discuss his internal affairs interview. Prater met with Complainant on September 19, 2008.

53. During his meeting with Prater, Complainant recanted the admissions he had made during the internal affairs interview, and said that he was coerced into making them. Complainant said he felt that he had no choice to agree with Reynolds and Elder because he was subjected to undue pressure. Prater told Complainant to tell Major Meredith the truth and to fight for himself.

54. On September 24, 2008, Prater wrote a memorandum to Meredith regarding his meeting with Complainant, and expressed his concern that that Complainant felt he was forced to make false statements during his internal affairs interview by the use of high pressure tactics.

55. Meredith and Prater met after Meredith received Prater's memorandum, and watched portions of the interview video, including the entire portion where Elder was questioning Complainant. After reviewing the video, Prater had no concerns that Complainant was forced by Reynolds or Elder to make untrue statements.

Internal Affairs Investigative Report and Rule 6-10 Meeting

56. After Reynolds completed his interviews and reviewed all of the relevant documentation, including Prater's memo, he wrote a report summarizing his investigation. Reynolds included his personal opinions in the report which was improper; he should have only included the facts that he gathered.

57. After Reynolds completed his report, he provided copies of it to the CSP chief, the Lt. Colonel, and to Meredith, as the Appointing Authority. In addition to

receiving a copy of the report, Meredith received the entire case file, including the video and audio recordings of the interviews.

58. Meredith reviewed the report and the case file, and then sent a notice of a Rule 6-10 meeting to Complainant. Before the Rule 6-10 meeting, Meredith read Reynolds' report and the case file. He also reviewed small portions of the Internal Affairs interview with Complainant.

59. Upon reviewing those materials, Meredith was concerned with several issues. They were: 1) Complainant was in uniform and, therefore, representing CSP at the time of the incident; 2) Complainant's use of a weapon; 3) Complainant throwing the bottle at Siebel's truck; 4) Complainant's temperament and demeanor during the incident; 5) the fact that Complainant did not report the incident to the Arvada Police Department; and 6) the memorandum Complainant wrote and gave to Lytle differed from the statements given by Stebbins and Siebels.

60. Meredith held the Rule 6-10 meeting with Complainant on October 7, 2008. At the outset of the meeting, he explained that it was an opportunity for Complainant to be candid regarding the areas of concern. Complainant gave Meredith an oral representation of the incident, and Meredith followed up with questions. He gave Complainant the opportunity to add anything he wanted to after answering Meredith's questions.

61. During the meeting, Meredith had additional concerns. He was concerned about the differences in what Complainant stated and the statements provided by the witnesses. He was also concerned about Complainant's frustration with the entire process and his lack of faith in CSP. During the meeting, Complainant stated that he did not think the altercation was a "big deal," but Meredith felt that it was extremely serious because Complainant's weapon was out and others could see it.

62. Meredith was further concerned that Complainant said that he had his weapon pointed down given Complainant's statements that he was concerned for his safety and Complainant's training. CSP trains it troopers to point their weapons at the area of concern so it did not make sense to Meredith that Complainant would have had his weapon pointed at the ground. If there is a threat, the weapon should be pointed at the threat; if there is no threat, the gun weapon should be holstered. During the Rule 6-10 meeting, Complainant stated that he was one hundred percent certain that he had his gun pointed down.

63. The fact that Complainant's vehicle was in front of Siebels' truck was a concern to Meredith because Complainant was vulnerable; it is unsafe to exit a vehicle which is front of the vehicle being stopped. While he did not think it was completely unreasonable to get out of the car, Meredith thought it would have been safer for Complainant to simply have run the red light, and getting away

from Siebels and Stebbins, instead of getting out of his vehicle and confronting them. This was very feasible because no other traffic was near the intersection.

64. Meredith thought Complainant could have gotten Siebels' license plate number and radioed it in, even though the radio was assigned for use at the DNC. There were still dispatchers available when the incident occurred.

65. Meredith thought that if Complainant did feel the need to confront Siebels and Stebbins, he should have given them his name and agency because he was wearing a uniform. Such actions would have shown a level of professionalism. Meredith thought Complainant should have also contacted another officer to take over the situation so he did not have to be involved any further in the incident. Meredith did not think it was appropriate for Complainant to have thrown the bottle.

66. A trooper is required to identify himself and his agency if he makes a stop. Complainant did not do so.

67. During the Rule 6-10 meeting, Complainant admitted that he personalized the situation with Siebels and Stebbins, and confronted them unnecessarily.

68. Meredith was also concerned about the rage and anger that Complainant exhibited during the situation. He also had concerns about Complainant's ability to tell the truth in court while testifying as a state trooper if he felt pressured by a criminal defense attorney. A trooper can be rendered an ineffective witness if he has a finding of being untruthful in the past.

69. When Meredith received the memorandum from Prater regarding Complainant's allegations of coercive tactics used by Reynolds and Elder, Meredith reviewed the video tape of the interview, and did not feel that there was any coercion.

Information Considered After Rule 6-10 Meeting

70. After the Rule 6-10 meeting, Meredith did a complete review of all of the documents and all of the audio and video recordings, including the internal affairs investigation interview with Complainant, in their entirety. Meredith was concerned about the stark differences between the two occupants of the truck and Complainant regarding whether the weapon was pointed or not. He was further concerned about the differences between Herrlinger's account and Complainant's regarding whether Complainant tapped on the window with his gun.

71. After reviewing all of the evidence, and the fact that Complainant had been trained to point his weapon at a threat, Meredith concluded that Complainant

was not telling the truth about where his gun had been pointed. This was especially true because Complainant could remember minute details about the incident, but claimed to not remember whether he pointed the gun or tapped on the window with his gun. Meredith could not conclude based on the information he had whether Complainant had tapped on the window with his gun. It was important to Meredith to listen to all of the interviews so he could come to a conclusion regarding the truth on his own, without relying on the internal affairs report.

72. Meredith had some concerns regarding the internal affairs interview with Complainant because he felt like the investigators did too much of the talking. However, he did not find anything about the interview to be egregious or coercive.

73. Meredith also talked with other Appointing Authorities, as it is his normal process to bounce things off other majors to make sure he is being fair and equitable. He also reviewed CSP's General Orders.

74. Meredith concluded that Complainant had violated the following General Orders: 1) Members will obey the law; 3) Members will be truthful and complete in their accounts and reports; 5) Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately; 6) Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession; 7) Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy and respect; and 8) Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.

75. Meredith found that Complainant may also have violated Section 18-3-206, C.R.S., Menacing, if he tapped on the window of the truck with his weapon. Complainant was never charged with this crime, nor did CSP ever consider charging him with it.

76. In making his decision regarding whether to discipline Complainant, Meredith also took into consideration the fact that Complainant was a long-time employee who had done "fantastic" things for CSP as a multi-media specialist.

Complainant's Disciplinary Termination

77. Ultimately, Meredith concluded that Complainant could not be employed as an officer based on his conduct, and demotion is not available for a trooper as there is no lower rank. Meredith did not decide to terminate Complainant based

on any one act, but the totality of the circumstances including the incident and Complainant's statements after the incident.

78. Meredith also considered the fact that Complainant had received a corrective action for a minor car crash he was involved in as a trooper.

79. Meredith prepared a letter of termination for Complainant, and asked him to come to his office because he did not want to terminate him without looking him in the eye. He also wanted a supervisor to accompany Complainant home after the meeting to retrieve all of the equipment that belonged to CSP. Complainant was terminated on October 21, 2008.

80. Complainant timely appealed Meredith's decision.

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 most of the acts for which he was disciplined.

Complainant was terminated for violating several of CSP's General Orders. They are: 1) Members will obey the law; 3) Members will be truthful and complete in their accounts and reports; 5) Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately; 6) Members will avoid any conduct that may bring discredit upon, or undermines the credibility of themselves, the Colorado State Patrol, or the police profession; 7) Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy and respect; and 8) Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.

Respondent did not satisfy its burden of proof that Complainant failed to obey the law. There was inadequate evidence to establish that Complainant tapped on the window of the truck with his gun, and thus, guilty of menacing.

Complainant was untruthful in his accounts and reports, thus violating General Order 3. He was untruthful about pointing the gun when he spoke with Sergeant Wheeler, when he wrote the memorandum to Sergeant Lytle, when he was interviewed by the internal affairs investigators and during his meeting with Meredith. Additionally, Complainant did not conduct himself in a manner that would preserve the public trust in violation of General Order 5. During his encounter with Siebels and Stebbins, Complainant acted so unprofessionally that Stebbins questioned whether Complainant was actually a police officer. Complainant did not identify himself, exhibited rage, and threw a bottle at their vehicle. Such conduct, in addition, to being untruthful regarding the incident, undermined his credibility in violation of General Order 6. Because he was wearing a uniform issued by the CSP, he also undermined the credibility of the agency by his actions. Likewise, Complainant did not conduct himself in a way that reflected "the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy and respect." To the contrary, Complainant's actions with respect to Siebels and Stebbins were very unprofessional. Respondent has therefore satisfied its burden that Complainant violated General Order 7. Respondent did not establish that Complainant violated General Order 8 as there was insufficient evidence that Complainant's actions unnecessarily endangered anyone.

Respondent has proven that Complainant committed most of the acts for which he was disciplined.

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).

Meredith did not neglect or refuse to use reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant. The internal affairs unit conducted an investigation, and provided Meredith with a copy of its final report. In addition to reviewing that report, Meredith listened to all of the audio interviews and watched Complainant's in its entirety. He also reviewed all of the documents related to the investigation. Meredith spent over one full work day reviewing all of the information available to him. Furthermore, Meredith held a Rule 6-10 meeting with Complainant and allowed him to present information or evidence regarding the incident and the subsequent investigation. Meredith considered the

information provided by Complainant during the meeting. Additionally, he considered Complainant's longevity with CSP and the fact that he had done excellent work in his prior position.

Meredith carefully considered all of the information he gathered, including Complainant's statements during the Rule 6-10 meeting, before deciding to impose the discipline he did.

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

As Meredith noted in the disciplinary letter he issued on October 21, 2008, Complainant violated several General Orders. He noted that Complainant was involved in a traffic altercation, and jumped out of his personal vehicle while wearing his CSP uniform and drew his weapon. He then confronted Siebels and Stebbins and threw a bottle at their vehicle as he was going back to his own car. Meredith noted that he found it not credible that Complainant would remember vivid details about the incident, but could not remember whether he pointed the gun or tapped on the window with the gun. Both Siebels and Stebbins were adamant that Complainant pointed the gun at them, even after they were told that there was a camera at the intersection. When told the ruse about the camera, Stebbins immediately admitted to throwing the bottle, but insisted that Complainant pointed the gun at them. While it would have been consistent with CSP training to have pointed the gun, Complainant stated that he had it pointed at the ground. Given the testimony of the witnesses, and Complainant's own admissions during the internal affairs interview, Complainant's statements about holding the gun down are not credible. Moreover, Complainant displayed inappropriate anger during his encounter with Siebels and Stebbins.

The discipline imposed by Respondent was within the range of reasonable alternatives available to it. Pursuant to Board Rule 6-2, "A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Complainant had one prior corrective action for a minor automobile accident which was considered as part of this disciplinary action. Even without the prior corrective action, Complainant's conduct was serious and flagrant; thus, immediate discipline was appropriate. Complainant is a peace officer who is to adhere to a certain standard of conduct as outlined in the General Orders. Because of his anger, Complainant violated a number of those orders. Complainant's failure to immediately tell the truth regarding the incident violated another General Order and cast doubt on his necessary credibility as an officer. While termination is harsh discipline, it was not outside of the reasonable range of alternatives.

D. Attorney fees are not warranted in this action.

Complainant moved for attorney fees and costs. Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-

38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38, 4 CCR 801. Because Complainant did not prevail, attorney fees are denied.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Attorney fees are not warranted.

ORDER

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

Dated this 3rd day of June, 2009

[redacted]

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 4th day of June, 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:

Douglas Jewell, Esq.
[redacted]

Diane Marie Dash
[redacted]

[redacted]

Andrea C. Woods