STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010B117**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JERRY LOPEZ,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 21, 2010, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Richard Reynolds, Regional Transportation Director, Colorado Department of Transportation (CDOT), and Complainant's Appointing Authority. Complainant represented himself.

MATTER APPEALED

Complainant, Jerry Lopez (Complainant) appeals his disciplinary pay reduction of 10 percent for one month by Respondent (CDOT or Respondent). Complainant's claim of race/national origin discrimination was deemed abandoned at hearing. Complainant seeks rescission of the disciplinary action and reimbursement.

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 the discipline imposed was within the range of reasonable alternatives;
4. Whether Respondent discriminated against Complainant on the basis of race or national origin.

FINDINGS OF FACT

1. Complainant is a certified Transportation Maintenance Worker (TM) II at CDOT. As a lead worker, Complainant directs the work of four subordinate TM I's.

2. Complainant has been employed by CDOT for twenty-six years. In 2008 and 2009, he received Outstanding annual performance ratings.

CDOT Computer and Internet Use Policies

3. CDOT Policy Directive 27, Computer and Internet Use (Policy 27), provides that "official department resources, including computers, software, and Internet access, may be used for official purposes only. . . Certain occasional non-official use of certain resources, including Internet access, may be permitted provided that such use is infrequent and incidental. Employees should always exercise good judgment when utilizing department resources."

4. Policy 27 prohibits CDOT employees from viewing matters on the computer or Internet that are "offensive, objectionable, obscene, or of a prurient nature." The policy also prohibits "Downloading of screen-savers, games, or streaming audio or video for entertainment purposes."

5. CDOT requires all employees to sign an Information Interchange Policies and Conditions Form #984 (the Form) as a condition of using computers. Complainant signed this Form on April 6, 2000, acknowledging that he had read and agreed to abide by the Policies and Conditions.

6. By signing the Form, CDOT employees waive their right to privacy in regard to any information contained on their computer at work, and consent to agency monitoring, retrieval and disclosure of any information on the network for any purpose, including enforcement of agency rules.

7. The Form states in part, "Chain mail is prohibited at CDOT. Please do not forward chain letters, games, virus alarms, or solicitations for donations. These are non-productive in the CDOT work environment." The Form also states, "To control network traffic however, please do not attempt to transfer messages or attachments larger than 10MB (aggregate.)"

8. In addition, the Form states, "Account holders are expected to be responsible users of the network. They should not take actions that may cause interference to the operation of the network, or to the work of other users on the network."

9. On December 12, 2009, Russell George, Executive Director, sent an email to all CDOT employees regarding "Internet and Email Use." The email referred employees' attention to Policy 27 and the Form and reinforced the importance of complying with the policies, stating, "It is important that we, as state employees,

follow this policy to ensure that we are utilizing taxpayer money and resources for their intended purpose, which is to accomplish the mission and vision of our Department."

Mr. Reynolds' Investigation

10. In the spring of 2009, the Regional Transportation Director in District 1 learned that some of his employees were sending pornographic emails to CDOT employees in other regions. That Director contacted Mr. Richard Reynolds, Director of Region 5.

11. Once Mr. Reynolds identified the names of the recipients of the emails in District 5, he directed the Information Technology (IT) staff in his office to send him an icon enabling him to access those employees' computers. Mr. Reynolds examined all of the non-work related emails in the employees' "Sent" folders, which had been sent during work hours. He then followed the trail of those emails, identifying additional District 5 employees who had sent the objectionable emails.

12. By following the chain of emails through District 5, Mr. Reynolds identified a total of 25 or 30 employees who had apparently violated the agency's computer use policies. Mr. Reynolds printed the entire "Sent" folder lists of these employees, highlighted those that were non-work related and sent during business hours, and then spent an entire week reviewing every single relevant email, to determine whether they were appropriate, inappropriate, offensive, or pornographic.

13. Mr. Reynolds did not examine any emails that had been deleted by his employees. He determined that employees who had received and deleted the non-work related emails had acted appropriately and would not receive any follow-up.

Complainant's Email Policy Violations

14. Mr. Reynolds printed the list of "Sent" emails of Complainant during the period May through December 2009, and highlighted the non-work related ones sent during work hours. He then viewed all of them personally to determine their content. He found that Complainant had sent over fifty non-work related chain emails to other CDOT employees during work hours from May through December 2009.

15. None of the emails sent by Complainant to other CDOT employees was pornographic.

16. Many of the emails Complainant sent to other CDOT workers were offensive, objectionable, or obscene. These included one entitled, "Dumbass," regarding

not placing a firecracker in one's anus. The accompanying photo was a violent image of maimed buttocks. Another offensive email was entitled, "BoyBeerStand." It featured a video of a teenage boy selling beer on a street corner to strangers and treating them in a rude and abusive manner, including calling women "bitch" and "broad."

17. Another offensive email sent by Complainant to other CDOT employees, entitled, "merrychristmas1.wmv," featured Osama Bin Laden reciting a poem about there being no Christmas this year, ending with Santa Claus shooting Bin Laden, who lay on the floor in a bloody mess.

18. Several of the emails sent by Complainant to other CDOT employees required downloading of screen-savers and streaming of audio or video for entertainment purposes. Many of the chain emails were extremely lengthy, often dozens of pages long, and took several minutes to read. One contained twenty-five pages; another contained forty-three pages.

19. One email was entitled Jesus asks Satan, and was 4 mega bites, a large file. This file had the potential to slow down the computer operations at CDOT. Several others were 2 megabytes or larger, clogging the system and prohibiting the transmission of legitimate emails. Transmission of 10-megabite emails shuts down the system.

20. Many of the chain emails forwarded by Complainant to coworkers contained statements such as, "If you love your country you'll forward this," and, "If you love Jesus you'll send this on to ten others," and, "Mathew: 20-32, if you love this man please forward to ten people." Complainant did forward these emails to many other coworkers.

Predisciplinary Meeting

21. Mr. Reynolds decided to have predisciplinary meetings with approximately twenty District 5 employees. Complainant was one of them. Mr. Reynolds sent a letter to Complainant advising him that they would need to meet to discuss the possibility of disciplinary action for violation of the agency's Internet and Computer usage policies.

22. On February 2, 2010, Complainant attended the predisciplinary meeting without a representative. Mr. Reynolds attended with a representative, Alice Baker, from the CDOT Equal Employment Opportunity office.

23. At the meeting, Mr. Reynolds reviewed the process by which he had learned of the email policy violations, his investigation, and the policies he believed Complainant had violated. He explained that infrequent and incidental personal emails at work are fine; however, chain emails are particularly problematic because they waste so much work time of the recipients, they ask the reader to

identify multiple individuals to forward them to, and they waste added work time of the additional recipients.

24. Sitting at two computers, Mr. Reynolds and Complainant then reviewed all fifty-plus emails sent by Complainant to others at work during the period May through December 2009. Mr. Reynolds described the contents of the emails, the number of pages, and the number of CDOT workers to whom Complainant forwarded the emails.

25. Complainant confirmed that he had read and sent all of the emails. Complainant confirmed that all of the emails had no relation to CDOT work, and that it was a waste of the taxpayers' money and of his and his coworkers' time to read and forward them.

26. Mr. Reynolds asked Complainant in the future to inform senders of chain email not to send more to him, and also to delete any emails he received that were not work related. Complainant agreed, and stated that it would not happen again.

Chart of Computer and Email Use Violations

27. After Mr. Reynolds completed the approximately twenty predisciplinary meetings with employees, Mr. Reynolds made a chart entitled, Computer & Email Use Violations (the chart). The purpose of the chart was to ensure he imposed consistent consequences on employees who engaged in similar conduct.

28. The chart contained five categories of email policy violations, from most to least serious. Once he had placed all of the policy violators on the chart, he decided what level of action to impose.

29. The most serious category contained the list of seven employees who received and sent several pornographic emails. Mr. Reynolds issued these individuals, consisting of TM I's and TM II's, two-month pay reductions.

30. The second most serious category consisted of employees who had received and sent an extremely large number of non-work related emails, including chain email, objectionable, and offensive emails. Mr. Reynolds issued a one-month ten percent pay reduction on these two individuals, Complainant and another TM II.

31. The third category on Mr. Reynolds's chart contained individuals who had sent just a couple of non-work related emails. Mr. Reynolds issued Performance Documentation Forms (PDF's) to these ten employees, who held positions at many different levels. In addition, Mr. Reynolds required these employees to attend a general meeting held on February 5, 2010, where he discussed the importance of adhering to the policies.

32. The fourth category listed one individual who received a corrective action. The individual was a supervisor above Complainant in the chain of command who had sent fourteen emails to Complainant and other CDOT employees. Mr. Reynolds issued a corrective action to this individual because he was a fairly high level supervisor.

33. The last category contained three employees who sent just a few emails and received PDF's.

Reynolds' Decision

34. Prior to deciding what action to impose, Mr. Reynolds reviewed Complainant's personnel file. Complainant's performance evaluations were recently Outstanding, consistently positive, and he had served CDOT for twenty-six years. Mr. Reynolds also found the following: a December 2009 Performance Documentation form for failing to inform his supervisors he missed a meeting and failing to use sick leave for the missed time; an April 2009 corrective action for a minor accident resulting from backing up a truck; and a 2004 disciplinary action for a positive drug test.

35. Mr. Reynolds concluded that due to the extremely high number of chain emails sent by Complainant, and the fact that many of them were offensive in content, he would impose a one-month ten percent pay disciplinary action.

36. Mr. Reynolds was concerned about the huge amount of time Complainant had wasted on the job, and the even larger amount of time that was wasted by the recipients of his emails. He concluded that Complainant had failed to lead by example, which is the purpose of being a lead worker.

37. On March 8, 2010, Mr. Reynolds issued a letter to Complainant, imposing the one-month, ten percent pay deduction. The letter noted that Complainant had violated Policy 27, the Form, the email from Russell George, CDOT Policy 2.0, CDOT Values, and State Personnel Board Rule 1-16.

38. Mr. Reynolds stated in his letter, "As I explained to you, certain occasional non-official use is permitted provided that such use is 'infrequent and occasional'. I am also concerned because you are a lead worker and should be setting an example for your employees, and not sending these types of e-mails."

39. Mr. Reynolds's letter noted that at the predisciplinary meeting, Complainant had agreed that he "did waste CDOT's time, your time, and other people's time and that this won't happen again."

40. Complainant has served on the Employee Council as a representative of CDOT. In his local community, he has helped raise public awareness of road safety by creating a CDOT float for a parade based on this theme.

41. Complainant timely appealed his disciplinary action.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant did not contest any of the facts that led to his disciplinary action. He admits to having sent over fifty non-work related emails, most of which were chain emails, some of which were offensive, and to having violated the policies listed in the disciplinary action letter.

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; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant asserts that Mr. Reynolds gave inadequate consideration to his Outstanding performance evaluations, his community outreach on behalf of CDOT, and his twenty-six years of dedicated service to the agency. The evidence demonstrated, however, that Mr. Reynolds gave due consideration to Complainant's strong performance history and his service to the agency. Complainant also argued at hearing that it was unfairly arbitrary for him to receive a disciplinary action for conduct so similar to the higher-level supervisor who received the corrective action. However, that supervisor sent fourteen emails; Complainant sent over fifty. This difference is significant enough to warrant a higher level of discipline.

Mr. Reynolds carefully and honestly considered all of the information he gathered before he made his decision to discipline Complainant. The chart he made demonstrates the diligence with which he sought to be fair and balanced in his response to the widespread problem of email abuse in his District. Part of the information Mr. Reynolds considered was Complainant's leadership role as lead worker, and the effect his actions had on others at CDOT. Mr. Reynolds' determination that the appropriate discipline for Complainant was a one-month pay reduction of ten percent was reasonable.

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

Complainant asserts that he should have received a corrective action instead of disciplinary action, in view of his Outstanding performance reviews and his lengthy service to CDOT. He also argues that Respondent should not have considered his prior disciplinary and corrective actions.

Board Rule 6-9, 4 CCR 801, provides that the "decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances." Therefore, Respondent was required to consider Complainant's prior corrective and disciplinary actions prior to taking action in this case.

In addition, Board Rule 6-2, 4 CCR 801, requires that a "certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of the discipline depends

upon the act committed." Complainant's violation of the rules governing email use at work was flagrant and serious. He was aware of the prohibition on chain emails, and yet he read them during work time and forwarded them routinely to numerous other CDOT workers, thereby wasting his own and others' work time on non-work related matters.

Complainant is a lead worker, responsible for setting the tone and the standard of conduct for his subordinates. His actions in this case demonstrate that he did not take agency policies seriously, that he believed it was acceptable to violate them, and that it was therefore acceptable for his subordinates to violate them. These aggravating factors render disciplinary action appropriate. Lastly, Respondent imposed a mild level of discipline, a measured response to a serious problem. Respondent's action was within the range of reasonable alternatives available.

D. Respondent did not discriminate against Complainant.

Complainant alleged on his appeal form that Respondent discriminated against him on the basis of race/national origin. However, Complainant put forth no evidence of discrimination at hearing. Therefore, this claim is deemed abandoned.

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. Respondent did not discriminate against Complainant.

ORDER

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 4th day of November, 2010

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. 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 4th day of Nov., 2010, I electronically served 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:

Jerry Lopez

[redacted]

and in the interagency mail, to:

Eric Freund

[redacted]

[redacted]

Andrea C. Woods