

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARTHUR ROBINSON,
Complainant,

vs.

UNIVERSITY OF COLORADO AT DENVER,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on December 5, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The record was closed upon Complainant's submission of redacted exhibits on December 7, 2012. David P. Temple, Office of University Counsel, represented Respondent. Respondent's advisory witness was Russell J. Poole, III, Assistant Vice Chancellor and Complainant's appointing authority. Complainant appeared and represented himself.

MATTERS APPEALED

Complainant, a certified employee, appeals his termination of employment from the Information Technology unit at the University of Colorado at Denver ("Respondent"), arguing that his termination was arbitrary, capricious and contrary to rule or law. Complainant also argues that his termination was the product of unlawful discrimination on the basis of his race and age, and a violation of the State Employee Protection Act. Complainant asks for reinstatement to his position, back pay, a promotion, front pay, and other relief as determined by the ALJ. Respondent argues that the termination was properly imposed after Complainant has repeatedly failed to meet his performance standards as a technician on the Help Desk, and that termination is an appropriate remedy after other efforts to correct Complainant's performance had failed. Respondent asks that the discipline be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

Background:

1. Complainant began work at the University of Colorado at Denver in January of 1988. He was originally hired as a senior administrative clerk in the Graduate School of Architecture.
2. Through changes in his duties and in the needs of the Graduate School of Architecture, Complainant became involved in running the first computer lab system for the Graduate School of Architecture.
3. Complainant began taking programming classes with the thought of becoming a programmer. Instead, as the Graduate School of Architecture received more computer resources, Complainant decided he would learn to run the system.
4. In the early 1990's Complainant helped the Graduate School of Architecture grow its computer resources in a computer lab. By this point, Complainant's working title was lab technician or lab coordinator. Complainant set up the first networks for the school. The lab was eventually shared with the English department and other departments, and Complainant provided the computer support.
5. Complainant began asking to have his job re-evaluated as his responsibilities grew.
6. During this period, the University of Colorado Denver was undergoing an expansion of computer service and needs. The decision was made to centralize computer support services and personnel at the Anschutz campus. Complainant was aware that his support position would be centralized and removed from the Graduate College of Architecture.
7. When Complainant first engaged in discussions about how his position would be integrated into the newly-enlarged computer support department, Complainant was of the understanding that that Respondent would reclassify his position to an IT Professional II. This would be a higher classification level than an IT Technician II. Complainant was then told he would be classified at the IT Technician II level.
8. By letter dated May 19, 2004, the Dean of the Graduate School of Architecture, Dean Gelernter, informed Complainant that his position of Information Technology Technician II would be reassigned to the Computing Information and Networking Service Department effective July 1, 2004. Complainant's new supervisor was Eric Campagna, Customer Care Manager. The decision to transfer Complainant as a technician was made by supervisors above Mr. Campagna's level, and Mr. Campagna played no role in the decision to place Complainant as a technician on his team.
9. Complainant was angry and upset that his position had not been rated any higher than the technician series. Complainant believed that the decision to transfer him at the technician level was a product of unlawful racial discrimination. Complainant believed this because there had been some tension at the Graduate School of Architecture regarding the Million Man March, in which some at the college had questioned the need for time off to support the march. Complainant alleges that Dean Gelernter called him into the office during this period of time and had called him a name that Complainant would not repeat. Complainant believed Dean Gelernter had racist views, and he blamed Dean Gelernter for the failure to place his position into a higher classification than the technician series.

10. During the time that Complainant was on Mr. Campagna's staff, he was the only African-American working on the staff.

11. Mr. Campagna was the manager of the support group which provided work station support as well as Help Desk support to Respondent's IT clients. This group provided the technicians for work station support issues and technicians to staff the Help Desk for clients to call. When Complainant started in 2004, his work and the work of other technicians was predominately field work assignments related to work station support. Technicians also staffed the Help Desk as well each week, in addition to performing field work. In 2010, the Help Desk and the work station support units were functionally separated even though they remained within Mr. Campagna's group. Complainant was assigned full-time to the Help Desk at that point.

12. Once Complainant was placed into a technician position on Mr. Campagna's staff, he continued to take the position that his placement there was the product of unlawful racial discrimination. Complainant raised the issue of racial discrimination repeatedly to Mr. Campagna.

Complainant's performance in 2009:

13. On or about April 24, 2009, Complainant was called into a meeting with Mr. Campagna and other supervisory staff to discuss his communication with his supervisor and Complainant's use of statements concerning "harassment" by his supervisor and a "hostile work environment" created by his supervisor. Complainant was told that he had to choose between ending the allegations or taking the allegations to Human Resources. The meeting ended when Complainant agreed that he would take allegations of harassment or hostile work environment to Human Resources.

2009 Action Plan:

14. Complainant was placed on an action plan on June 30, 2009 (2009 Action Plan). The Action Plan included the identification of four policy and procedure areas where Complainant had been noted to be inconsistently following requirements. The identified policies and procedures included the use of the Sickline notification procedures, calendar entry procedures, and work order procedures. The action plan also outlined a series of expectations concerning Complainant's communications with his site managers, supervisor, co-workers, departmental managers, and others. These expectations included that Complainant was to be professional and respectful at all times, and that discussions pertaining to past grievances would not occur from that point forward.

2009 Corrective Action:

15. On October 19, 2009, Mr. Campagna placed Complainant on a Corrective Action (2009 Corrective Action) related to Complainant's failure to meet the expectations of the 2009 Action Plan within a 90-day period.

16. Mr. Campagna specifically included in the 2009 Corrective Action that Complainant had not been consistently following established Help Desk policies and procedures, and had not improved his overall written and verbal communication, improved his timeliness with regard to entering work orders, or increased his efficiency rating by making proper entries into the CHAPS system. The 2009 Corrective Action required that the Complainant conduct his his written and

verbal communication so that it was respectful, professional, and that he provide timely responses to requests for information.

17. On or about October 19, 2009, Complainant sent an email to a supervisor which included the statements, "I totally disagree with your continued effort to misrepresent my performance to our management," and "I find your action to be a continuation of discrimination and harassment!"

18. Approximately during this period in 2009, Complainant heard from a client, Rick Gardner, that Mr. Campagna had made a comment during a phone call that Mr. Gardner made to Mr. Campagna regarding an IT issue that needed to be resolved. Mr. Gardner said that Mr. Gardner had told him that Mr. Campagna was sorry that Complainant had given Mr. Gardner the devil. Complainant inferred from Mr. Gardner's recounting of the comment that Mr. Campagna was being hostile to him.

19. On or about October 20, 2009, Complainant received an email from Corwin Gruebele, who had been a client of Complainant's. Mr. Gruebele said in his email, "I am sorry to hear that there is still trouble for you regarding the work order you completed for me." Mr. Gruebele told Complainant that someone by the name of Sheila had told him that Complainant hadn't done his job properly when Mr. Gruebele called to find out when Complainant would return to install a second computer station which was behind a locked door. Mr. Gruebele also told Complainant that he had picked up a voice mail from Mr. Campagna and, while he couldn't recall exactly what Mr. Campagna had said, "I was of the distinct impression that he was intent on filing a report on somebody." Mr. Gruebele ended his email with the statement as he was very disappointed "that Eric [Campagna] is choosing to enable Sheila to falsely accuse you of not doing your job. That is absurd!"

20. On or about October 22, 2009, Complainant sent another email to a supervisor in which he complained that he had heard from clients that management seemed to be using leading questions to seek out negative information to be used against him in a disciplinary action. Complainant also stated in this email that he believed that there was a premeditated intent to cause him harm.

21. On or about November 2, 2009, Complainant met with Mr. Campagna and Joe Kornblith concerning the 2009 Corrective Action and Complainant's emails. During this meeting, Mr. Campagna characterized the statements in Complainant's October 19, 2009 email as unprofessional. Mr. Campagna told Complainant that, if he were asked for information, Complainant was to respond to the request with the requested information only, and without including "negative comments." Mr. Campagna informed Complainant that negative comments included Complainant's use of terms such as "harassment," "hostile work environment," "discrimination," and "racism."

22. Mr. Campagna also reviewed with Complainant other ways to express his concerns when he received an inquiry from a supervisor, including requesting for more information from his supervisor, sending an email to Human Resources, or filing a grievance.

Complainant's Performance in 2010:

2009 – 2010 Review:

23. Complainant's annual review covering April 1, 2009 through March 31, 2010, was issued at the end of April 2010 (2009-2010 Review). Complainant's overall rating was a total of 174 points. This placed Complainant's overall rating at Below Expectations.

Complainant was rated as Exceeding Expectations (level 3) in the area of customer service. The comments for this core competency note that, "Art is very good with customer service. He is frequently requested by customers for work orders. He is friendly and polite when he provides on-site service. I have received several positive ... surveys from his customers about their completed work orders." The review narrative also included praise for Complainant's willingness to assist during emergencies or when the unit was short-staffed.

24. The 2009-2010 Review rated Complainant as Meeting Expectation (level 2) in four goals or core competencies: meeting training requirements; learning all aspects of two specific technology categories; interpersonal skills; and job knowledge.

25. The review of Complainant's interpersonal skill and job knowledge categories noted that Complainant was pleasant and courteous in most of his interactions on the job, and that he had demonstrated a good job knowledge overall. The review noted that Complainant needed to be more consistent in meeting the customer care rules and procedures, which involved his timesheet submissions, his average efficiency ratio, paging procedures, and the level of detail in his work order write-ups.

26. The 2009-2010 Review also rated Complainant as "Below Expectations" (level 1) in the category of maintaining an acceptable Average Efficiency Ratio (AER). The AER was calculated by totaling various types of hours reported (such as hours spent on workstation support, associated with help desk assignments, or taken as leave), and dividing that number by the employee's total hours. An employee who was at a Meeting Expectations level of performance would have an efficiency ratio of between 94% and 96.9%. Complainant's efficiency ratio was 77.5% for the year. The low number was caused in significant part by Complainant's failure to account for some of his workstation support time during the first half of the review period, with an improvement in recording time in the second half of the review period.

27. The 2009-2010 Review also rated Complainant as Below Expectations in the core competency of Accountability. The notes for that section included the following:

Art was rated at Below Expectations. While Art does accept some responsibility for his actions, work, and behavior, this is not very consistent. He often responds to written inquiries about work order status or calendar entries in a very defensive and negative manner.

Art has demonstrated his attention to work rules but again, this is not very consistent. His weekly timesheets to the [workstation support] manager are often late, his work order histories are not very detailed, he does not always respond to pages in a timely manner, and he does not always inform his supervisors of work order issues that cause a delay in services.

Art needs to work on meeting deadlines that are established for different types of assignments. His weekly timesheets are an example of deadlines being missed.

2010 Corrective Action:

28. On or about June 8, 2010, the Director of Operations for IT Service, Don Galarawicz issued Complainant a Corrective Action (2010 Corrective Action).

The 2010 Corrective Action was based upon the Below Expectations ratings in Complainant's 2009 - 2010 Review.

29. Complainant was informed that his Average Efficiency Rating of 77.5% was significantly below the expected AER of at least 94%. Complainant was reminded that his time needed to be recorded on a daily basis within the CHAPs call-tracking system for it to be recorded as part of his AER.

30. Complainant was reminded that he had been given explicit standards concerning the need for professional and respectful communications with during the November 2, 2009 meeting with Mr. Campagna and Mr. Kornblith. Mr. Galarowicz informed Complainant that he found that Complainant was not following those requirements. Mr. Galarowicz also found that Complainant's communication with his supervisor, Mr. Campagna, needed improvement because raising his voice or yelling at Mr. Campagna during discussions was a violation of acceptable communication standards and would not be tolerated. Mr. Galarowicz also noted that Complainant had received a below expectations rating for failing to consistently follow established work rules and meet deadlines.

31. The 2010 Corrective Action required Complainant, among other things, to follow the requirements for professional and respectful communications at all times, and to bring up concerns or disagreements in a professional manner. Complainant was informed that he had to enter all of his time for all work orders in the CHAPS system on a daily basis and to maintain that effort consistently. After Complainant reviewed his monthly efficiency stats, Complainant was also to take the initiative to schedule a meeting with his supervisor to discuss any discrepancies in those monthly efficiency time stats.

Events with Yvonne Fitzpatrick and the December 2010 Disciplinary Action:

32. Yvonne Fitzpatrick became a co-worker of Complainant during 2010. She reported to the team leader, Gabe Sandoval, that Complainant had been sleeping on the job and that Complainant had made some inappropriate comments to her.

34. Mr. Sandoval sent an email to Ms. Fitzpatrick on September 29, 2010, which read as follows:

Hi Yvonne,

I wanted to ask you specifically if you have any concerns about Art Robinson you would like to address, to Eric Campagna and I. You have mentioned in the recent past that you had some concerns about him sleeping at work and some other of his behaviors at the Help Desk might need to be addressed by a member of management.

In an effort to improve the atmosphere and professionalism at the Help Desk, I would ask that you detail your concerns with Art Robinson in an email to Eric and I. Please only do so if you are comfortable addressing those concerns at this time. Please also keep in mind that Eric and/or I will research and address your concerns appropriately soon after you report them to us. We will not indicate to Art Robinson or any other individual what your concerns are, in an effort to effectively deal with your concerns,

Please let me know if you have any questions.

Thank you.

35. By letter dated December 21, 2010, Complainant was disciplined for sleeping at his desk, telling Ms. Fitzpatrick on or about June 30, 2010, that all of the bosses were Jews, using a reference to Jews in a negative manner with other co-workers, and making inappropriate remarks to Ms. Fitzpatrick on November 16 and 17, 2010, which were of a sexual nature and which made her uncomfortable. The disciplinary sanction imposed was a 5% pay reduction for four months.

36. Complainant appealed the disciplinary action to the State Personnel Board. Complainant argued at hearing that the September 28, 2010, email from Mr. Sandoval, along with other actions, constituted evidence that he was being set up by management.

37. After two days of evidentiary hearing on July 26 and August 11, 2011, the Administrative Law Judge found the factual allegations related to the disciplinary action to be credible and upheld the disciplinary sanction in "Initial Decision of The Administrative Law Judge," Case No. 2011B063, issued September 26, 2011.

Complainant's Performance In 2011:

2010 - 2011 Review:

38. During the review period from April 1, 2010 through March 31, 2011, Complainant's assignment was changed so that he was only assigned to Help Desk duties. Prior to the re-assignment, Complainant had been assigned work station support issues and had been assigned to staff the Help Desk on a more limited basis. Complainant's work review goals and objectives were modified to take this change into account, and to add several new goals and objectives.

39. In late April 2011, Complainant was given his annual review for the 2010 – 2011 rating period (2010 - 2011 Review). The review form contains an internal discrepancy on the scoring of the core competency area of customer service. Complainant received either a total score of 168 or 180 points, depending upon whether his score for customer service was intended to be rated at Meeting Expectations or Exceeding Expectations. In any event, the resulting overall total score was within the Below Expectations rating range. This score was the result of Complainant receiving a Below Expectations rating in three goals or core competencies.

40. Complainant received a "Below Expectations" rating for the goal of implementing the Help Desk Center Rules and Procedures. The narrative for this goal noted that "Art has been advised over 5 times that he needs to perform the following duties regularly: create and have

Pinnacle work orders checked by another technician before they are dispatched, use the appropriate ADC phone codes and break lengths for projects or breaks, to complete CHAPS work orders with detailed information, and to follow procedures for proper escalation or transfer of issues.”

41. Complainant received a “Below Expectations” rating for the core competency area of communication. The narrative associated with this score noted that, “Art needs to improve both his written and oral communications skills. During the past [review period], Art has written a few unprofessional emails to his supervisor. This has been discussed in his Coaching & Review sessions. Since his last corrective action he has not sent any unprofessional emails to his supervisor.”

42. Complainant received a third “Below Expectations” rating in the core competency area of accountability. The explanation for this rating included:

Part of this goal deals with accepting and taking responsibility for your actions.... Some examples of not correcting on-going issues in a timely manner include professional communication, entering in emails, voicemails, and pages into our online database, responding to emails in a timely fashion, and following procedures for creating CHAPS tickets for all calls taken at the Help Desk and for all transferred class to other Internet departments.

June 2011 Corrective Action:

43. By memo dated June 15, 2011, Complainant received a Corrective Action (2011 Corrective Action) from the Assistant Vice Chancellor of IT Service at the time, Aaron Wishon. The 2011 Corrective Action was based upon the results of Complainant’s 2010-2011 Review.

44. The 2011 Corrective Action listed three categories of actions that Complainant was required to take.

45. In the first area of communication, Complainant was informed that all communications would be professional and respectful at all times, and that he was expected to effectively communicate timely updates relative to projects and work orders, scheduling issues, customer issues, and similar matters.

46. In the second area of accountability, Complainant was provided with a list of matters that he was expected to submit in a timely fashion. That list included a requirement that Complainant complete his work in a timely manner. Complainant was provided with six examples of response times that he needed to submit and track.

47. In the third area of Help Desk Call Center Rules and Procedures, Complainant was informed that he was expected to follow the established rules and procedures, and to provide timely updates to his supervisors and leads “without referring to details unrelated to the issue or current situation.”

Help Desk Procedures:

48. Once Complainant was transferred to the help Desk as his full-time assignment, he was expected to follow several procedures that he had previously only had to follow on the days each week that he had Help Desk duties.

49. Help Desk duties are tied to personnel being at their desk, available to take calls routed to them for service. The seven Help Desk technicians answer approximately 4,000 calls a year each. When on a call for service, the Help Desk technician changes the “mode” indication to a status which means that the technician is unavailable to take a call. When the technician is working on a more protracted issue, there is a “project mode” which can be triggered to prevent the routing of calls to that technician. When the technician is taking a break, there is a “break mode” which will also prevent calls from being routed to that technician. The time that each technician is using for each mode is tracked and the time is used as part of the measure of productivity. Help Desk technicians also need to coordinate their breaks so that the desk is not left understaffed.

50. One of the methods that Respondent utilizes to track the types of computer issues being brought to its attention by customers is the tally code system. Tally codes provide a way to summarize the technical issue and solution offered by the Help Desk. One of the tally codes used by Help Desk technicians, for example, is the password reset code. Help Desk technicians use the password reset tally code approximately 25% of the time to document the solution to the issue presented by the caller.

Complainant's 2011 – 2012 Review:

51. On April 26, 2012, Complainant received his annual review for the period of April 1, 2011 through March 31, 2012 (2011 – 2012 Review).

52. Complainant's overall rating for the 2011 – 2012 Review was Below Expectations. This overall rating was due to the fact that Complainant received four Below Expectations ratings in goals or core competencies.

53. Complainant received a rating of Exceeds Expectations in the core competency of customer service and the goal of generating Pinnacle tickets within thirty minutes and having the review of those tickets reveal no errors more than 90% of the time.

54. Complainant received a Meeting Expectations rating for the goal of generating CHAPS work orders for 75 – 89% of the calls he received at the Help Desk. The narrative for this goal recorded that Complainant achieved a 78% rating, and that he had shown continual improvement through the year.

55. Complainant also received a Meeting Expectations rating for the core competency of interpersonal skills. The narrative noted that Complainant was “courteous and polite in his interactions with his customers... [but he] needs to put more effort in to deal with some of he more complicated or difficulty relationships at the Help Desk.”

56. Complainant also received a Meeting Expectations rating for his job knowledge.

57. For the goal of adherence to the Help Desk call center rules and procedures, Complainant received a Below Expectations rating. The narrative related to this goal noted that:

Art has had an issue with consistently following the rules and procedures of the Help Desk. Art continues to struggle with Talley Codes. He is not accurately using the tally codes to categorize his calls. Art has been documented several times during the past [review period] for not following after

hours procedure. During his after hours shifts, he frequently fails to call the user back within the 15 / 30 minutes time frame as documented in our procedures. Art continues to have issues with break modes/ work mode times. His is not accurately using the appropriate "mode" when going into project or break. Additionally, Art will remain in work mode even though he has stepped way form his desk. Art needs to consistently assure that he is in ready mode to help reduce the amount of time he spends in work mode, which is currently higher than the 5 minutes Help Desk average established. Another area that needed consistent improvement was coordinating his breaks with the entire staff, per procedure.

58. Complainant received a Below Expectations rating for the goal of professional development. In order to meet expectations for this goal, the technician is to schedule and complete an average of 1 or 2 formal or informal training sessions each quarter. The narrative for this goal noted:

During the last three months, Art has taken steps to meet the requirements of this goal. While he has attended 3 trainings during the last 3 months (quarter) of this evaluation year, he did not meet the requirements for the previous three quarters of this year. Evaluating the entire year, Art was Below Expectations for this goal.

If Art were to consistently put in a continuous effort through the year to research, suggest and complete his trainings, as he did during the last three months, Art could easily achieve a high rating in the next performance plan year.

59. Complainant was also rated as Below Expectations for the core competency of communication. The narrative for this rating included the following:

Art has demonstrated improvement in communicating with [his] supervisors and lead during the last three months of the evaluation period. However, there continue to be examples of delayed responses to his supervisor's emails (up to five business days). He also does not send read receipts via Outlook when they are requested by supervisors/leads (per procedure). Also Art's lead and supervisor have received notifications that Art has deleted emails from them without reading them. Art needs to improve his communication with other teams and give clear descriptions of issues he escalates/transfers to other teams. It should be noted that Art has improved in communicating outages or emergency issues to others, as he has begun speaking with his supervisor/lead when he believes an issue is urgent or an outage. Art is encouraged to continue to develop his oral communication skills by voicing his concerns in staff meetings and increasing how often he discusses issues with his co-workers.

60. Finally, Complainant received a Below Expectations rating for the core competency of accountability. Complainant's supervisor, Mr. Campagna, noted in the narrative for this section:

Art is accepting responsibility for his mistakes more often, which is an improvement, but he needs to make sure he also corrects the mistakes brought to his attention. For example, Art has not consistently used project mode, break mode, or emails to indicate he is stepping away from the IT Services area or the Help Desk area. This has been brought to his attention repeatedly; however, he

continues to be reminded of this issue and is having difficulty correctly indicating he will be away from his desk to his co-workers and supervisors.

Also Art needs to improve his ability to complete assignments in a timely manner. Art is often reminded via page, email or in-person to: submit leave requests for his time off, submit his timesheet by the monthly deadline, provide information about work orders or issue transfers and get into a more appropriate [Held Desk] mode.

Another issue that still requires correcting is the appropriate use of tally codes. Art has continued to utilize between 2 – 3 tally codes to account for 85% - 90% of all his calls. This has been discussed several times throughout the year.

Art is encouraged to be more diligent in correcting his mistakes and continue to accept responsibility for his mistakes.

The Board Rule R6-10 Process:

61. By July or August of 2011, Mr. Wishon had left Respondent's employment. Complainant's appointing authority changed to Russell Poole, who took over the duties as Assistant Vice Chancellor for IT.

62. Mr. Campagna told Mr. Poole that Complainant was receiving a Below Expectations evaluation for his 21011- 2012 Review. When Mr. Poole learned of this, the review had already been issued. Mr. Poole then read the 2011 – 2012 Review, and obtained and reviewed the supporting documentation for the review from Mr. Campagna.

63. Mr. Poole also spoke with Human Resources about his options, and consulted with Respondent's legal affairs unit. He decided to hold a Board Rule 6-10 meeting with Complainant to go, line by line, through the 2011 – 2012 Review.

64. By letter dated May 17, 2012, Complainant was instructed to attend a Board Rule 6-10 meeting with Mr. Poole on May 23, 2012. The topic of the meeting was explained as the specific performance areas for which Complainant had received a Below Expectations rating in his 2011 – 2012 Review.

65. The Board Rule 6-10 meeting was held on May 23, 2012. Mr. Poole and Complainant discussed each of the reasons where Complainant had been found to be Below Expectations. Complainant brought a document with him to the meeting which addressed some of the issues from the 2011 – 2012 Review. Mr. Poole reviewed that document as part of his Board Rule 6-10 process. The Board Rule 6-10 meeting with Complainant took approximately 2 hours.

66. Complainant told Mr. Poole that the goal concerning following the Help Desk Call Center Rules and Procedures was general in nature, and that he was unsure why he did not meet the expectation. Mr. Poole presented his information that Complainant had used the tally code for password rest roughly 70% of the time, and that the other six Help Desk technicians use the code roughly 25 – 27% of the time.

67. Mr. Poole presented Complainant with documentation showing that Complainant had been late in submitting 8 out of 12 monthly timesheets during the review period. Complainant

asked for, and received, copies of multiple emails from Complainant's supervisors telling him to modify how he was using the Help Desk modes.

68. Complainant told Mr. Poole that the times he went on break, that all he needed was a little extra time in the restroom. He told Mr. Poole that he had been told to remove his status from project mode when he tried to look for training courses on-line, so he hadn't signed up for any training in the first part of the year. Complainant told Mr. Poole that the communication core competency standard was vague and that he had not been given clear direction on how to meet it.

69. Mr. Poole provided Complainant with five days from the Board Rule 6-10 meeting to provide him with any additional documentation that Complainant wanted Mr. Poole to review. Complainant did not submit any additional documentation.

The Decision To Terminate Complainant's Employment:

70. Mr. Poole concluded from his discussion with Complainant, and after review of the materials submitted by Complainant and Mr. Campagna, that Complainant had a highly unusual and unlikely number of password reset tally codes. Mr. Poole also checked Complainant's personnel records and saw that proper use of tally codes had been identified to Complainant as an issue to be corrected in the 2011 Corrective Action and during coaching meetings with Mr. Campagna on three dates during the review period in 2011.

71. Mr. Poole concluded that Complainant was not addressing the majority of the other items he had been found to be performing at a Below Expectations level. He considered Complainant's explanation that he had only used some extra time in the restroom did not address an on-going and consistent problem with Complainant's use of the "mode" system. He considered Complainant's contention that the communication core competency was not too vague to provide Complainant with notice, given the number of times that the issue had been addressed with Complainant over the years, and given that most recently Complainant had been deleting emails from his supervisor without reading them.

72. Mr. Poole rejected Complainant's explanation that he had not been allowed to search for training opportunities, given that Complainant did finally decide to find and attend some training in the last quarter of the review period. He considered Complainant's explanation that he had only missed a few middle-of-the-night calls when he had the after-hours assignment to minimize the issue of how many calls he had missed and why.

73. Further, Mr. Poole considered it to be unacceptable that Complainant had been rated at Below Expectations for the past three evaluation years that demonstrated not only a failure to perform competently but also a willful failure to modify his behavior to increase his performance.

74. Mr. Poole considered that termination was the only remedy that was available, given that no substantial change in Complainant's performance had been produced by the prior corrective actions, Below Expectation reviews, and the prior disciplinary action.

75. By letter dated on June 13, 2012, and hand-delivered to Complainant, Complainant's employment was terminated as of that date.

76. Complainant filed a timely appeal of the termination of his employment with the Board.

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; C.R.S. § 24-50-101, *et seq.*; *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. *Kinchen*, 886 P.2d at 704.

The situation is reversed when the matter concerns a non-disciplinary claim, such as a claim of unlawful discrimination under the Colorado Anti-Discrimination Act or violation of the State Employee Protection Act. For non-disciplinary claims, Complainant bears the burden of proof. See *Kinchen*, 886 P.2d at 706 (holding that, when a certified state employee is "dismissed, suspended, or otherwise disciplined" then the constitutional protections for such employees require that the state be considered to bear the burden of proof as the "proponent of the order" under C.R.S. § 24-4-105(7)); *Renteria v. Dept. Of Personnel*, 811 P.2d 797, 803 (Colo. 1991)(holding that an employee who was attempting to reverse a reallocation decision was the proponent of the order under C.R.S. § 24-4-105(7) and bore the burden of proof).

The Board may reverse or modify 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 committed the acts for which he was disciplined.

The core evidentiary issue presented at hearing concerned whether or not Respondent could prove that Complainant had failed to perform competently during the 2011-2012 review period.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. See *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing");

Colorado Ethics Watch v. City and County of Broomfield, 203 P.3d 623, 626 (Colo.App. 2009)(holding that “[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer”).

Complainant challenged only a small portion of the allegations related to his performance in the 2011 – 2012 review period. He argued that Respondent could not dispute that he had used the correct tally codes. Complainant also presented a few examples from 2009 through 2011 when his timesheets had been late because, at least in part, one of his supervisors had created a delay in the process.

Complainant's explanation for his use of the password reset tally code was not credible. Respondent's explanation that other technicians who were receiving the same mix of Help Desk calls as Complainant averaged use of the password reset tally code less than a third of the time was persuasive evidence that Complainant's 70% average use of the code indicated an incorrect use of that tally code. Additionally, Respondent produced credible testimony that a proper password reset situation would be most likely to be created when an employee was not able to log into the account because of a password issue, and that an employee who was having other problems once logged into the system was highly unlikely to require a password reset.

Complainant's reliance on a few occurrences in 2009 through 2011 in which his timesheet was late for reasons other than his late submission were not a persuasive rebuttal to Respondent's evidence that 8 of his 12 monthly timesheets were late during the review period.

On the whole, the evidence presented at hearing persuasively demonstrated that Complainant was a capable computer technician who took his customer service duties quite seriously. The evidence also demonstrated that Complainant had a very different reaction to working on Mr. Campagna's team. Complainant apparently could not shake his anger and disappointment at being placed on Mr. Campagna's team as a technician back in 2004. His work suffered as a result. The credible and persuasive evidence at hearing demonstrated that Complainant chose not to follow all of the rules and procedures that were applied to the technicians on the team. Even after repeated warnings, in the form of an action plan, coaching meetings, multiple corrective actions, and two years of failing reviews, Complainant still could not find a way to bring his performance up to par for the 2011 – 2012 review period.

As a result, Respondent has successfully demonstrated by a preponderance of the evidence that Complainant has committed all of the acts for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule, although it was contrary to law in one regard.

(1) Respondent's decision to impose discipline was neither arbitrary nor capricious:

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).

Respondent's actions in this case were neither arbitrary nor capricious. The evidence at hearing demonstrated that Mr. Poole took the steps which were necessary to thoroughly investigate Complainant's performance in the 2011 – 2012 review period. He gathered the supporting documentation from Mr. Campagna rather than rely solely upon the 2011 – 2012 Review document. Mr. Poole gathered additional information from Complainant's personnel file concerning Complainant's prior performance. Additionally, he provided Complainant with opportunities to submit information to him concerning the performance issues raised in the 2011 – 2012 Review. The record demonstrates that Mr. Poole used reasonable diligence and care to assemble the evidence that he needed to review to reach a reasonable judgment in this case.

Additionally, the evidence introduced at hearing demonstrated that Mr. Poole gave candid and honest consideration to all of the information he had collected, including the information that Respondent had presented to him. Moreover, the conclusion that Mr. Poole reached were reasonable conclusions based upon the evidence he had reviewed.

Accordingly, Respondent's decision to discipline Complainant was neither arbitrary nor capricious.

(2) Respondent's action was not contrary to rule or law:

A. Board Rule 6-9:

Respondent's action in taking disciplinary action comports with Board Rule 6-9, 4 CCR 801, which requires that a decision to take 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. Information presented by the employee must also be considered."

The evidence at hearing demonstrated that Mr. Poole took the relevant portions of Complainant's history with Respondent into account in reaching his decision. Complainant had a performance record with both positive and negative aspects in it. The evidence at hearing demonstrated that Mr. Poole did not fail to consider the aspects of Complainant's performance which were admirable. The evidence at hearing, in fact, showed that both Mr. Campagna and Mr. Poole were both willing to give Complainant high marks where those marks were warranted. It is not a Board Rule 6-9 violation, however, for Mr. Poole to have considered Complainant's unwillingness to abide by the internal procedures which were applied to all of the Help Desk technicians as being more important to Complainant's performance than the fact that Complainant had good technical skills and an excellent customer relations ethic.

There was no violation of Board Rule 6-9 in Respondent's decision that the nature, extent, and seriousness of the violations in the case required the imposition of discipline.

B. Progressive Discipline:

Board Rule 6-2, 4 CCR 801, provides 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.”

Complainant was the subject of three corrective actions in the three years leading up to his termination. Each one of those corrective actions placed Complainant on notice of the types of performance standards that were required of Complainant. These were the same types of performance standards that Complainant again did not meet in the 2011 – 2012 review period. There was no violation of Board Rule 6-2 in this case.

C. Unlawful Discrimination Based Upon Race and Age:

Complainant contends that his termination was based illegally upon his status as an African American and on his age, in violation of the Colorado Anti-Discrimination Act (CADA), C.R.S. 24-34-402.¹

Procedure For Determining Unlawful Discrimination:

An employee alleging unlawful employment discrimination “may prove intentional discrimination through either direct evidence of discrimination (e.g., oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (i.e., circumstantial) evidence of discrimination.” *Kendrick v. Penske*, 220 F.3d 1220, 1225 (10th Cir. 2000).

If there is direct evidence of discrimination, the finder of fact considers the issue of unlawful discrimination without the use of any burden-shifting analysis. See e.g., *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613 621-212, 83 L.Ed.2d 523 (1984)(holding, in an age discrimination issue, that “[t]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination”); *Ramsey v. City and County of Denver*, 907 F.2d 1004,1007-8 (10th Cir. 1990) (noting that the general rule for Title VII cases is that cases founded upon indirect or circumstantial evidence of discrimination, such as evidence of a personal bias, use the *McDonnell Douglas* burden shifting procedure, while cases founded upon direct evidence of discrimination do not follow a burden shifting procedure).

Not many cases present direct evidence of discrimination, however. See *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288, 296 (Colo. 2000)(“It has long been settled that in cases involving intentional discrimination, direct evidence of discrimination is rare”). The more

¹ Complainant did not file a timely prehearing statement. The document that Complainant filed shortly before hearing was called a prehearing statement, but it did not follow the organizational structure required of such a document. One of the results of the lack of a complete prehearing statement has been that Complainant did not identify which law(s) he believed were violated in this case, and he did not raise a discrimination claim based upon the federal analogue to CADA, Title VII. 42 U.S.C. § 2000e-2(a). CADA, however, is generally interpreted to follow Title VII in its requirements. See *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, (Colo. 1997)(“[W]e find federal law helpful in developing a thorough approach for proving intentional discrimination in state employment discrimination cases. Federal law is particularly helpful in this case because the language of the Colorado statute at issue, section 24-34-402(10(a)... closely parallels that of its federal counterpart, section 2000e of Title VII of the Civil Rights Act”). As a result, the analysis under Title VII would reach the same result as this CADA analysis.

common presentation involves the presentation of circumstantial evidence from which the trier of fact is asked to conclude that intentional discrimination was present.

In analyzing a claim of discrimination under CADA when there is no direct evidence of discrimination, a complainant carries the initial burden of establishing a *prima facie* case of discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 399 (Colo. 1997). A *prima facie* case of discrimination is one sufficient to raise a presumption of intentional discrimination. *St. Mary's Honor Ctr v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). "As the very name '*prima facie* case' suggests, there must be at least a logical connection between each element of the *prima facie* case and the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)(internal citation and quotations omitted).

The specific elements of a *prima facie* showing may vary according to the situation. The requirements for such a case, however, are established to eliminate the most common lawful reasons for an adverse personnel decision. See *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (holding that the *prima facie* case raises an inference of discrimination precisely because once the two most common nondiscriminatory reasons for an adverse employment decision are eliminated, that decision, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors"). See also *Perry v. Woodward*, 199 F.3d 1126, 1140 (10th Cir. 1999)(holding that "[w]hen viewed against the backdrop of historical workplace discrimination, an employee who belongs to racial minority and who eliminates the two most common, legitimate reasons for termination, i.e., lack of qualification or the elimination of the job, has at least raised an inference that the termination was based on a consideration of impermissible factors"). In the case of a minority employee who is arguing that he was terminated from employment because of unlawful discrimination based upon race, the *prima facie* case typically requires a showing that:

- 1) He is a member of a protected class;
- 2) He was qualified for his job;
- 3) Despite his qualifications, he suffered an adverse employment decision; and
- 4) The circumstances give rise to an inference of unlawful discrimination.

Big O Tires, 940 P.2d at 400.

If a complainant establishes a *prima facie* case, the burden of production shifts to the employer to proffer a facially nondiscriminatory reason for the challenged employment action. "It is important to note... although the establishment of the *prima facie* case shift the burden of production to the defendant, the defendant does not share in the burden of proof in an employment discrimination case... If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support that legitimate purpose, the presumption of the *prima facie* case is rebutted and drops from the case." *Bodaghi*, 995 P.2d at 298.

If the employer offers a facially nondiscriminatory reason for the adverse action, the burden of production shifts back to the employee to show that there is a genuine issue of material fact as to whether the employer's proffered reason is merely pretextual. A complainant can establish pretext by showing "either that a discriminatory reason more likely motivated the employer... or that the employer's proffered explanation is unworthy of credence." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (quotation marks omitted) (alteration in original). "The burden of proof .. can be met by the evidence already in the record and does not require, in every case, that additional evidence be offered by the employee." *Bodaghi*, 995 P.2d at 298.

The same procedure is used in CADA cases alleging indirect evidence of racial discrimination as well as age discrimination. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195 (Colo. App. 1997)(applying the *prima facie* requirements from *Big O Tires* to an age discrimination claim under CADA).

Complainant's *Prima Facie* Claim of Race Discrimination:

Complainant's evidence at hearing in support of his racial discrimination claim was that he was the only African American working for Mr. Campagna, that he had been successfully working on computers at the University of Colorado Denver since the 1990s, that he had been terminated from his employment, and that there was documentation that his supervisor was out to sabotage him.

These allegations meet the first three elements of Complainant's *prima facie* showing of racial discrimination.

The fourth element, however, requires that Complainant show some reason to believe that race was a factor in the decision to terminate his employment. Other than the fact that Complainant was the only African American in the work group, Complainant has not presented any evidence or argument to believe that race played any role in the decision to terminate his employment. Even assuming that Complainant's speculation that race played a role in the decision to assign him as an IT technician in 2004 is correct, such a decision would have been made by others not involved in the present events. Mr. Campagna was the supervisor who managed the group of IT Technicians where Complainant was placed when his position was transferred, but who was not involved in the 2004 decision to classify Complainant as an IT Technician II instead of an IT Professional II. Mr. Poole was not Complainant's appointing authority until years later.

Complainant's evidence that Mr. Campagna was out to sabotage him, and that this is evidence of race discrimination, is similarly unpersuasive. The only evidence that Complainant presented consisted of Mr. Campagna acting as a supervisor and reviewing Complainant's work, and resolving service issues, with Mr. Gardner and Mr. Gruebele in 2009. Complainant has extrapolated a great deal of personal hostility from the relatively minor incidents that he has placed into evidence. Complainant then translates what, at worst, sounds like Mr. Campagna's irritation at Complainant's work or results into what Complainant considers to be racial hostility. Such evidence is simply too insubstantial to support a claim of racial bias.

More importantly, Complainant has not presented any evidence that he was treated any differently from his white and Hispanic colleagues in the way he was evaluated or in the decision to terminate his employment. The essence of a claim of unlawful discrimination under CADA is that there has been some type of disparate treatment in the workplace because of an

unlawful criteria, such as race. The evidence that most often demonstrates such disparate treatment is a comparison of employees who were in similar situations but had dissimilar outcomes. There was no such presentation of that evidence in this case.

Complainant has not presented sufficient evidence to meet the burden of his *prima facie* showing of race discrimination.

Complainant's Showing of Pretext:

Assuming, without deciding, that Complainant met his *prima facie* burden, the next issue is to determine whether Respondent articulated and provided evidence of a legitimate non-discriminatory reason for Complainant's termination. As the first portion of this Discussion section demonstrates, Respondent offered evidence of long-standing performance deficits that more than meets its burden of production requirements.

The remaining issue, then, is whether Complainant was able to demonstrate that the proffered explanation by Respondent is merely a pretext for discrimination.

Complainant has not made such a showing. The preponderance of evidence at hearing supports that Complainant had some long-standing performance issues which were documented in his 2011 – 2012 review period. These performance deficits were chronic in nature, and related to Complainant's willingness to adhere to the rules and procedures applied to all of the Help Desk technicians. These deficits were also not cured by Respondent's repeated attempts over a period of three year to bring Complainant's attention to the need to correct the performance issues.

Complainant has not, therefore, shown that Respondent's reasons for terminating his employment were merely pretext for racial discrimination. Complainant cannot prevail on his claim of race discrimination under such circumstances.

Complainant's Claim of Unlawful Age Discrimination:

In his appeal sheet, Complainant argued that his termination had also been the product of age discrimination, as well as race discrimination.

At hearing, however, Complainant did not address his age discrimination claim. He did not introduce evidence of his age. He did not argue that age played any role in the decision to terminate his employment. He did not present evidence of being replaced with a younger employee, or that age in any way became an issue for him in the performance of his job.

On cross examination, Complainant testified that his evidence of age discrimination claim was that he was transferred to Mr. Campagna's group in 2004 and then assigned full-time to the Help Desk in 2010. Neither incident, however, appears to have any palpable connection to Complainant's age, and Complainant did not explain in closing statements how he viewed these two events to be connected to his age. Further, neither of these two events appears to be relevant to the issue of why Complainant was terminated from employment in 2012.

The record created by Complainant on his age discrimination claim is too sparse to be properly analyzed. The lack of any effort on Complainant's part to raise an age discrimination claim at hearing leads to the conclusion that Complainant has abandoned his age discrimination claim.

D. State Employee Protection Act:

Complainant also alleged in his appeal form that this matter constituted a violation of the State Employee Protection Act, C.R.S. § 24- 50.5-101, *et. seq.* (Whistleblower Act) based upon the assertion that he had been terminated from employment after he had disclosed to the Board that Gabe Sandoval had sent an email to Yvonne Fitzpatrick in September of 2011 asking for Ms. Fitzpatrick to provide information in writing addressing any concerns about Complainant. Complainant construes this email as proof that he has been set up by management, and argues that his disclosure of this email to the Board resulted in Respondent retaliating against him.

Whistleblower Act Requirements:

The Act provides, “no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee’s disclosure of information.” § 24-50.5-103(1), C.R.S.

To establish a *prima facie* case of whistleblower retaliation, a state employee must establish that his disclosures fell within the protection of the statute and that they were a substantial or motivating factor in the employer’s adverse action. *Ward v. Industrial Com.*, 699 P.2d 960, 964 (Colo. 1985).

The purpose of the Act, set forth in the legislative declaration, is to encourage “state employees . . . to disclose information on actions of state agencies that are not in the public interest.” C.R.S. § 24-50.5-101; *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). The Act defines “disclosure of information” as the provision of evidence “regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” C.R.S. § 24-50.5-102(2). Disclosures that do not concern matters in the public interest, or are not of “public concern,” however, do not invoke the statute. *Ferrel*, 179 P.3d at 186. The disclosure of information may be made to “any person.” C.R.S. § 24-50-102(2). Disclosures may be presented in writing or offered orally. *Ward*, 699 P.2d at 967.

The Act requires that an employee who wishes to disclose information must “make a good faith effort to provide to his supervisor or appointing authority, or member of the general assembly the information to be disclosed prior to the time of its disclosure.” C.R.S. § 24-50.5-103(2). This requirement, as well as the requirement for a disclosure of information, has been met when an employee discloses information meeting the test for a disclosure of information under the Act to his or her supervisor, and does not necessarily require two separate disclosures of information. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D.Colo. 2004).

The Act prohibits the imposition of “any disciplinary action against any employee on account of the employee’s disclosure of information.” C.R.S. § 24-50.5-103(1). “Disciplinary action” is construed broadly in the Act, and includes “any direct or indirect form of discipline or penalty” including termination of employment, withholding of work, unsatisfactory or below standard performance evaluations or the “threat of any such discipline or penalty.” C.R.S. § 24-50.5-102(1).

Complainant's Allegations:

Complainant's argument in his appeal form identified the disclosure at issue as his use of the email from Mr. Sandoval during his Board hearing in 2011. The Board hearing took place July 29 and August 11, 2011.

It is difficult to square Complainant's use of Mr. Sandoval's email at the hearing with the definition of a "disclosure" under the Whistleblower Act. A disclosure must be of a matter of public interest or of public concern. Complainant's reason for presenting the email was to show that management was mistreating him by soliciting bad reports about him from a co-worker. This type of personnel issue is not a matter of public interest or public concern, but a matter of personal concern for Complainant. See *Ferrell*, 179 P.3d at 186. As such, Complainant's use of the email before the Board is not a disclosure of information capable of triggering the protections of the Act.

Additionally, Complainant presented no credible evidence suggesting that this email should be found to be a "substantial or motivating factor" in the decision to terminate Complainant's employment.

Complainant's termination took place June 13, 2012, which was ten months after the conclusion of the Board hearing. There is, therefore, no temporal nexus present which would suggest a causal connection between the use of the email at hearing and the decision to terminate Complainant's employment.

Additionally, the email itself does not seem to be an unreasonable response of a supervisor to the complaint of an employee about a co-worker. Asking the employee to place her concerns in writing is a reasonable supervisory response to co-worker complaints. It is not clear from the content of the email why Respondent would have objected to Complainant's use of the email at hearing.

Finally, the decision-maker in the earlier disciplinary case was Aaron Wishon, while the decision-maker in the present case was Russell Poole. The change in appointing authority during the period between Complainant's 2011 hearing and the decision to terminate his employment makes it even less likely that use of the email in the earlier appeal process was a motivating factor in the termination decision.

Complainant's argument, therefore, is not sufficient to demonstrate that his use of the September 2010 email from Mr. Sandoval was within the protections of the Whistleblower Act. Complainant, accordingly, has failed to present a *prima facie* case of violation of the Whistleblower Act in this matter.

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

The final issue is whether termination was within the range of reasonable alternatives available to Respondent.

This is a case where the performance issues appear to be limited to violations of internal policies. The evidence was uncontradicted at hearing that Complainant was able to, and did, provide good and knowledgeable service to Respondent's clients. This raises the concern that

Respondent has over-reacted to the situation by imposing termination for comparatively small violations of policy and protocol.

That concern, however, is met by the length of time and effort that Respondent expended in trying to bolster Complainant's willingness to adhere to the standards expected of Help Desk technicians. The evidence in this case demonstrated that this was indeed a willingness problem, not an actual skill issue. Complainant was able to increase his performance when he desired to do so. It was very clear, however, from both Complainant's testimony and Mr. Campagna's description of events that Complainant has maintained an unresolved anger related to the decision in 2004 to transfer his position as an IT Technician II rather than as an IT Professional II. This anger has directly affected Complainant's willingness to adhere to all of the performance requirements for his position. In such a situation, termination of employment is within the reasonable range of disciplinary options open to Mr. Poole.

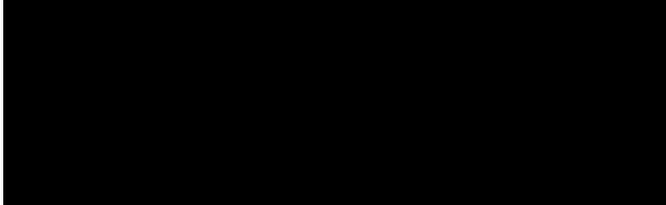
CONCLUSIONS OF LAW

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

ORDER

Respondent's disciplinary action is **affirmed**. The termination of Complainant's employment is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 28th day
of January, 2013 at
Denver, Colorado.



Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(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 electronic record on appeal in this case is \$5.00. 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 MAILING

This is to certify that on the 29th day of Jan, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Arthur Robinson

[REDACTED]

David P. Temple

[REDACTED]

[REDACTED]

Andrea Woods