

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B113

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PAMELA MONTOYA,
Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on July 19, August 21, and October 25, 2013, at the State Personnel Board, 633 17th Street, Denver, Colorado. The record was closed by order on December 17, 2013, after a redacted exhibit was reviewed and accepted for filing as part of the record of hearing. Stacy L. Worthington, Senior Assistant Attorney General, represented Respondent. Respondent's advisory witness was Tista S. Ghosh, the Director of the Disease Control and Environmental Epidemiology Division (DCEED) and Complainant's appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant appeals the termination of her employment as a Health Professional IV. Complainant asks for reinstatement to her position, back pay, and other relief as determined by the ALJ.

The Department of Public Health and Environment (Respondent or CDPHE) argues that the termination was properly imposed after Complainant violated information security procedures and policies, made untruthful statements, eavesdropped on private conversations, and was untimely in her work.

For the reasons presented below, the undersigned ALJ finds that Respondent's termination of Complainant's employment is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's actions were 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. The Sexually Transmitted Infection/Human Immunodeficiency Virus Section (STI/HIV Section or Section) of the Colorado Department of Public Health and Environment (CDPHE or Respondent) includes units that perform work on sexually transmitted infections and diseases in the state.

2. The STI/HIV Surveillance Unit (Unit or Surveillance Unit) conducts surveillance and research to characterize and track STI/HIV infections in Colorado. The Unit ensures the compliance and completeness of STI/HIV reporting in the state, investigates HIV cases with no identified risk, provides blood borne pathogen information to first responders, health care workers, law enforcement and corrections personnel, and conducts HIV incidence and prevalence studies.

3. During the relevant time period, there were four individuals who worked in the Surveillance Unit: Complainant, Peter Brandauer, Dave Robinson, and Phillip Whitt.

4. At the time of the termination of her employment, Complainant's position in the Surveillance Unit was as a Health Professional (HP) IV and her title was HIV Incidence Coordinator. Complainant's HP IV position, at one point, included lead worker duties. Complainant had been employed by Respondent in the Unit since 2003. She had been hired as an HP II, promoted to HP III in 2006, and promoted to HP IV in 2008.

5. All four staff members of the Surveillance Unit performed similar jobs, for the most part. Each of the four staff members also had a specific job that was only their assignment.

6. The four staff members in the Surveillance Unit were under the direct supervision of the HIV Surveillance Coordinator ("Coordinator"). Prior to the end of 2010, the Coordinator was Allison Crutchfield. Anita Watkins was hired as the Coordinator in July of 2011.

7. The Surveillance Unit also included a Manager who served as a supervisor for the Unit staff and the Coordinator. During 2010, 2011, and the first half of 2012, Melanie Mattson was the Manager. In July of 2012, Ms. Mattson was appointed as the Interim Section Chief for the STI/HIV Section. By the end of 2012, she had assumed the role of Section Chief on a permanent basis.

8. The STI/HIV Section includes other units besides the Surveillance Unit, such as the Registry Unit and the Data Management Unit.

9. The STI/HIV Section is within Respondent's Disease Control and Environmental Epidemiology Division (DCEED or Division).

Security of the STI/HIV Patient Information:

10. The information collected and analyzed by the STI/HIV Section is highly personal and protected by a variety of confidentiality laws and rules.

11. The databases utilized by the STI/HIV Section tracks 22,000 individuals in Colorado who have been diagnosed with, or have been suspected of having, one of the sexually transmitted infections that is required by law to be reported to Respondent. The reporting requirement is mandatory and performed without the consent of patients.

12. State law strictly prohibits the release of confidential health information collected by Respondent. C.R.S. § 25-4-1404(1), for example, declares the public health reports that are submitted to Respondent pursuant to the mandatory reporting requirements concerning HIV infection “shall be strictly confidential information” and releasable only under a small number of circumstances. Any of Respondent’s employees who releases or makes public any such confidential public health report, or otherwise breaches the confidentiality requirement created by the statute, may be criminally punished. See C.R.S. § 24-4-1409(2). State law provides similar protection creating strict confidentiality for reports of other communicable diseases. See C.R.S. §25-1-122(4) – (6).

13. The physical layout of the Section reflects the security and privacy concerns related to the type of sensitive health information collected and handled by the Section. The Division operates behind locked doors. Within the offices of the Division, there is a locked interior room called the Registry Room. The Registry Room holds the paper files of the information collected by the Section. Paper files containing confidential health information are not to be taken from the Registry Room.

Agency Security Restrictions:

14. Respondent’s strict information security policies are also intended to prevent releases of confidential health information.

15. CDPHE Policy 15.25: “Encryption” requires that, in cases when sensitive information can be transferred to a local drive on a desktop computer, strong encryption shall be used. Under this policy, any confidential health information transferred to a C:\ drive would need to be encrypted.

16. The written information security policy for the Division allows confidential health information to be kept only on secured network computer drives, such as the K:\ and J:\ drives. This requirement meant that all datasets containing identifying information had to be kept on the K:\ and J:\ limited access secured servers. The STI/HIV Section, however, has an even more strict policy that permits the use of only the secured K:\ drive for confidential health information, such as the files that are normally used by the Surveillance Unit. As a matter of practice in the Section, a staff member who was using a large dataset that might slow the K:\ drive could transfer the dataset to the desktop computer’s unsecured C:\ drive so long as the data was removed from that unsecured drive by the end of the day.

17. Complainant was aware that the Section prohibited the transfer of confidential health data, such as the data sets that she used for her analysis, to drives other than the K:\ drive, with the possible exception of the limited transfer on a daily basis to her unsecured C:\ drive in order to work on large datasets.

Confidentiality Agreement:

18. Respondent's employees who have access to confidential patient information are required to sign a Confidentiality Agreement. Complainant was aware of the confidentiality restrictions required of her and had signed such an Agreement in April of 2012.

19. The Agreement explains that the confidentiality of HIV and AIDS reports, and case reports of reportable diseases and conditions, is protected by state law. The Agreement includes the provision that, "[b]y signing this agreement any person with authorized access to personal identifying information on reportable disease and conditions contained in any Colorado Department of Health and Environment (CDPHE) record agrees not to discuss information with or provide copies of reports about a client, regardless of how or where acquired, to family members, friends, professional colleagues, other employees, other clients or any other person unless such person has been authorized to have access to that information." The Agreement also required Complainant to agree that she would not "examine documents or computer data containing confidential information for personal or professional reasons, unless required to do so in the course of performing [her] authorized duties and responsibilities."

Complainant's status as a lead worker and tensions in the Section:

20. There was dissent within the staff over Complainant's lead worker status and her perceived friendship with Ms. Crutchfield.

21. In the years between 2009 and 2013, a series of unpleasant interactions occurred among the staff members of the STI/HIV unit. Staff members accused Complainant of destroying their personal property, and Complainant accused others of destroying her work materials and personal property. There were multiple allegations of rude and unprofessional interactions lodged against Complainant, lodged against others in the Unit, and lodged by Complainant against other staff members.

The August 17, 2010 Incident of Vulgar Name Calling:

22. On August 17, 2010, Ms. Crutchfield was the supervisor for the Surveillance Unit. Ms. Crutchfield had previously authorized Complainant to collect time reports from Mr. Whitt, Mr. Brandauer, and Mr. Robinson. The three staff members went to Ms. Mattson and obtained permission from her to report time directly to Ms. Mattson rather than to Complainant.

23. Shortly before August 17, 2010, Complainant had asked Mr. Whitt for his time. During the early morning hours of August 17, 2010, Mr. Whitt was on his phone in the office in a heated conversation, during which he had loudly referred to Complainant with a profanity and a particularly vulgar term for a woman. There was one other employee of the Unit, Mr. Brandauer, in the area at the time. Mr. Brandauer happened to be using his camera phone to make a video an office tour, and he recorded Mr. Whitt's outburst.

24. When Complainant arrived at work that day and learned of Mr. Whitt's outburst from Mr. Brandauer, Complainant complained about Mr. Whitt's language to Ms. Crutchfield and Ms. Mattson. In an email documenting the incident for Ms. Crutchfield and Ms. Mattson on August 17, 2010, Complainant additionally complained that Mr. Whitt used sexually explicit language on a daily basis, and Complainant included nine examples of such language. Two of the examples of sexually-charged statements that Complainant included in her memo were that Mr. Whitt had said that he had pornographic video and images on his H:\ drive, and that his early morning hours allowed him to come into work and watch porn. Complainant also reported

that she had heard that another co-worker, Suzanna Hernandez, had said she was uncomfortable with Mr. Whitt's sexually explicit comments.

25. Later in the evening on August 17, 2010, Complainant also emailed the Section Chief at the time, Ralph Wilmoth, with a complaint that this incident was an example of the hostile environment she was experiencing in the Unit, and that she was concerned that nothing would be done about the incident. Complainant complained to Mr. Wilmoth that the supervisors of the Unit tolerated unprofessional and offensive behavior against her, and then also retaliated against her for complaining about offensive behavior.

26. The day after this incident, Mr. Whitt apologized in an email to Complainant. He explained that he had been angry at Complainant over her inquiries about his time, and that he had used offensive language at the time. Mr. Whitt was issued a corrective action for his language.

27. Mr. Whitt's computer was examined, and no pornographic materials were found on the computer. A review of the websites that Mr. Whitt had visited also did not indicate any access to pornographic websites.

28. The fact that Mr. Brandauer had a video of the incident created additional tensions in the office between Mr. Whitt and Mr. Brandauer. Mr. Brandauer later complained in September 2010 to Ms. Mattson that he felt he had been made into a scapegoat, and that he did not want to have been part of the complaint against Mr. Whitt.

29. Ms. Mattson would later incorrectly characterize this incident in a timeline that she prepared in January 2013 for the new Director of DCEED, Tista Ghosh. Ms. Mattson's version of this event in that timeline was as follows:

Pam made serious allegations against Phillip Whitt when she accused him of viewing pornographic material at work and of sexually harassing a co-worker. These accusations were later proven to be false. Pam did not approach Phillip or her superiors about these events and went directly to Human Resources.

30. Ms. Watkins provided a similarly incorrect version of events to Dr. Ghosh in her January 16, 2013, memo to Dr. Ghosh in which she explained the Unit's history with Complainant.

February 15, 2012 Corrective Action:

31. Ms. Mattson and Ms. Watkins issued Complainant a corrective action by memo dated February 15, 2012, finding that Complainant had made comments in the previous years that could be construed as intimidating or threatening, and that Complainant had taken actions that overstepped her authority.

32. The intimidating comments that Complaint had made included that she had told Ms. Watkins that the re-write of her PDQ was taking too long and that she could grieve the delay, and that she might go to Human Resources to discuss how Ms. Watkins was handling the time of other employees. Complainant was also found to have been intimidating or threatening when she "cornered" Mr. Robinson after a staff meeting and asked him if he had been written up yet concerning his time. These events had taken place between October 6, 2011 and February 7, 2012.

33. The February 15, 2012 corrective action also covered “previous occasions prior to October 2011” when Complainant had been counseled by her supervisors “concerning several encounters with staff members within and outside of the surveillance program” that had contributed to a work environment that was “uncomfortable for certain staff members.”

34. Ms. Mattson and Ms. Watkins found that Complainant had overstepped her authority when she had emailed the Section’s Centers for Disease Control (CDC) liaison without copying her supervisor, and when she responded to an inquiry from the Council of State and Territorial Epidemiologists requesting feedback from the Section on a budget issue. As was true for the issue of intimidating comments, the corrective action also covered “previous occasions prior to November 2011” when Complainant had been counseled for overstepping her authority.

35. The corrective action required Complainant, among other requirements, to cease making any action, comment or statement to any co-worker that may be deemed as “threatening, condescending, or intimidating” in the workplace, and to take “no action, physical or verbal, toward any staff member that may be deemed retaliatory.”

36. Complainant grieved the February 15, 2012, corrective action. Mr. Wilmoth affirmed the corrective action as Respondent’s grievance step II response on April 11, 2012.

April 25, 2012 referral to CSEAP:

37. In April of 2012, Ms. Watkins continued to hear from other staff members that Complainant had acted in disruptive ways and that they did not want to work with her.

38. Ms. Watkins counseled Complainant on April 25, 2013. The counseling form included Ms. Watkins’ assessment that Complainant was meeting the expectations of the job, but that her behavior and presence continued to contribute to a work environment that was “uncomfortable for certain staff members.” Ms. Watkins told Complainant that there was a perception among staff that Complainant was seeking information to discredit them or to make them appear that they were performing their jobs inadequately.

39. Ms. Watkins suggested that Complainant pursue counseling through the Colorado State Employee Assistance Program (CSEAP) to address issues that might be creating such issues with the staff.

40. Complainant accepted the referral to CSEAP and began counseling sessions with a CSEAP counselor. She authorized CSEAP to provide reports to Ms. Mattson on Complainant’s progress.

The Arnold Investigation:

41. Mr. Wilmoth was the STI/HIV Section Chief in early 2012. Mr. Wilmoth and the CDPHE Human Resources Director, Mona Huestis, organized an investigation into the dynamics of the STI/HIV Section to be performed by an outside attorney, Timothy Arnold.

42. Mr. Arnold interviewed 17 individuals associated with the Registry and Surveillance Units in the spring of 2012. He filed his results by written report dated May 9, 2012.

43. Mr. Arnold found that the Registry Unit had some morale problems but no major issues that required immediate attention.

44. Mr. Arnold found that the Surveillance Unit was riven by long-standing interpersonal conflicts and problems. He described the section as "struggling and nearly dysfunctional." He concluded that "[e]mployees in the Unit have been unwilling to let go of their emotions concerning [the incident in August 2010] and their mistrust of each other and management, whether justified or not. This continues to prevent them from interacting and performing as a cohesive team."

45. Mr. Arnold also considered a number of complaints about bullying behavior and the concerns that workplace violence could occur at any time. He noted that many of the complaints included allegations of harassing or bullying behavior by Complainant, with Complainant also complaining of harassing behavior by others. Mr. Arnold concluded that, of the competing claims of harassment, he found the complaints concerning Complainant's behavior to be the persuasive ones. Mr. Arnold concluded:

It is my conclusion that Ms. Montoya's credibility is less than that of her co-employees. While numbers of witnesses alone who state one view over another is not determinative, I feel in this instance that there is such an overwhelming consensus that Ms. Montoya's version of events and attitudes is not consistent with others that I have given less weight to her version of the facts than that of others. At the same time I also have to conclude that the situation is not black and white, and because of the lack of trust and cooperation that has developed, some blame can be placed on others such as Philip Whitt, Doug Robinson, and Peter Brandauer as well as Ms. Montoya.

46. Mr. Arnold found no concrete instances of bullying or other threats or conduct resulting in intimidation, harassment, harm or endangerment to the safety of another's person or property to warrant the imposition of discipline.

47. Mr. Arnold recommended that Ms. Mattson and Ms. Watkins continue to work on updating PDQ's and to continue creating lists of work to be performed to create uniformity in performance expectations. He also encouraged management to counsel and correct employees, as warranted, to address problems in the Unit with adherence to attendance and break time rules.

The Decision by Complainant's Supervisors That Complainant Should Be Subject To Discipline:

48. Ms. Watkins and Ms. Mattson considered the results of the Arnold report to not accurately reflect the problems in the Unit, particularly in the lack of evidence of violations by Complainant.

49. On or about May 24, 2012, Ms. Watkins and Ms. Mattson brought their concerns about Complainant to the attention of the then-Director of DCEED, Dr. Lisa Miller, after the Arnold report did not find a basis to impose discipline on Complainant.

50. Ms. Mattson told Dr. Miller that the Arnold report inadequately addressed the ongoing threat that Complainant posed to the Section.

51. Ms. Watkins told Dr. Miller that she was spending all of her time managing Complainant. She expressed her view that Complainant held all of the power in the situation and that management was waiting for Complainant to “mess up” so that management could issue corrective actions, and then move to disciplinary actions. Ms. Watkins also described the situation as being one where Complainant’s actions were so “insidious” that Ms. Watkins found them difficult to monitor.

52. Dr. Miller, however, did not act on Ms. Mattson’s and Ms. Watkins’ complaints concerning Complainant.

The November 21, 2012 Corrective Action:

53. In August and September of 2012, the Surveillance Unit’s duties were changed to include the entry of data into the PRISM system. On September 10, 2012, Complainant was included in a training session for entering PRISM data.

54. In the weeks that followed the training, Complainant was slow to begin making PRISM entries. Additionally, when Ms. Watkins would check on how PRISM entries were being made shortly after the training, Complainant explained to Ms. Watkins that a PRISM entry took her an hour to complete and that she could not complete PRISM entries in addition to her other duties. Ms. Watkins’ response was that PRISM was the programmatic priority for the Unit.

55. On November 12 and 13, 2012, Ms. Watkins again reviewed Complainant’s PRISM entries and found that her entries were still incomplete, even though Complainant had often processed the files more than once. Complainant again objected to Ms. Watkins that she could not complete PRISM data entry along with her other duties and did not understand why she was expected to perform the entries.

56. Ms. Watkins issued Complainant a corrective action dated November 21, 2012, which was based upon Complainant’s incomplete PRISM entries and objection to performing the data entry. The corrective action required Complainant to perform six actions:

- a. Complete all required data fields in PRISM based on the algorithm and training received the first time you work a case per programmatic standards and priorities.
- b. The cases that have been returned to you will be completed in PRISM by 12/17/2012. These cases should be returned to me, Anita Watkins, to verify that the work has been completed accurately.
- c. You will complete the re-assigned CD4/VL tests that we distributed to you on 11/12/12 by 12/12/2012.
- d. Follow all oral or written instruction from me as your supervisor or Melanie Mattson as your appointing authority in matters related to your position at the Colorado Department of Public Health and Environment.
- e. Refrain from discussing this corrective action with any CDPHE employee, with the exception [of] me, your immediate supervisor, appointing authority or Human Resources personnel.
- f. Seek guidance from me or Melanie Mattson, in that order, if any instruction or guidance is not clear.

57. Complainant successfully completed the PRISM entries and the re-assigned CD4/VL test reports required of her by the corrective action.

Complainant's Allegation of An Alcohol Smell On Ms. Mattson:

58. Ms. Mattson became the Interim Section Chief of the STI/HIV section in July of 2012 after the retirement of Mr. Wilmoth. She became the Section Chief as of November 1, 2012.

59. On or about December 13, 2012, Ms. Mattson and Ms. Watkins left the office for a meeting. Upon Ms. Mattson's return at about 4:00 PM, she passed Complainant while returning to her office. Complainant's work area was located immediately outside of Ms. Mattson's office.

60. Complainant reported to Respondent's management that she had smelled a strong odor of alcohol when Ms. Mattson passed her desk.

61. The Division Director, Dr. Miller, responded by coming to Ms. Mattson's office at about 4:30 PM and telling her to come with her. Dr. Miller and HR Director Mona Heustis interviewed Ms. Mattson. Neither Ms. Heustis nor Dr. Miller detected any smell of alcohol or signs of alcohol use.

62. Neither Dr. Miller nor Ms. Heustis told Ms. Mattson who had reported that she had a smell of alcohol on her. Ms. Mattson, however, suspected that the source of the complaint had been Complainant.

The January 2013 Dispute with Ms. Hernandez and Mr. Whitt:

63. Ms. Hernandez and Mr. Whitt were having a heated discussion while in the Registry Room on or about January 4, 2013. The topic of their discussion concerned a series of older test reports that had been located by Complainant and were going to be re-assigned to staff members to complete. Ms. Hernandez and Mr. Whitt were objecting to the fact that additional work would be assigned and that Complainant was the source of that work.

64. Complainant could hear the conversation as she was at her cubicle. She could hear that both of them were angry about the impending extra work. Complainant was concerned that they appeared to be blaming her for the extra work.

65. Complainant reported the comments to Ms. Watkins by email. In a follow-up email to Ms. Watkins, Complainant said that she found it scary and threatening to overhear her coworkers speaking this way about her.

66. Prior to the January 2013 dispute, Complainant and Ms. Hernandez entered into an agreement as a result of a mediation process. The agreement included a provision that Complainant agreed to speak with Ms. Hernandez to discuss any problems if and when the problem arose. Ms. Watkins told Complainant that she should speak directly to Ms. Hernandez about the issue during their next meeting. Complainant declined to use a regularly scheduled meeting to address Ms. Hernandez about her concerns over the statements.

Complainant's Supervisors' Efforts To Have Dr. Ghosh Take Disciplinary Action:

67. On December 1, 2012, Tista S. Ghosh, M.D., M.P.H., became the Director for DCEED, and the appointing authority for the STI/HIV Section. Dr. Ghosh was hired from outside of CDPHE, and had no prior substantive involvement with the STI/HIV Section staff. Dr. Ghosh had worked with Ms. Watkins for three years at a different agency.

68. Within a few weeks of Dr. Ghosh's start as the Division Director, Ms. Mattson had informed Dr. Ghosh that she had an employee with behavioral problems.

69. After Ms. Mattson had brought Complainant to Dr. Ghosh's attention, both she and Ms. Watkins began preparing documentation of the various issues they had with Complainant.

70. On or about January 16, 2013, Ms. Watkins prepared two memos for Dr. Ghosh concerning the reasons why she believed that Complainant should be disciplined based upon the history of the Unit. Ms. Watkins based her argument on the grounds that she believed that Complainant's actions continued to be disruptive to the Unit. Ms. Watkins alleged that Complainant's behavior created safety concerns, such as when a Unit staff member had complained that Complainant was creating a hostile work environment for him and created stress for him. Ms. Watkins considered Complainant's actions to include intimidation, such as when Complainant was openly agitated about the fact that Mr. Whitt's employment had been classified so that he could earn overtime while Complainant could not do so, and she had referred to the matter as preferential treatment for Mr. Whitt. Ms. Watkins included examples of what she referred to as Complainant's passive aggressive behavior, such as sending Ms. Watkins emails the first thing in the morning and the last thing in the evening to prove that she was at her desk on time. Ms. Watkins also included examples of statements that Complainant had made which were disrespectful of co-workers, such as comments that specific co-workers were not doing their jobs or did not have the proper training.

71. At approximately the same time as Ms. Watkins prepared her memo, Ms. Mattson prepared a timeline of events for Dr. Ghosh in which she presented her version of events involving Complainant from 2009 through 2013.

72. Ms. Mattson also prepared a memo to Ms. Heustis and copied to Dr. Ghosh, dated January 16, 2013, in which she argued that Complainant must have been the source of the allegation that Ms. Matson had a smell of alcohol on her, and requesting that Complainant's motives for such an allegation be investigated. This memo also generally repeated the same set of allegations concerning Complainant's behavior since 2009 as had been included in the timeline.

73. On or about January 24, 2013, Ms. Mattson also authorized the monitoring of Complainant's computer. Ms. Mattson believed that some sort of corrective or disciplinary action was in progress for Complainant, and she was suspicious that Complainant had been deleting files and accessing records for which she had no authorized access.

The Board Rule 6-10 Process:

74. Complainant and Dr. Ghosh met for Board Rule 6-10 meetings on February 12, March 8, and March 20, 2013.

The Initial 6-10 Meeting –

75. By letter dated January 25, 2013, Dr. Ghosh notified Complainant that she intended to hold a Board Rule 6-10 meeting with Complainant. The meeting was initially scheduled for February 1, 2013, but was later changed to February 12, 2013.

76. The notice identified the following areas as issues to be discussed: “your interactions with co-workers in the areas of intimidation, passive/aggressive behavior, disrespectful behavior, and making accusations against others and then refusing to discuss the accusations.” The notice also added that they would discuss “questioning work decisions made by your supervisor and your resulting refusal to perform the work as directed by your supervisor,” and the fact that Complainant had said that she “detected a strong odor of alcohol as you passed an employee in the hallway.”

77. At the February 12, 2013 Board Rule 6-10 meeting, Dr. Ghosh was present with Mona Heustis and Anita Watkins. Complainant and her counsel attended as well. The meeting was recorded.

78. Complainant’s counsel raised the issue of a third person being present for Respondent during the meeting. He was told by Ms. Heustis that the supervisor was allowed to sit in on the meeting without the employee’s approval. Ms. Heustis said that she had spoken with the Attorney General’s Office and that the procedure of including more than just one representative was proper when the appointing authority was new.

79. Dr. Ghosh and Complainant discussed Complainant’s prior incidents beginning in 2009 for which she had been previously counseled and given a corrective action in February of 2012. They also discussed the January 2013 situation with Ms. Hernandez and Mr. Whitt.

80. Dr. Ghosh asked Complainant to explain why she had reported Ms. Mattson for having a strong odor of alcohol about her. Complainant told Dr. Ghosh that she was sitting at her desk and smelled alcohol as someone walked by. When she turned to look at who it was, it was Ms. Mattson returning to her office, which was adjacent to Complainant’s workspace. Complainant told Dr. Ghosh that she had been trained by Respondent that the workspace was to be drug and alcohol free, and that employees were to report if there was a smell of alcohol.

81. Complainant told Dr. Ghosh that others in the unit had been hostile to her, and that two co-workers had discussed her in a threatening manner in January 2013. Complainant also denied that she had told Ms. Watkins that she refused to meet with Ms. Hernandez after there had been a recent dispute between the two of them. Complainant additionally told Dr. Ghosh that an investigation of the unit’s dynamics had recently been completed, and that it had shown that she was not at fault for the problems in the unit.

82. After the February 12, 2013 meeting, Complainant also provided Dr. Ghosh with a report from CSEAP that attested to her concern over how her behavior had affected her work area and her efforts at accepting coaching and counseling.

Dr. Ghosh’s investigation after the February 12, 2013 meeting:

83. After the February 12, 2013 meeting, Dr. Ghosh also interviewed the two co-workers who had been reported for having a threatening conversation about Complainant in January 2013, Mr. Whitt and Ms. Hernandez. She also reviewed the Arnold report on the

function of the STI/HIV Section. She spoke with Ms. Mattson regarding the result of the August 2012 incident. Ms. Mattson told Dr. Ghosh that there had been a thorough investigation of Mr. Whitt's computer and no pornography had been found on it or on the websites he had visited. Dr. Ghosh also spoke with the Director of Human Resources, Ms. Heustis, who had responded to the report of alcohol odor on Ms. Mattson.

84. Ms. Watkins prepared a memo for Dr. Ghosh with her responses to Complainant's explanations during the Board Rule 6-10 meeting.

The Decision to Place Complainant On Administrative Leave -

85. Ms. Mattson's decision to monitor Complainant's computer resulted in Ms. Mattson finding evidence that Complainant had downloaded confidential health files onto her computer's hard drive (the C:\ drive), as well as to her personal drive on the computer network (the H:\ drive). The monitoring of Complainant's computer had also taken a screen shot of a log of Unit events that Complainant appeared to be keeping.

86. Ms. Mattson took the information concerning Complainant's computer use to Dr. Ghosh.

87. Dr. Ghosh decided that the possible violation of computer security protocols warranted the placement of Complainant on paid administrative leave while the new allegations were investigated. At about 10:00 AM on February 20, 2013, Complainant was called to a meeting in Dr. Ghosh's office and provided with the letter placing her on administrative leave. Complainant left the building shortly thereafter.

The Information Found on Complainant's Computer:

The Log of Section Happenings:

88. A screenshot taken on February 8, 2013, showed that Complainant was tracking some of the events related to the STI/HIV Section in a series of entries in a Word document that she had on her desktop. The screenshot showed two of the entries that Complainant had added to her series.

89. One of the visible entries, numbered as 15, appeared to be a copy of an email that had been sent to staff announcing that Kelly Voorhees had been appointed as interim STI/HIV Surveillance Data Management Unit supervisor, expected to be effective as of February 1, 2013. Ms. Voorhees was slated to be the supervisor for five staff members in the Data Management Unit: Jean Ajayi, Elaine Daniloff, Megan Duffy, Susanna Hernandez, and Shelley Reed.

90. The second visible entry, numbered as 16, contained notes that Complainant made after overhearing a conversation between Ms. Mattson and Ms. Voorhees. This second visible entry read, in its entirety:

On or about the 16th or 17th KV (HP V) met with MM (GP VII), where MM disclosed to KV (HP V) corrective and or disciplinary action information about staff that she is expected to begin supervising starting February 1, 2013. (This paperwork is still not in place as of 2/8/2013.

MM: I will tell you everything you need to know about disciplinary actions and your staff when you officially start on February 1, 2012...Elaine is on her VERY last leg. She has no more chances. Not a single chance left. If she messes up even once, she is done, out. When I tell Anita to turn the heat on, [s]he turns it on high! Elaine (HP IV – stat analyst) will need to be continually monitored. I will be having IT load your computer with computer monitoring software so you can monitor Elaine's usage. But you don't want to make it look like like she is the only one being monitored. You need to spot check everyone. Right now I am just spot checking people... Everyone else is great. Susanna (PAJ) is our SAS genius and she is being underutilized, so you should give her more responsibilities. Megan is a star. And Shelly is great ... and Jean is Jean...

The Download of Patient Files on Complainant's C:\ Drive:

91. The computer screenshots also showed a list of documents on the C:\ drive, which is a non-secure hard drive for Complainant's computer.

92. Under a heading of DHH Holding Spot, Complainant had added nine files that included patient names and dates of birth, in addition to various other items concerning those individuals such as viral load test results or the date of HIV diagnosis. These nine files contained hundreds of entries concerning patients and providing identifying information about the patient and their diagnosis.

93. Complainant's C:\ drive desktop folder also included a file containing approximately 100 records that included patient name, HIV genotype results, medical provider names and laboratory information.

94. Another file in Complainant's C:\ drive desktop folder housed 150 records that included patient name, dates of birth, social security numbers, and diagnosis information. This file was created on February 20, 2013.

95. Some of the files which included confidential health information had been downloaded to the C:\ drive in late November 2012, and had not been deleted by the time that Complainant was placed on administrative leave on February 20, 2013. None of the files containing identifying information about patients or their diagnosis had been encrypted.

96. Complainant had, as a matter of her standard practice, downloaded unencrypted files that contained confidential and protected health information, such as the nine files identified as within the DHH Holding Spot, to her unsecured C:\ drive as she performed her work. She had not, however, removed the C:\ drive files at the end of each that day. Some of the files containing confidential health information had remained on Complainant's C:\drive for months.

Complainant's internet use:

97. The computer monitoring that Ms. Mattson used on Complainant's computer also recorded that Complainant had visited non-work internet sites from her work computer during the period of February 1 through February 20, 2013.

Information Concerning the Two Flash Drives:

98. On or about January 8, 2013, Respondent provided Complainant provided with two 8 GB flash drives that she had ordered.

99. When Complainant was placed on administrative leave on February 20, 2013, she was told to provide Human Resources with all state-owned equipment. Complainant turned over her laptop computer and one 8 GB flash drive. Complainant did not return the second flash drive. Complainant's work area was searched in March of 2013, and no flash drive was found in her work space.

100. The flash drive that Complainant returned contained only X-Box files and no work-related information.

101. The computer monitoring instituted by Ms. Mattson showed that Complainant had, on occasion, downloaded work files containing identifying patient information onto drives labeled as E:\ drives. An E:\ drive designation occurs when a flash drive is connected to the desktop computer. A screenshot taken on February 13, 2013 shows that Complainant appeared to have two E:\ drives in her computer. On February 19, 2013, a screenshot showed that Complainant appeared to have one E:\ drive connected to her computer.

CD4/VL Load Test Investigations from 2012:

102. On or about January 23, 2013, Complainant and others in her unit had been instructed by Ms. Watkins that all CD4/VL load test investigation reports from 2012 had to be completed by February 20, 2013. CD4/VL reports are a measure of the viral loads that have been identified in patients.

103. At the time that Complainant was placed on administrative leave during the morning of February 20, 2013, Complainant still had 10 open CD4/VL reports from 2012 that were not completely processed. Complainant had been assigned 25 of these reports on or about January 23, 2013, and was given a due date of February 20, 2013 for completion of the reports.

104. The fact that Complainant was placed on administrative leave in the morning of February 20, 2013, however, meant that Complainant was not provided with the entire period of time to complete her work of the CD4/VL reports due that day.

Second Board Rule 6-10 Meeting:

105. By letter dated March 5, 2013, Dr. Ghosh informed Complainant that she intended to hold a second Board Rule 6-10 meeting on March 8, 2013. The meeting was to discuss the following issues: "inappropriate use of your state issued computer; documenting private conversations between Melanie Mattson and other staff; downloading of confidential public health information to a non-secured drive; and possible personal possession of state owned equipment." Dr. Ghosh also included that she intended to discuss a "violation of the Corrective Action issued on November 19 that requires you to complete work in a timely manner as instructed by your supervisor."

106. At the March 8 meeting, Dr. Ghosh was present with her representative, Ms. Heustis. Complainant attended with her counsel. The meeting was recorded.

107. Dr. Ghosh asked Complainant to explain why she had made notes concerning a conversation between Ms. Mattson and Ms. Voorhees. Complainant explained to Dr. Ghosh that Ms. Mattson was often quite loud in her speaking voice, and that Ms. Mattson's portion of conversations was often audible to Complainant as Complainant worked at her workstation, which was located right outside of Ms. Mattson's office. Complainant told Dr. Ghosh that, on the date in question, she could hear Ms. Mattson while she was speaking, but that she could not hear Ms. Voorhees' side of the conversation. Complainant also explained that she had taken notes on the conversation because it seemed to confirm that Ms. Mattson was using Ms. Watkins to turn the heat on employees in order to issue corrective and disciplinary actions, and she believed that similar actions were being taken with her.

108. Complainant was asked to explain how she maintained security over confidential health information on her computer, and was given the examples of files that Ms. Mattson had located on Complainant's C:\ drive. Complainant told Dr. Ghosh that it was her common practice to put data sets on her desktop to use them that day, and then to remove them by either deleting them or placing them back onto the K:\ drive.

109. Complainant also explained that she had been provided with two 8GB flash drives. She returned one to Ms. Heustis after she was placed on administrative leave. She could not say with certainty where the second flash drive was located. Complainant explained that she used flash drives to take her own personal information home with her, such as her time sheets, and her log in and log out emails that she would send to Ms. Watkins to document the times she was at her desk. Dr. Ghosh asked her if she had downloaded confidential health information onto one or more flash drives. Complainant told Dr. Ghosh that she had not downloaded HIV data to a flash drive.

Follow-up of the March 8 meeting:

110. After the March 8 meeting, Dr. Ghosh spoke with Ms. Watkins about Complainant's workload. She also confirmed that one of the instructions that had been provided to staff regarding the use of datasets on the K:\ drive was that files should be moved temporarily to the C:\ drive to run a program, but then the dataset was to be placed back onto the secure K:\ drive at the end of each day, and removed from the C:\ drive.

Search of Complainant's Workspace and H:\ Drive:

111. Ms. Mattson completed a physical search of Complainant's work area on March 10, 2013.

112. Ms. Mattson located a 24-page document containing the download from a database that included approximately 575 patient names and dates of diagnosis. This report was a RER Reconciliation Report covering all cases from January 1, 2012 through December 7, 2012. The hard copy of the report had been placed in an unlocked cabinet in Complainant's office.

113. Complainant's possession of this report outside of the Registry Room was in violation of Section policies regarding the use of hard copy reports containing patient information. Ms. Mattson had the document returned to the Registry Room.

114. Ms. Mattson also reviewed the files that Complainant had stored on her H:\ drive. The H:\ drive is a personal network drive that is not a secured drive. Ms. Mattson located 13 files containing approximately 3250 records including confidential health information on Complainant's H:\ drive. A number of these files had last been modified in September or early October of 2012.

115. Ms. Mattson also discovered that file folders called "Aloha" and "DHH" had been on Complainant's H:\ drive.

116. The DHH folder was located in a folder named "TTH." The initials DHH stand for Denver Health and Hospitals. The DHH folder contained nine additional records that contained patient names, dates of birth, social security numbers, test dates and additional health information.

117. The Aloha file contained an access database with multiple files in it; three of those files contained patient records. The three files within Aloha that included patient information included: the "Allison" file containing 1,494 records that included patient names, HIV diagnosis date, CD4 and viral load results; the "Aloha VL lab" file which contained 949 records including patient name, date of birth, and HIV diagnosis date; and a file of CD4 to match, containing 2,208 records including patient names, dates of birth and CD4 results. The Aloha file on the K:\ drive contained the same access file as was found on Complainant's H:\ drive.

118. The screenshots that showed Complainant's use of E:\ drives included a list of files that, on at least one occasion, included files that had been named "Aloha" and "DHH."

119. A download of confidential patient information to a flash drive would constitute a particularly serious violation of the Section's security protocols.

Third Board Rule 6-10 Meeting:

120. On or about March 13, 2013, Dr. Ghosh issued a letter to Complainant informing her of a third Board Rule 6-10 meeting to be held on March 20, 2013.

121. The announced topics for the meeting were that a report that had been discovered in Complainant's unlocked cabinet in her office, the issue of storage of information on Complainant's drives, the issue of additional downloading of confidential files to Complainant's H: drive, the issue of the missing flash drives, and the possible violation of Complainant's November 19, 2012 corrective action in Complainant's completion of work.

122. Dr. Ghosh was again represented by Ms. Heustis at the meeting. Complainant attended with her counsel. The meeting was recorded.

123. Complainant was asked why she had confidential patient information on her H:\ drive. Complainant's answer was to untruthfully blame Ms. Mattson for telling her that the use of the H:\ drive was an acceptable place to maintain files with confidential patient information. Complainant also untruthfully told Dr. Ghosh that the use of the H:\ drive to store files with confidential patient information was a common practice in the Unit, and that references in agency written policy to the use of the J:\ drive as a secure drive were likely typographical errors and actually referred to use of the H:\ drive.

124. Complainant was asked why she had downloaded a hard copy of the RER Reconciliation Report, and why she had left it in an unlocked cabinet in her workspace. Complainant's response was that this document would have been a document that she would have removed from her box in the Registry Room, and she had no idea how or why it would be in her cubicle. Complainant told Dr. Ghosh that she used the report to find information regarding the first date of HIV diagnosis, and that she used that information in her reports.

125. During the March 20 meeting, Complainant admitted to Dr. Ghosh that, at times, she ignored the instruction to remove datasets from the C:\ drive at the end of the day because there were frozen datasets that she had wanted to keep.

126. Complainant was asked again about the location of the two flash drives that she had ordered. Complainant confirmed that she had returned one of those drives to Ms. Heustis at the time she had returned her laptop computer. Complainant again told Dr. Ghosh that she did not have the second flash drive, and that she believed that it had been in her desk drawer still in its packaging.

127. Complainant confirmed that she used her own personal flash drives to download information from her H:\ drive to take home. Complainant explained that she downloaded her personal information, such as her time sheets and copies of the emails that she sent to Ms. Watkins to document her start and end times each day. Complainant denied that she saved confidential information on her flash drives.

128. Complainant offered no explanation for why her E:\ drives would show DHH and Aloha files on those drives. She told Dr. Ghosh she did not know how to interpret the screen shots showing the list of files on her E:\ drives. Complainant also told Dr. Ghosh that she knew that she had never downloaded confidential patient information onto a flash drive. When Dr. Ghosh asked her what would have been in files labeled as Aloha and DHH, Complainant's response was that it would probably be personal stuff and that the DHH file might have been a form or template that she was working and not data files.

Dr. Ghosh's follow-up to the March 20 meeting:

129. Dr. Ghosh emailed an inquiry to Ms. Mattson and Ms. Watkins about the Section's use of various drives to store confidential patient data. Ms. Mattson sent the inquiry to eight staff members; those eight individuals (and Ms. Watkins) then emailed their responses directly to Dr. Ghosh. The questions that Dr. Ghosh asked were: 1) Which computer drive(s) do you save confidential patient information in?, and 2) Are there any circumstances under which you would save confidential information in drives other than the ones you listed above? If yes, please describe which drives and what the circumstances might be.

130. The results of this survey of practices showed that all of the Section members used the K:\ drive. One staff member reported also using the J:\ drive. One staff member reported also using her C drive for the day to run large datasets and then deleting at the end of the day, and using the H:\ drive with all identifiers removed. One staff member reported that some information would be sent to him via encrypted email and would arrive on his C:\ drive, but would be moved immediately to the K:\ drive. One staff member reported that she used her C:\ drive to run large datasets, but removed the files at the completion of the run. She also reported that she had, in the past, stored confidential files inappropriately on the H:\ drive, but had removed those files after being instructed to do so.

Disciplinary Decision:

131. Dr. Ghosh determined that, out of the many events that she had investigated during the Board rule 6-10 process, there were four grounds supporting disciplinary action.

132. In a disciplinary letter dated March 28, 2013, Dr. Gosh explained her findings as follows:

a) "You have violated your Corrective Action, issued in November 2012, related to the timeliness of your work and following your supervisor's instructions." This cause for discipline addresses the ten CD4/VL test results from 2012 that were to be completed by February 20, 2013.

b) "Your credibility and truthfulness are limited. This is evidenced by the accusations you have made against coworkers and manager that were found to be false upon investigation, the findings of an independent third-party investigation which questioned your credibility, as well as numerous instances during these three Rule 6-10 meetings where information you provided was found to be incorrect or untrue."

c) "You have little or no regard for the privacy of others. You showed a blatant disregard for the privacy of your Section Chief and your coworkers with regards to their conversation behind closed doors, and instead viewed their conversation as valid for your own personal use. In addition, you showed disregard for the privacy of the citizens of Colorado who have been diagnosed with HIV or STI, and whose confidential information has been entrusted to CDPHE."

d) "You have no or little regard for the sensitive and confidential nature of the work that you do. You knowingly and repeatedly violated security policies put in place to protect confidential patient information. The public health system in Colorado is dependent on CDPHE's ability to be a responsible steward of confidential medical information. Ignoring the safeguards and security measures placed on this confidential information violates the trust of the public, as well as the expectations of our federal funder, CDC."

133. Dr. Ghosh had also decided that Complainant's non-work internet usage, as documented during the period of computer monitoring in February 2013, also violated the Division's policy prohibiting any personal use of the internet from state equipment. This issue was not sufficiently significant, however, to be included as one the grounds for discipline described by Dr. Ghosh in her decision.

134. As part of her consideration, Dr. Ghosh reviewed Complainant's performance history. There were no prior disciplinary actions in Complainant's file. Dr. Ghosh reviewed the two corrective actions that Complainant had been previously issued. Neither of these corrective actions involved issues of information security or privacy. Dr. Ghosh found that Complainant's actions were sufficiently serious and flagrant to warrant the imposition of discipline.

135. In determining the proper sanction to be assessed for such violations, Dr. Ghosh decided that Complainant's violation of the security procedures for confidential health information was the most critical issue. Dr. Gosh considered the ability of CDPHE to maintain a high level of security to be a cornerstone of CDPHE's ability to succeed in its public health

mission. Dr. Ghosh believed that, if Complainant could not be trusted to follow the security procedures, Complainant could play no role in the activities of the Section.

136. Dr. Ghosh decided that termination from employment was warranted on the basis of these confidentiality violations. Complainant's employment was terminated effective March 29, 2013.

137. Respondent's termination letter included a statement of appeal rights. The letter was sent to Complainant by email, US mail, and certified mail.

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

DISCUSSION

I. 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 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 most serious acts for which she was disciplined.

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 and to determine whether Respondent has proven the historical facts which are the foundation of any disciplinary decision by a preponderance of the evidence. 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”).

During the hearing, it became patently clear that Complainant’s second level supervisor, Ms. Mattson, and her direct supervisor, Ms. Watkins, were personally invested in having Complainant fired from her position.

Ms. Mattson, for example, reported to Dr. Ghosh that Complainant had been found to have been untruthful in her August 2010 report concerning Mr. Whitt. (Ms. Watkins also reported a very similar version of events to Dr. Ghosh, although she acknowledged that she had not been present at the time and was relying on the description offered by others.) Ms. Mattson described the complaint as being an allegation that Mr. Whitt was viewing pornographic material on his computer, rather than one of Complainant objecting to Mr. Whitt’s use of a vulgar term toward her and use of sexualized language generally, including statements that he allegedly made about viewing pornography on his computer. Moreover, the fact that Mr. Whitt had admitted that he had called Complainant that vulgar name, apologized for his use of that term, and was issued a corrective action for his statement did not appear to be part of the information transmitted to Dr. Ghosh by Ms. Mattson. The version of events that Ms. Mattson presented as part of her recitation of events is almost unrecognizable when compared to the contemporaneous documentation of that incident. More importantly for this case, there was no credible evidence presented at hearing that anything that Complainant said about that incident with Mr. Whitt was, in fact, wrong or incorrect.

Because there was sufficient evidence of bias and antipathy toward Complainant from Complainant’s first and second-level supervisors, the findings of fact in this case have avoided adopting their factual allegations against Complainant, except to the extent that their allegations were sufficiently corroborated by more neutral sources. For this reason, there are generally no findings of fact related to the majority of allegations brought by Ms. Mattson and Ms. Watkins concerning Complainant.

Dr. Ghosh’s Board Rule 6-10 process, however, created an avenue for some of the most important allegations to be explored beyond the conclusory allegations raised by Complainant’s supervisors.

1. Findings that Complainant violated the November 2012 Corrective Action:

Respondent has failed to present a preponderance of evidence to support the conclusion that Complainant violated the terms of the November 2012 corrective action. The evidence at hearing established that Complainant had 10 of 25 CD4 reports still to complete at the time she was placed on administrative leave. The deadline for completing the work was the end of that day, and there was insufficient evidence presented to show that Complainant could not, or would not, have met the deadline if she had been permitted to work throughout the day.

2. Findings that Complainant had been untruthful:

Dr. Ghosh found that Complainant should be disciplined because her credibility and truthfulness was limited. In regard to discipline of an employee for failing to meet performance standards, however, the primary issue is not whether others have found an employee to be credible (or not), but a question of whether the employee has failed to be truthful. Dr. Ghosh’s finding, therefore, should be interpreted as a finding that Complainant has not been truthful. Respondent has partially proven this basis for discipline by a preponderance of the evidence.

Dr. Ghosh appears to have accepted Ms. Mattson's assurances that there were instances where Complainant's statements had been proven to be false. One of those instances involved Complainant's 2010 allegations against Mr. Whitt. As previously discussed, however, the credible evidence concerning that incident shows that Complainant was proven to be correct in much of what she alleged, and there was no evidence that something Complainant reported was, in fact, incorrect or untrue. Ms. Mattson, on the other hand, was incorrect when she stated that Complainant had alleged that there was pornographic materials on Mr. Whitt's computer; the credible evidence shows that Complainant alleged that Mr. Whitt himself had said that there was such material on his computer. There was no evidence presented at hearing concerning any investigation which had determined that Mr. Whitt did not make the statements attributed to him by Complainant. To the extent that Dr. Ghosh was relying on this incident as the basis of her conclusion that Complainant had been untruthful, such reliance was misplaced.

Ms. Mattson also considered Complainant's statement concerning her having a strong odor of alcohol on her as a proven falsehood. Respondent presented evidence at hearing that, approximately a half and hour after the report, Dr. Miller and Ms. Huestis did not smell alcohol on Ms. Mattson, and there were no other indications that she had consumed alcohol. The record is clear that Ms. Mattson had not consumed alcohol on that date. The question, however, was whether there was a factual basis to find that she had a smell of alcohol about her person. At hearing, Respondent could not rule out other sources of a smell of alcohol that could have dissipated in a half hour, such as hand sanitizer and mouthwash, and therefore have failed to prove that Complainant was being untruthful when she reported that there was an odor. To the extent that Dr. Ghosh was relying on this incident as proof that Complainant had been proven to have been untruthful, Respondent has failed to prove this allegation by a preponderance of the evidence.

Dr. Ghosh also cites to the Arnold report conclusions as a reason to believe that Complainant had been untruthful. The report, however, did not attempt to document instances where a particular employee was either truthful or untruthful. Mr. Arnold's conclusion seems to be that, of the host of allegations and cross-allegations that have been made by the Unit staff, it appeared to him that the descriptions provided by the other staff members were more likely to be true than Complainant's descriptions. It is not reasonable to construe this finding as a finding that Complainant had, therefore, violated her performance requirements. The results of the Arnold report do not represent grounds for discipline of Complainant.

Respondent did prove by a preponderance of the evidence that Complainant was untruthful at points during the Board Rule 6-10 process. Complainant was untruthful when she blamed Ms. Mattson for telling her that she could maintain confidential patient information on her H:\ drive, and when she told Dr. Ghosh that the H:\ drive was an acceptable place for confidential patient information. Complainant also did not tell the truth about what she had downloaded onto flash drives from her desktop computer, and when she denied that she had downloaded confidential patient information on to those drives. Complainant's explanation that she used the flash drives to download only her personal information, such as time sheets, was particularly troubling given that she then also explained that the DHH file seen on the E:\ drive would be a download of a form or template for data, but not the associated confidential patient data.

Truthfulness, particularly with regard to statements during a Board Rule 6-10 meeting and statements concerning core job functions, is a standard performance requirement for state employees. Respondent has proven by a preponderance of the evidence that Complainant failed to perform competently when she made these untrue statements.

3) Findings that Complainant had violated others' privacy:

Respondent alleged that Complainant violated the privacy of Ms. Mattson, Ms. Voorhees, Mr. Whitt and Ms. Hernandez when she listened to conversations they were having.

The evidence at hearing, however, was limited to the fact that Complainant could and did overhear conversations. The credible evidence presented at hearing was that Complainant was at her desk when these conversations occurred. Respondent did not present any evidence that Complainant was trying to overhear these conversations, or that she took steps to be able to overhear the conversations. The question presented on this evidence, therefore, is whether by overhearing comments Complainant had failed to perform competently in her job, or had committed willful misconduct by violating the privacy of the speakers. Under such circumstances, Respondent has failed to prove that Complainant should be subject to discipline for overhearing these conversations. A party who speaks loudly enough so that others can overhear the conversation without taking any other action other than listening while at their desk is not having a private conversation.

Respondent also finds that Complainant has violated privacy rights in the way she had handled confidential medical information. This contention is well-supported on the facts. Complainant has admitted that she kept confidential medical files on computer drives that did not have the protection of the secured K:\ drive. It was also supported at hearing that Complainant had downloaded files that contained confidential medical information to a flash drive, and that she had a hard copy of a report that should have been kept in the Registry Room in an unlocked cabinet in her workspace. These actions show a lack of concern over the privacy rights of the patients whose sensitive medical information is entrusted to Respondent, and create a valid basis to discipline Complainant.

4) Findings that Complainant's handling of files violated Respondent's security policies:

Respondent also found that Complainant showed little regard for the sensitive and confidential nature of the work performed by the Section by repeatedly and knowingly violating the security protocols for the handling of confidential medical information. Respondent has proven by a preponderance of the evidence that Complainant repeatedly violated the security restrictions in place for the Section. At hearing, Complainant did not dispute that she had confidential medical files stored on her C:\ and H:\ drives. Her dispute at hearing was that it was an acceptable practice, and that explanation was not credible given the evidence presented concerning the Section's security policies and practices, as well as Complainant's previous statements concerning her knowledge of those restrictions. The evidence at hearing also demonstrated that it was more likely than not that Complainant had downloaded two files, the DHH and Aloha files, onto flash drives, and that these files were the type that contained confidential patient information. It was also undisputed at trial that Complainant had kept a hard copy of a file that should have been secured in the Registry Room in her unlocked cabinet. These actions all represent violations of Respondent's security protocols and constitute a valid basis for imposing discipline.

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 imposing discipline in this case were neither arbitrary nor capricious. The evidence at hearing demonstrated that Dr. Ghosh took reasonable steps to gather information about Complainant's performance through multiple Board Rule 6-10 meetings with Complainant, to review information that Complainant presented during those meetings, and to take investigative steps after the meetings to check the information presented to her. On the most serious accusations regarding information security, Dr. Ghosh surveyed the Section's security procedures to make certain she understood both the policy in place and the practices of the staff. The evidence at hearing supported that Dr. Ghosh carefully reviewed the reports that she had received, allowed Complainant to submit materials to her, and reviewed those materials as part of her consideration.

Additionally, the evidence introduced at hearing demonstrated that Dr. Ghosh gave candid and honest consideration to all of the information she had collected, including the information that Complainant had presented to her. Moreover, the conclusions that Dr. Ghosh reached as to the facts of the proven incidents relating to Complainant's security of information were reasonable conclusions based upon the evidence she 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, except as to one meeting violation that was without material effect on the disciplinary decision:

A. 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."

Dr. Ghosh recognized that progressive discipline had not been applied in this case, and she included a finding that the violations of the performance expectations for Complainant were sufficiently flagrant and severe as to warrant the imposition of immediate discipline. Many of the findings made by Dr. Ghosh during the disciplinary process, however, were not proven at

hearing. The question at this point, therefore, is whether the proven allegations warrant the same finding.

The proven violations in this case relate to Complainant's handling of highly confidential medical information, and to her untruthful statements related to those practices. Such actions affect the core of the Section's functions and represent potentially serious problems for Respondent. These actions meet the test as such serious violation of the standards of conduct so as to warrant immediate discipline.

Under such circumstances, Respondent's decision to impose discipline is not a violation of Board Rule 6-2.

B. The First Board Rule 6-10 Meeting:

The first Board Rule 6-10 meeting, held February 15, 2013, included an aspect that was not in compliance with Board rules: the number of participants in the meeting.

The version of Board Rule 6-10, 4 CCR 801, in effect at the time of the meeting provides, in relevant part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond...The appointing authority and employee are each allowed one representative of their choice...."

This provision limits each side to a total of two persons each. There is no provision within the rule for the addition of extra observers or other participants; such additions would not be permitted unless the other party agreed to waive the limitation of this rule. The policy behind this rule is to encourage a productive meeting where the appointing authority and employee have a chance to talk freely, and to not create an interview by panel.

In this case, Complainant's counsel objected to the presence of an additional individual in the meeting, and was incorrectly told that the rules permitted the inclusion of an extra person. It was a violation of Board Rule 6-10 to include both Ms. Heustis and Ms. Watkins in the first meeting.

This violation of Board Rule 6-10's limitation on attendance at the meeting, however, occurred only during the first meeting and was not repeated in the subsequent meetings. The allegations proven at hearing, and which constitute the factual basis for the discipline sustained in this case, were based upon incidents discussed primarily in the third Board Rule 6-10 meeting. There was no indication in the evidence presented at hearing that the rule violation during the first meeting had any material effect on the process or outcome of this case.

As a result, Respondent's violation of Board Rule 6-10 during the first Board Rule 6-10 meeting is without material effect on the disciplinary process, and is not a cause to modify the result in this case.

Respondent's imposition of discipline in this matter was neither arbitrary nor capricious, and was not contrary to rule or law.

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.

Respondent's ability to carry out its public health duties depends in significant part upon the fact that the department receives reports of communicable diseases without regard to whether a patient consents to provide such information. Moreover, the specific diseases tracked by the Section also constitute some of the most sensitive medical issues imaginable. It is no stretch to conclude that Respondent's ability to strictly control the dissemination of the information that it collects is an essential function for the agency.

Dr. Ghosh correctly concluded that Complainant's handling of confidential medical data repeatedly violated the security protocols put into place to allow the agency to perform its core public health function. Her concern about Complainant's untrue statements related to how those materials were handled and why creates a fundamental trust issue related to Complainant's continued employment. Termination of Complainant's employment was, therefore, within the range of reasonable disciplinary alternatives available to the appointing authority in this case.

CONCLUSIONS OF LAW

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

ORDER

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

Dated this 30th day
of January, 2014 at
Denver, Colorado.



Denise DeForest
Senior Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 30th day of January, 2014, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Pamela Montoya

[REDACTED]
misspammontoyad@gmail.com

Stacy L. Worthington

[REDACTED]

[REDACTED]

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.