

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**MARK MITCHELL,**  
Complainant,

v.

**UNIVERSITY OF COLORADO BOULDER, DEPARTMENT OF INTERCOLLEGIATE  
ATHLETICS, ATHLETIC GAME MANAGEMENT AND FACILITY OPERATIONS,**  
Respondent.

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Senior Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on July 9 and 24, 2013, at the State Personnel Board. The record was closed on receipt of the parties' written Closing Arguments on July 2, 2013. Senior Associate University Counsel Elvira Strehle-Hensen represented Respondent University of Colorado Boulder, Department of Intercollegiate Athletics (CU Boulder or Respondent). Respondent's advisory witness was Tanya Panzer, HR Director for the CU Boulder Athletic Department. Complainant appeared and was represented by W. Harold Flowers, Esquire, Hurth, Sisk & Blakemore, LLP.

**MATTER APPEALED**

Complainant, Mark Mitchell, appeals his disciplinary termination of employment, asserting that the discipline imposed was unduly severe and Respondent failed to use progressive discipline. For the reasons set forth below, Respondent's action is **affirmed**.

**ISSUES**

1. Whether Complainant committed the acts upon which discipline was based;
2. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law; and
3. Whether either party is entitled to attorney fees and costs.

**FINDINGS OF FACT**

**General Background**

1. Complainant was a Custodian III, Custodial Foreman, at CU Boulder in the athletics department at the time of his termination. Complainant has worked for Respondent since 1993 and promoted through the ranks to his current position.
2. Complainant was responsible for supervising, coordinating, and directing the custodial work at CU athletic facilities, including the academic areas, the alumni club, the football stadium, several locker room, an auditorium, and hallways. His responsibilities included custodial work before and after large catered functions, many of which were scheduled with little prior notice.

### Performance Evaluation History

3. Complainant's direct supervisor was John Krueger, Assistant Athletic Director in charge of facilities. Mr. Krueger's office was on the other side of the football stadium from Complainant's office and he had little daily contact with Complainant.
4. Mr. Krueger reported to Tom McGann, Associate Athletic Director, Game Management and Operations.
5. In 2010, 2011, and 2012, Mr. Krueger rated Complainant at the "Exceeds Expectations" level, with numerical ratings in the high 280's out of 300 points.
6. In 2010, Mr. Krueger made the following comments on Complainant's evaluation: "Communicates effectively with staff;" "maintains proper supply levels and keeps equipment in good repair;" "effectively instructs employees as needed;" "maintains facilities at an extremely high level;" and "interacts and maintains good working relationships." This evaluation also noted Complainant was "extremely flexible and able to respond to last minute changes."
7. Complainant's 2011 evaluation was similar, with notes he "communicates well with crew and clients" and "works well with others despite lack of cooperation." This lack of cooperation referred to the many unscheduled event changes to which Complainant had to respond with custodial staffing.
8. In 2012, Mr. Krueger made comments on Complainant's evaluation that he "effectively communicates with his crew and other staff," was "very good at managing his staff despite constant change," and has "excellent overall knowledge in his field." The date of this evaluation was April 27, 2012.

### Complainant's Staff and Use of Work Lists

9. The second shift Complainant supervised consisted of a Custodian II lead worker, Jawo Tashi, and several Custodian I's, all of whom worked the 3 p.m. to 11:30 p.m. shift.
10. Complainant worked the 7 a.m. to 3:30 p.m. shift, with a thirty-minute overlap in shift so that he could provide direction at the time of shift change.
11. Mr. Tashi, the lead worker over the Custodian I's, was the brother-in-law of Mr. Passang,<sup>1</sup> a Custodian I. Mr. Passang resisted taking orders from Complainant, and preferred to work through Mr. Tashi. If Mr. Passang received conflicting directives from Mr. Tashi and Complainant, he would ask Mr. Tashi for clarification. This dynamic caused friction between Complainant and Mr. Tashi.
12. Another Custodian I was Eric Lough, whom Complainant hired in 2010. Mr. Lough is the son of one of Complainant's closest personal friends. Complainant and Mr. Lough had known each other since Mr. Lough's early childhood.

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<sup>1</sup> Mr. Passang does not have a first name.

13. Complainant used master job lists, outlining each task to be performed in each building or work area, to guide the work of the custodians. He also often filled out a separate sheet, "Things to do today," which was a daily list of up to twelve items. Complainant handed these daily task lists to Mr. Tashi as a way to focus Mr. Tashi on the highest priority daily tasks to be performed. Mr. Tashi generally resisted using these work sheets.
14. Complainant kept a private spiral notebook on which he made notes on his staff's performance. At some time<sup>2</sup> he started to make daily notes regarding staff failure to meet his expectations. He often listed the specific jobs not completed. Examples of his entries include: "9-14 same things not done. Have not used work sheets. Not one day since 8-23;" "9-15 same things not done does not use work sheets." The same notations continue for days and weeks.
15. Complainant's notes from 2012 and 2013 include comments about Mr. Tashi not respecting his authority. He stated, "12-1-12 has a problem with taking order he thinks he is my boss. Not a good leader does not check anyone's work;" and "2-27-13 He thinks he is my boss."
16. The areas under Complainant's supervision were routinely cleaned very well. Mr. Krueger and Mr. McGann were always impressed with the condition and cleanliness of the athletic facilities.

#### 2008 Grievance

17. Benjamin Montez was a Custodian II who reported to Complainant during the period 2006 to 2009. In 2008, Mr. Montez filed a grievance against Complainant, alleging that Complainant was intoxicated at work, asked him for a ride home on multiple occasions during his scheduled shift, used profane language towards him, and called him during non-work hours, typically while intoxicated.
18. In Complainant's grievance response, Complainant had agreed not to ask for rides home anymore and not to call Mr. Montez during non-work hours unless necessary for work-related matters. Complainant "strongly" denied ever having come to work intoxicated.
19. During the period of 2006 to 2009, Mr. Montez gave Complainant a ride home regularly during work hours and would be gone for thirty to ninety minutes. Mr. Montez took Complainant on personal errands and to see his girlfriend in Lafayette. He complied with Complainant's requests for rides because he felt pressure to do so and feared losing his job if he did not.
20. Complainant also called Mr. Montez at home after work hours while intoxicated. During these calls, Mr. Montez never got a word in.
21. In 2009, Mr. Montez complained to Mr. Krueger about Complainant requiring him to give him rides. Mr. Krueger believed that this was not appropriate and directed Complainant to stop the practice. Complainant agreed, and Mr. Krueger believed this issue had been resolved.

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<sup>2</sup> The record does not demonstrate what year Complainant started to make these notes; he inserted the year after the original notes were made.

22. In 2009, Mr. Montez transferred to a position out of the chain of command of Complainant in order to avoid the continuation of the problems he had complained about.

#### Rides Home from Subordinates

23. After Mr. Montez left the athletic department custodial staff, Complainant continued to get rides from his subordinates during work hours.
24. Every weekday, between 3:30 p.m. and 5:30 p.m., Complainant asked for a ride home by either Mr. Lough, Mr. Passang, or Mr. Tashi. Every day one of Complainant's subordinates left his post during work hours for between twenty minutes and two hours to give Complainant a ride home and take him to the grocery store, liquor store, bank, dry cleaner, or to see a girlfriend or family.
25. None of Complainant's subordinates felt comfortable refusing Complainant's requests for rides. They felt pressure to comply with his requests because he was their supervisor, he would get angry if they did not do so, and they feared termination if they refused.
26. It was not uncommon for Complainant to require Mr. Lough to give Complainant a ride to Lafayette to see a girlfriend. Mr. Lough would then give Complainant a ride home in Boulder, and then return to work.
27. This routine of receiving rides home and for personal errands occurred for at least the past three years.
28. Mr. Krueger did not notice that Complainant had removed one of his subordinates from the worksite for lengthy periods of time on a daily basis.
29. Approximately once every few months Complainant was not at work when his subordinates arrived for second shift and he had provided no advance notice. This caused some problems for his crew because they were unclear on what the priorities were for that day.
30. Mr. Krueger routinely approved Complainant's leave from work after the fact.

#### Calls to Subordinates at Home

31. Complainant called his subordinates at home a few nights each week between 11:30 p.m. and 2:00 a.m. During these conversations, Complainant berated his subordinates for not getting their work done, and complained about other members of the custodial staff not respecting his authority or getting their work done.
32. Complainant was intoxicated during most of these calls. Complainant talked nonstop and his subordinates found it difficult to participate in the conversations and to end the calls.
33. Complainant would often call Mr. Lough several times in one night. Mr. Lough found it difficult to understand what he was saying because he was intoxicated. During the calls, Complainant directed Mr. Lough to pass on specific directives to Mr. Tashi. When

Complainant did pass on these messages, Mr. Tashi would respond that Mr. Lough was not his supervisor. Complainant's directives placed Mr. Lough in a difficult position and increased the tension in the workplace.

34. In addition to the inappropriate calls, it was common for Complainant to make calls to his supervisees to inform them of schedule changes that occurred at the last minute.
35. During the period of 2009 through 2012, Complainant's subordinates complained to Mr. Krueger about his "off hours calls" periodically. Mr. Krueger felt the calls were necessary because of Complainant's need to advise them of a change in work schedule.

#### Yelling at Employees

36. Complainant's behavior towards his subordinates was variable. On some days he communicated appropriately.
37. On other days, approximately half of the time, Complainant was disrespectful, angry, and used put-downs towards his staff. He yelled and cursed at his employees for never getting their jobs done. Complainant often called his supervisees "d \_\_\_\_\_," "a \_\_\_\_\_," "piece of s \_\_\_\_\_," and "m \_\_\_\_\_," both in their presence and to other supervisees outside their presence.
38. Mr. Krueger received periodic complaints from Complainant's supervisees. They reported that Complainant was continually "after them" about getting a specific job done over the course of a few weeks. Mr. Krueger felt that staff was "nit picking" and saw their complaints as a sign that Complainant was appropriately paying high attention to detail.
39. Complainant's work crew kept the athletic buildings clean and well maintained.

#### Intoxicated on Game Day

40. On a football game day, a Saturday, within the last three years, Mr. Lough picked up Complainant at his home at 7:00 a.m. to bring him to work. Mr. Lough noticed that Complainant was clearly intoxicated because he smelled of alcohol, slurred his words, stumbled when walking, and acted in a belligerent manner. When Complainant found some papers used by the caterers on top of a trash can, he threw them off, and yelled, "Don't put that f \_\_\_\_\_ s \_\_\_\_\_ on our trash cans." Approximately fifteen catering workers were present at the time.
41. Complainant then went to his office. An hour later, Complainant called Mr. Lough and directed him to bring him home. Mr. Lough had to walk to the other side of campus to get his car. He did so, then returned to work. An hour and a half later, Complainant called Mr. Lough again at work and requested that he pick him up and bring him back to work. He did so.
42. This was the only time Mr. Lough saw Complainant report for work intoxicated.
43. Complainant's treatment of Mr. Lough made him feel unappreciated, like a pawn, and he often did not want to come to work because of Complainant's conduct.



51. With regard to the other allegations made by Mr. De la Cruz, the investigators concluded based on their interviews with Complainant's three current subordinates and Mr. Montez that these claims were founded.
52. Mr. Tashi, Mr. Lough, and Mr. Montez told the ODH investigators that Complainant had yelled at each of them and yelled at the other employees as well. They said that Complainant "uses obscenities when speaking to them about work and when talking about the other employees." Mr. Lough reported that Complainant says "f \_ \_ \_" all the time and has called other people "m \_ \_ \_ \_ \_ \_ \_ \_ \_ \_", often referring to him as "d \_ \_ \_ \_ \_" and "stupid." Mr. Passang reported that Complainant tells the employees that they are "b \_ \_ \_ \_ \_ \_ \_" if they make a mistake.
53. All of those interviewed stated that Complainant did not use racial slurs. Mr. Tashi, Mr. Lough, and Mr. Passang confirmed that Complainant had referred to Mr. De la Cruz as "lazy," but had called them all that at one time or another.
54. The subordinates all reported that Complainant had called them at various hours for reasons unrelated to work, while intoxicated. Complainant usually called them between 11:30 p.m. and 3 a.m., to complain about work and about the other employees. Mr. Lough reported that there had been five or six times Complainant called him and forgot having done so the next day or did not show up to work the next day.
55. Mr. Tashi, Mr. Lough, and Mr. Montez reported having seen Complainant intoxicated at work.
56. All of the current employees and Mr. Montez reported having been pressured to give Complainant a ride home and to take him on personal errands during work hours.
57. The ODH report concluded that Complainant had "engaged in grossly inappropriate and unprofessional behavior," used obscenities towards his subordinates, called employees during non-work hours for reasons unrelated to work while intoxicated, reported to work drunk, and used employees for personal errands and rides home during work hours. However, it determined that none of these actions had been taken based on unlawful discriminatory animus.
58. The ODH report was issued on November 19, 2012. Complainant, Mr. Krueger, and Mr. McGann all received a copy of the report, with a cover letter advising them it was confidential and not to discuss the report with any other individual.

McGann Response to ODH Report

59. Upon receipt of the investigative report from ODH, Mr. McGann scheduled a meeting with CU Boulder Human Resources (HR) staff to receive direction on how he should proceed in compliance with the personnel system rules.
60. In mid-December 2012, Mr. McGann met with HR personnel including Tanya Patzer, Director of CU Boulder Athletic Department HR and payroll.
61. Mr. McGann did not discuss the ODH report and how to respond to it with Mr. Krueger, because Mr. Krueger was in the process of separating from the university at that time.

December 20, 2012 Tape Recording of Complainant

62. On December 20, 2012, Complainant asked Mr. Lough to give him a ride home. Mr. Lough took Complainant to the grocery store, the liquor store, and then to his home.
63. Mr. Lough then returned to work to complete his shift.
64. That evening, Complainant called Mr. Lough at home while intoxicated multiple times. He was angry and yelled during these conversations, was often unintelligible, and he repeatedly complained to Mr. Lough about Mr. Tashi not getting the work done. Mr. Lough knew that the work was in fact getting done.
65. During the conversation, Complainant repeatedly complained about Mr. Tashi not taking his orders, because he was the boss. Mr. Lough was fed up with these calls and decided to record Complainant. Mr. Lough taped part of the conversation, during which Complainant stated, "He don't know a G \_\_\_\_\_ thing. He can't do s \_\_\_\_\_. You m \_\_\_\_\_ do not do y'all d \_\_\_\_ job. So listen man, I'm done. Listen, I'm done. F \_\_\_\_\_ go home. Tell that m \_\_\_\_\_ I said s \_\_\_\_\_ my d \_\_\_\_\_. . . . If I see that piece of s \_\_\_\_\_ I'm gonna slap the s \_\_\_\_\_ out of him. Alright, he's a piece of f \_\_\_\_\_ s \_\_\_\_\_. I'm tired of this s \_\_\_\_\_. 2013, that punk m \_\_\_\_\_ better start doing his G \_\_\_\_\_ job or I'll slap the s \_\_\_\_\_ out of his b \_\_\_\_\_ a \_\_\_\_\_. Alright man, I'm gone man."
66. Mr. Lough gave a copy of the tape to Mr. Tashi.
67. On December 26, 2012, Mr. Tashi gave the tape to the ODH investigators, complaining that Complainant was retaliating against him for having recently spoken to the investigators.
68. Mr. McGann soon received a copy of the tape. He was shocked by what he heard. Mr. McGann was not aware that Complainant had known Mr. Lough on a personal level since he was a small child.

Notice of Predisciplinary Meeting

69. The tape recording of the December 20, 2012 conversation with Complainant led Mr. McGann to conclude that the predisciplinary process was necessary. The tape verified some of the allegations made by the custodial staff in the ODH report.
70. On February 27, 2013, Mr. McGann sent a letter notifying Complainant that he would be holding a predisciplinary meeting on March 7, 2013 to discuss the contents of the ODH investigative report. The two-page, singled-spaced letter detailed the report findings in five sections. The five sections included a description of the problem behaviors and the names of employees who were the source of the information, including:

"1. You have yelled at your employees and commonly use vulgar language when you talk to them about their work; you have called your employees words such as 'm \_\_\_\_\_' and refer to them as 'lazy'; and, you say to your employees 'I'll kick your a \_\_\_\_\_' . . ."

"2. You have called your employees during non-work hours as well as work hours, often while you were intoxicated, for reasons unrelated to work and to complain about work and other employees. Mr. Tashi, Mr. Lough, Mr. Passang and Mr. Montez have all said that you have called them during non-work hours-anywhere from 11:30 p.m. to 3 a.m. - complaining about work and other employees. Mr. Passang and Mr. Montez said these calls would typically occur while you were intoxicated. . . "

"3. You have missed work and reported to work while drunk. . . "

"4. You have asked your employees for rides home and for purposes of completing personal errands while the employees were supposed to be working; you also had your employees provide you with rides for your personal errands outside of their work hours, using your role as a supervisor to pressure your employees into providing rides and cleaning services. Mr. Tashi, Mr. Lough, Mr. Passang and Mr. Montez have all said that during their shifts you have told them to give you a ride home. . . Mr. Lough has taken you to the liquor store a number of times."

"5. Since the publication of the ODH's Confidential Final Report, you have again used inappropriate language and threats in referring to your employees. In a conversation with Mr. Lough on or about December 20, 2012, in which you complain about Mr. Tashi specifically and other employees generally, you said, "He don't (sic) know a G \_\_\_\_\_ thing. He can't do s \_\_\_\_\_. You m \_\_\_\_\_ do not do y'all d \_\_\_\_ job. So listen man, I'm done. Listen, I'm done. F \_\_\_\_\_ go home. Tell that m \_\_\_\_\_ I said s \_\_\_\_\_ my d \_\_\_\_\_. . . If I see that piece of s \_\_\_\_\_ I'm gonna slap the s \_\_\_\_\_ out of him. Alright, he's a piece of f \_\_\_\_\_ s \_\_\_\_\_. I'm tired of this s \_\_\_\_\_. 2013, that punk m \_\_\_\_\_ better start doing his G \_\_\_\_\_ job or I'll slap the s \_\_\_\_\_ out of his b \_\_\_\_\_ a \_\_\_\_\_. Alright man, I'm gone man."

#### March 7, 2012 Predisiplinary Meeting

71. Complainant attended the predisiplinary meeting with Mr. McGann and Ms. Panzer on March 7, 2013. Ms. Panzer took notes of the meeting, which was not recorded.
72. Mr. McGann reviewed each of the five poor performance areas with Complainant in detail, and asked for Complainant's response, mitigating information, and any other explanation he might have to offer. Mr. McGann did not disclose to Complainant at this meeting that he had a recording of Complainant's December 20, 2012 phone conversation with Mr. Lough.
73. Complainant flatly denied ever having engaged in any of the conduct described in the ODH report. He stated that he never used vulgar language with his employees and had never stated he would kick any employee's a \_\_\_\_\_. He indicated that when he did not come in to work he used approved leave time. He denied ever directing Mr. Tashi, Mr. Lough, Mr. Passang, or Mr. Montez to give him a ride home, but claimed he would ask them, "Do you feel like giving me a ride home?"

74. With regard to the December 20, 2012 call with Mr. Lough, Complainant stated that he had said words to the effect of, "In 2013, he [Mr. Tashi] better start doing his job. He needs to follow these worksheets. He needs to do what he needs to do. I am out of here. I am done." He denied using any vulgar or physically threatening language with Mr. Lough.
75. Complainant informed Mr. McGann of the great difficulties he had encountered with Mr. Tashi failing to respect his authority, and failing to perform all of the work he assigned. Complainant showed Mr. McGann all of his written notes on Mr. Tashi, stating that he sat around when work had not been completed, and refused to fill out their worksheets or check on the custodians' work.
76. Mr. McGann read the notes. He was struck by the disparity between the negative content of all of Complainant's comments regarding Mr. Tashi and his staff, and the fact that all of the athletic buildings had always been very well cleaned by that same staff.
77. Mr. McGann concluded he could not trust Complainant's notes or his statements of denial made at the meeting.
78. Complainant's failure to acknowledge even some truth in his subordinates' allegations, the blanket nature of his denials, caused Mr. McGann to lose trust in Complainant.
79. After their meeting, Mr. McGann talked to all five employees referenced in the ODH report. They confirmed their statements made to the ODH investigators. Mr. McGann found them all to be credible.
80. With regard to the December 20, 2012 telephone call with Mr. Lough, Mr. McGann believed that Complainant's conduct constituted a form of intimidation that was unacceptable, and that his conduct put Mr. Lough in a hostile work environment.
81. Mr. McGann considered a demotion of Complainant to another position. However, he felt that because he had lost all trust in Complainant, he could not continue to employ Complainant. In addition, any action other than termination would not address what he determined to be an irreparably damaged, dysfunctional work unit.
82. Mr. Montez testified at hearing and was credible.
83. Mr. Lough testified at hearing and was credible.
84. Mr. Tashi and Mr. Passang testified at hearing and they were credible. It is likely that they exaggerated the frequency of Complainant's abusive conduct at work and requests for rides home and on errands, due to their allegiance to each other.
85. Mr. Krueger testified at hearing and was credible. He neither inflated nor deflated Complainant's performance. He acknowledged his lack of oversight of Complainant and his failure to follow up on supervisee complaints.
86. Complainant testified that he did not read the investigative report or the February 27 notice of predisciplinary action by Mr. McGann. This testimony lacks credibility because Complainant knew he was in trouble and it was in his best interest to read the

allegations against him so that he could effectively defend himself. Complainant did attempt to defend himself at the March 7, 2013 meeting.

#### Termination letter

87. Respondent concluded that Complainant engaged in all five areas of misconduct. The only exception was the allegation that Complainant arrived at work intoxicated on regular basis. He concluded that this had occurred one time.
88. On April 1, 2014, Mr. McGann issued the disciplinary termination letter to Complainant. He listed the conduct that had appeared in the letter noticing the predisciplinary meeting, included Complainant's explanations and defenses provided during their March 7, 2013 meeting, and provided his analysis of that mitigating information.
89. Mr. McGann's letter noted, "You said Mr. Tashi has been disrespectful to you. To the extent these assertions are true, as their supervisor you could have and should have addressed these issues in accordance with the performance management rules and procedures for classified employees, so I do not view this as mitigating information."
90. The letter also stated that the audio recording of the December 20, 2012 telephone call, and Complainant's complete denial of ever using vulgar language or physical threats during that conversation, corroborated his subordinates' statements and showed that Complainant was not truthful.
91. Mr. McGann stated, "It is my determination that you have made employees perform personal tasks for you while they were being paid by the University. This was a clear abuse of your authority and a gross misuse of university resources. I also think it is more likely than not that you had been under the influence of alcohol during some of the incidents described above. You have mistreated and harassed your employees by your language and verbal threats and intimidation."
92. Mr. McCann closed the letter by acknowledging that Complainant had never had a prior corrective or disciplinary action during his tenure at the university, and his performance evaluations had consistently exceeded expectations. Nevertheless, he stated, Complainant's "grossly inappropriate conduct" toward his employees was so serious that immediate disciplinary action was appropriate. He also stated that Complainant's "categorical denial" revealed a "complete lack of responsibility and remorse, as well as understanding on your part as to how your actions have had a negative impact on your employees. I find you not to be trustworthy."
93. Complainant timely appealed.

### **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(8); § 24-50-125, C.R.S.; *Department of*

*Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

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

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

## **II. HEARING ISSUES**

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant routinely yelled at his employees in an angry and abusive manner and commonly used vulgar language when he addressed them directly and when berating other custodians on his crew. Complainant often criticized the work performance of his crew in a manner that was grossly inappropriate and created a work environment that was hostile for all of his subordinates.

Complainant also called his subordinate employees at home while intoxicated to vent about work-related frustrations. During these conversations he criticized other members of the custodial crew, placing them in a difficult position of having to choose sides and alerting them to the fact that he was probably talking about all of his subordinates behind their back. In this manner, Complainant made it clear that he could not be trusted by any of them.

Complainant manipulated his subordinate staff into giving him a ride home and taking him on personal errands every day, during those subordinates' work hours. These trips lasted between twenty minutes and two hours. The job of a Custodian III is to provide the conditions for supervisees to succeed and thrive in their positions. Complainant violated the trust of his position, blatantly abused state assets for his personal benefit, and made it more difficult for his team members to perform their jobs.

Once during Mr. Lough's tenure, Complainant reported for work intoxicated and forced to spend at least half of his work day walking to his car and chauffeuring Complainant to and from the university. Complainant became violently and verbally abusive in front Mr. Lough and over a dozen catering employees.

Complainant's treatment of Mr. Lough made him feel that he no longer wanted to come to work. His conduct caused Mr. Montez to transfer to another division of the university. The remainder of the custodial crew lost respect for Complainant's authority. By the end of his

employment, Complainant had lost all credibility with university managers in his chain of command.

**B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law**

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent carefully and honestly considered all of the information relevant to its decision prior to imposing disciplinary action. First, two professional investigators interviewed Complainant's then-current subordinates and Mr. Montez, who by then had left the custodial staff. The conduct complained of was serious and could have placed the university in legal peril. Therefore, the thoroughness of the investigation was necessary and appropriate. The investigators issued a detailed and objective report describing Complainant's grossly unprofessional conduct.

Upon receipt of this report in late November 2012, Mr. McGann reviewed it thoroughly. He appears to have been shocked by its contents and daunted by what actions to take in response to it. Therefore, he relied heavily on athletic department HR professionals to guide him through the personnel procedures in determining next steps. His actions taken over the course of the next few months demonstrate how careful and methodical his approach was. During this time he maintained complete confidentiality.

Mr. McGann's approach to the predisciplinary process was comprehensive. After receiving the tape recording of Complainant's December 20, 2012 call with Mr. Lough, which corroborated statements made by all of the custodians in the ODH report, Mr. McGann conferred with HR staff and was directed to hold a predisciplinary meeting with Complainant. The February 2013 letter noticing the meeting was extremely detailed and contained statements attributed to each member of Complainant's custodial crew. This letter therefore performed an important function in the fact finding process by placing Complainant on specific notice of the allegations against him and the source of those allegations. Complainant thus had a full opportunity to defend himself at that meeting.

Complainant faults Mr. McGann for not disclosing the existence of the December 20 tape recording. However, the letter contained a verbatim quote of Complainant's statements made to Mr. Lough on December 20, 2012. Further, while Board Rule 6-10, 4 CCR 801, requires the appointing authority to "present information about the reason for potential discipline" and "the source of that information unless prohibited by law," it does not require disclosure of each piece of evidence. Mr. McGann met the letter and the spirit of Rule 6-10 during the predisciplinary meeting.

After Complainant responded to the detailed allegations against him at the predisciplinary meeting with a categorical denial of any wrongdoing, Mr. McGann had reason to

stop the fact finding process at that time. He correctly concluded that Complainant lacked credibility. Nonetheless, Mr. McGann thereafter met with each of Complainant's staff and Mr. Montez so that he could judge their credibility for himself.

This record establishes that Respondent's decision was not arbitrary or capricious.

Complainant asserts that Respondent erred by failing to engage in progressive discipline and failing to warn him in the performance management context that his behavior towards subordinates was unacceptable. State Personnel Board Rule 6-2, 4 CCR 801, requires that agencies impose corrective action prior to disciplinary action "unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination."

Complainant's assertion that he was on inadequate notice of deficiencies in his performance is unavailing. In 2008, Mr. Montez, a Custodian II, had filed a grievance against Complainant, alleging that Complainant was intoxicated at work, asked him for a ride home on multiple occasions during his scheduled shift, used profane language towards him, and called him during non-work hours, typically while intoxicated. In Complainant's grievance response, he had agreed not to ask for rides home again and not to call him during non-work hours unless necessary for work-related matters. Complainant then breached this agreement. Even in the absence of a prior grievance and an agreement to cease the improper conduct, common sense dictates that removing employees from the workplace to take a supervisor on personal errands and drive him home is a clear abuse of position.

Further, when Complainant received the ODH report on November 19, 2012, he was on notice that his conduct was "grossly inappropriate and unprofessional." Yet he failed to modify his conduct accordingly. Complainant had four full months to rectify his behavior, discuss his problems managing Mr. Tashi with HR managers and superiors, and design a plan to repair his dysfunctional work unit. He failed to take advantage of this opportunity.

Lastly, Complainant argues that he was fully justified in yelling at his crew, because Mr. Tashi disrespected him, Mr. Passang took his orders from Mr. Tashi instead of Complainant, and he was constantly finding work that had not been completed to his satisfaction. The relationship between Mr. Tashi and Mr. Passang was problematic. However, this difficult dynamic does not excuse Complainant's creation of a hostile work environment and clear abuse of his position. As Mr. McGann concluded in the disciplinary action letter, Complainant had appropriate performance management tools available to him that he failed to utilize. As the foreman over the entire group of custodians, it was Complainant's job to troubleshoot the problem with managers and exercise appropriate leadership to devise a solution to the problem. He failed to do so, and his own serious misconduct exacerbated the problem.

In summary, the facts of this matter present misconduct on Complainant's part that was flagrant and serious. Board Rule 6-2 does not require progressive discipline under such circumstances. Additionally, it is clear that Complainant was on notice that his conduct was grossly inappropriate.

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

Respondent's decision to terminate Complainant's employment was reasonable under the circumstances. The record demonstrates that Complainant engaged in abusive conduct

towards his subordinates and demanded rides home during work hours back in 2008. After being confronted about the behaviors and agreeing to put a stop to it, he nevertheless continued to abuse his position. When confronted again in 2012, Complainant failed to level with Mr. McGann in the predisciplinary meeting, demonstrating that he refused to take responsibility and that he was not worthy of Mr. McGann's trust. Based on this record, Respondent had little choice other than to separate Complainant from employment.

**CONCLUSIONS OF LAW**

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

**ORDER**

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

Dated this \_\_\_\_ day  
of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Mary McClatchey  
Senior Administrative Law Judge  
State Personnel Board  
633 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202-3604

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2013, I electronically served a true copy of the foregoing **INITIAL DECISION** as follows:

W. Harold Flowers, Esquire

[REDACTED]

Elvira Strehle-Hensen

[REDACTED]

\_\_\_\_\_  
Andrea Woods

## **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.