

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RODNEY SMITH,
Complainant,

vs.

COLORADO STATE UNIVERSITY, POLICE DEPARTMENT,
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the commencement hearing on January 8, 2014, and the evidentiary hearing in this matter on April 4, 2014, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on April 8, 2014, after the exhibits were reviewed for inclusion in the record. Heather J. Smith, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Tracy Hutton, the Associate Director for Human Resource Services and Complainant's appointing authority. Complainant appeared and was represented by Ryan Coward, Esq., and Donald Sisson, Esq., from Elkus Sisson & Rosenstein, P.C.

MATTER APPEALED

Rodney Smith (hereinafter Complainant) appeals Respondent's decision to terminate his employment as a Police Officer II after he was reported to have failed to qualify with his duty firearm. Complainant argues that Respondent's decision was unreasonable given that there was at least one attempt at qualification where he had performed adequately. Complainant also challenges the reasonableness and lawfulness of firing Complainant for violating the state Peace Office Safety and Training (POST) Board standards, but not waiting to see if POST Board would take action to remove Complainant's POST certification. Complainant requests that he be reinstated to his position with an award of back pay, attorney fees, and costs.

The Colorado State University Police Department (hereinafter Respondent or Department) argues that Complainant was offered multiple attempts at qualification with his duty weapon but failed to successfully complete the course in any attempt, and that it was reasonable and lawful to terminate his employment for his failure to qualify with his duty weapon. Respondent requests that the Board affirm its decision.

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 he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant was employed as a police officer for the Colorado State University Police Department for twenty-two years and seven months. At the time of the termination of his employment, Complainant held the rank of a Corporal.

2. As one of Respondent's police officers, Complainant was required to carry a loaded firearm each day as part of his duties.

3. Respondent's Standard Operating Procedures (SOP) required that Complainant pass a test demonstrating his skill level with his duty weapon. This test is referred to as qualifying with a duty weapon. SOP 101-2010 requires that "[o]fficers shall qualify with any and all firearms carried on a quarterly basis."

4. The SOP also allows the Chief of Police, a Lieutenant in the officer's line of command, or one of the Department's firearms instructors to revoke an officer's authority to carry a specific weapon based upon a failure to qualify with that weapon.

5. Under Respondent's SOP, if an officer's authority to carry or deploy his duty weapon has been revoked, that officer would be required to attend and successfully complete training classes, or other mandated conditions. After the training, classes or other mandated conditions had been completed, the officer would need to demonstrate the required level of competency in the handling of the weapon.

The POST Handgun Qualification Course:

6. The Colorado Peace Officer Standards and Training (POST) Board passes rules on the qualifications for peace officer certifications in the state. As part of that qualification process, POST requires that officers be able to shoot accurately and within a set time period qualify using a handgun on a specific course.

7. Respondent utilized the POST handgun qualification course as its method of conducting qualification tests for handguns. The requirements for the course are described in the POST rules and manuals concerning the qualification course.

8. The POST handgun qualification course has nine stages. Each stage requires the officer to position him or herself at a specified distance from a target and to perform specified movements while firing rounds into a target within a set time.

9. The required actions expected of officers include drawing their weapons from their holsters while moving, firing weapons while moving, simulating handcuffing a suspect before drawing the gun and firing, and having to address various weapon problems such as having to hold a flashlight with the weapon, firing after clearing a double feed, or firing after an attempted firing while the chamber was empty.

10. The nine stages also require the officers to shoot a total of 25 rounds at the target from various distances. The target used by Respondent consisted of the silhouette of a human head and torso rendered in blue. With the exception of the final shot on the last stage of the course, any shot that strikes the target within the blue silhouette (a "body shot") is counted as a successful shot. The final shot on the course is to be a head shot. The head shot must hit the silhouette in the head area above the neckline.

11. Several stages of the qualification course require officers to move either while shooting or as part of the actions to be taken for the stage. The requirement is that the shooting officer take one or more steps in a specific direction, such as steps to the left, right, or to the rear, or that the shooting officer advance to a specific line. Respondent's firearm instructors reasonably interpreted the requirement that steps be taken to not require that a specific distance be covered but that the shooter move his or her body in the necessary direction. While the taking of steps would normally require the shooter to transfer weight from one side of the body to the other, Respondent's instructors would also accept shuffle steps as compliant with the requirement so long as the shooter moved his or her body in the required direction.

12. The shooters' distance from the target also varied according to the stage, as well as the specific function to be tested such as reloading the weapon, clearing a malfunction, using a flashlight, using cover, etc. The specific required stages are as follows:

- a. Stage 1: The shooter initially stands 3 yards from the target with the weapon loaded, charged, and secured in the holster. On command to fire, the shooter draws the weapon while taking 1 step to the right and fires 2 body shots within 4 seconds. The shooter then returns to the initial position and, upon command to fire, draws while taking 1 step to the left and fires 2 body shots within 4 seconds.

- b. Stage 2: The shooter initially stands 7 yards from the target with the weapon loaded, charged and at the ready position. On command to fire, the shooter fires 3 body shots while advancing to the 3-yard line within 5 seconds.
- c. Stage 3: The shooter initially stands 1 yard from the target with the weapon loaded, charged, and secured in its holster. The stage requires that the officer simulate handcuffing by having handcuffs in one hand with the other hand out in front ready to defend. On the command to fire, the officer drops the handcuffs, draws the weapon, assumes a two-handed shooting position and fires 2 body shots while taking 3 steps to the rear. The time allowed is 4 seconds.
- d. Stage 4: The shooter initially stands 5 yards from the target with the weapon, loaded, charged, and at the ready position with a flashlight held in the support hand. Upon the command to fire, the shooter fires body shots within 3 seconds using an acceptable handheld flashlight method. The shooter then returns to the initial position without the flashlight. Upon the command to fire, the shooter fires 2 body shots one-handed, with the strong hand only, within 3 seconds.
- e. Stage 5: Prior to the start of Stage 5, the weapon is configured so that the chamber of the weapon is empty with a loaded magazine seated in the weapon. The shooter initially stands 7 yards from the target with the weapon secured in the holster. Upon command to fire, the shooter draws and attempts to fire the weapon. The shooter will then apply immediate action while stepping to the left or right (the direction to be determined by the lead instructor) and firing 2 body shots within 6 seconds.
- f. Stage 6: Prior to the start of this stage, the weapon is configured so that the chamber is loaded with only 1 round in the magazine, ensuring that the slide will lock back to the rear after firing 2 rounds. The shooter initially stands 10 yards from the target with the weapon loaded, charged, and held at a ready position. Upon command to fire, the shooter draws and fires 2 body shots. After the slide locks to the rear, the shooter performs a combat reload of the weapon while stepping to the right or left (as determined by the lead instructor), and fires 1 body shot. The total time allowed is 8 seconds.
- g. Stage 7: Prior to the beginning of the stage, the weapon is configured so that the weapon will experience a double feed from a failure to extract an empty casing. The weapon will have an empty

casing in the chamber and a loaded magazine seated in the weapon with the slide forward so that the top round in the magazine is pressing against the casing in the chamber. The shooter initially stands 15 yards from the target with the weapon in the ready position. Upon the command to fire, the shooter attempts to fire the weapon and then clears the malfunction while taking one step to the left or right (the direction to be determined by the lead instructor) and fires two body shots. If cover is available, the shooter will move to a covered kneeling position while clearing the malfunction. The time allowed is 15 seconds for this stage.

- h. Stage 8: The shooter initially stands 25 yards from the target with the weapon loaded, charged, and secured in its holster. Upon a command to fire, the shooter draws the weapon while moving to cover and fires 2 body shots. The shooter will have the option of firing from a covered standing position or a covered kneeling position, as well as the option to fire from a braced position using the cover. The time for these actions is 15 seconds. At the conclusion of the shooting in this stage, the shooter is to perform an untimed tactical reload of the weapon.
- i. Stage 9: At the start of this stage, any prior shots on the target silhouette which were head shots are marked. The shooter initially stands 1 yard from the target with the weapon loaded, charged and secured in the holster. Upon a command to fire, the shooter is to draw the weapon and fire 2 body shots, and then fire 1 head shot, while taking three steps to the rear. The time allowed is 5 seconds.

13. The POST qualification course is a pass/fail course. All rounds must be fired while performing the required movements for each stage, within the time given for each stage, and the shots must hit within the blue silhouette. If an officer fails to meet any of the criteria for any stage, then the result will be that the officer is given a "Does Not Qualify" (DNQ) result.

14. During the qualification course, ammunition management is the shooter's responsibility.

15. Under the POST rules, firearm instructors have the discretion to award an "alibi," which would be an opportunity to perform the stage again, when there is an immediate action malfunction. Immediate action malfunctions occur when the action of the firearm is not correct, and the malfunction is not due to an action taken by the shooter. There is no requirement under the POST rules that instructors must award alibis.

Complainant's Attempts To Qualify:

16. Complainant's duty weapon was a 9 mm Glock handgun. Complainant had been issued this weapon for approximately five years. Complainant was expected to qualify on the POST qualification course using his duty weapon. Not all of Respondent's officers used a 9 mm duty weapon.

17. Under the POST qualification procedures, officers were given three attempts to qualify on the handgun qualification course in one session at Respondent's firearm range.

May 7, 2013 Qualification Attempt:

18. Complainant attempted to qualify with his duty weapon on three attempts on May 7, 2013. Each attempt was a DNQ.

19. Under Respondent's procedures and practices, an officer who failed to successfully qualify with his or her duty weapon was given another opportunity to qualify at the firearms range at a later date. If that officer was still not able to qualify during this re-test opportunity, the officer was to undergo a mandatory remedial training course and then was permitted to attempt to qualify again.

June 11, 2013 Re-Qualification Attempts:

20. Complainant was permitted to re-qualify on June 11, 2013, along with two other officers. This re-test involved three attempts to qualify on the POST handgun qualification course. Complainant and one other officer were DNQ on all three attempts to qualify.

21. Pursuant to Respondent's policy, Complainant's authority to carry or deploy his duty weapon was revoked by Respondent once he had failed to qualify with his weapon at the conclusion of the three qualification attempts on June 11, 2013.

22. Respondent's policies and procedures required officers who had failed to qualify to undergo remedial firearms training. Complainant and the other officer who had failed to qualify were then placed into a remedial training class immediately after the failed qualification efforts on June 11, 2013. The instructors for this remedial class were Respondent's firearms instructors: Cpl. Jon Falbo, Sgt. Aaron Turner, and Officer Clint Schnorr. The remedial training course lasted approximately five hours.

23. The remedial training course involved dry fire drills that practiced proper stances, grips, drawing the weapon from the holster, manipulating the weapon, and dry firing. The remedial training also involved live fire training. Live fire training involved practicing the draw stroke, presentation to the target, and the firing of live rounds from the 25, 15, and 5-yard lines. Remedial training also required the shooters to complete

drills related to the stages of the qualification course, such as performing reloading drills and clearing double feeds.

24. The firearms instructors presenting the training noted that Complainant had some trouble during the training. Complainant, for example, missed the silhouette on one shot, and was slow during a stage 6 combat reload of his weapon and therefore did not get a shot off in time.

25. At the conclusion of the remedial training course, the shooters were provided with two additional attempts to qualify on the POST handgun certification course.

26. Complainant was DNQ on both of his attempts to qualify. Toward the end of his second attempt to qualify, Complainant had a catastrophic malfunction where a round entered the chamber primer end first. Officer Schnorr examined Complainant's gun and noted that he had only seen such a malfunction when the shooter loads a round into the magazine backwards. Respondent's firearm instructors considered this issue to be one of shooter error from an improper loading of the ammunition, and not a problem with the weapon.

June 14, 2013, Training and Attempted Re-Qualification:

27. Complainant attended a second remedial training course on June 14, 2013. One other officer who had not qualified in previous attempts was present with Complainant during the session.

28. Prior to attempting to qualify with his firearm, Complainant practiced the nine stages of the qualification course at least five times, using at least 125 rounds of ammunition. The practice session was not timed.

29. During the remedial training session on June 14, 2013, Complainant also completed stages 5, 6, and 7 of the qualification course under time restraints, four times for each stage. Complainant also completed stage 9 of the qualification course under time restraint a total of six times.

30. After the remedial training class on June 14, 2013, Complainant attempted to qualify on the course.

31. Respondent's range provided shooters with four coffee cans containing live ammunition rounds that had been saved from prior activities. Each coffee can was marked as containing a specific type of ammunition. One coffee can was to hold .40 caliber ammunition, while another coffee can was to hold 9 mm ammunition. Because of the similarity in sizes, .40 caliber ammunition can be loaded into a 9 mm handgun, but the round will not fire properly.

32. Complainant inadvertently loaded a .40 caliber round of ammunition that had been mixed into the coffee can that was to contain 9 mm ammunition. It is possible to tell the difference in the size of the ammunition by touch and by visual examination. Complainant did not detect that he was loading incorrectly-sized ammunition into his weapon.

33. During the second part of stage 1, Complainant was expected to draw his weapon and fire while he was taking one step to the left. Complainant's gun would not load a .40 caliber round into his weapon's magazine, and he was not able to meet the time requirement for that shot. Complainant was permitted to complete the rest of the qualification course as a practice round. Complainant did not hit the silhouette for each of his targets, being off with one round to the left.

34. Complainant attempted to qualify a second time on June 14, 2013. During this qualification round, the second officer on the course was using a .40 caliber weapon in which she had inadvertently loaded a 9 mm round. While the relative sizes of the two weapons will permit a 9 mm round to be loaded into a .40 caliber weapon, the round will not fire properly. Instead, the officer fired a "squib load." A "squib load" creates a dangerous situation where the casing is ejected but the barrel remains blocked by the ammunition. When this occurred, the firearms instructors immediately yelled "cease fire" and stopped both Complainant and the other officer from proceeding any further until the problem was corrected.

35. The interruption in the qualification round to clear the squib load issue rattled Complainant. When he reported that the yelling had rattled him, Complainant was permitted to go outside for a few minutes to calm down and to re-start his qualification attempt.

36. When Complainant returned to re-start his qualification attempt, he missed his first shot. The qualification attempt was ended at that point, and Complainant was permitted to leave the shooting range to calm down before starting another qualification attempt. Complainant went to his car, listened to music, and talked on the phone until he felt that he was ready to return to the range for his fourth attempt at qualification.

37. When Complainant returned to the range, he requested an opportunity to practice again before making the qualification attempt. Complainant was permitted to practice extensively before his resumption of his qualification attempt.

38. For practice before his fourth qualification attempt. Complainant was permitted to fire 23 rounds from the 25-yard line, and fired eight rounds from the 15-yard line while practicing the double feed drill. On each of these practice shots, Complainant had the target returned to him so he could evaluate the shot. Complainant was also permitted to practice stage 6 of the qualification course three times, and to practice stages 5, 9, and 2.

39. Complainant was also given fresh boxes of .9 mm ammunition rather than use the ammunition from the coffee cans.

40. After Complainant's self-directed practice session, Complainant told the firearm instructors that he was ready to qualify.

41. Complainant's next attempt at qualification was his fourth attempt of the day. Complainant shot all 25 rounds into the blue silhouette, as required, including the final head shot.

42. Complainant's performance was as required at stages 1 through 8.

43. At stage 9, however, Complainant was expected to start at the 1-yard line, and to fire three shots while taking three steps backwards. The final shot was to be a head shot.

44. Complainant successfully placed all three shots at stage 9. Complainant did not, however, take three steps backwards while firing his weapon. Instead, Complainant turned his body sideways so that one foot was back but the other foot remained at or near the 1-yard line where he had started.

45. Respondent's instructors reasonably interpreted the POST qualification course to require some movement of Complainant's body backwards from the target in order to satisfy the requirements of stage 9. When Complainant instead rotated his body sideways, rather than move his body backwards, the instructors correctly evaluated Complainant's motion as failing to meet the movement requirements for stage 9.

46. Complainant was informed that he was a DNQ on this fourth qualification attempt on June 14, 2013, because he failed to move backwards on stage 9. Complainant did not argue with the instructors or challenge their determination of a DNQ at the time the determination was made, other than to protest initially upon notification of the problem that he had moved.

Remedial Training and Qualification Attempt on June 17, 2013:

47. Complainant attended another remedial training course and qualification attempt session at Respondent's firing range on June 17, 2013. Sgt. Turner, Cpl. Falbo and Officer Schnorr were present at the range.

48. Complainant practiced several stages under timed conditions. He practiced stage 5 five times, and failed to successfully complete the stage on two of those practice sessions.

49. Complainant practiced stage 7 five times. Complainant was not able to meet the time requirement during one of the practice sessions, and had a shot miss the silhouette during a second practice session.

50. Complainant practiced stage 8 five times.

51. After stage 8, Complainant practiced stage 6 a total of seven times. During Complainant's first practice session on stage 6, Complainant failed to shoot a round because he incorrectly performed the combat reload sequence. During the second practice session, Complainant's grip prevented the weapon from locking back as designed and Complainant was not able to fire the third round because he froze and looked at his gun rather than applying a proper technique.

52. Complainant practiced stage 9 after practicing stage 6. The first practice session resulted in Complainant missing the head shot. The second practice session resulted in Complainant missing one body shot and the head shot. During his fifth practice session, Complainant's grip prevented the gun from functioning properly and he was unable to fire all of the rounds in the allotted time. During his sixth practice session of stage 9, Complainant missed the head shot. Complainant practiced stage 9 a total of six times.

53. Another of Respondent's officers arrived at the range to qualify and Complainant watched as the officer successfully qualified with her weapon. Complainant and the officer then practiced grips, reloads, and other drills in a dry fire capacity with Officer Schnorr.

54. Complainant and the officer then practiced stage 9 a total of five times. Complainant was successful in this set of practice sessions.

55. Complainant was given a short time to collect his thoughts and start his qualification round.

56. On stage 5 of Complainant's qualification round, he did not use the correct technique and could not fire all of his rounds in the allotted time. This qualification attempt, therefore, was a DNQ.

57. Respondent's firearms instructors evaluated Complainant's failure to qualify as Complainant's inability to remember and apply the lessons he had learned in practice to the stressful situation of the timed qualification round. They reported to Respondent's Chief of Police that Complainant had failed to qualify with his handgun after 13 attempts.

Evaluation by the Ft. Collins Police Services (FCPS) Firearms Section

58. Respondent's Chief of Police, Lowell Scott Harris, reviewed the reports that Complainant had not qualified with his duty weapon and decided to ask another

firearm instructor at a local agency to evaluate Complainant's ability to qualify with his duty weapon. Chief Harris contacted the firearms section of the Fort Collins Police Services (FCPS) and asked if its firearms instructor would evaluate one of Respondent's officers.

59. The FCPS Lead Firearms Instructor, Officer Al Brown, was asked to complete a basic firearms skills assessment on a CSUPD officer. Officer Brown and Firearms Instructor Officer R. Younger met with Complainant on June 21, 2013, at the Fort Collins Police Department indoor firing range.

60. Complainant was not told that the evaluation at the FCPS would be a formal qualification attempt.

61. Officer Brown observed and evaluated Complainant's performance during his completing of the POST qualification course. Complainant completed one full set of stages as the evaluation process.

62. Complainant would not have qualified during this evaluation process because of his hesitation while performing the combat reload that resulted in a failure to shoot all of the required rounds within the time limit, and because one of his shots was off the silhouette.

63. Officer Brown issued a memo that detailed his observations of Complainant's shooting techniques to Sgt. Woods. Officer Brown reported generally favorable things about Complainant's shooting, except that his speed of coming off target negatively affected his accuracy, that he had difficulties with the combat reload and the tactical reload, and that practice and repetition would make his reaction to weapon malfunctions smoother. The report was ultimately provided to Respondent.

The Disciplinary Process:

64. Complainant's appointing authority was Tracy Hutton, the Associate Director of Human Resource Services.

65. Ms. Hutton held a Board Rule 6-10 meeting with Complainant on July 17, 2013, on the issue of Complainant's failure to qualify with his duty weapon. Complainant attended the meeting with his representative, Ryan Coward, Esq. Ms. Hutton's advisory witness was Jannine Mohr from Respondent's Office of the General Counsel. The meeting was recorded.

66. Complainant initially disputed that he had failed to qualify on May 7, 2013. After the Board Rule 6-10 meeting, however, Complainant contacted Ms. Hutton and confirmed for her that his memory had been incorrect and that he had failed to qualify on May 7, 2013.

67. Complainant also told Ms. Hutton that he felt he had not been treated correctly on the range. He remarked that all three of the firearms instructors had provided him feedback and that he had felt like he was in front of a firing squad.

68. Complainant also suggested that he had been set up to fail with the problem of having .40 caliber ammunition in the 9 mm ammunition can on the range, and that he couldn't see the ammunition because he is farsighted and did not have his glasses on. Complainant told Ms. Hutton that he was getting .40 caliber ammunition in his magazine consistently, and that it was the range's fault that he was being given the wrong ammunition. Complainant argued that the slide of his gun was also not functioning properly, and that problem was also interfering with his concentration.

69. Complainant also objected that, during his time at the firearms range, he saw that others in the department had been permitted to qualify without taking the required steps.

70. Complainant also protested repeatedly during the meeting that he had indeed taken three steps back at stage 9 on his fourth qualification attempt on June 14, 2013. Complainant told Ms. Hutton that he did not tell the firearms instructors that he had taken three steps at the time when they announced to him that he had not qualified because of a lack of movement on stage 9. Complainant brought his target from that attempt to the meeting to show that he had hit all 25 shots during that round.

71. Prior to the Board Rule 6-10 meeting, Ms. Hutton decided to send Complainant's duty weapon to a certified Glock armorer for evaluation in case that the gun itself was part of the problem.

72. Complainant's duty weapon was provided to the Larimer County Sheriffs Office. Sgt. Ian Stewart evaluated the working of Complainant's Glock.

73. By report dated July 15, 2013, Ms. Hutton was informed that the inspection of the Complainant's duty weapon has revealed no defect, failure or unacceptable condition. Ms. Hutton was also told that Sgt. Stewart had been able to qualify with that gun on a POST qualification course.

74. Ms. Hutton also interviewed Sgt. Turner, Cpl. Falbo, and Officer Schnorr about Complainant's arguments from the Board Rule 6-10 meeting, including the argument that Complainant had moved appropriately during the 9th stage of his fourth qualification effort on June 14, 2013, and that Complainant's efforts to qualify had been impaired by the range's mix up with the ammunition.

75. After interviewing the firearm range instructors, Ms. Hutton determined that it was Complainant who would be responsible for making certain that he was loading the correct ammunition into his magazine. She also examined some of the different types of ammunition and noted that the differences between .40 caliber and 9 mm ammunition was visible even to her untrained eye.

76. Ms. Hutton also determined that the interruptions that Complainant argued had destroyed his concentration were not an adequate reason to have failed to qualify. Ms. Hutton found that the purpose of the qualification requirement was to ensure that officers would be able to use their weapons in the line of duty, and be able to adapt to the circumstances. Ms. Hutton found that having to adapt to wrong ammunition, to weapon malfunctions, to firearm instructors yelling for a cease fire, or to shooting at an unfamiliar course such as at the Fort Collins Police Services were minor issues. Ms. Hutton found that the fact that these influences would be able to break Complainant's concentration did not instill trust in Complainant's ability to use his firearm appropriately under widely varying circumstances.

77. Ms. Hutton concluded from her interviews with the firearms training instructors that the reason Complainant had seen others qualify when it appeared to him that they had failed to take enough steps during one or more stages was that the test for passage of the movement stages was whether the shooting officers could accurately fire while moving their bodies.

78. Ms. Hutton also reviewed Complainant's personnel file and found that Complainant had not received any corrective or disciplinary actions for similar issues during his tenure in Respondent's employment. Ms. Hutton found, however, that the issue of firearm qualification was of such a critical nature to the job of a police officer that a failure to qualify would warrant immediate discipline.

79. Ms. Hutton determined that the failure to qualify with his duty weapon necessitated the termination of Complainant's employment as a police officer because he could not perform the duties of his position without being able to qualify with his duty weapon. Ms. Hutton considered whether she could transfer Complainant to another position for which he would be qualified, but found no suitable opportunity.

80. By letter dated August 28, 2013, Ms. Hutton informed Complainant that his employment would be terminated as of the end of the day on August 28, 2013.

81. After Complainant's termination from employment, Respondent sent a standard form to the Colorado POST Board informing the Board that Complainant had been separated from employment. Respondent took no other action with the POST Board concerning Complainant's employment or duty weapon qualification.

82. Complainant filed a timely appeal of his termination from 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 failed to qualify with his duty weapon:

Respondent terminated Complainant's employment on the belief that Complainant had failed to qualify with his duty weapon on 13 qualification attempts held on Respondent's firing range, and during a 14th qualification attempt held at the Fort Collins Police Department range.

Complainant did not dispute that there were problems in each of his qualification attempts that would result in a DNQ, with the exception of his fourth and final qualification attempt on June 14, 2014. At hearing, Complainant produced the target that was used during that qualification round; the target shows 25 shots within the blue silhouette, with one of those shots within the area marked for the head shot. Complainant also testified that he was certain that he had taken the required steps backwards during that stage.

Respondent, however, presented contrary testimony from the three firearms instructors who had been present at Complainant's qualification attempt. The version of events presented by these witnesses was that Complainant was struggling in his qualification attempts in several areas, and that he was making mistakes during qualification attempts even after multiple practice sessions during which he was able to successfully perform the stages. As to stage 9 on Complainant's fourth qualification attempt on June 14, 2013, these three witnesses presented their recollection that Complainant only turned his body (or, as one of the witnesses testified, "bladed" his body) while shooting, rather than moving his body backwards, and that this failure to create distance between his body and the target meant that Complainant had failed to comply with the requirements for that stage.

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").

In this case, Respondent's witnesses presented credible testimony as to Complainant's actions during stage 9. While the recollection of these witnesses was not uniform, the differences between the versions of events was no more than is to be expected from three witnesses who are attempting to recollect the same event after the passage of time. Moreover, the actions and contemporaneous report of these witnesses are consistent with their version of events at hearing.

Complainant's actions and statements on June 14, 2014, on the other hand, were not consistent with his later insistence that he was certain that he had moved backwards four feet or more from the starting line on stage 9. His argument that the target from that qualification attempt would show gun powder if he had fired all of his shots from as close as a yard of the target was not a persuasive argument. The target showed no signs of gun powder, and Complainant presented no expert testimony that the target would have shown signs of gun powder if Complainant had turned or "bladed" his body as described by Respondent's witnesses. Complainant's demeanor and his explanations on the stand during the hearing also support that Complainant's version of events concerning his actions during his fourth qualification attempt on June 14, 2013, was not as credible as Respondent's version of events.

Respondent has, therefore, successfully proven at hearing that Complainant did not qualify on any attempt that he made on the POST handgun qualification course during May and June, 2013. Respondent has proven that Complainant took the actions for which he was disciplined.

B. Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law:

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

In determining whether an agency's decision is arbitrary or capricious, a reviewing tribunal 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).

a. Respondent's interpretation of the step requirement was reasonable:

Complainant argued at hearing that Respondent's interpretation of the step requirement as requiring a movement of the body, rather than the observation of whether there is foot movement or not, was an incorrect interpretation of the governing rules for the POST qualification course. This is an argument that Respondent's interpretation of the POST course requirements was arbitrary and capricious in that it failed to consider information that it should have gathered and considered.

Complainant's argument that the movement of the feet should be the defining requirement under the POST regulations is based upon Complainant's interpretation of the term "step" in the relevant regulations. Complainant argued at hearing that any movement of his feet should count as a step, and that the failure of the firearms instructors to watch for any foot movement was therefore an error. This argument is not persuasive because it ignores the broader common uses of the term "step." See e.g., Merriam-Webster On-Line Dictionary (including within the definition of "step" both that it is "an advance or movement made by raising the foot and bringing it down elsewhere" and "the space passed over in one step"). Complainant's argument as to the meaning of the step requirement also ignores the purpose and meaning of the qualification process. The point of the test is not to evaluate whether officers can move their feet while firing or loading a weapon. The goal is to evaluate whether officers can change their position in relation to a threat while firing or loading a weapon, and so the course requires that steps be taken to the left, the right, forward, and backward. Respondent's interpretation that it is body movement, rather than any particular type of foot movement or distance of a foot movement, which should constitute the required movement constitutes a reasonable and practical interpretation of the step requirement.

Respondent, therefore, was not arbitrary or capricious in the manner in which it interpreted the POST "step" requirements.

b. Respondent's decision to take disciplinary action before the POST Board took any action was reasonable:

Complainant also argued at hearing that Respondent was required to wait to see if the POST Board took away Complainant's POST certification for failing to qualify with his duty weapon before discharging him from employment.

While it is correct that the POST Board has the ability as a matter of law to rescind a certification for such actions as a failure to qualify, Complainant's argument misses the essential cause for the termination of employment in this case.

In order to be permitted to perform his job as one of Respondent's police officers, Complainant had to be able to carry a firearm. In order to lawfully carry that firearm under Respondent's rules and regulations, Complainant had to be able to demonstrate his competence with that firearm by passing the POST qualification course. The basis for the termination of Complainant's employment was Complainant's failure to qualify with his duty weapon and loss of his authority to carry or deploy that weapon. The termination decision was not founded upon a loss of Complainant's POST Board certification.

Respondent's decision to take disciplinary action before the POST Board took any action on Complainant's POST certification was within Respondent's authority and was not an arbitrary or capricious action.

c. Respondent's decision to take disciplinary action when Complainant had failed to qualify with his duty weapon on 13 attempts was neither arbitrary nor capricious:

The definition of the requirement that Respondent's action not be arbitrary or capricious is framed in the negative in *Lawley*, 36 P.3d at 1252. When that standard is translated into a statement of positive values, the legal requirement means that Respondent had to make reasonable efforts to gather the relevant evidence that it required in order to exercise its discretion in this case, to give honest and candid consideration to that gathered evidence, and to reach the type of reasonable conclusion that a fair and honest review of that evidence would reach.

In this case, Ms. Hutton's decision to impose discipline was neither arbitrary nor capricious. She gathered the relevant information that she needed to make an informed decision. Respondent had permitted Complainant to attempt to qualify a total of 13 times at its range, had performed remedial training classes with Complainant when his efforts to qualify had failed, and had allowed Complainant to practice repeatedly at the same range facility. Ms. Hutton sent the gun out for testing to see if the weapon itself had a negative impact on Complainant's qualification process. This was a not a case

where Respondent was drawing conclusions based upon a rushed process that did not provide Complainant with a fair opportunity to succeed. Ms. Hutton investigated the arguments that Complainant offered during the Board Rule 6-10 process to determine whether any of those points had not been taken into proper account. After investigation, however, Ms. Hutton did not agree that Complainant's version of his successful qualification attempt was credible, or that the circumstances of Complainant's other qualification attempts were so unfair or unreasonable so as to warrant additional attempts at qualification. These were reasonable conclusions to be drawn in this matter. There was no indication that Ms. Hutton ignored any relevant evidence in her decision-making process. Finally, the decision to discipline Complainant for failing to qualify with his duty weapon was a reasonable and fair conclusion to reach under these circumstances.

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

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

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."

In this case, Ms. Hutton understood that Complainant had not been previously corrected or disciplined for failing to qualify with his duty weapon, and that therefore this was not a case where there had been progressive discipline imposed. Instead, Ms. Hutton found that the failure to qualify with the duty weapon was so critical to the function of a police officer the position that the failure to qualify was sufficiently serious to warrant the immediate imposition of discipline.

Ms. Hutton's interpretation of the importance of the qualification standard is a reasonable one. The function of a police officer is to maintain peace on Respondent's campus, enforce the law when necessary, and to respond to threats when necessary. The position requires that officers be armed and capable of using their duty weapons proficiently. Complainant's inability to qualify with his duty weapon, and the resulting inability to carry his weapon on the job, represents a serious failure to be able to perform his position. Under such circumstances, Respondent's decision to impose immediate discipline is not a violation of Board Rule 6-2.

No other rule or law appeared to be violated in the process chosen by Respondent 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 third issue to be determined is whether termination was within the range of reasonable alternatives available to Respondent.

The type of task that Complainant was no longer qualified to perform is a task that defines the essence of the duties of a police officer; that is, the authority and responsibility to use a firearm, if necessary. Without the authority to carry a firearm on the job, Complainant could not fully function as a police officer. When that kind of essential function of the job is made impossible, then the range of reasonable disciplinary alternatives begins with disciplinary options such as demotions and transfers.

Ms. Hutton testified that she had attempted to locate a position within Respondent's campus that Complainant would qualify for if he could not carry a weapon, but that no such position had been located at the time the disciplinary decision was being made. Under such circumstances, the decision to terminate Complainant's employment as a police officer because he could no longer carry his duty weapon is within the range of reasonable alternatives available to Ms. Hutton.

D. An award of attorney fees and costs is not warranted:

Attorney fees are warranted in a personnel action has been instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party who requests the award bears the burden of proof.

In this matter, Complainant has not been persuasive that his version of events was credible or that there was material reason to doubt Respondent's version of events. Complainant has also not shown that any action taken by Respondent was taken in bad faith, as a means to harass him, maliciously, or was otherwise frivolous or groundless. As a result, there are no grounds present in this case to award Complainant attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined;
2. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law;
3. The discipline imposed was within the range of reasonable alternatives; and
4. Complainant is not entitled to an award of attorney fees

ORDER

Respondent's decision to terminate Complainant's employment is **affirmed**.
Complainant's appeal is dismissed with prejudice.

Dated this 27th day
of May, 2014 at
Denver, Colorado.

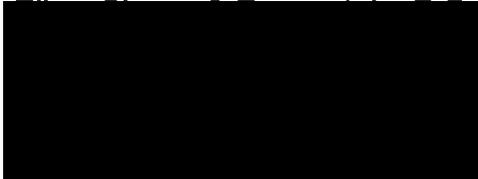


Denise DeForest
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 28th day of May, 2014, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Ryan Coward, Esq.



Heather J. Smith



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.