

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JACK CHEN,
Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, OFFICE OF ECONOMIC SECURITY, FOOD
DISTRIBUTION PROGRAMS,**
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the evidentiary hearing in this matter on May 20, 21, and 22, and June 23 and 24, 2014, at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The record was closed by order on August 18, 2014, after the final written closing argument was filed and reviewed. Bradford Jones, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Lena Harris-Wilson, Food Distribution Programs manager and Complainant's delegated appointing authority. Complainant appeared and was represented by Nora V. Kelly, Esq.

MATTER APPEALED

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

The Department of Human Services (CDHS), Office of Economic Security, Food Distribution Programs (Respondent or FDP) argues that the termination was properly imposed after Complainant violated numerous performance standards relating to the conduct of program audits and in his interpersonal communications as the team lead for his programs.

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 actions were arbitrary, capricious or contrary to rule or law; and
3. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

1. Complainant Jie “Jack” Chen (Complainant), began employment with the Department of Human Services, Office of Economic Security, Food Distribution Programs (Respondent) on January 4, 2010, as a General Professional IV with the working title of Household Programs Field Administrator. The Field Administrator position served as the team lead for Respondent’s Household Programs unit.

The Household Programs Unit:

2. The Household Programs unit runs two United State Department of Agriculture (USDA) food distribution programs: the Commodity Supplemental Food Program (CSFP) and The Emergency Food Assistance Program (TEFAP). The Household Programs unit is part of the Food Distribution Programs (FDP) section. Another unit of the Food Distribution Program administers the National School Lunch Program.

3. Respondent works with food banks and other charitable organizations to provide those agencies with shelf-stable commodity foods such as canned meat, frozen meats, cereals, and pastas for distribution to low-income populations. A few of the agencies under contract with Respondent are large regional food banks that arrange with other local agencies to distribute the commodities. Other agencies holding contracts with Respondent are local governmental entities or charitable agencies that provide boxes of foods for home consumption. Other programs receiving the commodities are soup kitchens that serve individuals directly. In July of 2013, there were approximately 92 agencies under direct contract with Respondent to provide TEFAP commodities. Another 116 agencies were sub-recipient agencies under TEFAP. Respondent also had 8 CSFP agency agreements in place during that period.

CSFP-

4. The Commodity Supplemental Food Program (CSFP) is designed to provide nutritious commodities to help meet the nutritional needs of low-income, pregnant, postpartum, and breastfeeding women; infants under one year of age; children who are at least one year of age but have not yet reached their sixth birthday; and persons who are at least 60 years of age.

5. Federal regulation of the CSFP required the Household Programs to manage local food bank and local agency participation in the CSFP program in the following manner:

(a) *What must the State agency do to ensure that local agencies meet program requirements and objectives?* The State agency must establish a management review system to ensure that local agencies, subdistributing agencies, and other agencies conducting program activities meet program requirements and objectives. As part of the system, the State agency must perform an on-site review of all local agencies, and or all storage facilities utilized by local agencies, at least once every two years. As part of the on-site review, the State agency must evaluate all aspects of program administration, including certification procedures, nutrition education, civil rights compliance, food storage practices, inventory controls, and financial management systems. In addition to conducting site reviews, the State agency must evaluate program administration on an ongoing basis by reviewing financial reports, audit reports, food orders, inventory reports, and other relevant information.

(b) What must the State agency do if it finds that a local agency is deficient in a particular area of program administration? The State agency must record all deficiencies identified during the review process, institute follow-up procedures to ensure that local agencies and subdistributing agencies correct all deficiencies within a reasonable time period. To ensure improved program performance in the future, the State agency may require that local agencies adopt specific review procedures for use in reviewing their own operations and those of subsidiary contractors. The State agency must provide copies of review reports to [the Food and Nutrition Service] upon request.

7 CFR section 247.34.

6. In order to receive food through CSFP, recipients must be able to provide valid identification, proof of residency and proof of income. Recipients may initially be certified for six months, while another additional six-month certification may be approved if the recipient can verify that their address and financial status had not changed.

TEFAP –

7. The Emergency Food Assistance Program (TEFAP) is a USDA program that provides supplemental food boxes and nutrition assistance at no cost to low-income individuals. USDA foods are delivered to food banks across the state, and then distributed to local agencies and soup kitchens that distribute directly to individuals or families who qualify for assistance.

8. To be eligible for TEFAP foods, an individual or family must either meet specified income guidelines, or be enrolled in one of the following programs: Temporary Assistance for Needy Families (TANF), Food Assistance Program, Women Infants and Children (WIC), or Medicaid.

Complainant's Duties with Regard to TEFAP and CSFP –

9. During the time period in question, Respondent was responsible for auditing food banks and the other entities that distributing USDA commodities through the TEFAP and CSFP programs in order to make certain that all of the federal and state program requirements were being met. Respondent's audits of these local agencies were also referred to as management reviews of those programs.

10. Respondent's audit program included checks on a host of compliance issues. Federal regulations, for example, required that Respondent periodically reconcile the actual inventories of commodities at local agencies under the TEFAP program with the inventory on the books for those programs. This requirement meant that Respondent was to receive monthly inventory reports from the agencies, and that Respondent would be expected to conduct complete physical inventories during periodic audits in order compare inventory records with the commodities.

11. Respondent's audits also included reviews of food safety concerns such as whether the distributing agency was using a first-in-first-out system to distribute food so that older food was not going to waste in the back of a storage area, whether the food storage units were properly cooled and maintained, whether the storage area was sufficient for proper food storage, and whether food had reached an expiration date.

12. Respondent's audits also covered financial issues, non-discrimination policies and the postings of civil rights notices, and the application of correct participant eligibility standards, among other items.

13. Both the TEFAP and CSFP programs required that Respondent conduct audits on a specified number or percentage of local agencies receiving foods or funding through those programs.

14. The specifics of an audit would change according to whether the program was a CSFP or TEFAP program, and according to whether the agency was a soup kitchen or another type of agency. As a general rule, however, the audit process would involve notifying the agency of an impending review, sending out one of Respondent's staff to conduct an on-site audit of the program, and generating an audit form report to be provided to the agency and kept in Respondent's files. Once the staff member returned to the office, a letter would be generated that would close out the audit with specific compliance requirements for the agency or recommendations for the agency.

15. As the Household Programs Field Administrator and team lead, Complainant's responsibilities included determining how the TEFAP and CSFP programs would be implemented in Colorado, assuring that agencies contracting with the state distributed commodities within the terms of the USDA regulations and state policy, and providing the contracting agencies with guidance, direction, training, and oversight. Complainant's duties, therefore, included such tasks as arranging for the Household Programs to audit a sufficient number of programs to meet its federal requirements. Complainant would also review inventory reports, conduct the physical inventory reconciliations for the program, and perform the program auditing of all compliance aspects for each agency participating in the TEFAP and CSFP program.

16. In January 2013, the Household Programs staff included Complainant, Leah Sullivan, and Sue Igli. Complainant served as the team lead for Ms. Sullivan and Ms. Igli and supervised the work of both women. Complainant's position description questionnaire showed that Complainant's duties were split in the following manner: 40% on program administration; 30% on program auditing; 10% as the team lead; 10% conducting fraud investigations, and 10% on general duties as assigned.

The 2011 Audit of Respondent by the USDA:

17. Phil Loo was the Food Distribution Programs manager until he retired in September of 2012. Mr. Loo directly supervised Complainant from the time of Complainant's hiring until Mr. Loo retired. After Mr. Loo retired, and prior to the point where a new manager of the FDP was hired, Complainant was supervised by Todd Jorgenson.

18. In May of 2011, the USDA completed an audit of the CSFP and TEFAP programs. This audit was a follow-up to a 2009 audit that had resulted in seven recommendations to correct noncompliance issues and two suggestions for improvements of program administration.

19. The results of the 2011 audit indicated that there were 14 areas in which the work of the Household Programs unit had to be corrected because of noncompliance with federal regulations. The audit also resulted in eight suggestions for improved practices.

20. Among the recommendations made in the 2011 audit report was a requirement that Respondent “must implement a system to document staff time spent on each program that complies with the requirements of 2 CFR Part 225, Attachment B, Item (h), and provide assurance that [staff] salaries charged to Federal programs will be supported by these documents.” This recommendation was explicitly explained in the audit report to require an accounting of “the actual activity of each employee that accounts for the total activity for which each employee is compensated.” Such a requirement meant that the Household Programs staff had to calculate their actual hours spent on TEFAP programs and on CSFP programs so that those hours could be billed to the specific program. Complainant had been one of the two staff persons contacted by the USDA audit team on this issue of time accounting. Complainant was aware of the resulting audit recommendation.

21. Another of the 14 recommendations included the requirement that Respondent “must provide written assurance that effective in Fiscal Year 2011 and beyond, it will conduct an annual review of at least 25 percent of all eligible recipient agencies under direct agreement with [Respondent] (with each such agency to be reviewed at least one every four years).” The audit report also required that Respondent commit to review a certain percentage of all of the agencies that were indirectly under agreements to distribute commodities. The report noted that, under the applicable standards, Respondent had been required to conduct 24 audit reviews in fiscal year 2010 of the 96 programs that were under direct agreement, but had conducted only 10 audits during that year. Additionally, the 2011 audit noted that, under similar standards for audits of agencies that were operating indirectly under Respondent’s agreements, Respondent had been expected to conduct 6 audits in fiscal year 2010. Respondent had failed to conduct any of those reviews.

Changing Respondent’s Audit Program To Require More Rigorous Audits:

22. The administration of the Household Programs unit under Mr. Loo had taken the approach that the food bank agencies should be encouraged by Respondent’s staff. Program staff would send out audit forms to the food banks for the program staff to complete prior to the date of the audit. Under Mr. Loo’s direction, audit letters rarely noted anything other than a clean audit report. If there were issues noted during the review, those issues were addressed with food bank agencies informally during and after the audit process. Mr. Loo also did not generate any internal training manuals or other formal instructions on how audits were to be conducted. Mr. Loo’s program would generally send several staff members to a program, rather than one staff member, and the more junior members of the audit team would learn how to conduct the audit through on-the-job training.

23. Complainant was using the audit system advocated by Mr. Loo when Lena Wilson was hired as the new manager of the program in December 2012. Prior to Ms. Wilson’s hiring, Complainant’s performance reviews had rated Complainant at a “3” on a 1 – 3 scale, and his audits of food bank and local agency programs had not been found to be deficient.

24. Ms. Wilson became the manager of the Food Distribution Programs section in early January of 2013. Ms. Wilson’s initial management emphasis was to strengthen Respondent’s audit program in order to be in compliance with the federal regulations, and to correct the deficiencies noted in the 2011 USDA audit report.

25. The audit procedures that Ms. Wilson implemented required changes in departmental procedure, including:

a. Under Mr. Loo's program, the audit forms were sent to the food banks for food bank staff to complete prior to the audit by Household Programs staff. Household Program staff did not actively complete the audit forms. Under Ms. Wilson's direction, Household Programs staff would complete the entirety of the audit form. The agency would receive an introductory letter describing what the audit would entail, rather than receive a copy of the audit form to complete.

b. The audit form itself was revised once Ms. Wilson was in charge of the program to reflect more attention to the types of detail that federal regulations required or allowed to be collected. Ms. Wilson also instituted the expectation that the audit form would be complete by the conclusion of the on-site process. A copy of this form would be given to the audited program. The staff's notations on the audit form were expected to be sufficiently detailed so that the agency would be on notice of what to expect in its follow-up compliance letter. Additionally, the audit report would be sufficiently complete by the end of the on-site review so as to note all of the technical issues observed during the audit and all of the technical training provided during the audit.

c. Under Mr. Loo's leadership, audited programs were infrequently issued formal corrective actions. The staff was expected to work with the food bank on a more informal basis. Under Ms. Wilson's program, an audit which revealed deficiencies of any type would result in compliance letters which noted the deficiencies with plans placed into effect to correct the noted problem. In Ms. Wilson's system, the expectation was that there would always be a paper trail of specific audit findings and directions for corrective actions, if needed.

26. Ms. Wilson's instructions on how the audits were to be conducted were discussed at numerous staff meetings that included Complainant. Additionally, Ms. Igli was tasked with producing revised forms and instructions for use during program audits, and had provided her drafts to Complainant as part of her drafting process. Complainant did not provide any feedback to assist with this project.

Complainant's Issues With Staff:

27. As the lead worker, Complainant's duties included tracking the Household Programs budget, training staff on audit procedures, assigning staff work assignments and monitoring their progress.

28. Complainant's relationship with Ms. Sullivan and Ms. Igli was fraught with conflict. Complainant would often raise his voice and yell at Ms. Sullivan. At one point, he threatened to fire Ms. Sullivan if she went to Sue McGinn, the Director of the Food and Energy Division and direct supervisor of the FDP manager. Complainant would also aggressively repeat his point to Ms. Sullivan numerous times until she would finally agree with him. Complainant's tone and language at times made Ms. Sullivan cry.

29. Complainant's relationship with Ms. Igli was no better than his relationship with Ms. Sullivan. Complainant screamed and yelled at Ms. Igli and refused to explain assignments he provided to her. Ms. Igli considered the situation in Household Programs unit to be the most toxic working situation she had ever experienced.

30. Ms. Igli complained on a regular basis to Ms. Wilson and Ms. McGinn about Complainant's interactions with her. She reported that Complainant was bullying her and would

block the door when he was yelling at her so she could not leave. Ms. Igli would yell back at Complainant on occasion. One of these episodes resulted in Ms. Igli receiving a corrective action in February 2013 for yelling at Complainant.

31. On February 28, 2013, Ms. Wilson and Ms. McGinn spoke to Complainant about multiple complaints that the staff had made concerning his treatment of them. Complainant falsely dismissed the reports as untrue.

Complainant's April 15, 2013 Annual Evaluation for 2012 - 2013:

32. Ms. Wilson provided Complainant with his annual performance review for the 2012- 2013 review period on April 15, 2013.

33. Complainant received an overall "2" rating, which was a rating at the fully competent level.

34. Within the evaluation, Complainant received both positive comments and negative comments. On the positive side, for example, Complainant was noted as having good communications with other departments and usually with the agencies overseen by the unit. He was also rated highly for his ability to ensure that there was a 100% utilization of the funds allocated to TEFAP and CSFP, and for his expertise concerning the job-specific knowledge of the applicable federal regulations.

35. The Communication section comments, however, also included notations that Complainant did not seem to listen to other's perspectives, that he needed to be aware that his tone sometimes appeared to be demanding rather than questioning, and that his employees had repeatedly reported that he would raise his voice to them and constantly repeat himself until they finally agreed with his point of view.

36. Ms. Wilson also provided Complainant with a rating of 1.25 (out of 3) on the core competency of Interpersonal Skills because of his inability to work constructively to solve problems with staff. Ms. Wilson noted that she had seen Complainant raise his voice to emphasize his point to staff members, and had noted that meetings with staff were often loud as both the staff and Complainant tried to air their points of view.

The April 15, 2013 Decision To Restructure the Household Program:

37. Ms. Wilson decided that the level of conflict between Complainant and the other employees within the Household Program required a change with the leadership in the program.

38. On or about April 15, 2013, Ms. Wilson informed Complainant the Household Program employees would report directly to her, and that he would be given the time and opportunity to attend training in order to improve his supervisory skills.

39. Complainant's response to Ms. Wilson's decision was to tell Ms. Wilson that he would not attend the courses.

40. At the time of Complainant's 2012-2013 annual review, Sue McGinn was Complainant's appointing authority. Once it became clear to her and Ms. Wilson that Complainant's behavior may need more formal intervention, Ms. McGinn delegated her

appointing authority in writing to Ms. Wilson, allowing Ms. Wilson to issue corrective and disciplinary actions to employees of the FDP section.

April 16, 2013 Meeting with McGinn Concerning Complainant's PMAP:

41. Complainant asked for, and received, a meeting with Ms. Wilson and Ms. Wilson's supervisor, Ms. McGinn, on April 16, 2013 to discuss his 2012- 2013 PMAP.

42. During the meeting, Complainant would not accept any of the information that Ms. Wilson was providing on why he had been marked down for his treatment of staff, for arguing with Ms. Wilson, and for his work hours.

43. Complainant filed an appeal of his overall PMAP rating, arguing that he should have been rated at a "3" level. He was not successful in obtaining a change to his overall PMAP score of "2".

Complainant's Morning Arrival Times Issue:

44. During 2012 and 2013, Complainant and his wife, who also worked within FDP, were authorized to work a schedule of 7:00 AM until 3:30 PM. Complainant wished to work the early schedule to accommodate childcare issues. The FDP office was open from 8:00 AM until 5:00 PM, with staff covering the office and phones during those hours.

45. During 2012 and early 2013, Household Program staff repeatedly complained to Ms. Wilson that Complainant was not in the office in the early morning, but was still leaving the office promptly at 3:30 PM.

46. Complainant parked in the parking area behind the office building. The door into the building from that parking area was in the back dock area. The front doors to the building were locked prior to 7:25 AM, and the back dock doors were always locked. In order to enter the building when the doors were a locked, an employee would enter a personal access code to be admitted to the building. The access code was individual to each worker and the security system recorded the codes that were entered and the times of those entries.

47. Ms. Wilson decided to determine what the door security records showed about Complainant's entry of his code to enter the building through the back dock. Ms. Wilson was attempting to learn whether there was a record showing that Complainant had entered the building prior to 7:00 AM. She asked the Colorado State Patrol to provide a record of the times that Complainant's access code had been used to enter the back dock door in recent months. Between the dates of December 20, 2012, and February 26, 2013, the security logs showed that Complainant's code had been used to access the back dock in the morning hours on a total of 36 mornings. On those 36 mornings, Complainant's code had not been used prior to 7:09 AM.

48. Ms. Wilson was concerned about Complainant's arrival time because he had been granted permission to leave at 3:30 PM on the assumption that he was working a full day beginning at 7:00 AM.

The April 17, 2013 Corrective Action:

49. On August 17, 2013, Ms. Wilson issued a Corrective Action to Complainant. Complainant was called into a meeting with Ms. Wilson and Ms. Wilson's supervisor, Ms. McGinn, to discuss the issues raised in the corrective action.

50. The corrective action listed four areas that required Complainant's action:

1. Communication with supervisory staff and co-workers;
2. Insubordinate behavior, e.g. refusing to follow supervisor's directives;
3. Appropriate conflict resolution strategies; and
4. Work hours and department coverage.

51. The corrective action addressed Ms. Wilson's observation that Complainant was created conflict with his co-workers by communicating in an aggressive manner and without regard for other perspectives. She also cited her observation that he would expend vast amounts of time in repetitive conversations when he was not in agreement on a topic, and that he would raise his voice to repeat his position, even if his position had been acknowledged. Ms. Wilson referred to the behavior as badgering other employees during these conversations, rather than engaging in healthy dialogue.

52. The corrective action also referenced that Complainant was not working a minimum of 40 hours per week, and that the expectation was that he would work later in the day if he arrived at work later than planned in order to maintain his hours. Ms. Wilson also referenced her expectation that Complainant would arrange coverage of the Household Program area, even if that meant he was the one to stay until 5 PM.

53. The corrective action listed four expectations for Complainant's behavior:

- "1. You will be instrumental in creating a respectful workplace. You will utilize appropriate and professional communications at all times. This includes tone, disposition, and aggressiveness in communication.
2. You will not refuse a reasonable request of your supervisor. 'I won't do it, or No', in response to a directive will be regarded as a direct refusal. You may express your point of view but when a decision is made, the debate will end.
3. You will engage in productive conflict resolution methods. This includes listening and responding in a non-confrontational manner.
4. Ensure that there is coverage in your work area until 5 p.m. daily. Expect to work until 5 p.m. if other Household Program staff is out conducting management reviews."

54. The corrective action also referenced an agreement between Ms. Wilson and Complainant that Complainant would take a course relating to interpersonal skills, conflict resolution, and communication in the workplace. There was no deadline imposed for the start or completion of the class. Complainant did not grieve the corrective action.

Complainant's Hours Allocation Issue:

55. The Household Programs also required Complainant and other staff to provide reports of hours worked on each program so that those costs could be billed to the USDA as administrative time. Staff reports of their time were compiled on a quarterly basis.

56. Complainant had told Ms. Sullivan to log in her hours on each program so that the budget goals were met, and not to log actual hours. Ms. Sullivan had been following that instruction. Complainant was also not tracking his individual hours but would submit quarterly hours reports based upon the budget goals for each program.

57. On or about April 17, 2013, Ms. Sullivan, Ms. Wilson and Complainant had a discussion concerning how hours were billed. It became apparent to Ms. Wilson that the staff was billing according to the program hourly budget goals rather than creating records of the hours actually worked.

58. On April 17, 2013, Ms. Wilson issued an email to both Complainant and Leah Sullivan about the need to make certain that the timesheets for each program reports actual hours worked and not just the hours that would meet a budget goal.

59. Ms. Wilson's hours had already been compiled in that manner. Ms. Sullivan restated her previous quarter's hours to more closely reflect actual hours. Complainant refused to amend his hours report for the prior quarter. He falsely insisted to Ms. Wilson that he was already stating his hours as his actual time on each federal program.

Complainant's Interactions With Household Programs Staff and Ms. Wilson after the Corrective Action:

60. Complainant did not substantially modify his behavior with regard to his treatment of Ms. Sullivan and Ms. Igli after he had been removed as supervisor and the April 17, 2013 corrective action had been issued to him.

61. Midday on April 22, 2013, Complainant raised his voice at Ms. Sullivan concerning her question to him about whether he had the phone number for an OIT technician. Complainant yelled at Ms. Sullivan that she needed to write things down and that he had given her the information previously.

62. Later in the afternoon on April 22, 2013, Complainant again raised his voice at Ms. Sullivan. On this occasion, the topic of discussion concerned 355 cases of pork patties in Pueblo County.

63. On April 29, 2013, Ms. Wilson was out of the office. Complainant decided that, given Ms. Wilson's absence, he had the authority to call a weekly team meeting. During this team meeting, Complainant referred to Ms. Sullivan as "so unprofessional" at least twice. Complainant also told Ms. Igli repeatedly that she was not completing her job and did not know her job.

64. In late April 2013, Ms. Wilson was so concerned about the Household Programs staff problem that she moved her office to a desk directly next to the program staff. She made this move in order to help calm the volatile and loud interactions between Complainant and the rest of the staff, and to observe directly what was occurring among the staff.

65. Ms. Wilson met with Complainant on May 10, 2013, to discuss Complainant's treatment of the Household Programs staff during the team meeting that Complainant held in her absence.

66. Complainant was argumentative during a household programs staff meeting on June 17, 2013, during discussions of the new procedures that were in place concerning the reconciliation of inventory and the submission of management evaluation tools to the audit site prior to the visit.

67. Complainant was also argumentative with Ms. Wilson during a meeting on June 21, 2013, held to discuss the mailing of audit letters issued by Complainant and that contained typos and improper grammar. Complainant told Ms. Wilson that the issues she noted with typographical errors in his compliance letters were just matters of her opinion.

Decision To Place Complainant On Paid Administrative Leave:

68. Ms. Wilson led a TEFAP audit of the Food Bank of the Rockies warehouse and services beginning on or about June 25, 2013. As part of that audit, Ms. Wilson inspected the financial records for the program.

69. During the review of the financial reports, Ms. Wilson noted a series of quarterly payments to a company by the name of BASupport that appeared to be incorrect or possibly fraudulent. Ms. Wilson asked Food Bank of the Rockies staff for clarification on the payments. The responses that she received convinced Ms. Wilson that the payments were likely to be improper and required further investigation.

70. The Chief Financial officer for the Food Bank of the Rockies, Marshall Aster, informed Ms. Wilson that Mr. Loo had directed that the payments be billed in the manner in which Ms. Wilson had found them. He also told Ms. Wilson that Complainant had also been aware of the payments.

71. Ms. Wilson took the information she gathered about the payments to the office within the Department of Human Services that conducts fraud investigations and requested an investigation. She also worked with her supervisor, Ms. McGinn, to arrange for Complainant to be placed on administrative leave pending the outcome of the investigation.

72. On July 1, 2013, Ms. McGinn placed Complainant on paid administrative leave because of the pending fraud investigation involving the payments to BASupport by Food Bank of the Rockies. The letter that Complainant received on that date did not specify the cause for the administrative leave.

Complainant's Audit Work in May and June of 2013:

73. During the spring of 2013, Ms. Igli left Respondent's employment. Her absence meant that Complainant and Ms. Sullivan were expected to perform the field audit work that Ms. Igli had been contributing to the unit. During this period, Ms. Sullivan was also on intermittent family medical leave. Ms. Sullivan's absences during the week meant that Complainant was responsible for performing more of the support for field audits.

74. Complainant had not conducted any site audits of TEFAP or CSFP agencies between September 2012 and May 2013. With the staffing changes during that period, however, Complainant became responsible for conducting the on-site program audits in order that the Household Programs unit met its required number of audits for the year.

75. Once Complainant was placed on administrative leave, Ms. Sullivan and others were responsible for completing the work begun by Complainant. They reviewed the records collected by Complainant, the audit reports completed by Complainant and the audit letters drafted by Complainant. During those reviews, a number of audit problems were identified by Ms. Wilson and the staff.

76. Complainant had completed an audit on May 22, 2013 of the program run by Advocates Against Domestic Assault. During the audit, he had provided staff with training on best practices for inventory management, but made no mention of the training in his audit report. Complainant's audit record of the inventory of the apricots and peaches did not show the expiration dates or that pack dates or similar information had been evaluated. Such notations were expected to be made part of the audit record by Complainant, and failure to include such information was a violation of the standards for the audit process.

77. Complainant had also issued the one-page follow-up letter to Advocates Against Domestic Violence on or about June 3, 2013. The letter contained typographical errors, including that Complainant has misspelled the name of the program contact. More importantly, Complainant's letter was unclear in its ultimate finding, stating that "[y]our agency was not found noncompliance issues at this time."

78. Complainant conducted an audit of Lighthouse Gospel Ministries and made a site visit on June 11, 2013. Lighthouse Gospel Ministries had a history known to Complainant of failing to timely submit inventory sheets to Respondent. Complainant made no note in his audit report that he had discussed the history of the agency's failure to submit timely inventory sheets with the agency staff. Complainant had noted that there were no temperature logs. Complainant did not, however, include a discussion of the situation or note any proposals to bring the program into compliance on this food safety issue. A failure to discuss the issue of late inventory sheets and no temperature logs, or a failure to note that such discussions were held, were violations of the expected performance of the audit process by Complainant.

79. Complainant audited the Salvation Army ARP on June 14, 2013. Complainant did not record that he had reconciled the inventory, failed to document concerns with inventory reports in the final write-up, and did not request that the agency submit a corrective action plan concerning their previous failure to submit timely inventory reports. A failure to reconcile the inventory, or a failure to note that such a reconciliation was performed, constituted a violation of the expected performance standards for the audit process by Complainant. A failure to create a corrective action to address a problem with the submission of inventory reports also constituted a violation of the expected audit performance standards for Complainant.

80. Complainant audited Delta County on June 26, 2013, and provided the agency with a copy of his review notes indicating full compliance and no findings. Complainant also responded "yes" to the question, "Do all TEFAP public notifications include the appropriate, current non-discrimination statement?" The materials collected during the audit of showed, however, that Delta County was using an incorrect non-discrimination statement on three documents. The required non-discrimination statement had been issued by the USDA shortly before the audit, and Complainant had spoken with Delta County staff about the need to

incorporate that newer language into their materials. Complainant did not note in his audit report, however, that he had discussed the issue with Delta County staff. Complainant's failure to note his discussion of the anti-discrimination statement in his audit report was a violation of the expected performance standards for Complainant's audit performance.

Complainant's Hours After the Corrective Action:

81. Complainant was still on a 7:00 AM through 3:30 PM schedule until June 8, 2013. On that date, he was expected to move to an 8:00 AM to 5:00 PM schedule.

82. Ms. Wilson decided to check the security door logs again to see if Complainant had been arriving early enough to be at his desk and ready to work by 7:00 AM.

83. Shortly before June 14, 2013, Ms. Wilson asked the Colorado State Patrol to provide the records of the times when Complainant's access code was used at the back dock door for the building. The Colorado State Patrol provided Ms. Wilson with a report covering March 1, 2013 through June 13, 2013.

84. During the period of March 1 through June 7, 2013, Complainant's access code was used in the morning on a total of 33 dates. Of those 33 days, Complainant's code was used only twice prior to 7:00 AM -- his code was used on April 19, 2013 at 6:59 AM and on June 7, 2013 at 6:58 AM.

85. Ms. Wilson also checked the records of when Complainant was logging into his computer each morning to determine if there was evidence that Complainant was indeed working at 7:00 AM even if the access code information suggested that he had arrived at work later than 7:00 AM. On or about October 2, 2013, Ms. Wilson obtained the records for Complainant's computer logins from October 1, 2012, through June 28, 2013.

86. The computer log in records for the period between the issuance of the corrective action and the point at which Complainant was placed on administrative leave, April 18 through June 28, 2013, showed only one computer login that occurred before 7:00 AM. On June 24, 2013, Complainant logged in at 6:57 AM.

87. While Complainant had in some ways improved his on-time attendance to meet the requirement that he be ready to start work at 7:00 AM, Complainant was still not routinely at his desk and ready to work at 7:00 AM during the period between the issuance of the corrective action and June 7, 2013.

Notice For A Board Rule 6-10 Meeting:

88. By letter dated September 13, 2013, Ms. Wilson informed Complainant that she would hold a Board Rule 6-10 meeting with him on September 18, 2013.

89. The letter listed a series of items to be discussed at the meeting:

- a) The Colorado Department of Human Services Code of Conduct, and Ms. Wilson's allegation that, when she had tried to counsel him or discuss certain issues, Complainant had become "argumentative, insubordinate, and disrespectful" with her. Ms. Wilson also noted that Complainant's interactions with others in the office "has been less than professional, does not represent

CDHS in a good light, and does not meet the expectations of a lead in our organization.”

b) Director’s Procedure 3-26: FSLA and Overtime, and Ms. Wilson’s allegation that Complainant was still not working a minimum of 40 hours a week because of his late arrivals, even though the issue had been raised with him previously; and

c) Various federal regulations referring to various aspects of program management, such as the need to provide civil rights notification, and the manner in which staff work can be billed as a cost to a federal program, and Ms. Wilson’s allegation that Complainant had failed to comply with various regulatory requirements and had failed to ensure compliance by program staff.

Board Rule 6-10 Process:

90. Ms. Wilson held a Rule 6-10 meeting with Complainant on September 18, 2013. Ms. Wilson and Complainant attended the meeting in person. Ms. Wilson had Roxanne Stuber, the Human Resources manager for CDHS as her representative. Pam Cress from Colorado WINS was on the phone as Complainant’s representative.

91. The meeting lasted for approximately 2 ½ hours. During that time, Ms. Wilson brought up a variety of topics related to her perception that Complainant was resisting the implementation of the new audit requirements. Ms. Wilson talked about Complainant’s compliance with inventory management audit requirements, and that the unit was not meeting the required number of reviews. She specifically referenced the Delta County, Lighthouse Gospel Ministries, and Salvation Army audits conducted by Complainant in May or June of 2013. Ms. Wilson discussed the cost allocation issue regarding Complainant’s statements of his program time. She also brought up the number of audits required in order for the unit to be in compliance with federal requirements.

92. Ms. Wilson also discussed that Complainant was still creating conflict in the workplace in the manner in which he dealt with employees. Ms. Wilson talked about the dispute over whether Complainant had been starting his workday at 7:00 AM during the period when he has been approved to work from 7:00 AM to 3:30 PM.

93. On the advice of the DHS investigator who had taken the potential fraud complaint from Ms. Wilson, the issue of the Food Bank of the Rockies payment for BASupport services was not discussed at the meeting.

94. Complainant asked to be able to submit his responses in writing. On September 20, 2013, Complainant emailed a written statement of his objections to Ms. McGinn.

95. At the Board Rule 6-10 meeting and in his September 20, 2013 written response, Complainant denied that he had been argumentative, insubordinate or disrespectful to FDP staff or Ms. Wilson. Complainant also used his written response to explain that he thought there had been an agreement that the corrective action would be removed from his file three months after he received it. He also used his written response to quote some of the good comments from his most recent PMAP, and to provide quotes from agency customers who had praised his work.

96. Complainant also argued that, as an exempt employee, he did not have a timecard to swipe and that he worked more than 40 hours a week during weeks when there was a need.

97. Finally, Complainant addressed the cited federal regulations by either arguing that he had met the regulation, arguing he had not been told he was violating any requirement under the regulation, arguing that the regulation did not apply, or asking Ms. Wilson to clarify what she thought was the violation.

Disciplinary Decision:

98. After the conclusion of the Board Rule 6-10 process, Ms. Wilson considered whether she should discipline Complainant. Ms. Wilson was aware that Complainant's prior performance reviews had rated him at a level "3." Ms. Wilson was concerned, however, that Complainant was not modifying his work to reflect the changes that Ms. Wilson and the staff were implementing in the audit process, and that his argumentative and raised voice interactions with staff were not likely to change. Ms. Wilson was also concerned that Complainant was not providing her with truthful information at all times.

99. By letter dated November 5, 2013, Ms. Wilson informed Complainant that she had decided to impose discipline and to terminate his employment.

100. Ms. Wilson found that several of Complainant's audits conducted in May and June of 2013 were deficient and warranted the imposition of discipline. Specifically, she found that:

a. Complainant had failed to note in the program review sheet which was generated as part of the May 22, 2013 audit of Advocates Against Domestic Assault that he had provided training on best practices for inventory management but did not write a corrective action for the inventory issues that were found. Ms. Harris-Wilson also found that Complainant's audit record of the apricots and peaches did not show the expiration dates, or that pack date or similar information had been evaluated.

b. Complainant had failed to note any discussions with Lighthouse Gospel Ministries during his site visits on June 11, 2013 concerning their history of failure to submit timely inventory sheets or included any notes attempting to reconcile the inventory. Ms. Harris-Wilson noted that Lighthouse Gospel Ministries later had its distribution suspended because of a failure to provide food temperature logs, and that this issue limited the availability of TEFAP to the 3,000 clients served by the ministry on a monthly basis.

c. Complainant audited the Salvation Army ARP on June 14, 2013, and did not record that he had reconciled the inventory, failed to document concerns with inventory reports in the final write-up and did not request a corrective action plan. Ms. Harris-Wilson noted that Leah Sullivan suspended the agency from receiving TEFAP service a month after the audit due to negligence by the Salvation Army ARP in submitting the required monthly inventory reports to her. Ms. Harris-Wilson found that it was Complainant's failure to require swift correction of the monthly inventory reports that led to 30 clients of TEFAP being impacted.

d. Complainant audited Delta County on June 26, 2013, and provided the agency with a copy of his review notes indicating full compliance and no findings. Complainant also responded "yes" to the question, "Do all TEFAP public notifications include the appropriate, current non-discrimination statement?" Staff review of the collected documentation, however, showed that the agency was not using the correct non-discrimination statement on three documents. Staff included the compliance issue in the final agency review letter.

101. Ms. Wilson additionally found Complainant had failed to properly bill for his time by listing actual hours spent on each program, and that Complainant had continued this practice even after being told that he needed to correct the issue.

102. Ms. Wilson found that Complainant had violated the Colorado Department of Human Services Code of Conduct requiring truthful, honest, courteous, and respectful behavior in a variety of ways, including:

a. That it did not appear that Complainant was generally at his desk at 7:00 AM, as he had agreed he would be, so that he could work a 40-hour work week;

b. That on April 22, 2013, Complainant had again yelled at Ms. Sullivan on two different occasions;

c. That Complainant had been frustrated and argumentative during two meetings involving Ms. Wilson in June 2013 and during a staff meeting on May 2, 2013;

d. That Complainant had decided to hold a team meeting with Ms. Sullivan and Ms. Igli after he had been removed as their supervisor, and had denigrated both women during the meeting.

103. Ms. Wilson also reached a number of conclusions that she placed into her disciplinary letter on issues that she had not included as part of the Board Rule 6-10 process. As a result, Complainant had not been given an opportunity to review and discuss these issues with Ms. Wilson, and Ms. Wilson reached her conclusion on these issues without knowing what Complainant had to offer about the matter:

a. Ms. Wilson included an allegation that Complainant had mishandled the 2010 review of the Food Bank of the Rockies. This allegation was based on the assertions that staff had not been able to locate a 2010 review form, and that the 2013 review by Ms. Wilson had disclosed many apparently long-standing compliance issues. The audit process for Food Bank of the Rockies in 2010 and earlier had not been noticed as part of the Board Rule 6-10 meeting notice and the compliance issues that Ms. Wilson had found had not been discussed with Complainant in the Board Rule 6-10 meeting.

b. Ms. Wilson found that Complainant had provided incorrect program information to a series of local agency staff members. None of these allegations had been discussed noticed as part of the Board Rule 6-10 process or discussed with Complainant at the Board Rule 6-10 meeting.

c. Ms. Wilson found that Complainant's proposed audit schedule for fiscal year 2013 was one audit short to meet Respondent's obligations for conducting a certain percentage of audits each year. This allegation was not noticed as part of the Board Rule 6-10 process and was not discussed at the meeting.

d. Ms. Wilson included in her disciplinary letter that Complainant had permitted Food Bank of the Rockies to claim National School Lunch Program expenses for TEFAP reimbursement. This issue had not been noticed as part of the Board Rule 6-10 meeting notice and was not discussed at the meeting.

e. Ms. Wilson also concluded that Complainant had told Marshall Aster of Food Bank of the Rockies that he could continue billing TEFAP for the BASupport services payments. Ms. Wilson had purposely not discussed the BASupport payment issue with Complainant during the Board Rule 6-10 process because it was under investigation at the time.

f. Ms. Wilson also found that Complainant had failed to review or provide collaborative feedback on the changes that were being made to the audit program protocols and forms. This allegation was not raised in the Board Rule 6-10 process or addressed at the meeting.

104. Ms. Wilson concluded that Complainant's position "must operate in a capacity of public trust and internally as a role model" and that Complainant's behavior did not warrant that level of responsibility. She also noted that she did not feel that she could "accept consultation or input from you without verifying its validity because you have continued to provide and record false information."

105. Ms. Wilson decided that the result of the discipline must be to remove Complainant from the position of team lead. She also considered whether she could demote Complainant to a GP III level, and decided that such a decision would require that there be a second reviewer available to check Complainant's work and that the availability of a second review would not always be possible.

106. Ms. Wilson terminated Complainant's employment effective November 8, 2013.

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

DISCUSSION

I. BURDEN OF PROOF

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

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;

4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Complainant committed the majority of acts for which he could be disciplined.

One of the more challenging aspects of this matter at hearing has been the wide variety of issues discussed by nearly all of the witnesses. The disciplinary letter itself, for example, includes references to at least twenty-four different events.

At hearing, Respondent argued that some of the references to program reviews and other conduct by Complainant were background events offered in support of the disciplinary contentions. Which incidents were offered as disciplinary events and which were offered as examples in support of Ms. Wilson's conclusions, however, was not immediately obvious.

In evaluating which of the many incidents referenced by the witnesses or by the disciplinary letter are the potential grounds for discipline, we are guided by a few essential principles.

First, the Board rules proscribe assessing discipline for incidents already addressed by corrective action. Board Rule 6-8, 4 CCR 801, provides, "[a]n employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature." In this case, Complainant was issued a corrective action as of April 17, 2013 pertaining to issues concerning his start time and his interactions and communication style with staff and with Ms. Wilson. The events leading up to that corrective action and which were the factual basis of the imposition of that corrective action, therefore, are not proper grounds for discipline. These pre-April 17, 2013 incidents, however, may be used to show the background of later events and the use of progressive discipline.

Second, the Board Rule 6-10 process is designed to provide an appointing authority with sufficient information to render a disciplinary decision without being arbitrary or capricious in that decision. The process also allows the employee an opportunity to provide relevant information prior to the decision. To these ends, the rules require that the appointing authority present the specific topics which might lead to discipline, and provide sufficient information about those topics to the employee to allow that employee to present relevant information. Specifically, the rules require that, "[w]hen considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision." Board Rule 6-10, 4 CCR 801. As a practical matter, therefore, any issue which might be the

proper subject for imposition of discipline must first be identified, and the source of that information must normally be disclosed, in order to facilitate a good discussion between the employee and the appointing authority prior to any disciplinary decision.

Third, in order to take discipline against an employee, an appointing authority must create a set of written findings. Board Rule 6-15, 4 CCR 801, requires: "A written notice of disciplinary action must be sent to the employee's last known address, by certified mail, or may be hand-delivered to the employee. ... The notice must state the specific charge [and] the discipline taken..." This letter listing the specific findings becomes the charging document for the Board's hearing, and the findings contained therein serve to define the scope of the hearing.

When these principles are applied to the matter at hand, it becomes obvious that any disciplinary charge must be referenced in the disciplinary letter as a reason to institute discipline. Additionally, the potential grounds for discipline in this case may not include the actions that prompted the issuance of the April 2013 corrective action. There are also potential conduct issues that were not subject to the April 2013 corrective action, but which were included in the Board Rule 6-10 process in this case. So long as these additional events were noted in the disciplinary letter as the grounds for discipline, these other events could also be grounds for discipline.

The numerous other events described at hearing that do not meet these criteria, such as the pre-2012 review of the Care and Share program distribution site, cannot be considered to be grounds to impose discipline.

With those standards in mind, we next turn to the question of which issues discussed at hearing are the disciplinary issues in this case, and which issues are only supporting discussions. The potential disciplinary issues in this case involve Complainant's interactions and communication style with staff and his supervisor, Complainant's arrival time at the office, Complainant's compliance with various federal and FDP standards (particularly concerning the accounting of program time and the completion of audit reports), and Complainant's scheduling of sufficient audits to meet federal standards.

With those limitations in mind, we turn next to a consideration of whether Respondent has proven specific disciplinary allegations by a preponderance of the evidence.

(1) Complainant's Interactions with Staff:

Complainant argues that Ms. Sullivan, Ms. Igli, and Ms. Wilson all harbored a bias against Complainant that undermines the credibility of those witnesses, particularly concerning whether or not he had communicated with them inappropriately.

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").

It was clear from the testimony that both Ms. Igli and Ms. Sullivan were quite angry with Complainant. Their descriptions of Complainant's abrasive and unprofessional tone and language, however, were often supported by contemporaneous reporting of the incidents and by the content of those accounts. Additionally, their descriptions of Complainant's behavior were consistent with patterns observed by Ms. Wilson and with other statements from Complainant observed by Ms. McGinn. Ms. Igli and Ms. Sullivan also appeared at hearing to be witnesses who were understandably angry because of the way they had been treated. In the end, the credible and persuasive evidence demonstrated that Complainant repeatedly treated his subordinates in demeaning ways, including yelling at them, badgering them into agreeing with him, and denigrating them. Ms Igli and Ms. Sullivan's accounts of how Complainant interacted with them constituted credible testimony.

Ms. Wilson's version of events was similarly a credible recounting of events. Ms. Wilson's actions support that she attempted to correct Complainant's interaction issues initially through feedback to Complainant, and then through the inclusion of the issues in a balanced performance review. Ms. Wilson only reached the corrective action stage because Complainant was flatly rejecting her counsel that he obtain additional training on conflict resolution and interactions, and she escalated her response to a disciplinary level only after these prior efforts had failed to make any real impact on the problem. These are not the actions of a biased supervisor whose statements should be discounted as Complainant argued, but of a supervisor who has been fundamentally supportive of Complainant and who was attempting to correct a problem with the lowest level of intervention. Ms Wilson's testimony about Complainant's interactions with staff and with her was credible testimony.

Respondent has, therefore, successfully proven that Complainant had yelled at Ms. Sullivan on two different occasions on April 22, 2013; that Complainant had been frustrated and argumentative during two meetings involving Ms. Wilson in June 2013 and during a staff meeting on May 2, 2013; and that Complainant had decided to hold a team meeting with Ms. Sullivan and Ms. Igli after he had been removed as their supervisor, and had denigrated both women during the meeting.

(2) Complainant's Arrival Times:

At hearing, Complainant testified that the records presented to him in the Board Rule 6-10 meeting and again at hearing showing his entry code times and computer log-in times were insufficient to show what times he was arriving for work in the mornings. Complainant presented testimony that he would follow others into the building in the mornings at 6:30 AM, but that he would then go back out to his car or back to the parking area to retrieve things, and that was why his entry code appeared after 7:00 AM. Complainant's explanation at hearing was untruthful, and it has been rejected in the findings of fact.

Complainant also raised the issue that he was an exempt employee not subject to the 40 hours per week requirements. It was not determined at hearing whether or not Complainant was an exempt employee under the Federal Labor and Standards Act. The exempt employee question, however, does not control the outcome of this issue. The problem alleged by Respondent was that Complainant had been permitted to leave at 3:30 PM because he had agreed to start his work day at 7:00 AM. The factual question at hearing was whether he was beginning his work day by 7:00 AM as he had agreed to do.

The credible evidence presented at hearing showed that, on the days that Complainant was in the office, Complainant often arrived at work after 7:00 AM. Respondent has,

accordingly, successfully proven by a preponderance of the evidence that Complainant was not appearing at work at the agreed upon time of 7:00 AM.

(3) Complainant's Program Billing:

Complainant argued at hearing he did actually bill his program hours according to his actual work time. That explanation was not adopted in the findings of fact because Ms. Sullivan's testimony was credible that she had been told by Complainant how to bill her hours according to budget, and that she had to re-state the hours to reflect her actual time.

Complainant also challenged whether the federal regulations required such an accounting. The regulations submitted at hearing support that actual time is a required component of billing program costs. Additionally, and most persuasively, the 2011 USDA audit response specifically noted this requirement, and it listed Complainant as the contact point for that portion of the audit. This evidence was persuasive in the finding that Complainant knew he should have been using actual hours and then was untruthful when asked to re-state those hours.

(4) Complainant's Audit Reports:

The audit process that Complainant testified he had used as part of his reconciliation of inventory at hearing concerning the Advocates Against Domestic Assault was persuasive in that it appears that Ms. Sullivan misinterpreted some of the findings in the audit report. As a result, Respondent did not prove by a preponderance of the evidence that Complainant had failed to note an inventory problem or issue a corrective action plan to address that issue.

The evidence was persuasive, however, that Complainant had provided Advocates Against Domestic Assault staff with training on best practices for inventory management, but he made no mention of the training in his audit report. Complainant's audit record of the inventory of the apricots and peaches also did not show the expiration dates or that pack date or similar information had been evaluated. Such notations were expected to be made part of the audit record created by Complainant. Complainant's letter was also poorly written, particularly in its ambiguous statement as to whether he had found a compliance violation or not.

The audit process for Lighthouse Ministries showed that Complainant had not followed the audit requirements expected of him at the time of the audit. Complainant objected at hearing that temperature logs were not a required part of an audit; that testimony was not persuasive. Temperature logs are part of the food safety evaluation process implemented as part of the audit process, and Complainant had checked "no" on his audit report in response to the question about whether temperature logs were maintained. Complainant clearly understood the need to ascertain the temperature that food was held at during his audit because he testified that he had checked the temperature of the food during his site visit. Even the older audit review forms admitted into evidence, however, show that program staff had long been asking agencies if they had been tracking temperatures and recording those temperatures in a log. The lack of a temperature log, therefore, was an issue that Complainant was expected to pursue, and he did not do so by requiring the submission of such logs or documenting a plan to address the issue.

Additionally, Complainant testified at hearing that it was customary to only look at three items when reconciling inventory for the audit form. This was an example at hearing of the type of procedures that Complainant may have been trained were acceptable under his previous

supervisor. The testimony, however was not persuasive that the applicable audit standards in effect at the time of the Lighthouse Ministries audit would allow Complainant to conduct a proper inventory by looking only at three food items. Respondent has, therefore, demonstrated by a preponderance of the evidence that Complainant had failed to document his discussions with Lighthouse Ministries staff concerning the temperature logs and the inventory reports, and that his inventory process was deficient under the applicable standards.

As for the audit of the Salvation Army program, Complainant testified that he did not have time to complete his report because he had been placed on administrative leave prior to his completion of the audit. That explanation was not a persuasive explanation for why Complainant's audit report did not include sufficient information concerning the on-site inventory, and it does not explain why Complainant did not note that he discussed the on-going problem of a failure to timely submit inventory reports. Respondent showed by a preponderance of the evidence that Complainant's report for his Salvation Army audit did not meet the standards it should have met.

Respondent has also shown by a preponderance of the evidence that Complainant did not properly document his technical guidance to Delta County concerning their use of the required non-discrimination statement.

(5) Number of Audits Planned:

Respondent argued that Complainant had not properly planned for a sufficient number of audits to be completed in fiscal year 2012- 2013 to meet the applicable federal standards. This allegation, however, was not sufficiently explained at hearing to warrant a finding that Complainant's performance was deficient in this area. The testimony established that, in the spring of 2013, the Household Programs unit lost one employee, Ms. Igli, who had been performing on-site audits at about the same time as Ms. Sullivan was on intermittent family medical leave. Additionally, Complainant was placed on administrative leave prior to the end of the federal fiscal year in September. Under such circumstances of severe understaffing, any discrepancy between the number of audits performed and the number expected for each fiscal year cannot simply be assumed to be the product of poor planning on Complainant's part.

In the final analysis, therefore, Respondent has successfully proven the charges involving Complainant's interpersonal communications with Household Programs staff and Ms. Wilson, his failure to arrive at 7:00 AM as required, his failure to state his hours properly for billing to the federal government, his untruthful denial of how he had been stating his hours for the purpose of billing his time to either TEFAP and CSFP, and that there had been a variety of performance issues with four audits that Complainant conducted in May and June of 2013.

B. The Appointing Authority's action 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 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).

In this case, Ms. Wilson took the time to conduct an exhaustive review of the work of the Household Programs unit. Complainant did not argue, and there were no other grounds to find, that Ms. Wilson failed to examine anything that she should have examined as part of her investigation into the multiple issues presented in this case. She also conducted a Board Rule 6-10 process that permitted Complainant to produce whatever explanatory or mitigating information into the record, and Complainant took advantage of that process to provide a lengthy rebuttal. In the end, Ms. Wilson's conclusion that there were multiple instances of Complainant violating the performance expectations for a program lead in the Household Programs unit was a reasonable conclusion.

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

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

At hearing, Complainant argued that Respondent's decision to terminate Complainant's employment violated the requirement to impose progressive discipline.

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." The purpose of the requirement for progressive discipline is to ensure that, except in cases of serious or flagrant performance standard violations, employees are given clear instruction on how to correct a performance issue before being subject to discipline.

(a) Issues addressed through prior corrective action:

Complainant was issued a corrective action in this case on April 17, 2013, addressing three communication issues and a timekeeping issue related to Complainant's failure to be present at his designated start time. The communication issues were all related to the need to engage in respectful and professional communications, including employing good conflict management strategies and not engaging in argumentative or insubordinate behavior with Complainant's supervisor.

Complainant's difficulties with respectful communications re-emerged immediately after April 17, 2013. Within days after the corrective action, Complainant was yelling at Ms. Sullivan again and denigrating both Ms. Sullivan and Ms. Igli at a meeting. Complainant was also argumentative with Ms. Wilson after the issuance of the corrective action at least two meetings.

Complainant also did not address the arrival time issue successfully, as the records from the Colorado State Patrol and his computer records attest.

Respondent's decision to discipline Complainant for his interpersonal behaviors with staff and his supervisor, as well as his failure to correct the issue with his actual start time, therefore did not violate Board Rule 6-2 because those performance issues were subject to progressive discipline.

(b) Incidents not addressed by prior corrective action:

Respondent also disciplined Complainant for billing of his time to the TEFAP and CSFP programs according to budget needs, and then falsely claiming that he did not need to re-state his hours report because he had billed for actual hours. Respondent also disciplined Complainant for failing to follow the expected audit standards in four audits that he had conducted in May and June 2013.

These types of performance issues had not been previously raised in a corrective action. They may be raised independently of any prior corrective action only if the acts are "so flagrant or serious that immediate discipline is proper." Board Rule 6-2.

Complainant's billing practices constituted a serious violation of applicable performance expectations. Complainant knew at least from the date of the 2011 USDA audit report that his unit was expected to present individualized billing reports for each program based upon actual hours worked. He provided Ms. Sullivan with incorrect instructions on her billing that allowed him to maintain a 100% utilization of the program budget but to do so using figures that were not actual hours. Worse, when instructed to change his timesheets to reflect actual hours, Complainant refused and falsely insisted that he had been billing actual time. These actions represent a serious violation of the applicable rules on billing of time for a federal program and warrant the imposition of discipline without prior corrective action.

Complainant's generation of audit reports that did not meet the requirements for audit reports under Ms. Wilson's more rigorous standards represent a different type of violation of the applicable standards of conduct. As the lead worker in the unit, Complainant was expected to support the effort to enhance the audit program as Ms. Wilson had instructed. Instead Complainant was, at best, not paying sufficient attention to the requirements to implement them in at least four of his audit reports in May and June 2013. As a general rule, technical issues such as these audit issues would be better presented in a corrective action prior to the imposition of any discipline. In this case, however, these audit issues arose both in the performance of the lead worker and in combination with a series of more serious allegations. Under such circumstances, the audit issues warrant the imposition of discipline without prior corrective action under Board Rule 6-2.

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

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

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

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

Complainant was serving as the team lead for a program that was undergoing an important change from a loosely-styled audit system to a significantly more rigorous audit process. Complainant's role as team lead required him to be able to successfully direct the program staff, to implement the new audit standards, and to be an effective leader in making certain his programs were in compliance.

The events that unfolded in the spring and early summer of 2013, however, demonstrated that Complainant was unwilling to change the unprofessional manner he was using with program staff, rendering him ineffective as a team lead. These events also showed that Complainant was unwilling to accept direction from Ms. Wilson. It was also unsettling to have Complainant provide a series of untruthful statements about his work start time and his use of budget-based billing tactics. These untruthful statements undermine Complainant's overall credibility.

Ms. Wilson's decision that she could not trust Complainant to be an effective team lead, or expect that he would be able and willing to perform proficient audits as a team member if demoted to a GP III, was therefore a reasonable conclusion. Under such circumstances, termination of Complainant's employment is within the range of reasonable alternatives available to Ms. Wilson.

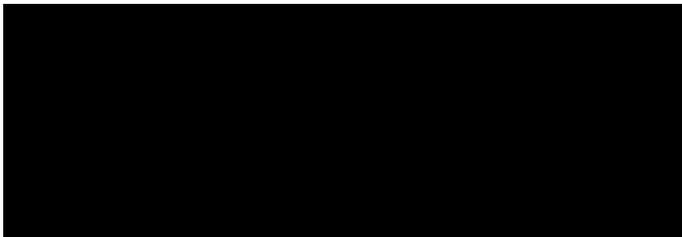
CONCLUSIONS OF LAW

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; and
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this 2nd day
of October, 2014 at
Denver, Colorado.



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

CERTIFICATE OF MAILING

This is to certify that on the 7th day of October, 2014, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Nora V. Kelly, Esq.

[REDACTED]

Bradford Jones

[REDACTED]

[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.