

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2015B011(C)

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**THERESA N. CHAVEZ,**  
Complainant,

vs.

**DEPARTMENT OF EDUCATION, OFFICE OF PROFESSIONAL SERVICES &  
EDUCATOR LICENSURE,**  
Respondent.

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Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on December 9, 2014, and the evidentiary hearing on February 5, 6, 26 and 27, and April 10 and 16, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on June 9, 2015, after the exhibits were reviewed and redacted for inclusion in the record and post-hearing briefs were received. Complainant appeared on February 5 and 6, and on April 10 and 16, 2015,<sup>1</sup> and was represented throughout the hearing by Jennifer Robinson. Respondent was represented by Stacy L. Worthington, Senior Assistant Attorney General, and Jack D. Patten, III, Assistant Attorney General. Respondent's advisory witness was Colleen O'Neil, Ed.D.

**MATTER APPEALED**

Complainant, Theresa Chavez, a certified employee, appeals the termination of her employment by Respondent on July 25, 2014, effective July 31, 2014. Complainant initially appealed a corrective action she received on March 14, 2014, alleging retaliation and violation of federal or state constitutional rights; this appeal was consolidated with the appeal of her July 31, 2014 termination. On January 15, 2015, Complainant withdrew her discrimination claims based on disability, religion/creed, hostile work environment and retaliation; at Complainant's request, these claims were dismissed by the ALJ on January 16, 2015. On February 9, 2015, the ALJ granted Respondent's motion to dismiss Complainant's appeal of the March 14, 2014 corrective action, due to Complainant's withdrawal of her discrimination and retaliation claims. This hearing proceeded on Complainant's appeal of Respondent's July 25, 2014 termination of her employment.

Complainant argues that the Respondent has failed to show that Complainant committed any of the acts for which she was disciplined, as Complainant was performing her job competently and her actions on June 4, 2014 were not willful. Complainant further argues that Respondent's decision to terminate her employment was arbitrary and capricious, because Respondent neglected or refused to use reasonable diligence and care, and failed to honestly

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<sup>1</sup> Through her attorney, Complainant waived her appearance on February 26 and 27, 2015, and asked that the hearing continue without her being present.

and candidly consider the evidence, in making this decision. Finally, Complainant argues that the termination of Complainant's employment was not within the range of reasonable alternatives. Complainant seeks reinstatement, back pay, the expungement of all related corrective and/or disciplinary actions, restoration of all benefits, including but not limited to PERA contributions, and an award of attorney fees and costs.

Respondent argues that its decision to terminate Complainant for incompetent performance of her job and disconnecting customers calling into Respondent's Customer Service Center on June 4, 2014 was made following a thorough investigation in accord with due process, and was not arbitrary, capricious or contrary to rule or law. Respondent further argues that Complainant refused to accept any responsibility for her disconnection of customers on June 4, 2014, and that her various excuses concerning her actions on June 4, 2014 lack credibility. Respondent requests that the Board affirm the actions of the appointing authority, dismiss Chavez's appeal with prejudice, and award Respondent its attorney fees and costs.

For the reasons discussed below, Respondent's termination of Complainant's employment is **affirmed**.

### **ISSUES**

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether either party is entitled to an award of attorney fees and costs.

### **FINDINGS OF FACT**

#### **Background**

1. Complainant was a certified employee with the State of Colorado for 27 years. She began working for the Colorado Department of Education (CDE) on or about March 1, 2009 as an Administrative Assistant III. At all relevant times, Complainant worked in the Customer Service Center (CSC) in CDE's Office of Professional Services and Educator Licensure (PSEL Office).

2. From the beginning of her employment in the CSC in March 2009 until her placement on administrative leave and termination in 2014, Complainant served as a member of a customer service team responsible for assisting teachers with walk-in, phone and e-mail queries concerning educator licenses. Complainant's March 2009 and May 2014 Position Description Questionnaires both identify that one of the purposes of this position is "[t]o serve as an initial point of contact and general information for inquiries related to all licensure areas and processes."

3. Complainant's first supervisor, Norma Lawanson, initially assigned Complainant to work with substitute licensing and to act as her assistant. During this initial period of employment, Complainant did not answer telephones in the CSC. It is unclear how long this

initial period lasted.

4. Some time in 2013, Complainant began answering customer telephone calls for part of her work day. Complainant's Performance Management and Growth Plan (PMP) for April 1, 2012 through March 31, 2013 states that she assists CSC in answering phone calls. She received an overall "Meets Expectations" rating.

5. In August 2013, Tanya Klein became Complainant's supervisor. Ms. Klein reviewed Complainant's job duties and expectations with her in October 2013; one of these expectations was that Complainant answer the telephone in a courteous and professional manner.

6. In a comment recorded in the Mid-Year Progress section of her PMP for July 1, 2013 through March 31, 2014, Complainant states, "I answer phones on a daily basis."

7. Colleen O'Neil, Ed.D., became Executive Director of CDE's PSEL Office on December 13, 2013.

#### The Avaya Call Distribution System

8. All CDE employees use Cisco desk phones. CDE employees who work in the CSC have an Avaya call distribution system loaded onto their computers. Customers seeking assistance with educator licensing call a main telephone number (303-866-6628); the call distribution system forwards the calls to available CSC employees.

9. To make themselves available to receive customer calls, CSC employees log into the Avaya system on their computers and identify themselves on the system as available to accept telephone calls on their Cisco desk phones. When CSC employees go on break or lunch, or are otherwise unavailable to accept telephone calls, they are supposed to list themselves as being in one of three auxiliary modes: Aux 1 – Time in Break, Aux 2 – Time in Lunch, or Aux 3 – Time in Admin Projects. Putting themselves in one of these auxiliary modes instructs the Avaya system not to forward telephone calls to their phones.

10. Dr. O'Neil and Ms. Klein, as well as CSC employees Justin McGrew, Emma Craighead and Sabrina Perkins, testified that the Avaya computer system was easy to learn and to use.

11. Dr. O'Neil was able to access a supervisor call center queue on the Avaya system, which allowed her to see whether a CSC employee is on a call, in auxiliary mode or logged out of the system.

12. Complainant, as well as other CSC employees, had access to a phone queue with less information than the supervisor queue, and could only see the number of CSC employees logged into the Avaya program, the number of calls in the queue, and the length of time the oldest call has been sitting in the queue.

#### Complainant's Performance History in the CSC

13. In March and April 2014, Complainant had a job-sharing arrangement with co-worker Joyce Grange. On March 7, 2014, Ms. Klein issued a CSC schedule that had Complainant and Ms. Grange alternating assignments each week. One week Complainant

would not answer phone calls, but instead would sit at the front desk in the reception area and serve as the primary assistance for walk-in customers and email inquiries, while Ms. Grange would serve as phone support and handle emails as needed. The following week they would switch, with Ms. Grange sitting at the front desk as the primary assistance for walk-ins and emails, and Complainant answering the phones.

14. Respondent's reception area contained a front desk and a back desk. In June 2014, CSC employees working at the front desk did not have access to the Avaya call distribution system, and were primarily responsible for handling walk-in customers and email queries. The back desk did have access to the Avaya call distribution system. When Complainant worked at the back desk and made herself available to answer calls through the Avaya system, this system would forward customer calls from the CSC queue to the phone on the back desk.

15. During a meeting with Complainant on March 17, 2014, Dr. O'Neil discussed a corrective action<sup>2</sup> with Complainant concerning "Timesheet Discrepancies and Avaya Work Protocols." In the written corrective action, Dr. O'Neil instructed Complainant:

As a Call Center Support (CSC) team member, you are required to be logged into your computer in order to do any of your work. This work includes accessing emails, logging into the call center phone system (Avaya), and accessing the eLicensing system to research, upload and document customer service activities.

16. In the written corrective action, Dr. O'Neil further advised Complainant:

After review of all current CSC team members I found that you have failed to correctly use the Aux modes to indicate when you are not available for a call through the Avaya system. The other three CSC representatives, two of which are junior to your years of service, do use the correct Aux modes per established process.

17. At the conclusion of the written corrective action, Dr. O'Neil warned Complainant that "any other similar ... work duty inconsistencies" could result in "further corrective and/or disciplinary action, up to and including termination."

18. On March 18, 2015, Dr. O'Neil sent Complainant a follow-up email emphasizing, among other work duties, that Complainant was expected to "[f]ully and completely log your correct Aux time in the Avaya system for every day that you are on the phones...". Dr. O'Neil offered Complainant "additional supports, training, or suggestions that I can assist with to help you be successful in your work duties." Complainant did not ask Dr. O'Neil for any additional training, supports or assistance with the Avaya phone system.

19. In a grievance filed by Complainant on March 24, 2014 concerning this corrective action, Complainant stated that, ever since Ms. Klein has been her supervisor, she has "logged into [her] computer and Avaya as directed" and "informed [Ms. Klein] when she has been unable to because of technical problems or computer problems."

20. In a March 24, 2014 response to the March 14, 2014 corrective action issued by

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<sup>2</sup> This corrective action was dated March 14, 2014, but was received by Complainant on March 17, 2014.

Dr. O'Neil, Complainant stated: "My understanding is that using the Aux modes will only be required when I sit away from the front desk and answer phones."

21. Complainant received an overall performance evaluation rating of "Needs Improvement" on her 2013-2014 PMP. The End-of-Year Supervisor comments observe: "Inquiries to the office via e-mail and telephone have increased and occupy the majority of your day-to-day duties." Complainant was advised to take responsibility for her actions rather than being defensive when instructed to follow procedures, and to take advantage of offered training and support to improve her technological skills.

22. On April 27, 2014, Dr. O'Neil issued a second corrective action to Complainant based on the "Needs Improvement" rating she received on her 2013-2014 PMP. In this corrective action, Dr. O'Neil instructed Complainant to "[u]nfailingly follow all established technical protocols for the Avaya system every day you are on the phones." While Dr. O'Neil stated that another performance review would be scheduled in two months, she also advised Complainant that if she discovered "any additional concerns about [her] work duty performance or professional conduct, they may be addressed earlier than the two month review period."

23. Joyce Grange retired effective June 1, 2014. Her last day at CDE was May 16, 2014; then she was on leave through May 31, 2014.

24. On May 7, 2014, Ms. Klein emailed Complainant about working at the back desk in the CSC reception area, where she was to answer phones and emails, and serve as "back-up support" for walk-in customers. A new CSC representative would be hired to work at the front desk to assist walk-ins, and would also serve as an office manager. Complainant confirmed her agreement with that arrangement in an email response that same afternoon.

25. On May 13, 2014, Dr. O'Neil emailed the CSC employees, including Complainant, several updates, including the following instruction: "[P]lease make sure that you have voicemail, that you can access it and that you are checking it on a daily basis."

#### Customer Complaints about Being Disconnected

26. Beginning in approximately March 2014, Complainant and other CSC employees, including Emma Craighead and Justin McGrew, reported that they received complaints from customers about being placed on hold for excessive times, receiving some kind of message from the Cisco phone system, and/or being disconnected.

27. CSC employees, including Complainant, were instructed to set up the voice mail on their Cisco desk phones so that customers would be able to leave a message.

28. An investigation by Dr. O'Neil and Ms. Klein revealed the Avaya system was erroneously shutting down at 3:55. This automatic shut down was eliminated and, as of May 1, 2014, the CSC employees were able to take calls after 4:00 p.m. However, the customer complaints about being disconnected continued.

29. No other technical problems with the Avaya system or the Cisco phones were identified.

30. CSC employees continued to receive numerous customer complaints about being disconnected throughout May and the first few days of June 2014.

## Events of June 4, 2014

31. In an attempt to determine the cause of the continuing customer complaints about being disconnected, on June 4, 2014, Dr. O'Neil called the main telephone number (303-866-6628) from which calls were routed to CSC employees. Dr. O'Neil made approximately 8 calls to this number while monitoring the Avaya supervisor call center queue.

32. During a period of time when Complainant was the only CSC employee listed as available in the Avaya call distribution system, Dr. O'Neil was disconnected several times in a row.

33. On June 4, 2014, Complainant was working at the back desk in the front reception area. A security camera located behind her had a view of her desk, computer screen and desk telephone.

34. After being disconnected several times in a row, Dr. O'Neil went to the office of Darrin Baca, E-licensing Manager, to access the live feed from the security camera behind Complainant's desk. Mr. Baca has worked in CDE's PSEL Office since January 2011. He has developed expertise in information technology and often installs software for the PSEL Office.

35. While watching the security camera's live feed, Dr. O'Neil and Mr. Baca observed that, when the phone on Complainant's desk would light up with an incoming call, Complainant repeatedly pushed a button, identified as the "iDivert" button, instead of answering the phone.

36. After observing this behavior by Complainant, Dr. O'Neil and Mr. Baca used a cell phone to record a video of calls they made to Complainant. The first time they called, Complainant hit the iDivert button; their call was forwarded to a Cisco voice message and then disconnected. The second time they called, Complainant appeared to hit the iDivert button on a call that came through the system immediately before theirs; as a result, their call was sent to the Avaya call distribution queue.

37. Approximately two hours of security video was recorded by Mr. Baca, showing Complainant repeatedly hitting the iDivert button instead of answering incoming telephone calls and, on two occasions, picking the receiver and hanging it up after a light on the telephone flashes, indicating an incoming call.

38. Complainant testified that, on June 4, 2014, her primary job was to handle walk-in and email queries; she was supposed to monitor the Avaya phone queue and answer the telephone if there were over six calls in the queue. Therefore, Complainant chose not to answer the telephone calls that came to the phone on her desk. Instead, she pressed a button labeled "iDivert," which she believed would send the telephone call back into the queue to be handled by another CSC employee.

39. The "iDivert" button did not send callers back into the queue. According to the Cisco phone manual, when the "iDivert" button is pressed, an incoming call is forwarded to the email set up on the phone. On June 4, 2014, the email on the phone on Complainant's desk was not activated. As a result, when Complainant pressed the "iDivert" button, the telephone call would ultimately be disconnected.

40. Complainant testified that, on June 4, 2014, Justin McGrew, who she believed to

be a lead employee, instructed her not to answer the phones. Mr. McGrew testified that he did not believe he was at work on June 4, 2014, and denied ever telling Complainant not to answer the phones. Mr. Baca confirmed that Mr. McGrew was not at work on June 4, 2014, and testified that Complainant was the only CSC employee available to answer phones that day.

41. Complainant's supervisor, Ms. Klein, confirmed that Complainant was supposed to be answering customer telephone calls from the back desk in the front reception area on June 4, 2014.

42. As a result of her observations of Complainant's behavior on June 4, 2014, Dr. O'Neil determined that Complainant was not properly handling customer calls. She talked to Jill Hawley, Associate Commissioner and Appointing Authority, who placed Complainant on paid administrative leave on June 4, 2014, pending further investigation.

#### Investigation and Rule 6-10 Meeting

43. After Complainant's departure on administrative leave on June 4, 2014 through June 24, 2014, Dr. O'Neil and Ms. Klein continued to call the CSC phone line. They did not experience any disconnections after Complainant left the work place.

44. Following Complainant's departure on administrative leave on June 4, 2014, CSC employees have not received any complaints from callers about being disconnected.

45. During her investigation, Dr. O'Neil reviewed Complainant's computer generated call logs and discovered that, between May 1 and June 4, 2014, Complainant was handling 2-3 times more calls than the other CSC employees and spending an average of less than one minute on each call. Dr. O'Neil found that this data further supported a conclusion that Complainant was disconnecting customers who called for assistance.

46. Dr. O'Neil provided the evidence she and Ms. Klein gathered to Appointing Authority Jill Hawley. On June 5, 2014, Ms. Hawley advised Complainant, via letter, that a Rule 6-10 meeting would be held on June 12, 2015 to discuss the possible need to administer disciplinary action due to Complainant's continued failure to follow Avaya system protocols every day she is on the phones, correctly upload applicant documents, follow eLicensing protocols, and accurately respond to customer queries.

47. In response to Complainant's request to reschedule, a Rule 6-10 meeting was held on June 24, 2014. Complainant attended with two attorney representatives, Jennifer Robinson and Jennifer Wadwa. Ms. Hawley attended with Wendi Kispert, Director of the Office of Human Resources.

48. Ms. Hawley stated the purpose of the meeting was to discuss Complainant's failure to perform job duties outlined in the April 27, 2014 Corrective Action Letter, her improper handling of telephone calls by hanging up or diverting customer calls, her improper use of technical protocols for the Avaya system, and her failure to consistently implement eLicensing technical protocols.

49. During this Rule 6-10 meeting, Complainant stated that her co-worker Mr. McGrew told her she was not responsible for answering phones and that she was only to answer phones "if they are busy." Complainant denied that phones were her primary responsibility.

50. On June 25, 2014, Ms. Hawley provided a written response to Complainant's explanations, confirming that, since early May 2014, Complainant has been assigned to the back desk in the front reception area by Ms. Klein, where she was responsible for answering telephone and email queries from customers. Contrary to Complainant's statements, Mr. McGrew had never been given authority to assign work to his CSC co-workers.

51. On June 26, 2014 Ms. Hawley provided the audio of the 6-10 hearing recording, a video thumb drive, and documentation of issues identified in the corrective actions issued to Complainant, to Complainant's attorneys.

52. On July 14, 2014, Complainant's attorneys responded to the additional information provided by Ms. Hawley, arguing that Complainant was not primarily responsible for answering telephones since her move to the back desk in the reception area in early May 2014, and that the evidence assembled by Respondent does not prove that Complainant disconnected customers.

53. Ms. Hawley considered the arguments raised by Complainant's attorneys before reaching her decision terminate Complainant's employment.

#### Termination Decision

54. Ms. Hawley terminated Complainant by letter dated July 25, 2014. The termination was effective July 31, 2014.

55. Ms. Hawley terminated Complainant for failing to meet the requirements outlined in Complainant's April 27, 2014 Corrective Action, failing to perform competently, and failing to meet the required functions of her position.

56. Complainant timely appealed the termination of her employment on August 7, 2014.

### 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; § 24-50-101, *et seq.*, C.R.S.; *Dep't 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. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The ALJ is charged with making "an independent finding of whether the evidence presented justifies a [disciplinary action] for cause." *Id.* at 706, n. 10. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

## **II. COMPLAINANT COMMITTED THE PRIMARY ACTS FOR WHICH SHE WAS DISCIPLINED.**

On June 4, 2015, Complainant logged onto the Avaya call routing system and informed the system that she was available to accept telephone calls. Complainant admitted that, when phone calls were routed to her telephone and the phone would ring, she hit the iDivert button instead of answering her telephone. While Complainant denies that she ever intentionally hung up on anyone, the result of her actions was to repeatedly disconnect customers who were calling for assistance. Complainant testified that she believed that hitting the iDivert button would send the caller back into the queue. Instead, hitting the iDivert button sent the caller to the voice mail for the phone on Complainant's desk. Because voice mail was not set up on this telephone, the caller was ultimately disconnected. In addition, the security video footage provided by Respondent shows two occasions when Complainant lifted the receiver and hung it up after a light on her telephone lit up, indicating an incoming call.

Complainant testified that, on June 4, 2014, her primary job was to handle walk-in and email queries. She believed that she was only supposed to answer the telephone if there were over six calls in the queue. This testimony was contradicted by Complainant's supervisor, Ms. Klein, as well as by Mr. Baca. In addition, Complainant's inability to recall the majority of incidents and events about which she was questioned during the hearing renders her testimony unreliable.

While Complainant denies that she intentionally hung up on customers, she made repeated decisions not to answer the phone calls that were coming to her phone, and to hit the "iDivert" button instead of answering these phone calls. These actions by Complainant were willful; the result of these willful actions was the repeated disconnection of incoming phone calls. For several weeks prior to Complainant's departure on June 4, 2014, CDE received numerous complaints from customers about being disconnected. After Complainant was put on administrative leave on June 4, 2014, these customer complaints ceased.

Respondent has proven by preponderant evidence that Complainant committed the primary acts for which she was disciplined: failing to answer telephone calls and disconnecting customers on June 4, 2015.

## **III. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO RULE OR LAW.**

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner that after a consideration of the 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 court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Ms. Hawley testified that she gathered information concerning Complainant's job performance and her actions on June 4, 2015 from Dr. O'Neil and Ms. Klein. She shared this information with Complainant and her attorneys during the Rule 6-10 process, and allowed them to respond. When Ms. Hawley received the responses from Complainant's attorneys, she did additional investigation about the concerns they raised. The preponderant evidence presented during the hearing demonstrated that Ms. Hawley used reasonable diligence and care to procure all relevant evidence, and candidly and honestly considered that evidence, before reaching a decision to discipline Complainant.

Respondent's decision to terminate Complainant's employment was not arbitrary or capricious, as those terms are defined in *Lawley*, and did not violate any rule or law.

#### **IV. THE DISCIPLINE IMPOSED WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES.**

Respondent's disciplinary action must comport with Board Rule 6-9, which requires that a decision to take disciplinary action "shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Ms. Hawley properly considered these factors before reaching a decision to terminate Complainant's employment.

Not only did Complainant's actions on June 4, 2014 result in the disconnection of numerous customer calls, the fact that customer complaints about being disconnected had been received for weeks before June 4, 2014, and ceased as soon as Complainant was no longer in the workplace, demonstrate that Complainant's failure to answer the telephone when calls were routed to her occurred for a number of weeks prior to her termination. Complainant's disconnection of incoming customer calls had the serious effect of delaying, or possibly denying, service to those customers. Complainant had been previously advised of her need to use the Avaya system properly on March 17 and 18, and again on April 27, 2014, as part of two corrective actions; however, she refused offers of coaching or training. Under these circumstances, the decision to terminate Complainant's employment complied with Board Rule 6-9.

#### **V. NEITHER PARTY IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.**

Attorney fees are warranted if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule 8-33, 4 CCR 801. Board Rule 8-33 provides the following additional guidance:

- A. Frivolous means that no rational argument based on the evidence or law was presented;

- B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;
- C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such action or defense.

As discussed above, Respondent's disciplinary demotion was not arbitrary, capricious, or contrary to rule or law, and was within the range of reasonable alternatives. Because Complainant has not prevailed in this matter, Complainant is not entitled to an award of attorney fees and costs.

Similarly, while Complainant has not prevailed in her appeal, Respondent has not demonstrated that Complainant's appeal was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Therefore, Respondent is not entitled to an award of attorney fees and costs.


### CONCLUSIONS OF LAW

- 1. Complainant committed the acts for which she was disciplined.
- 2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 3. The discipline imposed was within the range of reasonable alternatives.
- 4. Neither party is entitled to an award of attorney fees and costs.

### ORDER

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

Dated this 23<sup>rd</sup> day  
of July, 2015.



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Susan J. Tyburski  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, CO 80203  
(303) 866-3300

**CERTIFICATE OF MAILING**

This is to certify that on the 23<sup>rd</sup> day of July, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Jennifer Robinson, Esq.

[REDACTED]

Stacy L. Worthington  
Senior Assistant Attorney General  
Jack D. Patten, III  
Assistant Attorney General

[REDACTED]

[REDACTED]

Andrea Wood

## **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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.

