

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2016B069

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DANNY ROME,
Complainant,

vs.

UNIVERSITY OF COLORADO AT COLORADO SPRINGS, FACILITIES MANAGEMENT,
Respondent.

Administrative Law Judge ("ALJ") Rick Dindinger held the evidentiary hearing in this matter on July 25, 2016, at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. Complainant Danny Rome represented himself. Erica Weston, Esq., and Catherine Gleeson, Esq., both with the Office of University Counsel, represented Respondent.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment effective March 18, 2016. Complainant argues that the decision to discipline him was arbitrary, capricious, or contrary to rule or law. Complainant requests reinstatement to the position of Custodian I.

Respondent argues that the disciplinary action was not arbitrary, capricious, or contrary to rule or law. Respondent seeks this tribunal to affirm the discipline and requests that all relief sought by Complainant be denied and that his appeal be dismissed with prejudice.

For the reasons discussed below, Respondent's actions are **affirmed**.

ISSUES

- A. Whether Complainant committed the acts that resulted in the disciplinary action;
- B. Whether the decision to impose discipline was arbitrary, capricious, or contrary to rule or law; and
- C. Whether the level of discipline administered was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

Background

1. Complainant Danny Rome started working for Respondent on January 5, 2004. He was a certified state employee.

2. Complainant worked as a Custodian I in Respondent's Auxiliary Operations at the University's Colorado Springs campus.

3. Generally, the position of Custodian I performs cleaning duties and maintains student-housing facilities on campus, including trash removal, general cleaning, and assistance with maintenance needs. This position comes in regular contact with student residents, University faculty and staff, and student staff members.

4. Jeffery C. Davis, the Executive Director for Auxiliary Operations, has worked for Respondent for approximately 26 years. Mr. Davis was Complainant's appointing authority. Mr. Davis was either Complainant's first level or second level supervisor from approximately 2008 to the time of Complainant's termination.

5. Respondent gave a Corrective Action to Complainant on November 6, 2009. Among other things, that Corrective Action states that Complainant needed "to work on his communication skills with his peers, with the resident students in the housing villages, and with his supervisor." The Corrective Action also states: "Danny must also communicate with his supervisor, peers, and resident students with an appropriate level of respect and dignity, refraining from raising his voice or speaking over individuals or out of turn."

6. Respondent's performance evaluations reflect overall "Meeting Expectations" ratings or higher for all performance periods. His rating for the 2005—2006 period rated him as "Outstanding." Over the years, several of the evaluations ranked Complainant as meeting expectations in the category of interpersonal skills.

7. Respondent rated Complainant as "Below Expectations" in the category of interpersonal skills on his evaluations for 2008-2009 and 2014-2015. The notes from the 2008-2009 evaluation state: "Danny comes across very negatively to the residents." A narrative from the 2013-2014 evaluation expresses concern regarding "the lack of respect that Danny shows others." The explanatory notations from the 2014-2015 evaluation state: "Interpersonal skills are a major issue. Usually has negative attitude. Does not work well with others. A deterrent to morale and motivation."

8. Mr. Davis testified that he met with Complainant several times to discuss performance concerns and to coach Complainant regarding appropriate interpersonal skills. Coaching notes from August 27, 2014, state: "Your attitude towards your co-workers has to improve. Irritating them to the point that they avoid you will not be tolerated." Complainant admitted in discovery that he has received "multiple coaching sessions regarding appropriate communication and interpersonal skills."

The Incident Giving Rise to Discipline

9. The incident giving rise to the discipline occurred on February 19, 2016.

10. The incident involved Complainant and two of his co-workers, Melissa Hurt (Custodian I) and Randy Kotewa (Structural Trades II).

11. The incident occurred at Crestone House, a building that provides housing for students. The incident occurred on the first floor of Crestone in a hallway that connects bathrooms, a mail room, a custodial office, and some other rooms. The custodial office is just down the hall from the women's bathroom.

12. On the morning of the incident, Randy Kotewa was making repairs to a hole in the ceiling of the women's bathroom. Mr. Kotewa's step ladder was half in the bathroom and half in the hallway. Melissa Hurt was in the hallway immediately outside of the bathroom. Ms. Hurt was eight months pregnant.

13. The women's bathroom door was propped open with a doorstep. The doorstep was wedge-shaped, made of light pine, and measured approximately 3 to 4 inches in length by approximately an inch and a half at its highest point, tapering downward.

14. Complainant entered the hallway and started in the direction of the custodial office. To get to the custodial office, Complainant needed to walk past the women's bathroom. As Complainant passed between Mr. Kotewa and Ms. Hurt, he mumbled something inaudible. After he moved past them, Complainant told Ms. Hurt that she was not supposed to use the doorstep being used to prop open the bathroom door. Complainant told Ms. Hurt that she should use another doorstep. In response, Ms. Hurt told Complainant to give them a minute and that the project was almost finished.

15. The conversation between Complainant and Ms. Hurt became heated. Ms. Hurt said that Complainant did not own the doorstep and that "it ain't your doorstep." In response, Complainant grabbed the doorstep from underneath the bathroom door and said "is now."

16. After Complainant removed the doorstep, the door started closing but Mr. Kotewa quickly moved his foot to hold the bathroom door open.

17. Complainant retrieved another doorstep from a room in close proximity to the bathroom (either the custodial office or the mailroom). Complainant then "threw" or "tossed" or "flung" this second doorstep in Ms. Hurt's and Mr. Kotewa's direction. The doorstep landed approximately 6 inches from Mr. Kotewa's feet, behind the bathroom door. Complainant threw the doorstep using an underhanded motion. Complainant threw the doorstep with anger and aggression.

18. After Complainant threw the doorstep, Ms. Hurt said "do not throw that damn doorstep at me, I'm pregnant." (Ms. Hurt's testimony at the hearing regarding this statement was undisputed. Complainant's written description of the incident states that "Hurt said, 'Oh, that's fuckin great. That's so fuckin rude; throwin stuff. Is that how you act?'").

19. Complainant then yelled and cursed at Ms. Hurt.

20. Complainant yelled, "I don't want anything to do with you, you fucking bitch." (Complainant did not testify at the hearing about the incident. Complainant's written description of the incident states that he said "act like a [sic] Evil Bitch, but you ain't my Moma." Mr. Kotewa testified that the language Complainant used was "fucking bitch." Mr. Kotewa's written statement prepared on the day of the incident mirrors his testimony at the hearing. Mr. Kotewa's testimony was clear and credible. Ms. Hurt testified alternatively that the language Complainant used was "shut up bitch, you're not my fucking mother," "shut the fuck up bitch, you're not my mother," and "shut the fuck up bitch, you're not my fucking mother." Ms. Hurt's written statement prepared on the day of the incident quotes Complainant as saying: "I don't want nothing to do with you Bitch.")

21. Mr. Kotewa and Ms. Hurt immediately left the area and exited the building.

22. Mr. Kotewa testified that Complainant's actions made him feel somewhat "unnerved," "not comfortable," and unsure of "what he's capable of doing." Mr. Kotewa also observed that Ms. Hurt was visibly upset.

23. As a result of Complainant's actions, Ms. Hurt feared for her safety. Ms. Hurt suffered a physical reaction that included experiencing Braxton Hicks contractions. Emergency medical services were called to assist Ms. Hurt.

24. Ms. Hurt called Respondent's campus police. In turn, the campus police charged Complainant with violation of § 18-9-111, C.R.S. ("Harassment—Kiana Arellano's Law"). That charge was subsequently dismissed.

25. Later on the day of the incident, Mr. Davis put Complainant on paid administrative leave.

The Rule 6-10 Meeting

26. On or about February 24, 2016, Respondent notified Complainant of a Rule 6-10 meeting. The notification attached certain police reports, as well as statements by Ms. Hurt and Mr. Kotewa.

27. Mr. Davis interviewed both Mr. Kotewa and Ms. Hurt in advance of the Rule 6-10 meeting. Mr. Davis also reviewed written statements by Mr. Kotewa and Ms. Hurt concerning the incident. He also reviewed the police report of the incident.

28. Respondent held a Rule 6-10 meeting with Complainant on March 3, 2016.

29. Complainant provided information to Mr. Davis during and subsequent to the Rule 6-10 meeting. This information including photographs, audio recordings, and a written narrative prepared by Complainant of the incident. Mr. Davis reviewed the information prior to making the decision to terminate Complainant. Among other things, Complainant's written narrative of the incident admitted that he said "is now" and then pulled the doorstop from the bathroom door, "dropped tossed the mailroom stop toward the back end of the restroom door," and "replied mockingly, 'act like a Evil Bitch, but you ain't my Moma.'"

30. Mr. Davis also reviewed and considered Complainant's performance history, including past performance evaluations, past coaching sessions, and the Corrective Action dated November 6, 2009.

31. Mr. Davis testified that during his discussions with Complainant, Complainant admitted to (a) throwing the doorstop toward Mr. Kotewa and Ms. Hurt; and (b) referring to Ms. Hurt as a "fucking bitch." Mr. Davis' testimony was undisputed.

32. There was no evidence at the hearing of any procedural deficiencies with the Rule 6-10 meeting.

The Decision to Terminate Complainant's Employment

33. Respondent terminated Complainant from his employment effective March 18, 2016.

34. Among other things, the disciplinary letter states: "The University must operate in an environment where students, faculty and staff feel safe on campus and certainly feel safe in their residential/dormitory rooms and in their work place."

35. Mr. Davis testified that while he considered a lesser discipline, "circumstances had created such an unsafe, unsecure situation for both our staff as well as the residents in the housing complex that he worked, that it warranted termination."

36. Complainant timely appealed his termination of employment.

DISCUSSION

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12 § 13(8); § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Reasons for discipline listed in Board Rule 6-12 include:

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 of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if the employment is continued.

See also § 24-50-125(1), C.R.S.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by a preponderance of the 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 706. The Board may reverse the agency's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

I. RESPONDENT ESTABLISHED THAT COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Respondent met its burden of proof. Mr. Kotewa and Ms. Hurt testified at the hearing that Complainant: (a) antagonistically grabbed a doorstop they were using; (b) threw a second doorstop in their direction with anger and aggression; (c) yelled; and (d) called Ms. Hurt a "fucking bitch." Mr. Kotewa's testimony was clear, consistent and credible. Ms. Hurt's testimony was generally consistent and mostly credible. Complainant did not testify at the hearing about the incident or offer any credible evidence refuting Mr. Kotewa's or Ms. Hurt's version of the events.

II. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY OR CAPRICIOUS.

In determining whether an agency's decision to discipline an employee is arbitrary or

capricious, this Board 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 persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

The appointing authority, Mr. Davis, used reasonable diligence and care to procure evidence in making his decision. He received statements from, and met with, both Mr. Kotewa and Ms. Hurt. He received and reviewed the police report of the incident. He also reviewed Complainant's performance history, including past evaluations, coaching sessions, and a prior Corrective Action. In addition, Mr. Davis reviewed the information that Complainant gave him, including Complainant's written narrative of the incident.

Mr. Davis reached his decision thoughtfully after thoroughly reviewing all of the evidence, including the information presented by Complainant. This is reflected both in Mr. Davis' testimony and the analysis set forth in the disciplinary letter.

The decision to discipline Complainant was based on conclusions from the evidence that Mr. Davis procured prior to making his decision. As described above, that evidence showed that Complainant (a) grabbed a doorstop being used by others without their permission; (b) threw a second doorstop in the direction of two of his co-workers in anger and aggression; (c) yelled at one of his co-workers; and (d) called that co-worker a "fucking bitch." A reasonable person cannot be compelled, upon honest and fair consideration of the entire record, to reach a conclusion contrary to the one made by Mr. Davis.

III. THE LEVEL OF DISCIPLINE IMPOSED WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

If the administrative law judge finds valid justification for the imposition of a disciplinary action, the judge may nonetheless modify the discipline administered if it was arbitrary, capricious, or contrary to rule or law. Board Rule 6-12(B). In deciding to take disciplinary action, Respondent is required to consider "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." Board Rule 6-9. Moreover, Board Rule 6-2 provides:

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 nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority *may proceed immediately to disciplinary action, up to and including immediate termination*.

(Emphasis added.) Disciplinary actions may include dismissal. See § 24-50-125(1), C.R.S.; see also Board Rule 6-12.

Complainant's actions involved both verbal aggression and physical aggression. The verbal aggressions were yelling and referring to a co-worker as a "fucking bitch." Yelling is not

appropriate in the workplace. The epithet is a highly derogatory and abusive phrase that should never be used in the workplace. The physical aggressions were: (a) antagonistically grabbing a work tool being used by another; and (b) angrily throwing a doorstop in the direction of co-workers. While there are more dangerous forms of physical aggression, Complainant's actions were still serious and detrimental. His actions demonstrate a lack of self-control. His actions displayed unwarranted anger. Complainant's actions also demonstrate a lack of respect for boundaries and a disregard of the safety of others. While Complainant's physical actions are unacceptable in the workplace, they are acutely offensive in a residential building and in the presence of an 8-months pregnant woman. Complainant's actions are sufficiently flagrant and serious that immediate discipline is appropriate, up to and including termination. *See, e.g.,* Board Rule 6-2.

Complainant's actions resulted in his co-workers suffering emotional and physical harm. Mr. Kotewa testified of feeling unnerved, uncomfortable, and unsure of "what he's capable of doing." Ms. Hurt suffered a physical reaction that included experiencing Braxton Hicks contractions. Emergency medical services were called to assist Ms. Hurt. Additionally, Complainant's actions resulted in police involvement.

Complainant has a history of previous problematic behavior. Respondent gave Complainant a Corrective Action on November 6, 2009. Among other things, that Corrective Action states: "Danny must also communicate with his supervisors, peers, and resident students with an appropriate level of *respect and dignity*, refraining from *raising his voice* or speaking over individuals or out of turn" (emphasis added). Respondent rated Complainant as "Below Expectations" in the category of interpersonal skills on his evaluations for 2008-2009 and 2014-2015. The explanatory notations from the 2014-2015 evaluation state: "Interpersonal skills are a major issue. Usually has negative attitude. Does not work well with others. A deterrent to morale and motivation." Mr. Davis met with Complainant several times to discuss performance concerns with Complainant. Complainant himself admitted in discovery that he has had received "multiple coaching sessions regarding appropriate communication and interpersonal skills." While Complainant's actions on February 19, 2016, were worse than those that Respondent had previously addressed, it is disturbing that Respondent's efforts to help Complainant correct his behavior have not been successful. *See, e.g.,* Board Rule 6-9.

Complainant did not offer any mitigating evidence relevant to the events of February 19, 2016. He did not claim that there was an emergency requiring him to immediately grab and remove the doorstop. In fact, Complainant did not offer any explanation for grabbing the doorstop. Complainant did not testify that he threw the doorstop by accident or that he did not wish to hit, hurt, or intimidate his co-workers. Complainant did not claim that either Mr. Kotewa or Ms. Hurt yelled at him. He did not testify to any ambient noise or other circumstance that required him to yell. Complainant did not claim that either Mr. Kotewa or Ms. Hurt called him any names.

At no point during the hearing did Complainant show or express any remorse about his actions. There is no evidence that he ever apologized to anyone about the incident. There is no evidence that he recognized that his actions during the incident were wrong. Complainant's failure to take any responsibility for his actions supports upholding the level of discipline imposed by Respondent.

Therefore, this ALJ concludes that termination of Complainant's employment constitutes a discipline that falls within the range of reasonable alternatives and that it was not arbitrary, capricious, or contrary to rule or law.

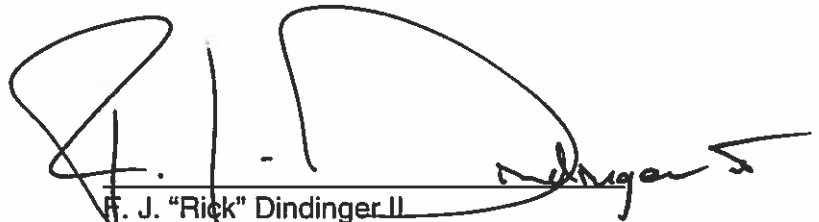
CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action in imposing discipline was not arbitrary, capricious, or contrary to rule or law.
3. The level of discipline administered was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's disciplinary termination of Complainant is **affirmed**.

Dated this 10th day
of August, 2016,
Denver, Colorado.



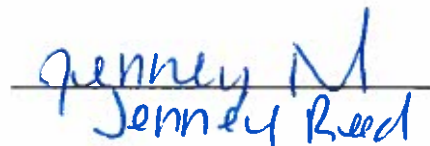
F. J. "Rick" Dindinger II
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 10th day of August, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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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.

