ANNOTATIONS OF DECISIONS OF THE BOARD 2004-2014

Abolishment of Position

Administrative Action

Administrative Discharge

Arbitrary and Capricious

Attorney Fees

Code of Conduct

Confidentiality

Constructive Discharge

Disciplinary Actions

Discrimination – Civil Rights

Exempt Position

Failure to Report

Jurisdiction

Layoff

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Performance

Probationary Employee

Progressive Discipline

Resident Safety

Retaliation

Selection

Senior Executive Service (SES)

Sexual Harassment

Whistleblower_State_Employee_Protection_Act

Workplace Violence

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Abolishment of Position

Harris v. Colorado State University, Communications and Creative Services, case number 2010B065 (May 21, 2010).

Complainant appealed the decision to reduce his position as a Production Operator II from full-time to half-time during a reorganization as arbitrary, capricious or contrary to rule or law, and sought reinstatement to his former full-time status. After hearing, the ALJ determined that the appointing authority's decision to reduce Complainant's work to half-time was not arbitrary and capricious, and was not contrary to rule or law. The ALJ found that the evidence at hearing demonstrated that Respondent made its decision to close the Print Shop based upon long-standing and on-going fiscal problems for CCS created in significant part by the failure of the Print Shop to host enough work to pay its operating costs; that the fiscal problems experienced by CCS were attributable in significant part to a shrinking demand for Print Shop services, and that there was good reason to expect that trend to continue or accelerate; and that the decision to close the Print Shop was only made after attempting to remedy the fiscal issues through other, unsuccessful, means. Affirming Respondent's decision to abolish Complainant's position within the Print Shop and to move Complainant to a half-time position action, the ALJ concluded that Respondent's decision to reduce Complainant's hours was not contrary to rule or law because CSU followed the proper procedures for reorganization, as prescribed in state statute and Board rules; Complainant, therefore, did not persuasively demonstrate that the reorganization plan, and the resulting decision to reduce his hours to half-time, was contrary to rule or law.

Administrative Action

Gallardo v. Department of Corrections, Division of Adult Parole and Community Corrections, case number 2004G046 (December 3, 2004).

Complainant, a correctional officer, appealed DOC's denial of his grievance. Following a preliminary recommendation in which the ALJ recommended that the Board deny the petition for hearing, the Board voted to grant him a hearing on the parties' compliance with the grievance process and his claim of hostile work environment. After hearing, the ALJ determined that the parties complied with the grievance process, although Respondent inadvertently failed to send the decision to Complainant's current address, and Complainant did not raise arguments or introduce evidence concerning his contention, in his grievances, that management created a hostile work environment for prison staff by failing to hold inmates accountable for violating the penal code. The only reference to retaliation and harassment in Complainant's trial brief was a reference to "adverse actions (i.e.) reassignment/displacement of Mr. Gallardo from Y.O.S." Affirming Respondent's actions, the ALJ concluded that Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and Complainant is not entitled to attorney fees and costs.

Administrative Discharge

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Lanoue v. Department of Corrections, Limon Correctional Facility, case number 2005B044 (March 10, 2005).

Complainant, a security officer, appealed her administrative termination, seeking reinstatement, back pay, benefits, attorney fees and costs, and placement in a different facility. After hearing, the ALJ found that Administrative Procedure P-5-10 did not apply because Complainant was able to return to work and DOC's Human Resource office had the Medical Certification Form from the treating doctor, which indicated that Complainant could perform the essential functions of her job, but failed to provide that important medical report to the appointing authority before he made his decision to administratively terminate Complainant. Finding that Respondent's action was arbitrary and capricious or contrary to rule or law, the ALJ rescinded the administrative termination, denied Complainant's request for placement in a different facility, and awarded attorney fees and costs to Complainant.

Montoya v. Colorado State University at Pueblo, case number 2005B059 (April 8, 2005).

Complainant, a custodian, appealed his administrative termination, seeking reinstatement, back pay and benefits, and attorney fees. After hearing, the ALJ found that Respondent did not discriminate against Complainant on the basis of disability and that its action was not arbitrary, capricious, or contrary to rule or law. The ALJ concluded Complainant does not have a disability under the Colorado Anti-Discrimination Act, since his limitations do not substantially limit a major life activity. The ALJ further concluded that Complainant is not a "qualified person" under the Act, because he could not perform the essential functions of his position with or without reasonable accommodation. The ALJ also determined that Respondent was diligent in its pursuit of complete information on Complainant's physical limitations, gave appropriate consideration to all information before it, acted reasonably in this situation, provided Complainant with unpaid leave in order to give him extra time to prepare for his return to work, and hired a temporary employee for two months to assist him in performing the essential functions of his position. Thus, Respondent's action was not arbitrary, capricious, or contrary to rule or law, and attorney fees are not warranted.

Salazar v. Colorado State University at Pueblo, case number 2006B053 (October 24, 2006).

Complainant, a custodian, appealed his administrative termination by Respondent, alleging discrimination based on disability, age, race, and national origin, and seeking reinstatement. After hearing, the ALJ found that Respondent's failure to obtain accurate, objective, and reliable information about Complainant's ability to perform the essential functions of his position, prior to making a decision to terminate Complainant's employment, was arbitrary and capricious. Reinstating Complainant with full back pay and benefits, the ALJ concluded that Respondent did not discriminate against Complainant on the basis of disability, race, or national origin, but did discriminate against him on the basis of age.

Martinez v. Department of Human Services, Division of Facilities Management, case number 2007B075 (February 25, 2008).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a custodian, appealed the termination of his employment by Respondent, due to exhaustion of Complainant's leave. In his appeal, Complainant asserted claims of unlawful discrimination on the basis of disability, age, race, and a claim of medical discrimination, and sought accommodation with a job in state employment, medical insurance, one year of severance pay, documentation of Custodian II and Vocational Education work, and recognition of five years of good service. Affirming Respondent's action, the ALJ concluded that Complainant did not present a *prima facie* case of discrimination and the appointing authority's action in terminating Complainant's employment due to exhaustion of leave was not arbitrary, capricious, or contrary to rule or law.

Griffith v. The Board of Trustees of the Colorado School of Mines, case number 2010B101 (July 19, 2010).

Complainant, a custodian, appealed her administrative separation from employment for exhaustion of leave, seeking reinstatement to her position. After hearing, the ALJ concluded that Complainant has not demonstrated that Respondent's decision to separate her from employment in order to re-open her position was made without sufficient information, made without consideration of her circumstances, or by drawing unreasonable conclusions from the information gathered by Respondent. Therefore, the ALJ ruled that Respondent's decision to separate Complainant from employment was not arbitrary, capricious, or contrary to rule or law. Affirming Respondent's decision to separate Complainant from employment, the ALJ dismissed Complainant's appeal with prejudice.

Brown v. Department of Human Services, Colorado Mental Health Institute at Pueblo, case number 2012B128 (September 12, 2013).

Complainant worked at CMHIP as a Psychiatric Admissions staffer on graveyard shift. She became disabled and was no longer able to perform physical take-downs (CTI) or CPR or train for these duties. She requested an accommodation by removing those duties from her position; her request was denied and she was administratively separated after exhaustion of leave. She appealed, alleging disability discrimination. Affirming Respondent, the ALJ held that performance of those duties was an essential function of her position because of the serious consequences that could result if the need for a take-down during her isolated shift occurred

Arbitrary and Capricious

Barron v. Department of Labor and Employment, Office of Field Operations, case number 2004B088 (June 10, 2004).

Complainant, a labor and employment specialist, appealed his termination. After hearing, the ALJ found that Respondent failed to meet its burden of proving that Complainant committed the acts upon which his termination was based and thus failed to show just cause for the termination; and Respondent's action was arbitrary, capricious and contrary to rule or law in that Respondent violated Board Rules R-6-5, R-6-6, and R-6-10. The ALJ also found that Respondent did not discriminate against Complainant on the basis of disability and Complainant is not disabled, as

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

defined by the Colorado Anti-Discrimination Act. The ALJ ordered that Complainant's termination is rescinded, Respondent is to reinstate Complainant to his former position as a Labor and Employment Specialist I with back pay and benefits to the date of termination, and Respondent is to pay Complainant his attorney fees and costs.

Rensel v. Department of Human Services, Office of Information Technology Services, case number 2004B073 (August 26, 2004).

Complainant, an information technology professional, appealed his termination. After hearing, the ALJ found that Respondent failed to meet its burden of proving that Complainant committed the acts upon which his termination was based (failure to perform competently). Respondent offered no evidence or exhibits which would document Complainant's compliance or non-compliance with those tasks set out in a performance goals memo issued after Complainant received a disciplinary action. Given the lack of proof or evidence that Complainant was not performing adequately, it was ruled that disciplining him was arbitrary and capricious. In addition, the ALJ found that the actions of Respondent prior to the R-6-10 meeting were contrary to rule or law in that Complainant's termination was presupposed. Given the previous factual findings, the ALJ found that the discipline imposed was not within the range of reasonable alternatives. Complainant was awarded attorney fees and costs because, based upon the complete lack of evidence presented by Respondent to support its disciplinary action against Complainant, the ALJ found that Respondent's action was groundless. The ALJ also found that statements made and actions taken by Complainant's direct supervisors paired with the subsequent events against Complainant were disrespectful of the truth and rendered the Respondent's action against Complainant an act of bad faith. Respondent's action against Complainant was rescinded, Complainant was to be reinstated to his former or a comparable position, without his former supervisors in his chain of command, and was to be awarded attorney fees and costs. See **Attorney Fees**.

Hawkins v. Department of Corrections, Youthful Offender System, case number 2004B120 (February 21, 2005).

Complainant, a correctional officer, appealed her disciplinary pay reduction and sought reinstatement of her right to apply for a promotion. After hearing, the ALJ determined that Respondent failed to prove that Complainant placed "the program ahead of the completion of good security practices" and she was lax on security; rather, the evidence demonstrated that she was keenly aware of the conflict between case manager and security officer duties, she routinely made constructive recommendations to management on how to increase security at YOS, and there is no factual basis in the record to support a Code of Conduct violation. The ALJ concluded that Respondent's action was arbitrary and capricious and contrary to rule or law because the warden refused to use reasonable diligence and care to obtain the evidence she needed in order to make an informed decision to discipline Complainant, failed to consider the other serious security breaches that contributed to the escape of two juveniles, and failed to give appropriate consideration to the fact that Complainant was required to be a mentor, counselor, and advocate for the youth. The ALJ ordered that the disciplinary action be rescinded and that Complainant be permitted to apply for promotions, retroactive to the date of discipline.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Pfaff v. Department of Corrections, case number 2004B112(C) (February 28, 2005).

Complainant, a correctional officer, appealed a corrective action and disciplinary demotion, seeking rescission of both actions, reinstatement, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ affirmed the corrective action in a finding that Complainant committed insubordination. With regard to the demotion, the ALJ concluded that Complainant did not commit the acts upon which the discipline was based, that the appointing authority did not attempt to procure evidence he was required to consider prior to imposing discipline, violated the mandates of Board Rule R-6-10 by not meeting with Complainant and his counsel, and failed to obtain and consider mitigating circumstances or information presented by Complainant, in contravention of Board Rule R-6-6. The ALJ ordered that Respondent reinstate Complainant to the rank of Lieutenant retroactive to the date of demotion, provide Complainant with full back pay and benefits to the date of demotion, and pay Complainant's reasonable attorney fees and costs incurred in appealing the demotion.

Ruchman v. Department of Revenue, Enforcement Group, Hearings Division, case number 2005B085 (September 26, 2005).

Complainant, a hearing officer, appealed his disciplinary termination, seeking reinstatement, back pay, benefits and attorney fees and costs, and alleging a violation of First Amendment political association rights. After hearing, the ALJ determined that Respondent did not meet its burden of proving that Complainant willfully violated its Emergency Action Plan and the two orders of his superiors to immediately evacuate the building by taking longer than he should have to evacuate; approximately two minutes does not equate to a willful refusal to evacuate. In addition, the ALJ found that Respondent failed to give candid and honest consideration to the significant mitigation before it in this matter, and erroneously considered a corrective action which should have been removed from Complainant's personnel file, rendering a decision that was arbitrary and capricious and a disciplinary action that was not within the range of reasonable alternatives. The ALJ concluded that Respondent did not terminate Complainant in part for exercising his First Amendment political association rights and attorney fees are not warranted, thus rescinding the termination to allow for alternate disciplinary or corrective action, not to exceed a thirty-day suspension without pay, and awarding Complainant back pay and benefits to the date of reinstatement.

Bellio v. Department of Revenue, Liquor and Tobacco Enforcement, case number 2005B052(C) (December 23, 2005).

Complainant, a criminal investigator, appealed his suspension, demotion and the imposition of a corrective action by Respondent, and sought rescission of the corrective action, rescission of the disciplinary action, restoration to the rank of Criminal Investigator I in the Liquor & Tobacco Enforcement Division, an award of back pay for the three-day suspension and the difference in pay between the rank of Criminal Investigator I and Criminal Investigator Intern during the period of demotion, entry of a cease and desist order to prohibit the agency from enforcing any current work plans issued against him, and the initiation of disciplinary action against his

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

supervisors for engaging in unlawful discrimination against him based upon his age. After hearing, the ALJ found that Complainant did not commit all of the acts for which he was disciplined and Respondent failed to fairly consider all of the evidence before it, including the fact that, as established by Complainant's performance evaluations and his nomination for a prestigious state government award, he was a valued employee who had worked for the state for over seventeen years without any prior communication or interpersonal problems with supervisors or a disciplinary history. Additionally, the ALJ determined that, given the gathered evidence, Respondent did not reach reasonable conclusions, thus rendering its decisions arbitrary, capricious, or contrary to rule or law and, further, that the discipline imposed was outside the range of reasonable alternatives. The ALJ ordered that the April 2004 Corrective Action be rescinded and the November 2004 Disciplinary Action be modified to a corrective action; Complainant is awarded full back pay and benefits for the period of his suspension and demotion; Respondent did not discriminate against Complainant based on age; and attorney fees and costs are not awarded.

Sarek v. Department of Corrections, case number 2006B040 (April 3, 2006).

Complainant, an academic teacher, appealed his disciplinary termination from Respondent, seeking reinstatement, back pay, and attorney fees and costs. After hearing, the ALJ concluded that Complainant committed the act for which he was disciplined, which was sleeping while on duty on August 18, 2005. However, the ALJ also found that while the appointing authority gave candid and honest consideration to the evidence he gathered before exercising his discretion, he failed to gather all of the evidence. In addition, during the Board Rule 6-10B meeting, Respondent failed to provide Complainant with the date of the allegation with which he was charged and failed to disclose the source of that allegation, thus depriving him of an opportunity for a meaningful hearing before he was terminated. Although the discipline imposed was within the range of reasonable alternatives, the ALJ deemed Respondent's actions to be arbitrary, capricious, or contrary to rule or law, and awarded attorney fees, full back pay, and benefits from the date of his termination until the last day of his evidentiary hearing to Complainant.

Emerson v. Department of Human Services, case number 2005B097 (June 29, 2006).

Complainant, a licensed practical nurse, appealed her disciplinary reduction in pay in the amount of 5% for 30 days, seeking reinstatement of the pay deducted from her paycheck. After hearing, the ALJ determined that although Complainant committed one of the acts for which she was disciplined, Respondent's action was arbitrary, capricious, or contrary to rule or law, and the discipline was not within the range of reasonable alternatives. The ALJ found that there was no evidence in the record that the appointing authority considered Complainant's lack of corrective or disciplinary actions in the past or her previous performance evaluations; that the appointing authority gave candid and honest consideration to the mitigating information Complainant provided in her February 5 letter; or that the appointing authority confirmed the facts upon which she based the discipline (falsification of a patient's medical record), prior to making her decision, in violation of the *Lawley* standard. Rescinding the disciplinary pay reduction, the ALJ ordered that Respondent remove the disciplinary action from Complainant's personnel file and reimburse her for the 5% in pay for thirty days that was deducted from her paycheck, allowing the

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

imposition of a corrective action in place of the disciplinary action.

Jayme v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Facility, case number 2005B131 (August 14, 2006**).**

Complainant, a safety and security officer, appealed his termination, seeking reinstatement, back pay and benefits, and attorney fees. After hearing, the ALJ found that many of the statements attributed to Complainant, which were used to justify his termination on grounds of violence in the workplace, were not credible, noting that these allegations had not been investigated or corroborated by Respondent, that many of the allegations were made without dates or context, and that the allegations did not surface until after he had angered staff members by reporting an act of suspected child abuse by his unit staff to local social services. The ALJ also found that the failure to inform Complainant of who had made the allegations against him during the 6-10 meeting violated the Board's rule requirements for a pre-disciplinary meeting and that Respondent had failed to prove a violation of its workplace violence policies because much of what Respondent presented was testimony that Complainant had acted in odd or disconcerting ways, or that his actions made the staff uncomfortable or angry, and such information lacked the necessary indication of actual violence or threatening behavior indicative of violence.

In addition, the ALJ found that Complainant's derogatory and sarcastic statements concerning his supervisors constituted multiple acts of insubordination, including his issuance of a memo declaring that he did not intend to follow his supervisor's order to stop using his digital camera and his rejection of a team agreement on how to handle a specific security risk. Finally, the ALJ found that Respondent's violation of the 6-10 procedures and the termination of his employment on unsupported grounds, while usually requiring the remedy of re-instatement of employment, was not viable in this case because Complainant had committed multiple acts of insubordination justifying termination of employment. Instead, the ALJ modified the termination, ordering an award of back pay to Complainant under C.R.S. §24-50-125(2), from the date of termination to the date that he received proper notification of the grounds for termination, finding that the date of proper notification was the first day of hearing. The ALJ did not order Complainant's reinstatement or attorney fees.

Myers v. Department of Personnel and Administration, Division of Information Technologies, Network/Communications Services, case number 2006B079 (November 24, 2006).

Complainant, a Telecom/Electronic Specialist III, appealed his termination, seeking reinstatement, back pay and benefits, attorney fees and costs, and reimbursement for uninsured medical expenses. After hearing, the ALJ determined that Complainant committed only one of the three acts for which he was terminated, although his employment was terminated for yelling and pointing at his supervisor and for being insubordinate to his supervisors, both violations of a corrective action, and for engaging in outside employment by changing a light bulb at the top of a radio tower without prior approval, the act which the ALJ found Complainant committed. Rescinding the termination and reinstating Complainant's employment with full back pay, benefits and statutory interest, the ALJ concluded that Respondent's action was arbitrary, capricious, or contrary to rule or law, except when Respondent found that Complainant had

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case**.** For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

violated secondary employment rules as to the KGIW tower work; the discipline imposed was not within the range of reasonable alternatives; attorney fees are not warranted; and Complainant is not entitled to reimbursement of medical expenses.

Sailas v. Regents of the University of Colorado, University of Colorado at Denver and Health Science Center, Office of Laboratory Animal Resources/Center for Laboratory Animal Care, case number 2006B109 (November 30, 2006).

Complainant, a research animal attendant, appealed his termination, seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the act alleged, as he pled guilty in federal court to one felony count of Unlawful Possession of a Destructive Device. However, the ALJ also found that Respondent's decision to terminate him was arbitrary, capricious, or contrary to rule or law because: (1) state law prohibits the discipline of an employee solely because of conviction of a felony or other offense involving moral turpitude, and (2) Respondent's decision to terminate Complainant because of a felony conviction which was fundamentally unrelated to his employment was based upon conclusions that reasonable men fairly and honestly considering the evidence would not reach. Rescinding the termination and reinstating Complainant with back pay, benefits, and interest, the ALJ also concluded that the discipline imposed was not within the range of reasonable alternatives and attorney fees are not warranted.

MacDonald v. Department of Transportation, case number 2007B030 (March 16, 2007).

Complainant, a welder, appealed his termination, seeking reinstatement and other remedies to make him whole. After hearing, the ALJ determined that Complainant had refused to participate in temporary assignments to take snowplow training and to go to the Empire Junction Maintenance Yard to perform welding work on sanders located at that site because he believed that these orders are in violation of the terms of his 2003 Settlement Agreement. This case originally appeared before the Board as an appeal of a significant disciplinary sanction imposed in May of 2006 for the same actions, which Complainant had appealed to the Board. In September 2006, the ALJ in this earlier case issued a ruling which affirmed Respondent's interpretation of the 2003 Settlement Agreement and allowed the imposition of discipline for failure to perform the temporary assignments. Once the ALJ's order was issued, but prior to the Board's consideration, Respondent held a 6-10 meeting with Complainant and asked Complainant if he was going to accept the disputed assignments. Complainant told Respondent that he had appealed the order to the Board and that he believed the order was incorrect. Respondent terminated Complainant's employment based upon his refusal to comply with the ALJ's order. The ALJ in this appeal held that termination of Complainant's employment for refusal to obey an ALJ order which was on appeal to the Board was an arbitrary and capricious act because Complainant has a right under the state Administrative Procedures Act to ask the Board for a final agency order and only a final agency order would be binding under these circumstances. Additionally, the ALJ in this case held that imposition of discipline under these unusual circumstances would constitute imposition of two instances of discipline for the same act, a violation of Board Rule 6-8. Rescinding the termination, the ALJ ordered that Complainant be reinstated with back pay and benefits.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Donaldson v. Department of Public Safety, Colorado State Patrol, case number 2006B051(C) (May 16, 2007).

Complainant, a security guard, appealed three actions: (1) a corrective action issued on September 22, 2005; 2) a disciplinary action of a 5-day suspension issued on December 13, 2005; and 3) a disciplinary termination issued on February 15, 2006, which the ALJ consolidated into one case. Complainant argued that Respondent discriminated against him on the basis of disability, age, race, and national origin, and sought reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant committed some of the acts for which he was disciplined, including failing to give status checks during his first day on the dayshift; leaving his assigned work area for forty-one minutes to go to the State Personnel Board, and changing out of his uniform shirt to complete the errand; refusing to answer and leaving his supervisor's office, which constituted insubordination; making allegations of discrimination in the form of a written report against a co-worker, as directed by his supervisor; and failing to return the fitness-to-return to work in a timely manner. However, the ALJ also found that Respondent's actions were arbitrary, capricious, or contrary to rule or law, in that the appointing authority reached a decision based on conclusions that were contrary to those that would be reached by reasonable men fairly and honestly considering the same evidence. With regard to the corrective action, the ALJ stated, "To issue a corrective action to someone, acting under direct orders, who perceives and reports those perceptions in good faith, has a chilling effect on future reports of discrimination in the workplace." The ALJ further found that the corrective action and two disciplinary actions were not within the range of reasonable alternatives, were imposed without consideration of mitigating circumstances, or were too severe. Although no attorney fees were awarded, the ALJ modified Respondent's actions to rescind the corrective action and the five-day suspension, imposing an alternate disciplinary action of a one-day suspension; to rescind the termination, imposing an alternate disciplinary action on Complainant of a thirty-day suspension; and to award Complainant to back pay and benefits to the date of reinstatement.

Romero v. Regents of the University of Colorado, University of Colorado at Boulder, Housing Facilities Services, case number 2007B015(C) (February 19, 2008).

Complainant, a project manager, appealed Respondent's August 11, 2006 imposition of a ten percent pay reduction for a period of twelve months and Respondent's termination of his employment, effective October 26, 2006, and sought reinstatement of his employment, removal of the disciplinary actions from his file, back pay and interest, attorney fees and costs, and any other relief deemed just and proper. After hearing, the ALJ determined that Complainant committed unprofessionally rude, confrontational or disrespectful communications in 2006 and that Respondent's imposition of discipline for those acts was neither arbitrary, capricious nor contrary to rule or law. The ALJ also found that the pay reduction was within the range of reasonable alternatives under the circumstances. In addition, the ALJ found that the acts that Complainant committed which were the bases for the termination of his employment were technical problems with his work as a project supervisor, and were not related to the prior disciplinary offenses for communication issues. Additionally, Respondent did not demonstrate

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

that Complainant's actions were so flagrant or serious as to warrant immediate discipline. Under such circumstances, Board Rule 6-2 requires that Respondent assess corrective action prior to imposing discipline. Given that these steps were not followed in this matter, the ALJ rescinded the termination of employment as contrary to rule. The ALJ reinstated Complainant with full back pay and benefits, permitted Respondent to impose a corrective action about the technical issues with Complainant's work if it chose to do so, and declined to award attorney fees to Complainant.

Benson v. Department of Corrections, Centennial Correctional Facility, case number 2008B032 (February 27, 2008).

Complainant, a correctional officer, appealed his termination by Respondent, seeking rescission of the disciplinary action, back pay, corresponding benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant did commit the act for which he was disciplined, that is, driving under the influence of alcohol and receiving a DUI on December 10, 2006, which ultimately resulted in a four-day jail sentence. However, the ALJ also found that Respondent's disciplinary termination was arbitrary, capricious, or contrary to rule or law, and the discipline imposed was not within the range of reasonable alternatives because Complainant was disciplined twice for the same incident, in violation of Board Rule 6-8, for his DUI of December 10, 2006: once for receiving the DUI and once for his sentence, which Respondent contended was a separate and distinct incident. Rescinding Respondent's termination of Complainant, the ALJ awarded attorney fees and costs to Complainant.

Pridemore v. Department of Public Health and Environment, case number 2007G073 (May 19, 2008).

Complainant, a surveyor who conducts reviews of long-term care facilities, appealed the denial of her grievance over the imposition of a corrective action issued to her on the basis of complaints filed by facilities she had surveyed as part of her duties, seeking removal of the corrective action, reinstatement to Team Coordinator duties, attorney fees and costs, and such other relief as warranted. Respondent argued at hearing that the appeal should be dismissed because the appeal concerned Respondent's application of Board Rule 8-3 rather than Board Rule 8-8 and, therefore, did not meet the limitations on Board jurisdiction under C.R.S., Section 24-50-123(3). The ALJ found that the grievance procedures adopted by the Board included both the procedures under Board Rule 8-8 for internal complaints and the procedures under Board Rule 8-3 for external complaints, and that the Board therefore had jurisdiction to hear the appeal under C.R.S., Section 24-50-123(3), as well as under Colo. Const. Art. XII, Section 13(8). After hearing, the ALJ determined that Respondent had failed to include an interview with Complainant as part of the investigation and had not permitted Complainant to explain her version of events prior to making the decision to issue Complainant a corrective action. The ALJ found that this procedure was contrary to Board Rule 8-3 as an action which did not constitute an appropriate way to conduct an investigation of an employee's conduct. The ALJ also found that the failure to interview Complainant prior to deciding to impose a corrective action constituted an arbitrary and capricious action because the investigation failed to use reasonable diligence and care to procure the evidence that the agency was authorized to consider. Finally, the ALJ found

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

that the Board's authority to remedy an action by an appointing authority which was arbitrary, capricious or contrary to rule or law should equal, to the extent practicable, the wrong actually sustained by Complainant and which would restore Complainant to the position she would have been in, had the investigation not occurred. Rescinding the corrective action, the ALJ declined to award attorney fees and costs.

Rodriguez v. Regents of the University of Colorado, University of Colorado at Denver, Information Technology Services, case number 2008B106 (January 9, 2009).

Complainant, an Information Technology Professional IV, appealed his demotion, seeking removal of the discipline, reinstatement to his former position, back pay and benefits, and attorney fees and costs. After hearing, the ALJ determined that Respondent failed to prove that Complainant committed the acts for which he was disciplined, including intentionally misleading anyone in his requests for the video footage, failing to follow the normal channels in obtaining the footage, using his position as an IT Pro IV for access to the footage. The ALJ also found that Respondent had failed to prove that Complainant had violated any of the University's policies, including any policy controlling the dissemination of the video footage, the Use of Facilities policy, the Use of Technology Information policy, or the University's Fiscal Code of Ethics. In addition, the ALJ found that Respondent's conclusions that there were violations of the three policies cited as the basis for Complainant's discipline, or there was willful misconduct in this case, were conclusions that reasonable persons would not reach given the facts of this case and the terms of the policies. Rescinding Respondent's actions and reinstating Complainant to his former IT Pro IV position, the ALJ concluded that Respondent's action was arbitrary, capricious, or contrary to rule or law and the discipline imposed was not within the range of reasonable alternatives.

Gonser v. Department of Transportation, Region 4, case number 2009B018 (February 12, 2009).

Complainant appealed his termination by Respondent from his current position of EIT III, seeking reinstatement to his previous position of Professional Engineer I, back pay and benefits calculated at the level of PE I, interest on lost wages based upon an rate of 1% computed quarterly, accommodations to allow Complainant to perform work duties as stated in his original Position Description Questionnaire, attorney fees, and legal expenses. After hearing, the ALJ determined that Complainant did not commit the acts for which he was disciplined; that is, he did not violate departmental values, the code of ethics, and other ethical standards and professionalism, and he did not lie about the status of his debt and refuse to pay for the truck damage for which he was found to be liable. In addition, the ALJ found that the appointing authority's action was arbitrary, capricious, or contrary to rule or law because Respondent's failure to recognize that the debt amount was reasonably in dispute, and that the issue of the debt had not yet been resolved, constituted a failure to give candid and honest consideration to the evidence before it. Respondent's conclusion that Complainant's dispute of the debt implicated an enforceable professional standard was also found to be an unreasonable interpretation of the lawful basis for discipline. Rescinding the disciplinary termination, which was found not to be in the range of reasonable alternatives, the ALJ reinstated Complainant with full back pay and benefits to the position of EIT III, and statutory interest on his back pay and benefits, but

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

declined to award him his attorney fees and costs.

Vigil v. Department of Corrections, Centennial Correctional Facility, case number 2009B021 (February 20, 2009).

Complainant appealed his termination by Respondent, and Complainant‘s counsel sought an order reversing the warden’s decision to terminate Complainant’s employment and awarding back pay and benefits until the date of Complainant’s death, as well as attorney fees and expenses. Prior to hearing, the ALJ had raised the issue of mootness or other reason to dismiss the action because Complainant had died shortly after filing the appeal with the Board. After briefing, the ALJ determined that the appeal could survive under state law and that the issue was not moot because of the difference in pay and benefits which would be available if Complainant's employment had not been terminated. After considering the evidence presented at hearing, the ALJ concluded that Complainant had been convicted of a DUI and had been sentenced to probation and a short term of house detention and, therefore, he had committed the acts for which he was disciplined. The ALJ found, however, that the appointing authority’s action was arbitrary, capricious, or contrary to rule or law because Complainant had a twelve-year career with good to commendable performance which had been unblemished by any corrective or disciplinary action, and Respondent’s decision to terminate his employment failed to either qualify for an exception or apply the requirements of progressive discipline under Board Rule 6-2. The ALJ also found that Respondent’s disciplinary action failed to take into account the full circumstances of the incident and the lack of departmental policy making conviction of a crime or house detention grounds for termination. Rescinding the termination and reinstating Complainant‘s employment status with full back pay and benefits, calculated as if he had worked his normal shifts until and including the date of Complainant's death on September 8, 2008, the ALJ reversed the appointing authority’s decision, but declined to award him attorney fees and costs.

Harp v. Department of Human Services, Colorado Mental Health Institute at Pueblo, case number 2009B030 (June 22, 2009).

Complainant, a safety and security officer in the F-2 unit, which houses patients who are at risk of being the most violent and dangerous patients at the facility, appealed her termination by Respondent, seeking an order reversing her termination, back pay and benefits, and an award of attorney fees and expenses. After hearing, the ALJ concluded that Complainant committed some of the acts for which she was terminated, including using unapproved holds on a patient in the restraint room on July 21, 2008. However, the ALJ also found that, while Respondent’s investigation was not arbitrary, capricious or contrary to rule or law, its disciplinary action was arbitrary, capricious or contrary to rule or law because Respondent failed to use progressive discipline, and Complainant’s work record included no mention of any prior corrective actions or disciplinary actions relating to her choice of physical tactics or inappropriate holds prior to the incident in question. The ALJ also found that the disciplinary termination imposed on Complainant was not within the range of reasonable alternatives. Rescinding the termination, the ALJ reinstated Complainant with full back pay and benefits from the date of the termination of her employment, permitting Respondent to issue a corrective action to her related to her use of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

inappropriate holds during the restraint of the patient. The ALJ declined to award attorney fees.

McCauley v. University of Colorado Denver, University of Colorado Denver Police Department, case number 2010B067 (April 21, 2010).

Complainant, a patrol officer, appealed his disciplinary pay reduction by Respondent, seeking rescission of the disciplinary action. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including failing to contact the juvenile in question's parents until six days after the incident at the bus stop. However, the ALJ also found that Respondent's actions were arbitrary, capricious or contrary to rule or law because there was no policy at UCD regarding the requirement of contacting a juvenile's parents, Complainant made a good faith effort to reach the juvenile's mother, and given the information and training he had, Complainant did not fail to perform competently. Rescinding the disciplinary action, the ALJ concluded that the discipline imposed was not within the range of reasonable alternatives.

Gietl v. Department of Public Safety, State Personnel Board case number 2011B066 (August 1, 2011).

Complainant was the Director of Human Resources for the Department of Public Safety. He was disciplinarily terminated after three years in the position. The ALJ concluded that Respondent failed to prove that Complainant committed most of the acts upon which discipline was based. In addition, Respondent violated Board Rules 6-2 and 6-9 and acted in an arbitrary and capricious manner by failing consider the required criteria in 6-9, failing to consider his two years of satisfactory performance and other mitigating information, and failing to impose corrective action prior to disciplinary action. The ALJ also concluded that Respondent did not engage in gender discrimination against Complainant, and that Complainant was not entitled to an award of attorney fees and costs.

Hilario v. University of Colorado Boulder, University Memorial Center, case number 2012B036 (May 14, 2012).

Complainant appealed the decision of the University to impose a pay reduction on the grounds that Complainant had exhibited a pattern of stalking and harassing co-workers in the past, and had stalked and harassed two co-workers on a particular date by reporting that the two co-workers were sitting down on the job. The ALJ found that the evidence concerning the pattern of stalking and harassment did not provide sufficient detail to determine if the alleged actions were correctly being considered to be stalking, harassment, or other improper behavior on Complainant's part. Additionally, the ALJ found that management encouraged workers to report other co-workers for sitting down on the job. Complainant's report about his two co-workers who were sitting down when he saw them was a truthful report that Complainant made to the appropriate supervisor. The only way that such a report could be considered to be misconduct would be if Complainant had been previously told that, although others may report their co-workers for failing to work, the standards of conduct were different for Complainant. After reviewing Complainant's history, the ALJ determined that Complainant had not been told he could not take such actions as of the time of the incident. The ALJ also noted that the University could change the expectations for Complainant in order to address the morale problem and the

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

personal disputes that had developed in the workplace, but that under the circumstances, Complainant was doing what he was permitted to do. As a result, Respondent was not able to sustain either of the factual allegations against Complainant by a preponderance of the evidence. The ALJ ordered that Complainant's pay reduction be refunded to him, with statutory interest.

Bell v. Board of Trustees for Metropolitan State College, case number 2012B071 (June 14, 2012).

Complainant was a certified Lab Coordinator III employed by Respondent Metropolitan State College prior to her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant did not commit the acts for which she was disciplined, that Respondent's disciplinary action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent's action was therefore rescinded. In particular, Respondent did not meet its burden to prove that Complainant failed to adhere to safety regulations and practices. Respondent did not produce an objective set of safety regulations and practices that Complainant was required to comply with, nor did Respondent prove that Complainant failed to abide by any general safety regulations and practices imposed by law or her PDQ. Complainant's direct supervisor testified on her behalf, and believed that Complainant was performing her job well, as reflected by exceeding expectations performance evaluations. Progressive discipline was not followed, because the two prior corrective actions were unrelated to the disciplinary action. Complainant's request for attorney fees was denied, because Complainant did not demonstrate that the action was frivolous, groundless, or made in bad faith. Case is discussed under **Disciplinary Actions** and **Progressive Discipline.**

Williams v. Department of Public Safety, Colorado State Patrol, case number 2011G028 (July 16, 2012).

Complainant was a 12-year employee who had been promoted to Captain at the time he resigned. His evaluations were excellent. Complainant was gay but had not disclosed it at the Patrol. During his tenure, Complainant witnessed anti-gay bias slurs and incidents at all staff levels and filed two complaints about anti-gay incidents, neither of which resulted in action by the Patrol to correct the conduct. Ten weeks after resignation, Complainant applied for reinstatement.

Respondent required Complainant to undergo the background investigation and polygraph exam. During the pre-test interview, Complainant made pre-test admissions that he had accidently viewed a video of child pornography for a few seconds and had flagged it on the website, and that one time a massage had ended in his being masturbated by the masseuse. The polygraph examiner asked Complainant if the masseuse was a male or female. Complainant responded truthfully that it was a male. Complainant was upset by the question and had a significant reaction to the polygraph test. The question violated the Patrol Polygraph policy prohibiting questions pertaining to sexual orientation.

Respondent denied reinstatement to Complainant on the basis of his failed polygraph test within two business days of the polygraph test without interviewing Complainant, consulting agency

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

counsel, HR, or reviewing any written policies or standards. The Patrol had recently hired two new Trooper Cadets and one reinstatement Trooper who failed the polygraph.

The ALJ concluded that Respondent's decision to deny reinstatement was arbitrary and capricious and constituted discrimination based on sexual orientation. Front pay was awarded, based on the unfeasibility of reinstatement due to the evidence Complainant would likely be placed in danger as a Trooper. Attorney fees were awarded based on the Patrol's failure to genuinely consider reinstating Complainant and conducting a sham decision-making process. Case is discussed under **Attorney Fees** and **Discrimination – Civil Rights.**

Williams v. Department of Public Safety, Colorado State Patrol, case number 2011G028, Order Awarding Back Pay and Front Pay (August 16, 2013; Amended August 29, 2013).

After a hearing on appropriate remedy, ALJ ordered back pay from date of reinstatement denial through December 21, 2012, date of final board order affirming Initial Decision, and front pay through age 55, which is when he would have retired from the Patrol. Complainant's request for front pay until age 67 was rejected. Front pay consists of difference between what Complainant would have earned as a Trooper and what he will earn at an irrigation company.

Biddle v. Department of Personnel and Administration, Division of Human Services, case number 2013B003 (November 2, 2012).

Complainant was a certified General Professional VI (Benefits Strategist) employed by Respondent Department of Personnel & Administration, Division of Human Resources until her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant committed some of the acts for which she was disciplined, that Respondent's disciplinary action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent's action was therefore rescinded. In particular, Respondent proved that Complainant yelled and cursed at her supervisor in a hallway, and that she had become overly emotional at times in the past. However, the decision to terminate Complainant's employment was arbitrary and capricious and contrary to Board Rule 6-9. In particular, although disciplinary action was appropriate under Board Rule 6-2, the decision to terminate Complainant's employment did not adequately take into account Complainant's employment history (ten years without a corrective action or disciplinary action, and no significant issues noted in annual performance evaluations) or the abundant mitigating circumstances. The termination decision was therefore also outside the range of reasonable alternatives. However, the appointing authority may consider disciplinary action up to a 30 day suspension without pay. Complainant's request for attorney fees was denied, because Complainant did not demonstrate that the action was frivolous, groundless, or made in bad faith. **See also Progressive Discipline.**

Ksouri v. Governor's Office of Information Technology, case number 2013B076(C) (January 31, 2014).

Complainant appealed a corrective action, a disciplinary pay reduction, and his termination of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

employment. The ALJ found that Complainant did not commit the acts upon which the disciplinary pay reduction was based; the action was arbitrary and capricious; and Respondent retaliated against Complainant for engaging in protected conduct under the Colorado Anti-Discrimination Act, reversing the corrective action and pay reduction. The ALJ also found that Complainant committed some of the acts upon which the discipline was based; therefore, the termination was modified to lesser discipline, to be determined by the appointing authority. **See also Discrimination – Civil Rights.**

Attorney Fees

Williams v. Department of Public Safety, Colorado State Patrol, case number 2011G028 (July 16, 2012).

Complainant was a 12-year employee who had been promoted to Captain at the time he resigned. His evaluations were excellent. Complainant was gay but had not disclosed it at the Patrol. During his tenure, Complainant witnessed anti-gay bias slurs and incidents at all staff levels and filed two complaints about anti-gay incidents, neither of which resulted in action by the Patrol to correct the conduct. Ten weeks after resignation, Complainant applied for reinstatement.

Respondent required Complainant to undergo the background investigation and polygraph exam. During the pre-test interview, Complainant made pre-test admissions that he had accidently viewed a video of child pornography for a few seconds and had flagged it on the website, and that one time a massage had ended in his being masturbated by the masseuse. The polygraph examiner asked Complainant if the masseuse was a male or female. Complainant responded truthfully that it was a male. Complainant was upset by the question and had a significant reaction to the polygraph test. The question violated the Patrol Polygraph policy prohibiting questions pertaining to sexual orientation.

Respondent denied reinstatement to Complainant on the basis of his failed polygraph test within two business days of the polygraph test without interviewing Complainant, consulting agency counsel, HR, or reviewing any written policies or standards. The Patrol had recently hired two new Trooper Cadets and one reinstatement Trooper who failed the polygraph.

The ALJ concluded that Respondent's decision to deny reinstatement was arbitrary and capricious and constituted discrimination based on sexual orientation. Front pay was awarded, based on the unfeasibility of reinstatement due to the evidence Complainant would likely be placed in danger as a Trooper. Attorney fees were awarded based on the Patrol's failure to genuinely consider reinstating Complainant and conducting a sham decision-making process. Case is discussed under **Arbitrary and Capricious** and **Discrimination – Civil Rights.**

Code of Conduct

Tarver v. Department of Corrections, case number 2004B138 (August 23, 2004).

Complainant, a correctional officer, appealed his termination. At hearing, the ALJ found that

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant committed the acts for which he was disciplined, including giving inmates access to his personal post office box as a means of sending illegal drugs to be brought into the prison; agreeing to engage in illegal conduct with an inmate, e.g., to bring inmates illegal drugs sent to his personal post office address; failing to report the inmates' repeated attempts to have him bring drugs into the prison; and disclosing personal information, in the form of his address, to inmates. Affirming the disciplinary termination, the ALJ also found that Respondent's action was not arbitrary, capricious, or contrary to rule and law, as the warden considered all information reasonably necessary to make a determination of appropriate discipline, and that Complainant was not entitled to award of attorney fees and costs.

Allison and Allison v. Department of Corrections, Limon Correctional Facility, case number 2004B155(C) (December 29, 2004).

Complainants, a medical records technician and a correctional support trades supervisor, appealed their termination from employment, seeking imposition of an alternate, lesser form of discipline, back pay, and an award of attorney fees and costs. After hearing, the ALJ determined that, while Respondent was unable to prove by preponderant evidence at hearing that Mrs. Allison was in violation of the grievance processing guidelines and other performance standards, Respondent did prove that Mrs. Allison acted with a complete lack of integrity and in an extremely dishonest, unprofessional manner concerning her brother, in violation of several provisions of the DOC Code of Conduct. In addition, the ALJ found that the imposition of termination against Mrs. Allison was appropriate because of the serious nature of her violations: she worked at a prison and assisted her brother in evading arrest and in depriving a bonding agent of a $5,000.00 bond she had posted in good faith on her brother's behalf and she lied about some of the events in connection with the ordeal, which demonstrates poor judgment and lack of integrity, and reflect poorly on DOC. Although the ALJ ruled that Respondent violated Board Rule R-6-10 in Mrs. Allison's pre-disciplinary meeting, the ALJ also found that violation was harmless error. With regard to Mr. Allison, the ALJ concluded that Respondent proved that Mr. Allison committed all of the acts upon which discipline was based, including making false statements to investigators, committing the same acts upon which Mrs. Allison's termination was based, and violating several additional provisions of the Code of Conduct. Taken together, the ALJ found that the Allisons' conduct was flagrant and serious. Affirming the termination of both Mr. and Mrs. Allison, the ALJ concluded that Respondent's actions were not arbitrary, capricious, or contrary to rule and law; and Complainants are not entitled to an award of attorney fees and costs or back pay.

Fails v. Department of Corrections, San Carlos Correctional Facility, case number 2005B007 (February 25, 2005).

Complainant, a correctional officer, appealed his disciplinary pay reduction and sought attorney fees and costs. After hearing, the ALJ affirmed Respondent's action, determining that Complainant committed willful violations of the DOC Code of Conduct provisions and the facility policy governing appropriate communication with the mentally ill inmates, including allegations by staff and inmates that Complainant had taunted inmates by whispering statements and threats to them, had kicked their cell doors, and had engaged in other hostile and

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

inappropriate actions. The ALJ found that the discipline imposed was not arbitrary, capricious or contrary to rule or law in that the report of the Inspector General, which was provided to Complainant prior to the R-6-10 meeting, contained statements from a fellow officer, co-worker statements without attribution, names of inmates alleged to have been mistreated by Complainant which corroborated the statements of the officer and co-workers, and the name of the prison psychologist who further corroborated the staff and inmate statements.

Enriquez v. Department of Corrections, case number 2005B068 (July 6, 2005).

Complainant, a correctional officer, appealed his disciplinary demotion and sought reinstatement to the position of sergeant, back pay and benefits, and an award of attorney fees and costs. At hearing, the ALJ found that Complainant violated the DOC Staff Code of Conduct, as well as regulations barring contraband in the facility; his pattern of misconduct demonstrated a notable lack of judgment with respect to maintaining professional boundaries with inmates; and he failed to understand and exercise his leadership role as a sergeant and neglected his duty to act as a role model of professionalism for other staff and inmates. Affirming Respondent's action, the ALJ rules that Respondent's action was not arbitrary, capricious, or contrary to rule or law; and attorney fees are not warranted.

Lehman v. Department of Corrections, Arkansas Valley Correctional Facility, case number 2005B125 (November 10, 2005).

Complainant, a major and a custody and control manager at the facility, appealed his disciplinary termination, seeking reinstatement, back pay and attorney fees and costs. After hearing, the ALJ determined that the credible and undisputed evidence established that Complainant drove 80 miles and reported to work in an intoxicated state on April 14, 2005, putting both the facility and the public at risk. Complainant contended that his medication prolonged and intensified the clearance of alcohol from his system and Complainant did not realize he was intoxicated. However, the ALJ ruled that Respondent's action was not arbitrary and capricious, as the warden considered an investigator's report and all written and oral information regarding the incident before making the decision to terminate Complainant's employment; and nothing in the literature Complainant provided regarding his medication supported Complainant's contention that the medication caused alcohol to stay in his system for a longer period of time, or would intensify the level of alcohol in his system. Finally, in affirming Respondent's action, the ALJ concluded that the discipline imposed was within the range of reasonable alternatives and attorney fees and costs are not warranted.

Hines v. Department of Corrections, Sterling Correctional Facility, case number 2004B052(C) (November 21, 2005).

Complainant, a correctional officer, appealed her disciplinary demotion and subsequent termination, alleging that, in demoting her, Respondent discriminated against her on the basis of race and retaliated against her for having filed a race discrimination claim in her appeal of a previous abolition of her position, and that, in terminating her, Respondent discriminated against her on the basis of race, sex, disability, and created a hostile work environment. After hearing,

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

the ALJ concluded that Complainant committed the acts for which she was disciplined, including not being able to adhere to normal working hours, which caused disruption in her workplace; violating call-off procedures and failing to report for work, which demonstrated a disrespect for DOC administrative regulations and the directives of her supervisors; and willfully violating the mandatory testing requirement, although she knew it would result in a positive test result and the imposition of disciplinary action. Affirming Respondent's actions, the ALJ also determined that Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and were within the range of reasonable alternatives; Respondent did not discriminate against Complainant on the basis of race, sex, or disability, and did not create a hostile work environment; and Complainant is not entitled to an award of attorney fees and costs.

Grasmick v. Department of Corrections, case number 2007B070 (July 19, 2007).

Complainant, a correctional officer, appealed his disciplinary termination by Respondent, seeking reinstatement, the imposition of alternate discipline, and attorney fees and costs. After hearing, the ALJ determined that Respondent proved by preponderant evidence that Complainant committed the acts for which he was disciplined, including leaving work in his uniform, purchasing alcohol, drinking to the point of serious intoxication as he drove a thirty-five mile distance, being in full uniform at the time of his arrest for driving while intoxicated, having a blood alcohol level nearly twice the legal maximum, pleading guilty to driving while under the influence of alcohol, losing his license for a one-year period, serving a seven-day jail sentence, and violating several provisions of the DOC Code of Conduct, thus, jeopardizing the integrity of DOC and calling into question his ability to perform effectively in a CO position. Affirming Respondent's disciplinary termination, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Riley v. Department of Corrections, case number 2011B100 (July 12, 2012).

Complainant was a certified Community Parole Officer employed by Respondent Department of Corrections prior to his disciplinary termination. Although Complainant filed a timely appeal with the Board, due to a clerical error, the Board did not hold a hearing within 90 days of the filing of the appeal. Respondent moved to dismiss for lack of jurisdiction. The ALJ denied the motion to dismiss, concluding that the 90-day deadline was directory, rather than jurisdictional, in nature. Thereafter, Complainant moved to dismiss and grant the relief requested in the appeal. The ALJ denied Complainant's motion.

After a 5-day evidentiary hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, that Respondent's disciplinary action was not arbitrary and capricious or contrary to rule or law, and that the discipline imposed was within the range of reasonable alternatives. Respondent's action was therefore affirmed. In particular, Respondent proved by preponderant evidence that Complainant misrepresented the truth during an official police investigation, that he failed to immediately report allegations of sexual misconduct to his supervisor, and that he failed to properly document his interactions with the parolee in question. Respondent demonstrated that its investigation and the discipline imposed were not arbitrary or

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

capricious, or contrary to rule or law. Lastly, due to the position of trust held by a CPO, Respondent demonstrated that despite the fact that progressive discipline was not followed, the conduct was sufficiently serious to conclude that termination was not outside the range of reasonable alternatives. Case is discussed under **Disciplinary Actions** and **Jurisdiction**.

Confidentiality

Lewthwaite v. Regents of the University of Colorado, University of Colorado Denver, case 2011B042 (May 16, 2011).

Complainant appealed the imposition of a pay reduction of $279 per month for a year. After hearing, the ALJ found that Complainant had released confidential patient records without a valid release from the patient involved, and then had involved the patient in creating a back-dated release and not told her supervisors the truth about the release when interviewed about it. The ALJ affirmed the imposition of discipline as the type of serious and flagrant action warranting the imposition of immediate discipline under Board Rule 6-2, and affirmed the significant pay reduction as reasonable under the circumstances.

Montoya v. Department of Public Health and Environment, case number 2013B113 (January 30, 2014).

Complainant appeals the termination of her employment as a Health Professional IV. Complainant asks for reinstatement to her position, back pay, and other relief as determined by the ALJ. CDPHE) argued that the termination was properly imposed after Complainant violated information security procedures and policies, made untruthful statements, eavesdropped on private conversations, and was untimely in her work. After hearing, the ALJ found that the evidence was insufficient to sustain many of the violations alleged by Respondent, but sufficient to sustain that Complainant violated the security protocols for confidential medical information and made untruthful statements during the Board Rule 6-10 process. The ALJ additionally found that, while Respondent utilized an improper procedure in the Board Rule 6-10 meeting process by having more than one assistant to the appointing authority in the meeting, this error had no material effect on the process and did not warrant a modification of the outcome of the case. Finally, the ALJ found that, given that Respondent's ability to carry out its public health duties depends upon the agency's ability to securely handle confidential medical information (and particularly sensitive information concerning communicable diseases), Complainant's violations of security protocols and her statements concerning those matters created a fundamental trust issue for Complainant's continued employment. Termination of employment was within the range of reasonable disciplinary alternatives under such circumstances, as the ALJ concluded, and Respondent's termination of Complainant's employment was affirmed.

Constructive Discharge

Little v. Department of Corrections, case number 2006B013 (May 25, 2006).

Complainant, a correctional officer, appealed Respondent's rejection of his withdrawal of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

resignation, asserting that he was constructively discharged. After hearing, the ALJ found that the Negotiated Resignation into which Complainant had entered with Respondent was ambiguous, although Complainant did intend to resign when he signed the document; Respondent violated Board Rule 7-5B in rejecting Complainant's timely withdrawal of his resignation; Complainant did not knowingly and voluntarily forfeit his right to appeal his resignation; Complainant was, in fact, constructively discharged; Complainant is entitled to a hearing to challenge the basis for his termination; and Complainant is not entitled to an award of attorney fees and costs. In her decision, the ALJ ordered that Respondent accept Complainant's withdrawal of resignation, and that the termination letter issued to Complainant be given full force and effect, both retroactive to August 5, 2005.

DePaul v. Department of Human Services, Division of Youth Corrections, Marvin Foote Youth Service Center, case number 2009G018 (April 20, 2009).

Complainant, a security officer, appealed his resignation, which he alleges was forced, seeking reinstatement, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ found that Complainant cannot be said to have been constructively discharged despite Complainant's arguments that Respondent was requiring him to attend a Board Rule 6-10 meeting, he was fearful of his work environment, he received a performance reminder document, he was placed on administrative leave for comments about violence in the workplace which he made during a telephone conversation with Standard Insurance, and his appointing authority promised not put any negative documents in his file in exchange for Complainant's resignation and then reneged on his promise. The ALJ ruled that Complainant resigned voluntarily and his appointing authority advised him to state "personal reasons" as the cause of his resignation to maximize Complainant's chances of obtaining another job within the state system. In addition, the ALJ determined that Respondent did not violate Complainant's rights under the Family Medical Leave Act because Complainant's administrative leave and subsequent scheduled Board Rule 6-10 meeting were not related to his use of FMLA. Dismissing Complainant's appeal, the ALJ concluded that Complainant is not entitled to an award of attorney fees and costs because he did not prevail in this matter.

Disciplinary Actions

Romero v. Department of Human Services, Division of Youth Corrections, Gilliam Youth Services Center, case number 2004B037 (November 26, 2003).

In this case, Complainant, a correctional security services officer, appealed the $150 per month reduction in his pay for a period of four months by Respondent, seeking back pay and removal of the disciplinary action from his personnel file. After hearing, the ALJ concluded that Complainant's emails were inappropriate, discriminatory, derogatory and/or contrary to DHS policy, and that his personal use of the Internet violated Board rules and agency policies; Complainant committed the acts for which he was disciplined; Respondent's actions were not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Bailey v. Department of Public Safety, Colorado State Patrol, case number 2004B043 (December 23, 2003).

Complainant, a state trooper, was suspended without pay for violating CSP Operations Manual, General Orders 2 and 9, and CSP Operations, Chapter 504.1. The appointing authority also directed Complainant to place his weapon in a secure location whenever he was not on duty in order to prevent theft and to provide him written documentation outlining Complainant's proposed security arrangement for his service weapon in the future. In affirming the appointing authority, the ALJ concluded that Complainant committed the acts for which he was disciplined; Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Augillard v. Department of Higher Education, Colorado Student Loan Program, case number 2004B057 (January 26, 2004).

Complainant, an office manager, appealed her disciplinary suspension for five days without pay. After hearing, the ALJ determined that the credible evidence established that Complainant did not have the authority to suspend loan transfers; she did not give notice to her supervisors that she did, in fact, suspend loan transfers; and such suspensions, especially for a four-month period, were a serious breach of CSLP's agreements. Therefore, the ALJ concluded, Complainant committed the acts for which she was disciplined; Respondent's actions were not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Martinez and Baum v. Department of Corrections, case number 2004B038(C) (February 19, 2004).

Complainants Martinez and Baum, a lieutenant and captain in the same unit, appealed their disciplinary fines in the amount of $300.00 and $500.00, respectively, seeking rescission of the disciplinary actions and attorney fees and costs. After hearing, the ALJ concluded that Complainants committed most of the acts for which they were disciplined, including engaging in an ongoing pattern of conduct that gave rise to a perception of an inappropriate relationship, failing to demonstrate fair and consistent treatment of all staff, and acting in a manner that resulted in a widespread perception of favoritism on the unit. The ALJ found that the disciplinary fines of Complainants were not arbitrary, capricious or contrary to rule or law, and ordered that Respondent's action is affirmed and Complainants' appeal is dismissed with prejudice. Martinez' appeal of his transfer was affirmed on grounds it would be detrimental to the unit to reinstate him there.

Anglada-Palma and Slade v. Department of Revenue, Motor Vehicle Business Group, Driver License Section, case number 2004B074(C) (March 16, 2004).

Complainants Anglada-Palma and Slade appealed their disciplinary pay reductions in the amounts of $265.90 and $142.70, as violative of the Federal Labor Standards Act ("FLSA") of 1938, 29 U.S.C. § 201 *et seq*., but did not contest the facts giving rise to the disciplinary action. After briefing, the ALJ determined that the State of Colorado does not utilize the fluctuating

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

workweek method of paying its employees, including Complainants, and the disciplinary fines did not constitute a minimum wage violation. The FLSA requires employers to compensate employees at not less than $5.15 per hour and not less than one and one half times the regular hourly rate for every hour worked over 40 hours per week. In this case, after the disciplinary fine, Anglada-Palma's regular hourly rate was reduced to $13.80 for that month, and Slade's regular hourly rate after her disciplinary fine of $142.70 was $15.64. Therefore, the ALJ concluded that Respondent did not commit a minimum wage violation in imposing discipline.

Kendall v. Department of Public Safety, Colorado State Patrol, case number 2004B089 (April 7, 2004).

Complainant, a state trooper, appealed his two-day disciplinary suspension without pay for escorting a stroke victim and his wife, who was driving their car, to the hospital in what Complainant judged to be a life-threatening situation. After hearing, the ALJ concluded that Complainant committed the acts for which he was disciplined, including violating policies listed in the disciplinary action letter, disregarding a verbal order not to continue with the escort, violating the agency rule prohibiting escorts, and engaging in conduct that endangered others unnecessarily. The primary mitigating factor for Respondent was the fact that Complainant was clearly attempting to do the right thing in the situation. The ALJ found that the appointing authority's action was not arbitrary, capricious or contrary to rule or law and attorney fees and costs was not warranted.

Grove v. Department of Labor and Employment, Office of Field Operations, Workforce Development Programs, case number 2004B032 (April 8, 2004).

Complainant, a labor and employment specialist, appealed his termination from employment for continuing performance problems. At hearing, the ALJ found that Respondent gave him a number of opportunities to improve his performance, he failed to comply with the terms of the corrective action and failed to meet the minimum standards for any of the objectives set forth in the performance improvement plan, he was unable to function at an acceptable level in the position over a sustained period of time, and it was reasonable for the agency to determine that ultimately it had to terminate him. Complainant had also incurred multiple hours of sick and annual leave without prior approval or notification, in violation of the corrective action and agency rules. The ALJ ruled that Complainant committed the acts for which he was disciplined, and the actions of the appointing authority were not arbitrary, capricious or contrary to rule or law.

Wegman v. Department of State, Secretary of State, case number 2004B082 (May 6, 2004).

Complainant, an administrative assistant, appealed her suspension without pay for two weeks by Respondent. After hearing, the ALJ concluded that Complainant has had a long-standing history of interpersonal conflicts with co-workers and improper handling of documents filed with the Secretary of State. In reaching a decision, the ALJ took into account the fact that Complainant has received four corrective actions over a fifteen-month period for behavior which, despite warnings, workspace reconfigurations, work reassignments and detailed document handling

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

instructions, remained unchecked. Affirming the action of the appointing authority, the ALJ ordered that Respondent's action was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives.

Galbreath v. Department of Human Services, Division of Youth Corrections, Mount View Youth Services Center, case number 2005B017 (December 27, 2004).

Complainant, a correctional officer, appealed his five percent reduction in pay for ninety days. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, that is, failing, during an incident, to properly supervise and secure youth who are adjudicated as delinquent. In addition, the ALJ concluded that Respondent's disciplining of Complainant was not arbitrary, capricious or contrary to rule or law because Respondent conducted a thorough investigation of the incident, the lack of supervision and securing of the residents led to an escape, and the appointing authority did not predetermine that Complainant would be disciplined. Affirming Respondent's disciplinary action and dismissing Complainant's appeal with prejudice, the ALJ concluded that the discipline imposed was within the range of reasonable alternatives and attorney fees are not warranted.

Shea v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Services Center, case number 2005B008 (January 20, 2005).

Complainant, a correctional youth security officer, appealed her disciplinary pay reduction. After hearing, the ALJ determined that Complainant's violations of DYC policies 3.20 and 9.17 constituted failure to perform her job competently and willful misconduct by violating DYC rules that affected her ability to perform her job. In her finding that Respondent's action was not arbitrary, capricious or contrary to rule or law, the ALJ concluded that the appointing authority appropriately weighed the mitigating and aggravating factors in arriving at the disciplinary action, the R-6-10 meeting was not insufficient, and the disciplinary action letter did not violate Complainant's due process rights. Affirming Respondent's action and dismissing Complainant's appeal with prejudice, the ALJ ruled that an award of attorney fees and costs was not warranted.

Newborn v. Department of Human Services, Division of Youth Corrections, Gilliam Youth Services Center, case number 2005B034 (February 3, 2005).

Complainant, a correctional security services officer, appealed his termination, seeking reinstatement, back pay, attorney fees and costs. After hearing, the ALJ found that Complainant sent e-mails which were "violent, racial and/or of a sexual nature" after receiving his disciplinary action in 2003, in violation of DYC's policies on internet/intranet access and e-mail, DHS policy VI 2.14, and Board Rule R-1-12. The ALJ further concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law because the appointing authority made it clear during the 2003 R-6-10 meeting that communications of a sexual nature were prohibited, he appropriately weighed mitigating and aggravating factors in reaching his decision, and he did not treat the employee differently than others. Affirming Respondent's action and dismissing Complainant's appeal, the ALJ did not award attorney fees and costs.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Weiser v. Department of Human Services, Division of Developmental Disabilities, case number 2005B054 (April 7, 2005).

Complainant, the Director of the Pueblo Regional Center, appealed her disciplinary pay reduction of $335.18 and requirement to take a class entitled "Cross-Cultural Communication" and a class entitled "Conflict Resolution at Work: Understanding Yourself and Others." After hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, namely, displaying inappropriate anger and using profanity; the discipline imposed was reasonable; and Respondent's actions were not arbitrary and capricious, as the appointing authority considered the results of his investigation, the information he gathered in the R-6-10 meeting, Complainant's prior PMAP, Complainant's PMAP priorities, the DHS Employee Code of Conduct, DHS Policy VI 4.4, Complainant's personnel file, Complainant's previous performance, and employee survey results before imposing discipline. Affirming Respondent's action, the ALJ dismissed Complainant's appeal and did not award attorney fees to either party.

Cowan v. Department of Human Services, case number 2005B018 (June 27, 2005).

Complainant, an accounting technician, appealed her two-day disciplinary suspension, alleging that she was discriminated against on the basis of race, and sought reinstatement of the two days of suspension, reimbursement of lost wages, and an award of attorney fees and costs. After hearing, the ALJ concluded that as an overseer of timekeeping, Complainant failed to keep the timesheet spreadsheet updated on a daily basis and filed the timesheets she received without logging them into the spreadsheet on the computer. In addition, Respondent's discipline was not arbitrary and capricious, as the appointing authority imposed discipline upon Complainant after a thorough investigation, reviewed all documentation, and gave Complainant an opportunity to provide mitigating information. Finally, affirming the disciplinary suspension, the ALJ ruled that Respondent did not discriminate against Complainant on the basis of race and she is not entitled to an award of attorney fees and costs.

Smaaland v. Regents of the University of Colorado, University of Colorado at Colorado Springs, Facilities Services, case number 2005B107 (July 11, 2005).

Complainant, a grounds supervisor, appealed the five percent reduction in his pay by Respondent, seeking back pay, benefits and attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including failure to complete the vehicle conversion work assignment and failure to purchase a spray gun. Although the ALJ concluded that Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law, and attorney fees are not warranted, the ALJ also found that the discipline imposed was not within the range of reasonable alternatives as it was a permanent reduction in pay. The ALJ modified the disciplinary pay reduction to a five percent reduction in pay per month for one year.

Shea v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Service Center, case number 2006B039 (May 31, 2006).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a correctional officer ("SSO I"), appealed her termination by Respondent, seeking reinstatement, back pay and benefits, and an award of attorney fees. After hearing, the ALJ rescinded the termination and reinstated Complainant to her position with full back pay and benefits, finding that Complainant committed the acts for which she was disciplined; Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law; the discipline imposed was not within the range of reasonable alternatives; and attorney fees are warranted. In the ALJ's analysis, Respondent's evaluation of Complainant's responsibility for the care of the resident in question called for an unreasonable interpretation of the facility rules and did not account for the fact that Complainant was only asked to provide her advice to another SSOI employee and then went off duty, while the matter was handled by two other SSOIs, a counselor, and a mental health therapist at the facility. The ALJ also found that termination from employment under the circumstances of this case, and for an employee with the performance history of Complainant, was excessive and not within the reasonable range of alternatives, even if one assumed that there had been rule violations in this case. Finally, the ALJ held that termination under the circumstances of this case constituted a groundless personnel action and warranted the award of attorney fees to Complainant.

Irions v. Department of Corrections, Denver Women's Correctional Facility, case number 2004B024 (June 12, 2006).

Complainant appealed his demotion from the rank of major, seeking reinstatement to his position, back pay or other expenses associated with the demotion, and reasonable attorney fees and costs. After hearing, the ALJ determined that Complainant committed many, although not all, of the acts for which he was disciplined, including inappropriately managing the performance evaluation process for those he supervised, failing to properly manage the preparation for an American Correctional Association ("ACA") audit, neglecting to take care of a deep-cleaning problem with the facility kitchen which was likely to affect the facility's ACA audit results, and having an inappropriate dating and/or romantic relationship with a person within his chain of command. The ALJ did not agree that Complainant had violated AR 1450-5 (which requires evidence of discriminatory harassment based on race, ethnicity, gender, color, national origin, age, religion, sexual orientation, physical disability or mental disability) in the manner in which he handled one of the captains in his chain of command, and the ALJ found that the evidentiary record did not produce a preponderance of the evidence to resolve the allegation of harassment raised by a subordinate female employee. The ALJ concluded that Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law with regard to the incidents which had been sustained at hearing, and that attorney fees were not warranted.

Bullock v. Department of Human Services, case number 2005B010 (July 20, 2006).

Complainant, a General Professional III, appealed his disciplinary termination, seeking reinstatement. After hearing, the ALJ determined that Complainant committed all of the acts for which he was disciplined, including willfully violating his supervisors' directives, engaging in a pattern of insubordination toward his supervisors, and violating the agency's workplace violence policy. Affirming the disciplinary termination, the ALJ concluded that Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law, and the discipline

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

imposed was within the range of reasonable alternatives. In addition, the ALJ determined that Respondent did not discriminate against Complainant and did not violate the Colorado State Employee Protection Act, as Complainant's statements do not constitute protected disclosures under the Act, because they do not relate to an abuse of authority or mismanagement of the state agency.

Hernandez v. Department of Revenue, case number 2006G047 (September 27, 2006).

Complainant, an administrative assistant, appealed her disciplinary termination during the probationary period by Respondent, alleging discrimination against her on the basis of race and national origin and seeking reinstatement. After hearing, the ALJ found that Complainant failed to establish a *prima facie* case of intentional discrimination and that the preponderance of evidence demonstrated that Complainant had ongoing problems performing at a level required of the position, particularly in the areas of customer service and responsiveness to supervisory directives via email. In conclusion, the ALJ determined that Respondent presented sufficient evidence demonstrating a legitimate business reason for terminating Complainant and affirmed the termination, dismissing Complainant's appeal with prejudice.

Quintana v. Department of Transportation, case number 2006B046 (October 12, 2006).

Complainant, a Labor Trades and Crafts supervisor, appealed his thirty-day suspension by Respondent, seeking removal of the disciplinary action from his file, restoration of all back pay and benefits, and no further retaliation or discrimination against him. After hearing, the ALJ found that Complainant had received nude photos at his work e-mail, that the photos were offensive, inappropriate, objectionable, obscene and of a prurient nature, and that he sent the photos to one of his subordinates using Respondent's e-mail system. Affirming Respondent's disciplinary action, the ALJ determined that the decision to impose discipline for violations of both the computer and sexual harassment policies was not arbitrary, capricious, or contrary to rule or law; Complainant did not prove that his discipline was the product of unlawful discrimination; Complainant's discipline is not contrary to Board Rule 6-2; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Maggard v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, case number 2006B058 (October 23, 2006).

Complainant, a certified nursing assistant, appealed her termination by Respondent, seeking reinstatement, back pay, and an award of attorney fees and costs with interest. After hearing, the ALJ found that Respondent's case for terminating Complainant's employment was built upon a series of events taking place during three days at the end of November and early December 2005; however, not all of the allegations about those events were supported by credible and persuasive evidence at hearing. There was persuasive evidence that Complainant had failed to complete the fourth class of the anger management course that she was required to take pursuant to her August 24, 2005 corrective action, that she had failed to talk with anyone about not attending the full class, that she was rude and loud during a discussion with the facility scheduler on one date, and that she told a supervisor that she was "sick of this shit" after being informed that she was being

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

placed on administrative leave. The ALJ concluded that Complainant committed only some of the acts for which she was disciplined; Respondent's action in disciplining Complainant was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was not within the range of reasonable alternatives; and attorney fees are not warranted. The ALJ ordered that Complainant is reinstated with full back pay and benefits, except that the amount of back pay is to be calculated as if Complainant had served a 30-day suspension without pay.

Applegate v. Department of Personnel and Administration, case number 2006B107 (November 2, 2006).

Complainant appealed his disciplinary demotion by Respondent to a Structural Trades I, seeking rescission of the demotion and reinstatement to his position as a Structural Trades II. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined. The ALJ found that following the October 2005 flood causing over half a million dollars in damage, Complainant was directed to follow the new procedure, which required that he isolate the floor prior to making a repair in a bathroom. The ALJ further found that, on April 10, 2006, fully aware of the potential disaster that could result from violating this procedure, Complainant knowingly and intentionally failed to follow the procedure, which resulted in significant flooding damage and the necessity of replacing all of the computer servers in the building. Affirming the disciplinary demotion, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives.

Radebaugh v. Department of Human Services, case number 2005B141 (December 28, 2006).

Complainant, a Laundry Worker I, appealed his disciplinary termination by Respondent, seeking reinstatement to his position and an award of back pay and benefits. He claimed disability discrimination on the basis of a brain injury. After hearing, the ALJ determined that Complainant committed the acts upon which discipline was based, including losing his temper, shoving laundry carts into a truck, using profanity, walking away from his lead worker when she attempted to talk to him, and throwing his keys at his supervisor's feet. The ALJ found such actions to be violent and intimidating to those around him, in violation of the workplace violence policy. In addition, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; Respondent did not discriminate against Complainant on the basis of disability; and the discipline imposed was within the range of reasonable alternatives.

Finley v. Department of Revenue, Motor Vehicle Business Group, Driver License Section, case number 2005G86 (January 25, 2007).

Complainant, an administrative assistant who was assigned to work as a DMV cashier, appealed his termination, seeking reinstatement or settlement considering restitution for wages and damages. After hearing, the ALJ determined that Complainant committed the act for which he was disciplined, that is, that Complainant had used information he gained during the performance of his duties for the state to call a woman on the telephone for personal, rather than official, reasons. The ALJ also determined that Complainant had denied making the call when

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

initially asked about the incident by his supervisor, and had provided a different version of events to his appointing authority. The ALJ noted that Respondent had issued a probationary employee termination letter in this matter when Complainant was not still within his probationary term, but that the disciplinary process actually used in this case did not depart significantly from the process required for certified employees and did not create a violation of the Board rules in this case. Affirming Respondent's action, the ALJ also found that Respondent's termination of Complainant was not arbitrary, capricious or contrary to rule or law since the appointing authority conducted an investigation and gave honest consideration to all of the evidence; the discipline imposed was within the reasonable range of alternatives available to Respondent because Complainant's personal use of the information he gained as part of his cashier duties was the type of flagrant and serious act which did not require imposition of progressive discipline; and attorney fees were not requested by either party and were not awarded.

Catholic v. Department of Human Services, Division of Disability Determination Services, case number 2007B009 (March 5, 2007).

Complainant, an administrative assistant, appealed her termination, seeking reinstatement, back pay, attorney fees and costs, and an apology. After hearing, the ALJ determined that Complainant committed the majority of the acts for which she was terminated, including using the phone excessively prior to the point when she had been told what her usage had been, continuing to have problems reporting to work on time and in using the time system to log her breaks and meal time, failing to turn over records and tapes once ordered to do so, talking about bringing in guns during a staff meeting, and creating legitimate concerns about her willingness and capacity to work in a professional, respectful, and truthful manner. Affirming Respondent's termination of Complainant's employment, the ALJ concluded that Respondent’s action was not arbitrary, capricious, or contrary to rule or law, as the ALJ found just cause for termination; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Nuss v. Colorado Department of Public Safety, Colorado State Patrol, case number 2007B005 (March 30, 2007).

Complainant, a state trooper, appealed a disciplinary action consisting of working on two vacation days by Respondent, seeking rescission of the disciplinary action and an award of attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts upon which discipline was based, including making a traffic stop in his personal vehicle, even though he was not in uniform or on duty; allowing himself to become personally invested in handling the driver's poor conduct and hostile attitude; and becoming so consumed by the situation that he made the serious error in judgment of stopping at a red light, in the midst of traffic, to confront the driver with the fact of his state trooper status. Affirming the disciplinary action, the ALJ concluded that Respondent’s action was not arbitrary, capricious, or contrary to rule or law; Respondent’s action was within the range of reasonable alternatives; and Complainant is not entitled to an award of attorney fees and costs.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Lybarger v. Colorado State University, Housing and Dining Services, case number 2006B100 (April 3, 2007).

Complainant, an associate director of dining services, appealed the imposition of a day of suspension by Respondent, seeking reversal of the suspension, removal of the disciplinary action from his file, removal of his last two performance reviews from his personnel file, and restoration of sick leave during the investigation period. After hearing, the ALJ concluded that Complainant committed all of the acts for which he was disciplined, including failing: (1) to manage the labor budget issues for two of the dining halls under his supervision until specifically directed to do so by his direct supervisor, Mr. Lategan; (2) to provide Mr. Lategan with the specific information required to support a request for student worker hourly rate increases; (3) to appropriately manage the performance of one of the subordinate hall managers by a failure to note deficiencies in communications with this manager and to reflect deficiencies in the mid-year evaluation; (4) to follow-up with a dining hall having continuing problems with meal check procedures, including making certain that the hall completed required training documentation; and (5) to actively participate in senior manager's team and group discussions. In addition, the ALJ determined that Respondent's one-day disciplinary suspension was not arbitrary, capricious or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Mares v. Fort Lewis College, case number 2007B032 (May 15, 2007).

Complainant, a custodian, appealed his disciplinary demotion by Respondent, seeking the rescission of that disciplinary action, back pay, benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including recommending the hiring of his brother-in-law, a person he knew to be a convicted sex offender, and not disclosing that information to anyone at the college. In addition, the ALJ found that the appointing authority's action was not arbitrary, capricious, or contrary to rule or law, but rather that Respondent's disciplinary demotion of Complainant was reasonable, considering the breach of trust committed by Complainant, and that the discipline imposed was within the range of reasonable alternatives. Declining to award attorney fees, the ALJ affirmed Respondent's action and dismissed Complainant's appeal with prejudice.

Messinger v. Department of Corrections, case number 2007B047 (June 14, 2007).

Complainant, a correctional officer, appealed his disciplinary demotion from Lieutenant to Sergeant by Respondent, seeking rescission of his disciplinary demotion, back pay, benefits, and an award of attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including his violation of Administrative Regulation 300-16RD Use of Force; his very poor decision-making on October 15, 2006; and his repeated initiation of and involvement in unnecessary use of force incidents. The ALJ concluded that Respondent met its burden of proving by preponderant evidence that Complainant engaged in a pattern of misconduct in his use of force with inmates, and, in fact, had previously received four corrective actions for conduct very similar to that on October 15. Affirming the disciplinary demotion and dismissing his case with prejudice, the ALJ found that Respondent's action was

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Gonser v. Department of Transportation, case number 2007B098 (September 4, 2007).

Complainant appealed his disciplinary thirty-day suspension, his one-year disciplinary demotion from a Professional Engineer I to an Engineer in Training III, and the prohibition on instate, work-related overnight travel trips for a period of one year. He sought reduction or elimination of the demotion and/or the suspension, as well as removal of his travel restrictions. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, that is, driving a CDOT truck while intoxicated, and hitting two parked vehicles. The ALJ also found that the appointing authority's action was not arbitrary, capricious, or contrary to rule or law because she used reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant; reviewed all of the potentially relevant policies and procedures, the police report, the accident report, the field sobriety test results, the results of Complainant's blood alcohol level, and a report from two persons who interviewed Complainant; and considered all of the information provided by Complainant during the Board Rule 6-10 meeting, email he sent her following the meeting, and his mitigating circumstances. Affirming Respondent's actions and dismissing Complainant's appeal with prejudice, the ALJ concluded that the discipline imposed was within the range of reasonable alternatives.

Monett v. Department of Corrections, Colorado State Penitentiary, case number 2006G074 (September 24, 2007).

Complainant, a correctional officer, appealed his disciplinary termination by Respondent, seeking reinstatement, back pay, a redaction of his personnel file to remove termination materials, a declaration that Complainant's state service time has been continuous, and an award of attorney fees and costs. After hearing, the ALJ determined that Complainant brought chewing tobacco into the facility by hiding the can of tobacco in a coffee cup, and that he had placed an amount of the chew into his mouth while he was on duty and while he was in the pod office. The ALJ also found that, contrary to Complainant's assertion that Respondent's action was arbitrary, capricious, or contrary to rule or law, Appointing Authority Medina possessed lawful appointing authority in this matter, Complainant's Board Rule 6-10 meeting met all applicable requirements, Complainant's knowledge that there were other staff members who chewed tobacco does not render Respondent's actions in this case arbitrary or capricious, and Respondent correctly concluded that Complainant's actions violated several departmental regulations. Affirming the disciplinary termination of Complainant, the ALJ concluded that the discipline was within the range of reasonable alternatives and that attorney fees were not warranted.

Baughman v. Colorado State University, case number 2007B076 (October 4, 2007).

Complainant, a grounds keeper, appealed the terms imposed in a demotion letter by Respondent, seeking both a modification of the provision in the demotion letter stating that a driver would no longer be available to transport him to and from job sites during the revocation of his driver's license and an order directing Respondent to permit CSU employees to provide transportation to

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

him on the job. After hearing, the ALJ determined that Respondent proved by preponderant evidence that Complainant committed the acts for which he was disciplined; that is, he failed to regain his driver's license within a year of losing it and he neglected to inform his direct supervisor of this fact despite repeated requests for documentation. Affirming the disciplinary action, the ALJ found that Respondent's decision to demote Complainant was not arbitrary, capricious or contrary to rule or law because the appointing authority considered all relevant information necessary to make a decision in this case, took pains to assure that Complainant did not suffer too great a decrease in salary, and reasonably deemed it an untenable burden on Complainant's unit to continue to provide a driver for Complainant in the completion of his duties.

Nawrocki v. Department of Public Safety, case number 2007B097 (October 4, 2007).

Complainant, a trooper, appealed his disciplinary demotion and transfer by the Department of Public Safety, Colorado State Patrol, seeking reinstatement to the position of Captain and a rescission of the transfer. After hearing, the ALJ found that Respondent proved by preponderant evidence that Complainant committed the acts for which he was disciplined, which Complainant did not deny. In addition, the ALJ concluded that Respondent's decision to demote Complainant was not arbitrary or capricious, because, prior to making the decision to demote Complainant, the appointing authority used reasonable diligence and care to consider all relevant evidence and information available to him, including that which was provided by Complainant, his long pattern of violating patrol regulations, his two previous disciplinary actions, and conduct which demonstrated that Complainant did not possess the leadership qualities necessary to serve as a Captain. However, the ALJ also found that no reasonable appointing authority would impose a 100-mile transfer for altruistic purposes, in addition to a disciplinary demotion, and thus, the ALJ rescinded the transfer decision, as a transfer was not within the range of reasonable alternatives.

Horak v. Department of Natural Resources, Division of Wildlife, case number 2007B071 (October 18, 2007).

Complainant, a Wildlife Technician III at the Poudre Rearing Unit fish hatchery, appealed his four-month disciplinary pay reduction of ten percent by Respondent, seeking rescission of the disciplinary action, back pay, corresponding benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including refusing to check the fish; refusing to document his time as requested by his lead worker, which was deemed insubordination; and removing the MS-222 (chemical used to anesthetize fish) from its normal storage place and refusing to return it until a supervisor intervened, which was considered to be sabotage in violation of the Department's Workplace Violence and Safety Policy. In addition, the ALJ found that Respondent's disciplinary pay reduction was not arbitrary, capricious, or contrary to rule or law and that the discipline imposed was within the range of reasonable alternatives. Affirming the disciplinary pay reduction, the ALJ declined to award attorney fees.

Branch v. Department of Public Safety, Colorado State Patrol, case number 2008B009 (November 26, 2007).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a trooper, appealed his two-day (20 hour) suspension by Respondent, seeking reversal of the suspension and imposition of a lesser form of discipline. After hearing, the ALJ found that Complainant committed the majority, but not all, of the acts for which he was disciplined, including leaving the gas pump going while he was filling his patrol car, on the assumption that it would shut off automatically; that the gas pump did not shut off automatically; and that the result was a spill of about 22 gallons of gasoline. The ALJ also concluded that Complainant did not notify anyone of the spill, take any actions to mitigate the spill, or assist the store clerk in dealing with the spill. Complainant instead asked the store clerk for a refund of the cost of the spilled gasoline, which resulted in the store clerk calling the store manager at about 3:00 A.M. so that Complainant could make his argument for a refund to her. The ALJ found that the portion of the disciplinary action which was founded upon the appointing authority's decision that Complainant had not reported the situation completely was not proven by a preponderance of the evidence. The ALJ further found that a disciplinary suspension for violation of two other sections of the general orders was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives when considered in light of the actions taken by Complainant. Affirming Respondent's action with modification, the ALJ ordered Respondent to amend the disciplinary letter of July 16, 2007, to remove references to a violation of General Order #3 and to Major Butts' incorrect assertions that Complainant was less than completely truthful regarding whether the patrol car was unattended or not while it was being fueled; affirmed the remainder of the disciplinary letter and the imposition of the two-day period of suspension; and declined to award attorney fees and costs.

Doering v. Department of Natural Resources, case number 2008B018 (December 28, 2007).

Complainant, a technician and fish culturist, appealed his termination seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ concluded that Respondent did not prove that Complainant committed an intentional fish kill during a fish plant at Tiago Lake or had spoken inappropriately to his work supervisor as alleged in the termination letter, but did prove that Complainant committed the other acts alleged; Complainant did not raise any persuasive argument as to why he should not have been subject to discipline for the fish kill or why his subsequent actions proven at hearing should not be viewed as failures to perform competently and willful misconduct; and Respondent's decision to discipline Complainant for his actions related to the Tiago Lake fish plant were not arbitrary, capricious or contrary to rule or law. Affirming Respondent's termination of Complainant's employment, the ALJ found that the discipline imposed was within the range of reasonable alternatives, given the facts of incident at Tiago Lake and Complainant's history. The ALJ declined to award attorney fees on the grounds that the general rule on fee awards does not permit attorney fee awards to *pro se* litigants and that, even if the Board were to consider such an award, Complainant did not show that fees were appropriate in this case.

Bustmante v. Regents of the University of Colorado, University of Colorado at Boulder, Division of Facilities Management, case number 2008B029 (February 27, 2008).

Complainant, a custodian, appealed his termination by Respondent and sought rescission of the

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

termination and reinstatement to his position at the University. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined (being loud and intimidating in a conversation he had with a co-worker), his prior corrective actions resulted from his inappropriate behavior towards co-workers, one of his disciplinary actions resulted from inappropriate behavior towards a co-worker, his personnel file contained an evaluation in which he was rated as "Unsatisfactory" in the area of Communication, in another evaluation he received an "Unsatisfactory" rating in the area of Interpersonal Relations, and it was noted that he lacked respect for others and discouraged a positive work environment. Affirming Respondent's actions, the ALJ concluded that Respondent's action was not arbitrary, capricious, contrary to rule or law, or discriminatory, and the discipline imposed was within the range of reasonable alternatives.

Malloy v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Services Center, case number 2007B102 (March 3, 2008).

Complainant, a Correctional Security Officer and supervisor, appealed the 5% reduction in pay for a period of three months imposed by Respondent, asserting that Respondent has violated the Colorado State Employee Protection Act. As relief, Complainant sought removal of the disciplinary action from his personnel file, a return of the monies withheld, a transfer from Platte Valley, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, which were mostly related to standards of supervisory performance; Respondent's actions were not arbitrary, capricious or contrary to rule or law; and those actions were within the range of reasonable alternatives. With regard to the violation of the Colorado State Employee Protection (Whistleblower) Act, the ALJ found that Complainant did not prove that Respondent's actions were in violation of the Act because Complainant did not make a "disclosure of information" and did not demonstrate that the disclosures he made were a substantial or motivating factor in Respondent's imposition of the disciplinary action. Respondent, the ALJ concluded, proved by a preponderance of the evidence that it would have taken the same disciplinary action even if Complainant had not filed his complaint. Affirming Respondent's disciplinary action, the ALJ declined to award attorney fees.

Bushrow v. Department of Transportation, case number 2008B038 (March 13, 2008).

Complainant, a transportation maintenance worker, appealed his disciplinary action of a one-time $500 reduction in pay, seeking rescission of the disciplinary pay reduction. After hearing, the ALJ found that Respondent proved by a preponderance of evidence that Complainant used rock chips which belonged to Respondent to place in his driveway and failed to stop two co-workers when he saw them with Respondent's equipment and property, even though he suspected that they were using the equipment and materials for personal use. Affirming the disciplinary reduction in pay, which was roughly equivalent to the value of the rock chips which Complainant converted for personal use, the ALJ concluded that Complainant committed the acts for which he was disciplined; Respondent's action was not arbitrary, capricious, or contrary to rule or law; and the discipline imposed was within the range of reasonable alternatives.

Carver v. Department of Revenue, Motor Carrier Services Division, case number 2008B033

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

(April 7, 2008).

Complainant, a Port of Entry Officer, appealed his disciplinary termination by Respondent, seeking reinstatement, an award of back pay, and the substitution of a corrective action for the disciplinary action. After hearing, the ALJ determined that there was no dispute that Complainant committed the acts for which he was disciplined. The ALJ also found that Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law because the fabrication of a doctor's note by a law enforcement officer meets the criteria of a flagrant act warranting immediate discipline, even when the employee has no prior disciplinary or corrective actions. Additionally, the ALJ found that it was not a violation of Director's Procedure 5-6 for Complainant's supervisor to ask Complainant for a written doctor's note for two consecutive days of requested sick leave, given that the circumstances indicated a possible abuse of sick leave time. Finally, the ALJ found that termination of employment was within the range of reasonable alternatives available to the Respondent because Complainant held a law enforcement position, and submitting an altered medical note was plainly unacceptable behavior for any employee, much less a law enforcement officer, who must exercise a high degree of discretion in his position and be able to consistently demonstrate good judgment in his choices.

Harris v. Department of Human Services, case number 2008B050 (May 23, 2008).

Complainant, a correctional youth security officer, appealed his demotion from Client Manager to Correctional Youth Security Officer I, seeking a return to his former position or a return to his former pay rate. After hearing, the ALJ concluded that Complainant committed the acts for which he was disciplined, including providing blank forms to be signed to parolees with whom he was to have face-to-face meetings, submitting false reports to his supervisor and into the TRAILS computer system concerning such meetings, and failing to meet his contact requirements with parolees due to the fact that he was working a second job. The ALJ also found that Respondent's decision to discipline Complainant was not arbitrary, capricious or contrary to rule or law because the appointing authority conducted a reasonable investigation and reached reasonable conclusions that Complainant's conduct violated a variety of performance and ethics standards. Finally, the ALJ determined that the discipline imposed was within the range of reasonable alternatives, considering that face-to-face contact with parolees is a core requirement for a Client Manager, Complainant had planned how to "fool the system" by having parolees sign blank forms, Complainant involved parolees in his plan to evade his reporting requirements, and the problem extended over an extended period of time. Affirming the disciplinary demotion, the ALJ dismissed Complainant's appeal with prejudice.

Jones v. Department of Corrections, Denver Women's Correctional Facility, case number 2008B095 (October 2, 2008).

Complainant, a correctional officer, appealed her disciplinary termination, seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, including disobeying multiple orders from members of the Aurora Police Department; arguing with those police officers, stating that she was a correctional officer, and, therefore, did not have to obey their orders;

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

resisting arrest by physically trying to pull away, which resulted in the need for three officers to restrain her; increasing the danger and officer safety concern for the officers who responded to the scene; and failing to notify her appointing authority of her contact with law enforcement. Affirming Respondent's action, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Houston v. Department of Corrections, Arkansas Valley Corrections Facility, case number 2008B093 (December 19, 2008) (Decision Amended: December 29, 2008).

Complainant, a Case Manager/Correctional Officer III/Lieutenant, appealed her termination, seeking reinstatement, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ determined that Complainant committed most of the acts for which she was disciplined that involved knowingly and willfully maintaining prohibited associations with a man who was classified as an "offender" under DOC policy in 2006 and 2007. The prohibited acts committed by Complainant included visiting the offender in jail on four separate occasions in 2006, placing money into his account on four separate occasions in 2007, agreeing to take his personal effects from the jail in August 2007, communicating with him by telephone at the end of May 2007, and giving him a ride into town after he appeared at her house in early September 2007. The ALJ also found that Respondent did not produce sufficient evidence to support that Complainant departed from the truth, failed to cooperate, acted without integrity, or had a conflict of interest. After limiting the case to consideration of only the violations predicated on the prohibited associations, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives considering the importance of the disciplinary rule violated and the length of time that the improper associations were maintained; and attorney fees were not warranted. Affirming Respondent's termination of Complainant, the ALJ dismissed the matter with prejudice.

Nawrocki v. Department of Public Safety, Colorado State Patrol, case number 2009G006 (March 6, 2009).

Complainant, a master sergeant with the Colorado State Patrol, appealed a corrective action, requesting rescission of the corrective action and all references to it, that the issues surrounding the corrective action not be considered in any of his performance evaluations, and "discontinuation from unfair and retaliatory treatment and a workplace free of harassment and hostility." After hearing, the ALJ determined that Complainant committed the acts for which he received the corrective action, including failing to provide complete and accurate information to his supervisors with regard to the destruction of evidence. Affirming the appointing authority's decision to uphold the corrective action, the ALJ also concluded that Respondent's imposition of the corrective action on Complainant was not arbitrary, capricious or contrary to rule or law; and Respondent did not retaliate against Complainant for filing an appeal of his disciplinary demotion, an appeal which resulted in the ALJ's overturning, in part, of the disciplinary demotion.

Wilday-O'Neill v. Department of Human Services, Colorado State Veterans Home at

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Fitzsimons, case number 2009B016(C) (April 9, 2009).

Seeking reinstatement and back pay, Complainant, a registered nurse, appealed her April 29, 2008 letter of sanction for violations of the Health Insurance Portability and Accountability Act (HIPAA) and her disciplinary termination of employment, asserting these actions were retaliatory actions in violation of the State Employee Protection (Whistleblower) Act. After hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, including repeated failure to assess, describe, measure and document a resident's wounds, constituting a pattern of violating basic nursing standards of practice; failing to chart medication administration; and failing to arrange for the STAT blood draw during her shift on July 7, 2008. Affirming the disciplinary termination, the ALJ concluded that Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law; the evidence fails to establish that Complainant's protected disclosures regarding patient care were a substantial or motivating factor in Respondent's decision to terminate Complainant's employment; and Complainant's pattern of performance errors in June and July of 2008 was sufficiently serious that it was within the range of reasonable alternatives to terminate her employment.

Umstead v. Department of Public Safety, Colorado State Patrol, case number 2009B038 (June 3, 2009).

Complainant, a certified Trooper, appealed his disciplinary termination, seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ determined that Complainant committed most of the acts for which he was disciplined, including being untruthful in his accounts and reports about pointing his gun when he spoke with a sergeant, when he wrote his memorandum, when he was interviewed by the internal affairs investigators and during a meeting with another superior. Additionally, the ALJ found that Complainant failed to conduct himself in a manner that would preserve the public trust; acted so unprofessionally that a citizen with whom he had contact questioned whether he was actually a police officer; and did not identify himself, exhibited rage, and threw a bottle at a vehicle, thus undermining his credibility and the credibility of the agency by his actions. Affirming the disciplinary termination, the ALJ concluded that Complainant did not conduct himself in a way that reflected "the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy and respect"; Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Salazar v. Department of Revenue, Motor Carrier Services Division, case number 2008B081 (June 29, 2009).

Complainant, a Port of Entry Officer II, mobile unit supervisor, appealed his termination, seeking an order reversing his termination and restoration to his position, expungement of his personnel file, an award of back pay and benefits, restoration of seniority, and compensation for all other compensable losses. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including the fact that, under his supervision, his mobile unit was contacting vehicles to be inspected without selecting a proper mobile unit inspection site and

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

without setting the necessary signage to direct traffic to the mobile unit inspection site, which were violations of policy for mobile units. Additionally, the ALJ concluded that Complainant was not truthful and forthcoming in describing his actions during either the investigation leading up to the Rule 6-10 meeting or during the Rule 6-10 meeting itself; the disciplinary termination was not arbitrary, capricious or contrary to rule or law; and the discipline imposed was within the range of reasonable alternatives. Affirming Respondent's termination of Complainant, the ALJ declined to award attorney fees.

Smith v. Department of Corrections, case number 2009B043 (July 30, 2009).

Complainant, a Sergeant at San Carlos Correctional Facility, filed an appeal of a $200 disciplinary fine imposed on him by Respondent for unauthorized use of force techniques on an inmate. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including standing on the lower back area of the inmate's leg and delivering five knee strikes to the inmate's back, while Complainant was not in imminent danger of serious bodily injury. In addition, the ALJ concluded that Respondent's action was not arbitrary, capricious or contrary to rule or law and that the discipline imposed was within the range of reasonable alternatives; the ALJ found that the appointing authority carefully considered all options, interviewed many of Complainant's co-workers, and used diligence and care to procure all evidence that was available to him prior to making his decision to discipline Complainant. Affirming the disciplinary action, the ALJ dismissed Complainant's appeal with prejudice.

Gilbert v. Colorado School of Mines, case number 2008B040 (August 20, 2009).

Complainant, an information technology profession, appealed her disciplinary demotion by Respondent, claiming discrimination on the basis of disability, and sought reinstatement, back pay and benefits. After hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, including engaging in a long pattern of hostile conduct towards coworkers, making direct threats against at least two coworkers, causing coworkers to fear for their physical safety at work and to avoid her entirely, and ultimately, creating a hostile work environment for a number of individuals on her team. The ALJ found that her conduct was a violation of Executive Order D0010 96, "Workplace Violence." Affirming the disciplinary demotion, the ALJ concluded Respondent's decision was not arbitrary, capricious, or contrary to rule or law and the discipline imposed was within the range of reasonable alternatives.

Shaw and Zarlingo v. Department of Human Services, case number 2009B082(C) (September 10, 2009).

Complainants Shaw, Administrator of Rifle Nursing Home, and Zarlingo, Director of Nursing at Rifle, appealed their terminations, requesting rescission of the disciplinary actions, reinstatement to their positions, back pay and benefits, and attorney fees and costs. After a lengthy hearing, the ALJ determined, with respect to Shaw, that he committed the acts for which he was disciplined, including utilizing state resources in the form of paid sick leave to pay an employee to perform work exclusively for Shaw's personal benefit and therefore, breaching his fiduciary duty to Rifle and DHS and violating DHS's Fraud Prevention and Ownership and Use of State Assets

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Policies. The ALJ also found that Shaw knowingly permitted an inaccurate insurance claim to be filed and accepted an insurance payment exceeding $13,000 for air conditioning units he knew not to be damaged by a lightning storm; committed patient neglect and abandonment and violated federal regulations and Rifle policies governing discharges of long term care residents by refusing to hold FB's bed open for him and accept him back at Rifle once FB had been stabilized; and created a hostile work environment at Rifle by his management style, and by permitting Zarlingo and another supervisor to engage in harassing and intimidating behavior towards their subordinates, permitted a hostile and intimidating work environment to persist under his authority.

With respect to Zarlingo, the ALJ found that she committed the acts for which she was disciplined, including violating Rifle's transfer policy which was directly contrary to FB's physical, mental, and psychological wellbeing; and engaging in conduct that was harassing and intimidating to the employees she supervised, in violation of the DHS Workplace Violence and Workplace Environment Policies, and the Code of Conduct. Affirming Respondent's actions and dismissing Complainants' appeals with prejudice, the ALJ concluded that Respondent's disciplinary terminations of Complainants were not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Complainants are not entitled to an award of attorney fees and costs.

Redding v. Department of Natural Resources**,** case number 2010B015(C) (April 27, 2010).

Complainant, a professional engineer, alleged that DNR retaliated against him for making protected disclosures under the State Employee Protection Act by creating a hostile work environment, by giving him a Needs Improvement evaluation and Corrective Action Plan in May 2009, and by terminating his employment in July 2009. After hearing, the ALJ determined that Complainant committed the acts for which he was terminated, including failing over a four-year period to improve in meeting deadlines, creating conflicts, personalizing work issues, failing to maintain positive work relationships with others, and failing to perform his engineering work independently. In addition, the ALJ found that Respondent's termination decision was not arbitrary or capricious and was within the range of reasonable alternatives, as Wolfe used the utmost diligence and care to obtain all relevant evidence prior to making his decision and issued a lengthy and detailed termination letter which addressed every argument raised by Complainant. The ALJ also concluded that Respondent did not violate Administrative Procedure 6-4 or the Colorado State Employee Protection Act since Complainant's protected disclosures were not a substantial or motivating factor in Respondent's decisions. Affirming the disciplinary termination and dismissing Complainant's case with prejudice, the ALJ declined to award attorney fees and costs.

Vidor v. Department of Corrections, case number 2010B027 (June 21, 2010).

Complainant, a General Professional III, Contract Administrator, appealed his disciplinary termination of employment, asserting that the termination violated the Colorado State Employee Protection Act (whistleblower act), and the Colorado Anti-Discrimination Act. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

failing to competently perform his job and continuing to perform at a Needs Improvement level; allowing the performance of his contract monitoring and budgeting duties to deteriorate significantly in 2009; and failing to provide accurate and consistent information on the reports he had been generating for years. The ALJ also found that Respondent violated Board Rule 6-10 by informing Complainant at the predisciplinary meeting that they would discuss only the last thirty days of his employment during July 2009, and then basing the termination decision on his performance from October 2008 through July 2009. While the ALJ concluded that the discipline imposed was within the range of reasonable alternatives, the ALJ ruled that Respondent did not discriminate against Complainant or violate the whistleblower act; and Respondent's delegation of appointing authority was appropriate. Affirming Respondent's termination of Complainant, the ALJ awarded Complainant full back pay and benefits from the date of his termination until the last day of his evidentiary hearing, as well as attorney fees and costs.

Miller v. Department of Public Safety, Colorado State Patrol, case number 2009G085 (August 23, 2010).

Complainant, an Administrative Assistant, appealed her involuntary termination of employment by Respondent, seeking reinstatement, back pay, benefits, and attorney fees and costs. Following the ALJ's finding in May 2010 that she was constructively discharged, an evidentiary hearing was held on her termination. The ALJ determined that Complainant committed the acts for which she was disciplined, including falsifying time-keeping records by failing to submit leave slips; violating CSP General Orders requiring that she be truthful and complete in her accounts and reports and avoid any conduct bringing discredit upon or undermining the credibility of herself or the Patrol; and acting either intentionally or with a reckless disregard of her duty to her employer. The ALJ also found that Complainant's actions constituted willful misconduct in violation of General Orders 3 and 6, and generally accepted standards of all state employees to accurately account for their time out of the office by submitting leave slips to HR for processing. Affirming the termination, the ALJ concluded that Respondent's decision was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Complainant is not entitled to an award of attorney fees and costs.

Riley v. Department of Human Services, Wheat Ridge Regional Center, case number 2010B127 (September 9, 2010).

Complainant, a Client Care Aide, appealed her three-month disciplinary pay reduction of five percent by Respondent, seeking rescission of the disciplinary action, back pay, corresponding benefits, and assurance that her record reflects no charge of neglect. After hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, including violating previous corrective actions, failing to perform assigned job duties, failing to perform competently, insubordination and failure to provide active treatment for a resident. In addition, the ALJ found that the appointing authority's action was not arbitrary, capricious or contrary to rule or law, as he did not neglect or refuse to use reasonable care and diligence to gather all of the relevant information concerning the allegations against Complainant, including reviewing all of the relevant information; the written narrative of events of January 20 and January 21, 2010; Complainant's prior Corrective Actions and other written warnings; CDHS Policy 2.24 and

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant's non-compliance with that policy; and the CDHS Employee Code of Conduct. Finally, affirming Respondent's action, the ALJ concluded that the discipline imposed was within the range of reasonable alternatives, given Complainant's performance history.

Beruman and Adams v. Department of Human Services, case number 2010B087(September 23, 2010).

Complainants appealed their disciplinary termination, seeking reinstatement, back pay, benefits and attorney fees. After hearing, the ALJ determined that Complainants committed the acts for which they were disciplined, including using an unauthorized hold and restraint on a client by restricting his freedom of movement; failing to utilize the list of interventions; losing control of themselves and using physical force and methods outside approved techniques which resulted in physical pain and injury to the client; and responding to the investigation in a deceitful manner, not being truthful or honest, and failing to accept responsibility for their mistakes. The ALJ further found that Respondent's decisions were not arbitrary, capricious, or contrary to rule or law, and the disciplinary actions imposed were within the range of reasonable alternatives. Affirming Respondent's actions, the ALJ declined to award attorney fees.

Romero v. Regents of the University of Colorado, University of Colorado at Boulder, Housing and Dining Services, case number 2010B049(C) (September 30, 2010).

Complainant, a Project Manager, appealed his termination and a corrective action he received as a result of his April 2009 Performance Evaluation, seeking reversal of the corrective and disciplinary actions, reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant committed most of the acts for which he was disciplined, including engaging in unprofessional behavior by confronting others rudely and angrily; escalating routine business matters into conflict and antagonism; and providing proprietary information to outside parties. The ALJ also found that the credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances; therefore, Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives. Finally, affirming Respondent's disciplinary actions and declining to award attorney fees, the ALJ determined that Respondent did not discriminate or retaliate against Complainant, contrary to Complainant's assertions.

Lopez v. Department of Transportation, case number 2010B117 (November 4, 2010).

Complainant, a Transportation Maintenance Worker, appealed his disciplinary pay reduction of 10 percent for one month and sought rescission of the disciplinary action and reimbursement. His claim of race/national origin discrimination was deemed abandoned at hearing. After hearing, the ALJ concluded that Complainant committed the acts for which he was disciplined, including sending over fifty non-work related emails, most of which were chain emails, some of which were offensive, and violating the policies listed in the disciplinary action letter. In addition, the ALJ found that Respondent's action was not arbitrary, capricious or contrary to rule

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

or law since the appointing authority gave due consideration to Complainant's strong performance history and his service to the agency and carefully and honestly considered all of the information he gathered before he made his decision to discipline Complainant. Affirming Respondent's action, the ALJ ruled that the discipline imposed was within the range of reasonable alternatives and Respondent did not discriminate against Complainant on the basis of race/national origin.

Trujillo v. Department of Corrections, case number 2009B094 (November 18, 2010).

Complainant, a Correctional Officer, appealed her disciplinary termination of employment, seeking rescission of the disciplinary action, reinstatement, back pay, and corresponding benefits. After hearing, the ALJ found that Complainant committed the acts for which she was terminated, including repeatedly sleeping at her post and making false statements during the application process at DOC. Additionally, the ALJ found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; Respondent did not discriminate against Complainant on the basis of disability; and the discipline imposed was within the range of reasonable alternatives. Affirming the disciplinary termination, the ALJ dismissed Complainant's appeal with prejudice.

Leyba v. Department of Corrections, Division of Adult Parole, Community Corrections & Youthful Offender System, case number 2010B107 (January 13, 2011).

Complainant, a Warden, appealed his termination of employment by Respondent, seeking reinstatement to his position with back pay and benefits, reimbursement for any monetary damages resulting from his termination such as full contribution to retirement benefits and insurance coverage costs, removal of the termination from his personnel file and an award of attorney fees and costs. The ALJ determined Complainant committed the majority of acts for which he was disciplined. Affirming the termination, the ALJ concluded that Respondent's decision was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Complainant is not entitled to an award of attorney fees and costs.

Miller v. Department of Public Safety, Colorado State Patrol, case number 2009G085 (Amended Initial Decision on Remand – January 20, 2011).

Complainant, an Administrative Assistant, appealed her involuntary termination of employment by Respondent, seeking reinstatement, back pay, benefits, and attorney fees and costs. Following the ALJ's finding in May 2010 that she was constructively discharged, an evidentiary hearing was held on her termination. The ALJ determined that Complainant committed the acts for which she was disciplined, including falsifying time-keeping records by failing to submit leave slips; violating CSP General Orders requiring that she be truthful and complete in her accounts and reports and avoid any conduct bringing discredit upon or undermining the credibility of herself or the Patrol; and acting either intentionally or with a reckless disregard of her duty to her employer. The ALJ also found that Complainant's actions constituted willful misconduct in violation of General Orders 3 and 6, and generally accepted standards of all state

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

employees to accurately account for their time out of the office by submitting leave slips to HR for processing. Affirming the termination, the ALJ concluded that Respondent's decision was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Complainant is not entitled to an award of attorney fees and costs.

On January 20, 2011, the ALJ issued the Amended Initial Decision of the Administrative Law Judge with the only amendment being the correct Order Regarding Constructive Discharge was attached as Attachment A.

Lease v. Department of Human Services, Wheat Ridge Regional Center, case number 2011B017 (February 16, 2011).

Complainant, a lead worker at a mental health facility, participated in a prone hold of a physically combative resident with another employee. Prone holds are prohibited under all circumstances. Respondent issued a 5% pay reduction. The Initial Decision affirmed the disciplinary action, holding that as lead worker it was Complainant's duty to immediately stop the prone hold, not to participate in it.

Cruz v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Services Center, case number 2011B001 (April 21, 2011).

Complainant, a certified CSSO-I at Lookout Mountain Youth Services Facility, appeals the imposition of a temporary 10% reduction in pay. After hearing, the Administrative Law Judge held that Complainant was the appropriate staff member to bear responsibility for failing to supervise two committed youths; that the appointing authority's actions in assessing discipline were neither arbitrary nor capricious; that the seriousness of failing to properly supervise the youth was sufficiently serious to warrant the immediate imposition of discipline prior to the imposition of a corrective action; that the appointing authority took Complainant's long successful work history into account in determining the level of discipline to impose; that a 3 month reduction of 10% of Complainant's pay was within the range of reasonable alternatives available to the appointing authority for the violation; and that an award of attorney fees and costs was not warranted.

Rushing v. Department of Public Safety, Colorado State Patrol, case number 2011B039 (May 4, 2011).

Complainant appealed his demotion from Sergeant to Trooper at the Colorado State Patrol. After hearing, the judge determined that he engaged in a pattern of using inappropriate and demeaning language towards his subordinates and abusing his authority. No progressive discipline was required under Board Rule 6-2 because of the seriousness of the misconduct and Complainant's supervisory problems were the result of his lack of judgment. The disciplinary demotion was affirmed.

Lyons v. Department of Human Services, case number 2010B097 (June 22, 2011).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a certified Safety and Security Officer, appealed his disciplinary termination of employment by Respondent, and sought rescission of the disciplinary action and reinstatement. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including engaging in a pattern of violent conduct towards others which demonstrated a propensity toward abuse, assault or similar offenses against others in violation of the Lawrence Bill policy and DHS' policies and standards of conduct. Affirming the disciplinary termination, the ALJ further found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Respondent did not discriminate against Complainant on the basis of race.

Robinson v. University of Colorado at Denver, Information Technology Services, case number 2011B063 (September 26, 2011).

Complainant, a certified Information Technology Technician II, appealed his disciplinary pay reduction requesting removal of the disciplinary action, reassignment of his supervisor, expungement of his files of all hearsay and unproven statements, return of duties, a monetary award, and all other appropriate relief. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including making unprofessional comments; Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law, except its imposition of discipline for an action which had already been handled through corrective action; Respondent did not violate Title VII or the Colorado Anti-Discrimination Act, the Whistleblower Act, or Complainant's First Amendment rights; and the discipline imposed was within the range of reasonable alternatives. Dismissing the appeal with prejudice, the ALJ affirmed the disciplinary action, but Respondent is ordered to remove the reference to the imposition of discipline for Complainant's derogatory comments concerning his ITS supervisors.

Buckley v. Community College of Colorado, Front Range Community College, case number 2012B016 (March 23, 2012).

Complainant was a certified Security Guard I employed by Respondent Front Range Community College prior to his disciplinary termination. It was undisputed that Complainant committed the acts for which he was disciplined, including the removal of state property (two sleeping bag storage bags) from the campus, permitting the removal of other storage bags from the campus, and not reporting the removal of the storage bags. It also was undisputed that Complainant returned the storage bags he had taken the following day. After an evidentiary hearing, the ALJ concluded that the discipline imposed was not arbitrary and capricious or contrary to rule or law, because Complainant did not exercise good judgment, and permitted and participated in the removal of state property from the campus. Complainant did not report the incident as required by his job duties, and his explanation for returning the property on his day off was not convincing. The ALJ also concluded that the discipline imposed was within the range of reasonable alternatives. In particular, Complainant had received a combined corrective action/disciplinary action one month prior to the subject incident, and was admonished to exercise good judgment and report all incidents. Respondent's action was therefore affirmed. See also **Progressive Discipline**.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Johnson v. Department of Transportation, case number 2012B013(C) (March 13, 2012).

Complainant, a Transportation Maintenance worker II for CDOT in an isolated area, stole several items from CDOT, including a 55-gallon barrel of oil, used tires, a cordless drill, and a transmission jack. During the investigative process, he was not forthcoming with the truth. In addition, he directed a temporary worker to load the barrel of oil onto his personal vehicle so he could take it home, an egregious violation of his duty to lead those under his supervision.

Complainant was terminated. The termination was sustained.

Crouse v. Department of Public Safety, Colorado State Patrol, case number 2012B018 (April 18, 2012).

Complainant was a State Trooper with a clean disciplinary history when he was terminated. Complainant testified untruthfully at a Department of Revenue hearing concerning the revocation of Mr. Garton's driver's license. Later, at the criminal trial against Mr. Garton for Driving Under the Influence, Complainant was impeached with his prior inconsistent testimony. The District Attorney's office was so concerned about Complainant's credibility that it raised the issue with the Patrol. The Patrol conducted an Internal Affairs investigation and found the complaint to be founded in its report. The DA's office concluded that it had a legal duty under the Brady rule to disclose the report concerning Complainant to the defense in any case he was listed as a witness. The Patrol concluded, based on Complainant's clearly demonstrated lack of credibility in the DOR hearing, and the existence of the Brady letter, that Complainant could no longer prosecute a case for the Patrol. Therefore, it terminated his employment. The Initial Decision of the Administrative Law Judge found the actions of Respondent to be appropriate and required under the Brady rule; Complainant's actions were serious and rendered him permanently unable to testify in any judicial district in the state; and therefore, the termination was upheld.

Lawson v. Department of Corrections, Arrowhead Correctional Facility, case number 2012B055 (April 24, 2012).

Complainant was a Correctional Officer III at Arrowhead Correctional Facility. As shift supervisor, he threatened to move an Aryan gang member to a cell with a black sex offender. During the investigation of his conduct, he was not forthcoming with the complete truth. Within the last year, he had received a disciplinary and a corrective action as a result of similar incidents involving poor judgment and willful misconduct in a position of authority.

Respondent demoted Complainant to Correctional Officer II for this incident. At hearing, Complainant asserted that he never intended to follow through on his threat and that the threat was a psychological ploy. The evidence demonstrated that Complainant committed the acts for which he was disciplined. The ALJ determined that Respondent's decision was not arbitrary or capricious or contrary to rule or law, found it was within the range of reasonable alternatives in view of Complainant's recent similar misconduct, and affirmed the action.

Bell v. Board of Trustees for Metropolitan State College, case number 2012B071 (June 14,

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

2012).

Complainant was a certified Lab Coordinator III employed by Respondent Metropolitan State College prior to her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant did not commit the acts for which she was disciplined, that Respondent's disciplinary action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent's action was therefore rescinded. In particular, Respondent did not meet its burden to prove that Complainant failed to adhere to safety regulations and practices. Respondent did not produce an objective set of safety regulations and practices that Complainant was required to comply with, nor did Respondent prove that Complainant failed to abide by any general safety regulations and practices imposed by law or her PDQ. Complainant's direct supervisor testified on her behalf, and believed that Complainant was performing her job well, as reflected by exceeding expectations performance evaluations. Progressive discipline was not followed, because the two prior corrective actions were unrelated to the disciplinary action. Complainant's request for attorney fees was denied, because Complainant did not demonstrate that the action was frivolous, groundless, or made in bad faith. Case is discussed under **Arbitrary and Capricious** and **Progressive Discipline.**

Riley v. Department of Corrections, case number 2010B127 (July 12, 2012).

Complainant was a certified Community Parole Officer employed by Respondent Department of Corrections prior to his disciplinary termination. Although Complainant filed a timely appeal with the Board, due to a clerical error, the Board did not hold a hearing within 90 days of the filing of the appeal. Respondent moved to dismiss for lack of jurisdiction. The ALJ denied the motion to dismiss, concluding that the 90-day deadline was directory, rather than jurisdictional, in nature. Thereafter, Complainant moved to dismiss and grant the relief requested in the appeal. The ALJ denied Complainant's motion.

After a 5-day evidentiary hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, that Respondent's disciplinary action was not arbitrary and capricious or contrary to rule or law, and that the discipline imposed was within the range of reasonable alternatives. Respondent's action was therefore affirmed. In particular, Respondent proved by preponderent evidence that Complainant misrepresented the truth during an official police investigation, that he failed to immediately report allegations of sexual misconduct to his supervisor, and that he failed to properly document his interactions with the parolee in question. Respondent demonstrated that its investigation and the discipline imposed were not arbitrary or capricious, or contrary to rule or law. Lastly, due to the position of trust held by a CPO, Respondent demonstrated that despite the fact that progressive discipline was not followed, the conduct was sufficiently serious to conclude that termination was not outside the range of reasonable alternatives. Case is discussed under **Code of Conduct** and **Jurisdiction**.

Skitt v. University of Colorado – Boulder, College of Arts and Sciences, case number 2012B004 (July 19, 2012).

Complainant was a certified Administrative Assistant III employed by Respondent University of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Colorado at Boulder prior to her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, that the disciplinary action was not arbitrary and capricious or contrary to rule or law, and that the discipline imposed was within the range of reasonable alternatives. Respondent's action was therefore affirmed. In particular, Respondent met its burden to prove that Complainant did not accurately and timely process late drop petitions, and that Complainant accepted two late drop petitions after the deadline. Respondent's investigation and decision to impose discipline was not arbitrary, capricious, or contrary to rule or law. Lastly, Respondent proved that it exercised progressive discipline in this case, and that based on the progressive discipline, the decision to terminate Complainant's employment was within the range of reasonable alternatives. Case is discussed under **Progressive Discipline**.

Wunderlich v. Department of Human Services, Colorado Mental Health Institute at Pueblo, case number 2012B123 (November 13, 2012) (Notice of Errata and Amended Initial Decision of the Administrative Law Judge - November 20, 2012).

Complainant appeals his termination from the position of Registered Nurse at the Colorado Mental Health Institute at Pueblo, arguing that his termination was arbitrary, capricious and contrary to rule or law in that it ignored the necessity of physically stopping Patient M when Patient M was running away after spitting at another staff member. Complainant also objected to the delay in receiving written notification of his termination. After hearing, the ALJ found that Complainant's explanation for why he thought Patient M was a threat to him and to another patient was not credible, and that the unorthodox takedown that Complainant performed on Patient M was contrary to CMHIP's use of force policies. Additionally, the ALJ found that, when Complainant moved to intercept Patient M and tackle him, he was moving beyond a three-foot distance from the highly suicidal patient that he had been assigned to watch and no longer in a position to view the patient. These actions were contrary to the suicide level II precautions that Complainant was expected to maintain with that patient. The ALJ also found that Complainant did not report his use of force against Patient M as required by policy, was not forthcoming in his interviews with the CMHIP Department of Public Safety, and was disingenuous during his Board Rule 6-10 meeting. As a result, the ALJ found that the decision to terminate Complainant's employment was not arbitrary or capricious, or contrary to rule. The ALJ found, however, that Respondent acted in a manner contrary to law in that it did not provide written notice of Complainant's termination from employment to Complainant, as required under C.R.S. § 24-50-125(2), within the five-day timeframe directed in that statute. Pursuant to the statute, Complainant was entitled to compensation in full for the delay between the date his employment was terminated and the date he received proper notice. The ALJ ordered that Complainant be provided with the funds that Respondent would have expended on his employment directly or indirectly if Complainant had not been terminated, as well as statutory interest on the delayed payment. Finally, Complainant requested an award attorney fees and costs, both for the termination of his employment and for the delay in paying him compensation for the delay in providing proper notification. The ALJ found that Complainant had not proven that Respondent's actions were frivolous, in bad faith, malicious, harassing, or otherwise groundless. Accordingly, the disciplinary action of termination was affirmed. Respondent was ordered to provide Complainant with compensation in full as required by C.R.S. § 24-50-125(2). No

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

attorney fees or costs were awarded.

Foxworth v. Department of Human Services, Division of Youth Corrections, Gilliam Youth Service Center, case number 2011B086 (January 11, 2013).

Complainant, Director of Gilliam Youth Service center, appealed his termination. After hearing, the ALJ concluded: Complainant committed the acts for which he was disciplined, including abdicating his role as Director of Gilliam, failing to improve his performance and address the audit deficiencies, implementing systems necessary to improve performance at Gilliam, failing to enforce the prohibition on group searches of youth, and driving under the influence of alcohol which is off duty conduct that adversely affects his ability to lead a youth corrections facility as a role model for youth, and his standing as a community leader. The ALJ also found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Respondent did not discriminate against Complainant. Affirming Respondent's action, the ALJ dismissed Complainant's appeal with prejudice.

Robinson v. University of Colorado Denver, Information Technology Services, case number 2012B131 (January 28, 2013).

Complainant, a certified employee, appealed his termination of employment from the Information Technology unit at the University of Colorado at Denver, arguing that it was arbitrary, capricious and contrary to rule or law and that his termination was the product of unlawful discrimination on the basis of his race and age, and a violation of the State Employee Protection Act. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including incorrectly using the tally code, submitting 8 of his 12 monthly timesheets late, and not following all of the rules and procedures that were applied to the technicians on the team. Even after repeated warnings, in the form of an action plan, coaching meetings, multiple corrective actions, and two years of failing reviews, Complainant still could not find a way to bring his performance up to par for the 2011 – 2012 review period. In addition, the ALJ held that Respondent’s action was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives. Affirming Respondent’s disciplinary action and the termination of Complainant’s employment, the ALJ dismissed Complainant’s appeal with prejudice.

Geremaia v. Department of Transportation, case number 2013B029 (February 4, 2013).

Complainant, a certified Transportation Maintenance II, appealed the termination of his employment on the grounds that the decision was arbitrary, capricious, and contrary to rule or law. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including improperly using state resources by filling the water tank on his personal vehicle to take water to his horses, not being truthful about the issue with his appointing authority, and using unsafe pothole filing procedures on several occasions. The ALJ also found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and an award of attorney fees and costs

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

is not warranted in this case. Affirming Respondent's disciplinary termination of Complainant's employment, the ALJ dismissed Complainant's appeal with prejudice.

Paiz v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Services Center, case number 2013B068(C) (April 22, 2013).

Complainant appealed the three-month reduction in pay he received for being the Safety Security Officer I on duty in the Cedar Unit A pod when three of the youth detainees hid at the back of the upper level quiet living area and engaged in sexual conduct, and then two of the youths again engaged in sexual conduct on the lower level quiet living area. The ALJ found that one of the primary functions of an SSO I is to maintain a head count of the youths assigned to, or visiting, the pod. Additionally, an SSO I is expected to report and address any evidence that a security violation has occurred. The ALJ found that a preponderance of the evidence established that Complainant was the SSO I on duty when three youths went to a spot in the pod which was not in Complainant's line of sight, that Complainant saw the three youths come down from that position but failed to report or address anything, and that such actions by the youth were major security violations which should have been reported and addressed by Complainant. The preponderance of the evidence also established that Complainant was the SSO I on duty when two of the youths later engaged in sexual contact. Finally, the ALJ found that Complainant did not tell the truth about his actions during the Board Rule 6-10 process. The ALJ concluded that, given the fact that the primary function of the SSO I on the pod is to maintain visual lines of sight on the youth offenders so as to not allow them to engaged in conduct violations, as well as to address any violations that are noted by staff, the performance deficits in this case were sufficiently serious to issue a disciplinary action without first issuing a corrective action for similar conduct. The disciplinary action was affirmed, and Complainant's request for an award of attorney fees and costs was denied.

Firko v. Department of Public Safety, Colorado State Patrol, case number 2013B046 (May 31, 2013).

Complainant, a certified corporal with the Colorado State Patrol, appealed the termination of his employment after CSP found that he had violated the Fourth Amendment and the civil rights of a civilian when, during the investigation of a possible DUI, he opened the door of a home without consent and then attempted to kick down the door when it was closed on him by the resident. CSP also determined that, as the ranking member in charge of the encounter, Complainant failed to consider other, safer options for addressing the investigation of a possible DUI, and that his aggressive reaction to being told by the resident that he needed a warrant led to the eventual shooting of the resident by the other trooper on the scene. The ALJ found that Complainant's appointing authority had conducted a patient and through review of the incident, and had reached reasonable conclusions as to what the law required under such circumstances. The ALJ also found that the appointing authority reached reasonable conclusions about whether Complainant had met those requirements, and that termination was within the range of reasonable disciplinary alternatives given that a violation of civil rights is a serious offense and given the life and death consequences of the mishandling the issue. The discipline was affirmed.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Rich v. Department of Revenue, Division of Motor Vehicles, Driver's License Section, case number 2013B049 (June 27, 2013).

Complainant, a certified Driver's License Examiner I, appeals the termination of her employment, and alleges a violation of the State Employee Protection Act (Whistleblower Act). After hearing, the ALJ found that Respondent had proven that Complainant had engaged in the intentional overcharging of customers during the months of July and August 2012. The ALJ found that Respondent had not proven by a preponderance of the evidence that Complainant had kept money she had collected for herself or that there had been theft of state monies. The ALJ concluded that Board Rule 6-9 permitted Respondent to take the findings from a prior disciplinary action into account when determining whether discipline should be imposed in this matter. Additionally, the ALJ did not permit Complainant to challenge the factual determinations made in that earlier matter because Complainant had not filed a timely appeal of the matter, and C.R.S. § 24-50-125(3) makes the action of the appointing authority final under such circumstances. The ALJ also dismissed Complainant's Whistleblower Act claim under C.R.C.P. Rule 50 because Complainant had presented no evidence in her case-in-chief addressing any protected disclosures of information, or that Complainant had alerted her supervisor or other appropriate person of information to be disclosed, or that there was any reason to believe that a disclosure had caused the termination of her employment. The ALJ found that Respondent had failed to provide Complainant with a copy of the termination letter by certified mail sent to Complainant's last known address, or by hand delivery, as required by C.R.S. § 24-50-125(2) and Board Rule 6-15, and in the time frame required by the statute. The ALJ ordered Respondent to follow the statutory requirements and to provide Complainant with compensation in full for the seven days between the point when the termination went into effect and the first date that Respondent provided Complainant with a copy of a letter which met the substantive requirements of C.R.S. § 24-50-125(2). Finally, the ALJ found that termination of employment was within the range of reasonable alternatives in this case because Complainant's overcharging of customers constituted willful misconduct and violated the basic trust that customers should be able to expect from a state agency, and because Complainant's actions meant that Complainant could not be trusted to handle money for the agency. Accordingly, the termination of employment was affirmed, but the disciplinary letter was to be modified to remove references to theft of state property, and the agency was to provide compensation in full to Complainant for a period of seven days.

Larsen v. Department of Agriculture, Markets Division, case number 2013B120 (August 29, 2013).

Complainant, a Senior International Marketing Specialist, appealed a disciplinary action requiring him to repay $162.83 in labor costs incurred by the State, in connection with his hiring an intern without prior authorization and sought rescission of the action. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including hiring an intern without prior authorization and thus incurring liability for the State without prior authorization by the Controller; Respondent's action was not arbitrary, capricious, or contrary to rule or law; and the discipline imposed was within the range of reasonable alternatives. Affirming the disciplinary action, the ALJ dismissed the appeal.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Mitchell v. University of Colorado Boulder, Department of Intercollegiate Athletics, Athletic Game Management & Facility Operations, case number 2013B116 (September 9, 2013).

Complainant appealed his termination of employment. He was Custodian III at CU athletic facilities; he yelled at and verbally abused his staff at work and at home and demanded rides home and on errands by subordinates every day. Complainant used employees for personal benefit during work time, but he asserted that Respondent did not use progressive discipline and provided no warning to him on performance evaluations. The ALJ upheld his termination due to the seriousness of his actions and abuse of his position.

Neumeister v. Department of Corrections, San Carlos Correctional Facility, case number 2013B129 (November 14, 2013).

Complainant, a mental health supervisor at San Carlos Correctional Facility, was disciplinarily terminated, and appealed. Complainant had been recently corrected and disciplined for violating internet use policies. She was transferred to SCCF in order to be under more supervision. On March 17, 2013, she was called into SCCF to perform a mental health assessment of an offender. Complainant failed to perform any assessment on the offender and falsified the record in the notes she made following the death of the offender in DOC custody. The ALJ found that Complainant committed the acts for which she was disciplined and that the termination was fully justified by Complainant's willful violation of DOC standards and her recent disciplinary action.

Wanker and Gallegos v. Department of Transportation, case number 2013B092(C) (December 27, 2013).

Complainants, both Transportation Maintenance IIIs for the Colorado Department of Transportation, were permanently disciplinarily demoted to Transportation Maintenance IIs and appealed. Complainants had been disciplined for their failure to supervise some of their subordinate employees who admitted to drinking on CDOT time and on CDOT property. These same subordinates further admitted to working less than half their shifts and goofing off for the remainder. The ALJ found that Mr. Wanker committed the acts for which he was disciplined, but that the permanency of his demotion was excessively punitive. The ALJ ordered that Mr. Wanker be permitted to compete for TM3 positions, or any CDOT positions, in the future. The ALJ found that Mr. Gallegos committed some of the acts for which he was disciplined; namely, he failed to supervise his employee who had been disappearing for portions of his shifts. The ALJ found that none of the employees who admitted to drinking on CDOT time and property were within the unit that Mr. Gallegos supervised, and that CDOT had not put on evidence showing that Mr. Gallegos had any duty to supervise them. The ALJ further found that Mr. Gallegos' actions were not so serious or flagrant as to exempt CDOT from using progressive discipline with him. Therefore, the ALJ ordered that Mr. Gallegos' demotion be rescinded and that he be reinstated to his previous TM3 position, that he receive back pay for the time he was paid a TM2 salary, and that he be issued a corrective action for his failure to properly supervise his employee who disappeared while on duty. Attorney fees were not awarded.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Discrimination - Civil Rights

Ward v. Department of Natural Resources, Division of Wildlife, case number 2004B143 (February 2, 2006).

Complainant, a Wildlife Technician III, appealed his administrative termination from his position, alleging discrimination based on disability. After hearing, the ALJ determined that Respondent discriminated against Complainant on the basis of his disability in violation of the Colorado Anti-Discrimination Act with a threefold finding: (1) Complainant is disabled within the meaning of the Act; (2) Respondent violated its duty to reasonably accommodate Complainant's disability in two ways: first, by failing to engage in the interactive process, and second, by failing to timely conduct a vacant job search; and (3) Complainant is unable to perform the essential functions of the Wildlife Technician III position with or without accommodation. In addition, the ALJ concluded that Respondent violated its own "Return to Work/Modified Duty Policy" and Board Rules pertaining to the Americans with Disabilities Act coordinator, and its action was arbitrary and capricious. The ALJ rescinded Respondent's termination of Complainant and ordered that Complainant is reinstated with full back pay and benefits to the date of termination. The ALJ's order stated that, because Complainant was not able to perform the essential functions of his position with or without reasonable accommodation at the time of his termination from DNR, Respondent and Complainant are ordered to engage in the interactive process of reasonably accommodating him in a vacant position for a six-month period during which time he shall continue to receive front pay consisting of his full pay and benefits. Finally, the ALJ awarded Complainant reasonable attorney fees and costs.

Ward v. Department of Natural Resources, Division of Wildlife, case number 2004B143 (July 20, 2006 - Initial Decision of the Administrative Law Judge, on Remand).

Following Board review of the Initial Decision of the Administrative Law Judge, the Board remanded this case to the ALJ "solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998)." On remand, the ALJ made additional findings, including the fact that the preponderance of evidence demonstrates that despite Complainant's request for reasonable accommodation by transfer to a vacant position, Respondent continued to seek applicants other than Complainant, for any and all vacant positions for which he was qualified. The ALJ determined that the agency had a policy requiring it to conduct the vacant job search, the employee requested transfer to a vacant position, the agency failed to conduct that job search in violation of its own policy, and the agency failed to consider that employee for any and all vacant positions that came open. Contrary to Respondent's argument, the ALJ reasoned that to require Complainant to perform a vacant job search, excusing Respondent from compliance with his own policy, in order to meet his *prima facie* case, would shift the burden of proving the affirmative defense of undue hardship away from Respondent and onto Complainant. Finally, the ALJ concluded that, despite Complainant's request for transfer to a vacant position, Respondent, in violation of its own policy, failed to consider Complainant as a candidate for any and all vacant positions in the 1500-employee statewide agency, for a period of over five months. The ALJ thus found that Complainant met the fifth prong of the *prima facie* case for a

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

failure to accommodate claim under *Fail.*

Clay v. Department of Corrections, Limon Correctional Facility, case number 2006G046 (January 18, 2007).

Complainant, a correctional officer, appealed her termination by Respondent, seeking reinstatement, back pay, and attorney fees and costs. After hearing, the ALJ found that Respondent did not intentionally and unlawfully discriminate against Complainant in terminating her probationary employment. Although Complainant met the *prima facie* showing requirement of discrimination based on gender with the evidence that she presented, Complainant failed to persuade the ALJ that Respondent's proffered reasons for terminating her employment were merely pretext for discrimination. In fact, the ALJ concluded that the warden was motivated to terminate Complainant's employment during the probationary period by a series of reports from a wide range of other employees as to problems caused or exacerbated by Complainant's behavior. Affirming the termination and dismissing Complainant's appeal with prejudice, the ALJ declined to award attorney fees and costs.

Maynard v. Department of Health Care Policy and Financing, case number 2007B073(C) (December 8, 2008).

Complainant, an accountant, appealed her March 28, 2007 disciplinary demotion; her November 26, 2007 corrective action; a May 23, 2008 Step I denial of one portion of her May 9, 2008 grievance; a June 4, 2008 Step II denial of the other portion of her May 9, 2008 grievance; and her June 30, 2008 disciplinary termination. After hearing, the ALJ determined that Complainant did not commit the acts upon which discipline was based, including creating a hostile work environment or violating the terms of her corrective action. The ALJ did conclude that Respondent's actions were arbitrary and capricious and violated Board Rules 6-5, 6-6, and 6-10, 4 CCR 801; and, while Respondent did not engage in race discrimination, Respondent's demotion of Complainant constituted gender discrimination. Additionally, the ALJ found that Respondent's November 2007 corrective action, 2008 evaluation and termination of Complainant were retaliatory in violation of CADA and constituted retaliation against Complainant for filing charges of discrimination; Respondent's termination of Complainant violated the Colorado State Employee Protection (Whistleblower) Act; Complainant is entitled to an award of attorney fees and costs; and Complainant is entitled to back pay and benefits, and front pay. The ALJ ordered Respondent to rescind the demotion and termination of Complainant, provide her back pay and benefits to the date of demotion, provide front pay in an amount to be determined at hearing, and pay attorney fees and costs incurred in bringing this action. The ALJ ordered the agency to impose disciplinary action, as mandated by the Whistleblower Act.

Schutte v. Department of Corrections, Buena Vista Correctional Facility, case number 2010G082(C) (December 16, 2011).

Complainant, a certified Correctional Officer I, raises claims of religious discrimination, retaliation, and hostile work environment in Buena Vista Correctional Facility management's

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

refusal to accommodate his observance of the Sabbath and other occurrences at his workplace related to his religion or his absence from work on the Sabbath. Complainant also appeals his termination from employment, along with the imposition of other lesser forms of correction, based upon his refusal to work as scheduled when his schedule included the Sabbath. After hearing, the ALJ found that Respondent unlawfully discriminated against Complainant because of his religion; Complainant committed the acts for which he was disciplined; Respondent's action was arbitrary, capricious, or contrary to rule or law; and the discipline imposed was not within the range of reasonable alternatives. The ALJ rescinded and reversed Respondent's actions in terminating Complainant's employment and in issuing performance documentation and corrective actions to Complainant from April 2010 until December 29, 2010; ordered that Complainant be reinstated to his former CO I position or an equivalent position; and awarded Complainant full back pay and benefits, with statutory interest.

Williams v. Department of Public Safety, Colorado State Patrol, case number 2011G028 (July 16, 2012).

Complainant was a 12-year employee who had been promoted to Captain at the time he resigned. His evaluations were excellent. Complainant was gay but had not disclosed it at the Patrol. During his tenure, Complainant witnessed anti-gay bias slurs and incidents at all staff levels and filed two complaints about anti-gay incidents, neither of which resulted in action by the Patrol to correct the conduct. Ten weeks after resignation, Complainant applied for reinstatement.

Respondent required Complainant to undergo the background investigation and polygraph exam. During the pre-test interview, Complainant made pre-test admissions that he had accidently viewed a video of child pornography for a few seconds and had flagged it on the website, and that one time a massage had ended in his being masturbated by the masseuse. The polygraph examiner asked Complainant if the masseuse was a male or female. Complainant responded truthfully that it was a male. Complainant was upset by the question and had a significant reaction to the polygraph test. The question violated the Patrol Polygraph policy prohibiting questions pertaining to sexual orientation.

Respondent denied reinstatement to Complainant on the basis of his failed polygraph test within two business days of the polygraph test without interviewing Complainant, consulting agency counsel, HR, or reviewing any written policies or standards. The Patrol had recently hired two new Trooper Cadets and one reinstatement Trooper who failed the polygraph.

The ALJ concluded that Respondent's decision to deny reinstatement was arbitrary and capricious and constituted discrimination based on sexual orientation. Front pay was awarded, based on the unfeasibility of reinstatement due to the evidence Complainant would likely be placed in danger as a Trooper. Attorney fees were awarded based on the Patrol's failure to genuinely consider reinstating Complainant and conducting a sham decision-making process. Case is discussed under **Arbitrary and Capricious** and **Attorney Fees.**

Chosvig v. Department of Revenue, Division of Motor Vehicles, case number 2013B026 (August 16, 2013).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant was administratively discharged under Director's Procedure 5-10 (2012) after leave was exhausted. She claimed FMLA and ADA violations. The ALJ held that Respondent violated FMLA by failing to designate her surgery and recovery as FMLA-qualifying, and failing to provide her the required 15-day notice of need to re-certify a qualifying medical condition to remain on leave; and Respondent violated ADA by failing to engage in interactive process with Complainant regarding a reasonable accommodation for her fibromyalgia. Rescinding the discharge, the ALJ ordered that Complainant be reinstated with all attendant FMLA and ADA rights, including to engage in the interactive process.

Sullivan v. Department of Transportation, case number 2014B003 (March 17, 2014).

Complainant worked for DOT for 20 years before being administratively discharged on June 25, 2013. Complainant appealed the separation from service arguing that he was discriminated against on the basis of disability, in violation of CADA. He further contends that DOT violated the Americans with Disabilities Act by failing to engage in the interactive process with him. The ALJ found that DOT violated the ADA by failing to engage in the interactive process with Complainant, reversed Complainant's administrative discharge, and ordered DOT to complete the interactive process with him, and ordered back pay.

Exempt Position

Blume v. Department of Public Safety, , Division of Fire Prevention and Control, State Personnel Board case number 2013B006 (February 21, 2013).

Complainant served as an exempt Administrative Professional with the Colorado State Forest Service for approximately nine years. As of July 1, 2012, certain functions, positions, and employees of the CSFS were legislatively transferred Respondent Department of Public Safety, Division of Fire Prevention and Control, as part of a larger reorganization and consolidation of agencies. DPS requested that CSFS employees submit applications, background packets, and take polygraph examinations prior to being considered for employment. Complainant did not do so, and the position was filled by another individual. On July 2, 2012, DPS issued Complainant a letter terminating his employment. Complainant argues that his position as Deputy Chief for Wildland Fire Field Operations transferred as a matter of law, and that he was not lawfully required to complete the application process to retain his position. He asserts that he became a classified employee on July 1, 2012, and that DPS' action in terminating his employment on July 2, 2012, was contrary to law. As relief, Complainant seeks reinstatement as a state employee in Fort Collins, at a level commensurate with the position he previously held, back pay, and benefits. After oral argument, the ALJ ordered that the Board lacks jurisdiction over Complainant and his appeal because Complainant was not a classified state employee at the time of his termination; the Board lacks the authority to overturn or rescind the action of Respondent; and because the Board lacks jurisdiction over this appeal, Complainant's appeal is dismissed with prejudice.

Failure to Report

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Escobedo v. Department of Human Services, Division of Youth Corrections, Zebulon Pike Youth Service Center, case number 2005B049 (April 14, 2005).

Complainant, a security service officer, appealed her disciplinary termination, seeking reinstatement, back pay, and an award of attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts for which she was terminated, including violating the self-reporting policies that governed her employment by failing to report a felony child abuse charge, failing to provide a copy of the charging documents and the final disposition to her supervisor, and failing to comply with the appointing authority's directive to fax him copies of documents charging her with felony menacing. In addition, the ALJ determined that Respondent's action was not arbitrary and capricious, as Respondent used reasonable diligence to ascertain all information necessary to make a fully informed decision. Affirming the actions of Respondent, the ALJ dismissed Complainant's appeal with prejudice and did not award attorney fees and costs.

Hegler v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Services Center, case number 2012B045 (April 23, 2012).

Complainant, a certified employee previously classified as a Correctional Youth Security Supervisor, appeals his demotion to Correctional Youth Security Officer. The demotion was based upon Respondent's finding that Complainant had violated departmental policy prohibiting certain types of supervisor/subordinate relationships and requiring that Complainant report his relationship with CSYO I Edwards within ten days of when it became an intimate relationship. The ALJ found that Complainant and Ms. Edwards had engaged in an intimate relationship, as that term is defined in the relevant policy, since before April of 2010; that Complainant had answered falsely and did not tell his supervisor the truth about the relationship when asked about in it late 2010; and that Complainant was still not reporting the matter truthfully even after Complainant acknowledged in July of 2011 to his supervisors that the relationship existed. The ALJ found that the decision to impose discipline was not contrary to rule even though Complainant had been told by the HR representative at his Rule 6-10 meeting that he could receive copies of the witness statements reviewed by his appointing authority, but Complainant's appointing authority did not provide the specific statements during that process. The Board's rules place the responsibility for a disciplinary process on the appointing authority and do not require that the statements themselves be disclosed to the employee during the Board Rule 6-10 process. Complainant's appointing authority, therefore, had the authority to not grant the request for the statements. The ALJ concluded that a demotion from the supervisory position of CYSS III was within the scope of reasonable disciplinary alternatives under such circumstances, even though Complainant had no prior disciplinary or correctional actions and had good performance reviews. The ALJ also concluded that progressive discipline was not required under Board Rule 6-2 because Complainant had engaged in a relationship with an employee who was initially his direct report and who was still within his chain of command when he served as facility supervisor, then mislead his supervisor concerning the nature of his relationship. The ALJ found that such actions were serious and flagrant violations of policy warranting a direct imposition of discipline. See also Disciplinary Actions.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Jurisdiction

Riley v. Department of Corrections, case number 2011B100 (July 12, 2012).

Complainant was a certified Community Parole Officer employed by Respondent Department of Corrections prior to his disciplinary termination. Although Complainant filed a timely appeal with the Board, due to a clerical error, the Board did not hold a hearing within 90 days of the filing of the appeal. Respondent moved to dismiss for lack of jurisdiction. The ALJ denied the motion to dismiss, concluding that the 90-day deadline was directory, rather than jurisdictional, in nature. Thereafter, Complainant moved to dismiss and grant the relief requested in the appeal. The ALJ denied Complainant's motion.

After a 5-day evidentiary hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, that Respondent's disciplinary action was not arbitrary and capricious or contrary to rule or law, and that the discipline imposed was within the range of reasonable alternatives. Respondent's action was therefore affirmed. In particular, Respondent proved by preponderant evidence that Complainant misrepresented the truth during an official police investigation, that he failed to immediately report allegations of sexual misconduct to his supervisor, and that he failed to properly document his interactions with the parolee in question. Respondent demonstrated that its investigation and the discipline imposed were not arbitrary or capricious, or contrary to rule or law. Lastly, due to the position of trust held by a CPO, Respondent demonstrated that despite the fact that progressive discipline was not followed, the conduct was sufficiently serious to conclude that termination was not outside the range of reasonable alternatives. Case is discussed under Code of Conduct and Disciplinary Actions.

Layoff

Najar v. Department of Corrections, case number 2014B009 (January 7, 2004).

Complainant, a program assistant, appealed the retention rights offered to her by DOC following layoff. In affirming the actions of Respondent and denying Respondent's request for attorney fees, the ALJ found that Complainant did not fail to produce any competent evidence to support her appeal; and her "experience of the layoff process was a poor one, fraught with incorrect and conflicting information, and then, upon learning that she was indeed to be laid off, a delay of a period of months to learn of what, if any, retention rights she would receive." The ALJ concluded that the fact that Complainant failed to prove that Respondent's conduct rose to the level of a rule violation does not render her appeal groundless, and therefore, attorney fees are not warranted.

Muncy v. Department of Human Services, Division of Colorado State Veterans Nursing Home, Colorado State Veterans Center at Homelake, case number 2004B087 (April 29, 2004).

Complainant appealed the abolishment of his position, alleging disability discrimination. After Complainant presented his case-in-chief, Respondent moved to dismiss on the grounds that

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant had not met his burden of proof. The ALJ granted the motion to dismiss, concluding that: the credible evidence established that Complainant was laid off due to a lack of funds and Respondent laid off Complainant only after laying off two other Homelake employees who, due to their seniority or lack of military service, were junior to Complainant in the Structural Trades I class; there was no evidence that there were any other employees in the Structural Trades I class who were junior to Complainant; and there was no evidence that any of the notice requirements mandated by the Board's layoff rules were violated. Affirming the layoff, the ALJ found that Respondent did not arbitrarily and capriciously abolish Complainant's position, Respondent did not discriminate against Complainant on the basis of disability, and an award of attorney fees to Respondent is not warranted.

Schulter v. Department of Personnel and Administration, Division of Central Services, case number 2004B093 (November 3, 2004).

Complainant appealed his layoff, including the determination of his retention rights, and sought reinstatement, back pay, benefits, attorney fees, and costs. After hearing, the ALJ determined that the appointing authority's action was not arbitrary, capricious, or contrary to rule or law. The ALJ found that the choices made by Respondent, while having a severe impact on Complainant, were not unreasonable or beyond the pale; rather, they were choices made in the context of a long history of losses, a state statute mandating costs be covered by the rates charged and the non-production nature of Complainant's position, and those choices were made after consideration of a wide range of facts. While the parties stipulated to consideration of the Complainant's retention rights for five positions, the ALJ found that Complainant did not meet the minimum and/or special entry requirements, including education and experience, for those five General Professional positions and that the agency properly assessed his past experience and job duties. Affirming Respondent's action, the ALJ did not award attorney fees and costs.

Performance

Mahaffey v. Department of Corrections, case number 2005B053 (June 20, 2005).

Complainant, a parole officer who rose to the position of supervisor, appealed her demotion based on failure to appropriately manage those she supervised, and sought rescission of the disciplinary demotion, reinstatement to her former position, and attorney fees and costs. Affirming Respondent's actions, the ALJ found that Complainant was a topnotch parole officer, so successful in the position that she was moved up the chain of command, but despite Respondent's dedicated efforts to mentor Complainant as a manager, Complainant never adjusted to the Team Leader position. In fact, the demands of the position so overwhelmed her that she was on edge most of the time, unable to be calm, thoughtful, and unemotional in her supervisory role; instead, she often snapped at others because she was under so much stress, and the position was so challenging to Complainant that it impaired her judgment in managing her own case load. The ALJ ruled that the demotion was not arbitrary, capricious, or contrary to rule or law, and Complainant was not entitled to an award of attorney fees and costs.

Miller v. Department of Higher Education, University of Northern Colorado, case number

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

2005B112 (November 14, 2005).

Complainant, a Pipe and Mechanical Trades II, appealed his disciplinary demotion, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ found, among other things, that Complainant failed to perform at the level required of his position, was unable to follow his supervisor's directions, and was unable to maintain the focus necessary to complete tasks in a timely manner, despite the fact that his supervisor worked hard to help him improve. The ALJ ruled that the appointing authority exercised his decision with moderation, and thus, Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and were within the range of reasonable alternatives. No attorney fees were awarded, as the ALJ affirmed Respondent's demotion of Complainant.

Gomez & Burnett v. Department of Labor Employment, Workforce Development Programs, case number 2005B136(C) (November 21, 2005).

Complainants, Labor and Employment Specialists V (Supervisor) and II respectively, appealed their terminations for consumption of alcohol in a state vehicle on state time. At hearing, the ALJ concluded that Complainants purchased a bottle of alcohol and drank it in the state vehicle while driving to Trinidad on business. With regard to Complainant Gomez, the ALJ found that Respondent's action was not arbitrary, capricious or contrary to rule or law, and termination was within the range of reasonable alternatives available to Respondent; Gomez's actions were such that he could no longer serve in his position of leadership in the community, and he breached the trust that the appointing authority needed to have in him as the holder of that position. With regard to Complainant Burnett, the ALJ found that Respondent's action was arbitrary, capricious or contrary to rule or law, and termination was not within the range of reasonable alternatives available to Respondent. The ALJ concluded, among other things, that Gomez's conduct placed Burnett in a difficult position, to terminate her for the decision to "go along with him" was unduly harsh, she does not hold the same high profile leadership position in the community that Gomez holds, and she is a stellar employee. Affirming the termination of Gomez, the ALJ ordered that Respondent's termination of Burnett is modified, permitting Respondent to impose a disciplinary suspension of the duration it deems appropriate against Burnett and then to reinstate her with back pay and benefits.

Williams v. Regents of the University of Colorado, University of Colorado System Office, Procurement Service Center, case number 2005B081 (March 15, 2006).

Complainant, a purchasing agent, appealed his disciplinary termination, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant committed most of the acts for which he was disciplined, including providing poor customer service with respect to the tote bag requisition, the Veritas Software requisition, and the Bear Creek Recreation Center sound system requisition. In addition, the ALJ found that Complainant was deliberately insubordinate in his actions of speaking to a co-worker for ten minutes immediately after he was told to limit conversations with that co-worker and that he was late to work, despite an agreement he entered into regarding the issue of timeliness. In affirming Respondent's disciplinary termination of Complainant, the ALJ concluded that Respondent's

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

Smith v. Department of Human Services, Disability Determination Services, case number 2007B090 (December 7, 2007).

Complainant, a technician, appealed her termination seeking reinstatement. After hearing, the ALJ determined that Complainant did not present evidence of intentional discrimination or a *prima facie* showing of discrimination based on age or disability, as she alleged in her appeal. In addition, the ALJ found that, while Respondent established by a preponderance of the evidence that Complainant had failed to perform competently under the January 2007 Corrective Action and had only a Needs Improvement rating for the quality of her work in the 2006-2007 review period, Respondent did not demonstrate by a preponderance of the evidence that Complainant's overall performance for purposes of the 2006–2007 review period was at an overall "Needs Improvement" level. Furthermore, affirming the disciplinary termination, the ALJ concluded that Respondent's action was arbitrary or capricious as to the assignment of discipline for leave usage and an overall "Needs Improvement" rating for the 2006-2007 review period, but not arbitrary, capricious or contrary to rule or law for the remainder of the causes for discipline and the discipline imposed was within the range of reasonable alternatives.

Arellano v. Department of Revenue, Division of Motor Vehicles, Title and Registration Section, case number 2012B108 (November 5, 2012).

Complainant appeals her termination of employment as an Administrative Assistant II with the Department of Revenue, Division of Motor Vehicles, Title and Registration Sections. Complainant argues that she was terminated while she was in the midst of a performance improvement plan (PIP), and that she was doing reasonably well under the PIP. Given those circumstances, Complainant argues that her termination was arbitrary, capricious or contrary to rule or law, and should be rescinded. Complainant requests that she be returned to her position, provided with back pay and benefits, and awarded attorney fees and costs.

The ALJ found that Complainant had been subject to multiple PIPs and corrective actions (CA) on the same performance issues which also resulted in her receiving a Needs Improvement overall rating at the end of the 2011-2012 performance period. The Needs Improvement rating triggered the issuance of a four-week PIP. Complainant began the PIP in the middle of April 2012. The ALJ found that the decision to terminate Complainant's employment at the end of April 2012 did not violate Board Rule 6-6 because the rule is not violated by the appointing authority taking disciplinary action even while a PIP is on-going, so long as "the employee is already under corrective or disciplinary action for the same performance matter." In this case, there was no need under Board Rule 6-6 for Respondent to wait to determine whether Complainant would improve her performance because the PIP addressed the same performance matters as her prior corrective actions. Respondent's imposition of discipline while the PIP was on-going, accordingly, did not violate Board Rule 6-6. No other basis to reverse the decision of the appointing authority was found. Respondent's disciplinary action was, therefore, affirmed. No attorney fees or costs were awarded.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Smith v. Colorado State University, case number 2014B019 (May 27, 2014).

Complainant appeals Respondent's decision to terminate his employment as a police officer after Respondent determined that he had failed to qualify with his handgun. Complainant argued that he had performed successfully in at least one of his 13 attempts to qualify, and that Respondent had erred when it decided to terminate his employment prior to the time when the Colorado Peace Officer Standards and Training Board had taken action to revoke Complainant's certification as a peace officer. The ALJ found that Complainant had not qualified with his handgun on any attempt, and that the POST Board did not need to act before Respondent could discharge Complainant for failing to meet the requirements of its policies requiring periodic qualification with the officer's duty weapon. Additionally, given the importance of skillful handling of a firearm to the duties of a police officer, Complainant's inability to qualify with his handgun justified immediate discipline and required that Complainant at least be removed from the position of police officer. Under such circumstances, termination of employment was within the range of reasonable disciplinary alternatives available to Respondent. The termination was affirmed.

Probationary Employee

Barwick v. Department of Corrections, case number 2008G090 (January 22, 2009).

Complainant, a probationary correctional officer, challenged his termination during the probationary period, seeking reinstatement, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ determined that Complainant's actions constituted unsatisfactory performance, including his refusal to submit to a chemical test upon request by the arresting officer following Complainant's motorcycle accident. The ALJ also affirmed Respondent's conclusions that Complainant's refusal violated the oath of office requiring correctional officers to uphold the laws of the State of Colorado and Complainant violated DOC's Code of Conduct because his off-duty conduct reflected poorly on Complainant and DOC, cast doubt on the integrity of DOC employees, and brought discredit upon Complainant as a DOC employee. Affirming Respondent's termination of Complainant, the ALJ concluded that Respondent did not violate Complainant's statutory or constitutional rights in terminating his probationary employment and Complainant is not entitled to an award of attorney fees and costs.

Ryan v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, case number 2013G025 (September 12, 2013).

Complainant, a probationary nurse I with the Colorado Mental Health Institute at Fort Logan (Ft. Logan), appealed the termination of her employment on the grounds that the decision violated the State Employee Protection Act (Whistleblower Act). Complainant specifically alleged that she was retaliated against for refusing to provide emergency medications under circumstances that did not meet her nursing judgment, for critiquing the treatment team's treatment protocols as insufficiently grounded in recovery model treatment principles, and for complaining that the facility did not provide adequate treatment plans for patients or provide adequate skill training

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

for patients. After hearing, the ALJ found that Complainant had met her burden of proving by a preponderance of the evidence that certain of her statements which questioned the quality of the psychiatric treatment services provided by Ft. Logan were disclosures of information entitled to protection under the Whistleblower Act, and that these disclosures were a substantial or motivating factor in the decision to terminate Complainant's employment. The ALJ also found that Respondent then met its burden to prove by a preponderance of the evidence that Complainant would have been terminated even without the protected disclosures. The ALJ found that Complainant's actions in failing to administer emergency or involuntary medications was not a protected disclosure subject to protection and that such actions were contrary to the applicable standards which governed the administration of medications. These actions alone would warrant the termination of a probationary nurse. The ALJ also found that Complainant's other actions in not working well as a member of a treatment team, complaining about the treatment provided by her team during an internal interview, and leaving the impression with various staff members that she had no intention of taking their perspectives into account in the manner in which she presented her arguments, were all factors which supported termination of her employment. As a result, The ALJ found that there had been no violation of the Whistleblower Act and the termination of Complainant's employment was affirmed.

Hardesty v. Department of Human Services, Division of Youth Corrections, Zebulon Pike Youth Services Center, case number 2013G080 (May 12, 2014).

Complainant appealed her termination as a probationary employee, claiming she was terminated in retaliation for filing a sexual harassment complaint against a co-worker. The ALJ found that Respondent did not retaliate against Complainant, but rather that Complainant's employment was terminated due to poor performance during her probationary year. The ALJ affirmed Respondent's termination of Complainant's employment.

Progressive Discipline

Filson v. Colorado State University, Human Resources Services, case number 2004B075 (July 8, 2004).

Complainant, an accounting technician, appealed her disciplinary termination, alleging discrimination based on age. After hearing, the ALJ determined that Respondent followed a logical progression of discipline in an attempt to correct Complainant's performance; given Complainant's lack of improvement, termination was a reasonable choice for discipline. At the end of the combined presentation of Complainant's response to Respondent's case-in-chief and Complainant's presentation of her case-in-chief on her age discrimination claim, Respondent moved to dismiss Complainant's age discrimination claim. The ALJ granted Respondent's motion, and Complainant's age discrimination claim was dismissed based upon her failure to present evidence of a *prima facie* case of age discrimination. In affirming Respondent's action, the ALJ concluded that Complainant committed the acts for which she was disciplined; Respondent's action was not arbitrary, capricious, or contrary to rule or law; and the discipline imposed was within the range of reasonable alternatives.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Apodaca v. Department of Revenue, Liquor Enforcement Division, case number 2011B033 (March 14, 2011).

Complainant, an administrative assistant, appealed her termination, seeking reversal of the disciplinary action, reinstatement to her position, and an award of damages, including an award of attorney fees and costs. After hearing, the ALJ found that Complainant committed only some of the acts for which she was disciplined and that only two of the acts she committed were violations of the applicable standards of conduct; Respondent's disciplinary termination was arbitrary and capricious because of Respondent's acceptance of inculpatory second-hand information while ignoring credible exculpatory first-hand information and because Respondent's interpretation of the applicable ethics rules was unreasonable; Respondent's termination of Complainant was contrary to rule or law because Respondent did not apply progressive discipline as required by Board Rule 6-2; the discipline imposed was not within the range of reasonable alternatives; and attorney fees and costs are warranted for that portion of the litigation addressing the disciplinary allegations that were not sustained at hearing. Rescinding the termination, the ALJ ordered that Complainant is reinstated to her previous position with full back pay and full benefits from the date of the termination of her employment, offset for any substitute earnings or unemployment compensation received by Complainant during this period of time, and the with cost of expenses incurred in seeking other employment deducted from the offset. The ALJ stated that Respondent may issue Complainant a corrective action for accepting two free drinks from employees or owners of regulated entities.

Bell v. Board of Trustees for Metropolitan State College, case number 2012B071 (June 14, 2012).

Complainant was a certified Lab Coordinator III employed by Respondent Metropolitan State College prior to her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant did not commit the acts for which she was disciplined, that Respondent's disciplinary action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives. Respondent's action was therefore rescinded. In particular, Respondent did not meet its burden to prove that Complainant failed to adhere to safety regulations and practices. Respondent did not produce an objective set of safety regulations and practices that Complainant was required to comply with, nor did Respondent prove that Complainant failed to abide by any general safety regulations and practices imposed by law or her PDQ. Complainant's direct supervisor testified on her behalf, and believed that Complainant was performing her job well, as reflected by exceeding expectations performance evaluations. Progressive discipline was not followed, because the two prior corrective actions were unrelated to the disciplinary action. Complainant's request for attorney fees was denied, because Complainant did not demonstrate that the action was frivolous, groundless, or made in bad faith. Case is discussed under **Arbitrary and Capricious** and **Disciplinary Actions.**

Skitt v. University of Colorado – Boulder, College of Arts and Sciences, case number 2012B004 (July 19, 2012).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant was a certified Administrative Assistant III employed by Respondent University of Colorado at Boulder prior to her disciplinary termination. After an evidentiary hearing, the ALJ determined that Complainant committed the acts for which she was disciplined, that the disciplinary action was not arbitrary and capricious or contrary to rule or law, and that the discipline imposed was within the range of reasonable alternatives. Respondent's action was therefore affirmed. In particular, Respondent met its burden to prove that Complainant did not accurately and timely process late drop petitions, and that Complainant accepted two late drop petitions after the deadline. Respondent's investigation and decision to impose discipline was not arbitary, capricious, or contrary to rule or law. Lastly, Respondent proved that it exercised progressive discipline in this case, and that based on the progressive discipline, the decision to terminate Complainant's employment was within the range of reasonable alternatives. Case is discussed under **Disciplinary Actions**.

Resident Safety

Casares v. Department of Human Services, Pueblo Regional Center, Community Living for the Developmentally Disabled, case number 2005B005 (December 15, 2004).

Complainant, a health care technician, appealed her disciplinary termination, denying that the action for which she was terminated, physical abuse of an at-risk adult resident, had taken place. At hearing, the ALJ found that two eye witnesses provided the same account of what had transpired between Complainant and the resident and the director of the center ordered an in-house investigation of the incident, which proved to be thorough, professional, and objective, resulting in a lengthy, detailed report. The ALJ concluded that Complainant committed the acts upon which discipline was based; Respondent’s action was not arbitrary, capricious, or contrary to rule or law, as the director used more than reasonable diligence and care to obtain all relevant evidence concerning what occurred, considered all evidence available to her, and made a reasonable decision; and Complainant is not entitled to an award of attorney fees and costs.

Gonzales v. Department of Human Services, Colorado State Veterans Center, case number 2005B091 (November 10, 2005).

Complainant, a nursing home activities director, appealed the disciplinary termination of her employment by Respondent, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant used her position at the Veterans Center to gain control of an elderly resident's life, money and property and to become the sole beneficiary of his will, all of which constitute financial exploitation of a resident. In addition, Complainant accepted the resident's entire estate, two months of rent, and a $13,000 hot tub, thus violating the Veterans Center Code of Ethics. Affirming the disciplinary termination of Complainant, the ALJ determined that Respondent's action in terminating her employment was not arbitrary, capricious, or contrary to rule of law; Respondent’s action was within the range of reasonable alternatives; and attorney fees are not warranted.

Robinson v. Department of Human Services, Colorado Mental Health Institute at Pueblo, case number 2006B007 (March 21, 2006).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a correctional security officer, appealed his disciplinary five percent pay reduction for three months, seeking rescission of the pay reduction and reimbursement of the amount deducted from his paycheck. After hearing, the ALJ determined that Complainant committed the acts upon which discipline was based, including violating CMHIP Policy 16.15, Adult Patient Abuse/Neglect, which defines Patient Abuse as "any behavior by an employee that is anti-therapeutic, non-professional and/or affects the patient detrimentally." His behavior included failing to keep his emotions in check, escalating the situation by failing to utilize the five steps mandated by verbal judo, and using unwarranted force with a patient by intimidating, traumatizing, and pushing the patient toward a wall, causing his head to bump the wall, resulting in a small bruise. In affirming the disciplinary pay reduction, the ALJ found that Respondent's actions were not arbitrary, capricious or contrary to rule or law.

Retaliation

Burke v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center, case number 2004B069 (October 24, 2005).

Complainant, a correctional safety and security officer (CSSO), appealed her disciplinary termination, alleging discrimination based on disability and seeking rescission of the termination, reinstatement to a similar position in a different facility, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ concluded that Complainant committed none of the acts upon which she was disciplined, Respondent's actions were arbitrary and capricious, as Respondent had no factual basis upon which to discipline Complainant, and the preponderance of evidence demonstrated that Complainant was the best performer on her unit with respect to imposing discipline when appropriate and enforcing regulations designed to protect residents' health and safety. In addition, the ALJ found that Respondent did not discriminate against Complainant on the basis of disability, but did retaliate against Complainant for exercising her free speech rights. Rescinding the disciplinary termination, the ALJ ordered that Respondent reinstate Complainant to a CSSO position at a different facility, with full back pay and benefits, minus compensation she has earned from other sources after her termination, and reimburse her for attorney fees and other costs incurred in bringing this action.

Luchenburg v. Department of Labor & Employment, Information Management Office and Governor's Office of Information Technology, case number 2010G040(C) (Amended Initial Decision - March 4, 2011).

Complainant, an Information Technology Professional III, asserted claims of unlawful sex discrimination, hostile and improper work environment and retaliation and sought remediation of her hostile work environment, upgrading of her position to IT Professional IV, and compensation from September 1, 2009, forward as well as attorney fees and costs. The ALJ determined that Respondent did not discriminate against Complainant because of her sex by treating her in a disparate manner from her male co-workers; Respondent did unlawfully discriminate against Complainant by retaliating against her; Respondent did not unlawfully discriminate against Complainant by creating a hostile work environment; and Complainant is entitled to an award of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

attorney fees and costs for litigation of the retaliation issue. Affirming Complainant's claims of discrimination in part and denying them in part, the ALJ ordered Respondent to re-start the facilitated conversations begun by CSEAP in order to mediate the relations among the members of the former IES group.

Selection

Cress v. Department of Human Services, case number 2005S012 (May 30, 2006).

Complainant appealed her non-selection for an Accounting Technician II position by Respondent, requesting appointment to that position or a comparable position with comparable pay or better. After hearing, the ALJ determined that it is reasonable for a departmental Human Resources (HR) Director to determine that it is poor HR practice to hire a former employee terminated for disciplinary reasons; in addition, it is an appropriate HR practice to assure that prior to making a hiring decision, the appointing authority is given all relevant information necessary to make a fully informed judgment. Finding that Respondent did not violate Board Rules or Director's Procedures in the selection process, that Respondent was not arbitrary and capricious in not selecting Complainant for the position, and that Respondent did not retaliate against Complainant in its decision, the ALJ affirmed Respondent's non-selection of Complainant for the Accounting Technician II position and dismissed the case with prejudice.

Redden & Kaberlein v. Department of Labor and Employment, case number 2005G094(C) (July 6, 2006).

Complainants appealed the selection process utilized by Respondent for filling multiple vacancies for the Labor and Employment Specialist III (L & E III) position, seeking an order invalidating the promotions (with the exception of the number 3 ranked candidate) and mandating that Respondent conduct the selection process again, in accordance with the Rule of Three as set forth in the Colorado Constitution, article XII, §13(5), and C.R.S. §24-50-112.5(b)(2). After hearing, the ALJ concluded that Respondent violated the Colorado Constitution, article XII, §13(5), and §24-50-112.5(2)(b), C.R.S.; Respondent violated former Director's Procedure P-4-17; and Respondent's action was arbitrary and capricious. Rescinding Respondent's actions, the ALJ ordered that Respondent shall invalidate the promotions of the nine individuals promoted to L & E III who did not rank #3; Respondent shall make the remaining selections to the L & E III positions from the January 2005 referral list based on the three highest ranking for each position; the first selection shall be made from the top three ranked individuals on the referral list (#1, #2, and #4); and for each additional selection, the next highest ranking individual's name (#5) will be referred to the appointing authority, until all selections have been made.

Autenrieth v. Department of Labor and Employment, Office of Unemployment Insurance, case number 2007B094 (October 11, 2007).

Complainant appealed the decision by Respondent to rescind his appointment to a Labor and Employment Specialist (L&E) III position, seeking reinstatement to an L&E III position.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Affirming Respondent's action and dismissing Complainant's appeal with prejudice, the ALJ determined that neither Complainant's nor Respondent's arguments demonstrate that the decision to rescind Complainant's L&E III position was arbitrary, capricious or contrary to rule or law; the procedure followed by Respondent in implementing the Board's decision of December 19, 2006, affirming the Initial Decision of the Administrative Law Judge in Lynn Redden and William J. Kaberlein v. Department of Labor And Employment, State Personnel Board Case Number 2005G094(C), followed the specific requirements for revising the L&E III selection process mandated by the Board; and in the final analysis, Complainant failed to demonstrate that the decision to rescind his L&E III appointment should be reversed by the Board.

McGuire v. Department of Revenue, case number 2004G080 (July 28, 2008).

Complainant, a revenue agent, appealed the selection procedure used by the Division of Gaming in the selection of a Criminal Investigator II position, seeking appointment to the position of Criminal Investigator II; an award of back pay, benefits, and interest; and reimbursement of attorney fees and costs. After hearing, the ALJ found that Respondent's actions, with regard to this position, were arbitrary, capricious or contrary to rule or law, based on the following: (1) By statute, an eligible list shall remain in effect for six months, or longer if the list is extended; and (2) Respondent's decision to cancel the January 2004 eligible list in February 2004 because Complainant was the only person on the eligible list and failing to interview Complainant for the position of Criminal Investigator II once he had been referred for that position were contrary to state law. The ALJ also found that Complainant had not met his burden of proving that his non-selection for the Criminal Investigator II position was the product of intentional age discrimination or retaliation. The ALJ declined to award attorney fees because Respondent's decision to cancel the January 2004 eligible list had been the product of a long-standing practice advocated by the Division of Human Resources of the Department of Personnel and Administration and, therefore, was not the type of personnel action which would warrant an award of fees. The ALJ ordered that Respondent's decision to cancel the January 2004 eligible list is rescinded and the remedy the ALJ awarded to Complainant is that Complainant is to be placed on the next Criminal Investigator II referral list and allowed to fully and fairly compete for openings in that class over the six-month (or more) period for which that list is in operation, in the same manner as if he had tested within the top three candidates for that eligible list.

Wilson v. Regents of the University of Colorado, University of Colorado at Colorado Springs, case number 2008S010 (October 16, 2009).

Complainant appealed the selection process used by Respondent for a Program Assistant I position as arbitrary, capricious or contrary to rule or law; challenged the selection process as a form of unlawful discrimination on the basis of age; and sought reinstatement to University employment through placement into the Program Assistant I position, back pay and benefits, and attorney fees. After hearing, the ALJ found that Respondent's selection process did not violate the Colorado Anti-Discrimination Act. The ALJ found, however, that Complainant had been referred for the position to the hiring committee as a reinstatement candidate, that it was arbitrary and capricious to use an informal poll of some faculty members as the basis to refuse to

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

interview Complainant or evaluate her application, and that it was contrary to Director's Procedures 4-13 and 4-24 for Respondent not to notify Complainant that she had been referred to the hiring committee and to deny her an interview. The ALJ noted that the available remedy is limited by law to that which is necessary to remedy the legal wrong sustained by Complainant and to not permit the granting of a windfall. In the absence of a clear showing that Complainant had been kept from a position that would have otherwise been offered to her in the absence of Respondent's actions which were arbitrary, capricious and contrary to rule, Complainant would not be entitled to placement into the position but would be entitled to compete fairly for the position. As a remedy, the ALJ ordered that Respondent's selection process for position number 400563-LAS/Political Science & Geography and Environmental Studies Department Program Assistant I is overturned; and Respondent is to re-open consideration for the position, and is to interview Complainant as a referred reinstatement candidate along with referrals from appropriate employment lists. The ALJ also ordered that, given the passage of time since the original recruitment process, Respondent may utilize an existing employment list or may find it necessary to assemble a new applicant pool. Attorney fees and costs were not awarded.

Harrison v. Department of Human Services, Division of Facilities Management, case number 2013S031 (April 25, 2014).

Complainant appealed Respondent's decision that he should not be interviewed in the third and final round of the selection process for the position of Equipment Operator III. Complainant argued that Respondent's decision constituted unlawful age discrimination, and asked for an order that he should be employed in the position and provided other relief as determined by the ALJ. After hearing, the ALJ determined that Respondent's decision to reject Complainant's application for the EO III position was not a violation of the Colorado Anti-Discrimination Act. The ALJ affirmed Respondent's decision to reject Complainant's application as part of the EO III selection process and dismissed the appeal with prejudice.

Senior Executive Service (SES)

Olson v. Department of Local Affairs, case number 2008B013 (March 20, 2008) (Decision Amended April 10, 2008).

Complainant appealed the termination of his Senior Executive Service (SES) contract with Respondent for the position of Director of the Division of Emergency Management (DEM) at DOLA, seeking reinstatement to the position of DEM Director, back pay, and an award of attorney fees and costs. After hearing, the ALJ determined that the preponderance of evidence demonstrated that Complainant gave a false statement of fact to the Governor's Chief Legal Counsel on June 27, 2007, by stating he did not know what the Governor's Chief Legal Counsel was talking about with regard to any gender discrimination claims, or that he was not aware of anything about that; Complainant's conduct on June 27, therefore, constituted an appropriate basis for disciplinary action under Board Rule 6-12(3); and Complainant did not produce evidence to rebut the conclusion that he violated Board Rule 6-12(3). In addition, the ALJ found that Respondent proved by preponderant evidence that when Complainant made a false representation of a material existing fact to Respondent, he knew at the time of its falsity and of

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

his duty in equity and good conscience to disclose the truth; and since Respondent proved all of the elements of a fraudulent inducement claim, it was therefore entitled to rescind the SES contract with Complainant. With regard to Complainant's allegation of discrimination based on age, the ALJ concluded that Respondent and the Governor determined that Complainant had concealed material information from the Governor's Chief Legal Counsel during the vetting process; the Executive Director of DOLA and the Governor had lost trust in Complainant; the Governor determined that Complainant lacked the management judgment and credibility to effectively function as DEM Director; and Complainant neither argued nor produced any evidence that age motivated the Governor's decision. Additionally, the ALJ found that: (1) Complainant's SES contract did not create a property interest in continued employment; therefore, in the absence of a property right, Complainant has no claim to a deprivation of due process; (2) Respondent did not deprive Complainant of his liberty interest in his reputation without due process of law; and (3) Respondent's action was not arbitrary, capricious, or contrary to rule or law. Affirming Respondent's action, the ALJ dismissed Complainant's appeal with prejudice.

Kirkmeyer v. Department of Local Affairs, case number 2007G089 (January 14, 2010).

Complainant appealed her separation from state service following the non-renewal of her Senior Executive Service (SES) contract. On June 7, 2007, the ALJ dismissed Complainant's appeal, finding that the Board had no jurisdiction over the case. The Board adopted that finding, and Complainant appealed to the Colorado Court of Appeals. The Court of Appeals found that the Board did have jurisdiction, reversed the Board's order, and remanded the case with directions on February 12, 2009. The Court of Appeals held, "Because we conclude that the Board had jurisdiction to determine whether complainant could compete for open classified jobs as a certified employee, we reverse and remand with directions." Complainant sought the following relief: an order that reverses the determination that the contract provision promising her return to a classified pay position is void; enforcement of that contract provision by order of the Board; an order that DOLA must offer her positions for which she qualifies when such positions become available; and an award of back pay, future pay, and attorney fees and costs. Respondent sought an order finding that it did not violate Board Rule 9-3 (which prohibits discrimination based on race, creed, color, gender, sexual orientation, national origin, age, retaliation, political affiliation, organizational membership, veteran's status, disability or other non-job related factors in all employment decisions) and that Complainant is not entitled to any relief.

After hearing, the ALJ found that Respondent's actions did not violate state statute or Board Rules, and are in compliance with the Court of Appeals decision in this case, there is no merit to the argument that Respondent was required under the contract to place Complainant in a position, and Complainant had only the privilege of competing for another position, and to date, has not done so, as she has not applied for any open positions at DOLA. The ALJ also found that Respondent did not discriminate against Complainant in violation of Board Rule 9-3, no illegal animus for Respondent's actions was proven, and as a result, Complainant has presented insufficient evidence to support a finding of pretext and of unlawful discrimination on the basis of her political affiliation. Affirming Respondent's action, the ALJ found that Complainant is not entitled to attorney fees and costs.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Kirkmeyer v. Department of Local Affairs, case number 2007G089 (January 24, 2013).

Complainant was a certified Management class employee employed by Respondent, Department of Local Affairs, prior to her separation from state service on June 30, 2007. Complainant was in the Senior Executive Service pay plan for the last three years of her state employment; Complainant seeks to be returned to the traditional classified pay plan within the state personnel system. In particular, Complainant contends that Respondent unlawfully determined that Complainant did not have the right to move into a vacant position within the Management class when Respondent elected not to renew her SES contract following the 2006-07 fiscal year. Complainant bases this claim on her 2006-07 SES contract, and in particular, a "safe harbor clause" within the contract.

After briefing by the parties, the ALJ found that under the safe harbor clause of Complainant's 2006-07 SES contract, if the contract was not renewed, the parties intended to provide Complainant with the right to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified; Complainant's claims are not barred by the doctrines of waiver or estoppels; Director's Procedure 2-11(C) precludes enforcement of the SHC; Board Rule 2-13 does not preclude enforcement of the SHC; and the Board does not have jurisdiction to review the three issues raised by Complainant following the Order on Summary Judgment. The ALJ ordered that Respondent's action is affirmed; Director's Procedure 2-11(C) precludes enforcement of the SHC in Complainant's 2006-07 SES contract; accordingly, Complainant is not entitled to the requested relief, and the appeal is therefore dismissed with prejudice.

Sexual Harassment

Baca v. Department of Corrections, Fremont Correctional Facility, case number 2004B152 (December 15, 2005).

Complainant, a correctional officer, appealed his termination, alleging that it was arbitrary and that Respondent discriminated against him based on his race and sexual orientation and seeking reinstatement, back pay, benefits, and transfer to a different facility. After hearing, the ALJ found that Complainant committed the acts for which he was terminated, including sexually harassing a female employee who was under his direct chain of command and violating several provisions of the agency's Code of Conduct. In addition, the ALJ concluded that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances; thus, the decision to terminate was not arbitrary, capricious or contrary to rule or law and the discipline imposed was within the range of reasonable alternatives. Finally, affirming Respondent's action, the ALJ found that Complainant failed to establish any circumstances that gave rise to an inference of unlawful discrimination based on either his race or his sexual orientation.

Whistleblower - State Employee Protection Act

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Lucci-Wolgamott v. Department of Natural Resources, Board of Land Commissioners, case number 2005G044 (July 5, 2007).

Complainant, a probationary employee, appealed her termination by Respondent, alleging that she was terminated in violation of the Colorado State Employee Protection Act (Whistleblower Act). She sought reinstatement to her previous position; back pay, plus interest; removal of all evidence of her termination from her personnel files; appropriate discipline for other employees, pursuant to the Whistleblower Act; and attorney fees and costs. After hearing, the ALJ determined that Respondent did not violate the Whistleblower Act, as follows: (1) Complainant's statements about a lease application backlog were not disclosures, since this information was already known; (2) liquidating purchase orders to allow a project manager to purchase computers did not violate procurement and fiscal rules, although Complainant believed that it did; (3) any statements Complainant made about a contract employee's contracts were not disclosures of any practices or actions that constituted the waste of public funds, abuse of authority, mismanagement, illegal or inappropriate activity, and cannot, therefore, be considered to be "disclosures" under the Act; (4) Complainant's report of the loss of purchase orders was not a disclosure because this information was already known; (5) it was not illegal or improper, as Complainant asserted, to reduce purchase orders to $5,000 or less to assure that contractors were timely paid; (6) the temporary employee who Complainant thought was illegally hired was not; (7) Complainant was incorrect in her assertion that a contract employee began working before his purchase order was approved; and (8) Complainant's complaints about a contractor's receipt of a sole source justification were unfounded and did not disclose any public waste, mismanagement, abuse of authority, or any other inappropriate or illegal practice, and were, therefore, not "disclosures." In affirming Respondent's action and dismissing Complainant's appeal with prejudice, the ALJ did not award attorney fees and costs.

Maynard v. Department of Health Care Policy and Financing, case number 2007B073(C) (December 8, 2008).

Complainant, an accountant, appealed her March 28, 2007 disciplinary demotion; her November 26, 2007 corrective action; a May 23, 2008 Step I denial of one portion of her May 9, 2008 grievance; a June 4, 2008 Step II denial of the other portion of her May 9, 2008 grievance; and her June 30, 2008 disciplinary termination. After hearing, the ALJ determined that Complainant did not commit the acts upon which discipline was based, including creating a hostile work environment or violating the terms of her corrective action. The ALJ did conclude that Respondent's actions were arbitrary and capricious and violated Board Rules 6-5, 6-6, and 6-10, 4 CCR 801; and, while Respondent did not engage in race discrimination, Respondent's demotion of Complainant constituted gender discrimination. Additionally, the ALJ found that Respondent's November 2007 corrective action, 2008 evaluation and termination of Complainant were retaliatory in violation of CADA and constituted retaliation against Complainant for filing charges of discrimination; Respondent's termination of Complainant violated the Colorado State Employee Protection (Whistleblower) Act; Complainant is entitled to an award of attorney fees and costs; and Complainant is entitled to back pay and benefits, and front pay. The ALJ ordered Respondent to rescind the demotion and termination of Complainant, provide her back pay and benefits to the date of demotion, provide front pay in an

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

amount to be determined at hearing, and pay attorney fees and costs incurred in bringing this action. The ALJ ordered the agency to impose disciplinary action, as mandated by the Whistleblower Act.

Katzenmeyer v. Department of Corrections, case number 2010G005 (November 15, 2010).

Complainant, a Health Services Administrator at Buena Vista Correctional Center, filed an appeal asserting that DOC retaliated against her and violated the State Employee Protection (Whistleblower) Act by placing her in a clerical parole position in September 2009 and by referring criminal charges against her to the District Attorney. After hearing, the ALJ determined that Complainant engaged in protected conduct under the Act by filing an incident report regarding potential inmate abuse and participating in the fact-finding process. The ALJ also found that Complainant did not timely appeal her assignment to the Parole position in Pueblo; therefore, the Board lacks jurisdiction over this claim. Finally, the ALJ concluded that Respondent's referral of criminal charges for prosecution against Complainant constitutes a form of penalty covered under the Whistleblower Act, and Complainant is entitled to the remedies mandated by the Act. The ALJ ordered Respondent to reimburse Complainant for any costs, including all court costs and attorney fees incurred in the proceeding before the Board and in the criminal trial held in April 2010; to expunge Complainant's personnel file and all other DOC files of all documents relating to the criminal investigation and prosecution of Complainant; and to restore any service credit as Health Services Administrator that she may have lost since her June 11, 2009 placement on administrative leave.

Workplace Violence

Kelly v. Trustees of the State Colleges in Colorado, Mesa State College, case number 2004B094 (July 12, 2004).

Complainant, a custodian, appealed his termination for "his consistent and long term pattern of unacceptable harassing and threatening behavior," which constituted failure to perform competently, willful misconduct, and inability to perform. Complainant had engaged in an ongoing pattern of aggressiveness and confrontational behavior towards co-workers and supervisors for years, culminating in a verbal attack against his supervisor as he continually pounded on her desk, and a confrontation with a complete stranger on campus. The ALJ found that the appointing authority was justified in assuring the protection of students and other individuals on campus, because she could not be sure Complainant would cease his violent behavior. Complainant had argued that working with cleaning agents with toxic chemicals had caused his violent outbursts at work. The ALJ found that he neglected to wear safety equipment and failed to demonstrate a causal connection between his exposure to the chemicals and his behavior on the job. The ALJ found that Complainant committed the acts upon which discipline was based and concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law. The ALJ affirmed Respondent's disciplinary termination and dismissed Complainant's appeal with prejudice.

Cunha v. Department of Transportation, case number 2005B006 (November 23, 2005).

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.

Complainant, a professional engineer, appealed his termination, seeking reinstatement with back pay, a finding that CDOT violated the Colorado Whistleblower Act and/or the Colorado Anti-discrimination Act, and an award of attorney fees. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including pretending to point a gun at his supervisor and asking him how he would negotiate himself out of that situation, a willful violation of CDOT's workplace violence policy; sending an e-mail to CDOT's Executive Director which was inappropriate and demonstrated a lack of tact and diplomacy; failing to respond professionally in e-mails regarding his attendance at a meeting; and using improper forums to discuss issues which should have been discussed in a private meeting with his supervisor. In addition, the ALJ concluded that Complainant failed to establish that his disclosure regarding the Trinidad Phase II project was the substantial and motivating factor for his termination, thus failing to prove that the Whistleblower Act was violated, and failed to establish any circumstances that gave rise to an inference of unlawful discrimination based on either his age or his national origin. The ALJ affirmed Respondent's action, finding that it was not arbitrary, capricious or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives.

Bryant v. Regents of the University of Colorado, University of Colorado Denver, School of Medicine, case number 2009B012 (October 5, 2009).

Complainant, an administrative assistant, appealed her disciplinary termination as arbitrary, capricious or contrary to rule or law, and discriminatory on the basis of race, seeking reinstatement, back pay, benefits, and attorney fees. After hearing, the ALJ found that there was credible evidence that Complainant had made threats of physical harm to her supervisor and others in her work site; that such threats resulted in a reasonable fear by Complainant's supervisor that Complainant intended to injure her; that the threats also disrupted the workplace; and that the threats therefore constituted violations of Respondent's anti-violence policy. The ALJ found that Respondent had not proven that Complainant's work performance was deficient so as to warrant discipline on that basis. Affirming the termination and declining to award attorney fees, ALJ determined that Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law and did not violate the Colorado Anti-Discrimination Act; and that the discipline imposed was within the range of reasonable alternatives.

Livesay v. Department of Transportation, case number 2010G087 (May 20, 2011).

Complainant, a Transportation Maintenance Worker, appealed Respondent's response to his grievance concerning workplace violence, seeking an assignment to a Heavy Equipment Operator IV position to remove him from his assignment under supervisor Nick Madrid, compensation for hours of overtime that he was denied, and reimbursement of his attorney fees and costs. After hearing, the ALJ determined that Respondent's disciplinary action - a performance documentation form - was not arbitrary, capricious, or contrary to rule or law; and an award of attorney fees and costs is not warranted.

Please note that appeals of Initial Decisions of the Administrative Law Judges to the Board and subsequent appeals of Board Orders to the courts have not been included in the analysis of each case. For further information on the subsequent history of these decisions, see the Board Orders on the web site or contact Board staff.