STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014B033

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANN SHERIDAN,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT PAROLE, COMMUNITY CORRECTIONS AND YOUTHFUL OFFENDER SYSTEM,
Respondent.

Administrative Law Judge ("ALJ") Tanya T. Light held the hearing in this matter on April 29 and 30, 2014; and May 1, 13, 15, 16, and 23, 2014 at the State Personnel Board ("Board") located at 1525 Sherman Street, 4th Floor, Denver, Colorado. The case commenced on the record on April 29, 2014, and the record closed on May 23, 2014. Ryan S. Coward and Donald C. Sisson of Elkus, Sisson & Rosenstein, P.C. represented Ann Sheridan ("Complainant"). Assistant Attorney General Sabrina L. Jensen represented Respondent, the Colorado Department of Corrections, Division of Adult Parole, Community Corrections and Youthful Offender System ("DOC"). Respondent's advisory witness was Kelly Messamore, DOC Region IV Assistant Director and complainant's appointing authority.

MATTERS APPEALED

Complainant appealed her October 25, 2013 termination as a Community Parole Officer ("CPO"), claiming that her termination was arbitrary and capricious. Through this appeal, Complainant sought reinstatement as a CPO.

Respondent stated that it properly terminated Complainant for failure to meet minimum job requirements and long-term poor performance history. Respondent requested that its termination of Complainant be affirmed and that all of Complainant's requested relief be denied.

For the reasons set forth below, Respondent's termination of Complainant is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

2. Whether Respondent's actions were arbitrary, capricious, or contrary to rule or law; and

3. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

DOC Background

1. Complainant began her DOC employment as a Community Parole Officer ("CPO") on May 1, 1999. She worked in that capacity throughout her DOC career, until her termination on October 25, 2013. She was a certified state employee at the time of her termination.

2. Ms. Messamore has worked for DOC for 27 years and is currently the DOC Assistant Director for Region 4, which includes Complainant's office. At all times relevant to this case she was Complainant's appointing authority.

3. "CWISE" is the primary tool CPOs use to track and record their contacts with and monitoring of the offenders in their caseload. CWISE stands for the Colorado Web-Based Integrated Support Environment, and can be accessed by the Internet, by Blackberry, or by calling live operators who enter the data for the CPOs.

4. The entries that CPOs make into CWISE are called "chronological entries," or "chrons" for short. "Chronning" is the term used by DOC which means making a CWISE entry. It refers to the fact that CWISE is the centralized repository of all of the CPOs' contacts with offenders listed in chronological order.

5. Other personnel have access to, rely on, and can make chron entries into CWISE, such as police, case managers, and other CPOs. It is critical that chron entries are up to date and accurate, in order to ensure that whoever accesses CWISE will be presented with an accurate and current picture of an offender's overall compliance or lack of compliance. For example, if an offender has consistent negative urinalyses ("UAs"), is maintaining stable employment, and is otherwise doing well outside of incarceration, those facts are reflected in CWISE. Courts have accepted CWISE entries as proof of alibi if, for another example, an offender was meeting with his or her CPO at the time a crime was committed.

6. Complainant supervised a caseload partially made up of "Community Residential" offenders, offenders transitioning out of DOC incarceration and living in halfway houses run by private companies. The rest of her caseload was offenders who were in the Intensive Supervision Program ("ISP").

7. ISP is the structured supervision, monitoring, and guidance of DOC high risk offenders who are living in the community at an approved residence other than a halfway house. They are subject to strict monitoring guidelines, such as electronic monitoring and daily check-in calls to the CWISE operator. ISP offenders must be seen in person every week by either their CPO or their case manager.

8. DOC has implemented Administrative Regulations ("ARs"), which establish, among other things, the minimum contacts CPOs must make with the offenders in their caseloads, and the rules offenders must abide by. The ARs are published online and were available to Complainant at all times.

9. Some of the ARs pertinent to this case include:

a. AR 250-47: "The CPO shall ensure that information regarding an offender's supervision, to include case plan decisions, events, and activities regarding offenders, is immediately documented in the chronological records . . . It is the responsibility of CPOs to provide assistance to offenders whenever possible. It is also the responsibility of the CPOs to adhere to the provisions of this administrative regulation."

b. AR 250-27: "The initial contact and office visit between the offender and assigned CPO shall take place within . . . 30 days of an offender's residential placement."

   "The chronological record will reflect all contacts pertinent to the offender's supervision . . . and will be a critical measure as to whether or not minimum standards are met. In order to provide up-to-date and accurate information on every offender, it is critical that entries are made as soon as possible after the contact. Personal contacts with the offender shall be made immediately after the contact was made, except under extenuating circumstances. In all cases, the date of the contact shall be documented and late entries shall be documented, as such."

   "Community parole officers shall be responsible for maintenance and currency of chronological recording."

c. A.R. 250-49 outlines minimum contact standards for CPOs with their ISP offenders:

   "Weekly face-to-face contact with the CPO or program contract workers at any location . . . At least 50 percent of these contacts shall be between the CPO and the offender."

   "A face-to-face contact within the first 30 calendar days from release and each time there is a change of residence . . . Home contacts should be conducted when the offender is most likely to be home, which is during the offender's assigned curfew."

10. AR 250-54 is DOC's Code of Penal Discipline ("COPD"), which outlines all of the rules offenders must abide by, the sanctions for failing to comply with the rules, and the procedures for providing them notice and a hearing when they are accused of violating the rules. A COPD hearing is presided over by a hearing officer or Administrative Law Judge, and the offender's CPO drafts and serves a "Notice of Charges" to trigger a COPD hearing.

11. AR 250-54 also defines the Colorado Violation Decision Making Process ("CVDMP"), a tool CPOs are required to use with offenders who are committing violations:

> This is the process...staff use to identify the most appropriate response to an offender's violation of a supervision condition. It includes the use of an automated instrument in CWISE that suggests a range of possible sanctions to the CPO based on a comparison of the severity of the violation and the offender's risk to re-offend . . .

> once the CPO has determined that a violation of an ISP placement condition has occurred, the CPO shall complete a CVDMP instrument in CWISE as soon as possible following notification of the event.

12. AR 250-54 requires CPOs to "respond to all violations in some way. Failing to acknowledge and address violations may be viewed as tacit approval of the behavior. Respond swiftly. Responses are more impactful when they closely follow the behavior."

13. AR 150-01 mandates that offenders must be given a COPD hearing within 10 days of their detention for violating COPD rules, and that failure to timely hold the hearing is a violation of their due process rights.

<u>Audit of Complainant's files and the Rule 6-10 Meetings</u>

14. In July of 2013, an offender in Complainant's caseload, B.C., was arrested and charged with first degree murder. In accordance with Ms. Messamore's usual practice when a high profile incident occurs with an offender, she reviewed B.C.'s chrons.

15. Upon review, Ms. Messamore discovered what she believed to be poor case management of B.C. by Complainant, including failing to meet minimum contact standards leading up to B.C.'s arrest. Due to her concerns, she asked two DOC supervisors, Barb Clementi and ShawnDee Ingo, to audit Complainant's cases. Ms. Messamore also reviewed additional cases, and spent approximately 40 hours reviewing Complainant's case work.

16. Ms. Clementi and Ms. Ingo recorded their findings in memoranda they gave to Ms. Messamore. Based on their findings, as well as her own, Ms. Messamore decided to conduct Board Rule 6-10 meetings with Complainant in order to share her concerns and provide Complainant the opportunity to provide mitigating information. Ms. Messamore also decided to conduct the 6-10 meeting because Complainant was currently on a Performance Improvement Plan ("PIP") for failing to meet minimum home visits with offenders.

17. Ms. Messamore conducted a total of four 6-10 meetings with Complainant in July through October of 2013. The number of meetings was the result of Complainant asking Ms. Messamore to consider other cases and mitigating information, as well as her requesting additional time to prepare her responses. Ms. Messamore provided Complainant with proper notice of the meetings.

<u>October 24, 2013 Termination Letter</u>

<u>B.C.</u>

18. After conducting the 6-10 meetings, reviewing the memoranda, conducting her own audits, reviewing Complainant's personnel file and performance history, and receiving Complainant's mitigating information, Ms. Messamore decided to terminate Complainant's DOC employment. On October 24, 2013, she sent Complainant a 20-page letter detailing what she believed was Complainants' sub-standard case work on a number of offenders, as well as overall concerns with Complainant's poor organization and time management skills, and informed Complainant she would be terminated effective October 25, 2013.

19. There were several issues in the termination letter that were litigated at trial, but about which findings of fact cannot be made because the evidence was either unclear or

confusing. These issues include, but are not necessarily limited to, Complainant's Daily Activity Logs, a chart that a DOC supervisor created attempting to quantify the CPOs' workloads as a percentage of full time equivalent ("FTE"), and certain allegations concerning Complainant's handling of some of her offenders. The lack of findings in the findings of fact is an intentional result.

20. The letter began by discussing Complainant's handling of offender B.C. B.C. was placed on ISP status and into Complainant's caseload on March 22, 2013. Complainant should have made a home visit with B.C. within the first 30 days of his placement, or by April 22, 2013. She failed to make the home visit timely, and did not make her first home visit until May 29, 2013.

21. On June 7, 2013, B.C. failed to report to a scheduled meeting with his case manager. On that same day, Complainant conducted her first face-to-face visit with B.C. June 13, 2013 should have been the next face-to-face visit with him by either Complainant or his case manager, but there is no chron entry that reflects anyone met with him. Complainant admits she did not meet with him after her June 7, 2013 meeting with him.

22. On June 11, 2013, B.C. missed a required UA. Complainant should have performed a CVDMP on B.C. for missing the UA, but did not. B.C. missed a second UA on June 18, 2013. Complainant did not perform a CVDMP after this failure. She did not discuss the missed UAs with him until a June 26, 2013 telephone call with him.

23. On June 13, 2013, the chrons document that B.C.'s mother-in-law called CWISE with concerns about B.C. and requested Complainant to return her call. The chrons do not document that Complainant called her back.

24. The chrons document that B.C. changed residences on June 18, 2013, but do not reflect that Complainant met with him after this move.

25. Complainant next made phone contact with B.C. on June 26, 2013, instructing him not to report to their face-to-face visit, which was scheduled for the next day, and that she would meet with him in the field. The chron did not indicate that Complainant gave B.C. a specific time or place in the field to meet. Complainant made no other face-to-face contacts with B.C. in June of 2013, and on June 29, 2013 he was arrested.

26. On June 30, 2013, the chrons note that Complainant made-to-face contact with B.C. at a halfway house meeting in which B.C. was present. Complainant called CWISE and asked the CWISE operator to enter this chron on all of her offenders – that she met with all of them at a halfway house meeting on June 30, 2013. However, she later realized she had made a mistake because many of her offenders, including B.C., did not reside in a halfway house, and Complainant did not attend a halfway house meeting on June 30, 2013. She had attended a halfway house meeting earlier in the week and met some of her offenders then.

27. Complainant did not intentionally make this incorrect chron entry. She had had dental surgery on June 28, 2013, was on medication and in a great deal of pain. Complainant did not have authority to change the chron entry once she realized her mistake. She could have asked her supervisor to change the entry, but did not do so.

28. The chrons reflect that B.C. had several curfew violations, but do not show a response from Complainant.

29. Complainant was required to meet with B.C. a total of eight times from his placement on ISP until his arrest according to the AR minimum contact standards. She met with him seven times.

30. During the 6-10 meetings and at hearing, Complainant provided explanations for the findings above. Many of these explanations apply to the majority of offenders discussed below, and are the following:

a. In March of 2013, DOC Director Tom Clements was murdered, and DOC was very hectic in the aftermath. Also, Complainant was out of the country for a week-long trip in the beginning of March. She additionally spent 40 hours in training that month, and served as a hearing officer for an entire week. Those things combined to leave Complainant with only 40 hours for the month of March 2013 to perform casework.

b. After Tom Clements' murder, DOC policy changed, requiring field visits with offenders to be made with partners, as opposed to CPOs being permitted to make visits alone, which had previously been allowed.

c. Complainant had scheduled face-to-face meetings with offenders at her office for June 27, 2013. However, Complainant's office moved that week, and Complainant's manager told the CPOs they could not use the new office yet, and the old office did not have furniture. Complainant did not want to have to sit on the floor to meet with her offenders, so she contacted all of them on June 26, 2013 and told them not to report to the office as scheduled on June 27, and that she would see them in the field. However, all of the CPOs had been informed earlier in June 2013 that the office would be moving that week.

d. On June 27, 2013, as Complainant was preparing to leave to meet with offenders in the field, she was informed by Ms. Ingo that another CPO was making credible suicide threats. This incident was particularly upsetting because less than one year earlier, anther CPO in the office had committed suicide.

e. Complainant, as a member of a DOC peer support team, participated in a peer support meeting with Ms. Ingo wherein Ms. Ingo asked the team to help provide emotional support to the other personnel in the office. Ms. Ingo did not require the peer support team members to remain in the office all day, but Complainant thought she did.

f. The day after the suicide threat incident, Friday, June 28, 2013, Complainant had a previously-scheduled dentist appointment that she could not cancel because she had waited over one month for the appointment, was experiencing extreme dental pain, and would not be able to wait another month to see the dentist due to the pain. The appointment ended up taking up most of her day, and she was not able to see offenders on June 28.

31. Complainant addressed B.C.'s failure to make his scheduled June 7, 2013 meeting with his case manager when she had her face-to-face meeting with him on that day.

32. Complainant tried to return B.C.'s mother-in-law's phone call, and left her a message. However, she did not chron this attempt.

33. Concerning B.C.'s curfew violations, Complainant had changed his curfew. However, this information was not clear in the chrons.

34. Complainant failed to meet the minimum home visit and face-to-face contact standards with B.C. in violation of the ARs. She also failed to conduct a CVDMP after his two failed UAs, and failed to enter accurate, timely, and complete information in the chrons, in violation of the ARs.

A.B.

35. Ms. Messamore's letter next discusses Complainant's handling of offender A.B.

36. A.B. escaped by failing to return to his halfway house on March 16, 2013, and was arrested and jailed in or around April of 2013. As of July 3, 2013, Complainant had neither filed a Notice of Charges nor held a COPD hearing for A.B. He remained in custody for over three months, as opposed to ten days as required by AR 150-01.

37. A.B.'s due process rights were violated due to Complainant's failure to hold a COPD hearing on the escape charges within ten days of A.B.'s detention.

L.A.

38. Complainant met with ISP offender L.A. for a face-to-face meeting on June 13, 2013. On June 18, 2013, his case manager met with him, and then he was not seen by Complainant or his case manager for the remainder of June 2013.

39. L.A. reported to CWISE that he was having difficulties with his living situation due to his father's drinking, and that he needed to move. Complainant spoke with him and gave him permission to move into a shed next to his dad's residence. However, Complainant did not chron the fact that she gave him permission to move into the shed.

40. L.A. had a positive UA result on June 7, 2013. He received another positive UA, for alcohol, on June 27, 2013. Complainant's chron entry states "offender called about his job change. Received 2nd positive UA for alcohol. Discussed the situation with the inmate."

41. On July 3, 2013, Complainant conducted a CVDMP on L.A. due to the two positive UAs.

42. On July 9, 2013, Complainant chronned that L.A. would be moving "tomorrow," but did not indicate in the chron where he would be moving.

43. Complainant failed to meet minimum face-to-face contacts with L.A. in June of 2013 in violation of the AR.

44. Complainant failed to adequately chron the facts surrounding L.A's living situation, problems with his father, and his move to the shed, in violation of the AR.

45. Complainant failed to timely conduct a CVDMP after L.A.'s two failed UAs in violation of the AR.

46. The state did not prove by a preponderance of the evidence that on the night of July 9, 2013, L.A.'s residence was unknown.

J.B.

47. Offender J.B. was placed on ISP in March of 2012. Complainant did not complete J.B.'s first home visit until July 31, 2012, four months late.

48. Ms. Messamore's letter states that on five occasions, Complainant's face-to-face visits with J.B. were over a week late. The chrons document that Complainant timely met with J.B., but that she entered the chron documenting her meetings with him one week late on five occasions.

49. The chrons indicate that J.B. had 22 curfew violations. Twelve curfew violations are noted in CWISE before Complainant entered a chron offering any explanation concerning the missed curfews, but the explanation was not entirely clear.

50. Complainant explained that she had approved a later curfew for J.B. and that he actually did not have any curfew violations; the problem was with CWISE erroneously reflecting curfew violations.

51. Ms. Messamore's next concern is that Complainant approved J.B. to live with a woman on probation, but that she failed to record the name or phone number of the probation officer, or if Complainant contacted the probation officer to discuss the situation.

52. Complainant chronned the woman's case manager's name, Ms. Been, and the name of the halfway house where Ms. Been worked, but not the phone number. Complainant chronned that she spoke with Ms. Been. Ms. Been chronned that she contacted Complainant on April 2, 2012.

53. Complainant chronned that the girlfriend moved out. Ms. Messamore was concerned that the chrons did not reflect that Complainant discussed this fact with Ms. Been. Also, J.B. then requested permission to live with another offender in a different CPO's caseload. Ms. Messamore noted in the letter that Complainant did not document that she checked out this other offender, and that the next day J.B. had a new address, but that it is unclear if the new address was approved, and if this was the address of the other offender.

54. Complainant chronned that she would "staff with CPO Carmody [the other offender's CPO] ASAP and get an answer." The chron entries provided at hearing for J.B. stopped two days after this entry.

55. Complainant failed to timely make a home visit with J.B. in violation of the AR.

56. Complainant's chrons documenting her response to J.B.'s 22 curfew violations were insufficient, in violation of the AR.

57. The state failed to prove by a preponderance of the evidence that Complainant met with J.B. one week late on five occasions as stated in the termination letter. The state did prove that Complainant entered five visits one week late, in violation of the AR's timeliness requirement.

58. The state did not prove by a preponderance of the evidence that Complainant failed to adequately address the girlfriend situation with the girlfriend's probation officer. Complainant did address the situation with the girlfriend's case manager, and it was unclear whether or not the girlfriend had a probation officer in addition to a case manager.

59. The state did prove that Complainant failed to chron Ms. Been's telephone number.

60. The state failed to prove by a preponderance of the evidence that Complainant did not adequately chron her conversation with CPO Carmody, due to the fact that the chrons stopped two days after her last entry.

P.B.

61. Complainant's initial visit with P.B. should have been made by April 1, 2013, but she did not meet with him until May 31, 2013, nearly two months late.

62. P.B. changed residences on June 11, 2013, and Complainant failed to make a required home visit after the move.

63. P.B. tested positive for methamphetamines. Complainant received the test results on Friday, April 26, 2013, and followed up the very next work day, which was Monday, April 29, 2013.

64. P.B. failed to attend drug treatment as required, which was a concern for Ms. Messamore. Complainant admitted this allegation, and as mitigation explained that she gave him leeway because this was during the time of the Black Forrest fires, and the day he was supposed to report to treatment, his family's house had burned down. She explained that she made sure he went to treatment, but that he was "flaky" about attending, and was eventually arrested.

65. Complainant failed to timely make an initial home visit with P.B. in violation of the A.R.

66. Complainant failed to timely make a home visit with P.B. after he moved, in violation of the A.R.

67. Complainant timely responded to P.B.'s positive methamphetamine test.

68. Complainant's explanation concerning P.B.'s failure to attend drug treatment and her response is reasonable, given the destruction of the Black Forest fires. The state failed to prove this allegation by a preponderance of the evidence.

69. A review of the chrons demonstrates that it took Complainant close to 33 hours - from June 10, 2103 at 1:43 PM until June 11, 2013 at 9:18 PM - before she chronned that she approved P.B.'s move. Complainant failed to timely and adequately chron P.B.'s change of residence.

C.C.

70. Ms. Messamore stated in the letter that Complainant failed to meet face-to-face or meet home visit standards with offender C.C. despite indicators that he was not doing well and in need of intervention. Complainant did not chron any face-to-face contacts with C.C. between May 29, 2013 and his arrest for domestic violence on June 22, 2013.

71. Ms. Messamore's termination letter next alleged that C.C. missed his curfew 27 out of 54 days, and that Complainant failed to adequately respond or conduct a CVDMP.

72. Complainant explained that C.C. did not have any actual curfew violations. His job was as an "auto rescue" person, and as such, he could be called during the middle of the night to fix a flat tire, for example. Complainant arranged his curfew to account for this fact. She required C.C. to call the CWISE operator when he received a work call, and then to call the operator again when he returned home, so that the operator could chron his whereabouts. Complainant also required C.C. to submit work verification sheets that documented the times he was actually at work.

73. A May 9, 2013, Complainant chronned that she called C.C. and told him to be more conscientious about calling the CWISE operator if he was going to be out longer than anticipated.

74. Complainant explained that C.C. brought in his work verification sheets to every office visit. However, she did not chron this fact.

75. The next allegation is that Complainant failed to respond to C.C.'s missed drug test on June 3, 2013.

76. The chrons show that on June 4, 2013, C.C. called CWISE and reported that he missed his UA and wanted to know if he could make it up, and that he then had a UA done on that day.

77. The letter next alleges that Complainant failed to return C.C.'s calls on May 2, 2013 and June 12, 2013. The CWISE operator entered a chron on May 2, 2013 stating that C.C. called CWISE and requested a call back from Complainant "ASAP." Complainant did not chron that returned his call. On June 12, 2013, C.C. called the CWISE operator again and asked for Complainant to call him back. Complainant did not chron that she called him back.

78. Ms. Messamore's letter expresses concern that C.C. was arrested on June 22, 2013, but that Complainant did not complete a Notice of Charges until July 9, 2013, and his COPD hearing was not held until July 10, 2013.

79. Complainant failed to meet minimum face-to-face contact standards with C.C. in violation of the A.R.

80. The state failed to prove by a preponderance of the evidence that Complainant did not meet minimum home visit contact standards with C.C. due to the fact that the chron entries began on May 1, 2013, and Complainant documented a home visit on May 29, 2013.

81. Complainant failed to adequately chron her response to C.C.'s perceived curfew violations, in violation of the AR.

82. Complainant failed to adequately respond to and chron her response to C.C.'s missed UA. While C.C. did take the make-up test, the chrons show that C.C., not Complainant, was the one being proactive because he called CWISE requesting the test. Complainant's response violates the AR.

83. Complainant failed to return C.C.'s calls in violation of the AR.

84. The state has proven by a preponderance of the evidence that Complainant failed to timely file a Notice of Charges against C.C. and failed to timely hold the COPD hearing, in violation of the AR. Complainant also failed to adequately chron the circumstances surrounding C.C.'s late Notice of Charges and COPDS hearing, in violation of the AR.

D.J.

85. Ms. Messamore states that Complainant failed to meet minimum face-to-face contact standards with D.J. because she had no contact with him between May 29, 2013 and July 11, 2013.

86. The next allegation is that Complainant failed to respond, or responded minimally, to D.J.'s multiple positive drug tests, failed to follow up with D.J. about attending Narcotics Anonymous ("NA"), and failed to address curfew violations; that rather than increasing her contact with D.J. as a result of these factors, she actually decreased her contact.

87. The chrons reflect that all of D.J.'s positive UAs came back on the same day, on April 5, 2013; that Complainant met with D.J. on April 11, 2013, but that she chronned the April 11, 2013 meeting on April 25, 2013.

88. Complainant chronned that on May 5, 2013, she and D.J. discussed his attending Alcoholics Anonymous ("AA"), and that Complainant gave him the address of an AA meeting and an extension of time in order to be able to attend the meeting. Complainant did not chron whether D.J. attended the AA meeting.

89. Complainant conducted a CVDMP on D.J. on June 26, 2013, after his fourth positive UA for cocaine.

90. D.J. was not attending NA as often as he should have and Complainant did not take sufficient action.

91. The chrons show D.J. had unauthorized leave on July 5, 2013 and July 9, 2013. Complainant explained that he was asking her for curfew extensions in order to work late nights at his girlfriend's restaurant, but that she would not grant them.

92. Ms. Messamore next alleges that Complainant failed to respond to calls from D.J. on at least five occasions.

93. In response, Complainant explained the following. On May 24, 2013, D.J. called and left her a voicemail asking for permission to travel to Denver. She did not grant him permission because of his positive UAs and missed curfews. On June 14, 2013, he called again to find out if Complainant granted him a curfew extension. She states she had already told him during their last contact that she would not be granting him a curfew extension because

he was still providing positive UAs. He called on June 21, 2013, and Complainant called him back on June 21, 2013, but he had his phone blocked.

94. Complainant further explained that she granted D.J. permission to work at the restaurant one day per week. However, he wanted to work all week. He called on July 1, 2013, and Complainant did not call him back.

95. D.J. next called Complainant on July 2, 2013, and Complainant did not return his call.

96. Complainant states that she left D.J. a message on July 8, 2013.

97. Complainant did not chron why she did not return D.J.'s calls.

98. Complainant failed to meet minimum face-to-face contact standards with D.J. in violation of the A.R.

99. Complainant failed to adequately and timely respond to D.J.'s positive UAs in violation of the A.R., including failing to conduct a CVDMP timely.

100. Complainant failed to adequately chron her response to D.J.'s drug and alcohol problems in violation of the A.R.

101. Complainant did not return D.J.'s telephone calls, but provided a fairly reasonable explanation. However, Complainant failed to chron that reason in violation of the A.R.

102. The state failed to prove by a preponderance of the evidence that Complainant decreased her contacts with D.J. after receiving indications he was not doing well.

K.S.

103. Ms. Messamore alleges that Complainant failed to meet home visit standards after K.S. made two moves.

104. The chrons indicate that K.S. moved on May 2, 2013, and that Complainant met with him on that day.

105. The chrons next show that K.S. moved an additional two more times, on June 14, 2013 and July 3, 2013. Complainant did not complete home visits for these moves.

106. Respondent's evidence on this issue ended with chron reports up to July 9, 2013.

107. The next allegation is that Complainant was not responsive to calls concerning K.S. and that a court had to call twice to get residence information from Complainant about K.S.

108. The chrons reflect that the court called on May 13 and 14, 2013 needing an address for K.S. and asking for a return call from Complainant. Complainant did not chron that she returned the call.

109. Complainant states that she spoke with the court on May 14, 2013.

110. Ms. Messamore states that Complainant failed to respond to a call from K.S. asking a question about a court date on May 16, 2013. Complainant offered that she had K.S. come to the office the next day and that he met with another CPO, Mr. Hagan. The chrons do not reflect that his question was answered by anyone.

111. Complainant failed to meet with K.S. in June of 2013 in violation of the AR.

112. The state failed to prove by a preponderance of the evidence that Complainant did not timely meet with K.S. after his first move, because she met with him on the day of his move. The state failed to prove by a preponderance of the evidence that Complainant failed to timely meet with K.S. after his second and third moves because the evidence was not sufficient to show what, if anything, occurred during the 30 days Complainant had to make the home visit.

113. Complainant failed to timely return the court's calls, and failed to chron her return call in violation of the A.R.

114. Complainant failed to chron how she responded to K.S.'s May 16, 2013 telephone call, in violation of the A.R.

115. Complainant failed to properly inform CWISE of her approval of K.S.'s move.

116. Complainant failed to respond to K.S.'s June 14, 2013 call.

B.H.

117. Ms. Messamore states that Complainant failed to meet home visit contact standards with B.H.

118. The chrons show that Complainant's last home visit with B. H. was on January 30, 2013. Complainant admits she failed to meet the home visit contact standards with B.H. She explained that in March of 2013 she only had 40 hours for the entire month to conduct casework, due to her vacation, training, and serving as a hearing officer, and that April 2013 was similarly hectic in the aftermath of Tom Clements' murder.

119. For mitigation, Complainant states that she supervised B.H. for approximately one-and-a-half years, and that up until March of 2013 she made a home visit with him every two months. She stated that she reviewed all the chrons for B.H. and that they document that she had more than 50 face-to-face meetings with him, and made well over 90% of the required contacts with him. Complainant did not offer these chrons into evidence.

120. The next allegation is that there was lack of documentation regarding Complainant's investigation of possible violations, which are not specified. The chrons indicate that B.H. missed a drug test on February 22, 2013, and that Complainant conducted a CVDMP on him on February 28, 2013.

121. The chrons reflect that B.H. missed another drug test on March 1, 2013, and again on March 15, 2013. The chrons reflect that B.H. missed curfew on March 17, 2013, and then missed curfew again later that same day.

122. Complainant's mitigating information is that she met with B.H. in her office on March 14, 2013, and that she entered a late chron on March 28, 2013 explaining that she met

with him on March 14. She also explained that she responded to his problems by putting him on an ankle monitor. There is no chron reflecting the fact that Complainant put B.H. on an ankle monitor.

123. The chrons indicate that on May 2, 2013, B.H. was found at another offender's home without permission, and that Complainant conducted another CVDMP on him on May 5, 2013.

124. The chrons next show that B.H. tested positive for methamphetamines on May 7, 2013, and that Complainant met with him on May 16, 2013 and also conducted a CVDMP on him that day.

125. The chrons indicate Complainant performed another CVDMP on B.H. on July 5, 2013, after he had another missed UA and a positive UA.

126. Complainant explained that she asked for permission to place B.H. in a 90 day in-patient treatment program in response to his missed and positive UAs. That information is not chronned.

127. Complainant failed to meet minimum home visit contact standards with B.H. in violation of the AR.

128. Complainant failed to adequately chron her responses to B.H.'s drug problems.

129. Complainant failed to timely conduct a CVDMP after B.H.'s positive meth result on May 7, 2013, in violation of the AR.

P.E.

130. Ms. Messamore's letter alleges that P.E. failed to return from a pass. Complainant was informed he did not return when he was supposed to, but did not issue a warrant for his arrest until the next day.

131. When P.E. escaped, Complainant failed to do anything about it other than refer the escape to "Crimestoppers."

132. Complainant should have better chronned her efforts to locate P.E., even if those efforts were unsuccessful.

133. Complainant failed to timely issue a warrant for P.E.'s arrest.

G.U.

134. G.U. was a residential offender (which means he resided in a halfway house), who escaped on April 26, 2013 and was arrested and jailed in Arapahoe County on June 13, 2013 on other charges.

135. The termination letter alleges that Complainant was more than one month late filing the Notice of Charges and conducting his COPD hearing, failing to draft the charges or conduct the hearing until July 18, 2013.

136. As mitigation, Complainant stated that because of G.U.'s offender status, he could not have posted bail despite the fact that she failed to file escape charges. Complainant further explained that when she received a call from Arapahoe County on July 16, 2013 concerning G.U., she immediately when to Arapahoe County the next day, July 17, 2013, and transported G.U. to the El Paso County Jail.

137. Complainant also explained that she requested and received an extension for the COPD hearing from the DOC Director.

138. Complainant failed to timely file a Notice of Charges or conduct a COPD hearing concerning G.U.'s escape in violation of the AR.

C.A.

139. Complainant began supervising C.A. on February 6, 2013. On March 3, 2013, CA called Complainant through CWISE to discuss threats being made to him by a halfway house staff member. The letter alleges Complainant did not return his call the next day, nor did she visit the facility to inquire about the threats within the next business day.

140. On March 4, 2013, Complainant called the halfway house head case manager, Sara Riley, and left her a message asking her and the offender's case manager to attempt to resolve the issue.

141. Complainant admits that she never spoke with C.A. directly about this incident, but spoke with Ms. Riley.

142. On May 9, 2013, C.A. called Complainant through CWISE and stated that someone at the halfway house had put their hands in his face, and he did not want to get in trouble. He asked for a call-back from Complainant and stated it was urgent, but Complainant did not chron that she called him back.

143. Complainant did not speak to C.A. about this second complaint.

144. C.A. was arrested for possessing a weapon and alluding police, but Complainant did not chron this incident.

145. The state has proven by a preponderance of the evidence that Complainant failed to chron C.A.'s arrest for weapon possession and alluding police.

146. The state has also proven by a preponderance of the evidence that Complainant failed to return C.A.'s telephone calls complaining about being threatened and touched in violation of the AR.s.

C.H.

147. The letter continues by alleging that Complainant failed to meet home visit standards with C.H. because she made a home visit on January 28, 2013, and then not again until May 3, 2013.

148. Complainant failed to meet minimum home visit standards with C.H. in violation of the A.R.

R.O.

149. The next allegations are that Complainant failed to make minimum face-to-face contact standards with R.O. in June 2013, and that she entered three face-to-face chron entries over one week late.

150. On December 13, 2012, Complainant made a late chron entry for a face-to-face meeting with R.O. she had on November 29, 2012. Complainant made a late entry on March 28, 2013 for a March 14, 2013 meeting, and she made a late entry on April 30, 2013 for an April 11, 2013 meeting.

151. The next allegation is that Complainant she was unresponsive to a call R.O. made to her on February 13, 2013. Complainant states that she called him back on her Blackberry and talked with him for approximately one minute, but got busy and did not chron her return call.

152. The chrons reflect that R.O. called again on May 11 and 13, 2013 requesting a call back from Complainant.

153. R.O. called Complainant over a weekend, and she called him back on June 26, 2013, but admits she did not chron that conversation. As mitigation, she explained that R.O. called her frequently for non-emergencies. The chrons indicate R.O. called again on June 27, 2013, and Complainant admits she did not return his call that day because that was the day of the suicide threat incident.

154. Complainant failed to meet minimum face-to-face contact standards with R.O. in violation of the AR.

155. Complainant made three chron entries over one week late in violation of the AR.'s timeliness requirement.

156. Complainant failed to timely return R.O.'s telephone calls in violation of the AR.s.

R.I.

157. The next allegation concerned Complainant's apparent failure to issue an escape warrant for R.I. while he was in the hospital, and that the hospital eventually discharged him because there was no warrant for his arrest.

158. Complainant adequately explained this situation. She had provided all of the warrant information and police fax number to the CWISE operator, who assured Complainant that he or she was working with the police and the warrant was being issued. It was only later that Complainant discovered that CWISE failed to ensure the warrant was issued.

159. Complainant failed to adequately chron her attempts to locate R.I. upon his escape, in violation of the A.R.s.

160. The state failed to prove by a preponderance of the evidence that the failure to issue an arrest warrant was Complainant's fault.

S.C.

161. Ms. Messamore's letter next alleges that Complainant failed to meet minimum face-to-face and home visit standards with S.C.

162. The chrons reflect that Complainant met with S.C. on May 29, 2013 and then not again until July 5, 2013.

163. The next allegation is that S.C. missed a drug test on May 29, 2013, and had a positive drug test on June 3, 2013, but that Complainant failed to follow up.

164. Complainant did not follow up on the missed and positive drug tests until she called him on June 26, 2013 to tell him not to report to her office the following day.

165. The next allegation was that S.C. had curfew violations on April 18, 2013, May 18, 2013, June 2, 2013, and June 25, 2013, and that he failed to report on April 25, 2013, and that Complainant failed to address these violations.

166. The chrons indicate that S.C. failed to report on April 25, 2013, and that "offender states that he would like for his officer to contact him or leave a message." S.C. left that message for Complainant at 4:08 in the afternoon on April 25, 2013. Complainant did not talk with S.C. again until April 29, 2013.

167. The next allegation concerned the fact that there were electronic monitoring issues with S.C. that did not appear to be addressed by Complainant.

168. Complainant discovered that there were problems with S.C.'s phone line; equipment issues that were not his fault. She addressed this problem by changing his curfew to a call-in system instead of electronic monitoring, and she entered a chron on May 29, 2013 which stated "deinstall – going to curfew call system."

169. On June 28, 2013, a female called Complainant to tell her that S.C. had choked her, threatened to kill her, and that the woman was afraid for her safety.

170. Complainant spoke with the woman and asked her if she could call her back, but that the woman said not to call her back. Complainant asked her partner, Van Leath, to follow up with the woman for her, which he agreed to do.

171. Officer Van Leath entered a very detailed chron narrating how he handled this situation. The chrons do not reflect Complainant's conversation with the woman.

172. Complainant met with S.C. on July 5, 2013 and discussed the situation with him.

173. Complainant failed to meet minimum face-to-face contact standards with S.C. in violation of the AR.

174. Complainant failed to adequately respond to or chron her response to S.C.'s missed and failed drug tests, in violation of the AR.s.

175. Complainant failed to timely return S.C.'s April 25, 2013 telephone call in violation of the ARs.

176. Complainant's chron about the electronic monitoring and curfew issues with S.C. was inadequate in violation of the ARs.

177. Complainant failed to chron her conversation with the woman who called, in violation of the ARs.

178. Complainant failed to timely follow up with S.C. after his alleged threats, in violation of the ARs.

179. The state has not proven by a preponderance of the evidence that Complainant failed to properly handle S.C.'s threats, because she did seek assistance from her partner, who properly followed up with the woman and properly chronned his handling of the situation.

The Letter's General Allegations

180. The letter next highlighted general concerns Ms. Messamore had about Complainant's case work. These included the fact that she did not feel Complainant provided clear instructions concerning where to report in many of her cases. This allegation was in response to Complainant's June 26, 2013 call to many of her offenders cancelling the next day's scheduled meetings and telling them she would see them in the field. Complainant explained that all of the offenders knew what she meant when she said she would see them in the field. However, the chrons do not reflect that the offenders would understand where to meet. Complainant failed to adequately chron in violation of the A.R.

181. Ms. Messamore next indicated she was concerned because there was an inaccurate entry on all of Complainant's cases indicating she had met with all of her offenders on June 30, 2013 at a halfway house meeting. Ms. Messamore ordered a tape of the CWISE conversation, and on it Complainant is heard telling the CWISE operator to record a house meeting in all of her cases on that day, which was a Sunday. Complainant admits she did not meet with any offenders on June 30, 2013.

182. As mitigation, Complainant explained that she had still been in a great deal of pain from her dental surgery the Friday before, that she had been at a halfway house meeting earlier in the week, which was true, and that she did not intentionally enter false chrons.

183. While the state has proven by a preponderance of the evidence that Complainant entered inaccurate chrons, Complainant's explanation was plausible, and the court does not believe Complainant made these false entries intentionally. However, Complainant never requested that the inaccurate entry be removed from the chrons, resulting in Complainant's contact numbers with offenders being inaccurately inflated.

184. Ms. Messamore indicated that she accepted Complainant's explanation and did not give this occurrence much weight in her decision to terminate Complainant.

185. The next general allegation was that Complainant only worked 23 hours in the field during a six month period in the winter and spring of 2013. The state proved this allegation by a preponderance of the evidence.

186. Another problem Ms. Messamore documented in her termination letter was that Complainant failed to return phone calls. The state has proven this allegation by a preponderance of the evidence.

Workload Issues

187. The workload for CPOs has increased from the time Complainant first began her DOC employment through the time of her termination.

188. It was difficult for CPOs to meet all the demands of their workload. Difficulties included the fact that CPOs were given Blackberries to use in the field to record their CWISE entries, but the Blackberries would at times fail, and the chrons the CPOs entered from the Blackberries would disappear.

189. At times CWISE operators made mistakes chronning information they were given by CPOs or offenders.

190. In the summer of 2013, DOC contracted with the National Center for State Courts to conduct a time study concerning CPO workloads.

191. The time study report was finalized on May 9, 2014, after Ms. Messamore conducted the 6-10 meetings and terminated Complainant.

192. The study found that 80-90% of CPOs met minimum face-to-face and home visit standards. However, the study did not assess the quality of the CPOs' work, only whether they met the minimum standards.

193. The study concluded that DOC was understaffed with CPOs, including Complainant's Colorado Springs office.

Complainant's Interpersonal Skills

194. Complainant had excellent interpersonal skills with the offenders in her caseload. She spent time with them, got to know them and their families, and genuinely cared about them and about her job helping them.

195. Complainant spent a great deal of time at the halfway house where many of her offenders resided. She attended approximately 90%-95% of the halfway house's "CIC" meetings, where offender issues were discussed, and was one of two CPOs who was very consistent and reliable about being available to meet with the offenders at the halfway house.

Complainant's Work Performance History

196. Before deciding to terminate Complainant, Ms. Messamore reviewed her performance reviews beginning with when she was first hired in 1999. She also reviewed PIPs, PDFs, and corrective actions Complainant received throughout her DOC career.

A. November 1, 1999 to January 31, 2000 Performance Review

197. In her six month review during this time period, Complainant received a "Needs Improvement" rating in "Quality of Work," specifically due to her lack of organization. In her nine month review, she received a "Needs Improvement" in every category, again primarily due to lack of organization.

198. One of the comments in the review stated: "Agent Sheridan has had a difficult time grasping the duties as an agent. She has been counseled on many of these issues throughout her first eight months on the job. She appears overwhelmed at times with the responsibilities and diversity of this job. She has done better with keeping her day timer updated, however, she has difficulties with organizational skills which are believed by this rater to continue to create unnecessary problems for her."

B. June 24, 2004 PDF

199. Complainant received a PDF on June 24, 2004 which stated that a case audit of Complainant's files found that she failed to meet contact standards.

C. August 2, 2004 Corrective Action

200. Complainant received a corrective action on August 2, 2004 for failing to meet face-to-face contact standards and home visits standards, failing to make treatment referrals, and failing to document compliance with treatment and ISP conditions.

201. Going forward, the corrective action required Complainant to document compliance and non-compliance issues on all her ISP cases, and ensure all home visits were made in accordance with the minimum requirements.

D. Complainant's August 10, 2004 PDF

202. The PDF explained that an audit of Complainant's files and chrons showed serious deficiencies in all areas of face-to-face standards, home visit standards, treatment referrals, verification of treatment and ISP conditions, and referrals to collections on overdue restitution.

203. As part of her PDF, Complainant was required to "maintain case documentation standards from this point forward."

E. January 6, 2005 Performance Review

204. Complainant received a "Needs Improvement" in the area of Communication due to offenders' and halfway house staff's complaints that she failed to return phone calls.

F. Complainant's April 1, 2005 through March 31, 2006 Performance Review

205. Complainant received a "Needs Improvement" rating in the areas of Accountability/Organizational Commitment, Job Knowledge, and Communication, and received an overall rating of Needs Improvement.

206. A portion of the narrative stated that Complainant "failed to meet job expectations regarding offender case recording . . . as a senior level officer, CPO Sheridan does not seem to understand the importance of timely and accurate chrons, or in some cases any chrons, regarding offender contacts and activities. The only measure of offender contacts and compliance is the official chronological record. Without this record, it is impossible to measure these standards."

G. Complainant's April 26, 2006 Performance Improvement Plan

207. This PIP required Complainant to make timely, complete and accurate chronological records within three days of offender contact "from this point forward." She was also required to complete remedial training and to attend a time management and organizational skills training class. She was further required to review all DOC regulations regarding offender supervision and comply with them.

H. Complainant's June 23, 2008 Corrective Action

208. Complainant received a corrective action for using a state computer to send emails concerning a private business she owned.

I. Complainant's 4/1/2008-12/31/2008 mid-year review

209. In the area of "Job Knowledge," Complainant received a Level I, and the following comments: "Officer Sheridan has not demonstrated an ability to produce an acceptable work product. Officer Sheridan's level of work is below par. Audits of Officer Sheridan's caseload reveled [sic] that she is not operating within the guidelines of Administrative Regulations."

210. Complainant's overall rating for this time period was a Level I.

J. February 6, 2009 Disciplinary Action and Corrective Action

211. Complainant received a disciplinary action for, among other things, failing to chron her case contacts, failure to promptly respond to offender calls, failure to address offender violations, failure to respond to missed drug tests, failure to meet face-to-face contacts.

212. Ms. Messamore also issued corrective action, which required Complainant to immediately document all case contacts, events, activities, and decisions regarding offenders.

K. Complainant's April 1, 2008-March 31, 2009 Performance Review

213. Complainant received a Level I in the Accountability/Organizational Commitment competency area. The narrative stated in part that "Officer Sheridan is unable to get organized which has led to missed hearings and missing other important time lines."

214. Complainant received a Level I in the area of Customer Service, in part for failing to return offenders' calls.

215. Complainant's overall rating for this time period was a Level I.

L. September 16, 2009 Performance Improvement Plan

216. Complainant received a PIP for tardiness, unaccountability and disregard for her work schedule.

M. Complainant's December 10, 2009 Performance Documentation Form and Performance Improvement Plan

217. The PDF and PIP both concerned Complainant's failure to adhere to her flex schedule and frequently being late to work, which resulted in her offenders waiting long periods of time to see her at the office.

N. Complainant's April 1, 2009 through March 31, 2010 Performance Evaluation

218. Complainant he received a Level II concerning Job Knowledge, and the narrative read in part "Officer Sheridan has done an excellent job of keeping offenders' supervision plans up to date. Officer Sheridan has also significantly improved on recording events in the chrons."

219. She also received Level IIs in Interpersonal Skills, Communication, and Customer Service, and an overall rating of Level II. In Customer Service, the narrative read in part that "Officer Sheridan has improved on returning calls to offenders and other stakeholders."

O. The April 27, 2010 PDF

220. Complainant received this PDF for arriving late to a mandatory team meeting, and for missing entirely a second mandatory meeting.

P. Complainant's April 1, 2010-March 31, 2011 Performance Review

221. Complainant received a Level I In the area of "Accountability/Organizational Commitment,"

222. In the Job Knowledge area, Complainant received a Level II, and her supervisor wrote: "over the last six months, CPO Sheridan's compliance screen report has improved and stabilized . . . two of the last three reports have shown one hundred percent compliance in the reviewed categories."

223. In Communication, Complainant received a Level II, and the narrative stated: "CPO Sheridan communicates well with her peers and with management. Her verbal skills are excellent. Her writing is concise, complete, and error-free."

224. In the area of Interpersonal Skills, Complainant received a Level III. The narrative included: "CPO Sheridan works very well with offenders and other stakeholders...CPO Sheridan has fostered, and maintains, strong working relationships with other agencies. She is well-received by her peers and gets along well with everyone."

225. Complainant's overall rating for this review period was a Level II.

Q. Complainant's April 1, 2011-March 31, 2012 Review

226. Complainant received all Level IIs except in the area of Interpersonal Skills, in which she was rated a Level III. Her overall rating was Level II.

R. Complainant's April 1, 2012-March 31, 2013 Mid-Year Review

227. Complainant's overall rating for this time period was a Level II. She received all Level II ratings in each competency, except for Communication, in which she received a Level III.

S. Complainant's April 1, 2012-March 31, 2013 Review

228. In "Customer Service," Complainant received a Level I rating during with the following narrative: "Officer Sheridan's supervisor was not available in the office over the last 6 months to provide direct oversight. During this rating period, Officer Sheridan's contact standards suffered significantly. For three consecutive months, Officer Sheridan had less than 70% compliance in face-to-face Contacts for the months of October (61%), November (62%), and December (48%) . . . It appears that Officer Sheridan's contact standards deteriorated significantly with the absence of her supervisor."

229. Complainant received an overall rating of Level II during this rating period.

T. May 13, 2013 Performance Improvement Plan

230. This PIP required Complainant to meet with her supervisor monthly to discuss her work and to adhere to her set work schedule.

U. Complainant's April 1, 2013-October 25, 2013 Review

231. Complainant received Level I's in every category, and was terminated effective October 25, 2013.

232. Complainant signed and dated her reviews.

DISCUSSION

I. GENERAL

A. Burden of Proof

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

(1) failure to perform competently;

(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;

(3) false statements of fact during the application process for a state position;

(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and

(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency bears the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *See Kinchen*. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6).

II. HEARING ISSUES

A. Complainant Committed Most of the Acts for Which She was Terminated.

Respondent has proven by a preponderance of the evidence that Complainant committed most of the acts for which she was terminated. Complainant repeatedly failed to meet minimum face-to-face and home visit contact standards with offenders. For many of these failures, Complainant explained that she did not meet the standards because of Tom Clements' murder, a very busy March and April of 2013, and the office move, suicide threat and dental appointment in June of 2013.

It is certainly understandable that Mr. Clements' murder and the resulting aftermath made it more difficult for Complainant to meet the contact standards because of how hectic the office became and because the policy changed requiring home visits to be made in pairs. It is also reasonable that Complainant believed Ms. Ingo asked her to remain in the office on June 27, 2013 to help office personnel deal with the suicide threat made by their co-worker, especially in light of the fact that a different co-worker had committed suicide less than one year earlier. Even if Complainant had not misunderstood Ms. Ingo, it would have been understandable if she did not want to meet with her offenders that day, given the trauma. Further, it was reasonable for Complainant to keep her June 28, 2013 dental appointment, given that she had waited for one month for the appointment and was in a great deal of pain.

However, despite the reasonableness of Complainant's explanations, the fact remains that as of June 2013, she knew that she had previously received discipline, a corrective action, and multiple PDFs, PIPs, and poor performance reviews, specifically concerning her failure to meet minimum face-to-face and home visit contact standards. She was on notice that meeting the contact standards was vitally important to DOC – multiple PDFs, PIPs and the corrective action required Complainant to meet these minimum contact standards going forward. Therefore, even though Mr. Clements' murder, the suicide threat, and the dental appointment provide some mitigation for Complainant's failure to meet contact standards, she should have found a way to meet the standards despite these difficulties, having been put on ample notice that this was a critical issue.

Complainant's other explanations for failing to meet the minimum contact standards were not persuasive. All CPOs were informed in early June 2013 that the office would be moving during the week of June 24, 2013. Complainant knew that fact well ahead of time and should have planned her offender visits around the move, or met with them in the office despite the fact that there was no office furniture, given how many times she had been informed that she needed to meet minimum contact standards. Complainant also knew at least one month ahead of time that she had a dentist appointment on June 28, 2013 because she testified that she had had to wait for over a month for that appointment. She therefore had sufficient time to schedule her visits around the dentist appointment.

Complainant also attempted to mitigate these failures by explaining that some of her offenders lived far away, and that making the required home visits took up to two hours round

trip, which was difficult to do when required to take a partner along. While this explanation may be true, the fact is that all jobs have challenges, and a CPO's job duties included determining how to meet the minimum standards despite the challenges.

Part of Complainant's case was the argument that the work of a CPO could not be accomplished in the amount of time CPOs were permitted to work, and that overtime was not allowed. Complainant put on two former DOC employees as witnesses who both testified that the CPO workload was too heavy, that CWISE created problems, and that CPOs were pulled in too many directions, among other things. However, both witnesses admitted meeting the minimum contact standards themselves, despite their many frustrations with the job.

Complainant placed into evidence the time study report which indicated that DOC was understaffed, and specifically that Complainant's office was understaffed. However, the evidence in this case does not show that systemic problems in the system caused Complainant to fail to meet minimum contact standards. The evidence shows that Complainant's lack of organizational and time management skills resulted in her failures. The study concluded that a majority of CPOs met the minimum contact standards even while being understaffed.

Complainant also attempted to argue that her compliance with contact standards should have been averaged over the entire time each offender was in her caseload. For example, if she met contact standards 100% of the time for six months, but failed to meet the standards in the seventh month, those seven months should be averaged together. If they were averaged, Complainant's contacts would meet the minimum standards. The problem with this argument, however, is that the ARs require minimum contacts for each and every month, and for a good reason. The state's witnesses credibly testified that offenders can be very compliant for a long period of time, but that in any given month something can happen in their lives that triggers a downward spiral. CPOs have to be monitoring their offenders each and every month to watch for and react to the downward spirals. "Averaging" a CPO's contacts does not account for the fact that the one month that a CPO fails to make minimum contact standards could be the month that the offender's compliance seriously deteriorates.

The state proved by a preponderance of the evidence that Complainant failed to make adequate and timely chron entries. The evidence showed that Complainant made many chron entries late; failed to make important chron entries; and entered vague or incomplete chrons. In contrast, CPO Van Leath's one chron entry concerning his handling of the S.C. situation was more detailed and complete than any of the hundreds of chron entries that Complainant made that were reviewed by the court. Complainant argued that "doing" the work was more important than "chronning" the work, but this argument is not persuasive. The state's witnesses credibly testified that accurate and up to date chrons were very important for a number of reasons. If there was an emergency concerning an offender in the middle of the night, for example, the chrons would be immediately accessible by that offender's CPO, other CPOs, supervisors, case managers, and police, whereas the offender's paper file would not be accessible in the middle of the night. If an offender is accused of a crime, courts have accepted chrons as evidence that the offender was meeting with his CPO at the time the crime occurred, as another example. If a new CPO takes over a case suddenly and unexpectedly, if the chrons are accurate and up-to-date, the new CPO will be able to immediately pick up where the last CPO left off. Finally, the chrons are the one place where the entire history of an offender is documented for stakeholders to see. If there is a high profile incident involving an offender, like in the case of B.C., DOC officials should be able to review the chrons in order to understand what led up to the incident.

The state proved by a preponderance of the evidence that Complainant failed to timely draft a Notice of Charges and conduct COPD hearings, violating the due process rights of two offenders. Complainant admitted this allegation concerning one of the offenders, and as mitigation explained that she just got busy and thought she had filed the charges but had not. However, this explanation does not mitigate these failures, especially in light of the fact that Complainant had been a CPO for 14 years and was very familiar with the COPD process, serving as the hearing officer herself in many COPD hearings.

The state also proved by a preponderance of the evidence that Complainant failed to timely conduct CVDMPs in response to offender non-compliant behavior, failed to timely address or address at all missed or positive UAs, and failed to return offender calls and calls from others concerning offenders. The court carefully reviewed all of the chrons that were placed into evidence, and that review confirmed all of these allegations.

Complainant argued that the chrons should not have been accepted into evidence and that Ms. Messamore should not have relied on the chrons because they were subject to CWISE operator errors, Blackberry errors, and were generally unreliable. However, the state put on credible testimony that the chrons are accepted as evidence in district courts throughout Colorado. In contrast, Complainant did not offer any evidence proving that the chrons are consistently unreliable, other than Complainant herself and two former DOC employees who testified to an insignificant number of CWISE operator errors and Blackberry failures. This limited testimony does not prove that chrons were unreliable as evidence. Also, as previously explained, even accounting for these problems with the chrons, these two witnesses were able to adequately chron their own compliance with DOC regulations.

The state proved by a preponderance of the evidence that it is critical to timely and adequately respond to offender non-compliance. DOC witnesses credibly testified that changing human behavior involves the "sure and swift" principle. When an offender does something wrong, the CPO needs to quickly point it out. Failure to do so shows that the CPO either does not know about the behavior, or approves of it, and in either case sends the message to the offender that the non-compliance is acceptable.

B. The Appointing Authority's Action was Not Arbitrary, Capricious, or Contrary to Rule or Law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) or exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

<u>Ms. Messamore Used Reasonable Diligence and Care to Procure Evidence</u>

Ms. Messamore used reasonable diligence and care to procure evidence surrounding Complainant's job performance. She asked Ms. Ingo and Ms. Clementi to conduct an audit of Complainant's cases. They spent a considerable amount of time doing so, and presented their findings in several detailed memoranda. Ms. Messamore personally spent at least 40 hours

reviewing Complainant's chron entries, personnel file, the memoranda from Ms. Ingo and Ms. Clementi, and Complainant's previous performance reviews, PIPs, PDFs, corrective actions, and disciplinary action. Complainant argued that the time Ms. Messamore spent reviewing Complainant's work performance proves that Ms. Messamore was singling out Complainant and was on a "fishing expedition." This argument is not persuasive for several reasons. First, Ms. Messamore's investigation into Complainant's work was triggered because B.C. committed murder while he was one of Complainant's parolees. Ms. Messamore credibly testified that it is her standard practice when there is a high profile incident involving a parolee to review that offender's chrons. Ms. Messamore did not single out Complainant or conduct a fishing expedition: she reviewed Complainant's handling of B.C.'s case in accordance with how she would have reviewed it had he been in any other CPO's caseload. Second, her review of B.C.'s chrons revealed serious problems with Complainant's casework that Ms. Messamore could not ignore, especially in light of the fact that public safety was at issue. As a DOC Assistant Director and Complainant's appointing authority, once Ms. Messamore discovered the problems with Complainant's handling of B.C.'s case, it was proper for her to have Ms. Ingo and Ms. Clementi audit other offenders in Complainant's caseload, and conduct her own review as well.

Complainant argued that Ms. Messamore failed to use diligence and care because she failed to interview Complainant's offenders, failed to review the offenders' paper files, and relied on chrons instead of on her own personal witnessing of Complainant's casework. These arguments are not persuasive. The state presented credible testimony that interviewing offenders is not a good investigation tool because offenders are not always honest and reliable witnesses, given their criminal background. This explanation is persuasive. Also, Complainant's argument that Ms. Messamore should have only relied on Complainant's casework deficiencies that she personally witnessed as opposed to relying on the chrons is unavailing and humanly impossible. Ms. Messamore, as one of only four DOC Assistant Directors, was responsible for all of DOC's offices in southern Colorado, as well as the cities of Colorado Springs, Durango, Grand Junction, Canon City, and others. It would not be possible for Ms. Messamore to personally witness any CPO's handling of any of offenders' cases. If the court accepted this argument, then CPOs should never be disciplined for anything if Ms. Messamore did not personally witness the behavior. The state proved by a preponderance of the evidence that the chrons were reliable evidence, as explained previously. Concerning reviewing the paper files, there was credible testimony at trial that Complainant's paper files were usually in a state of disarray, and, as will be discussed below, Ms. Messamore gave Complainant numerous opportunities to present any mitigating evidence, including any information in the paper files, if she wished to do so.

Ms. Messamore Gave Candid and Honest Consideration of the Evidence Before Her

Ms. Messamore's testimony at hearing concerning her consideration of all of the evidence before her was credible. She accepted as true Complainant's explanation that the June 30, 2013 inaccurate chron entry was an honest mistake; she only considered cases that she and Complainant had a chance to discuss during the Rule 6-10 process, and she did not consider other cases that were documented in Ms. Ingo and Ms. Clementi's memoranda but that she and Complainant did not discuss. She met with Complainant four times as part of the 6-10 process, and after each meeting gave her the opportunity to gather and present mitigating evidence in response to the issues they discussed at each meeting. Complainant gave Ms. Messamore 19 documents in response to the 6-10 meetings and the allegations, and Ms. Messamore reviewed and considered all 19. Complainant asked Ms. Messamore to speak with Ms. Riley, the head case manager at the halfway house, who would confirm that Complainant's attendance at the halfway house meetings was high. Ms. Messamore spoke with Ms. Riley,

confirmed the high attendance rate, and dropped the issue of attendance at halfway house meetings once she realized Complainant had not failed in that area. Ms. Messamore also accepted several other of Complainant's explanations as credible and dropped several issues, including the fact that Complainant received the results of an offender's positive UAs several days later than Ms. Messamore had originally thought, and therefore Complainant's response time was not delayed as Ms. Messamore had concluded. In that case, Ms. Messamore acknowledged Complainant's explanation and dropped the allegation. There was no evidence that Ms. Messamore was exaggerating Complainant's performance deficiencies, and to the contrary there was a long, very well documented history of performance reviews, PDFs, PIPs, corrective actions, and a disciplinary action that proved that Complainant had struggled in all of these areas during a major part of her DOC career.

Ms. Messamore's Actions Were Reasonably Based on Conclusions From The Evidence

Ms. Messamore's conclusion that Complainant was incapable of meeting the minimum requirements of a CPO was reasonable based on her thorough review of all of the evidence before her. Her termination of Complainant's employment based on that conclusion was reasonable given that public safety was at stake as well as the due process rights of offenders. Complainant's repeated failures to improve her performance despite multiple attempts by DOC supervisors to alert her to her deficiencies and attempt to help her improve further confirm that Ms. Messamore's termination was reasonably based on the evidence

C. The Discipline Was Within the Range of Reasonable Alternatives.

The State Personnel Board rules mandate that progressive discipline must be used unless an act is so serious as to require immediate discipline. Board rule 6-2, 4 CCR 801, states:

> A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Board Rule 6-12 states that reasons for discipline include "failure to perform competently . . . [and] willful misconduct or violation of these or department rules or law that affect the ability to perform the job."

Ms. Messamore's decision to terminate Complainant's DOC employment was reasonable because DOC had previously issued Complainant two corrective actions concerning the same casework deficiencies in compliance with the Board's requirement of progressive discipline. Ms. Messamore's decision was reasonable because the state proved by a preponderance of the evidence that Complainant failed to perform competently and violated multiple DOC rules that affected her ability to perform the CPO duties, in accordance with Board rule 6-12's requirements.

Moreover, Complainant had received a previous disciplinary action for the same deficiencies, and attempts to improve Complainant's performance continually failed. Complainant had been sent to remedial training, had been put on PIPs with specific performance objectives that she failed to meet, and had been counseled multiple times through

the performance review process about her casework deficiencies, but her performance failed to improve. Complainant argued that there were performance reviews from 2008 to the present that demonstrated that Complainant did improve, and that therefore termination was not reasonable. However, the state presented credible testimony that Complainant's performance improved only when her supervisors micro-managed her casework, or for a short period of time immediately following a corrective action or disciplinary action, but that Complainant's casework deficiencies always re-emerged once she was not being heavily monitored. As a CPO with 14 years tenure, DOC should not have had to heavily supervise Complainant's work, nor did DOC's supervisors have time to do so. Ms. Messamore's termination of Complainant's employment was within the range of reasonable alternative.

CONCLUSIONS OF LAW

1. Complainant committed the majority of the acts for which she was terminated.

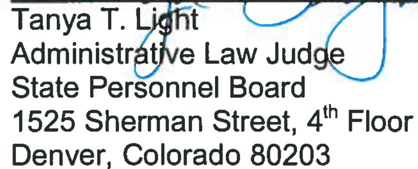
2. Respondent's actions were not arbitrary, capricious, or contrary to rule or law concerning Complainant; and

3. Termination was within the range of reasonable alternatives.

ORDER

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

DATED this 7th day
of **July 2014,** at
Denver, Colorado.



Tanya T. Light
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

CERTIFICATE OF MAILING

This is to certify that on the 8th day of July, 2014, I electronically served a true copy of the foregoing **INITIAL DECISION** as follows:

Sabrina Jensen

Ryan S. Coward
Donald C. Sisson

Andrea Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rules 8-62 and 8-63, 4 CCR 801.

3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.