STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2016B034**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND

MATHEW MARK STILES,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, DENVER RECEPTION & DIAGNOSTIC CENTER,
Respondent.

Administrative Law Judge ("ALJ") Keith A. Shandalow presided over this matter at the State Personnel Board ("Board"), 1525 Sherman Street, Denver, Colorado. The case commenced on the record on February 11, 2016, and the evidentiary hearing was held on April 25, 2016. The record was closed on May 6, 2016. Complainant Mathew Stiles ("Complainant") appeared and represented himself. Assistant Attorney General Davin Dahl represented Respondent, the Colorado Department of Corrections ("Respondent" or "DOC"). Respondent's advisory witness was David Johnson, who was then the Warden of the Denver Reception & Diagnostic Center and Complainant's appointing authority.

This matter has gone through a series of appeals, which are detailed below. Respondent appealed the original Initial Decision to the Board. The Board adopted the Initial Decision, and Respondent appealed to the Court of Appeals, which affirmed the Board order, and then to the Colorado Supreme Court, which reversed and remanded with instructions.

After the parties submitted supplemental briefs on remand, damages information, and participated in a damages hearing, the record on remand was closed on May 6, 2021. The record was re-opened on June 11, 2021 to supplement the record with the parties' submissions and exhibits addressing Complainant's economic damages. The record was then closed again as of that date.

The ALJ issued the Initial Decision of the Administrative Law Judge on Remand on July 6, 2021. On the same date, the ALJ issued an Award of Back Pay and Benefits.

Respondent filed an appeal to the Board, arguing in its Opening Brief that, in the Initial Decision on Remand, the ALJ found two additional rule violations that were beyond the scope of the Supreme Court's remand and that were not supported by the facts and the law. In all other respects, Respondent accepted the ALJ's Initial Decision on Remand. Complainant did not file an Answer Brief. On November 29, 2021, the Board stayed Respondent's appeal and remanded this matter to the ALJ "to consider whether issuing an Amended Initial Decision on Remand might be appropriate."

MATTERS APPEALED

Complainant, who was a certified state employee with the DOC, appeals Respondent's decision to terminate his employment. Complainant alleges that, although he did commit the act for which he was disciplined, the decision to terminate his employment was arbitrary, capricious and contrary to rule or law.

Complainant seeks back pay and benefits.[1]

Respondent requests that its decision be affirmed and that Complainant's appeal be dismissed with prejudice.

The ALJ, having considered the evidence, the file, including the parties' supplemental briefs on remand and briefs on damages, and applicable law, makes the following findings of fact, conclusions of law, and order.

For the reasons set forth below, Respondent's decision to terminate Complainant's employment is **rescinded** and the discipline imposed on Complainant is **modified**.

ISSUES

1. Whether Complainant committed the act or acts for which he was disciplined.

2. Whether Respondent's actions were arbitrary and capricious.

3. Whether Respondent's actions were contrary to rule or law.

RELEVANT PROCEDURAL HISTORY

This matter has a long procedural history:

1. Complainant's appointing authority, Warden David Johnson, terminated Complainant's certified employment on November 2, 2015, after Complainant tested positive for marijuana pursuant to a random drug test.

2. Complainant mailed his appeal to the State Personnel Board on November 12, 2015; the Board received it on November 17, 2015. Complainant alleged that the decision to terminate his employment was arbitrary and capricious and contrary to rule or law.

3. A commencement hearing was held on February 11, 2016, and the matter was set for an April 25, 2016 evidentiary hearing.

4. The evidentiary hearing was held on April 25, 2016, and the record was closed on May 6, 2016.

5. The ALJ issued the Initial Decision on June 17, 2016, in which he concluded that, although Complainant committed the act for which he was disciplined, Respondent's decision to terminate Complainant's employment was arbitrary, capricious, and contrary to rule or law. The ALJ also concluded that the discipline imposed was not within the range of reasonable alternatives. The ALJ modified Respondent's termination decision. He ordered that Respondent "rescind Complainant's termination and may impose an alternate disciplinary or corrective action on Complainant, not to exceed a ten percent (10%) reduction in pay for six (6) months. Complainant is entitled to full back pay and benefits from November 2, 2015 to the date of reinstatement, offset by any substitute earnings or unemployment compensation received by

[1] When Complainant initially appealed the termination decision, he sought reinstatement to the DOC. As explained, below, Complainant, who is currently employed by another state agency, no longer seeks reinstatement to the DOC.

Complainant during this period of time, and with the cost of expenses incurred in seeking other employment deducted from the offset."

6. On July 18, 2016, Respondent filed a notice of appeal to the Board, disputing several of the Initial Decision's Findings of Fact, disputing the Initial Decision's Conclusions of Law that Respondent's action was arbitrary and capricious and contrary to rule or law, and that the discipline imposed was not within the range of reasonable alternatives.

7. Despite Respondent's appeal, the Board adopted the Initial Decision at its regular monthly meeting on November 15, 2016 and issued the order memorializing its decision on November 17, 2016.

8. The ALJ conducted a hearing on damages on January 11, 2017.

9. The ALJ issued an Order Awarding Back Pay and Benefits on February 27, 2017.

10. On March 23 2017, Respondent filed its second notice of appeal addressing the Order Awarding Back Pay and Benefits.

11. The Board adopted the Order Awarding Back Pay and Benefits during its meeting on July 18, 2017, but remanded on July 19, 2017 for clarification.

12. The ALJ issued an order on remand clarifying the award of benefits on September 7, 2017.

13. The Board adopted the order on remand during its meeting on September 19, 2017.

14. Respondent filed its Notice of Appeal to the Court of Appeals on November 6, 2017. In its Notice, Respondent stated the basis of the appeal as follows: "DOC contends the ALJ and Board's decisions misapplied the legal tests for whether the appointing authority's decision was arbitrary, capricious, or contrary to rule or law, as set forth in supreme court precedent, and misinterpreted Board Rules 6-9, 6-2. and 6-10." In its appellate briefs, Respondent argued that an appointing authority's Rule 6-9 considerations must be accorded deference.

15. The Court of Appeals decision, issued on December 6, 2018, held that an ALJ's hearing on behalf of the Board is *de novo* with no deference to an appointing authority's findings based on the Board Rule 6-9 criteria for discipline. The decision also held that Warden Johnson acted arbitrarily and capriciously in terminating Complainant's employment for one-time marijuana use. *Stiles v. Department of Corrections*, 479 P.3d 3 (Colo. App. 2019).

16. On April 10, 2019, Respondent filed a Petition for Writ of Certiorari, which framed the question presented as follows: "The State Personnel Board may only reverse disciplinary decisions that are arbitrary or capricious. § 24-50-103(6), C.R.S. Applying this arbitrary or capricious standard, may the State Personnel Board weigh the evidence de novo and give no deference to the employer?"

17. On February 10, 2020, the Colorado Supreme Court granted the Petition for Writ of *Certiorari,* but reframed the question to be considered as follows: "Whether the State Personnel Board may only reverse or modify an appointing authority's disciplinary decision if at least three members of the Board find it to be arbitrary, capricious, or contrary to rule or law, and if so, whether

this standard prevents the State Personnel Board from reviewing such a disciplinary decision de novo and without giving any deference to it."

18. The Supreme Court issued its opinion on December 21, 2020, holding that an ALJ's decision on behalf of the Board is subject to deferential review, not *de novo* review. The Supreme Court reversed the Court of Appeals decision and remanded to the Court of Appeals with instructions. The Supreme Court directed the ALJ to make additional findings when considering whether the DOC's disciplinary action was arbitrary and capricious or contrary to rule or law. *Department of Corrections v. Stiles*, 477 P.3d 709 (Colo. 2020).

19. The Court of Appeals, in turn, remanded this matter to the Board, which in turn remanded to the undersigned ALJ for further proceedings consistent with the Supreme Court's decision.

20. On February 22, 2021, the ALJ issued a Procedural Order on Remand, which ordered the parties to file supplemental arguments addressing the "arbitrary and capricious" standard and the "contrary to rule or law" standard, as well as indicating whether additional evidence was indicated.

21. On March 8, 2021, Respondent filed its supplemental argument.

22. On March 22, 2021, Complainant filed his supplemental argument.

23. Pursuant to an Order Requiring Submission of Information Regarding Damages, issued on April 1, 2021, the parties submitted briefs and documents providing information about potential damages incurred by Complainant, in the event that the ALJ finds in Complainant's favor. The parties were given the opportunity to respond to the other party's filing on damages, and a hearing on damages was held on April 28, 2021.

24. On May 5, 2021, the ALJ issued an Order Following Hearing Regarding Calculation of Damages in the Event the State Personnel Board Rescinds or Modifies Respondent's Decision to Terminate Complainant's Employment, which provided, in pertinent part that,

> At the April 28th hearing, Complainant agreed with the calculations included in Respondent's Response to Complainant's Damages Information. More specifically, Complainant agreed that, because Complainant has been continuously employed by the State from March 2016 to the present, employee and employer benefits contributions for such matters as health insurance, dental insurance, short term disability and life insurance are the same and would not require any damage award be granted to Complainant. Respondent concluded that "[a]ny damages should therefore be limited to salary differences and applicable PERA and Medicare contributions….

25. The record was closed as of May 6, 2021.

26. On June 11, 2021, the ALJ re-opened the record to add the parties' submissions and exhibits addressing Complainant's economic damages. The record was then closed again as of that date.

27. As mentioned above, the ALJ issued an Initial Decision on Remand and an Award of Back Pay and Benefits on July 6, 2021.

28. Respondent appealed the Initial Decision on Remand to the Board, and filed an Opening Brief. Complainant did not file an Answer Brief.

29. On November 29, 2021, the Board stayed Respondent's appeal and remanded this matter to the ALJ "to consider whether issuing an Amended Initial Decision on Remand might be appropriate."

FINDINGS OF FACT

Complainant's DOC Employment History

1. Complainant was first hired as a Correctional Officer I – floater at DOC's Limon Correctional Facility effective August 1, 2010.

2. On December 1, 2010, Complainant was moved from his floater position to a Full Time Equivalent ("FTE") position as a Correctional Officer I assigned to the second shift.

3. On July 31, 2011, Complainant became a certified state employee.

4. Complainant's Performance Evaluation for the period April 1, 2012 through September 30, 2012 rated him at a Level II (meeting expectations, standards, requirements and objectives) in all core competency areas; his overall rating was Level II.

5. At Complainant's request, he was transferred to the DOC's Denver Correctional Complex effective October 1, 2012, with a reporting date of December 1, 2012.

6. In Complainant's Performance Evaluation for the period October 1, 2012 through March 31, 2013, his then-supervisor Charles Stoy gave Complainant an overall rating of Level II, as well as Level II ratings in each of his core competencies. The narrative for his overall rating stated, "Officer Stiles contributes in a positive fashion to the functionality of the unit. His work and efforts have helped the unit in meeting the mission given it by the Department of Corrections and the Citizens of the state of Colorado."

7. Complainant transferred to a Boiler House Intern Position within DOC in April 2013.

8. In May 2013, Complainant applied for a position as a Correctional Support Trades Supervisor ("CSTS") I – Boiler Operator.

9. In Complainant's Performance Review for the period April 1, 2013 through July 31, 2013 (a discretionary review), Complainant's then-supervisor Joseph Fisher rated Complainant a Level I in Accountability/Organizational Commitment, while rating Complainant in all other competencies at Level II and providing him a Level II overall rating. Mr. Fisher noted that Complainant had not been punctual on two dates in March 2013; he depleted his leave balances and received leave without pay on five occasions between February 2013 and May 2013 due to "not meeting his work schedule on these days and having no paid leave balance available." Mr. Fisher noted that Complainant received performance documentation on this issue twice in the prior six months – in February 2013 and June 2013, and wrote "Officer Stiles states that he is willing to work with his supervisors and peers to help facilitate his leave needs, however he continually fails to meet his work schedule."[2]

[2] There is no date on this Performance Review and no signatures on this exhibit stipulated to by the parties and admitted into evidence.

10. Complainant was given a Performance Plan in early July 2013, listing Individual Performance Objectives ("IPOs") for his core competency areas. His supervisor, Mr. Fisher, signed the Performance Plan on July 4, 2013 and Complainant signed it on July 6, 2013.

11. Complainant was also given a Performance Evaluation by Mr. Fisher for the period April 1, 2013 to July 31, 2013, with the same ratings as his Performance Review for the same period. The narrative provided in the overall rating section states that "Officer Stiles 17191 transferred to a Boiler House Intern Position with the department in April. A review was completed at that time. He was not closed out, so there was a need to complete this evaluation so that he could be moved to his new supervisor." This Performance Evaluation was signed by Mr. Fisher on September 24, 2013 and by Complainant on October 13, 2013.

12. On his Performance Evaluation for the period August 1, 2013 through March 31, 2014, prepared by his new supervisor Lt. James DeTello, Complainant received an overall rating of Level II, with Level II ratings in each of the core competencies with the exception of Interpersonal Skills, for which Complainant received a Level III, denoting exceptional performance. Lt. DeTello wrote the following in the narrative section of Complainant's overall rating: "Mr. Stiles' work in the Physical Plant is an asset to the Denver Complex. We can rely on Mat [sic] to perform his duties in a professional manner. Mr. Stiles has performed some of the less glamorous jobs around the Central Plant never complaining or showing signs of diminishing spirit. I believe from the adequate test scores Mr. Stiles has produced on his Apprentice tests he is going to succeed in the program and his work ethic reinforces my opinion."

13. In his Performance Evaluation for the period April 1, 2014 through March 31, 2015, prepared by his supervisor, Lt. DeTello, Complainant received an overall rating of Level II, with Level III ratings in Communication and Customer Service and Level II ratings for Accountability/Organizational Commitment, Job Knowledge, and Interpersonal Skills. Lt. DeTello wrote the following in the narrative section of Complainant's overall rating: "Mr. Stiles has come a long way in the apprentice program. He truly cares about the functions of his job and always is concerned about performing tasks the correct and safe way. He has a short time left in the program but as far as I'm concerned I would have no fear or resistance in him running a shift by himself at this point in time. Matt has upheld all the positives of this evaluation throughout the rating period."

14. On June 1, 2015, Complainant's position as a Correctional/Youth/Clinical Security Officer I was reallocated to a CSTS I position.

15. According to the DOC Position Description, the basic purpose of the CSTS I position is to "[e]nsure the safety and security of the general public, staff and offenders; supervise and train offender workers in utility/boiler operations and maintenance skills; evaluate condition of boiler and peripheral equipment and safely and skillfully perform preventive, predictive and corrective maintenance duties; ensure assigned work is performed in compliance with agency regulations and policy, as well as applicable local, state and federal guidelines and codes; track project expenses and submit expense reports; ensure proper use, care and storage of relevant tools and equipment. Position prepares offenders for community reentry by promoting the Colorado Department of Corrections Mission, Vision and Values while adhering to a high level of integrity and commitment."

Appointing Authority

16. On March 4, 2015, Frances Falk, who was then the Deputy Director of Prisons, delegated appointing authority to David Johnson, Warden of the Denver Correctional Complex,

for all positions reporting to him and encompassing all human resource matters within his authority.

Complainant's Extraordinary Personal Challenges in 2015

17. In 2015, Complainant experienced several difficult personal challenges. Complainant's spouse began an extramarital affair in April 2015, and the couple considered divorcing. Instead, they began couples counseling through the Colorado State Employee Assistance Program ("CSEAP").

18. In August 2015, Complainant's teenage daughter was committed to the Children's Hospital Intensive Psych ward and was diagnosed with a schizophrenic disorder for which she would be required to take powerful anti-psychotics for the rest of her life.

19. For some weeks or months prior to September 25, 2015, Complainant experienced significant difficulty sleeping. This difficulty was compounded when Complainant was switched back and forth between the day shift and the graveyard shift around this time.

20. On Thursday, September 24, 2015, Complainant and his wife participated in a CSEAP counseling session that was significantly upsetting to Complainant, because he had to relive the facts of his spouse's affair.

21. On Friday, September 25, 2015, Complainant argued with his daughter's birth mother concerning their daughter's conduct and condition. This argument compounded Complainant's elevated stress level.

22. None of these personal challenges had a negative impact on Complainant's job performance while he was experiencing them.

September 25, 2015

23. Around midnight on the night of Friday, September 25, 2015, or early Saturday morning, September 26, 2015, experiencing severe stress, feeling himself on the verge of a breakdown, and needing to sleep as his most immediate and exigent priority, Complainant consumed a small amount of his spouse's medical marijuana to help him sleep, which it did, for eleven hours. The psychoactive effects of the marijuana consumed by Complainant ended sometime during the morning of Saturday, September 26, 2015, although a component of marijuana, THC, is detectable via a urinalysis for several weeks.

September 28, 2015 Urinalysis

24. Complainant was not scheduled to work on the weekend of Saturday September 26 and Sunday September 27, 2015. On Monday September 28, 2015, at 10:34 a.m., Complainant submitted to a random urine screen test.

September 29, 2015 Incident Report and Its Aftermath

25. On September 29, 2015, Complainant filed a confidential Incident Report, stating that he had consumed marijuana on September 25, 2015. In that Incident Report, Complainant stated that he used marijuana to sleep. As background, Complainant explained:

> On the morning of Saturday September 25th I Matthew Mark Stiles Consumed marijuana by smoking an unknown exact quantity. I am writing this report to

state that due to numerous family issues, of which I am currently on FMLA fro I used the substance so I could sleep due to the amount of stress was greatly affecting my sleep and effecting my ability to focus on important and pertinent matters. On the morning of September 28th 2015, I was called from my post at DWCF Plant to take a random Urine Screen at DRDC. Later that evening I was reminded by my wife that I had used Marijuana on the dated stated above. On September 29th 2015 I went to the facility IG's at DRDC and reported my actions and asked to find out what I may do to keep my career and continue to perform my current job assignments until retirement in 2040. I am not a regular marijuana and I do not intend to do so ever again.

BACKGROUND
Since April 1st 2015 my spouse Misty Gale Stiles had an affair, so we split up and were going to file for divorce, at which time I used the peer support group at work and CSEAP couples counciling [sic] to save our marriage. This is ongoing and we are currently attending all scheduled appointments made by CSEAP. We had attended a CSEAP meeting the afternoon of Thursday September 24th 2015 and the items discussed within that meeting had a great influence on the amount of stress I was and am still under.

Near the beginning of August 2015, my daughter Cassidy Stiles had to be committed to Children's Hospital Intensive Psych ward and has been Diagnosed with a skitzophrenic [sic] Disorder to which she has to take powerful anti-psychotics for the rest of her life. She was sent back to live with me and my wife right at the end of August 2015, but we are still going through medication adjustments and behavioral issues. The afternoon of Friday September 25th, I had gotten into an argument with my daughter's birth mother about her behavior in school and in other areas., also greatly affecting the stress I was and am under.

26. On October 2, 2015, Respondent received the results of the drug screen, which tested positive for THC, the principal psychoactive chemical in marijuana.

27. On an unknown date, Investigator Scott Smith of the DOC's Office of Investigator General wrote a report regarding his investigation into this matter. The report states that Mr. Smith collected a urine sample from Mr. Stiles on September 21, 2015, and that on September 22, 2015, Mr. Stiles met with him to tell him that he had had been under extreme stress lately due to his daughter's psychological condition and his marital problems and that he had used some of his wife's medical marijuana on Friday September 18, 2015.[3] Mr. Smith reported that Mr. Stiles was very emotional and stated that he was worried about losing his job. Mr. Smith indicated that he advised Warden Johnson of Complainant's information. He also noted that he received confirmation on October 2, 2015 that Complainant's urine screen tested positive for marijuana.

Notice of Rule 6-10 Meeting

28. On October 13, 2015, Complainant was hand-delivered a Notice of Rule 6-10 meeting, dated October 9 and signed by Warden Johnson. The notice states, in pertinent part: "At this meeting, we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to, the report

[3] The dates included in Mr. Smith's report are incorrect, with the exception of receiving the urine test results on October 2, 2015. The urine sample was collected on September 28, 2015, Complainant met with Mr. Smith on September 29, 2015, and Complainant consumed marijuana on September 25, 2015.

that your most recent Urinary Analysis showed positive for the use of marijuana which may constitute a possible violation of AR [Administrative Regulation]/IA 1450-01, Code of Conduct."

Board Rule 6-10 Meeting on October 19, 2015

29. On October 19, 2015, Complainant's appointing authority, Warden Johnson, conducted a Rule 6-10 meeting with Complainant. Complainant was accompanied by his representative, Lt. DeTello, who was Complainant's immediate supervisor. Warden Johnson was accompanied by his representative, Major Jay Guilliams.

30. At the meeting, Major Guilliams recited the material facts that prompted the 6-10 meeting: that Complainant tested positive for marijuana and the conduct that resulted in the positive test violated DOC's Administrative Rules (AR) 1450-1 (Code of Conduct) and 1450-36 (Drug Deterrence Program).

31. In response, Complainant explained that he had been in an extreme state of stress due to his marital problems and his daughter's mental health issues and his lack of sleep. He admitted that he made a mistake but emphasized mitigating factors such as his marital issues and his daughter's health. He also pointed out that his performance evaluations were good and that he took a number of training opportunities in order to become a better employee. His supervisor, Lt. DeTello, stated that Complainant was a valuable asset to him, and that a lot of time and effort had been put into training Complainant for the job he currently held. Complainant ended the meeting by pleading for his job.

32. During the 6-10 meeting, Warden Johnson asked Complainant what effect this incident had on Complainant's ability to perform his job. Complainant responded that if he was a regular consumer of marijuana, it could affect his work in various ways and impact his position of trust. Complainant stated that, other than his conduct on September 25, 2015, he had not consumed marijuana for the entire time he was a DOC employee.

Lt. DeTello's Letter in Support of Complainant

33. After the Rule 6-10 meeting, Lt. DeTello submitted a letter to Warden Johnson on Complainant's behalf, dated October 16, 2015, attesting to Complainant's work ethic and moral character that he observed as Complainant's direct supervisor over the previous two and one-half years. In his letter, Lt. DeTello wrote the following:

> Since joining the central plant crew, Mathew has never failed to complete any task assigned to him, and has successfully completed his Boiler Operator Certification with a series of twelve tests, as well as, hands on experience. Mathew is among one of my top tier operators and is in control of the day shift operations in the central plants at DWCF and DRDC. As the day shift operator, he is required to sacrifice his personal schedule and cover any vacation and/or time off needed by my graveyard operators, and has done so without complaint. Through his strong motivational ability and team work skills, he is a much respected and well liked member of our team. Mathew possesses high communication skill level, along with, a professional rapport with the offender population; this makes him one of my top choices, in resolving kites and grievance issues. Besides his normal plant and facility responsibilities, I have also given him the responsibilities of the tedious task parts inventories, and ACA testing requirements. This being said, The Department of Corrections, his mentors and I have a great deal of money, time

> and effort invested in his training which makes him the invaluable asset that he is to me, and the department.
>
> In the past several months, Mathew has made me aware of several devastating, life changing occurrences in his personal life through which he has persevered, and has never let them effect [sic] his performance here at work. I am aware of the medical issues of his family members and of his spousal problems, and can attest that I have seen Mathew perform consistently at a high level when most other people would fail, due to the extremely high amount of stress he is constantly under. I also respect the fact that Mathew has had the imitative [sic] to be proactive in using our state, and Department resources to help manage his life, in these extremely difficult times, and to constantly better himself as a Department of Corrections employee.

Complainant's Final Performance Evaluation

34. Complainant's final Performance Review, signed by his supervisor, Lt. DeTello on October 19, 2015, the same day upon which Warden Johnson conducted the Rule 6-10 meeting, and by Major Guilliams as Reviewer on October 20, 2015, and by Complainant on October 20, 2015, gave Complainant an overall rating of Level II, with Level III ratings for Communication, Interpersonal Skills, and Level II ratings in all other core competencies.

The Termination of Complainant's Employment

35. On November 2, 2015, Warden Johnson issued a notice of disciplinary action, in which he reviewed the issues discussed at the Rule 6-10 meeting held on October 19, 2015. Warden Johnson summarized the material facts as follows:

> Complainant submitted to a UA test on September 28, 2015, which tested positive for marijuana.
>
> Complainant submitted a report on September 29, 2015 admitting to the use of an unknown quantity of marijuana on September 25, 2015 to help with sleep, which had been impacted by stress in Complainant's personal life.
>
> Complainant admitted that he was aware that smoking marijuana was a violation of department policy.
>
> Complainant stated that he had not been sleeping well for weeks, but he willfully decided to use marijuana rather than see a doctor or use an over the counter remedy.
>
> Complainant acknowledged that his decision to use marijuana has a negative impact on his ability to perform his duties as a correctional officer.

36. Warden Johnson then wrote that, in addition to this information, he also considered a letter submitted by Lt. DeTello, as well as remarks made by Lt. DeTello as Complainant's representative, and Complainant's past performance evaluations.

37. Warden Johnson pointed out that the DOC is a criminal justice agency and has adopted high standards for employment. He wrote, "Your actions violated those standards and demonstrate an inability to meet the responsibilities inherent to the position of a Correctional

Professional." Warden Johnson further concluded that Complainant had shown poor judgment and a disregard for Department regulations.

38. Warden Johnson added that due to Complainant's work in Corrections, he might be required to testify in court, during which his integrity and credibility would come under intense scrutiny. "This violation of Departmental policy has brought your integrity and professionalism into question thus impacting your creditability [sic] should you be called to testify in any further litigation." Warden Johnson did not consult with an Assistant Attorney General, or any other competent legal professional, to confirm whether this statement was true.

39. Warden Johnson stated that he had determined Complainant's actions violated a number of policies, procedures, and performance expectations.

40. Warden Johnson concluded that Complainant had violated State Personnel Board Rule 6-12: failure to perform competently and willful misconduct or violation of Board or department rules or law that affect the ability to perform the job.

41. Warden Johnson also concluded that Complainant had violated the Code of Ethics, an attachment to AR 1450-01, which provides, in pertinent part, that government employees shall "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated…."

42. Warden Johnson also concluded that Complainant had violated the Code of Ethics' Code of Conduct, which provides, in pertinent part, that all DOC employees shall "demonstrate the highest standards of personal integrity, truthfulness, and honesty and shall, through personal conduct, inspire public confidence and trust in government" and shall "not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government…."

43. Warden Johnson concluded that Complainant had violated a number of provisions of DOC AR 1450-01, Code of Conduct. These include section III.B., conduct unbecoming, defined as "any act or conduct either on or off duty that negatively impacts job performance, not specifically mentioned in administrative regulations. The act or conduct tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee…."

44. Warden Johnson also concluded that Complainant had violated the following subsections under section IV, Procedures: M, N, HH, TT, ZZ, discussed immediately below.

45. AR 1450-01 (IV)(M) provides, in pertinent part, that "DOC employees . . . shall avoid situations which give rise to direct, indirect, or perceived conflicts of interest."

46. AR 1450-01 (IV)(N) provides that "[a]ny action on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of DOC employees, contract workers, and volunteers, is prohibited. DOC employees, contract workers, and volunteers will exercise good judgment and sound discretion."

47. AR 1450-01 (IV)(HH) provides, in pertinent part, that DOC employees "shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures, and administrative instructions."

48. AR 1450-01(IV)(TT) provides, in pertinent part, that "Use (including under the influence) of alcohol or illicit drugs or the misuse of prescription drugs while on duty is prohibited. Illegal possession, manufacture, use, sale, or transfer of a controlled substance is prohibited and maybe subject to prosecution, except in the performance of official duties and with prior written authorization of the executive director. Failure to submit to a urinalysis/intoximeter or saliva screening when requested for DOC drug or alcohol testing may result in corrective and/or disciplinary action, as per ARs 1450-36, Drug Deterrence Program and 1150-04, Professional Standards Investigations."

49. AR 1450-01 (IV)(ZZ) provides that "[a]ny act or conduct on or off duty that affects job performance and that tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer or tends to adversely affect public safety is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

50. Warden Johnson also concluded that Complainant had violated provisions of AR 1430-36, Drug Deterrence Program, specifically sections (IV)(A)(1) and (2), which provide as follows:

> A. **Prohibition**: The use and/or possession of illegal drugs or abuse of controlled substances is a crime which, in most cases, constitutes a felony. Any DOC employee, contract worker, or volunteer who uses and/or possesses illegal drugs, abuses controlled substances, or reports to work under the influence of alcohol or illegal drugs poses a potential threat to the safety of the community and his/her fellow DOC employees, contract workers, and volunteers and diminishes the morale and integrity of the DOC. Use and/or possession of illegal drugs, abuse of controlled substances, or working under the influence of alcohol could place the DOC employee, contract worker, or volunteer in association with the criminal element and has the potential to seriously compromise the DOC.
>
> 1. The use and/or possession of illegal drugs, abuse of controlled substances, or working under the influence of alcohol or illegal drugs by DOC employees, contract workers, and volunteers is prohibited. Violations of this administrative regulation will be cause for management/supervisor intervention that may result in corrective and/or disciplinary action up to, and including, termination.
>
> 2. To ensure the Department upholds its commitment to provide a safe and secure work environment, the use of any illegal drug covered under the federal Controlled Substances Act, including marijuana that is medically prescribed and/or registered is prohibited. Marijuana remains a drug listed in Schedule 1 of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing regulations to use marijuana. The recent amendment to the State Constitution does not affect the Controlled Substances Act.

51. Finally, Warden Johnson also concluded that Complainant had violated two competencies from his Performance Management Plan: Accountability/Organizational Commitment, which included an IPO as critical for Level II job performance that directs Complainant to comply with policies, procedures and rules, and Job Knowledge, with a supervisor-defined IPO that directs Complainant to "[d]emonstrate the ability to make appropriate,

timely, logical decisions, using all available information while assessing the potential impact to the department."

52. Warden Johnson notified Complainant that he had decided to terminate Complainant's employment effective November 2, 2015.

53. The disciplinary letter provided Complainant with the proper notice of his appeal rights.

Complainant Appeals to the Board

54. Complainant timely appealed his termination to the Board, alleging that the disciplinary action was unwarranted, and requesting reinstatement with back pay and benefits.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause based on constitutionally-specified criteria. Colo. Const. Art. XII, §§ 13-15; §§ 24-50-101, *et seq.* C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Just cause for disciplining a certified state employee is outlined in Board Rule 6-12 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

See also, Stiles, 477 P.3d at 715 ("Rule 6-12 outlines what constitutes just cause to discipline a certified state employee").

Burden of Proof

Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-8. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary and capricious, or contrary to rule or law. § 24-50-103(6), C.R.S. *Stiles*, 477 P.3d at 717.

II. HEARING ISSUES

A. Complainant Committed the Act for Which He Was Disciplined.

The first issue to be determined is whether Complainant committed the act for which he was terminated. This issue is undisputed. Respondent terminated Complainant's employment for the sole reason that Complainant consumed a small amount of marijuana on September 25, 2015. Complainant has never denied that he consumed marijuana on that date. Complainant's drug screen indicated the presence of THC, the primary psychoactive chemical in marijuana.

B. The Appointing Authority's Action Was Arbitrary and Capricious.

The second issue to be determined is whether Warden Johnson's decision to terminate Complainant's employment with the DOC was arbitrary and capricious. *Stiles,* 477 P.3d at 718 ("if the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's disciplinary action in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule of law").

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner 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. *Stiles*, 477 P.3d at 718; *Lawley v. Department* of *Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

1. Reasonable Diligence and Care to Procure Evidence

To a large extent, Warden Johnson used reasonable diligence and care to procure such evidence as he was authorized to consider in exercising his discretion. His handling of the Rule 6-10 meeting was appropriate, he allowed Complainant extra time to provide additional information Complainant wanted Warden Johnson to consider in making his decision, he reviewed Complainant's performance evaluations, he reviewed the letter Lt. DeTello submitted in support of Complainant, and at the Rule 6-10 hearing he allowed Complainant to explain the reasons for his conduct.

There is one area, however, in which Warden Johnson did not exercise reasonable diligence and care to procure material evidence.

In his disciplinary letter, Warden Johnson made an oblique reference to the impact of the U.S. Supreme Court opinion in *Brady v. Maryland* and its progeny when he stated that if Complainant was required to testify in court, his credibility would be called into question because of this incident. At the hearing, Warden Johnson testified that Complainant's consumption of marijuana would negatively impact his ability to testify in court because he could be impeached on credibility grounds. Warden Johnson believed that Complainant's credibility would be subject to attack on cross-examination because of his consumption of marijuana. However, Warden Johnson's concerns about this matter are not justified. Warden Johnson's failure to obtain a legal opinion from a member of the Attorney General's office led Warden Johnson to base his disciplinary decision, at least in part, on a misunderstanding of applicable law.

As discussed in greater detail beginning at page 17, below, Warden Johnson's understanding of the effect of Complainant's one-time consumption of marijuana on Complainant's susceptibility to attacks on his credibility was unwarranted. Because that misunderstanding was an articulated factor in Warden Johnson's disciplinary decision, Warden Johnson should have used "reasonable diligence and care to procure" a proper understanding of how Complainant's conduct might affect his vulnerability in the event he was required to testify at a trial. However, Warden Johnson failed to obtain any legal advice about this issue.

Accordingly, Warden Johnson failed to exercise reasonable diligence and care to procure evidence relating to the possibility that Complainant's one-time marijuana use would subject Complainant to an attack on his credibility in the event he was required to testify under oath. Because this was one of the issues upon which Warden Johnson based his disciplinary decision, this is not an insignificant failure.

2. Candid and Honest Consideration of the Evidence

There is little evidence that Warden Johnson gave "candid and honest consideration" of the evidence he procured. First, it is helpful to understand what "candid and honest consideration" of the evidence means. According to the Merriam Webster dictionary, "candid" means "free from bias, prejudice, or malice." According to the Merriam Webster dictionary, "honest" means "in a genuine or sincere manner." According to the Merriam Webster dictionary, "consideration" means "continuous and careful thought." Put together, we take "candid and honest consideration" to mean an unbiased, genuine, sincere, careful, thoughtful review of the evidence.

In discussing this prong of the arbitrary and capricious standard, the Colorado Supreme Court in its opinion in this matter, wrote:

> The second *Lawley* prong focuses on whether the appointing authority "candid[ly] and honest[ly] considered the evidence." *Id*. (quoting *Van De Vegt*, 55 P.2d at 705). This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence, including the evidence related to the factors that an appointing authority must consider under Rule 6-9 in exercising its discretion on disciplinary matters.

Stiles, 477 P.3d at 719.

Warden Johnson failed to candidly and honestly consider all the relevant evidence, including the following: (1) Complainant's extraordinary mitigating circumstances; (2) Complainant's job performance, value to DOC, and work ethic; (3) Complainant's purported policy violations; (4) the effect on Complainant's credibility if testifying at trial; (5) misinterpretation of Complainant statement during Rule 6-10 concerning the effect of his one-time marijuana use on his ability to do his job; (6) Board Rule 6-9 factors; and (7) the seriousness of Complainant's act.

Complainant's Extraordinary Mitigating Circumstances

Warden Johnson did not candidly and honestly consider the extraordinary mitigating circumstances that confronted Complainant when he made the mistake of consuming marijuana. In this matter, we are presented with: (1) a certified employee, (2) with no prior corrective or disciplinary actions, (3) under significant marital and parental stress for (4) extraordinarily stressful and disruptive events, and (5) experiencing severe insomnia, (6) took a few puffs of marijuana (7) off-duty off-premises in a (8) state that has legalized the recreational use of marijuana (9) for the purpose of getting some needed sleep, (10) which use did not interfere with his ability to perform his duties when he went back to work (11) over two days later. As Complainant admitted, the combination of severe stress and insomnia, bringing Complainant to his breaking point, led him to make a poor decision late on Friday night, September 25, 2015.

Warden Johnson focused on Complainant's poor judgment in his one-time use of marijuana, without candidly and honestly considering the effect of severe stress and sleep deprivation had on Complainant's decision-making ability on the night of September 25, 2015. Complainant's judgment was clearly compromised, but Warden Johnson viewed Complainant's decision to use marijuana as a sleep aid as representative of Complainant's judgment, generally,

despite the fact that Complainant was never known to exercise poor judgment while performing his job duties for the DOC. Warden Johnson's view of this matter indicates a lack of candid and honest consideration of Complainant's mitigating circumstances.

Lt. DeTello, who, as Complainant's supervisor, was in a much better position to assess Complainant's character, value to DOC, and Complainant's challenges, showed a more candid and honest view of those challenges, writing in Complainant's support that

> Mathew has made me aware of several devastating, life changing occurrences in his personal life through which he has persevered, and has never let them effect [sic] his performance here at work. I am aware of the medical issues of his family members and of his spousal problems, and can attest that I have seen Mathew perform consistently at a high level when most other people would fail, due to the extremely high amount of stress he is constantly under. I also respect the fact that Mathew has had the imitative [sic] to be proactive in using our state, and Department resources to help manage his life, in these extremely difficult times, and to constantly better himself as a Department of Corrections employee.

Lt. DeTello viewed Complainant's family challenges, appropriately, as "devastating." Such challenges, along with sleep deprivation, are certain to negatively impact an individual's decision-making capabilities.

Complainant's Job Performance, Value to DOC, Work Ethic

Warden Johnson also failed to candidly and honestly consider Complainant's solid performance as a DOC employee, his dedication to his job and his documented desire to improve his job knowledge and performance, the training Complainant obtained, and the skills he possessed. As Complainant's supervisor, Lt. DeTello, stated in Complainant's Rule 6-10 meeting, and reiterated in his letter in support of Complainant, Complainant was an invaluable asset to his unit and to Respondent. Although Warden Johnson testified that he considered Complainant's job performance, that testimony lacks credibility.

Consideration of Purported Policy Violations

The need for a DOC regulation prohibiting an employee's use of marijuana was well-articulated by several of Respondent's witnesses. The concerns underlying the regulation include the safety and security of staff, inmates and the public; modeling conduct; employee vulnerability; the effect on Complainant's ability to do his job; and public perception. In addition, the impact of Complainant's conduct on his ability to testify in court without his credibility being attacked was another factor that was considered by Warden Johnson in his decision to terminate Complainant's employment. However, in this case, Complainant's one-time use under extraordinary circumstances would have been unlikely to open the Pandora's Box of severe consequences about which Respondent's witnesses testified.

The concern about safety and security relates to the effects of marijuana use on a boiler operator and correctional professional who deals with dangerous equipment such as boilers, and may be called upon to assist correctional officers in dealing with inmate disturbances. No doubt, a DOC employee who reported to work under the influence of marijuana would pose a danger to the safety and security of his co-workers, inmates at his correctional facility, and potentially the public as well. Here, however, Complainant consumed marijuana approximately 55 hours prior to his next scheduled work day, long after the psychoactive effects of the marijuana had worn off.

Complainant posed no danger to his co-workers, the inmates at the Denver Correctional Facility, or the public as a result of his one-time use of marijuana.

The concern about modeling conduct arises from a correctional professional's duty to act as a role model for inmates and show them, through conduct, how one should behave with integrity, honesty and respect. A user of illegal drugs therefore fails to be a proper role model for inmates who hopefully will be rehabilitated before their release into the community. Here, however, although there was testimony to the effect that, as a general matter, information passes swiftly and freely from DOC employees to DOC offenders, there is no evidence that inmates learned, or would have learned, about Complainant's one-time use of marijuana. Accordingly, any conclusion on the part of the appointing authority that Complainant's conduct would negatively impact his ability to continue to act as a role model for offenders is speculative.

The concern about employee vulnerability arises from the possibility that inmates may attempt to use information about a correctional officer's violation of rules or law to force the officer to do their bidding, whether it is providing contraband to the offender or participating in illegal conduct with the offender. In this matter, however, any leverage an offender might gain if that offender learned of Complainant's one-time use of marijuana would be rendered useless because DOC's upper management already knew about Complainant's conduct. Furthermore, as discussed above, the possibility that an inmate would learn of Complainant's one-time use of marijuana is speculative, at best.

The concern about the effect on an employee's ability to perform his or her job duties arises from the prospective loss of trust among co-workers if they learn of an employee's use of marijuana in violation of DOC regulations, as well as the possible negative impact of being mentally impaired might have on one's ability to perform assigned duties. Here, Major Guilliams testified that all other DOC employees in Complainant's unit had learned about Complainant's conduct. However, Respondent failed to introduce sufficient evidence establishing that any correctional officer at the Denver Correctional Complex, with the exception of Warden Johnson, no longer trusted Complainant because of his one-time consumption of marijuana. Furthermore, the manner in which these co-workers learned of Complainant's conduct is unclear. Complainant insisted that he only told his supervisor, Mr. DeTello, and the OIG investigator, about his conduct. If it is true that other DOC employees in Complainant's unit learned of Complainant's conduct, it was through no fault of Complainant. Major Guilliams indicated that reporting the information about Complainant to unauthorized individuals who did not have a need to know would constitute a violation of DOC regulations, but Major Guilliams took no action to ascertain how this information was supposedly disseminated.

The concern about public perception is that DOC employees are expected to meet a higher standard of conduct and personal integrity and inspire trust. To conclude, as Warden Johnson apparently did, that a DOC employee's off-duty, off-premises, one-time consumption of marijuana would negatively impact the public's perception of the DOC – a public that passed a Constitutional amendment permitting the personal use of marijuana for persons twenty-one years or older – is also highly speculative and without factual foundation. Furthermore, how the public would have learned about Complainant's conduct, prior to the termination of his employment and his filing this appeal is unclear, and was not addressed by Respondent at the hearing of this matter.

Consideration of Effect on Complainant's Credibility if Testifying at Trial

As briefly discussed, above, Warden Johnson believed that Complainant's consumption of marijuana would negatively impact his ability to testify in court because he could be impeached on credibility grounds. Warden Johnson was incorrect.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The U.S. Supreme Court in *Giglio v. U. S.*, 405 U.S. 150 (1972), held that when the reliability of a given witness may well be determinative of guilt or innocence, the nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution.

Under Colorado law, a witness' general credibility may be attacked only by testimony regarding the witness' character or reputation for truthfulness or untruthfulness. Colorado Rule of Evidence ("C.R.E.") 608(a). Specific instances of a witness' conduct, for the purpose of attacking a witness' character for truthfulness, may not be proved by extrinsic evidence, with the exception of a felony conviction. C.R.E. 608(b).

In *People v. Segovia*, 196 P.3d 1126 (Colo. 2008), the Colorado Supreme Court noted that Colorado courts have excluded attempts to impeach a witness' credibility by asking about drug use because drug use is not probative of truthfulness. *Id*. at 1130-31 (citing to *People v. Saldana*, 670 P.2d 14 (Colo. App. 1983)).

Complainant's consumption of marijuana is not relevant to Complainant's character or reputation for truthfulness or untruthfulness. Complainant has not been charged with a crime, let alone been convicted of a felony. Respondent failed to establish that Complainant was untruthful in any aspect of this matter. Accordingly, despite Warden Johnson's reference to *Brady* and the purported problems presented by Complainant's conduct in the event that Complainant is required to testify in court or at a hearing, Complainant's conduct presents no issue with respect to prospective attacks on his credibility if he is subjected to impeachment through cross-examination.[4]

Misinterpretation of Complainant's Statement During Rule 6-10 Meeting

Warden Johnson misinterpreted Complainant's response during the 6-10 meeting to his question about the impact Complainant's conduct had on Complainant's ability to perform his job duties. In his disciplinary letter, Warden Johnson alleged that "Complainant acknowledged that his decision to use marijuana has a negative impact on his ability to perform his duties as a correctional officer." Complainant has denied that he said that. A review of the audio recording of the Rule 6-10 meeting indicates that what Complainant said was that if he was a ***regular*** marijuana user, it could have a negative effect on his duties as a correctional officer. Complainant has consistently maintained that his consumption of marijuana on September 25, 2015, was the only time he used marijuana from the time he became a DOC employee in 2010 until the date of the hearing. Respondent offered no evidence to the contrary.

Consideration of the Board Rule 6-9 Factors

Board Rule 6-9 requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. Board Rule 6-9 provides that "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness,

[4] At the hearing, the ALJ provided Respondent's counsel the opportunity to brief the issue of the applicability of *Brady v. Maryland* and its progeny to the issues raised in this matter. Respondent's counsel requested that he be given until May 5, 2016 to submit a brief, and the record was kept open until that date. Respondent's counsel, however, did not submit a brief on this issue.

and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Warden Johnson failed to consider the extraordinary mitigating circumstances that confronted Complainant, Complainant's solid work performance, the absence of a disciplinary record, and Lt. DeTello's glowing remarks about Complainant's work, work ethic, and his value to the DOC facility. The one fact that drove Warden Johnson's decision was that Complainant consumed some marijuana, knowing it was a policy violation. The disciplinary decision violated Board Rule 6-9.

Consideration of the Seriousness of Complainant's Act

Warden Johnson did not candidly and honestly consider the seriousness of Complainant's act. Equating what Complainant did to robbing a bank indicates a highly questionable perspective on Complainant's act.

The totality of the circumstances that led Complainant to consume a small amount of marijuana, off-duty and off-premises, in a manner that did not negatively impact Complainant's ability to perform his job duties, did not affect Warden Johnson's consideration of this matter and ultimate decision to terminate Complainant; it should have, however. The only thing that mattered to Warden Johnson was that Complainant had consumed marijuana. To Warden Johnson, that act opened up a whole Pandora's Box of issues and problems that clearly indicated to him that he had no choice but to terminate Complainant's employment because, in Warden Johnson's view, Complainant's decision to consume marijuana indicated such poor judgment that Warden Johnson lost his trust in Complainant. However, an appointing authority's loss of trust in an employee is not the standard by which a certified state employee is to be judged. The applicable standard is the one established by statute and Board Rules.

Warden Johnson testified that he had no choice but to terminate Complainant's employment because of Complainant's one-time consumption of a small amount of marijuana under extenuating circumstances. Warden Johnson did have a choice, however, but failed to see the issues in any colors other than black and white. A prudent appointing authority would not have essentially ignored or discounted such significant mitigating circumstances as Complainant's marital strife; his daughter's severe medical condition; his insomnia; Complainant's successful performance evaluations; his supervisor's strong endorsement of his work and his work ethic; Complainant's acknowledgement that he used bad judgment and made a mistake; the fact that the mistake was off-duty, off-premises, and did not put any other person in jeopardy; and the fact that Complainant's conduct did not interfere with Complainant's ability to perform his job duties on his next work day.

In summary, Warden Johnson exaggerated or, in the case of *Brady* concerns, misconstrued the prospective deleterious effects of Complainant's conduct while failing to candidly and honestly consider and assess all the relevant evidence of the extraordinary mitigating circumstances that gave rise to Complainant's conduct. Therefore, Warden Johnson's decision to terminate Complainant's employment was arbitrary and capricious.

3. Whether Reasonable People Fairly and Honestly Considering the Evidence Must Reach Contrary Conclusions

The Colorado Supreme Court's opinion in this matter addressed the third prong of the arbitrary and capricious test as follows:

> The third prong of *Lawley*'s arbitrary or capricious test assesses the appointing authority's weighing of the evidence and the reasonableness of the appointing authority's disciplinary action. … But that inquiry doesn't simply ask whether the disciplinary action was reasonable. It asks whether "reasonable [people] fairly and honestly considering the evidence must reach contrary conclusions" regarding the propriety of the disciplinary action. *Id*. at 1252 (quoting *Van De Vegt*, 55 P.2d at 705).

Stiles, 477 P.3d at 720.

Based on the facts as determined at the hearing of this matter, and the arbitrary and capricious nature of Warden Johnson's decision, as well as the fact that it was contrary to rule or law as indicated above and below, reasonable people fairly and honestly considering the evidence must reach contrary conclusions. A reasonable person would not conclude that Complainant's act, viewed with an awareness of the challenges facing Complainant, was as egregious an act as robbing a bank. Based on the totality of the circumstances, reasonable people, fairly and honestly considering the evidence, would not have concluded that Respondent had no choice but to terminate Complainant's employment. Complainant's one-time, off-duty, off-premises consumption of a small amount of marijuana under truly extraordinary circumstances would not have resulted in reasonable people fairly and honestly considering the evidence concluding that Respondent had no choice but to terminate Complainant's employment. Complainant's one-time, off-duty, off-premises consumption of a small amount of marijuana under truly extraordinary circumstances did not affect Complainant's ability to perform his job duties and should not have had any deleterious effect on Complainant's continued ability to perform his job duties at the satisfactory level at which he had performed those job duties in the past.

Lt. DeTello may be viewed as an exemplar of a reasonable person who was likely to have known as much as, if not more, than Warden Johnson about Complainant's situation. Lt. DeTello's view of the severity of Complainant's challenges, and his view of Complainant's character, work performance, value to DOC, and work ethic, have led Lt. DeTello to reach conclusions contrary to those reached by Warden Johnson. Those contrary conclusions are evidenced by the letter Lt. DeTello wrote in support of Complainant.

C. The Appointing Authority's Action was Contrary to Rule or Law.

The third issue to be determined is whether Warden Johnson's decision to terminate Complainant's employment with the DOC was contrary to rule or law.

Board Rule 6-9

Board Rule 6-9, in effect at time, requires an appointing authority to consider the entirety of the situation before making a decision on the level of discipline to impose. Board Rule 6-9 provides that "[t]he decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

As discussed above, Warden Johnson failed to honestly and candidly consider some of the evidence relevant to the factors listed in Rule 6-9. Warden Johnson failed to consider the extraordinary mitigating circumstances that confronted Complainant, Complainant's solid work performance, the absence of a disciplinary record, and Lieutenant DeTello's glowing remarks about Complainant's work and work ethic.

Warden Johnson paid lip service to his consideration of the Rule 6-9 factors, but did not candidly and honestly consider each of these factors in reaching his decision to terminate Complainant's employment. The prior Initial Decision implied that Warden Johnson's testimony to the effect that he considered all the Rule 6-9 factors was not credible. That credibility assessment is now made explicit: Warden Johnson was not credible when he testified at hearing that he considered all Rule 6-9 factors in arriving at his disciplinary decision. In contrast, Complainant was consistent in his statements and testimony about this matter, and was credible in those statements and testimony. Accordingly, Warden Johnson's disciplinary decision was in violation of Board Rule 6-9.

D. Damages

Complainant seeks back pay and back benefits. He has waived his reinstatement request.

The Board may only provide remedies authorized by its enabling statute. *See, e.g., Colo. Civil Rights v. Travelers Ins. Co.*, 759 P.2d 1358, 1371 (Colo. 1988) ("the Commission may only provide remedies authorized by the Commission's enabling statute"). The Board may affirm, modify, or reverse a disciplinary action. § 24-50-125(4), C.R.S. An award may include all rights, salaries, and benefits. *See, e.g.,* § 24-50-125(7), C.R.S.

"Where a legal injury is of an economic character . . . legal redress in the form of compensation should be equal to the injury." *Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). "Any remedy fashioned . . . should equal, to the extent practicable, the wrong actually sustained by [Complainant]." *Id*. Even if successful, a Complainant "is not entitled to an award that bestows an economic windfall vastly disproportionate to the legal wrong that he has sustained." *Beardsley v. Colorado State Univ.*, 746 P.2d 1350, 1352 (Colo. App. 1987).

Back pay is determined by measuring the difference between a complainant's actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003). "A calculation of back pay should include the employee's base salary amount and pay raises the employee reasonably expected to receive, as well as sick leave, vacation pay, and other fringe benefits, during the back pay period." *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo. App. 2010).

Complainant is entitled to full back pay and benefits from November 2, 2015 to the date of this Amended Initial Decision, offset by any substitute earnings or unemployment compensation received by Complainant during this period of time, and with the cost of expenses incurred in seeking other employment deducted from the offset. The back pay and benefits Respondent owes Complainant are subject to statutory pre- and post-judgment interest at the statutory rate of 8% per annum. § 5-12-201, C.R.S.; *Rodgers v. Colo. Dep't. of Human Svcs*., 39 P.3d 1232, 1237 (Colo. App. 2001).

An Order Awarding Back Pay and Benefits was issued on July 6, 2021, contemporaneously with the Initial Decision on Remand. Respondent did not appeal that Order, and it remains in full force and effect.

CONCLUSIONS OF LAW

1. Complainant committed the act for which he was disciplined.

2. Respondent's action was arbitrary and capricious.

3. Respondent's action was contrary to rule or law.

ORDER

1. Respondent's decision to terminate Complainant's employment is **rescinded**.

2. Instead, Respondent shall impose an alternate disciplinary action on Complainant of a ten percent (10%) reduction in pay for six (6) months (from November 2015 through April 2016).

3. Complainant is entitled to full back pay and benefits as set forth in the Order Awarding Back Pay and Benefits.

DATED this 30th day
of November 2021,
at Denver, Colorado

[redacted]
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of November 2021, I electronically served true copies of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND** addressed as follows:

Greg D. Rawlings, Esq.
rawly59@gmail.com

Katherine Aidala, Esq.
Senior Assistant Attorney General
Katherine.Aidala@coag.gov

[redacted]

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 Rule 8-63, 4 CCR 801.

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 8-67, 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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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.

The parties may file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at Board Rule 8-6(C).