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

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**MATHEW MARK STILES,**
**Complainant,**

**v.**

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

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

## MATTERS APPEALED

Complainant, who was a certified state employee, appeals his termination of employment by the DOC. Complainant alleges that, although he did commit the act for which he was disciplined, the decision to terminate his employment was arbitrary, capricious or contrary to rule or law, and that his termination was not within the range of reasonable alternatives available to the appointing authority. Complainant seeks reinstatement, as well as back pay and benefits. Respondent requests that its decision be affirmed and that Complainant's appeal be dismissed with prejudice.

For the reasons set forth below, Respondent's decision to terminate Complainant's employment is **modified**.

## ISSUES

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

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

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

## 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."[1]

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

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

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 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."

16. Prior to the act that gave rise to Complainant's termination, Complainant did not receive any corrective or disciplinary action.

**Appointing Authority**

17. On March 4, 2015, Frances Falk, 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 Personal Challenges in 2015**

18. 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").

19. In August 2015, Complainant's daughter was committed to the Children's Hospital Intensive Psych ward and was diagnosed with a schizophrenic disorder.

20. For some weeks or months prior to September 25, 2015, Complainant experienced significant difficulty sleeping.

21. On Thursday, September 24, 2015, Complainant and his wife participated in a CSEAP counseling session that was upsetting to Complainant.

22. On Friday, September 25, 2015, Complainant argued with his daughter's birth mother concerning their daughter's conduct and condition.

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

**September 25, 2015**

24. Around midnight on the night of Friday, September 25, 2015, or early Saturday morning, September 26, 2015, experiencing severe stress and unable to sleep, Complainant consumed some of his spouse's medical marijuana to help him sleep, which it did.

25. The psychoactive effects of the marijuana consumed by Complainant ended sometime during the morning of Saturday, September 26, 2015.

**September 28, 2015 Urinalysis**

26. Complainant was not scheduled to work on the weekend of September 26 and 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**

27. On September 29, 2015, Complainant filed a confidential Incident Report, admitting 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 that his wife had an affair, which led to a near-divorce until Complainant utilized the CSEAP couples counseling to save his marriage. He and his wife had attended a session on September 24, 2015, which added to the stress he was already experiencing. Complainant also indicated that in August 2015, his daughter was committed to the Children's Hospital Intensive Psych ward and was diagnosed with a schizophrenic disorder. In addition, during the afternoon of September 25, 2016, Complainant had argued with his daughter's birth mother about his daughter's conduct. All these stressors resulted in Complainant's inability to sleep, for which condition he consumed marijuana.

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

29. 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.[2] 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**

30. 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 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**

31. 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.

32. At the meeting, Major Guilliams recited the material facts that prompted the Rule 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).

33. 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.

34. During the Rule 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 alleged that, other than his conduct on September 25, 2015, he had not consumed marijuana for the entire time he was a DOC employee.

[2] 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.

**Lt. DeTello's Letter in Support of Complainant**

35. 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 complainant. 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**

36. 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 Guillams 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**

37. 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.

38. 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.

39. 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.

40. 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."

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

42. 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.

43. 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...."

44. 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...."

45. 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...."

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

47. 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."

48. 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."

49. 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."

50. 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."

51. 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."

52. 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.

53. Finally, Warden Johnson also concluded that Complainant had violated two competencies from his Performance Management Plan, signed by Complainant on April 22, 2015: 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."

54. Warden Johnson notified Complainant in his November 2, 2015, disciplinary letter that he had decided to terminate Complainant's employment effective November 2, 2015.

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

**Board Appeals and Process**

56. Complainant timely appealed his termination to the Board on November 12, 2015, alleging that the disciplinary action was too severe, and requesting reinstatement with back pay and benefits.

**Assessment of Complainant's Credibility**

57. Complainant was entirely credible in his testimony at the hearing.

## 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, 4 CCR 801, 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.

**Burden of Proof**

In this *de novo* disciplinary proceeding, 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, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. This applies not only to the decision to impose a corrective or disciplinary action, but also to the propriety of the particular sanction that is imposed.

### 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 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, capricious, or contrary to rule or law.

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

##### 1. Arbitrary and Capricious

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. *Lawley v. Department* of *Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

**a. Reasonable Diligence and Care to Procure Evidence**

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 any 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.

**b. Candid and Honest Consideration of the Evidence**

Respondent offered little evidence that Warden Johnson gave candid and honest consideration of the evidence he procured. He failed to give proper weight to the extraordinary mitigating circumstances that confronted Complainant when he made the mistake of consuming marijuana. He also failed to give proper weight to Complainant's solid performance as a DOC employee; the absence of any prior corrective or disciplinary actions imposed on Complainant; Complainant's obvious 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.

None of this appeared to affect Warden Johnson's consideration of this matter and the ultimate decision to terminate Complainant in any significant way. This is a violation of Board Rule 6-9, 4 CCR 801, which 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." The only thing that mattered to Warden Johnson was that Complainant had consumed marijuana. To Warden Johnson, that act 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, although serious, 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.

Pursuant to Board Rule 6-9, an appointing authority is required to consider, and accord appropriate weight to, evidence of such significant mitigating circumstances as Complainant's marital strife; his daughter's severe medical condition; his insomnia; Complainant's successful performance evaluations; the lack of any prior corrective or disciplinary actions; Complainant's 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[3]; and the fact that

[3] The private nature of Complainant's conduct in this case, and the fact that his conduct never posed any threat to the general public, is in contrast to those DOC employees who have been arrested and

Complainant's conduct did not interfere with Complainant's ability to perform his job duties on his next workday.

The need for a DOC regulation prohibiting an employee's use of marijuana was well articulated by several of Respondent's witnesses. These concerns underlying the regulation include the safety and security of staff, inmates and the public; modeling conduct; employee vulnerability; the affect 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 of marijuana 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. Here, however, Complainant consumed marijuana approximately 55 hours prior to his next scheduled workday, long after the 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 his or her 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. At hearing, despite 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 what Respondent's witnesses testified to as inmates' attempts to use the leverage they may gain when they learn of 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 Complainant admitted to consuming marijuana. 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 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

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convicted of charges of driving under the influence of alcohol but who have not been terminated by the DOC because of that conduct.

officer at the Denver Correctional Complex, with the exception of Warden Johnson, no longer trusted Complainant because of his one-time consumption of marijuana.[4]

Warden Johnson misinterpreted Complainant's response during the Rule 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: "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 establishes 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.

The concern about public perception is that DOC employees are expected to meet a higher standard of conduct and personal integrity, and inspire trust in the general public. To conclude, as Warden Johnson 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. Furthermore, how the public would have learned about Complainant's conduct is unclear, and was not addressed by Respondent at the hearing.

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 were required to testify in court, his credibility would be called into question because of this incident.[5] 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 believes 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.

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). 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 appear as a witness in court or at a hearing, Complainant's conduct presents no issue with respect to

[4] The manner in which these co-workers learned of Complainant's conduct is unclear. Complainant insisted that he only told his supervisor, Lt. DeTello, and the Office of Investigator General 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 disseminated.

[5] Under *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent U.S. Supreme Court cases, the prosecution in criminal matters is obligated to provide the defendant with exculpatory evidence, including evidence affecting the credibility of prosecution witnesses.

prospective attacks on his credibility if he is subjected to impeachment through cross-examination.[6]

In summary, Warden Johnson gave too much weight to, or, in the case of *Brady* concerns, misconstrued, the prospective and speculative deleterious effects of Complainant's conduct while failing to give enough weight to the extraordinary mitigating circumstances that gave rise to Complainant's conduct, and his solid work record. Warden Johnson's consideration of this matter violated Board Rule 6-9 and was arbitrary and capricious.

**2. Contrary to Rule or Law**

Board Rule 6-2, 4 CCR 801, provides that "[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 purpose of this rule is to require that an employee be warned and corrected about improper conduct before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary action.

The question of whether Complainant's conduct was "so flagrant or serious" as to warrant immediate discipline without a prior corrective action does not lend itself to an easy answer. The use of a drug that, although legal under Colorado law remains illegal under federal law and prohibited by DOC regulations, is a serious matter. However, the one-time off-duty, off-premises use of marijuana, arising from the mitigating circumstances presented here, does not clearly rise to the level of a flagrant and serious transgression. That being said, the undersigned ALJ acknowledges that the appointing authority has discretion in determining whether conduct warrants discipline, as long as such discretion is exercised in a reasonable and justifiable manner. The discretion to impose disciplinary action without a prior corrective action addressing the same conduct, as exercised in this matter by Warden Johnson, will not be second-guessed here. The nature of the discipline imposed, however, is another matter, and is discussed below.

As noted above, and as explained further below, Warden Johnson's decision violated Board Rule 6-9.

**C. The discipline imposed was not within the range of reasonable alternatives.**

The third issue to be determined is whether termination was within the range of reasonable alternatives available to Respondent. A discussion of the factors an appointing authority must consider in making a disciplinary decision, as required by Board Rule 6-9, follows.

**1. Nature, Extent, and Seriousness of the Act, Error or Omission**

Complainant's consumption of marijuana on the night of September 25, 2015 was a violation of DOC administrative regulations.

[6] 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.

By Complainant's own admission, consuming marijuana was a bad decision. However, the act was not as serious or egregious as Warden Johnson perceived it to be. Complainant consumed marijuana on just one occasion. He was off duty and off premises. He was not due back at work for another 55 hours or so. As the DOC's Inspector General, Jay Kirby, testified, the effects of marijuana do not last more than 6 to 8 hours at the most. There is no indication that Complainant's consumption of marijuana affected his job performance at any time. By his own admission, Complainant was so stressed and so exhausted when he consumed the marijuana that the decision to do so cannot be viewed as indicative of Complainant's normal and usual decision-making skills. There is no indication that Complainant's decision-making abilities were ever questionable or in any way impaired while he was at work.

In short, although serious, Complainant's conduct was not so egregious as to warrant the severest disciplinary action available to the appointing authority.

**2. Effect of the Act, Error or Omission**

Respondent, through its witnesses, offered testimony that Complainant's conduct could have serious deleterious effects on Complainant's ability to perform the duties of his job, on the safety of the Denver Correctional Center's staff and inmates, and on the perception of DOC by the inmates and the public. Such evidence was speculative and exaggerated the potential negative impact of Complainant's conduct.

The effect on others of the knowledge that Complainant consumed marijuana, even though it is against federal law and against DOC regulations, should not have been a consideration because the results of Complainant's drug screen should have been kept confidential and accessible only to those DOC employees who had a need to know. Instead, according to the testimony of Respondent's witness, the employees in Complainant's unit all learned about it, and it was anticipated that this information would filter to the Denver Correctional Complex's inmate population, all through no fault of Complainant. It is apparent that if Complainant's co-workers learned of this matter, DOC employees other than Complainant spread the news. Respondent cannot now claim that a situation of its own making, or at least a situation for which Complainant should not be faulted, establishes the seriousness of Complainant's conduct and prevents him from returning to his old position with the DOC.

**3. Type and Frequency of Previous Unsatisfactory Behavior or Acts**

Complainant did receive several Performance Documentation Forms memorializing his failures to meet his work schedule. The last one he received was in May 2013. The nature of these acts is unrelated to Complainant's conduct that gave rise to his termination, and are too remote in time to be material to Warden Johnson's decision.

**4. Prior Corrective or Disciplinary Actions**

Complainant had no prior corrective or disciplinary actions in the more than five (5) years he was employed by the DOC.

**5. Period of Time Since a Prior Offense**

Complainant did not commit a prior offense.

### 6. Previous Performance Evaluations

Complainant was consistently rated as a Level II, with some core competency areas rated at Level III.

### 7. Mitigating Circumstances

As discussed above, Complainant's action for which he was terminated involved significant mitigating circumstances. In this matter, we are presented with a certified employee, with no prior corrective or disciplinary actions, under significant marital and parental stress for extraordinarily stressful and disruptive events, and experiencing severe insomnia, who consumed marijuana while off-duty, off-premises, in a state that has made the recreational use of marijuana a constitutional right, for the purpose of getting some needed sleep, which use did not interfere with his ability to perform his duties when he went back to work over two days later. As Complainant admitted, the combination of severe stress and insomnia led him to make a poor decision late on Friday night, September 25, 2015.

At the hearing of this matter, Warden Johnson testified that he had no choice but to terminate Complainant's employment. However, the AR that directly addresses the use of drugs that remain illegal under federal law, AR 1430-36, Drug Deterrence Program, provides that violations of the regulation, which prohibits the use, possession or working under the influence of illegal drugs, among other things, "will be cause for management/supervisor intervention that **may result in corrective and/or disciplinary action,** up to, and including termination. AR 1430-36 (IV)(A)(1)(emphasis added). Thus, the DOC regulation that directly addresses the use of a drug such as marijuana, contemplates that a violation of the regulation need not result in any kind of disciplinary action, let alone the severest form of disciplinary action, i.e., termination, but it "may" result in a corrective action instead.

Considering all the factors that must be considered in deciding the nature of the disciplinary action to be imposed, under the extraordinary circumstances presented by this matter, termination of employment for Complainant's one-time consumption of marijuana is too severe a penalty for a decision that Complainant acknowledges was a bad one, but was not so egregious as to warrant the severest penalty available to his appointing authority.

## CONCLUSIONS OF LAW

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

2. Respondent's action was arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed was not within the range of reasonable alternatives.

## ORDER

Respondent's action is **modified**. Respondent shall rescind Complainant's termination and replace it with a ten percent (10%) reduction in pay for six (6) months, from November 2, 2015 to May 2, 2016. Subject to this substitute disciplinary action, Complainant is entitled to full back pay and benefits, including but not limited to PERA contributions and service credit, from November 2, 2015, to the date of reinstatement, offset by any substitute earnings or unemployment compensation received by Complainant during this period of time.

Dated this 17th day
of June 2016,

at Denver, Colorado.

/Keith A. Shandalow

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

**CERTIFICATE OF MAILING**

This is to certify that on the 17th day of June 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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Andrea C. 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.