

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2016B087(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID SCHERBARTH,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, STERLING CORRECTIONAL FACILITY
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the evidentiary hearing in this matter on January 9, 10, 12 and 13, 2017, at the State Personnel Board (Board), 1525 Sherman Street, Courtroom 6, Denver, Colorado. The record was closed on January 18, 2017, after the ALJ ruled on Complainant's motions to strike portions of Respondent's rebuttal witnesses' testimony. Heather J. Smith, Assistant Attorney General, represented Respondent, the Colorado Department of Corrections (Respondent or DOC). Respondent's advisory witness, and Complainant's appointing authority, was Travis Trani, who is now the Colorado Deputy Director of Prisons. Complainant was represented by Bill Finger, Esq. and Casey Leier, Esq. of the law firm Finger, Newcomb & Thigpen, P.C.

MATTERS APPEALED

Complainant David Scherbarth (Complainant), formerly the Associate Warden at the Sterling Correctional Facility (SCF), appeals his disciplinary demotion to Major. Complainant argues that he did not commit the acts for which he was disciplined; that Respondent's decision to demote him was arbitrary, capricious and contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives. Complainant also appeals the interim performance evaluation he received after his demotion that rated him as needing improvement. Complainant requests rescission of his disciplinary demotion, reinstatement, back pay and benefits, rescission of his "Needs Improvement" interim performance evaluation, and attorney fees and costs.

Respondent argues that Complainant committed the acts for which he was disciplined; that Respondent's decision to demote Complainant was not arbitrary or capricious or contrary to rule or law; that the discipline imposed was within the range of reasonable alternatives; that the decision to demote Complainant should be upheld; and that Complainant is not entitled to any of the relief he has requested.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **rescinded**.

ISSUES

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

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and
4. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant began his employment with the DOC on or about April 1, 1989 as a Correctional Officer I and has been employed with the DOC since that time. (Stipulated fact.) He rose through the ranks and became an Associate Warden at DOC's Rifle Correctional Center on February 1, 2008. At all relevant times, he was a certified employee in the state personnel system.

2. Complainant held the position of Associate Warden from February 1, 2008 to June 14, 2016. (Stipulated fact.)

3. Respondent transferred Complainant from the Rifle Correctional Center (RCC) to SCF on or about Feb 1, 2012 in the capacity of Associate Warden. (Stipulated fact.)

4. SCF is the largest state prison in Colorado. It houses some of the most violent offenders in the state correctional system.

Complainant's Performance History

5. In each of his four annual performance evaluations covering the period from April 1, 2008 through March 31, 2012, each of which was prepared by Warden Steven Green of RCC, Complainant was rated at Level II overall (Satisfactory/Commendable), with Level II ratings in all core competencies with the exception of those core competencies for which he was rated at Level III (Outstanding): Accountability/Organizational Commitment (2008-2012); Communication (2008-2009 and 2010-2011); and Job Knowledge (2009-2012).

6. In his performance evaluation from April 1, 2012 through March 31, 2013, prepared by Warden James Falk of SCF, Complainant was rated at Level II overall, with Level II ratings in all core competencies.

7. In his performance evaluation from April 1, 2013 through March 31, 2014, prepared by Warden Falk of SCF, Complainant was rated at Level II overall, with Level II ratings in all core competencies with the exception of Performance Management, for which he was rated at Level I (Needs Improvement).

8. In his performance evaluation from April 1, 2014 through March 31, 2015, prepared by Warden Falk of SCF, Complainant was rated at Level II overall, with Level II ratings in all core competencies.

9. In his performance evaluation from April 1, 2015 through March 31, 2016, prepared by Warden John Chapdelaine of SCF, Complainant was rated level II overall, with level II

ratings in all core competencies, including Communication and Interpersonal Skills. (Stipulated fact.)

10. Complainant's only corrective or disciplinary action was given to him in July 2014 for failing to follow through on operational issues on his unit.

Conduct Towards Major Wilson on January 21, 2016

11. In October 2015, there were two associate wardens at SCF: Complainant and Michele Wingert.

12. In October 2015, Warden Chapdelaine demoted Michele Wingert from General Professional VII (Associate Warden) to Case Manager III (Captain), effective November 1, 2015, after determining that Wingert¹ had intentionally violated DOC administrative regulations.

13. On January 21, 2016, Chapdelaine was not present at SCF. Complainant was the highest ranking official in attendance at SCF that day and was in charge.

14. On or just prior to January 21, 2016, officials at SCF received a threat against SCF employee E.L.,² a threat that was deemed credible.

15. The threat was that members of a white supremacist prison gang, or offenders wanting to get into that gang, intended to kill E.L. SCF officials also received information that offenders were in possession of a weapon that was intended for the attempt on E.L.'s life.

16. After morning roll call on January 21, 2016, Complainant directed Major Charles "Wesley" Wilson, who had oversight over the prison unit housing the gang members, Living Unit # 4, to personally supervise interviews of gang offenders in Unit 4 and cell searches in that unit. The purpose of the interviews was to obtain any information about the purported death threat; the purpose of the cell searches was to find any contraband, such as a weapon that might be used to injure E.L. Complainant conveyed to Wilson that this was a top priority. Complainant expected that if Wilson had any questions about the assignment or if he needed additional resources to complete the assignment, he would contact Complainant. Complainant told Wilson that he wanted him to report on the progress of the interviews and cell searches right after the changeover meeting at 1:00 p.m. that afternoon, after which an Incident Action Plan would be devised.

17. At the time of the January 21, 2016 incident, Wilson had been a Major for just over a year. Complainant, as well as Chapdelaine, perceived Wilson as struggling in his role as Major.

18. Although Wilson was aware that the death threat created an emergency situation of the highest priority, Wilson delegated the interviews of gang members to a subordinate, Captain Scott. Wilson sat in on only a few interviews that morning, conducted no cell searches, and attended to several other, non-priority matters, including dealing with a kite request,³

¹ Because the ranks or position titles of some of the individuals discussed herein changed at times relevant to this matter, persons referenced in this Initial Decision will be referred to by their last names after their initial mention.

² To protect this SCF employee's privacy, this employee will be referred to by the initials E.L.

³ A "kite" in the correctional facility context refers to an offender request.

personally assigning cells to three offenders who needed to be separated, dealing with a missing plumbing augur, and having lunch. Despite the fact that there were only two or three subordinates available to conduct the interviews and cell searches, Wilson did not enlist Complainant's assistance in obtaining more resources and did not seek any clarification of Complainant's directives or expectations. Wilson did not obtain an update from Captain Scott about the status of interviews and cell searches prior to the changeover meeting at 1:00 p.m.

19. At the hearing, Wilson testified that Warden Chapdelaine authorized him to use his staff as he saw fit, despite what Complainant directed him to do. There is no documentation of that authorization, and Wilson never told Complainant that Warden Chapdelaine had accorded him that authority. Disobeying a direct order of a superior violates DOC regulations and could constitute insubordination.

20. Immediately after the changeover meeting, Complainant turned to Wilson and asked him about the progress being made relating to the E.L. death threat. Wilson stated that he did not know.

21. Complainant asked Wilson to accompany him out of the meeting. They went to the Warden's office. E.L. and Captain Jason Zwirn were outside the office. They could hear Complainant's raised voice, but could not make out the words he was saying. E.L. characterized Complainant's volume as yelling, Zwirn characterized it as a raised voice.

22. Wilson was not prepared with the information that Complainant had directed him to obtain prior to the changeover meeting. Complainant perceived that Wilson had failed to follow Complainant's directives.

23. Complainant told Wilson that his conduct was inept and incompetent. Complainant also told him that the chain of command was only as strong as its weakest link and Wilson was then the weakest link.

24. When Complainant asked Wilson a direct question, Wilson refused to answer him. Complainant suggested that refusing to answer constituted insubordination and that he could walk Wilson out the building for his insubordination.

25. Later that day, Wilson drafted a written grievance about his interaction with Complainant on that day, but he did not give that draft to anyone, nor did he tell anyone directly involved in Complainant's disciplinary action of its existence, until he was deposed during the discovery phase of this appeal. Wilson did not give a copy of that draft grievance to the investigator from the DOC's Office of Investigator General (OIG) who conducted a Professional Standards investigation of Complainant's conduct, and did not give a copy of it to Travis Trani, the appointing authority for this matter, during the Rule 6-10 process. Wilson did request a transfer shortly after his interaction with Complainant on January 21, 2016. Upon receiving the transfer request, Chapdelaine talked to Wilson, who characterized Complainant's conduct towards Wilson on January 21, 2016 as unprofessional.

26. Wilson did not file a complaint or grievance about Complainant. (Stipulated fact.)

27. Subsequently, Chapdelaine counseled Complainant about the manner in which Complainant spoke to subordinates. Although Complainant considered his communication style as straightforward and direct, Chapdelaine told Complainant that he needed to be aware that some subordinates considered his manner of speaking unprofessional. Complainant complied

with Chapdelaine's request. A month or two later, Chapdelaine followed up with Wilson, who admitted that there had been a significant improvement in his communications with Complainant.

28. Wilson transferred out of SCF in or about April 2016. The manner in which he was treated by Complainant was only one factor in his decision to transfer, likely not the primary reason, but merely the catalyst. Wilson never intended to stay at SCF and he had aging parents in mid-Colorado to whom he wanted to be closer.

Addressing Issues with Nycz-Halligan and Wingert

29. When Wingert was demoted from Associate Warden to Captain in October 2015, she took the demotion very hard. Because she was so emotionally upset by the demotion, she went out on leave for three weeks after being notified of her demotion.

30. Wingert appealed her demotion to the Board. Her appeal was still pending in February 2016. The appeal was subsequently settled and dismissed.

31. In the late Fall 2015, Chapdelaine received several complaints from employees in SCF's Education Department about the supervision provided by Program Manager Major Michelle Nycz-Halligan.⁴ Chapdelaine, or his delegatee, contacted the DOC's Office of Human Resources (OHR) and requested that it review staff concerns about the work environment in SCF's Education Department, and specifically Nycz-Halligan's performance as supervisor.

32. From December 14, 2015 through December 16, 2015, two OHR representatives met with and interviewed Nycz-Halligan and all 47 staff members reporting to her.

33. The subsequent OHR report, referred to as a Climate/Work Environment Survey (the climate survey), was highly critical of Nycz-Halligan's leadership and urged the appointing authority to utilize Chapter 6 of the State Personnel Board rules, which addresses employee performance, performance management, and corrective and disciplinary actions, to "reestablish an environment of cooperation, excellence and pride" in the Education Department.

34. With respect to Leadership and Supervision, the climate survey noted that, "The overwhelming consensus is that Program Manager, Major Michelle Nycz manages staff through fear and intimidation." The report concluded that Nycz-Halligan micromanaged the department, did not empower supervisors to make decisions, and insisted on making every day decisions resulting in inordinate delays related to performance management, resource requests and general inquiries.

35. With respect to Nycz-Halligan's treatment of staff, the climate survey concluded that she instills fear and promotes intimidation through a variety of methods, including volatile public reprimands, profane tirades, overt threats, unjustified harassment, and subtle warnings. The survey noted that staff are fearful of Nycz-Halligan, intimidated by her, and feel degraded by her management approach.

⁴ In documents, interviews, and even hearing testimony, Michelle Nycz-Halligan is referred to as both Michelle Nycz and Michelle Nycz-Halligan. For the sake of consistency, she will be referred to as Nycz-Halligan unless her name appears otherwise in a direct quote.

36. With respect to the work environment in SCF's Education Department, the climate survey characterized it as an atmosphere of distrust, stating that Nycz-Halligan consistently questions the motives and performance of staff, inappropriately asks staff personal information when they call in sick, sends subordinate staff Facebook "friend requests" and publicly demands to know why her requests are not accepted. The survey stated that staff "do not trust her and were suspicious of her sincerity when she wasn't behaving badly."

37. With respect to Safety and Security, the climate survey concluded that Nycz-Halligan "chastises employees with careless consideration of the setting and/or circumstances. Her flagrant disregard for the dignity of her staff has left them feeling undermined and stripped of any credibility with the offenders."

38. The Education Department's staff reported many other areas of concern about Nycz-Halligan, including, but not limited to, misusing or ignoring policies, providing negative evaluations for taking necessary leave to care for family members or schedule doctor's appointments, refusing or delaying expense reimbursements, creating barriers to employee use of the Federal Medical Leave Act (FMLA), and failure to respond to proposals for program improvement.

39. Based on the climate survey, Chapdelaine conducted a Board Rule 6-10 meeting and subsequently demoted Nycz-Halligan from a General Professional V (Major), to Correctional Officer IV (Captain), effective February 1, 2016. Nycz-Halligan was removed from her supervisory position in the Education Department.

40. On February 10, 2016, Nycz-Halligan filed an appeal with the Board, arguing that Respondent's disciplinary action was arbitrary, capricious, and too harsh, and constituted age and gender discrimination. The Board dismissed the appeal as a result of Nycz-Halligan's failure to meet certain procedural requirements.

41. On February 10, 2016, immediately after a training session at SCF, Wingert and Nycz-Halligan spoke to the class, which had ended early. The session had dealt with issues of integrity and trust, among others.

42. Wingert spoke first and, acknowledging the fact that she had been demoted, assured the attendees that she was committed to the DOC's core values of honesty and integrity and stated her intent to be promoted to Associate Warden at SCF again.

43. Nycz-Halligan then got up and expressed her disagreement with Respondent's disciplinary action against her. She spoke negatively about the DOC and criticized her subordinates for complaining about her. She blamed Chapdelaine and Complainant for her demotion.

44. One or more attendees complained about Wingert's and Nycz-Halligan's conduct during the training class on February 10, 2016. More specifically, one or more attendees felt it was inappropriate for them to talk about their demotions, and one or more attendees felt like they were being held captive after the training itself was over.

45. Chapdelaine had concerns about what was said by Wingert and Nycz-Halligan at the end of the February 10, 2016 training class. He felt it was disruptive and undermined DOC management. Furthermore, both individuals had been directed not to talk about their disciplinary demotions.

46. Sometime during the week of February 15, 2016, Complainant was tasked with finding out what Wingert and Nycz-Halligan said at the February 10, 2016 training, what their intent was, and to direct them to stop discussing their disciplinary actions and appeals.

47. During the week of February 15, 2016, accompanied by Major Ray Higgins, Complainant questioned Nycz-Halligan in Higgins' office. Nycz-Halligan explained that she addressed the training class about her personnel issues because it was the only opportunity to talk to them. During this meeting with Complainant and Higgins, Nycz-Halligan became agitated and animated, raised her voice, blamed Complainant and the Warden for her demotion, and announced that she had the backing of the teachers in SCF's Education Department. She appeared unable to accept the fact that her subordinates in the Education Department were critical of her leadership and that her mismanagement of the Education Department was the cause of her demotion. Nycz-Halligan did not appear to be open to believing that teachers had negative opinions about her. To redirect her and disabuse her of the notion that she had the support of her subordinates prior to her demotion, Complainant told Nycz-Halligan that teachers thank him nearly every day for Nycz-Halligan's removal as program manager for SCF's Education Department.

48. Nycz-Halligan also told Complainant and Higgins that she and Wingert discussed addressing the training class prior to going up and speaking to the class.

49. Nycz-Halligan did not file a complaint or grievance about Complainant's conduct during this meeting. (Stipulated fact.)

50. After the conversation with Nycz-Halligan, Complainant and Higgins debriefed Chapdelaine. Higgins told Chapdelaine that Complainant had handled the conversation with Nycz-Halligan well.

51. Subsequently, Complainant questioned Wingert in the presence of Higgins. At that time, Wingert's appeal of her demotion was still pending before the Board. Complainant's questioning, the allegation that she discussed her appeal in violation of directives not to, and the allegation that she kept attendees at the training against their will, upset her and caused her to fear for her job. Wingert became emotional and starting crying early in the meeting.

52. At first, Wingert denied any prior agreement with Nycz-Halligan that they would address the training class, which differed from what Nycz-Halligan had said. Several times, Complainant slightly revised the question about whether they had discussed addressing the class with each other prior to addressing the class. Finally, Wingert clarified her response to indicate that she discussed whether she should address the class with two other attendees and Nycz-Halligan, said that she was going to address the class, and then Nycz-Halligan said she would too. Then, both women went up before the class and spoke, first Wingert, then Nycz-Halligan. This clarified the discrepancy to Complainant's satisfaction.

53. Wingert did not file a complaint or grievance about Complainant's conduct regarding this meeting. (Stipulated fact.) At hearing, Wingert testified that Complainant's questioning did not rise to the level that it needed to be reported.

54. During the debrief with Chapdelaine, Higgins did not indicate that he felt Complainant handled the conversation with Wingert inappropriately.

Complainant Counsels Nycz-Halligan on February 26, 2016

55. On or about February 26, 2016, Nycz-Halligan went to Carolyn Klimper, a Teacher II at SCF, ostensibly to apologize for her past behavior. She closed the door, making Klimper feel like she unable to leave and very uncomfortable. She became upset and angry, and started to cry, stating that the climate survey was a witch hunt to get her. She felt betrayed by Klimper because she believed it was Klimper who told the OHR investigators about not wanted to be her friend on Facebook. Other comments she made indicated to Klimper that she did not accept any responsibility for what had happened to her. In an incident report she submitted on February 29, 2016, Klimper wrote that, "When I left her office, I felt so intimidated that all I wanted to do was walk out the front door and leave the facility. As time has progressed, I'm angry that Michelle Nycz continues to cause conflict in a department that we are trying to help heal and grow. I'm hurt that she continues to talk to others and make them uncomfortable in the place where they work."

56. Later that day, Klimper spoke with Complainant and Major Curtis Deal and told them what had happened. She also told them that other employees in the Education Department had similar interactions with Nycz-Halligan after her demotion. Complainant told her that she and the other Education Department employees should let DOC leadership know about the incident, and so she filed an incident report on February 29, 2016.

57. Complainant was tasked with speaking with Nycz-Halligan and directing her to stop talking about her demotion and her relationships with her subordinates.

58. On February 26, 2016, Complainant and Deal went to Nycz-Halligan's office to talk with her. Complainant was very direct with her and told her to cease and desist from commenting on her demotion and confronting her subordinates.

59. Nothing that Complainant said or did in this meeting was inappropriate.

60. Complainant did not yell at Nycz-Halligan, but his voice was elevated and he did not allow himself to be talked over.

61. On February 29, 2016, Klimper submitted an incident report describing her interaction with Nycz-Halligan on February 26, 2016. On that day and the next, three other Education Department employees submitted incident reports describing interactions with Nycz-Halligan similar to the one described by Klimper.

Nycz-Halligan's Grievance Meeting with Deputy Director Frances Falk

62. After her demotion and reassignment, Nycz-Halligan grieved the fact that she was not given the days off she requested and not given the opportunity to bid on her days off.

63. On March 16, 2016, Nycz-Halligan met with Deputy Director of Prisons Frances Falk as part of her Step II grievance. Falk brought up the issue of Complainant's treatment of Nycz-Halligan and encouraged her to file a grievance to make Complainant stop.

64. Nycz-Halligan made several allegations to Falk critical of Complainant, most notably:

a. During her first meeting with Complainant and Higgins after the February 10, 2016 training session, Complainant yelled at her, "Who do you think you are disagreeing with the mission of our facility and disagreeing with the warden's decision and disagreeing with this and stating your opinion and holding the class over?"

b. During that same meeting with Complainant and Higgins, Complainant responded to Nycz-Halligan's assertion that her demotion was too harsh a disciplinary action, by saying that it was not too harsh, which she interpreted as meaning that it was not harsh enough. He also told her that teachers thank him every day for demoting her and that they were probably going to have another Rule 6-10 meeting or something.

c. Complainant told Wingert that he was going to call the investigators and have them investigate Wingert and Nycz-Halligan for talking to the training class.

d. On February 26, 2016, Complainant and Deal came to her office, closed the door, and Complainant started yelling at her about questioning people, despite the fact that she only went to somebody to apologize. He screamed at her and yelled at her, "I'm giving you a directive to not talk to anybody anymore. You can't talk to anybody."

The Office of Investigator General Investigates Complainant

65. On March 28, 2016, Falk sent a memo to Danny Lake, Chief of Investigations with OIG, formally requesting a professional standards investigation regarding Complainant's potential violations of DOC Administrative Regulation (AR) 1450-01, Code of Conduct. Falk indicated that she had obtained information that Complainant yells, belittles, demeans and bullies staff.

66. Investigator Adam Cummings of OIG was given the assignment of conducting the investigation into Complainant's conduct and possible violation of AR 1450-01.

67. On April 6 and April 7, 2016, Cummings traveled to Sterling, Colorado and interviewed 9 individuals, in the following order: Wilson, Major Revord, Higgins, Major Beard, Deal, Major Keisel, Lt. Nygaard, Complainant, and Chapdelaine.⁵

68. In each interview, Cummings began by stating words to the effect that OIG received information indicating that Complainant acts as a workplace bully, that he yells at, belittles and demeans staff, is aggressive in his supervisory style, and is quick-tempered. He then asked each interviewee if they had witnessed such behavior.

69. On April 6, 2016, Cummings interviewed Wilson, who alleged that Complainant bullied people and used his position to bully. Wilson reported that Complainant pulled him out of a meeting in front of everyone, took him into the Warden's office, and yelled at him, calling him "inept" and "incompetent." When Wilson refused to answer a question Complainant posed, Complainant told him "You're going to answer me right now or you can leave right now and I'll walk you out of here," or words to that effect. After that incident, Wilson intended to file a grievance but decided against it. He did talk about the incident with Chapdelaine and since then his relationship with Complainant had improved.

⁵ Cummings also interviewed Denny Owens, Erin Owens and Gary Little, but their statements to Investigator Cummings were deemed irrelevant to Respondent's decision to discipline Complainant, and neither party sought to introduce the recordings and transcripts of these interviews into evidence.

70. In his interview with Wilson, Cummings did not explore the events that led to Complainant telling Wilson that he, or his performance, was inept and incompetent. At hearing, Cummings testified that the only thing that was important to him was that Complainant had made the comment, not what led up to it, not its context. However, without knowing the context, the propriety or impropriety of Complainant's comments to Wilson could not be adequately assessed. Because he chose not to explore the context of Complainant's remarks to Wilson, Cummings never asked Wilson if he had notes or documentation concerning the January 21, 2016 incident, which Wilson failed to volunteer.

71. Cummings' next interview was with Major Jeff Revord, who stated that he had not observed Complainant conducting himself as a workplace bully; he had not observed Complainant lose his temper or yell, belittle or demean staff members. In response to Cummings' assertion that everyone else he spoke with told him that Complainant gets angry and yells at staff, Revord said that Complainant could be very adamant but had never yelled at him.

72. Cummings then interviewed Higgins, who stated that Complainant's style is sarcastic and aggressive, but he could not recall a situation where he thought that Complainant went overboard or was unprofessional to the point of not being appropriate. He denied hearing Complainant tell Nycz-Halligan that her punishment was not harsh enough. He denied ever witnessing Complainant threaten staff with an IG investigation or a Rule 6-10 meeting. He did, however, indicate that he was uncomfortable with the way he questioned Wingert.

73. Cummings' last interview on April 6, 2016 was with Major Sean Beard, who denied witnessing Complainant yelling, belittling or demeaning staff, and denied that he ever saw Complainant threaten staff with an IG investigation or a Rule 6-10 meeting. Beard did indicate, however, that Complainant was "kind of" aggressive, and that he appeared hard on Wilson.

74. Cummings' first interview on April 7, 2016, was with Major Deal, who had accompanied Complainant to talk with Nycz-Halligan on February 26, 2016. Deal stated that Complainant was very firm, direct and straightforward in telling Nycz-Halligan that she was to cease and desist talking to Education Department staff about her demotion, the climate survey, and related issues. Deal stated that Nycz-Halligan protested that she was only talking to staff to apologize, to which Complainant replied that was not the information he received and she was to stop that conduct. Deal characterized Complainant's tone as elevated, but without harsh words or swearing. Deal believed that Complainant was entirely appropriate during this interaction. He also indicated that the door to Nycz-Halligan's office remained open, in contrast to Nycz-Halligan's assertion to Falk that Complainant and Deal came into her office that day and closed the door.

75. The next interview Cummings conducted on April 7, 2016 was with Major Robert Keisel, who stated that Complainant can be very firm, but he did not see Complainant as a bully, or acting like a bully, nor did he think Complainant was abrasive. He denied that Complainant yelled at staff, or that he cursed at staff, or threatened staff with an IG investigation or a Rule 6-10 meeting. When asked if Complainant was quick-tempered, Keisel responded that Complainant could sometimes get a little excited, but he had never seen him lose his composure. When asked if Complainant was a difficult person to work for, Keisel replied that he did not think so.

76. Cummings then interviewed Lt. Shawna Nygaard, who stated that Complainant could be demeaning, and did yell at staff, but she did not think Complainant acted inappropriately; it just was sometimes too much, excessive. She appeared to link this conduct to her perception that SCF was sometimes extremely understaffed.

77. Cummings' penultimate interview was with Complainant. In response to the allegations Cummings indicated he was investigating, Complainant responded that he was a direct communicator but he did not intentionally belittle anyone; that he used the word "inept" to describe behavior and performance; that he did not curse at staff; did not name call; did not threaten subordinates with an IG investigation or a Rule 6-10 meeting; denied being harder on Wilson but admitted that he had to correct Wilson much more than the other Majors; that he did ask Wilson if Wilson wanted him to walk Wilson out of SCF for insubordination for refusing to answer Complainant's direct question; volunteered that he had a book from the 1950s in his office entitled "My Daddy Lost His Job," which everyone knew to be a joke; denied telling Nycz-Halligan that her demotion was not harsh enough but did admit that he told her that teachers thank him on almost daily for removing her from her supervisory role because Nycz-Halligan refused to acknowledge the reality of her lack of support in the Education Department, which resulted in her demotion;

78. Cummings asked Complainant if he raised his voice or yelled, to which Complainant replied, "Sure I do." Later in the interview, Complainant denied yelling at staff.

79. Cummings cautioned Complainant about talking to others about the investigation, as follows: "Now because of your position, because the warden is potentially a subject, I can't have you talk about this with anybody.... So after today, after you leave here, I can't have you ask your major here that was in here that I already interviewed what he said, what I asked him.... Don't put him in that position, please.... Same thing with the warden. Don't put him in that position."

80. Cummings' final interview was with Chapdelaine, who opined that Complainant could be very firm and his voice can raise at times to the point that people would perceive it would be yelling; he could get kind of intense at times. When Complainant addresses performance issues with staff, they sometimes feel that Complainant is very demanding and belittling. Chapdelaine referenced the issue with Wilson, who complained to Chapdelaine that he sometimes felt belittled by Complainant. Chapdelaine told Cummings that he counseled Complainant about the issue and told Complainant that he needed to change the way in which he communicated with subordinates. Chapdelaine added that he followed up with Wilson that very day and Wilson told him that Wilson's communications with Complainant were significantly better. With respect to Complainant's communications with Nycz-Halligan, Chapdelaine provided Cummings with background information about Nycz-Halligan to put Complainant's comments in context; Chapdelaine also indicated that he received no complaints alleging that Complainant's comments to Nycz-Halligan were problematic.

81. Cummings did not interview Wingert and Nycz-Halligan relating to the investigation of Complainant. (Stipulated fact.)

82. Cummings did not read "My Daddy Lost His Job," and did not ask anyone else to read the book. No evidence was presented at hearing that established the names of anyone to whom Complainant gave the book.

83. After the last interview on April 7, 2016, Cummings spoke with Travis Trani, who was then the Deputy Director of DOC's Prison Operations, by phone and gave him a summary of his investigation. Trani had been delegated Complainant's Appointing Authority, in writing, by Director of Prisons Steve Hager in lieu of Warden Chapdelaine because Chapdelaine was a possible subject of Cummings' investigation.

84. After speaking with Cummings, Trani decided to remove Complainant from SCF. He communicated with Chapdelaine and directed him to place Complainant on administrative leave the next day, a Friday, and have him report to the Sterling Parole Office the following Monday, April 11, 2016.

85. On April 8, 2016, Complainant was notified by letter signed by Trani that he was placed on administrative leave on April 8, 2016 and was reassigned effective April 11, 2016 to the Sterling Parole Office.

86. From April 11, 2016 to June 14, 2016, Complainant was assigned to the Parole Office at SCF under Alison Morgan, Deputy Director of Adult Parole. (Stipulated fact.)

Meeting the Mayhughs at Walmart

87. On Friday, April 8, 2016, SCF staff were told that Complainant was on special assignment and would not be at the facility for a period of time.

88. On Saturday, April 9, 2016, Complainant ran into Connie and Josh Mayhugh at the Sterling Walmart while shopping with his family.

89. Connie Mayhugh is an Administrative Assistant III at SCF.

90. The Mayhughs' son and the Scherbarths' son were friends who played on the same sports teams.

91. Josh Mayhugh and Complainant are friends.

92. Complainant told the Mayhughs that he was on administrative leave and was going to work at the Sterling Parole Office starting on Monday, April 11, 2016.

93. Complainant said he hurt some people's feelings. He mentioned Captain Gary Little. Either he or Connie Mayhugh mentioned Nycz-Halligan.

94. Complainant did not mention anything about an investigation.

95. On April 12, 2016, Chapdelaine informed Cummings that he had received information from an SCF employee who was related to the Mayhughs that Complainant discussed the investigation with Connie and Josh Mayhugh at Walmart over the weekend.

96. Cummings spoke with the Mayhughs by phone and requested that they send him emails describing their conversation with Complainant.

97. Connie Mayhugh sent the following email to Cummings on April 13, 2016:

Dave Scherbarth made statement to me in Walmart Super Center that he was working out of the Parole Office temporarily, due to making statements to Major Nycz and Captain Little.

I do not recall any specific statements other than he was to report to the Parole office Monday so wouldn't be at the facility for awhile. I did not have any understanding of what was going on other than he stated he may have hurt Nycz and Little's feelings. I am assuming by you contacting me that this is an investigation of some sort? Not that he is out on special assignment like it was stated to staff here?

98. Josh Mayhugh sent the following email to Cummings on April 13, 2016:

I ran into Dave Scherbarth on 4/9/16 at Walmart in Sterling, CO. I have known Dave for several years on a personal level and consider him a friend. Dave told me he would be working out of the Parole Office in Sterling, CO for awhile. I found this odd and inquired what was going on at DOC. He said that he was put on AL [administrative leave] due to some grievances by staff. I thought Dave seemed disappointed by this and I so we talked about letting it run its course and I assured him that it would all work out. I offered to let Dave come over to the Community Corrections facility that I am the Deputy Director of since we deal with the local Parole office often and it seemed reasonable for him to see what Community Corrections is all about. During parts of the brief conversation my wife Connie may have heard some of the context of the conversation although I can not say that Dave was directing any information towards her. It was told to me by Mr. Cummings that Dave was given a directive not to speak to any State of Colorado employees about the pending investigation and if I would have known that were the case I would have never put Dave in a situation that we would be discussing work situations with me and I am sure Dave would have done the same if he considered me a State of Colorado employee. He has always seemed like a reasonable person and I wish you all the best of luck sorting this out. Please call me at my below extensions if you would like anymore clarifying information regarding this situation. Thank you for your time

Investigator Cummings' IG Report

99. Approximately a week after he received the Mayhugh's emails, Cummings finished his report (IG report).

100. The IG report included a summary, which states, in pertinent part:

Based on the witnesses' statements, this investigation revealed a minor variation in the witnesses' perceptions. Most of the witnesses describe Scherbarth's supervision demeanor as assertive, but their descriptions are slightly different. Scherbarth's demeanor was described as being aggressive, sarcastic, firm, and straight to the point. In addition, his tone was described as elevated by some and yelling by others. Most of the witnesses agreed that they have not heard Scherbarth curse at subordinates, but some of them have occasionally heard him use foul language.

When Scherbarth was interviewed, he was confronted with the allegations. Scherbarth admitted to yelling, using foul language, and name calling. Scherbarth stated he uses curse words, but denied ever cursing at a subordinate as a demeaning form of communication. Scherbarth also admitted to name calling, but explained he has used name calling in a joking manner. Scherbarth denied belittling his subordinates stating, "I don't intentionally belittle anybody." However, Scherbarth admits some people may perceive his communication as belittling, describing his personality as a direct communicator.

When Scherbarth was asked if he ever called someone "inept" or "incompetent" he admitted to using the word "inept" to describe someone's character, but denied ever calling someone by the name "inept." In addition, Scherbarth admitted to calling a subordinate "the weakest link." Finally, Scherbarth denied having any intent to bully anyone or use his position of authority to retaliate or pick on anyone.

There was not enough information to confirm the allegation that Scherbarth has used the Office of the Inspector General as a threat to his subordinates. In addition, the investigation did not reveal any information to support the allegation that Scherbarth has used the term, "R-6.10" to threaten staff. There was information revealed, however, that Scherbarth has threatened subordinates' with losing their job. Scherbarth admitted to Wilson's assertion that he threatened to walk Wilson out of the facility. In addition, Scherbarth offered additional information, stating he owns a book titled, "My Daddy Lost his Job." Scherbarth stated he will oftentimes hand the book to subordinates and tell them to go home and give it to their child. Scherbarth stated he has done this for quite some time, and explained that he does it as a joke. When Chapdelaine was asked if he knew about this joke, he stated he was aware of the book, but did not know Scherbarth was handing it to subordinates. Chapdelaine retrieved the book from Scherbarth's office and provided it to SCF Investigator, Scott Annable.

In addition, Chapdelaine stated he was aware of Scherbarth's subordinate's concerns about his method of supervision, stating he has been working with Scherbarth to correct his issue by counseling him. Scherbarth stated he has seen positive change in Scherbarth after counseling him in the past.

Associate [sic] Warden Scherbarth's Directive Violation:

When Scherbarth was interviewed, he was given a specific directive to refrain from discussing this investigation with anybody. Scherbarth acknowledged the importance of not discussing this investigation and stated he would not talk about it with anyone. On April 12, 2016, Chapdelaine provided information stating he received information that Scherbarth discussed this investigation with Josh and Connie Mayhugh. Chapdelaine stated he received this information from Barbara Mayhugh after Connie and Josh Mayhugh informed her that Scherbarth discussed this investigation with them inside Wal-Mart.

When Barbara Mayhugh was contacted, via cellular phone (not recorded), she stated Connie and Josh told her that Scherbarth talked about this investigation with them. Barbara Mayhugh said Scherbarth told them he was re-assigned to the Sterling Parole Office. Barbara also stated Connie and Josh told her that Scherbarth

said he was under investigation because he hurt Little's and Nycz' feelings. When Connie Mayhugh was contacted, via cellular phone (not recorded), she provided the same details that Barbara relayed. In addition, Connie Mayhugh stated her conversation with Scherbarth occurred on April 9, 2016, between 6:00 p.m. and 6:30 p.m. When Josh Mayhugh was contacted, he relayed the same information, but stated he could not recall any names, since the names would not mean anything to him. Barbara, Connie, and Josh Mayhugh also provided email statements about this incident (attached as exhibits 010, 011, and 012).

On April 12, 2016 Scherbarth was contacted, via cellular phone (not recorded) Scherbarth was asked if he discussed this investigation with anyone. Scherbarth stated Community Parole Officer Leslie Keisel asked him why he was re-assigned to the parole office. Scherbarth explained he told her he was the subject of a pending investigation and also told her he was not allowed to talk about it. Scherbarth was asked, again, if he spoke with anyone else about this investigation, at which point he said, "no."

Based on the statements provided by Josh, Barbara, and Connie Mayhugh, the investigation revealed Scherbarth violated the directive given to him in his interview. In addition, when Scherbarth was asked if he discussed this investigation with anyone, he stated "No." Since Scherbarth decided to depart from the truth, in this investigation, Scherbarth's statements and integrity may be questionable in this investigation or future criminal or administrative hearings.

Notice of and Preparation for the Rule 6-10 Meeting

101. Shortly after Cummings finalized the IG report and delivered it to his superiors within the OIG, Trani received a copy.

102. After reviewing the IG report and listening to those interviews that were recorded, Trani decided to schedule a Board Rule 6-10 meeting.

103. Board Rule 6-10 provides, in pertinent part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

104. On April 29, 2016, Trani sent Complainant a notice of a Rule 6-10 meeting, stating in part that "Information has been brought to my attention that indicates the possible need to administer disciplinary and/or corrective action." Trani also wrote that "At this meeting, we will discuss the information that causes me to believe that disciplinary and/or corrective may be appropriate. The information includes, but is not limited to the following: Possible violations of Administrative Regulation 1250-01 *Code of Conduct*."

105. Trani prepared for the Rule 6-10 meeting by reviewing the IG report, listening to the recordings of those interviews Cummings recorded and reviewing the Mayhughs' emails. Although Trani testified that he read the entire IG report and its attachments, he admitted on cross-examination that he had not read the Education Department climate survey highly critical of Nycz-Halligan, which was attached to the IG report.

The May 20, 2016 Rule 6-10 Meeting and Its Aftermath

106. A Rule 6-10 meeting with Travis Trani as the appointing authority, Jason Lengrich as his representative, and Complainant occurred on May 20, 2016. (Stipulated fact.)

107. The information Trani conveyed during the Rule 6-10 meeting, and Complainant's responses, were as follows:

a. Higgins alleged that he was present at a conversation with Wingert concerning comments she made at a training session. Higgins reported that Complainant asked Wingert the same question approximately a dozen times until she began to cry. He did not feel that the questioning was appropriate and he was uncomfortable with how Complainant handled the meeting. In response, Complainant expressed surprise because he was unaware that anyone had raised an issue about his handling of the meeting with Wingert, and denied belittling her.

b. Wilson believes Complainant uses his position to bully people. Wilson reported that Complainant pulled him out of a meeting into the Warden's office, where Complainant yelled at him and belittled him by calling him incompetent and inept. He also reported that Complainant threatened to walk him out of SCF if he did not answer a question posed by Complainant. Wilson indicated that he intended to file a grievance but decided not to. In response, Complainant denied belittling Wilson, and stated that he was referring to Wilson's performance when calling him "inept" and "incompetent." Trani did not explore the context of Complainant's comments to Wilson.

c. Complainant told Nycz-Halligan that teachers thank him every day for demoting her. In response, Complainant admitted that he said words to that effect, but only in an attempt to redirect Nycz-Halligan during a meeting about her demotion.

d. Complainant admitted raising his voice and yelling at staff. In response, Complainant denied yelling at staff, while admitting that he has an elevated voice.

e. Complainant admitted referring to Wilson as the weakest link. In response, Complainant indicated he was referring to Wilson's job performance.

f. Complainant stated that he owned a book entitled, "My Daddy Lost His Job," and he often gives the book to subordinates and tells them to go home and give it to their child. Complainant stated that he has done this for quite some time and explained it is meant as a joke. In response, Complainant stated that the book is intended as a joke and is taken that way by everyone who knows about it.

g. Complainant discussed the investigation with the Mayhughs but denied it when contacted by Cummings on April 12, 2016. While talking to the Mayhughs about the investigation, Complainant remarked that he hurt someone's feelings. In response, Complainant stated that he told the Mayhughs that he would be working out of the Sterling Parole Office and that he hurt some feelings, but did not mention or reference an investigation.

108. Complainant was given the opportunity of providing additional information after the Rule 6-10 meeting. He took advantage of that opportunity by sending Deputy Director Trani an email on the evening of May 20, 2016, which read, in pertinent part, "Didn't give much thought to 'My daddy lost his job' when the investigator asked me about it because I knew it was all in fun. Someone has evidently intentionally misrepresented it."

109. After the Rule 6-10 meeting and before he made his disciplinary decision, Trani spoke with 11 individuals, listened to the audio recording of the May 20, 2016 Rule 6-10 meeting, listened to the audio recordings of Cummings' interviews with Complainant, Higgins and Wilson, reviewed the IG report summary, reviewed the emails from the Mayhughs, reviewed Complainant's personnel file, and reviewed his notes from the Rule 6-10 meeting and his conversations with others. He did not speak with Nycz-Halligan.

110. Trani spoke with Marc Bolt, Matt Barnes, Jeff Long, and Chapdelaine about the book, "My Daddy Lost His Job." Long told Trani that he had no knowledge of the book. Marc Bolt told Trani that he considered the book a joke. Barnes heard about the book but had not seen it. Long denied any knowledge of the book. Chapdelaine viewed the book as a joke.

111. Trani spoke with Michael Tidwell, who reported that Complainant told him that Complainant was under investigation and could not talk about it.

112. Trani also spoke with Wingert about her meeting with Complainant and Higgins, and about "My Daddy Lost His Job." Wingert told Trani that Complainant was very accusatory during the meeting in front of Higgins, which was embarrassing to her because she was formerly Captain Higgins' superior prior to her demotion. She accused Complainant of asking her the same question over and over again and felt that the tone and feeling in the room made her feel belittled and demeaned. She felt like it was worse than an interrogation. She also told Trani that Complainant threatened her with an investigation. However, at hearing, Wingert denied that she told Trani that Complainant threatened her with an investigation. As indicated above, it was Wingert who requested an investigation during the meeting with Complainant. Trani also asked Wingert about the book and she indicated that Complainant jokes about it.

113. Trani spoke with Higgins about Complainant's questioning of Wingert. Higgins confirmed that what Wingert said about the meeting was accurate. Trani's notes of this conversation do not indicate that Trani asked any additional questions or attempted to obtain any further details about that meeting.

114. Trani spoke with Wilson about his interactions with Complainant. Wilson told him about Complainant's meeting with him on January 21, 2016 in the Warden's office. He told him that Complainant was yelling at him, was belittling and degrading. Wilson asked to stop the meeting and wait for the Warden, but Complainant did not stop the meeting. Wilson did not tell Trani the context for the meeting, nor about the draft grievance Wilson wrote that day. Wilson did not tell Trani that he believed that Chapdelaine had given him authority to use his staff as he saw fit. With respect to the book, Wilson told Trani that Complainant showed him the book and told him that he gave it to people when he counseled them.

115. Trani spoke with Deputy Director Hager about Complainant but took no notes and did not testify concerning this conversation.

116. Trani spoke with E.L. and Jason Zwirn about Complainant's meeting with Wilson in the Warden's office. Zwirn told Trani that he was present outside the Warden's office when Complainant met with Wilson. He indicated that Complainant's voice was elevated but he could not make out what was being said. E.L. said that Complainant did a lot of yelling but could not make out what he was saying. Trani did not ask either Zwirn or E.L. if Wilson was yelling.

117. Trani did not afford Complainant the opportunity to respond to the information he obtained after the Rule 6-10 meeting but before he made his disciplinary decision.

118. Trani's review of Complainant's personnel file revealed a corrective action given to Complainant in July 2014 for failing to follow through on operational issues on his unit, and a performance document from June 2013 along the same lines. Trani did not consider these matters relevant to the issues he was dealing with in this matter and these issues had already been addressed.

June 14, 2016 Notice of Disciplinary Action

119. Complainant received a Notice of Corrective and Disciplinary action on June 14, 2016. (Stipulated fact.)

120. In the notice of Corrective and Disciplinary action, Trani summarized the matters discussed at the May 20, 2016 Rule 6-10 meeting.

On March 15, 2016, during a Step 2 Grievance meeting with Sterling Correctional Facility (SCF) employee Michelle Nycz-Halligan, she complained to Deputy Director Frances Falk that you, Associate Warden Dave Scherbarth, had subjected subordinate staff members to inappropriate behavior such as "yelling", "belittling", "profanity" and "bullying". The allegations were referred to the Inspector General's Office and a Professional Standards investigation was conducted by Investigator Adam Cummings. Information from the investigation revealed that you belittled Captain Michele Wingert during a meeting in the presence of Major Raymond Higgins, and you belittled and made derogatory statements to Major Wesley Wilson on multiple occasions. The statements made to Wilson were that he was the weakest link and he was inept and incompetent.

The investigation also revealed that in the presence of Major Raymond Higgins you made an inappropriate comment to Captain Michelle Nycz-Halligan that teachers thank you every day for demoting her. You admitted to raising your voice and yelling at staff. You disclosed that you have a book in your office titled, "My Daddy Lost his Job". You give the book to subordinates when they make mistakes and tell them to go home and give it to their child to read as a joke. You were asked in a public setting by Josh and Connie Mayhugh (Connie is an Administrative Assistant III at SCF) about the investigation against you and you responded by stating the investigation occurred because you hurt Little's and Nycz's feelings.

At the meeting, you stated in summary: You have an elevated voice, but you do not yell at staff. You stated you do not intend to belittle anyone. You indicated the book titled "My Daddy Lost his Job" is intended to be a joke and you have owned the book for a long period of time. You admitted to telling Nycz-Halligan that teachers "thank you ever day for demoting her" in an attempt to redirect her during a meeting relating to her demotion. You stated the statements to Wilson about being inept, incompetent and weakest link were to describe his performance. You acknowledged that you made a comment about hurting someone's feeling to Josh and Connie Mayhugh when they asked about the investigation. You denied ever belittling Wingert or Wilson. You indicated that I should talk to the following staff relating to the allegations: Mark Bolt, Matt Barnes, Jeff Long, Michelle Wingert, John Chapdelaine, Ray Higgins, and Wesley Wilson. At the conclusion of the meeting, I told you I would allow you until close of business on May 27, 2016, to provide me any additional information that you

wanted me to consider. On May 20, 2016, you emailed me and asked for me to speak to John Chapdelaine about the intent of the book.

121. Trani arrived at the following conclusions, based on all the information he received "including your statements at the meeting, a review of your previous performance, to include conversations with Mark Bolt, Matt Barnes, Jeff Long, Michelle Wingert, John Chapdelaine, Ray Higgins, Wesley Wilson, Jason Zwirn, E.L., Michael Tidwell, and Steve Hager, and the information in Board Rule 6-9":

You belittled and demeaned Michele Wingert in the presence of Ray Higgins to the point that she mentally broke down. You yelled and made demeaning and belittling statements to Wesley Wilson. You made unprofessional comments to Michelle Nycz-Halligan and Connie and Josh Mayhugh. You inappropriately joked with subordinate staff that made mistakes by providing them with a book titled *My Daddy Lost his Job* and telling them to take the book home and have their children read it. Your statement that you do not yell during the Rule 6-10 meeting was contrary to what you told investigator Adam Cummings during your interview and contrary to witness statements.

As an Associate Warden at SCF, you are the second highest ranking person in the largest correctional facility in the State of Colorado. In your position, you belittled, demeaned, yelled and made unprofessional statements/jokes to your subordinate staff. Your unprofessional behavior as a superior/leader has created an intimidating and hostile work environment. You have a professional and ethical responsibility to demonstrate integrity, leadership, and professionalism at the highest standard as employees and offenders are directly influenced and impacted by your decisions and actions. Your actions not only discredit you as a correctional professional, but also bring discredit to the Department of Corrections. Your unprofessional conduct has impacted your ability to perform effectively in the role of an Associate Warden.

122. Trani determined that Complainant violated several provisions of the DOC Code of Conduct, AR 1450-01 as follows:

IV. J. Professional relationships will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies.

IV. N. Any 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.

IV. T. DOC employees, contract workers, and volunteers will not engage in acts of corruption, bribery, indecent, or disorderly conduct, nor will they condone such acts by other DOC employees, contract workers, and volunteers.

IV. X. DOC employees, contract workers, and volunteers shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation.

IV. HH. DOC employees, contract workers, and volunteers shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures, and administrative instructions. DOC employees, contract workers, and volunteers shall not aid, abet, or incite another in the violation of administrative regulations, procedures, operational memorandums, rules, duties, orders, or procedures of the DOC. Failure to obey any lawfully issued order by a supervisor, or any disrespectful, mutinous, insolent, or abusive language or actions toward a supervisor is deemed to be insubordination.

IV. II. Verbal or physical altercations between DOC employees, contract workers, and volunteers in the workplace are unacceptable practices. While on or off duty, DOC employees, contract workers, and volunteers are required to maintain a considerate, cooperative, and cordial relationship toward each other. Any DOC employee, contract worker, or volunteer who becomes aware of threats against non-offenders, or allegations of threats against non-offenders, shall report such to the Office of the Inspector General for possible investigation.

IV. OO. Workplace harassment in any form will not be tolerated.

IV. ZZ. Any 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.

123. Trani also determined that Complainant violated the Code of Ethics, an attachment to AR 1450-01, which provides, in pertinent part, as follows:

All employees, contract workers, and volunteers of the Colorado Department of Corrections:

- A. Shall serve the public with respect, concern, courtesy, and responsiveness;
- B. Shall demonstrate the highest standards of personal integrity, truthfulness, and honesty and shall, through personal conduct, inspire public confidence and trust in government;
- C. Shall not use public office to bestow any preferential benefit on anyone related to the officer, appointee, or employee by family, business, or social relationship;
- D. Shall not disclose or use or allow others to use confidential information acquired by virtue of state employment for private gain;
- E. Shall not accept any compensation, gift, payment of expenses, or any other thing of value which would influence him or her to depart from the faithful and impartial discharge of his or her duties;
- F. Shall not accept any compensation, gift, payment of expenses, or any other thing of value as a reward for official action taken;

G. Shall not engage in outside employment unless: (1) the outside employment is disclosed to the Governor or, in the case of an employee, the employee's immediate supervisor; and (2) the outside employment does not interfere with the performance of state duties;

H. Shall not use state time, property, equipment or supplies for private gain;

I. 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;

J. Shall carry out all duties as a public servant by exposing corruption or impropriety in government whenever discovered;

K. Shall support equal access and employment opportunities in state government for all of the State of Colorado;

L. Shall comply at all times with the standards of conduct set forth in title 24, article 18 of the Colorado Revised Statutes and Article XXIX of the Colorado Constitution.

124. Trani also determined that Complainant's conduct violated several Individual Performance Objectives included in Complainant's Performance Plan for the 2015-2016 period relating primarily to interpersonal relations and communications with subordinates.

125. Trani's decision was to demote Complainant from Associate Warden to Major, with a 10% reduction in his base salary, effective June 14, 2016. In addition to the disciplinary demotion, Trani gave Complainant a Corrective Action, which required Complainant to read and adhere to AR 1450-01, communicate and interact with coworkers in a professional manner and refrain from yelling and belittling coworkers, and attend a training on Communicating with Tact, Diplomacy and Professionalism. Complainant did not appeal this Corrective Action.

126. The disciplinary letter also included appropriate notice of Complainant's appeal rights.

127. Trani arrived at his decision to demote Complainant after considering the totality of all incidents, and the impact of Complainant's behavior on the facility, on the staff, and the fact that in the Rule 6-10 meeting, Complainant did not accept responsibility for any of his actions, did not see anything wrong with what he had done. Based on Complainant's impact as the second highest level person in facility, creating a negative culture and environment, not promoting positive relations and not seeing anything wrong with how he had treated staff or what he had done, Trani did not feel that Complainant could perform at the level of Associate Warden with the scope of impact he has on subordinate staff or offenders or the overall mission of the department.

128. Trani believes that it is incumbent on leaders to create a positive work culture, to create positive staff morale, to ensure staff buy-in to the DOC's mission to change offender behavior so offenders can return to society and not pose a security threat to their communities. In Trani's opinion, having a leader who is not creating positive work culture, who is not creating positive relations, who is not creating buy-in, and who is not building morale, negatively impacts that leader's ability to perform in that role.

129. Trani felt that he had an obligation to the SCF staff, the SCF offenders, and to the general community to make that the decision to demote Complainant, who he did not feel could perform at the level of Associate Warden. Furthermore, Sterling is a rural community, and if staff morale is low, this creates the potential for increased turnover, which in turn creates a staffing shortage in an area in which it is difficult to recruit new employees. In short, Trani viewed Complainant's conduct as having a significant impact on SCF's staff, SCF's offenders, and the communities in which those offenders would later reside.

130. Trani considered other disciplinary actions, but he decided upon disciplinary demotion because Complainant did not see anything wrong with the way he treated staff.

131. Complainant tried to present mitigating information during the Rule 6-10 meeting, for example with Nycz-Halligan, and tried to put his comments in context, but Trani rejected this perspective and said that "She may have been wrong in the way she was coming across to him and being defensive but being unprofessional as a reaction is not a justification."

Complainant Appeals His Disciplinary Demotion

132. Complainant filed an appeal with the State Personnel Board of the Disciplinary action on June 21, 2016.

Complainant's July 5, 2016 Performance Evaluation

133. On July 5, 2016, Complainant received a performance evaluation for a rating period of April 1, 2016 to June 14, 2016, the effective date of his demotion, drafted by Warden Chapdelaine as Complainant's supervisor and reviewed by Travis Trani as Complainant's Appointing Authority. (Stipulated fact.) Chapdelaine rated Complainant was rated at Level I overall, and at Level I in the core competencies of Accountability/Organizational Commitment, Job Knowledge, Communication, and Interpersonal Skills. The basis for these ratings was Trani's conclusions related to events that occurred between January 21, 2016 and April 9, 2016, during the prior evaluation period (except for the purported April 9, 2016 violation of Cummings' directive to not discuss his investigation). Chapdelaine explained the need for the Performance Evaluation by stating in the narrative to Complainant's overall rating that "The reason for the closeout selection was 'Transfer' because there is no other option available for this particular circumstance."

134. Complainant filed a dispute of the July 5, 2016 performance evaluation on July 11, 2016. The basis for Complainant's objection to the July 5, 2016 was that "the events upon which the ratings were based fall outside the rating period covered by the evaluation."

135. Complainant filed an appeal with the State Personnel Board of the July 5, 2016 performance evaluation on July 18, 2016.

DISCUSSION

BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, Respondent has the burden of proving 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 704.

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.

HEARING ISSUES

I. Complainant Did Not Commit All of the Acts for Which He was Disciplined

Complainant was demoted from his Associate Warden position to Major for the following alleged acts or omissions: (1) on January 21, 2016, Complainant yelled at Wilson, called him "inept" and "incompetent," and referred to him as the weakest link in the chain of command; (2) during the week of February 15, 2016, while questioning Wingert about her comments to a training session class on February 10, 2016, Complainant asked her the same or a similar question about a dozen times, belittling and bullying her, until she broke down physically and mentally; (3) during the week of February 15, 2016, while questioning Nycz-Halligan about her comments to the same training session class on February 10, 2016, Complainant belittled and demeaned her by telling her that "teachers thank me every day for demoting you," or words to that effect, and yelled at her; (4) Complainant violated Cummings' directive to not discuss the IG investigation with anyone when he discussed the investigation with the Mayhughs at the Sterling Walmart on April 9, 2016; (6) Complainant owned a book entitled "My Daddy Lost His Job," which he would give to subordinates when they had performance issues.

Respondent failed to establish by a preponderance that Complainant committed all the acts for which he was disciplined. At the hearing, Respondent established only that Complainant referred to Wilson's performance on January 21, 2016 as inept and incompetent, and characterized Wilson as the weakest link in the chain of command; that Complainant told Nycz-Halligan something to the effect that teachers thank him almost every day for her demotion; and Complainant owned a book published in the 1950s entitled "My Daddy Lost His Job," that he sometimes gave to subordinates as a joke.

A. Conduct Towards Wilson on January 21, 2016

In his disciplinary decision, Trani concluded that Complainant yelled at Wilson and called him "inept" and "incompetent." The evidence at hearing was inconclusive on the issue of

yelling. Complainant admitted that he referred to Wilson's conduct on January 21, 2016 as inept and incompetent.

B. Interview with Wingert in February 2016

In his disciplinary decision, Trani determined that Complainant belittled and bullied Wingert during his conversation with her in the week following the February 10, 2016 training session. Complainant did this primarily by asking her the same question, or slightly different versions of the same question, multiple times. Reportedly, Wingert cried during the meeting. Higgins testified that he felt uncomfortable during the meeting because Complainant asked the same question repeatedly.

However, the evidence at the hearing established that Complainant did not belittle and demean Wingert in the presence of Higgins to the point that she mentally broke down. Complainant asked Wingert a series of questions to determine whether Wingert and Nycz-Halligan jointly planned to speak at the conclusion of the February 10, 2016 block training. When Complainant and Higgins interviewed Nycz-Halligan, she stated that they had jointly planned beforehand to speak at the block training. Subsequently, when Complainant and Higgins interviewed Wingert, she denied any collusion before speaking at that training.

In order to ascertain the truth in the face of these conflicting stories, Complainant asked a series of slightly varying questions about the issue, until Wingert revealed that the intent to speak was expressed among Wingert, Nycz-Halligan, and two other employees just prior to Major Wingert and Nycz-Halligan getting up before the class and speaking. It was not Complainant's manner of questioning that upset Wingert as much as the complaint by at least one attendee that she talked about the details of her demotion and that the attendees felt that they could not leave. Having been demoted effective November 1, 2015, Wingert was concerned that these allegations against her could result in her termination. Wingert became emotional and started crying early in the interview, not after Complainant asked the same or similar questions about the issue of collusion with Nycz-Halligan.

It is significant that both Wingert and Higgins did not report Complainant for unprofessional conduct. Both Wingert and Higgins did not believe that Complainant's conduct rose to the level at which it needed to be reported, or grieved. They were present during that interview. Cummings, who never spoke with Wingert, was not there. Neither was Trani.

Respondent has failed to establish by a preponderance of the evidence that Complainant belittled and bullied Wingert during his conversation with her in the week or two following the February 10, 2016 training session.

C. Conduct Towards Nycz-Halligan in February 2016

In his disciplinary decision, Trani concluded that Complainant belittled and demeaned Nycz-Halligan by yelling at her and telling her that teachers thank him every day that Nycz-Halligan was demoted. There is no credible evidence that Complainant yelled at Nycz-Halligan. Higgins, who was present during Complainant's discussion with Nycz-Halligan concerning her conduct during the February 10, 2016 training session, and who testified at hearing, found nothing wrong with how Complainant conducted his discussion with Nycz-Halligan.

Nycz-Halligan did not testify at the hearing, so all statements attributed to her are hearsay, and are of limited probative value. According to Cummings, who did not interview

Nycz-Halligan during his investigation, he relied on what Frances Falk told him that Nycz-Halligan told her, a double-hearsay problem. Trani relied on Cummings' IG report and what Complainant told him Complainant said to Nycz-Halligan.

Complainant by his own admission did tell Nycz-Halligan something to the effect that teachers thank him almost every day for the removal of Nycz-Halligan from SCF's Education Department.

D. Yelling at Subordinates

In his disciplinary decision, Director Trani found that Complainant yelled at staff. The only yelling incident that was raised during the rule 6-10 meeting was the Wilson incident on January 21, 2016. Both Complainant and Zwirn maintained that Complainant did not yell, although his voice was elevated. Wilson and E.L. characterized Complainant's volume as yelling. To a certain extent, Trani relied on Cummings' inaccurate report that Complainant admitted to yelling. There is conflicting evidence on this issue. Ultimately, Respondent failed to prove by a preponderance of the evidence that Complainant yelled at Wilson on January 21, 2016, as opposed to merely raising his voice.

E. Conversation with the Mayhughs on April 9, 2016

In his disciplinary decision, Trani determined that Complainant violated Cummings' directive not to talk to anyone about the investigation in his conversation with the Mayhughs at the Sterling Walmart on April 9, 2016. The preponderance of the evidence, however, establishes that Complainant did not talk about the investigation with the Mayhughs, and did not violate Cummings' directive.

F. Possession and Use of Book "My Daddy Lost His Job"

Respondent determined that Complainant owned a book from the 1950s entitled "My Daddy Lost His Job," and sometimes gave it to subordinates. Complainant admitted to Cummings that he had the book and considered it a joke. Without having read the book, Cummings could not accurately assess how the book may have impacted those subordinates to whom Complainant gave it. No evidence was offered that anyone was offended by the book, that any one complained about the book, that anyone requested that Complainant remove the book from his office, or that Complainant had given the book to anyone within the last few years.

II. The Appointing Authority's Action was Arbitrary, Capricious, or Contrary to Rule or Law

A. Respondent's Decision to Impose Discipline was 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 court must determine whether a reasonable person, upon

consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colo. Dep't. of Social Svcs.*, 919 P.2d 942, 947 (Colo. App. 1996).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

1. Deputy Director Trani neglected or refused to use reasonable diligence and care to procure such evidence as he was by law authorized to consider in exercising the discretion vested in him

There was material information -- primarily concerning mitigating circumstances -- that Trani should have used reasonable diligence to procure. Trani was not only authorized, but required, to consider this evidence pursuant to Board Rule 6-9, prior to exercising the discretion vested in him by demoting Complainant. Deputy Director Trani was not reasonably diligent in procuring that evidence, to Complainant's detriment. Several instances stand out.

First, Trani did not seek or obtain information concerning the events that led up to Complainant's allegedly unprofessional conduct towards Wilson. At hearing, Trani explained that the context of Complainant's comments to Wilson on January 21, 2016 did not matter, that regardless of the cause, Complainant's calling Wilson's handling of his directives on January 21, 2016 inept and incompetent, and referring to Wilson as the weakest link, was inappropriate under any circumstances.

However, Trani also testified at hearing that knowing that Complainant's directives to Wilson on January 21, 2016 arose from a potential attempt to kill E.L. could have been helpful in his review of the matter prior to making his decision. He also failed to ask Zwirn and E.L. if they heard Wilson yell when Complainant was in the Warden's office with Wilson. If Wilson was yelling, that would put allegations about Complainant yelling at Wilson in a different light. He also did not ask Wilson if he had any documentation regarding the January 21, 2016 incident. He also did not find out that Wilson believed he was authorized to use his staff as he saw fit, which belief may have caused him to disobey Complainant's directives on January 21, 2016.

Second, Trani did not speak with Nycz-Halligan, and should have been aware that Cummings had not interviewed her prior to finalizing his IG report. He failed to review the SCF's Education Department climate survey despite the fact that it was an attachment to the IG report. Had he reviewed the climate survey, he would have realized the nature and extent of the problem Complainant faced when dealing with Nycz-Halligan and her insistence that she was wronged. Complainant did tell Nycz-Halligan, after she insisted that she had the support of her subordinates in the Education Department, that teachers thank him nearly every day for removing her from her Program Management position. Trani's conclusion that this was unprofessional is a purely subjective judgment, and ignores the context, intent and necessity of Complainant's remark. Complainant explained to Trani the context for that meeting, and Trani had other information from other witnesses to confirm that context. Nycz-Halligan's refusal to take responsibility for her demotion and for the manner in which teachers viewed her supervision, and her refusal to acknowledge that teachers wanted her removed from her supervisory position over them, may have mandated that Complainant bring her back to reality by making such a blunt remark. Trani's failure to consider these circumstances indicates that he did not consider information given to him by Complainant and others. Trani's failure to review the climate survey

critical of Nycz-Halligan's supervision may have contributed to his failure to fully understand the context and justification for Complainant's comments.

Trani, however, dismissed this mitigating information, believing that regardless of the context, it is never okay to say such a thing to a subordinate, especially one who is known as problematic. However, viewed in its proper context, and bearing in mind the intent behind it, Complainant's comment to Nycz-Halligan to the effect that her former subordinates in the Education Department were pleased that she had been removed from her Program Manager position appears unobjectionable.

Third, with respect to allegations of misconduct concerning Wingert, Trani did not ask Higgins why he did not report that he believed Complainant went too far, and was unprofessional, in the manner in which he interviewed Major Wingert after the February 10, 2016 training class. He also failed to ask Wingert why she did not report Complainant. He failed to confirm the assertion in the IG report -- which turned out to be a misrepresentation -- that Wingert had complained about how Complainant handled the interview with her. He failed to find out what the question was that Complainant was alleged to have asked repeatedly and never asked Complainant what his motive was for repeating the question. He also failed to obtain information about Wingert's emotional state in February 2016 and how she had reacted to her demotion in October 2015. Had he done so, he may have concluded that Wingert was emotionally fragile, and fearful of getting into any trouble after being demoted from Associate Warden to Captain. Knowing the context of Complainant's interview with Wingert would have provided a different perspective on the reasons for Complainant's conduct and the underlying causes of Wingert's emotional reaction to the interview, a perspective that would most likely place Complainant in a less blameworthy light.

Fourth, Trani also did not speak with former Warden James Falk, who could have provided information about Warden Falk's directives to Complainant about how to communicate with subordinates.

Finally, with respect to the book "My Daddy Lost His Job," Trani failed read the book, failed to obtain evidence that Complainant had given the book to any subordinate within the last few years, and failed to find anyone who was offended by it.

2. Trani failed to give candid and honest consideration of the evidence before him on which he was authorized to act in exercising his discretion

a) Trani's reliance on Cummings' IG Report

One piece of evidence upon which Trani relied in making his disciplinary decision to demote Complainant was Cummings' IG report. That reliance may have been replaced. The IG report and report summary contained materially incorrect or misleading statements, and there is no evidence that Trani realized that fact.

For example, Cummings' conclusion that "Most of the witnesses agreed that they have not heard Scherbarth curse at subordinates," is misleading, because no one interviewed by Cummings stated that they witnessed Complainant cursing at subordinates. Cummings also reported that Complainant admitted to yelling. This, too, is inaccurate. During his interview with Complainant, Cummings asked a compound question: did you raise your voice or yell? Complainant replied that he

did, but later in the interview he denied yelling. The most logical interpretation of Complainant's responses during that interview is that Complainant admitted to raising his voice, but denied yelling.

In addition, Cummings reported that Complainant admitted to using the word "inept" to describe someone's character. That is inaccurate. Complainant admitted to using the word "inept" to describe Wilson's behavior and performance on January 21, 2016, and not in relation to Wilson's character, not an insignificant difference. Furthermore, Cummings concluded that "There was not enough information to confirm the allegation that Scherbarth has used the Office of the Inspector General as a threat to his subordinates." That statement is also misleading, because there was no credible evidence to support that allegation other than one second-hand hearsay comment of dubious origin. Also misleading is Cummings' purported finding that "There was information revealed, however, that Scherbarth has threatened subordinates' with losing their job." That statement is based on one offhand assertion by one witness, who failed to provide any additional details to support the allegation, rendering that allegation unworthy of credence.

In the body of the IG report, Cummings alleged that Wingert made a complaint about how Complainant questioned her after the February 10, 2016 training session. This is untrue. Wingert did not make a formal complaint to anyone in authority until after the Rule 6-10 meeting on May 20, 2016, and Cummings did not interview Wingert before completing the IG report. Also in the body of the IG report, Cummings reported that Higgins told him that Higgins felt that Complainant's repeated questioning of Wingert was inappropriate. This, too, is untrue. The audio recording of that interview indicates that Higgins told Cummings that he felt uncomfortable with the manner in which Complainant questioned Wingert, but he could not recall a situation where he thought that Complainant went overboard or was unprofessional to the point of not being appropriate. Finally, Cummings' conclusion that Complainant violated his directive to not discuss the investigation lacks sufficient support. The fact is Complainant did not directly mention any investigation, as is clear from the emails that Connie and Josh Mayhugh sent to Cummings on April 13, 2016.

b) Several of Trani's conclusions were incorrect or inaccurate

Some of Trani's conclusions were incorrect or inaccurate, likely due to the fact that they were not supported by the information he reviewed prior to making his decision, or because he failed to obtain material information that, properly considered, should have led him to different or modified conclusions. In addition, he relied too heavily and too uncritically on Cummings' IG report.

Respondent failed to establish that Complainant belittled and demeaned Wingert until she mentally broke down. Complainant asked Wingert a series of questions to determine whether Wingert and Nycz-Halligan jointly planned to speak at the conclusion of the February 10, 2016 training session. When Complainant and Higgins interviewed Nycz-Halligan, she stated that they had jointly planned beforehand to speak at the block training. Subsequently, when Complainant and Higgins interviewed Wingert, she denied any collusion before speaking at that training. In order to ascertain the truth in the face of these conflicting stories, Complainant asked a series of slightly varying questions about the issue, until Wingert revealed that the intent to speak was expressed among Wingert, Nycz-Halligan, and two other employees just prior to Wingert and Nycz-Halligan getting up before the class and speaking. It was not Complainant's manner of questioning that upset Wingert as much as the complaint by at least one attendee that she talked about the details of her demotion and that the attendees felt that they could not leave. Having been demoted effective November 1, 2015, Wingert was concerned that these allegations against her could result in her termination. Wingert became emotional and started crying early in the

interview, not after Complainant asked the same or similar questions about the issue of collusion with Nycz-Halligan.

It is unclear if Complainant yelled at Wilson during the only instance of purported yelling Trani discussed during the Rule 6-10 meeting. At best, the evidence before Trani was inconclusive; Complainant and Zwirn believed that Complainant's voice was elevated, but that he was not yelling. Wilson and E.L. believed that Complainant was yelling. Trani did not attempt to ascertain whether Wilson yelled during this meeting. Given the fact that the situation concerned Wilson's failure to follow Complainant's directives arising from a credible death threat against E.L., and Wilson's refusal to answer Complainant's direct question, a raised voice in dealing with Wilson's recalcitrance and insubordination would not be unexpected or unjustifiable.

Trani's stated conclusion that Complainant made unprofessional comments to Connie and Josh Mayhugh is ambiguous -- it is not clear if he is referencing the allegation that Complainant told the Mayhughs that he was put on administrative leave, or the allegation that he said he hurt Captain Gary Little's and Nycz-Halligan's feelings. Contrary to Cummings's conclusion, Complainant did not mention or talk about the Professional Standards investigation with the Mayhughs. Complainant did not violate Cummings' directive that he not discuss the investigation with anyone. No one told Complainant that he could not tell anyone that he was put on administrative leave. At hearing, Trani testified that it was inappropriate or unprofessional for Complainant to tell Connie Mayhugh, an SCF employee subordinate to Captains Little and Nycz-Halligan, that he must have hurt their feelings. This is a highly subjective, not to mention questionable, characterization, and one that should not reasonably be the basis, or constitute part of the basis, for a disciplinary action imposed on a certified state employee of Complainant's record and longevity.

Trani concluded that during the Rule 6-10 meeting Complainant was inaccurate, or worse, when Complainant denied telling Cummings that he yelled. But as discussed above, Complainant did deny yelling while replying yes to an ambiguous, compound question that most likely indicated that Complainant was admitting to raising his voice, not yelling.

c) Trani gave too little weight to the mitigating information he was given

In arriving at his decision to disciplinarily demote Complainant, Trani failed to give candid and honest consideration of the mitigating information that he had obtained and that Complainant provided to him. His belief that the context of Complainant's comments to subordinates was essentially irrelevant reveals that Trani did not properly consider mitigating information and accord that information its proper weight.

Trani testified that the context for Complainant's discussions with Nycz-Halligan, Wingert and Wilson may have been important to Complainant, but they were not important to Trani. In Trani's mind, there was no justification for saying what was said to Nycz-Halligan, no justification for asking Wingert the same question up to a dozen times until she broke down, no justification for calling Wilson inept and incompetent.

However, Trani learned about the death threat to E.L. after the entire Rule 6-10 process. At hearing, he admitted that this information could have helped to evaluate the situation prior to making his decision. In addition, he did not know of Wilson's draft grievance until the hearing itself. Had he been more open to considering mitigating information, and learning more about the context of Complainant's purportedly objectionable remarks, he might have been more motivated to obtain Wilson's draft grievance, which would have revealed that Wilson failed to

follow Complainant's directives on January 21, 2016 relating to the death threat made against E.L.

Trani admitted under cross-examination that it would have been acceptable for Complainant to tell Wilson that his job performance on January 21, 2016 was deficient, or that what he did lacked competence. Furthermore, Trani agreed that not following orders related to a death threat against SCF staff could be inept. But Trani continued to insist that referring to Wilson or his conduct as inept and incompetent was unprofessional, as was referring to him as the weakest link.

Trani also did not accord appropriate weight to the fact that, prior to Nycz-Halligan's complaint to Frances Falk in March 2016, there were no significant documented allegations that Complainant's communication style was a violation of DOC regulations. Trani did not give appropriate weight to Complainant's commendable performance evaluations, to those subordinates interviewed by Cummings who had no issues with Complainant's supervisory style, or to Warden Chapdelaine's positive perspective on Complainant's job performance as Associate Warden and his belief that Complainant was very capable of conforming his conduct to instructions and directives.

Trani's failure to view Complainant's conduct in context, and his failure to truly consider, and give appropriate weight to, the mitigating information he had available to him, violates Board Rule 6-9, 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." Trani's belief that under no circumstances should an employee be told that his or her performance is inept or incompetent (although he did admit on cross-examination that it would be okay to characterize performance as not competent, a distinction without a difference) undermines the possibility of a truly candid and honest consideration of the nature and seriousness of Complainant's acts. As discussed below in reference to Rule 6-2, Trani's analysis of the effect of Complainant's acts is fundamentally flawed and, ultimately, speculative without evidence to support it.

In summary, Trani arrived at several inaccurate conclusions, accorded too much weight to the speculative deleterious effects of Complainant's conduct, and too little weight to the mitigating circumstances that gave rise to some of the comments to which Trani objected. Trani's consideration of this matter violated Board Rule 6-9 and was arbitrary and capricious.

B. Respondent's Action was Contrary to Rule or Law

In addition to violating Board Rule 6-9, Trani's handling of Complainant's Rule 6-10 process and his decision to disciplinarily demote Complainant violated Board Rule 6-2 and Board Rule 6-10.

1. Board Rule 6-2

Board Rule 6-2 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 arguably objectionable actions that Complainant did commit were not so flagrant or serious to warrant immediate discipline without a prior corrective action. Respondent established only that Complainant criticized Wilson in no uncertain terms for failing to follow his directives during a potentially life-threatening situation and being insubordinate; Complainant told Nycz-Halligan that teachers thank him for her removal as Program Manager of SCF's Education Department in the face of her excessive defensiveness and refusal to accept the reality that her treatment of subordinates resulted in an extremely negative climate survey resulting in her demotion; Complainant possessed a book from the 1950s entitled "My Daddy Lost His Job," that he showed or gave to employees as a joke in years past, although Trani could find no one to whom Complainant gave the book and no one who complained about it. Considered separately or collectively, these actions do not require immediate disciplinary action.

Complainant did not receive a prior corrective action addressing the kinds of conduct investigated by Investigator Cummings and addressed by Trani in the Rule 6-10 meeting. The fact that, by Wilson's own admission, communications between him and Complainant improved significantly after he complained to Chapdelaine after the January 21, 2016 incident and the Warden counseled Complainant about his communication style, indicates that Complainant was educable, and possessed the ability to conform his conduct to the directives and requirements of his superior.

Trani's justification for imposing a disciplinary action instead of a corrective action -- that Complainant did not perceive that he had done anything wrong in the manner in which he handled the issues raised in the Rule 6-10 meeting -- did not mean that Complainant could not and would not follow the instructions and directives of his superior and conform his conduct to meet the requirements imposed on him. His conduct after being counseled by Chapdelaine establishes that.

Trani's vision of a positive and nurturing work environment is an admirable one, to be sure, and one to which state employees should aspire. But managers and supervisors cannot always provide positive feedback to problematic employees. Sometimes, situations call for direct, unvarnished articulation of perceived deficiencies, which may serve to benefit not only the employee on the receiving end of such communications, but those whom the employee is employed to serve.

In short, Complainant's acts were not so flagrant or serious that immediate disciplinary action was warranted.

2. Board Rule 6-10

Trani obtained information that he considered after the Rule 6-10 meeting with Complainant, information that he did not provide to Complainant so that Complainant could respond to it prior to Trani's disciplinary decision. This violates Board Rule 6-10, and is a violation of Complainant's due process rights. Because this Initial Decision rescinds Respondent's disciplinary action, the ALJ need not provide a remedy for Trani's violation of Rule 6-10.

III. 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.

As noted above, Board Rule 6-9 enumerates the factors that an appointing authority should consider when deciding to take corrective or disciplinary action. These factors are applicable not only to the decision to take corrective or disciplinary action, but also to the specific corrective or disciplinary action taken once it has been decided that a corrective or disciplinary action is warranted. These considerations, as applied to the facts of this matter, are discussed immediately below.

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

Complainant was blunt, and perhaps undiplomatic, during the incidents upon which Trani based his disciplinary decision. The evidence presented at hearing indicate that these incidents were isolated, and when viewed in the context of Complainant's 27-year DOC career, few and far between. Complainant's arguably objectionable comments were also made under extraordinary circumstances. As discussed above, Trani exaggerated the seriousness of these comments.

B. Effect of the Act, Error or Omission

Trani's vision of the effect of Complainant's supervisory style, which led him to conclude the very security of Colorado's communities was at risk, is logically flawed, as well as speculative. There was no substantial evidence offered at hearing to establish that Complainant's subordinate staff were experiencing low morale (with the exception of Wilson, Nycz-Halligan and Wingert, who had reasons unrelated to Complainant to be dissatisfied), or that the SCF staff did not buy-in the DOC's mission, or that offenders were not being rehabilitated because of low staff morale, or that the communities into which the offenders were released were at any greater security risk.

C. Type and Frequency of Previous Unsatisfactory Behavior or Acts

There was no documented evidence that Respondent received any serious complaints about Complainant's supervisory style or manner of communication prior to the incidents discussed here.

D. Prior Corrective or Disciplinary Actions

As noted above, Complainant received a corrective action in July 2014 for an issue unrelated to the issues addressed in this appeal. Consequently, Trani did not consider those matters relevant to the issues he was dealing with in this matter.

E. Period of Time Since a Prior Offense

As noted above, Complainant was never accused of an offense similar to those at issue in this matter before the allegations addressed in his Rule 6-10 meeting.

F. Previous Performance Evaluations

Complainant's previous overall performance evaluations were always Satisfactory/Commendable, with many core competencies rated as Outstanding, and only one instance of a Needs Improvement evaluation in the core competency of Performance Management.

G. Mitigating Circumstances

As discussed at length above, there were mitigating circumstances related to Complainant's comments to Wilson and Nycz-Halligan, and mitigating circumstances that explained and justified the manner in which Complainant questioned Wingert. Trani did not view these mitigating circumstances as particularly relevant, and because of that view, he failed to give the mitigating information the weight that it deserved.

Considering all the factors to be considered in deciding on the nature of the corrective or disciplinary action to be imposed, Complainant's demotion is too severe a penalty for the few acts that Respondent established Complainant committed.

IV. Complainant's Interim Performance Evaluation

Complainant has appealed the interim performance evaluation for the period April 1, 2016 to June 14, 2016 that he received on July 5, 2016. The basis for Complainant's performance evaluation for the period April 1, 2016 to June 14, 2016 was Deputy Director Trani's conclusions about Complainant's conduct in January through March 2016 and his decision to disciplinarily demote Complainant effective June 14, 2016 and give Complainant a corrective action. Chapdelaine explained the need for the Performance Evaluation by stating in the narrative to Complainant's overall rating that "The reason for the closeout selection was 'Transfer' because there is no other option available for this particular circumstance."

However, according Board Rule 6-4, provides, in pertinent part, that "If an employee moves to a position under another appointing authority or department during a performance cycle, an interim overall evaluation shall be completed and delivered to the new appointing authority or department within 30 days of the effective date of the move." DOC AR 1450-02.IV(B)(3)(a)(2) addresses the same issue to the same effect. Here, Complainant's demotion did not result in his transfer to another department, and no evidence was presented at the hearing to indicate that the position to which he was demoted was under a different appointing authority.

Because the ALJ is rescinding Respondent's disciplinary action based on his conclusions that Respondent failed to meet its burden of proving that Complainant committed all, or even most, of the acts for which he was disciplined, and that the Respondent's disciplinary decision was arbitrary, capricious, contrary to rule or law, and not within the range of reasonable alternatives, it would be incongruous, and unfair to allow this interim performance evaluation of July 5, 2016 to remain as part of Complainant's personnel file and performance record. Accordingly, the July 5, 2016 performance evaluation should be stricken and purged from all DOC files.

V. Complainant did not establish a basis for entitlement to attorney fees and costs.

Board Rule 8-33 provides:

Pursuant to § 24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee, or department, upon final resolution of a proceeding against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, was a means of harassment, or was otherwise groundless.

A. Frivolous means that no rational argument based on the evidence or law was presented;

B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;

C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.

In this matter, although Respondent's decision to demote Complainant lacked sufficient support and was ill-advised, Complainant has not demonstrated that Respondent's decision to demote him was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Therefore, attorney fees and costs are not warranted.

CONCLUSIONS OF LAW

1. Complainant committed only some of the acts 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.
4. The Performance Evaluation of July 5, 2016, covering the performance period of April 1, 2016 to June 14, 2016, is without sufficient factual support and is violative of the findings of fact and conclusions of law in this Initial Decision.
5. Complainant's request for attorney fees and costs is denied.

ORDER

Respondent's disciplinary action is **rescinded**. Respondent shall reinstate Complainant to his former position as Associate Warden at the Sterling Correctional Facility, at the compensation level he would now hold had he not been demoted, and will compensate Complainant with his lost back pay and benefits. Respondent shall remove Complainant's performance evaluation for the period April 1, 2016 through June 14, 2016 from all DOC files.

Dated this 6th day
of March 2017
at Denver, Colorado.



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

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.

CERTIFICATE OF MAILING

This is to certify that on the 7th day of March 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Bill Finger, Esq.
Casey Leier, Esq.
Finger & Thigpen, P.C.
29025 Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437
bill@fntlegal.com
casey@fntlegal.com

Heather J. Smith
Assistant Attorney General
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Heather.Smith@coag.gov



Andrea G. Woods
