

AMENDED ORDER AWARDING BACK PAY AND FRONT PAY

BRETT L. WILLIAMS,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Senior Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on June 17, 2013. The matter was commenced on the record on May 14, 2013. The record was closed on July 2, 2013, following the parties' submission of written Closing Arguments. Complainant appeared through Keith Shandalow, Esquire. Respondent appeared through Diane Marie Dash, Senior Assistant Attorney General. Respondent's advisory witness was Interim Chief of the Colorado State Patrol (Patrol) Scott Hernandez.

This Amended Order is issued on the parties' joint motion to correct an error on Page 2, by adding the word, "no" to the last sentence of the second paragraph. The change, in bold, is the only modification to the Order.

MATTER ON APPEAL/PROCEDURAL BACKGROUND

This matter is on remand from the Colorado State Personnel Board (Board) for a determination of damages. On July 16, 2012, the ALJ issued the Initial Decision, rescinding the Colorado State Patrol's decision to deny reinstatement to Complainant as a Colorado State Trooper. The Initial Decision concluded that Respondent's decision was arbitrary and capricious; Respondent discriminated against Complainant on the basis of sexual orientation; and that Complainant was entitled to attorney fees and costs. The Decision also awarded Complainant front pay in lieu of reinstatement, ordered that a hearing would be necessary to determine the appropriate amount of front pay; and directed the Patrol to immediately incorporate sexual orientation into all existing diversity training programs and designate a command-level point of contact for gay Patrol members.

On December 20, 2012, the Board affirmed the Findings of Fact and adopted the Conclusions of Law in the Initial Decision. The December 20 Order also modified the Initial Decision, as follows: "The Board rejects the ALJ's conclusion that there is an anti-gay culture in the Colorado State Patrol and finds that this conclusion is not supported by substantial evidence in the record. The conclusion that there is an anti-gay culture in the Patrol is not necessary to support the ALJ's conclusion of law that Respondent discriminated against Complainant on the basis of sexual orientation, which the Board adopts."

On January 28, 2013, the Board remanded this matter to the ALJ for a hearing on damages. Respondent moved to stay the hearing pending its appeal of the Board final order in the Colorado Court of Appeals. On June 18, 2013, the Court of Appeals denied Respondent's motion for stay and dismissed Respondent's appeal without prejudice pending this hearing.

On May 8, 2013, Respondent filed a Motion to Limit Front Pay Award to exclude the period between the June 2010 denial of reinstatement and the December 20, 2012 Board Order. Complainant filed a response; Respondent filed a reply. On May 20, 2013, Complainant filed a motion in limine to exclude evidence of Respondent's March 2013 offers of reinstatement to Complainant. Respondent filed a response; Complainant filed a reply.

On June 12, 2013, the ALJ denied Respondent's Motion to Limit Front Pay Award and denied Complainant's motion to exclude written communications between the parties regarding Respondent's offers of reinstatement. The Order granted the motion to exclude most witness testimony on the reinstatement offers, because all of those communications occurred in writing and there had been **no** oral communications regarding same.

ISSUES

1. Whether the award of front pay precludes any make whole relief between the date of the discriminatory action in June 2010 and the date of final judgment, December 20, 2012;
2. Whether Respondent's offers of reinstatement toll the award of front pay; and
3. A determination of the amount of back pay and front pay damages to which Complainant is entitled.

FINDINGS OF FACT

1. The Findings of Fact contained in the Initial Decision are incorporated herein by reference.
2. Complainant graduated from high school in Hawaii and has taken college courses at Colorado Mountain College in Glenwood Springs, Colorado, and at Red Rocks Community College in Colorado.
3. Complainant earned a POST (Police Officer Standards Training) certificate early in his law enforcement career, which started in 1994. He does not possess a college degree.
4. In 1998, Complainant was hired by CSP as a Trooper and attended the Colorado State Patrol Academy. He also completed a 12-week program in Police Staffing Command in Boise, Idaho, through Northwestern University.
5. Complainant promoted through the ranks to the position of Captain.
6. In February 2010, Complainant resigned from the Patrol in order to attend helicopter flight training school. He is now a licensed private pilot.
7. At the time Complainant left the Patrol he was earning \$96,000 annually as a Captain, plus benefits.

Withdrawal of Retirement Funds

8. In March or April 2010, Complainant withdrew his retirement funds from his Colorado Public Employee Retirement Association (PERA) account. The amount was

approximately \$130,000. Complainant paid an early withdrawal penalty of \$16,070 and taxes in the amount of approximately \$20,000 on those funds. At the time, he planned to use those funds to support himself while attending flight school.

9. In April 2010, Complainant applied for reinstatement at the Patrol. His application was denied on June 2, 2010 and this appeal ensued.
10. In June 2010, Complainant received his PERA retirement funds. If Complainant had returned the funds to PERA within one year of withdrawal, he would have been reimbursed for the penalty. He did not return the funds.

Job Search

11. Complainant is in excellent health.
12. Since the denial of reinstatement, Complainant has applied for dozens of open positions both in and outside law enforcement. Complainant worked full-time submitting applications for employment and resumes on a daily basis.
13. Complainant applied for open law enforcement positions in Breckenridge, Thornton, Golden, and Lochbuie, Colorado, and in East Wendover, West Wendover, and Log Lane Village, Nevada. He was not hired.
14. Complainant also applied for open security positions in Afghanistan and Iraq, but was not hired.
15. Complainant has applied for open jobs in quasi-law enforcement agencies, including: Federal Reserve Bank, Douglas County Coroner's Office, Adams County Coroner's Office, Adams County District Attorney's Office, Community Corrections of America, and as a background investigator for private and governmental agencies. He was not hired.
16. Complainant also applied for managerial and a wide variety of other open positions at the following companies: Farmers Irrigation District, Manager; E-470 Authority, Call Center Manager; BNSF Railroad, Conductor; Kroger Foods Security; Rouch Engineering, Vehicle Evaluator; Vestas, Manufacturing Position; Emerson Corporation, Team Manager; Pepsi Corp, Warehouse Worker; Coke Corporation, Warehouse Worker; Brinks Armored Car Service, position unknown; United Environmental, Bio-Hazard Cleaner; Med-Ved Automotive Group, Car Salesman; Go Automotive, Car Salesman; Love's Truck Stops, Tire Changer; MHC Kenworth Leasing, Night Truck Fuel and Wash Laborer; Lowes, Management and Labor Positions, Housing Manager and Security; Energy Services, Brighton, Oil and Pipeline Worker; Deveraux Foundation, Night Security; Transwest Trucks, Parts and Service Counter Labor; Mortuaries, Body Pickup and Deliveryman; Health One, Patient Transporter; Regional Facility Maintenance, Yard Worker; Denver International Airport, Operations Manager; Universal Forest Products, Wood Processing and Shipping positions; Metro Community Provider Network, Security; Exempla Healthcare, Patient Transporter; Southwest Airlines, Ramp Agent; Worldwide Employment Resource, Security.
17. Complainant was not hired for any of these positions.

Complainant's Employment June 2010 through June 2013

18. Since being denied reinstatement to the Patrol, Complainant has held the following positions.
19. In 2010, Complainant earned \$210.00 as a reserve police officer in Brighton, Colorado, for working a DUI checkpoint.
20. From July 2011 to October 2011, Complainant worked as a corrections officer at Hudson Correctional facility for Geo Corporation. He earned \$12.00 per hour for a total of \$9,709.40, and received basic medical benefits. Despite working double shifts, it was not enough to support himself.
21. Complainant left Geo Corporation to work for nine months at Armored Knights Car Company, performing administrative duties, driving armored cars to transport cash, and repairing ATM machines. He earned a total of \$5,411.54 in 2011 and \$32,803 in 2012. Armored Knights cut staff, resulting in Complainant performing the work of several employees and not being paid for over 200 hours of work.
22. Complainant left Armored Knights in 2012 to work at Big Dog Services as a driver. He earned a total of \$6,091 in 2012 and had no employee benefits. He was given no more work after October 2012.
23. Complainant received Unemployment Insurance Benefit payments from the State of Colorado in 2012 in the amount of \$3,262.

POST Certification

24. Complainant's POST certification has value in small towns with police forces that cannot afford the cost of training new officers to become POST-certified. The cost, in the tens of thousands of dollars, is prohibitively high in such small jurisdictions. The Colorado POST certification is accepted as being transferrable in several other western states.
25. Complainant sought employment primarily in Colorado and Nevada because that is where his family is located. He did not seek law enforcement jobs in other states that would accept his POST certificate because he has no family or friends in those states.

Micromotion Application

26. Complainant had a personal contact in a management position at Micromotion, a private company based in Boulder, Colorado. In 2012, Complainant applied for two open management positions for which he was the only applicant, and quickly passed through the first three levels of interviews. Complainant's contact informed him he was doing an exceptional job in the application process.
27. The Micromotion position required a background investigation. During the background interview, Complainant was asked to discuss the reason he was denied reinstatement to the Patrol. Complainant explained he believed it was on the basis of his sexual orientation. The interviewer responded in a hostile manner that he did not believe Complainant and that he had heard a "different story" from people at the Patrol.

28. Complainant did not receive a job offer from Micromotion. This experience led Complainant to believe that the Patrol was providing negative information to prospective employers, that was interfering with his ability to secure employment.

Publicity in July 2012

29. After the July 16, 2012 Initial Decision was issued, Complainant's expert witness, Dan Montgomery, contacted a reporter from the Denver Post about the decision. The decision was covered in several media forums, including the Denver Post, other newspapers, television, and internet sites.
30. As a result, an internet search of "Brett Williams Denver" immediately turns up the full story that appeared in the Denver Post, describing Complainant's successful appeal of the denial of reinstatement by the Patrol on the basis of his sexual orientation. Until Complainant's application for reinstatement, appeal, and the subsequent media coverage, Complainant had been private about his sexual orientation.

Employability

31. Since October 2012, Complainant has been unable to secure employment.
32. All law enforcement positions require a background investigation as a condition of employment. Any background investigation of Complainant will reveal his litigation of this case and his sexual orientation.
33. Complainant's expert witness in law enforcement hiring practices at this hearing was Mr. Montgomery, a retired police chief and former statewide chair of several law enforcement organizations. Mr. Montgomery's testimony was credible and persuasive.
34. Law enforcement and other hiring authorities generally seek to avoid hiring someone who was and may still be inclined to create litigation against their current or former employer, as Complainant has done. In addition, they seek to avoid the costs of potential litigation.
35. Police chiefs, sheriffs, and law enforcement hiring officers will be reluctant to hire Complainant, not necessarily because of their own anti-gay beliefs, but because of a fear that Complainant's homosexuality may cause dissention among coworkers who are homophobic. Hiring authorities in law enforcement generally seek to avoid personnel unrest that can be disruptive to the workplace.
36. Some individuals at the Patrol have spread rumors about Complainant being a child molester and Complainant is still shunned by nearly all former peers and subordinates at the Patrol with whom he has had contact.
37. The Patrol has not taken measures to assist Complainant in obtaining new employment in the law enforcement arena, and it is more likely than not that some Patrol leaders have shared negative information about Complainant with prospective employers.
38. Complainant is not employable in the law enforcement field because of his litigation of this case, his publicly known homosexuality, and the negative information that may be shared about him by CSP.

39. Complainant will continue to face great difficulty obtaining employment even in non-law enforcement positions due to his litigation of this case and negative information that will be shared about him by CSP.

Offers of Reinstatement by the Patrol

40. In March 2013, Respondent's attorney suggested to Patrol leaders that it consider offering Complainant reinstatement. Respondent agreed.
41. On March 13, 2013, Respondent, through counsel, sent a letter to Complainant's counsel offering two positions to Complainant as follows:
1. Employment at top trooper pay in the position of either a:
 - A. CSP Trooper upon successfully passing a background investigation to include a polygraph examination or;
 - B. Colorado Department of Public Safety (DPS) civilian without a background investigation and polygraph examination.
 2. Front pay, minus earned income, from December 20, 2012 to the date of hire into either of the positions described in item 1, at top trooper pay.
 3. Payment of attorney fees and costs itemized in Complainant's Bill of Attorney Fees and Costs, filed on or about January 18, 2013.
42. The letter stated that the pending appeal would not be affected by the offer, it was not an offer of settlement, and the offer would remain open until March 27, 2013.
43. In March 2013, all positions at DPS required applicants to pass a background investigation and polygraph exam. Therefore, Interim Chief Hernandez was offering an exemption from that requirement for the DPS position.
44. Complainant believed that it was not feasible or safe for him to reinstate as a Trooper in view of his poor treatment by the Patrol in the reinstatement process and since the denial of reinstatement, outlined in the Initial Decision.
45. Complainant believed that realistically the Patrol would not permit him to pass the polygraph or background investigation, and as a result he would not actually be reinstated. He also had no information on the civilian position with which to make a decision. He discussed the offers with counsel.
46. On March 14, 2013, counsel sent a response to Respondent's counsel, in which he made the following points and asked the following questions:
- The offer was not valid because it was too indefinite and vague with respect to many essential terms; therefore, an acceptance of the offer would not constitute a valid and enforceable agreement or contract;

- The offer failed to make Complainant whole for the period June 2010 through December 2012;
- “What are the terms and conditions of the Trooper offer? Is ‘passing’ the polygraph a prerequisite to getting the position? If he makes the same innocent admissions he did back in May 2010, is the Patrol going to say that these are the reasons he did not pass the background examination? If he is not given the Trooper position, what alternatives will be provided to him? If he is given a Trooper position, what steps will the Patrol take to ensure his safety and prevent any harassment or retaliation? Would he be assigned to the Craig area, his preference, where he was a Captain for 3.5 years and where the probability of harassment, retaliation and threats to his personal safety would presumably be somewhat mitigated? We would need to know beforehand where he would be assigned.”
- Regarding the civilian position at the Department of Public Safety, “what would be the position (Title, Classification)? Would this be certified, probationary, or a trial service position? What would the responsibilities and expectations of the position be? Who would Mr. Williams report to or be working under?” What would be the work location be, is it a guaranteed permanent position funded through DPS? What steps will the Department take to prevent harassment or retaliation? How would it address the benefits disparity between law enforcement and civilian employees?”
- Given the offer’s indefiniteness and unenforceability, and Respondent’s refusal to participate in a settlement conference concerning the terms and conditions of the offer, it appeared that the offer was designed to prevent or limit front pay damages. “Respondent must provide a detailed plan to address the issue of how the hostility towards Mr. Williams can be effectively navigated so that he can perform his duties . . . in an atmosphere absolutely free of any sort of harassment, hostility or retaliation. The Respondent’s treatment of Mr. Williams during the reinstatement application period, and its litigation strategy, are persuasive examples of Respondent’s animosity towards Mr. Williams, which increased as a result of his prosecution of this litigation. See *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1178 (10th Cir. 2003).”

47. On March 22, 2013, Respondent, through counsel, responded by letter, as follows:

- Complainant was not entitled to make whole relief between June 2010 and December 2012 under *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846(2001), which defines front pay as “simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.”
- “The offer of a trooper position is conditioned on successfully passing the background investigation, including a polygraph examination. Mr. Williams would be required to provide full disclosure of any illegal sexual conduct other than his two prior admissions of viewing child pornography and paying for sex in Thailand. Additional admissions and any significant reactions would be included in

determining whether Mr. Williams successfully passes the background investigation.”

- “The federal grants received by CDPS mandate a drug free workplace. Mr. Williams should be aware that the CDPS conducts random drug testing of its employees.”
- “You ask what steps the CSP will take to ensure Mr. Williams’ safety and prevent harassment or retaliation. You will remember that the Personnel Board found there was not substantial evidence in the record to find an ‘anti-gay culture’ at the CSP. However, in spite of the Board’s finding, all Department of Public Safety employees have completed extensive diversity training during the last several months. All supervisors are currently receiving additional diversity training. As you know, the Department has received close scrutiny from the media and has responded with clear messages that any type of discrimination will not be tolerated. I have attached a recent email that was sent to all CSP employees from Colonel Scott Hernandez, Interim Chief, reiterating this policy.”
- If Complainant requests and qualifies for a trooper position, the CSP will allow him to be assigned to the Craig area;
- The civilian position being offered is a permanent classified General Professional IV at top trooper pay of \$5920 per month. Complainant should view the class description on the state website. Generally, it is a work leader, project leader, or staff authority.
- Additional bills of attorney fees would not be considered.

March 13, 2013 Email from Interim Chief Hernandez to Patrol Members; Events Precipitating the Email

48. The email attached to the March 22, 2013 letter was from Interim Chief Hernandez to the entire CSP staff, entitled, “IMPORTANT MESSAGE REGARDING DIVERSITY – PLEASE READ.” It stated that he was saddened to have to write the email, that the Patrol had recently been through a lot together, and he hoped it would be over so they could move forward and focus on the future of the organization. “However, it has become clear to me that with ongoing complaints and accusations of our culture being non accepting of diversity, we must address this issue as a critical part of moving forward.” He indicated that in the last six months, “there had been stories aired on news stations which focus on the perceived culture of the State Patrol. The stories have alleged a ‘homophobic’ culture within the Patrol.”
49. Interim Chief Hernandez indicated that a reporter issued an open records request for “the last three years of email, searching for key words which would indicate a biased or anti-gay culture. As you may be aware, a few were found. This is the problem. Searches of our systems and behaviors should not find any. In addition, our words and terms should not project or be associated with biased based language. In addition, I have recently been made aware of other communications containing allegations of anti-gay comments made by members associated with the diversity training and a culture which is negative toward female troopers.”

50. In his email, Interim Chief Hernandez said it was critical that Patrol members have respect for all people, inside and outside the organization, and treat all people with respect and courtesy regardless of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, and ancestry. He said, "We must set an example for all and lead through acceptance of diversity. We must not accept biased behavior of any type within the department or by any member of the Patrol . . . We must be disciplined and ensure our actions always uphold what the Patrol has stood for in the past and will into the future. Respect begins in how we treat each other, and if we can't respect each other, how will we be respected by the public we serve?"
51. He closed, "Let this letter serve as notice, I will not allow the fine members of our proud organization to be further tarnished by biased behavior of any type . . . all members are empowered to report biased actions without retribution or retaliation; all reports are investigated to the fullest extent possible; all substantiated complaints are strictly and consistently enforced."
52. Interim Chief Hernandez had been made aware that some Patrol members had complained about having to attend "fag training." Chief Hernandez learned of the "fag training" remarks from a letter whose source wished to remain anonymous. The Patrol never learned the identities of the individuals who made those comments. The anonymous letter also gave names of two or more Troopers who made anti-gay statements when they were angry. The Patrol initiated an Internal Affairs investigation, which found that those alleged to have made the statements denied making them. The Patrol took no action against them.
53. Another incident that led to Interim Chief Hernandez's email involved a Trooper in a squad car who referred to a detainee as a "queer." Mr. Hernandez became interim Chief after this incident came to light and did not follow up on it to learn whether any action had been taken against the Trooper.
54. In 2012 or 2013, a Sergeant at the Patrol, T.M., referred to a document as "that's so gay." T.M. was suspended for a couple of days, and appealed the disciplinary action to the State Personnel Board. T.M. was later transferred to the Motor Carrier unit where the GP IV position offered to Complainant was situated. (See below) Complainant would have reported to T.M. if he had accepted the position.

Continued Correspondence Regarding Reinstatement

55. On March 22, 2013, Complainant's counsel emailed Respondent's counsel requesting additional details regarding the "other communications containing allegations of anti-gay comments made to members associated with the diversity training and a culture which is negative toward female troopers" referenced in the Interim Chief's March 13 email. He indicated this information "is essential to assess whether in fact the anti-gay culture of the CSP has been eradicated or not. Thank you."
56. Respondent's counsel responded that it would provide a response no later than March 21, 2013. On March 22, 2013, Complainant's counsel emailed Respondent counsel indicating no response had been received.

57. On March 25, 2013, Complainant's counsel sent a lengthy letter to Respondent's counsel detailing concerns and issues yet to be clarified. Among them were the following: "Your continued characterization of Mr. Williams' admissions made during his pre-polygraph interview on May 26, 2010 as engaging in prostitution and viewing child pornography is very troubling, and appears to be probative of your client's continued hostility and animosity towards my client." He also requested details on the GP IV position, including how it would incorporate Complainant's skills, education and experience, steps to be taken to prevent harassment or retaliation, and adjustment of benefits to match those of a Trooper.
58. With regard to the Patrol's hostility towards Complainant and his request for some relief therefrom, Complainant's counsel pointed to several factors, including the following:
- The Initial Decision and Board Order concluded that the Patrol's consideration of Complainant's application for reinstatement was a sham;
 - Several witnesses, including command staff such as Interim Chief Hernandez, testified falsely under oath;
 - None of those individuals had suffered any negative consequences for testifying falsely;
 - During the pendency of the case Patrol members circulated rumors inside and outside CSP that Complainant is a child molester;
 - Former Patrol colleagues generally ignored or avoided Complainant when they saw him, demonstrating the difficulties he would face were he to return to the Patrol;
 - Emails discovered by local media revealed anti-gay comments;
 - Anti-gay comments were made at recent diversity trainings;
 - Another incident recently reported in the media was of a traffic stop by Patrol members who made anti-gay comments to another officer;
 - Recent ineffectual attempts to provide diversity training have not changed the environment to an appreciable degree;
 - Mr. Williams had recently spoken to "a few uniform officers of the CSP who have advised him, in no uncertain terms, that he should not return to the CSP and that it is not a safe environment for a gay male."
59. On March 27, 2013, Complainant's counsel requested an extension of time to March 29, 2013 to respond to the reinstatement offers. Respondent's attorney responded by email but did not extend the deadline.
60. The parties then exchanged emails accusing the other of not asking clear questions and not answering questions posed.

Offer of Employment in Hawaii

61. In late 2012, the owner of Kona Irrigation, in Hawaii, a former employer, contacted Complainant to see if he would accept his old job back. Complainant had worked there from 1980 to 1984 as a Service Technician and Warehouse Manager, overseeing the supply of irrigation systems for hotels, golf courses. Complainant had earned \$30,000 when he left in 1984.

62. Complainant had remained friends with the owner of Kona Irrigation since his departure in 1984. He took the offer seriously.

April 2, 2013 Counteroffer of Trooper position without polygraph exam

63. On April 2, 2013, Complainant's attorney emailed counsel for Respondent stating he was providing his client's final response to the offer. He stated in part:
- "My client will not subject himself again to a CSP background investigation and polygraph. He will agree to a background investigation, without a polygraph, if he can be assured that he will be assigned as a Trooper to the Craig area.
 - With respect to the DPS General Professional IV position, you have indicated the position has not yet been determined or created. I note again that my client's education, experience and skills do not line up with the job description for a General Professional IV. However, my client is prepared to accept the offer under the following conditions: attorney fees and costs paid by April 12, 2013; salary and benefits from December 20, 2012 through April 30, 2013 paid by April 12, 2013; and, by April 12, Respondent "will identify the exact position, job requirements and job responsibilities, in great detail, so that my client and I can make an educated decision concerning whether the position is appropriate for him given his education, experience and skills, and whether the work environment will be free of hostility and animosity."
64. The April 2, 2013 email also advised Respondent that Complainant had been offered a job in Hawaii that pays substantially less than the CSP position and needed to inform this prospective employer by April 15, 2013 at the latest. Counsel stated, "if we can identify and place Mr. Williams in a position in either the CSP, as detailed above, or with the DPS under appropriate and acceptable conditions, on or before April 12, 2013, then Mr. Williams will accept employment with either the CSP or the DPS and lose his opportunity to work for this prospective employer in Hawaii. Please get back to me at your very earliest opportunity."
65. Respondent had discretion to exempt Complainant from the background and polygraph exam for the Trooper position. It also could have used Complainant's two passing scores from the Brighton, Colorado Police Department lie detector test as a substitute for its own polygraph test. Respondent did not offer Complainant reinstatement as a Trooper without the polygraph test.
66. On April 5, 2013, Complainant's counsel emailed Respondent's attorney to ask if she had received his April 2 email. She responded by stating Complainant had been given two weeks to accept the offer; the deadline had passed; and the offer was never subject to negotiation. She asked if Complainant was requesting a reconsideration of the deadline.
67. After further email exchanges, on April 9, 2013, Respondent's counsel stated, "I think my client will have a response by April 15, but "I also do not think a PDQ for GP IV can be drafted and approved by April 15th."

April 10, 2013 Rejection of Counteroffer and Offer of GP IV Hazardous Materials Position

68. On April 10, 2013, Complainant's attorney emailed Respondent's attorney reiterating he "needs to know what the job is, his duties and responsibilities, and whether it is suitable for him based on his education, employment experience and skills." He stated he needed to have a written Position Description by April 12 in order to review it and make a decision in advance of the April 15 deadline on his other job offer.
69. On April 10, 2013, Respondent through counsel sent a letter to Complainant's counsel reopening the offers of reinstatement and providing detail, as follows:
- The GP IV position would "provide program support for Rules and Regulations Concerning the Permitting, Routing & Transportation of Hazardous and Nuclear Materials and the Intrastate Transportation of Agricultural Products in the State of Colorado; Rules and Regulations Concerning Minimum Standards for the Operation of Commercial Vehicles; Rules and Regulations for Claims for Reimbursement for the Costs of Handling Hazardous Substance Incidents; and Port of Entry Rules for Commercial Motor Carrier Size, Weight and Clearance. The position would involve research and analysis of federal law, developing recommendations for the adoption of more efficient processes, and interacting with stakeholders and attending stakeholder meetings. This position would report to Major Mark Savage and soon-to-be Captain Rocco Domenico."
 - The position was ready to be immediately filled and was to be part of the LEAN process at DPS, making recommendations on streamlining of the entire department's rulemaking process;
 - Interim Chief Scott Hernandez was available to meet with Complainant on April 11 or 12 to answer questions about the position or any transition concerns. The meeting would not include attorneys.
70. With regard to the offer to meet with Chief Hernandez without attorneys present, Complainant did not believe that it was in his best interest to have a meeting without attorneys present because his statements could be misconstrued and somehow used against him. He did not trust Chief Hernandez because of his central role in rejecting Complainant for reinstatement.
71. Complainant believed that the only reason the Patrol would not agree to waive the background and polygraph exam for the Trooper position was because the Patrol did not intend to pass him.
72. At hearing, Chief Hernandez confirmed that the offer to reinstate as a Trooper was a conditional job offer pending passage of the background and polygraph exam.
73. At hearing, Chief Hernandez was asked if Complainant disclosed again during the pretest interview portion of the polygraph examination that he inadvertently viewed child pornography and had engaged in sex after a massage in Thailand, would those same admissions lead to an unsuccessful result.
74. Chief Hernandez testified, "I don't know, I would want more follow up. . . . There would be more information exchanged about the dynamics of what occurred. And probably

more discussion about. . . I would hope they would have more discussion about exactly what occurred, the dynamics in the transaction in Thailand, as far as referencing the legality of or illegality and prostitution in Thailand and what that exchange actually meant, and things like that. So I think there would need to be more information exchanged in that context.”

75. The GP IV hazardous materials rulemaking position had recently been vacated by an attorney. This attorney has a law degree from Georgetown University Law School, worked for the FBI for over 25 years, including in the Legal Counsel’s office, and believed that his law degree was essential to performing the rulemaking position.
76. No one at the Patrol consulted either this attorney or the DPS Human Resources Director prior to offering the GP IV position to Complainant.
77. Complainant had no relevant background, experience, education, or training in hazardous materials or rulemaking. He believed he was not qualified for the position.
78. Complainant was also extremely concerned about the newly defined GP IV position because he would be in the Patrol instead of the Department of Public Safety, reporting directly to and working for uniformed troopers. Based on his hostile treatment by the Patrol over the previous three years, including being shunned by troopers, being accused of criminal acts, and being the subject of false rumors, Complainant believed he would not be safe returning to the Patrol. He would be intimidated to work at the Patrol under the direct supervision of armed officers.
79. Complainant considered his experience at Micromotion, wherein he had an inside contact that assisted in helping him get through three phases of interviews. Complainant believed that CSP leaders had poisoned the well for him outside of CSP, and that therefore CSP leaders were still hostile to him.
80. Complainant did not accept either offer of reinstatement based in part on his experience over the last three years of negative and hostile treatment. After three years of the Patrol doing everything in their power to keep him out of the organization, he had a hard time believing he would be welcomed back. Complainant took offense at the statements in the letter stating he had admitted to viewing child pornography and paying for sex, and informing him he would be subject to random drug tests. Complainant has never taken drugs and the Patrol has no reason to believe he might take drugs.

Acceptance of Job Offer in Hawaii

81. Complainant believed he would not find suitable employment in Colorado or Nevada. He accepted the offer from Kona Irrigation.

Back Pay, June 2010 – December 20, 2012

82. The annual salary for senior State Patrol Troopers in 2010, 2011, and 2012 was \$71,040 (no salary increases occurred during that time). The value of employee benefits was 24.26% of pay excluding paid holidays and sick leave, and 32% of pay including paid holidays and sick leave. Employee benefits for Troopers include: dental, medical, disability, and life insurance; paid holidays, vacation and sick leave; a monthly uniform allowance; employer contributions to PERA; and use of a patrol car for commuting.

92. Complainant plans to work at the irrigation company until retirement at age 67, when he will collect Social Security.
93. Hawaii does not accept Colorado's POST certification and has its own procedure for becoming a law enforcement officer. Law enforcement positions in Hawaii pay far less than in the contiguous United States.
94. Complainant plans to inquire about pursuing the Hawaii County Reserve Police Officer Academy.
95. The cost of living on the Kona coast of Hawaii is 16.5% higher than in Denver.
96. No evidence was submitted regarding Complainant's potential to obtain employment as a pilot or what a helicopter pilot might reasonably expect to earn.
97. Complainant's economics expert was Jane Lillydahl, Professor of Economics at the University of Colorado, Boulder. Dr. Lillydahl was credible and her calculations were mathematically and economically sound.
98. Dr. Lillydahl's report is attached to this decision as Exhibit 1 for reference purposes. Dr. Lillydahl's calculations were generally conservative. Dr. Lillydahl did not impute any promotions for Complainant at the Patrol over the remainder of his career there in forecasting future earnings losses. She imputed no future overtime wages to Complainant at the Patrol, despite the fact that he always had overtime earnings.
99. Exhibit 1, Table 3, "Brett Williams' Future Economic Losses," calculates Complainant's future economic losses from December 21, 2012 through 2034, a 22-year period, through age 67. This table calculates the present value of future earnings at the Patrol as a Trooper and at Kona Irrigation. Then, it subtracts the Kona earnings from what Complainant would have earned as a Trooper, and presents the results in present value.
100. In calculating the present value of future lost wages, Dr. Lillydahl used the most conservative rate possible, 3.5 percent, which is the long term government bond discount rate. She assumed a 2 percent annual increase in wages at both Kona Irrigation and at the Patrol, resulting in a net discount rate of 1.5 percent to convert future losses to present value terms.
101. In Table 3, Dr. Lillydahl adjusted for the 16.5 percent higher cost of living in Kona Hawaii by increasing the Patrol annual salary by 16.5 percent. She used 24.3 percent of salary for benefits in the Trooper position (thereby excluding paid leave) and 17% of salary for benefits in the irrigation position.
102. Dr. Lillydahl used age 67 as the retirement age for Complainant based on his intent to work at Kona Irrigation until he can receive Social Security, not on his presumed retirement age at the Patrol.
103. State contributions to PERA are 13.85 percent of base salary for civilian state employees and 16.5 percent of base salary for uniformed Troopers. Troopers also contribute 10 percent of their base salary to PERA; civilian state employees contribute 8 percent.

104. The higher levels of retirement contribution for Troopers enables them to retire earlier, with fewer years of service, than civilian state employees who typically work for thirty years. Complainant was thirty when he commenced employment at the Patrol and it is reasonable to assume he would have worked for twenty-five years until age 55, in 2023.
105. When Complainant reaches the age of 55 in 2023, at which time he would presumably have retired from the Patrol, he will have lost \$595,526, which is the net present value of his future lost earnings.

DISCUSSION

This case was brought under the Colorado Anti-Discrimination Act (CADA). The State Personnel Board (Board) exercises jurisdiction over CADA claims pursuant to its organic act at C.R.S. § 24-50-125.3. State Personnel Board Rule 9-4, 4 CCR 801, provides that "[s]tandards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

Relief authorized under the CADA includes: orders requiring the employer to cease and desist from the discriminatory practice or conduct; orders requiring the employer to take action regarding hiring, reinstating, or upgrading of employees, with or without back pay, orders concerning on-the-job training programs, the posting of notices, the making of reports regarding compliance with the Act, etc. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1174 (Colo. 2000); § 24-34-405; Board Rule 9-6, 4 CCR 801. The CADA expands the remedies otherwise available to the Board, including front pay. *Ward v. Department of Natural Resources*, 216 P.3d 84, 96-97 (Colo.App. 2008).

Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984). Back pay and front pay are equitable remedies. *Whittington v. Nordam Group Inc.*, 429 F.3d at 1000; *City of Colorado Springs*, 993 P.2d at 1175.

The equitable "purpose of placing a person in the wage and employment position they would have been in but for the discriminatory conduct is to make the person 'whole' in the employment setting." *City of Colorado Springs*, 993 P.2d at 1175, citing *Albemarle Paper v. Moody*, 422 U.S. 405, 418-19 (1975). A Board remedy must make the employee whole only and may not result in a windfall. *Donahue*, 690 P.2d at 250; *Whittington v. Nordam Group Inc.*, 429 F.3d at 1000-1001 (front pay "is set in the court's discretion as a substitute for restitution when it is necessary to make the plaintiff whole" but it "must avoid granting the plaintiff a windfall").

Front pay is a substitute for reinstatement. *Pollard v. E.I. Du Pont De Nemours & Co.*, 532 U.S. 843, 850 (2001). An order of front pay in lieu of reinstatement simply adds front pay to the back pay to which a successful discrimination plaintiff is entitled as part of make whole relief. *Id.*; *Whittington v. Nordam Group Inc.*, 429 F.3d 986 (10th Cir. 2005); *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo.App. 2003). Back pay is determined by measuring the difference between a plaintiff's actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo.App. 2003). Front pay can be awarded for compensation that will be lost from the judgment date until

reinstatement or, in lieu of reinstatement, until the plaintiff's earning capacity has fully recovered from the effects of discrimination. *Id.*, citing *Pollard*.

A. Complainant is entitled to back pay and front pay

Respondent asserts that Complainant is not entitled to back pay because it is separate from front pay and that the addition of compensatory damages to the remedies available under the Civil Rights Act of 1964 somehow vitiates back pay as a remedy. However, the addition of compensatory damages to Title VII does not eliminate the preexisting equitable remedies under that Act. Nor does it have any bearing on the CADA, which until July of this year contained no compensatory damages provision.¹ Respondent relies on *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236-1237 (10th Cir. 2000), a sexual harassment case in which plaintiffs received compensatory damages for the harassment, but no back pay or front pay because of their failure to prevail on their constructive discharge claims. In rejecting the plaintiffs' request for equitable remedies, the Tenth Circuit noted, "Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary form of monetary relief available was backpay . . . [which] is a 'make-whole' remedy that resembles compensatory damages in some respects. However, the new compensatory damages provision of the 1991 Act is 'in addition to' and does not replace or duplicate, the backpay remedy allowed under the prior law." *Id.* at 1236.

Similarly, in *Black v. Waterman*, 83 P.3d at 1133, where a plaintiff prevailed on her sexual harassment claim, the Colorado Court of Appeals found it was reversible error for the trial court to deny equitable remedies of back pay and front pay based on the jury's failure to award compensatory damages. It stated, "Back pay and front pay preexisted compensatory damages, which constitute an additional form of relief." *Id.*

Courts indulge a strong presumption that a plaintiff who has proved discrimination is entitled to back pay to the date of judgment. *Id.* If the trial court declines to award back pay or front pay, it must "carefully articulate its reasons." *Id.* at 1134 (federal citations omitted). Respondent provides no authority, state or federal, and no reasons, to bar Complainant from receiving the make whole relief to which he is entitled under the CADA and additional controlling authorities recited above.

B. Respondent's offers of reinstatement do not toll the award of front pay

I. Complainant has a duty to mitigate damages.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982), the U.S. Supreme Court held that when a claimant rejects an offer of reinstatement to the job he or she originally sought, as supplemented by a right to full court-ordered compensation, then, "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." *Id.* An employee's obligation to accept an offer of reinstatement is based on the general rule that a discharged employee must mitigate damages by using "reasonable diligence in finding other suitable employment." *Id.* at 231; *Graefenhain v. Pabst Brewing Company*, 870 F.2d 1198, 1202 (7th Cir. 1989). This rule, commonly referred to as the Ford Motor rule, applies equally to mitigation of front pay damages. *Id.*

¹ On May 6, 2013, Colorado Governor John Hickenlooper signed HB 13-1135 into law, creating new remedies available under CADA.

II. The GP IV position was not substantially equivalent to the Trooper position.

The Ford Motor rule applies only when the former employee refuses a job “substantially equivalent” to the one he was denied. *Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986). In *Ford*, the employee rejected an offer of reinstatement to the exact same position he had been denied. The requirement of substantial equivalence is consistent with the general doctrine of mitigation of damages, under which the employee “need not go into another line of work, accept a demotion, or take a demeaning position.” *Ford*, 458 U.S. at 231; *Graefenhain*, 870 F.2d at 1202. Thus, an employee “need not seek employment which is not consonant with his particular skills, background, and experience or which involves conditions that are substantially more onerous than his previous position.” *Ford*, 458 U.S. at 231 n. 16; *Graefenhain*, 870 F.2d at 1202. An offer of reinstatement tolls the accrual of damages only if it affords the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. *Id.* at 1202-03.

The GP IV hazardous materials rulemaking position offered to Complainant was a civilian position of a legal and policy nature involving no law enforcement duties and requiring no POST certification. The position had no relation to Complainant’s skills, background, and experience. It was “another line of work.” *Ford*, 458 U.S. at 231; *Graefenhain*, 870 F.2d at 1202. The working conditions of a state Trooper and those of a hazardous materials rulemaking administrator for a state agency are different. Therefore, the GP IV position was not substantially equivalent to the Trooper position sought by Complainant. This offer of reinstatement did not trigger the Ford Motor rule and does not toll the accrual of Respondent’s front pay liability.

III. The Trooper position with background investigation and polygraph exam was not an unconditional offer.

Offers of reinstatement must also be unconditional in order to toll employer liability. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989). In *Toledo*, the employer made a conditional offer of reinstatement contingent on the plaintiff dropping his claim and passing a polygraph test and physical examination. “Because the offer was not unconditional, the district court erred in concluding that Nobel could potentially be liable for backpay covering only the four-month period before the offer. Moreover, a rejected offer of reinstatement does not end ongoing backpay liability if the claimant’s rejection of the offer was reasonable given the form of the offer and the circumstances surrounding it.” *Id.* The Tenth Circuit cited several other cases barring application of the Ford Motor rule based on conditional offers of reinstatement, including *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983), *cert denied*, 464 U.S. 992 (1983).

In *Orzel*, the former assistant fire chief prevailed on an age discrimination claim based on his forced retirement at the age of 55. The City offered reinstatement to his former position if he took and passed a physical exam. The plaintiff rejected the offer based on his belief the City considered him physically unfit for the position. “At the time the conditional offer of reinstatement was made, the City had not yet agreed to stipulate that Orzel was physically capable of performing all firefighting duties.” *Id.* at 757. Based on the conditional nature of the offer of reinstatement and Orzel’s reasonable concern he would therefore never actually be reinstated, the Seventh Circuit Court of Appeals rejected application of the Ford Motor rule and refused to toll front pay.

Respondent's offer to reinstate Complainant as a Trooper was conditional. If Complainant took and passed the background investigation and polygraph exam, then he would be reinstated to a Trooper position. An invitation to apply for a position is not an unconditional offer of employment. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859 (11th Cir. 1986)(and cases cited therein). Chief Hernandez testified at hearing that the offer to reinstate Complainant as a Trooper was conditional, contingent on his passage of the background investigation and polygraph exam. It is undisputed that if Complainant failed the background investigation or polygraph exam, he would not have been reinstated as a Trooper.

Significantly, Complainant gave Respondent the opportunity to cure this deficiency by removing the requirement of the polygraph. On April 2, 2013, Complainant countered the offer to reinstate as a Trooper with the background investigation, but without the polygraph exam. Respondent refused to remove this condition from the offer.

Respondent's refusal to remove the polygraph exam as a condition of reinstatement as a Trooper defeats its invocation of the Ford Motor rule.

IV. Complainant's rejection of the Trooper position with the polygraph requirement was reasonable.

A plaintiff's unreasonable rejection of an unconditional offer of reinstatement will cut off an employer's liability for damages as of the date the offer is rejected or expires. *Ford Motor Company*, 458 U.S. at 230-32; *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004). The reasonableness of the rejection must be examined in light of the circumstances surrounding the offer and refusal. *Id.*; *Graefenhain*, 870 F.2d at 1202-03 (7th Cir. 1989). Rejection of a reinstatement offer solely for personal reasons will not avoid the rule set down in *Ford. Id.*

Much like the involuntarily retired employee in *Orzel*, Complainant had a legitimate reason to question Respondent's motives in requiring him to retake the polygraph exam as a condition of reinstatement as a Trooper. First, the Patrol had premised its denial of reinstatement on the previous, deeply flawed polygraph exam. Second, the Patrol had knowingly violated its polygraph regulations and industry standards in administering that exam to Complainant and basing its denial decision exclusively on the test results. Third, Respondent had hired similarly situated applicants with a significant reaction or deception indicated, demonstrating its denial to be a pretext for discrimination against Complainant based on his sexual orientation. Complainant had no reason to believe that the Patrol would not make another pretextual decision based on a second polygraph. Fourth, in spite of its discretion to forego the polygraph, the Patrol refused to exempt Complainant from repeating the ordeal.

Notably, Respondent stated in one of its letters to Complainant that his "prior admissions" would be excluded from the second background investigation and polygraph exam. Complainant responded by seeking clarification and confirmation of this statement. Respondent never followed up on Complainant's request. At hearing, it was clear that Complainant did not believe Respondent would avoid those issues in a second polygraph exam.

Interim Chief Hernandez's testimony at this hearing confirmed that Complainant's fears were justified. With regard to the second polygraph exam, he testified, "I would want more follow up. . . There would be more information exchanged about the dynamics of what occurred. And probably more discussion about ...I would hope they would have more discussion about exactly what occurred, the dynamics in the transaction in Thailand, as far as referencing the

legality of or illegality and prostitution in Thailand and what that exchange actually meant, and things like that. So I think there would need to be more information exchanged in that context.”

These shifting sands evince Respondent’s enduring ambivalence about reinstating Complainant. And, they confirm the reasonableness of his counteroffer to accept reinstatement without the polygraph exam. Complainant’s counter was well grounded in the Ford Motor rule requiring an unconditional offer of reinstatement upon which Complainant could reasonably rely. Accordingly, Complainant’s front pay damages are not tolled by Respondent’s offer of reinstatement as a Trooper with a polygraph exam.

C. Calculation of Damages

I. Back pay award

Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. *Department of Health v. Donahue*, 690 P.2d at 250. Such remedy must make the employee whole only and may not result in a windfall. *Id.* Back pay is determined by measuring the difference between a plaintiff’s actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d at 1133; *Bonidy v. Vail Valley Center for Aesthetic Dentistry, P.C.*, 232 P.3d 277 (Colo.App. 2010). Unemployment compensation received during this period of time is also offset. *Donahue*, 690 P.2d at 250. The statutory rate of interest under § 5-12-201, C.R.S., applies to awards of back pay in cases before the Board. *Rodgers v. Colo. Dept. of Human Svcs*, 39 P.3d 1232, 1237 (Colo.App. 2001). Therefore, Complainant is entitled to eight percent interest per annum on his back pay damages.

But for the discriminatory denial of Complainant’s reinstatement, he would have earned salary and benefits of \$222,246 as a Trooper between June 15, 2010 and December 20, 2012. Complainant earned salary, benefits, and unemployment insurance payments totaling \$62,881 during this period. The difference between these amounts is \$159,365.

Complainant also requests to also be reimbursed for the \$16,070 penalty he incurred in making an early withdrawal of his retirement funds. However, Complainant made the decision to withdraw the funds when he resigned from the Patrol and prior to applying for reinstatement. The purpose of withdrawing the funds was to support him while he attended helicopter flight training school. Respondent therefore had no role in his decision to incur the early withdrawal penalty.

Complainant testified at hearing that if he had been reinstated to the Patrol in June 2010, he would have been able to return the entire amount withdrawn from PERA, over \$100,000, and would then have been reimbursed for the early withdrawal penalty. There is no evidence in the record of when Complainant spent the PERA funds, how much of those funds were left in June 2010, or his ability to repay them at that time.

This record is insufficient to find that but for Respondent’s discriminatory denial of reinstatement, Complainant would not have incurred the early withdrawal penalty. Therefore, his request to be reimbursed for this expense as part of make whole relief is denied.

Once a plaintiff has established a violation of the antidiscrimination laws and presented evidence on damages, the employer has the burden of showing that he or she did not exercise diligence in attempting to find alternative employment. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d at

1493. Respondent argues that Complainant did not exercise the requisite diligence in attempting to find alternative employment. It asserts that he should have applied for law enforcement positions in other states that accept his Colorado POST certification, especially in those small communities that cannot afford to certify police officers. Complainant is not required to move to a small town in another state where he has no personal or professional connections in order to mitigate damages. See *McInnis v. Fairfield Comm., Inc.*, 458 F.3d 1129 (10th Cir. 2006)(using plaintiff's rural town as appropriate geographic range for seeking comparable employment).

Complainant assiduously applied for dozens of comparable law enforcement and managerial positions. And, he went beyond the requisite duty to mitigate his damages by seeking employment not consonant with his particular skills, background, and experience, many of which involved conditions substantially more onerous than his previous position. *Ford*, 458 U.S. at 231 n. 16; *Graefenhain*, 870 F.2d at 1202. Complainant has met his duty to mitigate damages.

Complainant is therefore awarded back pay in the amount of \$159,365, plus interest compounded annually at eight percent of \$13,377, totaling \$172,742.

II. Front Pay Award

Determining a front pay award requires the court to predict future events and consider many complicated and interlocking factors. Such orders are reviewed for an abuse of discretion. That discretion, however, should be measured against an anti-discrimination statute's purpose to make the plaintiffs "whole". *Davoll v. Webb*, 194 F.3d 1116, 1143 (10th Cir. 1999).

Front pay is generally calculated by determining the estimated present value of lost earnings that are reasonably likely to accumulate between the date of judgment and the time when the plaintiff would no longer suffer economic losses from the discrimination. *Id.* Several factors are relevant in assessing front pay, including work life expectancy, salary and benefits at the time of termination [here, failure to reinstate], any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which the plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value. *Id.*; *Whittington*, 429 F.3d at 1000-01. A front pay award should reflect the individualized circumstances of the plaintiff and the employer. *Davoll*, 194 F.3d at 1144.

A front pay award must specify an end date and take into account any amounts that the plaintiff could earn using reasonable efforts. *Id.* Although the cut-off date is within the court's discretion, that determination "must be based on 'more than mere guesswork'". *Id.* *Davoll v. Webb*, 194 F.3d 1116, 1143 (10th Cir. 1999).

In *Davoll*, *supra*, the Tenth Circuit reversed a two-year award of front pay for police officers injured on the job and forced to retire who had prevailed on disability discrimination claims. The undisputed evidence at trial demonstrated that plaintiffs made less than 50% of their former salaries that exceeded \$50,000 as police officers. The district court limited front pay to two years to "allow each a reasonable period of time to find comparable employment," without any further explanation. Finding that "the record does not appear to support that assessment," the Tenth Circuit reversed and remanded, emphasizing, "the purpose of front pay

is to make each plaintiff whole, the district court must look at the individualized circumstance of each plaintiff.” In its remand, it instructed the district court “to articulate the specific bases for the end date for each plaintiff, taking into consideration the factors” outlined in its opinion. *Id.* at 1145.

It is reversible error for the trial court to deny front pay to a prevailing plaintiff when he or she has no prospects of securing alternate comparable employment. *McInnis*, 458 F.3d at 1146. In *McInnis*, the harassment and retaliation were such that it would be “devastating to the plaintiff to be reinstated,” and plaintiff’s vocational expert testified that she had “absolutely no prospects of attaining a pay level equivalent to the pay she received at Fairfield. Fairfield is the largest resort in the Pagosa Springs area, and the job market in the area is very limited. As a result, the record indicates that McInnis will be adversely affected by the termination of her employment with Fairfield.” *Id.* at 1145. The Tenth Circuit therefore reversed the denial of front pay and remanded for a determination of the proper reward. See also *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1180 (10th Cir. 2003)(abuse of discretion for trial court not to award front pay at salary level plaintiff would have held but for discriminatory and retaliatory demotions).

Prevailing plaintiffs with a higher education often receive shorter terms of, or no, front pay. See *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1256-59 (2nd Cir. 1987)(two years of front pay sufficient for plaintiff with a master’s and law degree); *Dotson v. Pfizer, Incorporated*, 558 F.3d 284, 300 (4th Cir. 2009)(upholding denial of front pay to highly educated plaintiff who had secured employment at a \$170,000 salary as unduly speculative).

Conversely, the lack of a college education is recognized as making it extremely difficult for plaintiffs to obtain a comparable salary in other positions, thereby justifying lengthy front pay awards. In *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 356 (1st Cir. 1998), “Both experts agreed that, without a college education, it would have been extremely difficult for Kelley to obtain a comparable salary.” The court affirmed front pay for a manager in his forties who prevailed on his age discrimination claim, into his sixties.

Long periods of front pay through the age of retirement have been upheld in special circumstances. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2nd Cir. 1992), *cert denied*, 506 U.S. 826 (1992)(upholding front pay for 17 years until retirement age); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (9th Cir. 2000)(prevailing gender discrimination plaintiff, a 43-year old successful sales manager deprived of promotional opportunities over remainder of her career, received award of front pay at promotional pay level for 22 years; jury award upheld).

Negative publicity, and employer interference with the former employee’s ability to find new suitable employment, also justify a longer duration of front pay. *Warren v. County Commission of Lawrence County, Alabama*, 826 F.Supp.2d 1299, 1316-1316 (N.D. Ala. 2011). In *Warren*, the prevailing claimant, who had held an administrative position with the county government, made a diligent effort to mitigate her damages by immediately attempting to secure other employment. After the plaintiff started in a new position at a bank, the Commission informed the bank it viewed the situation as a conflict of interest because the Commission had several accounts at the bank; the bank promptly fired the plaintiff. The district court concluded that the retaliatory actions of the Commission, coupled with the negative publicity from the trial, proved that it was “virtually impossible for Ms. Warren to find comparable local employment.” *Id.* at 1317. The unique nature of the small town in which she resided also complicated her

ability to restore herself to a comparable position. Therefore, front pay of 32 years was awarded.

On the other hand, the balance of authority suggests that courts disfavor lifetime front pay awards for plaintiffs in their forties. *Payton v. DiMario*, 287 F.3d 1121, 1129-30 (D.C.Cir. 2002)(lifetime front pay overturned as abuse of discretion). Front pay has been held to be temporary in nature, and an automatic presumption that a plaintiff will remain in an alternate, low-paying job for a full career can result in an unwarranted windfall. *Id.*

A. The period of time Complainant would have worked for the Patrol but for his wrongful denial of reinstatement

Complainant is 45 years old; he was thirty when he started working for the Patrol; he worked as a Trooper for twelve years before resigning. Complainant testified that he planned to work for Kona Irrigation for twenty-two years, until he turns 67, because that is when he would be able to collect Social Security. However, it does not necessarily follow that Complainant would have continued to work at the Patrol for another 22 years, until age 67.

No evidence was submitted at hearing by either party regarding either the typical length of employment for a Trooper, or the typical retirement age for a Trooper. However, the evidence does demonstrate that due to higher monthly contributions to the PERA accounts of Troopers, they can retire earlier than civilian state employees. Therefore, it is reasonable to infer based on the evidence that a typical Trooper retires after twenty-five years of service.

Complainant is in perfect health. The record demonstrates that Complainant was highly dedicated to the Patrol, enjoyed a stellar career there, and that after departing from the organization in February 2010, he very soon came to regret it. At the time Complainant resigned, he believed he maintained an automatic right to reinstatement which made the decision to leave easier. The position of Trooper is a uniquely secure one, because it is a classified position in the state personnel system. Therefore, had Complainant been reinstated he would have enjoyed maximum job security.

Assuming Complainant would have worked as a Trooper for twenty-five years, he would have had an additional thirteen years left upon reinstatement in June 2010. That would take him through age 55 in 2023.

It is also noted that when Complainant applied for reinstatement, he planned to continue to pursue his helicopter flight training. It is therefore possible that had he eventually secured a position as a helicopter pilot, he may have accepted it. This fact also militates against imputing a career at the Patrol through age 67.²

² Additionally, Complainant made a unilateral decision in March or April 2010 to use twelve years of service credit in withdrawing his retirement funds to become a helicopter pilot. Respondent had no involvement in that decision. It would be unfair and constitute a windfall to Complainant if Respondent were held responsible for Complainant's decision to exhaust his service credit at the time of resignation. Mitigating against this consideration, however, is the fact that Complainant planned to pay back as much of his retirement funds as possible upon reinstatement. Complainant received no income for a four-month period in the spring of 2010. He also incurred the expense of helicopter flight training school. It is reasonable to assume he would have spent at least a half of the net amount of \$100,000 from the PERA withdrawal. Unfortunately, no evidence was proffered at hearing on the issue of how much, if any, service credit Complainant could have salvaged had he been reinstated in June 2010.

Assuming Complainant would have had a twenty-five-year career at the Patrol, it is concluded that Complainant would have worked as a Trooper for an additional 13 years, through the year 2023.

B. The earnings Complainant can reasonably expect to make from a new employer

Turning to the reasonable availability of other work opportunities, and the period within which Complainant may become re-employed with reasonable efforts, the individualized circumstances of Complainant and the Patrol must be considered. *Davoll*, 194 F.3d at 1144. Complainant's employment history is unique because it has been limited primarily to law enforcement. Since the denial of reinstatement in June 2010, Complainant attempted to secure other positions in law enforcement in Colorado, but those efforts were unsuccessful. There is ample reason to conclude that Respondent's conduct in responding to at least one and probably several inquiries for references, contributed to Complainant's inability to secure appropriate alternate law enforcement positions. In denying Complainant's application for reinstatement, Respondent refused to meet with Complainant in person; members of the Patrol spread rumors about Complainant as a child molester; former Patrol associates generally shunned him; and individuals at the Patrol interfered with Complainant's favorable job prospects at Micromotion.

In addition, once the Initial Decision received publicity in July 2012, Complainant became essentially unemployable in law enforcement. Because of his litigation of this case and his sexual orientation, Complainant will likely be regarded by prospective law enforcement employers as an individual who is potentially litigious and may pose internal personnel disruptions.³

Complainant has made diligent efforts to become appropriately re-employed in managerial and other non-law enforcement positions for three years. Unfortunately, those efforts have not borne fruit. Again, it is highly likely that the publicity surrounding this case will make it extremely difficult because he will be perceived as litigious.

The only success Complainant has had in becoming employed on a long-term basis is in securing the position in Hawaii. This position was not conditional and Complainant has every reason to trust the motives and good faith of his employer there. Complainant's decision to accept this position was reasonable and necessary in view of his circumstances in Colorado, including the Patrol's refusal to offer reinstatement as a Trooper on an unconditional basis.

It is unlikely that the adverse affects of the discrimination and resulting litigation will end in the foreseeable future. Complainant is now forty-five years old and the older he gets the less employable in law enforcement he becomes. By the time he is fifty it is questionable whether Complainant will be ever be employable in law enforcement.

Complainant's high school education will severely limit Complainant's future prospects of higher-paying employment outside law enforcement. It is noted that Complainant's proven track record as a trusted leader and effective manager may open new doors in Hawaii. It may be

³ In fact, the record in this case illustrates that this assumption would be erroneous: Complainant has demonstrated strong interpersonal skills and has avoided conflict during his career.

possible through future contacts developed there, and the future reference of his employer at Kona Irrigation, to leverage that position into a better managerial one. However, to assume that Complainant will be able to secure better employment without an advanced degree is too speculative.

In summary, Complainant will suffer the future effects of Respondent's discriminatory actions for the foreseeable future and he is unlikely to ever obtain employment at a pay level higher than Kona Irrigation because of his high school level education. Complainant's position at Kona Irrigation is at exactly the national average for a male with a high school education. There is no certainty that as he ages, Complainant will ever be able to secure higher paying employment in Hawaii.

In order to assure that Complainant is made whole, it will be necessary for him to receive the difference between his Kona Irrigation position and the Trooper position for the length of time he would have remained as a Trooper at the Patrol, which is thirteen years.

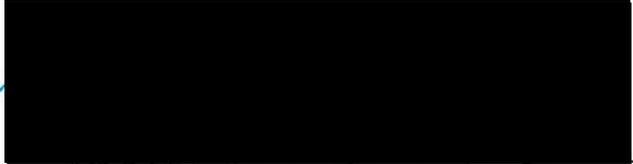
There is no dispute regarding the salary and benefits Complainant would have earned as a Trooper at the time reinstatement was denied. Dr. Lillydahl assumed no overtime or increase in salary through regular promotions. Dr. Lillydahl also used an appropriate method to discount the front pay award to net present value, using the 3.5 long term government bond discount rate and subtracting a 2% cost of living adjustment (for both positions).

Accordingly, Complainant is awarded thirteen years of front pay of \$595,526.

ORDER

Complainant is awarded back pay of \$172,742 and front pay of \$595,526, for a total of \$768,268.

Dated this 29 day
of August, 2013.



Mary McClatchey
Senior Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202-3604

CERTIFICATE OF MAILING

This is to certify that on the 29th day of Aug., 2013, I electronically served a true copy of the foregoing **AMENDED ORDER AWARDING BACK PAY AND FRONT PAY**, as follows:

Keith A. Shandalow Esq.

[REDACTED]

[REDACTED]

Stacy Worthington
Diane Marie Dash, S.A.A.G.

[REDACTED]

Diane.Dash@state.co.us

[REDACTED]

[REDACTED]

Andrea Woods