

**AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**PAMELA HOUSTON,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS, ARKANSAS VALLEY CORRECTIONAL FACILITY,**

Respondent.

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Administrative Law Judge Denise DeForest held the hearing in this matter on September 9 and 10, 2008, at the State Personnel Board, 633 - 17<sup>th</sup> Street, Courtroom 6, and September 17, 2008 in Courtroom 2 at the same building in Denver, Colorado. The record was closed by written order as of November 4, 2008, after the filing of Respondent's written Closing Argument Reply. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Warden Michael Arellano, the appointing authority. Complainant appeared and was represented by Jennifer Robinson, Esq.

**MATTER APPEALED**

Complainant, Pamela Houston ("Complainant"), appeals her termination by Respondent, Department of Corrections, Arkansas Valley Correctional Facility ("Respondent" or "AVCF"). Complainant seeks reinstatement, backpay and benefits, and an award of attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

**ISSUES**

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant was first employed by the Colorado Department of Corrections ("DOC") in June of 2000 as a Correctional Officer I. (Stipulated Fact) Complainant completed training at the DOC training academy. During her training, she learned of the requirements in DOC's Code of Conduct regulation, Administrative Regulation ("AR") 1450-01, including the prohibition against association with offenders and some former offenders. Complainant was assigned to the Arkansas Valley Correctional Center ("AVCF") after she completed the training academy. (Stipulated Fact)
2. Complainant was promoted to Correctional Officer II (Sergeant) on or about May 15, 2005. In June of 2005, Complainant transferred to the Fremont Correctional Facility ("FCF"). (Stipulated Facts)
3. Complainant transferred back to AVCF as of September 1, 2007, and promoted to Case Manager I on September 15, 2007. (Stipulated Facts) The position of Case Manager I is at a Correctional Officer III (Lieutenant) level within DOC. Complainant's duties as a case manager included assisting inmates with the creation of pre-parole plans, assisting with inmate education, assisting inmates with issues and concerns, and placing calls on behalf of inmates.
4. Complainant's performance evaluations for all of her annual reviews at DOC demonstrate that her work has been at least satisfactory, and at times commendable. Complainant had not been subject to any corrective or disciplinary actions during her employment at DOC until her employment was terminated in 2008.
5. At the time of the termination of Complainant's employment, Complainant was a certified employee of the state. (Stipulated Fact)

### **DOC's Policy Prohibiting Social Contacts with Offenders and Former Offenders**

6. In AR 1450-01, DOC prohibits its staff from maintaining social, emotional, and other types of associations with individuals who are under the jurisdiction of the criminal justice system. This prohibition is extended to also prohibit the same types of associations with certain former offenders.
7. AR 1450-01, subsection IV(D) imposes the following prohibition on staff conduct:

DOC employees, contract workers, and volunteers may not knowingly maintain social, emotional, sexual, business, or financial associations with current offenders, former offenders, or the family and/or friends of offenders. Prohibited activities include, but are not limited to, telephone calls, letters, notes, or other communications outside the normal scope of employment.

8. In the definition section of AR 1450-01, "Offender" is defined as "[a]ny individual under the supervision of the criminal justice system to include community correction clients, parolees, correctional clients, probationers, or youthful offender system residents." AR 1450-01, Subsection III (H).

9. "Former Offender" is defined under AR 1450-01 as "[a] person who has been found guilty of committing a felony, has been sentenced to any DOC, and less than three years have elapsed since his/her release from custody." AR 1450-01, subsection III(F).

10. Subsection IV(D)(4) of AR 1450-01 creates a process by which employees who wish to obtain an exception to the prohibitions in subsection IV(D) may petition their appointing authorities for special permission:

Any exceptions to the above, or when these individuals are immediate family members of DOC employees, contract workers, or volunteers, must be approved in writing by the appropriate appointing authority who will forward a copy to the Inspector General's Office. Relationships include:

- a. A DOC employee, contract worker, or volunteer with an offender.
- b. A DOC employee, contract worker, or volunteer with a family member of an offender.
- c. A family member of a DOC employee, contractor worker, or volunteer with an offender.
- d. A family member of a DOC employee, contract worker, or volunteer with a family member of an offender.

### **Lanny Ladish:**

11. Complainant met Lanny Ladish through mutual friends in 2001, shortly after Complainant began work for DOC. Complainant and Mr. Ladish had a romantic and sexual relationship for a total of approximately six to nine months in during the period of 2001 through 2004. Mr. Ladish lived at Complainant's home at 1446 Martin Lane in Boone, Colorado, for a portion of that time, although he would come and go and did not stay with Complainant continuously during that period. Complainant ended the living arrangement in 2004 because she suspected that Mr. Ladish was using or selling drugs.

12. Mr. Ladish has a history of incarceration in Kansas, as well as in Colorado. In Colorado, Mr. Ladish was incarcerated in a DOC facility or on parole on a felony charge from April 28, 1997, through December 8, 2000. During the time that Mr. Ladish was incarcerated in a DOC facility or on parole, he fit the definition of an "Offender" for purposes of AR 1450-01, subsection IV(D). Because Mr. Ladish had been found guilty of a felony and had served his time at a DOC facility, Ladish was also a "Former

Offender" under that policy for the three years following his release on December 8, 2000.

13. Mr. Ladish was arrested on June 6, 2002, for driving under the influence of alcohol and other traffic charges. He was found guilty at trial and sentenced to 30 days. Mr. Ladish did not serve his time for this offense at a DOC facility. Once Mr. Ladish was released from the criminal justice system on these charges, he was no longer an "Offender" for purposes of AR 1450-01, subsection IV(D). The lack of a felony conviction and lack of DOC incarceration related to these charges would also prevent him from assuming a "Former Offender" status relating to his 2002 driving charges under AR 1450-01, subsection IV(D) once he was released.

14. Mr. Ladish was again arrested in 2003 on a charge of driving under the influence and various traffic charges. Mr. Ladish was an "Offender" for purposes of AR 1450-01 so long as he was under the supervision of the criminal justice system for these charges. Mr. Ladish was not incarcerated in a DOC facility or on felony charges related to his 2003 arrest, and so he did not become a "Former Offender" upon his release from the criminal justice system.

15. Mr. Ladish was arrested in late 2005 or in 2006 on burglary, theft, and narcotics charges. He was held at the Pueblo County Jail pending resolution of the charges. On September 7, 2006, Mr. Ladish pled guilty to a felony offense and he was sentenced to serve 18 months in a DOC facility on that charge. Mr. Ladish arrived at a DOC facility on October 16, 2006.

16. Mr. Ladish was an "Offender" for purposes of AR 1450-01, subsection IV(D) from the time he was arrested in late 2005 or in 2006 and while he was under the supervision of the criminal justice system on those charges. This period of time includes the time while he was incarcerated in the Pueblo County Jail awaiting disposition of the charges as well as the time he was at a DOC facility serving his sentence and the time he was on parole.

17. Complainant first became aware that Mr. Ladish had a history with the criminal justice system when he was arrested for driving under the influence in either 2002 or 2003 and he told Complainant that he was worried about his probation or parole being revoked.

18. Complainant and Mr. Ladish understood that Complainant's connection to Mr. Ladish could imperil Complainant's career within DOC since at least June of 2005. During an argument between Complainant and Mr. Ladish, Ladish threatened to blackmail her and make sure she lost her job if she didn't do what he wanted her to do. This argument took place before Complainant transferred to FCF in June of 2005. Complainant never informed anyone at DOC about the threat because she was ashamed.

### **Burglaries of Complainant's Home:**

19. After Complainant had kicked Mr. Ladish out of her home in 2004, her contact with him did not cease.

20. Complainant reported to the Pueblo County Sheriff's Office on June 12, 2004, that her home had been burglarized approximately a week prior to her report. Complainant told the responding officer that she had Mr. Ladish living with her for three days because he had no place to go, and that she had told him to leave approximately a week before the burglary. Complainant believed that Mr. Ladish was the one who stole a number of items from her home, including a circular saw, cordless drill, chainsaw, a bradnailer, a television set, a DVD/VCR player, various CD box sets and CVCR tapes, and coins from a coin jar.

21. On July 14, 2005, Complainant reported a burglary of her home while she was working the previous night shift. Complainant told the responding Pueblo County Sheriff's Office officer that she suspected Mr. Ladish of robbing her home of her TV and VCR.

22. Complainant did not file for a protective order or take other legal action against Mr. Ladish other than reporting her suspicions that he had burglarized her home.

### **Other Contacts with Ladish:**

23. Even after Complainant had ended her live-in romantic relationship with Mr. Ladish in 2004, Mr. Ladish periodically contacted Complainant and Complainant would assist him.

24. In August of 2005, Mr. Ladish called Complainant and told Complainant that he was so angry with a certain individual he was going to kill her. Complainant talked with Mr. Ladish and told him that his plan was crazy. Mr. Ladish eventually calmed down.

### **Complainant's Visits to Ladish at the Pueblo County Jail -**

25. While Mr. Ladish was incarcerated in the Pueblo County Jail awaiting trial, Complainant visited him at the jail on August 23, September 6, September 13 and September 20, 2006. During one of these visits, Mr. Ladish told Complainant that he either had been, or would be, sentenced to prison.

26. While Complainant was a Sergeant in the visiting room at FCF during the middle to end of 2006, she told her supervisor at the time, Captain Terry Hamilton, that she had had a relationship with a man who was now an offender. Complainant made this disclosure because she had recently learned from Mr. Ladish that he was going to be sent to prison. Complainant reported to Capt. Hamilton that her relationship with Mr. Ladish was in the past. Capt. Hamilton instructed Complainant to report the relationship. Complainant completed a written report about her relationship with Mr. Ladish and provided it to Captain Hamilton. This report was never made a part of Complainant's personnel file or filed in such a way that it could be located later.

27. Complainant did not report to her supervisor or appointing authority that she was visiting Mr. Ladish while he was incarcerated, and she did not receive permission from her appointing authority to make the visits.

**Complainant's Addition of Money to Ladish's Jail Account –**

28. On or about May 30, 2007, and while Mr. Ladish was still incarcerated, Mr. Ladish called Complainant and Complainant agreed to place money into his jail account. Complainant made the following deposits into Mr. Ladish's inmate account: \$100.00 on June 15, 2007; \$50.00 on June 22, 2007; \$75.00 on June 29, 2007; and \$40.00 on July 13, 2007.

29. Complainant did not report that she had been asked to add money to Mr. Ladish's account or had added money to the account until questioned about her relationship with Ladish during the Inspector General's investigation in this matter. Complainant did not ask for or receive permission from her appointing authority to have any financial association with Mr. Ladish.

**Complainant's Handling of Ladish's Personal Items -**

30. Complainant was contacted by Pueblo County Jail and told that Ladish had released his personal items to her and that she needed to come pick them up. On or about August 2, 2007, Complainant picked up Mr. Ladish's clothing and other personal items and delivered the items to another home where Ladish had stayed in the past.

31. Complainant did not report to her appointing authority that she had been asked to retrieve Mr. Ladish's personal belongings from the Pueblo County Jail. Complainant did not ask for, or receive, permission from her appointing authority to retrieve Mr. Ladish's personal belongings from the Pueblo County Jail.

**Complainant's Disclosures in 2006 and 2007 To A Friendship With Ladish:**

32. Complainant admitted to a friendship with Mr. Ladish in three promotional applications that she filed throughout 2006 - 2007. Complainant's first application, dated October 12, 2006, listed Mr. Ladish as a friend under the application question No. 20: "Within the last 2 years have you visited, corresponded with anyone who is currently under the supervision of the Criminal Justice System (offender, parolee, probationer, etc?)." Complainant also stated that she had submitted a letter to FCF concerning Mr. Ladish.

33. Complainant completed question No. 20 in a similar manner in her promotional application dated January 18, 2007, as well as in her promotional application dated July 16, 2007.

**Ladish is Paroled and Then Absconds:**

34. On or about August 27, 2007, Mr. Ladish was placed on parole for a year and released into the community.

35. Mr. Ladish first reported to his parole officer, Officer Carlo Pino, at Officer Pino's office on August 28, 2007. Mr. Ladish had a pre-parole plan completed by his case manager, and that plan stated that his residence would be 1416 Martin Lane in Avondale, CO. Avondale, Colorado, is located close to Boone, Colorado. Mr. Ladish's pre-parole plan did not reference Complainant in any way.

36. During their initial meeting, Officer Pino told Mr. Ladish that he had contacted 1416 Martin Lane and that the residents at that address did not know him. Mr. Ladish then amended his residence address to 1446 Martin Lane, which was Complainant's address. Mr. Ladish did not reference Complainant or state that anyone other than he lived at the address.

37. Officer Pino visited Complainant's address at 1446 Martin Lane on August 29, 2007, for a home visit. Mr. Ladish was in the residence and watching television at the time of the visit while wearing old shorts and a baseball cap. Officer Pino did not observe any evidence of a break-in of the residence, and Mr. Ladish appeared to be calm and at home at the residence. Officer Pino did not observe anyone else at the residence other than Mr. Ladish, and Ladish told Officer Pino that he lived at the home alone.

38. Mr. Ladish could not have been found at Complainant's residence on August 29, 2007, without at least having had some type of communication with Complainant. There was insufficient evidence presented at hearing to establish whether Complainant had known of the ruse, or had implicitly or explicitly agreed to allow Mr. Ladish to be in her house.

39. Mr. Ladish was again at Complainant's house on September 3, 2007, when Complainant returned from work. Complainant found him sitting on her porch with the door to the home opened. Mr. Ladish asked Complainant if he could stay at her house and she told him that he could not. Complainant drove Mr. Ladish into Pueblo and dropped him off at a Loaf-N-Jug convenience store.

40. Mr. Ladish missed a required urinalysis appointment on November 5, 2007. Officer Pino again went to 1446 Martin Lane to look for Mr. Ladish. No one answered the door and Officer Pino left a business card on the door.

41. Officer Pino made two other trips to Complainant's home on November 9 and 21, 2007. On both occasions he found that no one answered the door at the residence and he left a business card on the door.

42. At some point after Officer Pino began leaving business cards on Complainant's door and before January 8, 2008, Mr. Ladish called Complainant. Complainant told him that parole was looking for him and that he needed to get the problem straightened out with his parole officer.

43. On November 30, 2007, Officer Pino, Parole Officer Travis Hadaway, and another parole officer went to Complainant's home to look for Mr. Ladish. On this visit, no one answered the door but there were two cars parked in the yard. Officer

Hadaway ran the license plates of the cars, and one of the cars was registered to Complainant. The officers also looked into the car registered to Complainant and could see Complainant's state pay stub on the back seat of the car.

44. Officer Hadaway contacted AVCF on November 30, 2007, to determine if Complainant worked at AVCF.

**Inspector General Investigation:**

45. After Parole Officer Hadaway contacted AVCF, AVCF Investigator Smokey Kurtz interviewed Complainant on November 30, 2007.

46. Complainant denied knowing that Mr. Ladish had listed her address as his home address on his parole plan. She told Investigator Kurtz that the last time she had had contact with Mr. Ladish was about five months earlier. Complainant stated that she had filed a report on her relationship with Mr. Ladish with her supervisor at FCF, Captain Hamilton. Complainant also was asked if she knew where Mr. Ladish was located, and Complainant provided Investigator Kurtz and Parole Officer Hadaway with addresses and phone numbers of some friends of Mr. Ladish.

47. Investigator Kurtz disqualified himself from continuing the investigation into Complainant's contact with Mr. Ladish because he knew Complainant's two sons who also worked for DOC: Rob Houston and Dan Houston. The investigation was continued by another investigator with the Office of the Inspector General ("IG"), Mark Finley.

48. As part of that IG investigation, Complainant was interviewed for the first time by Investigator Finley on January 8, 2008.

49. During that interview, Complainant told Investigator Finley that Mr. Ladish runs drugs and that was why she put him out of her house in 2004. She reported to Investigator Finley that she knew that Mr. Ladish had served time in a DOC facility prior to the time when she transferred to FCF in June of 2005. She also informed Investigator Finley that Mr. Ladish had attempted to blackmail her by threatening her job if she did not do what he wanted her to do.

50. Complainant told Investigator Finley that she had reported to her supervisor at FCF, Captain Terry Hamilton, that she had been involved with Mr. Ladish and that he was to be incarcerated at a DOC facility. She informed Investigator Finley that Captain Hamilton had her write an informational report on the matter, and that she had done so and provided that report to Captain Hamilton.

51. Complainant denied that she knew that Mr. Ladish had listed her residence on his parole plan. She told the investigator that Mr. Ladish had not been staying at her home before he absconded from parole. Complainant informed Investigator Finley that she had found Mr. Ladish sitting on her porch on one day when she returned home, and that she believed this contact took place in June of 2007. Complainant also informed



Investigator Finley that she thought Mr. Ladish was coming into her house and using her phone because she had found telephone calls to Springfield, Colorado on her bill.

52. During Complainant's interview on January 8, 2008, Complainant told Investigator Finley that Mr. Ladish scares her and that she felt that she had no place to go.

53. Complainant was interviewed a second time by Investigator Finley on February 11, 2008. During this interview, Complainant told Investigator Finley that, about two weeks earlier, she had received a call from one of the phone numbers she had previously supplied as being the phone number of a friend of Mr. Ladish. The woman who was calling told Complainant that she was calling Complainant's number because that phone number had called her earlier in the day. Complainant told Investigator Finley that she believed that it was Mr. Ladish who was in her house without permission and making that phone call.

54. In Complainant's second interview, she confirmed that Mr. Ladish had assaulted people who had spoken with her.

55. When asked why she would agree to take Mr. Ladish's personal property from the jail in August of 2007, Complainant told Investigator Finley:

Because I'm going to tell you why. Because my self esteem and my problems are mine. It was a very bad choice, but I felt I had to do it.

56. When pressed further about why she had to take care of Mr. Ladish's personal property from the Pueblo County jail, Complainant told Investigator Finley, "I don't honestly know, other than a messed up loyalty to someone who never was loyal to me."

57. Complainant told Investigator Finley that she didn't have to ask permission to give Mr. Ladish the money that she placed on Ladish's jail account because she said it was his money that she had been holding for him in one of her bank accounts.

58. Complainant also informed Investigator Finley that she did not know where Mr. Ladish was once he became a parole absconder. She admitted to Investigator Finley that Mr. Ladish had called her and she told him that there was a card left on her door by parole and that he should take care of it.

59. In the course of Complainant's interviews with Investigator Finley, Complainant admitted to a sporadic on-again, off-again relationship with Mr. Ladish from 2001 through late 2007. Complainant also admitted that, at times, her relationship with Mr. Ladish had been sexual or romantic in nature, and at other times the relationship was a friendship. Complainant also admitted that she had a financial relationship to Mr. Ladish as late as 2007 when she placed money into Mr. Ladish's inmate account.

60. During the course of the IG's investigation, Complainant had also been asked to provide information on Mr. Ladish's whereabouts or possible whereabouts. Complainant complied with this request by providing a series of names and phone numbers of friends of Mr. Ladish.

### **Administrative Leave:**

61. Warden Arellano placed Complainant on paid administrative leave pending completion of the investigation into the information connecting Complainant with Mr. Ladish. Complainant's administrative leave began February 11, 2008.

62. By letter dated February 15, 2008, Complainant requested that Warden Arellano provide her with "more information on which part of 1450-01 that I am allegedly in violation of." Complainant also made a general request for discovery.

63. Warden Arellano declined to provide more specific information to Complainant at that point in the investigation. The Warden informed Complainant by letter dated February 29, 2008, that the investigation was not complete at that point, and that he would send her a "notification of a meeting which will be held to present the information" once the investigation was complete and had been submitted to his office.

### **Board Rule 6-10 Meeting:**

64. By letter dated March 4, 2008, Warden Arellano notified Complainant that he was scheduling a Board Rule 6-10 pre-disciplinary meeting with her for March 17, 2008, in order to discuss violations of AR 1450-01. The letter informed Complainant that she would have an opportunity to admit or refute the information that had come to his attention and to present mitigating circumstances. The letter also informed Complainant that she had the right to bring a representative with her, and that the meeting would be taped and that she could bring her own taping equipment if she desired. The Warden also included copies of chapter 6 of the State Personnel Board Rules, AR 1450-01, AR 100-18, and the Executive Order pertaining to the Executive Department Code of Ethics with the letter.

65. Complainant appeared for the Board Rule 6-10 meeting with her son, Rob Houston, as her representative. Warden Arellano included Associate Warden John Davis in the meeting as his representative. The meeting was taped and transcribed.

66. Warden Arellano began the meeting with his description of the portions of the regulations that he believed were at issue. In his discussion, Warden Arellano included every regulation that he would later reference in Complainant's termination letter.

67. During the Board Rule 6-10 meeting, Complainant described her sporadic, on-again, off-again relationship with Mr. Ladish. She agreed that she had placed money on Mr. Ladish's account and that she had visited him in jail. She agreed that Mr. Ladish had been at her home on a number of occasions from at least 2003 through 2006.

68. Complainant denied knowing that Mr. Ladish had absconded from parole until she was told of that fact by Investigator Kurtz. Complainant told the Warden that she had tried to call Parole in response to a card that her son Danny had found on the side door of her house, but that all she had gotten was a recording.

69. Warden Arrellano told Complainant that the investigative report said she had admitted that she was at home during Officer Pino's home visit with Mr. Ladish. At several points in the meeting, Complainant denied that she was home or that she had said that she was home during that visit. The Warden's statement about Complainant's alleged admission concerning her presence at her home during Officer Pino's visit was a misstatement of the investigation results. Complainant had been asked by Investigator Finley if she had been present when Officer Pino conducted his visit, but her answer was not directed specifically at the issue of whether she was present during the Parole visit but whether Ladish was ever in her home.

70. During the Board Rule 6-10 meeting, Complainant expressed surprise that no one had interviewed her son Danny about who was present at her house. She explained that Danny went to her house several times a week. At the end of the meeting, Complainant told the Warden that she wanted to check with her son to see if he wanted to be interviewed.

71. Complainant explained to the Warden that she had tried to move on with her life and that she wasn't trying to have a relationship with Mr. Ladish, but that she was loyal to him. The Warden asked Complainant to explain what she meant by being loyal to him, and Complainant's answer was: "I wish the best for him, for all the bad shit that he's done, I don't hate him." At another point in the meeting, Complainant told the Warden that a part of her heart will probably always love Mr. Ladish.

72. Warden Arellano asked Complainant if there were other DOC employees who knew about her relationship with Mr. Ladish. Warden Arellano expressed an interest in finding out if there were other DOC employee who knew of her connection to Mr. Ladish who might support her. The Warden told Complainant that he would talk to them as part of his process if she wanted.

73. Warden Arellano told Complainant that she was not compelled to answer the question but that he wanted to know if she believed that she had violated the department's Code of Ethics, AR 1450-01, AR 1200-06, and AR 100-18. Complainant replied:

I would say that I am guilty of not coming forward and saying that I, I took him back. I, I, I should have reported that immediately I suppose, but I was embarrassed, I just wanted him gone. I, I was so excited that I was not getting beat and that I was doing a job that, I mean since I started the department this is exactly what I wanted to do. But I was tormented because he was back churning up my life on the personal side. I was nervous on the professional side because I wanted to do such a good job, I wanted Geno to be proud of me that he brought me back and I was making him proud. Was that a falsity on my part, yes. Was I ever a threat to the department security, no, never. My children work here, my friends work here, I would never, ever endanger any of them. Those are two different things, my professional life and my personal life, and I

will tell you my personal life in places is pretty screwed up. I'm working on it. My professional life is a whole another matter, I'm very business [like].

74. Warden Arellano informed Complainant that she could submit additional information after the meeting. He provided April 1, 2008, as a deadline for submitting any additional information. The Warden also told Complainant that he would review her information. He specifically mentioned at one point that he would review the tapes of Complainant's interviews.

75. During her March 17, 2008, Rule 6-10 meeting, Complainant requested that she be given a copy of the IG's investigative report. Warden Arellano declined to release the investigative file to Complainant. Warden Arellano told Complainant that he could not grant her request. He made this decision because DOC policy required that the IG's office, rather than an appointing authority, decide when and how to release an investigative file.

**March 30, 2008 Submission:**

76. Complainant submitted a supplemental letter dated March 30, 2008, in which she argued that she was entitled to cross-examine and challenge those that made accusations against her. Complainant specifically stated that she wished to challenge the individual who said that she was present while there was a parole officer at her residence. Complainant disputed this factual point for several paragraphs. Complainant also complained that Mr. Finley had called her a liar during her interviews and had inquired into her sex life, and that such statements had thrown her for a loop.

77. Complainant also argued that she was in violation of AR 1450-01, subsection IV(D)(4)(a), only because her chain of command had misplaced her letter disclosing her relationship with Mr. Ladish.

78. Complainant represented to Warden Arellano that she had "discontinued this relationship [with Ladish] on all levels" and that if there was any further contact by Mr. Ladish that she would report the contact to her appointing authority on the following business day.

79. Complainant disputed that she had violated AR 1450-01 subsection IV(X), which admonishes DOC employees that they are not to "falsify any documents nor wilfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation."

80. Complainant also noted that the Warden had asked her for a list of individuals that she wanted the Warden to contact, and she provided Warden Arellano with a list of 36 individuals to be contacted "regarding my integrity." Complainant placed a star next to four names and noted that the star "indicated individuals that were at my residence on a regular basis during the time in question, summer and fall 2007." Complainant's list of witnesses included her son, Danny Houston.

81. As a part of his investigation into Complainant's conduct, Warden Arellano did not interview any of the 36 witnesses that Complainant had listed. The Warden also did not review the tapes of Complainant's interviews with Investigator Finley.

**Disciplinary Action:**

82. After reviewing the IG report, talking with Complainant during the Board Rule 6-10 meeting, reviewing Complainant's training record, and reviewing Complainant's submissions, Warden Arellano decided that Complainant's relationship with Mr. Ladish constituted willful misconduct on her part because she knew as early as her training academy that DOC had a strict policy against socializing with offenders. Warden Arellano considered the policy to require Complainant to make the decision not to socialize with persons who have decided to break the law.

83. The purpose of the DOC policy prohibiting socializing with offenders is to prevent offenders from being placed into a position of power, either real or perceived, that would be created if the offender or other offenders believe that they have a contact within DOC staff. The policy is designed to prevent the safety and security issues that can arise when an employee develops relationships with offenders based on social contacts rather than a professional interaction.

84. By letter dated May 6, 2008, Warden Arellano terminated Complainant's employment effective as of that date. The letter was hand-delivered to Complainant on that date as well.

85. In the termination letter, Warden Arellano referenced 12 policy provisions that he had examined, and found that 11 of those provisions were violated in this case.

*Policies Prohibiting Contact with Offenders / Former Offenders -*

86. Warden Arellano concluded that Complainant had violated AR 1450-1, subsection IV(D), associations with offenders or former offenders. The Warden's conclusion that Complainant violated AR 1450-1, subsection IV(D) was based upon five different factual conclusions.

87. First, Warden Arellano determined that Complainant did not report her relationship with Mr. Ladish at the time she had first learned that Mr. Ladish had previously been incarcerated in DOC. Warden Arellano calculated that the time when Complainant learned of Mr. Ladish's former offender status was sometime in October 2003 through January of 2004, and that she should have reported the relationship at around that point in time.

88. Second, Warden Arellano found that, at the time that Complainant's home was broken into for the first time on June 13, 2004, she had just allowed Mr. Ladish to stay at her house for three days, and that this was during the period of time that Complainant was employed by AVCF and she had not reported it.

89. Third, Warden Arellano found that Complainant had told Captain Hamilton that she had been in a romantic relationship with Mr. Ladish, that Mr. Ladish was an offender who had been in DOC previously, and that the relationship had been broken off by the time Mr. Ladish began serving time. The Warden found that Complainant did not properly report the relationship at that time.

90. Fourth, Warden Arellano found that the Pueblo County Sheriff's Office had conducted a CCIC record check on Complainant on February 6, 2006, and allowed Complainant to visit Mr. Ladish at the jail on August 23, September 6, September 13, and September 20, 2006. Jail records also recorded a call placed by Mr. Ladish to Complainant's phone number on May 30, 2007. Additionally, Warden Arellano found that Complainant contributed \$100.00 to Mr. Ladish's jail account on June 15, 2007, \$50.00 on June 22, 2007, \$75.00 on June 29, 2007, and \$40.00 on July 13, 2007.

91. Finally, Warden Arellano found that Parole Officer Pino had contacted Mr. Ladish at Complainant's home on the initial home visit, and that Mr. Ladish appeared to be living at the house. Warden Arellano also found that, during her interview with the Inspector General's office, Complainant had admitted that, at the time of the home visit by the parole officer, she knew that Mr. Ladish was at her house, that she was there at the time of the home visit, and that she had said that Mr. Ladish scared her. Warden Arellano found that Complainant had admitted during that interview that Mr. Ladish would come and go at her house after he had absconded from parole in November 2007. Additionally, Warden Arellano found that Complainant had admitted that she had found Mr. Ladish sitting on her porch on Monday, September 3, 2007, and that Mr. Ladish told Complainant that he had no place to go.

92. Warden Arellano also found that Complainant had violated the terms of the Zero Tolerance Letter that he had issued to all DOC employees under his command when he became warden at AVCF. The Zero Tolerance Letter introduced the topics covered by the letter by stating that "[t]he Colorado Department of Corrections position on sexual harassment, introduction of contraband, and inappropriate offender relationships is 'zero tolerance.'" The letter also included the following: "Developing inappropriate relationships with offenders is a violation of policy. This includes sharing personal information, providing unapproved goods or favors, sexual relations, or bending the rules for offenders. I can think of no acceptable excuse for demonstrating this behavior." Complainant signed her copy of the Zero Tolerance Letter on November 29, 2007.

*Policies Prohibiting Association With Persons Associated with Illegal Activity, Conduct Unbecoming, Conduct Calling Into Question the Ability to Perform Effectively, and similar requirements -*

93. Warden Arellano also found that Complainant had violated AR 1450-01, subsection IV(V), which prohibits staff from "knowing[ly] associat[ing] or deal[ing] with persons who are known or suspected to be involved in illegal activities." Warden Arellano found this subsection to be violated because Complainant knew that Mr. Ladish was involved in the sale or use of drugs and had assaulted people who had talked with her.

94. Warden Arellano further found that Complainant had violated AR 1450-01, subsection IV(N), which states;

Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion.

The Warden found that Complainant violated this policy by knowingly failing to follow AR 1450-01.

95. The Warden found that Complainant had violated AR 1450-01, subsection IV(HH), which requires staff to comply with and obey the DOC Administrative Regulations, by disobeying the restrictions in AR 1450-01.

96. Warden Arellano considered Complainant's failure to follow AR 1450-01 to also be a violation of AR 1450-01, subsection IV(ZZ), which states:

Any act or conduct, on or off duty, which affects job performance and which 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 action and/or disciplinary action.

97. Warden Arellano also concluded that Complainant violated AR 1450-01, subsection III(B), Conduct Unbecoming, on the grounds that she had knowingly violated policy because she was aware of AR 1450-1 and had disregarded the policy. This reference to Conduct Unbecoming is to a definitional section of the regulation and therefore duplicative of the section that alleges a violation of the substantive rule.

*Policies Related to Truthfulness, Cooperation and Integrity Issues -*

98. Warden Arellano additionally found that Complainant had violated several subsections of AR 1450-01 related to truthfulness and cooperation in the investigation into her conduct.

99. The Warden found that Complainant had violated AR 1450-01, subsection IV(X), which states: "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." Warden Arellano found that Complainant knew of the policy and did not follow it by changing her statements frequently during the investigation.

100. Warden Arellano found a violation of AR 1450-01, subsection IV(Y), which states:

During the course of an official DOC investigation, DOC employees, contract workers, and volunteers shall cooperate fully

by providing all pertinent information that they may have. Full cooperation involves responding to all questions and providing a signed statement or affidavit, if requested.

The Warden found that this subsection was violated because Complainant “knowingly violated policy because you were aware of Administrative Regulation 1450-01, Staff Code of Conduct, however, you did not follow policy.”

101. The Warden also found that Complainant had violated the Executive Order regarding the Executive Department Code of Ethics, paragraph 2 (b), which states that:

All elected officers, appointees and employees of the Executive Department...[s]hall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire public confidence and trust in government.

The Warden based his finding on his conclusion that Complainant was aware of the Executive Order and did not follow policy.

102. Warden Arellano also found that Complainant generally violated AR 1540-1 and the January 15, 1999 Executive Order, “Executive Department Code of Ethics” because she was aware of the AR 1450-1 and did not follow the policy.

103. The Warden found that Complainant had violated two provisions of AR 100-18, the AVCF Mission Statement, which require employees to demonstrate integrity:

A.R. Values: Foster an environment that promotes organizational commitment, integrity, trust, responsibility, professionalism, and confidence....

The Arkansas Valley Correctional Facility will ensure the safety/security of the public, staff, and offenders through P R O D U C T I V E [in which “I”] means... Integrity.

*Policies Prohibiting Conflicts of Interest -*

104. Warden Arellano found that Complainant had violated the prohibitions against conflicts of interest found in 1450-01, subsection IV(M). Subsection IV(M) states:

Staff shall avoid situations which give rise to direct, indirect or perceived conflict of interest.

Warden Arellano found that Complainant had knowingly violated this policy because she was aware of AR 1450-1 and did not follow it.



*Policies Prohibiting the Aiding of an Escape –*

105. Warden Arellano also considered whether there had been a violation of subsection IV(G) of AR 1450-01, which states:

DOC employees, contract workers, and volunteers are prohibited from aiding or abetting an escape or an escape attempt. They are under a duty to report any information regarding evidence of plans to escape, escape attempts, or actual escapes to their appointing authorities immediately.

The Warden concluded that the information provided to him did not demonstrate that Complainant knew the whereabouts of Mr. Ladish after he absconded, and that there was “no evidence to support that Mr. Ladish was [at Complainant’s house] or that [she] knew the whereabouts of [Mr. Ladish’s] location” on the days that Parole Officer Pino went to Complainant’s home searching for Ladish. Accordingly, the Warden did not find a violation of this subsection of AR 1450-1.

**Determination of the Level of Discipline:**

106. Warden Arellano concluded that Complainant had demonstrated willful misconduct in her dealings with Mr. Ladish and the subsequent investigation into her conduct. The Warden also found that Complainant had failed to comply with standards of efficient service.

107. In determining the sanction to impose, Warden Arellano considered that Complainant’s evaluations had been consistently in the average or commendable range, and that she had not been subject to any prior disciplinary or corrective action.

108. Warden Arellano concluded, however, that Complainant’s willingness to associate with Mr. Ladish and her failure to properly report that association, as well the issues that Warden Arellano concluded had affected her integrity in both failing to report the contacts and during the course of the investigation into her relationship with Mr. Ladish, constituted proper grounds for termination.

109. Complainant filed a timely appeal of her termination with the Board.

110. Complainant was provided with discovery in preparation for her hearing and received a copy of the IG Report as part of that discovery.

**DISCUSSION**

**I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, *et seq.* See also *Department 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 comply with standards of efficient service or competence;
2. willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
3. false statements of fact during the application process for a state position;
4. willful failure or inability to perform duties assigned; and
5. final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant 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 704-8 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

## **II. HEARING ISSUES<sup>1</sup>**

### **A. Complainant committed most of the acts for which she was disciplined.**

Even though Warden Arellano's termination letter finds 12 different policy violations, the factual basis for the discipline involves only a handful of factual issues. The majority of the violations sustained against Complainant depend upon a showing that there is a factual basis to prove a violation of AR 1450-01, subsection IV(D).

The Warden's other sustained violations require that Respondent provide the factual basis to conclude that Complainant had departed from the truth or falsified documents, that Complainant failed to cooperate with the investigation, and that Complainant had a conflict of interest.

#### **1. Complainant knowingly and willfully maintained a prohibited relationship with Mr. Ladish from at least 2006 through 2007:**

The bulk of Warden Arellano's analysis in this matter is present to support his conclusion that Complainant engaged in a violation of AR 1450-01, subsection IV(D). Much of the Warden's language in the termination letter focuses on his conclusion that Complainant did not obtain permission for her contacts with Mr. Ladish. Whether or not permission has been granted, however, is the last step in any analysis of a potential

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<sup>1</sup> Complainant asked to present a Motion for Directed Verdict at the conclusion of the hearing, and was given permission to file it in writing as part of her written closing. Complainant, however, does not include a separate set of arguments to support such a motion in Complainant's Closing Arguments and Motion For Directed Verdict ("Complainant's Closing Argument"). All of Complainant's arguments, therefore, will be considered in the context of determining whether Respondent has proven its disciplinary case by a preponderance of the evidence.

violation of subsection IV(D).

a. Elements of AR 1450-01, Subsection IV(D) –

AR 1450-01, subsection IV(D) prohibits certain types of associations between staff members and certain other individuals. Parsing the requirements of subsection IV(D) shows that, in order to prove that there has been a violation of that section, there must be: 1) a DOC employee, contract worker or volunteer; 2) who knowingly maintains; 3) social, emotional, sexual, business, or financial associations; 4) with current offenders, former offenders, or the family and/or friends of offenders. If those requirements are met, the violation may still not be present if the individual involved has obtained written approval by the appropriate appointing authority for maintaining that association.

The regulation provides examples of the types of associations which are prohibited, and define that category to include “telephone calls, letters, notes, or other communications outside the normal scope of employment.”

As noted in the findings of fact, AR 1450-01 also defines two other important terms: offender and former offender.

Knowingly, however, is not defined in the regulations. The term “know” or “knowingly” generally refers to having actual knowledge of the fact in question. See, e.g., *Holmes v. Young*, 885 P.2d 305, 308-9 (Colo.App. 1994)(defining the requirement of “knowingly assist[ing] a fiduciary committing a breach of trust” to mean that proof of wrongful intent is not necessary “as the fact-finder is required only to find that the defendant knew of the breach of duty and participated in it”). Cf. *People v. Vanrees*, 80 P.3d 840, 842 (Colo.App. 2003)(quoting Criminal Instruction 17, which defines “knowingly” with respect to a person’s conduct or a circumstance to be “when he is aware that his conduct is of such a nature or that a circumstance exists”). In the case of a violation of subsection IV(D), the facts in question would be that there is an association and that the non-employee party to that association is an offender, former offender, or the family and /or friends of an offender.

b. Willful Misconduct –

Finally, Warden Arellano adds another requirement for the analysis of this case when he concluded that Complainant’s violation of AR 1450-01, subsection IV(D) was willful misconduct. Willful misconduct is not defined in the Board rules or the relevant state statutes, but the term “willful” generally means that an act is done voluntarily and intentionally and with the specific intent to do something the law forbids. Black’s Law Dictionary, 6<sup>th</sup> Ed., at p. 1599.

c. Factual Support In The Record for 2006 - 2007-

With those parameters in mind, we turn next to the evidence presented at

hearing.

It was uncontested at hearing that Complainant had visited Mr. Ladish in jail on four separate occasions in 2006, had placed money into Mr. Ladish's account on four separate occasions in 2007, and had agreed to take Mr. Ladish's personal effects from the jail in August of 2007.

Complainant also admitted at hearing that Mr. Ladish had called her at the end of May, 2007, and had appeared at her house in early September, 2007, and that she had given him a ride into town on that day.<sup>2</sup> Complainant argued at hearing and during the investigation into this matter that she did not welcome the calls and visits from Mr. Ladish, but these protestations ring hollow in light of her willingness to be so helpful to Mr. Ladish and her statements that part of her still loves him and that she considers him to be a friend even after she reported him for burglarizing her house twice. This evidence supports the conclusion that Complainant maintained a social, emotional, and financial association with Mr. Ladish at least in 2006 and 2007.

The evidence is also uncontested at hearing that Mr. Ladish was jailed by early 2006 and that he remained incarcerated until late August 2007 and then was placed on parole. These facts establish that he was he was under the supervision of the criminal justice system from the point when he entered the jail in either late 2005 or 2006 to the point when he absconded from parole in late 2007. Certainly at the times when Complainant visited Ladish in jail he was obviously under the supervision of the criminal justice system, and he was still under the supervision of the criminal justice system when Complainant placed money into Ladish's account. Individuals who are "under the supervision of the criminal justice system" are considered to be offenders for purposes of AR 1450-01, subsection IV(D). Mr. Ladish was therefore an offender, as that term is defined under AR 1450-01, subsection IV(D), in 2006 and 2007 when Complainant was visiting him, giving him money, taking care of his personal effects, and receiving phone calls and visits from Ladish once he was on parole.<sup>3</sup>

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<sup>2</sup> In its Closing Argument, Respondent includes proposed findings to be made as to the testimony of Ivan Gallegos. Mr. Gallegos testified at hearing about a home inspection he had performed on Complainant's residence in May of 2007 in order to evaluate a request by Mr. Ladish to spend a furlough period at Complainant's home. This information was not known to Warden Arellano until after discipline had been imposed, was not part of the Board Rule 6-10 discussion, and was not made part of the decision justifying termination of Complainant's employment. Mr. Gallegos' testimony was allowed as impeachment of Complainant's testimony during her case, and no factual findings are included in the Initial Decision because this incident is not part of the department's reasons for imposing discipline.

<sup>3</sup> Warden Arellano testified at hearing to two different standards for the term offender. As Complainant recognizes in her Closing Argument, the Warden used a definition which included county jail time for offender status. Warden Arellano also testified that he had calcuated when Mr. Ladish was an "Offender" under AR 1450-01, subsection IV(D), by examining when he had been in a DOC facility. The Warden used this more limited interpretation of "offender" to determine that Ladish was an offender from January 29, 1997 through December 8, 2000 and September 15, 2006 through November 13, 2007. The plain language of AR 1450-01, however, does not support such a narrow interpretation. A "former offender" under that provision does need to be someone who has served felony time at a DOC facility. The term

Moreover, a preponderance of the evidence demonstrates that Complainant was aware that Ladish was under the control of the criminal justice system at the times that Complainant had contact with him in 2006 and 2007. Complainant took the action she did knowing that Mr. Ladish was an offender.

Complainant argued at hearing that she did not intend to have a relationship with Mr. Ladish and that she was trying to cut off her connection to him, for example, at the time she placed the money on his account. This is an argument that she did not knowingly have an association with Mr. Ladish. Complainant's argument, however, is unpersuasive.

Complainant's assertions that, after 2004, she no longer was in a relationship with Mr. Ladish ignores an important point concerning subsection IV(D) -- that provision does not merely prohibit sexual or romantic relationships. Complainant's willingness to assist Mr. Ladish when he called her or appeared at her door is evidence of both a social and emotional association that remained after any romantic involvement may have ended.

Moreover, the evidence in this case demonstrates that Complainant was not only knowingly in prohibited associations with Mr. Ladish, she also understood that these associations were contrary to DOC policy. Complainant admitted to Investigator Finley that Mr. Ladish had tried to blackmail her with her job during an argument that took place before she transferred in June 2005 to FCF. Complainant also told Warden Arellano during the Board Rule 6-10 meeting that she didn't report the later contacts with Mr. Ladish because she was trying to do a good job in her new position. These are some of the more persuasive pieces of evidence that Complainant understood that her contacts with Mr. Ladish imperiled her job because such contacts were violation of DOC policy. Complainant's testimony at hearing that she did not understand departmental policy to prohibit contacts with Mr. Ladish while he was at the Pueblo County Jail was simply not credible. Her knowledge that her associations with Mr. Ladish were contrary to DOC policy means that her policy violations in 2006 through 2007 meet the definition of willful violations.

d. Ladish's Parole Plan and Officer Pino's Home Visit -

As noted in the findings, Warden Arellano's conclusion that Complainant had admitted that she was home when Officer Pino conducted his home visit is not well grounded in Complainant's actual statements. It is not necessary, however, for Complainant to have been present during the home visit to explain what Officer Pino found. While Complainant's contention that she knew nothing about how Mr. Ladish could be found in her home calmly watching TV is not credible, it does not follow that,

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"offender" however, is defined by the DOC regulation to be significantly broader than that described by the Warden in some of his testimony. It is the terms of the regulation as passed by DOC which constitutes a standard of efficient service or competence, however, rather an appointing authority's individual interpretation of that standard. *Cf. Colo. Const. art. XII, § 13(8).*

therefore, she must have been present for the home visit. If Ladish knew that her home would be open because she was leaving for a day or so, for example, he may have decided to stay there with or without Complainant's express or implied permission.

Complainant argues that the lack of any mention of her name or her lack of designation as a sponsor in the parole plan shows that this was all Ladish's doing and that it had nothing to do with her. This argument is not persuasive. Complainant would know that she could not be a sponsor and that Ladish could not name her in a pre-parole plan without creating problems for Complainant. The lack of any mention of Complainant as a sponsor in the parole plan, therefore, is not the type of detail that persuades the undersigned that Complainant had absolutely nothing to do with Mr. Ladish listing her home as his residence and being in her home on August 29, 2007.

The parties expended a great deal of hearing time arguing over whether Complainant was actually present during Officer Pino's home visit. Much of this argument, however, is to the side of the essential point. The question is whether the facts of Mr. Ladish's parole plan and subsequent actions support Warden Arellano's conclusion that Complainant had a prohibited association with Ladish. The undersigned is not willing to accept Complainant's contention that she had nothing to do with Ladish's actions, and concludes based on this evidence that Complainant had some involvement in Ladish's actions in listing her home as his parole residence and appearing there for the benefit of Officer Pino. Moreover, this involvement, however indirect it may have been, supports that Complainant had a social or emotional association with Ladish at the time of his parole and while he was an offender.

Such a conclusion, of course, is hardly surprising given that Complainant has repeatedly affirmed during the investigation into this matter and during hearing that she still has a friendship with Mr. Ladish despite the way he treated her, and that a part of her still loves him. The events surrounding Mr. Ladish's parole plan merely add further credible evidence to the conclusion that Complainant had a prohibited emotional or social association with Ladish in late 2007.

e. Failure To Report 2003 – 2004 Relationship –

Respondent was not as successful in proving the elements of a violation of AR 1450-01, Subsection IV(D) insofar as it relates to Complainant's and Mr. Ladish's live-in relationship which ended in 2004.

The very nature of the definition of the violation of subsection IV(D) requires that Warden Arellano be able to determine the date of the association with some specificity. In the case of Complainant's involvement with Mr. Ladish in 2003 and 2004, the need to determine the dates is particularly critical because Ladish was a former offender only until December 2003 and a current offender for only a short portion of the time in 2003. It is also necessary to decide whether Complainant had knowledge that Mr. Ladish could meet the definition of an offender or former offender.

The preponderance of the evidence presented at hearing does not provide a sufficient basis to demonstrate that Complainant's relationship in 2003 – 2004 violated AR 1450-01, subsection IV(D).

f. Complainant's Culpability for Ladish's Actions -

Complainant repeatedly asserted at hearing that it was Mr. Ladish who would suddenly appear and contact her, and this was not something that she had desired. Complainant argues, in essence, that she should not be found to have acted in violation of DOC regulations when their contacts were the result of Mr. Ladish's actions and not hers.

Complainant's argument fails to take into account her role in the contacts. Complainant may well have written off Mr. Ladish any number of times, but when he did appear in her life, she was not merely the unwilling recipient of his attentions. He appeared at her house after she has kicked him out and she let him stay. He appeared on her porch and instead of calling the police or otherwise forcing him to leave, she drove him into town. When he was arrested, she visited him in jail. When he decided he needed money, she placed cash on his account even though she also believed that he stole from her on at least two occasions. When the jail called and told her that Mr. Ladish needed her to pick up his personal belongings, she went, retrieved them, and delivered them to someone else's house. Mr. Ladish may initiate the contacts, but the persuasive evidence demonstrates that Complainant participates in those contacts as well.

**2. Respondent did not produce sufficient evidence to support that Complainant departed from the truth, failed to cooperate, acted without integrity, or had a conflict of interest:**

a. Respondent did not identify circumstances from which the Board could conclude that the statements were willful departures from the truth-

Respondent found that Complainant had violated AR 1450-01, subsection IV(X), which prohibits DOC employees from "falsify[ing] documents" or "willfully depart[ing] from the truth, either in giving testimony or in connection with any official duties of official investigation."

Warden Arellano testified that he was concerned that Complainant was not telling the truth during the investigation and the Board Rule 6-10 process because she changed her dates at so many junctures and it appeared to him that she was changing her story as she explained it. The Warden did not identify any documents that he believed to have been falsified by Complainant.

Complainant contends that she changed some of her dates because she realized

she had been off on some of the dates she had initially provided during the investigative interviews. She denied changing the details of her story and noted that Investigator Finley and the Warden did not properly piece the timeline together as she was describing it.

After reviewing the interviews and the Board Rule 6-10 meeting transcript, and observing Complainant's testimony at hearing, it is apparent that Complainant often offers inconsistent dates when pressed to identify a time period. It also appears that, at least in some cases, she may not realize that she has provided inconsistent information. Moreover, Complainant's speaking style can be convoluted. She introduces names and episodes that she believes are relevant to the answer without providing a clear indication that she is piecing together several different episodes or identifying who she is referencing, while ignoring other information which would seem to be directly relevant to the answer. Some of Complainant's answers can also be characterized by a problem that she shares with many witnesses; that is, she appears to be answering the question that she thinks she should be asked rather than squarely addressing the question asked. The result is that Complainant's various interviews and testimony appear to include a significant number of internal inconsistencies. It is not at all surprising that Warden Arellano was frustrated with Complainant's answers by the conclusion of the Board Rule 6-10 meeting in this case.

Such inconsistencies in a witness' version of events may represent deception on the part of a witness or may represent other issues not properly characterized as deception. As the Colorado Supreme Court noted when considering the related issue of why characterizing a factual inconsistency between witnesses at trial as evidence that one witness must be lying, "this form of questioning ignores numerous alternative explanations for evidentiary discrepancies and conflicts that do not involve lying. There may be differences in opinion, lapses or inaccuracies in memory, differences in perception, a misunderstanding, or any other number of wholly innocent explanations for discrepancies between one witness's testimony and another's." *Liggett v. People*, 135 P.3d 725, 731 (Colo. 2006).

In order to find that Complainant has willfully departed from the truth, therefore, there must be more than just a showing of inconsistencies in her statements. There needs to be something about the circumstances of a statement which make the discrepancy more likely than not to be the product of deception than, for example, merely a case of a lapse of memory, a difference in perception or opinion, or the product of an idiosyncratic way of explaining oneself.

Warden Arellano testified at hearing that he believed that Complainant was departing from the truth in the dates that she provided. The Warden did not, however, provide any persuasive reason to believe that these changes in dates were anything more than Complainant's basic confusion on dates. Warden Arellano also testified that he thought Complainant had changed her details about her contacts with Mr. Ladish. The points that the Warden explained at hearing, however, seemed to be just as likely



to be the product of Complainant's mixing of events in her discussions, and her failure to focus her answers on the specific questions asked of her, rather than a change of her story indicating deception.

Accordingly, Respondent has not shown that Complainant committed the acts which are necessary to support Respondent's finding that Complainant violated AR 1450-01, subsection IV(X).

- b. Respondent has provided an insufficient factual foundation to support a violation of AR 1450-01, subsection IV(Y) –

Warden Arellano found that Complainant had violated AR 1450-01, subsection IV(Y), which requires DOC employees to "cooperate fully by providing all pertinent information that they may have." The regulation requires employees to, among other things, "respond[] to all questions."

Respondent produced no persuasive evidence that Complainant failed to cooperate in the investigation of her contacts with Mr. Ladish. She was asked to provide phone numbers and addresses for Mr. Ladish's friends, and she did. She was asked to provide her phone log information for the times when she believed that Mr. Ladish was attempting to call her, and she provided that information. She attended two interviews with Investigator Finley and there was no indication that that she had declined to answer any of his questions.

The worst that can be found about Complainant's cooperation is that her manner of answering questions often required the questioner to ask the same or similar questions several times to arrive at a full answer. That fault by itself, however, is too ambiguous to serve as the foundation of a claim of failure to cooperate.

The undersigned has declined to make any factual finding that Complainant failed to cooperate in the investigation or the Board Rule 6-10 process. Respondent, accordingly, has not demonstrated that Complainant committed the act or acts necessary to support its finding that Complainant violated AR 1450-01, subsection IV(Y).

- c. Respondent's multiple findings that Complainant acted without integrity also are insufficiently supported once no willful departures from the truth are identified -

Respondent found that Complainant had failed to demonstrate integrity, and bases its findings on AR 100-18 and the Executive Order regarding the Executive Department Code of Ethics. The regulation and Executive Order do not specifically define "integrity" for purposes of applying the regulations to DOC employees. The term "integrity generally connotes that one acts with honesty. See Black's Law Dictionary, 6<sup>th</sup> ed., at p. 809 (defining integrity as "soundness of moral principles and character... and

and honesty in the discharge of trusts”)

Respondent has not explained in any detail how it found that Complainant’s integrity was impaired. Presumably, however, Respondent’s integrity findings connect to Respondent’s other findings that Complainant willfully departed from the truth and failed to cooperate with the investigation.

As explained above, however, there is insufficient support in the record that Complainant departed from the truth or failed to cooperate with the investigation. As a result, Respondent’s allegations that Complainant violated the regulations requiring her to maintain her integrity also fail.

d. Respondent has failed to support that there was a conflict of interest in this matter –

Respondent also has sustained a violation of AR 1450-01, subsection IV(M), which provides that employees are to avoid a conflict of interest.

While the term is not defined in the regulation, the phrase “conflict of interest” generally refers to a clash between public interest and the private pecuniary interests of the individual concerned. See Black’s Law Dictionary, 6<sup>th</sup> ed., at p. 299. In other contexts, it refers to a situation in which regard for one duty tends to lead to a disregard of another duty. *Id.* Respondent, however, produced no evidence that a conflict of interest existed in this case. There was no evidence presented that Complainant had two duties that were in conflict, or that she had any pecuniary interest at stake. The mere violation of a regulation, or even of several regulations, because Complainant had social, emotional, and financial associations with Mr. Ladish is not sufficient to demonstrate a conflict of interest.

e. Conclusion -

Respondent has demonstrated the essential factual basis for its contention that Complainant violated AR 1450-01, subsection IV(D), in at least 2006 to 2007. The existence of these associations with Mr. Ladish, particularly given that the contacts were willful violations of DOC policy, also call into question Complainant’s ability to perform effectively, constitute bad judgment on the part of Complainant, and constitute a discredit upon Complainant and Respondent. The violation also constitutes a failure to obey DOC administrative regulations.

All of the charges that use the AR 1450-01, subsection IV(D) violation as the factual basis for the charge, therefore, have sufficient factual support in the record. This includes the alleged violations of AR 1450-01, subsections IV (N), IV(HH), and IV(ZZ).

Respondent also has provided a sufficient factual basis to support its contention that Complainant violated AR 1450-01, subsection IV(V), because she suspected that

Mr. Ladish was doing drugs and she knew that he had assaulted people.

Respondent has not supported the other claims that Complainant has departed from the truth, failed to cooperate with the investigation, lacked integrity, and had a conflict of interest. Those counts fail from the insufficient factual basis demonstrated at hearing.

**B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.**

**1. Complainant's Due Process Arguments:**

**a. Due Process and the Board Rule 6-10 Meeting -**

Complainant argued at several points during the Board Rule 6-10 meeting and the Board hearing that she had been denied many of the documents that she had requested, that she had been not been permitted to procedures that she had requested during the pre-termination portion of this matter, and that these denials violate Due Process and well as specific Board Rules.

The Board's rules require an agency to follow the procedural steps required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), for the termination of a state employee whose employment can only be terminated for cause. See also *University of Southern Colorado v. State Personnel Board*, 759 P.2d 865, 867 (Colo.App. 1988)(applying the requirements of *Loudermill* to the state personnel system).

*Loudermill* re-affirmed the essential principle of due process that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542. "This principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Id.*

*Loudermill* stands for the proposition that "a tenured public employee is entitled to oral or written notice of the charges against him, and explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

The pre-termination hearing, however, "though necessary, need not be elaborate." *Id.* at 545. "In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* (internal quotations omitted). In the context of the termination of public employment when there is an opportunity for a full administrative hearing and judicial review after the termination, "the pretermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46.

The Board's rules for disciplinary processes apply the *Loudermill* standard for pre-termination hearings by requiring a pre-decisional meeting between the employee and the appointing authority to discuss the possible basis of discipline and to permit the employee a chance to respond prior to the point when a final decision is made. Board Rule 6-10, 4 CCR 801, specifically requires:

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. The appointing authority and employee are each allowed one representative of their choice. Statements during the meeting are not privileged.

To the extent that the Board's rules provide for a more extensive process than is required to meet the requirements of due process, "the agency must strictly comply with those rules." *Shumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo.App. 1974).

The pre-disciplinary meeting required by Board Rule 6-10 does not serve the same purpose as the evidentiary hearing before the Board. It is the Board's administrative appeal process which provides an employee with an evidentiary hearing and with the opportunity for judicial review. See *Kinchen*, 886 P.2d at 709 (holding that a respondent has the burden of proof in a disciplinary appeal to the Board because, in part, "the pre-termination 'hearing' procedures were not extensive and did not ensure an accurate result [in Kinchen's case]. *The post-termination hearing before the Personnel Board is the mechanism through which an employee is assured of a fair hearing and a full consideration of the issues*")(emphasis added). See also *Weiss v. Dept. of Public Safety*, 847 P.2d 197 (Colo. App. 1992)(applying the hearing requirements under the state Administrative Procedures Act, C.R.S. § 24-4-105 to Board hearings); C.R.S. § 24-50-125.4(3)("Any party may appeal the decision of the board to the court of appeals within forty-five days in accordance with section 24-4-106(11)").

Board rules also require that the appointing authority must consider the information offered by the employee in deciding whether to impose disciplinary or corrective action. See Board Rule 6-9, 4 CCR 801.

b. Complainant's specific arguments about the Board Rule 6-10 process -

Complainant contends that the process applied to Complainant failed to meet the requirements of Due Process and Board Rules 6-10 and 6-9 in three different ways.

First, Complainant argues that the “pre-disciplinary letter failed to include any information whatsoever about the specific allegations against her.” Complainant’s Closing Argument at p. 22. Board Rule 6-10, however, does not require such specificity in the letter which sets the Board Rule 6-10 meeting. This is also not a case where Complainant was unaware of the problem before she attended the Board Rule 6-10 meeting. Complainant had been interviewed three times prior to the Board Rule 6-10 meeting and her questions and answers during the Board Rule 6-10 meeting showed that she was well aware that the specific nature of her relationship with Mr. Ladish over the previous seven years was at issue. Once the Board Rule 6-10 meeting began, Complainant was informed of the allegations against her and a long, detailed discussion of those allegations was conducted. Complainant presents no authority for her argument that she was entitled to more than what occurred in this case insofar as the pre-disciplinary letter was concerned.

Second, Complainant argues that she asked the Warden to review the tapes of her IG interviews because she had denied that she was present at the home visit by Officer Pino. Warden Arellano had agreed during the Rule 6-10 meeting that he would review the tapes. He did not review the tapes, and his findings were based, in part, on his conclusion that she had been present during that visit.

Complainant presents no persuasive reason to find, however, that Board Rules 6-10 or 6-9 compel the Warden to review the tapes of an investigative interview conducted by the IG’s office, rather than relying on the written report, in order to strictly comply with the requirements of those rules. When Warden Arellano agreed to review the tapes, he was making an agreement above and beyond what the rules required him to do. The rules do not impose any limitation that an appointing authority cannot depend upon an investigative report as the basis for his knowledge of an alleged disciplinary offense. Warden Arellano’s reliance on an investigative report from the Office of the Inspector General was not unreasonable, and Complainant presents no persuasive reason to find that a failure to refer to the tapes when there was a dispute over a particular factual matter violated the applicable rules.

Third, Complainant contends that Warden Arellano’s failure to interview her 36 witnesses constitutes a violation of Board Rules 6-10 and 6-9.

This argument finds support in the rule requirement that an appointing authority must consider the mitigating evidence offered by an employee. Board Rule 6-9. In this case, Warden Arellano made Complainant’s integrity a part of the allegations against her. When Complainant then offered the names of witnesses who could speak “regarding my integrity,” the Warden was obligated under Board Rule 6-9 to perform a reasonable inquiry into that additional information if he was contemplating sustaining the integrity charges against Complainant. Instead, the Warden completely ignored the additional information and still found against Complainant on the integrity allegations.

The integrity allegations have already been eliminated from this case because

Respondent failed to prove the factual basis for such charges by a preponderance of the evidence. Warden Arellano's failure to reasonably investigate Complainant's additional witnesses on the integrity issue provides a second reason to dismiss all of the integrity-based allegations for violation of Board Rule 6-9 and 6-10 on that issue.

Warden Arellano's failure to interview the 36 witnesses did not affect the other allegations of wrongdoing in this case, however. Complainant argues that failing to interview the four witnesses denoted with a star because they had been in her house regularly during the summer of 2007 would have helped to prove that Mr. Ladish was not living with her during the summer of 2007 and that she was not involved in an "on-going" relationship with him. The disciplinary case against Complainant, however, was not founded upon a finding that Ladish lived at her house during the summer of 2007. Moreover, the allegation that Complainant had an on-going relationship with Mr. Ladish was based upon her continuing contacts with him and was not dependent on any assumption as to Mr. Ladish's living arrangements.

Finally, Complainant argues that Warden Arellano did not meet the Board Rule 6-10 requirement that he disclose his source because he had failed to disclose Ladish's Offender Profile (Exhibit 4-6c). Complainant contends that the Warden's reliance on this document was important because it reveals Ladish's arrests, and Warden Arellano "[made] it abundantly clear that Ladish's arrest record played a significant part in his determination that Ms. Houston violated the department's policies." Complainant's Closing Argument, at page 24.

This argument is not a persuasive application of the rule. It is correct that the Warden calculated Mr. Ladish's offender status as starting at the time of his arrests. Board Rule 6-10, however, states that the appointing authority "must meet with the certified employee to present information about the reason for potential discipline [and] disclose the source of that information unless prohibited by law." The phrase "source of that information" refers to the previous clause, which addresses "the reason for potential discipline." This is not a requirement that the content of investigative files be turned over to Complainant. The sources that must be revealed to an employee are the sources of the allegations against that employee. Mr. Ladish's Offender Profile is not a source of the allegation against Complainant but is a part of the file compiled to investigate those allegations.

In this case, the sources of the allegations were the Parole officers who discovered that Mr. Ladish was listing Complainant's address as his address, and Complainant herself through her multiple admissions during interviews with Investigators Kurtz and Finley. Warden Arellano's Board Rule 6-10 meeting procedure did not violate that rule through a failure to identify Mr. Ladish's Offender Profile as a "source" of the allegations.

## **2. Warden Arellano's Disciplinary Action Was Neither Arbitrary Nor 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; 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).

Warden Arellano acted in this matter with the benefit of a full IG investigative report prepared by Investigator Finley. Investigator Finley, in turn, had interviewed Complainant twice as part of that investigation and had worked to confirm or deny many of the statements that Complainant made during those interviews.

Complainant argues that Warden Arellano did not seek out evidence from her appointing authority at the time the events at issue occurred. Complainant does not explain, however, what evidence might have been revealed by such work. Complainant had provided information that she had told Capt. Hamilton of her relationship with Mr. Ladish, and a search was initiated for the letter she said that she gave to Capt. Hamilton. Moreover, Capt Hamilton was then interviewed as part of the IG investigation. Respondent's investigative process did follow up on leads offered by Complainant regarding how she had reported her relationship with Mr. Ladish, and Complainant presents no persuasive reason to have done more on this topic.

Complainant also argues that she had provided disclosure of her friendship with Mr. Ladish in her three promotional applications, and that the Warden had disregarded these efforts in his analysis. Complainant's disclosure of her friendship with Mr. Ladish, however, is not the same as meeting the requirements of AR 1450-01, subsection IV(D) which prohibits friendships with offenders unless permission is granted by the appropriate appointing authority. Promotional applications, moreover, are not the appropriate vehicle for obtaining permission for such associations. Complainant's admissions to the friendship, therefore, constitute additional evidence of the prohibited association with Mr. Ladish but do not represent a reasonable attempt to comply with the prohibition in AR 1450-01, subsection IV(D).

Complainant also argues that Warden Arellano's failure to look at Mr. Ladish's parole plan and AR 250-21 (the departmental regulation defining a parole plan), his failure to listen to the interview tapes, and the failure to interview Complainant's listed witnesses created an arbitrary and capricious disciplinary action.

Warden Arellano's decision not to examine Mr. Ladish's parole plan in detail was reasonable given that it Mr. Ladish's failure to note Complainant's name as his sponsor or her address as his residence would not be particularly probative of Complainant's involvement or non-involvement. The Warden also did not dispute Complainant's assertions that she was not named in the parole plan. It was not unreasonable under such circumstances to expend only the amount of time on the issue as was done.

Warden Arellano's failure to listen to the tapes, while not a Rule 6-10 violation, allowed the Warden's mistaken impression that Complainant had admitted to being in her home while Officer Pino conducted his home visit to become part of his disciplinary decisions. That factual conclusion, however, was only one small portion of the evidence available to the Warden. As the findings above demonstrate, once the mistake as to Complainant's admission is corrected and removed from the decision, Warden Arellano could still easily find that Complainant had an improper association with Mr. Ladish in 2006 – 2007. The failure to listen to the tapes in order to ascertain whether Complainant had admitted to being in her house during Officer Pino's visit, therefore, was not the type of mistake which indicated that Warden Arellano did not use reasonable diligence and care in compiling information in this case as to Complainant's association with Mr. Ladish.

Warden Arellano's complete disregard of Complainant's witness list with regard to her integrity witnesses, however, constitutes another reason to invalidate the integrity allegations as arbitrary and capricious. If the Warden intended to pursue integrity issues against Complainant, he needed to use reasonable diligence to collect information related to Complainant's integrity. The Warden's failure to use diligence and care in assembling the relevant information concerning the integrity allegations, however, does not affect the rest of the sustained charges against Complainant, particularly those related to her improper relationship with Mr. Ladish.

The evidence at hearing supports that Warden Arellano gave candid and honest consideration of the evidence in this matter related to Complainant's associations with Mr. Ladish and reached conclusions as to Complainant's relationship with Mr. Ladish that were reasonable. Respondent's discipline of Complainant for having improper associations with Mr. Ladish was not arbitrary, capricious or a violation of either rule or law.

**C. The discipline imposed was within the range of reasonable alternatives.**

The question before the Board is whether termination of Complainant's employment is within the range of reasonable responses for her violation of the subsections of AR 1450-01 related to prohibited offender associations and related standards. The allegations concerning Complainant departing from the truth, failing to have integrity, and in working under a conflict of interest have not been sustained and cannot be considered when evaluating the level of discipline to be imposed. See *also* Board Rule



6-12(B) ("If the Board of administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified").

An appointing authority's choice on the level of response is shaped by several Board rules.

Board Rule 6-9 requires that an appointing authority take a number of sources of information into account:

The 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 actions, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must be considered.

Board Rule 6-2 requires 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 nature and severity of discipline depend upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

In this case, Complainant has not been the subject of any prior or corrective action. Her work reviews prior to the point when her relationship with Mr. Ladish was revealed were at least in the satisfactory range and at times at the commendable level. Complainant's work was good enough to allow her to promote to the lieutenant level in a relatively short period of time.

The issues raised by these facts, then, are whether Warden Arellano took into account the information that he was required to consider, whether Complainant should have been issued a corrective action because she had no prior corrective or disciplinary action, and whether termination is otherwise reasonable on the facts proven at hearing.

Complainant argues that Warden Arellano made his decision prior to reviewing Complainant's March 30, 2008, response and that, therefore, the determination of the level of discipline fails to meet the requirements of Board Rule 6-9. While Complainant did present some impeachment evidence on this point, the persuasive evidence demonstrated that Warden Arellano took his time in reaching a decision and made his decision after reviewing Complainant's submissions. Testimony at hearing also supported that Warden Arellano considered the other types of information that he was

required to consider under Board Rule 6-9 in determining whether to issue corrective or disciplinary action.

While Board Rule 6-2 allows an appointing authority to take disciplinary action, including termination, without first resorting to a corrective action, such action is possible only when the violation is "so flagrant or serious that immediate discipline is proper."

Departmental policy established a strict, hard line of personal boundaries between staff and offender populations. Contrary to Complainant's arguments at hearing, this rule is not fundamentally difficult to understand: there is to be no social or casual interaction between an offender and DOC staff. A phone call is enough of a contact to trigger the prohibition.

Complainant's association with Mr. Ladish was a violation of a fundamental departmental standard of conduct – a standard that was sufficiently important that it was one of the three standards listed in Warden Arellano's Zero Tolerance Letter. Complainant's conduct also involved multiple contacts over a period of years. Moreover, Respondent has been able to prove that the violation was willful misconduct. Such characteristics support the conclusion that Complainant's violation of the standard of conduct was both flagrant and serious. Given the nature of the violation, Warden Arellano's decision to move directly to disciplinary action was not in violation of Board Rule 6-2.

The final issue is whether termination is a reasonable response to this offense. The undersigned finds that termination is reasonable under the facts proven at hearing. Complainant repeatedly demonstrated that she was either unable or unwilling to keep Mr. Ladish out of her life when she knew he was an offender and that such a connection could jeopardize her career. This was not a case where Mr. Ladish was, in essence, stalking Complainant and showing up unbidden. Complainant's explanation that Mr. Ladish would simply appear in her life and that she was not doing anything to encourage or promote those appearances was expressly rejected as not a credible explanation of the circumstances. Complainant allowed and encouraged Mr. Ladish to stay connected to her. Her arguments that she should not be held responsible for maintaining this connection are troubling.

Complainant's argument that the punishment imposed was too severe because she had never caused a security issue confuses the policy rationale for the bright line rule against offender associations with the necessary elements of the violation. There is no need for Respondent to wait until Complainant has caused a security breach before it can take strong action for violation of the rule.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Termination

is within the range of reasonable alternatives under the circumstances of this case.

**D. Attorney fees are not warranted in this action.**

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

Respondent's disciplinary action was, for the most part, well grounded in fact and policy. While a portion of the allegations that Warden Arellano sustained against Complainant were not sufficiently supported by the evidence at hearing and were undercut by the Warden's failure to fully investigate the integrity issues, there is no basis to find that Respondent imposed this unsupported portion of the case against Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

Respondent presented rational arguments and competent evidence to support its imposition of a personnel action against Complainant. An award of attorney fees and costs is not warranted under Board Rule 8-38 under such circumstances.


**CONCLUSIONS OF LAW**

1. Complainant committed most of the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

**ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 29<sup>th</sup> day of December, 2008.

  
Denise DeForest  
Administrative Law Judge

633 – 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202  
303-866-3300

## **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. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68B, 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 record on appeal in this case is \$50.00. 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 8-69B, 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**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73B, 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 8-75B, 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 8-65B, 4 CCR 801.

**CERTIFICATE OF SERVICE**

This is to certify that on the 29<sup>th</sup> day of Dec., 2008, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Jennifer Robinson



and in the interagency mail, to:

Eric W. Freund



Andrea C. Woods