

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RON LEYBA,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT PAROLE, COMMUNITY
CORRECTIONS & YOUTHFUL OFFENDER SYSTEM,

Respondent.

Administrative Law Judge Denise DeForest held a hearing in this matter on August 23, 24, and 25, 2010, and November 10, 12, 19, 29 and 30, 2010 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ on the last day of hearing. Assistant Attorneys General Michelle Brissette Miller and Willow Arnold, and First Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Jeaneene Miller, the Director of the Division of Adult Parole, Community Corrections & Youthful Offender System and the Department of Corrections official appointed as Complainant's appointing authority for this issue. Complainant appeared and was represented by Jennifer Robinson, Esq.

MATTER APPEALED

Complainant, Ron Leyba (Complainant) appeals his termination of employment by Respondent, Department of Corrections (DOC).¹ Complainant seeks reinstatement to his position of Warden with back pay and benefits, reimbursement for any monetary damages resulting from his termination such as full contribution to retirement benefits and insurance coverage costs, removal of the termination from his personnel file, and an award of attorney fees and costs.

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

1. Complainant originally included a discrimination claim in his appeal. At hearing, that claim was withdrawn without objection.

ISSUES

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

FINDINGS OF FACT

Introduction and Background:

1. Canon Minimum Center (CMC) consists of four separate facilities administered as one correctional facility and under the jurisdiction of one warden. The correctional facilities included the Four Mile Correctional Center (FMCC), which houses the main administrative building, the Arrowhead Correctional Center (ACC), and the Skyline Correctional Center (SCC).

2. Complainant began his career with the Department of Corrections (DOC) in 1988 as a Correctional Officer I, and he promoted rapidly within DOC. By 1997, he had been promoted to the position of Administrative Manager at Denver Reception and Diagnostic Center (DRDC). After two years with DRDC, Complainant was promoted to Warden. He then served as Warden at eight different DOC facilities.

3. Complainant's 21 years of service with DOC were without disciplinary action or corrective action. His performance reviews over those years were excellent.

Complainant's Move To CMC:

4. Complainant's appointing authority in 2006, and his direct supervisor from that period until the termination of his employment, was the Deputy Director of Prisons, Lou Archuletta.

5. Complainant was asked by Mr. Archuletta to take over leadership of CMC because it had been a struggling facility. Staff morale was low, and staffing had become a problem because of the lack of DOC transfer candidates who wanted to work at CMC.

6. Complainant arrived at CMC in May 2007.

7. Complainant's leadership style as the warden was a contrast to the prior wardens at CMC. When Complainant first arrived, he took a period of time to meet the

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staff and to observe the function of the facilities prior to making any changes or decisions. Complainant became quite popular among the staff for his penchant for showing up and working as a line officer for part of a shift. These appearances gave staff a chance to meet Complainant as they worked shoulder-to-shoulder, and provided Complainant with an invaluable view of the working conditions around the facilities.

8. Complainant's personal leadership style was also in contrast to the prior leadership at CMC. Complainant's personal style was charismatic and casual; there was often loud music playing from his office, and a lot of joking. Complainant would often hug employees, and ask about their families.

9. Complainant also believed in a system of leadership which emphasized the empowerment of the staff to participate fully in the mission of the facility. Complainant routinely lectured about servant leadership. This philosophy of leadership emphasizes the need of the leaders of any group to think of themselves as the ones that serve the needs of those below them in the hierarchy.

10. One of Complainant's more popular decisions was to open the management meetings to a much wider group of staff members. Meetings that once involved less than a dozen top management staff grew to include several dozen staff members.

Rumors of A Romantic Relationship Between Complainant and His Office Manager:

11. When Complainant arrived at CMC, Rita Rittenmeyer was the office manager for the complex. Ms. Rittenmeyer reported directly to the warden in the chain of command.

12. When Complainant arrived at the facility, Ms. Rittenmeyer's office was down the hall from the warden's office. The warden had a personal administrative assistant whose office was connected directly to the warden's office and served as an entranceway to the warden's office. When Complainant arrived at CMC, the warden's administrative assistant was Leona Silvers.

13. By approximately April of 2008, rumors concerning a romantic relationship between Ms. Rittenmeyer and Complainant were circulating among the administrative staff at FMCC. Administrative staff members in the FMCC building had, for example, observed that Complainant and Ms. Rittenmeyer were spending significant amounts of time together behind closed office doors. During and after April of 2008, various staff members had also noticed Complainant and Ms. Rittenmeyer acting in a physical manner which was exceptionally familiar, such as tickling and pinching each other while at a bosses' day luncheon in 2008, Complainant going through Ms. Rittenmeyer's purse while at that same luncheon, and the two touching in a familiar way while playing in a bounce house set up during a Fiesta Day event in about April of 2008.

Ms. Rittenmeyer Becomes Complainant's Assistant:

14. In approximately March of 2008, Complainant's administrative assistant, Ms. Silvers, was told by Complainant that she was needed for a temporary assignment to assist another DOC effort, the SAFE program. Complainant told Ms. Silvers that she would be gone from CMC for six to eight weeks, but would then return to her position as the administrative assistant to the warden.

15. In May 2008, Ms. Silvers transferred to the SAFE program and to an office in the maintenance support building in the East Canon Complex. She initially left her office as it was, in anticipation of her return in a few months.

16. Within a few days of Ms. Silvers leaving her office at FMCC, her personal belongings and the pictures from her old office in FMCC had been boxed up and sent to her, and Ms. Rittenmeyer had moved into Ms. Silver's old office. At the end of May 2008, Ms. Silvers learned during an administrative staff meeting at FMCC that she would not be returning to CMC and that Ms. Rittenmeyer had taken over her old job.

Ms. Smith's Transfer From FMCC to ACC:

17. Complainant and other staff members used the CMC gymnasium during the lunch hours to work out and play basketball in late 2007 and early 2008.

18. Wanda Smith, an administrative assistant at FMCC who was supervised by Major Ray Masse, occasionally used the gym to work out and play basketball. By approximately April of 2008, however, Ms. Smith had decided not to use the gym because she was uncomfortable with the physical horseplay between some of the female staff, including Ms. Rittenmeyer, and Complainant during basketball games.

19. Ms. Smith told Major Masse of her concerns about what Ms. Smith considered to be inappropriate physical touching between Complainant and some of the other staff, including Ms. Rittenmeyer.

20. Complainant learned that Ms. Smith had spoken about inappropriate touching between himself and Ms. Rittenmeyer.

21. In April of 2008, Complainant informed Associate Warden Dave Linam that Mr. Linam was going to move some employees out of FMCC and to ACC because they had been spreading rumors about Complainant and Ms. Rittenmeyer. Wanda Smith was one of the employees to be moved. Complainant told Mr. Linam that this move was to be his idea and that he was not to tell staff that Complainant had authorized the moves.

22. Ms. Smith learned in April of 2008 that she was to be transferred to ACC and moved into the position of assisting Ava Burbank with the American Correction Association accreditation processes. Major Masse had not requested that Ms. Smith be taken off her

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administrative work for his programs; Major Masse had been generally pleased with Ms. Smith's performance and played no role in the decision to change her position.

23. Ms. Smith found out that her work was to change when Ms. Rittenmeyer called into her into Ms. Rittenmeyer's office. During that conversation, Ms. Rittenmeyer told Ms. Smith that something that Ms. Smith had said had snowballed out of control, and that they needed to protect the Warden.

24. Ms. Smith was very upset by the announcement that she was moving jobs and facilities. Later in the day, Complainant stopped by her office and Ms. Smith talked to Complainant about how she did not understand what she had done to warrant a transfer. Complainant acted as if he did not know much about the moves and that the moves had been Mr. Linam's idea.

Ms. Burbank's Transfer From FMCC to ACC:

25. Ava Burbank was a General Professional II staff member who handled the ACA accreditation processes for CMC. In early 2008, Ms. Burbank was housed at FMCC.

26. Shortly before April of 2008, Ms. Burbank was going through a divorce. She had a conversation with Complainant during which Complainant told her in a half-joking manner to find a married man and that there would be no string attached. This comment shocked Ms. Burbank, and she told Complainant that she thought it was inappropriate.

27. During the same period of time, Ms. Burbank came into conflict with Ms. Rittenmeyer. Ms. Burbank objected to Ms. Rittenmeyer's frequently profane and angry interactions with staff. Ms. Burbank would make negative comments to Ms. Rittenmeyer and to other staff about Ms. Rittenmeyer's use of loud, coarse language.

28. Ms. Burbank also noticed that Complainant and Ms. Rittenmeyer were spending an unusual amount of time together behind closed doors during the day, and that they were often leaving the facility for lunch at about the same time and returning within a few minutes of each other.

29. Word reached Complainant that Ms. Burbank was also talking to others about his relationship with Ms. Rittenmeyer. In the same conversation during which Complainant told Mr. Linam to move Wanda Smith, Complainant also instructed Mr. Linam to move Ms. Burbank as well and for the same reasons.

30. It was harder for Mr. Linam to move Ms. Burbank because Ms. Burbank's work required her to use a significant amount of file and storage space. Within a few weeks of moving Ms. Smith, however, Mr. Linam was also able to move Ms. Burbank out of the FMCC administrative building.

Complainant Chastises Gina Roberts After Ms. Rittenmeyer Is Rude To Her:

31. Gina Roberts was a GP III at CMC who was Ms. Rittenmeyer's supervisor for a period of time. By May of 2008, however, Ms. Roberts was no longer Ms. Rittenmeyer's supervisor.

32. Ms. Roberts was performing work on the ACA accreditation files for Ms. Burbank, and she needed organization charts sent to her. Ms. Roberts asked Ms. Rittenmeyer in an email if she would place the charts in the inter-departmental mail to her. Ms. Rittenmeyer emailed back, you have been a little bit bitchy lately, keep it to yourself.

33. Ms. Roberts responded that she was tired and just asking for a bit of help, and that she didn't appreciate the rudeness from Ms. Rittenmeyer. Ms. Rittenmeyer responded that Ms. Roberts should never mind, that she would get the chart as she requested and to please forgive her because she wishes she had never said anything.

34. Ms. Roberts copied Complainant and Mr. Linam on the email exchange with Ms. Rittenmeyer.

35. A few moments after the last email of the exchange, Ms. Roberts received a phone call from Ms. Rittenmeyer. Ms. Rittenmeyer told Ms. Roberts that she was calling to apologize to Ms. Roberts for the email. Ms. Roberts told her, okay, apology accepted and started to hang up. Ms. Rittenmeyer began to raise her voice at Ms. Roberts. She told Ms. Roberts that she was trying to apologize. The call finally ended with Ms. Roberts again offering that she had accepted Ms. Rittenmeyer's apology.

36. Ms. Roberts could hear laughing in the background of Ms. Rittenmeyer's call. She believed that Complainant had made Ms. Rittenmeyer call and apologize to her.

37. A few days later, Mr. Linam and Complainant told Ms. Roberts that she should remain in the office after a management meeting. When Complainant, Mr. Linam, and Ms. Roberts talked after the meeting, Complainant told Ms. Roberts that he was placing her under investigation for the incident with Ms. Rittenmeyer. This news surprised and shocked Ms. Roberts, and she began crying at one point. Ms. Roberts told Complainant that it would be fine if he wanted to have the matter investigated because she had nothing to hide.

38. Complainant told Ms. Roberts that either Ms. Roberts or Ms. Rittenmeyer was going to have to move because they couldn't get along.

39. Ms. Roberts transferred to San Carlos Correctional Facility in August of 2008 because she was unhappy with the way that CMC was run.

Associate Warden Linam Talks About His Sexual Conquests:

40. Associate Warden Linam's wife died in 2007. At some point in 2008, Mr. Linam began dating women who were considerably younger than he was.

41. Mr. Linam developed a pattern of talking extensively with the female administrative support staff, particularly Toni Eilert, about his sexual activities with these young women. Mr. Linam's comments were sexual in nature and graphic. Mr. Linam also often used sexually explicit language in front of Complainant and others.

42. Complainant did not formally address the issue of Mr. Linam's choice of sexual topics to discuss with the administrative support staff, or his other use of sexually explicit language in the workplace, through the use of performance documentation or any other written system of documenting conduct. Complainant's response to Mr. Linam's language was to tell him not to talk to the administrative staff about his girlfriend and personal life.

43. Also in 2008 or early 2009, Capt. John Tafoya stopped by the CMC administrative office while Mr. Linam was in the office telling the administrative staff about a young girl he was dating. Capt. Tafoya told Mr. Linam that Linam was sick. Mr. Linam responded with a sexually explicit insult. Complainant was close enough to hear the exchange. Complainant's response was to apologize to Capt. Tafoya, and to speak with Mr. Linam about not insulting Capt. Tafoya in that manner. Complainant did not issue Complainant any written reprimand, performance plan, or other documentation concerning his choice of language either with the administrative staff or Capt. Tafoya.

Complainant's Relationship with Ms. Rittenmeyer and His Withdrawal From View:

44. Complainant and Ms. Rittenmeyer were physically attracted to each other significantly before they began their affair. At least by late December 2008, Complainant and Ms. Rittenmeyer were engaged in a romantic and sexual relationship.

45. A number of CMC staff noted that, in late 2008 and early 2009, Complainant seemed to be withdrawing from his work and that his usual levels of enthusiasm were not as apparent. Complainant, for example, stopped going to the morning management meetings.

46. In early 2009, Complainant made the decision to allow his upper-level managers to take control of the management meetings, instead of insisting that they open the meetings to a wider group of CMC staff. The upper-level managers preferred more of a top-down style for management meetings, in which a select group met and then issued instructions to the lower-ranked staff. These upper-level managers considered Complainant's style of inviting dozens of lower-ranked staff members to the meetings to be overly cumbersome. Once Complainant gave Mr. Linam and the other upper-level managers a chance to organize the meetings as they wished, upper management staff

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decided to go back to the smaller group style.

47. On or about February 12, 2009, Mr. Linam sent out a message to staff which restricted the daily management team meeting to only ten upper management staff and Ms. Rittenmeyer.

48. The staff members who had previously been invited to the management meetings felt as if they were now being excluded from something important. Some, such as Ms. Burbank and Mr. Cole, considered the exclusion from management meetings to be part of the disfavor they had curried with Complainant by talking about the rumors of Complainant and Ms. Rittenmeyer.

Rumors of Complainant's Affair With a Subordinate Reach DOC:

49. In February 2009, Complainant's supervisor, Mr. Archuletta, conducted a meeting with Complainant at DOC's Central Office. Mr. Archuletta called the meeting to discuss a rumor that had come to his attention concerning an affair that Complainant was allegedly having with a subordinate. Mr. Archuletta did not know at the time of the meeting that the affair was allegedly with Ms. Rittenmeyer.

50. Mr. Archuletta directly asked Complainant if he was having an affair. Complainant lied to Mr. Archuletta and told Mr. Archuletta that he was not having an affair.

51. Later that same day, Mr. Archuletta learned that the alleged affair was with Ms. Rittenmeyer. He and Complainant spoke on the phone that afternoon, and Mr. Archuletta brought up Ms. Rittenmeyer's name. Complainant again failed to truthfully report to Mr. Archuletta that he was, in fact, engaged in a romantic and sexual relationship with Ms. Rittenmeyer.

Complainant's Comments To CMC Staff About the Rumors:

52. In February of 2009, Complainant conducted a day-long training session on servant leadership for the CMC staff.

53. In the afternoon session of the presentation, Complainant told staff that there were two other staff members whose marriages were being ruined by rumors of an affair. Complainant informed staff that if he found out who was spreading these rumors, then Complainant would have their jobs.

54. At the time of this meeting, there continued to be rumors among staff of Complainant's and Ms Rittenmeyer's affair. At the same time, there were also rumors at CMC concerning another two officers.

55. A number of the staff members who heard Complainant's remarks reasonably believed that Complainant was talking about the rumors about himself and Ms.

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Rittenmeyer, and that Complainant was threatening their jobs over the rumors of his affair.

The Alleged Photos of Mr. Cole:

56. In August of 2007, the intelligence officer at Territorial Correctional Facility, Tom Beneze, came across a group of photos that had been sent to an inmate at the facility. The photos were contraband because, in addition to photos of a group of young men in social settings, the photos also included sexually explicit photos involving the men in gay sexual situations. The warden of TCF, Warden Abbott, examined the photos with Lt. Beneze, and the two of them concluded that one or more of the social photos may have also included a correctional officer at CMC, Lt. Melvin Cole. If the photos included Mr. Cole, such photos could represent an undisclosed social relationship between a member of DOC staff and inmates, and such social relationship constituted prohibited conduct for DOC staff.

57. Warden Abbott told Lt. Beneze to contact CMC and provide Complainant with the photos. When Lt. Beneze contacted Complainant shortly thereafter, however, Complainant asked Lt. Beneze to simply hold on to them and he would get back to the lieutenant. The file remained on Lt. Beneze's shelf.

58. The photos discovered by Lt. Beneze did not include any photos of Mr. Cole.

59. In February of 2009, Mr. Cole spoke with CMC staff member Lisa Guiterrez. Ms. Guiterrez was the administrative staff who handled the rollover phone calls when neither Complainant nor Ms. Rittenmeyer picked up their phones. Ms. Guiterrez had been complaining to Mr. Cole that often no one could find Complainant or Ms. Rittenmeyer and that she did not know what to tell people when she was asked where the two of them could be or when they would return.

60. Shortly after his discussion with Ms. Guiterrez, Mr. Cole brought up the issue with Complainant. Complainant chastised Cole for discussing rumors with Ms. Guiterrez. Complainant told Mr. Cole that he had violated a trust by talking about the rumors with Ms. Guiterrez, and that Cole had hurt both Complainant and Ms. Rittenmeyer.

61. In late February 2009, one of the administrative staff from CMC called Lt. Beneze and asked if he still had the photos. On or about February 27, 2009, Lt. Beneze transmitted the photos to Complainant's office at CMC.

62. In March of 2009, Mr. Linam went into Complainant's office and saw a white envelope on Complainant's desk. Complainant and Ms. Rittenmeyer were present. Complainant told Mr. Linam that if Mr. Cole tried to mess with him, that Complainant would mess with Mr. Cole. Complainant flipped over some of the photos and showed them to Mr. Linam. Ms. Rittenmeyer asked Complainant several times if she could see the photos and Complainant at first just told her that the photos were gross. Finally, Complainant showed Ms. Rittenmeyer some of the photos and Ms. Rittenmeyer agreed that the photos were

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gross.

63. Ms. Rittenmeyer intended to place the photos in Mr. Cole's personnel file to discredit him.

64. In March or April of 2009, Complainant had a discussion with Mr. Cole during which he brought up the existence of allegedly incriminating photos. Complainant told Mr. Cole that someone was out to hurt him, but that Complainant had protected him from sexually explicit photos.

Ms. Smith's Complainant Concerning Ms. Rittenmeyer:

65. On or about March 11, 2009, Ms. Smith was in a meeting in Ava Burbank's office. Ms. Smith had her headphone on, and answered a call from Ms. Rittenmeyer while she was seated in Ms. Burbank's office.

66. Ms. Rittenmeyer was calling Ms. Smith to chastise her over an earlier conversation with another administrative assistant, Patti Viola.

67. Ms. Rittenmeyer spoke with Ms. Smith on the phone in such a loud voice that Ms. Smith moved her headset a few inches from her ear, and Ms. Burbank could hear Ms. Rittenmeyer through the headset. Ms. Rittenmeyer told Ms. Smith that Ms. Smith should not dare to tell Ms. Viola how to do her job. Ms. Rittenmeyer continued to yell at Ms. Smith for several minutes.

68. At the conclusion of the call, Ms. Smith was left shaking and visibly upset about the manner in which Ms. Rittenmeyer had spoken to her.

69. Later that same day, Ms. Smith made a report to Rick Thompkins at the human resources office at DOC complaining of the manner in which she was treated by Ms. Rittenmeyer during the phone call. As part of that process, Ms. Smith told HR that she did not think Complainant would respond to any complaints about Ms. Rittenmeyer's supervision because of the relationship between the two.

Complainant's Third Denial Of The Affair To Mr. Archuletta:

70. On the last Friday in March of 2009, Complainant called his supervisor, Mr. Archuletta, and asked to meet with him. The two arranged to meet that evening at a Loaf-N-Jug store.

71. During this meeting, Complainant asked Mr. Archuletta if it was true that an investigation of him had begun. Mr. Archuletta had not heard of any investigation of Complainant, and he told Complainant that he had not been told of one. Mr. Archuletta encouraged Complainant to do what was necessary to end the rumors of his affair. Complainant told Mr. Archuletta that he and Ms. Rittenmeyer were close, but that he was

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close with a lot of his staff. Complainant did not discuss hugging or kissing Ms. Rittenmeyer, and did not suggest that he had a romantic or sexual relationship with her.

72. During this meeting, Complainant mentioned that Ms. Rittenmeyer was interested in a job that was open in risk management. Mr. Archuletta told Complainant that he would consider the idea. Mr. Archuletta considered this reference to the risk management job to be something that Ms. Rittenmeyer wanted to do, and not that Complainant was telling him that he was trying to move Ms. Rittenmeyer because of the affair.

73. Mr. Archuletta came away from the conversation at the Loaf-N-Jug believing that the problem faced by Complainant was one of quelling baseless rumors about an affair. He did not understand from anything that Complainant said to him during the meeting that Complainant and Ms. Rittenmeyer were engaged in a relationship in violation of DOC regulations.

Sighting of Complainant and Rittenmeyer at a Chuck E. Cheese Restaurant:

74. On or about March 28, 2009, a DOC employee who knew both Complainant and Ms. Rittenmeyer, Ronda Oliver, saw the two at a Chuck E Cheese restaurant near the World Arena in Colorado Springs. Ms. Oliver saw Complainant and Ms. Rittenmeyer kiss and touch in a romantic manner while at the restaurant. Ms. Oliver's observation, as well as other similar information, eventually reached Warden Susan Jones' attention.

75. Warden Jones informed Mr. Archuletta of what she had heard. Mr. Archuletta, in turn, contacted Director of Prisons Robert Cantwell with the information, and eventually provided the information to the Office of Inspector General (OIG). The report to OIG prompted the start of a formal investigation which addressed both Warden Jones' information as well as Wanda Smith's March 2009 complaint to Mr. Thompkins about Ms. Rittenmeyer's conduct.

Administrative Leave:

76. By April 23, 2009, Complainant had been placed on paid administrative leave by Robert Cantwell, Director of Prisons, pending the outcome of the professional standards investigation by the OIG.

OIG Investigation:

77. When the record of the OIG professional standards investigation was completed in early June of 2009, the record included interviews of thirty-six witnesses, with some of the witnesses interviewed on two or three occasions. The file of the investigative report, the reports of witness interviews, and the supporting documents filled a three inch binder.

78. Complainant was interviewed by OIG Investigator Grace Novatny on three dates: April 23, May 15, and May 26, 2009.

April 23, 2009 interview -

79. Complainant testified repeatedly at hearing that he had told the truth during his interviews with Investigator Novatny. While it is correct that Complainant admitted to a relationship with Ms. Rittenmeyer which was in violation of DOC regulations, Complainant also falsely denied that his relationship was sexual in nature. Complainant additionally told Investigator Novatny untruthful information concerning the relationship by suggesting that Complainant and Ms. Rittenmeyer had not developed a romantic relationship because they had been aware of the problems with such a relationship.

80. Complainant told Investigator Novatny, for example, that his relationship with Ms. Rittenmeyer was very close, in that he liked her and she liked him. When asked if the relationship had been intimate, however, Complainant responded that, no, it had not been sexual.

81. Complainant also agreed with Investigator Novatny that his relationship with Ms. Rittenmeyer was a romantic relationship. The way Complainant explained their romantic relationship, however, was that the two of them liked each other and were attracted to each other but that they had recognized the attraction and had tried to head it off.

May 15, 2009 interview -

82. Complainant called a meeting with Mr. Cantwell for May 15, 2009. Mr. Cantwell, the IG, Mr. Welton, Complainant, and his attorney attended the meeting.

83. During this meeting, Complainant read from a prepared statement in which he stated that he had committed three errors in judgment. The three errors of judgment were:

a. To allow a close relationship that he had with one of his subordinates, Ms. Rittenmeyer, develop into more than mere attraction and closeness, and instead into a romantic and sexual relationship;

b. To not fully disclose the nature of his relationship with Ms. Rittenmeyer when he spoke with Mr. Archuletta in March of 2009, and told Mr. Archuletta that he and Ms. Rittenmeyer were close; and

c. To deny that he had a romantic or sexual relationship with Ms. Rittenmeyer during his first meeting with Investigator Novatny.

84. After the meeting, Complainant was again interviewed by investigators for the OIG. During this interview, Complainant again read his statement into the record. He also answered additional questions about his affair. Complainant continued to date the onset of the sexual relationship to January 2009, and that he and Ms Rittenmeyer had developed a

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romantic relationship shortly before that point.

May 26, 2009 interview –

85. Complainant was interviewed by Investigator Novotny a third time as a follow-up to a variety of issues.

86. Complainant, for example, explained that he has misspoken earlier when asked how long Ms. Silvers' office was vacant after she had transferred to the SAFE program. He told Investigator Novotny that instead of being open for three to four months, it had been vacant for more like three or four weeks.

87. Complainant told Investigator Novotny that, during the meeting with Mr. Archuletta at the Loaf-N-Jug, he had tried to tell Mr. Archuletta how important it was that either he or Ms. Rittenmeyer transfer, and that he had told Mr. Archuletta that he and Ms. Rittenmeyer had hugged and kissed.

Change of Complainant's Appointing Authority:

88. Prior to April 23, 2009, Mr. Archuletta served as Complainant's appointing authority. By memo dated April 23, 2009, Mr. Cantwell, the Acting Director of Prisons, rescinded Mr. Archuletta's appointing authority over Complainant.

89. Once the OIG investigation was complete, Mr. Cantwell spoke with the Executive Director of DOC, Ari Zavaras, about reassigning the matter so that Mr. Cantwell's and Complainant's long working history would not be viewed as creating a bias in the matter. Mr. Zavaras agreed to reassign the matter to the head of a division who had not worked as closely with Complainant.

90. By memo dated June 19, 2009, Mr. Zavaras removed all appointing authority from Mr. Cantwell for all matters involving Complainant. By memo of the same date, Mr. Zavaras delegated appointing authority for all matters related to Complainant to Jeaneene E. Miller, Director of Adult Parole, Community Corrections and Youthful Offender System.

Rule 6-10 process:

91. After Ms. Miller had reviewed the OIG report, she sent a letter to Complainant dated July 23, 2009, scheduling a Rule 6-10 pre-disciplinary meeting for August 7, 2009. The topic for the discussion was listed as official misconduct.

92. On July 31, 2009, Complainant's attorney requested a copy of the investigative file from Ms. Miller. The parties made arrangements for Complainant to pick up the file at the August 7, 2009 Rule 6-10 meeting.

93. At the August 7, 2009, meeting, Ms. Miller identified seven areas of concern

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about which she wished to speak with Complainant. Those seven areas included the following:

- (a) Your personal relationship with subordinate staff member Ms. Rittenmeyer and the impact it had on the work environment.
- (b) Did the relationship with Ms. Rita Rittenmeyer create or foster a hostile work environment?
- (c) Have you engaged in a pattern of misuse of your official position or authority in the work place?
- (d) Your failure to disclose the relationships to your immediate supervisor.
- (e) Pertaining to this case, during your interview with the Inspector's General's Office you provided false information.
- (f) Was there a general pattern of misconduct?
- (g) Was there a pattern of sexual harassment?

94. Complainant and Ms. Miller agreed to continue the meeting with the understanding that Complainant was to provide Ms. Miller with a list of witnesses, specific topics to be discussed with each witness, a copy of an audio recording, and any written information that Ms. Miller was to consider.

95. Ms. Miller later sent Complainant a letter requesting that the witness list be provided no later than October 28, 2009. No witness list was received by that deadline.

96. Ms. Miller scheduled a series of witnesses that she wished to interview based upon their statements in the OIG report. Ms. Miller also reviewed the tapes of the witnesses interviews with OIG investigators and not just the statements contained in the main report.

96. By late October 2009, Ms. Miller began an outline of issues and facts that she had identified from the materials she had already seen. Ms. Miller's outline served as both a checklist of issues to be explored and an outline of a disciplinary letter.

97. Ms. Miller's preliminary outline indicated that, based upon what she had seen and heard so far and the lack of any letter or witness list from Complainant, she believed that termination was an appropriate option.

98. By letter dated November 3, 2010, Ms. Miller notified Complainant that she still had not received his materials, and that she hoped to see any materials he wished to submit no later than November 10, 2009.

99. By letter dated November 3, 2009, Complainant's attorney submitted a letter explaining Complainant's delay in forwarding materials, and provided Ms. Miller with a witness list and series of questions.

100. Ms. Miller received Complainant's written narrative response by fax on

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November 30, 20009.

101. Ms. Miller scheduled a conclusion Rule 6-10 meeting as of December 21, 2009.

102. By the end of Ms. Miller's inquiry, she had interviewed a total of 35 witnesses, reviewed the entirety of the OIG written report, listened to the recorded interviews, and interviewed Complainant four times during Rule 6-10 meetings. Complainant had been present at each Rule 6-10 meeting and had brought his attorney with him; Ms. Miller had Rick Thomkpins present with her at all four meetings. All four meetings were tape recorded and transcribed.

Ms. Miller's Decision To Terminate Complainant's Employment –

103. By letter dated February 3, 2010, Ms. Miller terminated Complainant's employment.

104. The decision letter provided to Complainant was 26 pages long and included a detailed assessment by Ms. Miller of the evidence before her and her reasons for the termination.

105. After reciting the lengthy procedural steps taken as part of the Rule 6-10 process, Ms. Miller reviewed the information that had been produced as part of the OIG professional standards investigation.

106. Ms. Miller also summarized the results of her follow-up interviews with staff members and witnesses. Ms. Miller noted that staff members described Complainant as friendly, compassionate and inclined to hug male and female staff members. Many had commented upon the good energy that Complainant had brought to the facility. Others, however, had characterized Complainant as arrogant, egotistical, and needing to be the center of attention, willing to demonstrate favoritism, and willing to demand personal loyalty over loyalty to the mission of DOC.

107. She concluded that, according to her interviews, staff generally agreed that there was a division among the staff at the facilities. One group of staff members was loyal and supportive of Complainant, and the others were considered non-supporters. Ms. Miller concluded that "this concept that a staff member had to be either loyal or non-loyal to you created a schism at the facility that resulted in a negative work environment and interfered with staff's ability to work as a team." Additionally, Ms. Miller found that "[y]our personal relationship with Mrs. Rittenmeyer compounded this situation."

108. Ms. Miller concluded her letter with a series of findings.

109. First, Ms. Miller concluded that Complainant violated Board Rule 1-11, which requires all appointing authorities to be accountable for compliance with the Board's rules

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and with state and federal law, and for reasonable business decisions, including implementation of policy directives and executive orders.

110. Specifically, Ms. Miller found that Complainant violated AR 100-20, Sections IV.B and C, which establishes an administrative head for each facility who is in charge of all offenders, employees, contract workers volunteers, programs and activities at the facility, and requires that "each warden is the authority for his/her facility/center and, within applicable laws and regulation, shall be responsible for the daily operations of the facility/center." Ms. Miller explained that Complainant's conduct had "compromised your integrity and credibility as a leader. You have not met the threshold performance expected of an Appointing Authority. In addition, you have provided false information to your supervisor, the Inspector General's Office, and me, undermining your overall credibility in the OIG Investigation, the Rule 6-10 process, and as a Warden in this Department."

111. Ms. Miller found that the comment that Complainant made to Ava Burbank advising her to find a married man constituted a violation of AR 1450-01, Code of Conduct, and AR 1450-05 Unlawful Discrimination/Sexual Harassment.

112. Ms. Miller found that Complainant's conduct in the gymnasium while participating in basketball games violated DOC regulations because he had allowed physical contact between Ms. Twillenger, Ms. Rittenmeyer and himself that staff had perceived to be inappropriate. Additionally, Ms. Miller found that Complainant had kissed Ms. Eilert in a manner not appropriate for a Warden. Ms. Miller concluded that these actions violated AR 1450-01, Code of Conduct, in that it was conduct unbecoming. Ms. Miller also found that the activities in the gym also violated prohibitions in AR 1450-01 Section IV, which prohibits horseplay, requires the development of professional relationships, and prohibits activities which jeopardize the integrity or security of the department, calling into questions one's ability to perform effectively and efficiently, or casts doubt upon the integrity of DOC employees, contract workers or volunteers.

113. Ms. Miller found that Complainant had used transfers of office location and assignments in an effort to control the rumors of Complainant's and Ms. Rittenmeyer's affair.

114. Ms. Miller concluded that Complainant had allowed Ms. Rittenmeyer to be abusive, use profanity, and be unprofessional toward staff in her new position as his assistant. In allowing such actions to be taken, Ms. Miller found that Complainant had violated AR 1450-01, which states "Workplace harassment in any form will not be tolerated". Ms. Miller also found that Complainant had failed to properly use the provisions of AR 1450-12, Corrective and Disciplinary Actions, to assist Ms. Rittenmeyer in changing her conduct.

115. Ms. Miller found that Complainant had violated AR 1450-01, Section IV.K, in his relationship with Ms Rittenmeyer. This section of the regulation states that "Dating/romantic/sexual relationships between and supervisor and one who is within the

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direct supervisory chain of command of the supervisor, or when the supervisor is in a position to influence the employment of, or volunteer status of, a DOC employee, contract worker, or volunteer, is prohibited.”

116. Ms. Miller found that Complainant had violated AR 1450-05, Unlawful Discrimination / Sexual Harassment when he failed to properly respond to Associate Warden Linam’s inappropriate sexual remarks to subordinate staff.

117. Ms. Miller also reported that she had reviewed the three other disciplinary cases that Complainant had asked her to review, and had determined that each case had its own set of facts and circumstances that were different than the facts and circumstances present in Complainant’s case. Ms. Miller explained that she would evaluate the situation on its own merits.

118. Ms. Miller concluded that Complainant’s “dishonest and unprofessional conduct as an Appointing authority to be egregious and that it would shock the conscience of a reasonable person.”

119. Ms. Miller decided that the totality and cumulative effect of all of the incidents pertinent to Complainant’s conduct were of such serious nature that they outweighed the benefit of his years of service to the department. “Your conduct has compromised your ability to serve as a trusted leader with staff and community members or in any other capacity with DOC, and has negatively impacted the Department. Therefore, it will not be possible for you to return to DOC.”

120. Ms. Miller additionally found that the pattern of unacceptable behavior, willful misconduct and violation of applicable administrative regulations was so serious and flagrant as to warrant immediate disciplinary action. Complainant’s employment was, therefore, terminated as of February 8, 2010.

121. Complainant filed a timely appeal of Ms. Miller’s action with the Board.

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.*, *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;

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- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof.

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 707-8. 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

A. Complainant committed the majority of the acts for which he was disciplined.

Respondent presented ample evidence that Complainant committed repeated acts of willful misconduct in participating in prohibited relationship with one of his direct subordinates, and then in making untruthful statements to Mr. Archuletta and the OIG concerning the nature of that relationship. These actions violated multiple provisions of AR 1450-01.

Respondent demonstrated by a preponderance of the evidence that Complainant had violated the prohibitions against sexually harassing conduct found in AR 1450-05 and AR 1450-01 by making the comment to Ms. Burbank that she should find a married man. Additionally, Respondent proved by a preponderance of evidence that Complainant's mild comments in response to Mr. Linam's unacceptable use of sexually graphic language and topics while talking with staff constituted an ineffective response to sexual harassment and the hostile work environment created by such language. AR 1450-05, as well as the other more general provisions, place the authority and responsibility for maintaining a harassment-free workplace squarely upon the shoulders of the leadership of the facility, and Respondent as amply demonstrated that Complainant did not meet that requirement in his response to Mr. Linam's conduct.

The evidence at hearing also demonstrated that Complainant had tolerated Ms. Rittenmeyer's use of profanity in her work communications, and that Complainant had supported her unprofessional actions toward Ms. Smith, Mr. Cole, and Ms. Roberts, thereby creating workplace harassment in violation of AR 1450-01.

Finally, Respondent has demonstrated by a preponderance of the evidence that Complainant permitted his growing relationship with Ms. Rittenmeyer to affect the operations of the administrative staff and the facility. The effects of that influence were felt as far back as April of 2008 when Complainant decided to move staff who had noticed his growing attraction to Ms. Rittenmeyer rather than take action to limit his interactions with

Ms. Rittenmeyer. As Ms. Miller explained repeatedly and persuasively in her termination letter, such actions undermined Complainant's responsibility to lead the facility and to be responsible for its daily operations, as required under AR 100-20.

Several of the smaller issues raised in the termination letter were not proven by a preponderance of the evidence, however.

Ms. Miller found that Complainant's conduct in the gymnasium while playing basketball, as well as a kiss delivered to Ms. Eilert, had violated several provisions of the applicable standards of conduct.

The evidence presented at hearing, however, could not establish with sufficient specificity what had occurred in these situations. There were no detailed descriptions offered of specific conduct on the basketball court, for example, from which the appropriateness of the conduct could be independently judged. The testimony concerning the kiss between Ms. Eilert and Complainant also did not establish by a preponderance of the evidence that it was an inappropriate kiss delivered by Complainant.

Ms. Miller also at least implicitly found that Ms. Rittenmeyer had been given authority beyond her position by Complainant. While the record demonstrates that several staff feared that Ms. Rittenmeyer held an oversized authority, there was insufficient evidence presented at hearing that Ms. Rittenmeyer actually exercised such authority.

These allegations are not sustained in the findings of fact because of the lack of sufficient evidence to support them. These charges should not be a factor in deciding the appropriate sanction to be imposed in this case.

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

1) Respondent's actions were 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).

There was no persuasive evidence presented at hearing to conclude that any arbitrary or capricious decision making occurred here.

Ms. Miller reviewed an exhaustive file prepared by the Office of Inspector General. She not only read the file reports on witness interviews but also listened to the interviews. Ms. Miller re-interviewed some witnesses and added witnesses to her list from Complainant's list of suggested witnesses. By the time she had completed her inquiry, Ms. Miller had used reasonable diligence to procure the relevant information necessary to make her determination.

Ms. Miller's considerations of the evidence compiled in this matter were similarly thorough. There is no persuasive reason to conclude that Ms. Miller's review had been anything other than a candid and honest consideration of the evidence of Complainant's conduct. The conclusions that Ms. Miller drew from that review were also well-reasoned and sensible.

Respondent's investigation and review of the allegations in this case was neither arbitrary nor capricious.

2) Respondent's actions were not contrary to rule or law:

a) Appointing Authority Objection:

Complainant objected at hearing to the designation of Ms. Miller as appointing authority by Mr. Zavaras. Complainant correctly points out that, as a matter of law, the Executive Director of DOC does not possess appointing authority for more than his own office staff and the heads of divisions.

The state constitution divides appointing authority between the executive director of a department and the division heads. "The head of each principal department shall be the appointing authority for the employees of his office and for the heads of divisions, within the personnel system, ranking next below the head of such department." Colo. Const. Art. XII, sec. 13(7). Division heads, in turn, "shall be the appointing authorities for all position in the personnel system within their respective divisions." *Id.*

In Complainant's case, this division of authority means that Mr. Cantwell was the state official who, by law, held the ultimate authority as Complainant's appointing authority.

Mr. Zavaras, on the other hand, had no authority unless and until he received a delegation of that authority from Mr. Cantwell. Once Mr. Zavaras had received appointing authority from Mr. Cantwell, Mr. Zavaras could delegate in writing to Ms. Miller. See Board Rule 1-8, 4 CCR 801.

While delegations of appointing authority are permitted under the rules, those delegations must be in writing. Board Rule 1-8.

In this case, Mr. Cantwell made clear that he fully intended to pass appointing authority to Mr. Zavaras, and for Mr. Zavaras to assign the matter to another division director with less of a potential conflict of interest. Under Board Rule 1-8, the delegation

from Mr. Cantwell should have been in writing. No such writing was introduced at hearing. There was, however, a written document from Mr. Cantwell to Mr. Archuletta rescinding Mr. Archuletta's delegation of appointing authority. There was also a written delegation of appointing authority from Mr. Zavaras to Ms. Miller which complies with Board Rule 1-8 requirement for a written delegation. The error, therefore, is that there was no writing from Mr. Cantwell to Mr. Zavaras. All of the other rule requirements for further delegation were met.

This failure to properly document a clearly intended movement in appointing authority is harmless error in this case. The fact that Mr. Zavaras wrote Mr. Cantwell to remove appointing authority, rather than Mr. Cantwell writing Mr. Zavaras to formally delegate the authority, would be of import only if Mr. Cantwell was not in agreement with the change. In this case, however, it is clear that Mr. Cantwell fully intended to remove himself from the process and to allow Mr. Zavaras to re-assign the matter.

The error, therefore, is only a technical rule error that has had no unfairly prejudicial effect on any issue in this case.

b) New Allegations Objection:

Complainant objected at hearing to Ms. Miller's inclusion of her allegations that Complainant not been truthful in speaking with her as a specific basis for imposing discipline.

It is important to note first that Ms. Miller's specific formal findings of grounds for discipline do not depend upon any allegation that Complainant was untruthful with her during the Rule 6-10 process. There is, however, a reference in the letter to Ms. Miller's opinion that Complainant undermined his own credibility by providing "false information to your supervisor, the Inspector General's Office, and me, undermining your overall credibility in the OIG Investigation the Rule 6-10 process, and as a Warden in this department." (emphasis added).

Complainant is correct that only those issues which have been noticed as the subject of a Rule 6-10 meeting can be a cause for discipline. See Board Rule 6-10, 4 CCR 801. If a new potential ground for discipline arises during the process, then a second Rule 6-10 meeting may held on the new allegation, if it is to be considered as a basis for imposition of discipline.

The allegation that Complaint was not entirely truthful with Ms. Miller during the Rule 6-10 process has not been noticed as a potentially separate cause for discipline, and not discussed as an issue in any of the Rule 6-10 meetings. It would therefore be a violation of Board rules to consider such allegation as a basis for discipline.

This is not to say that Ms. Miller's impression of Complainant's truthfulness in her process cannot be considered at all in her decision. The correct places to consider such

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information is in evaluating credibility and evaluating aggravating circumstances for the imposition of sanctions. The conduct of the employee during the disciplinary process is, for example, often either a mitigating or aggravating circumstance to be considered during the choice of sanction.

Ms. Miller's statement in her termination letter reflects that she was commenting on Complainant's overall credibility, and not attempting to impose a sanction on the grounds that Complainant had been untruthful with her.

c) Prejudgment Objection:

At hearing, Complaint introduced evidence that Ms. Miller had created a draft outline of a final decision which included a decision to terminate Complainant's employment, and that this draft was completed in late October, 2009, and before the Rule 6-10 process had ended and prior to the point when Complainant had offered his proposed witness list to Ms. Miller. Complainant argues that this draft indicates prejudgment on Ms. Miller's part, in violation of Complaint's due process rights.

Ms. Miller's explanation was that Complainant had been asked for a witness list more than a month prior to that point and had failed to produce one to her, and she had doubted that he would produce one. Ms. Miller also credibly testified that, once she had been given Complaint's information, she added the proposed witnesses to her set of employees to be interviewed and considered what these additional witnesses had to say.

Ms. Miller's explanation of events was credible and persuasive that she had not impermissibly prejudged Complainant. The question is not one of whether the appointing authority develops an opinion as she proceeds through her investigation, but whether she allows prejudgment to prevent a full and fair investigation of the facts and the drawing of reasonable conclusions. Complainant's list of witnesses was submitted weeks late, and it was not clear by the end of October 2009 that he would carry through on his statement that he would offer such a list. Once the list finally appeared, Ms. Miller amply demonstrated that she was willing to review and consider all of the material information offered in this case, including the information offered by Complainant. Due process does not require more than such a process.

C. The Discipline Imposed Was Within The Range of Reasonable Alternatives.

1) The Requirement For Progressive Discipline:

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Complainant has no prior discipline or corrective actions in his employment with DOC. Respondent did not present any other information which would demonstrate that progressive discipline was achieved in this case.

The rule, of course, does not demand progressive discipline in every case. There is an exception which permits immediate discipline, including termination, for serious or flagrant actions.

In this case, part of the seriousness of the infractions rests on the long period, and multiple opportunities, that Complainant had to correct the issues created by his growing attraction to Ms. Rittenmeyer. Complainant's staff noticed that Complainant and Ms. Rittenmeyer enjoyed each other's company to an exceptionally close degree by April of 2008. Rather than address the underlying issue and either re-assign Ms. Rittenmeyer or make sure that they spent less time together, however, Complainant instead installed Ms. Rittenmeyer in his outer office as his new personal administrative assistant, and ordered the transfer of two employees who had spoken of the closeness between Complainant and Ms. Rittenmeyer. Even accepting Complainant's contention that the relationship was not sexual until December of 2008, Complainant still took no action after December 2008 to eliminate the violation. At the time Complainant was placed on administrative leave in April of 2009, Ms. Rittenmeyer was still in his direct chain of command as his personal administrative assistant.

The seriousness of the violation is also measured in the fact that Complainant repeatedly told untruthful statements about the relationship to his supervisor and to the OIG. Complainant argued at hearing that he had fully answered the questions about his affair to both Mr. Archuletta and to Investigator Novotny in the April 27, 2009 interview. As the findings demonstrate, however, Complainant's protestations that he had fully explained the situation are not correct. Prior to Complainant's statement of May 15, 2009, anything that Complainant said which hinted at the nature of the relationship was then also hidden by Complainant under either flat denials, vague characterizations that failed to explain the nature of Complainant's relationship, or other characterizations that his relationship with Ms. Rittenmeyer were like the close and personal relationships he had with other staff. Prior to May 15, 2009, Complainant had multiple opportunities to be truthful, and instead he chose to hide his fully developed romantic and sexual relationship with Ms. Rittenmeyer with untrue denials, vague terms, and false assurances.

Complainant's actions in this case are also serious violations of performance standards because he took these actions while he was the top authority at CMC. It is a more serious violation for the man ultimately in charge of enforcing all of the rules to participate in a prohibited relationship with a direct subordinate than the same violation carried out by lower-ranked staff.

Finally, Complainant's growing romantic attraction to Ms. Rittenmeyer was carried out in a particularly flagrant way. The relationship was not handled discretely. Numerous staff members understood that it existed. Complainant even had the poor judgment to have Ms. Rittenmeyer take over the job (and the office) of his personal administrative assistant within days of telling his prior administrative assistant, Ms. Silvers, that she was only going on a short detail to help another program.

Complainant's actions in this case were sufficiently serious and flagrant to warrant the imposition of immediate discipline, rather than impose progressive discipline under Board Rule 6-2.

2) Comparisons With Other Disciplined DOC Employees:

Complainant discussed his knowledge of the discipline of other DOC employees at some length at hearing. Complainant's argument was that others accused of lying to the OIG and of having affairs with other staff members had not been terminated, and therefore he should not have been terminated either.

This argument is of very limited utility under the Board's rules for the setting of a disciplinary sanction. Board Rule 6-9, 4 CCR 801, requires that an appointing authority is to weigh the facts of the incident as well as an employee's information and performance in making a decision on the level of discipline to impose. See Board Rule 6-9 ("The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances"). In order for there to be a comparable situation, therefore, not only does the violation need to be similar, but all of the other factors have to be comparable as well. Nothing that Complainant presented came close to meeting that standard.

Complainant also argued that his situation should be compared to other discipline which was changed during the settlement process. Complainant points to another warden who was initially terminated, but then was rehired as part of his settlement of the personnel appeal. In deciding the issue of sanction, the correct focus is on the sanction assessed, and not on the result of any later settlement process. Settlement typically takes into account many other factors other than those listed in Rule 6-9. Sincere contrition on the part of an employee may, for example, be a persuasive reason to lessen a severe discipline. Whether or not there is sincere contrition expressed during a settlement process, however, is not something that is known beyond the parties to the settlement. Comparing the imposed sanction in one case with the settlement terms in even a similar offense provides no information on the reasonable range of disciplinary alternatives which should be considered in a case.

3) Termination Was Within The Range of Reasonable Sanctions Available:

The reasonable range of sanctions which could be imposed in this case, therefore, should be determined by the factors listed in Board Rule 6-9.

On the mitigation side, there is plenty to be said for Complainant's years of good service to DOC. His work was apparently often exemplary, and he brought energy, creativity, and passion to the job of a warden. As Ms. Miller found in her review, Complainant's performance reviews show that his work has been highly valued for many

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years.

On the other side of the equation, however, are a number of highly disturbing aspects to this matter. The primary violations involve an obviously improper relationship that Complainant lied about, and hid, repeatedly. Complainant's position as the appointing authority for his facility makes the improper relationship and deception as devastating to the system as such violations can be. When Complainant learned that his staff had (correctly) deduced that he was inappropriately physically attracted his office manager, instead of moderating his conduct, Complainant treated the staff as the problem. He transferred them away from FMCC. He threatened their jobs over the rumors. This abuse of Complainant's position as warden in and of itself warrants termination from employment.

Additionally, Complainant's repeated insistence during his testimony at the hearing that he had fully cooperated with the OIG and had not mislead Mr. Archuletta demonstrates that Complainant has yet to truly acknowledged his violations.

In the end, Ms. Miller's decision that Complainant should not be permitted to return to DOC is a reasonable conclusion under these circumstances. Termination of Complainant's employment was within the range of reasonable sanction alternatives available to her.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, as required by Board Rule 6-9. There is no basis to reverse Ms. Miller's decision to terminate Complainant's employment as outside the range of reasonable sanction alternatives in 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; 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).

Given the above findings of fact, an award of attorney fees is not warranted. Complainant has not demonstrated that there was any improper personnel action taken by Respondent. Complainant, therefore, has not demonstrated that attorney fees are warranted in this case.

CONCLUSIONS OF LAW

1. Complainant committed the majority of acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.


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3. The discipline imposed was within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

ORDER

Respondent's disciplinary action is **affirmed**. Complainant's appeal is dismissed with prejudice. No attorney fees are awarded.

Dated this 13th day of January, 2011.



Denise DeForest
Administrative Law Judge
633 – 17th 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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 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 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 8-75, 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 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of **January 2011**, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** as follows:

Robinson & Associates Law Offices, LLC

Jennifer Robinson, Esq.
[Redacted]

Willow Arnold
Michelle Brissette Miller

Assistant Attorney General
[Redacted]

Vincent Morscher

First Assistant Attorney General
[Redacted]

[Redacted]

Andrea C. Woods