

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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**CLINTON RUSHING,**

Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on March 21 and 22, 2011, at the State Personnel Board, 633 17<sup>th</sup> Street, Courtroom 6, Denver, Colorado. The case was commenced on the record on January 13, 2011. The record was closed on March 22, 2011, at the end of the hearing. Senior Assistant Attorney General Diane Dash represented Respondent. Respondent's advisory witness was Major Lawrence Martin, Complainant's appointing authority. Complainant appeared through Scott Olsen, Esquire, Bruno, Colin, Jewell, & Lowe, P.C.

**MATTER APPEALED**

Complainant, Clinton Rushing, appeals his disciplinary demotion from Sergeant to Trooper by Respondent, Department of Public Safety, Colorado State Patrol (CSP, the Patrol or Respondent). Complainant seeks rescission of the disciplinary action and reinstatement.

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

**PROCEDURAL MATTERS**

Video Conferencing. Several witnesses appeared by videoconference in Durango, Colorado. This enabled each witness in Durango to see the attorney in Denver conducting the examination. It also enabled the judge, the parties, and counsel to see each witness in Durango. Complainant, Respondent's advisory witness, and counsel for the parties appeared in Denver. There were no technical difficulties associated with the video conferencing, and utilization of this resource was very effective.

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

## FINDINGS OF FACT

1. Complainant began his career at the Patrol in 2000 as a Trooper. He received consistently good evaluations. Complainant's 2007 overall annual rating was the highest possible, Level 3, Exceptional.

2. In December 2007, Complainant was promoted to Sergeant. He reported to Durango, Colorado for duty as Sergeant on January 1, 2008.

3. As Sergeant, Complainant was the direct line supervisor over approximately seven Troopers. He performed their evaluations, made the work schedule, reviewed their tickets and accident reports for accuracy, punctuation, and grammar, and assured his team complied with policies and procedures.

4. The Sergeant position was Complainant's first supervisory position. He received training from the Patrol in first-line supervisory leadership. The training materials included the following: "If you really want to know how you are communicating with your people, and if they feel valued, ask them. But once you ask, then you must listen, and be prepared to act."

### Complainant's first year as Sergeant

5. Complainant reported directly to Captain Martin Petrik.

6. One of the routine functions of a sergeant is to review, edit, and return Troopers' accident reports for correction. Captain Petrik closely monitored the reports that were corrected by Complainant. Therefore, Complainant knew it was a priority for him to hold his Troopers accountable for their report quality. Because the majority of Durango Troopers under Complainant's supervision were new to the job, he spent a lot of his time sending reports back for correction.

7. Complainant often attached a note to his corrections, directing his Troopers on exactly what he wanted them to do and how to correct an error. He used bold, underlining, and capital letters in his written memos, stating, "You **WILL**" or "You **MUST**" do this or that. Many of the Troopers felt that his memos were a written form of yelling.

8. JK<sup>1</sup> is a Trooper in the Durango office who started there in 2007, prior to Complainant. Approximately one month after Complainant arrived, he corrected one of JK's tickets and sent it back to her. JK disagreed with Complainant's interpretation of the policy pertaining to the ticket. She spoke with a more seasoned Sergeant on the force about the situation, who suggested that she send the ticket back without Complainant's suggested changes with a copy of the policy highlighted for his review. She did so.

9. Complainant took offense at one of his Troopers going around his directive and talking to another Sergeant about a matter between himself and his subordinate. He talked to JK about the situation and made it clear she was not to undermine his authority by talking to another sergeant again. It was a heated conversation.

10. Later that day or the next day, JK came to Complainant to smooth things over. At the end of this conversation, in order to underscore his authority over her, he said, "Who's your daddy?" Trooper JK was taken aback by this comment, although she did not find it to be sexually based. She just looked at him. Complainant repeated, "Who's your daddy?" making it clear that he wanted her to say, "You are." JK responded to Complainant, "You are." Complainant's point was that he was the "daddy of the team," he was the boss.

11. This exchange made JK feel uncomfortable. She did not feel threatened by it.

12. JK did not have a good working relationship with Complainant. After one year under his supervision, she applied for a transfer because she disliked working under him. The request was denied because there was no opening.

13. JK is the top-performing Trooper in the Durango office in terms of tickets issued. Her communication style is such that, generally, she does not have smooth working relationships with most Troopers in the office.

14. Corporal Jared Rapp worked closely with Complainant. A Corporal is a Trooper with supervisory duties, between the rank of Trooper and Sergeant. Corporals fill in when the Sergeant is absent. Corporal Rapp had been a Corporal for one year in the Durango office prior to Complainant's arrival.

15. During the first year of Complainant's employment, Colonel Rapp had a very difficult time getting along with Complainant. He found Complainant's communication style to be harsh, blunt, and sharp-edged, and believed that Complainant intended to be intimidating to others. It was a very tough year for Rapp; there were days he dreaded going to work. When he saw a phone call from

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<sup>1</sup> This employee's identity is being kept confidential because the issue of domestic violence is discussed below in relation to her.

Complainant on his phone, he often thought to himself that he was going to get chewed out. By the end of their first year working together, Rapp was seriously considering transferring out of the Durango office.

16. On one occasion, Complainant called Rapp into his office to discuss a problem with meeting truck inspection quotas. When Rapp arrived in Complainant's office, Complainant came around his desk and stood in front of Rapp with his shoulders "squared up." Rapp diffused the situation by saying he was sorry if he had done anything wrong. Complainant backed off and then walked out of his office.

17. After approximately one year of having such a difficult time with Complainant, Corporal Rapp decided that, as the subordinate in the relationship, it was up to him to make it work. Once he made this decision, they got along better and he realized that in fact Complainant did not intend to intimidate others.

18. Trooper Stephanie Guilfoil initially had a problem with Complainant's management style, finding that he was so direct as to be intimidating. She informed fellow Trooper Michael Balenti, who had seventeen years with the Patrol, about this. Balenti informed Complainant that Guilfoil was a little bit "soft" and he needed to tone it down with her. Complainant did so and she never had any problems with Complainant after that.

19. Because the Troopers spend nearly all of their time in Patrol cars, Complainant often communicated with them via email "chat" messages while they were on the road. When he needed to talk to a Trooper in person, he sent a short message directing them to come see him at his office. He never provided the subject of the meeting. Most of the Troopers became nervous when they received these email messages from Complainant, because they could not prepare for the meeting, and because they assumed he was going to correct them on something. This experience caused unnecessary stress and anxiety for the Troopers under Complainant's supervision.

20. After Complainant's first year on the job, he received an overall Level 2, Successful, annual performance rating. In the narrative section of the evaluation, Captain Petrik noted that Complainant kept him informed of pertinent information but had submitted numerous reports past established deadlines. In addition, Complainant's written work needed proofreading. The Captain stated that Complainant had a majority of junior Troopers on his team, which required attention and guidance, and that Complainant monitored their performance closely to prevent problems. The Captain said that Complainant had earned the respect of his team and had arranged for trainings as appropriate.

21. The Patrol requires all Troopers to fill out upstream evaluations on their Sergeants. Complainant never saw them. Captain Petrik received and reviewed these evaluations and included some of their comments in Complainant's 2008 evaluation. He stated, "Based on the upstream evaluations by his Troopers Sgt. Rushing is viewed

as follows: *“Encourages high activity, focuses on positives; supportive of us from the beginning and has encouraged us to grow as an individual as well as a team; would also like to see him work with us a little more; team attitudes have gone up greatly; needs to work on his consistency on how he supervises his team; has the tendency to get ahead of himself when he answers questions and then has to later change the answer; his leadership is a very strong trait; goes to bat for employees; his door is always open.”* (Emphasis in original.)

### Sanchez Ticket Issue

22. Trooper Rusty Sanchez felt that Complainant was always available to provide assistance. He would call Complainant at 2 or 3 in the morning and receive an answer right away. On the other hand, Sanchez found that Complainant did not approve of Sanchez or other officers asking another sergeant in Pagosa or Cortez a question, even if it was more convenient and they did not want to interrupt Complainant.

23. In 2009, Trooper Sanchez covered a car crash and had a difficult time determining whom to cite. He spoke with Complainant, who said not to charge either party. Later, Sanchez mentioned it to Captain Petrik, who stated that he needed to cite the party who had turned into the other car. The Captain discussed it with Sanchez and Complainant, and Sanchez watched as Complainant “went off on the captain” in a disrespectful manner. After this discussion, Complainant directed Sanchez not to charge anyone. Sanchez complied with this directive, but several months later the Captain learned about it and Sanchez had to amend the report to charge that driver. The Captain was not happy with Complainant.

### Complainant's Language

24. Corporal Rapp experienced Complainant using foul language at work on several occasions, in a joking manner. Once, Rapp called Complainant to tell him about a mistake he (Rapp) had made, and Complainant responded, “I’m gonna kick your ass for that.” Rapp knew he was joking.

25. On another occasion, Complainant said to Rapp, as a joke, “You’re fired.” Rapp didn’t feel it was a big deal because he knew Complainant was saying it to make him feel better about a situation.

### 2009 Evaluation

26. During Complainant’s second year of employment, he became more resistant to Captain Petrik’s supervision and defensive about receiving feedback. On one occasion, Complainant sought to file drug possession charges against an individual who had been in a car involved in an accident. The Captain determined that there was no probable cause to make an arrest. Complainant strongly disagreed, and the Captain agreed to research the issue. The Captain consulted his Major and legal counsel for the Patrol and confirmed that there was no probable cause for an arrest. Complainant

refused to accept the Captain's decision as final and continued to push the issue, causing a lot of strain in the relationship.

27. On another occasion, the Captain sent Complainant an email message about having found several errors in a Trooper report that had been approved by Complainant. Complainant responded by stating that the Captain needed to be clearer because "my telepathy doesn't work." The Captain told Complainant that this is not how to talk to a supervisor.

28. Complainant's 2009 annual evaluation was at the Level 2, Successful, overall. He received a 1.5, Needs Improvement, in three sub categories:

- "Ensures communications are timely, clear, concise, easily understood, of appropriate content and grammatically correct."
- "Provides and accepts constructive feedback in a positive manner."
- "Performs duties/tasks in a timely and accurate manner."

29. Captain Petrik made the following comments on Complainant's evaluation: "Complainant is respected and liked by his team, who reflect that respect through their dedication to the job at hand; he is a team player; he works with his Troopers during team operations; for the most part he disseminates information and messages appropriately to subordinates to accomplish results (on three occasions he failed to assign overtime hours and Troopers' attendance as directed); his written correspondence shows improvement but there is still room for improvement in grammar; his correspondence needs more proof reading; in the first part of the evaluation period he improved on timeliness of reports, but in the latter part of the year he had numerous reports late, including several which were one month late."

30. In the Interpersonal Skills section, Captain Petrik noted that in the latter part of the evaluation period, after the Captain raised issues with Complainant, "His response appeared defensive and resistant to suggestions, or changes. Unless a direct order is given, a suggestion is always questioned. Sgt. Rushing felt he was not being supported when I administered corrective action to one of his Troopers."

31. This evaluation also noted, "Sgt. Rushing leads by example, which positively influences, motivates and challenges his subordinates to excel," and, "morale in the Durango team is up."

32. The 2009 evaluation also provided several comments from the Troopers' upstream evaluations. An example follows: "*Sgt. Rushing has earned my respect as a sergeant; I have no complaints; he makes a great attempt to help me when I need it, congratulates me on a job well done, and corrects me when I mess something up; his communication skills have greatly improved over the last year; it is a pleasure to work for him. . . he always has straight answers for me. . . he definitely has my back and looks out for me. He should try to improve more in the area of communication, specifically in the area of remembering his own directives. There are a lot of times that*

*he doesn't remember what he has told someone to do, or thought that he told someone to do something. This would really help him in everyday interactions with the entire team. . . Sergeant Rushing has observed what works and what does not before making changes that benefit the entire organization. . . He is great at listening, providing feedback and is extremely help[ful] in finding a solution when asked for assistance. He is very patient and fair." (Emphasis in original.)*

### George Rezebek

33. George Rezebek was a Trooper in the Durango office with seventeen years of experience at the Patrol when Complainant arrived in 2008. Rezebek had also been a police officer prior to his tenure with the Patrol, giving him nearly three decades in law enforcement.

34. On February 1, 2008, Complainant decided to nominate Rezebek for Master Trooper status, in order to demonstrate respect for Rezebek. Rezebek's nomination for Master Trooper was left pending by the Patrol for two years and was finally made official on June 16, 2010. Complainant had nothing to do with this delay.

35. Complainant and Rezebek generally had a good working relationship. Some Troopers felt that Complainant at times "talked down" to Rezebek or treated him as a child.

36. Rezebek's attitude about working for the Patrol was becoming progressively negative during the second half of 2009 and the first half of 2010. For example, he allowed his certifications to expire, so that he no longer had to perform trainings for other Troopers.

37. Captain Petrik was concerned about the small amount of time Rezebek spent on the Patrol car radio. Complainant repeatedly counseled Rezebek about this issue. In addition, Rezebek refused to note the race of individuals on his tickets, which was a violation of policy. Complainant had no choice but to counsel him on this issue.

38. Rezebek informed Trooper Sanchez that he felt Captain Petrik and Complainant took away a lot of his discretion by telling him how they wanted him to do his job. He said he had 20 to 30 years of law enforcement experience and, "it was all going down the drain."

39. Several Troopers noticed that during his last year at the Patrol, Rezebek was becoming increasingly paranoid about people high up in the Patrol chain of command being "out to get him."

40. One of the things Complainant did for his Troopers shortly after his arrival in Durango was to upgrade the computer equipment in their patrol cars. Rezebek did not receive the most up-to-date equipment in his car, and his computer was very slow. Rezebek therefore had to come into the Trooper office to enter his driver contacts. In

addition, the Patrol implemented a new computer email system for use by all Troopers sometime in 2009. Rezebek had a difficult time adjusting to the new computer systems.

41. Complainant attended the computer program training of trainers offered by the Patrol, in order to learn the programs and to become adept at training his staff.

42. Complainant spent dozens of hours with Rezebek trying to get him up to speed on the new programs and was patient in doing so. Rezebek never took notes during these training sessions.

43. Despite Complainant's extra effort on Rezebek's behalf, Rezebek never learned the programs. He could not open email or attach documents to emails.

44. Captain Petrik exerted pressure on Complainant to help Rezebek become proficient in the computer systems. In February 2010, Captain Petrik sent an email to Complainant expressing his concern that Rezebek was having so much difficulty with the computer systems he was a poor model for a Master Trooper.

45. In February 2010, Complainant showed Rezebek the email from the Captain and told him he needed to improve his performance. Later that day, Rezebek returned to Complainant's office with tears in his eyes, clearly upset about the Captain's memo. He told Complainant that he didn't want the Master Trooper nomination and that he planned to talk to his wife about his options after leaving the Patrol.

46. Complainant responded by trying to motivate Rezebek, telling him, "Fuck you, George, don't let them make you go out like this," or words to that effect. Complainant's effort to raise Rezebek's spirits was not successful. After Rezebek left the meeting, he did begin a discussion with his wife about retiring from the Patrol.

#### April 2010 JK Incident

47. In approximately March 2010, Trooper JK was the victim of an incident of domestic violence involving her husband. JK did not share this personal information with Complainant.

48. In April 2010, Complainant learned about this domestic violence incident from a police dispatcher from a nearby town who was a mutual acquaintance of both JK and Complainant. At that time, Trooper JK was on Workers Compensation injury leave from the Patrol and was taking prescription pain medication to address her injuries.

49. Complainant called Trooper JK at home and informed her in a telephone message that he needed for her to come to the office to handle some Workers Compensation paperwork. His intent was actually to meet with her to discuss the domestic violence incident, but he did not want her husband to know the purpose of the meeting.



50. Complainant drove to JK's home and picked her up. As they drove to the Patrol office, Complainant asked JK why she had not told him about the domestic violence incident. He informed her that he was hurt that she had not told him about it, and he felt it was his duty as her Sergeant to "take care of" his crew.

51. JK did not want to discuss the domestic violence incident with Complainant. She considered it private.

52. When they arrived at the office, Complainant brought JK into his office. He directed her to give him her cell phone. The police dispatcher had given him copies of emails she had generated to JK, regarding the incident with her husband. Complainant wanted to collect the emails that JK had sent to the dispatcher regarding the violent incident, so that he could collect evidence against JK's husband.

53. JK did not want to share her cell phone with Complainant. Nonetheless, she gave it to him. She spent the next two hours in his office as Complainant reviewed her history of email communications on her cell phone. Complainant then directed JK to forward him the ones that were relevant to the incident.

54. Complainant next ordered JK to sign a release to permit him to obtain copies of her medical records from the incident. She did not want to do this and asked if she had to do so. He responded that if she did not, he would simply get them by subpoena. JK did sign the medical release form.

55. While JK sat in his office, Complainant called the Sheriff's office to report the domestic violence incident. The Sheriff's office staff arrived, interviewed JK, and she gave a statement. Her husband was then arrested.

56. Later that evening, Complainant drove JK home. She was crying and very upset. Complainant asked her for her Trooper-issued weapons, and she gave them to him. He then asked her for her personally owned weapons, and she gave those to him.

57. In the days following this episode, Complainant conferred with the Patrol's legal advisor, who informed him that he should return the weapons to JK. He did so.

58. JK felt embarrassed that the domestic violence incident was raised at all in the workplace.

#### May 20, 2010 Memo to Rezebek; Performance Improvement Plan

59. Captain Petrik routinely monitored the radio traffic of the Troopers and printed reports that logged the Troopers' activity. The Captain noted that Rezebek continued to spend too little time on the radio and had insufficient activity on his shifts. He sent Complainant a memo asking what Rezebek was doing during his shifts.

60. On May 20, 2010, Complainant met with Rezebek on the side of the road during his shift and reviewed the issues raised by the Captain. In addition, he issued a confirming memo to Rezebek entitled, "Time spent during your shift." Portions of the memo include the following:

First, accountability is the way it is. If you are not calling in your stops as required by policy, someone, somewhere is going to raise an eyebrow and wonder what you are doing all day. You get paid to stop cars, write tickets, investigate crashes and crimes and lock up bad guys. No one is ever going to know [what] you are doing unless you say something out loud.

Second, if relaying is taking so much out of your day, you are relieved of that responsibility. . . You are not to touch relay unless asked specifically by the Captain or I.

Third, the Captain has specifically stated that all Troopers will be on the road from 6a.m. – 9a.m. and 3p.m.-6p.m. This means you will be working rush hour and stopping cars. You will do this. Not run relay, not anything else, with the exception of calls for service.

Fourth, your computer skills are still lacking. I have called you on several things that I know I have discussed with you. Per your IPO, you are to keep a notepad with everything computer wise that you have been taught. When I looked at it the other day there was hardly anything in it. This is unacceptable and it feels like you just don't care about my time. It is extremely frustrating for me when I see this. I do everything to help you out and it's like I am wasting my breath. If you do not want the help-then tell me, I will stop wasting my time. This will not excuse you from accountability. You still work here, and the computer is the way it is going. I cannot hold your hand and cover for you until you retire. You have to figure it out yourself.

Fifthly, your radio procedure will change. You **WILL USE** it more. You will call in **EVERYTHING** you do to dispatch. . . any future mishaps will result in performance improvement plans progressive action.

In conclusion I want to say this: You are now Master Trooper George Rezebek. You are and have to be the example. This is not negotiable.

61. In May 2010, Complainant placed Rezebek on a Performance Improvement Plan (PIP) because of his problems acclimating to the new computer systems. He was to be on the PIP for one month, unless he did not learn the systems.

62. Complainant and Rezebek scheduled a training meeting on June 8, 2010. Complainant arrived prior to his shift. Rezebek forgot about the meeting and missed it. They rescheduled the meeting for the next day, and Rezebek missed it again.

### Rezebek's Scheduling Issue

63. Another source of frustration for Rezebek in the late spring of 2010 was his impending change of schedule. Rezebek had an agreement with Trooper JK that she would work permanent nights and he would work permanent days. However, it was understood that when JK was ready to switch, they would switch. Complainant approved this arrangement because they agreed to it.

64. Pursuant to this agreement, Rezebek had worked for 18 straight months on day shift. In the spring of 2010, Trooper JK decided that she needed a break from

nights and wanted to work the entire summer on days. Rezebek was upset about this and did not want to work nights. He talked to all of the other Durango Troopers and finally found someone to trade with him, enabling him to work days.

65. Rezebek asked for Complainant's approval of the trade. Complainant denied the request, because Rezebek had made an agreement with JK, and he did not want to cause problems with the schedule of the other Troopers who had their own arrangement. Rezebek was angry about this.

66. Rezebek was scheduled to start working nights on July 5, 2010.

#### Rezebek Retirement on June 30, 2010

67. On June 23, 2010, Rezebek achieved his Master Trooper status. Complainant pinned the badge on his uniform.

68. On June 30, 2010, the Durango Troopers met outside for "range day." Rezebek was the on-call officer and he showed up in fatigues instead of his Patrol uniform. Complainant confronted Rezebek on the fact that he knew he was the on-call Trooper that day. Rezebek denied knowing that he was the on-call officer, but Complainant did not believe him. He ordered him to "get his ass in the office and put on his uniform," or words to that effect.

69. The Durango Patrol staff meeting followed the range day activities. At the meeting, Complainant publicly congratulated Rezebek on his Master Trooper status.

70. Later that day, Rezebek brought his hand-written resignation papers to Complainant, who was in court waiting to testify. The papers stated that his last day of work for the Patrol would be July 15, 2010. Complainant left the courtroom and talked to Rezebek briefly in the hall. He stated to Rezebek, "God damn it, George, I need to talk to you about this before you go. He also stated to Rezebek, "This isn't over." Rezebek left to drive home in his Patrol car because it was the end of his shift.

71. Complainant was concerned about Rezebek's retirement papers for two reasons. First, he was already short-staffed because JK was out on injury leave, so the loss of an additional Trooper would be a problem. Second, Patrol retirement policy requires a 90-day advance notice, and Rezebek had provided only two weeks. Complainant wanted to be sure that Rezebek complied with policy.

72. Complainant thought to himself that he needed to try to talk Rezebek out of retiring.

73. After he left court, Complainant called Rezebek and told him he wanted to meet. Rezebek was being driven home by Trooper Williams, because Williams needed to use Rezebek's Patrol car. Rezebek was half way home, approximately twenty or

thirty minutes outside of Durango at this point. He agreed to meet Complainant at the Bayfield Marshall's office.

74. On his way to the Bayfield Marshall's office, Complainant printed the Patrol retirement policy. He intended to help Rezebek fill out the paperwork properly while he drove Rezebek home.

75. When Complainant arrived at the Bayfield Marshall's office in his personal truck, Rezebek and Williams were in Rezebek's Patrol car. Complainant approached and told Rezebek to get out of the car and Complainant would take him home. Rezebek responded that he did not want to do that because he had a lot of stuff in his car, and Williams was going to drive him home.

76. Complainant responded, "It's no big deal, just move your stuff, I'll give you a ride." Rezebek responded by refusing again, stating that he just wanted to go home.

77. Complainant then said to Rezebek, "You have no choice, you have to move the stuff to my car and I'll give you a ride home." Rezebek started walking away from Complainant around the front of his car, grabbed his car keys, and said, "I'm done. Come on, Willy, let's go."

78. Complainant then walked around the back of the car, up to Rezebek and stated, "If you get in that car, I'll suspend you." Rezebek shrugged his shoulders and responded, "Do what you gotta do."

79. Complainant again ordered Rezebek to get in his car or he would suspend him. Then he turned to Trooper Williams and said, "Willy, take a walk." Williams walked to another area.

80. Rezebek asked if he could go and make a phone call, and Complainant said that was okay. Rezebek called his wife and asked her to come pick him up. He then came back outside and removed all of his personal belongings from his Patrol car, placing them on the sidewalk.

81. Complainant approached Rezebek and his belongings, and Rezebek said, "That's my stuff, leave it alone. I'm off duty."

82. Complainant tried to talk to Rezebek, asking him to take back his retirement papers, and to take the retirement policy and review it. Rezebek would not take the papers back. His wife arrived, they packed his belongings, and they left.

83. Rezebek never returned to the Patrol. He accused Complainant of creating a hostile work environment and later indicated that he was going to file criminal charges against Complainant and the Patrol for the incident on June 30, 2010.

## Memo to Captain

84. On June 30, 2010, as Complainant watched Rezebek pack up his belongings to depart with his wife, Complainant wrote a memo to Captain Petrik concerning the events that had just transpired. He stated in part that after he directed Rezebek to move his belongings into Complainant's truck so he could give him a ride home, "Trooper Rezebek refused to move his stuff over, and actually said something to the effect, 'Come on Willy, let's go.' He pulled his keys off his keeper and started to walk around the vehicle. I walked over the driver's side and headed him off, and told him that if he got in that car I would suspend him. He shrugged his shoulders and said, 'Well.' I told him that [I] was trying to help him and because he was not in compliance with policy . . ."

## July 1, 2010 Meeting

85. Rezebek re-wrote his retirement notice and handed it into Captain Petrik on July 1, 2010. During his meeting with the Captain, Rezebek alleged that Complainant had created a hostile working environment for him, and stated that he feared physical harm by Complainant. Captain Petrik informed Complainant of these allegations and asked Complainant to respond with a memo, explaining why this might have occurred.

86. Complainant responded in a memo to Captain Petrik on July 1, 2010. He indicated that he was at a loss to understand where the allegations had come from. He reviewed the recent meetings with Rezebek to discuss his performance issues, including the May 20, 2010 meeting. He noted that Rezebek and his wife had visited the hospital after the birth of Complainant's daughter, and had attended the holiday party at his house in December 2009. Complainant posited that it might be the impending change in schedule to night shift. He stated that he had ridden with Rezebek several times and there had been no issues between them.

## Internal Affairs Investigation

87. Rezebek's complaints against Complainant were referred to the Internal Affairs (IA) office for investigation.

88. IA Sgt. David Blatner was assigned to investigate the allegations of a hostile work environment made by Rezebek. He interviewed all of the Durango Troopers under Complainant's supervision in person, including Rapp, Sanchez, Williams, Balenti, Ward, Guilfoil, and JK. He interviewed Rezebek twice by telephone. He interviewed Complainant in person.

89. Trooper Guilfoil noted that she is "very soft" and at first felt that Complainant "kinda came off a little aggressive sometimes." "He does it all the time, without intending to." She stated he didn't mean anything by it, and "I don't know what

kind of allegations are up against Sarg, but I find it hard to believe that they're outrageous, I mean he's been awesome."

90. Trooper Williams reported that he and Rezebek had agreed that they never really know what Complainant's attitude was going to be. "He can be fine one day, and the next day you come in and he's mad about something, so it just switches day to day sometimes. Lately he's been fine, but you just never know."

91. Trooper Balenti said he had never had any conflicts with Complainant, and had seen Complainant be very patient with Rezebek in training him on computer issues. He also stated Complainant "is still finding his leadership style and his management abilities," is still learning, and in the last year had become more open to listening.

92. Trooper Ben Ward described Complainant's communication style as, "sometimes like I'm treating you as a child. . . That's just the way he communicates, I don't think he means any harm by it. I've never felt attacked or anything like that. He comes across, you know, poorly, you know when I think it really isn't." Ward described Complainant's emails with "you will do this, you must do this," as sounding "like he's yelling," but stated he didn't think Complainant meant to sound like that.

93. Trooper JK reviewed much of the information described above in the Findings of Fact. She stated that it's no secret she and Complainant didn't get along and she has a personality difference with Complainant. She stated that it goes both ways and is often her fault. She indicated she never felt threatened by Complainant, it is "just his supervision style. You know, he gives you one chance, and the next thing, if you do it again you will be writing a memo." After evaluations, Complainant improves significantly, she stated, "but eventually it kind of reverts back."

94. Trooper Sanchez indicated that he could always call Complainant for assistance and "with knowledge he's like an ideal sergeant. . . He's always there to help out and genuinely seems to enjoy it." He also remarked on Complainant not permitting the Troopers to ask other sergeants for assistance.

95. Sanchez stated, "I think sometimes Sergeant Rushing like talked down to [Rezebek] a little bit." He felt Complainant should have talked to Rezebek with more respect.

96. Sanchez also said that Complainant "gets moody at times," gets "snappy and talks down to him" when he is car sick. He stated, "sometimes he might tell you a couple different things that are contradictory." Asked what Complainant's biggest flaw would be, Sanchez said, "Pride and communication," and "I think having a hard time admitting when he's wrong." He then described the conflicting opinions of Complainant and the Captain regarding issuance of the ticket.

97. Corporal Rapp reported that he had heard Complainant say, "kicking your ass" in a joking way, and, "You're fired," which he interpreted as Complainant trying to make someone feel better.

98. Sgt. Blatner asked Corporal Rapp how he would describe Complainant's communication style. Rapp responded, "He's very, very blunt, very sharp edged and mostly his written communication is more terse than his verbal communication. He uses a lot of bold words, underlined words, capitalized letters and I don't think he means it [to] be as terse as it comes across. Communication is probably the toughest thing Sergeant Rushing has with other people."

99. Rapp described a message he had received from Complainant the week before his August 9, 2010 interview with Blatner. Rapp received a call about a fatal car accident, but was informed it may have been within the Native American jurisdictional area, not his area. He responded that he should probably not go then. Dispatch stated they would let him know if it was within his jurisdiction by calling him back. Later that day, Rapp checked his email and there was an email from Complainant there "that got me kind of excited cause it was from Sergeant Rushing that I wasn't doing my job basically and that this wouldn't happen again and trust that it wouldn't happen again," with a lot of bold, underlined and capitalized words. The email stated they would talk when Rapp came back on duty.

100. Rapp was angry when he read this email, so he called Complainant right away. However, during their phone conversation, it was clear that the issue was not that big of a deal to Complainant.

101. Corporal Rapp commented that Complainant's first year in Durango was "a really tough year" and that he would have transferred out of Durango if he had not figured out how to improve the communication between them. However, since Complainant's first year, he had been working very hard to improve and he had gotten "better at everything," he said.

#### Complainant's IA Interview

102. On August 18, 2010, Rushing participated in a lengthy interview with Blatner. In discussing the June 30 resignation of Rezebek, Complainant stated that after Rezebek left the court building, "I sat down next to Chris I was like, 'God Dammit I said George just handed me his retirement papers and we you know we're already short. Julie is out you know, I've got about six bodies, and he turned his paperwork in.' I was like, 'Aah, I gotta try to talk him outta this we at least still got a couple more bodies,' I was mentioning that to Chris."

103. When Blatner questioned Complainant about whether he had the authority to suspend Rezebek under those circumstances, Complainant stated, "Absolutely, any supervisor can, at any time. He was disobeying my instructions." He said, "I felt and you know the policy states any supervisor can put somebody on administrative leave

and then of course an investigation is launched and then decide whether or not I was right or wrong.”

104. Complainant discussed the February 2010 meeting with Rezebek when he showed him the Captain’s email questioning his Master Trooper status. “I let him read the email and I said George, you gotta kick it up a notch.” They went to Complainant’s office, “and he says I’m gonna go home, he says I don’t know who nominated me for it. . . you know I don’t want it, I don’t want this master Trooper thing at all, if they don’t feel that I’m entitled to it, then I don’t want it anyway. I looked at George and more of a pep talk rather than discrimination or harassment or anything like that, I was like fuck you George I said you’re gonna let him beat you like this, you’re gonna let him beat you down and make you retire early just because you got a few computer issues you can’t deal with, is that really what you’re gonna do. . . When he left my office he shook my hand and said thanks, that he appreciated what I had just done.”

105. In describing his approach to the job, Complainant stated that he takes care of his Troopers and wants what is best for them. He discussed getting new computer equipment in the patrol cars for his Troopers as soon as he arrived. He stated that prior to his arrival the ticket numbers were low. “I just tell them what I expect, and they all know it, when you come down to my team you better damn well work and if you don’t work I don’t want you around, bottom line.”

106. When asked about communication, he said that he mumbles and that is something he has worked on. He noted that one weakness is that he is overprotective of his Troopers, “like a father protecting their kids you know.”

107. Blatner mentioned that all of his Troopers had a problem with the way he communicated at times. Complainant responded, “I know I can be a little firm, a little direct, I don’t sugar coat anything.”

108. Complainant also discussed the “who’s your daddy” comment. He admitted to saying it to Trooper JK and, in a joking way, having her say, “you are.” He said, “my intent was that I am the daddy of this team, I’m the one running the show here.”

109. Complainant used profanity repeatedly during the interview.

110. On August 18, 2010, Complainant emailed Sgt. Blatner with the policy governing authority to suspend a Trooper, requesting his interpretation. Sgt. Blatner responded that a suspension was a disciplinary action, and that the policy stated, “All supervisors have the authority to place a member on paid administrative leave where the conduct is so flagrant or serious that immediate action is warranted. The situation you spoke about, (Rezebek refusing to accept a ride home from you, and you demanding that he had to), does not constitute flagrant or serious conduct.”



111. Complainant responded that he had believed suspension to mean taking the badge, gun, and ID card. "At the time of the incident I believed his refusal to get in the car was serious in nature. I never said, 'George, this is a direct order' however, I was not asking him either. It was a disregard/disrespect of supervisor – subordinate authority when he turned around and told Trooper Williams, "Let's go."

112. Sgt. Blatner tape-recorded all of his interviews. On August 31, 2010, he issued his final written report, which contained summaries of all the interviews.

### Major Martin and the Predisciplinary Process

113. Major Lawrence Martin is the appointing authority for District 5 of the Patrol, which encompasses southwest Colorado. Martin read the IA report, then made arrangements to travel to Patrol headquarters to listen to all of the interviews.

114. After Martin listened to the interviews, he determined that a predisciplinary meeting was appropriate.

115. Martin sent a letter to Complainant noticing a predisciplinary meeting, advising him of his rights under State Personnel Board rules.

116. Complainant and Martin met on September 14, 2010. Neither brought a representative. The meeting was tape-recorded.

117. The Major asked Complainant if he admitted to having used comments such as "who's your daddy, I'll fire you, I'll kick your ass, get your ass to the office, fuck you, at some point in time" with subordinates. Complainant admitted to having used all of those terms with subordinates at work. He denied having said, "Get your ass to the office" to Rezebek on June 30, 2010, but indicated he had said it at some time during his employment as Sergeant.

118. Martin discussed his concerns about Complainant's use of that language. He explained that he did not understand why Complainant would take the risk of engaging in this type of behavior, when it could easily be misinterpreted or misunderstood by his subordinates. Complainant indicated that it was rapport building with his Troopers.

119. Martin asked Complainant why, if Rezebek had just retired and was off duty on June 30 at the Bayfield Marshall's office, he insisted upon Rezebek coming with him in his truck. Complainant responded that he was trying to help Rezebek fill out the retirement paperwork in compliance with the policy, which required 90 days prior notice.

120. Major Martin pointed out that the situation ended up in a verbal confrontation. Complainant responded that he did not view it as a confrontation. He stated he was "trying to be forceful cause I honestly saw him screwing himself, screwing his wife over, you know, going down that road, that he was not helping himself one bit,

he was only gonna lose money and leave bitter . . . and finally get a paycheck three months down the road.”

121. Martin questioned Complainant how his use of the term, “Fuck you,” to Rezebek would motivate him. Complainant indicated it was his way of building rapport.

122. They discussed the circumstances under which Complainant prompted JK to respond to his “who’s your daddy” statement with, “you are.” Complainant stated that after they had had a heated conversation, she came back into his office and it was rapport building. He said he had told her, “you can bitch and gripe about it all you want to but I’m the one that makes the decision right or wrong.” Martin pointed out that he should have said, “Trooper [JK], this is the reason I want you to do it and as the sergeant of your team this is one of my expectations,” instead of “who’s your daddy.”

123. Martin informed Complainant that what concerned him was whether Complainant was breeding a safe environment in which the Troopers feel that they can go to him, or to the Captain, with concerns, when he is making comments like, “I’ll fire you, I’ll suspend you, I’ll kick your ass, get your ass to the office, and fuck you.” Martin stated that he saw it as very inappropriate behavior, a violation of his oath as a non-commissioned officer, which states, “There is no one more professional than me.” Complainant explained that he used the language in a joking manner.

124. After the predisciplinary meeting, Major Martin reviewed all of the investigatory materials again, and then reviewed all Patrol policies and procedures, including the General Orders.

125. Patrol General Orders include the following:

#2. Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.

#5. Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.

#6. Members will avoid any conduct which may bring discredit or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.

#7. Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.

126. Patrol Rules include the following:

Rule 4. Respect of others. Members treat others courteously, with fairness and respect.

Rule 9. Conduct. Members use reasonable judgment and refrain from conduct which reflects unfavorably on the department. This type of conduct includes that which: (a) brings the department into disrepute; (b) reflects discredit upon the individual as a member of the department or (c) tends to impair the operation, effectiveness or efficiency of the department or its members.

127. The Major determined that disciplinary action was warranted, and he was leaning towards termination. His chief concern was the pattern of demeaning behavior and use of inappropriate language. He felt that as a supervisor, Complainant should not have used that type of language regardless of its intended purpose. In addition, he was very concerned that every Trooper under Complainant's supervision had mentioned his inability to communicate appropriately.

128. Major Martin viewed it as his job to address the working environment of the Troopers, to assure that people have the resources to do their job and work in an environment conducive to good working relationships. If a Sergeant does not provide that environment, the Major believed he had an obligation to take appropriate action.

129. Major Martin determined that Complainant lacked the self-awareness necessary to understand the potential effect his language had on his subordinates. Specifically, he believed that using the term, "Fuck you," to motivate an employee when he was down was not an effective way to build rapport or build someone up. He believed that no sergeant should subject himself to a potential allegation of creating a hostile environment as a supervisor, and Complainant, through his behavior, had done just that.

130. The Major talked to nine of his peer appointing authorities at the Patrol at the rank of Major or higher. He shared the facts of the case and sought to assure he was acting in accordance and consistent with the level of discipline they would consider under similar circumstances.

#### The Decision to Demote

131. When the Major reviewed Complainant's personnel record, he was impressed to find that he had a stellar record of performance. The Major gave this record significant weight, and decided to demote Complainant instead of terminating him. The Major considered demoting Complainant to the rank of Corporal, but rejected the idea because it is a supervisory position.

132. On September 20, 2010, Major Martin sent a letter to Complainant demoting him to Trooper rank, setting his salary level at the top of the pay range. The letter cited violations of General Orders 2, 5, 6, and 7, and DPS Rules 4 and 9. The

letter listed the offensive and profane statements Complainant had made to subordinates as Sergeant, concluding, "Comments made to members of your team included inappropriate language, which was demeaning at times, making several members uncomfortable, with one employee eventually resigning as a result of your continued inappropriate actions and behavior." The letter noted that Complainant claimed that he made the comments in jest and to motivate others. Major Martin concluded, "However, your actions served to create a hostile work environment. . . . you are expected to set a positive example for others through compliance with [Patrol] policies by ensuring that the work place is kept free from harassment and discrimination. By your actions, you have failed to do so by engaging [in] the same type of behavior you are charged with enforcing."

133. Complainant timely appealed the disciplinary action.

## **DISCUSSION**

### **I. GENERAL**

#### **A. Burden of Proof**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

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

In this *de novo* disciplinary proceeding, 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, supra*. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

## **II. HEARING ISSUES**

### **A. Complainant committed the acts for which he was disciplined.**

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant had many strengths as a supervisor. He led by example. He closely monitored the conduct of the new Troopers under his supervision, corrected them when they made mistakes, and held them accountable for their performance. He worked hard, with good intentions, and was dedicated to the mission of the Patrol.

The evidence demonstrates, however, that Complainant's weaknesses as a supervisor outweighed those strengths and rendered him unfit to continue to serve in a supervisory role. Complainant lacked the requisite judgment to serve as a first line supervisor. He was either unaware of or unconcerned about his patronizing attitude toward and treatment of subordinates. He was unable to understand the boundaries of where his supervisory role ended.

With regard to Complainant's written communication with subordinates, the evidence demonstrates that while Complainant appropriately wrote memos to hold the Troopers accountable for their mistakes, the manner in which he wrote those memos was demeaning. Complainant's written communication with his Troopers was the equivalent of "yelling," making them feel defensive and worried, and adding unnecessary stress to an already dangerous job.

While most of the Troopers informed the IA investigator that Complainant had improved in his performance as sergeant, the evidence demonstrates that Complainant continued to send inappropriate emails and his Troopers simply adjusted to it. For instance, in August 2010, well after Rapp had patched up what was a very poor working relationship with Complainant, Complainant sent him a missive questioning his ability to do his job and stating that "this wouldn't happen again" with bold, underlined, and capitalized letters. This email showed a lack of respect for Corporal Rapp. The fact that many of the Durango Troopers adjusted to Complainant's aggressive and demeaning communication style does not change the inappropriate nature of Complainant's conduct; instead, it demonstrates the dedication of the Troopers to their work and to the Patrol.

Complainant also lacked personal boundaries in his role as supervisor, a problem which grew over time. At the beginning of his tenure, he made the "who's your daddy" comment to JK, making it clear she was required to respond, "you are." This comment could have subjected Complainant to a claim of sexual harassment. Complainant's lack of judgment in this instance could be excused if it were an isolated incident and because it occurred within his first few months on the job. However, Complainant continued to use poor judgment with JK and others. For instance, in April 2010, Complainant used exceptionally poor judgment with JK, violating her right to privacy and harassing her about a sensitive personal matter. When Complainant

learned that JK had not informed him about the domestic violence incident, Complainant held her in his office for several hours, coerced her into giving him access to her personal email communications and signing a medical release form, and then drove her home and demanded that she tender her firearms to him. Complainant apparently had no awareness of how embarrassing and humiliating this episode was for JK. He lacked the judgment to understand where his role as supervisor ended and where his Troopers' personal lives began.

Another example of Complainant's failure to respect his Troopers' personal lives is his treatment of Rezebek on June 30, 2010. The evidence demonstrated that Rezebek was a sensitive individual who, by June 2010, had developed serious performance issues with computer use, had become paranoid about Patrol leaders being out to get him, and who was dreading his impending return to the night shift on July 5, 2010. It is therefore no surprise that he found an excuse to leave the Patrol when he did. However, Complainant responded to Rezebek's retirement in a patronizing and harassing manner which also violated Rezebek's right to make his own personal decisions.

By Complainant's own admission, he did not want to lose Rezebek at that time because JK was already on injury leave; therefore, he set out to try to talk him out of retiring at that time. After Rezebek handed Complainant his resignation papers at the courthouse, Complainant used profanity with Rezebek and stated, "This isn't over." This was confrontational behavior by Complainant on a subject that was a private matter. At the Bayfield Marshall's office, when it became clear that Rezebek no longer accepted Complainant's authority over him because he had retired, Complainant was triggered into threatening to suspend Rezebek. Complainant failed to understand that he lacked the authority to order Rezebek to go home with him or to suspend him.

This pattern of misuse of authority is echoed in the reports of other Troopers. For example, after Captain Petrik made it clear to Complainant and Trooper Sanchez that Sanchez was obliged to charge someone after an accident, Complainant directed Sanchez not to charge anyone. This directive placed his subordinate in a difficult position and served Complainant's interest in exerting his authority, not the interest of the Patrol.

As Major Martin concluded, Complainant's use of profanity in the workplace, and of phrases such as, "I'll kick your ass," "fuck you," and "I'll fire you," was inherently risky behavior. Some individuals can handle this type of language; others cannot. As a supervisor, it was up to Complainant to control his use of language with subordinates to assure it was acceptable to all employees. Complainant repeatedly failed to exercise the self-control and judgment necessary to use professional language appropriate for a sergeant.

Major Martin concluded that Complainant had violated Patrol General Orders 2, 5, 6, and 7 and Patrol Rules 4 and 9. These provisions require that Patrol members will utilize their authority appropriately and with the highest degree of professionalism; treat

others with fairness, courtesy, and respect; use reasonable judgment in the execution of their duties; and refrain from conduct that tends to impair the operation or effectiveness of the department or its members. As discussed above, Complainant did violate these rules. He used his authority inappropriately and failed to treat others consistently with courtesy and respect. In addition, he failed to maintain a high level of professionalism in his use of profanity and inappropriate language with the Troopers.

In conclusion, Respondent has proven that Complainant committed the acts upon which discipline was based.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent carefully and honestly considered all of the information relevant to its decision prior to imposing disciplinary action. The Internal Affairs investigation was thorough. All statements of all of Complainant's subordinates were tape recorded and preserved for the record. Sgt. Blatner covered all appropriate subject areas with the Troopers.

Major Martin listened to all of the tape-recorded interviews of the Troopers who worked under Complainant's supervision both before and after the predisciplinary meeting with Complainant. The Major explored all of the areas that concerned him with Complainant at the meeting, giving him a full and fair opportunity to present mitigating information. The Major then conferred with nine of his colleagues to assure that he was exercising his discretion in a responsible manner. Major Martin's decision in this case was reasonable.

Complainant argues that Respondent violated State Personnel Board Rule 6-2, 4 CCR 801, by failing to use progressive discipline. Rule 6-2 requires that certified employees shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper.

Respondent did not violate Board Rule 6-2 because Complainant's conduct was serious. Complainant engaged in a pattern of conduct that was harmful to the Durango office: his communication style was demeaning and aggressive, his language was

inappropriate, and he abused his authority by interfering with personal matters of the Troopers.

Complainant argues that in the absence of a corrective action, the Patrol never warned him about the inappropriateness of his behavior; therefore, he never had the opportunity to improve. In Complainant's 2009 evaluation, Captain Petrik informed Complainant that he needed to be less defensive and resistant to suggestions or changes. He rated Complainant at a Needs Improvement in the area of communication, and included troopers' upstream evaluation comments that Complainant should try to improve in the area of communication. Complainant did receive warnings about his communication style with the Captain and with troopers.

The evidence also demonstrated that a corrective action would not have addressed Complainant's weaknesses as a supervisor. Most of his supervisory problems were matters of poor judgment. When the Patrol delegates authority to its line supervisors, it must be able to trust that they will use common sense in exercising their authority. It is natural for any new supervisor to have a learning curve. However, Complainant's judgment problems did not diminished over time; to the contrary, they escalated, as evidenced by the 2009 evaluation Needs Improvement ratings and the 2010 incidents with JK and Rezebek.

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

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. Complainant argues that demotion was too drastic in this case, because Complainant never received any indication that his conduct was inappropriate. This argument is rejected on the same basis discussed above in regard to Board Rule 6-2 above. The situation in this case did not call for progressive discipline. The evidence demonstrates that Complainant was given over two years to grow into the Sergeant position, but did not do so. Demoting Complainant to a non-supervisory position enables Complainant to continue to serve the Patrol with his strengths, while protecting the Patrol from his supervisory flaws. Therefore, the discipline imposed was within the range of reasonable alternatives.

**CONCLUSIONS OF LAW**

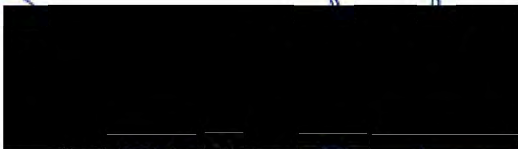
1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.



**ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 4<sup>th</sup> day of July, 2011



Mary S. McClatchey  
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. 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 5<sup>th</sup> day of May, 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** ~~in the United States mail, postage prepaid,~~ addressed as follows:

Scott Olsen, Esquire  
Bruno, Colino, Jewell & Lewis, P.C.  


and in the interagency mail, to:

Diane Dash  
Senior Assistant Attorney General  




Andrea C. Woods