

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2016B007

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**JUSTIN STURTEVANT,**  
Complainants,

vs.

**DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL  
FACILITY,**  
Respondent.

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Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing by telephone on October 15, 2015, and the evidentiary hearing on December 16, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on December 21, 2015, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared on December 16, 2015, and was represented by Mark Schwane, Esq. Respondent was represented by Joseph Haughain, Assistant Attorney General. Respondent's advisory witness was Associate Warden Siobhan Burtlow, who was the delegated Appointing Authority in this matter.

**MATTER APPEALED**

Complainant, a certified employee, appeals his disciplinary demotion on July 1, 2015 from a Correctional Officer (CO) II to a CO I, resulting in a reduction in base pay. Complainant argues that he did not commit the act for which he was disciplined; as a result, this disciplinary demotion was arbitrary and capricious, and was not within the reasonable range of alternatives. He seeks all damages to make him whole, including but not limited to reinstatement to the classification of CO II; back pay lost as a result of the disciplinary action from the effective date of the disciplinary action, July 1, 2015, to the date of judgment; front pay from the date of judgment to the date of reinstatement to the classification of CO II; reinstatement of lost back benefits, including but not limited to PERA service credits, and an award of attorney fees and costs.

Respondent argues that its decision to disciplinarily demote Complainant was reasonable, and not arbitrary and capricious. It did a full and thorough investigation of the incident for which Complainant was demoted, and followed principles of progressive discipline, pursuant to Board Rule 6-2. Respondent requests that its action be affirmed as reasonable.

For the reasons discussed below, Respondent's decision to discipline Complainant is reversed.

**ISSUES**

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

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

## **FINDINGS OF FACT**

### Complainant's Employment History

1. Complainant has been a certified state employee for approximately fifteen years, and began his employment with Respondent as a CO I.

2. Complainant was promoted to a CO II in December 2008 and was employed as a CO II at the Colorado Territorial Correctional Facility (CTCF) at the time of the events at issue in this case.

3. On March 27, 2006, Complainant received a corrective action for allowing a vehicle through facility gates that was not properly displaying an access placard, failing to immediately notify his Shift Commander, and making "unverifiable statements" regarding verbally abusive behavior of his supervisor, Lt. Mike Evans, when he was contacted about this vehicle.

4. On January 8, 2010, Complainant received a corrective action after he was arrested and charged with domestic violence, false imprisonment and harassment. (These charges were dismissed on December 11, 2009.)

5. On December 27, 2011, Complainant received a corrective action after he was observed sleeping on the job on two occasions while working the graveyard shift.

6. On April 6, 2015, Warden David Zupan held a Rule 6-10 meeting to discuss Complainant's failure to see and report an offender's apparent suicide attempt during his rounds. On May 5, 2015, Warden Zupan issued a corrective action and a disciplinary action imposing a six-month reduction in Complainant's base pay of \$50 per month, commencing June 1, 2015. Complainant did not appeal this action.

May 2, 2015

7. On May 2, 2015, Complainant was on duty at the Infirmary, with two officers reporting to him. One of these officers was Karyn Roetker. He discovered, via e-mail that morning, that he was going to be transferred to the Four Mile Correctional Center (FMCC), and that May 2<sup>nd</sup> would be his final day at the CTCF.

8. Complainant testified that he had previously contracted with offender M.K. to create art work for him, and was in the process of arranging for a new art work from M.K. Staff was allowed to purchase art work from offenders with an approved permit. Complainant had purchased some art projects from offender M.K. in the past, for which M.K. had permits. Offender M.K. did not yet have a permit for this new art project; however, Complainant had never been instructed not to discuss such art projects with offenders. These projects contributed

to offenders' rehabilitation and therefore were encouraged.

9. Around noon on May 2, 2015, Complainant directed offender M.K. to report to the Infirmary. Complainant wanted to let M.K. know he was leaving the CTCF so that M.K. would not engage in work for which he would not be compensated. Complainant explained that one of DOC's goals is to "rehabilitate offenders," and that it was "common courtesy" to provide such notice to M.K.

10. Complainant met with offender M.K. in his office, which was on a hallway outside the Infirmary's locked door. Complainant asked M.K. if he had started on the art project they had discussed a couple weeks ago. M.K. said he hadn't started it yet. Complainant said that was good, because he was transferring to another facility, and it would not be fair for M.K. to do work he wouldn't be paid for. M.K. said he appreciated that, and asked Complainant why he was leaving CTCF. Complainant said he needed a change and it was time to move on. M.K. then asked him about his wife's medical condition. Complainant responded that he couldn't talk with M.K. about that.

11. Complainant testified that he did not share any personal details of his wife's medical condition with Offender M.K., and that he knew that sharing such personal details was a violation of agency regulations.

12. Complainant testified that his conversation with M.K. lasted approximately five minutes. His office door was open during this meeting, and he did not see anyone in the hallway during this conversation. No one was present as he escorted M.K. out of the area. As he was escorting M.K. out of the area, he saw Officer Roetker sitting at the staff table in the center of the Infirmary behind a locked door.

13. Complainant's testimony was clear, consistent and credible.

#### Officer Karyn Roetker's May 2, 2015 Incident Report

14. Officer Roetker prepared and submitted a written and signed incident report to her shift commander, dated May 2, 2015 at 13:38, that states:

On May 2, 2015 at approximately 12:30 p.m. I CO K Roetker overheard Sgt. Sturtevant speaking with Offender K, M. Offender K had been called over to the infirmary by Sgt. Sturtevant. When K arrived Sgt. Sturtevant pulled him into the office and proceeded to tell him about his recent meeting (R610?) and that he was being moved to four mile. He said he was being moved because he told them to get him out of this facility and that he has been being set up for the last 12 years. He stated that he got an e-mail from the training coordinator [illegible text] coming to four mile yet he never heard anything from anyone at CTCF. Sgt. Sturtevant told K "since we [illegible text] over a year ago you know I've gone through so much" Sgt. Sturtevant then proceeded to inform K that his wife [illegible text] her biopsy results back and it was cancer. He said it was a type that starts somewhere else and usually shows up in [illegible text] lymph nodes as a second sign; he also stated that the next appointment would be with an oncologist. K asked [illegible text] she was feeling Sgt. Sturtevant said she was feeling fine that's why this was so surprising. It was at this time that I had to perform other duties he kept the offender in the office for another 5 or 10 minutes. I notified Lt. Trujillo the shift

commander.

15. Officer Roetker's incident report was not a sworn statement. She did not testify at the evidentiary hearing. No reason was offered for her absence.

16. Complainant testified that he had issues with Officer Roetker being "non-compliant" when he would ask her to do something during the approximately four or five months she worked in the Infirmary with him. She would taunt him by saying she was "best friends" with someone in management, and "what was he going to do?" Complainant reported these issues to Officer Roetker's supervisor, Lieutenant Dan Lloyd, but does not know what, if anything, happened as a result.

#### Rule 6-10 Meeting and Investigation

17. Siobhan Burtlow, Associate Warden, Colorado Territorial Correctional Facility, was delegated appointing authority by Warden David Zupan to handle this disciplinary action. She was presented with a packet of information from Warden Zupan, including Officer Roetker's May 2, 2015 incident report.

18. Associate Warden Burtlow conducted a Rule 6-10 meeting on May 19, 2015, which was recorded. She attended with her representative, Warden Zupan. Complainant attended with his representative, Eric Shaffer.

19. During the Rule 6-10 meeting, Associate Warden Burtlow informed Complainant that someone overheard him talking about his wife's illness with offender M.K. Complainant was not advised who made this report, and was not given a copy of Officer Roetker's incident report until after this meeting concluded.

20. Complainant denied discussing personal information with offender M.K., and did not know how M.K. knew about his wife's cancer. He described a five minute conversation with the offender, during which he informed him that he would be transferring to another facility and could not longer contract with the offender to purchase his art work. Complainant explained that it was "respectful" to let M.K. know that he was no longer going to be at CTCF. Complainant stated that the offender asked him about his wife, and he told the offender he could not discuss personal information with him. Complainant insisted that he was not "unprofessional" in his conversation with M.K.

21. Complainant stated that he had discussed his wife's cancer with a nurse in the Infirmary. However, while he was able to describe the nurse, he could not recall the nurse's name because of "everything going on" and having "so much on his mind." Complainant stated that he felt he was being "set up," and that when he talked with somebody, "it seemed to go everywhere." During the evidentiary hearing, Complainant further explained that, in addition to his wife's cancer, his father was on life support; as a result, his mind was "cloudy."

22. Complainant stated that he met with offender M.K. in his office with the door open. No staff was around the office during this brief meeting; however, staff working in the Infirmary could see them go into the office via a security camera.

23. Associate Warden Burtlow instructed Complainant to provide the name of the nurse he talked with about his wife's cancer, as well as any other information he wished to submit, within five days. After consulting a calendar, Associate Warden Burtlow realized that

the fifth day after the Rule 6-10 meeting was a Sunday, and that the following Monday was a holiday. Therefore, Associate Warden Burtlow gave Complainant until Tuesday, May 26, 2015 to provide any other information he wished to submit.

24. After the Rule 6-10 meeting concluded, Associate Warden Burtlow provided a copy of Officer Roetker's report to Complainant. Complainant requested that the video recording from the two security cameras covering the hallway outside his office be reviewed to determine whether anyone was, in fact, in the hallway outside his office during his five-minute conversation with offender M.K. on May 2, 2015. Complainant believed that these cameras would demonstrate his innocence, and testified that these security videos remain available up to thirty days after they are recorded.

25. Approximately five days after the Rule 6-10 meeting, Associate Warden Burtlow talked with offender M.K., who said he had conversations with Complainant about doing art work for him. The Associate Warden concluded that offender M.K. had exchanged personal information with Complainant, including the condition of Complainant's wife and the fact that Complainant did not like working at CTCF. She did not take notes or record this meeting with offender M.K., or have any witnesses present. Associate Warden Burtlow could not recall whether she asked offender M.K. whether he talked with anyone else about Complainant's personal issues. She admitted that the statements of any offender may not be credible.

26. Associate Warden Burtlow testified that, on May 2, 2015, offender M.K. did not have a permit to create a piece of art work for Complainant. The Associate Warden did not know whether offender M.K. had obtained permits to do art work for Complainant in the past, and testified that if such permits had been obtained, they were irrelevant to her decision to demote Complainant.

27. A couple weeks later, Associate Warden Burtlow talked with Officer Roetker, after Officer Roetker returned from vacation. The Associate Warden confirmed that Officer Roetker prepared her incident report from her personal observation from the hallway outside Complainant's office. Associate Warden Burtlow testified that she presumed that Officer Roetker was doing her assigned rounds when she was outside Complainant's office, even though this office was located in a hallway outside the locked Infirmary where Officer Roetker was assigned. Associate Warden Burtlow testified that Officer Roetker did not provide any additional information that was not contained in her report.

28. Associate Warden Burtlow testified that the video recording of the hallway outside Complainant's office on May 2, 2015 was not retrieved, and was not available.

29. On May 26, 2015, Complainant submitted the following statement, via his representative Eric Shaffer, to Associate Warden Burtlow and Warden Zupan:

On the date in question it was early in the shift when Officer Roetker was questioning me regarding my recent R-610 and as to my wife and her condition and type of cancer, and if we had seen a cancer doctor.

I asked how she heard about the R-610, she said she just did. The questions she asked about myself were nearly all the same as the allegations she made in her report.

At no time was she within hearing range of my conversation with offender K.

It should also known on numerous occasions I had issues with this officer and dealt with it at the lowest level as taught by the department.

30. After receiving Complainant's statement, Warden Zupan sent Associate Warden Burtlow, via email on May 26, 2015, the following message: "I am sure you have considered talking to the inmate.... and now perhaps other staff that he now implicates as some kind of indictment on the officer who reported his behavior. Let me know if I can assist in any way-thanks." Associate Warden Burtlow testified that she did not follow up on Warden Zupan's suggestions, and did not conduct any additional investigation.

July 1, 2015 Demotion Decision

31. On July 1, 2015, Associate Warden Burtlow issued a decision to demote Complainant from a CO II to a CO I, with a resulting reduction in base pay. In explaining this decision, the Associate Warden stated: "Offender M.K.'s liberty to ask you questions of a personal nature, after you directed him into your work area indicate that he was comfortable enough with your relationship to ask personal questions."

32. Associate Warden Burtlow reached the following conclusions concerning Complainant's meeting with Offender M.K. on May 2, 2015:

- Your behavior is contrary to the Department's mission and vision and reflects negatively upon your credibility as a CDOC professional and a person in a position of leadership. Your actions have impacted the safety/security of the facility and seriously affect your ability to perform your job duties appropriately.
- Your behavior is an egregious violation of policy and has brought into question your ability to perform effectively and efficiently in your position of Correctional Officer II, and casts doubt upon your reliability and professionalism. This behavior has seriously impacted your ability to provide adequate customer service to stakeholders, and negatively impacted your job performance as you demonstrated extremely poor judgment.
- You have failed to meet the requirements and expectations of a Correctional Officer II and of someone with positional authority over offenders. Your behavior displayed a lack of professional correctional practices and supervision necessary for a Correctional Officer.
- You failed to meet ethical responsibilities incumbent upon you as a public servant and you have failed to take responsibility for your actions, casting blame upon others.
- Your actions, particularly upon receipt of disciplinary action for prior conduct, displays a pattern of willful disregard for department policy.

33. Associate Warden Burton concluded that Complainant violated the following DOC regulations:

## **Administrative Regulation 1450-01 Code of Conduct**

### **III. DEFINITIONS**

B. Conduct Unbecoming: Includes any act or conduct either on or off duty that negatively impacts job performance, not specifically mentioned in administrative regulations. The act or conduct tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer.

### **IV. PROCEDURES**

F. DOC employees, contract workers, and volunteers shall not discuss their personal lives or other DOC employees, contract workers, and volunteers [sic] personal lives with offenders.

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

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

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

ZZ. Any act or conduct on or off duty that affects job performance and that tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer or tends to adversely affect public safety is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action.

34. Associate Warden Burton further concluded that Complainant engaged in the following actions justifying discipline under Board Rule 6-12:

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.

35. Associate Warden Burtlow testified that the prohibition against discussing

personal information with an offender was intended to prevent the creation of a relationship that can lead to inappropriate behavior and conduct. She explained that there is a need for delineation between staff and inmates, and that a lack of such delineation can affect the safety and security of the facility, as well as the public. Offenders can use violations of this prohibition to request favors from staff. Inappropriate relationships between staff and inmates can create problems and friction among the inmates.

36. Associate Warden Burtlow explained that Complainant's admission that offender M.K. asked him about his wife during their conversation on May 2, 2015 was a "bold step," as it was not common for offenders to ask such personal questions, and led her to conclude that there was an inappropriate relationship between Complainant and offender M.K. where such personal information was shared.

37. Associate Warden Burtlow testified that she did not find Complainant to be credible, because he could not remember the name of the nurse he talked with, and only mentioned his conversation with Officer Roetker after he discovered she was the one who submitted the incident report on May 2, 2015.

38. Associate Warden Burtlow testified that she considered his prior corrective actions in 2006, 2010 and 2011, and his corrective and disciplinary action issued on May 5, 2015, as evidence that Complainant made bad decisions and repeatedly failed to comply with the applicable code of conduct. She concluded that Complainant's general conduct in these prior incidents cast doubt on his integrity. Associate Warden Burtlow did not discuss these corrective and disciplinary actions with Complainant prior to deciding to demote him.

39. Associate Warden Burtlow's testimony was, at times, vague and inconsistent, and thus not completely credible.

40. Complainant filed a timely appeal of this disciplinary decision on July 7, 2015.

## **DISCUSSION**

### **I. BURDEN OF PROOF**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700 (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 a preponderance of the evidence that the acts or omissions on which the discipline was based

occurred and that just cause warranted the discipline imposed. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

## **II. RESPONDENT FAILED TO ESTABLISH THAT COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED BY A PREPONDERANCE OF THE EVIDENCE.**

Associate Warden Burtlow, the delegated appointing authority in this matter, imposed a disciplinary demotion on Complainant because she concluded that Complainant maintained an unprofessional relationship with offender M.K., as evidenced by a conversation Complainant had with M.K. on May 2, 2015. The only evidence offered at hearing to establish that this conversation was improper and unprofessional was an incident report submitted by Officer Roetker, testimony by Associate Warden Burtlow concerning conversations she had with M.K. and Officer Roetker, and Complainant's admission that M.K. asked him about his wife's medical condition.

With the exception of Complainant's admission, Respondent relies upon hearsay evidence to support its disciplinary demotion. In determining whether hearsay evidence is reliable, trustworthy and probative for the purposes of an administrative hearing, the Colorado Supreme Court has outlined the following criteria: (1) whether the statement was written and signed; (2) whether the statement was sworn to by the declarant; (3) whether the declarant was a disinterested witness or had a potential bias; (4) whether the hearsay statement is denied or contradicted by other evidence; (5) whether the declarant is credible; (6) whether there is corroboration for the hearsay statement; (7) whether the case turns on the credibility of witnesses; (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and (9) whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant. *Indus. Claims Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13, 18 (1989).

Officer Roetker's May 2, 2015 incident report, while in writing, dated and signed by Officer Roetker, was not a sworn declaration. Complainant's testimony that he had issues at work with Officer Roetker and reported those issues to her supervisor, suggesting that Officer Roetker may have had a possible bias against him, was unrebutted. Complainant's testimony concerning his conversation with M.K. directly contradicts Officer Roetker's written statement. Complainant credibly testified that, when he was escorting M.K. from his office into the outer hallway following their five-minute conversation on May 2, he saw Officer Roetker sitting at a table in the middle of her assigned work area, the Infirmary, behind a locked door. This testimony casts serious doubt upon the credibility of Officer Roetker's written statement. Complainant's additional testimony that Officer Roetker had no reason to be in the outer hallway, which was not part of her assigned work area, and that he did not see anyone in that hallway during his brief meeting with M.K., casts further doubt upon the credibility of her written statement. Even though this case turns on the credibility of witnesses, no explanation was offered by Respondent for Officer Roetker's absence from the evidentiary hearing. While Complainant presumably had the opportunity to subpoena and cross-examine Officer Roetker, it is Respondent who bears the burden of proving just cause for its disciplinary decision by a preponderance of the evidence. After careful consideration of all of these factors, Officer Roetker's incident report is found to be unreliable, untrustworthy and not probative.

Associate Warden Burtlow's hearsay testimony about her conversations with offender M.K. and with Officer Roetker is also fraught with credibility issues. The Associate Warden's

conversation with M.K. was not recorded in any way, and her description of this brief conversation was vague. Associate Warden Burtlow confirmed that Complainant and M.K. discussed art work projects. She ascertained that M.K. knew about Complainant's wife's medical condition and that Complainant did not like working at CTCF, but she could not recall whether she asked him if he learned about these personal issues from anyone else. Similarly, Associate Warden Burtlow did not have an extensive conversation with Officer Roetker, and primarily focused on whether the officer's May 2, 2015 statement was based upon her personal observations. The Associate Warden's failure to closely question M.K. or Officer Roetker about the events of May 2, 2015 renders her descriptions of these conversations of limited probative value.

In contrast, Complainant credibly testified that the subject of his May 2, 2015 conversation with offender M.K. was the inability to contract for a new work of art, due to Complainant's transfer to another correctional facility. Complainant's testimony concerning this brief conversation was consistent with his statements during the Rule 6-10 meeting. When M.K. asked Complainant about his wife's medical condition, Complainant credibly testified that he was surprised that M.K. knew about this condition, and informed M.K. that he could not discuss personal matters. The mere fact that M.K. asked Complainant about his wife does not prove that he had an inappropriate relationship with Complainant, during which they shared personal information.

Complainant's clear and consistent testimony about his professional conversation with M.K. on May 2, 2015 outweighs the unreliable hearsay evidence offered by Respondent. Therefore, Respondent has failed to prove by preponderant evidence that Complainant committed the acts for which he was disciplined.

### **III. THE DECISION TO DISCIPLINE COMPLAINANT WAS ARBITRARY AND CAPRICIOUS.**

In determining whether an agency's decision to discipline an employee 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 that after a consideration of the 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). The ALJ must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942, 945 (Colo. App. 1996).

Respondent's disciplinary decision in this case is both arbitrary and capricious, as those terms are defined in *Lawley, supra*. In her cursory investigation of Complainant's allegedly improper conversation with offender M.K. on May 2, 2015, Associate Warden Burtlow neglected or refused to use reasonable diligence or care to investigate the explanations provided by Complainant, to locate security camera video footage that may have exonerated Complainant, to determine whether or not Officer Roetker had reasons to fabricate her incident report, or to ascertain whether it was physically possible for Officer Roetker to overhear Complainant's conversation with M.K. when she was assigned to work in a separate, locked area – the Infirmary. In failing to undertake a careful and thorough investigation of the events of May 2,

2015, Associate Warden Burtlow failed to give candid and honest consideration of the evidence provided by Complainant.

Following this cursory investigation, Respondent exercised its discretion in such manner that, after a consideration of the evidence before it, clearly indicates that its decision to demote Complainant is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. For all of these reasons, Respondent's decision to discipline Complainant was both arbitrary and capricious.

#### **IV. THE DISCIPLINE IMPOSED WAS NOT WITHIN THE RANGE OF REASONABLE ALTERNATIVES.**

In reviewing the decision to impose discipline, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within a range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Board Rule 6-9.

Because the disciplinary demotion has been found to be arbitrary and capricious, as discussed above, it is also not within the range of reasonable alternatives.

#### **V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.**

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-103(6), C.R.S.; 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).

A groundless personnel action is one in which it is found that, despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-38(A)(3). Frivolous actions, on the other hand, are actions "in which it is found that no rational argument based on the evidence or law is presented." Board Rule 8-38(A)(1).

Respondent's decision to impose discipline in this case does not rise to the level of a decision that was frivolous, done in bad faith, done maliciously or as a means of harassment. While Respondent failed to establish by a preponderance of the evidence that Complainant committed the acts for which he was disciplined, its decision to impose discipline was not groundless because Respondent did produce a modicum of competent evidence to support its action. Board Rule 8-38(A)(3). Therefore, Complainant is not entitled to attorney fees and costs.

#### **CONCLUSIONS OF LAW**

1. Respondent failed to establish that Complainant committed the acts for which he was disciplined by a preponderance of the evidence.

2. Respondent's decision to demote Complainant was arbitrary and capricious.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Complainant is not entitled to attorney fees and costs.

**ORDER**

Respondent's disciplinary demotion of Complainant from a CO II to a CO I is **reversed**. Respondent shall restore Complainant to a CO II position, and shall make Complainant whole and reimburse him for any resulting loss in pay and benefits resulting from its July 1, 2015 demotion, including statutory interest.

Dated this 29<sup>th</sup> day  
of January, 2016.

  
\_\_\_\_\_  
Susan J. Tyburski  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, CO 80203  
(303) 866-3300

**CERTIFICATE OF MAILING**

This is to certify that on the 29<sup>th</sup> day of January, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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\_\_\_\_\_  
Andrea C. Woods  


## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### **RECORD ON APPEAL**

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

### **BRIEFS ON APPEAL**

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.