

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHRISTINA LABAZZETTA,
Complainant,

v.

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

Administrative Law Judge Susan Tyburski held a commencement on June 1, 2017. Administrative Law Judge F. J. "Rick" Dindinger ("ALJ") held an evidentiary hearing from October 31, 2017 through November 3, 2017. The commencement and the evidentiary hearing were both held at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The parties filed written closing arguments with the Board on November 17, 2017. Roger J. Lucas, Esq., of The Law Office of Roger J. Lucas, LLC, represented Complainant Christina Labazzetta. Jacob W. Paul, Esq., and Leslie C. Schulze, Esq., both Assistant Attorneys General of the State of Colorado, represented Respondent.

MATTER APPEALED

Complainant, a certified state employee, appeals her demotion from Correctional Support Trades Supervisor III to Correctional Support Trades Supervisor II. Complainant asserts the demotion was arbitrary, capricious, or contrary to rule or law and that it was discriminatory on the basis of race and/or national origin. Complainant requests that the State Personnel Board reverse the demotion.

Respondent argues that the demotion was not arbitrary, capricious, contrary to rule or law, or discriminatory. Respondent requests the Board to affirm the discipline.

For the reasons discussed below, the Disciplinary Action is **modified**.

ISSUES

- A. Whether Complainant committed the acts that resulted in the discipline;
- B. Whether the discipline was arbitrary, capricious, or contrary to rule or law;
- C. Whether Respondent discriminated against Complainant on the basis of her race or national origin; and
- D. Whether either side is entitled to attorney fees.

FINDINGS OF FACT

Background

1. Complainant Christina Labazzetta began her employment with Respondent on July 15, 2002. (Stipulated fact.)¹
2. Complainant identifies herself as Hispanic. Complainant also testified that she has Native American "blood" and that she is "Mexican-American."
3. Complainant's performance history reflects a successful career with Respondent. Complainant has served as an instructor for several of Respondent's in-house trainings, including the "Corrections 360" course that addresses ethics and professionalism.
4. Prior to October of 2015, Respondent had never issued any corrective or disciplinary action to Complainant.
5. Respondent promoted Complainant to a Correctional Support Trades Supervisor III ("CSTS III") on or about October 15, 2013. (Stipulated fact.) The CSTS III position is a Captain level position. (Stipulated fact.)
6. During all relevant times, Major Lance Miklich was the Programs Manager at Colorado Territorial Correctional Facility. Major Miklich was on the Board that recommended Complainant's promotion to CSTS III. At all times relevant to this appeal, Major Miklich was Complainant's immediate supervisor.
7. As a CSTS III, Complainant oversaw the kitchen area and managed all of the kitchen staff at the Colorado Territorial Correctional Facility. (Stipulated fact.)
8. In October of 2015, Complainant supervised the following staff members: Lieutenant John Evans, Lieutenant Laray Henderson, Sergeant Shawna Wood, Sergeant William Walker, Sergeant Joel Smith, Sergeant Shawn Hoar, Sergeant Pamela Stoddart, and Sergeant Benjamin Theil. (Stipulated fact.) In addition, Complainant indirectly supervised Sergeant Gary Benavidz when he provided security to the kitchen staff members.
9. At all times relevant to this appeal, Siobhan Burtlow was the Associate Warden at the Colorado Territorial Correctional Facility.
10. Ms. Burtlow started working for Respondent in 1995 as a Correctional Support Trade Supervisor I in food services. Ms. Burtlow served as a Captain at the Buena Vista Correctional Facility from 2009 until 2013. Ms. Burtlow served as the Programs Manager at the Buena Vista Correctional Facility from 2013 through early 2015. Ms. Burtlow became the Associate Warden at the Colorado Territorial Correctional Facility in May 2015. Ms. Burtlow currently serves as the Warden at Respondent's San Carlos Facility and Trinidad Correctional Facility.
11. On October 20, 2015, Colorado Territorial Correctional Facility Warden David Zupan delegated appointing authority to Ms. Burtlow to handle all matters pertaining to Complainant. At all times relevant to this matter, Ms. Burtlow was Complainant's appointing authority. (Stipulated fact.)

¹ The parties stipulated to a number of facts as identified with parenthetical notes.

12. Prior to 2015, Ms. Burtlow had little or no experience as an appointing authority.

The 2014 Annual Evaluation

13. Respondent gave Complainant an overall rating of Level II on her 2013-2014 annual Performance Evaluation. Herein, the "2014 Evaluation." A Level II rating means that Complainant was "meeting all the expectations, standards, requirements, and objectives on [her] performance plan and, on occasion, may exceed them."

14. The 2014 Evaluation was a partial year evaluation, from the period of Complainant's promotion to CTSS III (October 15, 2013) until the end of the review period (March 31, 2014).

15. Major Miklich signed the 2014 Evaluation on March 12, 2014.

16. Among other things, the 2014 Evaluation states: "Capt. Christina Labazzetta is adjusting very well to her new role at CTCF and has already reached many of the performance levels of a veteran Captain. She has done an amazing job jumping right in and being a team player . . ."

The 2014-2015 Mid-Year Evaluation

17. Respondent gave Complainant an overall rating of Level III on her 2014-2015 mid-year Performance Evaluation. Herein, the "Mid-Year Evaluation." A Level III rating represents "consistently exceptional and documented performance or consistently superior achievement beyond the regular assignment."

18. Major Miklich signed the Mid-Year Evaluation on October 3, 2014.

19. In describing Complainant's work behaviors, the Mid-Year Evaluation states that "[h]er work behaviors demonstrate responsible personal and professional conduct."

20. The Mid-Year Evaluation contains the following narrative to describe Complainant's performance in the competency of communication:

Capt. Christina Labazzetta is an effective communicator and she keeps the CTCF management team, her supervisor and her employees well informed of operational issues. Christina has excellent communication skills and I encourage her to continue to further develop her verbal communication skills in ways in which she will be seen as an approachable leader, listener and resource to a wide area of influence. Christina has shown she can be effective with a diverse audience, and can adapt as needed. Christina can improve in this area by ensuring her passion for perfection is displayed appropriately in all situations. Christina has met her IPO's in this area and has often exceeded them, it is evident in her building the relationships with other disciplines in her short time at CTCF.

21. The Mid-Year Evaluation contains the following narrative to describe Complainant's performance in the competency of interpersonal skills:

Capt. Christina Labazzetta has interpersonal communication skills that are professional and effective. She has earned the respect of her peers, subordinates, and supervisors with her integrity, knowledge, and work ethic. She has a direct no nonsense approach that is most often effective and balanced with passion and

care. She needs to ensure her passion is balanced when mentoring, coaching and correcting her employees so that they continue to be receptive through out [sic]. She is successful in many environments and has the knowledge to assist all areas of operations. As her experience is increased as a supervisor, she will be successful in adapting to all mentoring roles and difficult situations. Christina has met her IPO's in this area.

The 2015 Annual Evaluation

22. Respondent gave Complainant an overall rating of Level II on her 2014-2015 annual Performance Evaluation. Herein, the "2015 Evaluation."

23. Major Miklich signed the 2015 Evaluation on March 23, 2015

24. In describing Complainant's work behaviors, the 2015 Evaluation states that "[h]er work behaviors demonstrate responsible personal and professional conduct."

25. The 2015 Evaluation contains the following narrative to describe Complainant's performance in the competency of communication:

Capt. Christina Labazzetta is an effective communicator and she keeps the CTCF management team, her supervisor and her employees well informed of operational issues. Christina often has excellent communication skills both written and verbal. I encourage her to continue to further develop her verbal communication skills in ways in which she will be seen as an approachable leader, team player, listener and a resource to a wide area of influence. Christina has shown she can be effective with a diverse audience, and can adapt as needed. Christina can improve in this area by ensuring her passion for perfection is displayed appropriately in all situations. Christina has met her IPO's in this area.

26. The 2015 Evaluation contains the following narrative to describe Complainant's performance in the competency of interpersonal skills:

Capt. Christina Labazzetta has interpersonal communication skills that are professional and effective. She has earned the respect of her peers, subordinates, and supervisors with her integrity, knowledge, and work ethic. She has a direct no nonsense approach that is most often effective and with passion and care. She needs to ensure her passion is balanced when mentoring, coaching and correcting her employees so that they continue to be receptive through out [sic]. She is successful in many environments and has the knowledge to assist many areas of operations. As her experience is increased as a supervisor, she will be successful in adapting to all mentoring roles and difficult situations. Christina has met her IPO's in this area.

27. In describing Complainant's performance management, the 2015 Evaluation states "[s]he constantly evaluates and provides direction and reviews of her subordinates' performance to ensure expectations are met and the guidance is provided, to be successful" and "she has raised the bar for supervisors investing in their subordinates."

The events of October 2, 2015 between Complainant and Sergeant Hoar

28. At approximately 7:15 a.m. on October 2, 2015, Sergeant Hoar was eating breakfast in a dining hall at the Colorado Territorial Correctional Facility.

29. Complainant entered the dining hall as Sergeant Hoar was eating. Complainant spoke to Sergeant Hoar about certain laundry responsibilities that Sergeant Hoar had apparently failed to complete. Among other things, Complainant said "what is going on with the laundry?" and "Sergeant Hoar you need to get it pushed over there, we are an hour and a half behind schedule."

30. When Complainant spoke to Sergeant Hoar about the laundry, she was approximately 20 rows away from him and there were approximately 30 offenders also eating breakfast. Complainant used an elevated voice when she spoke.

31. A few minutes later, Complainant and Sergeant Helen Schwab (a kitchen staff employee) were in the kitchen area. Complainant picked up a plastic milk crate. Complainant and Sergeant Schwab looked at the contents of the milk crate. There were a few small milk cartons in the crate.

32. Sergeant Hoar walked past Complainant and Sergeant Schwab as they were looking at the contents of the milk crate. As Sergeant Hoar passed them, Complainant shoved the crate toward Sergeant Hoar's feet.

33. A surveillance video recorded the incident with the milk crate. The video consists of many picture frames in quick succession, but with micro time gaps between each picture frame.

34. As Sergeant Hoar walks past Complainant, several picture frames show him facing away from Complainant. These frames also show Complainant holding the milk crate in her hand and facing Sergeant Hoar's back.

35. The picture frames then reflect movement by both Complainant and Sergeant Hoar. The picture frames clearly show Sergeant Hoar stopping and then turning around in Complainant's direction. The picture frames do not conclusively show what Complainant is doing.

36. The picture frames then show Sergeant Hoar bending down to the floor. As Sergeant Hoar bends down, Complainant turns away from him to leave the area.

37. The picture frames then show Complainant walking away and Sergeant Hoar picking up the milk crate from the floor.

38. The picture frames then show Sergeant Hoar exiting the area. The picture frames show Sergeant Schwab lingering in the area after both Complainant and Sergeant Hoar had left.

39. The video shows that Sergeant Schwab was in close proximity to Complainant and Sergeant Hoar during the entire incident with the milk crate.

The reports of the events of October 2, 2015

40. On Monday October 5, 2015, Sergeant Hoar submitted a Colorado Territorial Incident Report Form, in which he reported that on October 2, 2015, Complainant yelled and threw a milk crate at him. (Stipulated fact.)

41. Lieutenant Henderson also prepared an incident report. Lieutenant Henderson's report is based upon information Sergeant Hoar conveyed to Lieutenant Henderson about the incident with the milk crate. In addition, Lieutenant Henderson's report observes that the incident "can be viewed on the cameras ObserVer ip address 10.10.85.21 Oct.2 at 0718 on camera labeled kitchen."

42. Major Miklich met with Lieutenant Henderson to discuss her report. Following this meeting, Lieutenant Henderson sent Major Miklich an email (dated October 5, 2015) stating: "I'm just sending you a note to let you know I just got chewed out for not answering my radio and talking to you."

43. Major Miklich prepared a report dated October 5, 2015. Among other things, Major Miklich wrote: "I observed the camera system to review the incident . . . I was able to see Captain Labazzetta drop a crate of milk on the floor and Sgt Hoar pick it up as she walks away." Major Miklich also wrote that "Sgt. Hoar was very intimidated" and that Lieutenant Henderson "feels very intimidated and threatened by Captain Labazetta."

The paid administrative leave

44. After conferring with Major Miklich and reviewing the video of the incident, Ms. Burtlow placed Complainant on paid administrative leave effective October 6, 2015.

45. Among other things, the notice of administrative leave states: "[i]t has come to my attention that you may have violated Administrative Regulation 1450-1 Code of Conduct and 100-29 Violence in the Workplace." Further, "[d]ue to the serious nature of the allegation(s), a thorough investigation must be conducted."

46. Ms. Burtlow requested and received approval to extend the duration of Complainant's paid administrative leave. The administrative leave lasted through approximately November 20, 2015.

Major Miklich's investigation

47. Ms. Burtlow asked Major Miklich to investigate the milk crate incident. As referenced in his report dated October 5, 2015, Major Miklich interviewed both Sergeant Hoar and Lieutenant Henderson and also reviewed the video of the incident.

48. In the days after October 5, 2015, Major Miklich continued to gather information regarding Complainant and matters relating to the food services operations at the Colorado Territorial Correctional Facility. As part of this process, Major Micklich asked various employees to write reports of their observations.

49. In addition, Major Miklich informed kitchen employees of temporary responsibilities to cover Complainant's absence.

50. Major Miklich prepared a binder (or "notebook") of documents related to his information gathering. Major Miklich's binder included incident reports relating to Complainant from the following individuals:

- a. Officer Cody Day (dated October 15, 2015);
- b. Lieutenant John Evans (dated October 15, 2015);
- c. Sergeant Helen Schwab (dated October 5, 2015);

- d. Officer Joel Smith (dated October 16, 2015);
- e. Sergeant William Walker (dated October 6, 2015); and
- f. Sergeant Shawna Wood (dated October 14, 2015).

51. Major Miklich also collected reports from Michael Gleason (dated October 17, 2015), Lieutenant Henderson (dated October 4, 2015), Sergeant Hoar (dated October 5, 2015 and October 8, 2015), Sergeant Beverly Masse (dated October 15, 2015 and October 24, 2015), and Officer Benjamin Thiel (dated October 15, 2015). This ALJ is uncertain of whether those reports were included in the binder/notebook.

52. Generally, the reports gathered by Major Miklich assert that Complainant's supervisory conduct was unprofessional and abrasive.

53. In addition to several reports, Major Miklich's binder/notebook included certain Board Rules, four of Respondent's Administrative Regulations, Complainant's Mid-Year Evaluation and her 2015 Evaluation, Complainant's training records, two written reports by Major Miklich of his investigation, and other materials.

The notices of the Rule 6-10 meeting

54. Ms. Burtlow noticed a Board Rule 6-10 meeting with Complainant via a letter dated October 13, 2015. The notice scheduled the Board Rule 6-10 meeting for October 20, 2015. Among other things, the notice states: "we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to the following: violation of Administrative Regulation 1450-01 Code of Conduct and 100-29 Violence in the Workplace."

55. On October 16, 2015, Ms. Burtlow sent Complainant a revised notice of a Board Rule 6-10 meeting. The revised notice rescheduled the Board Rule 6-10 meeting for October 21, 2015. Among other things, the revised notice states: "we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to the following: Violation of Administrative Regulation 1450-01, Code of Conduct."

56. Following receipt of the revised notice of a Board Rule 6-10 meeting, Complainant emailed Ms. Burtlow on October 16, 2015 as follows:

Hello Ms. Burtlow, Respectfully, I am responding to the letter you sent me concerning the meeting on 11-21-2015 [sic]. Though you have given me the time, date and place, I am still unsure as to the what I an [sic] allegedly in violation of. My first Letter from you on 10-05-2015, mentioned AR1450-01 and 100-29. Todays [sic] letter mentioned AR 1450-01. Respectfully, there are various standards in that AR. I am respectfully requesting some general information about the underlying reasons for this meeting, in order to prepare for these mitigating circumstances. Please, I ask with deepest respect. Thank you.

57. Ms. Burtlow replied to Complainant as follows:

The meeting on 10/21/15 is an information sharing meeting where we will both have an opportunity to discuss the issues and concerns at hand. Once the meeting is concluded you will have an additional 5 days to provide me with information if

you choose and if necessary we will have a second meeting prior to any decisions being considered.

Ms. Burtlow did not provide Complainant with any additional information in response to Complainant's email of October 16, 2015.

The Board Rule 6-10 meeting

58. Respondent held a Board Rule 6-10 meeting with Complainant on October 21, 2015. (Stipulated fact.) Major Miklich attended as Ms. Burtlow's representative and Roger Lucas, Esq., attended as Complainant's representative. (Stipulated fact.)

59. Toward the beginning of the Board Rule 6-10 meeting, Ms. Burtlow asked Complainant if she was prepared to proceed. Complainant answered affirmatively.

60. During the Board Rule 6-10 meeting, Major Miklich stated that Complainant might be in violation of Respondent's Administrative Regulation 1450-01, Code of Conduct, section IV, subsections J, N, II, and ZZ.

61. During the Rule 6-10 meeting, Major Miklich stated that Complainant might be in violation of Respondent's Administrative Regulation 100-29, Violence in the Workplace.

62. During the meeting, neither Major Miklich nor Ms. Burtlow indicated that Complainant might be in violation of Respondent's Code of Ethics.

63. During the meeting, Complainant inquired whether it looked from the video like she threw the crate. Neither Major Miklich nor Ms. Burtlow responded directly to this inquiry. Instead, Ms. Burtlow directed Major Miklich to quote the description from Sergeant Hoar's incident report. The exchange happened as follows:

MAJOR MIKLICH: And then you kind of see the crate go to the ground. You walk away. Sergeant Schwab stands there. Sergeant Hoar picks up the crate and then leaves the area. You had left the area and only Sergeant Schwab stayed in the area.

COMPLAINANT: Does it look like I threw the crate?

MS. BURTLOW: In his written report, can, can you quote from his written report? If there are any comments that he made?

MAJOR MIKLICH: Is it okay if I just read the whole report?

MS. BURTLOW: Um-hmn.

MAJOR MICKLICH: Okay. On October 2nd, 2015, at approximately 7:15 a.m. . . .

64. During the Board Rule 6-10 meeting, Complainant stated that she has a "habit" of tossing milk crates to the side because the crates are a tripping hazard but denied throwing crates at Sergeant Hoar:

Because normally, if you look at any of the camera footage that I—when I normally find milk crates and stuff, it is a habit of mine that I toss them off to the side so that they—they're a tripping hazard. So I normally just run them over to the side, or throw them over to the side. And you're going to see that if you look at any other camera footage. Whenever I find milk crates, that's just something I've always done. I throw them off to the side. I'm not throwing them at Mr. Hoar.

65. During the Rule 6-10 meeting, Ms. Burtlow represented that Sergeant Hoar's narrative indicated that Complainant threw the crate "directly" at his feet and inquired "what purpose would that serve?" In response, Complainant stated:

I don't—I don't know why I would do that. I don't even begin to realize why I would have done something like that. Because that doesn't make any sense on my end why I would do that. . . . I don't know. And I don't normally—I mean—and normally, I, I throw it—it's usually a, a game that I play with the staff and the inmates. Not a game, but it's—what's the word I want to say? An action of, like, bowling. I throw it down the long hallway or—because the inmates like to sit on them. That's when I usually pick up the crates because they're usually sitting on them in the dish room, and I get them from them and I toss them off to the side.

66. During the meeting, Major Miklich and Ms. Burtlow discussed the reports from Sergeant Hoar and Lieutenant Henderson.

67. During the meeting, Major Miklich stated that "numerous employees have reported that they have felt threatened, belittled, and humiliated, and have high levels of stress and anxiety." During the meeting, however, neither Major Miklich nor Ms. Burtlow identified those other employees or discussed the specific allegations in their reports.

68. During the meeting, Mr. Lucas asked about the other individuals who were levying allegations against Complainant as follows:

MR. LUCAS: It was mentioned that not—not only was it the two individuals, Mr. Hoar and Ms. Henderson, but there were numerous other employees that felt threatened and intimidated by Ms. Labazzetta. Are the identities of these employees going to be disclosed to her?

MS. BURTLOW: At this point, no. As this process goes on, if, if it becomes necessary, then through the discovery process should there be action and it appealed, then all the, the items are available.

69. During the Board Rule 6-10 meeting, Complainant indicated she "completely" understood Ms. Burtlow's position that the allegations needed to be investigated and stated "I would do the same thing." Complainant also said: "I know this incident here, it's got to be investigated."

70. During the meeting, Major Miklich and Ms. Burtlow referenced the surveillance video on seven occasions. Mr. Lucas requested a copy of the video. Ms. Burtlow denied that request.

71. Neither Ms. Burtlow nor Major Miklich gave Complainant copies of the various incident reports contained in the binder (or "notebook") that Major Miklich assembled prior to the Board Rule 6-10 meeting. Instead, Ms. Burtlow stated that Complainant had "about 15 minutes to review the binder" at the conclusion of the meeting. While Complainant did not request copies of the

various incident reports, Ms. Burtlow advised Complainant during the Board Rule 6-10 meeting that “we won’t be able to give you any of the information [in the binder].”

72. Toward the end of the meeting, Ms. Burtlow stated that she would give Complainant five days “from today” to provide additional information. Ms. Burtlow then clarified, “that date is Monday, October 26th and that will be close of business.” The period between October 21, 2015, and October 26, 2015, included a Saturday and Sunday.

Complainant’s position statement

73. On October 26, 2015, Mr. Lucas emailed Complainant’s position statement to Ms. Burtlow. Mr. Lucas transmitted the statement as an attachment to his email.

74. In his email to Ms. Burtlow on October 26, 2015, Mr. Lucas requested the following:

Since the statements from all the other employees was [sic] not fully discussed on 10/21, we are hoping that if the administration considers that information, and it is used as part of this process, that Capt. Labazzetta be given an additional opportunity to respond fully to that information. Giving us 15 minutes to review the entire notebook of the DOC’s information gathering was not sufficient, nor was providing us with 5 days to provide additional information, if the administration is indeed looking to impose some kind of action against Capt. Labazzetta.

75. In Complainant’s position statement, Mr. Lucas states “we felt it should have been 5 business days to have adequate time to respond.”

76. In Complainant’s position statement, Mr. Lucas also states:

Although we were allowed to view the notebook of the DOC’s administrative investigation commenced in early October 2015 detailing statements made by other employees against my client for 15 minutes, Capt. Labazzetta remains concerned that the information provided by the other employees to Major Miklich was not specifically discussed with her at the Rule 6-10 meeting, and may be used improperly in order to bolster these recent allegations against her for engaging in “violence” at the workplace. The notebook contained specific statements obtained from Sgt. Schwab, CO Day, Officer Smith, Sgt. Walker, Sgt. Wood, Lt. Evans, Capt. Selvage, Lt. Terral, and Sgt. Stoddart—statements that were not specifically discussed at the meeting on October 21st to allow for further meaningful discussion of the issues raised. Capt. Labazzetta is also concerned that she did not have any opportunity to view the “video surveillance” in question depicting the situation with Sgt. Hoar, clearly a critical piece of evidence in this case.

77. Ms. Burtlow did not give Complainant any additional opportunity to review the notebook or additional business days to submit her position statement.

78. Complainant’s position statement admits that “Capt. Labazzetta shoved a milk crate in another employee’s direction.”

Ms. Burtlow's follow-up after the Board Rule 6-10 meeting

79. During the Board Rule 6-10 meeting, Complainant requested that Ms. Burtlow speak to Lieutenant Evans, Sergeant Beverly Masse, Sergeant Rosalie Perida, Sergeant Schwab, Lieutenant Terral, and Sergeant Walker. Subsequent to the Board Rule 6-10 meeting, Ms. Burtlow spoke with these individuals.

80. During the Rule 6-10 meeting, Complainant also requested that Ms. Burtlow speak to Sergeant Stoddart. This ALJ is uncertain whether Ms. Burtlow spoke to Sergeant Stoddart after the meeting.

81. In Complainant's position statement, she also requested that Ms. Burtlow speak to Captain Daniel Strawn, Captain Charles Richard, and Captain Bob Chapman. Ms. Burtlow did not speak to these individuals prior to issuing the Disciplinary Action. According to the Disciplinary Action, these individuals did not have information about Complainant's "day to day interactions" and were not "present for the incident on October 2, 2015."

The Disciplinary Action

82. Ms. Burtlow issued the original Disciplinary Action on November 20, 2015. The original Disciplinary Action did not have an effective date for the demotion. Ms. Burtlow then issued a revised Disciplinary Action on November 24, 2015. The revised Disciplinary Action provides an effective date for the demotion.

83. In the Disciplinary Action, Ms. Burtlow concludes that Complainant violated Respondent's Administrative Regulation 1450-10 (Code of Conduct). The Disciplinary Action also concludes Complainant violated Respondent's Code of Ethics, her Performance Plan, and Board Rule 6-12.

84. The Disciplinary Action finds that Complainant engaged in numerous instances of misconduct. These include that Complainant acted inappropriately with the milk crate and Sergeant Hoar, that she yelled inappropriately at Sergeant Hoar about the laundry, that she yelled inappropriately at other staff in front of offenders, that she told Sergeant Hoar he should give his badge to offenders, that she intimidated subordinates by threatening to "paperwork" their shortcomings, that she told subordinates they could work at Chili's or Wal-Mart, that she pulled rank, that she threw a milk crate at Sergeant Thiel, that she referred to offenders as "clowns," that she ripped papers out of Lieutenant Henderson's hands, and other instances.

85. As a result of the Disciplinary Action, Respondent demoted Complainant from CSTS III to CSTS II. (Stipulated fact.) The demotion effective date was December 1, 2015.

86. Following the Disciplinary Action, Respondent transferred Complainant from the Colorado Territorial Correctional Facility to the Colorado State Penitentiary effective November 23, 2015.

AR 1450-01

87. As discussed above, the original and revised notices of the Board Rule 6-10 meeting both referenced Respondent's Administrative Regulation 1450-01.

88. Respondent's Administrative Regulation 1450-01 is Respondent's Code of Conduct. AR 1450-01 is ten pages in length. In addition, AR 1450-01 has three attachments; namely, (a) a

two-page Code of Ethics; (b) a Certificate of Review and Compliance for employees to sign; and (c) a one page administrative attachment.

89. Respondent's Administrative Regulation 1450-01 encompasses a gamut of conduct standards. These include (but are not limited to) prohibiting sexual associations with former offenders, gifts from offenders or members of an offender's family, horseplay, introducing contraband into a DOC facility, dating someone in one's chain of command, supervisors accepting gifts from employees under their supervision, gambling (unless specifically authorized by law), wearing uniforms in any business serving alcohol, bribery, falsifying documents, failing to report a change in address and/or telephone within 24 hours, using state time for private interests, theft of state property, leaving firearms in a state vehicle (unless placed in a secure lock box), workplace harassment, making reference to one's sexual life or preference, displaying materials of a sexual nature, misuse of prescription drugs while on duty, and using tobacco or tobacco-related products in the workplace.

90. The Disciplinary Action concludes that Complainant violated the following standards in Administrative Regulation 1450-01:

- Section IV (J): "Professional relationships will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies."
- Section IV (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."
- Section IV (X): "DOC employees, contract workers, and volunteers shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation."
- Section IV (Y): "During the course of an official DOC investigation, DOC employees, contract workers, and volunteers shall cooperate fully by providing all pertinent information that they may have. Full cooperation involves responding to all questions and providing a signed statement or affidavit, if requested."
- Section IV (II): "Verbal or physical altercations between DOC employees, contract workers, and volunteers in the workplace are unacceptable practices. While on or off duty, DOC employees, contract workers, and volunteers are required to maintain a considerate, cooperative, and cordial relationship toward each other. Any DOC employee, contract worker, or volunteer who becomes aware of threats against non-offenders, or allegations of threats against non-offenders, shall report such to the Office of the Inspector General for possible investigation."
- Section IV (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.”

91. During the Board Rule 6-10 meeting, Major Miklich stated that Complainant might be in violation of Respondent’s Administrative Regulation 1450-01, Code of Conduct, section IV, subsections J, N, II, and ZZ. Major Miklich specifically read those subsections during the Rule 6-10 meeting. The Disciplinary Action, however, concludes that Complainant violated section IV, subsections J, N, X, Y, II, and ZZ. Of these, subsections X and Y were not discussed during the Board Rule 6-10 meeting.

Procedural Matters

92. On November 30, 2015, Complainant timely appealed her demotion to the State Personnel Board.

93. On October 18, 2017, this ALJ granted Respondent’s Motion to Dismiss Retaliation and Gender Discrimination Claims.

94. On October 24, 2017, this ALJ entered a Protective Order.

DISCUSSION

I. THE ACTS UNDERLYING THE DISCIPLINARY ACTION.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII § 13(8); *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994) (“A central feature of the state personnel system is the principle that persons within the system can be subjected to discharge or other discipline only for just cause”); *Colorado Ass’n of Public Employees v. Dep’t of Highways*, 809 P.2d 988, 991 (Colo. 1991) (“discharge or other discipline only for just cause”). “Implicit in the requirement that the appointing authority have just cause is that the appointing authority must prove its reasons for [discipline] before a neutral decision-maker.” *Kinchen*, 886 P.2d at 708.

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Id.* at 705, 708. At the hearing, “the scales are not weighted in any way by the appointing authority’s initial decision to discipline the employee.” *Id.* at 706. “The employer must bear the burden of establishing just cause for [discipline] by a preponderance of the evidence at the hearing before the Personnel Board.” *Id.* at 708. The judge makes “an independent finding of whether the evidence presented justifies [a disciplinary action] for cause.” *Id.* at 706 n.10; see also § 24-4-105(14)(a), C.R.S. (“[I]nitial decision shall include a statement of findings and conclusions upon all the material issues of fact . . .”). If Respondent does not meet its burden of proving the underlying facts as charged in the discipline, then Respondent has not met its burden of establishing just cause for the discipline. *Kinchen*; § 24-50-125(2) and § 24-50-125(3), C.R.S. (hearing relates to the disciplinary action taken and the matters specifically charged); *Reeb v. Civil Serv. Comm’n*, 503 P.2d 629, 631 (Colo. App. 1972) (failure to prove charges set forth in the “bill of particulars” requires reversal of discipline).

Reasons for discipline listed in Board Rule 6-12 include:

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 of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if the employment is continued.

See also § 24-50-125(1), C.R.S. (listing reasons for discipline, including failure to comply with standards of efficient service or competence); § 24-50-116, C.R.S. (employees shall perform duties and conduct themselves "in accordance with generally accepted standards").

The Disciplinary Action makes multiple charges of misconduct against Complainant. Each of these charges related to Complainant's work performance. As discussed below, Respondent established that Complainant committed some of the acts underlying the demotion.

A. Complainant acted unprofessionally in shoving the milk crate in Sergeant Hoar's direction.

The Disciplinary Action asserts: "you were observed throwing the milk crate in the direction of Sgt. Hoar. It landed on the floor near his feet." Respondent's Information Sheet asserts that "Complainant did admit to throwing the milk crate."

The evidence at the hearing does not support the conclusion that Complainant threw the milk crate at Sergeant Hoar on October 2, 2015. First, the surveillance video of the incident does not show Complainant throwing the milk crate, the crate being airborne, or the crate landing. The video reflects some movement by Complainant shortly before Sergeant Hoar picks up the crate from the floor but the video does not clearly show what Complainant was doing. Second, while Sergeant Hoar's report asserts unequivocally that Complainant "took the milk crate that she was holding and threw it at me," the video shows that Complainant's movement with the crate was mostly behind Sergeant Hoar's back (and outside of his line of sight). As such, Sergeant Hoar's testimony about Complainant throwing the crate is dubious. Third, Major Miklich reviewed the video and stated "I was able to see Captain Labazzetta *drop* a crate of milk on the floor" (emphasis added). Fourth, Sergeant Schwab did not observe Complainant throwing the milk crate even though Sergeant Schwab was in close proximity during the entire incident. The video shows Sergeant Schwab looking in Complainant's direction at the time of Complainant's action with the crate. If Complainant had thrown the crate, Sergeant Schwab would have seen it (and it would have created a memorable impression). Last, Complainant emphatically denied throwing the milk crate at Sergeant Hoar.

Moreover, the evidence at the hearing does not support Respondent's assertion that Complainant admitted to throwing *the* milk crate. To the contrary, Complainant denied at the hearing that she threw the crate at Sergeant Hoar. While Complainant admitted during the Board Rule 6-10 meeting to a habit of throwing milk crates off to the side "like a bowling bowl," she specifically stated: "I'm not throwing them at Mr. Hoar."

Nonetheless, Complainant admitted in her position statement that she "shoved a milk crate in another employee's direction." Regardless of whether Complainant dropped the milk crate on the floor or shoved the crate, her action was aggressive and unprofessional. While there are more serious forms of physical aggression, Complainant's actions demonstrate a lack of respect for boundaries and a lack of self-control. The proper action here would have been for Complainant

to simply hand the crate to Sergeant Hoar. Her action with the crate forced Sergeant Hoar to bend down to the floor and pick it up. This was demeaning and degrading. Sergeant Hoar testified that Complainant treated him "almost like a dog." Complainant's unprofessional action with the milk crate constitutes unacceptable conduct for Captains in the kitchen facility.

During the hearing, Complainant did not offer any explanation for her failure to simply hand the milk crate to Sergeant Hoar. Complainant stated during the Board Rule 6-10 meeting that she has a habit of tossing crates to the side to prevent tripping hazards. Even if true, Complainant's habit does not justify her action vis-à-vis Sergeant Hoar.

Respondent proved by a preponderance of the evidence that Complainant acted inappropriately in her actions with the milk crate.

B. Complainant's words to Sergeant Hoar regarding the laundry do not constitute verbal aggression or a verbal altercation.

The Disciplinary Action asserts that Complainant yelled at Sergeant Hoar across the room, stating "Sgt. Hoar what is going on with the laundry, why hasn't it been taken yet?" and "[y]ou need to get it pushed over there, it is an hour and a half late." Moreover, the Disciplinary Action states that Correctional Officer Cody Day reported that Complainant "yell[ed] across the chow hall at Sgt. Hoar, 'what the hell is the thing with the laundry carts? Why are you so far behind?'"

There was considerable evidence at the hearing of the kitchen operations at Colorado Territorial Correctional Facility. From this evidence, it is clear that there is a lot of noise in the kitchen area. The noise is particularly loud during mealtimes. Supervisors may need to use an elevated voice simply to be heard. From the evidence at hearing, it is also clear that kitchen operations can be very stressful and hectic. When offenders are going through the serving lines, supervisors often give on-the-spot orders to subordinates. Supervisors in the kitchen often do not have the luxury of pausing to privately instruct subordinates because disruptions in food services may easily result in a mass of agitated offenders.

Sergeant Hoar testified that Complainant yelled at him regarding the laundry. This testimony was consistent with his written report where he states that Complainant (1) "yelled in front of the offenders, 'Sgt. Hoar what is going on with the laundry, why hasn't it been taken yet'" and then (2) "yelled, 'Sgt. Hoar you need to get it pushed over there we are a hour and a half behind schedule now.'" The offenders heard Complainant as she spoke to Sergeant Hoar about the laundry.

The words that Sergeant Hoar attributes to Complainant about the laundry are not of a reprimanding nature. Rather, Complainant's first statement about the laundry appears like a reasonable inquiry and the second statement appears like a reasonable instruction. Supervisors at Respondent's facilities must be able to give subordinates on-the-spot instructions. Sergeant Hoar testified that when Complainant spoke, there were approximately 30 offenders eating in the dining room and that Complainant was approximately 20 rows away from him. Sergeant Hoar testified that Complainant "had to yell." Under these circumstances, raising one's voice does not constitute verbal aggression or a verbal altercation.

Correctional Officer Day did not testify. There was no testimony at the hearing that Complainant said "what the hell" when speaking about the laundry. Moreover, the Disciplinary Action's reference to that remark is undermined by Sergeant Hoar's testimony and written report.

If Complainant had said “what the hell,” it seems highly probable that Sergeant Hoar would have mentioned it in both his testimony and in his written report.

Respondent did not meet its burden with respect to this ground for the Disciplinary Action.

C. The allegations that Complainant yelled inappropriately at staff in front of offenders.

In addition to Sergeant Hoar’s and Officer Day’s assertions (discussed immediately above), the Disciplinary Action asserts that (1) Lieutenant Evans reported Complainant “yelling at staff or questioning their decisions in front of offenders;” (2) “Sgt. Joel Smith reported [that as he was counseling an offender], he was approached by you, very loudly yelling, ‘Get him out of here. He is causing a disruption needing to be talked to for so long. He’s just wasting our time;” (3) Sergeant Stoddart reported that Complainant “regularly scream[s] at staff in front of inmates,” including during a specific incident on June 8, 2014; (4) “Sgt. Benjamin Thiel reports that you frequently demoralize him by yelling at him in front of offenders;” (5) “Sgt. Gary Benavidez [sic] reports . . . that you often yell at staff about duties in front of offenders;” (6) Lieutenant Terral reported “you are often unprofessional and borderline offensive, yelling at staff and confronting them in front of offenders;” and (7) Sergeant William Walker “feels very disrespected at being spoken to or yelled at in front of inmates.”

Sergeant Evans wrote a report dated October 15, 2015, stating Complainant “has a tendency of going onto the kitchen floor and yelling at staff in front of offenders.” Sergeant Evans’ report does not provide the date (or dates) that Complainant allegedly yelled. Sergeant Evans’ report does not provide any specific examples of Complainant yelling. During his testimony at hearing, Sergeant Evans did not testify that Complainant yelled at him (or other staff) in front of offenders. Sergeant Evans did not offer any examples of Complainant yelling or raising her voice. In fact, Sergeant Evans did not even testify to Complainant raising her voice. The testimonial omission and the lack of any contemporaneous report undermine Sergeant Evans’ written accusation. Complainant acknowledged using an “elevated” voice on the kitchen floor but did not admit to yelling or speaking inappropriately. Respondent did not meet its burden with respect to Lieutenant Evans’ allegation.

Sergeant Smith wrote a report about a situation when Complainant told him that an offender was wasting everyone’s time. While Sergeant Smith’s report states that Complainant was speaking “very loudly,” his report does not say that Complainant was yelling. During his testimony at the hearing, Sergeant Smith did not testify that Complainant yelled. Complainant acknowledged using an “elevated voice” during this conversation but did not admit to yelling. Respondent failed to meet its burden with respect to Sergeant Smith’s allegation.

Sergeant Stoddart testified at the hearing. Sergeant Stoddart, however, did not testify that Complainant yelled or screamed. Sergeant Stoddart did not testify about an incident on June 8, 2014. Respondent failed to meet its burden with respect to Sergeant Stoddart’s allegation.

Sergeant Thiel testified that Complainant yelled at him in front of offenders and that he felt demeaned and belittled. His testimony was consistent with his written report. Among other things, Sergeant Thiel’s report stated “Captain Labazetta [sic] has used a raised voice and yelled at me in front of Offenders.” Sergeant Thiel’s testimony was credible. His observations were first-hand. There was no evidence Sergeant Thiel knew of Complainant’s race or that he had a discriminatory bias against her. If anything, the evidence at hearing indicated that Sergeant Thiel might be inclined to favor Complainant; Sergeant Thiel testified that Complainant wrote a letter of

recommendation for him and that Complainant supported his career by giving him opportunities to serve as a trainer. Respondent met its burden with respect to Sergeant Thiel's allegation.

Sergeant Benavidz testified as to two particular circumstances of Complainant yelling. The first circumstance is discussed further below and related to Complainant referring to an offender as a clown. The second circumstance was an occasion when Complainant spoke to him when he was working the food line with offenders. Sergeant Benavidz testified equivocally that Complainant was "kinda yelling." Sergeant Benavidz did not testify as to what Complainant said to him. Sergeant Benavidz did not testify as to the ambient noise at the time. The equivocal testimony and the lack of specifics cast doubt as to whether Complainant improperly elevated her voice with Sergeant Benavidz. Respondent did not meet its burden with respect to Sergeant Benavidz's allegation that Complainant often yelled at staff in front of offenders.

Lieutenant Terral did not testify at the hearing. Respondent failed to meet its burden with respect to Lieutenant Terral's supposed allegation.

Sergeant Walker did not testify at the hearing. Respondent introduced a hearsay statement attributed to Sergeant Walker. That statement does not mention Complainant. That statement does not mention offenders, let alone being yelled at in front of offenders. Respondent failed to meet its burden with respect to Sergeant Walker's supposed allegation.

In sum, Respondent met its burden with respect to Sergeant Thiel's allegation but not with respect to the allegations made by Sergeant Evans, Sergeant Smith, Sergeant Stoddart, Sergeant Benavidz, Lieutenant Terral, and Sergeant Walker.

D. The allegation that Complainant told Sergeant Hoar that he should give his badge to offenders.

The Disciplinary Action asserts that Complainant told Sergeant Hoar, "[i]f you can't do the job you should just take off your badge and give it to the offenders and let them run it then" (referring to supervising the serving line).

Sergeant Hoar testified at the hearing that Complainant told him, "if you can't do the job, why don't you just take your badge off and give it to the offenders." Sergeant Hoar testified that offenders reacted to Complainant's statement by raising their eyebrows and opening their mouths. Complainant denied telling Sergeant Hoar that he should give his badge to offenders. This ALJ gives more weight to Complainant's testimony. Sergeant Hoar was aware that employees could write confidential reports regarding supervisors yet he delayed reporting this incident by at least ten months.² Sergeant Hoar did not explain his failure to promptly bring this incident forward. The delay undercuts Sergeant Hoar's testimony.

Respondent did not meet its burden with respect to this ground for the Disciplinary Action.

E. The allegation that Complainant intimidated subordinates by threatening to "paperwork" their shortcomings.

The Disciplinary Action asserts Complainant threatened to "write-up" subordinates. Specifically, (1) "Sgt. Hoar reported being threatened by you multiple times with paperwork, ie.

² Sergeant Hoar's report dated October 5, 2015, appears to be his first complaint relating to the badge statement. The statement, however, allegedly happened in 2014 shortly after he started working at the Territorial Correctional Facility.

'I'll put this on paper and get you out of the facility;'" (2) Sergeant Wood states she "is regularly threatened with being moved to another shift or to be given 'paperwork;'" (3) "Sgt. William Walker reported that . . . he is regularly threatened by you with 'paperwork' and being moved;" and (4) Sergeant Benavidz "reports daily threats of write ups."

It is not inherently wrong for supervisors to inform subordinates that performance issues may need to be documented. To the contrary, verbal warnings may prompt subordinates to improve unsatisfactory performance. Therefore, the issue is whether Complainant's threats of "writing up" subordinates abused her discretion as a supervisor in such a way as to create an unsafe and intimidating work environment.

Sergeant Hoar testified that Complainant said she would "put paperwork on [me]." Sergeant Hoar also wrote a report stating the following:

To the best of my knowledge the incident occurred about two months ago. I was called to the office and Captain Labazetta [sic] talked to me about a [sic] incident that happened with Sgt. Wood that day. We were talking about the incident and at one point Captain Labazetta [sic] said, "I will put paperwork on you and get you sent out of here." this [sic] was witnessed by Lt. Terral and after the conversation I received a memo from Lt. Terral as directed by Captain saying she wanted this put on paper.

There was no evidence at the hearing that Sergeant Hoar filed a grievance as to the memorandum issued by Lieutenant Terral. There was no evidence at the hearing as to the underlying incident. Thus, we know that (a) Complainant said she would put paperwork on Sergeant Hoar; and (b) shortly thereafter, Lieutenant Terral issued a memorandum to Sergeant Hoar. It is also likely that Sergeant Hoar did not grieve the memorandum. Based on this evidence, Respondent failed to establish that Complainant was not justified in telling Sergeant Hoar that she would document (or "paper") the incident.

Sergeant Wood did not testify at the hearing. Her written report does not mention Complainant making any threats to write her up or give her paperwork. Respondent did not meet its burden with respect to Sergeant Wood's supposed allegations.

Sergeant Walker did not testify at the hearing. Respondent did not meet its burden with respect to Sergeant Walker's supposed allegations.

Sergeant Benavidz did not testify that Complainant threatened to write him up. Respondent did not meet its burden with respect to Sergeant Benavidz's supposed allegations.

Respondent did not meet its burden with respect to this allegation.

F. The allegation that Complainant told subordinates they could work at Chili's or Wal-Mart.

The Disciplinary Action faults Complainant for insulting Lieutenant Henderson by "telling her that she should go work at Chili's or be a Wal-Mart greeter." Similarly, the Disciplinary Action criticizes Complainant for telling Sergeant Wood "[i]f you don't like my rules you can go work at Chili's or Applebee's." Likewise, the Disciplinary Action asserts Complainant told Sergeant Thiel "[y]ou can't cut it here. You can get a job at Chili's or Applebee's."

Lieutenant Henderson did not testify that Complainant told her she should go work at Chili's or Wal-Mart. Lieutenant Henderson's written report does not refer to such a remark. Respondent did not meet its burden with respect to Lieutenant Henderson's supposed allegations.

Sergeant Wood did not testify at the hearing. Her written report does not mention Complainant making any statement about anyone going to work for Chili's or Wal-Mart. Respondent did not meet its burden with respect to Sergeant Wood's supposed allegations.

Sergeant Thiel's written report stated "Captain Labazetta [sic] uses other forms of communication that are not conducive to positive work morale. Recently, and in the past, Staff has been told at meetings that we could 'get a job at Chilli's [sic] or Applebee's if we could not cut it here.'" Sergeant Thiel confirmed his report during his testimony.

Charles Richard is a Captain in Respondent's food services. Captain Richard testified that he has told staff subordinates that they should work at Chili's. There was no evidence that Respondent has corrected or disciplined Captain Richard for making such statements.

Respondent did not meet its burden with respect to this ground for the Disciplinary Action. While Sergeant Thiel's testimony supports the allegation, Captain Richard's testimony dispels that making such a remark is grounds for immediate discipline. Moreover, the fact that neither Lieutenant Henderson nor Sergeant Wood testified about Complainant making a remark about working at Chili's or Wal-Mart undermines that either perceived such a comment as being offensive or derogatory.

G. The allegations of Complainant pulling rank.

The Disciplinary Action faults Complainant for telling Lieutenant Henderson "I am the Captain" while pointing to her bars. Similarly, the Disciplinary Action asserts that Complainant often adds, "I'm the Captain" when giving Sergeant Wood directions.

During the hearing, Lieutenant Henderson testified that Complainant told her "I am your Captain" while pointing to her bars. Lieutenant Henderson offered details about the incident, including that Complainant was yelling in her face, pointing her finger, and that Lieutenant Terral was present. Lieutenant Henderson's testimony was credible. The incident had a significant impact on Lieutenant Henderson and her memory was strong as she recollected it.

Lieutenant Henderson's testimony was consistent with something Complainant admitted during the Board Rule 6-10 meeting. During the Rule 6-10 meeting, Complainant stated:

I, I don't want to refute some of the things that you're saying, but I don't think I've ever—I don't think anyone has ever seen me point at my bars and say—normally, what I say is, I didn't get these in the Cracker Jack box, is what I say, when I'm talking about the budget.

This statement by Complainant corroborates that she occasionally points to her Captain bars in the context of referencing her rank.

It is not necessarily improper for Complainant to point to her Captain bars or state that she did not get them "in a Cracker Jack box." In certain contexts, an action or statement of this nature might exhibit fitting pride in one's accomplishments or station. During the hearing, however,

Lieutenant Henderson testified that when Complainant pointed to her bars it was “pure insanity,” and that Complainant was screaming. Complainant’s action was unprofessional and intimidating.

Sergeant Wood did not testify at the hearing. Her written report does not mention Complainant making any statement about being the Captain. Respondent did not meet its burden with respect to Sergeant Wood’s allegations.

Respondent met its burden with respect to Lieutenant Henderson’s allegations.

H. Complainant asked Sergeant Thiel about his thoughts if she were to tell his next supervisor that he was “an ass.”

The Disciplinary Action asserts “Sgt. Benjamin Thiel reports that . . . while being counseled for an error on January 6, 2015, [Complainant] asked him ‘what would you do if I told your next supervisor that you’re an ass.’”

Sergeant Thiel testified that Complainant asked him how he would feel if she told his next supervisor that he was an “ass.” His testimony matched his written report. On the other hand, Complainant denied making this remark. This ALJ gives more weight to Sergeant Thiel’s statements. He described the context of Complainant’s question at length. His testimony was measured—he did not attest that Complainant directly called him an ass, but that Complainant asked him a “what if” question about telling his next supervisor that he was an ass.

The question Complainant asked Sergeant Thiel was intimidating; Complainant’s use of profanity was unprofessional. Respondent met its burden with respect to this assertion.

I. The allegation that Complainant threw a milk crate that almost hit Sergeant Thiel.

The Disciplinary Action asserts “[o]n an unknown date between September 17, 2015 and October 2, 2015, you threw a milk crate over the south side of the serving line which landed approximately six feet from Sgt. Thiel.”

Despite testifying at length, Sergeant Thiel did not testify about Complainant throwing a milk crate at him, in his vicinity, or over the serving line. Given the seriousness of this accusation, the testimonial omission indicates that this incident did not happen. Moreover, there was no evidence that Sergeant Thiel (or anyone else) made a contemporaneous complaint about this supposed incident. This lack of any contemporaneous complaint belies the accusation. Respondent did not offer any surveillance video of this supposed incident.

Respondent did not meet its burden with respect to this ground for the Disciplinary Action.

J. Complainant referred to offenders as “clowns.”

The Disciplinary Action asserts “Sgt. Gary Benavidez [sic] reports that you speak unprofessionally often referring to offenders as ‘clowns.’”

Sergeant Benavidz testified that Complainant “directly called the offender a clown.” On the other hand, Complainant denied making such a statement. This ALJ gives more weight to Sergeant Benavidz’s testimony. He did not appear to have any interest in testifying against Complainant; in fact, Sergeant Benavidz no longer works in kitchen services. He testified from

his personal observations. His testimony on this topic was unequivocal. His testimony resulted from questions during both direct and cross examination. He described the event that triggered Complainant's statement; namely, a situation when a dessert cart rolled over.

Complainant's reference to an offender as a clown is unprofessional and demonstrates poor judgment. Making such a reference in front of a lower ranked employee sets a bad example. Respondent met its burden with respect to this ground for the Disciplinary Action.

K. The allegation that Complainant ripped papers out of Lieutenant Henderson's hands.

The Disciplinary Action asserts that Lieutenant Henderson reported that Complainant "[r]ipped papers out of my hand and then berated me for leaving the Kitchen when she knew I was with the Major." According to the Disciplinary Action, "[t]his incident occurred on October 5, 2015."

Lieutenant Henderson sent Major Miklich an email on October 5, 2015, stating: "I'm just sending you a note to let you know I just got chewed out for not answering my radio and talking to you." The email, however, does not say anything about Complainant ripping papers out of Lieutenant Henderson's hands. This omission casts doubt on the allegation. During the hearing, Lieutenant Henderson did not testify that Complainant ripped out papers from her hand (or otherwise took papers from her).

Respondent did not meet its burden with respect to this ground for the Disciplinary Action.

II. THE DISCIPLINARY ACTION WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO RULE OR LAW.

The Board may reverse or modify the level of discipline if Respondent's decision is arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. As discussed below, Respondent violated Board Rule 6-10. In addition, the Disciplinary Action suffered from a degree of arbitrariness and capriciousness.

A. The notices of the Board Rule 6-10 meeting contravene the requirements of Board Rule 6-10(A).

Among other things, Board Rule 6-10(A) requires that the written notice of a meeting include "general information about the underlying reasons for scheduling the meeting." Here, Ms. Burtlow issued two notices of the Rule 6-10 meeting. The first, original notice (dated October 13, 2015) states: "we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to the following: violation of Administrative Regulation 1450-01 Code of Conduct and 100-29 Violence in the Workplace." The second, revised notice (dated October 16, 2015) states: "we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to the following: Violation of Administrative Regulation 1450-01, Code of Conduct." Neither the original nor the revised notices provides any information relating to the underlying allegations or the date of any alleged misconduct. Restated, neither of the notices mentions throwing a milk crate, yelling at subordinates, supervising by intimidation, inappropriately pulling rank, calling offenders clowns, ripping out papers from a subordinate's hands, or any other allegation.

Following her receipt of the revised notice of the Board Rule 6-10 meeting, Complainant emailed Ms. Burtlow. Among other things, Complainant's email observes that "there are various standards in that AR" and requests "some general information about the underlying reasons for this meeting, in order to prepare for these mitigating circumstances." Respondent, however, did not provide Complainant with additional information in advance of the Rule 6-10 meeting.

The notices of the Board Rule 6-10 meeting are problematic. Foremost, Respondent's Administrative Regulation 1450-01 is ten pages in length (without including its three attachments) and encompasses a gamut of conduct standards. As such, the notices' reference to Administrative Regulation 1450-01 is overly broad and did not furnish Complainant with general information about the underlying reasons for the Rule 6-10 meeting. Second, the revised notice omitted any mention of a possible violation of Administrative Regulation 100-29 (Violence in the Workplace). Given that the original notice mentioned Administrative Regulation 100-29, the omission in the revised notice suggested that the upcoming Rule 6-10 meeting would not involve allegations of violence. At the meeting, however, Major Miklich stated that Complainant might be in violation of Respondent's Administrative Regulation 100-29. This was sloppy and potentially misleading. Third, the notices provide absolutely zero information relating to the underlying factual allegations. In conclusion, the notices here contravene the requirements of Board Rule 6-10(A).

B. Respondent failed to show Complainant a copy of the surveillance video during the Board Rule 6-10 meeting.

During the Board Rule 6-10 meeting, Major Miklich and Ms. Burtlow referred to the surveillance video on seven occasions. Despite the video's significance, neither Major Miklich nor Ms. Burtlow showed Complainant the video or otherwise made it available. This failure runs afoul of Rule 6-10's requirement that "when considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond."

Instead of showing Complainant the video, Major Miklich verbally described it. When Major Miklich finished his description, Complainant inquired whether it looked from the video like she threw the crate. Rather than respond to that question, Ms. Burtlow directed Major Miklich to *quote* the description from Sergeant Hoar's incident report. Given the inconclusive nature of the video's depiction, it appears that Ms. Burtlow deflected Complainant's inquiry to avoid answering it. Regardless of Ms. Burtlow's motivation, the straightforward approach here would have been to show Complainant the video and give her an opportunity to respond to what it depicted.

Toward the end of the Rule 6-10 meeting, Mr. Lucas requested a copy of the video. Ms. Burtlow denied that request.

Respondent's actions with respect to the surveillance video denied Complainant the opportunity to meaningfully provide information in response to the allegations against her. If Respondent had provided the video (or permitted Complainant to observe it), Complainant or her representative might have strongly disputed that it depicted Complainant throwing the crate. This in turn might have persuaded Respondent to set aside the allegation that Complainant *threw* the milk crate at Sergeant's Hoar.

C. Respondent did not give Complainant a meaningful opportunity to respond to the negative reports from other employees.

When considering discipline, Board Rule 6-10 requires the appointing authority to meet with the certified employee “to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond.” During the Rule 6-10 meeting, Major Miklich stated that “numerous employees have reported that they have felt threatened, belittled, and humiliated, and have high levels of stress and anxiety.” Neither Major Miklich nor Ms. Burtlow, however, identified those employees during the meeting. Moreover, neither Ms. Burtlow nor Major Miklich gave Complainant copies of the reports in the binder (or “notebook”) that Major Miklich assembled. As a result, Complainant did not have an opportunity to respond to those reports during the course of the Rule 6-10 meeting. Without the identities of her accusers, Complainant was unable to assess the potential motives and address the credibility of the accusers during the Rule 6-10 meeting. Without the specific allegations, Complainant was unable to meaningfully respond to the accusations during the Rule 6-10 meeting. Respondent’s actions violated Rule 6-10.

At the conclusion of the meeting, Ms. Burtlow told Complainant she had “about 15 minutes to review the binder.” This did not cure Respondent’s infringement. First, Ms. Burtlow did not reconvene the meeting after Complainant viewed the reports. As such, Complainant did not have any opportunity during a meeting with her appointing authority to respond to the accusations. Second, while 15 minutes might have been enough time to skim the binder/notebook, it was not enough time to fully review all of the contents in the binder (and certainly not enough time to digest the reports). By reminder, the binder not only included several incident reports but also included certain Board Rules, four of Respondent’s Administrative Regulations, some of Complainant’s performance evaluations, Complainant’s training records, two reports by Major Miklich of his investigation, and other materials.

The Disciplinary Action is based in considerable part on these negative reports from other employees. Issuing discipline based upon these reports without giving Complainant a meaningful opportunity to respond to same during a meeting with her appointing authority runs afoul of Board Rule 6-10.

D. Respondent did not give Complainant five business days to provide additional information after the Board Rule 6-10 meeting.

The Board Rule 6-10 meeting took place on October 21, 2015. Toward the end of the meeting, Ms. Burtlow stated that she would give Complainant five days “from today” to provide additional information. Ms. Burtlow then clarified, “that date is Monday, October 26th and that will be close of business.” Complainant complied with this deadline but under protest. In an email from Mr. Lucas to Ms. Burtlow on October 26, 2015, he complained that it was not sufficient to provide “us with 5 days to provide additional information.” In her position statement, Complainant’s attorney also wrote: “we felt it should have been 5 business days to have adequate time to respond.” Despite Complainant’s protests about the deadline, Ms. Burtlow did not give Complainant additional time.

Board Rule 6-10 provides that “[t]he employee will be allowed up to 5 business days after the meeting to provide the appointing authority any additional information relating to issues discussed at the meeting.” Under this provision, appointing authorities must give employees five *business* days to provide additional information. Ms. Burtlow’s deadline did not give Complainant five business days to provide additional information. Thus, Ms. Burtlow’s deadline contravened

Rule 6-10. While Complainant did not explicitly request additional time, it is evident from Mr. Lucas' communications with Ms. Burtlow that Complainant wanted more time than permitted by Ms. Burtlow's deadline. Respondent's failure to give Complainant five *business* days to provide additional information runs afoul of Board Rule 6-10.

E. Respondent failed to give Complainant an opportunity to rebut allegations made against her after the Board Rule 6-10 meeting.

Subsequent to the Board Rule 6-10 meeting, Ms. Burtlow spoke to Lieutenant Evans, Sergeant Masse, Sergeant Perida, Sergeant Schwab, Lieutenant Terral, and Sergeant Walker. The Disciplinary Action recites numerous negative comments about Complainant that surfaced during those conversations to support the decision to demote Complainant.³ Ms. Burtlow, however, did not give Complainant an opportunity (in a second Rule 6-10 meeting or otherwise) to rebut the negative comments that were made after the Rule 6-10 meeting. This breaches Board Rule 6-10's requirement of giving "the employee an opportunity to respond."

F. Respondent's actions suffered from arbitrariness and capriciousness.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, this Board must determine whether: (1) the agency neglected or refused to use reasonable diligence and care to procure evidence to consider in exercising its discretion; (2) the agency failed to give candid and honest consideration of the evidence before it; or (3) reasonable persons fairly and honestly considering the evidence must reach a contrary conclusion. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Ms. Burtlow (through Major Miklich) collected reports by various employees relating to Complainant. In addition, Ms. Burtlow obtained and reviewed the surveillance video of the incident on October 2, 2015. She also reviewed Complainant's training records, and certain performance evaluations. Moreover, after the Rule 6-10 meeting (and at Complainant's request), Ms. Burtlow spoke to various individuals. Also after the Rule 6-10 meeting, Ms. Burtlow received and considered Complainant's position statement. Ms. Burtlow, however, should have given Complainant a more thorough (and more meaningful) opportunity to respond to the allegations against her. Respondent's violations of Board Rule 6-10 (as described at length above) demonstrate that the agency neglected to use reasonable diligence to procure information to consider in exercising its discretion.

Ms. Burtlow should have been more candid and forthright with the evidence before her. Ms. Burtlow testified that someone watching the video can see Complainant throwing the milk crate at Sergeant Hoar. While the video reflects movement by Complainant, the video does not clearly show what Complainant is doing. More specifically, the video is inconclusive as to what exactly Complainant did with the milk crate. Major Miklich observed that the video showed Complainant *dropping* it to the floor. Ms. Burtlow's failure to give candid consideration of the video's depiction was arbitrary and capricious under *Lawley's* second prong.

³ The Disciplinary Action includes the following negative comments from these conversations: (1) Lieutenant Evans described Complainant's demeanor "as degrading;" (2) Sergeant Masse reported confronting Complainant about being "pissed and angry;" (3) Lieutenant Terral stated Complainant is "often unprofessional and borderline offensive, yelling at staff and confronting them in front of offenders," and (4) Sergeant Walker indicated "he feels very disrespected at being spoken to or yelled at in front of inmates" and that "expectations are often unclear."

G. Remedy to Complainant.

The evidentiary hearing before this ALJ was Complainant's first opportunity for a full and fair opportunity to respond to Respondent's allegations against her. As a result of Respondent's violations of Board Rule 6-10, Complainant is entitled to back pay and benefits with statutory interest from the effective date of the demotion (December 1, 2015) until completion of the evidentiary hearing (November 17, 2017). *See Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984) (awarding back pay to restore the employee to "the position she would have been in if the flawed predisciplinary meeting had never occurred."); *see also Shumate v. State Personnel Bd.*, 528 P.2d 404, 407 (Colo. App. 1974) ("Where the procedures for [discipline] of a civil service employee are not strictly followed, the [discipline] is invalid and the employee must be reinstated.")

III. MODIFICATION TO THE DISCIPLINE ADMINISTERED.

The Board may reverse or modify the discipline if Respondent's decision is arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. *See also* Board Rule 6-12(B) ("If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified").

This ALJ finds that the discipline administered should be modified. Respondent did not prove by a preponderance of the evidence that Complainant committed some of the acts for which discipline was imposed. Because the level of discipline administered was based on the collective charges, the proper action here is to reduce the discipline. *See* § 24-50-125(4), C.R.S. (following the hearing, the Board may affirm, modify, or reverse the action of the appointing authority); Board Rule 6-12(B). Modification is also appropriate due to Respondent's failure to prove the more serious version of the events. Ms. Burtlow issued the demotion while under the impression that Complainant had thrown the milk crate at Sergeant Hoar. Respondent, however, did not prove that Complainant threw the milk crate at Sergeant Hoar. In the same vein, Respondent did not prove the more serious allegations that Complainant ripped papers out of a subordinate's hands or threw a milk crate at Sergeant Theil.

Complainant's performance evaluations as a CSTS III showed that she was meeting expectations. While the Disciplinary Action references Complainant's "previously demonstrated appropriate/satisfactory performance," the consideration that Ms. Burtlow gave to Complainant's demonstrated performance is unclear. When Respondent became concerned with Complainant's supervisory style and communications, Respondent should have taken measures short of demotion to correct and remediate those concerns. *See, e.g.*, Board Rule 6-11 (discussing corrective actions). Complainant's documented performance as a CSTS III coupled with her successful employment history with Respondent mitigates strongly against immediate imposition of a demotion in these circumstances.

Nonetheless, Complainant's action with the milk crate warrants discipline. While there are more serious forms of physical aggression, Complainant's actions demonstrate a lack of respect for boundaries and a lack of self-control. Complainant's action displayed unprofessional conduct that is unacceptable for Captains. Regardless of whether Complainant dropped the milk crate on the floor or shoved the crate, her actions forced Sergeant Hoar to bend down to the floor and pick it up. This was demeaning and degrading. Acts of physical aggression are sufficiently flagrant or serious that immediate discipline is proper. *See, e.g.*, Board Rule 6-2. This is particularly true given Complainant's leadership position and the impact her modeling has on the culture of the kitchen staff. Respondent established grounds for discipline.

Complainant's failure to take any responsibility for her actions further supports discipline. Complainant did not show or express any remorse about her actions with the milk crate during the Board Rule 6-10 meeting or at the hearing. There is no evidence that she ever apologized to Sergeant Hoar for her actions. There is no evidence that she recognized that her actions were wrong. To the contrary, Complainant repeatedly attempted to portray Sergeant Hoar as a problematic, racist, and disgruntled employee.

Additionally, Respondent met its burden with respect to some of the other grounds underlying the discipline. Complainant engaged in more than one instance of misconduct that was intimidating, unprofessional, and inappropriate.

Therefore, this ALJ modifies the discipline administered to Complainant from a demotion to a ten percent (10%) reduction in pay for six months. This ALJ finds that a ten percent (10%) reduction in pay for six months is an appropriate discipline for the allegations that Respondent proved at the hearing.

IV. THE DISCRIMINATION CLAIM.

Complainant's Appeal asserts a claim of discrimination based on her race/national origin. Claims of discrimination fall within the Board's statutory authority under § 24-50-125.3, C.R.S. Under that statute, the type of discrimination claims that this Board may hear are those under the Colorado Anti-Discrimination Act ("CADA"). CADA prohibits discrimination because of a person's race and national origin. § 24-34-402(1)(a), C.R.S.; *see also* Board Rule 9-3. CADA prohibits an employer from subjecting an employee to disparate treatment, meaning the employer treats certain employees more harshly because of a protected characteristic such as race or gender. *St. Croix v. Univ. of Colo. Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

In order to prove discrimination under CADA, "a plaintiff must establish, by a preponderance of the evidence, a *prima facie* case of discrimination." *Lawley*, 36 P.3d at 1247. To establish a *prima facie* case of discrimination under CADA, a complainant must demonstrate that: (1) she belongs to a protected class, (2) she was qualified for the job at issue, (3) she suffered an adverse employment action, and (4) the evidence gives rise to an inference of unlawful discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000), citing *Colorado Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). Once a complainant establishes a *prima facie* case, the employer must articulate some legitimate, nondiscriminatory reason for the adverse employment action. *Big O Tires*, 940 P.2d at 401. If the employer produces such an explanation, "the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Id.*

As to the first three prongs of a *prima facie* case of race discrimination, Respondent concedes those prongs. As to the fourth prong of a *prima facie* case, the procedural irregularities during the Board Rule 6-10 meeting support an inference of unlawful discrimination. Respondent acknowledges in its closing argument that "the burden to demonstrate a *prima facie* case is minimal."

Respondent articulated legitimate, nondiscriminatory reasons for the adverse action. Those reasons were set forth in the Disciplinary Action. In turn, the Disciplinary Action was supported by numerous witness statements, interviews, a video, and Complainant's acknowledgment in her position statement that she "shoved a milk crate in another employee's direction." The reasons articulated by Respondent rebut the *prima facie* case.

Complainant has not met her burden of proving that Respondent intentionally discriminated against her. Foremost, there was a preponderance of evidence that Complainant did not simply hand the milk crate over to Sergeant Hoar, but instead forced him to bend over to the floor and pick it up. Complainant herself acknowledged that she “shoved a milk crate in another employee’s direction.” Complainant’s action with the milk crate displayed unacceptable conduct for a Captain and warrants discipline. Respondent also proved other instances of Complainant’s misconduct. Respondent’s decision to discipline Complainant was not pretextual.

Complainant introduced evidence that in July of 2014, a white Lieutenant H in Respondent’s maintenance department made two separate remarks to Complainant that were racially offensive and derogatory. Complainant, however, did not introduce any evidence that Ms. Burtlow condoned Lieutenant H’s statements or that Ms. Burtlow even knew about them. To the contrary, Ms. Burtlow testified that she was working at Respondent’s Buena Vista Correctional Facility as a Programs Manager in 2014. Moreover, there was no evidence that Lieutenant H was involved in any way in the decision to discipline Complainant.

Complainant argues that Respondent’s treatment of Lieutenant H was disparate from the way Respondent treated Complainant. This ALJ, however, is not certain as to what Respondent did to correct or discipline Lieutenant H (if anything). More important, Ms. Burtlow was not even at the Colorado Territorial Correctional Facility in 2014 and was not involved in disciplining or correcting Lieutenant H. *See, e.g., St. Croix*, 166 P.3d at 237 (“To be similarly situated, other employees must be supervised by the same person, and subject to the same standards concerning performance, evaluation, and discipline”). Further, H worked in maintenance as a Lieutenant while Complainant worked in kitchen services as a CSTS III (a Captain). The two are not comparable in material respects.

Complainant also introduced evidence of a white Lieutenant B who allegedly yelled at another employee. Complainant, however, did not introduce any evidence that Ms. Burtlow condoned Lieutenant B’s yelling or that Ms. Burtlow even knew about it. Major Miklich testified that Lieutenant B worked in another area supervised by a Major Pierce. As such, Lieutenant B was not similarly situated as Complainant. This conclusion is further supported by the fact that B was a Lieutenant while Complainant was a CSTS III (a Captain). As such, Complainant and Lieutenant B are not comparable in material respects.

Sergeant Stoddart testified that Lieutenant Henderson yelled at her in April of 2016. Ms. Henderson was a Lieutenant, not a Captain. As such, Lieutenant Henderson and Complainant are not comparable in relevant respects. More problematically, Ms. Stoddart was not a credible witness. Among other things, there were circumstances that motivated Ms. Stoddart to testify adversely against Respondent. Additionally, Ms. Stoddart was not honest about her prior performance record.

Complainant testified that there were perhaps three or four Hispanic Captains at Colorado Territorial Correctional Facility, two to three at Respondent’s Fort Lyon Facility, and two to three at Respondent’s Freemont Facility. She also testified that the majority of Respondent’s employees were Caucasian and that she was a “minority.” Complainant did not introduce any other evidence of the racial demographics of Respondent’s workforce, of its hiring population, or of its employees who hold the rank of Captain. Complainant’s testimony does not lend much support to her claim of discrimination.

Complainant asserts that Lieutenant Evans, Lieutenant Henderson, Sergeant Hoar, Sergeant Thiel, and Sergeant Wood all wanted another individual (Pamela Bentley) to get the CSTS III position "because she was Caucasian." Complainant further asserts that these individuals "did not want to take orders from a Mexican." None of these individuals testified that they knew that Complainant identified herself as Hispanic or had Native American "blood" or had Mexican-American ancestry. Respondent promoted Complainant to CSTS III at Territorial Correctional Facility in October of 2013; assuming that Ms. Bentley had applied for the CSTS III position, more than two years had elapsed from Ms. Bentley's non-selection. The time duration between Ms. Bentley's purported non-selection (October 2013) and the alleged racist conspiracy to remove Complainant (October 2015) undermines Complainant's suppositions. Moreover, Respondent launched its investigation of Complainant *after* reports surfaced about the milk crate incident. Complainant herself acknowledged that this incident "needed to be investigated." Finally, Complainant did not offer any evidence that these employees made (or had any authority to make) any decision regarding Complainant's replacement (or that Ms. Bentley was available and interested in applying for the CSTS III position if it were to become vacant). Complainant's aspersions strain credulity.

Major Miklich gathered the information that Ms. Burtlow relied on in reaching the decision to discipline Complainant. This is important because: (1) there was no evidence that Major Miklich knew Complainant identified herself as Hispanic or was Mexican-American; (2) Major Miklich was on the Board that recommended Complainant's promotion to CSTS III at Colorado Territorial Correctional Facility; and (3) Major Miklich issued positive performance evaluations to Complainant with observations that she did an "amazing job," had "excellent communication skills," and demonstrated "professional conduct." *See, e.g., Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) ("where the employee was hired and fired by the same person within a relatively short time span, there is a strong inference that the employer's stated reason for acting against the employee is not pretextual") (citations omitted). Additionally, there was no evidence that Major Miklich requested employees to write negative reports or to slant their observations against Complainant.

Ms. Burtlow testified during her deposition about other employees who were subject to discipline. These employees were: (1) a Sergeant who used a toilet plunger on the serving line during meal service; (2) two employees involved in a Taser incident, (a) one of whom was a Lieutenant who received an unspecified discipline, and (b) the other of whom was a Major who observed the situation without intervening and was demoted; (3) a probationary Correctional Officer I who Respondent separated for having an inappropriate relationship with an offender; and (4) a Correctional Officer who was driving without a license and covering it up. There was no evidence at the hearing, however, of those employees' races. As such, this ALJ is uncertain whether they are comparators. Moreover, only the Major in the Taser incident was potentially similarly situated in terms of having supervisory authority over subordinate employees. Given that the Major's misconduct with the Taser was passive (failure to intervene) while Complainant's misconduct with the crate was active, the Major's misconduct is arguably less egregious than Complainant's misconduct. Respondent demoted both of them. Complainant failed to show that similarly situated employees not of her protected class were treated more favorably.

To be sure, there were procedural irregularities with the Board Rule 6-10 meeting. This ALJ, however, attributes those procedural irregularities to Ms. Burtlow's inexperience as an appointing authority rather than to a discriminatory animus. Ms. Burtlow became an Associate Warden in May 2015. During her deposition, Ms. Burtlow testified that she had only received authority to put employees on administrative leave since May of 2015. The documents introduced into evidence at the hearing indicate Ms. Burtlow received appointing authority in October of 2015.

There was no evidence that Ms. Burtlow had participated in any prior Board Rule 6-10 meetings as an appointing authority. Moreover, there was no evidence that Ms. Burtlow somehow could divine that Complainant identified herself as Hispanic, that Ms. Burtlow knew that Complainant had Native American "blood," or that Ms. Burtlow knew that Complainant had Mexican-American ancestry.

Complainant introduced evidence that Ms. Burtlow had outside social relations with Lieutenant Henderson, particularly that Ms. Burtlow's husband and Lieutenant Henderson's husband were former business partners. These outside relationships do not support a finding of race or national origin discrimination.

Complainant did not meet her burden to demonstrate the claim of race discrimination under CADA by a preponderance of the evidence.

V. ATTORNEY FEES.

Both sides request attorney fees. Section 24-50-125.5, C.R.S., governs these requests. That statute provides for an award of fees and costs: "if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless."

While Complainant prevailed in many important respects, an award of attorney fees and costs to Complainant is not warranted. Foremost, Complainant did not prove that the Disciplinary Action was frivolous, in bad faith, malicious, instituted as a means of harassment, or groundless. As discussed above, Complainant herself acknowledged to shoving a milk crate in another employee's direction. Complainant's action with the milk crate warranted discipline. Additionally, Respondent met its burden with respect to some of the other grounds underlying the discipline. Moreover, Complainant did not prevail on her race discrimination claim and this ALJ granted Respondent's Motion to Dismiss Complainant's retaliation and gender discrimination claims.

An award of attorney fees and costs to Respondent is not warranted. Respondent failed to follow Board Rule 6-10. In addition, Respondent did not prove by a preponderance of the evidence that Complainant threw the milk crate at Sergeant Hoar, ripped papers out of a subordinate's hands, or threw a milk crate at Sergeant Theil.

CONCLUSIONS OF LAW

1. Complainant committed some of the acts giving rise to the discipline; however, Respondent did not meet its burden with respect to some of the acts underlying the discipline and with respect to the more serious version of some of the acts underlying the discipline.
2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. The level of discipline should be modified as set forth herein.
4. Complainant did not meet her burden on the claim of discrimination.
5. Neither side is entitled to attorney fees and costs.

ORDER

As a result of Respondent's violations of Board Rule 6-10, Respondent shall pay Complainant back pay and benefits with statutory interest from the effective date of the demotion (December 1, 2015) until completion of the evidentiary hearing (November 17, 2017).

The Disciplinary Action is **modified**. Complainant's demotion is **rescinded** and replaced with a ten percent (10%) reduction in pay for six months, retroactive to December 1, 2015.

As a result of the modified discipline, Respondent shall pay Complainant back pay and benefits with statutory interest from the effective date of the demotion (December 1, 2015) until Respondent reinstates Complainant to a CSTS III position. The calculation of back pay should reflect that Complainant's rate of pay during the period from December 1, 2015, through May 31, 2016, is reduced by ten percent (10%). The calculation of back pay should include any pay increases adopted by Respondent for the class and normal pay raises given by Respondent to employees meeting expectations during the period covered by the award.

The amount owed to Complainant as a result of the violations of Board Rule 6-10 is not cumulative to the amount owed to Complainant as a result of the modification to the discipline.

Attorney fees and costs are not awarded.

Dated this 28th day
of December, 2017,
Denver, Colorado.



R. J. "Rick" Dindinger II
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of December 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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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 misunderstanding 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.