

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2020B060**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**LARIENA ROBERTS,**  
Complainant,

v.

**DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,**  
Respondent.

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Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing on August 5, 2020, in this matter via web conference. The record was closed on August 5, 2020.

Throughout the evidentiary hearing, Complainant appeared in person and was represented by her attorney, Mark A. Schwane, Esq. Respondent was represented by Senior Assistant Attorney General Lauren K. Peach, Esq. Respondent's advisory witness was Terry Jaques, Warden of Limon Correctional Facility and Complainant's Appointing Authority.

A list of exhibits offered and admitted into evidence, and a list of witnesses who testified at the hearing, are attached hereto as an Appendix.

**MATTER APPEALED**

Complainant, a certified employee, appeals her demotion from a Sergeant (Corrections Officer II or CO II) to a Corrections Officer I (CO I) and a corresponding decrease in her salary, effective January 1, 2020. Complainant argues that this demotion was arbitrary and capricious. She seeks all damages to make her whole, including but not limited to reinstatement to the classification of CO II, back pay and benefits lost as a result of the disciplinary action, and an award of attorney fees and costs.

Respondent argues that the action of the appointing authority should be affirmed, that all relief requested by Complainant be denied, and that Complainant's appeal be dismissed with prejudice.

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

**ISSUES**

1. Whether Complainant committed the omissions for which she was disciplined;
2. Whether Respondent's disciplinary demotion of Complainant was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and

4. Whether Complainant is entitled to an award of attorney fees and costs.

## **FINDINGS OF FACT**

### **Background**

1. Complainant began her employment with DOC on January 11, 2016. (Stipulated fact.<sup>1</sup>)
2. On December 15, 2016, Respondent promoted Complainant from Correctional Officer I (CO I) to Sergeant (CO II). (Stipulated fact.)
3. At the time of the discipline at issue in this case, Complainant was a certified state employee.
4. On April 22, 2017, Complainant received a performance improvement plan. (Stipulated fact.) Supervisor Jeffrey Gephart instructed Complainant to: "Provide timely information to ensure operational objectives are completed within a reasonable timeframe. Demonstrate confidence in duties, independently handling operational issues at the lowest level, learning to adapt to changes and additional workload."
5. On November 2, 2017, Complainant received a performance improvement plan. (Stipulated fact.) In this performance improvement plan, Supervisor Blas Torrez instructed Complainant to "demonstrate confidence in the performance of your duties and handle operational issues independently at the lowest level."
6. On May 1, 2018, Complainant received a corrective action. (Stipulated fact.) Associate Warden Eugene Redman issued this corrective action because of Complainant's Level 1 or "Needs Improvement" ratings in her mid-year and annual performance evaluations.
7. On June 30, 2019, Complainant received a performance improvement plan. (Stipulated fact.) Supervisor Brett Corbin issued this performance improvement plan because Complainant did not demonstrate "a satisfactory level of expertise of a lead worker at the level this position requires."
8. On October 8, 2019, Complainant received a corrective action. (Stipulated fact.) Warden Jacques issued this corrective action to address issues with Complainant's time management and completion of assigned tasks; guidance and oversight of her subordinate staff; compliance with directives concerning offender movement; effective communication of "pertinent information at shift change and operational issues during [her] assigned work period;" discussion of difficulties and challenges with her supervisor; and compliance "with established policy, processes and practices."

### **November 26, 2019 Incident**

9. On November 26, 2019, at approximately 9:15 a.m., Complainant entered the vestibule of Living Unit #2 in the Limon Correctional Facility. Two Correctional Officers were working in Living Unit #2 that morning: Jordan Ververs and Brandon Smith.

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<sup>1</sup> The parties stipulated to certain facts.

10. When Complainant entered Living Unit #2, a number of offenders were moving about, returning from recreational activities. Officer Ververs was inside a central control booth with large glass windows, and Officer Smith was on the other side of the vestibule.

11. As Complainant entered Living Unit #2, she realized that she had something in her hair, and lifted her right hand to try to find it.

12. Offender C.E.<sup>2</sup> was walking past Complainant. He stopped and guided Complainant's right hand to where the object was in her hair.

13. Complainant was shocked and angered by this contact. She quickly looked over at Officer Smith to try to catch his eye in case she needed back-up. She was unable to get Officer Smith's attention. Complainant pulled her hand away and forcefully directed C.E. to never touch her again.

14. Offender C.E. immediately complied, put his hands up in the air, apologized for his actions, and walked away.

15. Officer Ververs, who was in the control center, saw this brief incident. He did not call for back-up because he could see that Complainant handled the situation and was not in danger.

16. Correctional Officers, including Sergeants, are responsible for determining how to handle an incident involving an offender.

17. Correctional Officers, including Sergeants, have the discretion to determine whether an incident involving an offender should be documented via an incident report or a chronological entry (Chron) into an offender's electronic records.

18. DOC Administrative Regulation (AR) No. 100-07, "Reportable Incidents and Incident Tracking System," states: "DOC employees, contract workers, and volunteers will complete a report for any information/incident that can impact safety, security, and operations of the facility/office, prior to the end of his/her shift." AR No. 100-07 IV(A)(1) (Effective September 1, 2019). This regulation defines a "reportable incident" as "[a]ny non-routine occurrence or situation requiring DOC employee, contract worker, or volunteer intervention that disrupts normal operations of a facility, or office, or involves after-hours off-grounds transportation of offenders." AR No. 100-07 III(R).

19. The brief encounter between Complainant and Offender C.E. did not impact the safety, security or operations, or disrupt the normal operations, of the Limon Correctional Facility.

20. DOC AR No. 550-01, "Integrated Case Management," outlines a system for case managers to track and record offenders' behavior during their supervision by Respondent. While case managers are primarily responsible for tracking and recording offender information under this system, other DOC employees may be authorized to enter information concerning offenders' behavior. These chronological entries are referred to as "Chrons."

21. Warden Jacques, as the "administrative head" of the Limon Correctional Facility,

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<sup>2</sup> To protect the privacy of the offender, only his initials, "C.E.," will be used to identify him.

authorized all employees, including Complainant, to enter Chrons concerning offenders. While case managers are required to make Chron entries under DOC AR No. 550-01, other employees are not.

22. Complainant did not file an incident report or enter a Chron concerning her brief interaction with Offender C.E.

23. Officer Ververs did not file an incident report or enter a Chron concerning his observations of Complainant's brief interaction with Offender C.E.

#### Confidential Reports and Rule 6-10 Meeting

24. At the end of his shift on November 26, 2019, Officer Ververs, who was a fairly new DOC employee, told Officer Smith about the encounter between Complainant and Offender C.E. Officer Ververs believed that Complainant allowed Offender C.E. to have an extra mattress in his cell, and thought there might be an inappropriate relationship between Offender C.E. and Complainant.

25. On November 27, 2019, Officer Smith relayed Officer Ververs' suspicions to Lieutenant (Lt.) Nathan McDonald. Lt. McDonald viewed the brief security camera footage of the contact between Offender C.E. and Complainant, and filed a confidential incident report describing Officer Ververs' suspicions.

26. On November 27, 2019, Steve Owens, Deputy Director of Prisons, delegated appointing authority for all employees at Limon Correctional Facility to Terry Jaques, Warden of Limon Correctional Facility.

27. On November 29, 2019, Lt. Corbin directed Officer Ververs to file a confidential incident report describing his observations of Complainant's November 26th interaction with Offender C.E.

28. On December 3, 2019, Anthony Piper, LCF Custody/Control Manager, sent Warden Jaques a memorandum requesting an "administrative review" of Complainant. This request was based on "confidential information" concerning the November 26, 2019 encounter between Complainant and Offender C.E., a subsequent brief conversation observed between Complainant and C.E., and an allegation that Complainant "authorized Offender [C.E.] to possess an extra mattress for a period of time."

29. On December 5, 2019, Warden Jaques issued a Notice of Rule 6-10 meeting to Complainant. Warden Jaques identified the following issues to be discussed: "work performance and inappropriate contact with offenders."

30. On December 18, 2019, Complainant participated in a Rule 6-10 meeting with Warden Jaques. Mr. Piper attended the meeting as the Warden's representative, and Bryan Milburn attended the meeting as Complainant's representative.

31. During the Rule 6-10 meeting, Complainant explained what happened on November 26, 2019. She denied allowing Offender C.E. to have an extra mattress, and explained that she had ordered Offender C.E. to return an extra mattress that he took from another cell.

32. Mr. Piper asked Complainant whether she should have submitted a report

concerning her encounter with Offender C.E. Complainant responded that she thought the incident “was dealt with,” and did not believe it would repeat. Mr. Piper asked Complainant whether she should have written a report “just for informational purposes.” Complainant responded, “Yes, sir,” and subsequently sent the Warden a written apology for failing to do so.

33. Mr. Piper and Warden Jaques questioned Complainant at length about her past performance issues, for which she had previously received a series of performance improvement plans and corrective actions.

#### Discipline Decision

34. Warden Jaques determined that Complainant did not authorize Offender C.E. to have an extra mattress and did not have an inappropriate relationship with him.

35. On December 31, 2019, Warden Jaques gave Complainant a Notice of Disciplinary Action.

36. Warden Jaques identified the following reasons for disciplining Complainant:

- Offender CE touched your hand and hair for 3-4 seconds and you did not call for back-up, complete an incident report, or complete a Chron entry.
- You admitted that you should have completed an incident report.
- Your performance remains at overall Level 1 despite numerous efforts to correct your performance.
- On October 8, 2019, you received a corrective action for failure to manage resources to complete assigned tasks, comply with policy, provide guidance and oversight to subordinate staff, follow directives, communicate effectively regarding pertinent information and operational issues, and communicate challenges and difficulties to your supervisor.
- Your actions demonstrate an inability to meet the responsibilities inherent to the position of a Correctional Professional. During your regular work day, you make decisions that could potentially affect the safety and security of the entire facility and the public. It is critical that you display sound judgment at all times. Your unsatisfactory performance demonstrates poor judgment and a disregard for Department regulations. Your willful failure or inability to perform has placed not only yourself, but the safety of staff and offenders, at risk.

37. Warden Jaques concluded that Complainant violated performance expectations outlined in the following sources:

DOC Administrative Regulation 1450-01, *Code of Conduct*, Section IV, Subsections A.3, A.8, A.9, B.1, and D.1; Administrative Regulation 100-19, *Communication with Offenders*, Section IV, Subsection A.1; Code of Ethics (*signed annually, most recently by you on September 13, 2019*), Section II, A.1 and A.3; your Performance Plan (signed by you on April 30, 2019), Competency A – Accountability/Organization Commitment, Competency B – Job Knowledge, Competency C – Communication, Competence [sic] D – Interpersonal Skills,

Competency E – Customer service and State Personnel Board Rule 6-12, 1. Failure to perform competently and 2. Willful failure to perform or inability to perform. (Italics in original.)

38. None of the sources cited by Warden Jaques in his Notice of Disciplinary Action contain any instructions or requirements about calling for back-up, filing an incident report, or completing a Chron entry.

39. On January 1, 2020, Complainant was demoted from Sergeant to Correctional Officer I. (Stipulated fact.)

40. Beginning January 1, 2020, Complainant's pay was reduced by 10 percent, from \$4,043 to \$3,639, or \$404, per month.

41. Complainant filed a timely appeal of Respondent's disciplinary action.

## **ANALYSIS**

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

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, and generally includes:

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

In this *de novo* disciplinary proceeding, Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 706-708. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because "the appointing authority is the party attempting to overcome the presumption of satisfactory service" by the employee. *Id.* at 708.

The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

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

Warden Jaques testified that Complainant was disciplined because she failed to “call for back-up, complete an incident report, or complete a Chron entry” concerning her brief physical contact with Offender C.E. on November 26, 2019. Respondent has the burden to prove, by a preponderance of the evidence, that Complainant committed these alleged omissions. While there is no dispute that Complainant did not call for back-up, and did not file either an incident report or a Chron, Respondent failed to establish that such actions were required.

In his Notice of Disciplinary Action, Warden Jaques concluded that Complainant violated performance expectations outlined in two Administrative Regulations, the Code of Ethics, and Complainant’s most recent performance plan, as well as State Personnel Board Rule 6-12. None of these sources discuss when to call for back-up, file an incident report, or complete a Chron for incidents involving offenders.

The DOC Administrative Regulation (AR) that does govern reportable incidents, No. 100-07, “Reportable Incidents and Incident Tracking System” – which was not cited in Warden Jaques’ Notice of Disciplinary Action – simply states: “DOC employees, contract workers, and volunteers will complete a report for any information/incident that can impact safety, security, and operations of the facility/office, prior to the end of his/her shift.” AR No. 100-07 IV(A)(1) (Effective September 1, 2019). This regulation defines a “reportable incident” as “[a]ny non-routine occurrence or situation requiring DOC employee, contract worker, or volunteer intervention that disrupts normal operations of a facility, or office, or involves after-hours off-grounds transportation of offenders.” AR No. 100-07 III(R).

Respondent failed to establish that Complainant’s decision not to call for back-up, or to file any kind of report, impacted the safety, security or operations, or disrupted normal operations, of the Limon Correctional Facility. Warden Jaques confirmed that these decisions were “discretionary.” While Complainant initially considered calling for back-up, she did a quick assessment of the situation and forcefully ordered the offender to back off. The offender immediately complied. Officer Ververs, who witnessed the brief encounter, did not believe it necessitated a call for back-up and did not submit an incident report until asked to do so several days later. Therefore, Respondent failed to establish that Complainant’s decision not to call for back-up, or to file any kind of report, violated Respondent’s regulation concerning reportable incidents.

Complainant explained that Offender C.E. had been in the facility for a number of years and, in Complainant’s experience, he would comply with directives when they were given. Her decision not to call for back-up avoided a major physical confrontation in an area in which numerous offenders were moving around under the immediate supervision of only three officers. Complainant’s decision to handle the incident with a firm directive to Offender C.E. avoided escalation of the incident into a physical confrontation that could have impacted the safety, security and operations of the facility. Therefore, Complainant’s decision not to call for back-up, or to file any kind of report, was not an abuse of her discretion.

While a report or Chron may have been helpful to document the offender’s behavior, there is no requirement that such a report must be submitted for every encounter with an offender. DOC AR No. 550-01, “Integrated Case Management,” outlines a system for case managers to track and record offenders’ behavior during their supervision by Respondent. While “case

managers” are primarily responsible for tracking and recording offender information under this system, other DOC employees “designated by the administrative head of the facility” are also authorized “to make entries in the chronological record to maintain a record of offender contacts, adjustments, positive observations and behavioral documentation.” DOC AR No. 550-01 IV(J)(3)(b) (Effective October 1, 2019). These chronological entries are referred to as “Chron.”

Warden Jacques explained that he was the “administrative head” of the Limon Correctional Facility. He opened the Chron record to all DOC employees. While case managers are required to make Chron entries, Warden Jacques testified that DOC staff have the discretion to determine when to make Chron entries concerning offender behavior. He stated: “Staff are encouraged to enter them, but it’s not required.” (Emphasis added.) AR No. 550-01, like AR No. 100-07, was not cited in Warden Jacques’ Notice of Disciplinary Action.

During the Rule 6-10 meeting, the Warden’s representative, Anthony Piper, asked Complainant whether she should have submitted a report concerning her encounter with Offender C.E. Complainant responded that she thought the incident “was dealt with,” and did not believe it would repeat. Mr. Piper asked Complainant whether she should have written a report “just for informational purposes.” Complainant responded, “Yes, sir,” and subsequently sent the Warden a written apology for failing to do so. Complainant’s conciliatory statements do not establish that she violated any specific rule or policy, or abused her discretion.

In the absence of a clear requirement or evidence that her decisions were problematic, Complainant’s decision not to call for back-up, and her decision not to submit a report or enter a Chron concerning her brief encounter with Offender C.E., do not constitute acts or omissions upon which a disciplinary action may be based. Board Rule 6-9. The preponderance of the evidence established that these decisions were discretionary and that Complainant’s decisions were reasonable under the circumstances. Therefore, Complainant’s decisions not to call for back-up or file a report do not constitute “omissions” justifying disciplinary action.

After considering all of the evidence presented, Respondent failed to meet its burden to prove, by a preponderance of the evidence, that Complainant committed the omissions for which she was disciplined. *Kinchen*, 886 P.2d at 709.

### **III. RESPONDENT’S DISCIPLINARY ACTION WAS ARBITRARY AND CAPRICIOUS, AND WAS CONTRARY TO BOARD RULE 6-8.**

In determining whether an agency’s decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused “to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it,” 2) failed “to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion,” or 3) exercised “its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.” *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In reaching his conclusions concerning Complainant’s actions on November 26, 2019, Warden Jacques concluded that Complainant “violated performance expectations.” However, as discussed above, none of the administrative regulations, rules or performance plans cited by Warden Jacques in his Notice of Disciplinary Action discuss requirements concerning requests for back-up or offender reports. The two ARs that do discuss reports of offender behavior – AR Nos.



100-07 and 550-01, discussed above – do not support Warden Jaques’ conclusion that Complainant should have filed a report or entered a Chron.

By failing to locate and identify a specific rule or requirement concerning Complainant’s decisions, Warden Jaques failed “to use reasonable diligence and care” to procure relevant evidence. Warden Jaques also failed “to give candid and honest consideration of the evidence” provided by Complainant concerning her handling of the encounter with Offender C.E., and failed to recognize that she made decisions in a way that avoided a more serious physical confrontation.

The Warden’s admission that Complainant’s decisions whether to call for back-up or report the incident were discretionary, and his failure to identify a specific requirement that was violated, renders the Warden’s decision to demote Complainant unreasonable; i.e., a decision about which “reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.” *Id.* at 1252. Therefore, the decision to demote Complainant from a Corrections Officer II to a Corrections Officer I, and to decrease Complainant’s pay by ten percent, was arbitrary and capricious.

Warden Jaques’ decision was also contrary to Board Rule 6-8. Rather than identify a specific, relevant regulation or rule that Complainant violated, Warden Jacques primarily focused on Complainant’s prior corrective actions. During the Rule 6-10 meeting, the majority of Warden Jacques’ discussion with Complainant involved her prior performance issues. The Administrative Regulations cited by Warden Jacques in his termination notice were relevant to those prior performance issues, rather than to the November 26, 2019 incident. Board Rule 6-9 provides that an employee’s “previous unsatisfactory behavior and acts, prior corrective or disciplinary actions” and “previous performance evaluations” should be considered in deciding the level of corrective or disciplinary action to be imposed. However, Board Rule 6-8 cautions: “An employee may only be corrected or disciplined once for a single incident...” (Emphasis added.) Respondent cannot discipline Complainant for acts or omissions for which she has already received corrective actions.

While Complainant had past performance problems, those problems were addressed via performance improvement plans and corrective actions. Respondent did not identify any new incident that could prompt a new corrective or disciplinary action other than Complainant’s encounter with Offender C.E. on November 26, 2019. The only deficiencies identified by Warden Jaques concerning that encounter were Complainant’s failure to call for back-up, submit an incident report or enter a Chron. As discussed above, Respondent failed to establish that, under the circumstances, Complainant was required to do any of those things. In the absence of a precipitating incident for new disciplinary action, Respondent cannot justify its demotion of Complainant by relying on past performance issues for which Complainant already received corrective actions. Warden Jaques’ heavy reliance on Complainant’s past corrective actions as the basis for his decision to take disciplinary action violates Board Rule 6-8.

#### **IV. COMPLAINANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.**

§ 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other

costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which “no rational argument based on the evidence or law was presented.” Board Rule 8-33(A). Personnel actions that are “in bad faith, malicious, or as a means of harassment” are actions “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-33(B). A groundless personnel action is one in which it is found that “a party fails to offer or produce any competent evidence to support such an action...” Board Rule 8-33(C).

Here, Respondent failed to establish that Complainant’s handling of her encounter with Offender C.E. violated any policy or regulation, and therefore failed to prove that Complainant committed the omissions for which she was disciplined. Because Respondent failed to produce any competent evidence to support its personnel action, this action was groundless. Therefore, under § 24-50-125.5(1), C.R.S., Complainant is entitled to an award of attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Respondent failed to establish, by a preponderance of the evidence, that Complainant committed the omission for which she was disciplined.
2. Respondent’s demotion of Complainant’s position and pay decrease was arbitrary and capricious, and contrary to Board Rule 6-8.
3. Because Respondent’s personnel action was groundless, Complainant is entitled to an award of attorney fees and costs.

### **ORDER**

1. Respondent’s January 1, 2020 demotion is **rescinded**.
2. Respondent shall **reinstate** Complainant to her former position as a Sergeant (COII), at the compensation level she would now hold had she not been demoted.
3. Respondent shall **reimburse** Complainant for the 10% reduction in pay, or \$404 per month, resulting from her demotion, from January 1, 2020 to the date Complainant is reinstated to her former position. By September 30, 2020, the amount of back pay due Complainant will be \$3,636. This amount is subject to the employer’s PERA contribution, as well as post-judgment statutory interest of 8% per annum to the date of reinstatement.
4. Complainant is **awarded** reasonable attorney fees and costs attributable to her appeal of her disciplinary demotion. Complainant shall file a Bill of Attorney Fees and Costs no later than **October 6, 2020**. Respondent shall file a response within 10 days after receipt of Complainant’s Bill of Attorney Fees and Costs.

Dated this 21st day  
of September, 2020.

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

**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of September, 2020, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Mark A. Schwane, Esq.  
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Denver, CO 80246  
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## **APPENDIX**

### **EXHIBITS**

**COMPLAINANT'S EXHIBITS ADMITTED:** Complainant's Exhibits A and B were stipulated into evidence.

**RESPONDENT'S EXHIBITS ADMITTED:** Respondent's Exhibits 1-32 were stipulated into evidence.

### **WITNESSES**

The following is a list of witnesses who testified at hearing:

Terry Jaques, Warden, Limon Correctional Facility  
Jordan Ververs, Correctional Officer, Limon Correctional Facility  
Nathan McDonald, Lieutenant, Limon Correctional Facility  
Lariena Roberts, Complainant

## **NOTICE OF APPEAL RIGHTS**

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

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

### **RECORD ON APPEAL**

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

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

### **BRIEFS ON APPEAL**

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

### **ORAL ARGUMENT ON APPEAL**

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

### **PETITION FOR RECONSIDERATION**

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

**Email Filing:** The parties are encouraged to file by email to: [dpa\\_state\\_personnelboard@state.co.us](mailto:dpa_state_personnelboard@state.co.us). Instructions for filing by email can be found at: <https://spb.colorado.gov/forms-and-filing>. a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.