STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2023B016**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LOUIS J.P. MEDINA,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge ("ALJ") McCabe held the evidentiary hearing on December 12, 2022. The record was closed on January 4, 2023, following the parties' submission of written closing arguments. The hearing was conducted onsite at 1525 Sherman Street, 4th Floor, Court Room 6 in Denver, Colorado. Louis J.P. Medina ("Complainant") appeared for the hearing with counsel. Carrie Slinkard, Esq. represented Complainant. Amanda Swartz, Esq., represented the Department of Corrections, Colorado Correctional Industries ("Respondent"). Jessica Warren, Complainant's Appointing Authority, appeared as Respondent's advisory witness.

A list of exhibits offered and admitted into evidence, and a list of witnesses who testified, are attached in an Appendix.

MATTER APPEALED

Complainant, a former certified state employee, appeals Respondent's disciplinary termination of his employment. Complainant argues that Respondent cannot establish that Complainant engaged in the misconduct for which Respondent disciplined Complainant. Complainant further alleges Respondent's termination of Complainant's employment was arbitrary, capricious, and contrary to rule or law. Complainant requests reinstatement, back pay, and benefits. Complainant also seeks an award of attorney fees and costs, arguing Respondent's termination of Complainant's employment was frivolous and groundless.

Respondent argues it has proven that Complainant committed the misconduct for which he was disciplined and its decision to terminate Complainant was neither arbitrary nor capricious. Respondent requests its decision to terminate Complainant be upheld.

For the reasons discussed below, Respondent's decision to disciplinarily terminate Complainant from employment is **MODIFIED.**

ISSUE

1. Did Complainant commit the acts for which Complainant was disciplined?

2. Was Respondent's decision to terminate Complainant's employment arbitrary, capricious, or contrary to rule or law?

3. Is Complainant entitled to an award of attorney fees and costs?

FINDINGS OF FACT

Background

1. Complainant began his employment with DOC in October 1999. (Stipulated).

2. At the time of his termination, Colorado Correctional Industries ("CCI") Director Jessica Warren was Complainant's appointing authority. Ruth Coffman, Deputy Executive Director of Community Operations, delegated Director Warren appointing authority.

3. Complainant received positive performance evaluations throughout his employment with Respondent.

4. Complainant's annual performance evaluation for the March 2021-March 2022 review period was finalized on April 28, 2022. In that performance evaluation, Complainant's direct supervisor, Matt Gamblin, stated as follows:

> Louis complies with policies, procedures and regulations while maintaining a high level of accountability and organizational commitment. He agrees to schedule changes when the need arises. He comes to work prepared for the day, and is always professional in his appearance. Louis displays honesty and integrity and is supportive of the CCi management team and overall organization. He maintains a good working knowledge of regulations, emergency procedures and security practices. He is familiar with CCi and DOC policies and procedures, and General Services daily operations. He exercises good safety and security practices, while sharing his knowledge with others.

(Stipulated).

5. Complainant's gross monthly salary at the time of his termination was $5,556.92. (Stipulated).

Complainant's Position and Job Responsibilities

6. On September 19, 2005, Respondent promoted Complainant from Correctional Officer I to Correctional Support Trades Supervisor ("CSTS") I. (Stipulated).

7. Per Complainant's Position Description, the purpose of Complainant's work unit was:

> Protect the citizens of Colorado by holding offenders accountable and engaging them in opportunities to make positive behavioral changes and become law-abiding productive citizens. Employ and train DOC offenders in programs that replicate real world employment expectations. Manage programs that are profit-oriented, generate revenue for operations, and which assumes responsibility for

training offenders in general work habits, work skills, and specific training skills that increase their employment prospects upon their release.

8. Part of the purpose of Complainant's work unit was rehabilitation of offenders.

9. Per Complainant's Position Description, the purpose of Complainant's position was:

> Ensure the safety and security of the general public, staff, and offenders, supervise and train offenders to perform productions and service tasks safely with the appropriate use of tools, equipment, and materials; to ensure assigned work is performed in compliance with agency regulations and policy, as well as applicable…guidelines and codes; to work and contribute toward the continual growth and profitability of the Division of Correctional Industries; to employ as many offenders with the work unit as is practical and meaningful; ensure proper use, care and storage of relevant tools and equipment. Position prepares offenders for community reentry by promoting the Colorado Department of Corrections Mission, Vision, and Values while adhering to a high level of integrity and commitment.

10. Per Complainant's Position Description, one of the highest-level decisions Complainant had to make on a daily basis was determining "whether safety/security measures are compromised during work performance which includes monitoring equipment, tools and supplies and decides appropriate action to be taken for problematic issues, situations or security threats."

11. In 2021, during the winter months, Complainant's work crew performed trash pickup along Denver Metro Highways. In 2021, during the spring and summer months, Complainant's work crew performed weed mitigation on corridors and highways.

12. In the mornings, Complainant would report to the facility where his work crew lived. Complainant would check out the work crew members and then transport them to their work location. Complainant patted down work crew members before placing them in the transport vehicle. At the end of the workday, Complainant transported the work crew members back to the facility. After arriving at the facility, Correctional Officers took control of the work crew members. The Correctional Officers then strip-searched the work crew members. Complainant checked the transport vehicle for contraband before and after work crew members were in the vehicle.

13. Complainant was responsible for filling out a daily report sheet throughout the day. Respondent required the report to include work locations and number of bags of trash picked up during the day. The daily report sheet had an area for notes where Complainant could note anything that occurred throughout the day, including interactions with the public and gas stops.

14. Complainant was required to be vigilant about contraband. The work crew members might find contraband items on the side of the road.

15. Respondent has safety measures in place to ensure contraband does not enter the facility through work crew members. These include the pat down search at the beginning of the shift, the strip search at the end of the shift, and drug testing.

16. Work crew members are not allowed to interact with the public. It is unknown what the intention of a person approaching the work crew may be and it may create a safety issue.

Respondent's Relevant Policies

17. Administrative Regulation 100-16 is Respondent's Use of Cellular Devices policy. The effective date of the policy is March 1, 2021.

18. Administrative Regulation 100-16, Section IV, H.1 and H.2 require employees to abide by the terms of the technology policy and allows only *de minimus* personal use of state owned cellular devices.

19. Administrative Regulation 100-18 is Respondent's Mission Statement. The effective date of the policy is June 1, 2021.

20. Administrative Regulation 100-18, Attachment A, Value Statement 2 is, "We support a professional, empowered workforce that embodies honesty, integrity, and ethical behavior."

21. Administrative Regulation 100-18, Attachment A, Value Statement 4 is, "We respect the individual differences of our staff and offender populations and seek to safeguard the safety, dignity, and well-being of all."

22. Administrative Regulation 100-19 is Respondent's Communication with Offenders Policy. The effective date of the policy is December 21, 2021.

23. Administrative Regulation 300-43 is Respondent's Authorization to Provide Food Items for Offenders policy. The effective date of the policy is July 1, 2022.

24. Administrative Regulation 1450-01 is Respondent's Code of Conduct. The effective date of the policy is September 1, 2019.

25. Administrative Regulation 1450-01, Subsection III, F, defines "former offender" as, "A person who has been found guilty of committing a felony, has been sentenced to any DOC, and less than three years have elapsed since his/her release from custody or any type of supervision."

26. Administrative Regulation 1450-01, Subsection III, H, defines "offender" as, "Any individual under the supervision of the Colorado Department of Corrections (DOC) to include inmates, community correction clients (ISP-i), interstate compact individuals, and individuals sentenced to the Youthful Offender System."

27. Administrative Regulation 1450-01, Subsection IV, A.1, states, "***DOC employees…will avoid situations which give rise to direct, indirect, or perceived conflicts of interest.***" (Bold and italics in original).

28. Administrative Regulation 1450-01, Subsection IV, A.8, states:

> Any act or conduct on or off duty which affects job performance and/or tends to bring DOC into disrepute or reflects discredit upon the individual as a DOC

employee...or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action.

29. Administrative Regulation 1450-01, Subsection IV, A.9, requires employees to exercise good judgment and sound discretion.

30. Administrative Regulation 1450-01, Subsection IV, B.1, states:

> Any action on or off duty on the part of DOC employees…that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, adversely affects public safety, casts doubt upon the person's integrity or which reflects discredit upon the individual as a DOC employee…is expressly prohibited.

31. Administrative Regulation 1450-01, Subsection IV, C.5, states:

> ***DOC employees…will not accept any gifts, presents, subscriptions, favors, gratuities or promises that could be interpreted as seeking to cause them to compromise their official duties. They will not accept private or special advantage from their official status as DOC employees…***
>
> (Bold and italics in original).

32. Administrative Regulation 1450-01, Subsection IV, D.6.a. prohibits employees from communicating with current offenders, former offenders, and family/friends of offenders by phone outside the scope of normal employment.

33. Administrative Regulation 1450-01, Subsection IV, D.7 prohibits an employee from receiving a gift from an offender.

34. Administrative Regulation 1450-01, Subsection IV, D.8 prohibits an employee from discussing their personal life with an offender.

35. Administrative Regulation 1450-01, Subsection IV, D.9 prohibits exchanging "special treatment or favors, or make threats, promises, or deals for information from offenders…".

36. Administrative Regulation 1450-01, Subsection IV, D.10 prohibits employees from bringing into a facility any items for offenders.

37. Administrative Regulation 1450-01, Subsection IV, D.12, states, "All items received or purchased from offenders, or given to offenders, will be through officially sanctioned and documented channels and will have prior approval of the appointing authority."

38. Administrative Regulation 1450-01, Subsection IV, M.1. holds employees accountable for the use of state resources, and prohibits use of state resources for personal gain or private interests.

39. Respondent has a Code of Ethics. The Code of Ethics required Complainant to hold the respect and confidence of the people, carry out his duties for the benefit of the state, and avoid

conduct that violates, or creates a justifiable impression of violating, the public trust. The Code of Ethics also required Complainant to demonstrate highest standards of integrity and not use state equipment for private gain.

40. Complainant signed the Code of Ethics in April of 2020, 2021, and 2022.

41. Respondent has Road Crew Procedures. The Road Crew Procedures address morning vehicle pick-up, how to pull offenders for work, responsibilities while on work location, what to do with found contraband, what do if an offender is injured, and the return of offenders after a work crew shift.

42. The Road Crew Procedures prohibit the work crew from associating with the public, "Your offender work crew is not allowed to associate with the public while on break."

43. The Road Crew Procedures contemplate that Complainant will have interaction with the public:

> When on the job site the customer may attempt to provide food and beverages to your inmate work crews. This is not permitted per DOC regulations; it will be the crew supervisors' [sic] duty to politely decline the offers. At no time are you allowed to accept any tips or cash for services.

44. The Road Crew Procedures conclude with the following:

> Everyday when you come to work you are representing Colorado Correctional Industries, the Department of Corrections, and the State of Colorado. You are to be professional at all times. CI staff is expected to adhere to CDOC Code of Conduct (AR 1450-01) at all times. This AR is reviewed every year at your annual refresher DOC training. If you have any questions CI Golden has the AR on file for you to review.

45. Complainant signed the Road Crew Procedures on January 7, 2020.

Conduct Leading to Disciplinary Action

46. Throughout his employment, Complainant provided a business card with his work phone number written on the card to members of his crew that were good workers. Complainant wrote on the cards, "For job reference only." Complainant did this so the individuals could use him as a reference after release.

47. Throughout his employment, Complainant used his work phone as his primary personal phone.

48. Throughout his employment, while on the road with a work crew, Complainant occasionally provided work crew members with candy bars, gum, and "Raider Hater" cookies. Complainant did not receive approval to provide these items to work crew members.

49. Approximately one to two times per year, individuals formerly on Complainant's work crew observed Complainant on the road with a work crew and stopped to chat with Complainant. The individuals did not have contact with the work crew.

50. Approximately four years before Respondent's termination of Complainant's employment, an individual formerly on Complainant's work crew, who had been out of Respondent's facilities for approximately 10 years, asked Complainant to be a groomsman in his wedding and offered to pay Complainant's expenses associated with the wedding. The individual was successful after his release and felt Complainant had an impact on his life. Complainant accepted. The wedding occurred in Utah. Complainant had not had contact with the individual from the time of his release until that contact. Complainant is now friends with the individual.

51. In 2021, Complainant had a major medical issue[1] that affected his ability to do certain tasks. Respondent allowed Complainant to return to work with light duty restrictions, and Complainant's work crew agreed to help Complainant while out on the road. Complainant's work crew was aware of his limitations and medical condition.

52. In 2021, Complainant supervised A.G.[2] on work crew. Complainant was formerly neighborhood friends with A.G.'s family. Complainant did not immediately identify A.G. as a person he once knew. At some point, Complainant realized he knew A.G. as a child. Complainant did not report the connection to a supervisor. Complainant lost contact with A.G's family in the early 2000's and had not had contact with A.G. since A.G. was a child.

53. On one occasion in 2021, after A.G.'s release, Complainant provided his work location to A.G. A.G. then brought food to Complainant's work crew. Complainant and the work crew ate the food. Complainant did not check the food given to the work crew.

54. On one occasion in 2021, Complainant allowed a member of his work crew, H., to speak on the phone to A.G. Complainant was present with H. during the conversation.

55. In September 2021, Complainant received a new work phone. Complainant accessed pornography on his new work phone. Complainant's friend, who had a similar medical condition to Complainant, sent pornographic material to Complainant's messenger account. Complainant accessed that material from his work phone. Complainant deleted the pornographic material from his work phone.

56. In approximately October or November 2021, Complainant allowed J.R., a recently released individual, to visit with Complainant and the crew for approximately five minutes while they were working in the "mouse trap."[3] J.R. brought food for the work crew and Complainant when J.R. visited. Complainant provided the work crew's location to J.R.

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[1] Complainant's specific medical conditions are intentionally omitted from this Initial Decision to protect Complainant's privacy. The specifics of the medical conditions are not necessary for this Initial Decision. It does not appear to be in dispute that the medical condition existed.

[2] The names of individuals currently or formerly in Respondent's custody have been reduced to initials pursuant to protective order.

[3] During the professional standards investigation, Complainant admitted this occurred approximately four weeks before the interview. The specific date is not in evidence.

57. On or about November 30, 2021, Complainant engaged in text message communication with A.G. and had a seven-minute phone conversation with A.G.[4]

58. In November 2021, Complainant noticed a change in the individuals on his work crew. Complainant noticed the work crew as being sneaky and ornery. Complainant notified Supervisor Gamblin. Supervisor Gamblin took steps to have the work crew disbanded.

59. During 2021, Complainant started to view himself as a member of the team rather than a supervisor. Complainant lost sight of professional boundaries in 2021.

The Investigation

60. On November 18, 2021, Lieutenant Daniel Roberts wrote an Incident Report relating to his initial investigation interview with Inmate J.S. about potential Code of Penal Discipline charges for bringing suspected methamphetamine into the Colorado Correctional Center ("CCC"). (Stipulated).

61. Lt. Roberts reported that Inmate J.S. told an unidentified CCC staff member that a work crew supervisor was involved in "some illegal activities." More specifically, Inmate J.S. reported that work crew supervisor "Medina" was allowing offenders to use a phone to call family and driving them to "a park" to allow them to meet with family. (Stipulated).

62. Lt. Roberts referred these allegations to Associate Warden Usry, who referred the matter to Office of Inspector General ("OIG") Investigator Ronald Ryan for additional investigation. (Stipulated).

63. Respondent pulled Complainant from his normal job duties after the initiation of the investigation. Complainant was no longer permitted to work with a work crew outside of Respondent's facilities. Complainant was either under the surveillance equipment of a facility or with another employee.

64. From approximately late November 2021 to August 30, 2022, Complainant worked in a series of temporary positions that involved no supervision of offenders during DOC's investigation of his alleged misconduct and subsequent consideration of discipline. DOC did not place Complainant on administrative leave during this time. (Stipulated).

65. Complainant had contact with offenders in the temporary positions, and was occasionally by himself with offenders.

66. Complainant maintained his status as a full-time employee until the effective date of his termination. (Stipulated).

[4] The text message exchanges are included in an investigative report. The investigative report appears to include the incorrect date of December 1 for the text message exchange with A.G. Investigator Ryan interviewed Complainant and confiscated his phone on November 30. The text message and phone conversation likely occurred on November 30. Complainant informed Investigator Ryan he spoke with A.G. on the morning of the interview.

67. On November 30, 2021, Complainant met with Investigator Ryan for an in-person interview. (Stipulated).

68. That interview was recorded. (Stipulated).

69. Investigator Ryan informed Complainant that Investigator Ryan was investigating possible policy violations while Complainant was supervising work crews.

70. Investigator Ryan started the interview by having Complainant explain a typical workday.

71. Investigator Ryan asked Complainant if Complainant ever let offenders meet with family while having lunch at a park. Complainant responded, "No." Investigator Ryan then asked if it ever just happened. Complainant informed Investigator Ryan it had, but the work crew kept their distance and they left.

72. Investigator Ryan asked, "So, you've never been in a situation with the crew where they've interacted with anybody?" Complainant responded, "No."

73. Investigator Ryan asked Complainant if Complainant had ever let an offender use his work phone. Complainant denied letting an offender ever use his work phone. Investigator Ryan then confiscated Complainant's work phone.

74. During the interview, Complainant admitted providing offenders candy bars, gum, and "Raider Hater" cookies that his wife made to the work crew.

75. Investigator Ryan asked if there was anything wrong with providing the offenders with food. Complainant responded, "Yes…yes, I do know that it is…I thought about the food allergy thing." Investigator Ryan asked if there were any other downsides to giving the offenders stuff. Complainant responded, "Well, I guess they could learn to expect it."

76. Complainant informed Investigator Ryan that approximately four weeks before the investigation J.R., a recently released individual, had pulled up and visited with Complainant and the work crew for approximately five minutes.

77. Complainant informed Investigator Ryan that Complainant provided his work phone number to offenders on cards. Complainant informed Investigator Ryan that A.G. contacted Complainant by text message and phone that day. Investigator Ryan asked if this was okay per Respondent's standards. Complainant responded he did not know.

78. Complainant informed Investigator Ryan that there may be pornography on the work phone. Complainant informed Investigator Ryan that Complainant received a new work phone in September 2021. Complainant informed Investigator Ryan that he downloaded pornography. Complainant explained the pornography was used to help with a medical condition.

79. Investigator Ryan made comments about people in other investigations trying to cover things up and that this was the time to tell Investigator Ryan anything. Investigator Ryan then said if there was something looming, Complainant should bring it up.

80. Complainant then said, “A couple of times, yes…I better, a couple of times I’ve had, I’ve let formers bring the guys some food.” Complainant did not provide dates, but said it was “so long ago.” Complainant then admitted J.R. was one of the individuals that brought food to the work crew on the visit previously mentioned in the interview. Complainant said the food was Wendy’s and it occurred about a month before. Complainant said that people brought food for the work crew maybe three times. Complainant also admitted A.G. brought food to the work crew. Complainant informed Investigator Ryan the other type of food provided was breakfast burritos

81. Investigator Ryan asked, “So, how do these guys know where the crew is?” Complainant responded, “I don’t know if they’re, they drive around and see or…”. Investigator Ryan then said he had trouble finding Complainant’s crew, even when he knew where they were going to be. Complainant eventually said, “Okay, I’m gonna come clean…I’m not doing this no more…Yes, they called me first to let me know where…we were gonna be. Yes, I’m sorry.” Investigator Ryan again asked how often had that happened, Complainant said maybe four times in the summer.

82. Complainant’s responses to Investigator Ryan’s questions indicated that the behavior of allowing people to bring food to, and communicate with, the work crew was something that had occurred only recently, and was not a career long behavior.

83. Investigator Ryan mentioned the possibility of introducing drugs through the food to Complainant. Complainant’s stated he had not thought about that. Complainant stated later in the interview that it worried him now.

84. Investigator Ryan revisited the topic of offenders using Complainant’s phone. Complainant then admitted to allowing H. talk to A.G. on his work phone approximately a month or two before the interview.

The Board Rule 6-10 Meeting

85. On March 3, 2022, Complainant received a Notice of Rule 6-10 Meeting from Director Warren, identifying the possible need for corrective and/or disciplinary action based on Complainant’s purported violation of DOC AR #1450-01 Code of Conduct. (Stipulated).

86. On March 11, 2022, Complainant met with Director Warren for an in-person meeting pursuant to Board Rule 6-10. That meeting was audio recorded. (Stipulated).

87. In the Board Rule 6-10 Meeting, Complainant denied the behavior of allowing work crew members to meet and communicate with family members that initially led to the investigation.

88. In the Board Rule 6-10 Meeting, Complainant explained the pornography on his work phone:

> Complainant: Let’s see. Now as far as – this is pretty embarrassing for me, but as far as the pornography, I don’t even know why I told them that because I had already removed it because I had [medical condition], and I went through [medical treatment]. Well, it caused somewhat of a [medical condition], okay.
>
> So I had a [medical condition] buddy that went through the same thing, and he said his doctor recommended pornography to help out…

> Well, the [medical treatment] messed me up…
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> So my [medical condition] buddy started sending me porn. That phone was my lifeline. I had never had another phone. I've been with DOC – I've been with CCI now for sixteen, a little over sixteen years, and that was my only phone…
>
> …So I got rid of it.
> …
>
> Director Warren: And it was for the purposes of – even though it's a violation if it's on a state-issued phone or was on the state-issued phone.
>
> Complainant: Yes, it was on Messenger. I had it on Messenger

89. During the Board Rule 6-10 Meeting, Complainant acknowledged that, in the summer preceding the investigation (summer of 2021), Complainant lost sight of the fact that he was the supervisor and working with incarcerated individuals. Complainant described it as being part of a team, rather than being a supervisor, "And it just felt like we were a team instead of – and I kind of felt like we were all equal type of thing. And I just lost the fact that I was the boss, you know. I mean, it just – you know. And so I admitted, you know, things got carried away." Complainant also informed Director Warren that he realized things were getting out of hand and addressed it with Supervisor Gamblin. Complainant further informed Director Warren Supervisor Gamblin disbanded Complainant's work crew as a result of Complainant's report to him.

90. In the Board Rule 6-10 Meeting, Director Warren discussed with Complainant how often he gave candy bars to work crew members. Complainant informed Director Warren he gave the work crew candy bars maybe a couple of times a year.

91. Complainant stated during the Board Rule 6-10 Meeting, after being asked about the Code of Conduct, "We're not supposed to give them anything to eat, I mean, you know."

92. In the Board Rule 6-10 Meeting, Director Warren discussed with Complainant allowing crew members to use his work phone and supervision of A.G. Complainant informed Director Warren that Complainant knew A.G. as a child and that Complainant knew A.G.'s family from the neighborhood. Director Warren did not ask for specific details about Complainant's communication with A.G.'s family or when Complainant knew A.G.'s family. Complainant admitted to allowing a work crew member, H., to call A.G. after A.G.'s release.

93. In the Board Rule 6-10 Meeting, Complainant explained he provided his phone number to work crew members and wrote "For job reference only." Complainant explained, "And it's worked out pretty good over the years. Most of the formers have stayed out and have gotten – now I would only do that with my good workers. The lousy workers, I didn't care."

94. In the Board Rule 6-10 Meeting, Director Warren and Complainant discussed former crew members stopping by to talk to Complainant:

Director Warren: Right, right. And how many times has that happened with formerly incarcerated folks that are out in the community coming to visit a work crew?

Complainant: They don't come to visit the work crew. They would just stop by and say hello to me.

Director Warren: Oh, okay.

Complainant: Because they didn't know any of those guys.

Director Warren: Okay, so how many times have they come to, I guess, visit you?

Complainant: Maybe once or twice a summer maybe.

Director Warren: Okay.

Complainant: Passing by, you know.

95. Complainant acknowledged in the Board Rule 6-10 Meeting that Investigator Ryan made a good point as to the possibility of sneaking drugs in food provided to the work crew members.

96. In the Board Rule 6-10 Meeting, Complainant informed Director Warren about being a groomsman in the wedding of an individual formerly on Complainant's work crew, and that individual paying for expenses associated with the wedding. Complainant informed Director Warren the location of the wedding was Utah.

97. Complainant asked Director Warren to speak with his supervisors, Paul Smith, Casey Nutter, and Supervisor Gamblin. Director Warren spoke with each of these individuals in March 2022. Director Warren spoke with Supervisor Gamblin about his understanding of policies and about Complainant's conduct. Director Warren did not fully explain the conduct to Supervisor Nutter or Supervisor Gamblin.

98. At the close of the meeting, Director Warren advised Complainant that she would allow Complainant time to present any additional information and would make a decision and issue it to him in writing after March 18, 2022. (Stipulated).

Disciplinary Decision

99. Director Warren took five months to issue a disciplinary action following the Board Rule 6-10 Meeting. During this time period, Respondent was undergoing a major reorganization that delayed Director Warren's issuance of the Notice of Disciplinary Action. Director Warren also spent time consulting with other appointing authorities and with human resources to consider the appropriate disciplinary action.

100. On August 30, 2022, Director Warren served Complainant with a Notice of Disciplinary Action, terminating his employment effective immediately. (Stipulated).

101. In the Notice of Disciplinary Action, Director Warren made the following conclusions:

- You introduced contraband and allowed former offenders to introduce contraband to current work crews. You failed to identify the safety and security risk this posed to the offenders, the staff and the facility.

- You were complicit in allowing former offenders to communicate and meet with you and your current work crew. You never reported this to your supervisor. You reported this occurred between 16-32 times over the course of 16 years.

- You have had multiple inappropriate relationships that lacked professional boundaries with current and former offenders. You supervised an offender who was a family friend without reporting this to your supervisor.

- You violated technology rules and regulations and misused state resources by downloading pornography on your state issued phone.

(Stipulated).

102. Director Warren's factual basis for these conclusions were:

- For 16 years, former work crew members have visited 1-2x during the summer when you have been supervising current work crews. You admitted you did not notify your supervisor. You stated, "I lost the fact that I was the boss. Things got carried away. I don't know the difference" [between being a supervisor and being on a team].

- You reported you supervised an incarcerated individual for 4 months who was a family friend. You also reported you did not notify your supervisor of your relationship. You stated, "I knew he was leaving, so I didn't make a big deal about it."

- You reported you were a groomsman at a Nevada wedding of a former (10yrs ago) offender; the offender provided credit card information and paid for you and your wife's flight, lodging, and car rental.

- You reported you provided a card with your name and contact information for job references to offenders, "good workers only."

- You reporting providing candy bars and "Raider-hater" cookies (1-2x/year for the last 3-4 years) to offender work crew members. Additionally, you reported a former offender brought Wendy's for the crew (5 people) and then another former offender brought breakfast burritos for the crew (5 people).

- You admitted to having pornography on a state-issued phone. You stated, "Buddy sent me porn. I had it on messenger. It has been removed."

103. Director Warren considered the food provided to offenders to be contraband.

104. Director Warren had serious concerns about Complainant allowing individuals to bring food to offenders because food is often a vehicle for contraband entering Respondent's facilities.

105. Director Warren considered the work crew's interaction with individuals not currently incarcerated to be interactions with the public in violation of Respondent's policies.

106. Respondent regularly updates its policies. Director Warren reviewed the policies in effect at the time of her decision, rather than the policies in effect at the time of Complainant's alleged conduct.

107. Director Warren did not obtain a copy of or review the Road Crew Procedures in making her disciplinary decision.

108. Director Warren considered Complainant's failure to be forthcoming, the unfolding of information from the professional standards interview to the Board Rule 6-10 Meeting, in her decision to terminate Complainant's employment.

109. Director Warren determined that the above-described conduct violates the following performance expectations:

> DOC Administrative Regulation 100-18 Mission Statement, Attachment A, Value Statement 2 and 4; Administrative Regulation 100-19 Communication with Offenders, Section IV, Subsection A.1.b and A.1.l; Administrative Regulation 100-16 Use of Cellular Devices, Section IV, Subsections H.1, H.2, I.; Administrative Regulation 300-43 Authorization to Provide Food Items to Offenders, Section IV, Subsection A., E., F.; Administrative Regulation 1450-01 Code of Conduct, Section IV, Subsection A.1, A.3, A.4, A.8, A.9, B.1, C.5, D.1, D.6.a., D.7, D.8, D.9, D.10, D.12, and M.1; Code of Ethics (signed annually, most recently by you on April 27, 2022) Section II, Subsection A.1, A.2, A.3, Section III, Subsection A, B, C, E, H, and I; your performance plan (signed by you on April 28, 2022), and State Personnel Board Rule 6-12, 1. Failure to perform competently; 2. Willful misconduct; and 3. Failure to comply with Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other departmental directives.

(Stipulated).

ANALYSIS

A. BURDEN OF PROOF.

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." Colo. Const. Art. XII, § 13(8). "Once an employee acquires this right by being certified, the employee may be discharged only for just cause based on constitutionally specified criteria." *Dep't of Insts. v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

Section 13(8) lists the following specific criteria upon which discipline may be based:

> A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined.

Colo. Const. Art. XII, § 13(8).

Board Rule 6-12(B) includes the following as bases for discipline: "1. Failure to perform competently; 2. Willful misconduct; 3. Failure to comply with the Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other departmental directives; 4. A violation of any law that negatively impacts job performance…6. False statements or omissions of material facts during the course of employment…".

In this *de novo* disciplinary proceeding, Respondent had the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred. *Kinchen*, 886 P.2d at 706-09. "[A]n appointing authority must establish a constitutionally authorized ground in order to discharge…an employee." *Id.* at 707. 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 and to discipline the employee." *Id*. at 708.

The Colorado Supreme Court clarified the two-part inquiry required in an ALJ's review of a disciplinary action:

> [I]n reviewing an appointing authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; and, if it did, (2) whether the appointing authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

Dep't of Corr. v. Stiles, 477 P.3d 709, 717 (Colo. 2021). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the appointing authority establishes that the conduct on which the discipline is based occurred:

> [I]f the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's disciplinary action in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

Id. at 718. *See also* § 24-50-103(6), C.R.S.

B. COMPLAINANT ENGAGED IN THE MISCONDUCT FOR WHICH HE WAS DISCIPLINED.

Director Warren's Conclusion 1 – Proven Misconduct: You introduced contraband and allowed former offenders to introduce contraband to current work crews. You failed to identify the safety and security risks this posed to the offenders, the staff and the facility.

Director Warren referred to the food that Complainant allowed to be provided to work crew members as contraband in the Notice of Disciplinary Action. Respondent proved by a preponderance of the evidence that Complainant provided, and allowed others to provide, food to current work crew members and failed to identify the safety risks associated with that conduct. Respondent also proved by a preponderance of the evidence that this was misconduct. As discussed below, Complainant's conduct violated policy and was willful misconduct.

Complainant admitted to providing, and allowing others to provide, food to current work crew members. Complainant engaged in the conduct for which he was disciplined.

Providing food to work crew members violates multiple areas of Respondent's Code of Conduct, Administrative Regulation 1450-01. Administrative Regulation 1450-01, Subsection IV, D.12 requires any items given to offenders to be approved through proper channels. Complainant did not receive approval to provide, or have others provide, food to work crew members. Complainant's conduct also violates Administrative Regulation 1450-01, Subsection IV, A.9, which requires employees to exercise good judgment and sound discretion. Complainant's admitted knowledge that he was not allowed to provide food to work crew members, yet did so anyway, demonstrates a lack of good judgement and sound discretion.

Providing food to current work crew members posed multiple safety and security risks, to include possible food allergies, drugs being introduced through the food, and the offenders coming to expect food. Complainant failed to identify the risk of drugs being introduced through food and work crew members coming to expect food prior to the food being provided. Complainant's failure to identify these risks violates Administrative Regulation 1450-01, Subsection IV, A.9, which requires employees to exercise good judgment and sound discretion. It is also a dereliction of Complainant's job duties and failure to perform competently per his Position Description, which charged Complainant with the safety and security of work crew members.

Complainant's conduct was willful misconduct pursuant to Board Rule 6-12. Complainant's statements during the investigation and the Board Rule 6-10 Meeting demonstrate Complainant knew it was impermissible to provide food to work crew members. Complainant's deception about allowing others to provide food during the Professional Standards Investigation further supports that Complainant knew this was not allowed. Complainant engaged in misconduct by providing, and allowing others to provide, food to current work crew members.

Complainant's arguments that Respondent did not demonstrate contraband (as in drugs or other dangerous items) were received by offenders through the food provided is not persuasive. The factual bases for discipline included in the Notice of Disciplinary Action demonstrate that Director Warren was referring to food through her use of the word contraband. Director Warren's credible testimony at hearing demonstrates that she considered the food itself to be contraband.

Complainant's arguments that the individuals Complainant allowed to provide food to the work crew were still, by definition, offenders is also not persuasive. Whether or not the individuals were considered offenders under Respondent's policy, Complainant permitted items (in this case food) to be given to current work crew members without approval in violation of policy.

Respondent demonstrated by a preponderance of the evidence that Complainant provided, and allowed others to provide, food to work crew members and this was misconduct.

Director Warren's Conclusion 2 – Proven Misconduct: You were complicit in allowing former offenders to communicate and meet with you and your current work crew. You never reported this to your supervisor. You reported this occurred 16-32 times over the course of 16 years.

Respondent proved by a preponderance of the evidence that Complainant was complicit in allowing individuals formerly on Complainant's work crew to communicate and meet with Complainant and current work crew members. Complainant did not report this to his supervisors. Respondent also proved by a preponderance of the evidence that this was misconduct. As discussed below, Complainant's conduct not only violated Respondent's policies, but it was also willful misconduct pursuant to Board Rule 6-12.

Complainant admitted this conduct. Complainant admitted to allowing two former work crew members, A.G. and J.R., to come visit the work crew and have communication with the work crew on the road. Complainant also admitted to allowing A.G. to speak with a current work crew member on Complainant's work phone. Complainant did not report this to his supervisors. Complainant was complicit in the communication because Complainant provided the work crew's location and work telephone for these communications to occur. Complainant engaged in the conduct for which he was disciplined.

Complainant's conduct violates Administrative Regulation 1450-01, Subsection IV, A.9, which requires employees to exercise good judgment and sound discretion. Respondent presented persuasive evidence that individuals approaching a work crew may present a danger. In 2021, Complainant not only allowed individuals to approach the work crew, but invited individuals to approach by providing the work crew's location to the individuals. This demonstrates a lack of good judgement in violation of policy.

Complainant's conduct also violated the Road Crew Procedures. The Road Crew Procedures prohibit the work crew from having contact with the public. While the individuals that brought food and visited were still offenders as defined by Administrative Regulation 1450-01, Director Warren's categorization of the individuals as the public after their release is a fair categorization. The recently released individuals were part of the public, and could access things the incarcerated work crew members could not. Complainant then violated the Road Crew Procedures by allowing the recently released individuals (members of the public) to have contact with the work crew.

Complainant engaged in willful misconduct pursuant to Board Rule 6-12. Complainant's deception during the professional standards interview about the conduct of providing his work crew's location and allowing A.G. to speak with a current work crew member demonstrates that Complainant knew he should not engage in this behavior. Complainant's complicity in communication is, therefore, willful misconduct.

The duration of the misconduct, 16 years, was not proven by a preponderance of the evidence. The conduct of Complainant being complicit in communication between former work crew members and the current work crew, based upon the evidence presented at hearing, was isolated to 2021. The conduct that occurred over the course of 16 years was individuals stopping by to visit with Complainant.

Respondent did not prove by a preponderance of the evidence that it was a violation of policy or procedure for Complainant to have contact with members of the public while out with the work crew. The Road Crew Procedures prohibit the work crew from associating with the public: "Your offender work crew is not allowed to associate with the public while on break." The Road Crew Procedures do not prohibit Complainant from interacting with the public. Complainant's interactions with individuals stopping as they saw him on the side of the road are not clearly a violation of Road Crew Procedures or other policy of Respondent. The Road Crew Procedures anticipate Complainant will have to communicate with the public, because they anticipate Complainant will need to decline offers of refreshment and tips. Even if it is misconduct for Complainant to briefly communicate with an individual stopping by and to not communicate the contact to a supervisor, the conduct that occurred over the course of 16 years is different from the conduct that occurred in 2021.

Respondent demonstrated by a preponderance of the evidence that Complainant was complicit in allowing individuals formerly on the work crew to communicate with Complainant *and* the work crew in 2021, and this was misconduct.

Director Warren's Conclusion 3 – Proven Misconduct: You have had multiple inappropriate relationships that lacked professional boundaries with current and former offenders. You supervised an offender who was a family friend without reporting this to your supervisor.

Respondent proved by a preponderance of the evidence that Complainant had inappropriate relationships with work crew members, both while they were on Complainant's work crew and after. Respondent also proved by a preponderance of the evidence that this was misconduct. As discussed below, Complainant's conduct not only violated Respondent's policies, but it was also willful misconduct pursuant to Board Rule 6-12.

In 2021, Complainant developed inappropriate relationships with A.G., J.R., and current work crew members.

As to A.G. and J.R., Complainant admitted to communicating with A.G. and J.R. to provide the work crew's location, to allowing them to come visit with the work crew, and to accepting food for the work crew and himself from both individuals. Complainant's admitted actions demonstrate by a preponderance of the evidence that Complainant developed inappropriate relationships with these individuals.

Complainant's inappropriate relationship with A.G. and J.R. resulted in multiple policy violations. A.G. and J.R. were offenders as defined by AR1450-01. Complainant's communication, providing work crew's location and having seven minute conversation with A.G. after a text message exchange, exceeded communication in the normal scope of employment and violates Administrative Regulation 1450-01, Subsection IV, D.6.a. Complainant's conduct

violated Administrative Regulation 1450-01, Subsection IV, A.1, which requires employees to avoid situations that can cause perceived conflicts of interest. Complainant's conduct in relation to A.G. and J.R. created situations that could cause perceived conflicts of interest.

As to Complainant's 2021 work crew, Complainant admitted to losing sight of professional boundaries and the fact that Complainant was the work crew supervisor rather than a member of a team. Complainant also admitted the work crew was aware of his medical condition following his return to work in 2021. Complainant's admitted relationship with the 2021 work crew demonstrates he developed an inappropriate relationship with the work crew.

This admitted relationship violated Respondent's policies including Administrative Regulation 1450-01, Subsection IV, A.1. This type of relationship, where Complainant views himself as part of a team and allows food to provided to the team, could create a perceived conflict of interest. In addition, the work crews awareness of Complainant's medical condition, demonstrates Complainant shared personal information with the work crew in violation of Administrative Regulation 1450-01, Subsection IV, D.8, which prohibits sharing personal information with offenders.

Complainant's argument that Director Warren incorrectly categorized A.G. as a family friend is not persuasive. Whether or not A.G. was a family friend, Complainant's actions demonstrate that Complainant developed an inappropriate relationship with A.G. No matter how attenuated Complainant's relationship with A.G.'s family was at the time of A.G.'s membership on Complainant's work crew, Complainant had an inappropriate relationship with A.G. that resulted in Complainant providing the location of his work to crew to A.G., engaging in phone conversations with A.G., and allowing A.G. to talk to a current work crew member after A.G.'s release.

The Administrative Law Judge agrees with Complainant's argument that providing Complainant's work phone number for job reference is not specifically a violation a Respondent's policies. A job reference communication, however, would not be between Complainant and an individual formerly on work crew, but between Complainant and a prospective employer. The evidence in the record demonstrates Complainant had contact with offenders, as defined by Respondent's policies, after their release. Contact with offenders after release exceeds communication within the normal scope of employment in violation of Administrative Regulation 1450-01, Subsection IV, D.6.a. and supports a conclusion that Complainant had inappropriate relationships with individuals formerly on his work crew.

Respondent did not present evidence to demonstrate it was a violation of policy for Complainant to accept the invitation to be in an individual's wedding, including the individual paying for expenses associated with the wedding, who had been released from Respondent's custody for approximately a decade. The individual was no longer considered by Respondent's policy to be an offender or former offender. Director Warren's testimony demonstrates she did not consider Respondent's definition of "former offender" when she determined this was misconduct.

Director Warren testified this act did not weigh heavily into her decision because of the length of time the individual had been out of Respondent's custody. Director Warren testified this conduct caused her concern for Complainant's ability to be in a position of supervision and his ability to maintain professional boundaries – particularly because the trip was paid for by the individual. While it was reasonable for this to give Director Warren pause, particularly in the

context of what was being investigated, Respondent did not present sufficient evidence to demonstrate this was misconduct, because of the length of time the individual had been out of Respondent's custody.

Respondent demonstrated by a preponderance of the evidence that Complainant had inappropriate relationships with individuals currently and formerly on Complainant's work crew and this was misconduct.

Director Warren's Conclusion 4 – Proven Misconduct: You violated technology rules and regulations and misused state resources by downloading pornography to your state issued phone.

Respondent proved by a preponderance of the evidence that Complainant violated Respondent's policies by using his work phone for personal use, including to receive pornography.

Administrative Regulation 1450-01, Subsection IV, M.1. prohibits the use of state resources for personal gain. Administrative Regulation 100-16, Section IV, H.1 and H.2 require employees to abide by the terms of the technology policy and allow only *de minimus* personal use of state owned cellular devices. Complainant's own statements during the investigation and Board Rule 6-10 Meeting demonstrate Complainant used his work phone for personal use and his personal use of the work phone was more than *de minimus*. In Complainant's case, any use of a work phone to access pornography is more than *de minimus* personal use. Complainant's cell phone use is a violation of Respondent's policies and misconduct.

Respondent demonstrated by a preponderance of the evidence that Complainant violated state technology rules and this was misconduct.

C. RESPONDENT'S DECISION TO TERMINATE COMPLAINANT FROM EMPLOYMENT WAS ARBITRARY AND CAPRICIOUS.

After determining a person has committed the act for which they were disciplined, the second question to be determined is whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law. In determining whether an agency's decision is arbitrary or capricious, the ALJ must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1252 (Colo. 2001).

Director Warren did not use reasonable diligence and care to procure evidence.

As to the first *Lawley* prong, Respondent did not establish that Director Warren used reasonable diligence and care to procure evidence. The evidence at hearing revealed at least one significant shortcoming in Director Warren's efforts to procure evidence. Director Warren failed to obtain and review a copy of Respondent's Road Crew Procedures. The Road Crew

Procedures are necessary in considering some of Complainant's policy violations and misconduct in this case, as most of the concerning behavior occurred while Complainant was on the road with a work crew. Some of the conduct Director Warren concluded was misconduct may have been viewed through a different lens had Director Warren reviewed the Road Crew Procedures. The Road Crew Procedures did not prohibit Complainant from interacting with the public while supervising a crew. Conversations about a policy with supervisors does not substitute for review of the policy itself. Further, testimony at hearing indicates Director Warren did not fully explain the bases of discipline to at least two of the supervisors with whom she spoke. Therefore, conversations about the policy with those individuals would not be authoritative on whether or not all of Complainant's conduct violated Road Crew Procedures. Director Warren failed to use reasonable diligence and care to procure evidence by failing to review the Road Crew Procedures.

As argued by Complainant, Director Warren reviewed two policies that were not in effect at the time of Complainant's Conduct: Administrative Regulation 100-19, Respondent's Communication with Offenders Policy (effective in December 2021) and Administrative Regulation 300-43, Respondent's Authorization to Provide Food Items to Offenders policy (effective in July 2022). In this case, because all of the evidence in the record indicates the policies were substantially similar, this would not alone be a failure to use reasonable diligence and care to procure evidence.

Director Warren did not give candid and honest consideration to the evidence.

As to the second *Lawley* prong, Director Warren did not give candid and honest consideration to the evidence. First, Director Warren's Notice of Disciplinary action contained inaccuracies about what Complainant communicated. Second, Director Warren's disciplinary decision was heavily influenced by a grouping together of distinctly different types of conduct that led to little consideration of many of the Board Rule 6-11 factors. Finally, Director Warren incorrectly used, and was unaware of, defined terms relevant to Complainant's conduct that led to the disciplinary action taken against Complainant. As a result of these issues, Respondent did not prove by a preponderance of the evidence that Director Warren candidly and honestly considered the evidence.

a. The Notice of Disciplinary Action.

The written foundation for establishing an appointing authority's decision was not arbitrary and capricious, especially as to the second *Lawley* prong, is the notice of disciplinary action issued by an appointing authority. Per statute, the notice must provide the employee notice of the bases for discipline ("the specific charges giving rise" to the action) and notify the employee of their appeal rights. § 24-50-125(2), C.R.S. Because it is required by statute, it is part of the process due to a disciplined certified state employee. It is the written foundation for establishing the decision was not arbitrary and capricious because it sets forth the reasons for the disciplinary action, and provides the certified employee a starting point for seeking review of a disciplinary action.

Director Warren's Notice of Disciplinary Action created a weak written foundation for Respondent to establish by a preponderance of the evidence that Director Warren gave candid and honest consideration to the evidence.

Director Warren got a simple fact wrong in her Notice of Disciplinary Action. Director Warren wrote, "You reported you were a groomsman at a Nevada wedding of a former (10yrs ago) offender…". Complainant reported the wedding was in Utah, not Nevada. During the evidentiary hearing, Director Warren even made a point to testify the wedding was in Vegas. The location of the wedding has no bearing on whether or not Complainant's conduct was misconduct. While the fact is not significant to misconduct, it is significant to determining candid and honest consideration of the evidence. The error itself calls into question careful consideration of the evidence.

Director Warren's first factual basis for discipline in the Notice of Disciplinary Action was:

> For 16 years, former work crew members have visited 1-2x during the summer when you have been supervising current work crews. You admitted you did not notify your supervisor. You stated "I lost the fact that I was the boss. Things got carried away. I don't know the difference" [between being a supervisor and being on a team].

As signaled by the use of quotation marks, the factual basis includes statements purported to be made by Complainant. Director Warren, however, misquoted Complainant. Complainant actually stated, "And it just felt like we were a team instead of – and I kind of felt like we were all equal type of thing. And I just lost the fact that I was the boss you know…And so I admitted, you know, things got carried away." Complainant did not say, "I don't know the difference..." between being a supervisor and being on a team. Complainant's statements about losing sight of the fact that he was the boss in the Board Rule 6-10 Meeting were also specifically referring to events that occurred in 2021. Complainant did not state or indicate he generally did not know the difference between being a supervisor and being on the team. Fair and honest consideration is reasonably questioned when an appointing authority misquotes information presented in a Board Rule 6-10 meeting, and attributes statements to the Complainant that Complainant did not make.

Director Warren also misquoted Complainant as stating, "Buddy sent me porn. I had it on messenger. It has been removed." In this quote, Director Warren paraphrased comments made by Complainant within quotation marks and oversimplified what was said to her in the meeting. Complainant provided a medical explanation for the pornography and additional detail.

Director Warren concluded in her Notice of Disciplinary Action that, "[Complainant was] complicit in allowing former offenders to communicate with you and your current work crew. You never reported this to your supervisor. You reported this occurred between 16-32 times over the course of 16 years." Complainant stated in the Board Rule 6-10 Meeting that the individuals stopping by over the course of 16 years were only communicating with Complainant, "They don't come to visit the work crew. They would just stop by and say hello to me…Because they didn't know any of those guys." Following which Director Warren asked, "Okay, so how many times have they come to, I guess, visit you?" And Complainant replied, "Maybe once or twice a summer, maybe." Complainant did not report he allowed individuals to visit with himself *and* the work crew once or twice a summer for sixteen years. Complainant reported individuals stopped by to visit with him over the course of sixteen years. This information is consistent with information Complainant provided in the professional standards interview about the length of time Complainant allowed individuals to visit with the work crew. The conclusion as written demonstrates as a lack of fair and honest consideration of the evidence, because it indicates

Complainant reported something Complainant did not report and concludes something occurred for a period of 16 years that occurred only in 2021.

Worthy of note, an appointing authority is tasked with making a decision based upon available information following a reasonably diligent effort to gather information. In preparing a written decision, an appointing authority reasonably might summarize information, paraphrase comments, find something presented to be not credible, or even find they don't have enough information to know exactly what happened. Director Warren, however, attributed statements to Complainant that Complainant did not make and misquoted other statements made by Complainant in her Notice of Disciplinary Action. Director Warren did not find Complainant not to be credible, instead she misquoted Complainant and concluded he reported things he did not report. As discussed above, a notice of disciplinary action is required and is an important part of the disciplinary process of a certified state employee. Since Director Warren chose to use quotes, she had a responsibility to do so at least somewhat accurately. As a result, Director Warren's Notice of Disciplinary Action compromises Respondent's ability to prove by a preponderance of the evidence that Director Warren carefully considered the evidence available to her and gave it candid and honest consideration.

b. Conclusion not supported by evidence and consideration of the Board Rule 6-11 factors.

The testimony and evidence presented at hearing did not cure the concerns caused by Director Warren's Notice of Disciplinary Action. The testimony and evidence at hearing proved by a preponderance of the evidence that Director Warren did not fairly and honestly consider the evidence. The information Director Warren had available simply does not support that Complainant allowed people to visit Complainant *and* the work crew for a period of 16 years. Complainant's statements during the Board Rule 6-10 Meeting and the professional standards interview support a finding that Complainant only allowed visitation with the work crew to occur in 2021.

Director Warren testified, "I think…one of the most concerning was the duration of time that he had allowed previous offenders to come visit his work crews. So, for me, that was something that really stood out was this was not episodic. This was something that had an established pattern of visits of work crews throughout sixteen years." Further, Director Warren testified context did not matter as to the conduct of individuals approaching the work crew. Director Warren's testimony indicated that she did not know what Complainant allowed to occur when individuals stopped by, but that Complainant was complicit in allowing communication with himself and work crews over the course of 16 years. Context matters. In one situation, Complainant provided his work crew's location to individuals and allowed individuals to communicate with and provide food to the current work crew. This conduct violates multiple policies of Respondent. In the other situation, individuals happened to see Complainant and stopped by to speak with Complainant. This conduct is patently distinguishable from the 2021 misconduct. Disregarding context and grouping together distinctly different conduct in reaching a disciplinary decision demonstrates a lack of fair consideration of the evidence.

Because if this grouping of conduct, Director Warren did not fairly and honestly consider the factors set forth in Board Rule 6-11. The second *Lawley* prong "is satisfied if the appointing authority considered, in good faith, the relevant evidence…" including the factors set forth in Board

Rule. *Stiles* 477 P.3d at 719.[5] Board Rule 6-11(A)(1-6) lists the following factors to be considered by the appointing authority:

1. The nature, extent, seriousness, and effect of the performance issues or conduct;

2. Type and frequency of prior unsatisfactory performance or conduct (including any prior performance improvement plans, corrective actions or disciplinary actions);

3. The period of time since any prior unsatisfactory performance or conduct;

4. Prior performance evaluations;

5. Mitigating circumstances; and

6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.

First, Respondent did not prove by a preponderance that Director Warren candidly and honestly considered the evidence about the nature, extent, seriousness, and effect of Complainant's misconduct, because the preponderance of the evidence establishes that Director Warren grouped distinctly different conduct into the same category. *See* Board Rule 6-11(A)(1). Director Warren grouped the very serious misconduct of providing work location/allowing recently released offender to visit and provide food to the work crew with the conduct of individuals randomly stopping by to briefly visit with Complainant and this grouping heavily influenced her decision.

Second, Director Warren's grouping of the ongoing conduct with the misconduct led her to give little weight to Complainant's performance evaluations. *See* Board Rule 6-11(A)(4). Director Warren's testimony was that she considered Complainant's performance evaluations to not be reflective of his actual performance, because she believed evaluators did not know about the long-term ongoing misconduct. While there was ongoing misconduct, Complainant's most serious misconduct – providing the work crew's location, allowing others to provide food to the work crew, and serious breakdown of professional boundaries – occurred in 2021. Director Warren did not fairly and honestly consider Complainant's performance evaluations, because she did not fairly and honestly consider the duration of the ongoing serious misconduct.

Third, Director Warren's grouping of conduct also led her to give little weight to Complainant's mitigating factors. *See* Board Rule 6-11(A)(5). Complainant's serious misconduct occurred in the 2021 while Complainant was dealing with a serious medical condition. In that time period, Complainant, with Respondent's knowledge, returned to work with medical restrictions, causing Complainant to rely on his work crew to make up for his inability to do some things. Director Warren testified she did not consider Complainant's medical condition to be a mitigating factor, because she concluded that misconduct was occurring long before the medical condition. However, Respondent failed to establish that the serious misconduct of providing work crew's location/allowing recently released offenders to bring food to current work crews occurred prior to 2021. Further, fair consideration of the evidence might reasonably include some

[5] *Stiles* references Board Rule 6-9, which was amended. Language similar to the old Board Rule 6-9 is now included in Board Rule 6-11.

consideration of the fact that Respondent allowed Complainant to return to work with medical restrictions and that circumstance contributed to the Complainant's blurring of professional boundaries in 2021.

c. Misuse and lack of knowledge about defined terms relevant to Director Warren's disciplinary action.

Finally, Director Warren misused and did not know relevant terms defined in AR 1450-01. Based upon Director Warren's testimony, this policy was the overarching policy used to reach her decision. The term "former offender" is defined by Respondent's Code of Conduct AR 1450-01. Director Warren used the term "former offender" to refer to anyone formerly in Respondent's custody. This is inconsistent with the definition of "former offender" in AR 1450-01. This is problematic because the policy controls interaction allowed with "offenders" and "former offenders," and Director Warren disciplined Complainant for his relationships with those formerly in Respondent's custody.

More problematic than misuse of the term in the Notice of Disciplinary Action is Director Warren's lack of knowledge about the definition of the term at the time she wrote the disciplinary decision. Director Warren testified she did not know the definition of "former offender" at the time she wrote the Notice of Disciplinary Action. This demonstrates Director Warren either failed to procure the information through thorough review of the entire policy or failed to consider relevant evidence, and did not give the policy candid and honest consideration.

Director Warren testified that the definition of "former offender" was not important because it was a violation for the work crew to have contact with any member of the public. This statement does not demonstrate candid and honest consideration of the evidence. Director Warren administered discipline for more than the work crew's interactions with members of the public. Director Warren disciplined Complainant for Complainant's interactions/relationships with work crew members and individuals formerly on Complainant's work crew. The definitions of "offender" and "former offender" are essential to determining if Complainant violated portions of AR 1450-01 setting forth boundaries for relationships with "offenders" and "former offenders." Director Warren's admitted lack of knowledge about a relevant defined term, in the overarching policy used to determine Complainant's misconduct, demonstrates a lack of candid and honest consideration of the evidence, because it demonstrates she did not consider portions of the policy relevant to the alleged misconduct at all.

Director Warren's decision was contrary to rule or law.

As to the third *Lawley* prong, Director Warren's Notice of Disciplinary action was contrary to rule or law. Section 24-50-125(2), C.R.S. and Board Rule 6-13(A), set standards for the notice of disciplinary action. The specific charges, the factual basis, and specific reasons for discipline must be included in the Notice of Disciplinary Action. *See* § 24-50-125(2), C.R.S. and Board Rule 6-13(A). Director Warren failed to comply with statue and Board Rule in her Notice of Disciplinary Action.

First, Director Warren omitted factual bases for discipline. A notice of disciplinary action should leave any reviewer of the action with little question about the conduct that led to discipline (factual basis for discipline) and the reasons for that discipline. Here, Director Warren's Notice of Disciplinary Action falls short in relaying some of the relevant factual bases for discipline. Based

upon testimony at the hearing, Director Warren concluded Complainant had inappropriate relationships with members of his work crew, in part, because they knew about Complainant's medical condition. This is not included as a factual basis for discipline in Director Warren's Notice of Disciplinary Action. The factual bases for discipline in the Notice of Disciplinary Action also do not mention that Complainant provided his work crew's location to A.G. and J.R. or that Complainant allowed A.G. to talk to a work crew member on Complainant's work phone. These are significant important factual bases for the discipline that were omitted from the Notice of Disciplinary Action.

Second, Director Warren failed to comply with § 24-50-125(2), C.R.S. and Board Rule 6-13(A), by not including all of the reasons and factual bases for discipline in Director Warren's Notice of Disciplinary Action. Director Warren testified about concerns with the unfolding of information during the investigation and Board Rule 6-10 process and how that influenced her disciplinary decision. The preponderance of the evidence establishes that Complainant not only failed to be forthcoming, but also initially lied in the Professional Standards Investigation. Director Warren's testimony at hearing indicated Complainant's failure to be forthcoming with information was a reason and part of the factual basis for the disciplinary action. It was part of how she assessed whether or not he could continue employment with Respondent. Director Warren, however, did not include concerns about Complainant's failure to be forthcoming or dishonesty as bases for discipline in the Notice of Disciplinary Action. Director Warren's failure to include this as a reason and/or factual basis for discipline in the Notice of Disciplinary Action violates Board Rule 6-13 (A)(1).

Respondent failed to prove by a preponderance of the evidence that Director Warren used reasonable diligence and care to procure evidence and gave candid and honest consideration to the evidence. The preponderance of the evidence also establishes the Director Warren's decision was contrary to rule or law. Therefore, Director Warren's disciplinary decision is arbitrary and capricious.

MODIFICATION TO THE DISCIPLINE ADMINISTERED

Following an evidentiary hearing, the Board may affirm, modify, or reverse an appointing authority's decision. *See* § 24-50-125(4), C.R.S., and Board Rule 8-39. An appointing authority's decision can only be modified or reversed only when the appointing authority's decision is arbitrary, capricious, or contrary to rule or law. *See* § 24-50-103(6), C.R.S. Director Warren's disciplinary action was arbitrary and capricious.

Despite, Director Warren's arbitrary and capricious disciplinary action, Respondent demonstrated it had constitutionally-authorized grounds for discipline. This Administrative Law Judge concludes the discipline administered should be modified, rather than affirmed or reversed. As discussed below, reversal is not appropriate because Respondent proved by a preponderance of the evidence constitutionally authorized grounds for discipline, and misconduct by Complainant that was serious and flagrant. Modification rather than affirmation is supported by the misconduct proven at hearing and Complainant's nine-month period of work following initiation of the investigation.

Reversal is not appropriate because Respondent established more than one "constitutionally authorized ground" to discipline Complainant. *Kinchen* 886 P.2d at 707. Pursuant to Colo. Const. Art. XII, § 13(8), Respondent can discipline Complainant for willful

misconduct and failure to comply with standards of competence. Complainant engaged in willful misconduct and failed to comply with standards of competence. Because Complainant engaged in willful misconduct and failed to comply with standards of competence, Respondent had constitutionally-authorized grounds to discipline Complainant.

Reversal is further not appropriate because Complainant's proven misconduct was serious and flagrant. Board Rule 6-11(A)(1). First, Complainant engaged in the long-term misconduct of misusing his cell phone and providing food to offenders without prior approval. Complainant knew he was not permitted to provide food to offenders. Second, in 2021, Complainant allowed himself to develop inappropriate relationships with offenders and allowed professional boundaries to be blurred. In 2021, Complainant knowingly engaged in misconduct that created a potentially dangerous situation when he provided his work crew's location to recently released individuals, allowed food to be provided to currently incarcerated work crew members without approval, and allowed recently released individuals to interact with the work crew. Complainant acknowledged the possibility of negative consequences resulting from this behavior, and identified that this behavior resulted in actual behavior changes from his work crew. Complainant knew he was engaging in misconduct because he was deceptive about the behavior in the professional standards investigation. Because Complainant's 2021 conduct was serious and flagrant, Complainant's misconduct warrants disciplinary action without prior corrective performance measures. *See* Board Rule 6-2.

Based upon Director Warren's testimony, the 16-year history of Complainant allowing individuals to communicate with current work crew members was significant in her decision to terminate Complainant. Looking at the record as a whole, modification is appropriate because Complainant was a 22-year employee with no prior corrective performance measures and overall satisfactory performance evaluations, including a good performance evaluation *after* the Board Rule 6-10 Meeting. Board Rule 6-11(A)(2) and (4). Respondent failed to demonstrate the more serious version of ongoing misconduct that led to Director Warren's disciplinary decision of termination. Further, Complainant performed successfully in temporary positions for nine months following initiation of the investigation without misconduct. Board Rule 6-11(A)(3). Complainant's most serious misconduct occurred in 2021, and that conduct coincided with Complainant's return to work with light duty restrictions as a result of a medical condition. Board 6-11(A)(5) and (6). The testimony presented indicates Director Warren gave little weight to these factors, because of how the conduct was grouped.

Modification also appears to be appropriate because Complainant's conduct was not so serious or dangerous that Respondent promptly stopped Complainant from working. Director Warren testified she decided to terminate Complainant's employment because she determined Complainant was no longer trustworthy to hold any position with Respondent and was not trainable. Respondent, however, allowed Complainant to continue work for nine months after initiation of the investigation and five months after the Board Rule 6-10 Meeting. Based upon her testimony, Director Warren had all of the information she needed about Complainant's conduct to reach a disciplinary decision in March 2022, more than five months before the disciplinary decision was reached. Complainant continued to have contact with offenders in this time period. If Complainant's conduct was so serious he was no longer trustworthy to hold any position with Respondent, Respondent knew that for five months before Complainant's termination and allowed him to continue working anyway. This period of work contradicts a conclusion that Complainant was no longer trustworthy to hold any position with Respondent. Therefore, modification of Respondent's disciplinary action is appropriate.

Complainant's misconduct reasonably warrants demotion. Although it appears Complainant did not have any performance issues in the nine months following the initiation of the investigation, Complainant was not performing the supervisory duties of a CSTS I. Complainant was no longer supervising a work crew outside of Complainant's facilities. Complainant's proven misconduct reasonably degraded Respondent's confidence in Complainant's ability to maintain professional boundaries with a work crew outside of Respondent's facilities. Complainant's 2021 conduct is serious and flagrant enough to warrant a demotion.

For these reasons, Respondent's disciplinary decision is modified to demotion rather than termination.

REMEDY TO COMPLAINANT AND ATTORNEY'S FEES

The court in *Kinchen* explained:

> Upon petition, an employee is entitled to a hearing before the Personnel Board reviewing an appointing authority's disciplinary action. An appointing authority cannot discipline a certified state employee without giving the employee an opportunity to petition for a hearing. The purpose of this hearing is to ensure that an employee is not disciplined without good cause and to protect employees from arbitrary and capricious action.

Kinchen, 886 P.2d at 707-08. The evidentiary hearing provided Complainant a full and fair opportunity to ensure Complainant was not disciplined without cause. Here, despite the arbitrary and capricious disciplinary action, Respondent had cause to discipline Complainant and Complainant's injury is of an economic character. "Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. (citations omitted)." *Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). For Respondent's arbitrary and capricious discipline, where Respondent had good cause for discipline, Complainant is entitled to an award of backpay and benefits from the date of his termination to the date of the evidentiary hearing at the salary of a CSTS I.

Attorney's fees and costs are not the mandated remedy for shortcomings in the disciplinary process. Section 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 or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate.

A frivolous action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-51(B)(1). Actions that are "[i]n 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 8-51(B)(2). A groundless personnel action is one in which it is found "that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory." Board Rule 8-51(B)(3).

Respondent's action was not frivolous as defined by Board Rule. Respondent presented rational argument based upon the evidence and the law. Respondent's action was not in bad faith as defined by Board Rule. Director Warren's action does not appear to have been taken in bad faith. Complainant engaged in serious misconduct and admitted to engaging in that conduct. That misconduct warrants serious disciplinary action. There is no evidence that this action was taken maliciously or to harass Complainant. Finally, Respondent's action was not groundless as defined by Board Rule. Respondent presented competent evidence to support its legal theory of the case.

In *Coffey v. Colo. Sch. of Mines*, 870 P.2d 608 (Colo. App. 1993), the Court of Appeals held that an award of attorney fees and costs "was mandated" where an ALJ reduced the school's disciplinary discharge of an employee to a three-day suspension. The Court explained that, even though the school established that Complainant engaged in misconduct that justified a disciplinary suspension, the attorney fee award was statutorily "mandated" because the school had "no grounds" to discharge the employee. *Id.* at 609-10. The presentation of evidence at hearing does not demonstrate that Director Warren had no grounds to discharge Complainant.

In this case, Respondent presented rational argument to support its theory (not frivolous), Respondent did not act maliciously or to harass Complainant (no bad faith), and Respondent presented competent evidence to support its position (not groundless). Therefore, Complainant is not entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Complainant committed the misconduct for which he was disciplined. Director Warren's disciplinary decision was arbitrary and capricious.

2. Complainant engaged in willful misconduct and failed to comply with standards of competence. Director Warren's disciplinary action should be modified.

3. Complainant is entitled to a remedy. Complainant is not entitled to an award of attorney fees.

ORDER

1. Respondent's disciplinary decision is **MODIFIED**.

2. Respondent must modify Director Warren's disciplinary decision from termination to demotion.

3. Respondent shall reimburse Complainant for his lost wages from August 31, 2022 through the date of the evidentiary hearing at his CSTS I salary. The total amount of wages is $18,691.46 (three months and eight days of salary).

Respondent shall reimburse Complainant for his lost wages from the day after the evidentiary hearing to the date Complainant resumes work in his disciplinarily demoted position at his new salary. The total amount will be determined based upon Complainant's salary in the demoted position.

These amounts are subject to the employer's PERA contribution, as well as interest of 8% per annum to the date of reinstatement to disciplinarily demoted position.

Dated this 21st day, of
February, 2023, at,
Denver, Colorado.

/s/ [redacted]

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the **21st** day of **February, 2023**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Taylor Frandsen, Esq.
Taylor.Frandsen@thefrontlinelawyers.com
Carrie Slinkard, Esq.
Carrie.Slinkard@thefrontlinelawyers.com

Amanda Swartz, Esq.
Amanda Swartz@coag.gov

[redacted]

APPENDIX

EXHIBITS

RESPONDENT'S EXHIBITS: The following exhibits were stipulated to and admitted into evidence: 1-17.

COMPLAINANT'S EXHIBITS: The following exhibits were stipulated to and admitted into evidence: B and D-O. The following exhibit was offered and admitted into evidence: A.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Casey Nutter

Jessica Warren

Louis Medina

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).

3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). 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. 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. *See* Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. *See* Board Rule 8-47(K).