

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2025B030(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GWENDOLYN LONDENBERG,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, OFFICE OF OFFENDER SERVICES,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the evidentiary hearing in this matter on January 30, January 31, and February 25, 2025, remotely through Google Meet. Complainant Gwendolyn Londenberg appeared, representing herself. Dayna Zolle Hauser, Assistant Attorney General, represented Respondent Department of Corrections (Respondent or DOC). Respondent's advisory witness, and Complainant's appointing authority, was David Lisac, DOC's Assistant Director of Offender Services.

The record was closed on March 5, 2025, after the parties' filings concerning the admissibility of Complainant's exhibits not already ruled on at hearing, and after the ALJ issued his order on March 5, 2025, regarding those exhibits. The record was re-opened on April 15, 2025, in order for Respondent to provide unredacted copies of specific heavily redacted exhibits. The record was closed on April 30, 2025, after Respondent provided unredacted copies of the specific exhibits ordered by the ALJ.

A list of witnesses who testified at hearing is attached hereto as Appendix A. A list of exhibits offered and admitted into evidence is attached hereto as Appendix B.

MATTERS APPEALED

Complainant, formerly a Captain (Correctional Officer IV) and a certified DOC employee, appeals Respondent's decision to terminate her employment. Complainant argues that she did not commit the acts for which she was disciplined and that Respondent's decision to terminate her employment was arbitrary and capricious and contrary to rule or law. Complainant also alleges that Respondent discriminated against her on the basis of sex and retaliated against her in violation of the Colorado Anti-Discrimination Act.¹ Complainant requests reversal of her disciplinary termination, reinstatement, and back pay and benefits.

¹ In her petition for hearing, Complainant also alleged harassment because of membership in a protected class, but did not offer evidence on that specific claim, which is deemed abandoned.

Respondent argues that Complainant committed the acts for which she was disciplined; that Respondent's decision to terminate Complainant's employment was not arbitrary or capricious or contrary to rule or law; that Respondent did not discriminate or retaliate against Complainant in violation of the Colorado Anti-Discrimination Act; that the decision to terminate Complainant's employment should be upheld; and that Complainant is not entitled to any of her requested relief.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **reversed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined.
2. Whether Respondent's action was arbitrary and capricious, or contrary to rule or law.
3. Whether Respondent discriminated against Complainant on the basis of sex in violation of the Colorado Anti-Discrimination Act.
4. Whether Respondent retaliated against Complainant in violation of Colorado Anti-Discrimination Act.

FINDINGS OF FACT

Background

1. Prior to the termination of her employment in October 2024, which is a focus of this appeal, Complainant had been a DOC employee for approximately 20 years.
2. At the time of the termination of her employment, Complainant had been a Correctional Officer (CO) IV (Captain) for approximately 6 years.
3. Complainant, a female, was a certified state employee.

Prior Confirming Memoranda

4. In early September 2019, while working at the Fremont Correctional Facility (FCF), David Lisac, who was then Complainant's supervisor, issued Complainant a confirming memorandum, arising from an incident in which Complainant questioned a staff member in front of their peers about a facial hair issue. This staff member had a valid medical waiver and was in compliance with policy. Complainant's conduct was perceived as demonstrating inadequate professional leadership and communication skills.

5. On June 8, 2021, while still working at FCF, Complainant was issued a confirming memorandum arising from an incident in April 2021 involving the manner in which an offender was treated. It was determined that Complainant, as the Duty Officer,

did not appropriately communicate her concerns to the Shift Commander and the Warden at that time, but at a meeting the following day, Complainant expressed her disagreement with a Behavioral Management Plan in a manner perceived as counter-productive.

6. On June 16, 2021, Complainant filed a petition for hearing with the State Personnel Board (Board) that included a Whistleblower Act complaint. In the petition, Complainant alleged that the June 2021 confirming memorandum was in retaliation for Complainant's reporting a policy violation directed by FCF's Warden, Siobhan Burtlow, involving the alleged mistreatment of an offender. The matter was set for preliminary review. However, Complainant failed to file an Information Sheet, and the ALJ issued an Order to Show Cause Why Petition Should Not Be Dismissed. Complainant filed a response to the Order to Show Cause, and wrote:

I did not file an information form out of fear of further retaliation. I understand that the more I push, the more I will pay through my evaluations, promotions, growth opportunities, assigned positions, daily interactions, and with each incident that occurs. None of which can be fought through the grievance process, courts, or the State Personnel Board. In addition, my presented concerns are documented and have been forwarded to appropriate parties. This is the professional obligation that I have to the offender population and State of Colorado.

Complainant's petition for hearing in this matter was dismissed due to Complainant's expressed wish to abandon her petition.²

Notice of Corrective Action – September 2022

7. On September 27, 2022, FCF's Warden Burtlow issued a Corrective Action to Complainant, arising out of Complainant's handling of an August 31, 2022, incident involving two offenders. Burtlow issued the Corrective Action after determining that Complainant failed to conduct a thorough investigation of the incident and failed to require staff to complete incident reports.

Complainant's Transfer to the Colorado State Penitentiary

8. On or about May 15, 2023, Complainant transferred from FCF to the Colorado State Penitentiary (CSP) in Cañon City.

9. CSP is a Level V correctional facility primarily incarcerating high-risk, violent offenders and those who pose a flight risk.

10. Complainant was a Swing Shift Commander from May 15, 2023, to November 30, 2023. Complainant was reassigned from the Swing Shift Commander

² The ALJ takes judicial notice of Complainant's 2021 petition for hearing and Whistleblower Act complaint from the Board's files pursuant to Colorado Rule of Evidence (C.R.E.) 201.

position to the Security Support Services Captain position on December 1, 2023, at her own request.

11. Complainant's duties as a Security Support Services Captain at CSP included, but were not limited to, responding to all incidents; oversight of breaching and breach training³; oversight of the Emergency Response Team (ERT), Locksmith, Recreation, and Armory; and oversight of communications between shift commanders.

12. Major Chance Turner became Complainant's supervisor when Complainant became the Security Support Services Captain. Warden Stephanie Sandoval was Complainant's appointing authority at CSP.

13. In her job performance evaluations, Complainant was consistently rated as satisfactory or above.

14. Complainant is straightforward and blunt in her communications with others and directly addressed issues that she perceived needed addressing. Not all DOC employees looked favorably on Complainant's communication style.

Complainant's Performance Evaluations from May 1, 2023 through Mid-March 2024

15. In Complainant's job performance evaluation for the review period of May 1, 2023 to July 31, 2023, written by her then-supervisor Major Christopher Thompson, Complainant received an overall rating of Level III out of V (Effective), with a Level IV rating (Highly Effective) in the core competency of Accountability/Organizational Commitment. The narrative for her overall rating included the following comment: "Captain Londenberg has only been at CSP for a short time, but I believe she is going to make a large positive impact on the work culture."

16. Complainant's mid-year job performance evaluation in mid-March 2024, written by Major Turner, rated Complainant overall at Level III (Effective), with ratings of Level IV (Highly Effective) in the competencies of Accountability/Organizational Commitment and Job Knowledge.

April 24, 2024, Conversation between Complainant and Captain Montano

17. On April 24, 2024, Complainant had a conversation about Lieutenant Jordan Powell with Powell's supervisor, Captain Charles Montano, who had transferred to CSP on or about March 1, 2024. Complainant supervised the Emergency Response Team (ERT), and Powell had applied for that team. During that conversation, Montano expressed to Complainant his concern that Powell was capable of becoming angry, getting angry to the point of blowing up, and possibly resorting to physical manifestations of anger.

³ "Breach" refers to any incident where the safety and security protocols of a correctional facility are compromised.

April 25, 2024, Incident (hereinafter, “the April 25th Incident”)

18. On April 25, 2024, at or around noon, there was a fight with weapons between two offenders in the “C” pod, one of CSP’s housing units. Powell was the Lieutenant in charge of C pod (also referred to as “C unit,” “Charlie pod,” or “Charlie unit”).

19. First responders were called to the unit, and order was restored.

20. Complainant, as the Security Support Services Captain, was one of the first responders to report to C pod, along with Turner and Captain Martinez.

21. Complainant performed an inspection of C pod and found that day hall 8 was in significant disarray. Complainant surmised that another incident may have occurred in day hall 8 in addition to the offender fight in C pod.

22. Complainant summoned Powell, and Montano as Powell’s supervisor, to report to C pod.

23. When Powell returned to C pod, Complainant asked him about the condition of day hall 8. Powell explained that an offender had acted out that morning but that he would take care of putting day hall 8 back together.

24. This conversation between Complainant and Powell appeared cordial, but Powell was agitated by it because he thought Complainant was nit-picking and questioning his leadership abilities. He also thought that the timing of her inquiry was inappropriate given the offender fight in C pod. However, Powell did not appear outwardly agitated by Complainant’s inquiry.

25. Shortly after the conversation between Complainant and Powell, Turner asked Powell where his staff was. Powell became more agitated and stated, with a raised voice, “I’ve been posted,⁴ my staff are right here, this is all I’ve got to work with. If we staffed appropriately you wouldn’t have to ask that question.”

26. Powell then turned around and said words to the effect of, “Fuck this, we are always fucking short. That was a stupid question.” He then walked angrily away, grabbed the camera that had recorded the offender fight, stormed out of C pod, and walked towards his office, which was right outside of C pod, talking out loud to himself and cursing.

27. Montano witnessed Powell’s reaction to Turner’s question, perceived Powell as “super agitated,” and viewed that reaction as unprofessional and disrespectful to Turner.

⁴ According to DOC Administrative Regulation (AR) 300-13, a “post” is defined as a “location, an area, or an accumulation of tasks requiring surveillance, supervision, or control by employees specifically assigned.”

28. Montano followed Powell to Powell's office to address what had just occurred.

29. Once in Powell's office, Montano and Powell talked in raised voices. Both were standing, and the lights in the office were out.

30. Montano asked Powell what was going on, pointing out that Powell appeared calm earlier in the day but now was agitated and irritated. Montano explained that it was unprofessional to curse, and that Powell was an example to his unit. He told Powell that Turner would have no idea who was working in the unit and that is why he asked the question of Powell. Powell admitted that he had been wrong to react to Turner's question that way.

31. Powell was beginning to calm down, although the conversation between Powell and Montano continued to be loud.

32. At that point, Complainant passed by Powell's office and heard voices raised in the office. She stepped back and saw that both Powell and Montano were standing, and the office was dark.

33. Complainant had been taught that it was best to have two supervisors present when dealing with difficult or sensitive employee issues.

34. In addition, because of what Montano told Complainant the day before about Powell's potential to blow up and to even become physical when angry, and because she had witnessed Powell's angry response to Turner's question in C pod, Complainant stepped into Powell's office to support Montano.

35. When Complainant entered Powell's office, the door, which swung out towards the corridor, closed behind her and she stood near the hinge side of the door. To her immediate right was a chair. Complainant did not say anything when she first entered Powell's office, and she was calm.

36. Powell immediately became highly agitated again, felt threatened, and said words to the effect of, "I can't be here. I'm leaving."

37. There are conflicting narratives about what Complainant said after Powell stated that he was leaving. Complainant either said words to the effect that he didn't have to leave, or words to the effect that he could not leave.

38. Powell then moved towards the door, stating either words to the effect that "you can't stop me from leaving," or "are you gonna stop me?" With his left hand in his pocket, Powell grabbed the door handle to Complainant's left with his right hand, opened the door and exited the office. As he was exiting, his body made physical contact with Complainant.

39. Complainant did not have time to react to Powell's exit, and there was little room for her to move to her right because of the chair immediately to her right.

40. Complainant believed that Powell made contact with her intentionally in an attempt to intimidate her.

41. Complainant was triggered by Powell's physical contact with her. Complainant's mother had been physically brutalized by men, one of whom had murdered her.

42. After exiting his office, Powell walked down the hallway towards master control, cursing and saying things to the effect of, "You're not going to stop me from leaving my office, you can't stop me from leaving my office, this is bullshit. Fuck this."

43. Complainant followed Powell out of his office down the hallway, followed by Montano. Complainant told Powell to report to the Warden's office but then remembered that Warden Sandoval was not there that day. Complainant then told Powell to go to Associate Warden Carmen Estrada's office. Powell reached back and gave Complainant a thumbs up to acknowledge that he heard her, but he was not going to speak to her.

44. Estrada was on the phone when the trio arrived outside her office.

45. Complainant told Powell, "Have a seat."

46. Powell replied, "I'll stand."

47. Complainant then said, "Fine, just don't go anywhere, that's a directive. And it was not okay to make contact with me."

48. Powell replied, "Where am I going to go?"

49. At that point, Estrada opened her office door, and Complainant went into Estrada's office to provide Estrada a report of what had just occurred.

50. At some point while in Estrada's office, Complainant looked at her left arm and noticed an abrasion or a scrape caused by Powell's contact with her as he was exiting his office. Complainant believed that Estrada saw that abrasion, but it is unclear whether Estrada noticed it or not. While Complainant was looking at her left arm, Estrada asked her if she was okay. This led Complainant to believe that Estrada was commenting on the abrasion or scrape on her arm.

51. Complainant only briefly told Estrada what had occurred. Estrada told Complainant that she would get back with Complainant before the end of the day to interview her more fully.

52. After Complainant spoke with Estrada, Complainant left Estrada's office and wrote a confidential report before she left for the day. Complainant also filled out a DOC AR Form 100-29B (Workplace Violence Incident Report) because Powell made physical contact with her when exiting his office.

53. After Complainant left Estrada's office, Powell went into Estrada's office, accompanied by Montano. They were joined by Major James Larimore. Montano was present when Powell told Estrada and Larimore his version of his interaction with Complainant.

54. It is unclear why Estrada and Larimore permitted Montano to accompany Powell and to hear Powell's version of the incident. At hearing, Estrada admitted that it is not common to interview witnesses to an incident together.

55. After Powell recited his version of the events, Estrada told him to leave and write a confidential report.

56. Then, Estrada spoke with Montano with Larimore present. Montano essentially echoed Powell's narrative of his interaction with Complainant. Montano then left Estrada's office and wrote his own confidential report.

57. Before Complainant left work on April 25, 2024, Larimore stopped at Complainant's office and told Complainant words to the effect of, "Of course you had a right to go in there but maybe you shouldn't have.... You both made mistakes." Complainant viewed that comment as implying that she had asked for what had happened to her.

58. Estrada left that day before getting back with Complainant to interview her.

59. Complainant expected to speak with Estrada again that day because she had only briefly told Estrada what had happened. When Estrada did not call her to come to Estrada's office, Complainant looked for her, but Estrada had left for the day. Complainant placed her confidential report and her workplace violence complaint in Estrada's mailbox before leaving on April 25, 2024.

Complainant's Confidential Incident Report

60. In her confidential report of the incident, written after Complainant left Estrada's office on April 25, 2024, Complainant wrote, in pertinent part:

As I was leaving the unit I saw Captain Montano in a dark office with Lieutenant Powell. Lieutenant Powell was standing behind the desk and Montano was standing in front of it. On April 24, 2025 [sic] I spoke with Captain Montano after he spoke with Lieutenant Powell about Special Teams. In our conversation Captain Montano stated he was hesitant to sign off of Powell because of his history and attendance. He said that Powell has a history of blowing up and implied that he may have a history of getting physical when he gets mad. With this in mind and due to their postures, I stepped into the office with them and stood at the door. At this time Captain Montano said "you don't have to do this". Powell quickly escalated and said "do what, what am I doing". His posture and tone were escalating. I then stated "what you are doing now". He was postured up and then walked towards me to leave the

office, saying something like “fuck this”. As he was moving towards me I told him that he didn’t need to leave. He then asked me “what are you going to stop me” and something like “how are you going to stop me, stand in my way”. I had no and was taken back as he then pushed past me scraping his body across mine as he pushed out the door. This happened in a matter of seconds.

I then followed behind him and directed him to go to the Associate Warden’s Office. While walking to the Associate Warden’s Office he kept saying “fuck this”. I then told him again to go the Associate Warden’s Office he tried to go in the office but the door was locked. I told him to sit in one of the chairs by her office and told him that making physical contact with me was not okay. He told me that he would not sit but would stand. He remained highly confrontational at this time. I told him that was fine but he wasn’t to leave the area. He then asked me “where am I gonna go”. I then stepped in Associate Warden Carmen Estrada’s office and briefed her on what happened, while Captain Montano stayed with Lieutenant Powell.

Powell’s Confidential Report

61. Powell’s confidential report, written after he and Montano left Estrada’s office on April 25, 2025, was as follows, in its entirety:

On 4/25/24 at approximately 12:30pm I, Lieutenant Powell was working my assigned area in C pod when 1st responders were called to the unit. After the situation was handled and the inmates involved were restrained Captain Londenburg [sic] called me on the radio to return to the unit while I was on an escort to intake. I returned to the unit, and she asked me about trash in C pod dayhall 8 floor. I told her that we will take care of it. I got agitated by the question because I felt this was not an appropriate time to address trash on the day hall floor. In my perception she was knit [sic] picking my unit and questioning my leadership. I then walked away from her and started addressing my unit staff and Major Turner asked me where all my staff was. I told him that all my staff was right here and I had one staff member on an escort. After that question I grabbed a body camera that recorded the fight and headed to my office. I said to myself but out loud if we staff appropriately we could have more staff. I then exited my unit and went into my office to attempt to calm down and download video footage of the incident. Captain Montano followed me into my office and could tell I was upset and proceeded to calm me down by talking to me respectfully. Captain Londenburg [sic] then came into my office during Montano and I [sic] conversation and stood in front of the door. I could tell that she was upset and I did not want any further conflict as I was just calming down. I said I’m going to leave, meaning leave the office because I know that I will say things I will regret. So it’s best to remove myself from the situation. Londenburg [sic] told me that I cannot go and stood in front of

the office door. I immediately felt threatened by that statement and her actions. I said you cannot stop me and reached for the door handle and side stepped out of my office. I cannot remember how I exited my office but one hand was in my pocket and with the other hand I opened the door while my body bladed and side stepped out the door. Captain Montano did inform me that I made slight contact with captain [sic] Londenburg [sic], in no way was it malicious or ill intent. I just needed to get out of my office. Once I was out of my office I started to walk down the hallway again talking to myself out loud saying you can't keep me in my office and I was cussing. Captain Londenburg [sic] told me to go to the wardens [sic] office then said go to the AW office and I gave her a thumbs up acknowledging that she was speaking to me. Once we were outside the AW office she told me to sit down and I told her I'm going to stand. She then told me it's not a request and to sit down it's a directive. She then just said just don't go anywhere and I said where am I going to go. She entered the AW office and shut the door. I do accept and realize how I conducted myself was wrong. I apologize for it. For almost two years I have been here at CSP I have not had an incident like this. I know that I have things to work on and Captain Montano and I have talked about ways to cope and deal with situations. I am better than this and again I apologize.

Montano's Confidential Report

62. Montano's confidential report, written after he and Powell left Estrada's office on April 25, 2024, stated that while Montano was calming Powell down in Powell's office, Complainant stepped into the office, which agitated Powell, who said something to the effect of, "I can't be here right now, I'm leaving." Complainant replied, "No, you're not," to which Powell replied, "You can't stop me." Powell then left the office by blading his body to get between Complainant, who was standing in front of a portion of the door, and the door frame. Complainant did not move out of the way. Powell started walking toward Master Control, talking to himself, saying, "You can't stop me from leaving, fuck this." Complainant followed Powell, followed by Montano. Montano added that when they were outside of Estrada's office, Complainant "instructed" Powell to have a seat, to which Powell replied, "I will just stand." Montano wrote that Complainant then said, "This is not a request, it's a directive," before Complainant entered Estrada's office. Montano does not mention that Complainant told Powell not to leave the area just before she went into Estrada's office.

Confidential Incident Reports Sent to DOC's Office of Inspector General

63. Estrada reviewed the confidential incident reports and Complainant's workplace violence complaint and sent the documents to Warden Sandoval and to Scott Smith of DOC's Office of Inspector General (OIG), for a potential Professional Standards (PS) investigation of Complainant's workplace violence complaint.

Complainant's Meeting with Estrada on April 30, 2024

64. On April 30, 2024, Complainant met with Estrada about the April 25th Incident, and Complainant's workplace violence complaint.

65. Estrada asked Complainant whether she trapped Powell in his own office and whether it was unlawful detainment. She also asked Complainant, "Did you ever think maybe they didn't want you in there?"

66. In response to Estrada's accusations, Complainant asserted that Estrada was grasping at straws.

67. Estrada did not ask Complainant to provide her with Complainant's narrative of the April 25th Incident.

OIG Investigation of Complainant's Workplace Violence Complaint

68. On May 1, 2024, Shayne Corey, an OIG Criminal Investigator, was assigned to investigate Complainant's workplace violence complaint. This matter was assigned case number PS2024001044.

Corey's Interview with Complainant on May 1, 2024

69. On May 1, 2024, Corey interviewed Complainant for 30 minutes at CSP. Her report to Corey tracked the contents of her confidential incident report.

70. During that interview, Complainant reported that when Powell exited his office and made contact with her, he scraped her arm, probably from his equipment.

Corey's Interview with Montano on May 1, 2024

71. Corey interviewed Montano on May 1, 2024, for 16 minutes at CSP.

72. Montano reported that Powell said "Fuck this, we are always fucking short" in response to Turner's question about the whereabouts of Powell's staff.

73. Montano expressed his belief that Powell was unprofessional and disrespectful towards Turner when responding to Turner's question.

74. Montano failed to mention that that Powell was cursing to himself out loud as he left to go to his office.

75. Montano alleged that Powell did not say anything negative about his earlier interaction with Complainant about day hall 8.

76. Montano reported that Complainant said, "You're not leaving anywhere."

77. Montano alleged that after Powell declined the offer to take a seat outside Estrada's office and said he would stand, Complainant said, "That's not an option, you're gonna take a seat. That's a directive."

78. Montano alleged that Powell made no disrespectful or rude comments about Complainant.

79. Montano made no mention of Complainant crossing her arms after she entered Powell's office.

80. Montano mentioned that Complainant told Powell outside Estrada's office that it was not okay to make physical contact with her

81. Corey did not ask, and Montano did not mention, what was discussed in Estrada's office with Montano, Estrada, and Larimore.

82. Corey did not ask about, and Montano did not report, the conversation between Montano and Complainant on April 24, 2024, about Powell's propensity to blow up and get angry.

83. At the end of the interview, Corey told Montano, "I really appreciate your honesty. You really take care of business and I appreciate that."

Corey's Interviews with Powell on May 2 and 3, 2024

84. Corey interviewed Powell at CSP on May 2, 2024. The interview was meant to be recorded; however, the recording ended at 3 minutes and 25 seconds in what turned out to be a 40-minute interview, ostensibly because the battery of Corey's recorder died. Neither Corey nor Powell noticed that the recording had stopped.

85. On May 3, 2024, Corey interviewed Powell again, this time by telephone, and this 14-minute interview was recorded.

86. At the outset of the interview, Corey informed Powell that he wanted to record Powell's statements about the events of April 25, 2024, because, "To be honest with you, we're potentially talking about another staff member, not you of course, that may have been involved in maybe some untrue statements, okay?"

87. Powell's statements during the May 3, 2024, interview added details that were omitted from Powell's confidential report of April 25, 2024, and omitted others.

88. Powell admitted, for the first time, that he was short with Turner and that his conduct in response to Turner's questioning him could have come across as disrespectful.

89. Powell admitted, for the first time, that he raised his voice to Turner.

90. Powell admitted, for the first time, that he was talking loud exiting towards his office after Turner questioned him but added that he did not remember what he was saying as he exited C pod.

91. Powell alleged, for the first time, that Complainant had her arms crossed when she entered Powell's office.

92. Powell admitted that when she entered his office, Complainant stood on the hinge side of the door.

93. Powell alleged, for the first time, that, after he said he was leaving, Complainant replied, "You're not going anywhere."

94. Powell alleged that Complainant blocked the door to his office.

95. Powell stated that he did not feel like Complainant was unlawfully detaining him.

96. Powell admitted that, outside Estrada's office, Complainant told him to "have a seat," and that it was more like a directive. This statement conflicts with Powell's statement in his confidential report that when Complainant told him to have a seat and he said he'd stand she replied, "it's not a request, it's a directive."

97. In response to Powell's statement that his reaction to Turner's questions could have come across as disrespectful, Corey replied, "It didn't for him. I spoke with him, and he told me he knew what was going on there, he knew you were shorthanded, and he didn't take it as disrespect in any way, shape, or form."

98. Corey told Powell that he spoke with Turner the day before and that Turner "actually helped me out a bunch in the direction I was aiming on this particular situation."

99. Before ending the interview, Corey told Powell, "Thank you for your honesty and your integrity. . . . sounds like you got wrung through the ringer there a little bit and then I was told you went back and hid a hell of a job the rest of the day, so good job on that. . . . You managed to deal with some BS and took care of business on top of it, so that's very much appreciated."

100. Corey did not ask, and Powell did not report, that Montano accompanied him to Estrada's office and heard his narrative of the interaction with Complainant.

101. Corey did not ask, and Powell did not report, about what Powell told Estrada and Larimore in Estrada's office on April 25, 2024.

Powell's Temporary Assignment to Another DOC Facility

102. On May 2, 2024, Powell was temporarily assigned to another DOC facility. It is unclear when he was returned to CSP, but his re-assignment was no longer than a week or two.

Corey's Interview with Major Turner on May 2, 2024

103. On May 2, 2024, Corey telephoned Turner. Their conversation was not recorded or, if it was recorded, the recording was not offered in evidence. Corey asked Turner if he felt Powell was being disrespectful in any way during Turner's conversation with Powell on April 25, 2024, about the whereabouts of Powell's staff. Turner said "no."

104. During Corey's telephone interview with Powell on May 3, 2024, Corey stated, with respect to Corey's conversation with Turner on May 2, 2024, "He actually really helped me out a bunch in the direction I was aiming on this particular situation." That part of the conversation between Corey and Turner was not reflected in Corey's investigative report. and it is unclear what Turner told Corey and what the direction Corey was aiming for in his investigation.

Corey's Follow-Up Interview with Complainant on May 7, 2024

105. Corey conducted a follow-up interview with Complainant on May 7, 2024.

106. Corey characterized his need to interview Complainant again because of discrepancies between Complainant's narrative of the April 25th Incident and Powell's and Montano's narratives.

107. Corey pointed out to Complainant that Montano's narrative supported Powell's narrative more than Complainant's. Complainant pointed out that Powell and Montano spoke with each other when Complainant entered Estrada's office, and that Montano was present when Powell told Estrada and Larimore what happened, so it is not surprising that their narratives were similar.

108. Complainant denied telling Powell that he could not leave his office.

109. Concerning the issue of whether Complainant could have moved out of the way to avoid physical contact with Powell as he was exiting his office, Corey stated that, "I went and looked at that office and you were 100% right. There were two chairs right there beside you. You couldn't go much farther at all on the inside back that direction."

110. Complainant explained that she did not give Powell a directive to sit when she and Powell and Montano were waiting outside Estrada's office; she gave Powell a directive not to leave because Powell had already left two situations – C pod after Turner's question, and Powell's office when Complainant stepped in.

111. During the interview, Corey said this about Powell and the April 25th Incident:

He was posted that day too, behind, so he was not only the Lieutenant but in posted position, and he was behind and he was frustrated and I even called Turner and asked Major Turner. My understanding went sideways, said, "Well, I don't take it that way. Based on his circumstances, I didn't take it as him being disrespectful." And I know

Turner pretty well and I know him to be a very nice guy, very tolerable [sic] about a lot of stuff, things that you and I might not tolerate.

Neither Estrada nor Larimore Interviewed by Corey

112. Corey did not interview Estrada or Larimore.

Corey's OIG Investigative Report

113. Corey completed his investigative report on May 10, 2024. In his report, he summarized his interviews with Complainant, Powell, and Montano. His summary follows:

There were multiple inconsistencies in several areas of the Confidential reports provided as well as interviews conducted.

The first inconsistency was between Capt. Londenbergs report and differed considerably from what both Lt. Powell and Capt. Montano reported. Powell and Montano's reports were extremely similar and they were all three present during the primary allegations of this investigation.

Capt. Londenberg reported after entering the Lt's office to stand by due to both Powell and Montano were standing and there was elevated communication, Powell advised he was leaving the office and Londenberg reported she advised him "you don't need to leave." Both Powell and Montano reported in their reports and interviews to which [sic] Londenberg clearly advised Powell that he was not leaving the office.

Capt. Londenberg reported as Lt. Powell exited the office, Powell pushed past her scraping his body across hers as he pushed his way out of the office making physical contact with her. Powell did not recall touching Londenberg but advised he was later told by Capt. Montano he did indeed make contact.

Both Lt. Powell and Capt. Montano advised if Capt. Londenberg would have moved slightly or bladed her body, there would have been no contact as she stood in the way of Powell's exit.

Upon arriving to the Administrative area, Londenberg reported she told him to sit in one of the chairs outside of AW's office. She advised she did not give him a directive to be seated, rather she gave him a directive to not leave the area.

Both Lt. Powell and Capt. Montano reported Capt. Londenberg provided Powell with a directive to be seated to which he declined.

Lt. Powell took full ownership of his rude and unprofessional behavior even during the initial arrival to the Pod by Capt. Londenberg and with his brief contact with Major Turner.

114. Corey's Investigative Report did not determine who, if anyone, was being untruthful about the April 25th Incident.

115. Corey's Investigative Report did not determine whether Complainant was the victim of workplace violence.

Complainant Alone Placed on Administrative Leave and Referred to DA

116. On May 20, 2024, Sandoval telephoned Complainant and advised her that she was being placed on paid administrative leave. Sandoval told Complainant that OIG and a District Attorney were handling the matter, and that Complainant may have violated the *Brady* rule⁵ and could be charged with two misdemeanors.

117. In a letter dated May 20, 2024, Sandoval informed Complainant that Sandoval was placing Complainant on paid administrative leave effective May 21, 2024. Sandoval wrote, in pertinent part:

I am granting administrative leave pending review of the Office of the Inspector General Professional Standards case #2024001044, as it pertains to the incident that occurred on April 25, 2024, that may have violated Administrative Regulations 1450-01, *Code of Conduct*, and 1150-20, *Brady Reporting and Disclosures*. Due to the serious nature of the allegations, you will remain on paid administrative leave until the completion of the investigation.

118. There is no evidence that either Powell or Montano were placed on administrative leave or disciplined.

119. The District Attorney to whom Complainant's possible violations were sent did not pursue any criminal charges against Complainant.

Sandoval's Delegation of Appointing Authority to David Lisac

120. On June 7, 2024, Warden Sandoval delegated appointing authority to David Lisac, DOC's Assistant Director of Offender Services, "to handle a specific personnel matter related to Gwendolyn Londenberg The matter has already been investigated by the Office of Inspector General, PS Case # 2024001044."

⁵ In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *People v. James*, 40 P.3d 36, 49 (Colo. App. 2001), the Colorado Court of Appeals explained that, "Exculpatory evidence includes evidence that bears on the credibility of a witness the prosecution intends to call at trial."

Notice of Board Rule 6-10 Meeting Set for July 9, 2024

121. On June 24, 2024, Lisac sent Complainant a notice of a Rule 6-10 meeting scheduled for July 9, 2024. In the letter, Lisac wrote,

At this meeting, we will discuss the information that causes me to believe that disciplinary and/or corrective action may be appropriate. This information includes, but is not limited to the following: Your involvement in an incident which occurred at Colorado State Penitentiary on April 25, 2024 surrounding allegations of unprofessionalism and antagonistic behaviors exhibited by you which may be violations of the following Administrative Regulations: 100-01 *Administrative Regulation Process*, 100-29 *Violence in the Workplace*, 1450-01 *Code of Conduct*, 1450-05 *Unlawful Discrimination/Discriminatory Harassment*. Additional issues may be addressed if I receive further information prior to the meeting.

122. The notice of the Rule 6-10 meeting was originally drafted by Sandoval and included an allegation of a possible *Brady* violation. However, Lisac deleted that reference to *Brady* because, according to his testimony at hearing, he did not know if the facts supported that allegation.

First Board Rule 6-10 meeting – July 9, 2024

123. Lisac, accompanied by his representative, Associate Director Jeremy Brandt, held the first Board Rule 6-10 meeting with Complainant on July 9, 2024.

124. At the beginning of the Rule 6-10 meeting, which was recorded, Brandt outlined the issues to be addressed based on Corey's OIG Investigative Report and the confidential reports by Complainant, Powell, and Montano.

125. The information reviewed by Lisac indicated that Complainant's narrative was not corroborated by the narratives of Powell and Montano, "suggesting selective omissions on [Complainant's] part or integrity issues with Montano and Powell."

126. In response, Complainant explained the conversation she had with Montano on April 24, 2024, concerning Powell's anger potential, Powell's blow-up in reaction to Turner's question on April 25, 2024, and her intent to offer support for Montano when he was in Powell's office immediately afterwards.

127. Complainant denied crossing her arms when she stepped into Powell's office. She also denied giving Powell a directive to sit when they were outside Estrada's office. She did give him a directive to not go anywhere when Complainant entered Estrada's office. She denied blocking the door of Powell's office.

128. Complainant pointed out the discrepancies and changes over time in Powell's and Montano's narratives, while her narrative did not change.

129. Lisac expressed his situation as the delegated appointing authority as follows: “I have a singular person making a statement and I have two individuals making a statement both that were present for and witness to that don’t corroborate with the other one. So, it’s one of two scenarios: these two are making up stories or colluding or you [Complainant] are not telling the truth of the matter.”

130. Complainant told Lisac that Turner’s expressed view that Powell had not been rude to him was in accord with Turner’s “rule that he doesn’t see anything and he has verbally expressed that to me before.”

Lisac Unable to Determine Who is Untruthful

131. In his quest for the truth, Lisac found the Corey’s OIG Investigative Report essentially useless because, in Lisac’s words, “The final conclusion was there were discrepancies between staff. The only thing that it really affirmed was that somebody was not being truthful although it didn’t point you in the direction of where you should go next.”

132. After listening to all the witnesses after the first Rule 6-10 meeting, Lisac found himself in the same place, in “stalemate,” because all the witnesses seemed credible.

Lisac’s Request that Complainant Submit to a Polygraph Examination

133. In his own words, Lisac “requested a polygraph to put [me] in the direction, to break the stalemate.” As he also explained, “the main reason I asked for [the polygraph] was to essentially kind of start pointing me in the right direction that who may be potentially being deceitful with me as I felt both parties were credible.”

134. On July 17, 2024, OIG polygrapher John Bradburn contacted Complainant and scheduled Complainant’s polygraph examination for July 18, 2024.

Complainant’s Polygraph Examination

135. Complainant was given a polygraph examination on July 18, 2024.

136. In his Polygraph Examination Report, Bradburn characterized the impetus of the polygraph examination as follows: “It was alleged that Capt. Londenbergh had departed from the truth during an administrative investigation, an allegation she denied.”

137. The three test questions asked of Complainant during the polygraph examination were:

- Did you order that man to sit down?
- Did you order that man to sit down in a chair?
- Did you tell that man that he could not leave the office?

138. Complainant answered “no” to each of the test questions.

139. Complainant's answers to the test questions resulted in a finding of "Deception Indicated."

Lisac's Reliance on Complainant's Polygraph Examination Results

140. Complainant's polygraph examination results were for Lisac, in his own words, "a compass of which direction I need to proceed in . . ."

141. Once Complainant took the polygraph examination on July 18, 2024, Lisac was convinced that Complainant was being untruthful.

142. Lisac's conclusion that Complainant was untruthful in her statements regarding the April 25th Incident was based on the results of the polygraph examination administered to Complainant on July 18, 2024.

Neither Powell Nor Montano Subjected to Polygraph Examinations

143. Neither Powell nor Montano was subjected to a polygraph examination.

144. Lisac testified that it was OIG's decision to not give Montano or Powell a polygraph examination after OIG obtained the results of Complainant's polygraph examination.

Lisac's Interview with Powell on July 19, 2024

145. Lisac interviewed Powell on July 19, 2024. The interview was recorded; however, the recording started late and ended abruptly.

146. Powell admitted, for the first time, that he was annoyed on April 25, 2024, when Complainant told Montano about the disarray in day hall 8.

147. Powell admitted that he yelled at Turner after Turner asked him about the whereabouts of his staff.

148. Powell admitted, for the first time, that he was talking loudly with Montano in Powell's office.

149. Powell admitted, for the first time, that he criticized Complainant to Montano when talking in Powell's office for addressing the issue of day hall 8's disarray when there was just a fight between offenders with weapons. Powell referred to Complainant's questioning him regarding the state of day hall 8 as "ridiculous."

150. Powell did not report that Complainant said words to the effect of "I'm giving you a directive to sit down."

151. Lisac did not ask, and Powell did not report, that Complainant told him it was not okay to make physical contact with her.

152. Lisac did not ask, and Powell did not report, that Montano accompanied him to Estrada's office and heard his narrative of the interaction with Complainant.

153. Lisac did not ask, and Powell did not report, about what Powell told Estrada and Larimore in Estrada's office on April 25, 2024.

Lisac's Interview with Montano on July 19, 2024

154. Lisac interviewed Montano on July 19, 2024. The interview was recorded but the recording started late.

155. Montano alleged that he and Powell were not talking loudly in Powell's office on April 25, 2024.

156. Montano mentioned, for the first time, that Complainant had her arms crossed after she entered Powell's office.

157. Montano reported, for the first time, that after Complainant entered Powell's office, Powell said, "I got to get the fuck out of here."

158. Montano alleged, for the first time, that Complainant said, "You're not going anywhere," matching the phrase reported by Powell to Corey in May.

159. Montano alleged that, as he and Complainant and Powell were waiting outside Estrada's office, Complainant said to Powell, "I'm giving you a directive. You will sit down. That's a directive."

160. Lisac did not ask about, and Montano did not mention, his conversation with Complainant on April 24, 2024, about Powell's propensity towards angry blow ups.

161. Lisac did not ask him about, and Montano did not mention, what was discussed in Estrada's office with Powell, Estrada, and Larimore.

Lisac's Interviews with Turner and Estrada – Not Recorded

162. Lisac interviewed Turner but did not record that interview. As Lisac described the interview in his disciplinary letter of October 15, 2024:

I interviewed Maj. Turner about his policy of "not seeing" negative staff performance and behaviors. Maj. Turner stated he never made those statements and is continually involved in personnel actions. Specifically related to the incident which occurred on April 25, 2024, regarding his negative interaction with Lt. Powell in the unit, Maj. Turner stated Lt. Powell's action was unprofessional and any accountability is pending the outcome of the investigation.

163. Lisac also interviewed Estrada “to seek information on the abrasion on your [Complainant’s] arm as a result of Lt. Powell’s actions,” but did not record this interview. As Lisac described the interview in his disciplinary letter of October 15, 2024:

I also interviewed Associate Warden Estrada at your request to seek information on the abrasion on your arm as a result of Lt. Powell’s actions. When questioned on this information, AW Estrada stated that discussion never occurred and you never presented any injury or abrasion to your forearm to her as a result of the incident. AW Estrada also stated that information was also never listed in any incident report by you. You then asked if AW Estrada recalled asking if you were okay; I again spoke to AW Estrada and she confirmed she did ask if you were okay because you were visibly upset; however, AW Estrada stated there was no discussion related to your arm.

Reconvened Rule 6-10 Meeting and Aftermath

164. On August 2, 2024, Lisac emailed Complainant with a notice that the Rule 6-10 meeting would be reconvened on August 12, 2024.

165. In the notice, Lisac indicated that the information that caused Lisac to consider disciplinary or correction action included:

Your involvement in an incident which occurred at Colorado State Penitentiary on April 25, 2024 surrounding allegations of unprofessionalism and antagonistic behaviors exhibited by you which may be violations of the following Administrative Regulations: *100-01 Administrative Regulation Process, 100-29 Violence in the Workplace, 1450-01 Code of Conduct, 1450-05 Unlawful Discrimination/Discriminatory Harassment.*

166. Lisac conducted the reconvened Rule 6-10 on August 12, 2024, alleging that he had received additional information and wanted to give Complainant the opportunity to respond.

167. The additional information Lisac provided Complainant included, (1) Turner’s denial that he made the statement regarding his personnel policy; (2) Estrada’s denial of having seen an abrasion on Complainant’s arm; (3) the polygraph results indicating that Complainant was deceptive; (4) the fact that Complainant did not include a reference to her arm abrasion in her confidential incident report; (5) evidence of Complainant’s pattern of antagonistic conduct; and (6) contradictions of Complainant’s statements by Powell, Montano, Estrada, and Turner.

168. In response, Complainant affirmed that she was being truthful, and that the reason she was not believed was because she is a female.

169. Lisac testified that he spoke again with Powell and Montano during the week of August 12, 2024, presumably after Complainant’s second Rule 6-10 meeting, but he

did not record those conversations and there is no evidence that he learned any relevant information from those conversations.

Complainant's Additional Information After Second Rule 6-10 Meeting

170. On August 19, 2024, Complainant submitted an eight-page letter to Lisac outlining the “multiple contradictions in [Powell’s] and Montano’s reporting.”

171. In that letter, Complainant also requested that Lisac ask Montano about the April 24, 2024, conversation about Powell’s anger issues. There is no evidence that Lisac acted on that request.

Complainant's Discrimination and Retaliation Complaint and Investigation

172. On July 16, 2024, Complainant submitted a discrimination and retaliation complaint to DOC Executive Director Stancil. After explaining the April 25, 2024 Incident and the subsequent investigations focused on Complainant’s conduct and comments, Complainant expressed her belief “that I am experiencing discrimination (disparate treatment) and bias based on my gender at the facility level. . . . Now I am being accused of being unprofessional, violating Brady, discrimination/harassment, and violence in the workplace. None of which is accurate. I believe I am experiencing the backlash of selective bias, retaliation, and discrimination based on my gender and the nature of the complaint made.”

173. After Complainant submitted her discrimination and retaliation complaint to Stancil on July 16, 2024, Stancil forwarded Complainant’s discrimination and retaliation complaint to Meredith McGrath, Deputy Executive Director of Community Operations.

174. On July 23, 2024, McGrath spoke with Complainant over the phone about Complainant’s discrimination and retaliation complaint.

175. On August 13, 2024, McGrath sent Complainant a written summary of their July 23, 2024, phone call, which listed Complainant’s examples of sex discrimination she experienced or was made aware of at FCF and CSP.

176. McGrath forwarded Complainant’s complaint to DOC’s Office of Human Resources (OHR).

177. On August 16, 2024, Heather Tepley, Employee Relations Manager, sent a letter to Complainant acknowledging that OHR had received Complainant’s discrimination and retaliation complaint and that it would be assigned to an Employee Relations Specialist for investigation.

178. Tepley assigned Jennifer Banda, a Human Resources Specialist III, to investigate Complainant’s complaint.

179. Banda conducted her first interview with Complainant on August 23, 2024. It was Banda’s misunderstanding that the scope of the investigation would be limited to

the culture at DOC and CSP, and would not address the April 25th Incident, the subsequent Professional Standards investigation, or the Rule 6-10 meetings to which Complainant had been subjected.

180. In a series of email exchanges with McGrath on September 4, 2024, Complainant expressed her confusion and frustration that her discrimination and retaliation complaint arising from the April 25th Incident was not being addressed, although McGrath mistakenly thought that the April 25th Incident was being investigated by Banda.

181. On September 17, 2024, Banda conducted a second interview with Complainant, this time focusing on Complainant's allegations of sex discrimination arising from the April 25th Incident, including how DOC treated her and the subsequent investigations, as well as Complainant's performance evaluation dispute, discussed below.

182. Based on her own experiences and those of other female DOC employees about which Complainant became aware, Complainant believed that sex discrimination was prevalent within DOC generally, and CSP specifically. Complainant believed that there existed a culture of discrimination based on sex.

183. In her interviews with Banda, Complainant provided several examples of alleged sex discrimination Complainant had experienced or witnessed while at FCF and CSP:

- In 2019, while Complainant was working at FCF, then-Lieutenant R.B.,⁶ Complainant's supervisee at the time, shared with Complainant his belief that women "shouldn't be past the sliders" in correctional facilities, *i.e.*, should only work administrative or desk job, and should not be working directly with offenders. Complainant submitted a complaint based on R.B.'s comment and R.B. was given a corrective action in October 2019. Despite that incident and corrective action, R.B. was promoted to Captain in January 2020. Complainant viewed R.B.'s promotion as an example of DOC supporting sex discrimination.
- Complainant became aware of the following incident: On or about November 7, 2023, at CSP, Sgt. C.E. [male] informed Officer J.G. [female] that if she wanted to be equal to him, she would need to strip male inmates just like C.E. did. Complainant was informed of that comment, and informed Warden Sandoval. Sandoval attempted to hold a Rule 6-10 meeting with C.E., but he went out on FMLA leave until February 2024. C.E. was never held accountable for his inappropriate comment.
- Complainant perceived that female staff are discouraged from applying for security teams and are often placed in towers or at main security, away from inmates.

⁶ Individuals who are not directly involved in the material incidents of this matter are referred to by their initials to protect their privacy.

- In response to her attempts to maintain a more equitable balance between male and female roles at CSP, Complainant was accused of “bringing feminism in” by staff in a leadership role.
- Complainant alleged that CSP staff frequently mishandled DOC AR 1450-05, discrimination and harassment, complaints; specifically, staff failed to keep confidentiality, did not address complaints in a timely manner, retaliated against the complainant, and pre-determined guilt or innocence before an investigation was concluded.
- Complainant also was made aware of the following discriminatory conduct: In March 2024, Officer A.M. [female] transferred from the A unit or pod, one of CSP’s housing units, to Complainant’s team, after A.M. filed a complaint in February 2024 about her treatment while assigned to A pod. Officer A.M. informed Complainant that A.M. had difficulties with Lt. P.C. [male] and Sgt. A.T. [male], who constantly had issues with her and would degrade her. A.M.’s complaint alleged that after A.M.’s monthly cycle began unexpectedly and she bled through her pants, P.C. did not allow A.M. to leave the unit to retrieve the appropriate feminine products. A.M. alleged that an investigation into her complaint was delayed and that initial interviews conducted as part of the investigation focused on her own conduct rather than the conduct about which she complained. She also alleged that on A.M.’s first day working on A unit, Officer M.C. told her that she was a female who did not belong working at CSP. A.M. also alleged that her job performance evaluation, written by P.C. was retaliatory and P.C. had “warped” her timesheets. The remedy provided A.M. was the transfer to Recreation, under Complainant’s purview.
- Complainant alleged that during a sergeant’s meeting in May 2024, Captain C.M. [male] stated that inmates at CSP were “like females,” and needed everything explained to them.
- Complainant alleged that during a conversation with Captain C.M. [male], he admitted to her that he thought a lieutenant in his chain of command, Lt. P.C. [male] had acted discriminatorily toward Officer A.M. [female]. Complainant alleged that Lt. P.C. was not held accountable for his actions by Captain C.M.
- Complainant alleged that staff in leadership roles are pressured to not report issues and instead handle them individually to prove their leadership skills.
- Complainant alleged that female staff complaints are not taken as seriously as their male counterparts, particularly relating to how seriously workplace violence complaints between male staff are taken versus between female staff.
- Complainant alleged that Stancil and McGrath did not follow AR 1450-05 policy upon receiving her complaint of unlawful discrimination. Specifically, Complainant alleged that they failed to: provide a copy of the AR 1450-05 policy; ensure she understood her rights, particularly in regards to retaliatory behavior; obtain and

document as much information as possible regarding the complaint; forward the complaint to the appointing authority; confirm with her in writing that the form correctly and completely reflected her complaint; forward the complaint to OHR or OIG and advise such action had been taken; and take steps to provide immediate relief.

- Complainant alleged that Estrada retaliated against her for reporting that Estrada had not followed policy regarding AR 100-29, *Violence in the Workplace*, and discriminated against Complainant based on her sex by identifying Powell as the victim in the situation that occurred on April 25, 2024.
- Complainant further alleged that Estrada failed to follow up with her and failed to provide her with a copy of the appropriate policy.
- Complainant alleged that Turner retaliated against her by providing an evaluation rated lower than her previous review.
- Complainant alleged that Larimore discriminated against her based on her gender by making the statement, “you both [Complainant and Powell] made mistakes” on April 25, 2024.

184. As part of her investigation, Banda interviewed Complainant twice, and interviewed nine additional DOC employees identified by Complainant who were alleged to have been involved, as witness or victim or perpetrator, in incidents of sex discrimination or retaliation. Banda also reviewed documents associated with the incidents of alleged sex discrimination identified by Complainant.

185. Banda did not interview anyone other than Complainant regarding Complainant’s claim of sex discrimination arising from Respondent’s handling of the April 25th Incident. The only document Banda reviewed as part of her investigation of the April 25th Incident was Complainant’s confidential report.

186. Banda finalized her Investigative Report in late September or early October 2024.

187. With respect to Complainant’s contention that the handling of the April 25th Incident was discriminatory on the basis of sex, Banda’s investigation report did express a determination of whether that contention was established. However, at the evidentiary hearing, Banda testified that she had concluded that it was less likely than so that the April 25th Incident and its aftermath constituted discrimination on the basis of sex.

188. Concerning Complainant’s claim that Turner’s year-end job performance evaluation for Complainant was retaliatory, Banda concluded that because Complainant’s overall rating remained as a Level III (Effective), it was a positive review and therefore was not retaliatory.

189. On October 8, 2024, Banda's 1450-05 Investigative Report was forwarded to Mark Fairbairn, Deputy Director of Prison Operations, to review and discuss with Complainant.

190. On October 15, 2024, Complainant and Fairbairn spoke by telephone concerning the 1450-05 Investigative Report. Fairbairn told Complainant that, according to the Investigative Report, Complainant's allegations of sex discrimination/harassment and retaliation were not substantiated.

Complainant's Job Performance Evaluation Dispute

191. On or about August 31, 2024, Complainant was sent a copy of her performance evaluation for the review period November 2023 to June 30, 2024, drafted by Turner, who supervised Complainant from October or November 2023 until May 20, 2024, when Complainant was placed on administrative leave.

192. On September 12, 2024, Complainant disputed her evaluation, which she viewed as retaliatory. She also forwarded a copy of the dispute to Banda. In a written objection, Complainant compared Turner's mid-annual job performance evaluation signed by Turner on March 16, 2024, and the annual job performance evaluation signed by Turner on August 30, 2024. Complainant worked only two months after March 16, 2024. The only significant event that occurred between March 16, 2024, and May 20, 2024, was the April 25, 2024, incident that was still under investigation as of August 30, 2024.

193. Under Competency A. Accountability/Organization Commitment, Turner had written the following narrative in mid-March 2024 and rated her at Level IV (Highly Effective):

Capt. Londenberg's proactive approach to completing all tasks and supervising Lieutenants and areas assigned has led to actual practices aligning with operational practices. Captain Londenberg ensures that staff are held accountable, conducts regular meetings, and sets a deliberate direction to ensure expected performance meets operational practices. Captain Londenberg's dedication to meeting work schedules and reducing overtime demonstrates commitment. Captain Londenberg is always willing to take on additional assignments and is an invaluable team member. Captain Londenberg Volunteers to assist with training whenever possible. Captain Londenberg's highly exceptional performance has been recognized. Captains like Londenberg are critical to the success of CSP and the safety of its staff and offenders. Capt. Londenberg has proven valuable in filling the role of Shift Commander during the first part of this evaluation cycle, and continues to assist when needed.

194. However, in the evaluation he signed on August 30, 2024, Turner downgraded Complainant's rating for this competency to a Level III (Effective), and deleted the following parts of the narrative for his competency:

- “Captain Londenber is a highly exceptional performer who has consistently exceeded all performance objectives as the Security Support Captain at CSP.”
- “Captain Londenber’s dedication to meeting work schedules and reducing overtime demonstrates commitment.”
- “. . . and is an invaluable team member.”
- “Captain Londenber’s highly exceptional performance has been recognized. Captains like Londenber are critical to the success of CSP and the safety of its staff and offenders. Captain Londenber has proven valuable in filling the role of Shift Commander during the first part of this evaluation cycle, and continues to assist when needed.”

195. In her dispute about the changes in the rating and narrative for his competency, Complainant provided five sizable paragraphs detailing her significant achievements, innovations, and successes that were not mentioned in Turner’s August 2024 narrative for this competency. Complainant also noted that, “The only incident that occurred during the two months since my review, was the incident that is currently pending investigation.”

196. Under Competency B. Job Knowledge, Turner had written the following narrative in mid-March 2024 and rated her at Level IV (Highly Effective):

Capt. Londenber performs at a highly exceptional level in meeting objectives concerning this overall competency. Capt. Londenber ensures staff receive their required training within the necessary time frames. Capt. Londenber has a good understanding of emergency procedures through experience and mentoring. Capt. Londenber has assisted the Operations and Security Managers with Use of Force reviews, oversight on emergency management, inmate property, Violence Reduction and Prevention review, and facilitation of CTA student training. Capt. Londenber demonstrates a 360 perspective when supervising and organizing security based operations while in the capacity of the second shift commander.

197. In the evaluation he signed on August 30, 2024, Turner downgraded Complainant’s rating for this competency to a Level III (Effective), deleted the sentence, “Capt. Londenber performs at a highly exceptional level in meeting objectives concerning this overall competency,” and added the sentence, “Captain Londenber needs to gain more experience and knowledge with regard to Breach Training. Additional training with the Breach instructors are [sic] recommended.”

198. In her dispute about the changes in the rating and narrative for his competency, Complainant noted that she had handled breach situations many times

without further incident and had never been told before that she needed additional breach training. Complainant also again provided five sizable paragraphs detailing the knowledge she obtained in her roles as Shift Commander and Security Support Captain and the steps she took to increase efficiency and effectiveness in the various facility sub-groups, such as Armorer, Locksmith, Property, Volunteer Coordinator, Tool Control, and Recreations. None of Complainant's accomplishments associated with this competency were mentioned in Turner's August 2024 narrative.

199. Under the competency C. Communication, Turner had written the following narrative in mid-March 2024 and rated Complainant at Level III (Effective):

Captain Londenbergr demonstrates a consistent high level of professionalism, communication, and a commitment to duties. Captain Londenbergr communicate appropriately with others, listens and responds to others, provides accurate and timely information, and expresses ideas and information clearly. Captain Londenbergr has performed rounds throughout the facility, answered staff and inmate questions, provides security knowledge and correctional expertise. Captain Londenbergr effectively addressed questions and concerns, ensuring that accurate and timely information is provided to all parties involved. Overall, Captain Londenbergr's performance and communication skills have played a significant role in the success of the security team and Colorado State Penitentiary. Captain Londenbergr's professionalism, dedication, performance of duties, and tasks assigned presents an invaluable asset to the security team.

200. However, in the evaluation he signed on August 30, 2024, kept Complainant's rating for this competency at Level III (Effective), Turner rewrote the narrative as follows:

Captain Londenbergr communicates with peers and manages all necessary information promptly to support the facility's continued safe and efficient operations. Capt. Londenbergr visits all areas under her supervision weekly and is available to resolve staff and offender issues, demonstrating effective communication of policies and procedures. Captain Landenbergr communicates and reports to her immediate supervisor, however this Captain has not been consistent in communicating appropriately up the chain of command.

201. In her dispute about the changes in the narrative for his competency, Complainant provided explanations for two incidents that Turner may have been referring to when he charged Complainant with inconsistent communication up the chain of command. Further, Complainant detailed the ways in which she addressed ways in which communication among staff could be improved, and the successes she achieved in improving staff communications.

202. Under Competency D., Interpersonal Skills, had written the following narrative in mid-March 2024 and rated Complainant at Level III (Effective):

Captain Londenbergs performance has been exceptional, consistently demonstrating a high level of professionalism, leadership, and a commitment to promoting cooperation and teamwork. Captain Londenberg is effectively promoting a culture of respect, diversity, and inclusion, ensuring that all team members are treated fairly and without prejudice. Captain Londenbergs performance and leadership skills have played a significant role in the success of the security support team. Captain Londenberg handles conflict constructively, showing flexibility, and maintaining employee morale and motivation allowing staff to feel they are an invaluable asset to Colorado State Penitentiary. Captain Londenberg demonstrates an understanding of conflict resolution, and knows how to handle conflict constructively, competently, however Captain Londenberg should understand what audience is present when addressing staff. Building equity with staff through emotional intelligence can go a long way, and is a good tool for a leader.

203. However, in the evaluation he signed on August 30, 2024, Turner kept Complainant's rating for this competency at Level III, but deleted the following positive comments about Complainant's performance for this competency:

- "Captain Londenbergs performance has been exceptional, consistently demonstrating a high level of professionalism, leadership, and a commitment to promoting cooperation and teamwork."
- "Captain Londenberg is effectively promoting a culture of respect, diversity, and inclusion, ensuring that all team members are treated fairly and without prejudice."
- "Captain Londenberg handles conflict constructively, showing flexibility, and maintaining employee morale and motivation allowing staff to feel they are an invaluable asset to Colorado State Penitentiary."
- "Captain Londenberg demonstrates an understanding of conflict resolution, and knows how to handle conflict constructively, competently . . ."

204. In addition, Turner rewrote the following sentence by adding the final phrase, "Captain Londenbergs performance and leadership skills have played a significant role in the success of the security support team, however this is not consistent."

205. Turner also added the following sentence to this competency's narrative: "I expect Captain Londenberg to be more receptive to constructive feedback especially regarding emotional intelligence which was previously recommended."

206. In her dispute about the changes in the narrative for his competency, Complainant noted the steps she took in response to Turner's constructive feedback regarding emotional intelligence, including retaking the emotional intelligence course and

reassessing herself on April 16, 2024. Complainant also speculated about incidents or situations that Turner may have been referring to that raised issues of interpersonal friction. Complainant explained that she had successfully worked to resolve one of those situations and the other incident was the one arising from April 25, 2024, which was still under investigation with no determination as of August 2024.

207. Under Competency E., Customer Service, Turner had written the following narrative in mid-March 2024 and rated Complainant at Level III (Effective):

Captain Londenberg has demonstrated a consistent and effective commitment in treating staff and inmates without prejudice, addressing their needs in a timely manner. Captain Londenberg consistently keeps appointments and returns calls promptly, which has helped to establish a positive relationship with peers in other areas, and within the team. Captain Londenberg consistently demonstrates a willingness to offer appropriate and innovative solutions to issues, concerns and identified deficiencies. Captain Londenberg seeks out new ideas and technologies that can improve our services, and has been effective in implementing these solutions in a timely and cost-effective manner.

In addition, Captain Londenberg has been instrumental in creating a culture that fosters high standards of ethics. Captain Londenberg seeks to understand, value, accept, and appreciate differences, and has worked to promote a diverse workplace that is free from discrimination and harassment. Captain Londenberg has held subordinate staff accountable for the same, and have contributed to employee morale and motivation by promoting cooperation and teamwork. Captain Londenberg needs to build equity and pull from knowledge of emotional intelligence when addressing conflict. Captain Londenberg employs professional interpersonal skills to maintain smooth working relationships with staff. Overall, Captain Londenberg has been a positive force within the organization, promoting staff morale and professionalism through positive interaction with all staff. I expect Captain Londenberg to continue to maintain a high standard of ethics, and to work collaboratively with others to promote a positive, inclusive workplace environment. I expect Captain Londenberg to communicate more effectively ensuring continuity of direction, training, and assignments providing CSP and staff confidence in Security and its team.

208. However, in the evaluation he signed on August 30, 2024, Turner kept Complainant's rating for this competency at Level III, but rewrote the narrative for the competency as follows: "Captain Londenberg has used her skills to create work unit objectives that are clear, concise, and actionable, and have effectively communicate [sic] objectives to her team. Captain Londenberg has placed herself in two different situations that were unfavorable, and prevented equity in conflict resolution."

209. In her dispute about the changes in the narrative for his competency, Complainant objected to the deletion of all the positive contributions noted in the mid-March 2024 evaluation. Complainant also objected to the characterization of two situations or incidents as being unfavorable, and that she did anything that “prevented equity in conflict resolution.” As noted above, Complainant worked to resolve one of those situations and did so successfully. The other situation was the April 25, 2024, incident, still under investigation, with no determination made as of August 2024. In short, Complainant contended that there was no basis for Turner’s negative narrative.

210. Under Competency F, Performance Management, Turner had written the following narrative in mid-March 2024 and rated Complainant at Level III (Effective):

Captain Londenberg has demonstrated a strong commitment to meeting regularly with staff to ensure understanding, promote growth, and mentoring. They have consistently made themselves available to their team members, providing guidance and support as needed. Through these regular check-ins, Captain Londenberg has been able to identify areas where staff members need additional training or support, and has provided the necessary resources to help them succeed. Captain Londenberg has also maintained a high level of communication with staff, ensuring that everyone is up-to-date on important information and changes within the organization. Captain Londenberg has been effective in conveying complex information in a clear and concise manner, ensuring that everyone is on the same page. In addition, Captain Londenberg has been instrumental in promoting growth and development among security staff. Captain Londenberg has worked to provide opportunities for the security team to take on new responsibilities and develop new skills, and have been effective in identifying potential future leaders. Captain Londenberg has also demonstrated a commitment to ensuring accountability among subordinate staff. Captain Londenberg provides proper mentoring and counseling when necessary, and held team members to a high standard of performance. Through Captain Londenberg's leadership and guidance, the Security Support team has been able to create a cohesive and effective team that works well together to achieve organizational goals. Going forward, I expect Captain Londenberg to continue to prioritize regular communication, growth and development, and accountability among staff members.

211. In August 2024, Turner deleted the following positive comments:

- “They have consistently made themselves available to their team members, providing guidance and support as needed.”
- “Captain Londenberg has been effective in conveying complex information in a clear and concise manner, ensuring that everyone is on the same page.”

- “In addition, Captain Londenberg has been instrumental in promoting growth and development among security staff.”
- “Captain Londenberg provides proper mentoring and counseling when necessary, and held team members to a high standard of performance.”
- “Through Captain Londenberg's leadership and guidance, the Security Support team has been able to create a cohesive and effective team that works well together to achieve organizational goals.”

212. In addition, Turner deleted the words, “promote growth, and mentoring” from the first sentence of the narrative for this competency.

213. In her dispute about the changes in the narrative for his competency, Complainant objected to the omission of all the positive comments included in her mid-March 2024 evaluation.

214. For Complainant's overall rating as of August 2024, Turner rated Complainant at Level III, and wrote in his narrative:

Captain Londenberg has been on leave since about the middle of May. Captain Londenberg has encountered some challenges with staffing. The staffing issues are systemic to some leadership, conflict awareness, and equity decisions that were made by this Captain during her involvement in staff conflict situations. The commonality is personality, presentation, lack of empathy, support and understanding when immediate intervention is not necessary. Given Captain Londenberg's knowledge, experience and abilities this Captain should be able to navigate staff conflict management.

215. In her dispute about the narrative for her overall rating, Complainant objected to Turner's characterization of Complainant's approach to staff conflict situations as simply inaccurate.

216. On October 2, 2024, Complainant discussed her evaluation dispute with Warden Sandoval, who met with Turner on October 2, 2024, to discuss Complainant's concerns.

217. On October 7, 2024, Sandoval sent Complainant a letter detailing the changes made to Complainant's annual job performance evaluation. Those positive comments that were included in Turner's mid-March evaluation but were omitted in Turner's August 2024 evaluation were not restored in the revised evaluation, but some of Complainant's positive contributions were added, and her Level IV ratings for Accountability/Organizational Commitment and Job Knowledge were restored. In addition, the narrative for her overall rating was revised as follows:

Captain Londenberg has been on leave since about the middle of May. Captain Londenberg has encountered some challenges in her leadership, and communication style. Captain Londenberg has taken training to better understand and sharpen necessary skills. Captain Londenberg has demonstrated she is effective and has demonstrated the hard work and dedication required to supervise staff and effectively manage inmates at a level V facility. Captain Londenberg has effectively learned the duties and responsibilities in supervising her Lieutenants areas maintaining programmatic operations and doing so quickly and efficiently. Captain Londenberg has demonstrated a perseverance toward steady progress in adapting to Colorado State Penitentiary and progressively working to become highly effective in the future.

218. On October 10, 2024, after 5:00 p.m., Complainant filed a petition for hearing with the Board, alleging violations of CADA based on sex, harassment because of membership in a protected class, and retaliation. Complainant asserted that her year-end performance evaluation contained “derogatory statements about an incident that is still pending investigation. However, a decision on this investigation has not been determined as of yet. In addition, I believe that in retaliation for me reporting violence as a female my ratings were dropped, positive information was omitted, and derogatory information was added. I did submit a dispute resolution. Some changes were made that I still disagree with.”

219. This matter was assigned Board case number 2025G023.

Complainant's Employment Terminated

220. On October 15, 2024, Lisac issued a disciplinary letter to Complainant terminating her employment. Lisac based on his decision on his conclusions that Complainant was untruthful in recounting the events of April 25, 2024; was untruthful in alleging that Turner told her that his policy concerning personnel matters was to not acknowledge issues; and was hostile and antagonistic towards Powell on April 25, 2024, continuing a pattern of antagonistic behaviors towards subordinates.

221. Lisac concluded that Complainant had violated “performance expectations” in the following: DOC Administrative Regulation: 1450-01 *Code of Conduct*, Section IV, Subsections: A.1, A.3, A.6, A.8, B.1, B.2, C.1, C.7, E.1, E.2 and E.4; 1150-04 *Professional Standards Investigations* Section IV, Subsections: B.1.D and D.1 1150-20 *Brady Reporting Disclosures* Section IV, Subsections: A. D.4, D.5, D.7, D.9, D.10, E.1, F.1 and F.2; Code of Ethics Section II, A.1, A.2, A.3; Section III, A and B; Complainant's performance plan,, Competency (A – Accountability/Organization Commitment, B- Job Knowledge, C- Communication, D Interpersonal Skills and State Personnel Board Rule 6-12, 1. Failure to perform competently; 2. Willful misconduct; 3. Failure to comply with Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other departmental directives; 6. False statements or omissions of materials facts during the course of employment; 7. Violence or threats of violence; a. “Violence” means any act of physical, verbal, or psychological aggression. “Violence” includes

destruction or abuse of property by an individual; b. “Threat” may include a veiled, conditional or direct threat of violence in verbal, written, electronic, or gestural form, resulting in intimidation, harassment, harm, or endangerment to the safety of another person or property.

222. Complainant timely appealed the termination of her DOC employment.

223. Complainant’s appeal of her employment termination was consolidated with her petition for hearing objecting to her August 2024 performance evaluation under Board case number 2025B030(C).

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause based on constitutionally-specified criteria. Colo. Const. Art. XII, §§ 13-15; C.R.S. § 24-50-101, *et seq.*; *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Just cause for disciplining a certified state employee is outlined in Board Rule 6-12 and generally includes:

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;
5. False statements or omissions of material facts during the application process for a state position;
6. False statements or omissions of material facts during the course of employment;
7. Violence or threats of violence: a. “Violence” means any act of physical, verbal, or psychological aggression. “Violence” includes destruction or abuse of property by an individual. b. “Threat” may include a veiled, conditional or direct threat of violence in verbal, written, electronic, or gestural form, resulting in intimidation, harassment, harm, or endangerment to the safety of another person or property.

See also, Dep’t of Corrections v. Stiles, 477 P.3d 709, 715 (Colo. 2020) (“Rule 6-12 outlines what constitutes just cause to discipline a certified state employee”).

Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-8. The Board may reverse or modify Respondent’s decision if the action is found to be arbitrary and capricious, or contrary to rule or law. C.R.S. § 24-50-103(6); *Stiles*, 477 P.3d at 717. If a Respondent fails to prove that a Complainant committed the acts for which she was disciplined, the decision to discipline a Complainant is arbitrary and capricious on that basis alone. *Kinchen*, 886 P.2d at 706, n. 10.

II. Hearing Issues

A. Complainant Did Not Commit the Acts for Which She Was Disciplined

Respondent terminated Complainant's employment because Lisac, as delegated appointing authority, determined that Complainant had been untruthful in her statements concerning the April 25th Incident and Turner's personnel issues policy, and had been hostile and antagonistic in her actions on April 25, 2024.

Respondent failed to establish by a preponderance of the evidence at the evidentiary hearing that Complainant committed the acts for which she was terminated.

1. Untruthfulness

The only fact that Respondent established at the hearing is there are several inconsistencies among the three eyewitnesses to Complainant's interactions with Powell on April 25, 2024, as well as inconsistencies between Complainant and Estrada on the one hand and Complainant and Turner on the other. There are also inconsistencies within each witness' narratives over time. The undersigned ALJ is in much the same place as Lisac found himself after the first Rule 6-10 meeting on July 9, 2024. Lisac was no further at unmasking the deceitful party than he was before he began his investigation.

As Lisac testified at the evidentiary hearing, in his quest for the truth, he found the Corey's OIG Investigative Report essentially useless because it merely noted narrative discrepancies but failed to identify which party was being deceitful. After listening to all the witnesses after the first Rule 6-10 meeting, he found himself in the same place, in "stalemate," because all the witnesses seemed credible.

a. Complainant's Polygraph Examination and Lisac's Reliance on the Results

When Lisac found all witnesses credible, Lisac testified that he "requested a polygraph to put him in the direction, to break the stalemate . . . the main reason I asked for [the polygraph] was to essentially kind of start pointing me in the right direction that who may be potentially being deceitful with me as I felt both parties were credible."

Complainant was the only one among the individuals involved in the April 25th Incident to be given a polygraph examination. Complainant took the polygraph examination on July 18, 2024. Lisac concluded that Complainant was untruthful in her statements regarding the events of April 25, 2025, because of the results of Complainant's polygraph examination.

There are some contradictions in Lisac's testimony concerning the impetus for requesting a polygraph for Complainant. He testified that he decided to request a polygraph after listening to all the witnesses and finding them credible. Complainant took the polygraph examination on July 18, 2024. But Lisac interviewed Powell and Montano on July 19, 2024. So, the evidence indicates that he had not yet interviewed Powell and Montano when he requested a polygraph for Complainant – so how could he assess Powell's and Montano's credibility prior to requesting that all the witnesses be given

polygraph examinations? It is also concerning that in Lisac's disciplinary letter, he states that Complainant's polygraph examination took place on July 23, 2024, which is not true, but which dates the polygraph examination *after* Lisac interviewed Powell and Montano.

At the hearing, Lisac testified that he "placed very little weight if any at all [on Complainant's polygraph results]" in reaching his decision to terminate Complainant's employment. That testimony is belied by Lisac's contradictory testimony to the effect that it was the polygraph results that "pointed him in the right direction," *i.e.*, towards Complainant, as noted above.

That testimony is also belied by the fact that Lisac discussed the results of Complainant's polygraph examination during the second Rule 6-10 meeting on August 12, 2024, and he made frequent mention of that examination and the results in his disciplinary letter of October 15, 2024.

During the prehearing conference on January 28, 2025, just two days before the start of the evidentiary hearing, the ALJ notified the parties that the results of the polygraph examination were inadmissible under controlling Colorado law because the polygraph examination itself has been deemed unreliable. After that notification, Lisac downplayed his reliance on the polygraph examination results, but his reliance is inescapable. Furthermore, in Respondent's prehearing statement, filed on January 17, 2025, *i.e.*, before the January 28, 2025, prehearing conference, Respondent referenced the polygraph examination results and listed the polygraph examination as one of its exhibits.

Lisac's disciplinary letter also indicates the reliance Lisac placed on Complainant's polygraph examination results. Besides devoting two full paragraphs discussing the polygraph results, Lisac also refers to the polygraph repeatedly, including the following:

- "Based upon all of the information I have received, including your statements at the meeting, the additional information you provided, additional staff interviews; PS Case #2024001044 and **confidential report CR#2024001775 [the polygraph report]**, I have reached the following conclusions" (Emphasis added.)
- "In regard to the statements made in the administrative area, it appears that you selectively omitted and minimized your statements during your incident reports and during the investigation. **This determination is based again on** the eyewitness account of Capt. Montano where he stated you did direct Lt. Powell a second time to have a seat. This is further supported by your own contradictory statements made during our meeting and **the report from the polygraph exam which indicated you were being deceitful.**" (Emphasis added.)
- "**I have placed a higher weight on the eyewitness testimony** - which is contrary to your own testimony - **as a result of** your contradicting statements, **polygraph results**, and the testimony of Major Turner and Associate Warden Estrada. Based on this information, it is clear you engaged in falsifying information and making false statements to detract attention from your own actions." (Emphasis added.)

- “Due to the results of the polygraph and the information obtained in my additional interviews, I requested to reconvene our meeting to afford you an opportunity to discuss the polygraph and to seek clarification on my supplemental staff interviews.” (Emphasis added.)

b. **Evidence of, and Determinations Based on, Polygraph Results Are Inadmissible**

Colorado courts have consistently held that evidence of polygraph examination results and the testimony of polygraph examiners, as well as those whose conclusions or recommendations are based on polygraph results, are *per se* inadmissible in both criminal and civil trials. *Valley National Bank v. Chaffin*, 718 P.2d 259, 262 (Colo. App. 1986); *People ex rel. M.M.*, 215 P.3d 1237, 1249 (Colo. App. 2009). Evidence of polygraph examination results are *per se* inadmissible at an adjudicatory trial because they are not reliable. *Id.* at 1248. The prohibition of polygraph evidence extends to expert opinions, based in whole or in part, on polygraphs, as well as the recommendations or determinations based on polygraph results. *Id.* at 1250.

In *People v. Anderson*, 637 P.2d 354 (Colo. 1981), the Colorado Supreme Court, applying the *Frye* test,⁷ held that

We do not believe that the physiological and psychological bases for the polygraph examination have been sufficiently established to assure the validity and reliability of test results. Nor are we persuaded that sufficient standards for qualification of polygraph examiners exist to insure competent examination procedures and accurate interpretation of the polygraph. Further, use of the polygraph at trial interferes with and may easily prejudice a jury's evaluation of the demeanor and credibility of witnesses and their testimony. Accordingly, we conclude that any evidence of polygraph results and testimony of polygraph examiners is *per se* inadmissible in a criminal trial.

The Court concluded that, “we are not persuaded that the scientific theory or technique of the polygraph is sufficiently advanced to permit its use at trial as competent evidence of credibility.” *Anderson*, 637 P.2d at 357.

Although the *Frye* test was subsequently rejected as the basis for determining the admissibility of “scientific” evidence in *People v. Shreck*, 22 P.3d 68 (Colo. 2001) in favor of the application of C.R.E. 702 and C.R.E. 403, the reasoning in *Anderson* supporting the inadmissibility of polygraph evidence is “still viable.” *People v. Wallace*, 97 P.3d 262, 268 (Colo. App. 2004).

The judicial opinion that is most applicable in this matter is *People ex rel. M.M.* In that case, the trial court terminated a father’s parental rights based, in large part, on the

⁷ *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923) established the traditional standard for admission of polygraph evidence at trial.

results of polygraph examinations that informed the decisions made by caseworkers as well as the trial testimony of expert witnesses. The Court of Appeal noted that, even though the trial court stated in its decision that it had considered

the question of failing or passing or the validity of the polygraph tests...the polygraph evidence and the reaction of the treatment professionals to it (1) consumed most of the trial; (2) supplanted father's treatment plan; (3) controlled or significantly influenced every recommendation by the treating and supervising professionals concerning unsupervised visitation and father's fitness as a member of a reunited family; and (4) thereby essentially eliminated any chance father had to retain a parent-child relationship with both of his children.

People ex rel. M.M., 215 P.3d at 1248-49.

The *People ex rel. M.M.* court held that expert testimony "must be grounded in the methods and procedures of science, not on a subjective belief or unsupported speculation." Since the underlying basis for the expert opinions and caseworker recommendations were based on polygraph results, which the court held to unreliable and without scientific foundation, "the evidence of the polygraph examinations should not have been admitted, and the trial court should not have listened to, or considered, the opinions of any experts based, in whole or in part, on the polygraphs." *Id.* at 1250.

People ex rel. M.M. was decided on April 16, 2009. No subsequent Colorado case has held that evidence of polygraph examination results, the testimony of polygraphers, the opinions of experts based on polygraph examination results, or the professionals who based their conclusions or recommendations on polygraph results, is admissible in either a civil or criminal proceeding. Polygraphy still fails the test outlined in *Shrek* pursuant to C.R.E. 702 and C.R.E. 403.

Furthermore, as the court in *Wallace* noted, opinion testimony regarding a witness' truthfulness on a specific occasion, rather than the witness' propensity for deception, is inadmissible pursuant to C.R.E. 608(a), which provides that:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Consequently, any testimony to the effect that Complainant's polygraph test results indicated deception is "tantamount to an expert opinion on [the examinee's] truthfulness on a specific occasion and was thus inadmissible under C.R.E. 608(a)." *Wallace*, 97 P.3d at 268.

In summary, the evidence of polygraph examination results is *per se* inadmissible in Colorado, is "not accepted as reliable by the courts," and any testimony based on

polygraph results is inadmissible for credibility purposes or to show deceit of wrongdoing. *People ex rel. M.M.*, 215 P.3d at 1250; C.R.E. 608.

The results of Complainant's polygraph examination did not establish Complainant's untruthfulness. The preponderance of the evidence at the hearing establishes that Lisac believed that it did. Lisac's reliance on the results of the polygraph examination in determining Complainant's truthfulness requires a reversal of the decision to terminate Complainant's employment.

c. Estrada and The Purported Abrasion on Complainant's Arm

Lisac also concluded that Complainant was untruthful about the alleged abrasion on her arm caused by Powell's angry exit from his office on April 25, 2024. The basis for Lisac's conclusion was that Estrada, who Complainant indicated had seen the abrasion, denied that Complainant showed Estrada the abrasion, and that Lisac came to believe that the first time Complainant mentioned the abrasion was during the first Rule 6-10 meeting on July 9, 2024. In his disciplinary letter, Lisac wrote:

When questioned on this information, AW Estrada stated that discussion never occurred and you [Complainant] never presented any injury or abrasion to your forearm to her as a result of the incident. AW Estrada also stated that information was also never listed in any incident report by you. You then asked if AW Estrada recalled asking if you were okay; I again spoke to AW Estrada and she confirmed she did ask if you were okay because you were visibly upset; however, AW Estrada stated there was no discussion related to your arm.

However, Complainant did not allege that there was a discussion about her abrasion, so it is not surprising that Estrada stated there was no discussion. What Complainant alleged was, as she was briefly informing Estrada of what happened on April 25, 2024, she looked at her arm and, at that point, Estrada asked if she was okay. It would appear more likely than not that Complainant thought Estrada had seen her arm and was reacting to that, but nothing was actually said about it. Lisac believed Estrada's denial, and doubted Complainant's assertion.

Furthermore, Lisac's understanding that the first time Complainant mentioned the abrasion was during the Rule 6-10 meeting on July 9, 2024, was incorrect, and indicates that Lisac may not have listened to the recordings from Corey's OIG investigation. During his May 1, 2024, interview with Complainant – *i.e.*, six days after the April 25th incident - Complainant mentioned that her arm was scraped by Powell as he exited his office. Corey did not include that statement in his investigative report, but it was recorded. The significance Lisac placed on his mistaken understanding of this matter was indicated in his hearing testimony:

In my opinion, it felt as if, based on how I weighed things, it was if she was willing to falsify something in a 6-10 meeting that was never

mentioned in any previous report with any other investigator,⁸ at this point she would be willing to make a statement toward an offender or another staff member or another staff member and that would be a Brady violation

Respondent failed to establish by a preponderance of the evidence that Complainant was untruthful about the purported abrasion on her arm.

d. Complainant's Comment About Turner and Personnel Matters

Lisac also concluded that Complainant's comment about Turner's approach to personnel matters was untruthful. In his disciplinary letter, Lisac reported that during the Rule 6-10 meeting,

You [Complainant] also stated Lt. Powell was clearly insubordinate to Maj., Turner, but had not been addressed. You stated that Maj. Turner told you in a conversation prior to this incident that he has a policy of intentionally not seeing staff issues. I asked for clarification on this issue; you stated Maj. Turner does not wish to act on staff performance or behavior issues so therefore he claims he does not see them.

Lisac indicated that he interviewed Turner about that allegation and Turner denied making that statement. Lisac wrote, "Specifically related to the incident which occurred on April 25, 2024, regarding his negative interaction with Lt. Powell in the unit, Maj. Turner stated Lt. Powell's action was unprofessional and any accountability is pending the outcome of the investigation." However, Turner's statement to Lisac lacks credibility.

During Corey's interview with Powell on May 3, 2024, Powell stated that his conduct towards Turner on April 25, 2024, could have come across as disrespectful. Corey replied, "It didn't for him. I spoke with him and he told me he knew what was going on there, he knew you were short-handed, and he didn't take it as disrespect in any way, shape or form."⁹ In addition, during Corey's follow-up interview with Complainant on May 7, 2024, Corey told Complainant, "I even called Turner and asked Major Turner . . . said 'Well I don't take it that way, based on his circumstances, I didn't take it was him being disrespectful.' I know Turner pretty well and I know him to be a very nice guy, very tolerable about a lot of stuff, things that you and I might not tolerate."¹⁰

These prior statements render Turner's subsequent comment to Lisac that he now thought that Powell's conduct was unprofessional highly suspect. Furthermore, Turner's reported statement that "any accountability is pending the outcome of the investigation" makes little sense because Complainant was the subject of the investigation, and there is no evidence that Powell was the subject of any related investigation.

⁸ There was only one investigator – Corey.

⁹ This statement, found on Corey's May 3, 2024, recording of his interview with Powell, is another piece of evidence overlooked by Lisac in his investigation and conclusions.

¹⁰ This statement, found on Corey's recording of his May 7, 2024, interview with Complainant, is another piece of evidence overlooked by Lisac in his investigation and conclusions.

Finally, Corey's report of Turner's reaction to Powell's indisputably unprofessional and disrespectful conduct towards Turner on April 25, 2025, supports Complainant's report of Turner's stated general policy about personnel matters. In the face of Powell's misconduct, Turner failed to acknowledge that Powell showed him any disrespect or lack of professionalism. The preponderance of the evidence indicates that Turner's subsequent contradictory statement to Lisac is not worthy of belief.

In short, Respondent failed to establish by a preponderance of the evidence that Complainant was untruthful in her statement about Turner's approach to personnel matters.

2. Antagonistic and Threatening Conduct

In reaching his decision to terminate Complainant's employment, Lisac concluded that Complainant engaged in hostile and antagonistic behaviors during the April 25th Incident and that Complainant engaged in a pattern of similar behavior toward staff that was increasing in frequency.

The preponderance of the evidence indicates that Complainant's conduct on April 25, 2024, was professional and justified. After viewing the disarray in day hall 8 following the offender fight in C Pod, Complainant asked Powell whether another incident had occurred in day hall 8. This was a perfectly legitimate inquiry and one that was within Complainant's role as the Security Support Services Captain.

After Powell stormed out of C pod, he was talking with Montano in Powell's office. Complainant decided to join them. Complainant's decision was based on the following: (1) Complainant had a conversation with Montano just the day before, during which Montano expressed concern about Powell's temper. (2) Turner questioned Powell about the whereabouts of his staff and Powell responded in an unprofessional, disrespectful, and explosively angry manner. (3) Complainant passed by Powell's office and heard loud voices. Complainant looked into the office and saw both Powell and Montano standing in Powell's dark office. Under these circumstances, it was legitimate and justified for Complainant to step into the office to support Captain Montano. Complainant had no reason to believe that her prior interaction with Powell about day hall 8 had upset or agitated Powell, so his reaction to Complainant's presence appeared to Complainant as inexplicable and extreme. Powell may have felt threatened by Complainant's stepping into his office, but his subjective perspective was not objectively justified.

Lisac also based his finding of hostile and antagonistic behaviors during the April 25th Incident on allegations that Complainant told Powell that, "you aren't going anywhere," blocking his exit from his office, and giving him a directive to sit when outside Estrada's office. As discussed above, Respondent failed to establish by a preponderance of the evidence that Complainant uttered either of those comments or that she intentionally blocked Powell's exit from his office.

Finally, the evidence supporting a finding of a pattern of hostile and antagonistic behaviors towards staff is thin, at best. In 2019, Complainant questioned a staff member at FCF in front of their peers about a facial hair issue. This staff member had a valid

medical waiver and was in compliance with policy. Lisac, who was Complainant's supervisor at that time, gave Complainant a confirming memorandum for that incident. Because Lisac was the supervisor who gave Complainant the confirming memorandum, it is likely that he accorded greater weight to this incident than it deserved.

In his disciplinary letter Lisac also references a comment in Turner's March 2024 mid-year evaluation of Complainant to the effect that Complainant should better understand the audience present when addressing staff. That vague and ambiguous statement does not indicate that Complainant engaged in hostile and antagonistic conduct towards staff. Based on the 2019 incident, Turner's comment, and Lisac's view of Complainant's conduct on April 25, 2024, Lisac concluded that Complainant engaged in a pattern of antagonistic behaviors. However, all that Respondent was able to establish by a preponderance of the evidence is the 2019 incident. One incident in a career spanning 20 years does not establish a pattern of hostile conduct.

In summary, Respondent failed to establish by a preponderance of the evidence that Complainant committed the acts – untruthfulness and hostile and antagonistic conduct – for which she was disciplined.

3. Complainant Did Not Violate the Policies and other Provisions Lisac Determined She Violated

The preponderance of the evidence also establishes that Complainant did not violate the myriad DOC regulations and standards of job performance that Lisac listed in his disciplinary letter. Lisac determined that Complainant failed to comply with sections of DOC's Code of Conduct, Code of Ethics, Professional Standards Investigations, Brady Reporting Disclosures, Complainant's performance plan, and Board Rule 6-12. These provisions addressed issues of conflicts of interest, adherence to departmental regulations, rules, and orders, professional and respectful conduct towards others, professionalism and good judgment, workplace violence and harassment, truthfulness, integrity, competence, and willful misconduct. Respondent failed to establish by a preponderance of the evidence that Complainant committed the acts for which she was disciplined. Accordingly, Respondent failed to establish that Complainant violated any of the policies and provisions identified by Lisac.

B. Respondent Failed to Prove that Complainant Committed the Acts for Which She Was Disciplined; Therefore, the Disciplinary Decision was Arbitrary and Capricious or Contrary to Rule or Law

As noted above, because Respondent failed to prove that Complainant committed the acts for which she was disciplined, the decision to discipline Complainant is arbitrary and capricious or contrary to rule or law on that basis alone. *Kinchen*, 886 P.2d at 706, n. 10 ("in the present case the hearing officer's finding of evidentiary fact established that Kinchen did not do the acts for which he was disciplined, so implicitly the Department's action in terminating his employment was 'arbitrary, capricious, or contrary to rule or law' within the meaning of [C.R.S. § 24-50-103(6)].").

C. The Appointing Authority's Action was Arbitrary and Capricious

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

1. Neglected To Use Reasonable Diligence to Procure Pertinent Evidence

Lisac used reasonable diligence to procure some of the evidence pertinent to his disciplinary decision. He reviewed the confidential incident reports of Complainant, Powell and Montano, as well as Corey's OIG Investigative Report. He interviewed Complainant, Powell, Montano, Turner, and Estrada. He appropriately conducted two Rule 6-10 meetings with Complainant and received Complainant's additional information after the second Rule 6-10 meeting.

However, Lisac neglected to use reasonable diligence to procure pertinent evidence concerning three material witnesses and their knowledge about events central to Lisac's inquiry: (1) Warden Sandoval and her role in Respondent's decisions concerning Complainant from May 10, 2024 to June 7, 2024, when she delegated appointing authority to Lisac; (2) Major Larimore, who witnessed, along with Montano and Estrada, Powell's narrative of his interaction with Complainant in Estrada's office, as well as Montano's narrative immediately after Powell's narrative; and (3) OIG investigator Corey, who made some pertinent comments in his interviews with Powell that can be heard on the May 3, 2024 recording of his Powell interview but are not memorialized in his Investigative Report.

Sandoval was Complainant's appointing authority prior to June 7, 2024. Sandoval made the decision, or validated the decision, to place Complainant on administrative leave beginning on May 21, 2024. In Sandoval's communications to Complainant on May 20, 2024, Sandoval raised allegations of potential DOC policy violations and provided Complainant notice that she was reported to a District Attorney for possible criminal violations. Neither Powell nor Montano were similarly placed on administrative leave. Respondent provided no evidence that either Powell or Montano were similarly referred to a District Attorney for possible prosecution. Corey's OIG Investigative Report did not determine whose narrative of the April 25th Incident was more truthful than the others'.

This begs the question, why did Sandoval make the determination that Complainant was untruthful, that Complainant was the one to be placed on administrative leave, and be referred to a District Attorney for possible criminal charges? We do not know because Lisac failed to interview Sandoval and obtain an answer to that highly pertinent question.

In addition, Lisac failed to interview Larimore who, along with Estrada, witnessed Powell's and Montano's narratives of the April 25th Incident in Estrada's office. What transpired in Estrada's office while Powell and Montano were present along with Estrada and Larimore remains unknown. It is concerning that no recordings were made of the discussions that occurred at that time, no notes were produced about what was discussed, and no investigators sought to ascertain what Powell and Montano said about Powell's interactions with Complainant on April 25, 2024, while in Estrada's office. In addition, Complainant had reported that, at the end of the day on April 25, 2024, Larimore told Complainant that both she and Powell made mistakes that day. That comment begs the question of why Larimore made that comment and what caused him to conclude that Complainant's behavior was somehow blameworthy. We do not know because Lisac failed to interview Larimore and obtain an answer to those pertinent questions.

Corey made at least two comments to Powell on May 3, 2024, that required further inquiry. First, he told Powell that someone else may have made untruthful statements, clearly implying that it was Complainant. That comment begs the question, why had Corey come to believe so early in the investigation that Complainant, and not Powell, may have been untruthful? Corey also told Powell that Turner "actually really helped me out a bunch in the direction I was aiming on this particular situation." In what direction was Corey aiming at in his investigation and how had Turner helped him out "a bunch"? We do not know the answers to these questions because Lisac failed to talk to Corey to obtain answers to those pertinent questions. Both of these comments by Corey can be heard on the recording of Corey's interview with Powell on May 3, 2024, but were not included in Corey's Investigative Report. In addition, Lisac did not realize that Complainant told Corey about the scrape on her arm allegedly caused by Powell and contended that Complainant did not raise that allegation until the first Rule 6-10 meeting on July 9, 2024. These facts raise the distinct possibility that Lisac did not listen to the recordings of Corey's interviews with Complainant, Powell, and Montano.

Sandoval, Larimore, and Corey possessed information about the reasons why Complainant was identified – perhaps as early as April 25, 2024 -- as the one individual who was untruthful, an early identification that lacked a credible factual basis. The failure to interview and obtain information from Sandoval, Larimore, and Corey constitutes a failure to use reasonable diligence and care to obtain that information.

Finally, Lisac relied on Complainant's polygraph results in determining that Complainant was untruthful regarding her words and actions on April 25, 2024. It would have been reasonable – if not obligatory – for Lisac to consult with an attorney in the Attorney General's office for information and guidance on whether it was appropriate for Lisac to rely on polygraph results in determining Complainant's truthfulness. Lisac's failure to do so constitutes a failure to use reasonable diligence and care to obtain that information.

2. Candid and Honest Consideration of the Evidence

There are numerous instances of Lisac's failure to give "candid and honest consideration" of the evidence he did procure. First, it is helpful to understand what "candid and honest consideration" of the evidence means. According to the Merriam-

Webster dictionary, “candid” means “free from bias, prejudice, or malice.” According to the Merriam-Webster dictionary, “honest” means “in a genuine or sincere manner.” According to the Merriam-Webster dictionary, “consideration” means “continuous and careful thought.” Put together, we take “candid and honest consideration” to mean an unbiased, genuine, sincere, careful, thoughtful review of the evidence.

In discussing this prong of the arbitrary and capricious standard, the Colorado Supreme Court wrote:

The second *Lawley* prong focuses on whether the appointing authority “candid[ly] and honest[ly] considered the evidence.” *Id.* (quoting *Van De Vegt*, 55 P.2d at 705). This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence, including the evidence related to the factors that an appointing authority must consider under Rule 6-9 in exercising its discretion on disciplinary matters.

Stiles, 477 P.3d at 719.

a. **Failure to candidly and honestly consider discrepancies in Powell’s and Montano’s narratives**

Lisac focused on Complainant’s alleged discrepancies in her narrative of the April 25th Incident but failed to candidly and honestly consider the discrepancies between Powell’s and Montano’s narratives and the discrepancies within each of their narratives over time. The omissions, additions, and revisions in these narratives are enumerated in the Findings of Facts, above.

For example, several facts were missing from Powell’s confidential incident report that were later confirmed by either Powell himself, Montano, or Complainant. Powell failed to mention that, in response to Turner’s question about the whereabouts of his staff, Powell yelled at Turner, and turned and cursed, saying things to the effect of, “if we staffed adequately, you wouldn’t have to ask that question,” “fuck this, we are always fucking short,” and acted in a disrespectful and unprofessional manner towards Turner. Powell failed to mention that he became extremely agitated after Turner questioned him and as he exited C unit and proceeded to his office. Powell also did not mention that his voice was raised when he and Montano were speaking in Powell’s office just prior to Complainant’s entry into the office. Powell also failed to mention that Complainant told him that it was not okay to make physical contact with her just before Complainant went into Estrada’s office. Powell also omitted that Montano accompanied him into Estrada’s office and was a witness to Powell’s version of the interaction with Complainant. He also did not mention that he did not appear agitated or irritated by Complainant questioning him about the trash in day hall 8, although he felt agitated. He also did not report that Complainant stood near the hinge portion of the door rather than directly in front of it. Powell did not report that Complainant had her arms crossed when she entered Powell’s office, an allegation he will make in later reports. He also did not report that Complainant said, “You’re not going anywhere,” an allegation that neither he nor Montano made in their confidential reports but would both later assert.

Similarly, several facts were missing from Montano's confidential incident report that were later confirmed by either Montano himself, Powell, or Complainant. For example, Montano makes no mention of Complainant crossing her arms after she entered Powell's office, an allegation he made later, and which Powell also made later. Montano failed to mention that he accompanied Powell when they entered Estrada's office and Powell told his version of events to Estrada and Larimore. Montano failed to mention that Complainant told Powell that it was not okay to make physical contact with her. Montano failed to mention that Complainant told Powell, "Just don't go anywhere" before Complainant entered Estrada's office. Montano failed to mention the conversation between Montano and Complainant on April 24, 2024, about Powell's propensity to blow up and get angry. Furthermore, Montano reported that Complainant told Powell to have a seat outside Estrada's office, and said, "This is not a request its [sic] a directive," which statement was later denied by Powell. He also reported that Complainant said, "No you are not" after Powell said he was leaving while in his office but later changed that statement to "You're not going anywhere," a phrase that Powell also subsequently alleged she used.

Complainant identified many of these discrepancies and narrative omissions and additions in the additional information she provided Lisac after the second Rule 6-10 meeting on August 12, 2024. However, there is no credible evidence in either Lisac's disciplinary letter or Lisac's testimony at the evidentiary hearing that he seriously, honestly, and candidly considered Complainant's information on these issues. In his disciplinary letter, Lisac wrote that he "considered the information you provided in writing after the meeting – I did not find this information to be mitigating as my decision was based solely on your actions, statements, and behaviors in this incident." However, Lisac's conclusions about Complainant's actions, statements, and behaviors were based on his view that Powell and Montano were telling the truth despite their discrepancies and narrative omissions and additions, and despite all evidence to the contrary.

At the evidentiary hearing, Lisac testified that he did consider that information, but turned that information against Complainant, rather than consider the possibility that Powell and Montano were less than truthful, and certainly less than consistent in their narratives. Lisac testified that he considered that information as indicating that Complainant had made contradictory statements and reinforced "her false statements." He added that, "And again, when some of her own incident reports state that she could not remember what happened the day she wrote them like as she said 'something like,' 'something like,' I felt there were almost an equal number of discrepancies on Complainant's statements as there were with Powell and Montano's."

Lisac's admission that there were more discrepancies in Powell's and Montano's narratives than in Complainant's narrative is not reflected in Lisac's ultimate determination that it was Complainant who was untruthful. Lisac failed to seriously, honestly, and candidly consider the implications of Powell's and Montano's narrative discrepancies. The preponderance of the evidence demonstrates that no one's memories of the highly-charged interactions between Complainant and Powell on April 25, 2024, were entirely accurate. Complainant's relatively more consistent version of the April 25th Incident

appears to be closer to the truth of what actually transpired than Powell's or Montano's versions.

The changes in Powell's and Montano's narratives did not stop after Lisac interviewed them. Powell's testimony during the evidentiary hearing included several departures from his earlier statements. At the hearing, Powell admitted that he changed Complainant's statement from "you cannot go," to "you're not going anywhere," but denied that he was prompted to make the change. He also did not indicate that Complainant used the words "directive" or "order" when telling him to have a seat outside Estrada's office. In addition, he recalled, for the first time, that Complainant told him it was inappropriate to make physical contact with her.

Montano's testimony at the evidentiary hearing included several discrepancies from his earlier reports or from matters alleged or established by Powell or Complainant. At hearing Montano denied that he and Powell were talking loudly in Powell's office; he alleged that Powell had his left arm up as he exited his office, contradicting Powell's assertion that he had his left hand in his pocket when he exited his office; he alleged that Complainant said "You're not leaving," or "you're not going," or words to that effect, rather than "You're not going anywhere" as he stated previously; and he failed to recall the following: Complainant telling Powell that it was not okay to make physical contact with her; that he went into Estrada's office with Powell on April 25, 2024; that he talked to Estrada on April on April 25, 2024; that he talked to Larimore on April 25, 2024; that he spoke with any investigator about the April 25th Incident.

b. Failure to candidly and honestly consider evidence of collusion

When confronted with statements from Corey and Lisac about the similarities between Powell's and Montano's narratives, Complainant raised the possibility that Powell and Montano colluded in some fashion. Lisac testified at the evidentiary hearing that he seriously considered that possibility, but because Powell and Montano both denied colluding, he concluded that they did not do so.

However, Lisac failed to seriously, honestly, and candidly consider the evidence that they did collude, either inadvertently or by design. Montano witnessed Powell's initial explanation of his interactions with Complainant in Estrada's office on April 25, 2024, which more likely than not informed Montano's subsequent version of events.

In their confidential incident reports written on April 25, 2024, neither Powell nor Montano reported that Complainant crossed her arms when she stepped into Powell's office in their confidential reports written on April 25, 2024. Montano failed to mention that detail during his interview with Corey on May 1, 2024. However, Powell reported that to Corey on either May 2, 2024 (although we do not have the recording of that interview because the battery died), or May 3, 2024. And then, when interviewed by Lisac on July 19, 2024, Montano reported that Complainant's arms were crossed. This statement by Montano on July 19, 2024, is especially suspect because Montano never mentioned it before, and the three months between his April 25, 2024, confidential report and his July 19, 2024, interview could not serve to improve Montano's memory. This is particularly true because Montano testified at the evidentiary hearing that he has a medical condition

that affects his memory over time and that his most reliable recollection of the April 25, 2024, events was included in his April 25, 2024, confidential report. Montano's significant memory issues explain the fact that, when testifying at the evidentiary hearing, Montano did not recall that he accompanied Powell in Estrada's office on April 25, 2024, he did not recall talking to Estrada on April 25, 2024, he did not recall talking to Larimore on April 25, 2024, and he did not recall speaking with any investigator about the April 25, 2024 incident.

The most striking item of evidence indicating some degree of collusion between Powell and Montano is the fact that, subsequent to April 25, 2024, both men reported the very same, very particular, statement they ascribed to Complainant, "You're not going anywhere." Powell first used those exact words on May 2 or May 3, 2024, in his interview with Corey, which was a variation of Montano's formulation on May 1, 2024, "You're not leaving anywhere." Montano first reported that Complainant said, "You're not going anywhere," on July 19, 2024, in his interview with Lisac. It strains credulity to believe that Powell and Montano independently remembered the same exact phrase subsequent to their April 25, 2024, confidential reports.

In short, Lisac failed to candidly and honestly consider evidence of collusion between Powell and Montano, whether such collusion was inadvertent or by design.

c. Failure to candidly and honestly consider Complainant's evidence of an abrasion

It appears that Lisac did not listen to the audio recording of Corey's interview with Complainant on May 1, 2024, when Complainant told Corey that Powell scraped her arm when he exited his office and made physical contact with her. At the evidentiary hearing, Lisac testified that Complainant never mentioned the abrasion until the Rule 6-10 meeting on July 9, 2024. He stated, "In my opinion, it felt as if, based on how I weighed things, it was if she was willing to falsify something in a 6-10 meeting that was never mentioned in any previous report with any other investigator, at this point she would be willing to make a statement toward an offender or another staff member and that would be a *Brady* violation."

Complainant never said that she and Estrada actually talked about the abrasion or scrape on her arm. While in Estrada's office on April 25, 2024, Complainant looked at her left arm and Estrada asked if she was okay. Complainant assumed that Estrada had seen the abrasion, but that was just an assumption that Estrada later denied. That is not evidence that Complainant was untruthful about the abrasion or about Estrada's knowledge of it.

d. Failure to candidly and honestly consider Complainant being triggered by Powell's physical contact with her

When she was interviewed by Corey on May 1, 2024, Complainant revealed personal details about the fatal physical abuse suffered by her mother that caused Complainant to be triggered on April 25, 2024, when Powell made physical contact with her as he was exiting his office. The evidence in the record is rife with sympathetic and

understanding perspectives on Powell's unprofessional and disrespectful conduct on April 25, 2024 – he was stressed, he was short-staffed, he was behind, he was being questioned, he realized his behavior was wrong, he apologized to Turner – but the same sympathetic and understanding perspective was not accorded to Complainant. Lisac's dubious conclusion that Complainant exhibited unprofessional, antagonistic, and hostile behaviors towards Powell on April 25, 2025 – besides not being established by a preponderance of the evidence in the record -- appears to lack any candid and honest consideration of Complainant's sensitivity to others making unwanted physical contact with her. One would expect a reasonable appointing authority candidly and honestly considering the evidence of Complainant's sensitivities around physical contact to view Complainant's conduct on April 25, 2024, in a much more sympathetic and understanding perspective.

e. **Failure to candidly and honestly consider the context in which Complainant's actions should be viewed**

There is scant evidence that Lisac candidly and honestly considered the context in which Complainant's actions on April 25, 2024, are most correctly viewed. The day before the April 25, 2024, incident, Montano alerted Complainant to the possibility that Powell could be quick to anger and could even become physical when angry. That anger was very much in evidence on April 25, 2024, when Turner asked Powell where his staff was. Powell reacted in an unprofessional and rude manner, cursed, uttered profanities, and stormed out of C pod. Complainant witnessed that behavior. Then, as Complainant walked past Powell's office, she heard raised voices and went back and looked into Powell's office. Both Powell and Montano were standing, and the office was dark. One might conclude that it would have been a dereliction of duty for Complainant to not step into the office to lend support to Montano during what appeared to be a heated confrontation. As soon as Complainant entered Powell's office, Powell became highly agitated, expressed his need to leave, and bolted through the door, making physical contact with Complainant. Under those circumstances, it was legitimate for Complainant to direct Powell to Estrada's office and order him to stay outside Estrada's office while Complainant entered the office to brief Estrada on the situation. Viewed in the context of these considerations, Complainant's actions were unassailable, and an appointing authority candidly and honestly viewing Complainant's actions in this context would have arrived at the same conclusion.

f. **Failure to candidly and honestly consider the evidence supporting Complainant's allegation regarding Turner's approach to personnel issues**

As discussed, above, Lisac failed to candidly and honestly consider the evidence supporting Complainant's allegation that Turner expressed what can be characterized as a relative *laissez faire* attitude towards personnel issues. In the face of indisputably unprofessional and disrespectful conduct by Powell towards Turner on April 25, 2024, Turner told Corey on May 2, 2024, that "he didn't take it as disrespect in any way, shape or form."

In addition, during Corey's follow-up interview with Complainant on May 7, 2024, Corey told Complainant, "I even called Turner and asked Major Turner . . . said 'Well I

don't take it that way, based on his circumstances, I didn't take it was him being disrespectful.' I know Turner pretty well and I know him to be a very nice guy, very tolerable about a lot of stuff, things that you and I might not tolerate."

Instead of considering that information, Lisac relied on Turner's denials and on Turner's subsequent statement that Powell's action was unprofessional "any accountability is pending the outcome of the investigation." Had Lisac candidly and honestly considered the evidence of Turner's actions and statements rather than his questionable denials, Lisac would have concluded that Complainant's representation concerning Turner's personnel issues policy was more than likely to be true.

g. Apparent failure to listen to the recordings of Corey's interviews with Complainant and Powell

As mentioned briefly above, the evidence indicates that Lisac did not listen to the recordings of Corey's interviews with Complainant, Powell and Montano. One reason that Lisac determined that Complainant made up her allegation of an abrasion or scrape on her arm was his belief that she never mentioned it prior to the first Rule 6-10 meeting on July 9, 2024. However, Complainant did mention it to Corey during her interview with him on May 1, 2024. Corey did not put that allegation in his report, but it is on the recording of that interview. Had Lisac listened to that recording, he would not have alleged that Complainant failed to mention the abrasion or scrape on her arm until July 9, 2024.

With respect to Lisac's consideration of Complainant's allegation of Turner's stated personnel issue policy, there is no evidence that Lisac was aware that Corey reassured Powell on May 3, 2024, that Turner did not view Powell's conduct towards him "as disrespect in any way, shape, or form." In addition, there is no evidence that Lisac was aware that during Corey's follow-up interview with Complainant on May 7, 2024, Corey told Complainant, "I even called Turner and asked Major Turner . . . said "Well I don't take it that way, based on his circumstances, I didn't take it was him being disrespectful.' I know Turner pretty well and I know him to be a very nice guy, very tolerable about a lot of stuff, things that you and I might not tolerate." Had Lisac listened to the recording of Powell's interview and Complainant's May 7, 2024, interview, and candidly and honestly considered what Corey said about Turner, he would not have been so confident that Complainant was being untruthful when she made her comments about Turner's expressed personnel issues policy.

h. Failure to Consider a Third Possibility

Lisac labored under the assumption that the conflicting narratives meant one of two possibilities: as he characterized those possibilities during the first Rule 6-10 meeting with Complainant, "So, it's one of two scenarios: these two [Powell and Montano] are making up stories or colluding or you [Complainant] are not telling the truth of the matter." But there is an obvious third possibility that Lisac did not consider: during a very brief but highly-charged and stressful interaction between and among Complainant, Powell, and Montano on April 25, 2024, each individual's perception of what was occurring and what was being said in the moment, and subsequent memory of those events and comments,

was somewhat distorted and inaccurate. In other words, the discrepancies in their reports and, with respect to Powell and Montano, changes in their narratives over time, could be explained without resorting to allegations of untruthfulness. The three individuals could believe their own narratives in good faith, based on what they perceived and what they remembered. The fact that there are discrepancies does not mandate a finding of untruthfulness.

i. Failure to candidly and honestly view Complainant's record and her reports

The evidence established that Lisac failed to candidly and honestly view Complainant's performance reviews and her reports. During the evidentiary hearing, Lisac referred to Complainant as having received corrective *actions*, when the record indicates that Complainant only received one corrective action. As discussed above, Lisac also perceived a pattern of antagonistic conduct by Complainant that was unsupported by the evidence.

Furthermore, in attempting to downplay discrepancies in Powell's and Montano's narratives, Lisac testified that "Some of her own incident reports state that she could not remember what happened the day she wrote them." While it is true that Complainant did not remember exact details of certain matters, the matters that she did not remember were trivial and not material ones --- the name of the offender who had trashed day hall 8 and the exact curse words uttered by Powell as he stormed out of C pod -- a distinction Lisac failed to acknowledge.

Finally, the evidence establishes Complainant was a highly effective DOC employee who had made significant contributions to the efficiency and equity of the department. The portrayal of Complainant's record included in Lisac's disciplinary letter is in marked contrast to Complainant's profile included in Turner's mid-March 2024 performance evaluation. There is little evidence that Lisac candidly and honestly took into consideration the totality of Complainant's job performance history.

3. Reasonable People Fairly and Honestly Considering the Evidence Must Reach Contrary Conclusions

The Colorado Supreme Court in *Stiles* addressed the third prong of the arbitrary and capricious test as follows:

The third prong of *Lawley's* arbitrary or capricious test assesses the appointing authority's weighing of the evidence and the reasonableness of the appointing authority's disciplinary action. ... But that inquiry doesn't simply ask whether the disciplinary action was reasonable. It asks whether "reasonable [people] fairly and honestly considering the evidence must reach contrary conclusions" regarding the propriety of the disciplinary action.

Stiles, 477 P.3d at 720.

Based on the facts as determined at the hearing of this matter, and the arbitrary and capricious nature of Lisac's decision, as well as the fact that it was contrary to rule or law, as discussed below, reasonable people fairly and honestly considering the evidence must reach contrary conclusions. A reasonable person would not conclude that the questionable evidence of Complainant's alleged wrongdoing was so egregious as to warrant termination. Complainant's actions were in compliance with all applicable DOC policies, Board rules, and performance plans. The evidence in the record establishes that there was no legitimate basis to impose a disciplinary action on Complainant.

D. The Appointing Authority's Action was Contrary to Board Rules

The next issue to be determined is whether Lisac's decision to terminate Complainant's employment was contrary to rule or law. The short answer is: it was contrary to several Board Rules.

1. Board Rule 6-2

Board Rule 6-2 provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." The purpose of this rule is to require that an employee be warned and corrected about improper conduct before any formal discipline is implemented, unless the activity is sufficiently troubling to warrant an immediate disciplinary action.

Respondent failed to establish by a preponderance of the evidence that Complainant committed the acts for which she was disciplined. Accordingly, Respondent failed to establish that Complainant committed any act that was "so flagrant or serious that immediate discipline is proper." The decision to terminate Complainant's employment was not warranted. Therefore, Lisac's action of terminating Complainant's employment was contrary to Board Rule 6-2.

2. Board Rule 6-10(I)

Board Rule 6-10(I) provides, "In deciding whether to take disciplinary action, the appointing authority shall consider all the information discussed during the Rule 6-10 meeting and any additional information provided by the employee."

A preliminary question to be addressed is the parameters of the word, "consider." As the Colorado Supreme Court noted:

In the absence of ... a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); see also *Roup v. Commercial Research, LLC*, 2015 CO 38, ¶ 8, 349 P.3d 273, 276 ("When a statute does not define a term, we assume that the General Assembly intended to give the term its usual and ordinary meaning."). This approach honors our preference for the commonly accepted meaning of statutory terms over "strained or forced interpretation[s]." *Roup*, ¶ 8, 349 P.3d at 275.

When determining the plain and ordinary meaning of words, we may consider a definition in a recognized dictionary. See, e.g., *People v. Hunter*, 2013 CO 48, ¶ 10, 307 P.3d 1083, 1086 (determining the plain meaning of the statutory term “stranger” by consulting Webster’s New College Dictionary and Black’s Law Dictionary).

Cowen v. People, 431 P.3d 215, 218–19 (Colo. 2018).

According to *Webster’s New World College Dictionary* (2014), “consider” means “to think carefully or seriously; reflect.” As discussed above, the evidence establishes that Lisac failed to think carefully or seriously about the additional information Complainant provided him after the second Rule 6-10 meeting concerning the discrepancies and conflicts between Powell’s and Montano’s narratives and within those narratives over time. Therefore, Lisac’s failure to consider that information constitutes a violation of Board Rule 6-10(I).

3. Board Rule 6-11(A)

Board Rule 6-11(A) lists the factors upon which an appointing authority must base the decision to impose a disciplinary action on a certified state employee, which include:

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.

As discussed in more detail above, Respondent failed to establish by a preponderance of the evidence that Complainant committed the acts for which she was terminated. Lisac concluded that Complainant was untruthful and antagonistic, but those conclusions were not established at the evidentiary hearing and were problematic to the extent they were based, as discussed above, on misplaced reliance on unreliable polygraph examination results, a failure to procure pertinent evidence, and a failure to candidly and honestly consider the totality of the evidence to which Lisac had access. Accordingly, Lisac’s application of the Rule 6-11 factors should have led him to a different result.

3. Board Rule 6-12(B).

Board Rule 6-12(B) lists the reasons discipline may be imposed on a certified state employee. As discussed above, Respondent failed to establish by a preponderance of

the evidence that Complainant's conduct constituted legitimate and appropriate reasons for Respondent's disciplinary termination of Complainant's employment. Accordingly, Lisac's decision to terminate Complainant's employment based on the reasons listed in Board Rule 6-12(B) is in violation of that Rule.

The decision to terminate Complainant's employment was contrary to Board Rules 6-2, 6-10(I), 6-11(A), and 6-12(B).

E. Respondent Discriminated Against Complainant in Violation of CADA

1. Complainant Established A *Prima Facie* Case of Unlawful Discrimination Based on Sex

Complainant alleges that she was discriminated against by Respondent on the basis of her sex, female, in violation of the Colorado Anti-Discrimination Act (CADA). She alleges sex discrimination was the reason for Respondent's handling of the events of April 25, 2024, placing Complainant on administrative leave, and ultimately terminating Complainant's employment.

CADA and the Board's rules mandate that employment decisions be made without discrimination on the basis of sex, among other protected classes. See C.R.S. § 24-34-402(1)(a); Board Rule 9-3 ("Discrimination and/or harassment against any person is prohibited because of . . . sex . . . or any other protected class recognized under the Colorado Anti-Discrimination Act (CADA). This applies to all employment decisions.").

CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. See, e.g., *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). See also *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) ("Colorado and federal law apply the same standards to discrimination claims"); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1219 (10th Cir. 2003) ("Colorado has adopted the same standards applicable to Title VII cases when considering claims brought under the [CADA]").

"Colorado has adopted the following approach [for analyzing discrimination claims based on circumstantial evidence], modeled on the [U.S.] Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving an inference of discriminatory intent." *St. Croix v. Univ. of Colo. Health Scis. Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

"First, an employee must show that [she] belongs to a protected class. Second, the employee must prove that [she] was qualified for the job at issue. Third, the employee must show that [she] suffered an adverse employment decision despite [her] qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination." *Bodaghi v. Dep't of Nat. Res.*, 995 P.2d 288, 297 (Colo. 2000).

If the complainant establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate some

legitimate, nondiscriminatory reason for the employment decision. Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination.

Colo. Civ. Rts. Comm'n v. Big O Tires, Inc., 940 P.2d 397, 401 (Colo. 1997).

In this case, Complainant established a *prima facie* case of discrimination on the basis of sex. As a female who was qualified for her position for 20 years, Complainant met the first two prongs of a *prima facie* case of sex discrimination. Respondent's decision to terminate Complainant's employment was an adverse employment action and establishes the third prong of a *prima facie* case of sex discrimination.

For the fourth prong of a *prima facie* case of sex discrimination, Complainant must establish that all the evidence in the record supports or permits an inference of unlawful discrimination. Only a "small amount of proof [is] necessary to create an inference of discrimination." *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 539 (10th Cir. 2014) (quoting *Orr v. City of Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005)).

The contrast in DOC's treatment of Complainant on the one hand and Powell and Montano on the other hand is more than sufficient to support or permit an inference of unlawful sex discrimination.

As early as April 25, 2024, it appears that Complainant was identified as having acted in a wrongful manner, as indicated by Larimore's comment to Complainant towards the end of the day that both parties – Complainant and Powell – made mistakes. At that time, Larimore had not been privy to Complainant's explanation of what had occurred on that day.

When Estrada met with Complainant on April 30, 2024, Estrada appeared to adopt an adversarial attitude towards Complainant rather than obtaining Complainant's version of the April 25, 2024, incident. Estrada suggested that Complainant unlawfully detained Powell in his office, and implied that Complainant's entry into Powell's office was unwanted and unwarranted.

Then, in remarks made to Powell on May 3, 2024, Corey implied that someone, not Powell, was being untruthful, and clearly referring to Complainant. Again, at this point, there was no basis to determine who was being untruthful, but somehow the determination was made that it was the woman – Complainant – and not the men – Powell and Montano.

Corey's bias towards Powell and Montano is evidenced by his complimenting both men on their honesty and integrity while not complimenting Complainant on her honesty and integrity. At that time, there was no basis to conclude that Powell and Montano were being truthful, and Complainant was not.

That premature identification of Complainant as the purveyor of untruths was continued by Sandoval, when she placed Complainant on administrative leave effective May 21, 2024, and referred Complainant's conduct to the District Attorney for possible criminal charges. This was done despite the fact that Corey's Investigative Report failed to identify who might be untruthful. Sandoval's actions are in stark contrast to actions taken against Powell, who was merely reassigned to another DOC facility for approximately two weeks or so.

Complainant's disparate treatment continued as she lingered on administrative leave and was subjected to two Rule 6-10 meetings. Furthermore, Complainant was the only one of the three individuals who participated in or were witnesses to the interactions between Powell and Complainant on April 25, 2024, to be subjected to a polygraph examination, even though Lisac testified that he could not tell who was being untruthful. Ultimately, Complainant was the one who was terminated.

These facts support or permit an inference of unlawful discrimination and establish the fourth and final prong of a *prima facie* case of sex discrimination. Accordingly, Complainant established a *prima facie* case of employment discrimination on the basis of sex.

The burden of production now shifts to Respondent to offer a purported legitimate, nondiscriminatory reason for its decision to terminate Complainant's employment.

2. Respondent Provided Purported Legitimate Nondiscriminatory Reasons for Its Decision

Respondent provided purported legitimate, nondiscriminatory reasons for its decision to terminate Complainant's employment: Lisac concluded that Complainant was untruthful in her reports of the April 25th Incident, and in her statement concerning Turner's personnel issues policy, as well as being antagonistic towards Powell on April 25, 2024. Therefore, the discussion must now focus on evidence that these purported legitimate, nondiscriminatory reasons were pretextual.

3. Complainant Established Pretext

Where an employer responds to an employee's *prima facie* case with evidence of a legitimate, nondiscriminatory reason for its action, showing that the reason was pretextual does "not require a plaintiff to offer any direct evidence of actual discrimination." *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Cir. 2007). "[I]ndirect proof suffices because discrimination is as sly as it is insidious. It lives in inference, tone, and gesture as much as in action. Instead, the employee may show pretext based on "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's explanation. For example, the timing and sequence of events leading up to the adverse action, as well as post-hoc justifications, can be evidence of pretext." *Williams v. Dept. of Pub. Safety*, 369 P.3d 760, 772 (Colo. App. 2015) (citations and internal quotation marks omitted). In addition, misjudging an employee's qualifications and job performance may be evidence of pretext. See *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000) ("evidence indicating that an employer misjudged

an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination") (citation and internal quotation marks omitted).

The evidence presented at the evidentiary hearing is more than sufficient to establish that Respondent's purported legitimate, nondiscriminatory reasons for terminating Complainant's employment were pretextual.

In addition to the evidence of disparate treatment establishing Complainant's *prima facie* case of sex discrimination – which alone is sufficient to support a conclusion of pretext -- the following evidence of Respondent's explanatory weaknesses, irregularities, and misguided conclusions adds further support of a finding of pretext:

- As Banda's discrimination and retaliation Investigative Report established, verified incidents of sex discrimination at CSP were not uncommon, and there existed a culture in which such incidents could occur, with little evidence that complaints of sex discrimination were handled expeditiously or that the perpetrators of discriminatory actions were always sufficiently held accountable for their actions.
- Complainant's workplace violence complaint was turned into an investigation and indictment of her own conduct, with no official determination as to the legitimacy of her complaint.
- While Estrada failed to fully interview Complainant on April 25, 2024, Estrada interviewed Powell with Montano in the room. As Estrada testified at the evidentiary hearing, it is not common to interview witnesses to an incident together. It makes sense to interview witnesses separately, so as not to taint or influence the perspective and memory of the second witness after hearing the perspective and memory of the first witness.
- No recordings were made of Powell's and Montano's discussion with Estrada and Larimore on April 25, 2024, no notes were taken or produced, and investigators Corey and Lisac did not inquire as to what was said and by whom.
- Corey failed to record his interviews with Estrada and Turner.
- Corey failed to record 37 minutes of his 40-minute interview with Powell on May 2, 2024.
- Corey's May 3, 2024, interview with Powell lasted only approximately 15 minutes.
- Montano was present in Estrada's office when Powell provided his report of his interactions with Complainant, which likely influenced Montano's narrative of events.
- Lisac failed to interview Sandoval and Larimore, both of whom possessed material information about what was told to them on April 25, 2024, and why Complainant

was placed on administrative leave and referred to the District Attorney while Powell and Montano were not.

- Lisac failed to record his interviews with Estrada and Turner, but he did record his interviews with Complainant, Powell, and Montano.
- Lisac relied to a significant degree on the unreliable results of Complainant's polygraph examination when he knew, or should have known, that polygraph examinations were unreliable to obtaining the truth, and then Lisac attempted to minimize his reliance on the polygraph results in his testimony at the evidentiary hearing, after the ALJ advised Respondent's counsel that polygraph test results were inadmissible in adjudicatory proceedings under Colorado law.
- Lisac ignored the many material discrepancies in Powell's and Montano's narratives but exaggerated the minor discrepancies in Complainant's reports.
- Lisac failed to fully record his interviews with Powell and Montano, which recording started late and, at least in one instance, abruptly ended.
- Lisac exaggerated the negative aspects of Complainant's job performance history while downplaying Complainant's positive evaluation and her significant achievements.
- Complainant's discrimination and retaliation complaint was not investigated in an expeditious manner and was further delayed by the initial misunderstanding of the scope of that investigation. Complainant was not interviewed about her discrimination claim arising from the April 25th Incident and its aftermath until two months after she submitted her discrimination complaint. Banda failed to investigate this aspect of Complainant's discrimination complaint, other than interviewing Complainant and reviewing Complainant's confidential report of April 25, 2024. Banda did not review any of the other documents concerning Complainant's claim that Respondent's handling of the April 25th Incident constituted sex discrimination. Banda did not review the confidential reports of Powell and Montano. She did not review Corey's OIG Investigative Report. She did not listen to the recordings of Corey's interviews with Complainant, Powell, and Montano. She did not listen to the recordings of Lisac's interviews with Complainant, Powell, and Montano. In summary, Banda did not conduct an adequate investigation of Complainant's claim that Respondent's actions taken against Complainant concerning the April 25th Incident constituted sex discrimination.

In summary, Complainant established by a preponderance of the evidence that the purported legitimate, nondiscriminatory reasons for the decision to terminate Complainant's employment were pretextual. Accordingly, the evidence establishes that Respondent discriminated against Complainant on the basis of sex in violation of the Colorado Anti-Discrimination Act.

E. Respondent Retaliated Against Complainant in Violation of CADA

Complainant also alleges that Respondent retaliated against her in violation of CADA. The purported retaliation took the form of the job performance evaluation drafted and signed by Turner on August 30, 2024, and the termination of Complainant's employment on October 15, 2024.

Under CADA, it is a "discriminatory or unfair employment practice ... [f]or any person, whether or not an employer ... [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." C.R.S. § 24-34-402(1)(e)(IV).

The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). As noted above, CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. See *George*, 950 P.2d at 1198.

1, Complainant Established A *Prima Facie* Case of Retaliation in Violation of CADA

To establish a *prima facie* claim of retaliation under CADA, Complainant must demonstrate that: (1) she engaged in protected opposition to discrimination; (2) Respondent took an adverse employment action against her; and (3) there exists a causal connection between the protected activity and the adverse action. *Smith v. Board of Educ. Of Sch. Dist. Fremont RE-1*, 83 P.3d 1157, 1162 (Colo. App. 2003).

Complainant raised allegations of sex discrimination and retaliation during her interview with Corey on May 1, 2024, and with Lisac on July 9, 2024. Complainant submitted her discrimination and retaliation complaint to DOC Executive Director Stancil on July 16, 2024. After that, she participated in the discrimination and retaliation investigation conducted by DOC's OHR from July 2024 to October 2024. Complainant's claims of sex discrimination and retaliation, and participation in the resulting investigations of those claims, constitute activities protected by CADA, establishing the first prong of a *prima facie* retaliation claim under CADA.

An adverse action under Title VII and CADA retaliation cases is defined as an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-70 (2006). See also *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006).

The Tenth Circuit "liberally define[s] the phrase 'adverse employment action'.... Such actions are not simply limited to monetary losses in the form of wages or benefits. Instead, [the circuit] take[s] a case-by-case approach, examining the unique factors relevant to the situation at hand. One factor that strongly indicates a challenged action is an 'adverse employment action' is that the action causes harm to future employment prospects." *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004) (internal citations

and quotation marks omitted). The scope of adverse employment action is broader for retaliation than for discrimination. “[T]he antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.” *Burlington Northern*, 548 U.S. at 64.

The prospect of lost wages, benefits, or the job itself are significant or material alterations to an employee's job status and can be considered adverse employment actions in a retaliation case. *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1316 (10th Cir. 2006). However, an adverse employment action is not necessarily limited to these acts. *E.E.O.C. v. C.R. Eng., Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011). For example, conduct that harms employment prospects, such as a negative job reference, can also count. *Hillig*, 381 F.3d at 1033–35. The Tenth Circuit has noted:

Disciplinary proceedings, such as warning letters and reprimands, can constitute an adverse employment action. A reprimand, however, will only constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment -- for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities.

Medina v. Income Support Div., 413 F.3d 1131, 1137 (10th Cir. 2005) (citations omitted). See also, e.g., *Dunn v. Shinseki*, 71 F. Supp. 3d 1188, 1191-92 (D. Colo. 2014) (negative performance reviews may qualify as adverse employment actions in retaliation cases).

Here, Complainant established the second prong of a *prima facie* claim of CADA retaliation. The job performance evaluation signed by Turner on August 30, 2024, removed most of the many complimentary comments about Complainant's performance that were included in Complainant's mid-March evaluation, and downgraded Complainant's ratings in two core competencies from Highly Effective to Effective. In her Investigative Report concerning Complainant's allegation of retaliation, Banda concluded that, because Complainant's overall rating remained at Level III (Effective), the August 2024 evaluation was not retaliatory. That conclusion is without merit for several reasons.

First, as evidenced by Lisac's reliance on narrative comments in Complainant's past evaluations to support his argument that Complainant's job performance was somehow problematic, the content of the narratives accompanying the numerical ratings can affect, either positively or adversely, an employee's future job security and reputation.

Second, as Complainant correctly notes, there was no justification for the deletion of the highly positive ratings and narrative included in the mid-March evaluation. Complainant only worked for an additional two months subsequent to that evaluation before she was placed on administrative leave on May 21, 2024, and there is no evidence that Complainant's job performance during those two months justified the change in ratings or the removal of those positive comments included in the narratives. The only significant events that occurred between March 16, 2024, and August 30, 2024, were the April 25, 2024, incident and the subsequent investigation, which was still pending as of August 30, 2024, and Complainant's discrimination and retaliation complaint, which she

submitted on July 16, 2024. Turner's August 2024 evaluation of Complainant's job performance was an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern*, 548 U.S. at 68-70.

And, of course, Respondent's decision to terminate Complainant's employment was an adverse action.

To establish the third prong of a *prima facie* claim of CADA retaliation, Complainant must establish a causal connection demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Chavez v. City of Arvada*, 88 F.3d 861, 866 (10th Cir.1996). Here, Complainant's protected activity stretched from May 1, 2024, when she first raised the issue of sex discrimination with Corey, through September 17, 2024, when Banda interviewed Complainant for the second time as part of the sex discrimination and retaliation investigation, during which Complainant reiterated her discrimination and retaliation claims. Based on temporal proximity alone, Complainant has demonstrated a causal connection between her protected activities and the adverse action she received. Accordingly, Complainant established the third prong of a *prima facie* claim of CADA retaliation. Therefore, Complainant established a *prima facie* case of CADA retaliation.

Once Complainant establishes a *prima facie* retaliation case, the burden shifts to Respondent to proffer an alleged legitimate, non-retaliatory reason for the adverse employment action.

2. Respondent Provided Purported Legitimate Non-Retaliatory Reasons for Its Disciplinary Decision, But No Reason Was Provided for Turner's August Job Performance Evaluation

As discussed above, Respondent has proffered non-discriminatory and non-retaliatory reasons for disciplining Complainant. However, no explanation was provided for Turner's August 2024 job performance evaluation of Complainant. After Complainant disputed that evaluation, objecting to the downgrading of her ratings in two core competencies, the deletion of the many highly complimentary comments included in Turner's mid-March 2024 evaluation, and the omission of nearly all of Complainant's significant contributions and achievements, Sandoval met with Turner and Complainant's evaluation was revised to include some, but not all, of Complainant's achievements. However, the complimentary comments included in the mid-March evaluation narratives remained deleted. Accordingly, Respondent has satisfied its burden to proffer purported legitimate, non-retaliatory reasons for disciplining Complainant, but has not satisfied its burden to proffer a legitimate, non-retaliatory reason for the significant omissions of positive comments in Turner's August 2024 evaluation of Complainant's performance.

3. Complainant Established Pretext

If Respondent does so, Complainant must establish that the purported legitimate, non-retaliatory reasons for the adverse employment action are pretextual. *Hansen v. SkyWest Airlines*, 844 F.3d 914, 925 (10th Cir. 2016). As discussed above in the discussion of Complainant's sex discrimination claim, the same factors establishing

pretext apply here. Complainant has established by a preponderance of the evidence that Respondent's purported legitimate, non-retaliatory reasons for its adverse employment actions are pretextual. Accordingly, the evidence establishes that Turner's August 2024, evaluation of Complainant's job performance, and Respondent's decision to terminate Complainant's employment in October 2024, were retaliatory actions in violation of CADA.

III. Remedies

Respondent's decision to terminate Complainant's employment is reversed. Complainant shall be reinstated to her previous position as a Correctional Office IV (Captain) at the Colorado State Penitentiary.

Complainant also seeks back pay and benefits.

The Board may only provide remedies authorized by its enabling statute. See, e.g., *Colo. Civ. Rts. Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1371 (Colo. 1988) ("the Commission may only provide remedies authorized by the Commission's enabling statute"). The Board may affirm, modify, or reverse a disciplinary action. C.R.S. § 24-50-125(4). An award may include all rights, salaries, and benefits. See, e.g., C.R.S. § 24-50-125(7).

"Where a legal injury is of an economic character . . . legal redress in the form of compensation should be equal to the injury." *Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). "Any remedy fashioned . . . should equal, to the extent practicable, the wrong actually sustained by [Complainant]." *Id.*

Complainant is entitled to back pay and benefits. Back pay is a "make whole" remedy intended to restore the employee to the financial situation that would have existed but for the employer's wrongful conduct. "A calculation of back pay should include the employee's base salary amount and pay raises the employee reasonably expected to receive, as well as sick leave, vacation pay, and other fringe benefits, during the back pay period." *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo. App. 2010).

With respect to the issue of Complainant's mitigation of damages, Respondent alleges that Complainant failed to mitigate her damages because she has not sought alternative employment but instead has gone back to school.

"Failure to mitigate damages is an affirmative defense that must be proved by the [Respondent]." *Bullington v. Barela*, 555 P.3d 102, 107 (Colo. App. 2024). Respondent has the burden of proof to establish that: (1) there were substantially comparable positions that Complainant could have discovered and for which she was qualified; and (2) Complainant failed to use reasonable diligence to find suitable employment. *E.E.O.C. v. W. Trading Co., Inc.*, 291 F.R.D. 615, 620 (D. Colo. 2013).

Respondent failed to establish by a preponderance of the evidence that there were positions that were substantially comparable to Complainant's DOC position that

Complainant could have discovered and for which she was qualified. Respondent failed to present any evidence of the existence of substantially comparable positions that Complainant could have discovered and for which she was qualified. The fact is that, having been disciplinarily terminated by Respondent, it is unlikely that Complainant would have been hired by any other law enforcement agency in the State of Colorado.

Respondent also failed to establish by a preponderance of the evidence that Complainant failed to use reasonable diligence to find suitable employment. Respondent offered no evidence to establish Complainant's lack of reasonable diligence to find suitable employment.

Accordingly, Respondent failed to meet its burden to establish that Complainant failed to mitigate her damages. Therefore, Complainant is entitled to her full back pay and benefits.

CONCLUSIONS OF LAW

1. Complainant did not commit the acts for which she was disciplined.
2. Respondent's action in terminating Complainant's employment was arbitrary and capricious and contrary to Board rules.
3. Respondent discriminated against Complainant on the basis of sex in violation of the Colorado Anti-Discrimination Act.
4. Respondent retaliated against Complainant in violation of the Colorado Anti-Discrimination Act.

ORDER

1. Respondent's disciplinary action is **reversed**.
2. Respondent shall reinstate Complainant to her former position as a Captain (Correctional Officer IV) at the compensation level she would now hold had she not been terminated.
3. Respondent shall compensate Complainant with her lost back pay and benefits. At the time of the termination of Complainant's employment, Complainant's base monthly salary was \$7,485.00, with an added monthly temporary pay differential of \$209.58. Complainant's back pay based on her monthly base salary from October 16, 2024, through June 30, 2025, equals **\$63,622.50**. It is unclear if, or when, the monthly temporary pay differential expired, but if it would be payable through June 30, 2025, the total temporary pay differential from October 16, 2024, through June 30, 2025, would be **\$1,781.43**. Total back pay, with the full temporary pay differential, therefore, equals **\$65,403.93 through June 30, 2025**. Respondent shall also reimburse Complainant for the value of the benefits she would have received had she not been terminated, which include "sick leave, vacation pay, and other fringe benefits, during the back pay period."

Bonidy, 232 P.3d at 283. Complainant's award of back pay is subject to the usual withholdings and DOC's PERA contributions.

3. Complainant is also entitled to pre- and post-judgment interest at the statutory rate of 8% per annum pursuant to C.R.S. § 5-12-201. See *Rodgers v. Colo. Dep't of Hum. Svcs.*, 39 P.3d 1232, 1237 (Colo. App. 2001) (statutory interest applies to awards of back pay before the Board).

DATED this 4th day
of June 2025,
at Denver, Colorado

/s/ [REDACTED]
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of June 2025, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Gwendolyn Londenberg
[REDACTED]

Nicholas J. Lopez, Esq.
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Assistant Attorney General
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[REDACTED]

APPENDIX A

WITNESSES TESTIFYING AT HEARING (IN ORDER OF APPEARANCE)

Jordan Powell

Charles Montano

Chance Turner

Carmen Estrada

Dave Lisac

Jennifer Banda

Meredith McGrath

Shayne Corey

Gwendolyn Londenberg

APPENDIX B

EXHIBITS ADMITTED OR STIPULATED TO, OR EXHIBITS OFFERED BUT NOT ADMITTED

Respondent's Exhibits Admitted: 1, 2, 3, 4, 5, 6, 8 (limited to post-test interview), 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41

Complainant's Exhibits Admitted: B, C, D, E, F, G, H, I, J, K, L, M (limited to June 24, 2024 notice of Rule 6-10 meeting and Investigative Report), O, P, Q (limited to August 2, 2024 notice of reconvened Rule 6-10 meeting and June 7, 2024 delegation letter), S, U, W, A2, A3, A11, A12, A13, A14, A15, A22, A29, A32, A34, C2, H1, I1, K2, L1, P1, P2, Q1, W1, X2, Y2, Z1, Z2

Respondent Exhibits Offered But Not Admitted: 7, 9, 10, 11, 13, 23, 24, 25, 36, 37

Complainant Exhibits Offered But Not Admitted: A, N, R, T, V, Y, Z, A4, A5, A6, A7, A8, A9, A10, A16, A17, A18, A19, A20, A21, A23, A24, A25, A26, A27, A28, A30, A31, A33

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.

RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. 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 mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-54.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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