

FIRST AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRANCES MOORE,

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES,
LOOKOUT MOUNTAIN YOUTH SERVICES CENTER,**

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 8, 9, 10, and 11, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Nora Kelly, Esquire, represented Complainant Frances Moore ("Complainant" or "Moore"). Assistant Attorney General Monica Ramunda represented Respondent Department of Human Services, Lookout Mountain Youth Services Center ("Respondent" or "Lookout Mountain").

This First Amended Initial Decision replaces the Amended Initial Decision and Initial Decision. The extremely minor modifications herein are not substantive in nature and therefore do not toll the period for appealing the October 26, 2003 Initial Decision.

MATTER APPEALED

Complainant appeals her disciplinary termination by Respondent and seeks reinstatement, back pay, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded**.

PROCEDURAL MATTERS

The Administrative Law Judge has entered a Protective Order mandating that the identities of all juveniles at Lookout Mountain remain confidential.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Lookout Mountain is an all-male residential treatment center for youth with the most serious criminal histories in the state. The youth incarcerated at Lookout Mountain have committed violent crimes, including sex, drug, and property offenses. The average length of stay is 14 months.
2. Complainant, Frances Moore, worked at Lookout Mountain from April 1999 until her termination in April 2003. She began as a mental health clinician and was promoted to Safety and Security Officer I ("SSO I"). SSO I's are charged with assuring the safety and security of the youth and providing counseling through individual and group therapy.
3. Moore worked on the Juniper West unit. The unit is divided into the following areas: an open area in the middle; three wings expanding off the open area, containing residents' rooms; and the "level room." The level room is an activity room where residents who have achieved Level 2 status for good behavior can spend time.
4. Juniper West is always staffed with one milieu manager, an SSO II, who oversees the level room, and an SSO I, who covers the remainder of the unit. Moore worked most often with Willie Martinez and Damon Carver, SSO II's who were her immediate supervisors.
5. Lookout Mountain residents are disciplined through incentive programs that promote good behavior and punitive programs that punish bad behavior. Staff impose points for bad behavior which result in privileges being lost, impose "timeouts" in which youth are locked down in their rooms, and write up Incident Reports on youth, which are serious. If a resident accumulates a certain number of points by the end of the week, he is put in scrubs and cannot participate in any activities.

Moore's Performance History; Problems with Management

6. Moore was generally a good performer. She was appropriately tough with the youth under her supervision and had no problems being assertive with them. She imposed points on residents for not following staff instructions and for general misbehavior. At the outset of her employment, she had difficulty controlling her temper; however, she overcame this issue after counseling by Willie Martinez.
7. Willie Martinez and Damon Carver, Moore's two immediate supervisors, with whom she worked nearly every shift, viewed her as an outstanding member of their team. They trusted her

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completely, and had excellent communication with Moore, essential to the smooth functioning of the unit.

8. Moore has had occasional problems with enforcing rules. For example, she once allowed a youth to open a letter without reviewing it first; she allowed a resident to take an unauthorized phone call from his mother; and she once brought in art supplies for a resident. In November 2002, she printed a list of music records for a resident off the computer at work, resulting in a January 28, 2003, Corrective Action. Moore has no other disciplinary history.
9. Moore had problems with authority at Lookout Mountain, who viewed her as passive. Moore has a somewhat unusual communication style, and occasionally utilizes atypical grammar. Management staff responded to her communication style by making fun of her. Kerry Martin, Unit Manager on Juniper West and East, a high level manager with supervisory authority over all Juniper staff, had a strong dislike for Moore. She once openly humiliated Moore in a team meeting in front of the entire Juniper East and West staff. She repeatedly referred to Moore as "crazy" to one of the group leaders, who found it grossly inappropriate.¹ In addition, two of Moore's group leaders, Steve Humbard and Donna Kelliher, made fun of Moore.
10. In January 2003, when the allegations that are the subject of this action arose, Moore had a grievance pending against Steve Humbard. She had recently joined the union in an effort to improve her situation at work with management.

January 2000 Sex Assault by Resident #1 on Moore

11. On January 29, 2000, Resident #1, a youth on the Juniper West unit, sexually assaulted Moore. As Moore handed him pencils and pens, he pulled her into his room, grabbed her arms and pulled them behind her body, threw her to the floor, and kicked the door closed. Moore's supervisor, Willie Martinez, heard the tussle, forced the door open, and stopped the incident.
12. Moore pressed criminal charges against Resident #1, and he was convicted of sexually assaulting her.
13. During the pendency of the criminal case, Lookout Mountain officials allowed Resident #1 to remain on the Juniper West unit, where Moore continued to work. This extremely uncomfortable situation continued for two months until Resident #1 was sent to prison, on March 29, 2000.
14. During the two-month period prior to his departure, Resident #1 told the other youth on Juniper West and other units that Moore had had a sexual relationship with him, had set him up on false criminal charges, and that he was not guilty. The residents at Lookout Mountain believed his story.

¹ In addition, in April 2002, Martin made two errors on Moore's evaluation, which Moore successfully grieved. In a May 30, 2002 email to Moore, Lookout Mountain Director Caren Leaf notes that the corrections Moore sought on her evaluation had been made. She also thanked Moore for the manner in which she pursued the issue.

15. This belief that Moore had set up Resident #1 on false criminal charges circulated widely among the youth at Lookout Mountain.
16. Resident #1 threatened Moore, informing her he had her address and telephone number. Moore was so afraid that she applied for the witness protection program.

Resident #1 Letters to Lookout Residents; August 2000 False Allegations Against Moore

17. Once in prison, Resident #1 sent letters to youth on Juniper West, discussing the criminal case and Moore. Lookout Mountain officials, who are required to review all letters to residents prior to their delivery, somehow allowed the letters to be read and widely discussed by youth on Juniper West. This created a difficult work environment for Moore.
18. In August of 2000, a number of youth made allegations that Moore had engaged in inappropriate physical contact with them. The youth wrote statements alleging that Moore had placed her hands down youth's pants; had kissed a youth on the lips; and had watched residents expose themselves to her without looking away.
19. Pat Kirk, Assistant Director of Lookout Mountain, reviewed the written statements, and conducted a full internal investigation into the allegations. She interviewed eleven youth. She concluded that the allegations against Moore were false and unfounded, and closed the investigation. At hearing, Kirk testified that "there was no merit" to that case.
20. Lookout residents made false allegations of sexual misconduct by Moore in an attempt to retaliate against her for "setting up" Resident #1.

Resident #1's Ongoing Contact with Lookout Residents

21. Resident #1 remained in contact with Juniper youth by letter regarding his criminal case and Moore for an exceptionally long time. By July 2001, well over a year after his release to prison, the issue had become such a problem on the unit that on July 12, 2001, James Meadows, Unit Director of Juniper [who preceded Martin], sent out an email to all staff alerting them to it. It stated in part, "It appears that an 'ex-resident' is sending court information regarding a current staff member's charges against him, to resident(s) on campus. Thus far no personal information has been disclosed to our knowledge, but documents have been found which contain statements made by the staff member during court proceedings. These documents have been duplicated and appear to be circulating on campus." The email requests increased surveillance of mail arriving from the Department of Corrections, where Resident #1 was incarcerated.
22. A year later, in the summer of 2002, Mike Martinez, a security staff member at Lookout Mountain, called Moore into his office to inform her of another letter from Resident #1 to a youth at Lookout. It is almost certain the letter was written to Resident #2, although his time at Lookout had only overlapped with Resident #1's for 22 days.

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23. Moore informed Pat Kirk of the Resident #1 letter in the summer of 2002. Kirk took no action.
24. Moore was fearful for her welfare. She called the victim witness protection program staff person again, who referred her to Resident #1's case manager. Moore feared retaliation by Resident #1.

Resident #2

25. Throughout her employment, after Resident #1 was sent to prison, Moore was asked by the youth on Juniper West, "What happened with Resident #1, did you set him up?" She ignored it. Resident #2 consistently brought it up with her. Moore requested a transfer off Juniper West but did not receive it.
26. Lookout Mountain management provided no moral support to Moore concerning Resident #1's continued harassment of and attempts to retaliate against her through the youth at Lookout Mountain. Moore felt unsupported at work.
27. In late November 2002, Resident #2 started calling Moore "promiscuous." Moore immediately reported it to Steve Humbard, one of her group leaders. She requested permission to write an Incident Report on Resident #2 for his comment. Humbard denied Moore's request, and directed her not "to make an issue of it."
28. Moore decided to make an issue of it anyway. She wrote an informational Incident Report on Resident #2, and informed Willie Martinez of what Humbard had said (not to make an issue of it), in Humbard's presence.
29. Resident #2 was one of the most dangerous and deceitful residents at Lookout Mountain, feared by all the other residents. He bullied the other youth, often lying about their conduct to get them into trouble, while earning points with staff for himself.
30. Resident #2 once stated to Jackie Trainer, an SSO I [who left Lookout in October 2002], that he had had sex with a number of the teachers at Lookout. When she challenged his statement as untrue, he replied, "do you know how long I have to be here, what difference does it make?" or words to that effect.

Resident #3

31. Resident #2 was the roommate and close friend of Resident #3, the primary accuser of Moore in this case.
32. Resident #2 (and several other Lookout residents) informed Resident #3 that they had been present at the Resident #1 incident with Moore, and that Moore had "set up" Resident #1 on a

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false sex assault charge resulting in his unjustified conviction and incarceration.

33. Resident #3 believed Resident #2 and the other boys. He believes that Moore had had a sexual relationship with Resident #1, and set him up on false criminal charges of sexual assault. Resident #3 testified at hearing that "a lot of people knew about Resident #1 and Moore. It was bs and Frances set him up."
34. Resident #2 was discharged from Lookout Mountain on November 28, 2002. He made negative statements about Moore to Lookout staff in the car on the way out of the facility.
35. Resident #2 continued his close friendship with Resident #3 by letter after his release to a Department of Corrections jail.

January 2003 Allegations Against Moore

36. On January 16, 2003, Resident #3 informed a teacher, Elizabeth James, that Moore had put his hands on her breasts. James doubted that anything improper had occurred, based on her knowledge of Resident #3's poor boundaries and her knowledge of Moore. She told him she would think about it and get back to him.
37. On January 22, 2003, James told Resident #3 that if he felt Moore had overstepped her boundaries, she would support him if he wanted to report the incident. She referred him to Bonnie McCarty, an SSO I on the Eagles unit, to which Resident #3 had just been transferred.
38. Resident #3 next told McCarty about the alleged misconduct by Moore. He told her Moore brought in chewing tobacco and pornography for residents, including Resident #5, on Saturday mornings, that she was having oral sex with youth in their bedrooms and in the isolation rooms on Saturday mornings, that she had grabbed his penis and buttocks, that she tried to grab his hands and move them onto her breasts, that she often rubs her buttocks against their penis, and that she allows youth to touch her. He stated that Resident #5 had told Moore of his allegations, and that Moore had threatened to have him beaten up. He said he feared being "set up" like Resident #1.
39. McCarty required that Resident #3 put his allegations in writing and sign his name to it, so that he would appreciate the seriousness of his allegations. She also asked him to obtain written statements from other youth, corroborating his allegations.
40. Resident #3 provided a written statement, which McCarty typed and he signed. It contains additional allegations that Moore did the following: in December 2002 he saw Moore touch other residents on their penis; "she has done the same thing to me several times." "Ms. Moore has rubbed her butt on the penis area of other residents when she walks by them and makes sexual comments such as you could not handle me in bed if I gave you the chance, or she talks about when she has sex she likes to wear a leather g-string and have sex all night." "I also seen her walk out of peers' rooms buttoning up her pants during the mornings that she works." He has

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heard her take youth out of their rooms on Saturday mornings when she works alone and bring them back and tell them they were good enough to take again. She once asked youth in the dining room if they wanted to see what she could do with a hotdog. Resident #2 had told him that Moore was giving youth oral sex when she worked on Saturdays. She commented about her private parts getting tighter when she runs stairs, and about her breasts getting bigger when she lifts weights. She has threatened to have someone "take care of him" as retribution for his coming forward.

41. Resident #3 was able to obtain only one written statement containing allegations of misconduct by Moore. It was written by Resident #4, a small, unpopular boy at Lookout whose only friend and protector was Resident #3.
42. Resident #4's written statement contains no allegations about Moore having inappropriate sexual contact with him. Instead, his allegations all consist of her alleged actions toward others. He stated: Moore talks about shaving her vagina or a youth's penis; she grabs youth's buttocks; she said "do you know what I can do with a corn dog?"; she is always blowing kisses to youth; she slaps her own buttocks when she walks; she allows youth to touch her private parts; she discusses her undergarments being uncomfortable, then re-adjusts her bra; she says "I know you guys are lonely" while she rubs down your back to your buttocks; she stares at youth's crotches and buttocks.

Investigation

43. Pat Kirk utilized the Department's contract investigator, Kitty Arnold, to investigate the allegations against Moore. Pursuant to an agreement with the City of Golden, a detective on the Golden Police Department, Kristin Puttkammer, was assigned to conduct the concurrent criminal investigation.
44. Arnold and Puttkammer agreed that Puttkammer would interview Moore, and Arnold would not.
45. Arnold noted in her report that "Frances Moore declined to be interviewed by this investigator due to the police investigation and the felony charges brought against her." In fact, Arnold never asked Moore for an interview, and no felony charges have been brought against Moore.
46. Arnold interviewed Residents #3 and #4, Detective Puttkammer, and a number of managers and staff at Lookout: Kerry Martin, Unit Supervisor of Juniper East and West, Damon Carver and Willie Martinez, SSO II's with whom Moore worked the closest, Bonnie McCarty, Donna Kelliher and Steve Humbard, group leaders on Juniper West, and Elizabeth James.
47. None of the staff or management interviewed by Arnold corroborated the allegations of improper sexual conduct. Willie Martinez, Moore's direct supervisor, was "adamant in his assertion that the allegations were made up by residents who wanted to get Ms. Moore in trouble

because she holds them accountable." Martinez and Damon Carver reported that both boys have problems with women, that Moore was a hard worker, passionate about her job, and that they had never seen her do anything inappropriate.

48. Steve Humbard advised that while he had had conflicts with Moore, and she in fact had a grievance pending against him, he found it hard to believe that she would have interacted so inappropriately with residents.
49. Arnold accepted unsubstantiated rumors about Moore as true and recorded them in her report without questioning their veracity or trustworthiness. These include:
 - A. McCarty "was able to confirm that Ms. Moore did bring chewing tobacco into the facility on 01/21/03, and gave it to a resident who divided it up and either gave it, or sold it, to other residents." This has never been proven.
 - B. Donna Kelliher, a group leader on Juniper West, reported that "she was aware that Ms. Moore had downloaded gang-related material from the internet." In fact, residents had accessed this material while Moore was absent from the computer; Moore was unaware it had occurred; and Kirk's January 2003 corrective action letter deemed that allegation "unsubstantiated." Arnold was not aware of this and accepted the allegation as true.
 - C. In a section entitled, "Additional information relevant to this case," Arnold reports on the results of Detective Puttkamer's interview with Resident #2, who was not a credible reporter. (See Finding of Fact #52 below.) Arnold notes, "during his placement at Lookout, he had oral sex with Ms. Moore and also observed other residents, including Resident #1, the resident who was charged with assaulting Ms. Moore, having a sexual contact with Ms. Moore. [Resident #2] reported that the sexual contact consisted of oral, vaginal and anal sex. He said that the incidents occurred when Ms. Moore was working alone. . . [Resident #2] recalled the incident when Ms. Moore alleged that she was assaulted by [Resident #1] and he advised that the staff member that observed her exiting [Resident #1's] room was Willie Martinez. However, Willie Martinez denied seeing any sexual contact occur between Ms. Moore and [Resident #1]. [Resident #2] said that he also saw [Resident #3] engage in oral sex with Ms. Moore. [Resident #2] advised that the incidents with Ms. Moore occurred throughout the unit, including in Mr. Hombard's (sic) office, and [Resident #2] verified the allegations that Ms. Moore would bring in and distribute contraband to the residents, saying that she brought tobacco in for him. It is this investigator's opinion that Ms. Moore's actions clearly undermined the efficacy of the program at Lookout Mountain."
 - D. Arnold never investigated Resident #2's credibility, nor did she attempt to identify the names of the boys whom he claimed had had "oral, vaginal, and anal" sex with her.
 - E. Resident #3 reported to Arnold that he had reported Moore's actions to staff member Susan Dotts in December 2002, but that nothing happened. Arnold never interviewed Dotts.

50. Arnold did not interview Resident #5, a critical potential corroborating witness mentioned by Resident #3.
51. Based on all the unsubstantiated rumour and Resident #2's shocking report, all of which Arnold found to be corroborating evidence, Arnold concluded that Residents #3 and #4 were credible.
52. Resident #2 is not a credible reporter. It was the consensus of every witness who testified about him, including Respondent's witnesses, that he completely lacks credibility. Pat Kirk, the appointing authority who terminated Moore, testified that she could not find Resident #2 trustworthy, reliable, or credible at all due to his "well documented and numerous instances of lying, manipulating, theft, contraband, and attempted escape" at Lookout Mountain. Resident #2 routinely lied about the other residents at Lookout Mountain to get them in trouble, and lied about alleged sexual misconduct of other Lookout Mountain staff, as noted above. Lastly, the outrageous and fictitious nature of his claims about Moore is evidenced by the fact that he alleged to Puttkammer he had seen her engage in oral sex with Resident #3; not even Resident #3 himself ever made this allegation.
53. There is no evidence that Arnold was aware of any of the following: the August 2000 false allegations against Moore; Resident #1's letter campaign of inciting revenge against Moore on Juniper West over a period of years; Resident #2's history of deriding Moore on the unit; or Resident #2's close friendship with Resident #3 and the fact they were roommates.
54. Resident #2's false allegations against Moore are of such a prejudicial nature that they fatally taint Arnold's report.
55. Arnold concluded in her report that Moore had committed criminal violations of "minor sexual abuse" on Resident #3 and "minor neglect/environment injurious" of Resident #4.

R-6-10 Pre-Disciplinary Meeting

56. On March 27, 2003, Pat Kirk, Moore, her attorney, and Kerry Martin, attended the pre-disciplinary R-6-10 meeting. Kirk had prepared over fifty questions relating to the contents of the Arnold investigative report and the written statements of Residents #3 and #4. She asked all of her questions, and engaged in a thorough discussion of the allegations with Moore and her attorney.
57. At the meeting, Moore denied having engaged in any of the conduct alleged against her by Residents #2, #3, and #4.
58. At the meeting Moore informed Kirk of the following:
 - A. Prior to Resident #3 coming forward with his allegations in January 2003, "the kids had been talking about other things prior to this over a period of time and I just ignored it because I

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didn't think anything of it and I was told by Steve Humbard at one point when [Resident #2] was doing it that I was to let it go as well and not to make an issue of it. . . I'm talking about [Resident #2] and [Resident #3] who were roommates prior to that, prior to [Resident #2] leaving the unit and the hill and being taken over to the adult facility. He was discussing things about these types of situations prior to that so that's been quite some time before and I was told to ignore it. . . . Willy Martinez is aware of both situations and he was my manager on both nights, you could talk to him. I let him know, I made him immediately aware of what was going on."

- B. Resident #2 and #3's allegations had begun "I'd say around Thanksgiving. [Resident #2] said I was promiscuous and he started using a lot of other words to the effect that I had done something terribly wrong which was untrue and I let my manager know like I said I also let another coworker, Damon Carver, know about the situation so that we could watch each other. Without communication it's difficult. So everybody was aware of the situation, what was going on."
- C. When Kirk asked if Moore had ever given a youth her address, home phone number, or cell phone number, Moore responded, "I don't have a cell phone number, I've never given a youth my home number, however on several occasions I've had to change my phone number which I don't change it anymore, I'm not paying to change it. I was told that they received my phone number off the board in the back office which that's no longer there anymore. . . On two occasions I've had to change my phone number because yes youth have called me at my house. And I informed intake of it."
- D. Kirk asked Moore if she had openly discussed the sexual assault case against Resident #1 with youth on the unit. Moore said no, and informed Kirk that Resident #1 was sending letters to A.D. [another resident] from jail, and Mike Martinez, from the security department, found the letter. She told Kirk that the letter had been passed around to other youth, that it pertained to her, and several youth were aware of the letter and the assault and were discussing it openly amongst each other. Moore stated, "There was more than one I'm understanding but they only found one. I think you need to investigate that Pat."
- E. Moore told Kirk, "You can talk to Mike Martinez. I believe he's the one that found the letter. . . ." Kirk said, "And so, after Mike informed you that the letter had been circulating, that's about the time that you were aware that youth were talking openly about the incident?" Moore responded, "Well they had been talking openly about it anyway but I don't elaborate on those types of conversations because it would hurt me. . . cause more trouble for me, more retaliation. More problems in our lives like what's going on right here, the falsification."
- F. Kirk then stated, "Were you retaliated against as a result of these letters" Moore responded, "I believe that's where Resident #2 got the promiscuous [remark] and started the attitude problem. I'm not really sure, I'm just making assumptions like I said due to gang affiliation and behaviors that certain gang members have."

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- G. Kirk asked if Resident #2 was a gang member, Moore responded that she didn't know, but that "he talked to all of them and was very good friends with every one of them. So I'm not sure what his affiliation was with them. He might have been their carrier, he could have been a lot of things."
 - H. At the end of the meeting, Kirk stated, "I was gathering that you wanted me to chat with Mike Martinez about the letter that came from Resident #1 so I'll do that."
 - I. Moore suggested that Kirk also speak to Willy Martinez, who would know when the letter was turned in, Damon Caver, and three other staff with whom she worked closely.
 - J. Moore stated in closing that she wanted her name cleared "of all these false allegations. . . I believe that some of the authority here abuses their authority at times with threats, insinuations, gossip, innuendo. I believe that those things seem to prevail over what is right. That they need to take a little more time with their coworkers, a little more innovation applying a little more practices of what they see good in individuals instead of what they're always seeing bad. And determining their characters on others' perceptions. I think they need to know each other a little more better."
 - K. Moore also stated, based "on what I've accomplished throughout life and what I've done so far and I would never have engaged in any of these types of things that are presented here today."
59. Moore completed her Bachelor's degree while at Lookout Mountain and has been enrolled in the Masters in Public Administration program at University of Colorado at Denver for some time.
60. Kirk never contacted security officer Mike Martinez concerning the Resident #1 letter. There is no evidence Kirk discussed the Resident #1 letter, Resident #2's conduct towards Moore and his allegations against Moore in 2002, with any other staff at Lookout Mountain.
61. Kirk did not interview any of the five individuals with whom Moore worked closely, whom Moore asked her to interview.
62. At hearing, Kirk testified that Moore provided no mitigating information at the pre-disciplinary meeting, and that Moore had not mentioned either Resident #2 or Resident #1 and revenge as possible motives at that meeting.
63. Kirk was a credible witness. Her clearly erroneous testimony demonstrates that she did not "hear" Moore at the pre-disciplinary meeting; that the mitigating information provided did not sink in or have any effect on her decision making process.
64. Kirk failed to give consideration to mitigating information provided by Moore in making the

decision to terminate her.

65. After reading Arnold's report and the statements of Residents #3 and #4, Kirk was struck by the similarities of the statements contained therein to those made by the youth in August 2000. She found the two sets of allegations "compellingly similar," and made a chart comparing them. Notwithstanding her conclusion that "there wasn't any merit to that [2000] case at all" [Kirk testimony], Kirk gave strong consideration to the previous unfounded allegations when assessing Resident #3 and #4's credibility.
66. Kirk interviewed five individuals in an attempt to assess the credibility of Resident #3 and #4: Kitty Arnold, Detective Puttkammer, Kerry Martin, DeEtta Lessor, Resident #3's client manager, Humbard, and McCarty. Lessor informed Kirk that Resident #3 had been sexually assaulted by a neighbor when he was young, had courageously confronted his abuser, who was convicted, and that he was a trustworthy youth who admitted when he was wrong.²
67. Kerry Martin aggressively researched the issue of whether Moore had worked alone at Lookout Mountain and therefore had had an opportunity to commit the misconduct alleged. She obtained staff work schedules for a period of months, establishing that Moore had indeed worked alone on Saturday mornings and during some Wednesday staff meetings. She provided this information to Kirk.
68. Prior to imposing discipline, Kirk re-read all pertinent rules and regulations, the Colorado Children's Code, and consulted with the director of Lookout Mountain.
69. On April 2, 2003, Kirk terminated Moore. The termination letter cited Moore for the following misconduct:
 - A. she fondled and molested youth in December 2002;
 - B. she brought contraband into the facility to distribute to some of the juveniles;
 - C. Moore had committed minor sexual abuse against Resident #3;
 - D. Moore had committed minor neglect/environment injurious to a youth against Residents #3 and #4;
 - E. Moore allowed youth out of their bedrooms when she was the only staff member in the building;
 - F. Moore had given youth back and neck rubs, had rubbed her buttocks up against youth's genitals, and had touched and fondled youth on their buttocks and testicles;
 - G. Moore had entered youths' bedrooms by herself and unaccompanied by a second staff member when youth were alone in their rooms;
 - H. Moore had made sexually inappropriate comments to male juveniles;
 - I. Moore had provided youth with her address and phone number in the community;
 - J. Moore had engaged in oral, anal, and vaginal sexual relations with youth;

² Respondent did not call Detective Puttkammer as a witness. In addition, the City of Golden, on advice of counsel, directed Detective Puttkammer not to appear for deposition by Complainant's counsel. Therefore, the results of Detective Puttkammer's investigation are not in evidence.

- K. Moore had brought contraband (cigarettes, chewing tobacco and pornographic magazines/videos) to the correctional facility to distribute to youth;
- L. Moore had threatened youth, indicating that if they reported her behaviors as inappropriate she would have someone 'harm them' or file charges against them;
- M. Moore had therefore violated the DHS Code of Ethics and other policies.

70. With respect to the alleged "oral, anal, and vaginal sexual relations with youth" cited in the letter, it is unknown whom Kirk believed Moore had engaged in such sexual acts with. No evidence regarding this issue was offered at hearing. In fact, the only possible source of this allegation was Resident #2, whom Kirk knew not to be a credible reporter.
71. Respondent failed to prove that Moore engaged in any of the acts cited in Kirk's termination letter.
72. Resident #3 is found not to be credible. He was a skilled manipulator of many (but not all) staff at Lookout Mountain, lying about other boys' alleged misconduct in order to earn brownie points with staff.³ He changed his testimony when he felt it helped his case against Moore. For instance, he testified that Resident #2 told him about Moore setting up Resident #1, and that Resident #2 and other youth had been present when it occurred. He testified, "A lot of people [Lookout Mountain boys] knew about Resident #1 and Moore. It was bs and Frances [Moore] set him up." Resident #3 had also reported this version of the Resident #1 incident to Arnold and others previously as though it were gospel. At hearing, however, when he realized that this belief could be perceived as a basis for seeking revenge against Moore, he recanted that testimony, stating "I don't believe what people tell me unless I see it with my own eyes."
73. Resident #3 testified that Moore made a number of her sexually explicit statements in the presence of other youth. Upon further examination, when it appeared that this story was far-fetched, he changed his testimony and said she was not within earshot of other boys when she made the alleged comments.
74. Resident #3's claim that Moore threatened to set him up just like she had set up Resident #1 is ridiculous. It is premised on two false assumptions, first, that she did set Resident #1 up, and second, that she would openly admit such a thing to Resident #3. Resident #3 made this assertion in a clear attempt to retaliate against her for what he viewed as her abuse of the legal system against a fellow youth.
75. Resident #3's assertion that he saw Moore walking out of other boys' rooms buttoning up her pants is also inherently ludicrous.
76. When asked how close a friend he was to Resident #2, Resident #3 testified that he was

³ He was so skilled at this that he was eventually moved to the Eagles dormitory, an honor for good behavior. There was a heated disagreement among Juniper staff as to whether Resident #3 deserved this transfer to Eagle. Some felt he deserved it for good behavior and others felt he had manipulated staff into thinking he was behaving well when in fact he was not.

"friends, good friends" with him. Then he changed his testimony to indicate they were just "acquaintances." Exhibit 34, a hand-written, three-page letter from Resident #2 in jail to Resident #3 at Lookout, written in February of 2003, demonstrates that the two boys are very close friends. The letter opens with, "what's up little homie?" He references his interview with Detective Puttkammer "about your little case you have going on." He refers to past written correspondence between Resident #3 and himself, stating, "thought you would write. You can write straight to me. I sent some through you know who, but I don't want to keep doing that. So from now on unless I am low on stamps, it will come straight to you." The letter also references some shoes Resident #3 had gotten for him.

77. This letter indicates that Resident #2 has been writing Resident #3 letters through an unnamed go-between since his departure from Lookout on November 28, 2002.
78. Resident #2 refers to Moore and other women in his letter as "hoe's."
79. A further indication of Resident #3's lack of credibility is the fact that he routinely turned in other Lookout boys for violations of the contraband policy, to curry favor with Lookout staff. While Resident #3 testified that one reason he and others failed to turn in Moore was that "nobody wanted to be a snitch" at Lookout, he clearly did not fear being a snitch against other boys, thereby subjecting himself to retaliation by the other boys. Resident #2 apparently protected Resident #3 from such retaliation. There is no logical explanation for why Resident #3 would fear being a snitch against Moore when he had no fear of being a snitch against his peers.
80. When asked why he came forward, Resident #3 also testified that he was "tired of it." However, he was on a completely different ward when he gave his statements to McCarty and Arnold. The more plausible explanation is that he knew Martinez and Carver had great respect for Moore and would be less responsive to his allegations than Elizabeth James.
81. It is noted that two boys on the Eagles dormitory beat up Resident #3 after Moore had left the facility. The evidence fails to establish a connection between that incident and this case.
82. Resident #4 is also found not to be credible. He was a small, quiet boy who was generally disliked and teased by all the boys at Lookout. He carried a stuffed animal at Lookout Mountain, which subjected him to being picked on frequently. The only exception was Resident #3, whom he knew because they had been at the same facility together prior to Lookout Mountain. When Resident #4 was upset, Resident #3 would come talk to him. Resident #4 received protection from Resident #3 and sometimes from Resident #2, and he was their "gofer."
83. Resident #4 was completely dependent on Resident #3 for protection at Lookout. He was motivated by self-preservation and friendship to write a statement for Resident #3 against Moore. Resident #4 also admitted at hearing that he and Resident #3 discussed the fact they might be moved out of Lookout Mountain if they came forward against Moore. Both were in

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fact paroled earlier than they would have been had they not come forward.

84. When asked why he had not come forward in the past, Resident #4 testified that he wanted to be sure others perceived Moore's behavior the same as he did, and he "wanted solid evidence." However, he also testified that he kept the information about Moore's misconduct quiet because he "wanted no one else to know." These explanations make no sense and lack credibility.
85. Resident #4 embellished his story at hearing, adding new allegations as he was asked new questions. He asserted that she would bribe the boys she made comments to with commissary items (candy, snacks) so they would not say anything about her behavior. He even asserted that she once tried to bribe him, but he walked away and said he didn't want to be a part of this. These are new allegations raised at hearing, for which there is no corroboration. They lack credibility.
86. Kirk erred in her investigation in a number of ways. First, she accepted Resident #2's statements regarding oral, vaginal, and anal sex, as related in Arnold's report, without question, citing those specific allegations by him in her termination letter. Yet she testified with conviction at hearing that Resident #2 is not a credible reporter. Kirk never provided an explanation as to why she used these clearly fictitious and unsupported allegations against Moore as grounds for her termination. Second, Kirk improperly gave strong weight to the August 2000 allegations against Moore, which she herself had found to be false and unfounded. Third, she failed utterly to understand that Resident #3 could be motivated by revenge against Moore for what he deeply believed was an unjust set-up of Resident #1, as well as by his loyalty to Resident #2. Fourth, she failed to follow up on her promise to Moore at the R-6-10 meeting to track down the letter or letters from Resident #1 to residents on Juniper West, to interview Mike Martinez about it, and to assess those letters' impact on Residents #2, #3, #4, and others.

DISCUSSION

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). In this *de novo* disciplinary proceeding, the Respondent has the burden to prove by preponderant evidence that Moore committed the acts or omissions on which the termination was based and that just cause warranted the termination. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse the Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

Respondent has not met its burden of proving that Moore committed the acts upon which discipline was based and that just cause warrants her termination. Therefore, the discipline cannot stand and it is contrary to law. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-125, C.R.S.; *Kinchen, supra*.

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Board Rule R-6-6, 4 CCR 801, states,

"The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Kirk failed to consider the mitigating information provided by Moore at the pre-disciplinary meeting. This omission violated Board Rule R-6-6. Moreover, she gave strong consideration to unfounded allegations from the year 2000, also in violation of the rule. The rule provides that it is appropriate for appointing authorities to consider "previous unsatisfactory behavior or acts" and "prior offense[s]." However, nothing in the rule, and nothing in the law, renders it appropriate for an appointing authority to utilize unfounded allegations from a previous period of time as grounds for termination three years later.

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (a) by neglecting or refusing 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; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001). Kirk's investigation was arbitrary and capricious in its failure to: acknowledge the obvious prejudicial effect of the Resident #2 allegations on Arnold's report; question and investigate further the substance of Resident #2's allegations of "oral, anal, and vaginal sex"; and track down the Resident #1 letters and their impact on Residents #2, #3, and #4.

Attorney fees are not warranted in this action. Complainant has requested an award of attorney fees and costs. Attorney fees "shall" be awarded if it is found that a personnel action or appeal thereof was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

Kirk proceeded in good faith. She had no bias against Moore and no motive to do her harm or end her career with Lookout Mountain.

Nor was Respondent's action groundless. Board Rule R-8-38(A)(3) defines a groundless action as one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Such was not the case herein.

CONCLUSIONS OF LAW

1. Complainant did not commit the acts for which she was disciplined.

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2. Respondent's action was arbitrary, capricious, or contrary to rule or law.
3. Attorney's fees and costs are not warranted.

ORDER

Respondent's action is **rescinded**. Respondent is ordered to reinstate Complainant, with back pay and benefits to the date of termination.

Dated this ___ day of November, 2003.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An

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original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of November, 2003, I placed true copies of the foregoing **FIRST AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
1776 Lincoln Street, Suite 810
Denver, Colorado 80203

and in the interagency mail, to:

Monica J. Ramunda
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods