

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 94B090(C)

CCRD Charge No. S94DR019

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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MARIAN OBOKA,

Complainant,

vs.

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

Respondent.

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This consolidated case came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on March 17, 1995. The hearing reconvened on June 22-23, October 5-6, 12 and December 14-15. Respondent appeared through Maurice Williams and was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent called the following witnesses in its case-in-chief: Ann Milam, Education Director, Office of Youth Services; Teachers Susan Law, Mike Wales, Michael Pizzuto and Della Dickerson; former Principal Norine Huston; and Maurice Williams, former Assistant Director, Lookout Mountain Youth Services Center. Respondent called the following additional witnesses in rebuttal: Steve Bates, Director, Lookout Mountain Youth Services Center; Robert

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Finnerty, Assistant Director; Carolyn Holmes, Administrative Assistant; Madline SaBell, Coordinator for Human Services; Don Sauer, former Principal; and Mary Ann Hernandez, Custodian of Records, Colorado Department of Labor and Employment.

Complainant testified on her own behalf and called one other witness: Iris Hogue, Title I Consultant, Colorado Department of Education.

Respondent's Exhibits 1-3, 5-9, 11-25, 27-40, 42-51, 53-58 and 61 were admitted into evidence without objection. Exhibits 10, 26, 59, 60 and 62 were admitted over objection. Page 1 of Exhibit 41 was offered but not admitted.

Complainant's Exhibits B-E, G-I, L (Item #2), M and O-R were admitted without objection. Exhibit N was admitted over objection. Exhibit K was offered but not admitted.

#### **MATTER APPEALED**

Complainant appeals a corrective action and the disciplinary termination of her employment. For the reasons set forth herein, the corrective action is affirmed. The disciplinary action is reversed and remanded with directions.

#### **ISSUES**

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;
2. Whether termination was within the range of alternatives available to the appointing authority;

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3. Whether complainant failed to mitigate her damages;
4. Whether complainant was discriminated against on the basis of age, gender or race;
5. Whether complainant was afforded due process at the predisciplinary meeting;
- 6, Whether either party is entitled to an award of attorney fees and costs.

#### **PRELIMINARY MATTERS**

Upon respondent's motion, the case caption was amended to reflect that respondent is now the Office of Youth Services rather than the Division of Youth Services. The caption is hereby further amended to reflect that respondent is presently the Department of Human Services rather than the Department of Institutions.

In Case No. 94B099, complainant appeals a corrective action of November 19, 1993 denying approval for annual leave with a consequential loss of pay for one day. The parties stipulated that the corrective action itself, requiring certain future actions by complainant, was not grieved through Step 4 and is not before the Board. The issue before the Board pertains to the loss of pay, which entitles complainant to a mandatory hearing. By Order dated March 2, 1994, complainant's motion to consolidate Case No. 94B099 with Case No. 94B090, in which complainant appeals her disciplinary termination of December 21, 1993, was granted.

At respondent's request, administrative notice was taken of Case No. 94G028 in which complainant appealed a prior corrective action. This matter was settled by the parties without an

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evidentiary hearing. Notice was also taken of the CCRD Opinion of No Probable Cause in the present proceeding.

Per complainant's request, a witness sequestration order was entered. Excepted from the order were the complainant and Maurice Williams, respondent's advisory witness.

#### **FINDINGS OF FACT**

1. Complainant, Marian Oboka, was employed as a Chapter I math teacher at Lookout Mountain Youth Services Center (LMYSC) from October 15, 1979 until May 30, 1993, when she was reassigned to a general math classroom until her employment was terminated effective December 21, 1993. She was certified in the class title of Academic Teacher. Ms. Oboka is a 53 year-old African-American female. She was age 51 on the date of termination. She holds a master of arts degree in mathematics and has taught at the college level. Her current teaching certificate expires in January 1998.

2. LMYSC is located in Golden and houses males ages 13-21 who have been adjudicated property, sex or violent offenders. Most have been abused and come from dysfunctional families.

3. Chapter I is a federally funded program designed to provide supplemental instruction to students in need of special assistance. Instruction is tailored to meet the individual needs of each student. A Chapter I math student may also be enrolled in general math.

4. The Chapter I federal grant is subject to annual renewal. The grant provides funding for all classroom materials as well as

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the salaries of the Chapter I teachers. Because the program funds come from outside the agency's general funds, it is necessary to keep all Chapter I materials, equipment and furniture separate from the generally funded programs, and special federal requirements must be met. Chapter I teachers are afforded training opportunities not made available to the other teachers.

5. There are approximately 20 teachers at LMYSC. Complainant was one of four Chapter I teachers. The school principal made the decisions on class assignments. The average size of a Chapter I class is six to nine students, while a general classroom may have more than 20 students.

6. Complainant was the only African-American teacher at the time of her dismissal. She was apparently replaced with temporary contract employees.

7. On July 1, 1994, a contract between the agency and Metropolitan State College of Denver (Metro) became effective whereby Metro was charged with the responsibility of managing and operating the LMYSC school. The Office of Youth Services remains legally responsible for the custody, education and treatment of the youth.

8. The teachers and the school principal are now employees of Metro. All incumbent teachers were interviewed by Metro, and all but five retained their positions. The five who did not keep their positions remained employees of the Office of Youth Services and were reassigned. If complainant had not earlier been dismissed, she would have been interviewed by Metro and either would have been employed by Metro or by respondent at a different facility.

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9. Over the years, complainant gained the reputation of being rude, demeaning and condescending toward the other teachers, some of whom came to avoid her for fear of becoming the subject of an outburst or snub. Complainant did not consider the other teachers to be "professional", with one or two exceptions.

10. Some teachers observed, and expressed concerns to the school principal about, what they believed to be negative treatment of students by the complainant.

11. As early as 1983, complainant received written notice from then principal Don Sauer that there were concerns over complainant's interactions with her students, namely that she demonstrated a lack of patience with the students, talked down to them, made demeaning remarks and created a negative environment which discouraged learning. (Exhibit 62.)

12. Norine Huston began teaching at LMYSC in 1983. In 1989, she became acting co-principal and served as school principal from 1990 until September 1994. In that capacity, she was the direct supervisor of all teachers.

13. The first Performance Appraisal for Colorado Employees (PACE) that Huston conducted of the complainant was for the period July 1989 through June 1990. Huston assigned an overall rating of Good but rated complainant as Needs Improvement in the area of interpersonal relations with students and other staff members. Huston noted: "Over the past several months, students have filed grievances and made verbal complaints about the treatment they received, i.e. abusive language, put-downs, loss of points, etc. Staff are also often ignored or put down by employee. Classroom is often loud and employee is speaking very loudly." (Exhibit 10.) In response to the interpersonal relations rating,

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complainant submitted a list of her contributions to the school. (Exhibit O.)

14. Huston wrote additional comments on the PACE form after complainant had signed it, which came to complainant's attention when she received her copy of the evaluation, whereupon she filed a grievance. The agency director advised Huston that the additional written comments were an inappropriate action on her part and the comments should be deleted. The PACE was then reissued without the additional comments. (Exhibit N.) The significance of this incident to the complainant was that it caused her to distrust Huston, and such distrust was to grow.

15. Complainant received an overall rating of Good on her PACE for the period July 1, 1990 through June 30, 1991. Huston noted as an employee strength that complainant "has excellent organizational skills and quickly grasps the needs of task to be done." As an area for development, Huston noted, "Interpersonal relations with students and staff need to be improved in areas of respect and courtesy." (Exhibit 11.)

16. Complainant received an overall rating of Commendable on her PACE for the period July 1, 1991 through June 30, 1992. She was rated as Needs Improvement in the areas of maintaining smooth working relations and respect of others and in considering the ideas of others on issues that affect them. (Exhibit 12.) Huston testified at hearing that she actually disagreed with the Commendable rating because of complainant's deficiencies in interpersonal communications. Weekly, students would complain about being put down and would demand to be taken out of complainant's class. The overall rating for this PACE was based on complainant's instructional skills and knowledge of the subject, which were known to be excellent.

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17. The formal means for a student to complain about a teacher was through a grievance process whereby the student would file a written grievance with the school principal, who would review the grievance and refer the matter to the teacher with instructions to attempt to reach a resolution with the student. If necessary, which it usually wasn't, a meeting would be held involving the teacher, the student and the principal or another third party. This meeting was generally referred to as "mediation" but was not mediation in the strict legal sense.

18. During calendar year 1993, complainant's relationship with her students, other staff members and Huston worsened. More student grievances were filed against the complainant than had ever been filed against any other teacher. Students continued to demand to be taken out of her class because of the way she treated them, unlike the typical student complaint of being assigned excessive homework. Complainant refused to discuss grievances with students, taking the position that there was nothing to talk about because the problem was that the student would not follow the rules and this was solely the student's problem, not hers. (See e.g. Exhibits 42 and 23.) The general line of student complaints was that the complainant was rude, unfair and took away excessive privilege points. In several instances, when mediation was attempted, complainant refused to talk directly to the student. In meetings with students and with other teachers complainant would communicate in negative ways through body language, such as turning her back on the speaker or rolling her eyes in front of the speaker.

19. Complainant consistently took privilege points away from students for failure to do work. She does not know of any other teachers who used this approach.

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20. The working relationship between complainant and Norine Huston deteriorated to the point of communicating primarily through memos. Complainant felt a need for written documentation as a result of her growing distrust of Huston. Her complaints against Huston included removal of students from her class without prior consultation and returning to students privilege points she had taken away. (See Exhibit 25; see e.g. Exhibit 47.) Complainant also believed that she was required to work in an unsafe environment and filed a grievance to that effect. Acts of violence in her classroom included students turning over her desk, knocking a computer on the floor, smashing a tape recorder tape and throwing a pen top that hit her in the eye.

21. During 1993, a few teachers complained to Huston about the complainant being rude and not listening to them. Huston advised them to try to work it out directly with complainant. On one occasion, upon a disagreement between another teacher and complainant, Huston asked both teachers to come to her office to discuss the matter. While the other teacher was willing to do so, complainant refused.

22. Complainant routinely did not talk to other staff members. When confronted with this by Huston, complainant responded that nobody on the staff was professional.

23. By memo dated February 25, 1993, Huston advised the complainant that there was a need for improvement in student relations and classroom management based upon the number of student complaints and grievances filed against her. Huston further advised the complainant of a need for improvement in the area of staff/peer relations based upon a continuing display of discourtesy and inappropriate behavior in meetings with her

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supervisor and in staff meetings. Complainant was directed to submit a plan for improvement which was to be reviewed with Huston weekly until the completion of the annual PACE in June 1993. (Exhibit 50.)

24. A March 3, 1993 memo reminded the complainant of the need for behavioral changes prior to the June 1993 PACE and to have meetings with Huston to monitor complainant's improvement in the contemplated areas. (Exhibit 49.)

25. In the spring of 1993, while complainant was on vacation from April 30 until May 26, Huston reassigned two Chapter I teachers, including complainant, to a general math classroom effective June 1, 1993. Two general classroom teachers also received new assignments. There had previously been staff discussions regarding possible reassignments, but no decisions had been made prior to complainant's taking annual leave. Teacher reassignments had, in the past, been made with short notice to the reassigned teacher. Huston tried unsuccessfully to reach complainant by telephone to advise her of the room change and then sent her a written memo. (See Exhibit 46.)

26. Complainant was out of town during her annual leave and did not receive Huston's memo until she returned home on May 24. She returned to work on Wednesday, May 26. On Thursday, she discovered that her new classroom was not furnished. Huston had expected the furniture to remain in the room and was surprised to learn that this had not happened. Huston provided suggestions and assistance in obtaining the necessary furniture and teaching materials, since all Chapter I furniture and equipment had to remain in the federally funded Chapter I classroom. Complainant improvised her instruction for the initial three days of the new grading period, beginning June 1, after which equipment and

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furniture from other sources began to arrive. Complainant blamed Huston for all of this, and the friction between the two increased. (See Exhibits 22, 27 and 32.)

27. Complainant also discovered, upon her return, that some of her personal belongings were missing from the Chapter I classroom. She was advised by the substitute teacher, Phillip Elliott, that the students had cleaned out her desk and file cabinets, and that he could not stop them. Elliott also had not complied with the teaching plan complainant had left behind. Elliott complained about the way the complainant treated him, and a meeting was held which included the two of them plus Huston and Maurice Williams. Complainant refused to talk to Elliott at this meeting, taking the position that she had no issues with Elliott and had nothing to discuss with Elliott. Her concern was that Elliott was not properly supervised by Huston and that Elliott did not seek supervision on an assignment he could not handle. (See Exhibit 29.)

28. By memo dated June 15, 1993, Huston asked complainant to respond to a student grievance alleging mental and emotional abuse, use of the phrase "common sense deficiency syndrome", comparing a student to a piece of petrified wood, ridiculing the student and "ruling with an iron fist". Complainant replied with the notation, "The above points are not actions that I have used in my program." (Exhibit 40.)

29. Complainant received an overall rating of Needs Improvement on her PACE for the period July 1, 1992 through June 30, 1993. Noting the problem areas of student relationships and staff interpersonal relations, namely that complainant was abusive and rude to students and staff, Huston assigned a rating of Needs Improvement in Classroom Management and a rating of Unacceptable

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in Interpersonal Relations/Communications. (Exhibit 13.)

30. On July 7, 1993, Huston issued a letter of corrective action addressing a number of instances of alleged rude, abusive and uncooperative behavior on the part of complainant towards students and staff, including six specific student complaints or grievances that had been registered in the preceding month. Complainant was directed to take the following corrective action:

1) to treat your students with dignity and respect; you are not to tell a student that his actions are stupid. You are to treat them with human dignity and in a professional manner; 2) Your behavior towards co-workers to include respect and a determined effort to understand them as well as accept your part in the situation; 3) to attend meetings on time and when there is a conflict you will send a message of why and follow up to see the message was received; to follow the chain of command by requesting information, relief from job duties and any job issues with your immediate supervisor, Norine Huston, first. You will request in an acceptable time frame, following the leave request policy, and giving enough information to be assured of appropriate action; 5) to accept your part in situations of interpersonal relationships by being open to reason, willing to listen and explore ways to make the situation work. This includes staff, students and supervisors. (Exhibit 38.)

31. In the late afternoon of October 6, 1993, complainant submitted a written request for annual leave on October 7 by placing the pre-printed agency request form in Huston's mailbox. The form contains a statement that annual leave must be requested

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and approved five days in advance. (Exhibit 8.)

32. Huston was out of the office on October 6 and did not receive complainant's leave request until she arrived at the school on the following day. She telephoned the complainant's residence between 6:45 a.m. and 7:15 a.m. to advise her that the leave request was denied and that she should report to work. No one answered the phone. As a result of complainant's absence, it became necessary to make special arrangements to cover complainant's classes via "double coverage".

33. While agency policy mandated five days notice in order for a request for annual leave to be approved, there were times when leave would be approved on shorter notice if there would be no problem with class coverage. All teacher's had the principal's home telephone number and were expected to contact Huston at home if necessary. Complainant did not attempt to contact Huston at home.

34. Maurice Williams issued a disciplinary action to the complainant on November 9, 1993. This action was rescinded and a corrective action intended to correct complainant's attendance was issued instead on November 19. Williams determined that, because the complainant had not received approval of annual leave for October 7, the leave would be recorded as "unauthorized" and complainant would not be paid for that day. (Exhibit 2.)

35. Complainant grieved the November 19 corrective action through step 3, and the action was upheld. (Exhibit 61.) (The appeal now before the Board concerns complainant's loss of pay for October 7, not the validity of the corrective action itself.)

36. Huston did not know that she was required to issue a

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corrective action for the 1993 Needs Improvement PACE. After being so advised by Madline SaBell, the human services coordinator, and Ken Doby of the Department of Personnel, she wrote a corrective action and another PACE plan to afford complainant the opportunity to improve her job performance, as set forth below.

37. Huston issued a formal corrective action dated October 7, 1993 to be attached to complainant's PACE for the July 1, 1992 through June 30, 1993 evaluation period.

38. A meeting was held on October 12 involving Huston, the complainant, Maurice Williams and Ken Doby to discuss the PACE process. (See Exhibits 29 and 30.) A new PACE performance plan was issued. (Exhibit 14.) Complainant did not concur in the plan, denying that there were any problems for her to resolve, but was advised by Doby that she was required to comply with the performance plan. Complainant signed as having received the written corrective action on October 13.

39. The four-page corrective action letter set out standards, expectations and necessary actions for complainant to improve her behavior and job performance in three factor areas: a) Instruction and Classroom Management; b) Professional Occupational, Planning, Organizing and Decision Making; c) Interpersonal Relations/ Communications. Huston summarized the behaviors that led to the Needs Improvement PACE as follows:

You denigrate, criticize and demoralize students by making negative comments (sic) refusing to speak with them, taking an autocratic attitude and refusing to allow them to take a more participatory relationship with you.

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Your role modeling is conflictual, inflammatory, and explosive. You blame the students for all incidents and conflicts and refuse to take responsibility for your part in the interaction and communication with them. This does not allow for the nurturing of trust and personal growth of your students. In turn, your students complain and grieve your actions on a consistent basis.

Your negative behavior encourages the students to act out and diminishes their sense of a safe and secure learning environment. It is your inappropriate interaction with others that model poor social behavior to the students. An example of this is when you speak loudly and with anger to peers and students.

....

You fail to cooperate in a positive manner during events by your negative comments, unwillingness to see others' point of view, and expressing dislike by your body language, i.e., rolling your eyes, turning your back on your audience.

Instead of discussing issues with me, your immediate supervisor, you have chosen to contact Ann Milam and/or Betty Marler, the Education Director and Director of Treatment Services. This does not lend itself to positive conflict resolution when I am, and have been, willing to expedite issues for you. Also, you choose not to inform me of events; therefore, it is not possible for me to support you, i.e., Chapter II grants, requisitions, classroom equipment.

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....

You fail to maintain smooth working relations, support and respect of Norine Huston, teacher aides, other teachers and other administrators. This has been demonstrated in corrective actions and meetings where your behavior was one of no personal responsibility, disdain, and negativity. You do not keep your supervisor informed in a timely fashion due to a demand for formal, documented memos.

You have failed to correct your negative, demanding and non-participatory attitude with students, in confrontations with students through taking points excessively, grievances, mediations and generally exhibiting a lack of diplomacy and tact. The number of complaints from students about your inappropriate actions is excessive and demonstrates your not being sensitive to students' feelings and efforts. (Exhibit 3.)

The corrective action was to remain in effect until December 7, 1993, when complainant's job performance would be re-evaluated.

40. By memo dated November 4, 1993, Huston advised complainant that their "PACE feedback meetings" were unproductive and ineffective in helping the complainant to satisfy job performance expectations as a result of complainant's "unwillingness to openly discuss issues", and that the meetings would be suspended until such time as complainant felt the meetings would be productive and requested them. (Exhibit 20.) As an example of the ineffectiveness of their discussions, Huston testified that complainant would not even agree as a general proposition that

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each of them had value as human beings.

41. The pattern of unacceptable behavior as stated in the October 7 corrective action letter continued. In a November 15, 1993 memo, Huston reminded complainant that she was required to meet with a particular student who had filed a grievance against her. Complainant implied in her written reply that she would not meet with the student but would "continue to require student observance of class rules and to provide instruction." (Exhibit 18; see also Exhibit 23.)

42. By memo dated December 1, 1993, Huston advised complainant of six students who had come to the principal's office to complain that complainant treated them unfairly, would not listen to them or talk to them and took away privilege points from the whole class. Offering her assistance if desired, Huston instructed complainant to resolve these issues with the students and to help the students to appropriately modify their behavior. (Exhibit 16.)

43. Complainant received an overall rating of Needs Improvement on her PACE for the period of the corrective action, October 7, 1993 through December 7, 1993. She received an Unacceptable rating in the area of Interpersonal Relations/Communications, a Needs Improvement rating in Instruction and Classroom Management, and a rating of Good in the area of Professional Occupational, Planning, Organizing and Decision Making. (Exhibit 15.)

44. Huston concluded that, although complainant was good at designing a curriculum and monitoring an academic program, her classroom management and interpersonal skills had not improved during the corrective action period. At this time, Huston referred the matter to her supervisor and appointing authority,

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Maurice Williams.

45. Maurice Williams was one of two assistant directors of LMYSC from May 3, 1993 until June 19, 1995. By a note dated May 3, 1993, Youth Services Director F. Jerald Adamek delegated to Williams "the authority to administer corrective and disciplinary actions for Lookout Mountain Youth Services, Division of Youth Services." (Exhibit 57.)

46. Williams testified that the extent of his delegated authority was dependent upon his job duties as assigned by LMYSC Director Steve Bates, who was his direct supervisor. For instance, if he was assigned to the operation of the school, he had the appointing authority over the employees of the school. If, on the other hand, he was assigned by Bates to manage one or more of the residential cottages, then he would be the appointing authority for those employees. The same arrangement applied to the other assistant director. The one-sentence letter of delegation from Adamek does not contain information to this effect.

47. Even though Williams was the appointing authority for the teachers, Steve Bates exercised appointing authority as well. Bates disciplinarily terminated one teacher without consulting Williams. According to Williams, Bates, as the agency director, was the ultimate appointing authority and could, simultaneously with Williams, impose discipline. Williams does not know if Bates had the authority to overrule his decisions, but he did not consult Bates before taking disciplinary action. He merely kept Bates advised.

48. There was a period during the summer of 1993 when Steve Bates informed Williams that he, Bates, wanted to assume responsibility for the administration of the school, that Williams could assist

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but Bates would be in charge. Bates acted as the appointing authority for the school during this time. The time frame is unclear; Williams testified that it was a "short period of time".

At some point, Bates said to Williams, "Okay, the school is yours again."

49. Upon his arrival at the LMYSC school, Williams began making regular rounds of the facility, talking to students and teachers.

He received an "exorbitant amount" of complaints by students against the complainant. The students told Williams that they felt demeaned, demoralized and put down by the complainant and that if they did not get out of her class they might do something inappropriate. The students appeared extremely agitated. In one case, Williams held a meeting with a student and the complainant, who faulted the student and refused to interact with him. The student started to cry and stated that if he was not removed from complainant's class he might end up hurting her. This student was removed from complainant's class at the direction of Williams.

50. As he made the rounds, Williams was approached by teachers, members of the residential cottages staff and complainant's supervisor, receiving a "blitz" of negative information about the complainant. Four or five teachers told Williams that they understood why so many students wanted out of complainant's class, based upon her treatment of the students. After a couple of months, he reviewed files received from Huston and concerning complainant that reflected a ten-year history of similar complaints by others against the complainant.

51. Upon the occasion of sitting in on one of complainant's classes in August 1993, Williams observed that the complainant would direct to students the acronym, "C.S.D.S., C.S.D.S., C.S.D.S....". In answer to Williams' subsequent question,

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complainant stated that the acronym stood for "common sense deficiency syndrome", a phrase she had picked up at a lecture by a rapper. She had explained the meaning of the phrase to the students and used it to avoid unnecessary dialogue when the student knew that he was not following the rules. Williams felt that the phrase was demeaning to the students and ordered complainant to cease using it, which she did.

52. On one occasion, upon the filing of a grievance by complainant against another teacher, Williams brought the two teachers together, and complainant took the position that the problem belonged to the other teacher and there was nothing complainant could do about it. The issue involved a student making a scheduling change, and Williams felt that complainant should have been, but wasn't, concerned about what was best for the student. (See Exhibit 58.)

53. To Williams, the pattern of complainant's behavior was consistent in her interactions with students, staff and her supervisor, i.e., there were no changes for her to make -- the problem belonged to the other person.

54. By memo dated July 6, 1993, Williams made an official request to Steve Bates that an R8-3-3 meeting be scheduled for the complainant. The basis for the request was that complainant was unwilling to resolve conflicts with Phillip Elliott and with the students in her classroom. (Exhibit 37.) Williams testified that he must have submitted the request to Bates for the reason that this was during the time that Bates had assigned himself the duties of administrator of the school and, therefore, Williams "apparently" was not the appointing authority.

55. In a July 8, 1993 memo to Bates, Williams recommended that

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administrative and/or disciplinary action be taken to assist the complainant "in correcting some obvious detrimental attitudes, behaviors and actions." The recommendation was based upon complainant's unwillingness to attempt to resolve a grievance she had filed against Huston. (Exhibit M.) Williams recalls discussing the memo with Bates but does not recall if Bates took any action at that time with respect to the complainant.

56. Having received notice from Huston on December 10 that complainant had received a rating of Needs Improvement during the PACE reevaluation period of October 7 through December 7, 1993, Williams scheduled a predisciplinary meeting for December 17.

57. The agency "Leave Taken Form" for complainant for the month of December was dated and signed by Maurice Williams on December 16, 1993, the day before the R8-3-3 meeting was held. The document, effectively a request to calculate the annual leave balance, was transmitted by facsimile from Williams to Dee Klinemar of the payroll department located at Fort Logan. (Exhibit I.) Williams testified that he is not sure if he sent the form on December 16, but it was a matter of routine to send timesheets to the payroll office when an employee was terminated, and that is what he was doing.

58. The R8-3-3 meeting was held on Friday, December 17, 1993, from 2:13 p.m. until 3:32 p.m. Only Williams and the complainant were present. While Williams testified that he did not make the termination decision until after the conclusion of the meeting, complainant's final paycheck was issued the same day, December 17. (Exhibit G.) The warrant included payment for salary and annual leave through December 21, 1993.

59. On December 21, 1993, Maurice Williams terminated the

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employment of Marian Oboka. The termination was based upon complainant not having improved her job performance during the 60-day reevaluation period. Williams relied on State Personnel Board Rule R8-2-5(A), which provides that an employee shall be dismissed or demoted if the employee receives a second Needs Improvement PACE rating after being afforded a period of time to improve her performance, absent extraordinary circumstances. Williams further found that complainant had willfully violated Division of Youth Services Policy 3.7, Code of Ethics, III(A), "Relationships with Juveniles, the Public, Other Professionals, and Colleagues" (Exhibit 5), and Division of Youth Services Policy 13.1, "Basic Rights and Responsibilities of Residents" (Exhibit 6). (Exhibit 1.)

60. In the termination letter, Williams cited the corrective actions of July 7 and October 7, 1993, and a third corrective action of October 13, 1992, erroneously dated 1993 in the letter. Williams conceded at hearing that the 1992 corrective action had been rescinded and should not have been considered. (Administrative notice was taken of State Personnel Board Case No. 94G028.) The November 19, 1993 corrective action regarding the use of leave was not listed in the termination letter and was not taken into account. Williams testified that he only considered matters that related to the issues raised by the two Needs Improvement PACEs.

61. Complainant was initially denied unemployment insurance benefits by a deputy of the Department of Labor and Employment. She appealed the deputy's denial. By order entered March 31, 1994, a referee overturned the deputy's decision, ruling that complainant was entitled to the maximum benefit award of \$6,786.00.

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62. Respondent appealed the decision of the referee to the Claim Appeal Office. On June 28, 1994, the Claim Appeal Office upheld the referee's decision awarding benefits and dismissed the employer's appeal.

63. In order to receive unemployment benefits, an applicant must send bi-weekly pay order cards to the unemployment insurance office indicating that the applicant is seeking and is available for work. Complainant submitted only two pay order cards, on January 5 and 19, 1994. She did not receive benefits for those time periods because she had received vacation pay from the employer. If she had continued to send in the pay order cards, she would have eventually received the total award of \$6,786.00. Upon a telephone call from the complainant in August 1995, a representative of the unemployment insurance office determined that complainant did not have a valid reason for failing to send the pay order cards.

64. Complainant was selected by a committee of members of the Correctional Education Association as the 1993 Teacher of the Year for Region IX. Complainant's application for the award was submitted by Carolyn Holmes, an administrative assistant at the school. Holmes does not remember what the criteria were for nomination and selection. She had never observed complainant in the classroom. (Holmes contradicted complainant's testimony that Holmes visited her classroom two or three times each month.) Members of the selection committee did not visit complainant's classroom. The Correctional Education Association is not affiliated with LMYSC.

#### **DISCUSSION**

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In this de novo disciplinary proceeding, the burden is on the agency to prove by a preponderance of the evidence that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant bears the burden to prove by preponderant evidence that she was discriminated against on the basis of age, gender or race.

A.

Complainant first poses the question of whether Maurice Williams was properly delegated the appointing authority to impose discipline upon the complainant, suggesting that the delegation was partial and that the actions of LMYSC Director Steve Bates demonstrated that Bates could supersede Williams' authority at will. Although there may be grounds for questioning the actions of Bates relative to a possible interference with the exercise of properly delegated appointing authority from respondent's executive director, Bates' authority is not at issue. Complainant does not dispute that Executive Director Jerald Adamek was empowered to delegate the appointing authority for disciplinary actions. The delegation was accomplished in writing and was never rescinded. Vis-a-vis the present complainant, Williams exercised appointing authority pursuant to the written delegation. He acted independently and fully in carrying out the disciplinary process without seeking the approval of Bates. The termination decision was his alone. This is not a partial delegation of appointing authority, which is prohibited. See Rules R8-3-3(D)(1)(C), R1-4-1 and R1-4-2, 4 Code Colo. Reg. 801-1. See also Colo. Const. art. XII, § 13(7) and § 24-50-101(3)(d), C.R.S. (1988 Repl. Vol. 10B).

B.

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The administrative law judge concludes through reasonable factual inferences drawn from the record that the appointing authority prejudged the case of Marian Oboka and decided to terminate her employment before the R8-3-3 meeting took place. It is found that Maurice Williams submitted complainant's ending leave form to the payroll office on the day preceding the R8-3-3 meeting and directed the payroll office to issue the final warrant. It is unreasonable to believe that Williams candidly contemplated the substance of the one hour and nineteen minute meeting, and that the necessary payroll functions were completed, between 3:32 p.m. and the close of business on December 17, 1993. Moreover, Williams had postured himself as early as July 1993 when he wrote the two memos to Steve Bates recommending disciplinary action against the complainant with respect to the same issues that were involved in complainant's dismissal.

The appointing authority's prejudgment of this case is of no small consequence. Predisciplinary meetings are an extremely important cog in the wheel of due process to which state employees are constitutionally entitled. The underlying philosophy of the information exchange meeting mandates that the appointing authority listen to, and fairly consider, the employee's position and circumstances, not as a formality or courtesy, but as a last effort to gather the information and formulate the perspective needed to render a fair and appropriate decision. This cannot be accomplished when the appointing authority decides what he is going to do in advance of the meeting and has, in fact, initiated steps to effectuate his predisposition. To predetermine a decision, as was done here, is to violate both the spirit and the substance of Rule R8-3-3(D)(1)(a), 4 Code Colo. Reg. 801-1.

The outcome of a fair and open meeting is speculative at this point. Perhaps such a meeting would have been successful in

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avoiding the litigation that ensued. Having been denied an honest predisciplinary meeting, the complainant suffered a due process violation for which there must be a remedy. Cf. Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984).

Rationalizing against a remedy for violating an employee's rights does not work in this case. It does not suffice to argue that because the complainant ultimately received a fair hearing before a neutral third party the defect of an improper R8-3-3 meeting was cured. Otherwise, an appointing authority could surreptitiously disregard all elements of propriety, comforted in the knowledge that if the employee does not appeal the imposition of discipline then no one will ever know of the improprieties, and if the employee appeals then any defects in the conduct of the R8-3-3 meeting will subsequently be cured by an evidentiary hearing.

This due process violation is sufficiently serious to warrant an order of reinstatement with back pay pending the occurrence of a proper R8-3-3 meeting. Inasmuch as the administrative law judge also finds that respondent satisfied its burden to show that there was just cause for the disciplinary termination, due consideration has been given to ordering back pay without reinstatement, in effect declaring a second meeting unnecessary. But such a remedy would presuppose the outcome of the second meeting. The relief that complainant deserves is a new R8-3-3 meeting with a different and open-minded person, properly delegated the requisite appointing authority. The only way to give meaning to this relief is through reinstatement, even though the parties will have knowledge of this judge's ruling on the merits of the case. The appointing authority is nonetheless free to exercise his discretion in reaching an independent decision given all of the circumstances at the time the decision is made. Or, the agency may wish to consider alternatives to continuing the disciplinary

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process. In the event of a similar outcome after the new R8-3-3 meeting is held, it should be anticipated that principles of law may preclude relitigation of the case except as to issues originating from the conduct of the second meeting. (The fact that the LMYSC school is now administered by Metropolitan State College has no bearing on this initial decision.)

Reinstatement of complainant while affording respondent an opportunity to correct the error is an apt remedy under Krueger v. University of Colorado at Boulder, where the Board said:

Depending on the relevant factual circumstances of the case, an employee terminated in a case in which a procedural defect has occurred may be made whole by rescission of the termination, payment of back pay and benefits and remand to the agency to decide whether to attempt to correct any procedural error in the predisciplinary process. Reinstatement with full back pay and no opportunity to correct the procedural error may result in an economic windfall vastly disproportionate to the legal wrong sustained.

Opinion and Order of the State Personnel Board, Krueger v. University of Colorado at Boulder, Case No. 901-B-191, April 29, 1992.

C.

Teaching involves more than expertise in the subject matter taught. It also requires an ability to interact with the student population in a way that enhances the capacity for learning. Not all student populations are the same. A particular teaching methodology may be appropriate for one group but not for another.

A teacher's ability to design an instructional program loses its essence when the teacher lacks the ability or the inclination to interact with the students in a positive, encouraging way. A

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qualified college instructor, as complainant has been, does not necessarily make a competent high school teacher; a competent high school teacher is not necessarily suitable for the elementary grades.

Establishing policies and procedures designed to fit the needs of a specific student population is a function of school administrators. Complainant refused to accept this facet of educational management. Through her unbending adherence to her selected approach to student and peer relations, she scoffed at the administration and disregarded the rights and feelings of her students. She was advised that her ritualistic teaching style was contrary to the teaching principles of the school. Complainant seemed to have no use for the goals and objectives of the Division of Youth Services, an agency charged with the responsibility and obligation of educating institutionalized youth and preparing them for the future. Complainant proffered no testimony other than her own in support of her techniques related to her handling of the students.

The concept of interpersonal relations refers to communications, written, oral, listening and body language. Interpersonal skills are important to communicating in such a manner that the other person understands what is meant. The significance of interpersonal skills in the workplace is that they assist in relationship building, problem solving and teamwork. Strong interpersonal skills re-enforce one's good will, competency and credibility. Effective teaching thus requires good interpersonal skills, especially in a correctional setting like LMYSC. Complainant's job performance was deficient in these areas, a deficiency that peaked in 1992-93. Complainant cannot reasonably complain of a lack of sufficient notice of a need for improvement.

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While all teachers serve as role models to some extent, this is especially so at LMYSC. As pointed out by complainant's supervisor, complainant's poor example of positive interaction was counterproductive to the students learning the lesson of getting along with other people. Complainant displayed no appearance of attempting to understand the manner in which low self esteem would cause these young people to act in a way producing a negative outcome, or how her behavior towards them extended their feeling of lack of self worth, despite repeated opportunities to do so. (Complainant testified that she believed the students to have high self esteem because of the way they challenged her, but that this was not "healthy" high self esteem.)

From complainant's take-it-or-leave-it stance relative to human relations, it appears that she did not accept the mission of the agency as evinced by Policy 3.7, "Relationships with Juveniles, the Public, Other Professionals, and Colleagues" and by Policy 13.1, "Basic Rights and Responsibilities of Residents". It is found that her conduct on the job resulted in an ongoing and continuing violation of these policies.

D.

Complainant's defense to the November 19, 1993 corrective action is that she and other teachers had received approval for annual leave on less than five days notice in the past. The agency does not dispute that there were exceptions to the five-day rule, but only in cases where some notice was given so the availability of class coverage could be determined. A telephone call to the principal at home was an expected practice when the principal was not available for necessary consultation at the school. Complainant did neither of these things. She effectively gave no advance notice at all. The five-day advance notice policy was

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still valid. An employee cannot presume that annual leave will be approved after the fact. There is no evidence to support a finding that complainant was confronted with an emergency. The appointing authority did not abuse his discretion in declining to authorize complainant's use of annual leave pursuant to Personnel Director's Administrative Procedure P7-1-6, 4 Code Colo. Reg. 801-2.

E.

Complainant established a prima facie case of age, race and gender discrimination by showing that she is a member of each protected group, was qualified for the position and suffered an adverse employment consequence, termination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant is over the age of 40 (See Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988)), African-American and female. Complainant does not know who replaced her but believes she was replaced by one or more temporary employees. Respondent did not present evidence of complainant's replacement.

Respondent successfully rebutted this presumption of discrimination by articulating a non-discriminatory justification, poor job performance, for the allegedly discriminatory act. McDonnell Douglas, 411 U.S. at 802. Complainant did not prove by preponderant evidence that respondent's asserted reason for the termination was a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Complainant failed to carry her ultimate burden to prove that respondent's action was the result of intentional discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. \_\_\_, 113 S. Ct. \_\_\_, 125 L.Ed.2d 407 (1993).

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F.

The record evidence discloses that, but for her own neglect, complainant would have collected \$6,786.00 in unemployment compensation benefits. Respondent should not be held liable for this failure to mitigate damages. Respondent did not prove by preponderant evidence that complainant failed to mitigate her damages in other ways. In the event of any income earned by complainant that would not have been earned but for the termination of her employment by respondent, such income should be deducted from the award of back pay. See Department of Health v. Donahue, supra.

G.

The appointing authority's prejudgment of the case, resulting in a due process violation, is an act of bad faith and warrants an award of attorney fees and costs to complainant pursuant to § 24-50-125.5, C.R.S. of the State Personnel System Act. This award pertains solely to complainant's expenses in litigating the disciplinary termination (including representation at any subsequent R8-3-3 meeting) and excludes her fees and costs relative to the corrective action, which was not considered in the disciplinary process. The statute does not justify a fee award to respondent.

**CONCLUSIONS OF LAW**

1. Respondent's action with respect to the disciplinary termination was arbitrary, capricious and contrary to rule or law.
2. Termination was within the range of alternatives available to the appointing authority.

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3. Complainant failed to mitigate her damages.
4. Complainant was not discriminated against on the basis of age, gender or race.
5. Complainant was not afforded due process at the predisciplinary meeting.
6. Complainant is entitled to an award of attorney fees and costs.

**ORDER**

The corrective action is affirmed. The disciplinary termination is reversed. Complainant shall be reinstated to her former position with full back pay and benefits less \$6,786.00 and any substitute income. Respondent may hold another R8-3-3 meeting upon reasonable notice to complainant, which meeting shall be with a different appointing authority than was the original meeting. Respondent shall pay to complainant her attorney fees and costs incurred in the litigation of the disciplinary termination.

DATED this \_\_\_\_\_ day of  
January, 1996, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of January, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf  
Attorney at Law  
1390 Logan Street, Suite 402  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Thomas S. Parchman  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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