

INITIAL DECISION

JAMES R. ARAGON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter came on for hearing on September 18, 2003, and January 20, February 4 and 12, 2004, before Administrative Law Judge Mary S. McClatchey. The record remained open until February 24, 2004, for submission of written closing arguments. James Aragon ("Complainant" or "Aragon") was represented by William S. Finger, Esquire. Respondent Department of Corrections ("DOC") was represented by Assistant Attorney General Danielle Moore.

MATTER APPEALED

Complainant, a Correctional Officer III at DOC, appeals the denial of his grievance challenging a January 2001 Corrective Action and transfer.

For the reasons set forth below, the action is **affirmed**.

PROCEDURAL MATTERS

A protective order is in effect under which medical information relating to Robert Farrington is under seal.

ISSUES

1. Whether the action of Respondent was arbitrary, capricious, or contrary to rule or law;
2. Whether either party is entitled to an award of attorney fees and costs;
3. Whether Complainant is entitled to sanctions for costs incurred in filing a motion to compel discovery.

FINDINGS OF FACT

1. Complainant commenced employment at DOC in July 1987. In August 1989 he transferred to Centennial Correctional Facility ("CCF").
2. In 1990, Complainant promoted to Lieutenant.
3. Complainant has received no corrective or disciplinary actions prior to the one at issue herein.
4. At all times relevant, Complainant was the supervising Lieutenant over three Sergeants in the Recreation unit at CCF. Aragon supervised Sergeants Robert Farrington, Mike Moore, and Brendan Pardue.
5. The Recreation staff are responsible for supervising inmates during their leisure time in the gym, in the yard outside, and in the barbershop.
6. DOC trains its supervisors to de-escalate situations that arise with staff on the job. Aragon received this training.

1999 Pardue Incident

7. In July 1999, Pardue and Aragon had a heated argument. Aragon filed a grievance against Pardue for insubordination. Pardue and Aragon accused each other of losing their tempers and acting inappropriately.
8. Warden Williams ordered an investigation, the results of which are not in evidence.
9. Warden Williams took no action at that time against either Pardue or Aragon.
10. After the Pardue incident, Aragon felt as though management had not supported him as a line supervisor. He asked Warden Williams for a transfer to Pueblo. Williams tried to help him get the transfer, but to no avail.

Robert Farrington

11. Robert Farrington was customarily a social individual who got along well with everyone at work, including Aragon.
12. During the summer of 2000, Farrington was having marital problems. He felt depressed and his behavior and appearance at work changed significantly. Farrington became testy, argumentative, and he complained a lot at work. He began to openly defy Aragon's authority with some regularity.
13. Farrington let his beard grow out and looked disheveled much of the time.

14. Aragon noticed Farrington's change in appearance. On numerous occasions he directed Farrington to improve his appearance and present himself more professionally.
15. Farrington responded by stating he would do what he wanted and suffer the consequences. He made it clear to Aragon he did not respect his authority. Aragon told Farrington he was not showing him adequate respect.
16. Farrington discussed Aragon's more favorable work schedule with the other Sergeants, and attempted to get their schedules modified to a ten-hour, four-day workweek. Aragon denied this request as the schedule did not match the hours of the gym and therefore did not meet the needs of the facility. Farrington resented this.
17. Aragon found the situation with Farrington to be difficult. He knew that CCF Warden Michael Williams expected his line supervisors to resolve work conflicts in a quiet, non-confrontational way. Specifically, he felt that taking written action against Farrington would not be the appropriate way to address the issue. Yet, he had a direct subordinate who was defying his authority.
18. Aragon felt the politically appropriate way to handle the situation was to go to his supervisor, Captain Holditch. Aragon discussed Farrington's disrespectful behavior towards him with Holditch on numerous occasions in 2000.
19. Holditch directed Aragon to counsel Farrington, and if the issues became serious enough, to write up a performance documentation form on his behavior. If that were not successful, the next step would have been to submit a written request for corrective action against Farrington.
20. Aragon never wrote up Farrington for his performance issues despite the fact his verbal counseling was ineffective.
21. Holditch counseled Farrington on appearance issues on one occasion during this period. This appears to have been an attempt to back up Aragon's authority over Farrington.
22. Aragon reported to Holditch that he believed Farrington was depressed. Holditch discussed it with his supervisor, Major Dennis Pierson. Holditch ultimately determined that Farrington's condition was serious enough to warrant mental health assistance. Holditch referred Farrington to a mental health counselor for help, through Pierson.
23. Farrington's behavior at work did not change.

December 1, 2000 Incident

24. One of Aragon's duties as line supervisor was to review time sheets for accuracy and

assure the correct allotment of compensatory ("comp") time for his employees.

25. In November 2000, Farrington had inadvertently failed to record a four-hour absence on his time sheet. This resulted in his claiming comp time to which he was not entitled.
26. Aragon caught this error and when Farrington arrived at work on December 1, 2000, he questioned Farrington about it in the gym. Aragon explained to Farrington that he had failed to note his early departure on his November 13 time sheet, precluding him from using comp time as requested for a November 18 absence. He told Farrington he could not yet sign off on the time sheet.
27. Farrington responded that he thought he had several hours of comp time available. Aragon informed him that was not the case, and that he would have to discuss his time sheet with Captain Holditch.
28. Farrington then became angry, and stated to Aragon that he was on a power trip and was "fucking" with him.
29. Aragon ordered Sgt. Pardue to leave the gym. Farrington objected, asking Pardue to stay. Aragon again ordered Pardue to leave, and he did.
30. Aragon next confronted Farrington about having claimed vacation time on November 18, 2000. Aragon informed Farrington that he had to use sick leave instead of annual leave for that day. The two argued about that.
31. Aragon then confronted Farrington about not having called him at home when he called off work on a recent Saturday. He reminded Farrington that he had directed all Recreation staff, including Farrington, to call him at home if they would be absent from work on a weekend when he was not present at CCF. Aragon explained that due to security issues that had arisen recently, if something should happen, CCF command staff would ask him why there had been only one person on duty.
32. Farrington responded that he had called the shift commander, and that was good enough. Aragon became sarcastic and stated that if Farrington couldn't understand the call-off procedures he would write it down and read it to him.
33. Aragon stated to Farrington that by calling him at home he was showing him some respect. Farrington responded that he had no respect for Aragon and that he would have to earn his respect.
34. Aragon saw that Farrington had become very upset at this point. Aragon then brought up the appearance issue. He told Farrington that he expected him to come to work looking professional, with a clean shave, a trimmed mustache, clothing clean and neat, and shoes shined.

35. Farrington responded that he would do what he wanted, that the conversation was "fucked up" and he was tired of Aragon's "bullshit." He said he was leaving. Aragon said he was not to leave the gym.
36. Aragon told Farrington that if he wanted to work in the Recreation unit he would have to comply with what he asked of him. Farrington said if he wanted to do something he would, and if he didn't want to he wouldn't. Aragon responded he had not asked him to do anything that any other supervisor would ask him to do.
37. Farrington left the gym.
38. Approximately fifteen minutes after this argument, Aragon and Farrington were in the gym again together, with Pardue present. Aragon extended his hand to shake Farrington's and apologized. Farrington shook it and stated that what had really upset him was he felt Aragon had questioned his honesty and professionalism. He admitted he had made a mistake on his time card and stated he was not trying to cheat on it. Aragon said he was glad they had both had the chance to vent. They shook hands again.
39. Aragon never questioned Farrington's intentions regarding the time sheet, and did not believe Farrington was attempting to claim comp time to which he was not entitled.
40. Aragon informed Farrington he would have his signed time sheet ready for him the following Monday, December 4.

December 4, 2000 Incident

41. Aragon contacted Captain Holditch by telephone after the December 1 argument with Farrington. He informed Holditch he sought a meeting with him and Farrington to address Farrington's insubordination, vulgar language, inappropriate behavior and appearance, and the time sheet issue. Holditch agreed to meet with them on Monday, December 4.
42. On Monday, Holditch recalled he had a dentist appointment, and informed Aragon he would have to postpone the meeting until Thursday of that week.
43. Aragon researched the comp time issue and determined that Farrington indeed had no comp time left to use. Having resolved the time sheet issue, he could have signed it and given it to Farrington on that day. Instead, for reasons that are unclear, he decided not to give it to Farrington, as promised.
44. That afternoon, when Farrington, predictably, asked Aragon if his time sheet was ready, Aragon informed him it was not, and that he needed to talk to Captain Holditch about it. Farrington asked what was wrong, and Aragon stated something

to the effect of, "you'll find out on Thursday."

45. This provocative remark sparked Farrington's anger again. Farrington became very angry, as he believed he and Aragon had resolved the time sheet issue on Friday.
46. Aragon, seeing Farrington had become angry, ordered Mike Moore to leave the gym. Farrington objected. Moore left the gym.
47. Farrington asked Aragon what the problem was, stating he thought they had resolved it the previous week by agreeing Farrington would use his vacation leave for the missing time.
48. Aragon responded that they needed to show the time sheet to Holditch, who would be back on Thursday. Farrington became angry, and said Aragon was not man enough to take care of the situation himself and that he had to run to Captain Holditch.
49. Aragon stated that Holditch needed to know about his behavior, and that when he saw the time sheet he would be in trouble. Farrington responded by stating again that Aragon was on a power trip and was "fucking with him."
50. Farrington asked if Aragon was threatening his job. Aragon responded, not your job, but your gym position, or words to that effect. Farrington asked him why he was "fucking" with him.
51. Farrington was so angry he was pacing back and forth. He said to Aragon to stop fucking with his head. Aragon said he wasn't, but he was sending him home. Farrington said, "bullshit, you don't have that authority." He told him he wasn't going home unless ordered to do so by the shift commander. Aragon then ordered him to leave the gym to cool off, but Farrington again refused.
52. Aragon stood up and started yelling at Farrington, pointing towards either Farrington or the door, in Farrington's direction. Aragon told him to sit down on the bench and they could talk it over.
53. Farrington told Aragon to back off and keep his finger out of his face. Aragon asked him what he was going to do about it. Farrington said, "if you come any closer I'll hurt you."
54. Aragon asked if Farrington was threatening him. Farrington replied that he had better leave him alone. At some point in this exchange, Aragon, feeling physically threatened by Farrington, who weighed at least 100 points more than he and towered over him in height, stated that he would "kick him in his fucking head."
55. At the end of this exchange, Farrington told Aragon he was going to the captain's

office to report the incident, and he did so.

56. Aragon went home "to cool off," according to his written account of the incident, dated December 7, 2000.
57. Although Aragon has repeatedly stated and testified that he never lost his temper on December 4, it is found that he did. He and Farrington engaged in a highly emotional, heated argument; both were angry. Aragon therefore found it necessary to leave work in the middle of his shift to go home and cool off.
58. Farrington filed a grievance against Aragon. He mentioned the threat made by Aragon that he would "kick him in the head." Farrington requested that Aragon be moved out of the CCF gym, be removed as his supervisor, be given a corrective/disciplinary action, and be provided with additional training in supervisory skills, professionalism and communication skills.
59. Aragon did not write up any type of performance documentation form on Farrington for either incident on December 1 or 4, 2000.
60. On December 14, 2000, the union representative, Reyes Martinez, held a meeting between Farrington, Aragon, Captain Holditch, and Major Pierson, in an attempt to informally resolve the situation.
61. At the meeting, Aragon and Farrington presented completely different versions of what had occurred on December 1 and 4, 2000, and they made no progress. The outcome of the meeting was that Farrington would pursue his grievance against Aragon.
62. Martinez wrote up the results of this meeting and submitted it to Captain Holditch. The memo notes Farrington's strong concern about Aragon's statement that he would kick him in the head.

Warden Williams' Investigative Process

63. Warden Williams scheduled a pre-disciplinary meeting with Aragon pursuant to Board Rule R-6-10 on January 5, 2001. In his letter scheduling the meeting, he indicated that his investigation had revealed a possible violation of CDOC AR 1450-1 Staff Code of Conduct and 100-29 Violence in the Workplace, indicating a possible need to administer disciplinary action. (He ultimately imposed corrective, not disciplinary, action.)
64. Prior to the pre-disciplinary meeting, Williams approached Aragon in the hallway and asked how he would feel about transferring to the Custody and Control unit at CCF. Aragon responded that it would be okay, because of all the tension in the Recreation unit, or words to that effect.

65. Aragon appeared for the pre-disciplinary meeting with his union representative. Williams did not have a representative present. At the outset, Williams stated that his information indicated Farrington and Aragon had had a "couple of heated discussions," that got "rather loud and there may have been some threats of physical violence involved. That's my biggest concern."
66. At the pre-disciplinary meeting, Aragon spoke at length and in detail about his history of employment at DOC. He informed Williams that when Major Pierson became his supervisor, Pearson had informed him that he would never be promoted, that he should not apply for any captain position, and attempted to move him to a lower paying position.
67. Aragon also explained to Williams that Farrington had recently been coming to work in dirty clothes, with a beard, and disheveled hair. He informed Williams that he had asked Farrington periodically if everything was okay at home, and was told "no." He also informed Williams that Farrington had been complaining repeatedly about everything, and had made an enormous issue of the fact Aragon had a day shift schedule with weekends and holidays off.
68. Aragon explained to Williams that his Recreation staff had asked him to change their schedules to ten-hour shifts, but that he had turned down their request because it did not meet the needs of the facility. He said Mike Moore had gone to Holditch about it.
69. Aragon told Williams he felt his staff was conspiring to get rid of him.
70. Regarding December 1, 2000, Aragon explained that when Farrington arrived, he asked if he had his time sheet. When Aragon pointed out that Farrington had erroneously claimed to have worked on a day he was absent, Farrington stated he would use comp time. When Aragon stated that he might not have comp time available, Farrington became upset and said, "This is a bunch of fucking bullshit, you're fucking with me." Aragon informed Williams that he stated he was only doing his job, and told him to calm down, if he had the comp time, he would give it to him.
71. Williams confirmed that later that day, December 1, Aragon smoothed things out with Farrington.
72. Aragon then explained how he had set up a meeting with Captain Holditch to address that day's incident and the appearance issues with Farrington, that Holditch had agreed to do so on Monday, December 4, and that he had ended up not being available.
73. Aragon also explained what occurred on Monday, December 4. He denied

threatening Farrington in any manner, losing his temper, or conducting himself unprofessionally.

January 2001 Corrective Action

74. Warden Williams did not review Aragon's personnel file prior to imposing the corrective action. His impression of Aragon was that he was a good employee.
75. Williams did interview Farrington prior to issuing the corrective action to Aragon. Williams was unaware of and never explored Farrington's mental and emotional condition.
76. Warden Williams was not concerned about Farrington's disrespect towards Aragon, or the reasons why Farrington lost his temper.
77. On January 22, 2001, Williams issued a corrective action letter to Aragon. In his letter, he noted that on December 1 and 4, 2000, he had had confrontations with Farrington in the CCF gymnasium. He stated in part,

Since our meeting on January 5, 2001, I have interviewed Sgt. Robert Farrington and Sgt. Mike Moore. Mr. Moore was unable to corroborate either story. Since you and Mr. Farrington relate vastly different versions of the same event and there are no eyewitnesses, I am left to decide what I believe to be the facts. I believe that both of you may have lost your tempers and acted inappropriately. The difference is, you are a Correctional Officer III-supervisor. It is your duty to ensure that incidents of this nature do not happen. You have a responsibility to ensure the safety and security of all staff and inmates. Incidents of this nature undermine the team concept and lead to divisions among staff. Because of this incident and previous incidents of this nature involving you, I believe we now have a situation in the recreation department where staff do not trust each other and are not confident they will get the full support they need should a situation arise.

78. Williams imposed the following corrective actions: transfer to custody/control, with a new direct report to two captains who would mentor him "in all aspects of the job including supervision of staff"; and, within 180 days he would complete DOC in-service classes in Professionalism, Violence in the Workplace, Interpersonal Communications and Stress Management.

Aragon's Grievance of the Corrective Action

79. Aragon timely grieved the corrective action. He denied losing his temper, contended that he did not instigate the incident, and asserted that Farrington was the aggressor.
80. Aragon also challenged Warden Williams' partial reliance on the 1999 incident with

Pardue, as the investigative panel had never issued any findings or conclusions on that incident.¹

81. Complainant's written grievance was referred to a grievance panel for review. After interviewing witnesses, investigating, and deliberating, the grievance panel forwarded its findings and recommendations to Gerald Gasko, Deputy Director, Prison Operations, DOC. On April 23, 2001, Gasko issued a letter denying the grievance, concurring with the panel's findings, which were the following:
- A. "The Corrective Action was not issued arbitrarily or capriciously and was issued appropriately within the parameters of the warden's authority and responsibility. It should not be interpreted as a punishment but as a tool intended to correct or improve those areas identified in the Corrective Action for your own benefit;"
 - B. "The main issue of the grievance was the Corrective Action, and the subject of the hostile work environment [in his new position] is beyond the scope of the grievance;"
 - C. The warden indicated that you are a valuable asset to the Department. Furthermore, a transfer to another facility could provide you with new opportunities, and you should continue with the transfer process under departmental guidelines."
82. Aragon requested the following relief in his grievance, which he re-affirmed following the hearing: rescission of the Corrective Action and a transfer out of CCF.
83. Both Aragon and Farrington were not credible witnesses. Their testimony was inconsistent and self-serving.
84. Farrington's verbally abusive conduct on December 1 and 4 2000 constituted a serious, flagrant disregard of Aragon's authority and insubordination, warranting either corrective or disciplinary action. Warden Williams made a significant judgment error in failing to impose serious consequences on Farrington.²
85. Aragon contends that Williams is biased against him, as evidenced by his failure to impose any adverse action on Farrington, and by Williams' plan to transfer Aragon out of the unit well prior to December 2000. Aragon himself requested a transfer from Williams in 1999, and reaffirmed his position that it would be an acceptable outcome in January 2001. Williams' position on the transfer issue is not evidence of bias. Further, Williams viewed the corrective action as a means of alerting Aragon to his weaknesses as a supervisor, not as a means of undermining his authority.

¹ Aragon's additional contentions were not set for hearing, per the Preliminary Recommendation and the Board's order affirming it.

² Warden Williams is retired from DOC.

86. Aragon's conduct on December 1 demonstrated lack of sound judgment.
87. Verbal counseling of an employee is only appropriate when it can occur in a calm, productive setting. It is counterproductive when the employee is in an agitated or angry emotional state. Once Farrington had become upset, Aragon should have disengaged himself from the conversation by leaving the gym. Instead, he allowed himself to become emotionally drawn into an argument, attempting to assert his will over Farrington in an inappropriate manner.
88. Aragon erroneously escalated the argument, rather than deflated it, by confronting Farrington about the call-in and appearance issues once he saw Farrington was upset.
89. Significantly, once Farrington admitted his error on his time sheet and the two men shook hands on December 1, Aragon made a commitment to Farrington to bring in the completed time sheet on December 4, 2000. Aragon never believed Farrington was attempting to claim comp time he was not due; therefore, he should have followed through on that commitment.
90. Had Aragon separated his legitimate concern about Farrington's escalating insubordination from the timesheet issue, which was fully resolved, the second confrontation would likely not have occurred.
91. Aragon should have given Farrington his time card on December 4. Then, he should have written either a Performance Documentation form or a memo requesting corrective or disciplinary action against Farrington, based on his misconduct on December 1 and any other previous similar incidents. This would have been an appropriate, professional exercise of his supervisory authority over Farrington.
92. Instead, he confronted Farrington with the time card issue on Monday, using it as a pretext for "getting Farrington into trouble" with Captain Holditch. This error in judgment led to the second confrontation.
93. Aragon then allowed the argument to escalate by ordering Moore to leave, engaging in further heated exchanges with Farrington, and failing to simply end the encounter by leaving. Once again, he allowed himself to be drawn into the emotion of the situation, instead of removing himself from it.

DISCUSSION

In this action challenging an agency response to a grievance, it is Complainant's burden to demonstrate that the Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

1. Complainant Has Not Demonstrated That the Decision to Impose Corrective Action

Was Arbitrary, Capricious, or Contrary to Rule or Law.

In determining whether agency action is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

As stated above, Aragon acted inappropriately with Farrington in a number of ways. On December 1, once he knew that Farrington was very upset about the time sheet issue, he raised two entirely new issues to confront him with, which had the effect of further escalating Farrington.

One of the most difficult tasks supervisors face is handling problem employees. In December 2000, Farrington was a problem employee. While Aragon is to be commended for attempting to use informal channels in accommodating Farrington's volatile emotional state over the year 2000, by December 1, he needed to realize it was time for formal action. Verbal counseling was no longer a viable option; it was time to use the written channels available to him, as urged by Captain Holditch.

Once Aragon saw that Farrington was becoming angry on December 1, he had two choices: escalate the situation by continuing to argue with him and raise additional performance issues; or end the discussion and use a Performance Documentation form to put Farrington on notice that he was commencing the progressive discipline process. Aragon made the wrong choice.

Again, on December 4, Aragon had basically the same two choices available to him. He could either follow through on his commitment to hand Farrington the signed timesheet, since the issue had been resolved, and initiate the written performance documentation process separately. Or, he could breach that commitment and engage in another verbal encounter. Unfortunately, he again made the wrong choice. He inadvertently created another escalating situation by threatening to get Farrington "in trouble" with Captain Holditch. Then, having triggered Farrington's angry state again, he remained present and engaged in the escalating argument.

In his grievance, Aragon challenged Warden Williams' partial reliance on the 1999 incident with Brendan Pardue. Warden Williams' concern was the fact that on such a small unit, Aragon had somehow allowed himself to enter into heated exchanges with two out of the three employees he supervised. Williams appropriately conferred with Aragon about whether a transfer out of the unit might be appropriate. Aragon agreed, and Williams correctly concluded that the work environment was uncomfortable for everyone, and that the team concept had been undermined under Aragon's supervision. It was appropriate for Williams to consider the fact that a previous heated argument had occurred; it was part of the landscape of the small unit.

Complainant asserts it was arbitrary and capricious for Williams to fail to investigate whether his three subordinates had conspired against him to have him transferred out of the Recreation unit.

However, Warden Williams had been informed by Aragon himself that he felt a transfer was probably best, due to the tension that existed in the unit. Under that circumstance, it would have been a waste of time for Williams to investigate the situation on the unit any further; he had a solution to the problem with Aragon's blessing.

Complainant asserts that Warden Williams' investigation was arbitrary and capricious under *Lawley, supra*, because he failed to adequately investigate Farrington's mental and emotional state. Williams would have benefited from this information. Williams committed an enormous blunder by failing to hold Farrington accountable for his misconduct, thereby sending the wrong message to Farrington and his co-workers. However, Williams' failure to appropriately address Farrington does not negate the appropriateness of his action taken with respect to Aragon. Aragon failed to effectively manage a problem employee, allowing two encounters to spiral out of control. Aragon should have utilized other, more appropriate supervisory tools available to him, namely, written documentation of his misconduct.

Aragon also argues that Williams abused his discretion by failing to determine whether he actually violated any specific DOC rule, regulation, or standard. However, the decision to take corrective action does not require a finding of a violation of a specific rule. Corrective action is "intended to correct and improve performance or behavior." Board Rule R-6-8. Supervisors are trained and expected to diffuse situations with employees, especially those like Farrington who have known problems. Williams issued the corrective action to prompt Aragon to examine his own behavior as a supervisor, and to prompt him to change his response to potentially heated situations on the job.

2. Respondent is Not Entitled to an Award of Attorney Fees and Costs.

Respondent requests an award of attorney fees and costs against Aragon. Attorney fees and costs are to be awarded if it is found that a personnel action or appeal thereof as instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. Section 24-50-125.5, C.R.S.; Board Rule R-8-38, 4 CCR 801. Aragon pursued his appeal in good faith, and no evidence was presented demonstrating any motive to harass DOC in the course of bringing this action. Fees and costs are not warranted in this situation.

3. Complainant is Not Entitled to Sanctions.

On September 10, 2003, Complainant filed a motion to compel discovery and for sanctions. On September 15, 2003, the motion to compel was granted in part, and the issue of sanctions was set aside until after hearing.

Rule 37(a)(4), C.R.C.P., governs sanctions for failure to make discovery. It provides that if a motion to compel is granted, the movant may be granted "reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust."

The situation herein is such that an award of expenses would be unjust. Portions of the motion to compel were granted because Respondent did not have a valid basis to deny discovery. On the other hand, Complainant spent an enormous amount of time in his motion on the issue of the Office of the Attorney General's ("AG") representation of Farrington, an employee of its agency client, DOC. His motion failed to address the ethical rule that squarely disposes of the issue, however. (Colorado Rule of Professional Conduct 1.13.) This caused the AG's office to expend considerable resources on defending the motion. Under these circumstances, an award of attorney fees would be unjust.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary or capricious.
2. Neither party is entitled to an award of attorney fees and costs.
3. Complainant is not entitled to an award of sanctions for costs incurred in filing his motion to compel.

INITIAL DECISION

Respondent's January 2000 Corrective Action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
April, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 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. The notice of appeal must be received by the Board no later than the 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 a written notice of appeal is not received by the Board 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 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 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 MAILING

This is to certify that on the ____ day of April 2004, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, Colorado 80437-1477

and in the interagency mail, addressed as follows:

Danielle Moore
Assistant Attorney General
C/O Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
