

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 93 G 002

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CAROLYN WEATHERFORD,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT SERVICES,
LIMON CORRECTIONAL FACILITY,

Respondent.

The hearing was held on October 25 and 26, and November 5 and 10, 1993. The parties filed written closing arguments. Respondent filed its closing argument on November 22, 1993 and Complainant filed her closing argument on November 24, 1993, thus concluding the hearing. Respondent appeared at the hearing through Paul S. Sanzo, Assistant Attorney General. Complainant Carolyn Weatherford was present at the hearing and represented by William S. Finger, Attorney at Law.

Complainant testified in her own behalf and called the following witnesses to testify at hearing: Larry Stuart; Lana Sue Ritter; John Cosma; Debbie Day; John "Smokey" Kurtz; Maurice Hilty; Rex Worley; Craig Bridgmon; and Gerald Gasko. Complainant's witnesses William Wilson, William Price and James Brittain, offered their testimony via telephone. Complainant's exhibits D through G were admitted into evidence by stipulation of the parties. Complainant's exhibits A through C, H through K, M through Z, AB through AD, AG, AI through AT, and AV through AY were admitted into evidence without objection. Complainant's exhibit AA was admitted into evidence over Respondent's objection.

Respondent called the following witnesses to testify at hearing: Donald Ray Lawson; Lotte Broughburg; Robert Furlong; Mark Edward McKinna; Major Delayne Tornowski; and Shelley Windgarden. Respondent's witness Aristide Zavarras offered his testimony via telephone. The parties stipulated to the admission of Respondent's exhibit 21. Respondent's exhibits 16 and 18 through 20 were admitted into evidence without objection. Respondent's exhibits 6, 11 and 22 were admitted into evidence over Complainant's objection.

PRELIMINARY MATTERS

1. The parties met for a prehearing conference on July 18, 1993. Complainant's counsel was unable to attend the prehearing

conference due to unexpected out of town business. Counsel's associate, Hal Warren, an attorney, who had limited familiarity with the facts of the case, appeared on Complainant's behalf.

2. A telephone conference was held with counsel and the Administrative Law Judge (ALJ) on October 18, 1993. During the telephone conference the issues to be considered in this case were clarified. The ALJ ruled that the primary issue before her in this appeal is whether Respondent's action transferring Complainant from the Limon Correctional Facility (LCF) medical unit to the yard was retaliatory for her disclosure of information.

3. During the telephone conference on October 18, 1993, Complainant was ordered to accept the burden of proof and the burden of going forward on the issue whether her transfer from the medical unit was retaliatory.

4. During the telephone conference, the parties agreed that certain witnesses' testimony would be taken by telephone.

5. Complainant's request to sequester the witnesses from the hearing room was granted.

6. The ALJ takes administrative notice of State Personnel Board Appeals numbered 912B135, Deborah Kathman v. Department of Corrections, and 93B084, Carolyn Weatherford v. Department of Corrections.

MATTER APPEALED

Respondent appealed a determination made by the Personnel Director for the Department of Personnel that there was probable cause to believe that Complainant was transferred from the medical unit in retaliation for her reports of violations in the medical unit and for her participation in the internal investigation of LCF conducted by John "Smokey" Kurtz.

ISSUES

1. Whether Complainant was transferred from the medical unit in retaliation for her reports of infractions in the medical unit and for her cooperation in an investigation of LCF.

2. If Respondent's actions are found to be retaliatory, what relief can be afforded Complainant under Sections 24-50.5-104 and 24-50.5-106, C.R.S. (1988 Repl. Vol. 10B).

3. Whether Complainant is entitled to an award of attorney's fees under Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

FINDINGS OF FACT

1. Complainant Carolyn Weatherford is a Hispanic female who is 50 years old. She is a high school graduate who is licensed as a practical nurse (LPN) and a developmental disabilities technician.

Weatherford is the single parent of three children and she resides in Pueblo, Colorado.

2. Weatherford was employed by the Department in 1985. Weatherford began State employment at the Arkansas Valley Correctional Facility (AVCF) as a correctional officer. Weatherford participated in six to eight weeks of correctional officer training, immediately following her employment. After training, Weatherford was assigned to yard security at AVCF where she worked as a guard monitoring inmate activity and assisting in the movement of inmates through the facility. She remained in this position until January 1991.

3. Weatherford was hired at AVCF as a correctional officer by James Brittain, who was the Warden at the time. On or about April 1990, Brittain was assigned as Warden at LCF. In April 1990, LCF was under construction and was approximately one year away from opening. During the one year period preceding the opening of the facility, Brittain assisted in resolving issues related to the opening of the new facility. During this period, he also worked on staffing the facility.

4. LCF was built to house medium security inmates and, in fact, when the facility opened in April 1991, it received medium security inmates. Medium security inmates are given a substantial amount of freedom to come and go within a correctional facility during the daylight hours. Generally, there are fewer correctional officers used to staff a medium security prison. And, since there is less structure involved in the medium security prison, there are fewer programs organized for the inmates.

5. Beginning shortly after LCF opened until August 1992, approximately 400 inmates were transferred from the State's Shadow Mountain Correctional Facility to LCF. These were inmates who were supposed to be housed in a closed security facility. By August 1992, LCF had 60% closed security inmates. This change in the type of inmate housed at LCF occurred at the direction of George Sullivan, the Department's Deputy Director. Brittain was not consulted. The change in the type of inmate housed affected security procedures followed, and required adaptation of the facility which was intended for use by medium security inmates.

6. Brittain, and LCF's Deputy Warden Rex Worley, attempted to raise the security problems created by having closed security inmates at LCF with Sullivan and other administrators at the Department's Colorado Springs offices. They emphasized the need

for additional correctional officer at LCF. However, their request for additional officers was ignored.

7. Prior to LCF's opening, Brittain was assisted in his duty to staff the facility by A.J. Rose, a personnel analyst who was employed by the Department in the human resources office under the supervision of Maurice Hilty, the Director of Human Resources. Rose offered Brittain advice about the level and classification of employees assigned to work at LCF.

8. In consultation with Rose, Brittain requested the creation of a position in the medical unit at LCF for a correctional technician. Brittain's request was approved by human resources personnel. The class specification for the correctional technician position specifies a number of areas where a correctional technician may be assigned to work. Among those areas defined by the class specification is assignment as officer in charge of a medical unit. In Brittain's experience as a Warden, he believed that a correctional technician should always be assigned to the medical unit in a medium and closed security facility.

9. There are security issues which arise in the medium and closed security facility which are peculiar to the medical unit, making it important to have an experienced officer with some degree of authority in this assignment. The medical unit is a high risk area for the introduction of drugs to the inmate population, since narcotics are stored in the unit. The medical unit also stocks utensils which could be used as weapons, thus security measures must be tight in this area to insure that utensils are properly stored and accounted for.

10. Brittain worked with Weatherford at AVCF and was aware that she performed her duties in a commendable manner. He was further aware that she is a LPN. He concluded that she was well suited to the correctional technician duties in the medical unit at LCF. Brittain hired Weatherford for the position in February 1991, resulting in a promotion of Weatherford from the correctional officer position at AVCF to the correctional technician position at LCF.

11. Brittain arranged the LCF medical unit to require the correctional technician to report directly to the security manager, and not to the clinical administrator of the medical unit. The clinical administrator of the medical unit had supervisory authority over a multi-disciplinary health care team which included a physician's assistant and nurses. By placing the correctional technician in the medical unit under the security manager, and not the clinical administrator, Brittain attempted to insure the independence and freedom of the officer to perform the assigned duties of medical security.

12. The post orders for the correctional technician position in the medical unit were prepared by Brittain prior to the date that Weatherford assumed her post at LCF. The post orders defined with specificity the duties of the assignment. These duties included the control of inmate movement, conducting inmate counts ensuring the safety of the staff and conducting sensitive item inventory.

13. LCF opened in April 1991, and in May 1991, Weatherford was recognized by the LCF management team as an outstanding employee.

In a memorandum dated May 14, 1991, Weatherford was honored in recognition of National Correctional Officer Week. She was advised in the memorandum as follows, "In your assignment as the Clinical Services Security, you have consistently demonstrated that safety of staff and inmates is your prime concern. You have learned to maintain your authority in an understanding and caring manner that has earned the respect of staff and inmates".

14. Weatherford's commendation received in May 1991 was consistent with the performance evaluation she received from 1990 through June 1992. Each rating during this period was commendable and in the sub-categories of communication and interpersonal relationships, Weatherford received ratings ranging from good to outstanding.

15. In April 1991 when LCF opened, Larry Stuart was the security manager to whom Weatherford reported. She reported to him about medical security issues on a daily basis. Stuart found Weatherford's security practices in the medical unit to be as required by the post order, and to be carried out in a professional and commendable manner.

16. Within the first six months of the opening the facility, Weatherford reported to Stuart that the physician's assistant was administering prescription drugs to the staff without authorization. She reported that medications were being left out in the open, accessible to the inmates on the medication line. She reported that inventory reports of syringes were being altered. Medical personnel in the medical unit at LCF also made reports during this period of irregularities in the medical unit.

17. Dave Holt was the clinical administrator in charge of the medical unit. Holt consistently complained to Stuart and Worley about Weatherford. Holt believed that Weatherford got in the way of the unit's efforts to provide medical services. Holt thought Weatherford performed her duties too aggressively. Holt wanted Weatherford to "back off" in the performance of her security duties in the medical unit.

18. As early as May 1991, Holt complained that he did not want

Weatherford to make copies of inventory reports in which syringes and narcotics were accounted for. Holt was advised by Stuart that Weatherford would continue to copy these reports for medical security purposes. In June and August 1991, numerous verbal and written reports were made to Stuart, Worley and Brittain by Weatherford about problems with security in the medical unit. Meetings were held with Weatherford, her supervisors and Holt in an effort to resolve the security issues reported by Weatherford. By August 1991, Weatherford held weekly meetings with Holt to keep him apprised of security concerns.

19. In November 1991, when the security issues persisted, Holt was reassigned from his position at LCF and Donald Lawson was assigned as the clinical administrator of the medical unit. Lawson was equally resistant to Weatherford's efforts to maintain security in the medical unit. In December 1991, Lawson became so annoyed with Weatherford's effort to carry out the post order that he yelled at Weatherford on at least two occasions expressing about his displeasure with the security measures in the medical unit.

20. Stuart reported the information he received from Weatherford about the irregularities in the medical unit to Worley. Worley and Brittain were also receiving reports from the Holt during this period. This information was relayed by them to the managers of the Department. In October 1991, Guy Thomas was an investigator who worked under the direction of the Inspector General Jerry Gasko. Thomas assigned John "Smokey" Kurtz, a Department investigator, to investigate the LCF medical unit. Kurtz was instructed only to investigate the allegedly unauthorized injections administered to the LCF staff members. He was instructed not to investigate the allegation of the mishandling of drugs in the unit. No explanation was provided to Kurtz concerning the reason why the investigation should proceed in this manner.

21. Kurtz concluded his investigation in January 1992 after interviewing Weatherford and the medical unit staff members. Kurtz concluded that there were security violations in the medical unit and that drugs were administered to LCF staff without authorization. In the course of Kurtz' investigation, he spoke to the medical unit supervising nurse, Lotte Broughburg, and the clinical administrator, Dave Holt. Holt and Broughburg were highly agitated by any reference during the investigation to Weatherford.

22. Kurtz provided his investigative report to Thomas. Subsequently, Kurtz' report was provided to Lawson. Following receipt of the report, Lawson met with each of the medical unit's personnel alone. This was an intimidating procedure for the employees, since it was not the regular practice of the clinical administrator to meet with the unit's personnel alone.

23. Lana Ryan was a probationary status LPN in the medical unit who provided Kurtz with information during his investigation. Lawson met with Ryan and made it clear to Ryan that the security issues that Weatherford raised and Kurtz investigated were none of Ryan's concern. In fact, Ryan knew that she had a legal obligation to report any irregularities in the use of drugs or syringes in the medical unit, but she was lead to believe by Lawson that these were administrative matters that she should not be concerned about.

24. In January 1992, Stuart felt there was an increased need for security personnel in the medical unit. In addition to the numerous reports filed by Weatherford about the activities in the medical unit, Stuart was concerned about the security problems related to the increasing number of closed security inmates assigned to LCF.

25. John Cosma, a correctional officer, was assigned to work with Weatherford in the medical unit in January 1992. Cosma was hired as a correctional officer in January 1992. His first assignment, after training, was in the medical unit at LCF. Cosma and Weatherford worked well together. Cosma found the work in the medical unit to be difficult and he was assisted by Weatherford's professionalism and knowledge.

26. Following Kurtz' investigative report in January 1992, Stuart, Worley and Brittain continued to receive communications from the medical unit staff that they did not want Weatherford in the medical unit. Lawson, the physician's assistant Thompson, and Broughburg consistently complained about Weatherford's aggressiveness in the performance of her duties. Throughout this period, Weatherford remained professional despite the mounting hostility toward her. She and Cosma continued to report medical security issues.

27. In January 1992, shortly after Kurtz' report was provided to Thomas, Stuart's office was entered without authorization and all the reports provided by Weatherford to Stuart about medical security were stolen.

28. Prior to June 1992, LCF received substantial media attention when inmates were killed in their cells. Worley and Brittain were held responsible for the problems at the facility and were transferred from LCF. In June 1992, Worley and Brittain were replaced at LCF by Robert Furlong, who was assigned to be the Deputy Warden, and Mark McKinna, who was assigned to be the Warden.

29. At or around the date of Furlong and McKinna's assignment to LCF, the facility received additional newspaper coverage concerning activities in the medical unit. These reports were

premised on the information that originally was supplied by Weatherford in 1991, and early 1992, about irregularities in drug administration to staff members and the inaccurate accounting for drugs and equipment in the unit. Weatherford was not the focus of these reports. The newspaper accounts made reference to another medical unit employee, Deborah Kathman, who was terminated from her position. Kathman alleged that she was terminated because she is a whistleblower who cooperated in Kurtz' investigation. Ultimately, Kathman appealed her termination from employment and the termination was found to be neither arbitrary, capricious or in violation of the whistleblower statute.

30. Furlong and McKinna were directed by the Executive Director of the Department to go to LCF and "fix" what was wrong. After McKinna's arrival on June 10, 1992, at LCF, he quickly concluded that he needed to reassign the personnel at LCF to have a larger number of correctional personnel in contact with the inmates.

31. Sixteen days after McKinna arrived at LCF, on June 22, 1992, he reassigned Weatherford from medical security to the yard. He did not speak to Weatherford or Cosma about Weatherford's reassignment. McKinna spoke with Lawson about the medical unit. During these conversations with Lawson, Lawson expressed a concern that the tension between medical security and the clinical personnel end. McKinna and Furlong worked with Holt and Lawson prior to their assignment at LCF when they were employed at the Fremont Correctional Facility where McKinna was the deputy warden.

32. McKinna intended to, and ultimately did, make reassignments throughout the facility, starting with the majors, and continuing through the ranks. These changes took effect on July 1, 1993. However, McKinna selected Weatherford as the first officer to reassign. Weatherford learned of her reassignment from Cosma on June 26, 1993 while she was on vacation. She verbally confirmed that she was being reassigned with Major Delayne Tornowski, one of her supervisors. By memorandum dated June 26th, Weatherford was advised by Tornowski of McKinna's decision to reassign her to yard security.

33. After Weatherford's reassignment, Cosma was the lone security officer in the medical unit. He had been employed by the Department for 6 months at this time. He found it difficult to carry out his duties alone in the medical unit because of his inexperience and because of the level of responsibility involved in the assignment. The post order for the medical unit remained unchanged during Cosma's assignment to the unit. He continued to carry out the duties of security in the medical unit as provided in the post order and as he had been instructed by Weatherford.

34. McKinna was supervised by William Wilson who was the Director of the Division of Prison in June 1992. When Weatherford was

transferred from medical security, she contacted Wilson on June 26, 1992. Weatherford left the chain of command and contacted Wilson because she had not met Furlong and McKinna, since there assignment to LCF, and she knew Wilson was aware of the problems in medical security. Wilson told Weatherford to schedule a meeting with McKinna. Wilson also called McKinna and encouraged him to meet with Weatherford and discuss her concerns.

35. McKinna met with Weatherford on June 29, 1992. Weatherford explained her position, that it was important to maintain a correctional technician in medical security, and that she was being forced out of medical security by the clinical staff because she had done her job too well. McKinna remained firm that she would remain in her new assignment in the yard.

36. When the June 29th meeting proved fruitless for Weatherford, she grieved the decision to transfer her from medical security raising the issue that she was transferred because she is a whistleblower.

37. Weatherford did not enter the medical unit after June 29, 1993 for any unauthorized purpose. After this date, she never copied inmate records. On July 8, 1992 at 6:50 a.m., Weatherford checked out keys for medical security and entered the unit for the purpose of returning a book and dropping off security reports for Cosma. She returned the keys to the unit at 6:55 a.m.

38. Later that day, Weatherford was advised by Tornowski that she could not check out keys and enter the medical unit. She was further advised that if she wanted to enter the medical unit in the future, she needed to advise Tornowski of the reason for her entry. Tornowski advised Weatherford that these instructions came from "upstairs". In fact, Lawson contacted McKinna and Furlong and advised them that Weatherford had gained entry to the medical unit for the purpose of copying inmate records.

39. Weatherford was astonished that she was barred from the medical unit since security officers were routinely permitted access to all areas of the facility without special authorization. She had not been advised that she had acted in an inappropriate manner in medical security necessitating her exclusion.

40. After entering the medical unit on July 8, 1993, Weatherford entered the unit on one additional occasion when she was called because an inmate was out of control. Weatherford assisted Cosma in bringing the inmate under control and left the unit with the inmate without incident.

41. On July 31, 1993, when Weatherford had completed steps one and two of the grievance process, she met with Furlong in his office. This encounter was the first time Weatherford had spoken

to Furlong since assignment to the facility in June 1993. Furlong's manner in this meeting was hostile and intimidating. Furlong told Weatherford that there was no way he would move Weatherford back into the medical unit. He leaned across the desk and pointed his finger at her, instructing her that it was "unhealthy" for her read anything into his comments. He instructed her not to go back into the medical unit without specific permission from him. Weatherford advised Furlong that she would proceed to step three of the grievance process.

42. After the July 31, 1993 meeting, Weatherford was upset about her treatment. Captain Farrell supervised her in her duties in yard security. She told him that she had been banned from the medical unit. Farrell agreed that this was extraordinary. Farrell asked her to work in the receiving unit and she agreed to do so.

43. At the third step of the grievance process, Weatherford agreed to waive the time frames for response to the grievance. She did this at the direction of a business representative for the Colorado Association of Public Employees (C.A.P.E.) because she was having difficulty finding representation. However, no one in LCF management contacted her to set up a meeting date for the step three grievance.

44. Weatherford again contacted Wilson about the delay in setting up the grievance meeting. Wilson again contacted McKinna to inquire whether there had been a delay in setting up a grievance meeting. McKinna advised Furlong of his communication from Wilson. Furlong was enraged by Weatherford's actions leaving the chain of command and contacting Wilson about the grievance response.

45. On August 14, 1993, after learning of Weatherford communication with Wilson, Furlong contacted Weatherford in the receiving unit by telephone. He directed her to come to his office immediately. She advised him that she was the only officer in the receiving unit and could not leave it unattended. He inquired whether there was anyone else in the unit with her, she told him there was no one there and he advised her, he would be right down.

46. Furlong arrived in the receiving unit with Shelly Windgarden, an employee who works in the personnel office at LCF. He was red faced, he stood over Weatherford in an intimidating manner, he raised his voice, clenched his teeth and he shook his finger in her face. Furlong told Weatherford that he took her out of the medical unit because he did not want her snooping around in the unit anymore. He told her that she had a serious problem with an inability to communicate. He told Weatherford that she could consider his remarks an informal warning. Weatherford told

Furlong that she had contacted Wilson to inquire about setting up the grievance meeting at her business representative's direction.

Furlong repeated Weatherford's words about her business representative in a sarcastic manner and left the receiving unit.

47. After Furlong left the receiving unit, Windgarden stayed behind. Windgarden told Weatherford that she should never have gotten the C.A.P.E. representative involved. Windgarden advised Weatherford that she should have discussed things with Furlong informally.

48. On August 14, 1993, Weatherford filed a report with Wilson alleging that Furlong's conduct in the receiving unit constituted an abuse of authority. On August 24, 1993, Wilson directed McKinna to look into Weatherford allegations of abuse of authority. No action was taken by McKinna consistent with Wilson's direction.

49. After the August 14, 1993 meeting with Furlong in receiving, Weatherford started calling in sick. She felt anxiety over her treatment by Furlong and McKinna.

50. On September 2, 1993, Weatherford met with McKinna for a step four grievance meeting. Weatherford's business representative was present at the meeting and the meeting was tape recorded. McKinna told Weatherford that she had a bad reputation at LCF. McKinna had learned of Weatherford's reputation from Lawson and Furlong. McKinna told Weatherford that she had set a bad example of what medical security should be at LCF. McKinna encouraged Weatherford to transfer out of LCF to another facility. McKinna encouraged Weatherford to leave the chain of command anytime she wanted, but to let him know if she intended to do so.

51. On September 8, 1993, McKinna wrote to Weatherford advising her that her step four grievance was denied. On September 14, 1993, McKinna wrote a letter to Weatherford's personnel file in which he explained his justification for moving Weatherford from medical security and he wrote that Weatherford's "situational anxiety" was caused by the fact that she was uncooperative and failed to communicate during the grievance process.

52. On September 18, 1993, as a result of McKinna's inquiry, Weatherford interviewed with William Price, the Warden at AVCF, for a correctional technician position at the facility. Price was also contacted by Wilson and Gasko and encouraged to consider Weatherford for a position at his facility. Weatherford could not accept the correctional technician position on September 18, 1993, because Wilson could not be sure of the shift to which the position would be assigned. Weatherford had personal considerations which caused her to only be able to work the day or night shifts. On September 21, 23 and 24, 1993, Price attempted

to contact Weatherford again about the position. On September 24, 1993, Weatherford could not commit to taking the position because she was under a doctor's care and was not sure she could get a release from him to return to work in a correctional facility.

53. In October 1993, Price offered Weatherford a correctional officer position at AVCF. Weatherford advised Price that her doctor had ordered her not to return to work in a correctional facility.

54. Subsequent efforts, which continued through November 1993 during the administrative hearing, to find Weatherford another position in the Department were unsuccessful.

55. Ultimately, Weatherford was administratively terminated from her position when she exhausted all sick and annual leave and short term disability benefits were denied.

DISCUSSION

Complainant Carolyn Weatherford relies on the whistleblower act for protection from the retaliation and harassment which she contends resulted in her transfer from the medical unit to the yard at LCF in June 1992. Respondent contends that the whistleblower act is inapplicable because Complainant failed to present evidence that McKinna's decision to transfer Complainant from medical security to the yard was in retaliation for her disclosure of information.

The whistleblower act prohibits the transfer or reassignment of an employee as a result of the employee's disclosure of information.

Section 24-50.5-103(1), C.R.S. (1988 Repl Vol 10B). There is no dispute in this case that the type of information disclosed by Complainant, during the course of her duties in the medical unit and to Kurtz during his investigation, was the type intended to be covered by the whistleblower act. Section 24-50.5-102(2), C.R.S. (1988 Repl Vol 10B). Nor is there a dispute that Complainant followed the requisite procedure of disclosing the information first to her immediate supervisors and the appointing authority as provided for in Section 24-50.5-103(2) C.R.S. (1988 Repl Vol 10B).

It is Respondent's contention that Complainant failed to link McKinna's action transferring her to her disclosure of information. This contention is without merit. Respondent ask the ALJ to view the series of events from April 1991 to September 1992 as isolated occurrences without relation. Such a view of events negates the reality of the employment relationships in the Department.

The evidence showed that many of the managers and middle managers in this case are long term employees of the Department and have

been assigned to facilities where they worked together closely during their employment. Thus, the notion that McKinna and Furlong accepted their assignment at LCF in June 1992 without any background information or with information sources about the conditions and controversies at the facility untapped is a fallacy.

Examples of these interrelationships are evidence by the fact that Lawson and Holt, the clinical administrators in the medical unit, worked with Furlong and McKinna at a correctional facility before their assignment to LCF. Further evidence is the fact the Guy Thomas, who instructed Kurtz to investigate LCF in October 1991, was supervised by the Inspector General Gasko. In June 1992, Gasko was the Director of the Division of Prisons and McKinna's immediate supervisor as Warden at LCF, when McKinna ordered Complainant transferred. These are only examples of the relationships which were proven to have existed in the Department during the relevant period. This evidence contributes to the difficulty the ALJ has accepting Respondent's theory of this case. These relationships, when combined with the actions taken and statements made by Furlong and McKinna, make it impossible to put on the blinders that Respondent urges the ALJ to wear.

The evidence established that Furlong and McKinna's assignment to LCF in June 1992 occurred within days of a Denver Post newspaper article which rehashed all of the information uncovered by Complainant in 1991 and 1992 about improprieties in the medical unit. The evidence further established that after the article appeared in the Denver Post, McKinna decided to transfer Complainant. Furthermore, during June 1992, McKinna and Furlong began to discuss with Complainant their decision to transfer her, and they confronted her with a venom which was extraordinary and somewhat unexplainable if one views the case as Respondent urges.

In addition, McKinna and Furlong evidenced a displeasure with Complainant's performance in the medical unit that could not be explained solely on the basis that they wanted her assigned to the yard for security reasons. They made statements to Complainant in the course of the conversations and grievance meetings that reflected that they believed she had a bad reputation at the facility and that she had not conducted the medical security assignment properly.

In fact, the evidence established that Complainant was deemed by her co-workers and supervisors to have performed her job duties in a commendable and professional manner, and in accordance with the post order. In direct contradiction to this evidence is McKinna's testimony that Complainant set a bad example of what medical security should be. However, the evidence further established that when McKinna assigned Cosma as the sole correctional officer in the medical unit in June 1992, he did not change the post order. It would seem that McKinna would have instructed Cosma to

perform medical security differently if in fact Complainant had set such a poor example.

Complainant's case is one which is based primarily on circumstantial evidence. No one in the chain of authority was naive enough to testify that Complainant caused negative media exposure by properly performing her job duties in medical security, and thus was removed from her position to prevent her from causing any additional exposure. This conclusion can only be reached by consideration of the totality of the evidence presented.

In this case, the ALJ cannot delineate the credible witnesses from those who were not. Each of the witnesses' testimony becomes important to an understanding of the events surrounding Complainant's allegations.

It is contrary to the evidence for Respondent to assert that a simple change in the players in management roles, and a bald denial of any desire to retaliate against Complainant, can relieve those in authority of responsibility for their retaliatory action.

The evidence established that Complainant was branded as a troublemaker first by the clinical administrators and staff members in the medical unit, and later by McKinna and Furlong. The evidence further established that Complainant's label as a troublemaker resulted from her disclosure of information.

Gasko, who the evidence established was involved in the management chain over Thomas, Kurtz, Brittain, Worley, McKinna and Furlong, testified in October 1993 that he was under the impression that Complainant was transferred out of medical security because she needed additional training. This testimony was certainly a red flag. No witness before or after Gasko testified that Complainant was inadequately trained. The only evidence that even came close to this was McKinna's statement at the fourth step grievance meeting when he told Complainant that she set a bad example of what a medical security officer should be. However, both of these statements stand out as incongruous with Complainant's overall record as the medical security officer.

Complainant is entitled to an award of attorney's fees and cost because the appeal was instituted in bad faith, maliciously and as a means of harassment. While Complainant's case was largely based on circumstantial evidence, it is apparent that Respondent had information available to it, which if it had acted in good faith, should have caused it not to pursue the appeal.

CONCLUSIONS OF LAW

1. The evidence presented at hearing established that Complainant's transfer from the medical unit to the yard at LCF in June 1992 was in retaliation for her disclosure of information about conduct occurring in the medical unit.

2. Complainant is entitled to the relief provide in sections 24-50.5-104, 24-50.5-106 and 24-50.5-107, C.R.S. (1988 Repl Vol 10B).

3. Complainant is entitled to an award of attorney's fees and cost because Respondent's action in pursuing the appeal was done in bad faith, maliciously and as a means of harassment.

ORDERS

1. Under Sections 24-50.5-104, C.R.S. (1988 Repl Vol 10B), Respondent is ordered to offer Complainant suitable comparable employment within the Department within a reasonable time following this initial decision.

2. Under Section 24-50.5-106, C.R.S. (1988 Repl Vol 10B), the Board shall transmit a copy of the investigation report to the State auditor.

3. Under Section 24-50.5-107, C.R.S. (1988 Repl Vol 10B), the Board shall make apart of it's annual report to the governor and the general assembly information concerning the finding herein.

4. Respondent shall expunge from Complainant's employment record all negative references which were placed in her record as a result of the retaliatory action.

5. Respondent shall place in McKinna's employment record a letter which reflects that his action in transferring Complainant from the medical unit to the yard was retaliatory.

6. Respondent is ordered to pay Complainant attorney's fees and costs for pursuing this appeal. Complainant has submitted a bill for attorney's fees and costs in the amount of \$22,103.02. Respondent may file an objection to the amount of this award within thirty day of the initial decision. Thereafter, the amount of the award shall be determined by the ALJ. In the absence of an objection to the amount of the attorney's fees and costs, Complainant is entitled to payment in the amount of \$22,103.02.

Dated this 10th day
of January, 1994, at
Denver, Colorado

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 10th day of January, 1994, I placed

true and correct copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Frank & Finger
29025D Upper Bear Creek Road
Evergreen, CO. 80439

Paul Sanzo
Department of Law
1525 Sherman St., 5th Floor
Denver, CO. 80203
