

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 95B082

---

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

J. FRANK RICE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

---

**INTRODUCTION**

This matter came on for 27 days of hearing between April 27, 1995 and September 9, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Executive Director Aristedes Zavaras and was represented by Assistant Attorney General Diane Marie Michaud. Zavaras appeared as Respondent's advisory witness throughout the proceedings. Complainant appeared and was represented by William S. Finger, Attorney at Law.

The hearing commenced on January 27, 1995 when a three-hour conference with counsel was held. A Case Management Order resulted on February 1, 1995. Numerous motions were filed during the discovery process, including motions to compel, motions for sanctions against the respective attorneys, motions to dismiss and motions for summary judgment. Two interim hearings, one by telephone, were held to resolve discovery disputes.

Respondent called 27 witnesses during its case-in-chief. Six witnesses testified in rebuttal, two of whom had also testified on direct examination. Complainant testified on his own behalf and called 25 other witnesses.

Respondent's Exhibits 1, 2, 3, 4, 5, 22, 23, 29, 33, 34 (pp. 1-9) and 42 were admitted into evidence by stipulation of the parties. Respondent's Exhibits 16, 24, 28, 37, 40, 41, 45, 46, 47 and 48 were admitted without objection. Admitted over objection were Exhibits 6, 7, 8, 10 (pp. 1-5), 11, 12, 13, 14, 15, 17, 20, 21-A, 21-B, 21-C, 25, 26, 27, 30, 35, 49, 50, 51, 53 and Complainant's Exhibit JJ (offered by Respondent). Respondent's Exhibits 21 and 43 were not admitted. Exhibits 39 and 52 were withdrawn. Exhibits 36, 38 and 44 were marked but were not offered.

Complainant's Exhibits T and U were admitted by stipulation. Admitted without objection were Complainant's Exhibits CC, D, EE, GG, KK, MM, OO, P, PP, Y, Y-1 and X (p. 1). Complainant's Exhibit X (pp. 2, 3, 4) was admitted over objection. Exhibits BB, DD, HH, II, NN and QQ were not admitted. Exhibit Z was marked but was not offered. Exhibit LL was not offered pursuant to a ruling of the administrative law judge regarding the use of CRE 608.

Exhibit FF was received into evidence over Respondent's objection during the cross-examination of witness Tim Chase for the sole and limited purpose of impeachment of the witness's testimony. On August 14, 1995, Respondent filed a written Motion for Reconsideration with respect to admitting Exhibit FF into evidence on grounds that the probative value, if any, of Exhibit FF was substantially outweighed by its prejudicial effect and confusion of the issues under CRE 403. Respondent's motion was denied. However, upon review of the complete record, it is found that Respondent's motion has merit and should be granted. The testimony of witness Chase had no bearing on the outcome of this case. Exhibit FF, therefore, will be excluded from the evidence but will be carried with the record.

ALJ Exhibit 1 was admitted over the objection of the Complainant. ALJ Exhibit 2 was admitted by stipulation.

## **MATTER APPEALED**

Complainant timely appealed his disciplinary termination of December 8, 1994. For the reasons set forth herein, Respondent's action is affirmed.

## **ISSUES**

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether there was just cause for the disciplinary termination;
4. Whether either party is entitled to an award of attorney fees and costs.

## **PRELIMINARY MATTERS**

At the outset of the hearing on April 27, 1995, various discovery and evidentiary rulings were entered. Evidence regarding the sexual conduct of the witnesses was limited to behavior in the workplace. Complainant withdrew the whistleblower issue, which he had raised in his notice of appeal. (Complainant waived an investigation by the State Personnel Director in Attachment "A" to his notice of appeal.) Over the objection of Respondent, Complainant was allowed to assert the defense of retaliation.

Pursuant to a written ruling on Respondent's motion in limine, judicial notice was taken of the following:

- a. In 1992, Complainant appealed his displacement from the position of Superintendent of the Denver Reception and

Diagnostic Center. By initial decision dated March 3, 1993, Administrative Law Judge Elizabeth Comeaux ordered that Complainant be reinstated to that position. (Case No. 912B048.)

- b. In 1993, Complainant and other DOC employees filed two lawsuits in U.S. District Court, Civil Actions 93-Z-574 and 93-Z-1878, alleging racial discrimination by the Department of Corrections and certain named DOC employees. As a related matter, Complainant filed a motion in federal court to prevent his transfer to the correctional facility in San Carlos. These lawsuits culminated in settlement, and by release dated January 7, 1995, Complainant released the defendants from all claims relative to the lawsuits.
- c. On or about October 12, 1994, Complainant filed charges with the Equal Employment Opportunity Commission and the Colorado Civil Rights Division, alleging racial discrimination by the Department of Corrections. The release in the aforementioned lawsuits specifically excluded these claims.
- d. Only the fact of the prior proceedings and allegations was deemed relevant to Complainant's retaliation defense, not whether the allegations were true. Whether the allegations were true was deemed irrelevant by the administrative law judge.

Pursuant to Complainant's motion, an order was entered sequestering the witnesses except for Complainant and the Respondent's advisory witness, Aristedes Zavaras.

At the close of Respondent's case-in-chief on August 18, Complainant moved for a directed verdict. Complainant's motion for a directed verdict was denied in writing on August 23, 1995.

## FINDINGS OF FACT

1. Complainant, J. Frank Rice, has the following employment history with the Respondent, the Department of Corrections (DOC):

8/86	Psychologist -- Centennial and Territorial Correctional Facilities, Canon City.
4/88	Acting Parole Supervisor -- Denver Parole Office.
8/88	On-the-Job-Training -- Arkansas Valley Correctional Facility, Ordway.
12/88	Manager of Diagnostic Unit -- Territorial Correctional Facility, Canon City.
6/89	Project Officer -- Central Office, Colorado Springs.
9/89	Superintendent -- Denver Reception and Diagnostic Center -- Central Office, Colorado Springs.
6/90	Superintendent -- Denver Reception and Diagnostic Center -- Warehouse, Denver.
2/91	Superintendent -- Denver Reception and Diagnostic Center -- Denver.
11/91	Psychologist -- Fremont Correctional Facility, Canon City.

---

The terms superintendent and warden are used interchangeably.

4/1/93 Superintendent -- Denver Reception and Diagnostic Center, Central Office, Colorado Springs.

4/15/93 Superintendent -- Denver Reception and Diagnostic Center, Denver.

9/12/94 Superintendent -- Denver Reception and Diagnostic Center, Central Office, Colorado Springs.

10/11/94 Suspension with Pay.

12/8/94 Termination.

(See ALJ Exhibit 2.)

2. Complainant is fifty-five years old. He was the first black warden to serve with the Colorado Department of Corrections. Prior to his DOC employment, Complainant served for 27 years in the United States Air Force. His last duty assignment was at the Air Force Academy in Colorado Springs. Following his retirement from the Air Force in 1984, Complainant received a Ph.D. in psychology from the University of Denver.

3. In April 1988, at the direction of then Executive Director Kip Kautzky, Complainant was appointed the Acting Parole Supervisor of the Denver Parole Office. In August of that year, Kautzky asked James Brittain, the warden of the Arkansas Valley Correctional Facility in Ordway, to teach Complainant everything that Brittain knew about being a superintendent for one year. Complainant then reported to Brittain and was trained by Brittain to be a warden. After several months, Kautzky asked Brittain if he felt that the Complainant was qualified to be the manager of the diagnostic unit at the Colorado Territorial Correctional Facility (CTCF) in Canon

City. Brittain responded in the affirmative, and Complainant became Manager of the CTCF Diagnostic Unit in December 1988. This unit was eventually moved to Denver and became the Denver Reception and Diagnostic Center (DRDC).

4. Complainant served as Project Officer in the Central Office in Colorado Springs beginning in June 1989 to plan and prepare for the opening of DRDC. He was appointed DRDC Superintendent in September 1989 and continued working in the Central Office until June 1990, when his office was moved to temporary quarters in a warehouse in Denver while construction of the facility was nearing completion.

5. The Denver Reception and Diagnostic Center became operational in February 1991. In November of that year, Complainant was displaced from his position during a layoff process and was assigned to the Fremont Correctional Facility (FCF) in Canon City as a psychologist. Donice Neal became the DRDC warden. On April 1, 1993, Complainant again became the DRDC warden, following his reinstatement to the position via his appeal to the State Personnel Board.

6. DOC wardens meet monthly at various correctional facilities throughout the state. It was Complainant's practice to have a correctional officer drive him to these meetings because a particular medical condition would cause him to fall asleep. In July 1994, Captain Robert Taylor was asked by his supervisor, Major Hank Booth, to find a volunteer to drive Complainant to the wardens' meeting that month in Buena Vista. Taylor gathered a list of three volunteers by asking certain correctional officers if they would be willing to drive Complainant on the trip. Each of the three volunteers was reluctant to go but said they would do so if no one else would. One of these volunteers was Correctional Officer Camille Lewis. Lewis said that she would go, but she did not really want to because she had three children in day care and

would have to make special arrangements. Lewis did not go on this trip.

7. At some point in time, Sergeant Kathy Thomas approached Complainant in the courtyard and asked if she could go to the August wardens' meeting, which was to be held at the correctional facility in Delta. (Thomas had earlier been approached by Superintendent Robert Hickox of the Delta facility in regard to possibly transferring to the Delta facility, and she wanted an opportunity to view that facility.) Complainant responded to Thomas' inquiry by saying that he wanted to take two women on this trip so the women would not feel discriminated against. (Complainant had always had a male driver on previous trips.) Complainant advised Thomas that Officer Lewis was also interested in attending the Delta meeting. Thomas then went to Lewis. She had never had a conversation with Lewis before. Thomas testified that Lewis responded that she would like to go on the trip but was not sure that Captain Taylor could cover her shift. Lewis testified that Sergeant Thomas told her that she would be going with her to the wardens' meeting at the end of August. Lewis was not anxious to go but was willing to do so because, among other things, she felt she owed it to her fellow officers to accumulate some overtime; she seldom worked overtime, while other officers did.

8. Captain Taylor did not ask Lewis a second time to drive Complainant to the meeting. He was told by Sergeant Thomas that Lewis would be going less than twenty-four hours before the trip. He rearranged the schedule to account for her absence. He approved overtime for Lewis for the two-day trip. On the day she left, Lewis was apprehensive about going. Captain Taylor told her that she did not have to go, but she responded that she did not want to burn any bridges, so she would go.

9. Camille Lewis first became employed as a Correctional Officer I at DRDC in June 1993. This is the position she held in August 1994. Her direct supervisor during the pertinent time period was Captain Taylor. However, Sergeant Tonya Coleman often served as her direct supervisor in the absence of Taylor.

10. The order of rank within the DOC system is: Correctional Officer I, Sergeant, Lieutenant, Captain, Major, Deputy Warden, Warden.

11. Some time between the July and August wardens' meetings, Officer Lewis was working at the gatehouse, through which everyone must enter the facility. Complainant, together with his administrative assistant, Donna Roberts, and his secretary, Beverly Quintana-Thompson, came through the gatehouse following lunch. Complainant asked Lewis if she was looking forward to the Delta trip and if she knew how to two-step, to which Lewis responded no.

Then Complainant told Lewis that he knew of a good redneck bar to go dancing and that he and Warden Hickox went there sometimes. Lewis testified that Complainant asked her if she was ready to go dancing at a redneck bar in Delta, and she said that she did not know how to dance in order to get out of it because she did not want to dance with him, and the statement made her feel uncomfortable. A few minutes later, Complainant called Lewis on the telephone and apologized for using the term redneck, saying that it had come to his attention that he may have offended her. Complainant also called and apologized to Sergeant Coleman, who was present at the gatehouse. Donna Roberts had advised him to do this because she felt that the remark could be taken offensively.

12. The Delta trip was scheduled for August 30 and 31, 1994. Lewis and Thomas reported to Complainant's office at 8:00 a.m. on August 30. However, Complainant was not ready to leave because he had to finish some last minute paperwork. Complainant instructed them to get the vehicle ready.

13. The threesome took two vehicles on the trip, both Jeeps. One Jeep was a state vehicle assigned to the Complainant, and the other was Complainant's personal vehicle. The state vehicle was being taken to Delta in order to replace the emergency lights and to install a siren at the inmate workshop of the correctional facility. Complainant was then to take his own vehicle, apparently to go on vacation.

#### The Delta Trip

14. Complainant, Lewis and Thomas left Denver at around 10:00 a.m. Officer Lewis and Complainant rode in the state vehicle. Officer Thomas drove Complainant's personal vehicle. Complainant's clothes were in his own vehicle. No reason was given at hearing for Complainant choosing to ride with Lewis.

15. Delta is located southeast of Grand Junction. (See map, Exhibit 48.) The route taken was Interstate 70 to Glenwood Springs, then south on State Highways 82 and 133, over McClure Pass. Neither Thomas nor Lewis were familiar with the route taken. Lewis, who is from Alaska, had lived in Colorado for about three years and had never been in that part of the state. This was the first time Thomas had been past Vail on I-70.

16. Lewis and Complainant talked about their backgrounds, their families and their careers. Lewis, with a B.A. in psychology and knowing of Complainant's Ph.D., was especially interested in talking about that field. They talked about career objectives; she wanted to become a case manager at the rank of sergeant. Complainant told her that she needed to complete the application and then come to him and he would see that she got on the list to take the test for case manager. Complainant told her that he had an open door policy and that she should feel free to come to him if she had any problems with her supervisor. In talking about

families, Complainant asked Lewis if she wanted to have any more kids. Lewis, who has three children, said, "No, I'm fixed." By this she meant that she had had a tubal ligation. Then Complainant said to her, "You wouldn't tell your husband or anyone else if I said I fantasized about making love to you?" Lewis ignored the comment. Complainant asked if she had heard him and said, "Well, would you be offended if I said I fantasized about making love to you?" He asked if that comment made her uncomfortable, and she said yes, that she loved her husband and was monogamous. He then said, "Well don't worry because I'm impotent and can't do anything about it."

17. Lewis has not been totally consistent when relating where the comments by the Complainant were made. Originally, she thought it happened some time after they stopped at Dillon for lunch. But later, upon reflection and visualizing the scenery, she decided that the statements must have been made just before they stopped at Dillon. This is how she testified at hearing and now maintains that this is correct. She has been consistent in reporting the words used by the Complainant.

18. They stopped in Dillon for lunch, where Complainant purchased hot dogs for the three of them at a 7-11 store. They all went down by the stream to eat. Lewis testified that, even though she was in shock from Complainant's statements about fantasizing, she was happy to be out of the car talking to Kathy Thomas and enjoying the scenery, which reminded her of Alaska. Kathy Thomas testified that Lewis appeared to be happy and bubbly, and that Lewis talked about how the scenery reminded her of Alaska.

19. When they left Dillon, the driving arrangements remained the same. Complainant slept most of the way between Dillon and Glenwood Springs. Shortly after they turned off of I-70, they made a restroom and gas stop. They stopped once more along the side of the road because Thomas' lights were on, and Complainant thought

something might be wrong. At that time, he got into his own vehicle to ride with Thomas for about an hour because, according to Thomas, he did not want her to feel bad. They made another rest stop, and Complainant returned to the state vehicle driven by Lewis because, he said, he had to call ahead to Delta and the radio was in the state vehicle.

20. Complainant's account of events is as follows:

One day when Complainant was walking through the prison yard, Lewis approached him and asked why he did not take women on his trips. He had the thought that he should find a way to give women equal opportunity and told Lewis that if she could find another woman to go, he would be willing to take two women to the wardens' meeting. Lewis then found Sergeant Thomas. Between Denver and Dillon, Lewis and the Complainant discussed their respective backgrounds, education and aspirations. He did not tell Lewis that he fantasized about her and did not proposition her in any way. Lewis had stated that she had three children and did not want to have more, and that she had had her tubes tied because she had an active sex life. Complainant told Lewis that he was happy she had an active sex life, and that he was impotent and could only dream about sex. He made no inference that Lewis would get promoted in exchange for sex. He began to feel uncomfortable with having made a statement about being impotent and wondered why he was talking to this woman about sex. For that reason, he asked Lewis to pull over and he got out of the car and rode with Thomas. Lewis was the one who initiated any discussion pertaining to sex. Complainant denies asking Lewis to go dancing at the gatehouse when he made the "redneck bar" comment.

21. Upon arrival in Delta, Lewis and Thomas checked into a motel, where they shared a room. Complainant did not stay at the motel, but rather stayed at the residence of his friend, Warden Hickox. Lewis asked Thomas if she knew anything about the Complainant.

Thomas testified that she said no. Lewis testified that Thomas said the Complainant was known to be a family man. Then they went on to the facility and met Hickox and his secretary, Shirley Sinner, in Hickox' office. Complainant, Hickox, and Kathy Thomas went into Hickox' office to discuss the potential for Thomas transferring to that facility. (Hickox was interested in recruiting minorities to work at the Delta facility. He had previously discussed this possibility with Thomas, who is a black female.) Lewis stayed in the reception area with Skinner for somewhere between fifteen and thirty minutes. Skinner testified that Lewis did not seem upset during this time.

22. The wardens' dinner took place at approximately 7:00 p.m., preceded by a one-hour reception. Thomas introduced Lewis to Warden Hickox. Lewis was also introduced to Regis Groff, who had recently been appointed the Director of the Youth Offender System (YOS) program at DRDC. At the dinner, Lewis sat between Thomas and Rice. Groff sat with them. They engaged in general conversation. Complainant and Groff did most of the talking, but all participated. Groff described it as a "nice dinner". Lewis did not give the appearance to Groff of being upset, but she and Thomas "stuck pretty close together".

23. Back at the motel, Lewis telephoned her husband and told him that she had to talk to him about something that happened on the way to Delta but could not do so right at that time. She testified that she was reluctant to talk about the comments Complainant had made to her in the presence of Thomas. Thomas testified that she could hear Lewis' voice on the telephone but did not attempt to listen.

24. The following day, Lewis and Thomas took the state vehicle to the shop at the Delta facility to have the work done on the emergency lights and siren. They were taken on a tour of the facility by a correctional officer. Complainant asked them to sit

in on the wardens' meeting. They left the facility at approximately 2:00 p.m. and arrived in Denver at around 8:00 p.m.

25. On the return trip, Lewis and Thomas talked about sex, among other things. It was "girl talk", as described by Thomas. Lewis did not mention Complainant's fantasy comments. According to Lewis, she did not feel that she knew Thomas well enough to do that and did not know whether or not Thomas was a friend of Complainant. Everyone in Delta she had met for the first time and did not mention the comments to them. Immediately upon her return home, she told her husband.

26. Lewis reported for her regular shift at 6:00 a.m. on September 1, 1994. She staffed Tower One. Correctional Officer Eric Johnson, who worked the same shift, was in Tower Two. About one and one-half hours after the shift began, the two officers were having a general telephone conversation between the towers. Lewis told Johnson about the trip. Then she became hesitant and said she did have one problem. She told Johnson what Complainant had said to her about fantasizing of making love to her. Her voice was shaky. It seemed to Johnson that Lewis was trying to come out with something but did not know how to do it. After telling him, she said she did not know what to do about it. She said that she had told her husband and he would support her. In response to her question as to what she should do, Johnson said something to the effect that he would take Complainant to the bank. He then said that a good place to start would be to talk to Dave Smith, the DRDC investigator.

27. The next day, Lewis worked with Correctional Officer Karen Rayl. Prior to leaving for the Delta trip, Lewis had told Rayl that Complainant had asked her to drive him, and that Sergeant Thomas was also going. Lewis told Rayl that she did not want to go, but she did not feel comfortable refusing the warden. She had said she was uncomfortable around the Complainant and was concerned about him because sometimes when she was escorting inmates through

the facility, he would call her over and show her attention. On this day, September 2, Lewis told Rayl that the Complainant said that he fantasized about making love to her. Lewis said that she ignored him but he repeated the statement, and this made her feel uncomfortable. She related to Rayl that she told the Complainant that she was married, and that he said she did not have to worry about it because he was impotent. During this conversation, Rayl perceived Lewis to be hesitant, uncomfortable and confused as to what she should do. Rayl told Lewis that whatever her decision turned out to be, it had to be her own decision and that people would stand by her if she chose to report the incident. Lewis also told Rayl that she had told the Complainant she wanted to get into case management, and he said that that would be no problem, to just come see him. Lewis was concerned that if she filed charges, Complainant would find a way to get back at her; she was concerned about retaliation. Lewis told Rayl that Complainant had implied that he could get her into case management in exchange for sex, that he said he was impotent, and he had not propositioned her.

28. Lewis also talked to Sergeant Tonya Coleman. Lewis started out by posing a hypothetical question regarding when a boss shows an interest in an employee. After awhile, Coleman asked specifically what this was about. Lewis responded that it must be kept confidential and that she did not know where to take it. Lewis then told Coleman that she had told Complainant that she wanted to get into case management, that he had asked if she was on the list and said that with her qualifications she should be. Then Lewis told Coleman about the other statements. Coleman told her that the allegations were serious and that she had to make a decision, and that she, Coleman, would support her. As they were talking, Coleman perceived Lewis as concerned and wondering what the right thing to do would be.

29. About a week later, Lieutenant Robert Cannon, the shift commander, talked to Lewis because Lewis had told Sergeant Linda

Lucero to tell Cannon what the Complainant had said to her. Cannon advised Lewis to talk to an investigator regarding her options. After the discussion with Cannon, Lewis was paged over the intercom to report to the warden's office immediately.

30. Lewis went to Complainant's office in response to being summoned over the intercom. Complainant and Roberta Monchak, his staff assistant, were present. Complainant, who did most of the talking, stated that it had been brought to his attention by two people that there were rumors that something sexual and inappropriate had happened on the Delta trip. He told Lewis that nothing inappropriate happened. Either Complainant or Monchak, or both, asked Lewis if she had made any accusations, to which she responded in the negative. Lewis testified that she had not made any formal accusations at that time and she just wanted to get out of the office. Monchak emphasized during the conversation that any rumors must be stopped. Lewis testified that she felt threatened because Complainant was the warden and had control over her. Of the three, Lewis did the least talking. She did not state at the meeting that she felt anything inappropriate had happened on the trip.

31. Lewis testified that, as she left the building on the day of the meeting with Complainant and Monchak, she saw Investigator Dave Smith standing in the parking lot, and she decided at that time to tell him everything. She made an appointment to talk with him for an hour later. Dave Smith testified that he believed that the appointment with Lewis, which took place at approximately 3:00 p.m. on September 8, was made earlier in the day while Lewis was on her shift. In any event, Lewis met with Dave Smith and fellow investigator Dennis Hougnon at the Village Inn on Chambers Road on September 8, 1994. Inspector General Robert Cantwell, having additional questions, interviewed Lewis by telephone three days later. Lewis was called into Dave Smith's office for another interview on October 5, 1994. Smith and Hougnon were more specific

with their questions this time. They wanted to know what Lewis and Thomas talked about on the way back from Delta. (See Exhibit 20, tabs 1, 1.1, 1.2; Exhibits 6, 7, 8.)

32. Several days after the Delta trip, Lewis asked Captain Taylor if he wanted to hear about it, to which he responded no. On September 9, Lewis and Thomas went to Complainant's secretary, Beverly Quintana-Thompson, and asked her to type a thank you letter for them to send to Warden Hickox, which she did and they initialed. Quintana-Thompson testified that, also on September 9, Lewis telephoned the office and said to her that she cared for Complainant and was worried about him. Lewis did not recall this telephone conversation at hearing.

33. Aristedes Zavaras was appointed the Executive Director of the Department of Corrections in April 1993. Zavaras had previously had a 25-year career with the Denver Police Department, the last four of which he served as Chief of Police. Zavaras is the appointing authority in this case. The Denver Police Chief is the equivalent of the appointing authority in the state system.

34. Zavaras was appointed subsequent to the time period in which Complainant had been bumped from his position as warden and then reinstated. However, Zavaras participated in the settlement negotiations regarding the discrimination lawsuit.

35. Robert Cantwell is the Inspector General for the Department of Corrections. In this capacity, Cantwell supervises the investigative unit. All investigators are level I peace officers. They handle internal investigations involving complaints made by staff members against other staff members. Cantwell reports directly to the Executive Director. Cantwell, like Zavaras, is a retiree of the Denver Police Department. Cantwell was second in command at the time Zavaras was Chief.

36. In September 1994, Cantwell went to Zavaras with information concerning an "outcry" of sexual harassment against the Complainant. Zavaras testified that he was shocked and caught off guard by this information because he had worked closely with Complainant since becoming Executive Director. He instructed Cantwell to conduct a full and complete investigation. His grave concern was caused not only by the allegation of sexual harassment, but also because the allegation involved someone "at the top". He wanted a full investigation in order to protect the department as well as any individuals who might be involved. Zavaras did not inquire of Cantwell as to any details of the allegation in order to prevent becoming tainted by potential bias, since he might be involved in the administrative hearing process.

37. Complainant was Superintendent II at DRDC when Zavaras became Executive Director. All wardens have the job classification of Superintendent II. Deputy wardens are classified Superintendent I. The Superintendent II is in charge of everything that takes place at a facility, being the highest ranking person at that facility. Zavaras considered this to be an unusual case because it involved someone within the high levels of the Department of Corrections. In his capacity of warden, Complainant was the appointing authority for DRDC.

38. Cantwell briefed Zavaras periodically with respect to the time frames of the investigation and the resources needed to conduct the investigation. Cantwell did not advise Zavaras of substantive details. He advised Zavaras early in the investigation that other people had come forward to make complaints, but he did not provide substantive information about these complaints.

39. Zavaras decided that Complainant should be removed from DRDC during the investigative process for the protection of the Complainant, the department, and possibly others. At his

direction, the Complainant was assigned to work in the Central Office in Colorado Springs on Monday, September 12, 1994.

40. Zavaras decided that, as the appointing authority, he would administer the R8-3-3 meeting if one became necessary. Warren Diesslin, Regional Director, and John Purko, Deputy Director, both expressed a strong desire for Zavaras to handle this part of the process. Zavaras had already, himself, come to this conclusion. Zavaras did not know what course the investigation would take and felt that he should be the one who remained independent throughout.

41. The investigation was conducted primarily by Investigator Dave Smith, with the assistance of Investigator Dennis Hougnon, under the supervision of Inspector General Cantwell. Cantwell also had some participation. During the investigation, allegations of sexual harassment arose against Complainant dating back to 1988. The investigation thus went beyond the allegations of Camille Lewis, as set forth below.

Linda Lucero

42. Linda Lucero was hired by the Department of Corrections as a Correctional Officer I in July 1987. She was promoted to the rank of Sergeant in 1990. She was assigned to DRDC in February 1991.

43. During the period of February 1991 to November 1991, Complainant would frequently come and talk to Lucero. He would look at her breasts instead of her face and would ask her if she wanted to go out somewhere for wine or pie. Complainant told her that she had beautiful lips. Lucero related this to her friend Sergeant Sosa. She did not file any formal complaints. Complainant was the warden and she feared the loss of her job, or an unwanted transfer, or some other form of retaliation.

44. Complainant was gone from DRDC between November 1991 and April 1993. Upon his return, he resumed making comments about how Lucero looked and asking her if she wanted to go out for wine.

45. On April 30, 1994, a Saturday, Lewis was working in the control center of the facility. The control center is completely secured, and anyone wishing to enter must be let in by the person inside. Lucero went into the control center at 10:56 a.m. Complainant arrived at 11:00 a.m. He was there for one and one-half to two hours. He talked about having an apartment on the Sixteenth Street Mall in Denver, that he would lie naked in bed, and that he would stand naked at the window and no one could see him. Complainant invited Lucero to his apartment, saying that she could bring Lieutenant Robert Cannon (her fiance), but that he preferred she come alone.

46. Lucero took the Lieutenant's test in June 1994. After that, Complainant told her what her score was and said to keep it between the two of them and he would try to get her promoted.

47. Major Tom Lopez had earlier told Complainant that he wanted to promote Sergeant Lucero if she was high enough on the list after taking the exam. Complainant agreed with Lopez.

48. Lucero did not file a grievance over the control center incident for fear of losing her job. She talked to Sergeant Sosa and Lieutenant Cannon about it.

49. At some point prior to the Lieutenant's test, Complainant called Lucero to his office. He had her personnel file with him, said that she should be a lieutenant and that they would work on it. Complainant had called her to his office several times previously and would change the subject from work-related matters to such things as how she looked and going out for wine.

Complainant told her that he was in charge and that he would make the decision regarding promotion.

50. During her first year at DRDC, Lucero complained to Lieutenant Cannon about Complainant asking her out but said that she did not want to do anything about it at that time. In 1994, she expressed to Cannon that she was upset that Complainant had invited her to his apartment and that he had talked to her about promoting her. She told Cannon that she would do something about it if and when she was ready.

51. Complainant denies making any statements about Lucero's lips or anything else of a sexually-related nature. He denies making statements about sharing wine or standing naked in front of the window. He testified that he had told Lucero that he had just purchased a condominium and that she and Lieutenant Cannon were welcome to come by and look at it if they were interested in such an arrangement for themselves. He testified that he told Major Lopez that he would support the promotion of Lucero, and that he would have promoted her if she had scored high enough on the test, which she did not.

52. Lucero was interviewed by the investigators on September 16, 1994. She had talked to Camille Lewis and decided to come forward because she felt that it was "time for this to stop". (See Exhibit 20, tab 9.)

53. Prior to meeting with the investigators, Lucero and Lieutenant Cannon requested a meeting with Zavaras because Lucero had significant fears of retaliation if she came forward with information. Zavaras, who advised Lucero that he could not hear substantive information, and he did not, assured Lucero that the investigation would be fair and that she would not experience retaliation.

Terry Searl

54. Terry Searl became employed through a private agency as a contract employee for DOC at the Fremont Correctional Facility (FCF) in Canon City on February 22, 1993. This was during the period of time when Complainant had been bumped from the warden's position at DRDC and was working as a psychologist at FCF. Searl worked in a clerical capacity in the inmate mental health treatment unit, typing, filing and answering the phone.

55. On March 15, 1993, Complainant invited Searl to lunch in appreciation for some work she had done. He had invited her two or three times before she accepted. She was concerned because she did not know him very well.

56. Complainant drove them to a restaurant in Florence, about fifteen miles from the facility in Canon City. Complainant told Searl about his pending lawsuit against the Department of Corrections. At the restaurant, he removed several newspaper articles from his briefcase and showed them to her. He gave her a set of copies of the articles, which she accepted but did not read. They were at the restaurant for approximately forty-five minutes. The conversation primarily pertained to the lawsuit and prejudice.

57. On the return trip, Complainant and Searl discussed music. Complainant played a Garth Brooks cassette tape which included the song, "We Shall Be Free". He made continuous comments about what a beautiful person Searl was, to the extent that she had the thought that she "might not get back to the facility". Complainant would lean toward her and make continuous eye contact. She told him to keep his eyes on the road. In Searl's view, Complainant's numerous statements about she being a beautiful person inside and out went well beyond what could be considered a normal compliment. When they reached the facility, Complainant backed into a parking space, and Searl started to get out of the car. Complainant then reached

over and took hold of her left arm, placing his face within six or seven inches of her face, saying that he wanted to let her know again that she was a beautiful person inside and out and that she should not let DOC change her. As Complainant was holding her arm, Searl became frightened. She got out of the car right away and went into the facility without him. Searl testified that she felt Complainant was going to kiss her and that she was very intimidated by this action. Her earlier perception during the drive was that he was going to take her somewhere and attempt to have sex with her.

58. Upon her arrival inside the facility, Searl told two co-workers what had happened and documented the incident on her computer. She also talked to two supervisors about this and other incidents in which she felt threatened by Complainant. She did not file a formal written grievance.

59. During this time frame, Richard Moore, a DOC psychologist, supervised the mental health staff and was the on-site supervisor for the contract employees. Moore was Complainant's supervisor and oversaw the activities of Searl. Moore recalled that Searl had come to him with information that Complainant had asked her out to lunch. She was concerned and a little confused. Searl later indicated to Moore that Complainant had taken her to lunch and expressed to her that she was a beautiful person and had good qualities. Searl indicated that, in the parking lot, Complainant had leaned close to her and told her that she was a very beautiful person.

60. Peggy Heil knows Complainant as a colleague. Heil recalled that Moore had talked to her about what Searl had said about the Complainant. She discussed it with Searl briefly, mainly advising her that if she was uncomfortable she should report the incident to her supervisor.

61. Searl was interviewed by investigators Smith and Hougnon during the 1994 investigation. They contacted her at FCF, where they met in the warden's office. The investigators told her only that they had gotten her name from someone else. (See Exhibits 11, 12; Exhibit 20, tabs 12, 12.1, 12A.)

62. Complainant's account of events is as follows:

Searl told Complainant that she had read about his lawsuit in the newspaper and would like to have him tell her about it. That is why they went to lunch in Florence, where he showed her various newspaper clippings. On the way back, he played a Garth Brooks cassette tape of "We Shall Be Free", which refers to an individual's "beauty within". (See Exhibits Y and Y-1.) He was referring to these lyrics when he said to Searl that she was a beautiful person. Complainant testified that he touched Searl on the arm in order to get her attention as she was turning to get out of the car. He did this because he wanted to tell her again to not let DOC spoil her. He denies moving his head toward her when he touched her. He used the phrase "beautiful inside and out" only once.

63. Complainant, who had been reinstated to his position as DRDC warden, was reassigned from FCF to the Central Office in Colorado Springs on April 1, 1993, two weeks after the lunch with Searl.

Patricia Hoffler

64. Patricia Hoffler began as a Correctional Officer I with the Department of Corrections assigned to DRDC in 1991. She first met the Complainant when he was introduced to her as the warden. Her father and the Complainant had been friends since serving together at the Air Force Academy.

65. During the first half of 1993, while at the facility, Complainant invited Hoffler out to lunch. Hoffler was an entry level correctional officer at the time. She had recently taken the exam to become a sergeant.

66. Hoffler's close friend, Pam Epps, was at Hoffler's apartment on the day of the scheduled lunch. Complainant called ahead on his cellular phone for directions because he was lost. After that, Epps left, knowing that the Complainant was soon to arrive.

67. Hoffler and Complainant went to a downtown restaurant, Hoffler driving her car with Complainant as a passenger giving directions. At the restaurant, they talked about the Sergeant's exam and how Complainant was going to promote Hoffler. Hoffler would subsequently tell the investigators that she thought Complainant wanted more than lunch, that she thought he wanted sex. They were at the restaurant for about an hour and then returned to Hoffler's apartment. Complainant paid for the meal.

68. At the apartment building, Complainant and Hoffler went back up to her apartment. She did not invite him in; they just went in together. Inside the apartment, Hoffler turned on the TV and Complainant sat in a chair in the living room. Hoffler became uncomfortable with the warden being in her apartment. At some point he asked her to sit on his lap. Hoffler went to the kitchen and telephoned her friend Pam Epps by paging Epps with a "911" call. To the two of them, this code meant to call right back because it was an emergency. Hoffler dialed her own telephone number into Epps' pager. Epps called within a few minutes. Hoffler talked to Epps as if she were talking to her brother and responding to him telling her that his car had broken down and that she would be right there. Epps asked Hoffler if he was still there, to which Hoffler answered yes. Epps asked Hoffler if she was okay, and Hoffler said yes. Epps asked Hoffler if she wanted her to come over, and Hoffler responded in the affirmative.

69. Hoffler then went back to the living room and told Complainant that her brother had an emergency and that she had to leave. They left the apartment and rode the elevator down to the lobby, where Complainant got off. Hoffler continued in the elevator to the parking garage. She got into her car and drove around to the front of the building, as if she were leaving. By that time Epps had arrived at the front of the building. They talked. Hoffler said that she had to leave and drive around the block to make it look like she was going to pick up her brother. Hoffler told Epps that Complainant would not leave, but she was okay and needed a drink.

70. Hoffler's testimony at hearing differed from her statements during her interviews with the investigators, which took place on September 16 and September 23, 1994. At hearing, Hoffler denied that Complainant asked her to sit on his lap or that he made sexually inappropriate remarks. During one of the interviews, Hoffler referred the investigators to Pam Epps and gave them Epps' telephone number so they could contact her. They did, and Epps provided a statement of her personal knowledge of the occurrence. (See Exhibit 20, tabs 19, 24 and 25; Exhibits 26 and 30.)

71. At the request of Complainant's attorney, Hoffler signed two affidavits, one on October 12 and the other on November 16, which were brought to her and notarized by a representative of the attorney's office. In the first affidavit Hoffler stated that Complainant never asked her to sit on his lap. In the second affidavit she stated that he did ask her to sit on his lap, but not in a sexual way. (See Exhibit P.) Hoffler testified that she had told the attorney that she felt pressured by the investigators and told them what they wanted to hear.

72. Criminal Investigator Annette Fucles sat in on the September 16 interview of Hoffler, the idea being for Hoffler to feel more comfortable by having another female present. Robert Cantwell and

Dave Smith conducted the interview. Hoffler appeared to Fucles to be cooperative and straightforward, but a little nervous. She answered all of the questions asked of her.

73. Annette Fucles interviewed Hoffler alone on November 26, 1994 because the Inspector General had received an affidavit (Exhibit P) in which Hoffler had changed some of her original statements. Hoffler affirmed to Fucles that Complainant had asked her to sit on his lap. (See Exhibit 26; Exhibit 40.)

74. In early April 1995, Complainant told Joseph Hoffler, Patricia's father, that he was having some problems with DOC and that one of them involved an issue with Patricia.

75. On or about April 23, 1995, Joseph Hoffler was advised by Respondent's counsel of the statements made by Pam Epps and by his daughter Patricia. Joseph Hoffler subsequently told his daughter that he wanted to know if the statements about the Complainant were true, and she said they were not. Joseph Hoffler testified that he would be surprised if his daughter had said that she lied to the investigators. (Patricia Hoffler testified that she lied in all three of her statements to the investigators and in the second signed affidavit.)

76. Complainant denies that he asked Hoffler to sit on his lap. He testified that he had made arrangements with Hoffler to look at her apartment because he, himself, was considering moving to a downtown apartment building.

Cathy Willson

---

Page 1 of Exhibit 40 is corrected so the sentence reads, "did not feel like" instead of "did feel like".

77. Cathy Willson was hired as a Correctional Officer I in the medical security unit of DRDC on February 1, 1991. She served a one-year probationary period.

78. During 1991, Willson worked in the infirmary. Complainant would make rounds almost daily but rarely engaged in conversation with her, except to say "Hi." One day, Complainant came by and asked, "When are we going out to lunch?" Willson, thinking he was kidding, answered, "Anytime." Then they set a date for the following Monday, when she would be off work. Normally, correctional officers are required to eat lunch while on duty. Willson's work hours were 7:00 a.m. until 3:00 p.m. Willson wondered why the warden would want to have lunch with a correctional officer, but she did not ask him why.

79. On the Monday of the lunch, Willson arrived at the facility and met Complainant in his office. They left in Complainant's state vehicle; he drove. They went to Bennett's Barbecue on Peoria Street, where they talked about work, their respective educational backgrounds, and some of Complainant's military experiences. The lunch lasted for about one hour.

80. When it came time to pay the bill, Complainant discovered that he did not have his wallet with him. Willson offered to pay for the lunch and let him pay her back later, but Complainant said no, that his apartment was not far away and he could go get his wallet. She stated that it was not necessary to go to his apartment, but he insisted. Willson paid for the lunch for both of them, then Complainant drove them to his apartment, a ten to fifteen minute drive.

81. At the apartment complex, Willson intended to wait in the car. Complainant invited her in. She did not immediately respond. Then he asked again, and she accepted the invitation.

82. Inside the apartment, Complainant picked up his wallet off of the table in the living room. His roommate, Lieutenant Hunter, was there and came out, apparently from a bedroom. Complainant said to Willson words to the effect, "Let me show you around." Complainant gave Willson a tour of the apartment, including two bedrooms, the kitchen and a master bathroom adjacent to Complainant's bedroom. They then returned to the living room, where Complainant and Hunter spoke for few minutes. Complainant paid Willson for the lunch, and they went back to the facility.

83. Willson was not paid overtime. Complainant never gave a reason for wanting to have lunch with her. Willson has never gone to lunch with any other supervisor, except as a group, when the entire shift might go. She told co-workers that she had gone to lunch with the warden, not believing it to be a secret.

84. Willson was uncomfortable with the fact of having gone to lunch with the warden, and then to his apartment. She did not feel that it was appropriate to be shown the warden's bedroom. She did not feel sexually harassed but believes that Complainant should be given "a talking to".

85. Willson believes that someone gave her name to the investigators. Camille Lewis also asked her to talk to the investigators. She was interviewed on September 16, 1994. (See Exhibit 16; Exhibit 20, tab 21.)

86. Complainant's explanation of events is as follows:

Cathy Willson is a friend of the sister of Donna Roberts. Willson was one of the persons he and Roberts recruited to work at DRDC. He asked Willson out to lunch because it is his habit to get people away from the facility in order to see how they were feeling and how they were doing. He was embarrassed by having forgotten his wallet at the apartment. He was not sure if he had left it

there or if he had lost it. He invited Willson into the apartment as a courtesy, saying, "You're welcome to come in if you wish." Willson said, "Sure", and they went in. He showed her around the apartment because he is proud of the way he keeps house. He asked her if she wanted to see it, and she said yes. Donna Roberts knew about the lunch. No one had ever told him that it was inappropriate to take correctional officers out to lunch. There are no rules or regulations regarding who the warden may take to lunch.

Kim Wilken

87. Kim Wilken has been employed by the Department of Corrections for five years. Presently, she is an Administrative Assistant III. In February 1991, she transferred from the Central Office in Colorado Springs to DRDC. In May 1991, she was a wordprocessing operator.

88. In May 1991, Wilken went to Complainant's office in order to obtain a particular document. When she arrived in the office, Beverly Quintana-Thompson was there with the Complainant. Donna Roberts was also present. Wilken obtained the document she was looking for, then Quintana-Thompson and Roberts left. Complainant asked her to close the door, which she did. She then sat in a chair in front of his desk. Complainant moved around to sit on the corner of his desk, placing himself in front of her. He brought his right hand to her neck and nudged her face toward his, within six to twelve inches. Wilken stated that this was not what she had in mind, turned to her right and got up to leave. Complainant then said that he hoped she did not take it the wrong way.

89. Wilken did not report the incident at that time. She was probationary in her position, having been recently promoted. Her immediate supervisor was Frank Irions, whom she believed to be a good friend of the Complainant.

90. In the early summer of 1993, Jerry Gasko, who worked at the Central Office, was visiting DRDC. Wilken approached Gasko and told him of the May 1991 incident. Gasko said that if she wanted to pursue it she would have to file a complaint. At this point, Wilken did not want to bring the matter up any further, being concerned with personal matters and not believing that it would do any good.

91. At some point in time, in a conversation between Wilken, the Complainant and Captain Charles Hunter, Captain Hunter made a statement to Wilken to the effect of, "I'll bet you would rather be home riding your horse." Complainant then stated, in Wilken's presence, "I wish I was that horse."

92. On September 16, 1994, Investigator Dave Smith telephoned Wilken to make arrangements for an interview. Wilken had heard that Camille Lewis had reported an incident regarding the Complainant, was glad that someone had come forward, and decided that she would finally do so as well. (See Exhibit 13; Exhibit 20, tab 16.)

93. During mid-year 1994, Wilken told Major Hank Booth that Complainant had once tried to kiss her, and that she was concerned about possible retaliation because Complainant's attorney now had this information. Major Booth related this to the DOC investigators on September 15, 1994. (See Exhibit 20, tab 17.)

94. Complainant denies that the meeting with Wilken occurred. He denies pulling Wilken toward him and denies that the "horse-riding" statement was made. Beverly Quintana-Thompson and Donna Roberts testified that they do not recall ever leaving Complainant alone with Kim Wilken.

Suzie Sosa

95. Suzie Sosa was employed by the Department of Corrections as a Correctional Officer I in Canon City on July 1, 1987. On February 1, 1991, she was promoted to Sergeant and was transferred to DRDC later that month. She was hired at DRDC to run the inmate visiting room, based upon her previous experience at another facility.

96. Sosa was living in Pueblo when she started working at DRDC. Between February and June she commuted between Pueblo and Denver because her children were still in school. She moved to Denver the latter part of June or the first part of July 1991.

97. Complainant would come to the visiting room at least once or twice every week during Sosa's shift. Sometimes he would just pass through, sometimes he would sit down and talk. Sosa was not uncomfortable with this initially, but after a few visits the atmosphere changed. Complainant began making comments about how pretty she was, how nice she looked, that she could have anything she wanted, and to just see him but to not tell anyone. Complainant said to trust him and that he would upgrade her position. Sosa testified that Complainant told her she could come to him if she wanted to "snitch" on anyone, and that they could do each other favors. The frequency of the comments about how pretty she was increased, and Sosa became uncomfortable when Complainant would look directly at her breasts and observe her body. This went on for four or five months. No one else was present during these visits. Complainant would also frequently call her to his office for this type of conversation.

98. On a morning shortly after Sosa moved to Denver, Complainant telephoned her and said that it was very important that she call him before she left for the day. Sosa's shift was from 8:00 a.m. until 4:00 p.m. She telephoned him about fifteen minutes before her shift ended, but there was no answer. As she was leaving, Sosa

ran into Complainant at the gatehouse and told him that she had to go home; it was raining very hard, her dog was outside and she was worried about the dog. Complainant said something to the effect that he would follow her. As she was driving down Smith Road, she noticed Complainant's car in her rearview mirror. She became nervous because she thought he might be following her home, so she pulled over, got out and went to his vehicle. It was pouring rain by then. Sosa told Complainant that she did not want him to follow her, to which he responded that it was very important that he talk to her and to meet him at a restaurant near Sixth Avenue and Chambers Road. She said "Okay," then went home and called Sergeant Linda Lucero, another DRDC employee, with whom she had been good friends for about ten years. Lucero advised Sosa that she had better meet with Complainant to see what it was about, that he was the boss.

99. Sosa met Complainant at the restaurant near Sixth and Chambers for about 30 minutes. According to Sosa, it was "the same old thing", that she was pretty, that he would upgrade her to Lieutenant, and that she should trust him. As she was leaving, in the parking lot, Complainant grabbed her by the right arm and said words to the effect, "Now come with me in my car to my apartment and I'll bring you back later." Sosa said no, got in her car and left. By this time Sosa was physically and emotionally upset. She believed that Complainant was asking for sexual favors.

100. Sosa drove to the residence of Linda Lucero because she needed to talk to someone. Complainant had not mentioned what the important matter was that he needed to talk to her about. Sosa did not get paid overtime for the meeting.

101. Within the next couple of days, Complainant came to the visiting room and said to Sosa that he hoped she did not take it the wrong way. A few days after that, Complainant called her to his office and angrily told her that he would fire her if she

gossiped. At this point, she feared that her job was being threatened.

102. Sosa did not file any written grievances or complaints over this incident. She feared the loss of her job. Investigators Smith and Hougnon came to her because Linda Lucero had told them about her.

103. Sosa was interviewed by investigators Smith and Hougnon at the Colorado State Penitentiary in Canon City, her current work location, on September 19, 1994. Sosa testified that she agreed to give a statement because she wanted to get everything off her mind and that what Complainant did to her was not right. (See Exhibit 10; Exhibit 20, tab 11.)

104. Complainant's account of events is as follows:

Sosa had complained to him about the treatment she was getting from Captain Taylor and that Captain Taylor was interfering with how she ran the visiting room. Complainant asked Sosa if they could meet somewhere outside of the facility so Taylor would not know that they had met. Complainant followed Sosa down Smith Road, until he turned onto Chambers to go to the restaurant, where he waited for her for 30 to 40 minutes. Complainant denies that Sosa pulled over to the side of the road. At the restaurant, they discussed the operation of the visiting room and her duties as lead sergeant, to make sure that Taylor did not interfere, and that she should go through the chain of command to him if necessary. Complainant denies commenting on how Sosa was dressed and denies making any sexually related statements. When they were leaving, he walked her to her car, putting his hand on her elbow to make sure that she did not fall. He asked her if she could get home all right because she had stated earlier that she got lost on the way to the restaurant. Complainant denies that the meeting in his office in which Sosa alleged he got angry occurred.

Mary Ann Fahey

105. Mary Ann Fahey worked as an administrative clerk in the diagnostic unit of the Colorado Territorial Correctional Facility (CTCF) in Canon City from June 1988 through June 1989. She was a probationary employee until June 1, 1989. Complainant was the manager of the diagnostic unit from December 1988 until June 1989.

106. Fahey was supervised by Cheryl Saucedo, who was supervised by the Complainant.

107. After his arrival at CTCF, Complainant began making comments about Fahey's attire, once saying, "Boy, would I like to be that sweater." Complainant asked at some point if Fahey would go out to lunch with him. Fahey kept a personal log of the various comments, including the dates and times the comments were made. Fahey told the Complainant that she did not appreciate those comments and that if the behavior continued she would take further action. Fahey felt offended and intimidated. She did not go to lunch with the Complainant.

108. Complainant's unwelcome comments continued for about two months. Fahey would change her work attire from time to time and would cease to wear certain clothing in an effort to avoid Complainant's comments. After Fahey advised Complainant that she would take further action if necessary, the behavior ceased.

109. Complainant told Fahey that he could get her a senior secretary position at DRDC and that he could make her husband (then boyfriend) a sergeant. She understood this to mean that the Complainant expected favors of a sexual nature.

110. Complainant testified that he had to correct Fahey about her dress from time to time, that she would wear tight or see-through clothing. He denies making the statement about the sweater.

111. Cheryl Saucedo, Fahey's supervisor, became aware of Fahey's concerns over Complainant's behavior. Saucedo testified that she believed Fahey's concerns to be real. Saucedo is not aware of Fahey having dressed inappropriately on the job. Complainant did not bring to Saucedo's attention that he believed Fahey dressed inappropriately. Juanita Novak, Fahey's current supervisor, testified that Fahey told her about two years ago of Complainant's comment to the effect that he wished he was the sweater she was wearing. This was prior to the time that Novak supervised Fahey.

112. Robert Cantwell contacted Fahey in 1994 and asked her if she had known the Complainant at CTCF and if he had done anything inappropriate. She provided a statement. (See Exhibit 20, tab 29.)

Kristi Rosten

113. Kristi Rosten has been employed as a statistical analyst at the DOC Central Office in Colorado Springs since June 30, 1989. She collects and analyzes data regarding offenders. She was a probationary employee until January 1990.

114. Complainant was assigned to the Central Office from June 1989 until June 1990, preparing for the opening of DRDC. He had an office directly across from Rosten's office. Rosten worked in a small cubicle separated from another cubicle by a half wall. Her office contained a visitor's chair about six inches from her desk. Rosten saw the Complainant almost every day. He would frequently come into her office and sit down to talk, sometimes for ten to fifteen minutes. He would occasionally ask for offender statistics and sometimes would ask her out to lunch. Eventually he began to

make comments about how she was dressed, how nice she looked, and that he envisioned her in his dreams. These comments made her feel uncomfortable and vulnerable. She began changing what she would wear to work so she would not wear certain clothes that Complainant commented upon. The comments continued. Rosten testified that she told Complainant several times that she did not appreciate such comments.

115. Complainant never discussed Rosten's work functions. He would tell her that she was very attractive and should appreciate his comments. He was soft spoken and talked quietly. He would leave her office if someone else came in or if she turned away and said she had work to do.

116. Rosten never went to lunch with the Complainant, who would at times also ask her to come out and take a smoke break with him. She would refuse because she does not smoke. Then Complainant asked if she would come out with him while he smoked. Complainant asked Rosten to come to DRDC, saying that she could do whatever she wanted to do at DRDC. On one occasion, Rosten accepted Complainant's invitation to take a break and told him that she did not want to move to Denver because she had a husband and three children and did not want to relocate, and that it was too far of a distance to commute. Complainant responded that she could do what he was going to do, that is, stay in Denver in an apartment during the week. (Complainant's residence was, and is, in Colorado Springs.) On this and other occasions, Complainant had a response for all of the reasons Rosten gave for not wanting to move to Denver. He asked her on several occasions what kind of equipment and software she would need in order to work for him.

117. Complainant once asked Rosten to come into his office and help select colors, carpet and furniture for his new office. She did so, but she included another worker from her office because she was uncomfortable being alone in Complainant's presence.

118. After a period of a couple of months, Complainant stopped coming into Rosten's office, just prior to Donna Roberts being hired as his administrative assistant.

119. Rosten told others that she did not appreciate Complainant's remarks. She discussed it with her supervisor, Scott Hromas, and Hromas' supervisor, Ron Ditmore. Later, after Complainant had stopped coming into her office, she asked Hromas if he had talked to Complainant, and he said he had not. She considered this to be an example of sexual harassment but did not want to file a complaint because there were no witnesses and she did not think she could prove it, and because the behavior had stopped. Complainant was not in her chain of command.

120. Several times Complainant told Rosten that he envisioned her in his dreams. Her perception was that he was willing to pay for her apartment in Denver. He never directly said this, or that he wanted to have sex with her. She told Ron Ditmore that it was more how he said it than what he said that made her feel that his remarks had sexual connotations.

121. On September 20, 1994, Robert Cantwell approached Rosten in the Central Office regarding giving an interview to the investigators. Rosten stated that she preferred to not get involved. Cantwell responded that she was obligated under DOC regulations to cooperate with an investigation. Cantwell would not tell her how he was referred to her, and she still does not know. Rosten was interviewed by investigators Smith and Hougnon on September 21, 1994. (See Exhibit 15; Exhibit 20, tab 18.)

122. Complainant denies telling Rosten that he dreamed about her and denies making any sexual innuendos of any kind. Complainant testified that he complimented Rosten on her appearance because she dressed professionally and was one of the best dressed people in

the building. He testified that he was trying to recruit her to work at DRDC as a statistician/analyst. (This position ultimately was not funded and was never filled.)

Mary Niswonger

123. Mary Niswonger was employed by the Department of Corrections in 1983. In 1987, she was assigned to the Division of Community Corrections in Denver. She works with inmates in transition programs.

124. Complainant was assigned to the Division of Adult Parole at 660 Bannock Street in Denver in April 1988. He served there in the capacity of Parole Supervisor until August 1988. In that capacity, Complainant supervised the parole agents. He did not supervise Niswonger, although he was above Niswonger in terms of rank within the DOC system.

125. Niswonger and the Complainant associated with each other as employees working in the same office. Several of the employees would meet for breakfast across the street from the office at Denver General Hospital (DGH). Soon the other employees did not want to have breakfast with Complainant, leaving Complainant and Niswonger to continue meeting for breakfast. (Apparently there was some resentment among the parole officers toward Complainant because he was considered an outsider, with no parole experience.) This went on for a couple of weeks.

126. One day upon leaving the hospital to go to work, in the DGH parking lot shortly before 8:00 a.m., Complainant said to Niswonger that he wanted to have an affair and go to bed with her. Niswonger testified that she was stunned and hurt and could not understand why Complainant would say something like that because there had been nothing in their conversations to bring on such a statement.

Niswonger asked, "What are you doing?" Complainant then said to just think about it.

127. Niswonger crossed the street by herself and went to her office. She telephoned her husband but could not reach him. Nor could she reach her supervisor, Jeaneene Miller, that day. In the evening, she told her husband what had happened, and he became extremely upset. She decided that she had to tell her supervisor.

128. The next day, Niswonger told Jeaneene Miller of Complainant's statement. Miller advised Niswonger to go back to the Complainant and tell him that this had to cease immediately or legal action would be taken. Niswonger did so, to which Complainant responded, "Okay."

129. When Niswonger advised Jeaneene Miller of the incident, she was visibly shaken and began crying. Niswonger requested that Miller not pursue the issue because she was worried about potential ramifications. Niswonger appeared to Miller to be considerably upset for a long period of time thereafter.

130. Niswonger subsequently avoided Complainant to the greatest extent possible. Near the time that Complainant was to leave the Parole Office for his assignment at the Arkansas Valley Correctional Center in Ordway, he told Niswonger that he hoped she had no hard feelings and that if she wanted to have a job at DRDC he would get her one at more money. Niswonger responded that she was not interested.

131. While at the Denver Parole Office, Complainant was vocal about the fact that he was going to be the one to head up the DRDC program.

132. Mary Niswonger was interviewed by Robert Cantwell in September 1994. Cantwell did not tell her who had referred her name to him. (See Exhibit 20, tab 22; Exhibit 17.)

133. Niswonger talked to the investigator in 1994 because she was asked to. She felt that she, herself, had handled the matter appropriately at the time it happened by talking to her supervisor and then talking to Complainant.

134. All of the employees in the Parole Office, approximately fifteen, were supervised by either Jeaneene Miller or the Complainant.

135. Miller was contacted by Robert Cantwell in September 1994 to arrange an interview with Niswonger. Cantwell later requested a written statement from Miller, who complied. (See Exhibit 20, tab 23.)

136. Complainant denies making a statement to Niswonger regarding having an affair. Complainant testified that, when he arrived at the Denver Parole Office, the environment was extremely hostile toward him. Complainant testified that he had asked several people at the office to go to a play. In the DGH parking lot, he asked Niswonger if she would like to go to a play with him. He testified that he was not asking for a date, but rather was trying to get a group of people together to go to the play, and that Niswonger misunderstood him. He denies that Niswonger told him his conduct had to stop or that she subsequently avoided him.

#### Additional Findings

137. Nancy Photos is a trainer for the Department of Corrections and has provided in-house training at the various correctional facilities throughout the state. On March 10, 1994, Photos taught a one-half day course in workplace harassment and sexual discrimination at DRDC. Complainant participated in this training session as a student. Photos taught the course with a co-instructor. At one point, a student asked if affirmative action

was a form of reverse discrimination. The co-instructor answered that it was a form of reverse discrimination. Complainant, in a loud voice, forcefully stated that there was no such thing as reverse discrimination, that there is either discrimination or there is not. Photos characterized Complainant's behavior as an "outburst", disrupting the flow of the class. The other students quieted down. A break was taken. In a written evaluation of the course presentation, one student wrote that it was a shame that the warden distracted from the presentation.

138. Complainant testified that he suffered a brain aneurysm in 1984, resulting in his medical retirement from the Air Force in March of that year. The aneurysm caused permanent damage, i.e., numbness on the right side of his body, and he can no longer control his emotions as he did before; he cries a lot. Complainant testified that the aneurysm does not, itself, affect his sexuality, but it caused him to "sort of" lose interest in sex because the aneurysm occurred while he was having sex with his wife, and he subsequently feared that he would have another aneurysm. Complainant testified that he is unable to even have a feeling about sex, that he is uncomfortable in situations that have sexual connotations, and that the last time he attempted to have sex with his wife was in January 1992. Complainant admitted to having an extramarital affair with a DOC employee that lasted for about one year in 1987-1988. The affair was ongoing during the time Complainant was assigned to the Denver Parole Office.

139. Dr. Richard Wahl began treating Complainant for hypertension in 1991. In 1992, Complainant developed non-insulin dependent diabetes. In January 1992, Complainant reported to Dr. Wahl that he was experiencing problems with impotency. To the physician's knowledge, Complainant's impotency continued intermittently through October 26, 1994. The disorder of impotency can only be described by the patient, and the diagnosis was made based upon statements from the patient. Complainant did not indicate to the doctor that

he had no desire for sex. Complainant testified that his impotent condition continues.

140. Complainant testified, as did several other witnesses, that he is a "people person". He takes a team approach to management and solicits opinions and comments from all employees. He encourages his employees to achieve their educational goals and to advance in their careers. He compliments his employees on their appearance in order to enhance a positive image of themselves. He frequently takes employees to lunch. He uses this approach with both males and females.

141. Complainant presented more than a dozen witnesses who testified to his professionalism and integrity, and that they had never seen Complainant act inappropriately around women or make inappropriate comments. At least seven of these witnesses wrote "To Whom It May Concern" letters expressing their support for the Complainant. (See Exhibit T.) Frank Miller, Complainant's supervisor in the diagnostic unit at CTCF, evaluated Complainant as having "outstanding people skills" for the year 1989. (See Exhibits OO and PP.)

142. There was testimony that not all staff members at DRDC were supportive of Complainant's management, that some opposed him, and that some staff members would oppose management no matter who served as warden. A number of witnesses testified that DRDC is a "rumor mill".

143. Donna Roberts, Complainant's administrative assistant at DRDC, and Beverly Quintana-Thompson, Complainant's secretary at DRDC, testified that, after Complainant returned to the facility as warden in April 1993, they developed a policy of "shadowing" the Complainant so that he was never alone with female inmates or employees, either in his office or on his walking tours of the facility. They felt that Complainant was "under a microscope", as

did Complainant. Complainant testified that "shadowing" was not a policy, but he did not discourage it, and it happened at times. He has met alone with female employees, but he would try to have someone there in order to make a record of the meeting.

144. Complainant was relieved of his duties as DRDC warden and assigned to duties at the Central Office in Colorado Springs the afternoon of Monday, September 12, 1994, at the direction of the Executive Director.

145. Complainant was interviewed by Robert Cantwell on September 16 and September 22, 1994. Investigator Dennis Hougnon was also present. Complainant was represented by counsel and given the Gerraghty advisement. At hearing, Complainant could not recall much of what was said during the Cantwell interviews. There appeared to be some discrepancies and omissions between statements made at the respective interviews and compared to Complainant's testimony at hearing. Complainant's explanation is that he was heavily sedated with prescribed medications during the Cantwell interviews and that, as a result of the brain aneurysm, his long-term memory is much clearer than his short-term memory. In the short term, ranging up to six weeks, he suffers from lack of immediate recall. However, in the long term, his memory of a particular event improves. Given sufficient time to think about a given situation, he remembers it better. This condition has not adversely affected his performance on the job. There was no medical testimony concerning the brain aneurysm or its effects.

146. Jeffrey Schutt, Manager of Human Resource Services for the Department of Personnel/General Support Services, serves as the agency representative for several state agencies, including the Department of Corrections. An agency representative is a manager whom the agency may contact to ask particular questions. In October 1994, Robert Cantwell met with Schutt in order to ask if an employee who alleges sexual harassment must go through the

grievance system. Schutt answered that an employee may go through the grievance process, which is designed for the benefit of the employee, but an appointing authority has the discretion to conduct his own investigation. Schutt's answer was based in his knowledge of the personnel rules as well as his belief that it is a good management practice to take action.

147. DOC Administrative Regulation 701-5, entitled "Sexual Harassment/Sexual Discrimination", with reference to the Civil Rights Act of 1964 and the rules and regulations of the Colorado State Personnel System, defines sexual harassment and provides, "Grievance Procedure: Allegations of sexual harassment or sexual discrimination shall be administered in accordance with the Department of Corrections' Regulation 701-24, Staff Grievance System." This regulation was in effect from September 9, 1986 until June 15, 1992. (Exhibit 33.)

148. DOC Administrative Regulation 1450-5, a nine-page document entitled "Unlawful Employment Practices/Policy Prohibiting Work Place Discrimination and Harassment", became effective on June 15, 1992. (Exhibit 34.) This regulation was revised on March 11, 1993 and remained in effect throughout the time period relevant to Complainant's termination. (Exhibit 2.) Administrative Regulation 1450-5 defines sexual harassment as:

Any unwelcomed sexual advances, request for sexual favors or other verbal or physical conduct of a sexual nature, when: (1) submission to such conduct is made either explicitly or implicitly a term of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive environment; and/or, (4) such conduct stereotypes a gender into a degrading, less than desirable status within the work place, creating an intimidating, hostile or offensive environment. Any deliberate, unwanted or unwelcomed behavior of a sexual

nature or sexual stereotyping, whether verbal, non-verbal, or physical.

(Exhibit 2, pp. 2, 3.)

149. Administrative Regulation 1450-5 also provides, in part:

IV. PROCEDURES

A. General:

. . . .

4. All employees shall have access to the grievance process as described in the Colorado State Personnel Board Rules, Chapters 10 and 11, as outlined in Attachment "A", Workplace Discrimination and/or Harassment Grievance Procedure Flowchart.
5. An aggrieved employee is encouraged to utilize the procedures described herein first in the hope that any workplace discrimination and/or harassment claims may be resolved as quickly as possible. If the Colorado State Personnel Board grievance procedures are not utilized, the complainant must be aware of the filing time frames required by other agencies appropriate for possible resolution:
  - a. C.C.R.D.: must be filed within 6 months/180 days of the alleged incident;
  - b. E.E.O.C.: must be filed within 300 days of the alleged discrimination/harassment.
6. The Workplace Discrimination and Sexual Harassment Investigative Team may be requested by the complainant or the Appointing Authority at Step 2 or 3 of the grievance process. The Team must investigate allegations at Step 4 of the grievance process. In order to complete the investigation a reasonable waiver of the time limits may be necessary.

. . . .

B. Rights of the Involved Parties: At each and every level of the grievance process, the involved parties shall have the following rights:

1. A fair and impartial hearing;
2. To have representation as approved by the Colorado State Personnel Board Rules;
3. To question the other party involved;
4. To present up to three (3) witnesses;
5. To present documentary evidence;
6. To question any witnesses presented by the other party; and
7. To request mediation pursuant to R10-2-1(D) of the Colorado State Personnel Board Rules.

C. Grievance Procedures: Chapters 10 and 11 of the Colorado State Personnel Board Rules govern the appropriate procedures to file a workplace discrimination and/or harassment complaint. Attachment "A", Work Place Discrimination and/or Harassment Grievance Flowchart, depicts this process.

D. Powers of Investigation:

1. The appropriate DOC respondent answering the grievance shall:
  - a. Have the power to interview any and all employees who might be able to make relevant statements regarding the allegations; and,
  - b. Have the power to compel the production of any non-confidential documentary evidence which exists within the official files of the Department of Corrections.
2. The complainant and/or accused may compel the reviewing respondent to interview:
  - a. The complainant;
  - b. The accused; and/or,
  - c. Any witness(s) of the alleged work place discrimination/ harassment up to three (3) witnesses per side.

. . . .

F. Corrective Action:

1. It is imperative that the Appointing Authority who responds to a workplace discrimination and/or harassment grievance NOT be the same Appointing Authority who will be responsible to administer corrective or disciplinary action against the accused employee. Coordination to ensure utilization of the proper Appointing Authority shall be facilitated with the appropriate Deputy Director or Division Director.

. . . .

VI. AUTHORITY

- A. Equal Pay Act, 1963, requires equal pay for men and women performing substantially the same work.
- B. Title VII, Civil Rights Act, 1964, prohibits discrimination in employment on the basis of sex.
- C. Executive Order D003590 from Governor Roy Romer dated December 10, 1990.
- D. CRS 24-34-402(1) et seq.
- E. CRS 24-50-125 et seq.
- F. All rules and regulations promulgated by Colorado Civil Rights Division.
- G. Colorado State Personnel Board Rules.
- H. Executive Order 1178, 1969.
- I. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794).
- J. Age Discrimination Act of 1975.
- K. Americans With Disabilities Act 1990 (ADA).

(Exhibit 2, pp. 4-9.)

150. Regulation 1450-5 does not provide a procedure for the circumstance in which the appointing authority is the accused harasser.

151. The agency interprets Regulation 1450-5 as an informal, as opposed to formal rule. The regulation was adopted as an interpretive rule, exempt from the procedures and requirements of the Administrative Procedures Act. The regulation was not subject to formal rulemaking. (See Exhibit 53.)

152. State Personnel Board Rule R11-1-3 provides:

Sexual Harassment. Harassment on the basis of sex is a violation of Policy 11-1.

(A) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(Exhibit 3.)

153. On September 28, 1994, Executive Director Zavaras received the Inspector General's investigative report, "Inspector General IA #94-077", regarding Complainant. (Exhibit 20.) The report consists of 274 pages and includes statements of interviews of 48 former and current DOC employees. In addition to the ten women who testified at hearing, the report includes statements of interviews of six other female employees who alleged that they were made to feel uncomfortable by such actions of the Complainant as staring at their breasts, repeatedly asking them out to lunch or to a bar, and comments about appearance and clothing which were taken to be sexual. (See Exhibit 20, tabs 26, 28, 30, 31, 32, 33.) The report also contains statements of interviews of female employees who stated that they had no problems with the Complainant. (See

Exhibit 20, tabs 36, 37, 38, 39.) The report includes a statement of Complainant's responses to the allegations and a statement from Beverly Quintana-Thompson. (Exhibit 20, tab 43, tab 42.) The report ultimately included supplemental information that was developed following the pre-disciplinary meeting with Complainant, such as interviews with Patricia Hoffler, Pamela Epps and Regis Groff. (See Exhibits 26-30.)

154. Zavaras testified that he read and considered the entire investigative report, page by page, estimating that he spent approximately 40 hours on the report. He did not discuss the substance of the report with the Inspector General.

155. Having reviewed the report, Zavaras made the decision to suspend the Complainant with pay pending a pre-disciplinary meeting. (Complainant had been working at the Central Office since September 12.) On October 11, 1994, Zavaras placed the Complainant on administrative leave and gave notice of a Rule R8-3-3 meeting to be held on October 13, 1994. (See Exhibit 4.)

156. Present at the October 13 meeting were the Complainant and his counsel, Zavaras and his representative, Assistant Attorney General Stacy Worthington. First Assistant Attorney General John Lizza also appeared per the agreement of the parties. Complainant was provided a complete copy of the investigative report. Complainant asked if he could talk to the women involved; Zavaras replied that it was up to them. Zavaras requested any additional information that the Complainant wished to offer. The meeting was continued in order to afford the Complainant time and opportunity to respond.

157. The second R8-3-3 meeting was held on November 4, 1994. The same parties were in attendance. Complainant submitted a lengthy

---

The women declined to be interviewed by Complainant or his counsel prior to Complainant's termination.

written response, which included background information, his explanation with reference to the allegations, medical documentation, letters of support, and other documentation. (See Exhibit T.) By letter dated November 18, 1994, Complainant conveyed additional information and documentation to Zavaras for consideration. (See Exhibit U.)

158. Zavaras read and considered all of the information submitted to him by Complainant in response to the allegations. He also received and considered a November 21, 1994 letter written directly to him by Complainant's wife offering further explanation and pleading with the Executive Director to not terminate Complainant's employment. (Exhibit 24.)

159. At Complainant's request, Zavaras conducted personal interviews with Roberta Monchak, Donna Roberts and Beverly Quintana-Thompson, requesting any facts or evidence they could offer in support of the Complainant. An investigator was assigned to conduct additional interviews, per Complainant's request. (See Exhibits 26-30.) Zavaras reviewed Complainant's personnel file, taking into consideration Complainant's performance evaluations and his overall job performance. Zavaras had worked closely with the Complainant on various issues and, although there had been some problems, Zavaras felt that Complainant's overall job performance had been commendable.

160. Zavaras found misconduct on the part of the Complainant in a continuing pattern of placing subordinate female employees in uncomfortable situations, thus creating a hostile work environment. He found common threads in how the Complainant approached the individuals, what was said, and how the individuals reacted. He viewed the facts, as he found them to be, in the light of DOC Administrative Regulation 1450-5, State Personnel Board Rule R11-1-3, and state and federal law pertaining to sexual harassment. He felt that federal law, especially, subjected DOC to liability for

the type of conduct that he concluded the Complainant had engaged in. He concluded that demotion, or other corrective or disciplinary options, would not suffice in this instance, and that the conduct was sufficiently serious to warrant termination.

161. Zavaras explained his thought process to the Complainant in a six-page letter of December 8, 1994, terminating Complainant's employment effective that date. (Exhibit 5.) The letter was personally received by the Complainant on December 12, 1994.

162. In the termination letter, Zavaras specifically referenced Complainant's acts with respect to Camille Lewis, Linda Lucero, Terry Searl, Patricia Hoffler, Cathy Willson, Kim Wilken, Suzie Sosa, Kristi Rosten and Mary Niswonger, and referenced several other DOC employees who had provided statements to the investigators that Complainant had done or said things that made them feel uncomfortable, such as looking at their breasts and making sexually-oriented comments such as, "Boy, would I like to be that sweater." (Mary Ann Fahey.) Zavaras then wrote:

Based upon all the information I have received, including all the statements obtained by DOC investigators, all the materials you and your attorney provided to me, the follow-up interviews conducted by the investigators, and my own interviews, I have concluded that you have engaged in a pattern and practice of conduct with female DOC employees that has involved unwelcome sexual advances or other verbal or physical conduct of a sexual nature that has had the effect of creating an intimidating, hostile, or offensive work environment. I reached these conclusions for the following reasons.

1. The complaints are repetitive and sufficiently severe for a reasonable, prudent, and objective supervisor to conclude that you created a hostile and offensive work environment for some female DOC employees.

2. Much of the offensive conduct was reported by more than one woman, such as

reports that you asked women to accompany you socially, even after they had refused; you held conversations of a personal or even sexual nature; and/or you touched women in ways that implied an intent to pursue a sexual encounter. The repeated reports also cause me to believe that you have made inappropriate comments to female DOC employees, which they reasonably believed were sexually motivated and offensive. Each of the incidents involved female employees who were subordinate to you.

3. To conclude that the allegations are unfounded and that your denials are true, I would also have to conclude that the females conspired collectively to injure you for their own personal reasons or ulterior motives, as you have stated in the materials you provided.

However, I was unable to discern any reason for all of these women to lie about you, or to concoct stories containing many similar threads. At least one of the women, Patricia Hoffler, appears to have some personal family connection with you that makes it unlikely that she would fabricate a story to hurt you.

The conduct she described was inappropriate for a supervisor, even if she did not find it offensive, as she said in her later statements.

4. Each of the complaints was corroborated by statements by others, who verified that the women reported the harassment shortly after it occurred.

5. In many cases, you verified parts of the women's accounts. For example, you admitted that you talked about sex with Camille Lewis; that you often commented on female employees' appearance; that you often invited female employees out socially (though you did not provide information that you had also extended similar invitations to male employees); and that you had discussed assisting some of the women in obtaining promotions.

There may be some dispute over the exact words that were used or other certain details contained in the statements. However, the overall weight of the evidence compels the conclusion that you were responsible for sexual harassment in that your behavior toward

female DOC employees did create a hostile, intimidating, and offensive work environment.

Your conduct violates federal anti-discrimination requirements, as well as DOC Administrative Regulation 1450-5 and State Personnel Board Rule R11-1-3, which prohibits sexually harassing conduct in the workplace. You were well aware that such conduct is prohibited and illegal; in fact, even though you attended at least one sexual harassment class at DOC, you persisted in harassing female employees. Your harassment was directed at women who were your subordinates.

Someone of your level of education and high-ranking position at DOC is under the highest obligation to refrain from harassment in the workplace. Your conduct constituted a breach of trust and could subject DOC to liability.

Your actions further constitute a violation of State Personnel Board Rules R8-3-3(C)(1). Failure to comply with standards of efficient service or competence, and (2) Willful misconduct, which may include, but is not limited to, a violation of Board Rules or of the rules of the agency of employment, or both. In light of your high-ranking position at DOC, a conclusion that you engaged in conduct (verbal or physical) of a sexual nature that harassed even one female DOC employee would be grounds for disciplinary action, including termination. When these allegations are evaluated as a pattern and practice of harassment, your offense is so serious and flagrant that I have decided to terminate your employment with DOC, effective December 8, 1994.

(Exhibit 5, pp. 4-5.)

163. J. Frank Rice filed a timely appeal of his disciplinary termination on December 16, 1994.

## **DISCUSSION**

### **A.**

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

In Respondent's view, this is a case of a high-ranking DOC employee abusing his power over subordinate women by engaging in a pattern and practice of sexual harassment for a period of six years. According to Respondent, Complainant's conduct is violative of DOC regulations and policies, State Personnel Board rules, and state and federal law regarding sexual harassment. Respondent argues further that the disciplinary termination should be upheld because Complainant failed to comply with standards of efficient service or competence (Rule R8-3-3(C)(1)), and because Complainant's conduct constitutes willful misconduct (Rule R8-3-3(C)(2)).

Complainant first contends that this case can be decided on the basis of the Respondent not complying with its own rules, *i.e.*, that none of the alleged victims filed a written grievance within the DOC system or complained to the Colorado Civil Rights Division or the Equal Employment Opportunity Commission, and that Complainant was denied the rights listed on page 6 of Administrative Regulation 1450-5 (Exhibit 2). Complainant argues that DOC Administrative Regulation 701-5, in effect from 1986 until 1992, mandates that allegations of sexual harassment be processed through the grievance system before the allegations can be used as a basis for discipline. Complainant also contends that the allegations were manufactured by DOC investigators during September and October 1994, are fabricated and untrue, and that a conspiracy existed among certain DOC employees to get rid of the Complainant.

**B.**

In making credibility determinations, the administrative law judge is guided by the factors set forth in Colorado Jury Instruction 3:16, which provides:

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

If you believe that any witness has wilfully testified falsely to any material fact in this case, you may disregard all or any part of the witness' testimony.

Complainant's credibility was diminished by his demeanor on the witness stand and the unreasonableness of his explanations of events, which appeared contrived, and the inconsistencies in some of the statements that he made. Unlike on direct examination, on cross-examination the Complainant professed confusion and inability to understand the questions. He searched for answers and provided answers reluctantly. His memory was selective. By contrast, the appointing authority presented a highly credible manner of straightforwardness on both direct and cross-examination; he did not search for answers to questions and did not appear hesitant, or afraid, to provide a "wrong" answer.

Many of Complainant's supporting witnesses testified to what they did not know, as opposed to what they did know. For instance, much of the testimony involved the witnesses not personally knowing of any inappropriate comments or behavior on the part of the Complainant. Witnesses Roberta Monchak, Donna Roberts and Beverly

Quintana-Thompson were clearly and openly supportive of their former supervisor. The testimony that one of the three of them "shadowed" the Complainant everywhere he went at DRDC was contradicted by the Complainant, himself, as well as other witnesses. The testimony of Monchak was discredited in rebuttal by her current supervisor, who testified that Monchak did not perform certain job duties and functions as Monchak had testified, and that Monchak was not in a position to judge the truthfulness of witness Mary Niswonger, as she had testified.

The overall testimony of Complainant's supporting witnesses does not result in the conclusion that the alleged conduct did not occur, only that they did not observe it for themselves. There is no allegation that the Complainant harassed every woman with whom he came into contact. The fact that he went out to lunch with both male and female employees, or that the lunches were generally routine, is unpersuasive as evidence that certain lunches in an exclusive context did not take place. Moreover, Complainant's conduct encompassed elements of privacy and secrecy.

Both parties seem to agree that Patricia Hoffler is an unreliable witness, at least to the extent that her account of events changed over a period of time. The record supports a finding that her original statements to the investigators regarding sexual harassment by the Complainant were true, and that she changed her statements later in view of other considerations.

There was testimony that the Complainant never lost his temper. Yet, there was credible testimony that the Complainant lost his temper at the DOC training session in March of 1994. On the

---

Although the appointing authority noted in the termination letter that Complainant did not provide information that he "also extended similar invitations to male employees", there was testimony at hearing that Complainant went to lunch with men as well as women.

witness stand, Complainant frequently appeared on edge and at risk of losing his temper. In one instance, when opposing counsel directed a question to Complainant and inadvertently used the name "Donna Rice" (Complainant's last name) instead of "Donna Roberts", Complainant angrily blurted, "I resent that!", causing a pause in the proceedings.

Complainant proffered evidence of opposition to his style of management at DRDC by certain staff members and by certain former employees of the Central Office. He alleges that each of his assignments placed him in a hostile work environment and that certain employees formulated a conspiracy to oust him. Yet he also presented evidence that he was supported by the higher echelons of management, including former Executive Director Kip Kautzky, who was primarily responsible for Complainant's initial assignments and who ordered that Complainant receive on-the-job training that would qualify him for a superintendent's position. There is no credible evidence that a conspiracy actually existed, or that would link the subject women together in a plan designed to lead to Complainant's ultimate termination.

Complainant also was unsuccessful in his attempt to show that the investigation was tainted by the action of the investigators. The investigative report included information that was developed which would mitigate against disciplinary action. There is no evidence whatsoever that the appointing authority's action was taken in retaliation for any other acts on the part of the Complainant. The evidence supports a finding that the appointing authority did not prejudge the case, that he fairly and candidly considered all of the information presented to him, favorable as well as unfavorable to the Complainant, and that he was willing to find in favor of the Complainant if the evidence pointed in that direction.

Complainant proffered evidence that there had been several outside investigations concerning the operation and management of DRDC and

other DOC facilities in 1993 and 1994. He submits that he knew he was "under a microscope" and that he would have been a fool for taking any chances in that light and, therefore, would not have engaged in the alleged acts or made the alleged comments. The administrative law judge simply is not persuaded by this argument.

Nor is the administrative law judge persuaded by the argument that the previous investigations provided some of the accusers the opportunity to come forward with their allegations and the fact that they did not proves that the allegations are not true. The evidence does not lead to this conclusion. There is record support for Respondent's action.

Complainant went to great lengths to attack the credibility of the accusers on cross-examination. Yet each witness remained steadfast in the essentials of the allegations. Although Camille Lewis demonstrated some initial confusion as to the exact location on the highway where Complainant's statements were made, she remained consistent in relating what was said, as corroborated by other witnesses. Beverly Quintana-Thompson's testimony of the September 9 telephone call, in which Lewis said she cared about the Complainant, does not diminish the credibility of Lewis' testimony of the statements made to her by the Complainant on the trip to Delta. Nor is Lewis' credibility diminished by the inability of other people to perceive that she was upset the evening of their arrival in Delta. It is undisputed that she was not familiar with any of the people with whom she came into contact, and, according to Regis Groff, Lewis and Thomas "stuck pretty close together", which is consistent with Lewis' testimony. Groff also testified that he mainly talked to the Complainant and DOC Regional Director Warren Diesslin because he knew them and did not know most of the others who were present, evincing the understandable reaction that Lewis demonstrated vis-a-vis strangers.

There is no evidence from which to conclude that the accusers misunderstood the Complainant's comments due to cultural

differences, as Complainant intimated. A common thread in Complainant's conduct is that he would subsequently say that he was misunderstood, or that his words were taken out of context (e.g., Lewis, Searl, Wilken, Sosa, Niswonger). There is no evidence of racial bias in the investigation.

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative setting is "by a preponderance". This standard of proof has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985) (emphasis supplied).

After a considered review of the entire record in this case, the administrative law judge accords substantial weight to the testimonies of the subject female DOC employees and concludes that it is more likely than not that the factual allegations upon which the discipline was based are true.

C.

DOC Administrative Regulation 701-5 (Exhibit 33) does not mandate that a grievance be filed, but rather requires that any grievance procedure initiated be administered in accord with the DOC Staff Grievance System. While none of the subject employees went through the grievance process, for their own reasons, DOC Administrative Regulation 1450-5 (Exhibit 2) does not preclude the appointing authority from ordering an investigation of alleged improper behavior. In the present matter, the Executive Director acted as the appointing authority under the regulation and ordered the Inspector General, in the capacity of a respondent, to carry out the investigation. Neither regulation covers a situation where it is the appointing authority who is the alleged harasser, as was Complainant in his capacity of DRDC warden. The appointing authority in this case, Zavaras, having no prior knowledge of the substance of the allegations, conducted an independent review of the findings of the investigation and was the final decisionmaker. There is no evidence that his decision was unduly influenced by outside forces or improper considerations.

Rule R8-3-1(B), 4 Code Colo. Reg. 801-1, sets out the factors to be considered in deciding whether to correct or discipline an employee. The lapse of time since the occurrence of the misconduct is not listed therein. Rule R8-3-3(D), 4 Code Colo. Reg. 801-1, sets forth the procedure to be followed in pre-disciplinary proceedings. This provision begins with, "When information received by an appointing authority indicates the possible need to administer disciplinary action, . . .", indicating that the appointing authority's promptness in acting is to be evaluated against the timing with which the appointing authority learned of the alleged misconduct, not the timing of when the misconduct occurred. See Caponiti v. Department of Transportation, State Personnel Board Case No. 912B131 (Comeaux, Amended Initial Decision 1992) (holding not improper for appointing authority to impose discipline in 1992 for conduct that occurred in 1984).

The investigation into Complainant's conduct took place during September and October of 1994. The appointing authority received the initial investigative report on September 28 and began immediate review thereof. The entire document was furnished to the Complainant on October 13. Complainant was afforded the opportunity to respond in writing and did so with extensive documentation (Exhibits T and U), which was reviewed and considered by the appointing authority before making his decision. The appointing authority conducted three personal interviews himself at the request of the Complainant and ordered further investigation. The supplemental investigative materials were also furnished to the Complainant. Extensive pre-hearing discovery was conducted by Complainant. Finally, Complainant received a full opportunity to be heard by a neutral third party. Complainant's due process rights were not denied.

This is a case where the appointing authority was fulfilling his obligation to investigate allegations of improper conduct. He did not place himself in the shoes of the complaining women. The investigation was conducted on behalf of the Department of Corrections. It would be contrary to the performance of his duties to interpret the administrative regulations as having a preclusive effect on this type of investigation. The appointing authority would have been remiss in the fulfillment of his responsibilities if he had done nothing.

**D.**

The Equal Employment Opportunity Commission describes sexual harassment as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when submission to such conduct is made, either explicitly or implicitly, a consideration of an individual's employment; and submission to or rejection of such conduct by an individual is used

as a basis for employment decisions affecting such individuals; or such conduct has the purpose or effect of substantially interfering with an individual's work performance or creates an intimidating, hostile or offensive work environment. DOC Administrative Regulation 1450-5 and State Personnel Board Rule R11-1-3 follow this definition. (Exhibits 2 and 3.) This definition results in two types of sexual harassment, *quid pro quo* and hostile environment.

*Quid pro quo* sexual harassment occurs when submission to unwelcome sexual advances is either explicitly or implicitly made a condition of employment, or submission to or rejection of such conduct is used as the basis for employment decisions affecting the individual. The harasser has the employer's authority to alter the terms and conditions of employment, either actually or apparently.

See e.g., Karibian v. Columbia University, 14 F.3d 733 (2nd Cir. 1994), cert. denied, 114 S.Ct. 2693 (1994); Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993); Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59 (2nd Cir. 1992); Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990). A *quid pro quo* claim requires that it be shown that the employee's submission to advances was a condition of receiving a benefit, or that the employee's refusal resulted in a tangible job detriment. *Quid pro quo* sexual harassment imposes strict liability on the employer. A *quid pro quo* claim does not lie if the employer/supervisor threatens to retaliate against an employee for rebuffing advances, but does not, in fact, do so.

For the determination of sexual harassment, Rule R11-1-3(B), 4 Code Colo. Reg. 801-1, provides:

In determining whether alleged conduct constitutes sexual harassment, the board will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular

action will be made from the facts, on a case by case basis.

Although there is evidence of implied career advancement in Complainant's comments to Lewis, Lucero, Hoffler, Wilken, Sosa and Niswonger, there is no evidence that the employees' job status was actually altered as the result of an action by the Complainant. The record thus does not support a claim of *quid pro quo* sexual harassment.

This case involves hostile environment sexual harassment. A hostile environment case exists where a reasonable person would find the environment hostile or abusive, and the harassed party found the environment to be so. Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993). When the harasser is a supervisor, the employer faces a higher standard of liability. An employer is liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt, remedial action. Steiner v. Showboat Operating Co., 25 F.2d 1459 (9th Cir. 1994). Employer liability extends to failing to take appropriate action in the face of actual, constructive, or imputed knowledge of the alleged harassment. See Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). See also Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987). Additionally, the Tenth Circuit U.S. Court of Appeals has held that sexual harassment lawsuits against individuals will be construed as a suit against the employer, not the individual. Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993).

The appointing authority considered this potential liability in reasonably ordering the initial investigation and in making his ultimate decision. The appointing authority reasonably viewed the allegations as more serious than normal when the harasser was a supervisor, and especially when the harasser was the highest ranking DOC employee assigned to the correctional facility.

Sexual harassment concerns misuse or abuse of power and control, not sexual desire or sexual performance. Sexual desire or physical attraction are not prerequisites to sexual harassment. Nor is Complainant's alleged impotency a defense to sexual harassment. When a female employee is made to feel uncomfortable, confused, fearful of adverse employment consequences or retaliation, or feels compelled to alter her workplace behavior or to change her normal work attire in order to avoid being sexually harassed, a hostile or abusive work environment has been created. The egregiousness of sexual harassment is enhanced when there is a large disparity of positions between the harasser and the harassed and reaches its highest level when the harasser is the appointing authority.

In the cases of Lewis, Lucero, Hoffler, Willson, Wilken and Sosa, the Complainant was the warden and appointing authority of DRDC and was viewed as having the ultimate control over the jobs of these employees. In the cases of Fahey, Rosten and Niswonger, he was the expectant warden. In the instance of Searl, he had been reinstated to his warden's position but had not yet reassumed those duties. Complainant was at a far higher level in the system than were Lewis, Lucero, Searl, Hoffler, Willson, Wilken, Sosa, Fahey and Rosten. While Niswonger was more of a co-worker than a subordinate, she was at a lower level than was Complainant and had been made aware by the Complainant that he would likely become the DRDC warden. In all cases, Complainant was in a position of relative power and control, with the potential for offering or withholding a job benefit.

Complainant's misconduct includes unwelcome touching (Searl, Wilken, Sosa), offensive words (Lewis, Lucero, Hoffler, Wilken, Sosa, Fahey, Niswonger), excessive compliments (Lucero, Searl, Sosa, Rosten), unpaid off-duty meetings (Hoffler, Willson, Sosa), statements of secrecy (Lewis, Lucero, Sosa), and the conduct occurred in confined or private locations. All too often, upon

rejection, Complainant would say that he was misunderstood or that his comments should not be taken the wrong way (Lewis, Searl, Wilken, Sosa, Niswonger).

Complainant's statements and actions all took place in the context of the work environment. This includes lunches or off-duty meetings that did not actually occur on the premises of the workplace. In addition to the conduct being initiated at the work site, the context of the event was always one of having relevance to employment with the Department of Corrections. In the case of Niswonger, Complainant's statements were made as the two employees were walking together toward the office on a work day. Their morning meeting originated from their employment, not as a private social affair. It matters not whether the comments were made one minute before 8:00 a.m. or one minute after 8:00 a.m. The demeaning and abusive effect of sexual harassment is the same in either event. Nor does it matter that Complainant ceased the harassing conduct when told to do so by the other party. This does not change the fact that the conduct was inappropriate in the first instance; the adverse effect does not automatically go away. The case of Cathy Willson is the one instance that probably does not fulfill the technical elements of sexual harassment. Yet a reasonable administrator could find the conduct with respect to Willson otherwise improper.

**E.**

Even if Complainant's conduct does not rise to the level of sexual harassment, which this administrative law judge finds it does, the pattern and practice of such inappropriate behavior constitutes a failure by Complainant to comply with standards of efficient service or competence, and willful misconduct. Rule R8-3-3(C)(1) and (2), 4 Code Colo. Reg. 801-1. The appointing authority acted promptly and reasonably when the information was brought to his

attention. This record supports a finding that the conduct was so flagrant or serious as to justify immediate disciplinary action. Rule R8-3-1(C), 4 Code Colo. Reg. 801-1. The discipline imposed was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.

This is not a case where an award of attorney fees and costs is warranted under § 24-50-125.5 of the State Personnel System Act.

#### **CONCLUSIONS OF LAW**

1. The action of the Respondent was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.
3. There was just cause for the disciplinary termination.
4. Neither party is entitled to an award of attorney fees and costs.

#### **ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this \_\_\_\_\_ day of October, 1995, at Denver, Colorado.

---

ROBERT W. THOMPSON, JR.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of October, 1995, I placed true copies of the foregoing Initial Decision of the Administrative Law Judge in the United States Mail, postage prepaid, addressed as follows:

William S. Finger  
Attorney at Law  
29025-D Upper Bear Creek Road  
P.O. Box 1477  
Evergreen, Colorado 80439

and in the Interagency Mail, addressed as follows:

Diane Marie Michaud  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, Colorado 80203