

**AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

DAVID RAMIREZ,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

---

This Amended Initial Decision is entered pursuant to Complainant's December 6, 2000 Request for Clarification and Request for Correction of Order, to which Respondent did not respond. Minor amendments appear in bold print on Pages 14 and 32.

Hearing was held on July 14, September 14 and September 15, 2000 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by Assistant Attorney General Coleman M. Connelly. Complainant was represented by Darrell D.B. Damschen, Frank & Finger, P.C.

**PRELIMINARY MATTERS**

Respondent called the following witnesses: Dennis Hougnon, Chief Criminal Investigator, Inspector General's Office, Department of Corrections ("DOC"); and Carl K. Sagara, Deputy Director of the Division of Community Corrections ("CC"), DOC.

Complainant called the following witnesses: Lucy McClelland, Human Resources Specialist, DOC; Tim Hand, Community Programs Agent III, CC, Colorado Springs office, DOC; Ely Pacheco, Community Program Agent II, Pueblo office, DOC; David Monson, Fleet Manager, DOC; and himself.

Respondent's Exhibits 2 - 9, 12, and 14 were admitted by stipulation. Exhibit 11 was admitted over objection. Exhibit 18 was admitted without objection.

Complainant's Exhibits A, B, G, H, L, R, U, and BB - FF were admitted by stipulation. Exhibit GG was admitted solely for the purpose of demonstrating what information the appointing authority considered, and not for the truth of the matters asserted therein.

Exhibit HH was offered but not admitted.

A witness sequestration order was entered.

The record remained open until October 15, 2000 for the purpose of accepting the parties' written closing arguments and rebuttals thereto.

### **MATTER APPEALED**

Complainant appeals his disciplinary demotion, reduction in pay, transfer, and order that he attend the Training Academy for new DOC employees. For the reasons set forth below, Respondent's action is modified pursuant to section 24-50-103(6), C.R.S.

### **ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether either party is entitled to an award of attorney fees and costs.

### **STIPULATED FACT**

1. As of July, 2000, the state vehicle at issue driven by Complainant had 40,218 miles on it.

### **FINDINGS OF FACT**

1. Complainant, David Ramirez, commenced employment with DOC in 1986 in the Division of Adult Parole and Supervision in 1986. The division is now called the Division of Adult Parole and Community Corrections. At all times relevant, Complainant has held the position of Community Programs Agent ("CPA"). In 1988, he was promoted from CPA I to CPA II. Since 1988, he has applied for numerous promotions but has received none.
2. Community Corrections ("CC") consists of three programs: the Intensive

Supervision Program ("ISP"), in which offenders reside in apartments or residences in the community; halfway houses; and YOS, Youth Offender Services, in which youth aged 14-18 that were convicted as adults reside in special facilities. Complainant supervised offenders in ISP and halfway houses. The ratio of CPA's to ISP offenders is 1 per 20-25; the ratio for halfway house residents is 1 per 60.

3. Complainant worked in the Pueblo office of DCC from 1988 through July 1999, at which time he was transferred to the Colorado Springs office as part of the disciplinary action under review herein. The Pueblo office consisted of two CC officers, as well as numerous parole officers. Complainant's supervisor was located in the Colorado Springs office; he never had a supervisor in Pueblo.

#### Complainant's Actions Leading to the Disciplinary Action

4. In August, 1997, Complainant was assigned a state vehicle, a 1997 Ford Taurus station wagon with approximately 2,187 miles on it.
5. Complainant failed to change the oil at any time after being issued this vehicle. He did check the oil periodically, approximately twice a month, at which times it was either full or needed a small amount. Complainant topped off the oil whenever necessary. He kept a quart of oil in his vehicle at all times for this purpose.
6. Under DOC regulations of which Complainant was aware, he was required to assure the state vehicle received preventive maintenance every 5000 miles or every six months.
7. On December 23, 1998, Complainant's car broke down on the way to the office. The car acted as though it had run out of gas, and coasted to a stop. There was no warning on the light panel, no sound of metal grinding on metal, no smoke or smell thereof. He did not believe it was a serious malfunction of the car. He attempted to start the engine again, but it did not turn over. The temperature outside that day was 24 degree below zero.
8. Complainant walked the rest of the way to work.
9. Complainant called a tow company, and his wife picked him up and drove him to meet the tow truck driver at the vehicle. He removed his belongings from the back seat, including a backpack, his field book, flex cuffs (a type of handcuffs), a tape recorder, and a flashlight.

10. Complainant did not look in the rear storage area of the station wagon, which had a canopy pulled over it. By forgetting to do this, he left a number of items there, outlined below.
11. Complainant was familiar with Freedom Ford ("Ford") at the time he had the car towed there, and expected that the car would be kept in the gated, fenced parking lot with the other cars awaiting repair.
12. Complainant called Ford the next day, as well as numerous times over the course of the next few weeks. Each time he was informed they had not had a chance to look at the vehicle.
13. Complainant had no idea what was wrong with the vehicle, and did not know what type of work would be necessary, i.e., replace the starter or more serious work.
14. On January 25, 1999, Ford informed Complainant that the engine was inoperable and had to be replaced due to lack of preventive maintenance. The next day, he called his immediate supervisor, Tim Hand, in the Colorado Springs office, to inform him of the problem. Complainant offered to pay for the cost of replacing the engine, and Hand testified that his demeanor in this conversation was "concerned."
15. Complainant did not inform his supervisor earlier that the car had been towed because he did not know the status of the car or that it had sustained serious damage. He did not intend to deceive his supervisor about the problem with his car.
16. During the four-week period the state vehicle was at Ford, Complainant drove his own car to work and used it to perform his job duties. He spent approximately 75-80% of his work time in the office. The other time he spent primarily making site visits to offenders under his supervision.
17. Complainant had insurance on the personal vehicle he used during the period late December, 1998 to late January, 1999.
18. During this period, he used his car once to make a transport of a DOC inmate: he picked up a woman the Governor had just pardoned from a minimum-security prison, and drove her two and a half miles to her apartment. Because of the fact she was leaving a prison setting for freedom, there was no safety or security risk posed by this transport. No one else from the Pueblo office was available to make this transport, and she would have remained in prison had he not made it.

19. Following his discipline, Complainant continued to drive his personal vehicle for work purposes for five months, but was never provided written authorization to use his personal vehicle for work purposes, as is required by DOC regulations.

#### Inspector General's Office Investigation

20. DOC Inspector General's Office Investigator Dennis Hougnon was assigned to investigate Complainant's failure to provide preventive maintenance to his state vehicle. He visited Ford.
21. Ford employees informed Hougnon that the engine of the vehicle had seized up due to lack of maintenance, oil breakdown, and a low amount of oil in the engine.
22. Hougnon found an unopened quart of oil in the rear of the vehicle. Hougnon checked the oil in the vehicle and found none, but did this after the dealership had removed the oil filter and oil plug, both of which actions resulted in the vehicle losing oil.
23. The record did not disclose precisely what amount of oil was in the vehicle at the time it broke down on December 23, 1998.
24. Hougnon learned that Ford locked the perimeter fence around the vehicles every evening between 6 and 7 p.m. He did not inquire as to whether the dealership locked the cars every night.
25. Hougnon spoke to Complainant, who confirmed that he had failed to change the oil and did not attempt to deceive Hougnon about his negligence.
26. Hougnon took inventory of the vehicle at Ford. He found the following items in the rear storage area, covered by the canopy:
  - in a blue duffel bag, and therefore not in plain view, were: his personal weapon (formerly his duty weapon), which was not loaded; a pair of handcuffs; ammunition that did not fit into his personal weapon; a magazine or clip holder with no bullets in it (this normally houses the bullets and is inserted into the gun); a speedloader (not a weapon but a device used to expedite loading of a gun); 5 boxes of ammunition; one brown hip belt with handcuffs; a Beretta case with a lock; an electronic tracking unit (used to check if an offender is located where he is supposed to be, which CC agents are not required to and seldom use), and a case for the tracking unit.

27. No Ford employee reported having found any of these items in the vehicle.
28. Ford refused to honor the warranty on the vehicle due to Complainant's failure to perform preventive maintenance on it. The warranty expired at 3 years or 36,000 miles. As of July 2000 the vehicle had over 40,000 miles on it and had not needed any warranty work.
29. The cost of replacing the engine for the vehicle was \$4,253.72.
30. Hougnon wrote a report on his investigation containing the above information, which the appointing authority, Carl Sagara, considered prior to imposing discipline. This report was not introduced into evidence.
31. Sagara discussed the investigation with Hougnon and requested that he contact an independent mechanic. This mechanic informed Hougnon that low oil causes engines to seize up, that severe breakdown in oil also can cause engines to seize up (caused by extreme heat), but that rarely had the mechanic seen an engine seize based simply on oil not being changed, so long as the quantity of oil stayed the same. This mechanic also informed Hougnon that the warning signs of an engine breakdown due to lack of oil are: a clicking sound, metal on metal sounds, a clanging noise, the car becomes hard to start, and the pistons freeze. Hougnon did not establish that these warning signs had occurred prior to Complainant's state vehicle breaking down. He gave this information to Sagara.
32. During the period the state car was in the shop, Complainant made no arrests. Had he needed to make an unplanned arrest, he was prepared to do so; he had his duty weapon on his person at all times, as well as flex cuffs (a variety of handcuffs) available immediately. He also had access to standard handcuffs at the Pueblo office.

#### Personal Weapons; Weapon Storage

33. DOC has no regulation prohibiting officers from storing personal weapons in state vehicles. This practice is actually common, as most officers store their DOC and personal weapons in their locked state vehicles to avoid family members having access to them. Even the firearms instructor in the Pueblo office keeps his personal weapon in his state vehicle.
34. Complainant stored his personal weapon in his state vehicle at all times because he has a ten-year-old son at home whom he did not want to have access to the weapon.

35. At the time of the incidents herein, DOC had not yet issued lock boxes for state-issued duty weapons to its employees.
36. Sagara testified that it is acceptable for DOC officers to keep their duty weapons in their locked state vehicles all day if necessary during the time they testify in hearings, and that there is no DOC regulation prohibiting DOC officers from storing their personal weapons in state vehicles.
37. Sagara testified that his duty weapon was locked in a brief case in his state vehicle during this hearing.

#### Preventive Maintenance Regulations

38. DOC employees are required by Administrative Regulation 200-9, Vehicle Fleet Planning, Assignment, and Management, to perform preventive maintenance on state vehicles. Employees customarily make an appointment at an approved car service center, bring the car in for maintenance as approved by Fleet Management, pay for the maintenance, and send the bill directly to Fleet Management. A normal oil change takes approximately the time of a long lunch hour.
39. Each state vehicle contains a booklet on Preventive Maintenance. It states, in bold print, "**It is the driver's responsibility to see that the PM service is performed when due.**" This booklet provides information to the employee regarding what preventive maintenance must be accomplished at specific mileage intervals. At the time of the incidents herein, state employees were required to have the oil changed on their state vehicles every 5000 miles or every six months.
40. When asked at hearing why he never changed the oil in his state vehicle, Complainant stated that he did not have a reason, it was his responsibility, and he procrastinated in doing it. He stated that he should have changed the oil.
41. Complainant did not intentionally cause damage to the state vehicle.

#### The Rule R-6-10 Meeting

42. The Rule R-6-10 meeting occurred on April 30, 1999. Ramirez, his attorney, and Sagara were present.
43. At the meeting, Complainant informed Sagara of the following:
  - he had not changed the oil on the vehicle, acknowledged that he had

been remiss in his responsibilities in failing to do so, and said he had no excuse for neglecting to get the oil changed;

- he had periodically checked the oil and topped it off, assuring it never ran low, and had kept oil in the vehicle for this purpose. Because he had topped off the oil regularly, he questioned whether his negligence was the precise cause of the engine breakdown. He acknowledged his negligence in failing to change the oil, but wanted Sagara to consider his periodic topping off of the oil as a mitigating factor. He handed Sagara a letter from a mechanic indicating that car engines can operate while low on oil in the amount of two quarts.

- he offered to pay for the cost of replacing the engine;

- he explained that he had transported a pardoned woman from prison to her apartment in his personal vehicle during the period the car was in the shop, and that therefore there was no security risk posed by this transport.

44. Sagara testified that Complainant gave him no mitigating factors to consider at the R-6-10 meeting.
45. Sagara testified that he considered the transport of the inmate to be a safety issue and to constitute an escape possibility.

#### Sagara's Letters Imposing Discipline

46. Sagara's June 5, 1999 letter imposing discipline stated in pertinent part as follows:

"As a result of our meeting I have found the following facts to be true.

- On or about 08/04/97, you were assigned state vehicle license # 625A77 by the division of Community Corrections. The vehicle was new in that it was a 1997 model, (Ford Taurus, station wagon . . .) with 2,187 miles on the odometer at the time it was assigned to you.
- This vehicle's engine failed with 23,597 miles on the odometer on December 23, 1998, and consequently you had it towed to Freedom Ford in Pueblo, Colorado. The service advisor at Freedom Ford reported to the DOC Inspector General's investigators that the reason the engine failed was due to lack of maintenance, i.e. low engine oil, severe oil breakdown and possibly a factory installed oil filter, i.e. no oil change.
- You stated in our meeting and to the department's I.G. investigators that you never changed the oil. You said in the meeting that you did check the oil level about every two (2) weeks.
- You also claim that a mechanic in Pueblo told you that as long as an engine had the proper amount of oil, it would not seize. The Department's I.G. investigator advised that this

mechanic had been contacted and that the mechanic had never seen the vehicle.

- The vehicle's manufacture's warranty was voided due to your failure to meet schedule maintenance. State Fleet Management Operator's Manual provided in each vehicle states on the first page of this book that the vehicles are to have engine oil changes every 5,000 miles. Specifically the book states, "It is the driver's responsibility to see that P.M. (Preventive Maintenance) service is performed when due."

I have concluded from the information and the discussion with you that you have demonstrated **negligent disregard** for state property resulting in the destruction of a state vehicle engine by failing to provide normal, proper and routine vehicle maintenance, which included oil changes as set out by the vehicle manufacturer in order to hold the vehicle warranty in place. You complied with neither state regulation nor vehicle manufacturer requirements. Your conduct demonstrates a **total indifference** to the published State Fleet Management authority and DOC regulation. In addition, your gross disregard for vehicle maintenance resulted in the complete voiding of the vehicle warranty provided by the manufacturer upon the sale of the new vehicle to the State of Colorado \$4,253.72, which was the cost to replace the engine.

At the time you had the state owned vehicle towed to a garage (December 23, 1998 . . . ) because of engine failure, you did not notify your supervisor, Tim Hand. By your own admission, you did not notify Mr. Hand or any other division supervisor or manager that the vehicle was not operating and had been towed until January 26, 1999. In fact, the records indicate that the very same day you notified your supervisor, State Fleet Management had notified the Department's State Fleet Manager about the need to replace the engine due to lack of maintenance and failure to change engine oil.

Based on the information presented to me which includes your own admission that you did not notify your supervisor nor did you take any other steps to make appropriate notification as to your assigned state owned vehicle's breakdown that you have shown a **wanton disregard to report essential and important job related information to supervisory personnel**. The intent for such conduct is stipulated in the 'Executive Order, Integrity in Government' 'Each person in public office in the executive branch in government' '(2) Shall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire public confidence and trust in government.' Additionally, your conduct is in violation of DOC Administrative Regulation 1450-1, 'Staff Code of Conduct' '(FF) There is an obligation to be accountable and efficient in the use of state resources. . . . Loss, misuse, misplacement, theft, or destruction of state property must be reported to appropriate supervisor immediately.'

The information presented to me and by your own admission, you used your own personal vehicle to conduct state business. You stated in the meeting that on one occasion you transported a DOC inmate in your personal vehicle.

DOC Administrative Regulation 200-0 states, "When specifically authorized to do so, staff may use personal vehicles for official DOC business, subject to the following restrictions: 1. 'The employee must demonstrate that the vehicle is properly licensed and carries liability insurance at limits established by the DOC . . . 2. 'The Security Manager or other supervisory employee must approve the specific use of the vehicle in writing. Such approval, for repetitive use, will detail the circumstances under which the employee is permitted to do so, and the general limits of travel.

Mr. Ramirez, your conscious failure to notify your supervisor and to obtain appropriate written

authorization to use your personal vehicle for DOC business, supports a finding that you conducted yourself with **total indifference** to DOC governing authority. You have conceded that you did transport an inmate in your personal vehicle without any authorization, exposing the DOC to potential legal liability in the event of an accident or injury. This action was in **blatant disregard** to elementary department regulations.

The information I have received reveals that when the department's Inspector General's investigators examined the state owned vehicle. . . they found in the back of this vehicle a blue bag with: 1 Colt Python .357 magnum revolver . . . in ranger holster; 1 clip holder; 1 speedloader; 5 boxes of live 9 mm ammo; 4 live 9 mm rounds among other items. Also the investigators found in the vehicle: 1 brown transport belt with Peerless handcuffs; a Beretta case with a lock; 1 electronic tracking unit and . . . case among other items.

By your own admission you do not recall exactly when the items were placed in the state vehicle and specifically, you stated that you placed your personal weapon (Colt Python .357 magnum) in the state vehicle because you were afraid of the weapon being around your young son. You left the items in the state vehicle totally unsecured even during the approximately 35 days it was in the garage at Freedom Ford. You also admitted during our meeting that you did not have authorization to carry the Colt Python on the job.

I find that your actions are in violation of DOC AR 1250-47, 'Weapons for Parole and Community Corrections Staff, Policy: 'It is the policy of the DOC . . . that Parole and CCO's carry approved concealed weapons.' 'Other authorized weapons must be approved by the Executive Director, the Division Director and the Chief Firearms Instructor or his designee. Approval must be in writing.' . . .

'Officers shall only carry their DOC issued weapon or other Department approved weapon.' . 'Any careless handling and/or discharge of a duty weapon shall be subject to corrective or disciplinary action. Officers will provide maximum security for all duty weapons located within their residence while off duty, both to provide for the safety of other family members and to lessen the possibility of the weapons being obtained and/or used by unauthorized persons. When on duty and the weapon is not being worn by the officer, the weapon must be stored under lock and key.'

I find that you had possession of an unauthorized firearm by virtue of having the weapon stored in your assigned state owned vehicle that you have demonstrated a **wanton and reckless disregard** for DOC Administrative Regulation relating to Weapons for Parole and Community Corrections Staff. Moreover, that your conduct posed an unacceptable risk to public safety. Your failure to provide proper security of this weapon further demonstrates an attitude of **reckless indifference to the public safety** in complete defiance to elementary DOC regulations.

Mr. Ramirez, it is clear to me by your actions in this matter that you are not performing at the level of a Community Programs Agent II. Your years of experience as a Community Corrections Agent belies all your actions in the issues cited in this mater. The normal and expected behavior and responses are very elementary and fundamental to even a new and inexperienced state employee. It is expected and required that a state employee take proper and reasonable care of a state vehicle; it is expected and fundamental that a state employee make timely notification to his/her supervisor that the vehicle was no longer operating and had been towed; it is expected and required that a state employee request permission to use his/her personal vehicle and not transport an inmate due to exposure to state and personal liability; it is expected and required that an agent obtain proper authorization to carry a personal weapon; and it is expected and required that an agent provide proper security of a

deadly weapon. Mr. Ramirez the evidence shows that you did none of these elementary and fundamental things." (Emphasis in original.)

47. Sagara imposed the following discipline on Complainant:

- demotion to Community Programs Agent I "until such time as you demonstrate over a period of time that you are competent by virtue of your performance to advance to the level of CPA II";
- attend and complete the DOC Training Academy course for new employees;
- read all DOC regulations in the Division of Community Corrections "Extended Orientation" book which is required of all new CC agents;
- take and pass the Extended Orientation Test given to all new division agents;
- transfer of Complainant from the Pueblo office to the Colorado Springs office, which would "allow you to receive close direction and supervision from your supervisor who is based in the Colorado Springs Office."

48. On June 9, 1999, Sagara sent Complainant an addendum to his June 5 disciplinary action letter. The letter stated in part:

"I have been asked by DOC Personnel to clarify your exact pay since there is no longer a step system. You are currently at the equivalent of the traditional step 7 which constitutes the maximum salary for a Community Programs Agent II of \$4,324 per month. Based on your performance, which was spelled out in my findings, I do not consider your performance to be at the high level of a CPA I. Therefore, I am placing you more appropriately at the mid-range salary of a CPA I which is currently \$3,083 per month. However, this base will be increased by the 2 1/2 percent salary adjustment, making your new salary effective July 1, 1999, at approximately \$3,160. I would also like to clarify that in order to promote back to the CPA II level, the position must be re allocated and you must apply and test for the up graded position according to established personnel rules."

49. Complainant had no previous disciplinary or corrective actions at the time he was disciplined.

50. Sagara has been Complainant's immediate supervisor during two periods in the past approximately ten years. In both periods he rated Complainant's performance to be "Commendable."

51. On direct examination, when asked repeatedly what factors he considered in imposing discipline against Complainant, Sagara did not list his employment history, performance evaluations, or lack of prior discipline. When asked on cross exam whether he considered Complainant's performance history, employment record, and lack of prior disciplinary

actions, as mitigation, he stated, "to some extent."

52. Sagara testified with respect to the Training Academy that no particular class specifically related to Complainant's deficiencies, but stated that the whole academy would benefit him. He admitted that Complainant did not need the sexual harassment training or training in use of handcuffs.
53. Out of the entire four-week Training Academy, none of it related directly to Complainant's discipline. Sagara excused him from the self defense and firearms training. Regarding the orientation for new DOC employees, only one administrative regulation given to him was in any way connected to his discipline, AR 200-9.
54. Sagara testified that he knew it would be embarrassing for Complainant as a long-term DOC employee to have to attend the Training Academy for new employees. He further stated that he could have sent Complainant to specific classes, but chose not to.
55. Complainant was embarrassed and humiliated by having to participate in the Training Academy.

#### Level of Complainant's Performance

56. On June 21, 1999, Hand received a letter of commendation for Complainant's performance, which stated that Ramirez had saved the life of one of the offenders under his supervision. When the offender failed to make a daily call in, Ramirez became concerned, and he and the other CC officer went to the offender's home. Unable to get into the apartment, they convinced the police to assist them in a welfare check, and they found the offender near death from an apparent suicide attempt. The client was taken to the hospital, and survived.
57. On July 1, 1999, Complainant transferred to the Colorado Springs office as a CPA I. The difference between a CPA I and II is primarily that II's function more independently and without oversight by a supervisor or work leader. At all times relevant thereafter, Complainant continued to function at a CPA II level. He needed no extra supervision or guidance in decisionmaking, and at his supervisor's request he mentored CPA interns.
58. In January of 2000, Complainant's supervisor, Tim Hand, suggested to Sagara that Complainant be promoted back to the CPA II position, and that he receive back pay for the period July 1999 through the time of his promotion back to CPA II.

## Mike Slayton Grievance

59. At the time Sagara transferred Complainant to the Colorado Springs office, he knew that Mike Slayton would be his work leader, and that Slayton had previously been Complainant's work leader in 1998, but had been removed from that position because he had created a hostile working environment for Complainant. Sagara also knew that Slayton had also made false accusations against other officers in the Colorado Springs office in which he worked, including filing a bogus grievance against his supervisor, Tim Hand, alleging he had threatened him. Sagara investigated those accusations against Hand and found them to be "not true and accurate." Sagara testified that he viewed Slayton to be an undiplomatic and poor communicator.
60. In January of 2000, Sagara was processing the paperwork for Complainant's promotion back to CPA II when he received a grievance filed by Slayton against Complainant. Sagara assigned the grievance to the Inspector General's office for investigation, and he put Complainant's promotion on hold during the pendency of that investigation.
61. Slayton's grievance alleged, generally, that Complainant had balled up a piece of paper and thrown it at Slayton, and made threatening gestures to Slayton inviting him to hit him.
62. The Slayton incident consisted of the following: Slayton left a memo on Complainant's desk outlining an agenda for a training he and one other officer were responsible for overseeing. Complainant had been responsible for training staff for years, and felt that Slayton had interfered unnecessarily in his work. He crumbled up the memo, and then went to Slayton's office to confront him about it, stating he didn't want Slayton interfering in his responsibilities. They argued with raised voices. Complainant tossed the memo on Slayton's desk as he left his office.
63. Sagara testified that the only reason he did not promote Complainant to CPA II in January 2000 was the pendency of Slayton's grievance.
64. Sagara held an R-6-10 meeting on the Slayton grievance. He determined that while Complainant had not done most of the things alleged by Slayton, Complainant was "guilty of insubordination and belligerence" towards him. He wrote a letter of warning and placed it in Complainant's personnel file, with the proviso that further incidents would lead to disciplinary action. This letter contained no notice of appeal rights with respect to its role in prolonging Complainant's promotion to CPA II.

65. Complainant was not promoted back to CPA II until September of 2000.
66. Complainant remains in the Colorado Springs office through the present. Sagara testified that the reason he has not transferred Complainant back to Pueblo now that he is a CPA II again is because he "still needs supervision."

#### Effect of Demotion on Complainant's Salary

67. At the time of his demotion, June 9, 1999, Complainant was a CPA II earning the highest level of salary, \$4,324 per month. After the July 1, 1999 salary survey increase he would have received \$4,432 per month.
68. Respondent demoted Complainant to a CPA I in the mid-salary range, to \$3,083 per month. After the salary survey increase effective July 1, 1999, he earned \$3,160.
69. From July 1, 1999 through July 1, 2000, Complainant lost \$1,272 per month, for a total of \$15,264, as a result of the demotion.
70. After the July 1, 2000 salary survey increase of 3.5%, Complainant's pay increased to **\$3270** (as opposed to \$4586, had he not been demoted).
71. On September 1, 2000, Complainant was promoted back to the CPA II position, with a new salary of \$3815.
72. Complainant is now paid \$771 per month less than he would have been had he not been demoted, or \$9252 per year in perpetuity.
73. Complainant has suffered a total loss of income thus far of over \$19,912 as a result of the disciplinary action.

#### Disciplinary Action Taken Against Other, White, DOC Employees

74. Sagara issued a disciplinary action letter against a white male Pueblo officer, X, on October 20, 1999. X was chief firearms instructor at the time. Sagara made these findings in his letter: X had drawn his weapon and pointed it at an empty chair in the office and made derogatory remarks about an inmate, in violation of DOC firearm regulations; Chaddick had bore false witness against another officer or inmate, in violation of the DOC staff code of conduct; and, the subordinate staff in the Pueblo office found his words and tone generally to be "hurtful and demeaning." The gun-drawing was not an isolated incident. At his pre-disciplinary meeting with Sagara, X apologized for the gun-drawing

incident, but took no responsibility for bearing false witness against others or for creating a hurtful and demeaning workplace for his subordinates. Sagara initially imposed a twelve-month 10 percent salary reduction in the amount of \$443, which upon settlement was reduced to 5 percent, or \$221, for 3 or 6 months. Sagara imposed neither training nor a transfer.

75. On January 30, 1998, DOC imposed discipline on a Correctional Officer III, for abandoning his post without obtaining relief; calling the sheriff's department and asking that they rescue him from being kidnapped by the DOC (after being told he could not leave due to road closure for bad weather); and refusing to follow direct orders. He was demoted to Correctional Officer II (lead worker level) with a loss of \$484 per month salary.
76. On June 15, 1998, DOC imposed discipline on a Correctional Industry Sector Supervisor who had a previous history of disciplinary problems. In 1990 he had received a corrective action for driving a state vehicle recklessly and being intoxicated. In 1994 he had received a corrective action for taking physical action towards a fellow staff member and using profanity towards other staff. In 1998, numerous accusations had been made that he engaged in sexual harassment of numerous female staff under his supervision in the form of unwelcome hugging and kissing, sexual jokes and inappropriate sexual statements. He was found to have a history of making comments and jokes of a sexual nature about and towards females. He was demoted to Correctional Services Plant Supervisor II, transferred, and ordered to attend training in sexual harassment. He suffered a loss in pay of \$716 per month.
77. On August 22, 1996, DOC imposed discipline on a Correctional Security Services Officer II for the following: on two separate occasions sleeping on duty; displaying a disrespectful attitude towards his captain; and threatening a staff member that he believed had reported him for sleeping on duty. DOC imposed a one-year reduction in salary of \$123 for a total of \$1476.
78. On March 24, 1997, DOC imposed discipline on a Correctional Service Officer I for the following: failing to report or correct another officer for willfully misusing pepper spray on duty, and failing to properly decontaminate the areas sprayed. His offer of a promotion to level II was withdrawn. On April 23, 1997, this officer received further disciplinary action for delivering contraband in the form of a VCR and pornographic videotape to an inmate. DOC reduced his pay by \$218 per month and transferred him to a shift where he would receive more supervision.

## Complainant's and Pacheco's Charges of Discrimination Against Respondent

79. In 1996 and in October of 1997, Ramirez filed charges of national origin and race discrimination with the Colorado Civil Rights Division ("CCRD"). He alleged that he had made written and verbal complaints about harassment by a white lead worker, discrimination, and being asked unnecessarily whether he was a U.S. citizen, and had been retaliated against in the form of a corrective action (later rescinded upon review); failure to promote; and denial of work leader status. He alleged he had been passed over for promotions by white employees that were less qualified.
80. During this period, Ely Pacheco, the other CPA II in the Pueblo office also filed charges of discrimination and retaliation against DOC.
81. In 1997, Complainant and Pacheco filed a case in federal district court alleging race and national origin discrimination and retaliation ("the lawsuit"). The lawsuit named as defendants DOC, Jeanneene Miller, Director of Division of Community Corrections, who was sued individually, and Aristedes Zavaras, Executive Director of DOC, who was sued in his official capacity. (Exhibit L) The lawsuit alleged the same facts that were contained in the above CCRD charges, as well as violations of whistle blower laws and denial of First Amendment rights.
82. In April of 1998, after being denied another promotion to a less qualified white individual, Complainant amended his CCRD charge.
83. On November 10, 1999, Complainant filed an EEOC charge of race and national origin discrimination and retaliation against DOC. (Exhibit CC) He alleged that after testing #1 with a score of 98% for two new Community Corrections Administrator I positions, the positions were given to two white males that were less qualified for the position. He alleged Ms. Miller, sued individually by Complainant in the lawsuit, participated in the interview panels for these positions, and informed Complainant on January 18, 1999 that he was not hired because he was not a "good fit." He alleged that he had not been selected for the positions in retaliation for having spoken out and filed the lawsuit against DOC for prior discrimination and retaliation.
84. Complainant filed a second charge of discrimination and retaliation against DOC on November 10, 1999, alleging that on August 1, 1999 he had been denied promotion to the same position and that an unqualified white male had been hired.

### Allegations of Retaliation for Filing Charges of Discrimination

85. In 1996, after Complainant and Pacheco had made numerous complaints about Slayton (that were only partially race based), DOC employees asked Complainant and Pacheco if they were U.S. citizens. It had been a prerequisite of their "post certified" positions to be U.S. Citizens, and this information was in their personnel files; therefore, Complainant and Pacheco took offense at being asked this question.
86. On May 15, 1996, they wrote a letter to Sagara explaining that they felt it was culturally insensitive to have been asked that question, when their research confirmed no white DOC employees had been asked that question. Sagara never responded to this letter.
87. On May 15, 1996, Complainant and filed a complaint with DOC's Inspector General regarding workplace harassment and discrimination, including ethnic-related harassment of a racial nature, alluding to the citizenship inquiry.
88. On May 21, 1996, Miller sent Complainant a letter indicating she was commencing disciplinary action against him. The basis of the action was an allegation by the white woman who had inquired about his citizenship, that he had called her a "brown person." In fact, he had asked her if she asked him about his citizenship because he was a brown person. Miller had no discussions with him prior to issuing this letter.
89. On July 26, 1996, after the pre-disciplinary meeting, a white regional director for DOC issued a corrective again against Complainant for his having complained about the U.S. citizenship inquiry.
90. The DOC Inspector General, Gerald Gasko, eventually overturned this corrective action.
91. On July 19, 1996, without ever discussing it with Pacheco, Miller issued a counseling letter to Pacheco for violating the DOC harassment policy in challenging the inquiry about his U.S. citizenship. He grieved this letter. During its pendency, on September 3, 1996, Miller sent him a letter indicating she was initiating a new corrective action process against him regarding the U.S. citizenship inquiry.
92. At his pre-disciplinary meeting with Robert Cantwell, Chief of Staff at DOC, Pacheco produced a tape recording proving that he had never called the white woman a "brown person." No disciplinary action was taken against Pacheco.

93. During that meeting with Cantwell, Cantwell told Pacheco that raising the harassment complaint and challenging the inquiry about his U.S. citizenship could in itself be racist.
94. In mid-to-late 1996, Complainant called Sagara's attention to inappropriate fax cover sheets being used by Slayton, including one with an overweight police officer on it. After changing cover sheets to one that had an American Flag, reading "second to none," immediately following the U.S. citizenship incident, Ramirez sent a copy to Sagara with a comment that Slayton was being "passive aggressive." Sagara issued a letter of counseling to Complainant for referring to Slayton in that fashion.
95. In January of 1999 Miller and Sagara sat on an interview panel to consider Complainant for a promotion. He was denied the promotion. Miller informed Complainant he was not "a good fit." Two white individuals were given the two open positions.
96. Complainant seeks reinstatement at his former level of pay, back pay and benefits, and rescission of his transfer to Colorado Springs.

## DISCUSSION

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 warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeak v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

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). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

## **A. Credibility**

Complainant's testimony is given great weight. He presented as an intelligent, reasonable, even-headed individual. He did not attempt to excuse or minimize his conduct at issue; he evenly explained the situation. He did not attempt to exaggerate or manipulate facts to his own benefit. He told the straight story of what happened in December of 1998 and January of 1999. He owned his responsibility for what occurred.

One area of Complainant's testimony that deserves attention here is his statement that he continuously "topped off" the oil in the state vehicle, and never allowed it to become so low that it would cause the engine to "freeze up." This testimony is corroborated by the fact that he sought the written opinion of the mechanic regarding whether the failure to change oil, in itself, as opposed to allowing the oil to run out, could cause an engine to fail. He would not have sought that opinion if he had simply failed to put any oil in the engine. Further, the fact he had a quart of oil in the vehicle at the time it was towed demonstrates that he was tracking the amount of oil.

Similarly, when discussing his heated exchange with Slayton in Colorado Springs, he admitted that he became angry, that he felt his treatment was entirely inappropriate, and he admitted to tossing the crumbled up paper in Slayton's direction. Complainant's testimony was both internally consistent and was corroborated by the evidence offered by Respondent.

Sagara's testimony was contradicted in many instances by his disciplinary action letter. Of paramount importance is the fact that Sagara testified at hearing that he disciplined Complainant for some reasons that were not listed in his disciplinary letter. For instance, he testified at length on direct exam about Complainant not having access to the handcuffs he left in his vehicle while on the job, thereby impinging on his ability to safely execute an arrest, and placing himself, the public, and other officers in danger. However, this issue was not identified at all in his disciplinary letter, and he admitted on cross exam that he did not discipline Complainant for this.

Sagara clarified on cross-examination that he did not discipline Complainant for having left any of the items in the vehicle, with the exception of the weapon. On re-direct examination by Respondent's counsel, however, Sagara answered "yes" to the question of whether Complainant's having left the electronic monitoring device was "a consideration in the seriousness" of Complainant's actions. Here, Sagara demonstrated that he was willing to contradict his own sworn testimony in order to accommodate his attorney's apparent desire to have him testify a certain way.

Lastly, Sagara testified repeatedly at hearing that he disciplined Complainant so harshly because he failed to take responsibility for his actions. This concern appeared nowhere in his disciplinary action letter. Further, it strains credulity for Sagara to conclude that Complainant did not take responsibility for his actions, when Complainant admitted his

negligence and offered to pay for the new engine out of his own pocket. If these actions of Complainant do not constitute acceptance of responsibility for his actions, it is unclear what would.

These discrepancies between Sagara's disciplinary letter and his sworn testimony create a credibility gap: it appeared as though Sagara was willing to embellish his testimony at hearing in order to assure his discipline of Complainant would be upheld. This demonstrated a bias against Complainant, as opposed to an objective approach of a senior manager to carrying out his appointing authority functions.

Sagara testified on direct examination that he disciplined Complainant in part because his transport of the prisoner implicated "safety issues and an escape possibility." However, the evidence was un rebutted that Complainant explained to Sagara he had transported a woman pardoned by the Governor, from prison to her apartment, for which there was no safety or escape risk. Sagara's testimony on this issue lacks weight and is self-serving.

Lastly, the fact that Sagara ordered Complainant to attend the month-long training academy for new DOC hires, knowing that this would humiliate him and that none of the contents of that training were directly related to the conduct for which he was disciplined, further suggests that Sagara was motivated in part by a personal desire to humiliate Ramirez.

All other witnesses called by both parties presented as credible and unbiased.

**B. Did Complainant commit the acts for which he was disciplined?**

**Failure to Perform Preventive Maintenance, Resulting in Destruction of Vehicle Engine, Loss of Warranty, and a Cost to the State of \$4,253.72.**

Complainant was disciplined in part for demonstrating "negligent disregard for state property resulting in the destruction of a state vehicle engine by failing to provide normal, proper and routine vehicle maintenance, which included oil changes as set out by the vehicle manufacturer in order to hold the vehicle warranty in place." Respondent has proven that Complainant committed this act. Complainant admitted at hearing that he never took the car in for any preventive maintenance, that he never changed the oil, and that he topped off the oil periodically. DOC Fleet Management regulations required him to perform preventive maintenance every 5000 miles, or at least four times during his custody of the vehicle.

Complainant argues that it would be improper to sustain discipline for this act, since Respondent never proved that Complainant's negligence was the precise reason for the engine breaking down. He premises this argument on the fact that "low oil" was the primary reason for the engine breakdown, and that since he did not allow the oil to run low,

he can not properly be held responsible for the engine's failure. However, the plain language of the disciplinary action letter defeats this argument, since it also cites severe oil breakdown and no oil change as reasons for the engine's failure<sup>1</sup>. The letter states, "the service advisor at Freedom Ford reported to the DOC Inspector General's investigators that the reason the engine failed was due to lack of maintenance, i.e., low engine oil, severe oil breakdown and possibly a factory installed oil filter, i.e. no oil change." (Emphasis added).

It is uncontested that the failure to perform preventive maintenance resulted in the loss of the vehicle's warranty and in a cost to the state of \$4,253.72. Respondent has met its burden here.

Complainant's failure to perform preventive maintenance on the state vehicle entrusted to him constituted negligent disregard for state property and a violation of DOC regulations requiring him to perform periodic preventive maintenance.

It is a mitigating factor that Complainant did regularly "top off" the oil. He believed that doing this would prevent the engine from seizing and would keep it operating.

#### Failure to Notify Supervisor the State Vehicle Had Been Towed

Respondent disciplined Complainant in part for failing to inform his supervisor that the car was out of commission until January 26, 1999. Complainant admits that he did not notify his supervisor that his vehicle had been towed on December 23, 1998. He did not notify his supervisor that the car was out of circulation and in the garage until January 26, 1999, the day after he learned that the engine was inoperable and had to be replaced.

Sagara's letter stated that Complainant had "shown a **wanton disregard to report essential and important job related information to supervisory personnel**." (Emphasis in original). The letter further relied on a state Executive Order, Integrity in Government, which states, "Each person in public office in the executive branch of government . . . shall demonstrate the highest standards of personal integrity, truthfulness and honesty and shall through personal conduct inspire public confidence and trust in government." It also relies on the DOC Code of Conduct, AR 1450-1; "There is an obligation to be accountable and efficient in the use of state resources." "Loss, misuse, misplacement, theft, or destruction of state property must be reported to appropriate supervisor immediately."

As found above, Complainant had no intention of deceiving his supervisor by keeping information from him. Complainant did not know the status of the vehicle until January 25, 1999. The dealership gave him the brush off for four full weeks on the status

---

<sup>1</sup> While Complainant raised a question at hearing about whether there might be another cause for the engine's failure, the disciplinary action letter citing the Ford dealership is the only evidence in the record on this issue. It is therefore determinative of this fact.

of the car. Complainant didn't know if the starter needed to be replaced, or if it was a more serious problem. He had no idea what the level of seriousness of the problem was.

Regarding the executive order relied upon by Respondent; there has been no showing that Complainant's failure to call his supervisor evinced a lack of integrity, truthfulness and honesty. When he did inform his supervisors of the problem, he readily admitted that he had failed to perform preventive maintenance on the vehicle, demonstrating truthfulness and honesty.

With regard to the DOC staff code of conduct, it requires immediate reporting of the "loss, misuse, misplacement, theft, or destruction of state property." Here, during the wait from December 23 through January 25, Complainant had no information that the car had been lost, misused, misplaced, stolen, or destroyed. He therefore did not violate this provision.

The staff code of conduct also required that Complainant be "accountable and efficient in the use of state resources." This general provision does not translate into a specific mandate to call one's supervisor immediately when a state vehicle is towed, particularly if the status of the vehicle is unknown. Here, the first two weeks of the vehicle's absence were over the Christmas and New Year's holidays; it is understandable how Complainant could have decided to wait until the holidays passed.

However, this provision, which simply codifies common sense and good judgment, did require that once the holidays passed, Complainant should have contacted his supervisor to inform him of the status of the vehicle. A vehicle is an expensive state asset.

General accountability for state assets certainly requires that employees inform their supervisors within a reasonable time period when the status or condition of such an asset is in question. In mitigation, as discussed above, Complainant had no intention of hiding anything from his supervisor. He merely exercised poor judgment.

#### Failure to Obtain Approval to Use Personal Vehicle for DOC Business

Respondent disciplined Complainant in part for his failure to obtain managerial approval to use his personal vehicle to conduct state business. Sagara's letter stated that Complainant's failure to notify his supervisor and obtain authorization to use his personal vehicle for DOC business "supports a finding that you conducted yourself **with total indifference** to DOC governing authority. You have conceded that you did transport an inmate in your personal vehicle without any authorization, exposing the DOC to potential legal liability in the event of an accident or injury. This action was in **blatant disregard** to elementary department regulations."

DOC Administrative Regulation 200-9 states in part, "When specifically authorized to do so, staff may use personal vehicles for official DOC business, subject to the following restrictions: 1. The employee must demonstrate that the vehicle is properly licensed and

carries liability insurance at limits established by the DOC Director of Legal Services or designee . . . 2. The Security Manager or supervisory employee must approve the specific use of the vehicle in writing. Such approval, for repetitive use, will detail the circumstances under which the employee is permitted to do so, and the general limits of travel."

Respondent has proven that Complainant violated this administrative regulation by using his personal vehicle for work for the period December 24, 1998 - January 24, 1999 without prior authorization.

With respect to this violation, there are a number of mitigating factors. First, his car was insured, thereby minimizing the state's exposure to liability. Second, the one prisoner Complainant transported in his personal vehicle was a woman that had been pardoned by the Governor. He picked her up at a prison facility and drove her two and a half miles to a private residence. This posed absolutely no security risk.

The evidence at hearing indicated that Complainant spent 75-80% of his time in the office. Further, even after imposing discipline on Complainant for failing to obtain written authorization to use his personal vehicle for DOC business, no manager at DOC issued Complainant such written authorization for five months.

#### Leaving Items in the State Vehicle

Sagara's letter cited Complainant for violating DOC AR 1250-47, "Weapons for Parole and Community Corrections Staff." This policy prohibits officers from carrying any weapons that are not authorized in writing and provides that any careless handling of a duty weapon shall be subject to corrective or disciplinary action. It further requires that officers "provide maximum security for all duty weapons located within their residence while off duty, both to provide for the safety of other family members and to lessen the possibility of the weapons being obtained and/or used by unauthorized persons. When on duty and the weapon is not being worn by the officer, the weapon must be stored under lock and key."

Sagara's letter stated, "I find that you had possession of an unauthorized firearm by virtue of having the weapon stored in your assigned state owned vehicle that you have demonstrated a wanton and reckless disregard to DOC AR relating to Weapons for Parole and CC staff. Moreover, that your conduct posed an unacceptable risk to public safety. Your failure to provide proper security of this weapon further demonstrates an attitude of reckless indifference to the public safety in complete defiance to elementary DOC regulations."

As a threshold issue, Complainant did not have possession of an unauthorized firearm. Complainant never stated to Sagara that he carried the weapon or used it on duty.

Sagara's disciplinary letter acknowledges that Complainant told him it was his personal weapon. Despite this, Sagara nonetheless made an uninvestigated and

unconfirmed "finding" that he had "possession" of an unauthorized duty weapon and had violated the duty weapon regulations.

The uncontested evidence is that the weapon left in the vehicle was Complainant's personal weapon. AR 1250-7 governs duty weapons only. Therefore, it does not apply. Respondent has failed to meet its burden to prove that Complainant violated AR 1250-7.

DOC has no regulation barring transport of a personal weapon in a state vehicle; in fact, this is a common practice. Notwithstanding that fact, does DOC have the authority to discipline an officer for leaving his personal weapon in a DOC vehicle in a situation that uniquely gives rise to security concerns? This ALJ finds that it does. DOC has a legitimate interest in assuring that officers adhere to generally accepted standards in handling their personal weapons in connection with state vehicles. Section 24-50-116, C.R.S. provides, "Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority."

If it is a violation of DOC generally accepted standards for Complainant to have left his personal weapon in a state vehicle, in a bag, under a canopy, in a locked and gated area at a car dealership, with no matching ammunition, then he can be disciplined for it. However, the testimony of both Complainant's and Respondent's witnesses was that it is common and acceptable practice for DOC officers to leave personal firearms in state vehicles either overnight in front of their residences or during the day while in hearing. Further, Sagara 's discipline on this issue was premised on his finding that Complainant possessed the gun as an unauthorized duty weapon.

There is insufficient evidence in this record to sustain discipline against Complainant for leaving his personal weapon (with no matching bullets) in a bag, covered by a canopy, in the back of his vehicle, in a locked and gated car dealership lot.

**C. Was the Action of the Appointing Authority Arbitrary, Capricious, or Contrary to Rule or Law?**

**Respondent Violated Rule R-6-6**

R-6-6, 4 Code Colo. Reg. 801, provides:

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

Sagara failed to take numerous of the above factors into consideration in this case. He testified that Complainant offered him no mitigating information at the R-6-10 meeting. However, Complainant informed him in that meeting he did keep a quart of oil in the vehicle at all times and topped it off periodically, assuring it did not run low. He even went so far as to obtain the written opinion of a mechanic on the usual warning signs that precede the seizure of an engine. Sagara gave this information no consideration, in violation of Rule R-6-6.

Complainant had no prior disciplinary or corrective actions, and Sagara had personally rated Complainant at the "Commendable" level during his two previous periods as his supervisor. Complainant had a thirteen-year long unblemished career at DOC. In June of 1999, he had been commended for saving the life of one of the offenders under his charge. Sagara's disciplinary letter and his testimony reveal that he gave no consideration to any of this mitigating information; he did not testify that he considered any of these factors on direct examination. It was not until asked on cross exam about Complainant's employment history at DOC that he stated he had given it slight consideration. However, this testimony is given little weight.

Turning to the "nature, extent, seriousness, and effect of the act, the error or omission," Complainant's gross negligence in failing to have the car serviced is a serious omission warranting disciplinary action. A corrective action would not have been appropriate since Complainant knew that he was violating the fleet management rules. However, this omission had nothing to do with Complainant's actual performance of his duties as a Community Programs Agent. This fact appears to have been completely overlooked by Sagara. Further, while Complainant clearly should have informed Hand that the car was in the shop by mid-January at the latest, there is no evidence in the record that Complainant generally had a difficult time accepting the authority and supervision of his managers at DOC. Complainant neglected, once, to inform his supervisor that his state vehicle was in the shop. He did not openly defy Hand's authority in any way.

Turning again to the personal weapon issue, Complainant told Sagara the weapon found in the state vehicle was his own, not his duty weapon, and that it indeed was not approved for duty weapon use by DOC. Sagara outright refused to consider this statement that he never used it as his duty weapon. Without making any inquiry or investigation to establish for certain that Complainant had used the gun as his duty weapon, he made a "finding" that Complainant had "possession of an unauthorized firearm" in the vehicle. Sagara violated R-6-6 by refusing to consider Complainant's statement that the gun was his personal weapon. Sagara also failed to consider the well-known fact that most DOC employees with children routinely store their personal weapons in state vehicles.

With respect to Complainant's use of his personal vehicle for DOC business, Sagara failed to inquire whether Complainant even carried insurance on his vehicle, central to the liability issue. He also failed to consider Complainant's statement to him at the R-6-10

meeting that the prisoner Complainant transported was a pardoned woman whom he drove home from prison. This information constituted strong mitigation, since the transport posed no security risk and no safety risk to the public. Sagara's testimony that the transport implicated safety issues and constituted a possible escape situation is unsupported by any evidence, and demonstrates a persistent refusal to consider Complainant's statements to him in mitigation.

### Respondent Retaliated Against Complainant

Complainant alleges that he has been excessively disciplined in retaliation for exercising protected rights under the Colorado Anti-Discrimination Act, at section 24-34-402(1)(e)(IV), 7 C.R.S. (1999)("the Act"). This provision states:

"It shall be a discriminatory or unfair employment practice . . . for any person, whether or not an employer, . . . [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article. . . ."

To establish a prima facie case of retaliation under the Act, Complainant must establish: 1) he engaged in the protected activity of opposing discriminatory conduct or filing a charge with the commission; 2) he was subjected to adverse employment action; and 3) a causal connection exists between the protected activity and the adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10<sup>th</sup> Cir. 1996). Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a nondiscriminatory reason for the challenged action. The plaintiff may then demonstrate that reason to be a pretext for retaliation.

Complainant has established that he engaged in protected conduct. He has filed numerous charges with the Colorado Civil Rights Commission alleging national origin and race discrimination and a long pattern of retaliation for complaining about such discrimination. His most recent charge [preceding the disciplinary action challenged herein] was his April 1998 modification of his charge to include a denial of a promotion.

Complainant has suffered adverse employment action in the form of the demotion and loss of over \$19,000 in pay, as well as the potential future loss of well over \$700 per month following his September 2000 reinstatement as a CPA II.

The last element of the prima facie case is whether Complainant has demonstrated a causal connection between the protected activity and the adverse action. A retaliatory motive may be inferred when an adverse action closely follows protected activity. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir.1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th

Cir. 1996). For instance, the Tenth Circuit has held that a six-week period between protected activity and adverse action may, by itself, establish causation.

Generally, unless the action is "*very closely* connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* At 328 (citations omitted; emphasis in original). The close temporal proximity standard is relaxed, however, "where the pattern of retaliatory conduct begins soon after the [protected activity] and only culminates later in actual discharge" [or a more serious adverse action]. *Id.*

Here, Complainant amended his CCRD charge to add a new charge of failure to promote in April of 1998. His discipline occurred in June of 1999 (after numerous delays of the Rule R-6-10 meeting). This is a period of over a year. Since the adverse action is not "very closely" connected in time to the protected activity, we must look at whether additional evidence might establish causation, particularly, whether a pattern of retaliation commenced after Complainant filed his first claim with CCRD in 1996.

Additional evidence in this record that might support a finding of causation includes the following: the retaliatory actions taken against Complainant after he complained about the U.S. citizenship inquiry (including a notice of disciplinary action letter issued six days after filing his complaint) and a corrective action that was later overturned), and Sagara's letter of counseling to Complainant for calling Slayton "passive-aggressive" after Slayton taunted Complainant about his citizenship with a fax cover sheet); Sagara's failure to consider mitigating evidence and imposition of excessive discipline (over \$19,000 thus far, and over \$9,000 annually into the future on a permanent basis); Sagara's apparent bias against Complainant, discussed above, for which there is no manifest explanation; and Sagara's attempt to humiliate Complainant by sending him to the Training Academy for new officers, which was completely unrelated to his offense. Sagara's placement of Complainant back under Slayton as his lead worker, after having removed him from that post in response to allegations of creating a hostile work environment, is a key factor here. For Sagara to reverse himself on this decision and place Complainant back into what Sagara knew Complainant perceived to be a hostile work environment has an "in your face" quality that smacks of retaliation. Lastly, Sagara's and Miller's failure to remove Miller, a defendant in Complainant's lawsuit, from the interview panel for promotion in January 1999 is a factor: they made no attempt to assure the panel was objective.

Further evidence supporting a finding of causation is Respondent's retaliatory treatment of Pacheco. See Coletti v. Cudd Pressure Control, 165 F.3d 767, 776-7 (10<sup>th</sup> Cir. 1999)(testimony of other employees about treatment by defendant employer is relevant to issue of employer's discriminatory intent if it establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motives). After Pacheco complained about the U.S. citizenship inquiry, he received a counseling letter for violating the DOC harassment policy in challenging the citizenship inquiry. Respondent also attempted to discipline him for calling the inquirer a "brown person," but his tape recording

of the actual conversation resulted in the matter being dropped.

The above additional evidence constitutes a sufficient basis upon which to find causation. Complainant has therefore presented a prima facie case of retaliation.

Respondent has articulated a nondiscriminatory reason for the challenged action, in that Complainant has committed serious omissions that appropriately subject him to disciplinary action.

Complainant must next demonstrate that Respondent's proffered reason for the adverse action is a pretext for retaliation. Pretext may be demonstrated in a number of ways. One such means is by demonstrating disparate treatment, as in Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997). In that case, a black woman was terminated for conduct nearly identical to that committed by a white woman, who was not terminated.

Comparing Complainant's misdeeds to those in Findings 72 through 76 above leads to the conclusion that Complainant was excessively disciplined. He was treated differently. See Elmore v. Capstan, Inc., 58 F.3d 525, 530 (10<sup>th</sup> Cir. 1995)(when comparing relative treatment of similarly situated minority and non-minority employees, the comparison need not be based on identical violations of identical work rules; the violations need only be of "comparable seriousness."). X drew a gun, lied about co-workers, and created a generally hurtful and demeaning work environment for support staff. He showed no remorse for the latter two offenses. This behavior demonstrated a serious lack of respect for DOC regulations, for the safety of those around him, for the truth, and for the welfare of those that work for him on a daily basis. Yet Sagara imposed a total penalty of between \$663 and \$1326, with no training, no transfer, no demotion.

Complainant engaged in knowing disregard of the regulations requiring regular vehicle maintenance, which is grossly negligent, but he did not intentionally damage the vehicle. He attempted to maintain it by regularly topping off the oil. Complainant's actions were unrelated to his job performance, and did not adversely affect anyone he worked with. While he should have called his supervisor earlier, there is no indication he attempted to conceal information from him or had difficulty accepting supervision or authority. Yet Complainant has been severely punished, humiliated, and economically damaged for his actions, suffering economic loss of over \$19,000 to date and future income of \$9,552 annually. To impose on Complainant a permanent future loss of over \$9,552 every year for costing the state \$4,254 is unduly harsh.

Sagara's glaringly different approaches to X and Ramirez reveals disparate treatment, demonstrating that the severity of his discipline of Ramirez was a pretext for retaliation.

Other means of demonstrating pretext include showing "that an employer's proffered

explanation is unworthy of credence." Randle v. City of Aurora, 69 F.3d 441, 451-2 (10<sup>th</sup> Cir. 1995), citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 at 256 (1981). As discussed above, Sagara's testimony is entitled to little weight, due to internal inconsistencies, contradictions by other evidence, his apparent bias against Complainant, and his failure to take major mitigating factors into consideration. Sagara's general lack of credibility renders his explanation for imposing such harsh discipline on Complainant unworthy of credence.

#### Respondent did not violate Complainant's Appeal Rights

Complainant argues that Respondent violated his due process rights by failing to advise him of his right to appeal Sagara's May 1999 letter regarding the Slayton grievance. He claims that since his promotion back to CPA II was delayed for nine months due to the pendency of that grievance, it was equivalent to being disciplined. However, Sagara's June 9 letter imposing discipline gave Sagara the discretion to make the promotion whenever he deemed appropriate, based on performance factors. The appointing authority's consideration of the grievance therefore did not trigger an appeal right. Further, Complainant had already appealed the discipline, and he has received his procedural due process in the context of this hearing.

#### Sagara's Action was Arbitrary and Capricious

In determining whether an agency's decision is arbitrary or capricious, the court must determine whether a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Dept of Social Services, 895 P.2d 1188, 1192 (Colo. App. 1995). Sagara did not consider all of the evidence before him. Further, his response to the situation was excessively harsh. It is inconceivable that a long-term employee with a clean record who failed to maintain a state vehicle resulting in \$4,254 in damage, and who committed other minor rule violations, should be forced to pay \$15,264 in the first year, and over \$9,250 every year thereafter in perpetuity. A reasonable manager would not impose such a severe penalty.

#### **D. The Discipline Imposed Was Not Within the Range of Reasonable Alternatives Available to the Appointing Authority**

Thus far, the discussion has demonstrated the following: Complainant did not commit all of the acts for which he was disciplined; Sagara violated Rule R-6-6 by failing to consider many of the required factors; and DOC retaliated against Complainant by imposing such harsh discipline. Based on the foregoing, the discipline cannot stand.

Complainant committed serious omissions resulting in \$4,254 in damage to a state vehicle and loss of the warranty on the vehicle. He failed to obtain prior authorization to drive his own vehicle for work purposes. He failed to timely inform his supervisor about the

fact the vehicle was in the shop for over a month. Discipline is clearly appropriate in this situation.

In January 2000, Hand suggested to Sagara that he be reinstated with full back pay. Clearly, Complainant's immediate supervisor viewed Complainant's performance to be at a fully competent CPA II level, and he was actively advocating on Complainant's behalf. Instead of taking the line supervisor's suggestion, Sagara chose to delay the promotion during the pendency of what was obviously a minor feud between Complainant and Slayton. Sagara knew that Slayton would be trouble for Complainant when he transferred him to the Colorado Springs office. Complainant had been raised legitimate issues regarding Slayton's inappropriate conduct for years, and Sagara had already removed him as his supervisor once. Further, Sagara knew that Slayton had made repeated false accusations against other employees, including Hand. He therefore made an extremely questionable decision to delay Complainant's promotion.

It view of these facts, it is appropriate to reinstate Complainant to the position of CPA II at his original rate of pay commencing January 1, 2000. This will result in his net loss of \$7632, an amount that covers the state's cost of replacing the engine and also punishes him in a meaningful way for his other violations.

While there is no evidence supporting the imposition of the training academy, that unnecessary humiliation cannot be undone.

Sagara testified that the reason Complainant remains in the Colorado Springs office is that he still needs some extra supervision. This testimony was directly contradicted by Hand, Complainant's immediate supervisor. Further, Sagara gave no legitimate business reason for needing Complainant in the Colorado Springs office. Complainant resides in Pueblo, and working in Colorado Springs (still under Slayton as work leader) imposes a hardship on him. Complainant will pay for his errors in the amount of \$7632. It is unnecessary to continue to punish him by commuting to Colorado Springs every day. Further, the remedy for retaliation should make Complainant whole. See Lanes v. O'Brien, 746 P.2d 1366, 1373 (Colo. App. 1987). The transfer is therefore immediately rescinded and Complainant is to return to the Pueblo office.

#### **E. Complainant is Entitled to Attorney Fees**

Complainant requests attorney fees and costs under section 24-50-125.5, C.R.S., which states in part:

"if it is found that the personnel action . . . was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency. . . ."

Board Rule R-8-38 provides the following guidance in interpreting this statutory provision:

"A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented."

A personnel action made in bad faith, that was malicious, or was used as a means of harassment "shall be defined as an action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth."

"A groundless personnel action shall be defined as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce **any** competent evidence to support such an action." (emphasis in original)

Complainant argues that the punishment imposed upon him is "so excessive that it can be found to be nothing less than an act of bad faith, abusive maliciousness, and harassment. In addition, portions of the disciplinary action are clearly groundless and frivolous."

Sagara ignored critical factors under Rule 6-6 and failed to give candid consideration to important mitigating evidence. The record in this case demonstrates that Sagara engaged in a pattern of disrespect for the truth. Sagara intentionally retaliated against Complainant for filing charges of discrimination and retaliation. Such retaliation is by definition in bad faith. Under these circumstances, and in view of all the findings and conclusions reached above, Complainant has met his burden of proving that Respondent's action was imposed in bad faith, to harass him, and was disrespectful of the truth. He therefore is entitled to attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Complainant committed some, but not all, of the acts for which he was disciplined;
2. Respondent's action was arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives;
4. Complainant is entitled to an award of attorney fees and costs.

## ORDER

Respondent's action is modified pursuant to section 24-50-103(6), C.R.S. Complainant is reinstated to the position of Community Programs Agent II effective January 1, 2000 at his original rate of pay, and shall be reimbursed for all back pay from that date forward. **Complainant shall receive all appropriate salary increases he would have received but for the disciplinary action: \$4,432.00 from January 1, 2000 through June 30, 2000; and \$4,586.00 from July 1, 2000 through the present.** The transfer to Colorado Springs is rescinded and Complainant is to be immediately reassigned to the Pueblo office. Respondent is to pay Complainant attorney fees and costs incurred in bringing this action.

DATED this \_\_\_\_\_ day of  
January, 2001, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, Colorado 80203

### NOTICE OF APPEAL RIGHTS

#### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### PETITION FOR RECONSIDERATION

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

### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

### ORAL ARGUMENT ON APPEAL

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

### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of January, 2001, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the

United States mail, postage prepaid, addressed as follows:

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

and in the interagency mail, addressed as follows:

Coleman Connelly  
Assistant Attorney General  
Personnel and Employment Law Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

---