

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

Charles Hendricks,

Complainant,

v.

Colorado Department of Corrections, Denver Reception and Diagnostic Center,

Respondent.

---

Hearing on this matter was commenced on April 7, 2000 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. Hearing in this matter continued on June 5 and concluded on June 6, 2000.

**MATTER APPEALED**

Complainant, Charles Hendricks (“Complainant” or “Hendricks”) appeals his disciplinary demotion by the Department of Corrections, Denver Reception and Diagnostic Center. (“Respondent” or “DRDC”).

For the reasons set forth below, the actions of Respondent modified in part pursuant to CRS 24-50-125 (1999).

**PRELIMINARY MATTERS**

Respondent was represented by Susan J. Trout, Assistant Attorney General and Joseph Q. Lynch, Assistant Attorney General, 1525 Sherman Street, 5<sup>th</sup> Floor, Denver, CO. Respondent’s Advisory Witness for the proceedings was Warden William Bokros, DRDC, Department of Corrections (“DOC”).

Complainant was represented by Todd J. McNamara, Esq. and Kristina James, Esq. Complainant was present for the evidentiary proceedings.

**1. Procedural History**

**A. Pleadings**

Complainant filed his Notice of Appeal on February 22, 2000. Complainant appealed his disciplinary demotion from Corrections Officer II to

Corrections Officer 1. In that Notice of Appeal, Complainant “recognized” that some discipline is appropriate but contends that permanent demotion is arbitrary and capricious.

Complainant’s Prehearing Statement was filed on March 16, 2000. Respondent’s Prehearing Statement was filed March 17, 2000. As indicated in a Notice of Compliance R-8-55, 4 CCR 801, the parties attempted to resolve the matter prior to proceeding to hearing.

An Amended Prehearing Statement was filed March 28, 2000 by Respondent.

On April 4, 2000, Complainant moved for the hearing to be continued based upon new information that other employees at the Department of Corrections had been subjected to workplace harassment, intimidation and violence by a lieutenant at DRDC but that no personnel action had been taken against the lieutenant. In Complainant’s motion, issues are raised as to racial discrimination and an argument is presented that Complainant’s appeal should be continued to determine whether this new information is relevant. On April 6, 2000, Complainant supplemented his motion to continue the hearing and noted that he would be amending his appeal to include a charge of discrimination based on race.

On April 12, 2000, the administrative law judge (“ALJ”) issued an Interim Order re: Hearing, Discovery, and Amendment to Notice of Appeal and Notice of Hearing. The hearing was deemed commenced on April 7, 2000 and the order addressed a number of preliminary issues including those cited above. The ALJ determined that the Notice of Appeal could not be amended to include a claim of discrimination because it was time-barred. The ALJ did, however, allow Complainant to “raise any issues as to alleged discrimination in its case-in-chief in order to address the issues of whether the discipline imposed was within the range of reasonable alternatives.” The purpose of such a ruling was not to inadvertently shift burdens of proof associated with discrimination actions. Rather, the ruling was to merely allow evidence of disparate treatment to be introduced as it relates to progressive discipline.

Complainant’s Amended Prehearing Statement was filed May 17, 2000 and once again referenced discrimination. Respondent’s 2<sup>nd</sup> Amended Prehearing Statement was also filed May 17, 2000. Respondent filed an Objection to Complainant’s Amended Prehearing Statement based on the grounds it referred to discrimination and was, therefore, expanding the grounds of the ALJ’s initial order regarding such. Respondent’s Objection was granted, in part, on June 1, 2000. On June 1, 2000, Complainant filed an additional Supplement to Complainant’s Amended Prehearing Statement.

At the time of hearing, Complainant renewed his request to amend the

Notice of Appeal to include the matter of discrimination and that any investigation by the Colorado Civil Rights Commission was waived. Based on his previous ruling, and Rule R-8-29, 4 CCR 801, any claims of discrimination were deemed waived.

### **B. Telephonic Testimony**

Respondent moved for telephonic testimony of some witnesses. No objection was raised by Complainant. The ALJ instructed the parties that in order to proceed with telephonic testimony, three conditions needed to be met. First, a copy of exhibits needed to be in the witness' possession. Second, any notes used by the witness had to be available to both parties. Finally, it was necessary to have the witness in a location which would be free of interruption or influence of other individuals. The motion was granted.

### **C. Motion for Protective Order**

During the course of pre-trial discovery, certain documents referenced individual employees at DRDC who had been subject to investigative reports. Initially, concerns were raised about the confidentiality of this information. Subsequent to the parties having filed motions on the matter, and an ALJ interim order, it was determined that documents obtained in discovery could be "redacted" to eliminate reference to any particular individuals.

## **2. Witnesses**

Respondent called the following witnesses in its case-in chief:

<b><u>Name</u></b>	<b><u>Position and Location</u></b>
Lt. Ramona Toomey	Lieutenant, DOC Corrections Officer Specialist III – Training
Ms. Dana Bustos	Clinical Behavioral Specialist III, DRCD
Deborah Paulsen	Investigator, Office of Inspector General, Sterling Correctional Facility
William Bokros	Warden, DRDC
Donna Haratyk	Nurse, DRDC
Ellen Benoit	Nurse, DRDC
James Michaud	Chief of Mental Health, DOC
Joanie Shoemaker	Clinical Team Leader, DRDC

In its rebuttal case, Respondent called the following witnesses: Deborah Paulsen, Investigator.

Complainant called the following witnesses in its case-in-chief :

<b><u>Name</u></b>	<b><u>Position and Location</u></b>
Charles Hendricks	Complainant
John Wirtz	Corrections Officer I, DRDC, Infirmary
Colleen Fordham	Corrections Officer I, DRDC

### 3. Exhibits

The following exhibits were admitted by Respondent during its case-in-chief, unless otherwise noted:

<b>Exhibit #</b>	<b>Type</b>	<b>Comments</b>
1	Training Records of Hendricks	No objection
2	Lesson Plan, DRDC	No objection
3	DOC Administrative Regulation 1450-01	No objection
4	DOC Administrative Regulation 1450-05	No objections
5	DOC Administrative Regulation 100-29	No objection
6	Memo Bustos to Shoemaker 12/7/99	No objection
7	IG Case Chronological Sheet	No objection
8	IG Investigative Report 12/21/99	No objection
9	Correspondence Rulo to Hendricks 12/14/99	(admitted in Complainant's Case in Chief) No objection
10	Correspondence Rulo to Hendricks 1/5/2000	No objection
11	Notice of Disciplinary Action 2/11/2000	No objection
12	Correspondence Suspension with Pay 12/9/99	No objection
13	Memo Arellano to Smith	No objection
14	Memo Arellano to Everingham; Shift Commanders	No objection
15	Notice of R-6-10 Meeting	No objection
16	R-6-10 Transcript 3/3/2000	No objection
17	Corrective Action 6/8/92	Over objection
18	Reprimand McGoff to Hendricks	Over objection
21	Memo Rulo to Executive Staff; Appointing Authorities 6/23/99	No objection
22	Hand Drawn Floor Plan	No objection

In addition to Exhibit 9, the following exhibits were introduced by Complainant during its case-in-chief:

<u>Exhibit #</u>	<u>Type</u>	<u>Comments</u>
A	Complainant's Performance Evaluation 1995	No objection
B	Complainant's Performance Evaluation 1996	No objection
C	Complainant's Performance Evaluation 1997	No objection
D	Complainant's Performance Evaluation 1998 (11/97 – 3/31/98)	No objection
E	Complainant's Performance Evaluation 1998 (4/1/98 – 9/30/98)	No objection
G	Correspondence McGoff to Hendricks 1/17/97	No objection
U	Incident Report Form 12/8/99 (stamp 29)	Objection on grounds of Relevancy and Hearsay
V	Incident Report Form 12/8/99 (stamp 30)	Objection on grounds of Relevancy and Hearsay
W	Incident Report Form 12/13/99 (stamp 31)	Objection on grounds of Relevancy and Hearsay
X	Incident Report Form 12/7/99 (stamp 32)	Objection on grounds of Relevancy and Hearsay
DD	Correspondence Suspension with Pay of Other DOC employee 1/25/2000	No objection
EE	Notice of Disciplinary Action DRDC Employee 5/9/2000	Objection on grounds of Relevancy and Hearsay
FF	Notice of R-8-3-3 Meeting DRDC Employee 6/12/92	Stipulated Limited Admission
GG	Corrective Action DRDC Employee 7/6/92	Stipulated Limited Admission
HH	Disciplinary Action 11/3/97 DRDC Employee	Objection on grounds of Relevancy and Hearsay
II	Domestic Violence Charge DRDC Employee 1/22/2000	Objection on grounds of Relevancy and Hearsay
JJ	Custody Report DRDC Captain Domestic Violence Charge	Objection on grounds of Relevancy and Hearsay

KK	Statement of Probable Cause 3rd Degree Assault and Domestic Violence DRDC Employee 1/22/2000	Objection on grounds of Relevancy and Hearsay
LL	Investigations Statement DRDC Employee	Objection on grounds of Relevancy and Hearsay

#### 4. Sequestration Order

By way of stipulation on the second day of hearing, a sequestration order was entered. The attorneys were advised to notify all witnesses that such an order was put in place and that the witnesses were not to discuss their testimony with each other until completion of this matter.

### ISSUES

For the purposes of this administrative hearing, the issues are characterized as follows:

1. Did the Complainant commit the acts for which discipline was imposed?
2. Was the discipline imposed within the reasonable range of available alternatives to the appointing authority?
3. Were the actions of the Respondent arbitrary, capricious, and/or contrary to rule or law?
4. Is either party entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999)?
5. Respondent argues an additional issue of whether the presumption of administrative regularity is overcome by Complainant.<sup>1</sup>

### STIPULATED FINDINGS OF FACT

---

<sup>1</sup> Application of this presumption acts to shift the burden of persuasion from Respondent to Complainant. Given that Complainant's Notice of Appeal is with regard to a disciplinary action, pursuant to *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994), application of such a presumption would be contrary to law.

1. Complainant was hired as a Correctional Security Services Officer I by DOC on November 15, 1987.
2. Complainant was certified as a Correctional Security Services Office I by DOC on November 15, 1988.
3. Complainant was promoted to a Correctional Security Services Officer II by DOC on February 1, 1991.
4. On November 22, 1999, the day of the incident which gives rise to [t]his case, Complainant was assigned to and working the swing shift in the infirmary at DRDC.
5. On January 26, 2000, Complainant was notified by certified mail that he was to attend a R-6-10 meeting on February 3, 2000 at 9:00 a.m. in the Warden's Office at DRDC.

### **FINDINGS OF FACT**

(parentheticals refer to exhibits or witness' testimony )

#### **I. Background of Department of Corrections, Denver Regional Diagnostic Center**

1. DRDC is the intake facility for the processing of inmates admitted to the Department of Corrections. Within DRDC, assessments are conducted of inmates through a clinic. A portion of the clinic includes an infirmary with about 30 beds in which inmates are assessed and treated for mental health. (Bokros, Haratyk).
2. The clinic/infirmary is designed so that a control center and nurses' station is located in the center of the floor, in an island. A day room for the patients/inmates is directly across from the Control Center. Inmate/patient rooms surround the Control Center and nurses' station. (Ex. 8, Bokros, Ex.22, Hendricks, Katzenmeyer, Benoit).
3. DRDC's warden is William Bokros. He has been warden since February 1998. As warden, Bokros is the appointing authority and is responsible for the hiring and firing of employees. The warden is also responsible for the general administration of the facility. (Bokros).
4. James Michaud is Chief of Mental Health statewide for DOC and would conduct regular staff meetings. (Michaud)
5. Deborah Paulsen is an investigator for the Inspector's General office within the Department of Corrections. She is normally assigned to the Sterling facility. Her responsibilities as investigator include being a fact finder for wardens in matters that may violate criminal laws or crimes

which affect the safety and security of the Department. (Ex. 21, Paulsen).

6. As part of the Department of Corrections, DRDC is subject to a number of Administrative Regulations, which include in part:

<u>Regulation</u>	<u>Subject/Relevant Portions:</u>
1450-01	<p>Staff Code of Conduct</p> <ul style="list-style-type: none"><li>• Purpose is to ensure all staff comply with the Executive Order re: Integrity in Government.</li><li>• Conduct unbecoming includes acts or conduct either <i>on or off duty</i>, which impacts job performance and/or which brings DOC into disrepute. (emphasis added).</li><li>• Horseplay between staff or staff and offenders is prohibited. Horseplay includes, but is not limited to, such acts as wrestling, pushing, chasing, or offensive practical jokes.</li><li>• Verbal or physical altercations between staff in the workplace are unacceptable practices. While on duty, staff are required to maintain a considerate, cooperative, and cordial relationship toward fellow staff.</li><li>• Physical acts of a sexual nature, such as intentional physical conduct that is sexual in nature and is unwelcomed or that a reasonable person would find offensive is prohibited.</li><li>• Workplace harassment . . . in any form will not be tolerated.</li></ul>
1450-05	<p>Unlawful Employment Practices: Policy Prohibiting Workplace Discrimination/Harassment.</p> <ul style="list-style-type: none"><li>• Purpose of the AR is to ensure a workplace free from harassment; to inform all staff of their rights to a workplace without harassment; and to establish standards preventing harassment.</li><li>• Workplace harassment is defined as a course of conduct which results in an intimidating, hostile, or offensive environment.</li><li>• In determining harassment, whether in comments or conduct, were inappropriate, the behaviors will be reviewed from the perspective of a <i>“reasonable or average” person standard</i>. (emphasis added).</li></ul>
AR 100-29	<p>Violence in the Workplace</p> <ul style="list-style-type: none"><li>• Purpose is to provide a safe and secure work environment.</li><li>• Comports with Governor’s Executive Order re: Workplace violence.</li><li>• Violence defined, in part, as: infliction of any bodily injury, harmful psychological contact, intimidation, threatening or hostile behaviors, violence-related jokes, or offensive comments.</li></ul>
(Ex. 3,4,5)	

7. Ms. Dana Bustos has been employed by DOC at DRDC as a Clinical Behavioral Specialist III and Program Specialist. Her responsibilities are not akin to the correctional officer series, but her “rank” would be considered one of captain. (Bustos). In part, she is supervised by Michaud. (Michaud).
8. Bustos’ responsibilities would include evaluating inmates’ mental health.
9. In 1992 and 1997, some DRDC employees of rank received corrective actions and disciplinary actions for violation of AR 1450-01. With regard

to a 1997 disciplinary action, discipline was imposed of a temporary suspension (Ex GG, HH). Such actions occurred under the leadership other than Warden Bokros.

10. In late 1999 and early 2000, miscellaneous events occurred involving interactions between staff, and staff and inmates. Such events included:

<u>Date</u>	<u>Events</u>	<u>Individuals Involved</u>
December 1999	<ul style="list-style-type: none"> <li>Individual completed incident report because individual observed a Lieutenant driving through the snow with an all terrain vehicle pulling an inmate as if "water skiing" on snow.</li> <li>At one point, inmate had arms on shoulders of Lt.</li> </ul> (Ex U, V, W)	<ul style="list-style-type: none"> <li>Lieutenant, DRDC engaged in conduct.</li> <li>DRDC Sgt. &amp; staff observed conduct.</li> <li>Inmate participated in conduct.</li> </ul>
December 1999	<ul style="list-style-type: none"> <li>Lt. driving all terrain vehicle would be driving, hit ice, and cause the vehicle to skid through parking area.</li> <li>No discipline or corrective action was involved.</li> </ul> (Ex X)	<ul style="list-style-type: none"> <li>Lieutenant, DRDC engaged in conduct.</li> <li>DRCD staff observed conduct.</li> </ul>
January 2000	<ul style="list-style-type: none"> <li>DOC Captain suspended with pay for domestic violence allegation.</li> <li>Disciplinary Action as result of 3<sup>rd</sup> degree assault and domestic violence convictions.</li> <li>Violation of AR 1450-1 and Executive Order.</li> <li>Discipline of temporary pay reduction; need for compliance with Order for Deferred Judgment and Sentence; temporary removal from Denver Emergency Response Team.</li> </ul> (Ex DD, II, JJ, KK, LL)	<ul style="list-style-type: none"> <li>DRDC supervisory staff.</li> <li>Warden Bokros imposed discipline.</li> </ul>

11. Warden Bokros characterizes the event of December 2000 involving inmate(s) being towed on the snow as if to be skiing as horseplay and would be a violation of DOC AR 1450-01. (Bokros).
12. Warden Bokros believes the skidding on ice with the all terrain vehicle was unsafe but not necessarily horseplay. (Bokros).
13. Non-professional behavior would occur at the DRDC facility on occasion between co-workers. Examples include Complainant and a lieutenant shadow boxing on occasion. (Hendricks). Bustos would also engage in

such occasional behavior including the touching of others, hugging, patting others, joking, and referring to Hendricks as a “scamp.” (Bustos, Hendricks, Katzenmeyer, Haratyk, Wirtz, Benoit). No corrective or disciplinary actions occurred from such behavior.

## II. Complainant’s Service to DOC and Background

14. During the course of his career with DOC, Complainant has received the following ratings and comments on performance:

<b>Date</b>	<b>Event</b>	<b>Relevant Comments:</b>
7/1/94 to 6/30/95 (Ex A)	Performance Planning and Appraisal Form	<i>Overall rating:</i> Commendable <i>Rating on Factors:</i> Correctional [Policies]- Commendable <i>Comments:</i> Gets along well with others
7/1/95 to 6/30/96 (Ex B)	Performance Planning and Appraisal Form	<i>Overall Rating:</i> Commendable
11/1/96 to 10/31/97 (Ex C)	Performance Plan/Review and Evaluation	<i>Overall Rating:</i> Commendable <i>Comments:</i> [Hendricks] has maintained a professional working relation with staff.
11/1/97 to 03/31/98 (Ex D)	Performance Plan/Review and Evaluation	<i>Overall Rating:</i> Commendable
04/1/98 to 09/30/98 (Ex E)	Performance Review Form	<i>Overall Rating:</i> Fully Competent
1/17/97 (Ex G)	Letter of Appreciation	[Hendricks] performed a superb job while serving as class leader for the 1997 Line Staff Training.
(Hendricks)		

15. Prior to working at DRDC, Complainant worked for some period at what was termed “Old Max”, a nickname for the Colorado Territorial Correctional Facility. At that time, Bustos was also working at the facility. The two individuals were acquaintances in that they would see each other weekly at work, engage in jokes on occasion, and both would facilitate friendly exchanges between themselves. Occasional touching on the arm and shoulder would occur during the course of work, by consent between Hendricks and Bustos. (Bustos, Hendricks).
16. Hendricks would engage in behavior which would include slap boxing, touching, taping others and general joking around. (Katzenmeyer,

Hendricks).

17. While at Old Max, at one point, Complainant helped Bustos with an automobile problem. (Bustos, Hendricks).
18. While in the employ of DOC, Complainant had various types of training including:

<u>Type</u>	<u>Date</u>
Administrative Issues	1/8/96
Violence in the Workplace	1/14/97
Administrative Issues	2/9/98
DRDC Administrative	3/22/99
Violence in the Workplace	7/20/99
DRDC Administrative	7/20/99
DRCD Administrative (Ex. 1, Toomey)	3/21/00

The Administrative Training included review of Administrative Regulation 1450-01, Staff Code of Conduct, and Administrative Regulation 1450-05, Unlawful Employment Practices: Policy Prohibiting Workplace Harassment. (Ex, 2). Participants received copies of each Administrative Regulation.

19. Other staff, including lieutenants, would receive similar training while at DRDC. (Toomey).

### **III. The Headlock of November, 1999**

20. On November 22, 1999, Bustos and Hendricks were both on duty. Prior to arriving at the infirmary, the two had engaged in some friendly verbal bantering.
21. Eventually, Bustos arrived at the infirmary/clinic to check on the status, and examine for discharge, an inmate in Room 11. (Bustos).
22. As Bustos arrived at the infirmary, Complainant was already present along with Nurse Ellen Benoit in or near the Dayroom. Officer Kirk Katzenmeyer was on duty in the Control Room. Nurse Donna Haratyk was preparing trays for patients. (Bustos, Benoit, Katzenmeyer, Haratyk).
23. Benoit had been with DRDC for approximately 6 years as a Licensed Practical Nurse (LPN). (Benoit).
24. Katzenmeyer had been with DOC for less than 2 years and was acquainted with Bustos through the performance of her duties at the infirmary. He was supervised by Hendricks. (Katzenmeyer).

25. Haratyk had been with DOC for approximately 7 years. (Haratyk).
26. As Bustos began a conversation to discuss which inmate she was there to visit, Hendricks wrapped his arm around Bustos' head/neck, bent her over, and proceeded towards Room 11. (Hendricks, Bustos, Benoit, Haratyk).
27. Bustos remained in the headlock despite slapping the Complainant's legs, raising her voice, and asking him to stop the behavior. (Bustos, Hendricks).
28. Inmates and other staff saw the behavior.
29. At arrival of Room 11, Hendricks released her. Bustos was embarrassed, shocked, and to some extent humiliated. While witnesses' accounts vary, it is clear Complainant had placed Bustos in a headlock and moved a distance of anywhere from 8 to 20 feet.
30. Bustos proceeded to meet with the inmate in Room 11. During that session, Complainant, in making an attempt to apologize, tried to contact Bustos using the intercom system and tapping on the door/glass surrounding Room 11. (Bustos, Complainant, Benoit).
31. Hendricks verbally reported the incident to his co-worker and supervisor. (Hendricks, Katzenmeyer). No incident report was completed.
32. Benoit, having noticed the behavior of Complainant and Bustos while heading towards Room 11, found the behavior shocking despite the fact that other types of joking behavior had occurred in the past between staff. Benoit's impression had always been that such behavior was non-threatening. (Benoit, Ex. 8).
33. Subsequent to the incident, Bustos visited the nurse's station and then returned to her office, avoiding contact with Hendricks. At one point, a telephone discussion occurred in which Hendricks attempted to apologize to Bustos. Bustos did not consider the incident horseplay but believed the behavior was inappropriate, as if worse than horseplay. (Bustos, Ex. 6).
34. Subsequent to the incident, Bustos would avoid the infirmary if complainant was on duty. (Bustos).
35. In a subsequent meeting with Joanie Shoemaker, a clinical team leader and registered nurse for CMHIP, Bustos disclosed that the incident had occurred. Bustos reported to Shoemaker. Shoemaker requested Bustos draft a report outlining the circumstances. (Shoemaker). Shoemaker was concerned a violation of the Administrative Regulations had occurred which could impact Bustos' performance.

36. On December 9, 1999, Complainant was suspended with pay pending an investigation. (Ex. 12).
37. In mid-December, an internal investigation was conducted by Deborah Paulsen of the Inspector's General office. Paulsen investigated the matter, conducted interviews with Bustos, Katzenmeyer, Haratyk, and Complainant. The report of the investigation made a number of "points to consider." (Ex. 8). Some conclusions were proffered for the appointing authority.
38. During the pending investigation, Hendricks received a threatening anonymous note which he immediately disclosed to his superiors. The note was later identified to be from Bustos' boyfriend, another DOC employee. No action was taken against Bustos' boyfriend. (Hendricks, Ex. 8).
39. Upon completion and review of the investigation, Warden Bokros reviewed the matter. (Bokros, Ex. 10).
40. Bokros subsequently inspected the area of the infirmary in which the events occurred. (Bokros, Ex .10).
41. A Rule R-6-10 meeting was held in which Complainant admitted to the behavior and expressed remorse. Complainant believed his relationship with Bustos was such that this non-professional behavior was something less than horseplay. (Bokros, Hendricks).
42. After the Rule R-6-10 meeting, a Notice of Disciplinary Action was issued February 11, 2000. (Ex. 11). The disciplinary actions listed three grounds for imposing discipline: AR 100-29; AR 1450-01; and AR 1450-05. Bokros concluded the following:

AR 100-29 Violence in Workplace	<ul style="list-style-type: none"> <li>• Complainant willfully violated this regulation by making threats or engaging in threatening behavior or acts of violence.</li> </ul>
AR1450-01 Staff Code of Conduct	<p>Complainant violated this regulation because :</p> <ul style="list-style-type: none"> <li>• Staff was not treated professionally .</li> <li>• Horseplay was prohibited.</li> <li>• Professional relationships with colleague are to promote mutual respect, assistance, consideration, and harmony at DOC.</li> <li>• Staff are to comply with ARs.</li> </ul>
AR 1450-05 Unlawful Employment Practices Policy: Prohibiting Workplace Discrimination/Harassment	<ul style="list-style-type: none"> <li>• Complainant failed to maintain a healthy work environment free of workplace harassment, i.e., a course of conduct which results in an intimidating, hostile or</li> </ul>

(Ex. 11)<sup>2</sup>

43. As part of the discipline imposed, Bokros demoted Complainant from Correctional Officer II to Correctional Officer 1, effective February 14, 2000 and reduced his pay from the job rate for CO II to the job rate for CO I, effective March 1, 2000. (Ex. 11). Bokros also required Complainant to comply in the future with all Administrative Regulations and complete training in Violence in the Workplace, Workplace Harassment, and Staff Code of Conduct.
44. In determining whether to impose discipline, Bokros gathered information and relied upon information from the investigation as well as his own inspection of the infirmary. Bokros further reviewed Complainant's previous performance record and noted any other disciplinary actions, corrective actions, and or reprimands. (Bokros). Complainant had received a corrective action based on a complaint of sexual harassment by a female co-worker in 1992. (Ex. 17, Bokros). Additionally, a reprimand had been given to Complainant in 1996 because he had "flashed" his badge in a nightclub while off duty in order to intimidate patrons.
45. Bokros considered in mitigation Complainant's years of service. (Bokros).
46. Bokros further considered the nature of the incident by considering the impact on staff. He believed that there was a significant impact on staff. He noted that Complainant was senior officer in charge and that his behavior could impact relationships between corrections staff and clinical workers. He noted that this incident involved physical contact. In reviewing the nature of the incident, Bokros also considered the fact that inmates were able to observe the behavior between staff members. Bokros' conclusion was that the correctional business can be dangerous and given that inmates are felonious and prone to repeat modeled behavior, behavior such as Complainant's cannot be condoned. (Bokros). Bokros did not apparently consider the nature of Bustos' and Complainant's previous relationship or that employees within DRDC sometimes engaged in playful behavior.
47. Board Rule R-6-2, 4 CCR 801 (2000) provides that a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. It provides that:

The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may

---

<sup>2</sup> At no time during the hearing, or in the course of administration of the disciplinary action was sexual harassment raised as an issue.

proceed immediately to disciplinary action, up to and including immediate termination.

48. Board Rule R-6-6, 4 CCR 801 (1999) provides, in part:

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omissions, 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.

## **DISCUSSION**

### **I. INTRODUCTION**

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 (1999) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994 ).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge, Inc.*, 972 P.2d 707 (Colo. App. 1999). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent

improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

In *Bodaghi v. Department of Natural Resources*, 2000 WL 276913 (Colo. 2000), the Supreme Court of Colorado held:

The findings of an administrative tribunal as to the facts shall be conclusive if supported by substantial evidence. See § 24-4-106, 7 C.R.S. (1999). Even when evidence is conflicting, the hearing officer's findings are binding on appeal, and a reviewing court may not substitute its judgment for that of the factfinder. See: *Glasmann v. Department of Revenue*, 719 P.2d 1096, 1097 (Colo.App.1986). An agency's factual determination reasonably supported by the record is entitled to deference. See: *Department of Revenue v. Woodmen of the World*, 919 P.2d 806, 817 (Colo.1996); *G & G Trucking Co. v. Public Utils. Comm'n*, 745 P.2d 211, 216 (Colo.1987).

The credibility of witnesses and the weight to be accorded their testimony lies within the province of the agency as trier of the facts. See: *Goldy v. Henry*, 166 Colo. 401, 408, 443 P.2d 994, 997 (1968). Where the record supports the findings of the factfinder, the court of appeals is not at liberty to make an independent evaluation of the evidence and substitute its judgment for that of the factfinder. See: *Linley v. Hanson*, 173 Colo. 239, 242-43, 477 P.2d 453, 454 (1970). As stated in *Goldy v. Henry*:

[T]he credibility of witnesses as well as the weight of the testimony are peculiarly within the province of the commission to whom a statute entrusts the fact finding process. When a conflict in the evidence exists, it is not within the power of a reviewing court to substitute its judgment for that of the fact finding authority as to the weight of the evidence and the credibility of witnesses.

All of these factors were considered in evaluating witnesses' testimony. Additionally, all evidence introduced was considered.

## II. PARTIES' ARGUMENTS

Respondent argues that the discipline imposed, in the form of demotion and reduction in pay, was warranted based on the events in November and December 1999. It maintains there is no "real" dispute as to whether or not Complainant placed Bustos in a headlock. Respondent argues significant evidence and party admissions support this finding of fact. Respondent further argues that Complainant paraded Bustos, while in the headlock, down the corridor of the infirmary for a number of feet, allowing other staff and inmates to observe the behavior. It is this event which gives rise to immediate disciplinary action. Respondent maintains that the behavior was serious and flagrant, so as to mandate discipline, because Complainant violated at least three administrative regulations, that such conduct was willful, and that in order to preserve the safety of staff and inmates, such behavior cannot be condoned. Responder further maintains that Complainant tried to "minimize" the action or event by trying to apologize. It is suggested that by self-reporting the incident to a superior and trying to apologize, Complainant was trying to inappropriately minimize the seriousness of the event. Finally, Respondent argues that the appointing authority correctly balanced the appropriate factors in determining what level of discipline to impose, including mitigating factors.

Complainant does not dispute that the behavior occurred. However, Complainant does dispute the type and level of discipline imposed. First, it is Complainant's position that the atmosphere at DRDC, if not DOC in general, is such that horseplay does occur regularly and often results in no personnel actions. Complainant points out that a number of DRDC's staff engage in touching, joking, patting, name calling and other "non-professional" behavior which is harmless, without intending to violate of any of DOC's administrative regulations. Complainant admits to having made one mistake in an otherwise commendable career. Complainant recognizes that his actions exceeded the boundary of appropriate behavior between himself and Bustos. Complainant further maintains that the incident, while impacting the relationship between Complainant and Bustos, had no measurable impact on staff, the inmates, or the facility. Moreover, Complainant maintains that some hypocrisy exists given other incidents that have occurred, including between inmates and staff, for which no permanent demotions or long lasting discipline was imposed. Complainant maintains that such hypocrisy is indicative of arbitrary, capricious, and contrary to rule or law action by Respondent. Complainant's argument rests on a theory that Complainant received disparate punishment, as compared to other staff, given the relative nature of the incidents involved at DRDC during the Fall and Winter of 1999-2000.

### III.

#### 1. The Act for Which Discipline was Imposed.

In this instance, the evidence clearly supports that Complainant placed Bustos in a headlock and traveled with her down the hallway, in view of other employees and inmates. Complainant admits that the incident occurred and various witnesses corroborate that the event happened. While both parties seemed to be concerned about the distance Complainant and Bustos traveled while Bustos was in the headlock, the distance traveled is of little significance.

It is clear that the behavior constituted "horseplay" as defined in DOC's Administrative Regulation 1450-01. Both parties mention that an element of the behavior was whether or not there was consent. However, DOC's Administrative Regulation does not reference consent. It makes no difference if the staff or inmates consent to the horseplay. It is simply prohibited. And, the Administrative Regulation provides some non-exclusive examples of horseplay, including wrestling and pushing such as to provide notice to Complainant of what is and is not horseplay. AR 1450-01, the Staff Code of Conduct, also provides that no altercations are to occur between staff and the staff are required to maintain considerate, cooperative, and cordial relationships towards other staff. In this instance, it appears such relationships did not occur. The act of placing one in a headlock, in a corrections work environment, tests the boundaries of promoting mutual respect and harmony as required by the Staff Code of Conduct.

DOC is required to provide a safe and non-violent workplace. The incident which occurred between Bustos and Hendricks certainly raises the issue of workplace violence as addressed in AR 100-29. The act of putting Complainant in a headlock, without her consent, creates harmful psychological contact, can foster intimidation, and is generally a threatening or hostile behavior.

It is also a fair characterization that the behavior by Complainant created a hostile working environment and was harassing, to at least Bustos. It should be noted that with the exception of Nurse Benoit, other staff did not react to the incident per se. While having observed the behavior, no one reported the incident except the participants, Complainant and Bustos.

Thus, based on the evidence introduced, it can be concluded that the act of Complainant putting Bustos in a headlock violated DOC's AR 1450-01, 1450-05, and 100-29.

## **2. The Discipline Imposed was Not Within the Reasonable Range of Alternatives pursuant to Board Rules and was Arbitrary and Capricious.**

The most difficult element of this case is the level of discipline that was imposed upon Complainant.

It is clear that State Personnel Board rules allow an appointing authority to impose both corrective and disciplinary actions. See: Board Rule R-6-2. In applying this rule, an appointing authority is first **required** to determine if the acts involved are so serious or flagrant as to warrant discipline instead of corrective action. Next, the appointing authority is **required** to examine the acts involved to determine the nature and severity of any discipline. Such a rule implicitly provides that lesser levels of discipline are to be considered and imposed before greater levels of discipline. In addition, it is **incumbent** upon an appointing authority to weigh individual factors such as outlined in Board Rule R-6-6 when administering corrective or disciplinary action. Thereby, the rules allow an appointing authority to distinguish incidents on a case by case basis and administer a measured level of corrective action or discipline.

### **A. Corrective Action v. Disciplinary Action**

In this instance, Respondent met its burden that the act was so serious and flagrant as to warrant discipline pursuant to Rule R-6-2. The act is arguably serious because (1) Bustos was humiliated, embarrassed, and upset; (2) other staff observed the behavior; and (3) inmates were capable of observing the behavior. Complainant's actions were serious and flagrant on their face because a number of Administrative Regulations were violated and Complainant was aware of those regulations. The actions were clearly flagrant given the fact that Complainant had notice through repeated training of the applicable DOC Administrative Regulations, and in fact had at one type facilitated training related to such regulations. As a result, it is correct for Respondent to have imposed disciplinary action instead of a corrective action.

### **B. The Level of Discipline Imposed**

Respondent did not violate Board rules in deciding to impose discipline instead of corrective action. The intent of the Board rules is to provide for progressive discipline and to have appointing authorities engage in an analysis of what level of discipline to impose when administering discipline. As mentioned above, this suggests that lesser levels of discipline are to be imposed prior to harsher levels depending upon the act. In this case, a history of bantering behavior and even light touching existed between Complainant and Bustos, and Bustos had condoned and participated in such playfulness in the past with Hendricks and other staff. In this case, no staff completed an incident report until Bustos completed her report to Shoemaker. Only Benoit found Complainant's

actions exceeding the bounds of playfulness. This suggests that the majority of staff who observed the incident, perceived no violation of consequence of DOC regulation. The record reflects that while horseplay may be prohibited, playful interaction between staff can and did occur often with no negative consequences or intent. And, while inmates could have observed the behavior, no evidence was introduced demonstrating inmates had observed the behavior and drawn any negative conclusions. Such supports the conclusion that while discipline was appropriate, Respondent did not fully analyze the nature of the act or the surrounding circumstances.

Additionally, Complainant's theory of the case cannot be ignored. Complainant's argument that Complainant received disparate punishment (i.e., an unsupportable level of discipline) compared to other staff members engaging in similar behavior is persuasive as to Respondent's arbitrary and capricious action.

Complainant's theory is borrowed from cases generally involving discrimination in which similarly situated individuals claim disparate treatment from other employees by the same employer. By way of example, in *Aramburu v. The Boeing Company*, 112 F.3d 1398 (10<sup>th</sup> Cir. 1997), an employee argued that he should not be terminated for chronic absenteeism because other employees had absenteeism issues and were not terminated. In *Aramburu*, the theory was used in determining whether or not discrimination had occurred in the imposition of the termination. The Court determined that it was appropriate to compare relevant employment circumstances, such as work history and company policies, applicable to an employee and intended comparable employees in determining whether they were similarly situated for the purposes of both federal and state discrimination. In other words, the Court held that to assert a claim of disparate treatment, a party must show that he was treated differently than other similarly situated employees who violated work rules of comparable seriousness. "Similarly situated employees" is defined by the Court as those who deal with the same supervisor and are subject to the same standards governing performance evaluations and discipline. Included in the same line of cases is *Elmore v. Capstan, Inc.* (10<sup>th</sup> Cir. 1995) which stands, in part, for the proposition that when comparing relative treatment of similarly situated employees, comparison need not be based on identical violations of identical work rules. It must also be noted that the 10<sup>th</sup> Circuit has noted that "differences in treatment (amongst employees) is inevitable, and even irrational or accidental differences of treatment occur in most business organizations of any size." See: *EEOC v. Flasher Company, Inc.* 986 F. 2d 1312 (10<sup>th</sup> Cir. 1992).

Under Respondent's theory, every violation, merely because it was a violation, would be serious and/or flagrant and warrant a relatively severe level of discipline. Such a theory clearly violates the intent of Board rules. Under the Board's rules, it is incumbent upon the appointing authority to fully analyze the act warranting discipline in order to gauge the nature and level of discipline to

impose. This was not done. In this matter, other events in late 1999 involving staff using all terrain vehicles to “tow” inmates and staff, and using those vehicles to playfully skid across the parking lot must also be considered horseplay and in violation of the Staff Code of Conduct. This is established by the fact that a number of incident reports were filed. Yet, no severe disciplinary actions, i.e., demotion, were imposed. The appointing authority was the same and the Administrative Regulation(s) at issue were the same. And, the nature of the “bad” acts were the same: the towing of inmates and interactions were physical in nature and observed by inmates and staff. Additionally, an individual of higher rank (thus, one who should be as or more familiar with the regulations than Complainant) was involved in a violation of Administrative Regulations, which also involved violence and staff members, albeit off DOC property, in January 2000. He did not receive permanent demotion. Again, the Administrative Regulations were the same as was the notion that Complainant and this individual were of higher rank or had more responsibility. In yet another incident, tangentially related to the events in this matter, a DOC employee drafted a threatening note to Complainant and no disciplinary action whatsoever was taken. Yet again, similar or identical violations of Administrative Regulations appear to be involved. The participants in this case, and in the other examples, were similarly situated yet received very different forms of discipline.

While an appointing authority is able to impose corrective action or discipline based on each individual case, and is able to consider a number of different factors in determining the level of discipline, the appointing authority is not free to randomly impose discipline upon similarly situated individuals at different levels for substantially similar violations. To do so is to suggest that acts and the surrounding circumstances warranting discipline are not being fully analyzed in order to determine the nature and severity of discipline to impose.

The law in Colorado suggests that it is improper for the Board to “step into the shoes” of an appointing authority and determine what level of discipline is appropriate. In *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 1188 (Colo. App. 1995), the Court maintained that an administrative agency’s decision is arbitrary and capricious only if a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion.<sup>3</sup> Unless that standard is met, an agency’s decisions should not be overturned by an ALJ or the Board. But, in this instance, given the record, how other employees were treated by the same appointing authority, for violations of the same or similar Administrative Regulations, reasonable people would fairly and honestly be compelled to reach a different conclusion than the agency in determining the level of discipline imposed. Respondent’s action of permanently demoting Complainant was arbitrary and capricious.

---

<sup>3</sup> In *Hughes v. Department of Higher Education*, 934 P.2d 891 (Colo. App. 1997), a case involving layoff, the Court of Appeals held that it is not within the province of an ALJ, the Board, or the court to operate or second-guess an agency in making decisions.

#### **IV. Attorney Fees and Costs**

Neither party is not entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999) and Board Rule R-8-38, 4 CCR 801 (1999). Given the above findings of fact, Respondent's action of imposing discipline based on the acts of the Complainant does not demonstrate that Respondent acted frivolously, in bad faith, maliciously, as a means of harassment, or that its actions were groundless. See: CRS 24-50-125.5 (1999) and Board Rule R-8-38, 4 CCR 801 (1999). Complainant admitted having committed an act, thereby providing grounds for a personnel action. Complainant failed to show that the action was not based on evidence or the law as presented. Nor did Complainant show that the personnel action was pursued to annoy or harass, was abusive or stubbornly litigious. It cannot be said that the action was disrespectful of the truth. And, it is clear both sides provided competent evidence in litigating the action.

#### **CONCLUSIONS OF LAW**

1. Complainant committed the act for which discipline was imposed. He violated the Department of Corrections Administrative Regulations 1450-01, 1450-05, and 100-29.
2. The disciplinary demotion imposed was not within the reasonable range of available alternatives to the appointing authority. The appointing authority misapplied Board rules with regard to progressive discipline, by not fully accounting for the severity and nature of Complainant's act and the level of discipline imposed as defined by Board Rule R-6-2 and R-6-6, 4 CCR 801.
3. The actions of the Respondent were arbitrary and capricious. In setting the level of discipline at permanent demotion without fully analyzing the act and its circumstances, the action was arbitrary and capricious such that reasonable people would fairly and honestly be compelled to reach a different conclusion as to the level of discipline imposed.
4. Neither party is entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999) or Board rule.

#### **ORDER**

Given that Complainant had committed the acts for which discipline was imposed, but that Respondent was arbitrary, capricious and acted contrary to rule and/or law in demoting Complainant, Respondent's disciplinary action is modified in part. Effective July 25, 2000, Complainant is to be reinstated to the Corrections Officer II series at his former rate of pay, adjusted for any changes

in pay range as the result of the Total Compensation Survey, effective for Fiscal Year 2001. All other elements of the disciplinary action are affirmed. Such a remedy enforces DOC's Administrative Regulations and supports the Board's rules with regard to progressive discipline and the need to fully analyze the act and circumstances in determining a level of discipline.

Dated this 25<sup>th</sup> day of  
July, 2000

---

G. Charles Robertson  
Administrative Law Judge  
State Personnel Board  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203

### Certificate of Service

This is to certify that on the \_\_\_\_\_ day of July, 2000, I placed a true copy of the **foregoing Initial Decision of the Administrative Law Judge and Notice of Appeal Rights** in the United States mail, postage prepaid, addressed as follows:

Todd J. McNamara  
Kristina James  
1700 Lincoln Street, Suite 3850  
Denver, CO 80203

and by interdepartmental mail to:

Susan J. Trout  
Joseph Q. Lynch  
Assistant Attorneys General  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, CO 80203