

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**ROBERT E. HAGGAR,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,**

Respondent.

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Administrative Law Judge Mary S. McClatchey held the hearing in this matter on July 16, 17, and 23, 2002. Elizabeth Tormoen Hickey, Esquire, represented Complainant. Assistant Attorney General Luis A. Corchado represented Respondent.

**MATTER APPEALED**

Robert Hagggar (“Complainant” or “Hagggar”) appeals his termination from employment.

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

**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.

**FINDINGS OF FACT**

1. Complainant has worked as a Food Service Supervisor in the kitchen area of Fremont Correctional Facility ("Fremont"), Department of Corrections ("DOC"), for over eight years.
2. The Fremont kitchen area is an enormous, open area containing a number of workstations, storage rooms, and two large dining rooms that seat over 450 inmates each.
3. The Fremont kitchen staff are responsible for supervising inmates in the performance of food

preparation duties. At any given time there are 60 to 80 physically unrestricted inmates working in the kitchen area. It is therefore a high stress work environment for Fremont staff.

4. The noise level in the Fremont kitchen area is so high that it is necessary to stand right next to another person in order to be heard.
5. Ninety percent of the Fremont inmate population has committed sex offense felonies such as rape. Fremont staff including Complainant are trained to understand that sex offender inmates are highly likely to be manipulative, and that therefore certain precautions are critically important. For instance, inmates are not to become aware of any conflicts between DOC staff. Inmates can and do fabricate stories about DOC staff to other DOC staff, in order to cause a conflict to worsen. The greater the friction between DOC staff members, the less security there exists in the prison.
6. Complainant and his co-workers often made jokes to diffuse the tension in the kitchen work area. Some were "off color" and sexual jokes. Complainant generally got along with his co-workers, and often sang humorous songs to make them laugh.
7. Complainant was often flirtatious with women staff at Fremont, and complemented them on their clothing or how they looked. He also routinely made inappropriate comments of a sexual nature to many of the women staff at Fremont, often accompanied by touching.

#### Sgt. Hill

8. Sgt. Glenda Hill was hired as a Food Service Supervisor in the Fremont kitchen in April 2000. She has been married 27 years and has three children.
9. Approximately six months after Hill started working at Fremont, Complainant began making offensive comments to her. On a daily basis, Complainant approached Sgt. Hill and said he would like to put whipped cream all over her body and lick it off. He also said, "once you have me you won't want your husband anymore," or words to that effect. Once, when she bent over to put something away in an office, he said, "don't bend over, I like that too much, I can't take it anymore," or words to that effect. He also said to her, "When can I take you in the back and have my way with you."
10. Complainant's statements bothered Hill and made her feel dirty and cheap. She found them to be offensive.
11. Once, Complainant approached Hill by her side and put his hand between her arm and her side, next to her breast area. Hill felt that unless she moved away he would touch her breast. She moved away. This physical contact by Complainant was unwelcome, and she avoided him and did not feel safe around him afterward.
12. Hill once told Complainant to "stop it," but she believed he thought she was joking. She did

not push the issue, because she did not want to cause a rift between herself and Complainant in the workplace.

13. Hill did not report Complainant's offensive conduct because, as a new employee, she did not want to be blackballed for making waves. She did not want to cause problems in the department.

#### Sgt. Randall

14. Sgt. Cassandra Randall was hired as a Food Service Supervisor at Fremont in April of 2000. Randall appears young, in her twenties. Approximately 2 to 4 months after she started at Fremont, Complainant began to make inappropriate comments to her.
15. On a daily basis, Complainant approached Randall, rubbed her arm and made statements such as, "You're so beautiful, you look good enough to eat," and, "You smell so good, why don't we go to Cripple Creek and get a room and we'll have fun," or words to that effect. Complainant also told Randall he would like to put whipped cream all over her.
16. Complainant once approached Randall and said she looked good enough to eat, then pretended to "nip" at her cheek. She laughed and pulled away, attempting to diffuse the situation, although she did not find it to be funny. Complainant once hugged Randall at work.
17. Randall felt uncomfortable with Complainant's physical and verbal conduct towards her. Having just taken the sexual harassment course as part of the training academy for new employees, she felt his conduct was inappropriate and constituted sexual harassment.
18. Randall did not report Complainant because as a new employee, she did not want to make waves, to be "on the outside," or to cause a rift among staff at Fremont. She testified, "You want somebody else to go first." Randall was too intimidated to report Complainant's offensive conduct.

#### Sgt. Knight

19. Sgt. Judy Knight commenced employment as a Food Service Supervisor at Fremont in February 2000. On a daily basis, Complainant made inappropriate sexual comments to her, such as, "I'm going to stick my tongue in your ear," "Come here, I'm gonna kiss you," and, "If I knew where you lived, I'd come over, and boy would we have a good time."
20. Complainant asked Sgt. Knight for her address, and said he wanted to come see her.
21. Complainant often grabbed Knight by the arm to pull her close enough to whisper these statements in her ear. Once, in the Storage Supply Room, Complainant grabbed Knight by the arm and pulled her close and said he would like to stick his tongue in her ear. She laughed and pushed him away. The Storage Supply Room is a room with no windows where

no other DOC staff could either see or hear what occurred.

22. On another occasion, in the production area, Complainant grabbed Knight by the arm, pulled her close, and whispered that he would like to stick his tongue in her ear. She felt uncomfortable, laughed, and pushed him away. Laughing was her way of diffusing these encounters.
23. Complainant made his comments to Knight primarily when other staff were not in the same area and therefore could not hear.
24. Complainant's inappropriate sexual comments and grabbing were offensive to Knight, and made her uncomfortable.
25. Knight was worried about losing her job if she reported Complainant's conduct. Her "take" on the workplace was, "it's the good old boys club - retired military boys with their own code of ethics." She feared that if she upset one of these retired military men, of whom Complainant was one, they would all turn against her. She did not want to "rock the boat."
26. Complainant and two other male Fremont kitchen employees were retired military officers. The three of them had five, eight, and eighteen years of experience in the Fremont kitchen. The men often spoke in military slang to each other, which the female employees did not understand. They often shared war stories.

#### Lt. Peachee

27. Lieutenant Jolena Peachee has been with DOC since March 1998. She came to Fremont as a Food Services Supervisor in January of 1999. In December 2001 she was promoted to Lieutenant.
28. Peachee and Complainant had a joking relationship at work. He often said to her, in the presence of other officers, "Come here and let me stick my tongue in your ear." She considered this to be a joke, and did not take it seriously. It was not offensive to her. Complainant also sometimes put his arm around her.
29. Sometimes, however, Complainant's conduct crossed the line and became offensive to Peachee. Complainant at times approached her from behind, grabbed her arm, and whispered in her ear that he wanted to stick his tongue in her ear. He got so close she could feel his breath on her ear. These encounters gave her a creepy feeling.
30. Peachee did not report Complainant's conduct. While she felt that his comments were not all that offensive, the close whispering in her ear was uncomfortable for her. She did not report that because she sought to avoid creating a rift between staff. She was very concerned that reporting his conduct would be severely detrimental to staff morale and facility security.

31. After Peachee became a Lieutenant in December 2001, Complainant's offensive conduct ceased.

Sgt. Goyett and the February 2, 2002 Incident.

32. Sgt. Pearl Goyett has worked as a Food Service Supervisor at Fremont since December 1, 2000. She is married with children between the ages of 23 and 36.

33. When Goyett first started at Fremont, her shift overlapped for a short time with Complainant's. He often said to her, "you smell good." After a few months, when she began to work the same shift as Complainant, his comments became more serious. He said to her, "I'll take you in the back with some Cool Whip & you'll never go back to your husband." Goyett found his inappropriate sexual remarks to be offensive. Despite this, Goyett maintained a friendly working relationship with Complainant.

34. On February 2, 2002, Goyett entered the Storage Supply Room. Complainant was already in the room with an inmate. Complainant did not greet Goyett when she entered, so she said, in a joking tone, "Are you being stuck up today?" or words to that effect. Complainant said, "I'll show you stuck up," then told his inmate to leave the room. The inmate left. Only Complainant and Goyett remained.

35. The Storage Supply Room is the same room in which Complainant had grabbed Knight. See Finding of Fact #21.

36. Complainant said to Goyett, "Come here." She said, "No." Complainant then grabbed Goyett tightly by the arm and pulled her close to him. He pulled her so hard that she had to let go of the door to the room, which closed.

37. Once the door to the Storage Supply Room door closed, it was locked. Only staff with keys could open it. There are no windows in the room. No one can hear what is happening in the room when the door is closed.

38. Complainant then pulled Goyett around the corner, up against the wall, with his back to the wall. Using a bear hug, he pulled her up close to his body, with her back to him. He held her in a tight bear hug, and started to kiss her on the neck and ear. She was trapped in the corner of the room, against his body. Goyett told him to stop, but he did not. She struggled to get loose from his hold, and in the course of doing so her hat fell on the floor. She picked up her hat, said, "I can't believe you did that," and left.

39. Complainant and Goyett did not speak for the remainder of their shift, which was several hours.

40. Goyett felt shocked, very upset, and that she had been attacked.

41. On February 3, 2002, she told Sgt. Heinze, a co-worker, what had occurred.
42. On February 4, 2002, she told Sgt. Hill, who stated that if Goyett didn't report it up the chain of command, she would. Goyett then reported it to Lt. Peachee, who was on duty at that time.
43. On February 5, Associate Warden Nard Claar and Major Mallory requested a meeting with Goyett. At that meeting, she reported what had occurred, and wrote a brief statement. Despite the seriousness of the reported attack, the prison administrators then asked Goyett if she felt she could "work through this." In an attempt to be a team player, she stated that she felt she could try.
44. Associate Warden Claar then called Complainant into the room for the purpose of attempting to mediate the situation. Goyett was asked to tell Complainant what her feelings about the attack were. She stated that she had never liked the sexual comments that he had made in the past. She said that although she had been able to "work around" the comments, when he touched her, he crossed the line. Complainant was then told to speak to Goyett. He stated that he didn't know why he had done what he had done, and that it would never happen again.
45. Associate Warden Claar informed Goyett that if at any time after mediation she felt uncomfortable with the way the facility was handling the situation, they would "go a different route."
46. Complainant returned to work committed to putting the attack behind her. She was unable to do so. She worked the same shift, on the same days, as Complainant, and was unable to function at work when he was in the same area. His job duties required that he periodically walk through Goyett's work area, and throughout the kitchen, during his shift. In addition, every afternoon Complainant brought inmates to Goyett's area for supervision, and later picked them up.
47. On February 10, 2002, Complainant returned to see the Associate Warden and Major Mallory. She informed them that she was having great difficulty being at work while Complainant was there, that the mediation had been an insufficient facility response to what had occurred, and that she thought the matter should be pursued further. They asked her to write a statement. She wrote the following,

"On February 5, 2002, I talked to Captain Dansdill, Major Mallory and the Associate Warden Nard Claar about my concerns with what had happen[ed] on February 2<sup>nd</sup> with Sgt. Hagger. You had ask[ed] me at that time if I would be willing to try and work with the situation, I did say I would try and I have tried very hard.

I can't think of anything else but what has happen[ed]. It is very hard for me to go in the room where it did happen, I know I will overcome that and it will take time. I

think to myself every day - is he going to be there and am I going [to] see him. I have gone home and prayed about it then I become very emotional I just can't get rid of the feeling I have. I feel I have been violated and I can't get rid of that thought. I do want to pursue this matter."

48. Fremont administrators had issued Complainant a Corrective Action for the February 2, 2002 attack. It is unknown who signed it, as a copy is not in the record.
49. Claar and Mallory informed Goyett that because it was a personnel matter, they could not disclose to her what action had been taken against Complainant. They stated that since action had been taken, however, there was nothing further they could do.
50. Goyett responded that if she had been caught doing the same thing to an inmate, she would have been escorted out of the facility. She said that she should be considered at least as important as an inmate. They informed her that Complainant had to be progressively disciplined. Goyett questioned why there should be a double standard in enforcing the "zero tolerance" policy towards sexual harassment when the attack is against a co-worker.
51. Goyett gave the administration additional names of Fremont kitchen co-workers that stated Complainant had sexually harassed them. The Inspector General's Office at DOC initiated an investigation into those additional sexual harassment charges.
52. Through a personal contact, Goyett learned that DOC administrative regulations permitted her to file a charge with the Criminal Investigations Division ("CID") of the DOC Inspector General's office. She did so in late February, 2002. An investigation into assault and harassment was initiated.
53. A CID investigator interviewed Goyett, six female co-workers, and Complainant.

#### CID Investigation.

54. In his interview with Complainant, the CID investigator informed him that he was investigating allegations of sexual harassment by female co-workers at Fremont. He informed Complainant he had been told Complainant was in the habit of making sexually related comments on a daily basis. Sgt. Haggard denied this, saying in the past few months he had not had time to joke with anyone because of his work, and that his comments were periodic, not daily.
55. When asked if he had ever said to a female staff member that he wanted to stick his tongue in her ear, Complainant stated he had never said that, and he was too professional for that. When asked, he also denied having told female officers that if they went with him, they would never go back to their husband.
56. When asked if he had stated to a female staff member that he wanted to cover her with

whipping cream and lick it off, he said people are always joking about whipped cream and he may have said, "Yea, let's get some whipped cream and have some fun."

57. Complainant stated that he had told all of the female staff members that he likes to joke around and if they are ever offended by his jokes, to let him know and he would stop. When asked if he thought that someone may have been offended but didn't want to approach him, he said that was a "good possibility." He also told the investigator that he never meant to make anyone uncomfortable by his jokes.
58. Regarding the February 2 attack on Goyett, Complainant affirmed that he had placed Goyett in a hug, and that they were "pretty close." He stated that he was in front of Goyett, not behind her. When asked if he had tried to kiss Goyett's neck, he stated he had tried to, but couldn't. When asked if she had struggled to get away from him, he said she had not.
59. Complainant asked for copies of the interviews with co-workers, but was denied access to them.
60. The final CID investigative report contains detailed descriptions of statements made by Complainant's female co-workers. The statements therein are consistent with the testimony of the women at hearing contained in the Findings of Fact above with a very few subtle differences.
61. Fremont Warden Gary D. Neet reviewed the investigative report, then scheduled an R-6-10 pre-disciplinary meeting with Complainant.

#### R-6-10 Meeting.

62. On April 1, 2002, Complainant attended the R-6-10 meeting with his attorney. Warden Neet attended with his representative, Associate Warden Nard Claar. Claar presented the information contained in the CID investigative report, namely, that six out of the eight female food service staff from Fremont had alleged that Complainant had sexually harassed them by making inappropriate sexual remarks to them on a regular basis. Without disclosing the names of the women, he read at least ten of the alleged statements to Complainant, including, "I'd like to nibble on your ear," "When can I take you in the back and have my way with you?" "Oh, don't do that in front of me. You know what I could do with that butt!" "I'd like to stick my tongue in your ear. C'mere, I'm gonna kiss you. Oh, the things we could do." "I could make you happy." "Come here and let me stick my tongue in your ear." "You smell good; you look good enough to eat." "Let's go to Cripple Creek; we'll buy some drinks and rent a room. We'll take whipped cream and strawberries." "I'll take you in the back with some Cool Whip and you'll never go back to your husband." "If I had a bottle of whipped cream, I'd spray it all over you and lick it off."
63. Claar also informed Complainant that in addition to Goyett, three other female food service employees had alleged that he physically harassed them. Without disclosing their identities,

Claar described the alleged conduct: that he placed his hand between one woman's left arm and breast, and she believed he was attempting to feel her breast; that he hugged and tried to kiss one woman, nipping at her cheek; and that he grabbed one woman's arm and pulled her up against him.

64. Complainant's attorney provided two types of responses. She indicated that Complainant was a touchy-feely person and may have gone too far, that some of his actions may have been misinterpreted. She also stated that most of the allegations were untrue. When asked which of the allegations were true, Complainant stated that he grabs both males and females by the arm, and touches people a lot. Complainant admitted to none of the conduct alleged at this meeting.
65. In an April 4 follow-up letter to Warden Neet, Complainant's attorney stated that Complainant denied sexually harassing any of the food service staff. She stated that he admits to laughing and joking a lot and telling one female, "I am going to blow in your ear real fast," and that she must have misinterpreted this to mean he was going to stick his tongue in her ear. She further stated that this employee would laugh and giggle and say, "oh baby!" and then leave. The letter also stated that Complainant was willing to apologize to the female staff he may have offended, to participate in any training classes, and that he was amenable to counseling, including a psychological evaluation.
66. After the R-6-10 meeting and review of the April 4, letter, Warden Neet interviewed the staff member about Complainant's assertion that his statement had been misinterpreted. She denied having said, "oh baby" and re-confirmed that he had said he wanted to stick his tongue in her ear on an almost daily basis. She reiterated that she found it both uncomfortable and inappropriate.
67. Warden Neet also interviewed the other female staff that had made allegations of sexual harassment.
68. Warden Neet concluded that the female staff at Fremont were more credible than Complainant. He concluded that there had been a long period of abuse and sexual harassment by Sgt. Haggar that was so prevalent that some female staff had become desensitized to it. Warden Neet was extremely concerned that the harassment was not only verbal in nature but also physical.
69. Warden Neet was also extremely concerned about the fact that Complainant had accepted no responsibility for his actions and had simply denied that the actions ever occurred. Because of his denial and failure to recognize the seriousness of his wrongdoing, Warden Neet believed that Haggar would continue the conduct and that it could easily happen to another employee.
70. Warden Neet reviewed Complainant's personnel file, which contained the corrective action for the February 2 attack on Goyett, and his performance evaluations, which were

Satisfactory, Competent, and Commendable. He also considered the serious nature of the offenses, the effect on the staff and workplace, and the frequency of the acts.

71. On April 10, 2002, Warden Neet issued his letter terminating Complainant's employment. In the letter, he stated in part,

"After reviewing all of the information in this case, it is my belief that you have severely minimized your behavior with regard to the female food service staff. I also believe that you lied to the CID investigator, to Associate Warden Claar and to me. Further, it is my opinion that your actions, both verbal and physical, were deliberate, unwanted and unwelcome acts of sexual harassment. I also believe your conduct unreasonably interfered with the work performance of the female food service staff and created an intimidating and offensive work environment. Such actions are a violation of DOC AR 1450-5, Unlawful Discrimination/Sexual Harassment and 1450-1, Staff Code of Conduct, and constitute willful misconduct under State Personnel Rule 6-10."

#### Credibility.

72. Complainant was not credible. He denies all of the conduct alleged by Knight, Peachee, Randall, and Hill (with the exception of having stated he wanted to blow in the ear of one co-worker). To accept Complainant's testimony as true would require the rejection of four co-workers' testimony as pure fabrication. Complainant offered no evidence or argument as to why any of his co-workers would have a grudge or bias against him. He offered no explanation for why co-workers would get together to manufacture allegations of sexual harassment against him. In fact, he testified that he got along well with all of his accusers.
73. In addition to denying all of the conduct alleged, Complainant takes a second, and contrary position, that his co-workers misinterpreted his statements and behavior. This position is also rejected. The women who testified at hearing were not at all confused about Complainant's conduct and statements. They heard what he said, and they knew how they felt about his conduct. They simply felt that it would be detrimental to the workplace to challenge him on his conduct, and elected to put the interests of the workplace above their own.
74. Significantly, even Complainant's own witness contradicts his testimony. One male co-worker, Michael Fanello, testified that he had heard Complainant say "I'd like to stick my tongue in your ear," and, "something about tongue and whipped cream. I remember the whipped cream part."
75. Complainant's testimony at hearing and his previous statements to the investigator were full of inconsistencies. He testified repeatedly that he likes to joke with people and compliments his female coworkers often. He told the investigator he was always telling crazy jokes to lighten the mood at work. Yet he also testified, "I do not get into conversations with people

if I can avoid it," and, when confronted with his offensive comments, he told the investigator that in the past few months he hadn't had time to joke with anyone because of his work.

76. Turning to the attack on Goyett, Complainant's statements made directly following the incident and his testimony at hearing were notably different. Complainant testified at hearing that the reason he hugged Goyett on February 2 was that she looked sad, and he was attempting to make her feel better. However, on February 2, in the February 5 meeting with Goyett and Fremont administrators, and in his later interviews with the CID investigator, he never mentioned that Goyett appeared sad or that he had been trying to console her. In fact, at the February 5 meeting, he stated to Goyett and his superiors that he had no idea why he had done what he had done to Goyett. If Complainant truly had had good intentions, he would have made them known to Goyett and to the prison leaders to whom he was asked to explain his actions.
77. It is found that Complainant manufactured a false reason for hugging Goyett for hearing, in an attempt to defend his behavior, and that he lied under oath about it. Complainant's lack of credibility on this issue detracts from his general credibility on all issues.
78. Complainant's testimony that the inmate under his supervision on February 2 stated, "I'd better get out of here," and left the room of his own accord, also lacks credibility. The inmate was under Complainant's direct supervision and was not authorized to leave without Complainant's express permission.
79. Goyett was a highly credible witness. Her testimony was identical to her written statement on February 4, two days after the attack, when it was fresh in her mind, and her statements to the CID investigator on February 21, 2002. At hearing, she made no attempt to embellish the attack, and demonstrated exceptional restraint in re-telling the story of a traumatic episode in her life.
80. All of the female staff were credible witnesses. Their testimony was identical or extremely similar to their statements to the CID investigator. None of them attempted to overstate or exaggerate Complainant's conduct. Rather, it was clear that all of them had learned somehow to accept the offensive conduct as part of the work environment, and that as relatively new employees, they felt too intimidated to challenge the norm. None of the women demonstrated bias or animosity towards Complainant.
81. Complainant received a copy of the sexual harassment policy when hired at DOC and received periodic training in sexual harassment throughout his employment.
82. Complainant knew his comments and physical contact with female co-workers were unwelcome, inappropriate, and offensive, but continued to engage in the behavior because no one filed a complaint against him.
83. Prior to the corrective action for the February 2 attack on Goyett, Complainant had never

received any type of prior verbal or written counseling, or corrective or disciplinary action, for actions that could be construed as sexual harassment.

## **DISCUSSION**

### **I. Standard of Proof**

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *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, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;
- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden 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. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

### **II. Complainant committed the acts for which he was disciplined**

The Findings of Fact above make it clear that Complainant committed all of the acts for which he was disciplined, namely, sexually harassing co-workers and lying about it.

#### **AR 1450-5, Sexual Harassment.**

Complainant argues that his actions do not rise to the level of sexual harassment as defined by DOC's policy. DOC Administrative Regulation ("AR") 1450-5 defines sexual harassment as "Any deliberate, unwanted or unwelcome behavior of a sexual nature whether verbal, nonverbal, or physical . . . Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive work environment."

Complainant's comments, often accompanied by grabbing and standing extremely close to the women, were sexual in nature, unwanted and unwelcome. Complainant argues that even if it is found that he engaged in the conduct alleged, his behavior did not "create an intimidating, hostile or offensive work environment." This ALJ disagrees.

A work environment in which a male co-worker daily informs a female that he would like to

take her in the back room and have his way with her, and that he would like to put whipped cream on her body and lick it off, is an intimidating, hostile and offensive one.

A work environment in which a male co-worker informs a female that she looks good enough to eat, that he would like to put whipped cream all over her, take her to the mountains, get a hotel room and have fun, is an intimidating, hostile and offensive one.

A work environment in which a male co-worker approaches a female, grabs her arm to pull her close, and whispers that he is going to stick his tongue in her ear, asks where she lives, and states that if he knew where she lived, he'd come over and have a good time, is an intimidating, hostile, and offensive one.

Complainant's aggressive conduct escalated to the point that he caused two co-workers to fear him. After Complainant put his arm around Sgt. Hill's midsection, she avoided contact with him and did not feel safe around him. After his sexual attack on Sgt. Goyett in a locked room, in which he used his superior physical strength to overcome her, she was unable to function at work around him. Complainant's pattern of sexual harassment grew in seriousness over time. His presence in the Fremont kitchen area created an intimidating, hostile, and offensive work environment.

One further note on the work environment at Fremont. It is significant that Associate Warden Claar and Major Mallory failed to take the February 2 attack on Goyett seriously.<sup>1</sup> This administrative failure to respond appropriately corroborates the view of Sgts. Randall and Knight that Fremont institutional culture condoned Complainant's conduct. If an assault such as that on Goyett results in a request for the victim to "work through it," and only a corrective action for the offender, the female staff were probably correct to assume that reports of sexually harassing comments would have gone unaddressed, or at least would not have been taken very seriously. The female staff experienced a work environment where they felt unsafe to report sexual harassment. Fortunately, Warden Neet appreciated the seriousness of Complainant's conduct and took appropriate, decisive action.<sup>2</sup>

#### AR 1450-1, Staff Code of Conduct.

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<sup>1</sup> The February 2, 2002 attack was serious and flagrant enough to warrant immediate disciplinary action up to and including termination. Board Rule R-6-2.

<sup>2</sup> In arguing that Respondent has failed to prove that he did not create an intimidating, hostile, or offensive work environment, Complainant appears to contend that the agency must meet the standards of a Title VII sexual harassment case. However, Title VII law is premised on the "terms and conditions" clause in the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e *et seq.* To be actionable under Title VII, federal case law requires that hostile work environment sexual harassment must be so severe and pervasive as to alter the "terms and conditions" of employment. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998). Compare section 24-34-402, C.R.S., barring harassment based on sex. There is no such requirement here. DOC need not prove up a Title VII case as a prerequisite to disciplining an employee for violating its internal sexual harassment regulation. DOC has the authority to promulgate internal regulations governing conduct in the workplace, and its regulation is presumptively valid. *Mile High Greyhound Park, Inc., v. Colorado Racing Commission*, 12 P.3d 351 (Colo. App. 2000).

DOC's Staff Code of Conduct, AR 1450-1, mandates that "Professional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies." AR 1450-1, page 3. Complainant's conduct towards his female co-workers violated this code of conduct.

### **III. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law**

Complainant contends that Respondent denied him due process at the pre-disciplinary meeting. First, he avers Respondent should have provided him access to the investigative report prepared by CID, which contains the sources of information upon which discipline was based. Second, he argues that at the meeting he was not given the opportunity to test the accuracy of the allegations through any kind of cross-examination.

To determine whether Complainant's argument has merit, the nature and purpose of the pre-disciplinary meeting must first be examined. In *Department of Institutions v Kinchen*, 886 P.2d 700 (Colo. 1994), the Colorado Supreme Court discussed due process in the context of the state personnel system. It determined that the only means to assure the constitutional adequacy of Board disciplinary hearings is to place the burden of proof on the agency. In making this determination, the Court contrasted the exhaustive procedural due process protections of Board hearings (right to present evidence, to conduct cross examination, to obtain judicial review), with the "informal" nature of the pre-disciplinary meeting. The Court stated,

"The forum in which the appointing authority must establish just cause if the employee . . . [appeals] discharge is the disciplinary hearing before the Personnel Board. If this were not required, there would be little check on the constitutional sufficiency of an appointing authority's standards in imposing discipline. For as previously described, the procedures leading up to imposition of disciplinary action are informal and afford little protection to an employee accused of misconduct. Therefore, the constitutional requirement that an appointing authority may terminate a certified employee only for just cause dictates that the burden of proof at the disciplinary hearing must be borne by the appointing authority." *Kinchen*, 886 P.2d at 707.3 Colo. Const. art. XII, sec. 13(8).

Thus, it is the Board hearing, not the pre-disciplinary meeting, that provides the constitutionally mandated procedural due process prior to deprivation of classified employment.

When the state, however, promulgates a regulation that imposes on governmental departments more stringent standards than are constitutionally required, due process of law requires those departments to adhere to those standards in discharging employees. *Department of Health v. Donahue*,

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3 While the pre-disciplinary rule relied on in *Kinchen* is slightly different than that in effect now, both rules mandate a meeting in which the parties exchange information and at which the employee may provide information that the appointing authority must consider prior to imposing discipline.

690 P.2d 243, 249 (Colo. 1984). *See also Shumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo. App. 1974)(disciplinary termination overturned where appointing authority neglected to provide a pre-disciplinary meeting).

State Personnel Board Rule R-6-10, 4 CCR 801 (2002) requires the following:

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, **disclose the source of that information unless prohibited by law**, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appointing authority and employee are each allowed one representative of their choice. Statements during the meeting are not privileged." Rule R-6-10 (with portion added by amendment, effective March 1, 2002, emphasized.)<sup>4</sup>

Rule R-6-11 further requires,

"The person conducting the meeting is responsible for the decision to take disciplinary action. The decision is made after consideration of all written and verbal information collected."

Rule R-6-10 requires a meeting. This meeting is not a "hearing," and the rule in no way implies that it is intended to function as a hearing. (Words and phrases in agency regulations are to be construed according to their familiar and generally accepted meaning. *Halverstadt v. Department of Corrections*, 911 P.2d 654, 657 (Colo. App. 1995); Section 2-4-101, C.R.S.)

The rule states its purpose clearly, "The purpose of the meeting is to exchange information before making a final decision." In early 2002, the Board amended Rule R-6-10 in order to improve the quality of this early information exchange. In addition to requiring the appointing authority to "present information about the reason for potential discipline" it now requires "disclos[ure of] the source" of the information "unless prohibited by law." This means disclosure of the identity of the person or persons that have made allegations against the employee.

Mandatory disclosure of the identity of one's accuser(s) at the pre-disciplinary stage is beneficial to the disciplinary process for a number of reasons. First, it enables the employee to attack the credibility or reliability of the source - critical mitigating information for the appointing authority's consideration. Second, knowing the source of information empowers the employee to better understand the exact nature of the allegation, and to more precisely rebut it. Increasing the accuracy of mitigating information is helpful to both employee and appointing authority. In summary, "disclosing the source" decreases the likelihood of mistakes in the imposition of discipline, ultimately resulting in fewer cases being litigated before the Board.

Rule R-6-10 requires disclosure of the source "unless prohibited by law." The Colorado Public (Open) Records Act, Section 24-72-101 *et seq*, C.R.S. ("the Act"), generally prohibits disclosure of

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<sup>4</sup> The R-6-10 meeting occurred in April 2002, after amendment of the rule.

investigative records pertaining to sexual harassment allegations, with certain exceptions. The Act states in part,

"(3)(a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records . . . shall be available to the person in interest under this subsection (3):

"(X)(A) Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file; except that, an administrative agency investigating the complaint may, upon a showing of necessity to the custodian of records, gain access to information necessary to the investigation of such a complaint . . . **Disclosure of all or a part of any records of sexual harassment complaints and investigations to the person in interest is permissible to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved. . . .**"

"(B) A person in interest under this subparagraph (X) includes the person making a complaint and the person whose conduct is the subject of such a complaint." Section 24-72-204(3)(a)(X)(A) and (B), C.R.S. (Emphasis added.)

The Act therefore permits disclosure of sexual harassment investigative reports or parts thereof, if requested, unless such disclosure would result in the identification of the accusers. (Complainant never submitted an Open Records Act request to CID.)

At Complainant's R-6-10 meeting, Associate Warden Claar verbally disclosed the entire contents of the investigative report, with the exception of the identity of the accusers. He informed Complainant that the source of the information upon which discipline might be imposed was five female co-workers, and he fully detailed the allegations of sexual harassment. Respondent presented information about the reason for potential discipline, and disclosed the source of that information except as prohibited by law. Therefore, the pre-disciplinary meeting complied fully with Board Rule R-6-10 and the Colorado Public Records Act.<sup>5</sup>

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

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<sup>5</sup> It is noted that nothing in the Public Records Act prohibited Respondent from verbally disclosing the identities of Complainant's accusers. However, it would violate the spirit and intent of the Act, as well as the express public policy of this State as codified therein, to require disclosure of those names.

*Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant contends that Respondent erred in failing to progressively discipline him, in violation of Board Rule R-6-2, and that the appointing authority failed to adequately consider alternatives to termination. He points out, correctly, that Respondent never gave him any warning that his conduct was unacceptable. Therefore, he argues, it was patently unfair to terminate him for such conduct. Implicit in the latter argument is that the appointing authority's action was arbitrary and capricious.

State Personnel Board Rule R-6-2, 4 CCR 801, states,

"A certified employee . . . shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination."

Warden Neet had the following information available to him at the time he made the termination decision: Complainant had sexually attacked Goyett in a locked room, holding her in a bear hug against her will and kissing her on the neck and ears. Complainant had received a corrective action for that incident. Following imposition of the corrective action, the investigation concluded that Complainant had engaged in a pattern sexual harassment of his female colleagues, of a verbal and physical nature, on a daily basis for a period of years.

Warden Neet was also aware that prior to attacking Goyett in the Storage Supply Room, Complainant had previously grabbed Sgt. Knight in the same room. This is a locked room where any cries for help by female staff would not be heard.

Complainant was terminated not just for the above conduct, but also for lying about it. Warden Neet concluded correctly that Complainant could not be trusted and if reinstated would repeat the conduct.

Complainant's argument that he deserved a warning prior to termination ignores the fact that any reasonable person would know that his conduct was vulgar, offensive, and a gross violation of the dignity of the female staff. His behavior ultimately posed a threat to the security of the work environment, and was serious and flagrant enough to warrant immediate termination.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

**INITIAL DECISION**

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

Dated this 5th day of September, 2002.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-894-1236

## **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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or 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 the Board does not receive a written notice of appeal 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 1/4 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 SERVICE**

This is to certify that on the \_\_\_\_\_ day of September, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Elizabeth Tormoen Hickey  
14 North Sierra Madre, Suite A  
Colorado Springs, Colorado 80903

and in the interagency mail, to:

Luis A. Corchado  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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