

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TROY HARDESTY,  
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS,  
GILLIAM YOUTH SERVICE CENTER,  
Respondent.

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THIS MATTER came on for hearing on August 10 and 13, 2004, before Administrative Law Judge Mary S. McClatchey. Troy Hardesty ("Hardesty" or "Complainant") represented himself. Melanie Sedlak, Assistant Attorney General, represented Respondent, Department of Human Services ("DHS"), Division of Youth Corrections ("DYC"), Gilliam Youth Service Center ("Gilliam"). At the request of Respondent, the record was kept open until November 16, 2004 in order to address the issue of mitigation of back pay.

**MATTER APPEALED**

Complainant appeals his disciplinary termination from employment by Respondent. For the reasons set forth below, Respondent's action is **modified**.

**ISSUES**

1. Whether Complainant committed the acts upon which discipline was based.
2. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law.

**FINDINGS OF FACT**

1. In March 2002, Hardesty commenced employment as a Safety and Security Officer I ("SSO I") at Gilliam, a youth detention facility.

2. Hardesty's performance ratings at Gilliam throughout his employment were Good and Commendable. He had received no corrective or disciplinary actions prior to his termination. Hardesty was a solid employee, dedicated to his job at Gilliam and to his career in the criminal justice field.

3. At the time of hire, Hardesty, like all Gilliam employees, reviewed and signed numerous policies governing their employment. Those policies included:

- Policy #3.7, Code of Ethics, which mandates that DYC employees shall protect the juveniles from any form of physical, emotional, or verbal abuse, sexual contact, harassment, or corporal punishment;
- Policy #3.22, Sexual Harassment, which prohibits employees from engaging in sexual harassment, defined in part as “the display or usage of sexually suggestive, provocative or explicit materials in the work place or juvenile living areas of a facility” and as any conduct that has the purpose or effect of creating an intimidating, hostile, or offensive environment;
- Policy #22.1, Use of Email, which states that email is to be used for business related communications only and not for the benefit of any other organization or individual, and prohibits use of inappropriate, unsuitable, or otherwise foul language; and
- Policy #22.4, Internet Access, which requires that all internet use be in support of current job duties, and prohibits accessing, transmitting, displaying of pornographic, erotic, profane, racist, sexist, or other offensive material. The policy states, “This includes messages, images, video, or sound that violates the state’s harassment policies or creates an intimidating or hostile work environment.”

4. In the Spring of 2003, at least ten SSO I employees and at least one SSO II (supervisory level) employee at Gilliam and elsewhere in DHS routinely sent each other inappropriate, sexist, erotic, racist, violent, and offensive email messages, with attachments containing internet hyperlinks, in violation of the policies set forth in Paragraph #3. Hardesty was one of those employees.

5. The climate in which Hardesty worked was one in which some Gilliam line supervisors were aware of the routine violation of the policies listed in Paragraph 3 herein, engaged in those same violations, and condoned the misconduct.

6. Gilliam first line supervisors were aware that employees sent each other inappropriate, personal emails while on duty, and took no action to stop the practice.

### **The Plastic Surgeon Email**

7. In mid-May, 2003, over twenty employees of the State of Colorado, including male and female employees of DHS, the Auditor’s Office, and other state agencies, circulated an email entitled, “Don’t Piss Off Your Plastic Surgeon” (“the Plastic Surgeon email”). It contained an attachment that was pornographic and sexist: a photograph of a woman from the chest up, nude, and attached to the end of her bare breasts are large penises. The image is shocking and offensive.

8. On May 20, 2003, Eron Berrian, an SSO I at another DYC facility, Adams Youth Services

Center, forwarded the Plastic Surgeon email to Hardesty.

9. On May 27, 2003, Hardesty opened the email. At 3:21 p.m., Hardesty decided to forward it to an old personal friend, Christopher Allen, who is not a state employee. Hardesty attempted to input "Allen" into the computer, and pressed, "send," on his computer.

10. Instead of going to his friend, the Plastic Surgeon email was erroneously sent to "ALL" employees in DHS, over 5300 individuals.

11. Hardesty did not intend to send the Plastic Surgeon email to anyone other than his friend, Christopher Allen.

12. Within minutes, Hardesty received dozens of responses to the email from employees of DHS who were repulsed, shocked, and offended by it.

13. As soon as he figured out what had occurred, Hardesty immediately paged the computer "super user" on duty, Richard Green. As a "super user," Green was responsible for assisting employees with computer problems. Green did not answer his page. Hardesty left him a message as to what had occurred and asked him to come immediately.

14. Hardesty panicked and immediately paged Erin Weeda, another computer problem solver on staff at Gilliam. Weeda was the Administrative Assistant to Gilliam Executive Director Cornelius Foxworth.

15. Weeda came immediately to Hardesty's work station. When she arrived, Hardesty and Green were "trying to remove the email accidentally sent out." (Testimony of Weeda.)

16. Weeda was able to retract the email. Therefore, DHS employees who had not opened the email at that time never saw it. Hardesty's immediate action taken to assure retraction of the Plastic Surgeon email limited the damage done to the agency and its employees.

17. Hardesty informed Weeda that he wanted to send an apology letter to all DHS employees, for having sent them an offensive email accidentally. Weeda directed Hardesty not to do so, for reasons that are not in this record.

18. Hardesty also informed his immediate supervisor about what had occurred within minutes of realizing his error.

19. Hardesty informed Weeda that he had recently had problems with his computer. She arranged to have computer experts examine and trouble shoot his computer. No problems were found.

## **Investigation into Email and Internet Misuse by Other Employees; Other Discipline Imposed**

20. Following the May 27, 2003 debacle, DHS conducted a thorough investigation into its employees' email and Internet use. That investigation revealed widespread misuse of email and Internet by employees and some supervisors during work time, at Gilliam and other facilities.

21. At least ten other employees were disciplined by DHS for the same conduct as Hardesty, many of whom sent the same emails he did. Many of these employees sent more emails and spent more time on the Internet than Hardesty. Some sent fewer emails than Hardesty.

22. DHS officials developed a sliding scale for the imposition of discipline against these other employees, based on the number of inappropriate emails sent, and the type of content (racial, sexual, violent).

23. The lowest level of discipline imposed by DHS on the ten other employees was a fine of \$300.00; the highest was a fine of \$1000.00.<sup>1</sup>

24. For example, the employee who sent Hardesty the Plastic Surgeon email, Eron Berrian, was found to have sent out 120 emails that were humorous or joke related, and deemed inappropriate by DYC, and 22 emails that were deemed highly offensive and pornographic in nature.

25. DHS imposed a \$400.00 fine on Berrian. In addition, his email privileges were revoked for six months and he was required to attend training.

26. During the period April, May, and June 2003, Kris Leyba, an SSO II at Gilliam (a line supervisor of employees such as Hardesty), received, reviewed, and forwarded several violent, racial, and/or sexual emails to other Gilliam employees, as well as other individuals outside Gilliam.

27. Leyba was given a \$400.00 fine. The disciplinary action letter covers three months of email use and one month of Internet use. While not quantifying the total number of infractions during that period, the letter concludes that "quite a few" of the emails he received and forwarded "have been of a racial, violent, and/or sexual nature." The disciplinary action letter makes no reference to the fact he was a line supervisor responsible for enforcing policies and professional standards of conduct at Gilliam, and that he had seriously violated those supervisory responsibilities.

28. Three supervisors were found to have abused email during work time. There is no evidence concerning what action, if any, was taken against the two other supervisors.

29. During the same three-month period, Hardesty had sent 28 inappropriate emails, some of them highly offensive and pornographic in nature, including the Plastic Surgeon email.

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<sup>1</sup> The only exception is Victor Nevins, an individual terminated for several serious, unrelated allegations of misconduct.

30. Hardesty is the only DHS employee terminated for his email misuse at work. He is the only employee that received disciplinary action exceeding a fine. No other employees were suspended for any period of time. No other employees were demoted or terminated. The only distinguishing factor in the discipline imposed was the fact that his May 27 email was inadvertently sent to the entire agency.

### **Pre-Disciplinary Process**

31. On May 27, 2003, Cornelius Foxworth, Executive Director of Gilliam, sent a notice of pre-disciplinary meeting under Board Rule R-6-10 to Hardesty.

32. Just prior to that meeting, on June 4, 2003, DHS Executive Director Marva Hammons, through her communications director, sent an email message to the entire department. It stated in part,

“Recently, a highly offensive e-mail was distributed department-wide by a CDHS staff member. The e-mail violated our department values and represented appallingly poor judgment. The Office of Information Technology Services acted almost immediately to limit its distribution. Unfortunately, many staff members saw it before it could be deleted from the system. To those who saw it and were justifiably offended, please accept my apology and that of the Executive Management Team. The incident has been investigated and disciplinary actions are scheduled. Please let this reprehensible incident serve as a reminder that the Colorado Department of Human Services has zero tolerance for this kind of behavior and is committed to treating all employees with respect and dignity. Also be reminded that e-mail is a state resource and its use is strictly governed by department policy.”

33. As soon as Hardesty read this message, he grew fearful for his job. His friends at work suggested he postpone the pre-disciplinary meeting in order retain a lawyer. He did so.

34. Foxworth responded to Hammons’ email message by sending his supervisor an email indicating he had noticed a pre-disciplinary meeting with Hardesty, but had not yet determined what action to take.

35. On June 12, 2003, Hardesty attended the pre-disciplinary meeting with his attorney. Foxworth, Tanya Lyons, Assistant Director of Gilliam, and Erin Weeda were also present.

36. At the meeting, Hardesty admitted to having sent the email, and explained it was a complete accident that occurred in attempting to send it to a friend with the last name of “Allen.” He asked Foxworth to have his computer checked, and to have someone repeat what he had done, in order to prove that he had not intentionally sent the Plastic Surgeon email to the entire department.

37. With respect to the other emails he had sent, he stated that he forwarded them to friends, none of whom found them offensive. He also said that everyone he worked with at Gilliam engaged in this type of email misuse at work, and that supervisors knew about it and condoned it.

38. Foxworth confronted Hardesty with the information he had learned from the investigation. He stated that the Internet usage report for the last thirty days confirmed he had visited numerous unauthorized websites. Hardesty explained that he did not visit the sites independently, but in the course of opening hyperlinks in the attachments to emails he received from others. Hardesty explained that the only site he visited on his own was dailyrotten.com. Foxworth followed up on this information and confirmed that Hardesty had made six hits on that site over two user sessions with a cumulative time spent of two minutes and twenty seconds.

39. Foxworth also stated to Hardesty at the meeting, "I can't believe you went to boners.com," or words to that effect. Foxworth assumed this to be an erotic website. In fact, the site contains only humorous gaffes and mistakes, nothing offensive or inappropriate.

40. Foxworth erroneously assumed that Hardesty had lied about not going to websites on his own, because he was unaware that boners.com was a hyperlink from dailyrotton.com.

41. Foxworth followed up on the pre-disciplinary meeting by asking Weeda to attempt to duplicate what Hardesty had done when inputting "Allen" on May 27. Weeda inputted the same letters and hit "send," but it did not work. The only reasonable explanation for this is the fact that Hardesty input the letters quickly on May 27, and neither he nor anyone will ever know exactly how the mishap occurred.

### **Termination of Hardesty**

42. Foxworth appropriately felt that the May 27 email sent by Hardesty constituted sexual harassment of the individuals who opened it and saw it. He was concerned about department liability in relation to any potential legal claims that might be filed. No claims have been filed.

43. On June 20, 2004, Foxworth sent Hardesty a termination letter. The bases for the termination were the following: sending the Plastic Surgeon email to all DHS staff on May 27, 2003; a "sampling of approximately thirty emails" contained "content that could be construed as violent, racial and/or of a sexual nature. These emails were not only received internally and externally, but they were then forwarded on to Gilliam Youth Services Employees as well as others outside of this building"; he had received training in all of the policies listed in Paragraph 3 herein; and, he had willfully violated those policies.

44. At hearing, Foxworth testified that one of the primary bases for imposing the harshest sanction of all against Hardesty, termination, was his conclusion that he had sent the Plastic Surgeon email to the entire department "willfully." He testified, "I concluded it was willful."

45. There is no record support for the assertion that Hardesty sent the Plastic Surgeon email

willfully to the entire DHS staff.

46. At hearing, Foxworth's own administrative assistant, Erin Weeda, testified without hesitation that Hardesty had sent the Plastic Surgeon email "accidentally." There was no question in her mind about this. Weeda had been present with Hardesty immediately following the incident: she witnessed him panicking about the situation, making every effort to have the email immediately retracted, and asking her if he could send an apology letter to the entire department.

47. Foxworth failed to consider this critical information from Weeda concerning Hardesty's intent in sending the email department-wide.

48. Foxworth failed to consider mitigation in his decision to terminate Hardesty. He failed to consider the fact that Hardesty took immediate action to have the email rescinded. He failed to consider the fact that line supervisors at Gilliam knew about and condoned the conduct.

49. From the date of termination through the time of hearing, Complainant has earned income in the amount of \$10,013.07. (Stipulation of parties.)

## **DISCUSSION**

### **A. Burden of Proof**

Certified state employees have a property interest in their positions and may only be disciplined 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 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 *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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

**B. Complainant did not commit all of the acts for which he was disciplined**

The action that set Hardesty apart from the other DHS employees who routinely abused email was his May 27 transmission of the Plastic Surgeon email. Hardesty was terminated because of that act. All other employees, including the supervisors who condoned and engaged in the misconduct, received nothing more than a fine.

Foxworth testified that he fired Hardesty because he had “willfully” sent the Plastic Surgeon email to the entire Department. Hardesty did not willfully send the Plastic Surgeon email to the entire department. No evidence in the record supports that determination. It was a mistake. Therefore, Respondent failed to prove the central component of “good cause” upon which Hardesty’s termination was based. The harsh discipline of termination therefore cannot stand. 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). Clearly, however, some disciplinary action is appropriate.

**C. The discipline imposed was arbitrary and capricious and contrary to rule or law**

Respondent’s action was taken in violation of Board Rule R-6-6

Board Rule R-6-6 sets forth the criteria appointing authorities must consider prior to imposing corrective or disciplinary action. It states,

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

Foxworth appropriately considered the “seriousness” and “effect of the act” of Hardesty’s accidental transmission of the Plastic Surgeon email to the entire Department. The effect of this act was to shock, traumatize, and offend hundreds of Department employees. It was an extremely serious incident. An additional effect included the fear within the Department that an offended employee might file a legal claim against the Department. While Hardesty did not intend to cause these effects, his action caused them to occur. The dramatic effects of Hardesty’s action on the agency constitutes aggravation that sets Hardesty apart from the other employees who engaged in email abuse on the job at Gilliam and elsewhere in the state system. Respondent therefore appropriately viewed his case as more serious than the others, warranting a more serious disciplinary action.

Weighing against that aggravation, however, are mitigating factors that Foxworth failed to

consider, in violation of R-6-6. First, he failed to consider the fact that line supervisors at Gilliam not only condoned the misconduct, but also engaged in it themselves. Hardesty reasonably believed that he would never have been terminated for that conduct. Under these circumstances, Hardesty was clearly entitled to one warning, in the form of progressive discipline, prior to imposing termination for that condoned conduct. Hardesty has never had the benefit of that warning, unlike the ten other employees who were given fines of \$400 to \$1000. An employee who engages in misconduct condoned by line supervisors cannot fairly be terminated for that misconduct, absent an intervening warning.

In addition, Foxworth failed to consider the mitigating fact that Hardesty did not intentionally send the email to the entire department. Foxworth either knew or should have known that as soon as Hardesty discovered his error, he immediately paged Erin Weeda, Foxworth's own administrative assistant, in order to have the email retracted, that Hardesty asked Weeda if he could send an apology letter to the Department, and that Hardesty was clearly horrified about the situation on May 27. Hardesty's actions on May 27 were not those of an individual who brazenly sent an offensive photo of a nude woman to 5300 individuals. Foxworth failed to consider mitigation of the highest importance. Lastly, the record reveals that Foxworth gave inadequate consideration to Hardesty's Good and Commendable performance evaluations and lack of any previous performance issues or corrective or disciplinary actions of any type.

#### Termination was an arbitrary and capricious sanction

The discussion above regarding line supervisors having condoned and engaged in the same conduct for which Hardesty was terminated is incorporated herein. The double standard imposed against Hardesty and others renders termination an arbitrary and capricious sanction. Moreover, Foxworth neglected to use reasonable diligence and care to gather all necessary evidence, and failed to give the evidence candid and honest consideration, prior to imposing the most serious discipline of all, termination. *Lawley, supra*. Had he spoken to Weeda about her interactions with Hardesty on May 27, he would have immediately understood that Hardesty was horrified and remorseful about the mass email transmission, took decisive action to have it retracted, and sought to send an apology letter. For reasons not in the record, Foxworth never considered this critical mitigating information. His failure to do so renders his termination of Hardesty arbitrary and capricious.

#### **D. Appropriate Sanction**

Section 24-50-103(6), C.R.S., provides in part, "An action of . . . an appointing authority . . . may be reversed or modified on appeal to the board only if at least three members of the board find the action to have been arbitrary, capricious, or contrary to rule or law." Board Rule R-6-9(B) states, "If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified." Such is the case herein, as termination was imposed in violation of R-6-6, and was arbitrary and capricious under *Lawley*.

Rule R-6-9 empowers appointing authorities to impose disciplinary suspensions, without any

limit as to the length of such suspensions. Respondent terminated Complainant on June 20, 2003. Over a year has passed since Complainant's separation from employment.

In view of the seriousness of the effect of Complainant's conduct on DHS as an agency, and on the individuals who unwittingly opened the email and were shocked and offended by it, it is appropriate to modify the discipline to a suspension. Therefore, Respondent's disciplinary action is hereby modified to a 180-day suspension.

Complainant is to be reinstated to his position as of 180 days following his June 20, 2003 termination, which date is December 17, 2003. With respect to back pay, Complainant is entitled to receive back pay and benefits from the period December 17, 2003 through his reinstatement, minus "any substitute earnings or unemployment compensation received during this period," thereby restoring him to a position he would have been in but for the termination. *Dept. of Health v. Donahue*, 690 P.2d 243 (Colo. 1984).

At the close of hearing, in the event the discipline were modified, Respondent moved to leave to keep the record open so that the issue of offset of back pay could be addressed prior to issuance of the Initial Decision. The motion was granted. The parties stipulated that the amount of back pay offset is \$10,013.07.

### CONCLUSIONS OF LAW

1. Complainant did not commit all of the acts for which he was disciplined.
2. Respondent's sanction of termination was arbitrary and capricious or contrary to rule or law.
3. The disciplinary action is modified to a suspension of 180 days.

### ORDER

The termination of Complainant is **modified** to a suspension of 180 days. Respondent shall reinstate Complainant to his former position, effective December 17, 2003, with full back pay and benefits, minus an offset in the amount of \$10,013.07.

DATED this \_\_\_\_ day of  
**November, 2004**, at  
Denver, Colorado.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln St., Suite 1420  
Denver, CO 80203

## NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

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

### PETITION FOR RECONSIDERATION

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

### RECORD ON APPEAL

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 764-1472.

### 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 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

### ORAL ARGUMENT ON APPEAL

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

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of **November, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Troy Hardesty  
601 South Forest #317  
Glendale, Colorado 80214

And in the interagency mail to:

Melanie Sedlak  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods