STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2004B024

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRANK IRIONS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, DENVER WOMEN'S CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on August 29, September 29 and 30, October 25, and November 30, 2005, and January 5, 6, 12, 19, and February 23, 2006 at the State Personnel Board, 633- 17th Street, Denver, Colorado. The hearing dates were held in Courtroom 6, with the exception of the October 25, 2005 hearing date which was held in Courtroom 5. Assistant Attorney General F.J. Dindinger represented Respondent for the first part of the proceedings, and Assistant Attorney General Christopher Puckett completed the matter for Respondent. Respondent's advisory witness was Joan M. Shoemaker, the appointing authority. Complainant appeared and was represented by William F. Finger, Esq.

MATTER APPEALED

Complainant, Captain Frank Irions ("Complainant") appeals his demotion from the rank of Major by Respondent, Department of Corrections ("Respondent"). Complainant seeks reinstatement to his position of Major, back pay or other expenses associated with the demotion, and reasonable attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed in part** and **rescinded in part**.

ISSUES

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

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. From July 1, 2002, until his demotion on July 10, 2003, Complainant was the Programs Manager for the Denver Complex. The Denver Complex includes three facilities: the Denver Reception and Diagnostic Center ("DRDC"), the Denver Women's Correctional Facility ("DWCF") and the Colorado Correctional Center ("CCC') in Golden, Colorado.

2. As Programs Manager, Complainant had supervisory authority over such functions as library, teachers, laundry and food service. Complainant reported to the Associate Warden Noble Wallace.

3. The appointing authority for the Denver Complex is Warden Joan Shoemaker. Warden Shoemaker has been employed by Respondent for over eighteen years at the time of hearing. She was promoted to warden of DWCF in October of 2000. The other two facilities were administratively joined to DWCF shortly thereafter. Warden Shoemaker is a white female.

4. Complainant is a black male.

Management Issues with Captain Tafoya:

5. Captain John Tafoya began working at the Denver Complex in June 2000.

6. In March or early April of 2002, Captain Tafoya moved from custody and control duties into the position of a programs supervisor. He was assigned to supervise functions such as academics, vocational education, and library services.

7. In July 2002, Complainant became Captain Tafoya's direct supervisor.

8. From the beginning of their working relationship, there was tension between Complainant and Captain Tafoya. Captain Tafoya had made disparaging remarks about Complainant even before Complainant had become Captain Tafoya's supervisor.

9. On July 1, 2002, Complainant held a morning meeting with his command staff, including Captain Tafoya. At this meeting, Complainant discussed the fiscal pressures that DOC was experiencing at the time and the fact that there would be a cut-back in positions. Complainant also told his staff that there was no planned cut-back for programs staff, including the teachers.

10. After this morning meeting, Captain Tafoya held a meeting with the contract teaching staff within in his line of supervision. He advised these individuals that he had just had a meeting with Complainant and that Complainant had said that there would be cuts in the contracts for teaching staff. At the time he gave this information, Captain Tafoya knew that he was not accurately relaying what Complainant had said.

11. The teaching staff was very upset at this news. It was only after a period of time that Captain Tafoya told the teachers that he was just joking.

12. Captain Tafoya then paged Complainant through the use of the page-net system, and told Complainant that the teaching staff was up in arms. At the time Captain Tafoya sent the page-net, he knew that he was not telling Complainant the truth. Captain Tafoya told the teachers in the room that he was sending the page-net to Complainant just to start things off right with Complainant.

13. On July 2, 2002, Complainant held a meeting with the teachers in response to the page-net he had received from Captain Tafoya. At that point in time, the teachers did not tell Complainant that Captain Tafoya had been toying with him.

14. After the meeting with the teachers, Complainant set off to find Captain Tafoya and see what he knew about the issue. Captain Tafoya did not admit to having sent out an incorrect page-net to Complainant.

15. While Complainant was inquiring about the events of the previous day, Captain Tafoya fell silent and then started to ignore Complainant and taking notes rather than speaking with Complainant. Complainant was upset at this response, and told Captain Tafoya that he was a rookie and needed to act in a more professional manner. Complainant also referenced the fact that he had been on the committee that had hired Captain Tafoya as a programs supervisor. Complainant told Captain Tafoya that he, Complainant, was responsible for Captain Tafoya having gotten the job.

16. Captain Tafoya complained to Complainant's supervisor, Mr. Wallace, that Complainant had been demeaning and threatening to him. Mr. Wallace in turn told Warden Shoemaker of Captain Tafoya's complaint. Warden Shoemaker asked Major Neva Butterfield to attempt to mediate the situation between Complainant and Captain Tafoya.

17. Major Butterfield met with both men to attempt to resolve the tension. In this meeting, Complainant and Captain Tafoya agreed to have more professional relations with each other. Complainant also agreed to write a letter of apology to Captain Tafoya for referring to Captain Tafoya as a rookie and to acknowledge that Captain Tafoya had achieved his position through merit and achievement.

18. Shortly after this agreement was reached, Complainant attempted to contact

Captain Tafoya in a training meeting. He went over to Captain Tafoya during a break and extended his hand to Captain Tafoya. Captain Tafoya reused to shake Complainant's hand and instead turned and walked away.

19. Complainant decided that he would not write the letter of apology and he had not done so by the time of hearing on this matter.

20. On August 23, 2002, five of the female teaching staff met with Mr. Wallace to complain about the conduct of Captain Tafoya. They complained that he was threatening, intimidating, and abusive to them. Complainant was not initially a part of this meeting, but Mr. Wallace brought him into the last part of the meeting.

21. Complainant observed that, during the next month after the meeting with Mr. Wallace, the situation was not improving between the teaching staff and Captain Tafoya. Complainant decided that he would switch the assignments and have Captain Tom Valdez cover the assignment and move Captain Tafoya into Captain Valdez's position.

22. Complainant told Captain Tafoya and Captain Valdez that he was moving the two of them because of the breakdown of Captain Tafoya's relationship with the female teaching staff.

23. Captain Tafoya grieved the change in assignment on November 1, 2002, arguing that this change was a hostile work environment. During the grievance process, Captain Tafoya also alleged that Complainant had threatened to have the teaching staff to write letters against him.

24. Complainant and Captain Tafoya attempted to mediate the disagreement through the Human Resources Dispute Resolution office. That attempt was unsuccessful.

25. Warden Shoemaker decided that the proper response to the grievance was to change Captain Tafoya's reporting structure so that he reported directly to Mr. Wallace. Complainant did not have supervisory authority over Captain Tafoya from approximately November 15, 2002.

26. Complainant requested that the teaching staff write letters to Warden Shoemaker explaining what they had witnessed on July 1, 2002. Complainant finally learned about what Captain Tafoya had said and done in the meeting with the teaching staff on July 1, 2002, during his conversations with members of teaching staff in December or early January, 2003. By that point, Complainant was in the process of rebutting Captain Tafoya's allegations that Complainant had created a hostile work environment for Captain Tafoya. The letters from the teaching staff support Complainant's version of events. There is no indication that Complainant solicited false or misleading information against Captain Tafoya in these letters.

Kitchen Inspection:

27. The kitchen in DRDC was going through a renovation in early 2003 because of sewage pipe problems. The kitchen itself was not usable during the renovation. Food service for DRDC was changed so that the food service would occur at the DRDC gym. The food, however, was prepared at DWDC and then carted over to DRDC using inmate labor.

28. Prior to the point when the functions were joined, DRDC and DWDC each had a captain in charge of the kitchen. Captain Karen Lutz was assigned to DWDC. Captain Lutz was an experienced food service manager, with both private sector and correctional experience. Captain Kathleen Arnold was assigned to DRDC. Captain Arnold also had experience in food service management prior to her assignment to DRDC.

29. Shortly after the two kitchen functions were joined, Captain Arnold requested that Complainant split the duties between Captain Lutz and herself. Complainant did so, and assigned Captain Arnold to the operational side of the kitchen function and Captain Lutz to the administrative functions for the kitchen. As a practical matter, this meant that Captain Arnold supervised the day-to-day food services and kitchen operations, and Captain Lutz took care of the paperwork associated with those functions.

30. The Denver Complex was to undergo an American Correctional Association ("ACA") audit in May of 2003. ACA audits are often focused on food service issues because these issues can determine quality of life for the inmates.

31. In early April 2003, Respondent conducted an internal audit of food service and kitchen in anticipation of the ACA audit in May 2003.

32. The early April 2003 internal audit was conducted by Rick Soares. Mr. Soares identified a number of specific issues with the food services operation in both DWCF and DRDC. He identified a number of cleaning issues that had to be rectified before the Denver Complex kitchen and food services would pass ACA audit inspection.

33. The primary concerns revealed in the audit of the kitchen were related to sanitation. The DRDC floor and beverage island were tacky. There were concerns about the DWCF dining room floors being dirty, that the hood had collected grease, and that the dock areas, ovens, and other areas were in need of deep cleaning. There had also been some questionable food preparations observed, such as allowing pooled eggs in a 60 quart mixing bowl. While any kitchen will have problems during an inspection, the Denver complex kitchen audits showed that routine deep cleaning had not been done in the weeks leading up to the audit.

34. Captain Arnold understood that the kitchen area required a periodic deep cleaning. At one point, she had instructed one of her lieutenants, Lt. Lambert, to form a deep cleaning crew. When Lt. Lambert moved to another facility, however, the deep cleaning

crew fell apart.

35. Captain Arnold was working more than 8 hours a day trying to keep up with the operational needs of the facilities.

36. Captain Arnold requested from Major Hall that additional inmate assistance be assigned to the kitchen, but Major Hall did not provide her with additional inmate help. In early 2003, the kitchen staff included funding and approval for 200 inmate workers.

37. Captain Arnold reported her inability to acquire additional inmate help to Complainant. Complainant's response was to report the issue to his direct supervisor., Mr. Wallace. Complainant also advised Captain Arnold to keep talking with Major Hall and Mr. Wallace about having more inmates made available.

38. Complainant did not significantly involve Captain Lutz in his efforts to find ways to clean the kitchen to pass the audit requirements.

39. Inmate workers require staff supervision in the kitchen. As a result, inmate worker numbers cannot be significantly increased without creating the need to increase staff supervision of the workers. At the time leading up to the ACA audit, the kitchen had 22 staff positions filled. Full staffing for the kitchen when the facilities were operating at full capacity was expected to be at 25 positions. In April of 2003, however, DWCF was not yet fully built out and was operating at about two-thirds of capacity.

40. After the early April 2003 internal audit was completed, the Assistant Director of Correctional Services, Dona Zavislan, performed a follow-up audit of the kitchen issues. Ms. Zavislan toured the kitchen with DOC Accreditation Manager Pam Plough on April 28, 2003.

41. Ms. Zavislan's report noted a series of deficiencies which still existed in the kitchen, many having to do with deep cleaning issues. Ms. Zavislan also noted that the Denver Complex food services system appeared to lack the necessary management to ensure consistency and accountability in the operations.

42. Complainant received copies of the internal audit reports. Complainant did not create a new plan or otherwise modify his approach the management of the kitchen issue problems.

43. Warden Shoemaker assigned an administrative officer at the Denver Complex, Mike Evans, to the job of cleaning the kitchen to take care of the deficiencies noted in the internal audits. Mr. Evans was a General Professional IV, which is somewhere between a Captain and a Major. Mr. Evans had a background in food service management prior to his hiring by DOC in January of 1990.

44. Mr. Evans took his instructions directly from Warden Shoemaker and did not report

to Complainant. He assumed that the Warden would inform Complainant of the assignment.

45. Mr. Evans began work on or about May 5, 2003. He originally requested, and was given, some extra inmate assistance on the job but he found that the supervision of the inmates took more time than was useful. Mr. Evans gave some assignments on cleaning to Captain Lutz. Mr. Evans completed the kitchen clean up without additional inmate or staff assistance, other than some staff overtime.

46. The ACA audit was conducted as scheduled. The Denver Complex kitchen and dining halls passed the audit.

Complainant's Relationship with Captain Arnold:

47. Captain Kathleen Arnold was originally hired by DOC in December 1998 as a Food Service Supervisor I. She was promoted to Food Service Supervisor II in 1999, and promoted to Captain in March 2001.

48. Complainant and Captain Arnold had known each other socially for several years. Prior to the end of 2002, Captain Arnold had been over to Complainant's house three or three times; during her first visit, she met Complainant's wife, but the other times she went over Complainant's wife was not present. Complainant later told her that he had been divorced from his wife.

49. Starting at least by late 2002, Complainant began to spend more time with Captain Arnold on a social basis.

50. In late 2002 and early 2003, Complainant's and Captain Arnold's relationship began to change. By March of 2003, Captain Arnold was seeing Complainant on more than a professional basis.

51. By November of 2002, there was a rumor among the staff in the food service area that Complainant and Captain Arnold had an on-going relationship.

52. By February 2003, Captain Arnold had told Complainant that she was interested in exploring a full relationship with him. Complainant told her that he had just ended his marriage and did not want to start another relationship soon after.

53. In the spring of 2003, Complainant and Captain Arnold went to dinner together, such as the time when they dined together at the Cheesecake Factory. When Complainant and Captain Arnold went out for a meal, generally one would pay for the whole meal and then the other one would pay for the next meal. They went to the movies together. They talked to each other every day on the phone.

54. The first night of the March 2003 snowstorm which dumped three feet of snow onto

Denver, Complainant needed to find a ride home from work and he contacted Captain Arnold. Complainant had originally asked to be dropped off at Embassy Suites that night. Captain Arnold suggested, however, that he spend the night at her house rather than pay for a room. Complainant did spend the night that night at Captain Arnold's house.

55. Two or three days afterwards, Complainant was working late at Foley's at his second job. He needed a ride home late that night and again called Captain Arnold. Captain Arnold drove out to get him, even though the snow had not been fully plowed yet. Complainant suggested that Captain Arnold stay at his house and they would go into work together the next morning. Captain Arnold agreed and spent the night at Complainant's house.

56. Complainant and Captain Arnold would sometimes have lunch at Complainant' s office in DRDC with the door closed. This office had no windows. Complainant also sometimes had lunch with Captain Valdez in his office with the door closed.

57. When Captain Arnold was interviewed by Inspector General Investigator LaCole Archuletta on February 19, 2003, she told Investigator Archuletta that she had feelings for Complainant, and that she thought she should be talking to the warden about their relationship

58. Complaint was responsible for Captain Arnold's April 2003 performance evaluation. Even though the condition of the cleaning in the kitchen had been a significant issue for the ACA audit preparations, and even though Captain Arnold held the responsibility for the operation of the kitchen, Complainant did not address the issue in his evaluation.

59. Captain Arnold considers that she became "significant friends" with Complainant in the fall or winter of 2003. By this time, Complainant had been demoted to Captain and she was no longer in his chain of command. The difference between her relationship with Complainant prior to that point and her relationship with Complainant after the fall or winter of 2003 is that her friendship now had a sexual aspect and that the two of them see each other more frequently.

60. DOC Administrative Regulation ("AR") 1450-11, "Employment of Relatives by the DOC," effective February 1, 2003, states that "Dating / romantic / sexual relationships between a supervisor and staff when the staff is within the chain of command of the supervisor are prohibited." Section IV.E.

61. AR 1450-11 also provides that: "Staff who become family members by marriage or become involved in a significant relationship after initial employment must notify the appointing authority in writing within ten days after marriage or the establishment of a significant relationship identifying the affected work unit and the names of the affected staff." Section IV. C. "Significant relationship," in turn, is defined as "that which exists when individuals are involved in an ongoing romantic relationship." Section III.D.

62. Neither Complainant nor Captain Arnold has reported that they were, or are, in a significant relationship.

63. From early spring of 2003 until the time of Complainant's discipline, Complainant and Captain Arnold had a relationship which was both a dating and a romantic relationship.

Interactions with Officer Johnson and Officer Roberts:

64. Officer Tiffany Johnson was a Correctional Officer I ("CO I") assigned to the Denver Complex in 2002.

65. In July 2002, Officer Johnson requested a transfer to a Cañon City or Pueblo correctional facility for family reasons.

66. Officer Johnson was assigned to the lobby of the DWCF facility checking identifications and running the metal detector. Complainant would pass through that area if he was coming into work at the time she was posted to that assignment. Officer Johnson was not in Complainant's chain of command.

67. Shortly after Officer Johnson made her transfer request, she was talking to other staff in the lobby about her request. Complainant was passing through the lobby at that point and joined into the conversation.

68. Complainant told Officer Johnson that he had friends down at Pueblo which could help her get her transfer. Officer Johnson was initially pleased at the offer of help, given that transfers were difficult to obtain at that point in time. Complainant asked Officer Johnson for her cell and home phone numbers, and Office Johnson gave them to him.

69. By September of 2002, Complainant had begun calling Officer Johnson repeatedly at her cell phone number and at her work station. Officer Johnson received calls or message concerning calls from Complainant sometimes five to ten times a day. Complainant called enough to her work station that other staff members notice and commented about the frequency of the calls form Complainant.

70. Complainant called her cell phone approximately ten times from October through November 2002. Complainant did not pick up the calls, and instead she would receive a message for a missed call. On at least three occasions in October 2002, Officer Johnson called the number back to determine who was calling. The three calls were from Complainant's phone.

71. Complainant called once to Officer Johnson's home number at 10:30 or 11:00 p.m. Officer Johnson spoke with him on that call and informed him that he couldn't call so late because it woke her roommate.

72. Officer Johnson did not tell Complainant to stop calling. The calls made her nervous and afraid that, if she should tell Complainant to stop, her transfer would be in jeopardy.

73. Complainant asked her to dinner to talk about her transfer. Officer Johnson did not accept the invitation.

74. Complainant never said anything that was inappropriate to Officer Johnson or anything that was sexual in nature to her.

75. Officer Johnson eventually reported that she was receiving unwanted phone calls from Complainant to Captain Terry Unruh, but told the captain that she did not want to cause any trouble. Captain Unruh offered to push the issue, but Officer Johnson declined the offer. Captain Unruh told Officer Johnson that she had to tell Complainant to stop calling.

76. Officer Johnson's request for a transfer to the Colorado Territorial Correctional Facility in Cañon City was granted in December 2002. She received no further calls from Complainant after her transfer.

77. Officer Tracie Roberts worked as a CO I at DWCF from May 2001 until October 2002.

78. Officer Roberts worked for Captain Dennis Burr in Unit 6 until three weeks before she left DOC. During those last three weeks, Officer Roberts worked for Lieutenant Sean O'Neil.

79. At some point in the middle of October 2002, Complainant spoke with Officer Roberts about moving her assignment to recreation. This conversation occurred on what would be Officer Roberts' last day at work.

80. Officer Roberts quit her job that day. She came to the facility to complete her exit paperwork soon thereafter. In her exit interview form, Officer Roberts gave as her reason for leaving that she had "accepted another job, moving to another area, personal reasons. The exit questionnaire also asked if the employee has experienced any harassment or unfair treatment. Ms. Robert checked the "no" box.

81. Captain Burr contacted Officer Roberts approximately three months later to find out why she had quit DOC so suddenly. Captain Burr made contact with Officer Roberts in January of 2003, and arranged for her to come back to the facility to complete an exit interview.

82. During the meeting on January 4, 2003, between Captain Burr and Officer Roberts, Officer Roberts told Captain Burr that she had quit because of a comment made by Complainant to the effect that with a body like hers, she could be working in the kitchen or recreation, and that she considered Complainant to be hitting on her.

83. Officer Roberts completed a second exit interview in which she wrote that Complainant had offered her a *quid pro quo* proposition.

84. In subsequent interviews and discussions of these allegations, Complainant has denied doing more than asking Officer Roberts if she wanted to transfer into recreation. Complainant had lost some employees within recreation at DWCF and was searching for female CO I's to fill out his staff.

ACA Files:

85. The ACA accredits correctional facilities using an audit program which evaluates facility performance as that performance compares to national standards. The accreditation process is very important to Respondent. One of Respondent's missions is to run accredited correctional institutions.

86. Once a facility passes an initial accreditation, the ACA conducts audits at the facility every three years. The Denver Complex was scheduled to undergo an audit by the ACA beginning on May 12, 2003.

87. In order to prepare for the ACA audit, each area of the facility completed ACA files. These files required that the section to compile specific data on the activities of that particular section for the previous three years. Donna Roberts, the accreditation manager for the Denver Complex, created a system for the completion of these files.

88. The files were assigned to the manager of the section responsible for compiling the necessary data. Complainant was the manager for Programs and was expected to handle the required files for religious services, chaplains, teachers, and food service. Complainant received his assignments in July 2002 when the room with the files and assignment list was set up by Ms. Roberts.

89. Complainant was responsible for making sure that approximately 93 files requesting data from the Programs unit were fully completed and ready for the audit.

90. Complainant assigned the files to various staff in his chain of command. Captain Lutz picked up 16 files related to the kitchen services and returned the completed files in a timely manner.

91. Ms. Roberts was concerned because Complainant did not pick up the remaining 77 files until February 2003. That left only a few months to assemble all of the necessary paperwork and to review the files in order to correct any deficiencies.

92. In March of 2003, Ms. Roberts contacted Complainant about her concern that the ACA files related to Programs were not being returned to her for review. Complainant told her that he had assigned the files to staff members.

93. Prior to the point in November 2002 when Captain Tafoya had been removed form his chain of command, Complainant had assigned Captain Tafoya some of the ACA files in his program area.

94. On May 9, 2003, during the 6-10 meeting in this matter, Complainant and Warden Shoemaker discussed the fact that a number of ACA files were not yet completed in preparation for the ACA audit in the following week.

95. By the day before the beginning of the audit, Sunday May 11, 2003, twenty-three of Complainant's files were still not complete.

96. Various staff member of the Denver Complex were at the facility on May 11, 2003, going through files and making certain that all of the required information was included. Warden Shoemaker was present to ensure that all of the audit files were ready for Monday morning. Ms. Roberts focused on the 23 files from programs which were incomplete.

97. Ms. Roberts paged Complainant. When he answered her page, Ms. Roberts asked him to help complete the files. Complainant told Ms. Roberts that he was working his second job and could not come into the facility until later that night.

98. Complainant came into the facility to work on the files at 8:00 p.m. on Sunday night. By that time, the majority of the last-minute work on the files had been completed by Ms. Roberts, Warden Shoemaker, Captain Valdez, or others who had come in during the day.

Performance Reviews:

99. The completion of the annual performance evaluations are used as the basis for the pay for performance plan.

100. Complainant was responsible for managing the performance evaluations of all of the staff within Programs. It was Complainant's responsibility to make sure that the performance reviews in his section were complete by the end of April, 2003.

101. As of May 5, 2003, there were 21 performance evaluations outstanding in the programs area. Complainant's 21 outstanding reviews accounted for approximately 40% of all of the performance evaluations assigned to him.

102. Complainant explained at hearing that he did not believe that the April deadline was a solid deadline, and that evaluations had been done later than that in prior years. He also testified that he did not want to increase the stress on the kitchen staff in particular because of the kitchen audit problems, so he did not enforce the April 30 deadline for evaluations.

The Transfer of Major Kleinholtz:

103. Major Jeffrey Kleinholtz was a Correctional Officer V at Colorado Territorial Correctional Facility ("CTCF") prior to May of 2003. Major Kleinholtz is a white male.

104. Major Kleinholtz knew the DOC Director of Prisons, Nolin Renfrow, and had told Mr. Renfrow of his desire to be transferred to Denver about a year before the transfer occurred.

105. Major Kleinholtz saw Mr. Renfrow again during a retirement party in February of 2003. At that party, the topic of whether Major Kleinholtz still wanted to move to Denver was discussed, and Major Kleinholtz confirmed that it was still his desire to transfer to a Denver facility.

106. In early 2003, Mr. Renfrow was aware that the Denver Complex had a problem with inappropriate relationships between staff and offenders. He had discussed the Denver Complex's need for additional security enhancements with Warden Shoemaker. Mr. Renfrow considered that Major Kleinholtz could be an extra set of eyes at the facility to help manage the security problem. Mr. Renfro w arranged for Major Kleinholtz to be transferred to the Denver Complex as an incentive transfer for him.

107. During the layoff process in spring of 2003, a Denver Complex CO V position was abolished in mid to late April, 2003. By May 1, 2003, there was no vacant CO V position at the Denver Complex.

108. Mr. Renfrow told Warden Shoemaker via e-mail that Major Kleinholtz would be transferred to her facility. When Warden Shoemaker received the e-mail about this transfer, she called Mr. Renfrow to express her concern about how the position was to be funded. Mr. Renfrow told her not to worry about the funding and that he would take care of the budget issues created by the transfer.

109. Major Kleinholtz transferred to the Denver Complex on May 1, 2003. Once Major Kleinholtz left his position at CTCF, his old CO V position was abolished.

110. Because there was no open position available to Major Kleinholtz, he was placed into an "S" position. An "S" position is a temporary position limited in duration to 6 months. Major Kleinholtz was in an "S" position from May 1, 2003, until July 15, 2003.

111. Major Kleinholtz did not have a job description until July 15, 2003. Major Kleinholtz's first job description at the Denver Complex description was to replace Complainant as the manger of facility programs.

Request for Inspector General Investigation:

112. Warden Shoemaker referred Complainant's conduct with Captain Tafoya and with Captain Arnold to the DOC Inspector General on or about November 15, 2002.

113. Warden Shoemaker also informed Nolin Renfrow that a member of her management team was suspected of having an inappropriate relationship with a subordinate, and that the matter was going to be investigated by the Inspector General.

114. The IG report was completed on April 1, 2003. Under DOC policy for Inspector General reports, all IG reports are first routed through the central office, and then are distributed to the wardens. In this case, Warden Shoemaker's direct supervisor, Mary West, sent the IG report on Complainant to Warden Shoemaker by transmittal letter dated April 2, 2003.

R-6-10 Meeting:

115. On April 24, 2003, Warden Shoemaker requested a Rule 6-10 meeting with Complainant citing "alleged violations of Administrative Regulations 1450-1, Staff Code of Conduct, 1450-5, Unlawful Discrimination / Sexual Harassment, and 1450-11, Employment of Relatives by the DOC which indicates the [possible need to administer disciplinary action."

116. Complainant requested that the meeting, originally scheduled for April 24, 2003, be continued until May 9, 2003.

117. On May 9, 2003, Complainant and his attorney, Mr. William Finger, met with Warden Shoemaker for the 6-10 meeting. Madline SaBell, DOC Director of Human Resources, was also present. The meeting was taped.

118. During the initial comments at the meeting, Warden Shoemaker outlined three general areas that she wished to discuss with Complainant. The first area involved the allegations around hostile work environment involving Captain Tafoya, Officer Roberts, and Officer Johnson. The second area Warden Shoemaker identified as a topic for the meeting concerned Complainant's relationship with Captain Arnold. The third area for discussion included performance issues related to Food Service and the timeliness of paperwork, such as performance evaluations.

119. Complainant asked for, and was given, permission to submit materials to Warden Shoemaker after the conclusion of the 6-10 meeting. On May 19, 2003, Complainant's counsel submitted a lengthy response to Warden Shoemaker.

120. In his May 19, 2003, response, Complainant's counsel argues that Complainant was not the only supervisor with late evaluations, and that Complainant's contact with Officer Johnson was nothing more than an attempt to communicate about a potential transfer. He asserted that Complainant said nothing improper to Officer Roberts. He also asserted that Complainant had addressed the need to complete the ACA audits in two different command staff and section meetings. Complainant's counsel also argued that Complainant's handling of Captain Tafoya was within his right as a supervisor to instruct a subordinate in a firm manner, and that his decisions with regard to the change in Captain Tafoya's assignment reflects a necessary and appropriate business decisions on the management of the teaching staff.

121. In Complainant's counsel's May 19, 2003, submission to Warden Shoemaker, he also explained that he has spoken to Captain Arnold and that Captain Arnold has confirmed that her relationship with Complainant was platonic. He further informed Warden Shoemaker that Captain Arnold had denied to him that she and Complainant were romantically involved, that there was only one kiss on the cheek that occurred at a Christmas party, that the two of them had never gone out formally, that Complainant had told her that he did not want any type of relationship beyond a platonic relationship.

122. Warden Shoemaker reviewed the material submitted by Complainant's counsel prior to making a decision on discipline.

Disciplinary Action:

123. By letter dated July 10, 2003, Warden Shoemaker announced her decision on the issues addressed at the 6-10 meeting.

124. Warden Shoemaker found that Complainant's relationship with Captain Arnold violated Administrative Regulation 1450-11, as well as AR 1450-1, Staff Code of Conduct IV.K, which states that "dating/romantic/sexual relationships between a supervisor and staff who is within the direct supervisory chain of command of the supervisor, or when the supervisor is in a position to influence the employment status of the staff member is prohibited."

125. Warden Shoemaker found that Complaint had failed to recognize that his behavior "can be interpreted as harassing to lower ranking staff," and found that Complainant violated AR 1450-1, Staff Code of Conduct IV.J. which states: "[p]rofessional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration and harmony with DOC and with other agencies," as well as section IV, OO, which provides that "[w]orkplace harassment in any form will not be tolerated."

126. She considered that Complainant had created an intimidating work environment for Captain Tafoya, and cited to AR 1450-5, which defines discriminatory harassment as "a course of conduct which results in an intimidating, hostile, or offensive environment, base upon an individual's race, ethnicity, gender, color, national origin, age, religion, sexual orientation, physical disability, or mental disability, or retaliatory behavior toward the employee who appropriately reported the hostile or offensive environment."

127. Finally, Warden Shoemaker found that Complainant's timeliness in which he completed his work is an issue which negatively impacted the Programs unit and staff. She specifically found that Complainant had jeopardized the national reaccredidation audit with the condition of the food service area" and that he had "adequate opportunity to take action and yet failed to do so." Earlier in the letter, Warden Shoemaker had noted that there had been timeliness issues with Complainant's completion of the performance evaluations and the ACA files.

128. Warden Shoemaker concluded that these actions constituted willful misconduct /violation of personnel rules or agency rules or law that affect the ability to perform the job;" and " willful failure to perform, including failure to plan or evaluate performance in a timely manner or inability to perform."

129. Warden Shoemaker considered disciplinary options other than demotion. She considered that Complaint had been a valuable employee with a long employment with the department.

130. Accordingly, Warden Shoemaker decided that Complainant was to be demoted to the rank of Correctional Officer IV, effective July 15, 2003, and that he would report to CCC as a Custody/Control Captain.

131. In other recent cases involving an inappropriate relationship between supervisor and subordinate, Warden Shoemaker has demoted the supervisor one step. Warden Shoemaker demoted Joel Levy, who had been a Case Manger III, to Case Manger II in response to the fact that he was pursuing a relationship with a subordinate. Warden Shoemaker has also demoted Charles Miller from Case Manager II to Case Manager I, for having an inappropriate relationship with a subordinate.

132. Complainant was a member of the plaintiff group who successfully sued Respondent in 1993 over issues of racial discrimination.

133. Warden Shoemaker was promoted to the position of warden of DWCF in October of 2000, and had all three facilities under her appointing authority jurisdiction by June of 2002. By the time of Complainant's discipline in July of 2003, Warden Shoemaker has not promoted a black employee to a position above that of lieutenant.

134. Warden Shoemaker is married to a black man who, while a high ranking employee of DOC in the mid-1990s, was accused of inappropriate sexual conduct with DOC staff.

135. In deciding to demote Complainant, Warden Shoemaker did not act with intent to discriminate against Complainant on the basis of his race in deciding to demote Complainant.

DISCUSSION

I. GENERAL

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 Rule R-6-9, 4 CCR 801 and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rule or law that affect the ability to perform the job;...
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform...

A. Burden of Proof

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 Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed many, although not all, of the acts for which he was disciplined:

1. Late Performance Evaluations:

Complainant did not argue at hearing that the April 2003 performance evaluations were timely, or that he was not responsible for managing the evaluation process for Programs staff.

Instead, Complainant argued in his testimony that the deadline of the end of April was not a hard and fast deadline and that in prior years there had been no problem with later reviews. Additionally, he testified that the kitchen audit issues were stressful enough and he did not want to add to the stress of his team by insisting on the April30, 2003, deadline for performance evaluations. Finally, Complainant argued that he was not the only supervisor with outstanding evaluations.

Complainant's factual defenses, however, simply add to Respondent's contention that he was inappropriately managing the performance evaluation process. The state's pay-for-performance system changed the rules about when performance evaluations had to be complete. Employees are entitled to have pay increases in place by the start of the new fiscal year, and that puts a great deal of pressure on managers to make sure that the appropriate steps have been taken in time. The older evaluation systems may well have had a looser understanding of the evaluation deadlines, but the implementation of pay-for-performance changed those old practices.

2. Managerial performance on the ACA files:

Complainant does not appear to contest that he had a number of ACA files left undone by the day before the audit. He instead argues that Captain Tafoya failed to complete his files, and that Captain Tafoya's failure to performs explains at least some of the incomplete files.

Complainant's argument, however, supports Respondent's fundamental argument contention that Complainant had failed to properly manage the ACA file process. The position of manager at the facility means that the files are Complainant's responsibility. Complainant unquestionably had the authority to delegate the ACA file work to others in his chain of command. Complainant's authority to delegate, however, does not eliminate the need for him to effectively manage that process. Complainant needed to make certain that the files for which he was responsible were being completed. As the findings of fact demonstrate, in this case he failed to take that responsibility seriously enough to avoid problems for Donna Roberts and Warden Shoemaker on the last day before the ACA audit was to be completed.

3. Deep Cleaning of the Kitchen:

The historical facts surrounding the deep cleaning of the kitchen were not in significant dispute at hearing. It was well-established that the Denver Complex food service and facility kitchen was failing to pass internal audits primarily because of deep cleaning problems, that Complainant did not find a solution to that problem and did not organize a special cleaning effort, and that the kitchen was finally sufficiently cleaned only once Warden Shoemaker took over the job and appointed Mike Evans to accomplish the task shortly before the ACA audit.

4. Interactions with Officers Johnson and Roberts:

At hearing, Complainant disputed that he had made calls that were inappropriate to Officer Johnson. Officer's Johnson's description of the numerous calls over an extended time period, in combination with Complainant's explanation of events, was persuasive and established that Complainant had indeed taken the actions described by Warden Shoemaker in Complainant's disciplinary letter.

The testimony addressing Officer Robert's allegations, however, did not have the internal consistency or persuasiveness that Officer Johnson's allegations had at hearing. At the end of the hearing, there were enough unanswered questions about Officer Robert's contentions that the undersigned has not found a preponderance of the evidence to establish what was said when Complainant spoke with Officer Roberts.. For this reason, the analysis of the appropriateness of the discipline in this case will be made without adding Officer Robert's contentions.

5. Relationship with Captain Arnold:

Complainant argues that his relationship with Captain Arnold was platonic during the

critical time period while he was her supervisor, and that the platonic nature of the relationship makes the relationship one which does not violate AR 1450-11.

DOC regulations, however, do not limit themselves to outlawing only sexual relationships between supervisor and subordinate. The list of prohibited relationships includes both dating and romantic relationships. While the regulation does not attempt to define these terms, these are terms in common usage. Neither dating relationships nor romantic relationships require that the relationship be non-platonic. The critical question here is whether the relationship is of the character which could be fairly described as dating and/or romantic, and not necessarily whether there has been a sexual relationship established.

As the findings of fact demonstrate, Complainant's relationship with Captain Arnold was not simply a friendship. Captain Arnold spoke with Complainant about her desire to develop their relationship him and Complainant answered that he had just ended his marriage. This was a conversation between individuals who are dating or in the early stages of a romantic relationship, and not a conversation between just friends. The two had periods of contact which were of a frequency and type more indicative of romantic or dating relationships than of simple friendships. Additionally, this was a relationship which, by all accounts, blossomed into a fully sexual relationship once the fall or winter of 2003 arrived, which adds to the conclusion that this relationship has had a sexual attraction component prior to the fall of 2003. That attraction and the possibility of a future sexual relationship, even if it existed without non-platonic activity, helps to change the fundamental nature of this friendship into something which is best captured as a dating or romantic relationship, and not simply friendship.

In short, the nature of Complainant's relationship with Captain Arnold was of the type which Complainant should have recognized was prohibited under DOC regulations for supervisors to have with subordinates.

6. Complainant's relationship with Captain Tafoya:

As the findings of fact demonstrate, Warden Shoemaker had considered Captain Tafoya's version of events concerning Complainant's interactions with him to be a correct version of events. At hearing, however, it became clear from the internal inconsistencies of Captain Tafoya's answers, his demeanor while testifying, and multiple witnesses who were present when he began his interaction with Complainant on July 1, 2002, that Captain Tafoya's description of events at hearing was not credible.

B. The Appointing Authority's action was generally not arbitrary, capricious, or contrary to rule or law.

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; or 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).

1. Complainant's objections that the discipline was arbitrary or capricious:

Complainant argues that he informed Warden Shoemaker that Captain Arnold should be re-interviewed, and that Warden Shoemaker failed to interview two individuals named by Complainant as persons with whom he had spoken in order to facilitate Officer Johnson's transfer. The troubling issue with Complainant's calls to Officer Johnson , however, lay in the sheer number and timing of the calls, and evidence that he did indeed speak with two others at a Pueblo facility does not materially affect that issue. Captain Arnold had already been extensively interviewed by the Inspector General, and Complainant provided the warden with the additional information he wished the warden to know. In this case, therefore, these two actions do not constitute a reason to find that Respondent had failed to use reasonable diligence to procure evidence in this case.

2. Complainant's argument that the demotion was contrary to law as a product of unlawful discrimination on the basis of race:

In order to prove intentional discrimination under section 24-34-402, C.R.S., a plaintiff must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The factors of a *prima facie* case of intentional discrimination are: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the position; (3) that the complainant suffered an adverse employment decision despite his qualifications; and (4) that the circumstances gave rise to an inference of unlawful discrimination. *Lawley*, 36 P.3d at 1247-48.

Although the burden of proof always remains on the complainant, the employer has the burden of producing an explanation to rebut a *prima facie* case: that is, the employer must provide a non-discriminatory explanation for its action. *Lawley*, 36 P.3d at 1248.

If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support its legitimate purpose, the presumption created by the employee's *prima facie* case is rebutted and drops from the case. *Id.* If the employer meets its burden of producing a legitimate reason for the adverse employment action, the employee must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment action were in fact a pretext for discrimination. The employee may use the evidence already in the record as part of his or her *prima facie* case and need not present additional evidence in every case. *Id.*

Pretext may be demonstrated by establishing that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999), *overruled on other grounds*, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 n. 11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

Pretext can be demonstrated by the production of evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jaramillo v. Colorado Judicial Department*, 427 F.3d 1303, 1308 (10th Cir. 2005) (internal quotations and citations omitted). Evidence of pretext may include "prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating ... criteria); and the use of subjective criteria." *Id.*

Although a *prima facie* case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it permits the factfinder to infer intentional unlawful discrimination. *See Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995). A finding of pretext, however, does not necessarily compel the conclusion that discrimination is the cause for the disputed action. A factfinder is not required to find discriminatory animus from pretext, and each case will rest on an evaluation of the facts of that case as to whether discrimination should be inferred. *See Randle*, 69 at 451 n. 14 and n. 15; *Ingels v. Thiokol*, 42 F.3d 616, 622 n. 3 (10th Cir. 1994)("Pretext may support a factual conclusion of discrimination but it does not compel such a conclusion. Pretextual reasons may be offered for reasons other than to conceal a discriminatory motivation"), *abrogated on other grounds*, *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003).

In this case, Complainant has established a *prima facie* case of discrimination: that is, that he is a black man who, having held the position of major for a number of years, was demoted and replaced by a white man. The circumstances surrounding Major Kleinholtz's arrival at the Denver Complex, and the fact that Major Kleinholtz remained without a job description for months until Complainant was demoted, certainly paints an odd and disturbing picture that at least suggests that race could have played a role in Complainant's demotion.

Respondent, however, has produced evidence that Complainant was demoted because his performance as a manager was deficient, he had an inappropriate relationship with a direct subordinate, and he had inappropriate contact with another employee. Additionally, Complainant has produced at lest some evidence that Major Kleinholtz' assignment to the Denver Complex was a product of an incentive transfer for him rather than as a replacement for Complainant.

Complainant's attempt to overcome the business reasons offered by Respondent focuses on a few facts beyond his *prima facie* case. Complainant cross-examined Warden

Shoemaker on the question of how many black employees she had promoted since she became warden. DOC records establish that Warden Shoemaker has promoted no black employee to a post above that of lieutenant. Promotion, however, occurs primarily according to testing results, and promotional testing under the state personnel system generally requires both that an employee be eligible to test and rank highly enough to be considered for promotion. If in that time period, for example, no black employees tested for higher positions than lieutenant, then nothing can be learned form Warden Shoemaker's failure to promote any black employees to higher positions. Complainant's evidence on this point was only the first part of the story and did not account for the number of non-discriminatory reasons why no black employee may have been promoted to a position higher than lieutenant at the Denver Complex.

Complainant has also failed to persuasively hook race into this decision beyond the basic fact that Complainant is black and Major Kleinholtz is white. Preferential treatment of Major Kleinholtz is not exclusively indicative of racial animus but could also be the product of favorable treatment to a high ranking officer who is at risk of being laid off during the 2003 reduction in force.

In the end, Complainant has failed to prove that either a discriminatory reason more likely motivated Respondent in demoting him or that Respondent's proffered explanation is unworthy of credence. As a result, Complainant has failed to prove that his demotion was due to unlawful discrimination on the basis of race.

3. Complainant's other allegations of discrimination based on sex and retaliation:

In his appeal form, Complainant has argued that Warden Shoemaker's demotion of him also constituted discrimination on the basis of sex or gender, and as retaliation for his participating in a 1993 discrimination suit against DOC. Neither argument was supported by a *prima facie* showing at hearing.

A *prima facie* showing of discrimination on the basis of gender shares the same elements as that of discrimination by race. *See Lawley*, 36 P.3d at 1247-48 (applying the *prima facie* elements of discrimination to a gender discrimination issue).

Complainant appears to found his argument that Warden Shoemaker has discriminated against him on the basis of gender on one line from the July 10, 2003 disciplinary action letter, which reads: "There is a difference in being friends with a subordinate who is the same gender versus a subordinate who is the opposite gender." This line is written in response to Complainant's argument that he is friends with Captain Valdez, another man, as well as Captain Arnold.

Complainant reads the sentence far too restrictively. As the broader context demonstrates, Warden Shoemaker appears to be commenting that no one was under the impression that Complainant was dating or in a romantic relationship with Captain Valdez, while quite a few people were under the impression that Complainant was in fact dating his

friend of the opposite gender, Captain Arnold.

A *prima facie* case of discrimination on the basis of sex or gender requires far more than this narrowly interpreted sentence from the disciplinary letter. It requires Complainant to show that there are circumstances in this matter which give rise to an inference of unlawful discrimination on the basis of his gender, and Complainant has not articulated any such circumstance. Complainant has failed to present sufficient evidence of discrimination on the basis of sex to create even a *prima facie* showing of unlawful discrimination on the basis of gender.

As for Complaint's contention in his appeal form that his demotion was an act of retaliation for his participation in a 1993 discrimination suit against DOC, Complainant has a similar lack of evidence connecting his demotion to a suit which, at the time of his demotion, was a decade old. *See Krauss v. Catholic Health Initiatives Mountain Region*, 66 P.3d 195, 201 (Colo.App. 2003) (holding that a *prima facie* case of retaliation for exercise of FMLA rights requires the employee to show "assertion of an FMLA right, followed by an adverse employment action, *and a causal connection between the assertion and the adverse action*")(emphasis added). Complainant has not articulated any reason to believe that his demotion had any connection to the old discrimination suit and, as a result, he has not presented a *prima facie* showing of retaliation.

4. Conclusions:

Given the findings in this matter, it is not arbitrary, capricious or contrary to rule or law for Warden Shoemaker to conclude that Complainant was engaging in a prohibited relationship with Captain Arnold, in violation of AR 1450-11 and AR 1450-1, Staff Code of Conduct , section IV.K.

It is also not arbitrary capricious or contrary to rule or law for Warden Shoemaker to conclude that Complainant exhibited performance problems in the way he managed the kitchen cleanup, the ACA files, and his April 2003 performance evaluation process, and that such conduct constitutes a failure to perform competently

Finally, it is not arbitrary, capricious or contrary to rule or law for Warden Shoemaker to conclude that Complainant's actions in calling Officer Johnson repeatedly and at home constituted a form of harassment, in violation of AR 1450-1, Staff Code of Conduct sections IV.J. and IV.OO.

Warden Shoemaker's conclusions that Complainant violated AR 1450-5 in the manner in which he handled Captain Tafoya, however, fails to describe conduct with has the requisite discriminatory character to it. Additionally, several of the events that Warden Shoemaker used in determining this portion of the matter were not supported in hearing. Accordingly, Warden's Shoemaker's reliance on a violation of AR 1540-5 is arbitrary, capricious and contrary to rule or law.

C. The discipline imposed was within the range of reasonable alternatives

The hearing of this matter demonstrated that Complainant had failed to successfully manage the performance evaluation and ACA audit file process, and that he had an inappropriate relationship with his direct subordinate, Captain Arnold. Complainant also did not find a way to make certain that the kitchen underwent a necessary deep cleaning in order to pass an impending ACA audit, even when he had two captains reporting to him in the kitchen. Additionally, Complainant called Officer Johnson at night and enough times so that it created a problem for her and she placed her in the position of having to decide whether she should tell Complainant to stop the calls and possibly jeopardize her transfer.

Warden Shoemaker successfully demonstrated at hearing that her typical response to an inappropriate supervisor-subordinate relationship would be to demote the supervisor to the next lower rank or grade. Complainant has argued that the decision in *Martinez and Baum*, State Personnel Board case 2004B038(C), in which two officers were fined in the amounts of $300 and $500 for, among other things, having an inappropriate relationship constitutes evidence of disproportionate discipline in this matter. *Martinez and Baum*, however, are not directly comparable to this case, involve another facility and another warden, and do not in any way bind Warden Shoemaker's discretion as to how she manages Denver complex staff who engage in prohibited relationships.

This case presents persuasive evidence that Complainant was not functioning satisfactorily as the manager of programs in the spring of 2003. Under such circumstances, it is within the range of reasonable options for Warden Shoemaker to remove Complainant from manager status.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-11, 4 CCR 801.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5 and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees are not warranted. Respondent presented rational arguments and competent evidence to support its imposition of a personnel action against Complainant. Additionally, there was no persuasive evidence which would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined, with the exception of the allegations concerning Officer Roberts and the manner in which he handled supervision of Captain Tafoya.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law, with the exception of Respondent's conclusion that Complainant had violated AR 1450-5 in the manner in which Complainant handled supervision of Captain Tafoya.

3. The discipline imposed was within the range of reasonable alternatives.

4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed in part** and **rescinded in part**. Respondent is to remove all references of a violation of AR 1450-5 in relation to Complainant's interaction with Captain John Tafoya from the disciplinary letter in this matter. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 12th day of JUNE, 2006.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.); Board Rule 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69B, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 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. Board Rule 8-73B, 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. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65B, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 13th day of June, 2006, 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:

William S. Finger
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80427-1477

and in the interagency mail, to:

Christopher Puckett
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods