

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PAUL BACA,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, FREMONT CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on October 31, 2005, at the State Personnel Board, 633 17th Street, Suite 1320, Denver, Colorado. Complainant appeared and was represented by Michael O'Malley, Esq. Assistant Attorney General Eric W. Freund represented Respondent. Respondent's advisory witness was Gary Watkins, the appointing authority.

MATTER APPEALED

Complainant, Paul Baca (Complainant or Baca), appeals his termination by Respondent, Department of Corrections, Fremont Correctional Facility (Respondent or DOC). Complainant alleges that his termination was arbitrary and that Respondent discriminated against him based on his race and sexual orientation. Complainant seeks reinstatement, back pay, benefits and transfer to a different DOC facility.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

FINDINGS OF FACT

General Background

1. Complainant was a certified state employee. He was employed at the Fremont Correctional Facility as the day shift sergeant for the facility's cell house 4. *Stipulated facts.*
2. Complainant was employed at DOC for approximately ten years.
3. Complainant's job classification was Correctional Officer II and he was a lead worker. *Stipulated facts.*
4. As a sergeant and lead worker, Complainant had supervisory authority over other correctional officers at the Fremont Correctional Facility. *Stipulated fact.*
5. A female correctional officer, R.G., was in Complainant's direct chain of command. *Stipulated fact.*
6. R.H. is a male correctional officer, who was also in Complainant's direct chain of command. R.H. was junior to R.G. and Complainant.
7. Gary Watkins is the warden at Fremont Correctional Facility, and was Complainant's appointing authority at all times relevant to this appeal. *Stipulated fact.*
8. DOC has a Staff Code of Conduct which is contained in DOC Administrative Regulation 1450-01 (AR 1450-01).
9. The portions of AR 1450-01, which are pertinent to this case, are:

IV. PROCEDURES

The following rules and standards are included, but not limited to accepted principle, expressing in general terms the conduct expected of DOC staff. Violations of these principles may result in corrective or disciplinary action. [2-CO-IC-04]. The Department reserves the right to monitor staff activity in order to ensure compliance with this administrative regulation. Violations of these principles may result in an investigation, as defined in Administrative Regulation 1150-04, *Professional Standards Investigations*. [Italics in original.]

- J. Professional relationships with colleagues will be of such character to promote mutual respect, assistance, and harmony within DOC and with other agencies.
- K. 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.
- N. Any action on or off duty on the part of DOC that jeopardizes the integrity of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.
- OO. Workplace harassment in any form will not be tolerated.
- PP. Any behavior of a sexual nature whether verbal, nonverbal, or physical is strictly prohibited. Examples of such acts include, but are not limited to, telling jokes of a sexual nature; making reference to one's sexual life or preference; making suggestions to staff of a personal nature; use of profanity; and offensive touching.
- QQ. Displaying, reading, publicizing, or bringing materials of a sexual nature into the workplace, such as pictures, posters, calendars, graffiti, objects, reading materials, or other materials that are sexually revealing, suggestive, demeaning, or sexually explicit are prohibited.
- ZZ. Any act or conduct, on or off duty, which affect job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

10. DOC also has a policy regarding Unlawful Discrimination/Sexual Harassment, AR 1450-05. Two versions of that policy are relevant to this case. One version was effective from February 15, 2003, to February 14, 2004. The other version became effective on February 15, 2004.

11. Both versions of AR 1450-05 require a person who feels that he or she is being sexually harassed to report the harassment.

12. The relevant portion of the February 15, 2003, to February 14, 2004 portion of AR 1450-05 provides the following:

- L. Sexual Harassment: Any deliberate, unwanted, or unwelcome behavior of a sexual nature whether verbal, nonverbal, or physical. [2-CO-1C-11] [3-4054-1]

1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment.
 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment.
13. The relevant portion of AR 1450-05, which became effective on February 15, 2004, provides the following:
- L. Sexual Harassment: Any behavior of a sexual nature whether verbal, nonverbal, or physical. [2-CO-1C-11] [4-4056]. Some examples of prohibited behavior include, but are not limited to, telling jokes of a sexual nature; making reference to one's personal sex life or preference; making suggestions to staff of a personal nature; use of profanity; and offensive touching.
 1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment.
 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment.
 - N. Supervisory Personnel: Employees of the Department of Corrections whose job classifications and duties include supervision of Department staff.

Complainant's Behavior Toward R.G.

14. R.G. worked with Complainant at the Fremont Correctional Facility on the graveyard shift in 2000. During the time R.G. and Complainant worked together on the graveyard shift, R.G. had no problems or complaints regarding Complainant.
15. In 2003, R.G. and Complainant were working together on the dayshift in Fremont Correctional Facility's cell house 4.
16. Complainant was a lead shift supervisor and was R.G.'s direct supervisor.

17. R.G. worked in the control room, which was upstairs from the office where Complainant worked. Complainant would sometimes come to the control room to talk to R.G.
18. In approximately October of 2003, Complainant began making comments and jokes of a sexual nature to R.G.
19. During the fall and early winter of 2003, Complainant, R.G. and R.H. had many conversations at work where they discussed their sex lives, sexual fantasies, and other sex-related topics.
20. At some point, Complainant began escalating his sexual comments and behaviors towards R.G. Examples of Complainant's comments and behavior are:
 - Asking R.G. on numerous occasions if she would have sex with him;
 - Placing magazines containing nude pictures in R.G.'s mailbox at work (the magazines were confiscated from inmates);
 - Showing R.G. pictures of nude women doing various acts and asking her if she would enjoy doing what was depicted in the photographs;
 - Making comments about the size of R.G.'s breasts and indicating that he wanted to touch them;
 - Asking R.G. if she enjoyed masturbation and telling her he would like to masturbate with her;
 - Asking R.G. if she shaved her tuck or her gorilla (referring to her pubic area);
 - Performing a pelvic thrust dance about eight inches from R.G.'s face;
 - Asking R.G. if he could come by her motel room after the DOC Christmas party in Pueblo;
 - Telling R.G. he was a great lover and she would enjoy having sex with him.
21. Although R.G. initially participated in some of the sexual conversations, she became increasingly uncomfortable with Complainant's comments and behaviors which were directed towards her. Sometimes, she would tell Complainant that his behavior was inappropriate and to stop, but he did not.
22. Complainant made inappropriate sexual comments and engaged in inappropriate behavior directed at R.G. on a regular basis.
23. R.H. also was becoming uncomfortable with Complainant's conduct toward R.G. On several occasions, R.H. cautioned Complainant to stop making sexual remarks to R.G. R.H. also cautioned Complainant that he was stepping over the line with the comments he was making to R.G.

24. Most of the time, R.G. tried to ignore Complainant's conduct, but at times she became upset and cried. On these occasions, R.H. would attempt to console and comfort R.G.
25. R.H. also sometimes made inappropriate comments to R.G. Like Complainant, he asked R.G. if she would have sex with him.
26. Once, Complainant and R.H. made a "make-shift" bed by placing several large cardboard boxes containing toilet paper together and throwing a blanket over the boxes. They used another blanket to make a pillow. The "bed" was in a small room located between the two control centers within cell house 4.
27. Complainant and R.H. showed the bed to R.G. Complainant said something similar to, "We can have sex and R.H. can watch us." R.H. responded by saying, "I want to go first and Sgt. Baca can watch."
28. R.G. expressed her displeasure about the bed incident and told Complainant and R.H. that she found the incident to be extremely offensive and she left the area.

Incident of February 28, 2004

29. On February 28, 2004, R.G. attempted to enter her cell house operations center, but could not because Complainant was sitting in a chair with his feet up on the desk. Complainant was blocking the door with his feet.
30. When R.G. got in the operations center, she asked Complainant if he was comfortable. Complainant said, "No, but I would be if I had your breasts for pillows."
31. At that point, R.G. got extremely angry and was fed up with Complainant's sexual comments directed towards her. She immediately left cell house 4 and went to cell house 5 to see if she could work there that day. The lieutenant in cell house 5 asked R.G. why she didn't want to work in cell house 4. When R.G. told the lieutenant about the incident, the lieutenant advised her to file an incident report if she felt so strongly about it.
32. R.G. did submit an incident report on February 29, 2004.
33. After R.G. submitted her incident report, the cell house captain took her to talk to Major Pam Yeo, who is the facility's custody control manager. Major Yeo gave R.G. a copy of DOC's administrative regulation (AR) on sexual harassment. After reviewing the AR, R.G. completed a form entitled, "Unlawful Discrimination/Sexual Harassment Complaint." In that form, R.G. indicated that her complaint was based on a "sex-based hostile work environment."

34. R.G. did not report Complainant's conduct before February 28, 2004, because she feared retaliation. She feared that she would be transferred from the cell house where she enjoyed working. Also, Complainant told her if she reported his behavior, people would think she was lying and she could possibly be transferred.
35. Complainant's behavior affected R.G.'s work performance at DOC because she began avoiding personal conversations with co-workers, became depressed and always sat near a door so she could leave an area quickly.

Inspector General Investigation

36. Watkins, the warden of the facility, learned of R.G.'s complaint on March 1, 2004, and was given a copy of R.G.'s incident report.
37. After discussing R.G.'s allegations with one of the associate wardens, Watkins placed Complainant on paid administrative leave while DOC investigated the incident.
38. Watkins met with R.G. and got a verbal version of her report from her. Watkins found R.G. to be credible because she was able to provide many details regarding her allegations.
39. Watkins then asked DOC's Inspector General's office to conduct an investigation into the allegations.
40. The Inspector General's office assigned an investigator, Kenneth Lovin, to conduct the investigation. Watkins had no control over the investigation.
41. Lovin interviewed Complainant, R.G. and R.H. as part of his investigation.
42. When Lovin interviewed Complainant, Complainant admitted that he asked R.G. to have sex with him on at least five occasions. Complainant told Lovin that R.G. responded by saying, "I can't have sex with you; you are my supervisor." Complainant interpreted R.G.'s response to mean that she would enjoy having sex with him but was somewhat fearful of the fact that he was her immediate sergeant.
43. During his interview with Lovin, Complainant also admitted that he "may have" or "probably" did make the statement on February 28, 2004, about using R.G.'s breasts for pillows, but he was only joking with her. Complainant also explained that he had a terrible headache that day and was "bummed out" on a medication, which probably caused him to make the statement.
44. Complainant also admitted that he made suggestive pelvic gestures sometimes at work and that he frequently read "girly magazines" that had been confiscated

from inmates. He admitted showing them to R.G. and asking her if she participated in any of the sexual acts depicted in the photographs. Complainant told Lovin that R.G. would walk away, but did not make any remarks expressing her displeasure or disgust with his behavior.

45. Complainant further admitted asking R.G. if she enjoyed masturbating, but denied suggesting that they masturbate together. Complainant also admitted asking R.G. if she shaved her “taco” or her “gorilla” (referring to her pubic area). He told Lovin that R.G. would respond by saying, “It’s none of your business what I do with my body,” and walk away.
46. Complainant also admitted putting pornographic material in R.G.’s mailbox . He explained that many staff members engaged in this conduct. He also indicated that his types of remarks, gestures and behaviors were very typical among all the staff in cell house 4 and cell house 5. However, Complainant was unable to provide the names of anyone else who made remarks similar to the remarks he made.
47. Complainant admitted to Lovin that he asked R.G. if he could stop by her motel room after the DOC Christmas party and that R.G. laughed and walked away.
48. Finally, Complainant admitted that R.H. warned him on several occasions that his remarks and gestures were “over the line” and very inappropriate.
49. Lovin provided a copy of this report, together with summaries of his interviews to Watkins when he concluded his investigation.
50. When Watkins received the information from Lovin, he moved R.H. out of security into housing so R.G. would not have to work with him. Complainant was still on administrative leave.

R-6-10 Meeting and Disciplinary Action¹

51. Watkins scheduled a meeting pursuant to State Personnel Board Rule R-6-10 with Complainant.
52. Complainant’s R-6-10 meeting was held on March 22, 2004. Yeo attended as Watkins’ representative. Complainant was informed that he could have a representative present at the meeting, but did not.
53. At the beginning of the meeting, Yeo informed Complainant of the allegations against him, including the admissions he made to Lovin during the investigation.

¹ This action was filed prior to July 1, 2005. Effective July 1, 2005, there were substantial revisions to the Board’s statutes and its rules. This action is analyzed under the statutes and Board rules in effect prior to July 1, 2005, and all citations are to those statutes and rules.

Yeo also informed Complainant which Administrative Regulations he had possibly violated, and read each of them aloud.

54. Complainant was given the opportunity to respond to the allegations and to provide any mitigating information.
55. With respect to the incident of February 28, 2004, Complainant denied saying that he said "your breasts" to R.G.; instead, Complainant alleges that he said "some breasts."
56. Complainant also pointed out what he said were other inaccuracies with Lovin's report. Complainant said that although he asked R.G. to have sex, it was less than five times. Additionally, Complainant said that R.G. did not laugh and walk away when he asked her to have sex with him.
57. Complainant also said that he did show pornographic materials or magazines with pictures of nude women in them to R.G., but far less than ten times. He further said that R.G. did not walk away when he showed her the pictures.
58. During the R-6-10 meeting, Complainant admitted that he asked R.G. if she shaved her "taco" or her "gorilla," but she said, "Yes," instead of telling him it was none of his business.
59. Complainant also admitted to putting pornographic materials in R.G.'s mailbox, but stated that everyone put pornographic materials into each other's mailboxes.
60. Complainant denied asking R.G. if he could come to her motel room in Pueblo. He stated that he said, "Do you want someone to come by your motel room?" and that R.G. merely smirked.
61. Complainant told Watkins that he was only joking when he made sexual comments to R.G.
62. Complainant denied telling Lovin that R.H. had warned him about his behavior towards R.G.
63. Complainant also said that R.G. once pinched him on the buttocks and on another occasion said that she and Complainant could have an affair on her days off from work. He said that R.G. would touch his arm and would engage in other inappropriate behaviors.
64. Complainant also said that others also made comments to R.G. and he felt like he was being singled out for a reason unknown to him, but possibly because he is Hispanic. Complainant said that R.G. had never informed him that she thought his behavior was inappropriate. Complainant said he would have stopped if R.G. had told him she thought his behavior was inappropriate.

65. Watkins found that Complainant denied very few of the allegations, but merely minimized the number of occurrences. Watkins did not find Complainant to be entirely credible because his statements in the R-6-10 meeting varied from his statements to Lovin.
66. Watkins told Complainant he could submit a written statement after the R-6-10 meeting, but Complainant did not.
67. Complainant asked Watkins to interview two other employees, Joe Garcia and James Gallardo. Watkins interviewed Garcia who told him there was a lot of “locker room talk” in cell house 4 and that staff members passed around magazines. Watkins did not interview Gallardo because Complainant had essentially admitted to most of the allegations, and he did not feel the need to involve other employees.
68. Watkins did consider the mitigating information provided to him by Complainant. In fact, he gave it above average consideration because Complainant did not deny the allegations.
69. Watkins also reviewed Complainant’s personnel file and found that Complainant had received several commendations and had average and above average evaluations. He also discovered that Complainant had no previous corrective actions or disciplinary actions. Watkins considered the contents of Complainant’s personnel file before making his decision regarding Complainant’s discipline. He also considered Complainant’s length of employment with DOC.
70. Watkins also considered the fact that Complainant had taken several classes concerning sexual harassment during his tenure at DOC.
71. After the R-6-10 meeting, Watkins interviewed Garcia, as requested by Complainant. He also rereviewed Lovin’s report, and all of the other information and evidence he had.
72. Watkins very carefully weighed all of the information before him before making his decision. It took Watkins approximately ten to twelve days to make the decision to terminate Complainant. In making that decision, Watkins strongly took into consideration the fact that R.G. worked directly under Complainant, and that Complainant took advantage of R.G., and never admitted that he made a mistake. Additionally, Watkins considered that Complainant was a mentor for training officers under him and that Complainant had reporting authority to provide input to the lieutenant for R.G.’s performance evaluation.
73. Watkins considered giving Complainant a corrective action or a disciplinary action short of termination. However, he found Complainant’s behavior to be so egregious that he felt termination was the best decision.

74. Watkins also considered the fact that Complainant had no remorse for his actions during the R-6-10 meeting. Instead, Complainant attempted to shift the blame to R.G.

75. Watkins considered that Complainant's impacted R.G.'s job performance because her focus on her job was diminished by Complainant's behavior.

76. Complainant's actions towards R.G., his subordinate, were serious and flagrant.

R.H.'s Discipline

77. Watkins held an R-6-10 meeting with R.H., as well as a result of R.G.'s allegations and the results of the investigation.

78. R.H. was disciplined by receiving a fine, but was not terminated. He also received a corrective action. In making his decision not to terminate R.H., Watkins took into consideration that R.H. was a junior officer to R.G., and not her direct supervisor.

79. Additionally, Watkins considered that R.H. was very remorseful for his actions and sometimes tried to stop Complainant when he went over the line with R.G.

80. Watkins also considered that Complainant was R.H.'s supervisor and that R.H. was impressionable.

81. R.G. did not receive a corrective or disciplinary action.

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 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.

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 arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. Complainant also alleged discrimination based on race and sexual orientation. Complainant has the burden of proof with respect to his discrimination allegations.

II. HEARING ISSUES

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

Respondent met its burden of proof of demonstrating that Complainant, a supervisor, sexually harassed a female employee who was under his direct chain of command. Complainant was terminated for violating several provisions of DOC AR 1450-01. Those provisions are:

IV., J. Professional relationships with colleagues will be of such a character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies.

IV., K. 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.

IV., N. Any action or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.

IV., OO. Workplace harassment in any form will not be tolerated.

IV., PP. Any behavior of a sexual nature whether verbal, nonverbal, or physical is strictly prohibited. Examples of such acts include, but are not limited to, telling jokes of a sexual nature.

IV., QQ. Displaying, reading, publicizing, bringing any materials of a sexual nature into the workplace, such as pictures, posters, calendars, graffiti, objects, reading materials that are sexually revealing, suggestive, demeaning, or sexually explicit are prohibited.

IV., ZZ. Any act or conduct, or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as unbecoming, and may lead to corrective and/or disciplinary action.

Complainant was also terminated for violating provision L. of DOC AR 1450-05, which became effective on February 15, 2004. That provision defines "sexual harassment" as "[a]ny behavior of a sexual nature whether verbal, nonverbal, or physical . . . [s]ome examples of prohibited behavior include, but are not limited to, telling jokes of a sexual nature; making reference to one's personal sex life or preference; making suggestions to staff of a personal nature; use of profanity; and offensive touching. . . . [s]uch conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment." Complainant argues that Respondent should have used the version of AR 1450-05 which was in effect from February 15, 2003 through February 14, 2004, when evaluating his behavior because many of the allegations against him took place prior to February 15, 2004. That version of AR 1450-05 defines sexual harassment as "deliberate, unwanted, or unwelcome behavior of a sexual nature" Complainant argues that his comments to R.G. were not unwanted or unwelcome. Thus, he argues, he was not in violation of 1450-05. However, the credible evidence is that many of Complainant's comments and actions towards R.G. were unwanted and unwelcome. Moreover, Complainant's actions were deliberate and did create an offensive work environment.

Complainant's conduct with his colleagues, who were also his subordinates and in his direct chain of command, did not promote mutual respect, consideration and harmony within DOC. Although Complainant attempted to have a sexual relationship with R.G., who was in his direct chain of command, he did not because R.G. did not comply. Complainant's conduct cast doubt on his integrity and he did not exercise good judgment and sound discretion. Complainant's actions and behavior were of a sexual nature, which constituted harassment of R.G. Finally, although Complainant did not bring materials of a pornographic nature into the facility, he did display them to R.G. and other employees.

B. The Appointing Authority's action was 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; 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).

Watkins did use reasonable diligence and care in procuring the evidence that he was authorized to consider. He requested an independent investigation into R.G.'s allegations, and carefully considered the investigator's findings. Additionally, Watkins personally interviewed R.G., R.H. and Joe Garcia. Most importantly, Watkins offered Complainant the opportunity to respond to the allegations in the Rule R-6-10 meeting. Watkins also considered all of the relevant documentation, as well as Complainant's personnel file. Watkins gave candid and honest consideration to all of the evidence he gathered. In fact, it took him ten to twelve days to make his decision because he wanted to rereview and give deliberate consideration to the relevant evidence. Finally, Watkins' decision to terminate Complainant was reasonable given the evidence before him; Complainant was a lead worker who regularly sexually harassed a female subordinate in his direct chain of command

There is not credible evidence of like instances in which an employee was treated differently. Complainant argues that he was treated differently from other employees who engaged in similar conduct. Although Complainant said that almost everybody engaged in some type of sexual behavior or conversation, the only evidence presented was R.H.'s conduct toward R.G. when he asked her to have sex with him and his participation in the construction of the make-shift bed. R.H. also participated in many conversations of a sexual nature with R.G. and Complainant. While R.H.'s conduct also ran afoul of DOC's ARs on Staff Code of Conduct and Unlawful Discrimination/Sexual Harassment, he was not similarly situated to Complainant. R.H. was not R.G.'s supervisor; in fact, he was junior to her. Additionally, R.H.'s conduct was much less severe than Complainant's, and he tried to counsel and warn Complainant that he thought he was going "over the line" in his comments to R.G. R.H. also attempted to console R.G. when Complainant's comments upset her. Unlike Complainant, R.H. showed remorse for his actions. Finally, R.H. did receive a disciplinary action for his participation in the harassment towards R.G. R.G. also participated in conversations regarding topics of a sexual nature. However, she is also not similarly situated to Complainant. She was not in a supervisory role. Furthermore, unlike Complainant, she was not victimizing or harassing anyone with her comments.

Complainant alleges that Respondent discriminated against him based on his race and his sexual orientation. In order to prove a *prima facie* case of intentional discrimination under Colorado law, Complainant must demonstrate by preponderant evidence that: (1) he belongs to a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment decision; and (4) the circumstances give rise to an inference of unlawful discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997), *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The uncontested information provided establishes that Complainant is a member of a protected class based on his race. However, Complainant, a heterosexual male, is not a member of a protected class based on his sexual orientation. Complainant was qualified for the position he held as he performed

it successfully for several years. Additionally, Complainant suffered termination, which is clearly an adverse employment action. The question is, therefore, whether the circumstances give rise to an inference of unlawful discrimination. Complainant failed to establish any circumstances that gave rise to an inference of unlawful discrimination based on either his race or his sexual orientation. Although Complainant speculated that he was being singled out because of his race, he offered no evidence that anyone at DOC ever made comments about his race. Complainant's disciplinary termination was based solely on his inappropriate behavior towards R.G.

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

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801. The credible evidence established that Watkins appropriately weighed the mitigating and aggravating factors in reaching his decision to terminate Complainant. Watkins thoroughly and deliberately weighed all of the evidence, including Complainant's admissions and all mitigating information. Complainant was a sergeant and a lead worker. As such, he was a role model for junior correctional officers. Instead of presenting a positive image, Complainant regularly and routinely sexually harassed a female correctional officer who was in his direct chain of command. Complainant's comments and behavior toward that officer were inappropriate and inexcusable. When Watkins gave Complainant an opportunity to respond to the allegations against him, Complainant admitted to most of the acts, but denied that they happened as frequently as they did. Moreover, Complainant showed no remorse for his actions, and attempted to place the blame on the victim, R.G. Finally, Complainant ignored numerous warnings from a subordinate officer that his actions were over the line and inappropriate. Given the seriousness of Complainant's behavior, and his lack of remorse, Watkins did not think that Complainant's actions were correctable. Watkins considered all forms of discipline, including demotion, but ultimately concluded that termination was the only appropriate sanction. Watkins did not abuse his discretion.

CONCLUSIONS OF LAW

1. Complainant did commit the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this ____ day of December, 2005.

Hollyce Farrell
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 R-8-67B](#), 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).

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. 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 [\(303\) 866-3300](tel:3038663300).

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 **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 Code of Colo. Reg. 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 Code of Colo. Reg. 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 decision of the ALJ. [Board Rule 8-65B](#)

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of December, 2005, 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:

Michael O'Malley
Attorney at Law
1444 Stuart Street
Denver, CO 80204

and in the interagency mail, to:

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

Andrea C. Woods