**STATE PERSONNEL BOARD, STATE OF COLORADO**
Case No. **2005B131**

## INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**ROBERT JAYME,**

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, LOOKOUT MOUNTAIN YOUTH FACILITY,**
Respondent.

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Administrative Law Judge Denise DeForest held the hearing in this matter on November 14 and December 12, 2005, January 27, February 14 and February 28, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. The record in this case was held open until June 28, 2006, for the submission of written proposed findings of fact, written closing arguments, a supplemental briefing with rebuttal brief submitted by Respondent and a review of the file and evidence to determine that the evidence could be properly closed at that point. First Assistant Attorney General Stacey Worthington represented Respondent. Respondent's advisory witness was Respondent's Assistant Director, Anders Jacobson. Complainant appeared and was represented by Nora Kelly, Esq.

## MATTER APPEALED

Complainant, Robert Jayme ("Complainant") appeals his termination by Respondent, Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Facility ("Respondent," "Lookout Mountain," or "facility"). Complainant seeks reinstatement, back pay and benefits, and an award of attorney fees.

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

## 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

**Background:**

1. Lookout Mountain Youth Facility is a maximum security correctional facility for more than 200 high risk young offenders in the Colorado criminal justice system. The facility covers 15 acres, is surrounded by a 25 foot fence, and contains five residential programs on the grounds. The facility looks like a campus rather than a prison. Offenders are commonly referred to as clients, residents, or students. The residents walk from their residence units to classes, therapy and counseling sessions, and other activities.

2. The offenders placed at the facility are between the ages of 16 and 21, and have been adjudicated of offenses including sex offenses, violent offenses, property offenses and drug offenses. Many of the residents placed at Lookout Mountain arrive with severe mental health issues. Half of the resident population is on psychotropic medication.

3. The staff at Lookout Mountain work with a "Normative Culture" emphasis. "Normative Culture" captures an agreed upon set for behavioral norms for both residents and staff. These norms include such issues ranging from the proper dress to behavorial requirements requiring impulse control. The norms describe the expected behavior between residents, between residents and staff, and between staff members. Normative culture also includes appropriate confrontation of inappropriate behavior.

4. Staff at Lookout Mountain are expected to teach and model Normative Culture expectations.

**Cedar Unit Background and Complainant's Assignment:**

5. Complainant was certified as a Safety and Security Officer II ("SSOII") and assigned to the Cedar Unit for approximately five years prior to his termination from employment.

6. The Cedar Unit is a two-story building contains three pods – A, B, and C. Each pod houses 15 residents. Cedar Unit has a control center desk near the entrance, and three seclusion rooms. One of

the seclusion rooms is located directly behind the control center desk.

7. Cedar Unit has a Unit Manager who oversees such functions as the daily programming, scheduling, and performance management. Stan Skinger was the Cedar Unit Manager in 2003 and 2004. He retired in November of 2004. Mr. Skinger was on an extended medical leave for approximately seven months prior to his retirement. His absences decreased his involvement at Cedar Unit during that time and increased the supervisory responsibilities for the Youth Service Counselors on the unit.

8. Cedar Unit has four Youth Service Counselors ("YSC I") who provide individual and group therapy for residents and who directly supervisor the Safety and Security officers. During the events at issue in this matter, the four Cedar Unit YSC I's were Dale Austin, Mitch Hartzler, Tom Huffman, and Mike Caires.

9. The YSC I's supervise four Safety and Security Officers II (SSOII) assigned to Cedar Unit. The SSOII's are called Milieu Managers. The Milieu Managers structure the shifts of Safety and Security Officer I ("SSOI") staff and are responsible for the safety of the unit. Mr. Austin was Complainant's direct supervisor until March of 2004. After March of 2004, Lookout Mountain's Assistant Director, Anders Jacobson, changed Complainant's supervisor to Mr. Hartzler.

**Complainant's Performance:**

10. Complainant had a well-deserved reputation at the facility for working in creative and innovative ways with residents. Even residents of Cedar Unit who were difficult to reach often responded to Complainant.

11. Complainant actively searched for ways to engage the residents in a variety of tasks and to give them new experiences. He brought in a train set for Christmas and had residents programming the train. He provided musical instruments to the unit. Complainant also found ways to have residents fix broken appliances at Cedar Unit.

12. For the majority of the time that he worked under Mr. Skinger, Complaint had a close friendship with Mr. Skinger. Mr. Skinger had served in the armed forces and Complainant had retired after twenty years in the U.S. Air Force. Complainant, Mr. Skinger, and at least one other staff member who had served in the armed forces would talk about their military service days.

13. Other staff members of Cedar Unit viewed Mr. Skinger as protecting Complainant and of allowing Complainant to run his own program.

14. Complainant's role in Cedar Unit changed significantly once Mr. Skinger began taking medical leave and then retired. Practices which had been authorized, and even encouraged, by Mr. Skinger were eliminated or curtailed because the practices were viewed as against facility policy or as creating problems with Complainant's performance or within the unit. These changes can be seen with regard to Complainant's rolling desk, Complainant's installation of a flight simulator as an incentive for residents, Complainant's use of his digital camera, and Complainant's role in generating and maintaining the Cedar Unit Rules of Engagement.

**The Flight Simulator:**

15. Complainant installed a computer-based flight simulator in a box on the Cedar Unit. He used time on this computer program as an incentive for residents. Complainant was praised by his supervisors for his innovative approach to providing leisure activities and incentives to the residents. In Complainant's 2003-2004 PMAP process, Mr. Austin included this statement as part of Complainant's closeout evaluation from January of 2004: "Structured Leisure Activities during the holidays were remarkable, to include your Flight Simulator, your electric train set, and your computer activities. Your awareness of recreational needs to the clients was noted as above-standard. All clients were given equal opportunity to participate and succeed."

16. Complainant's use of the flight simulator was not one of the incentives that the Cedar Unit team had agreed would be provided. Only Complainant could offer this incentive to residents, and it was a very popular incentive among the residents.

17. The fact that Complainant had been permitted by Mr. Skinger to offer such a popular incentive that no other staff member could offer caused problems and some resentment among other Cedar Unit staff members. Some Cedar Unit staff members saw this as Complainant being permitted to run his own program rather than participating in what the team was willing to support.

**Complainant's Rolling Desk:**

18. Mr. Skinger allowed Complainant to use a rolling desk of his own construction. Complainant was the only staff member at Cedar Unit with such a desk.

19. The desk was a well-made cabinet on wheels. It contained a stereo, craft supplies, scissors, and paper decorated with military or travel themes. The desk also included a laptop computer, a monitor and an associated camera, and it contained copies of paperwork and other supplies which would otherwise be at the control center. For a period to time, the rolling desk also had a camera attached to a tall support on one corner which, when turned on, would transmit a picture of the area behind Complainant to a monitor on the desk.

20. Complainant rolled the desk with him as he performed his assignments on the Cedar Unit pods.

21. Complainant made videos of himself explaining various conduct requirements for residents. He also had residents make videos explaining issues such as the dress code. Complaint would play these videos for residents on the monitor on his rolling desk.

22. Complainant's rolling desk was identified as a source of concern for Complainant's supervisors by the middle of 2003. In Complainant's August 2003 performance plan comments, his direct supervisor noted that, while some improvement in the area had been noted, "the perception is that you are still glued to your personal garage (desk)." The December 2003 interim PMAP comments included that "[t]he perception continued that the desk is your "wall" between you and the rest of the unit. I am not sure where to go with this, however, the perception is there, and this must change."

23. In the final closeout comments for the 2003-2004 performance evaluation cycle in January 2004, Complainant's supervisor noted "Your desk has been in the unit for several years; you provide continuous activities for the kids using this, however the perception continues that you use this as a 'wall' between you and the rest of the unit; something that cannot be anyone else's issue but yours. At this time, please be aware of this, and think about some ways to minimize the perceptions."

24. Mr. Jacobson ordered Complainant to remove his personal desk, along with the associated computer, desk monitor and camera

equipment, during a meeting held on May 19, 2004, between Mr. Jacobson and Complainant.

**Complainant's Use of the Digital Camera:**

25. Complainant had instituted a shutterbug program for the residents under Mr. Skinger's management, and he had used his digital camera on facility grounds. Complainant had taken a variety of photos of the facility from various angles, including a time when he climbed the water tower and took a photo of the facility from that perspective.

26. Camera use at a juvenile facility such as Lookout Mountain can create problems with confidentiality requirements mandated for the facility, as well as security issues inherent in running a correctional operation.

27. Caren Leaf, Lookout Mountain Facility Director, was aware that Complainant was taking photos of the facility, and that this activity had caused some controversy within the facility. Notwithstanding any controversy, however, she asked Complainant on May 19, 2004, if he would be willing to supply one of his photos of the facility to be used as part of the official gift to a retiring employee.

28. On February 25, 2004, Mr. Hartzler informed Complainant during a meeting that he was not to use his digital camera at the facility. At the time of the meeting, Complainant responded that he considered that new stance to be the facility's loss.

29. By memo dated March 29, 2004, Complainant filed a memo with his supervisors. In this memo, Complainant referred to the camera prohibition as "unfounded, unmerited, unilateral, arbitrary, and violates the state's whistle-blower protection requirements." Complainant provided two additional points as to why he believed that the policy was invalid:

> A. particularly so given both the documented treacherous supervision I have incurred this [past] year where the camera was key in providing substantial evidence in validating grievance, as well as documenting the negligence regarding the clearly ineptly-maintained and unsafe facility sidewalks;
> B. and, as well, particularly in light of the injuries I have incurred due to both situations identified above. All parties [presumably, all of the entities he consulted about the issue – *ed.*] are in agreement that unilaterally prohibiting my use of

photography violates the Department's equity requirements and is clearly not in mine or the State's best interest.

30. Complainant concluded his March 29, 2004, memo with an unambiguous rejection of Mr. Jacobson's instruction to no longer use a digital camera at the facility:

> The unfounded unilateral directive ban on my photographic actions in unsanctioned, inappropriate and arbitrarily denies my utilization of an effect[ive] tool in the milieu. As there is absolutely no basis for the directive to not utilize my camera, I will continue to utilize my camera, following the self-imposed limitations regarding its use of which I have constantly adhered to and respected without incident.

**Cedar Unit Rules of Engagement and the Ten Hill Norms:**

31. While Mr. Skinger was the Unit Manager, Mr. Skinger asked Complainant to start a written record of the interpretations of the departmental polices as the Cedar Unit staff had decided to apply them. The goal in writing out these interpretations was to provide Cedar Unit staff with consistent, predictable, and specific guidelines in the conduct of their work with the residents.

32. Complainant titled these written interpretations as the "Cedar Rules of Engagement." Mr. Skinger approved of the title.

33. By January of 2003, the Cedar Rules of Engagement included a multi-page index and dozens of practical interpretations ranging from the use of the intercom, to the staffing policies to be followed for graveyard shift assignments, to various programs for residents. Although the described practices stemmed from team meeting discussions, Complainant was the author of the document and the staff member most closely tied to the project. At some point, Complainant placed a copyright notation including his name on at least one copy of the Cedar Rules of Engagement.

34. The Cedar Rules of Engagement document was also supported by a document titled "The Ten Hill Norms and Jayme's 41 Corollaries." This document included ten statements of the conduct that was expected of residents, along with Complainant's explanations of those statements. An example would be that the statement is:

    1. Round here, it's Normative Culture. Support! Support!"

The listed corollaries for that statement include:

A. Around here, we appropriately confront negative behaviors.
B. Around here, we actively support positive behaviors.
C. Around here, we accept all confrontations and feedback; we avoid power/control issues.

35. This document also included other corollaries from staff members, such as "Atchison's corollary: The appropriateness of the 'response' correlates directly with the inappropriateness of the 'action.'"

36. The Cedar Rules of Engagement were left in an easily accessible spot on the unit so that staff could reference the binder whenever necessary.

37. The Cedar Rules of Engagement were not formally approved by Respondent's chain of supervisors above Mr. Skinger's level. Mr. Jacobson noted as much in his December 2003 response to a step II grievance filed by Complainant that the Cedar Rules of Engagement was a document that "has no Facility Director approval and is merely a guide to a specific unit and does not have the support of the [Lookout Mountain] administration. I encourage you to NOT utilize this documentation to guide your practice."

**Complainant's Use of a Bicycle Mirror and Events in April, 2004:**

38. Complainant had fallen while at work on or about February 14, 2004, and had suffered a concussion at that time. This was his second concussion in a year. Complainant had then been placed on administrative leave for a period of time in March and April.

39. On or about April 15, 2004, Respondent requested that Complainant be medically re-evaluated because he had been wearing a bicycle mirror attached to his normal glasses, and a question was raised as to whether this had to do with his head injury.

40. Complainant bicycled to work on some of his shifts. He would arrive at Cedar Unit before his shift began, and he would have his bicycle mirror still attached to glasses frame while he was on the unit. At times, Complainant would be on the unit for two to three hours before taking the mirror off of his glasses frame.

41. Complainant was medically re-evaluated on April 19, 2004. Complainant explained at that examination that he wore his bicycle mirror attached to his glasses as a way to better observe what the residents were doing behind him.

**October 2003 Removed Corrective Action and Grievance:**

42. In June of 2003, Complainant was issued a confirming memorandum by Mr. Austin concerning an issue with a visitor to the unit. Complainant was also issued a Corrective Action dated October 31, 2003, for the visitor issue.

43. Complainant grieved these actions. At the step II stage of the grievance process, Mr. Jacobson examined Complaint's argument and evidence that both actions had been improperly issued. By letter dated December 23, 2003, Mr. Jacobson agreed that both documents should be removed from Complainant's personnel file, and that a committee was to be appointed to examine if facility policies should be updated.

**The July 2004 Corrective Action:**

44. Complainant received a corrective action dated July 29, 2004, based upon his actions in relation to the facility's annual Policy and Procedure Test.

45. Complainant received a copy of the Policy and Procedure Test on or about June 30, 2004.

46. On July 23, 2004, Complainant returned the test to Mr. Hartzler. The test had a half-page cover sheet attached to it which covered a section of the first page of the test. The cover sheet was signed by Complainant and dated July 23, 2004. The sheet stated that Complainant was turning in his test, and had shown his completed test to his peer to verify its completing. The cover sheet goes on to state that had Complainant has not received any training "from a qualified trainer regarding any [of] the material addressed in the test, not was I provided with any duty time to ready or study the identified policies." He also objected to the lack of provision of a quiet study room, and in having to take the test on his off-duty hours. Complainant concluded that "[g]iven the clear documented record of my supervisors repetitive, uncooperative and unsubstantiated punitive behaviors toward myself, I reserve the option of withholding my completed test until I have been fully reimbursed and utilized my 5.25 hours of comp time due to me with my above and beyond efforts to complete this test on time."

47. The test sheets that Complaint submitted with the cover sheet had a series of empty blocks printed in lieu of Complainant's answers.

48. By memo dated July 29, 2004, Mr. Hartzler imposed a corrective action upon Complainant for his failure to submit a completed response to the test.

**Complainant's Statements Toward and Concerning Supervisors:**

49. In the years 2003 and 2004, Complainant showed a pattern of increasingly negative and derogatory comments about the supervisory structure at the facility.

50. Mr. Austin noted in Complainant's April 1, 2003, performance management and pay review ('PMPA") evaluation that "Jayme's negative and sarcastic comments regarding the Agency have become a problem, as this can be damaging to team unity and overall image of Lookout Mountain."

51. This observation was repeated in the first quarter review for the 2003-2004 PMAP process. As of August, 2003, Complainant's supervisor noted that Complainant's overall negative view of the agency "still comes across" and that he needed to work on carrying a cooperative view of the agency. Complainant objected in his employee comments that there has been no documentation of any such problem, and his language at this point was direct but civil.

52. By the 2nd quarter review in December 2003 (which was directly after Complainant succeeded in removing Mr. Austin's memorandum and corrective action from his file), Complainant's comments about Mr. Austin's supervision of him began to contain personal invective. On December 27, 2003, Complainant filed 38 pages of employee comments for attachment to his interim review.

53. In his December 27, 2003 employee comments, Complainant referred to Mr. Austin's review as "without a doubt the most ill conceived and completely miss-managed performance review I have ever seen or experienced, and it is replete with information of dubious function and quality." Complainant refers to the review as "recklessly contain[ing] un-substantiated biased egregious errors." Complainant argues that the review contains information that had been part of a corrective action which Complainant had successfully had removed through a grievance process. Complainant's interpretation of that process was that "Dale was directed to remove all of his fabricated lies from my personal

records. Their inclusion above clearly illustrates Dale's apparent continued bias in performing outside the PMAP parameters." At another point in the response while discussing the same issue, Complainant accuses Mr. Austin of attempting to "falsely document a manufactured sub-performance issue, which never existed. The kid's call it lying like a dog."

54. Complainant concludes this section of his December 27, 2003 comments by stating: "Dale's apparent dogged efforts to include such unsubstantiated lies in my interim PAMAP progress review are of extremely dubious intent, clearly reinforcing the apparent back-stabbing consistently documented throughout Dale's supervision." The rest of Complainant's 38 page response included similar themes, such as references to a conspiracy, referring to Mr. Austin's review as "treacherous backstabbing comments," and referring to Mr. Austin's knowledge of procedures as less than that found in "a half empty box of Milky Ways."

55. Complainant used derogatory language about his supervisor, Mr. Austin, in his official written response to his 2003-2004 performance management and pay review ("PMAP"). On February 12, 2004, Complainant filed a 29 page written response to Mr. Austin's close-out evaluation to be included with his PMAP. The first paragraph, along with the two associated sub-paragraphs, of this document read as follows:

> The following are Robert Jayme's (employee) observations on the concerning, unsound, fallacious, fabricated, unsubstantiated, and invalid comments Dale Austin (supervisor) presents in his initial 2003-2004 PMAP closeout evaluation report regarding my past year's performance. As written, the report reflects Dale's apparent continued previously-substantiated inability to follow established documented policies in performing his supervisory requirements, and as a result, once again, given Dale's well documented of such, an apparent calumnious attempt has been made to egregiously and negligently damage and libel my otherwise outstanding official performance record. Such is amateurishly malicious, vindictive, and professionally offensive and unacceptable.
>
> 1. Dale has been fired as my supervisor, due likely to his documented complete inability to supervise with his substantiated incompetent, treacherous back-stabbing attempt at maliciously defaming myself with his ill-conceived egregious presentation of a Conforming memorandum and a

Corrective Action to myself during this reporting period. Both the confirming memorandum and Corrective Action successfully were grieved and wholly substantiated as being complete falsehoods written for actions that did not in reality exist and were complete deceitful fabrications.

2. Dale's apparent continued determined incompetence and calumnious manipulations, as well as the apparent lack of Dale being productively and appropriate[ly] supervised, is clearly evidenced in Dale's closeout PMAP report comments herein. The comments continue to offer false unsubstantiated defamatory and inappropriate opinioned implications as documented performance facts. Such clearly continued to demonstrate the previously documents and apparently ongoing hostile work environment in which I endeavor to productively endure and tolerate.

56. The remainder of the document contains references to Mr. Austin being "inept," in him having a "documented and apparently on-going inability to effectively supervise and provide appropriate and productive mentoring and supervision," and similarly-themed language.

57. Complainant also used similarly disrespectful language and tone in an e-mail that he sent Mr. Austin, Mr. Hartzler, and Mr. Jacobson dated March 2, 2004, concerning a letter Mr. Austin had authored to Complainant dated February 27, 2004. In the course of disputing Mr. Austin's version of events concerning the signing of Complainant's 2003-2004 PMAP form, Complainant writes that Mr. Austin apparently "elect[s] to set me up and attempt[s] to screw me over," and refers to Mr. Austin as making "amateurish attempts."

58. On April 14, 2004, Mr. Hartzler received an e-mail from Cedar Unit employee Tom Sager. Mr. Sager related a conversation he had had with Complainant a short time before he wrote Mr. Hartzler the e-mail. During this conversation, Mr. Sager asked Complainant why he battled all of the time. Complainant told Mr. Sager that he just wanted to "fuck with [the administration] every chance I get."

59. On or about May 27, 2004, Complainant was speaking with a new staff member, SSOI David Morello, at the Cedar Unit control desk. Other staff, including SSOI Timothy Zorno was present. Mr. Zorno overheard Complainant tell Mr. Morello that he, Complainant, did not give his staff a hard time, unless you were his supervisor. Complainant continued by bragging that, if you were his supervisor, Complainant would "rip you a new one and embarrass your ass in

front of administration and embarrass them too, all at once." Mr. Zorno reported this statement to Mr. Hartzler and Mr. Huffman within a day or so of the date that he heard it. Mr. Huffman met with Complainant about making this statement in an informal meeting held on or about June 3, 2004.

60. Complainant has referred to Caren Leaf as a "stupid bitch" in front of several staff members of lower and equal position to him on the Cedar Unit. He also referred to her in front of facility staff as a "stupid cunt," and made reference to her "tits." He would repeatedly talk about Ms. Leaf and Mr. Austin in derogatory ways, such as that Mr. Austin was an "idiot" or a "buffoon" and that Ms. Leaf was incompetent and not fit to manage the facility.

61. Complainant did not speak of committing acts of violence against his supervisors or other facility staff. He instead referred to himself as having a role like a chess player to move people into place. Complainant also told other staff members that he was trained to handle chaos.

**The Incident with Resident O.A.:**

62. On August 4, 2004, Complainant returned to work after his usual three days off. Complainant's shift began at noon. By the time of Complainant's shift, Resident O.A. had already been placed into the seclusion room which is located behind the control desk.

63. As required by policy, there were processing sheets, called "pink sheets" due to their color, affixed to the outer door of the seclusion room. These pink sheets indicated that O.A. was in the seclusion room because he had threatened staff, exhibited assaultive behavior, failed to follow staff directions, and instigated others to unsafe behavior. The pink sheets also included that O.A. was on suicide monitoring, and posed both a danger to self and to others.

64. OA had been placed into the seclusion room on August 1, 2004, after verbally threatening, in very graphic and often sexual terms, to kill one of the Cedar Unit Staff, SSOI Stacy Shipherd. O.A. had auditory hallucinations that one of his family members was telling him to kill Ms. Shipherd. He continued to threaten Ms. Shipherd or express that he had thoughts of killing her, or of hurting himself, for the next three days.

65. The weekly unit staff meeting occurred in the early afternoon of August 4, 2005. Complainant was present for the meeting, and Ms. Shipherd was also present. At the staff meeting, the unit staff

discussed that O.A. was still threatening Ms. Shipherd, and agreed that O.A. should be separated from Ms. Shipherd at all times. Complainant understood that staff decisions on how to handle specific safety and security issues were to be followed as a team.

66. At approximately 4:20 p.m. on August 4, 2005, Complainant decided to take O.A. for a bike ride. At the time, Ms. Shipherd was working on the computer at the control desk with her back to the seclusion room. Complainant walked over the door of the seclusion room, opened it, and then turned away from the door.

67. O.A. exited the seclusion room and was standing about 15 feet behind Ms. Shipherd when she turned to see what was happening. There were no barriers between O.A. and Ms. Shipherd. Complainant was not close enough to O.A. to have been able to physically restrain him, if necessary.

68. Ms. Shipherd asked Complainant was he was doing, given that O.A. wanted to kill her. Complainant responded to Ms. Shipherd that he was giving O.A. a chance not to kill her.

69. O.A. did not threaten Ms. Shipherd, and he left the area with Complainant for his bike ride without incident. Ms. Shipherd and other staff members were alarmed by the event. Ms. Shepherd was angry that Complainant had taken such a risk; she reported Complainant's actions to Mr. Hartzler. Mr. Hartzler had a meeting that day with Ms. Shipherd and Complainant to discuss what had occurred.

**<u>The Abuse Allegation</u>**:

70. Nancy Hodge, a Cedar Unit SSOI, reported to work at noon on a Sunday July 25, 2004 . When she arrived, there was a youth from another residential unit being placed in an isolation room in a three-point restraint by Cedar Unit SSOI's. Four SSOI's were on duty when the resident was restrained, including Ms. Shipherd.

71. The facility protocol for use of restraints requires that a mattress be placed on the bed in the isolation room. The bed is grey in color and the mattress is green. Ms. Hodge noticed that the youth was not on a mattress on the bed. She did not intercede or do more at the time than to note the lack of a mattress.

72. Ms. Hodge reported her observation to Tom Sager and to other senior staff. One supervisor's reaction was to tell Ms. Hodge that

the resident's unit manager had filed a complaint and that she, Ms. Hodge, should just keep her head down.

73. Ms. Hodge approached Complainant and told him what she had seen and that nothing was being done about it. Ms. Hodge knew that facility policy required staff to report suspected abuse to the local social services agency for investigation, but she was on probation as an employee and was not willing to make the report herself. As child care workers, all of the Cedar Unit staff are required by state statute to report any suspicions of child abuse or neglect to Human Services within 24 hours.

74. Complainant reported Ms. Hodge's observations to Ms. Leaf on or about August 4, 2004. Ms. Leaf provided Complainant with the phone number for local social services investigator. Complainant called and left a message for the investigator.

75. On August 11, 2004, Complainant and Ms. Hodge were told to attend a unit staff meeting because they the restraint policy was going to be discussed. Mr. Jacobson attended the meeting as well. It was not a normal occurrence to have an assistant director attend a staff meeting.

76. The staff meeting was hostile. There were several staff members who were quite vocal and angry that Complainant had gone to social services with the report, and angry that Ms. Hodge had gone outside of the team with her concerns.

77. Complainant would not confirm for the group that he had filed a report with social services, even when asked directly whether he did so. Complainant answered staff questions flippantly and evasively.

78. At the August 11, 2004, unit staff meeting, Mr. Caires advised the group that the allegation had been resolved when Mr. Caires had spoken with the resident in his office, and the resident had signed a written statement that he had been placed on a mattress during the restraint process.

79. By the time of the hearing in this matter, several facility staff members remained upset or concerned that Complainant had made a report of possible abuse to social services.

**Administrative Leave:**

80. Ms. Shipherd spoke with Mr. Jacobson either on the day of the September 11, 2004, unit staff meeting or the next day. She complained to Mr. Jacobson about Complainant's behavior at the unit staff meeting. Other Cedar Unit staff members also expressed their concern to Mr. Jacobson about how Complainant was behaving.

81. Mr. Jacobson decided that there were enough indications of a workplace violence potential that he needed to take action. Mr. Jacobson spoke with Director Leaf and the Department of Human Services risk manager, Scott Bowers, about the issue. On August 13, 2004, Complainant was placed on paid administrative leave by Mr. Jacobson, with a confirming letter sent out September 16, 2004.

82. Respondent hired Dr. Robin Eskey, Psy.D., of Nicoletti-Flater Associates to provide it with a report on Complainant's behavior. Dr. Eskey performs workplace violence risk assessments for both private and public sector clients.

83. The Nicoletti-Flater Report involved two steps of analysis. First, Dr. Eskey interviewed sixteen individuals at the facility. She asked them a series of six pre-set questions. The questions asked if the staff members had "observed or heard anything from Robert Jayme that has made you fearful, uncomfortable, or concerned," for example, and "[h]ave you ever heard Robert Jayme make a general threat, or a threat against any specific person or group of people?" The resulting collection of statements was placed into a series of charts. The charts listed information such as the date of the alleged incident or statement (or a notation that the speaker did not identify the time period), the nature of the action or content of the statement, whether the staff member had taken any action about the statement or incident, and whether other staff members had reported the same thing.

84. The second step of the analysis was for another Nicoletti-Flater associate Dr. Jaime Brower, Psy.D., to review Complainant's personnel paperwork, and to integrate the information in that paperwork into a chronology of events.

85. The purpose of the report was to evaluate Complainant's potential for disruptive behavior in the workplace, and potential for dangerous or violent behaviors in the workplace. The purpose of the report was not to evaluate whether the Violence in the

Workplace policies applicable to the facility had already been violated.

86. A draft of the Nicoletti-Flater Report was generated by November, 2004, and a final version of the report was completed in February, 2005.

87. The conclusion reached as a result of this process was that Complainant had a high risk of potential for disruptive behavior in the workplace, and Complaint's potential for dangerous or violent behaviors in the workplace was moderate to high risk.

88. The allegations collected for the Nicoletti-Flater Report were not validated by Dr. Eskey for the accuracy of the reports by staff. Dr. Eskey did not attempt to gauge the credibility of the reported statements, other than to note if there was a report of action taken at the time or a reference to the same subject made by another employee. Dr. Eskey also does not interview the subject of the report as part of the process. Any validation of reported issues was to be performed by Respondent. Mr. Bennett spoke with two upper-level supervisors, Mr. Jacobson and Ms. Leaf, about the contents of the report.

89. No other investigative report examining the factual allegations made during the Nicoletti-Flater Report process was completed by Respondent.

**The 6-10 Meeting:**

90. David Bennett was appointed as Associate Director of the Division of Youth Services in October 2004. He oversees two regions and Lookout Mountain. Mr. Bennett acted as the appointing authority in this matter.

91. Mr. Bennett received the final Nicoletti-Flater report around late January or early February 2005. He sent that report to Complainant. The Nicoletti-Flater Report did not contain information identifying the sources of the information used in the report.

92. Mr. Bennett scheduled a 6-10 meeting with Complainant for February 14, 2005, but Complainant's counsel asked for the meeting to be re-scheduled to March 7, 2005.

93. In preparing for the meeting, Mr. Bennett talked with Director Leaf, Mr. Jacobson, and Mr. Bowers. He reviewed Complainant's

personnel file and applicable policies having to do with workplace violence, ethics, and performance standards and expectations.

94. The 6-10 meeting took place on March 7, 2005, with Mr. Bennett and his representative, Michelle Brissette Miller, and Complainant and Complainant's counsel, Nora Kelly. The meeting was taped.

95. Mr. Bennett discussed three potential grounds for discipline with Complainant: 1) the allegations in the Nicoletti-Flater Report which supported a possible workplace violence policy violation; 2) a report that Complainant had told others that he was going to make a sign that said "Nice tits Caren" and try to hold it up on camera during a visit to the set of Good Morning America in New York City; and 3) that Complainant had made statements which violate DYC Policy 3.7, Code of Ethics.

96. Complainant and his counsel requested information about the names of the persons who had made the allegations in the Nicoletti-Flater Report because they could not fully answer Mr. Bennett's questions as to why someone would fabricate those allegations. Respondent intentionally denied that request.

97. At the conclusion of the 6-10 meeting, Mr. Bennett assigned Jim Cronin to conduct additional interviews of staff members to see if they supported Complainant, or if they perceive any level of fear due to Complaint's behavior in themselves or in others. Mr. Cronin interviewed thirteen staff members at Cedar Unit. His conclusions were that Complainant did not have much support at Cedar Unit, and that the staff members were reporting that either they or someone else had a level of fear about Complainant's behavior.

**<u>The Disciplinary Decision</u>:**

98. Mr. Bennett considered the Nicoletti-Flater Report, the results of Mr. Cronin's survey as to levels of support for Complainant and expressions of fear by staff members, Mr. Bennett also considered lesser discipline than termination but considered reinstatement to be ineffective because there was a longstanding pattern of problems, previous interventions had not improved the situation, and the inappropriate behavior was escalating.

99. By letter dated May 23, 2005, Mr. Bennett terminated Complainant's employment.

100. In the letter, Mr. Bennett describes that he concluded that Complainant had committed the following: (1) "That you did

engage in violent and threatening behavior including veiled and direct threats of physical, verbal and psychological aggression towards other individuals, both in verbal and written form;" (2)"Your threats did cause other employees to feel intimidated, harassed and endangered;" and (3) "You knowingly violated the Colorado Department of Human Services and Division of Youth corrections Violence in the Workplace policy."

101. Mr. Bennett further described his findings in this manner: "[s]pecficially, I find that you engaged in inappropriate conversations and made threatening and intimidating comments within the workplace that are in direct violation of the Violence in the Workplace policy. All of these actions are performance related and demonstrate a failure to perform competently."

102. Mr. Bennett provided three citations on the policies or rules that he found that Complainant had violated. Two of the citations were specific to Violence in the Workplace policies: CDHS Policy VI 3.5 and DYC Policy 3.28. The third rule or policy that Mr. Bennett cited was "Colorado Code of Regulations R-6-10," and refers to this provision in an earlier paragraph as permitting discipline for failure to perform competently and willful misconduct. The Board rules in effect at the time, however, contains the referenced provisions in Board Rule 6-9. Board Rule 6-10 instead describes the requirements for a pre-disciplinary meeting.

**Policies in Effect during 2003 through 2005:**

103. Respondent's Policy VI 3.5., Workplace Violence, states that it "will not tolerate any violent behavior or threat of violent behavior directed at a coworker, supervisor, client, or work-site."

104. Policy VI 3.5 defines violent behavior as "the infliction of any bodily injury or harmful psychological contact or the destruction or abuse of property." A threat under the policy includes "veiled, conditional or direct verbal, written threats or racial slurs/offensive abusive/coarse language or gestures which are intended to intimidate, harass, harm, or endanger the safety of another person or of state property."

105. Division of Youth Corrections Policy 3.28, Violence in the Workplace, also states that DYC "will not tolerate violent behavior or threats of violent behavior." Under this policy, threat is defined as "making a declaration or announcement that harm or injury will be inflicted in retaliation for something, whether real or imagined;

an indication of a coming harm." The policy also incorporates the definition of threat from Policy VI 3.5.

106. DYC Policy 3.28 also requires that all employees of DYC shall immediately verbally report any threat or act of violence within the workplace that come to their attention to their immediate supervisor and/or the facility's designated workplace violence coordinator. Such a report would then begin a chain of events described in the policy concerning facility response to the information.

107. DYC Policy 3.7, Code of Ethics, contains a variety of standards of conduct for employees, including standards for professional conduct and interactions with colleagues.

108. Policy 3.7 III.A.4 states: "Employee-to-employee relationships shall promote mutual respect within the facility, the Division of Youth Corrections, and the State of Colorado while maintaining professionalism and facilitating the delivery and/or improvement of available services."

109. Policy 3.7 III.A.5 states: "Employee's statements which are critical of other employees, the facility, or a program are to be verifiable and constructive in nature."

## General Discussion:

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, 704 (Colo. 1994). "Implicit in this protection for certified state employees is the principle that an appointing authority must establish a constitutionally authorized ground in order to discharge such an employee." *Kinchen*, 886 P.2d at 707.

The state constitution provides that a certified state employee may be disciplined "upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude..." Colo.Const. Art. 12. §13(8). Such cause to discipline a certified employee is further defined in State Personnel Board Rule 6-12B, 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) false statements of fact during the application process for a state position;

(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 708. 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.

## Hearing Issues:

### I. Complainant committed only some of the acts alleged:

Respondent presented a number of witnesses of various ranks within the facility to support its claim that Complainant had violated the Workplace Violence policies. Several of these witnesses testified to actions on Complainant's part that they considered to be odd or disconcerting, such as the creation of the rolling desk with all of the video equipment, the wearing of bicycle glasses, or the reporting of the resident abuse allegation to Jefferson County Social Services.

A number of other allegations as to statements made and actions taken by Complainant were not supported by a preponderance of evidence and are found to be incredible. Many of these statements appear without attribution in the Nicoletti-Flater Report, and some of these statements were testified to by witnesses at hearing. These statements often lacked context or indications of to when they were alleged to have occurred. There is no indication that anyone ever made a contemporaneous report of these rejected assertions, and there was no corroboration presented for these allegations at hearing. In a workplace which is designed around Normative Culture, it is also difficult to believe that Complainant could have said and done what was alleged without a single member of the staff appropriately confronting Complainant directly, bringing it up in the group meetings, or privately discussing it with one of Complainant's supervisors. The staff members of Cedar Unit work with some of the most violent and disturbed youth in the state's criminal justice system, and it is hard to believe that they were so intimidated by Complainant that no one reported anything about alleged threats of violence until September of 2004. It is also disturbing to see these reports surface only after the Cedar Unit staff becomes angry about Complainant's role in reporting the suspected abuse of a resident by Cedar Unit staff.

There were, however, some statements and actions described by Respondent's witnesses which were supported by a preponderance of the evidence. The remainder of the analysis will be based upon those facts.

## II. Respondent's disciplinary action was arbitrary or capricious as taken:

### A. Defining arbitrary or capricious action for purposes of a personnel case:

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

### B. Respondent's R-6-10 meeting violated the Board Rules:

The first issue to be addressed concerns Respondent's procedure in its 6-10 meeting.

Board Rule R-6-10 requires that three things must happen at a pre-disciplinary meeting held pursuant to that rule: 1) the appointing authority must meet with the employee to present information about the reason for potential discipline; 2) the appointing authority must disclose the source of that information unless prohibited by law; and 3) the appointing authority must give the employee an opportunity to respond. Board Rule R-6-10, 4 CCR 801.

In this case, the record is undisputed that Respondent provided Complainant with a copy of the Nicoletti-Flater report, which by design did not identify the individuals who had made the allegations. As a result, Respondent did not provide Complainant with the sources of the allegations against him. Complainant and his counsel asked Mr. Bennett during the 6-10 meeting for the names of the individuals, and that request was denied.

This violation of the procedures had a decided impact on the 6-10 meeting. Much of the credibility of the allegations in this case turns on the timing of the allegations and the politics of the Cedar Unit, and these were topics of which that Mr. Bennett was unlikely to be aware. This is the type of situation that the Board's 6-10 rule was specifically designed to address. The rule recognizes that understanding the source of the allegations is critical to providing Complainant with an opportunity to respond, and in providing Respondent with enough solid information that a good decision can be made. The Board has set the rule so that the source of the information must always be disclosed at this

stage of the proceedings, with only one exception. That exception occurs only in the relatively rare circumstance when the law prohibits disclosure of the source.

Respondent has presented no reason to believe that the one exception to the requirement that Respondent disclose its sources of information for purposes of the 6-10 meeting is applicable to this situation.

Respondent objects instead that Complainant has waived his opportunity to raise this issue because Complainant did not raise a potential violation of Board Rule 6-10 in his discovery answers. Respondent does not argue that it was somehow misled or otherwise unfairly surprised to see Complainant's arguments on the Rule 6-10 violation in closing arguments, there was no objection at hearing to the testimony related to the 6-10 procedure, and Respondent has been given a full opportunity to argue the point in its rebuttal closing argument.

Respondent, however, is required to comply with Board Rule 6-10 in its conduct of pre-disciplinary proceedings, and any discovery issue which might exist in this case does not relieve Respondent of its obligation to comply with that rule. Respondent's failure to provide information critical to a good discussion about the credibility of the allegations meant that the 6-10 meeting failed in its role as an initial check against the mistaken disciplinary decisions. It also meant that Complainant had to wait for his Board hearing, which began on November 14, 2005, before he could adequately address the issues.

B. It is arbitrary or capricious to hold Complainant responsible for violating the Workplace Violence Policies:

Respondent terminated Complainant's employment on the basis that Complainant's behavior violated the applicable workplace violence policies. In support of this contention at hearing, Respondent's witnesses repeatedly commented upon behavior by Complainant that they found to be odd or contentious or unexpected.

The Workplace Violence policies, however, do not make it an infraction to act in odd, strange, unapproved, or unexpected ways. The proper focus of the Workplace Violence policies is on actual violence or on threatening behavior indicative of violence. Actions which make staff uncomfortable or angry, or actions which reflect that Complainant was not willing to be part of the team, are not necessarily behaviors which also contain the essential violent characteristic necessary to demonstrate a violation of the Workplace Violence policies. The vast majority of testimony offered by Respondent in this case concerning Complainant's behaviors falls into this category and does not support a violation of those policies.

The statements that Complainant is found to have made were often derogatory, crass, and disrespectful of supervision and of the team concept. That is not to say, however, that these statements also reflect threats of violence, as required for a violation of the Workplace Violence policies. Complainant's turning away from the door when O.A. exited the isolation room was also not an act of a threat of violence, but a rejection of team norms and expectations.

This is not to say that Complainant's conduct is within the proper norms for staff conduct; the discussion of the specific problem that Complainant's conduct poses is discussed at length below.

Insofar as Respondent has based its case against Complainant on a violation of workplace violence, policies, however, a candid review of all of the record, including the credibility of many of the allegations, the dynamics of the Cedar Unit, and the timing of the allegations, does not support such a conclusion.

C. Independent Grounds Exist To Support Termination:

One type of willful misconduct which could support discipline in this matter would be on the grounds of insubordination.

The Board (and its predecessor agency) have permitted insubordination charges to be a basis for termination in the past. *See Paris v. Civil Service Commission*, 519 P.2d 323 (Colo. 1974)(affirming a termination of an employee in part on insubordination grounds). *See also State Personnel Board v. Lloyd*, 752 P.2d 559 (Colo. 1988)(noting that the Board had denied a full hearing to an employee who had been terminated on insubordination grounds and other charges, thereby allowing the termination to stand). Neither the Board rules nor the associated case law, however, define the term for purposes of Board action.

Insubordination was listed a specific grounds for discipline under the Colorado Teacher Tenure Act, which was another administrative disciplinary process under state law. *See* C.R.S. § 22-63-301. Additionally, the Colorado Supreme Court has provided a specific definition of insubordination for purposes of that Act. That definition does not seem to depend upon the employee's status as a teacher or upon procedural aspects of the Act which are not shared by the Board's processes. This definition, therefore, is a helpful guide to the legal requirements which should be applied for purposes of the Board's review as well.

The Colorado Supreme Court has held that insubordination, as used under the Teacher Tenure Act, "imports a willful or intentional refusal to obey a reasonable order of a lawful supervisor on a particular occasion." *Ware v. Morgan County School District No. RE-3*, 748 P.2d 1295, 1300 (Colo. 1988). *See also School District No. 1, City and County of Denver v. Cornish*, 58 P.3d 1091, 1095(Colo.App. 2002)(applying the *Ware* definition of insubordination from the Teacher Tenure Act to the current statutory requirements in the Colorado

Teacher Employment, Compensation, and Dismissal Act). The *Ware* court noted that some courts in other jurisdictions have interpreted the term "insubordination" to require a constant or persistent course of willful defiance. In effectuating the purposes of the Act, however, the *Ware* court held that a school board would have grounds to discipline a teacher for just one act of defiance to a reasonable order. *Id.*

The *Ware* standard requires evidence of intentional conduct on the part of the employee. Insubordination, however, "does not require proof that [the employee] specifically intended to violate the directions of superiors." *Board of Education of West Yuma School District RJ-1 v. Flaming*, 938 P.2d 151, 159 (Colo. 1997)(affirming a finding of insubordination because a teacher acted intentionally, as opposed to accidentally, in hitting or tapping a child in the head with a wooden pointer because the child was not paying attention after being directed not to use physical interventions, and rejecting the argument that the teacher had to be found to have intended to violate the directive given to her).

Respondent's Code of Ethics sets forth a series of unsurprising standards for professional interactions: employee interactions are to use mutual respect and maintain professionalism, and disagreements and critiques are to be handled constructively.

As the findings of fact indicate, Complainant has disobeyed that directive on numerous occasions with his choice of language. His language about his supervisors and the administration of the facility (Finding of Fact # 58, 59 and 60) is disrespectful and unprofessional. His unrelenting excoriation of Dale Austin in documents that he knew were to attached to his permanent personnel file (Finding of Fact #52 – 57) is also disrespectful and unprofessional, and fails to address a dispute in a constructive manner. The problem is not that Complainant disagrees with his supervisor, files grievances, or knows and applies the rules of the facility. The problem here is the disrespectful, sarcastic, unprofessional way that Complainant has carried out those activities. Complainant has committed willful violations of Respondent's policy requirements controlling his interactions with other staff, and in doing so has committed repeated acts of insubordination.

The events surrounding Complaint's use of his digital camera poses a different question. Unlike the other incidents described above, there is no evidence in this case that Complainant actually performed an act which he had been told not to do – that is, to use his digital camera. Instead, the evidence shows that Complainant initially acquiesced to the order, but then filed an explicit, unambiguous memo with his superiors informing them that he was rejecting their order.

The focus of insubordination is the refusal to comply with a directive. That refusal is often indicated by a contrary action. Here, however, Complainant is

refusing the directive in any even more obvious manner: by declaring his refusal to comply in writing. As such, the March 29, 2004 memo is also grounds to find insubordination on Complainant's part.

Finally, Complainant's actions in disregarding the team's decision to keep O.A. separated at all times from Ms. Shipherd is also an act of defiance of Complainant's part that he knew what was going to happen better than anyone else. In disregarding the team's discussion just a few hours earlier, Complainant was also disregarding the supervisory expectation that team decisions on such issues would be controlling. This is also a willful act of insubordination on Complainant's part.

## III. Termination of employment is within the range of reasonable disciplinary alternatives in this matter:

This case has included two procedural problems which had a direct impact on Complainant. Respondent did not correctly identify grounds for which discipline was reasonable, and has terminated Respondent on a factually invalid ground of workplace violence policy grounds. At least part of this problem was undoubtedly caused by the second procedural error in failing to provide sufficient information to Complainant in the R-6-10 meeting, as required in the rule, to permit a full and fair discussion of the issues.

Rule violations which impact Complainant's due process rights under Board rules, as these violations have done, can be the basis for invalidation of the appointing authority's decision. In this case, however, the evidence at hearing was that Complainant has committed multiple acts of insubordination. Mr. Bennett's consideration of the impact of Complainant's behavior, the length of time that such behaviors existed, the failure of previous attempts to re-direct Complainant, and the fact that Complainant's behavior was escalating, all support termination as a reasonable disciplinary alternative, even if the stated grounds for such termination were not as described in Complainant's termination letter.

Respondent has argued in supplemental briefing that the correct response in a circumstance such as this one is not re-instatement but an award of back pay under C.R.S. §24-50-125(2), from the date of termination to the date that Complainant received proper notification of the grounds for termination. That remedy is the most appropriate in this circumstance.

## IV. 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)(3).

In this case, any mistakes made by Respondent of the prosecution of this case are not of such a character to warrant the award of attorney fees.

## CONCLUSIONS OF LAW

1. Complainant committed only some of the acts for which he was disciplined.

2. Respondent's disciplinary action as charged was arbitrary, capricious or contrary to rule or law, but sufficient independent grounds exist to support the termination.

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

4. Attorney's fees are not warranted.

## ORDER

Respondent's action is **affirmed with modification**. Complainant is entitled to full back pay until the first day of hearing in this matter. Attorney fees and costs are not awarded.

Dated this 14th day of August, 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 8-68, 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 8-69, 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 8-72, 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 8-73, 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 8-75, 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 8-65, 4 CCR 801.

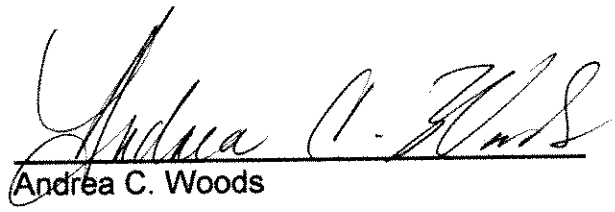
## CERTIFICATE OF SERVICE

This is to certify that on the 15th day of Aug. 2006, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, to the following addresses:

Nora V. Kelly, Esq.
Trinity Place
1801 Broadway
Suite 1204
Denver, CO 80203

**And via interoffice courier:**

Stacey Worthington, Esq.
First Assistant Attorney General
Employment Section
1525 Sherman St., 5th Fl.
Denver, CO 80203



Andrea C. Woods