STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B047**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KENNETH MESSINGER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on May 2, 2007, at the State Personnel Board, 633 17th Street, Denver, Colorado. The matter was commenced on April 11, 2007. The record was closed on the record by the ALJ on the last day of hearing on May 2, 2007. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Richard Harlan, Warden of Trinidad Correctional Facility. Complainant appeared and was represented by Robert S. Thompson, Attorney at Law.

MATTER APPEALED

Complainant, Kenneth Messinger (Complainant) appeals his disciplinary demotion from Lieutenant to Sergeant by Respondent, Department of Corrections (Respondent or TCF). Complainant seeks the rescision of his disciplinary demotion, back pay, benefits, and an award of attorney fees and costs.

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 range of reasonable alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant began his career with Respondent in 1992 as a Correctional Officer (CO) I. In April 1999 he was promoted to CO II. In February 2002 he was promoted to CO III.

2. TCF is a relatively new facility, having opened in March 2002.

3. TCF is geographically isolated in the Trinidad area. If a violent inmate uprising were to develop there, it would take 60 to 90 minutes for an emergency medical support and rescue team to arrive from Pueblo. Avoiding violent outbreaks among the inmates is therefore crucial to maintaining the safety and security of the facility, its staff, inmates, and the general public.

4. Complainant's Position Description Questionnaire as a CO III included the following:

   > Highest level decisions regularly made by the position: "Determines appropriate action and/or counseling to be taken concerning inmates noncompliance in disciplinary issues and emotional stability and decide whether violations warrant formal COPD charges." "Determines appropriate level of force when dealing with an unruly or uncooperative inmate."

5. Complainant's class description as a CO III included the following:

   > Decision making: "By nature, data needed to make decisions are numerous and variable so reasoning is needed to develop the practical course of acceptable standards, alternatives, and technical practices which are in the form of agency and unit procedures, memoranda, or post orders. As an example, although continuum of force guidelines exist, officers must decide the appropriate level of physical control response to offender(s) disturbances."
   >
   > Complexity: "Guidelines in the form of post orders, procedures, and emergency response directives exist for most situations. Judgment is needed in locating and selecting the most appropriate of these guidelines, which may change for varying circumstances as the task is repeated." "As an example, choosing verbal warning, physical restraint or force with combative techniques, activity termination, unit lockdown, or the use of deadly force (use of weapons) may be alternatives, but one may be preferable in a given situation."

Use of Force Regulations

6. Use of force by correctional officers on inmates can be a triggering event for a spread of violence among inmates.

7. The overriding mission of correctional officers is to de-escalate conflict and crisis in the prison environment, so as to maintain the safety and security of inmates, prison employees, and the general public.

8. The DOC Use of Force Administrative Regulations (AR's) codify the standard for use of force by correctional officers.

9. Respondent's AR 300-16 RD Use of Force, states in part,

> "Use of physical force is restricted to instances of justifiable self-defense, protection of others, protection of property, implementation of lawful orders, and prevention of escapes, and then only as a last resort **to maintain or regain control** and in accordance with appropriate statutory authority." (Emphasis in original).
>
> "Staff shall never personalize failures in managing dangerous or disruptive offenders, and are prohibited from seeking reprisal. They are expected to continually utilize opportunities to de-escalate volatile conditions in order to solve problems and peaceably restore safety and control prior to the use of reasonable force."
>
> "In no event is physical force justifiable as punishment."
>
> "Staff shall conduct themselves professionally when managing an offender and shall avoid any personal reprisal when controlling an offender by use of force."
>
> "Staff shall make every reasonable effort to resolve conflict by talking directly to a disruptive offender."

10. Any incidents involving use of force by a correctional officer on an inmate are investigated by a Fact Finding board, consisting of three prison staff. The mission of the board is to determine the appropriateness of the use and level of force utilized by the officer.

The Prison Environment

11. Prison inmates are constantly under threat of intimidation and victimization by other inmates. The prison culture therefore requires that inmates save face and show no sign of weakness among their peers, in order to protect themselves.

12. When correctional officers give an order to an inmate, the inmate is likely to respond by verbalizing a hostile response to the officer, demonstrating strength among their inmate peers.

13. Correctional officers are trained to understand that this antagonistic response from inmates is a routine element of the work environment for correctional officers. The use of force regulation cited above therefore prohibits officers from personalizing failures in managing dangerous or disruptive offenders and from "seeking reprisal."

14. Correctional officers are expected to attempt to avoid situations that would expose an inmate as weak before his peers. In order to achieve this goal, an officer may need to ignore "back talk" from an inmate in front of his peers, and then confront the inmate later in private about the inmate's behavior. When an inmate focuses his hostility directly on one correctional officer, that officer is required to call for a replacement officer to handle the inmate, in order to de-escalate the conflict. These responses to predictable inmate hostility serve the primary mission of preserving the safety and security of the facility.

15. The Code of Penal Discipline (COPD) is the system by which inmates are held accountable and punished for breaking prison regulations governing their conduct.

Performance Documentation Forms and Corrective Actions

16. On September 9, 2000, Complainant received a Performance Documentation form at Sterling Correctional Facility for making verbal threats towards a DOC employee.

17. In January 2002, Complainant received a Corrective Action for using excessive force on an inmate and irresponsible supervision.

18. In July 2002, at TCF, a Fact Finding board reviewed Complainant's use of force against an inmate and concluded the following: "Lieutenant Messinger utilized a strength technique that had a high probability of injury considering the proximity of the inmate to fixed furniture in the Living Unit Office. He did not make appropriate notifications in a timely manner. Lieutenant Messinger was directed, in the future, to notify the Shift Commander as soon as possible regarding disruptive actions of an inmate(s) that could lead to a physical altercation or disruption of unit operations."

19. On December 17, 2003, Captain Plattner wrote a confirming Memorandum for Complainant's personnel file. The memo indicated that Complainant had "typed up an informal and unauthorized document summarizing the substandard (in his opinion) performance of CO I Terrill. He then presented it to her for her

signature; she refused to sign it. He had no prior permission or authorization to take this action and he does not have the authority to take this responsibility on himself. The document proved to be ill-prepared and unprofessional in nature in addition to being unauthorized."

20. The December 2003 memo also stated, "On 12/27/03 Lt. Messinger had a run-in with Inmate . . . #117277. In the course of events, Lt. Messinger physically grabbed the belt of [his] pants and pulled him into the staff office to address his sagging pants issue. Messinger also allegedly threatened [him] with 'bodily harm' and went so far as to admit he was doing just that, to the inmate."

21. In January 2004, Complainant received a Corrective Action for a use of force incident that was unjustified and unsupportable by the guidelines established in the Use of Force policy. A Fact Finding board was convened to review the incident, and concluded that his interactions with the offender prior to, during, and after the use of force were aggressive, inappropriate, and unprofessional. Complainant was ordered to attend re-training in Professionalism, Games Criminals Play, Use of Force, and Crisis Intervention. In addition, he was ordered to read and prepare written reports describing the meaning, and his understanding of, several AR's, including Violence in the Workplace, Staff and Offender Communication, and the Staff Code of Conduct.

22. In October 2005, Warden Harlan issued a Corrective Action and Performance Documentation to Complainant involving inappropriate use of force against an inmate. Warden Harlan handled the matter himself due to his concern about the pattern of inappropriate use of force Complainant had exhibited.

23. In the October 25, 2005 Performance Documentation accompanying the Corrective Action, Warden Harlan reviewed the incident as follows: Complainant approached an offender in the TCF dining hall and told him he was "sagging" and needed to fix his belt. The offender became argumentative, and Complainant reported that he had perceived the offender to exhibit aggressive behavior by stepping into his "reactionary gap." Complainant stated that he grabbed the offender's left hand and brought it around his back in a joint lock. Complainant then placed his right forearm on the back of the offender and forced his upper torso onto a dining table to displace his balance. After Complainant gained control of the offender, he released him without placing him in restraints and informed him that he was taking him to the Shift Commander's office. The offender responded that he would not go. Complainant then ordered the offender to "cuff up," the offender refused, and Complainant grabbed him, placed him against the wall, applied wrist restraints, then escorted him to the Shift Commander's office.

24. In addition, the Fact Finding board and Warden Harlan concluded that Complainant had been off his post at the time, in violation of a direct order of his captain, that he had failed to utilize any method of de-escalation of the offender's

behavior, and that the use of force was not justifiable. Complainant had stated, "Do you want to get it on?" to the offender, which Warden Harlan found to have clearly escalated the intensity of the moment and prohibited any non-physical resolution of the issue. Warden Harlan noted that Complainant had initiated physical contact with an offender in the dining hall "over an issue (sagging pants) that did not immediately jeopardize the safety or security of the staff, offenders or DOC property. You did not call for back up assistance, and did not request or direct assistance from Sgt. Rose who was nearby."

25. In his October 25, 2005 Performance Documentation memo, Warden Harlan reviewed five previous incidents involving Complainant's inappropriate use of force on offenders. He then closed by listing six paragraphs describing the ways in which Complainant must improve his performance:

- use physical force only when justifiable and necessary per policy, and make every effort to de-escalate incidents prior to the application of force;
- never escalate, either verbally or physically, a situation with an offender;
- report incidents accurately and timely;
- avoid confrontation in high traffic areas in which overwhelming offender presence presents danger to staff or offenders;
- basic correctional practice requires a request for back-up prior to confrontation of an offender; and,
- abandonment of post is prohibited.

26. Warden Harlan required Complainant to prepare a written statement detailing how he intended to improve his performance and compliance with DOC policy and training standards. He also suspended Complainant's teaching credentials for one year.

27. Complainant grieved none of the above actions.

28. In April 2006, Complainant received an overall Commendable rating on his evaluation for the period October 2006 through March 2006. The document highlighted his strengths in organizational commitment, job knowledge, and supervision of subordinate staff, and noted his difficulty in dealing with aggressive or confrontational inmates.

29. In July 2006, Complainant received a Corrective Action for inappropriate use of force. The Fact Finding board, after reviewing the incident, found that Complainant's decision to apply force by attempting to kick the shin area of the offender's leg and then taking the offender to the floor while he was handcuffed behind his back with both arms physically controlled by Sgt. Putnam and Complainant was unwarranted and unnecessary.

30. Complainant grieved this corrective action. Respondent denied it. Complainant did not appeal it to the Board.

Events of October 15, 2006

31. On October 15, 2006, Sergeant Martinez noticed that an inmate, B.J., was "sagging his pants." Sagging pants are a violation of the COPD governing inmate prison behavior, because they are often an indication of gang affiliation.

32. On the previous day, Martinez had ordered the inmate to stop sagging his pants. In view of the inmate's violation of a previous warning, Martinez called to the inmate's assigned unit and ordered Officer Rodriguez to inform the inmate that he would receive a written report written for the COPD violation, for sagging pants.

33. Officer Rodriguez issued an order over the loudspeaker for inmate B.J to come to the Living Unit 4 office, also known as the Master Control area.

34. Inmate B.J. came to the office. Complainant was also present.

35. Rodriguez informed the inmate that he was being written up for sagging pants. The inmate understood that he would later face a disciplinary hearing pursuant to the COPD on the issue.

36. Complainant made a comment about the inmate having engaged in horseplay with another inmate in the yard. Complainant then stated to the inmate, "Turn around and show me your pants." The inmate refused to comply with this directive. He threw up his hands and said, "I'm getting written up for it anyway," then walked away.

37. The inmate left the room and started walking up the stairs to the living units.

38. Complainant told the inmate to come back several times, but the inmate ignored him.

39. Complainant pounded on a window to get the inmate to come back. The inmate continued to walk up the stairs.

40. Complainant followed the inmate up the stairs, at a rate faster than a walk. On the stairwell he yelled to the inmate to stop.

41. When Complainant caught up to the inmate, just inside the unit, he tripped the inmate and faced him towards the wall.

42. Officer Rodriquez followed Complainant up the stairs. When he arrived at the top, he saw the inmate up against the wall, facing the wall, with Complainant behind him.

43. Complainant ordered the inmate to "cuff up," to place his hands behind his back. The inmate was passively resistant, refusing to put his hands behind his back, but also not moving.

44. The inmate posed no threat to Complainant or any other individual, or to any property, at this time.

45. Complainant grabbed the inmate's hands and placed him in handcuffs.

46. The inmate then became verbally abusive to Complainant.

47. Complainant and Sgt. Barela escorted the handcuffed inmate to the Shift Commander's office.

48. It is customary for inmates to sit at the large Captain's table when in the Shift Commander's office.

49. Complainant ordered the inmate to sit at the Captain's table. The inmate refused to do so, stating he preferred to stand. He was verbally abusive and aggressive towards Complainant, using profanity.

50. At the time the handcuffed inmate was standing in the Shift Commander's office refusing to sit down, he posed no threat to any individual or to any property.

51. Complainant issued a second order to the inmate to sit. The inmate refused, making comments such as, "You don't tell me what to do, you sit down."

52. Complainant placed his hand on the inmate's shoulder, attempting to guide him to a sitting position. The inmate tightened up and continued to stand. He still posed no threat to any person or property.

53. Complainant then applied a pressure point control technique to the inmate, called the "jugular notch," which involves placing one's finger point on the jugular location of the throat of the inmate. The jugular notch temporarily disables an inmate, enabling a correctional officer to force an inmate to sit or to remain down if he is attempting to get up.

54. The inmate responded by lurching his head forward at Complainant, and then attempting to kick Complainant.

55. Complainant and the other officer present then engaged in a takedown of the inmate, during which the inmate thrashed around and lunged at Complainant and

other staff. Once the inmate was under control, he was removed to administrative separation.

56. Captain Waltman, present during this incident in her office, called her first responders team in.

57. Another officer then replaced Complainant on the scene.

Fact Finding Board Report

58. The Fact Finding board assigned to investigate Complainant's conduct on October 15, 2006 consisted of a captain, a lieutenant, and a General Professional III.

59. There were eyewitnesses to each phase of the incident between Complainant and the inmate. Each witness wrote a report, which was reviewed by the board and attached to its report. In addition, a member of the Fact Finding board interviewed all witnesses at the events on October 15, 2006.

60. Officer Rodriguez wrote in his report that he had been assigned to living unit 4 on October 15, and that he received a call from Sgt. Martinez, asking him to make contact with inmate B.J. and inform him he would be receiving the write-up for sagging pants. Sgt. Martinez's report was consistent with that of Rodriguez.

61. In Complainant's written incident report, submitted to and considered by the board, he stated in part,

> "I call [the inmate] into Lu#4's office to talk to him about horseplay/fighting and the condition of his pants and how he could get a write up. He [the inmate] stated that he was already getting a write up for sagging, and then turned leaving the office. I called the inmate back to finish counseling him, but he kept walking, going up the stairs. I asked the unit officer, C/O Rodriguez to come with me so as to take the inmate to the Shift Commander's office. I caught up with the inmate as he was going down E-wing and ordered him to stop. He continued down the wing and again I gave him an order to stop, which he continued to ignore. I then caught up with him and turned him to the wall. Because the inmate was acting out and being non-compliant, I place[d] him in handcuffs for every ones safety. Then C/O Rodriguez and myself started to escort him down stairs . . .
>
> I directed [the inmate] to the chair by the commander's desk and told him to sit down. When I placed my hand lightly on his shoulder, to sit him down, he pushed towards me. Sgt. Barela (yard 1), seeing this came over to help control the inmate, at which

point the inmate really became physical; pushing, shoving, and pulling from our grasp. Sgt. Barela and myself wrestled him to the ground where he continued to resist."

62. The October 19, 2006 report of the Fact Finding board contained two sets of conclusions. The first set addressed the central issues of whether Complainant's use of force and the amount of force used on B.J. in the Shift Commander's office was warranted and appropriate. It concluded, "It was the determination of the committee that the use of force in the Shift Commanders as reported in the 'Use of Force Report' was justified and appropriate to [gain] the control of the situation that had developed."

63. The second set of board conclusions addressed Complainant's conduct preceding the use of force in the Shift Commander's office. It stated,

> "Of concern to the committee was the fact that the incident had developed at all. Of equal concern was the determination by the committee that there was a use of force in the living unit that was not appropriately documented as a use of force. This use of force was Lt. Messinger taking hold of the offender and placing him against the wall to place handcuffs on him. The committee did not feel that it was necessary for Lt. Messinger to pursue the offender upstairs and further antagonize the incident. When this idea was suggested to Lt. Messinger in the fact-finding he stated that only when looking back at the incident did he consider this option.
>
> The use of force in the Shift Commanders Office became necessary when Lt. Messinger insisted that the offender sit down. Lt. Messinger stated to the committee that when he first told the offender to sit down, the offender stated he would rather stand. Rather than accepting this answer as an option, Lt. Messinger insisted that the offender sit down and placed his hand on the offender's shoulder to guide him into the chair. The offender resisted this movement. This is when Sgt. Barela felt the incident was getting out of hand and placed the offender to the floor to prevent further incident. The committee asked why it was important that the offender be seated and Lt. Messinger's answer was that this was the first time he had ever been told by an offender they would rather stand. The committee also asked Lt. Messinger if he felt that it would have been prudent on his part to allow other staff to take the offender to the Shift Commander's Office and he stated that he did not consider that option.
>
> In all, the committee felt that the incident should not have happened and that a use of force would not have been necessary if Lt. Messinger had not felt it necessary to pursue the offender or to try

to make him sit down once they arrived in the Shift Commander's Office."

Pre-disciplinary Meeting

64. After reviewing the report, Warden Harlan sent a notice of pre-disciplinary meeting to Complainant, advising him of his right to have a representative present.

65. Complainant sent a letter requesting an extension of time. Warden Harlan granted this request, and Complainant agreed to re-schedule the meeting for November 27, 2006, so that Complainant could have counsel present.

66. On the morning of November 27, 2006, Complainant contacted Warden Harlan, stating that his representative could not be present on that day.

67. Warden Harlan granted Complainant a second extension of time for the meeting to November 30, 2006. In his letter noticing the meeting, the Warden indicated that this would be the last extension of time, that the matter needed to be addressed, and that Complainant's representative could participate in person or by telephone.

68. On November 30, 2006, Complainant attended the meeting with no representative. Warden Harlan had the TCF Custody and Control Manager present.

69. Warden Harlan opened the meeting by reviewing the conclusions of the Fact Finding board and the facts contained in the written incident reports submitted by Complainant and the eyewitnesses.

70. Warden Harlan made it clear that his chief concern was the same as the board's, namely, Complainant's escalating conduct that created the need to use force on October 15.

71. Complainant started by stating that he believed it was necessary to have a representative present, and that he believed he had been deprived of that right. Complainant also stated that the notice letter had not sufficiently advised him of the subject matter of the pre-disciplinary meeting.

72. Complainant then addressed the events of October 15. With regard to the board's concern that he had not written a separate Use of Force report regarding his placement of handcuffs on the inmate, he stated that he had honestly reported the facts relating to the handcuffing in his other report, and had not withheld information.

73. In response to the suggestion that he should not have followed the inmate up the stairs, Complainant stated that the inmate had made his statements to both Complainant and to Rodriguez. Therefore, it would not have made any difference which officer followed the inmate.

74. Warden Harlan expressed concern to Complainant about the fact it was his "third use of force incident which has been questioned. That originated with the sagging of pants. You've been sanctioned twice."

75. Complainant responded that his concern was not the sagging but the inmate having engaged in a verbal altercation with another inmate, causing Complainant to be concerned about a possible disruption to the unit. Complainant stated that he had sought to counsel the inmate on not causing a fight in the unit.

76. Complainant stated that he takes the former corrective actions into consideration every day on the job, and denied having an anger problem. He noted that the CSEAP (Colorado State Employee Assistance Program) counselor he worked with would verify this.

77. Complainant asserted that he viewed his corrective actions as isolated incidents, and that the October 15 incident should be viewed separately from his prior corrective actions.

78. Complainant concluded by stating that he took his job seriously, that he tries to do the best he can for the facility, and that he never intended to provoke an incident on October 15 with the inmate.

79. Warden Harlan stated that he did not in any way doubt Complainant's commitment to his job at the Department of Corrections and to TCF.

Warden Harlan's Decision

80. After the pre-disciplinary meeting, Warden Harlan interviewed Officer Rodriguez to clarify the circumstances under which inmate B.J. was called to the living unit office. Officer Rodriguez's account was corroborated by Sergeant Martinez's account: B.J.'s sagging pants violation led to Martinez's request to have Rodriguez counsel him in the office. There was no independent corroboration of Complainant's account of having initiated inmate B.J.'s presence in the office.

81. Warden Harlan concluded that Complainant had no legitimate reason for chasing inmate B.J. up the stairs, for placing him up against the wall on the living unit, and for cuffing him on the living unit. In addition, he concluded that Complainant had no legitimate reason for placing his hand on B.J. to make him sit down in the Shift Commander's office. Hence, he concluded that Complainant had violated the Use of Force AR by failing to de-escalate the two situations, by unilaterally

escalating both situations, and by initiating physical contact with the inmate on two separate occasions without justification under the regulation.

82. Warden Harlan reviewed Complainant's performance history, including the performance memos and corrective actions, evaluations, training record, and job description, prior to making a decision.

83. The Warden had assumed sole responsibility for handling the October 25, 2005 corrective action and performance memo issued to Complainant, in order to underscore how seriously he viewed Complainant's pattern of inappropriate use of force with inmates. In an effort to re-educate Complainant in the fundamentals of handling inmates in difficult situations, the Warden had also imposed significant additional training on Complainant and had stripped him of his teaching credentials for one year.

84. Warden Harlan concluded that another consequence in the form of a corrective action would have no effect on Complainant's conduct, because the previous four corrective actions, the performance memos, the additional re-training, and his personal intervention had not modified Complainant's behavior.

85. Warden Harlan was very concerned about the effect of retaining Complainant in the Lieutenant position, serving as a role model for the younger and newer CO's at TCF. From his experience as a career correctional officer, Harlan knew that role modeling is a huge part of how prison staff become acclimated to and successful in the correctional environment. In Harlan's view, Complainant had failed to consistently role model appropriate behavior in handling offenders for several years. In fact, he had modeled inappropriate responses to difficult inmate situations repeatedly over time.

86. Warden Harlan concluded that nothing short of demotion was a reasonable option because he could no longer trust Complainant in a leadership position at the level of Lieutenant. He considered termination as an option, given the seriousness of the pattern of Complainant's behavior, but he rejected this action based on Complainant's length of service.

87. On December 6, 2006, Warden Harlan issued the disciplinary action letter to Complainant, demoting him to the rank of Sergeant and reducing his pay by ten percent, from $4918.00 to $4427.00 per month, effective January 1, 2007.

88. In his four-page, single spaced letter, the Warden outlined the applicable use of force regulation provisions, Complainant's job description, the history of corrective actions and performance documentations for violating use of force regulations in handling inmates, and the conclusions of the Fact Finding board following the October 15, 2006 incident.

89. Warden Harlan stated, "As a Correctional Officer III it is your responsibility to demonstrate the ability to make decisions and initiate actions that are consistent with Department and facility guidelines as described in your Class Series Description, your job description, regulations, policies, and directives. Any application of force against an offender is a serious action that has potentially catastrophic consequences, and must be well-advised, immediately necessary to control an unruly offender, properly documented, and reviewed."

90. The Warden concluded that Complainant's conduct was the result of "very poor decision making" and that his "repeated initiation of, and involvement in ill-advised and/or unnecessary use of force incidents demonstrates egregious behavior that seriously threatens the safety of employees and offenders as well as jeopardizing the security of the institution."

91. Complainant appealed his disciplinary demotion.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant was demoted for violating AR 300-16RD Use of Force and engaging in very poor decision-making on October 15, 2006, and for his repeated initiation of and involvement in unnecessary use of force incidents.

AR 300-16RD requires that correctional officers "continually utilize opportunities to de-escalate volatile conditions in order to solve problems and peaceably restore safety and control prior to the use of reasonable force." It also requires staff to "conduct themselves professionally when managing an offender." Complainant acted in an unprofessional manner and unilaterally escalated the situation by ordering B.J. to, "Turn around and show me your pants," by ordering him to remain in the office after the purpose of his presence had been achieved (notifying him of the COPD complaint), and by chasing him up the stairs. If Complainant sought to discipline Complainant under the COPD for engaging in horseplay with another inmate, or for walking away in violation of his order, he had the COPD available to him. Complainant's decision to physically pursue B.J., instead of using the COPD to enforce his authority over the inmate, constituted very poor decision making.

Complainant also violated AR 300-16RD by "tripping" the inmate into the wall, pinning him to the wall, and hand cuffing him. At the time this use of force occurred, the inmate posed no threat to any person or property. Therefore, no use of force was justified.

During Complainant's escort of the inmate to the Shift Commander's office, B.J. verbally attacked Complainant. Once they arrived in the Shift Commander's office, Complainant violated AR 300-16RD by escalating the situation and placing his hand on B.J.'s shoulder to force him to sit, rather than utilizing de-escalation techniques. The inmate posed no threat to any person or property. He was choosing to stand instead of to sit, openly defying Complainant's authority. Complainant permitted himself to be enticed into a test of wills with the inmate, personalizing the situation and leading to very poor decision-making. Under the Use of Force Regulation, Complainant was required to remain professionally detached and to literally remove himself from the situation with B.J. by requesting a replacement officer to stand in for him, instead of escalating it.

Lastly, Respondent met its burden of proving by preponderant evidence that Complainant engaged in a pattern of misconduct in his use of force with inmates. Complainant had previously received four corrective actions for conduct very similar to that on October 15. The evidence demonstrates that objective Fact Finding boards repeatedly found Complainant's use of force to have been unjustified and unsupportable. The January 2004 board found that Complainant's interactions with the offender prior to, during, and after the use of force were aggressive, inappropriate, and unprofessional. The October 2005 board faulted Complainant's failure to utilize any

method of de-escalation and found Complainant's use of force to have been unjustifiable. The July 2006 board found Complainant's use of force on a handcuffed inmate to be unwarranted and unnecessary. Lastly, the October 2006 board determined that Complainant's escalating conduct was exclusively responsible for creating the need to use force.

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; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant asserts that because the Fact Finding board concluded that his use of force, and level of force used, were appropriate, he is not properly subject to disciplinary action for any of his conduct on October 15, 2006. Complainant's position is that any information not relevant to those two determinations must be ignored, and is an improper basis for the imposition of discipline.

There is no authority for Complainant's position. In fact, under the *Lawley* standard, Respondent would have acted in an arbitrary and capricious manner to have ignored the board's lengthy critique of Complainant's escalating conduct preceding the use of force. Warden Harlan appropriately considered the entire sequence of events between Complainant and the inmate on October 15, 2006. Had he not done so, he would have failed to give candid and honest consideration to all of the relevant evidence before him. Further, it would not be reasonable for a prison warden to ignore a Lieutenant's egregious pattern of violating Department use of force regulations, following four corrective actions for the same type of conduct.

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

The level of discipline imposed by Warden Harlan was appropriate, and was well within the range of reasonable alternatives. Demotion is particularly appropriate in this case because Complainant demonstrated by his own conduct that he was incapable of consistently modeling appropriate behavior to his subordinates. By demoting Complainant, Warden Harlan fulfilled his mandate as appointing authority to enforce the regulations that govern all correctional officers' conduct. Moreover, he proved by his action that all correctional officers, regardless of rank, will be subject to consequences for violating prison regulations. If a Lieutenant such as Complainant demonstrates

repeatedly that he is unwilling or unable to comply with use of force regulations, it is appropriate for the warden to remove him from that leadership position.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38B, 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 8-38B, 4 CCR 801.

Complainant requested an award of attorney fees and costs. Because he did not prevail in this matter, there is no basis for such an award.

CONCLUSIONS OF LAW

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

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded

Dated this 14th day of June, 2007

Mary S. McClatchey
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 9 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.

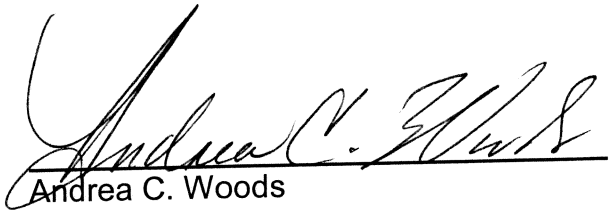
CERTIFICATE OF SERVICE

This is to certify that on the 15th day of June, 2007, 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:

Robert W. Thompson, Esquire
366 South Victor Street
Aurora, Colorado 80012

and in the interagency mail, to:

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



Andrea C. Woods