STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B013**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHRISTOPHER OLSON,

Complainant,

vs.

DEPARTMENT OF LOCAL AFFAIRS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on January 23 and 24 and February 12 and 13, 2008, at the State Personnel Board, 633 17th Street, Courtroom 1, Denver, Colorado. Complainant was represented by Todd L. Seelman and Leslie E. Miller, Grimshaw & Harring, P.C. Respondent was represented by First Assistant Attorney General Stacy L. Worthington and Assistant Attorney General Christopher Puckett. Respondent's advisory witness was Susan Kirkpatrick, Executive Director of the Department of Local Affairs (DOLA).

On March 26, 2008, Respondent filed a Petition for Reconsideration, noting that Respondent had not conceded the issue of breach of contract, contrary to a statement made in the Initial Decision. That Petition was granted and the amended portions of this decision appear in boldface on pages 23 and 24.

MATTER APPEALED

Christopher Olson (Complainant) appeals the termination of his Senior Executive Service (SES) contract with Respondent for the position of Director of the Division of Emergency Management (DEM) at DOLA. Complainant seeks reinstatement to the position of DEM Director, back pay, and an award of attorney fees and costs.

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

ISSUES

1. Whether Complainant failed to perform in a satisfactory manner;

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

3. Whether either party is entitled to an award of attorney fees and costs.

AUTHORITIES

Colorado State Personnel Systems Act

C.R.S. Section 24-50-104. Job evaluation and compensation . . . (5) **Pay Plans**. (a) The state personnel director shall establish pay plans as technically and professionally necessary and shall establish any procedures and directives required to implement the state's prevailing total compensation philosophy as defined in subsection (1) of this section.

(b) No employee in any pay plan may exceed an established maximum salary amount for such plan, except as provided in paragraph (e) of subsection (1) of this section. . . The maximum monthly salary for the senior executive service plan shall not exceed the maximum monthly salary of any nonmedical pay plan by more than twenty-five percent.

(c) The senior executive service shall be limited to one hundred twenty-five positions. The state personnel director shall establish criteria for inclusion in the senior executive service and shall review each nominated position before it is placed in the pay plan for the senior executive service. . . The head of the department or agency . . . shall make appointments to the senior executive service based on competitive selection and is responsible for the management of the employees in such plan. Any person in the senior executive service shall have no right to a position outside of the senior executive service.

(d) In the pay plans for medical and the senior executive service, there shall be no anniversary-based merit increases. The salaries in such pay plans shall be based on the negotiation of an annual contract between the employee and the department head . . . and the amount of such salaries may increase, decrease, or remain unchanged from year to year. Any employee dismissed for failure to perform under such contract may only appeal directly to the state personnel board.

Colorado State Personnel Board Rules

Board Rule 2-13

Any employee entering or remaining in the senior executive service pay plan on or after July 1, 2003, waives retention and reemployment rights with respect to any other position in the personnel system pursuant to Board Rule 1-19, but shall have reinstatement privileges with respect to any vacant position in the employee's current or previously certified class.

Board Rule 8-53

Any action that adversely affects a certified employee's current base pay, status, or tenure as defined by Board rule may be appealed and will be set for hearing. . . . Issues involving annual total compensation survey, discretionary pay differentials. . . renewals of senior executive service contracts at a reduced

salary, and removal of positions from the senior executive service pay plan into the traditional classified pay plan are not subject to appeal . . . .

B Employees who are separated for failure to perform under senior executive service contracts do not have a right to progressive discipline or to a Board Rule 6-10 meeting. In such an appeal, the appointing authority must produce evidence that the employee's performance was not satisfactory. The employee shall then have the burden of producing evidence that performance was satisfactory, and shall bear the burden of proof that the appointing authority's decision was arbitrary, capricious, or contrary to rule or law.

Colorado State Personnel Director's Procedures

Director's Procedure 2-11

The senior executive service is an alternative performance-based pay plan available for employees in positions that are in the management class and are responsible for directly controlling, through subordinate managers, relatively large or important segments of a principal department, including the acquisition and administration of human, fiscal, operating, and capital resources, and direction and guidance of significant programs, projects, and public policy development.

A. A position may be considered for inclusion in the senior executive service only upon the nomination of the department head. . . The Director's decision to place a position into, or remove a position from, the senior executive service is final and not subject to appeal. . .

C. The department head may decide not to renew the contract for any reason. As part of the negotiation process and in consideration for a salary that exceeds the maximum of the management class, an employee entering into a senior executive service contract may be required to waive all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system with respect to the expiration of the non-renewed contract. If the department head gives the employee written notice of non-renewal by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which qualified.

Director's Procedure 2-12

It is not considered a promotion when an employee's current position is approved for and moved into the senior executive service. Movement out of senior executive service is not considered a demotion. No employee shall be required to accept a senior executive service pay plan with respect to the employee's current position. All provisions of the rules apply to employees in the senior executive service unless specifically noted otherwise.

FINDINGS OF FACT

General Background

1. In May 2007, Complainant applied for the position of Director of DEM.

2. The DEM Director position is a high profile one, responsible for coordinating all aspects of emergency management for the State of Colorado. The application form describes the duties of the Director as follows: "This position manages and directs the Division of Emergency Management, which includes developing program policies; guidelines and objectives; managing an administrative budget of $2.9 million per year; and managing approximately $40 million in grants and assistance to local governments annually, including Homeland Security operations and grants. The position directly supervises 5 FTE and indirectly 24 FTE. The position oversees the State Emergency Operations Center and maintains the State Emergency Operations Plan. Further, the position ensures a disaster emergency management system embodying every aspect of all-hazards disaster emergency preparedness, prevention, response and recovery."

3. The DEM Director is the conduit for communication between local, state, and federal officials regarding coordination and deployment of necessary emergency services. Unlike most Division Director-level posts in state government, this position has significant direct contact with the Governor. During crises, the Governor depends upon the DEM Director to obtain and communicate accurate information, so that he can make the best decision possible regarding utilization, mobilization, and coordination of state resources.

4. In December 2006, there was a blizzard in Colorado requiring emergency response from state officials. Governor Bill Owens invited Governor-elect Bill Ritter, Jr. to accompany him to the DEM offices to watch the crisis response to the blizzard. Governor-elect Ritter joined Governor Owens and watched the interactions between Governor Owens, the DEM Director, and others.

5. Governor Ritter concluded from that experience that he would need to work directly with the DEM Director and that it would be a critical position in his new Administration.

6. Shortly after assuming office, Governor Ritter prioritized emergency management services as an area he sought to reorganize and improve. Governor Ritter, Susan Kirkpatrick, Executive Director of DOLA (the appointing authority for the DEM Director position), and other senior staff decided not to renew the SES contract of the individual who had served Governor Owens in the DEM Director position.

7. Governor Ritter directed one of his two Deputy Chiefs of Staff, Stephanie Villafuerte, to oversee the emergency management reorganization, and to be involved in the hiring process to fill the DEM Director position. Villafuerte contacted Complainant and several other local stakeholders involved in Homeland Security issues to provide advice to the new Administration on improving state emergency management services. In addition, Villafuerte sat on the oral interview panel for the Director position during the hiring process.

Hiring Process and Complainant's Candidacy

8. On May 14, 2007, DOLA posted the job announcement for the Director position online, as open competitive. The announcement described the Job Title as: "Director, Division of Emergency Management (Senior Executive Service Contract Position)." The first section described the position as follows: "Information About The Job: The Senior Executive Service (SES) is a distinct performance pay plan. In exchange for the higher potential salaries, employees under SES performance contracts are not afforded any of the following rights: retention or reemployment; appeal of the State Personnel Director's decision to move a position into or out of the SES; any pay adjustments such as achievement pay; and appeal of the salary from one contract year to the next. SES contracts must be renewed June 30th of every year."

9. During the hiring process, Complainant was 60 years old. (Stipulated Fact) Respondent was aware of his age at all times relevant.

10. Complainant served as Director of Safety Services for the City of Englewood from 1997 through July 2007. In that position, he served as police and fire chief, managed all public safety services for the City, and oversaw a budget of $17 million. Having started his 32-year career at Englewood as a firefighter, he progressed through the ranks in such positions as paramedic, fire officer, captain, and Deputy Director of Safety Services, prior to serving as Director.

11. Complainant chaired the Ready Colorado Homeland Security Preparedness Campaign. In addition, he served on several boards and commissions during his public safety career. Among those he listed on the resume he submitted with his application for the DEM Director position are: Chairman, Arapahoe County E-911 Authority Board; Member, Treasurer, Kops n' Kids, Inc.; Member, Colorado PUC E-911 Task Force and President of the Colorado 911 Resource Center Executive Board; President, Colorado Association of Chiefs of Police and former Legislative Committee Chair.

12. Complainant also served as a member of the Denver Civil Service Commission from January 1997 through December 2006, having been appointed to this position for five terms by the Denver City Council. Complainant served as President for his last two terms. As a Commissioner, he was responsible for

entry level selection and promotional processes and disciplinary reviews for Denver fire and police officers.

13. Governor Ritter knew Complainant through their joint service on the Kops n' Kids board. Kops n' Kids raised money for widows and children of police officers killed in the line of duty. The Governor also knew of Complainant's work on other boards and in the law enforcement community.

14. Governor Ritter had high regard for Complainant and considered him to be eminently qualified for the DEM Director position.

2005 Gender Discrimination Charges and Lawsuit

15. On January 22, 2004, Ms. Diedre Scott, a police officer in Englewood, filed a charge of sex and disability discrimination against the City of Englewood Department of Safety Services with the Colorado Civil Rights Division (CCRD).

16. In April 2004, after Englewood terminated her employment, Scott filed a second CCRD charge, alleging sex discrimination and retaliatory discharge for having filed the January 2004 CCRD charges. She named Complainant as the Respondent, asserting that he aided and abetted in discharging her based on her sex and retaliated against her for opposing discriminatory employment practices. She filed the same type of complaint against five other Englewood managers.

17. On August 30, 2004, the Director of CCRD sent a letter to Complainant, stating in part, "Diedre M. Scott has filed a charge of alleged discrimination with this agency naming Chris Olson, City of Englewood/Dept. of Safety Services as the Respondent. Pursuant to this Commission's Rule 10.4(G)(2), you are being furnished with a copy of this charge." The letter informed Complainant of the requirement to respond to the enclosed Request for Information.

18. On June 29, 2005, the CCRD issued an opinion of Probable Cause on the retaliation claim and No Probable Cause on the claim of aiding and abetting a discriminatory discharge. CCRD concluded, "In summary, the available evidence does not demonstrate that the Respondent [Olson] harassed the Charging Party [Scott] due to her sex (female) or due to her disability (Post Traumatic Stress Disorder or PTSD). The available evidence does indicate, however, that it is more likely tha[n] not the Respondent [Olson] discharged her due to her sex (female) and in retaliation for complaining of unequal treatment." CCRD based its conclusion of No Probable Cause in the aiding and abetting claim on its finding that "the record indicates that the Respondent [Olson] was the sole decision-maker in the decision to discharge the Charging Party [Scott], and hence was not aiding or abetting another's discriminatory conduct."

19. In July 2005, upon receipt of a right to sue letter from CCRD, Scott filed a lawsuit in federal district court. The Complaint and Jury Demand, personally served on

Complainant on August 2, 2005, asserted claims of sex discrimination under the federal constitution and state anti-discrimination act, and retaliation for filing a sex and disability claim.

20. The Complaint named the City of Englewood Police Department, Chris Olson, and five other individuals as defendants, in their individual and official capacities. The lawsuit claimed that after Scott witnessed two fellow officers suffer violent injuries on the job, she developed PTSD. She asserted that she was treated in a punitive manner, and that male comparators with similar problems, and male comparators who had committed serious misconduct, were treated more favorably. The Complaint provided several specific examples of male officers who were given one- or two-day suspensions for criminal conduct and other serious violations of agency regulations.

21. On January 10, 2006, Complainant and all defendants in the Scott case signed a Settlement Agreement. In exchange for Scott dropping her "claims for discrimination, based on her sex/female, disability and retaliation" and all other claims, she received the sum of $354,300.00.

22. On April 20, 2004, another Englewood police officer, Andrea Fabianich, had filed a sex discrimination charge against the City of Englewood, Department of Safety Services and Complainant, challenging her termination and subsequent demotion. This case was eventually settled.

Media Coverage of Scott Lawsuit and Complainant's Role on Denver Civil Service Commission

23. There was news coverage of the Scott lawsuit and its settlement. Complainant's peers on the Denver Civil Service Commission were familiar with this coverage, which included newspaper articles.

24. Channel 7 reporter John Ferugia learned about the Scott lawsuit and investigated it. Ferugia interviewed Complainant and Denver City Councilwoman Jeanne Faatz. On May 19, 2006, Channel 7 ran a story entitled, "Questions Raised About Denver Civil Service Board Head." A video tape of Ferugia's interview of Complainant was available for download online.

25. The Ferugia story noted that Complainant headed the Denver Civil Service Commission and that "serious questions have been raised about his judgment and leadership, because of decisions he's made as head of Englewood's police and fire departments." The article reported that the CCRD had "found that Olson had retaliated against Officer Deidre Scott after she filed a complaint for unequal treatment. What's more, the division found Olson's department had fired Scott because she is a woman. That finding cost the City of Englewood nearly $355,000 to settle the case and raised questions about Olson's ability to function in his other role, as head of Denver's Civil Service Board." The article noted that

Complainant dealt with employment, discipline, and discrimination issues between the city and its employees.

26. Ferugia interviewed Complainant about the male employees of Englewood named in Scott's lawsuit, who had allegedly engaged in misconduct and whom Complainant had not terminated. Complainant confirmed that one male Englewood police officer "found to be running an illegal online gambling operation using department computers" was still employed by the department and had not been charged with any crime. Complainant also confirmed that a male homicide detective who had had sex with the sister of a victim of a crime he was investigating had also not been terminated.

27. Ferugia reported that Councilwoman Faatz, charged with overseeing the Civil Service Commission, was concerned about Complainant's leniency with these officers and would watch his decision-making "very closely." In addition, the article stated that the Denver City Attorney would review whether the 7News investigation "will affect Olson's ability to serve on the Civil Service Commission." The article noted, "There is concern that lawyers for employees appearing before the commission may challenge Olson's judgment in controversial cases – charging he is biased."

Denver Civil Service Commission Response to the Scott Lawsuit

28. Following the release of the Ferugia report, Councilwoman Faatz contacted the Executive Director of the Denver Civil Service Commission, Earl Peterson. She asked him about his perceptions of the Scott lawsuit and whether it affected Complainant's tenure on the Commission. Peterson informed her he had the utmost confidence in Complainant.

29. At the next Denver Civil Service Commission meeting, because the Commissioners had read about the Englewood lawsuit in the newspapers, Complainant discussed the Scott lawsuit and the settlement, indicating it was a personnel matter that he was addressing. He did not discuss any details or specifics.

30. The members of the Commission discussed the lawsuit and the article and determined that neither had any bearing on their confidence in Complainant's leadership as President of the Civil Service Commission. The matter was dropped.

31. After that Commission meeting, Complainant met with Peterson and informed him he would not seek another term on the Commission. Complainant indicated that he felt he may be compromising the Commission if he remained, and made it clear that the demands of his Englewood position, and of his work heading the state police chiefs organization, were such that he needed to leave at the end of his term.

32. Peterson urged Complainant to remain for another term.

33. Gary Sears, the City Manager of Englewood and Complainant's boss, had long felt that Complainant's service on the Denver Civil Service Commission could present a conflict of interest for Complainant. After the Ferugia story came out, he directed Complainant to refrain from serving another term on the Commission.

Kirkpatrick's Contacts with Complainant's References

34. In June 2007, Complainant participated in the written and oral exams for the DEM Director position. After the completion of the oral exams on June 21, 2007, Complainant was scored as the top applicant. (Stipulated Fact)

35. Kirkpatrick interviewed Complainant on June 25, 2007. After completing all of the interviews of the finalists, Complainant was the top candidate. The next step was to check his references.

36. Complainant provided six references with his application and resume. These included: Gary Sears, City Manager of Englewood and Complainant's boss; Martin Flahive, Denver Urban Area Security Initiative; Susan Casey, former Denver City Counsel member; Cecelia Mascarenas, a fellow Denver Civil Service Commissioner; Ed Thomas, a former Denver City Council member and police officer; Elizabeth McCann, a Deputy Attorney General and former Manager of Public Safety for the City of Denver; and Alan Stanley, chair of the Colorado Parole Board.

37. Kirkpatrick contacted Martin Flahive, whom Kirkpatrick knew of because of his work with the Urban Area Security organization. She spoke to him about Complainant's candidacy.

38. Kirkpatrick also called another reference, but was unable to reach him or her.

39. Kirkpatrick called Gary Sears, and arranged to talk with him in person on June 27, 2007, when they both would be in Snowmass at the Colorado Municipal League (CML) conference. Kirkpatrick knew Sears well from serving with him on the CML executive board.

40. Kirkpatrick's son was scheduled to get married on June 30, 2007 and she was expecting relatives to arrive that week. Therefore, she planned to leave the CML conference after lunch on June 27, 2007.

41. On June 27, 2007, Kirkpatrick and Sears met immediately prior to her departure back to Denver, for approximately ten minutes. Kirkpatrick asked Sears for information about Complainant and his suitability for the Director position. Sears' overall appraisal of Complainant was that he was appropriate for the Director

position and would do a good job. Sears indicated that Complainant had always done what he asked him to do. However, Sears' general assessment of Complainant was not as enthusiastic as Kirkpatrick had hoped, because she had anticipated his reference would be the final piece of information she needed to extend an offer to Complainant.

42. Sears informed Kirkpatrick that Complainant had been a strong Director of Safety Services in Englewood, but that he was somewhat opinionated about certain things. Sears anticipated the importance of his future working relationship with Kirkpatrick and others in the incoming Ritter Administration; therefore, he felt obliged to share what he felt might be sensitive issues that could be raised about Complainant, as a heads-up.

43. Sears informed Kirkpatrick about an ongoing issue regarding a parking ticket issued against Complainant's wife in Denver. Complainant had been involved in attempting to resolve it, and had appeared in court on the matter. A television camera had been present in the courtroom to record the proceedings, and Sears expected that there might be immediate follow-up news coverage any day.

44. Sears and Kirkpatrick spent the majority of their ten-minute meeting discussing the parking ticket issue. Kirkpatrick's impression from this discussion was that Complainant may have been involved in having the parking ticket altered or reduced, and this indicated to her that he might sometimes lack good judgment.

45. Sears also informed Kirkpatrick that there had been an "EEO case" Complainant was involved in and that there had been press coverage on it. He did not provide details about the facts about the case, did not inform her that Complainant had been sued individually, and did not tell her the amount of settlement. Kirkpatrick is not an attorney. She did not ask follow-up questions on this information.

46. Sears told Kirkpatrick about two police union votes of no confidence against Complainant, describing the votes as typical "union/management stuff." Kirkpatrick understood that this issue was not necessarily a reflection on Complainant's performance.

47. During her discussion with Sears, Kirkpatrick stated that there were other candidates she was looking at for the Director position, and indicated that the Governor's office was very interested in hiring Complainant.

48. After her discussion with Sears, Kirkpatrick immediately left Snowmass to return to Denver. She was sufficiently concerned about the appearance of Complainant having potentially interfered in a parking ticket matter on behalf of his wife that she called the Governor's Chief Legal Counsel, Thomas (Trey) Rogers, to ask him to investigate it.

49. Sears in the meantime learned that the parking ticket case had been dismissed, and he called Kirkpatrick to inform her of this.

50. Rogers informed Governor Ritter that information had surfaced regarding Complainant having possibly fixed parking tickets on behalf of his wife. The Governor directed Rogers to investigate the issue.

June 27, 2007 Telephone Conversation Between Complainant and Rogers

51. Mr. Rogers called Denver Mayor John Hickenlooper's Chief of Staff, Kelly Brough, and asked if she was aware of any issue regarding Complainant having intervened in the resolution of a parking ticket for his wife's benefit. Brough agreed to check into it and call him back.

52. Brough called Rogers back and informed him that she had looked into the issue and no one was aware of an allegation Complainant had attempted to get a parking ticket altered or dismissed.

53. Brough then told Rogers that, in the course of considering Complainant for a position, Rogers should be aware that she recalled some charge of gender discrimination involving Complainant while he was a member of the Civil Service Commission. Rogers requested more details. Brough had nothing else to add.

54. Rogers then performed a series of Google searches to see if anything came up for Chris Olson and discrimination, Englewood, Civil Service Commission, etc. He got millions of hits and reviewed only the first few pages, finding nothing involving Complainant and a discrimination lawsuit.

55. On June 27, 2007, Rogers attempted to reach Complainant by phone. Rogers left a message with Complainant's wife. Rogers and Complainant called each other several times during the day until they finally made contact.

56. Rogers reached Complainant at approximately 7:00 p.m. on the evening of June 27, 2007. Complainant was in front of his house, getting into his car to go out to dinner with his wife, and answered the call on his cell phone.

57. Rogers introduced himself to Complainant and explained that he was assisting with some vetting in connection with his candidacy for the Director position, regarding issues that had been brought to his attention. Rogers stated he had a few questions for him. Rogers indicated that there was an allegation that Complainant had attempted to get a parking ticket dismissed for his wife in Denver, and asked Complainant to tell him about that.

58. Complainant was aware of the situation and explained what had occurred. Rogers was completely satisfied with Complainant's explanation.

59. Rogers then stated there was a second matter to ask him about, indicating he had heard that Complainant might have been involved in a charge of sex discrimination while he was a member of the Denver Civil Service Commission. Rogers asked Complainant to tell him about that.

60. Complainant responded that he did not know what Rogers was talking about, or was not aware of anything about that, or words to that effect. Rogers asked Complainant some additional follow-up questions. Complainant discussed race discrimination issues that he had dealt with while on the Commission.

61. The conversation lasted ten minutes. Rogers then closed the call, indicating that someone would get in touch with Complainant soon.

62. Rogers reported the results of his investigation to the Governor and Kirkpatrick.

63. Kirkpatrick's office informed the Governor's office that she intended to offer the DEM Director position to Complainant. The Governor approved of this hiring decision and Kirkpatrick was aware of his approval at the time she offered the job to Complainant.

Execution of the SES Contract

64. On June 28, 2007, Kirkpatrick called Complainant and offered him the position. Complainant accepted the offer. Kirkpatrick asked him to contact the DOLA Human Resources Director, Mona Huestes, in order to discuss the details of the position and to sign the contract.

65. Huestes printed a boilerplate SES contract from the Department of Personnel & Administration's website. On June 29, 2007, Matthew Blackmon signed the contract on behalf of DOLA, on Kirkpatrick's request. Huestes then gave the unsigned contract to Complainant to review over the weekend.

66. Complainant and Huestes also discussed benefits and other administrative issues. Complainant requested that the contract be amended to begin on July 30, 2007, instead of July 15, 2007. Huestes obtained Kirkpatrick's approval for this change and initialed the change on the contract.

67. On July 2, 2007, Complainant signed the contract and submitted it to Huestes.

68. Complainant then immediately called Gary Sears to inform him that he had signed the contract with DOLA. Sears requested that Complainant's resignation be in writing.

69. On July 5, 2007, Complainant tendered a written resignation letter to Sears, giving his last day of employment as July 20, 2007, and listing his start date at DOLA to be July 30, 2007. Complainant's letter noted that he had accepted the

offer of employment from DOLA, "with the approval of the Governor's office, to become the new Director of the Colorado Division of Emergency Management." The letter thanked Sears for the opportunities he had been provided in Englewood and noted the difficulty of leaving an employer he had served for over thirty years.

SES Contract Provisions

70. The SES Contract designates Complainant's salary to be $10,278 per month and defines the "Contract Term" as July 30, 2007 – June 30, 2008. The contract contains the following provisions:

"By signing this contract, the employee acknowledges, understands, and agrees as follows:

1) Salary for FY 07-08 may not exceed $11,390 per month and shall not change during the term of this contract;
2) Salary is based on the negotiation of an annual contract between the employee and the Department Executive Director, and the amount of such salary may increase, decrease, or remain unchanged from year to year;
3) Employees in the senior executive service may not appeal a reduction in salary from one year to the next, nor may they appeal removal from the senior executive service and placement in a traditional pay plan;
4) If the Executive Director gives the employee written notice of non-renewal by May 1, the employee shall either be separated from state service upon expiration of the contract on June 30 or appointed to a vacant non-senior executive service position for which qualified;
5) If the Executive Director has not given timely written notice of non-renewal and no contract is provided by July 1, the employee shall be returned to the traditional classified pay plan at either the contract salary or the statutory salary lid, whichever is lower;
6) If a contract is provided and the employee fails or refuses to sign by July 1, the employee shall be deemed to have resigned effective June 30[;].
7) Employees in the senior executive service have no retention or reemployment rights with respect to any other position in the state personnel system; and
8) Any termination during the contract term may be appealed to the State Personnel Board.

With respect to any separation from state service as a result of the expiration or non-renewal of this contract, the employee further voluntarily waives all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system."

71. Complainant understood it to be a renewable contract.

Press Release

72. On July 3, 2007, the Office of the Governor issued a press release announcing the hiring of Complainant in the Director position. The Governor stated, "Chris Olson's commitment to emergency management, his longtime experience in public safety and service to the community, make him an excellent choice for leading the Division of Emergency Management. I believe his background will elevate the critical and valuable work this division provides to our state."

73. As word spread of Complainant's appointment, he received many emails from other emergency management professionals, congratulating him, requesting meetings, and inviting him to conferences.

July 16, 2007 Meeting Between Complainant and Kirkpatrick

74. During the month of July, Complainant attended some meetings at the DEM office and had multiple telephone conversations with stakeholders regarding the work of DEM. Kirkpatrick asked him to be present for a telephone conference on July 14, 2007, at the DEM office.

75. Kirkpatrick also set up a meeting with Complainant on July 16, 2007, for the primary purpose of discussing his introduction to the Department and the Division, his role in the position, and her general expectations of him.

76. Cognizant of the fact the Governor expected to work closely with Complainant, Kirkpatrick notified Villafuerte of the meeting. Kirkpatrick was advised that the Governor planned to attend the July 16 meeting, so she moved it to the Office of the Governor.

77. On July 16, 2007, an armed man entered the State Capital and appeared just outside the Office of the Governor. The man was killed by security guards. This event disrupted the operations of the Governor's Office for the entire week. The Governor's attendance at the meeting with Complainant and Kirkpatrick was cancelled.

78. Kirkpatrick and Complainant met on July 16. At the end of the meeting, Complainant provided Kirkpatrick with a Colorado Open Records Act (CORA) request that had been sent to the City of Englewood. (Stipulated Fact)

79. The CORA request concerned the Scott lawsuit.

80. Kirkpatrick and Complainant discussed the fact that one of the challenges of holding a position of leadership is that some people gain satisfaction from attempting to damage the reputations of those willing to take on leadership roles.

81. Kirkpatrick informed Complainant that she would forward the open records request to the Governor's office. She did so.

82. Complainant's last day working for the City of Englewood was July 20, 2007. (Stipulated Fact)

Additional CORA Requests

83. In mid-July 2007, the Office of the Governor learned that several reporters were making CORA requests of city and state offices concerning Complainant. The City and County of Denver received a CORA request for information about a 911 call that Complainant's wife had made to the police regarding Complainant. The CCRD, through the Colorado Department of Regulatory Agencies, received a CORA request for CCRD charges filed by Scott and Fabianish.

84. Rogers received copies of all CORA requests and responsive documents. He reviewed the two CCRD charges filed by Scott, the CCRD charge by Fabianish, the Scott federal district court Complaint, the settlement documents containing the $354,500.00 settlement figure, and the 7News Ferugia article on the Scott lawsuit and Complainant's leadership on his Denver Civil Service Commission.

85. After reviewing these documents, Rogers was stunned. He immediately concluded that Complainant had been dishonest with him during their June 27, 2007 telephone conversation. He believed that the questions he had asked Complainant on June 27 were such that Complainant should have disclosed the CCRD charges, the Scott lawsuit, the settlement, and the publicity aftermath in Denver.

86. Rogers contacted the Governor to report the discrepancy between Complainant's statements on June 27 and the documents he had reviewed. Rogers described the Scott lawsuit documents in some detail to the Governor, including the facts Complainant had been a named party and a signatory to the settlement agreement for approximately $354,000. At the time he described the basis of the lawsuit, Rogers had a copy of the federal district court Complaint in front of him. Rogers also described the CCRD complaints, the 911 and parking ticket issues, and the other documents responsive to the CORA requests.

87. Once the Governor learned about the employment discrimination lawsuit filed against Complainant which had settled for over $350,000, the Governor asked Rogers about his June 27 conversation with Complainant. Rogers started by describing his call to Kelly Brough, to inquire about the parking ticket issue. Rogers informed the Governor that Brough had told him she didn't find anything out about a parking ticket issue, but that it had been her understanding there had been a gender discrimination issue or lawsuit involving Complainant while he served on the Denver Civil Service Commission.

88. Rogers told the Governor that he then called Complainant and asked him about the parking ticket issue, and whether there had been an employment discrimination issue during his service on the Civil Service Commission. Rogers said that Complainant had told him he didn't know what Rogers was talking about.

89. Governor Ritter directed Rogers to assemble a meeting with Complainant in order to ask him specifically about that June 27 conversation and have Complainant respond to the question of why he had not told Rogers or anyone else in the Administration about the Scott lawsuit.

90. On July 18 or 19, 2007, Rogers called Complainant and asked him to attend a meeting with him, Kirkpatrick, and others from the Governor's Office. He indicated they would be discussing the open records requests and documents responsive to those requests, including the Scott lawsuit documents. Complainant asked if it was so serious that he would not be able to take the Director job. Rogers responded that he did not know, but they would have to talk with Complainant in order to make that determination.

91. Upon receipt of the open records request concerning the 911 call, Villafuerte was directed to obtain any available additional information on that incident. She obtained a copy of the transcript of the 911 call between Complainant's wife and the dispatcher, just prior to the meeting with Complainant.

July 19, 2007 Meeting

92. The meeting was set for July 19, 2007 at 2:00 p.m. Complainant arrived with his wife and offered to have her attend the meeting, since she had first-hand knowledge about the parking ticket issue and the 911 call. Rogers rejected that offer and asked that his wife remain in the waiting area.

93. Present at the meeting were Complainant, Rogers, Kirkpatrick, Villafuerte, Evan Dryer, the Governor's Communications Director, and Craig Welling, Deputy Legal Counsel to the Governor.

94. Rogers led the meeting. Rogers first asked Complainant to tell them about the Scott case. Complainant discussed the case, confirming that she filed a sex discrimination charge at CCRD in January 2004, and a second charge in May 2004, after her termination, alleging retaliation. Complainant confirmed that the case she filed in federal district court had settled for approximately $355,000. Complainant discussed what Scott's charges and allegations were, and why he believed they were false or inaccurate. Rogers had read the complaint and was familiar with the allegations Scott had raised, and determined that Complainant's description of the lawsuit was accurate.

95. Complainant informed the group why he felt Scott really didn't have a case, and that he had strongly opposed settlement. He stated that the insurance company had insisted that the case be settled, over his objection. He then gave Rogers the name of the attorney who had represented the City of Englewood on the case, so that Rogers could follow up with questions if he sought to do so.

96. Rogers then asked about the CCRD charge filed by the second Englewood employee. Complainant indicated that she had had nine preventable accidents in her patrol car, her case settled, and she never filed a lawsuit in court.

97. Rogers asked Complainant about the vote of "no confidence" by the Englewood police union. Complainant reported that the issue concerned the lack of a pay raise and was resolved through a pay raise the following year.

98. Villafuerte next asked Complainant about the 911 call on November 4, 2005, initiated from his home. Complainant described the events of that evening, indicated he had been drinking and he and his wife, under the stress of a recent move, had argued. He confirmed that there had been no arrest or charges filed. Someone asked Complainant if he felt he had a drinking problem; Complainant responded that he was a rugby player. Kirkpatrick found this response not to be forthright.

99. Villafuerte and the others present determined that the 911 call and the "no confidence" vote did not establish any basis for concern about Complainant's appointment as Director.

100. Rogers next noted that the parking ticket issue had been fully resolved to everyone's satisfaction.

101. Rogers then raised the last issue: why had Complainant not disclosed the Scott lawsuit and the CCRD charges on June 27 when Rogers had asked him whether he had been involved in any discrimination claims while he was with the Civil Service Commission. Complainant responded that he did not think that the two were related, meaning the Englewood lawsuit and his service on the Denver Civil Service Commission.

102. Rogers and Complainant disagreed during this conversation on the scope of Rogers' questions of Complainant on June 27, 2007. Complainant stated that he thought that Rogers' question had been limited to claims relating to his service as a Denver Civil Service Commissioner. Rogers stated that he had asked him about discrimination claims or lawsuits, and said that Complainant should have brought up the lawsuits to him then, so that they could have discussed them at that time. Complainant also stated that the Scott lawsuit was not a sex discrimination case, but rather a retaliation case.

103. Rogers then placed the Ferugia article in front of Complainant and stated that the article clearly established a connection between his service on the Denver Civil Service Commission and the Scott lawsuit. Rogers had highlighted several portions of the article. Rogers again asked, why hadn't Complainant informed Rogers about the lawsuit on June 27. Complainant, recognizing the article, again stated that he just didn't think they were related.

104. Rogers was not satisfied with Complainant's responses to his questioning about why he had not disclosed the Scott lawsuit on June 27, 2007. The responses strengthened Rogers' belief that Complainant had been dishonest in the first conversation. Rogers believed that the Ferugia article established that the Scott lawsuit caused Complainant some problems in the media about his role on the Commission; therefore, there was no way that Complainant did not understand what Rogers was asking about on June 27.

105. After this discussion of the Ferugia article, Dryer led a discussion about the fact that Complainant would probably get media inquiries about the open records requests and the issues raised.

106. At the end of the meeting, Villafuerte and Rogers informed Complainant that they would get back to him on Monday, July 23, 2007.

107. Kirkpatrick found Complainant's explanation of his failure to disclose the lawsuit to Rogers on June 27 not to be credible. She felt that Complainant had not given straightforward answers regarding the June 27 meeting.

108. After the July 19 meeting, Kirkpatrick felt that the necessary level of trust that she needed in Complainant, as DEM Director, had eroded.

109. Following the meeting, Kirkpatrick met with Villafuerte, Rogers, Dryer, and the Governor.

Reports to the Governor

110. From Friday, July 20, through Sunday, July 22, 2007, Governor Ritter was out of state at the National Governor's Association conference.

111. After the July 19, 2007 meeting with Complainant, the Governor had several conversations with those in attendance and obtained a full briefing on all issues discussed.

112. Villafuerte reported to the Governor that Rogers had asked Complainant directly why he had not told him about the Scott lawsuit during their June 27 conversation, and that Complainant had had no satisfactory explanation for why he said nothing about it. Villafuerte informed the Governor that Complainant insisted that he had not mentioned the Scott lawsuit because Rogers had not

asked about lawsuits against him in relation to his tenure in Englewood. She explained that there had been a disagreement between Rogers and Complainant about the June 27 telephone conversation, namely, that Rogers felt he had asked an open-ended question about discrimination issues or lawsuits, and that Complainant felt that Rogers had asked him only about discrimination issues or lawsuits as it related to his tenure as a Denver Civil Service Commission member. Villafuerte indicated that Complainant's position at the July 19 meeting was that Rogers had not asked him the right question.

113. Villafuerte also reported to the Governor the fact that Complainant had fully answered all of the questions asked at the meeting. She reported on the 911 call and her finding there was no cause for concern regarding the incident.

114. Governor Ritter asked several follow-up questions of Villafuerte. At the end of the conversation, he informed her that he had concerns about Complainant's appointment as Director. The Governor indicated that he felt that when Complainant received the call from Rogers with two questions concerning his candidacy for the Director position, when asked about discrimination issues, Complainant should have been forthcoming about the Scott lawsuit, and should not have parsed the question. The Governor expressed his concern that Complainant's position of, "You didn't ask the right question," or, "I will only give you this information if you ask me in a particular way," was not appropriate for the individual serving as emergency manager for the entire state. He stated that he felt Complainant should have answered Rogers' questions about discrimination lawsuits as forthrightly and openly as possible, and his failure to do so bore on his fitness to serve in the sensitive public safety position. Governor Ritter informed Villafuerte that he needed to think about his decision over the weekend.

115. Governor Ritter also had several conversations with Kirkpatrick, Rogers, and Welling about the July 19 meeting and about his decision on Complainant's appointment. He conferred with his Chief of Staff regarding the information and the legal advice received throughout the weekend, prior to making a decision. His last conversation, after extensive fact-finding from staff and consultation with legal counsel, including both Rogers and Welling, was with Kirkpatrick, Welling, and Villafuerte.

<u>The Decision to Terminate the Contract</u>

116. The Governor ultimately decided not to proceed with Complainant's appointment and to terminate the contract. Kirkpatrick agreed with and supported this decision. The Governor's decision was based on two considerations. First, he had lost trust in Complainant. Governor Ritter believed that an individual in Complainant's position in Englewood, being asked by the Governor's legal counsel about information that came up prior to his appointment to a high profile position such as DEM Director, would have known that he should disclose the Scott lawsuit under the circumstances of the June 27 call from Rogers. The

Governor felt that Complainant had not been open and forthcoming about something that was very significant.

117. Governor Ritter determined that he could no longer develop the relationship of trust he needed to work effectively with Complainant as the DEM Director. The Governor viewed the position as one that demanded the Governor's complete trust in crisis situations.

118. Second, the Governor felt that the employment discrimination lawsuit and the large amount of the settlement raised a serious issue as to Complainant's management capability in the Director position. His chief concern in this regard was the need for the DEM Director to inspire and garner the confidence and trust of his employees, so that the Division would function well when crises arose. The Scott lawsuit caused the Governor to question Complainant's ability to effectively lead the Division staff. The Governor felt that had he known about a sex discrimination lawsuit against Complainant that had been settled for several hundred thousand dollars, before Complainant was offered the position, he would not have approved of the hire.

119. On July 23, 2007, the Governor called Villafuerte and they discussed his decision. He directed her to contact Complainant and tell him that his appointment as Director was being rescinded.

120. Villafuerte called Complainant's home at 10:00 a.m. on July 23, 2007. She informed him that the Governor did not wish to proceed with his appointment. Complainant was shocked. He asked what was the basis for the decision. Villafuerte responded that it was based upon the events and issues discussed at the July 19 meeting.

121. Complainant stated he could not believe that it was enough to hold him back from the appointment, and that he had already cleaned out his office in Englewood. He asked to speak to the Governor. Villafuerte indicated he could not speak to the Governor and that the decision was final.

122. At the close of the conversation, Villafuerte informed Complainant that the Governor's office had received several press inquiries regarding the incidents that were the subjects of the open records requests. She informed Complainant that she would like to handle press inquiries in a manner that he agreed on, and asked him to think it over for a few hours. She indicated she would call him back that afternoon.

123. That afternoon, Villafuerte, with the Deputy Legal Counsel Welling present, called Complainant back. She asked him how he would like to go forward. Complainant responded that he was still shocked by the situation he was in, and felt he needed to get an attorney. He stated that he had a contract, and asked if

she knew whether he had a legal claim. Villafuerte responded that she could not provide him with legal advice. The two ended the conversation.

124. On July 24, 2007, Kirkpatrick sent a letter to Complainant stating, "The purpose of this letter is to memorialize the employment decision that was communicated to you on Monday, July 23, 2007. The Department of Local Affairs has withdrawn its offer of employment for the Director of the Division of Emergency Management (position #00302) and terminates the Senior Executive Service contract executed on July 2, 2007." The letter was posted on July 25, 2007.

Press Coverage of Rescission

125. On July 26, 2007, the Denver Post published an article with the headline, "Ritter pulls emergency-job offer." The article quoted the Governor's spokesman as saying the Governor "decided to go in another direction." It further reported, "Chris Olson, director of safety services for Englewood, was named to the post this month. He was supposed to start the job July 30. 'We are evaluating our options and will move as quickly as possible to fill the position,' spokesman Evan Dryer said."

126. Complainant called Gary Sears to inform him about what had occurred. He asked for his job back. Sears indicated he was planning to save money by reorganizing the Department of Safety Services, but told Complainant to write a letter.

127. On August 22, 2007, Complainant wrote a letter to Sears indicating DOLA and the Governor had "decided not to honor the employment contract" and requesting to return to his former position with the City of Englewood.

128. On August 30, 2007, Sears informed Complainant by letter that he had reviewed the overall structure of the Department of Safety Services and had decided not to fill Complainant's former position during 2008.

129. In August 2007, Complainant applied for the position of Director of Public Safety with the Student Life Department at Colorado School of Mines. He was not offered the position. Complainant also applied for security positions and was not offered employment.

130. Kirkpatrick offered the DEM Director position to Bobbi Hans Kallam, who had been a finalist for the position in June 2007. Kallam was 48 years old at the time of hire. (Stipulated Fact)

DISCUSSION

I. INTRODUCTION

The Senior Executive Service is a legislatively created hybrid management class, defined as a special pay plan in the Colorado Personnel Systems Act, at § 24-50-104(5), C.R.S. In exchange for a salary that exceeds the mandatory statutory pay cap for certified state employees, SES managers serve the State of Colorado under one-year term contracts that are not renewable "for any reason." State Personnel Director's Procedure 2-11(C), 4 CCR 801. The Colorado General Assembly, in creating the SES class, mandated, "Any person in the senior executive service shall have no right to a position outside of the senior executive service." § 24-50-104(5)(d), C.R.S. Any employee entering or remaining in the SES waives retention and reemployment rights with respect to any other position in the personnel system. State Personnel Board Rule 2-13.

If an SES manager is dismissed for failure to perform, he or she may file an appeal with the State Personnel Board. § 24-50-104(5)(d), C.R.S. The State Personnel Board has interpreted this statutory provision to provide a mandatory right to a hearing to appeal the involuntary termination of an SES contract. Board Rule 8-53, 4 CCR 801.

Generally, "All provisions of the [State Personnel Board] rules apply to employees in the senior executive service unless specifically noted otherwise." Director's Procedure 2-12. The Board has promulgated Rule 8-53(B) to define the procedural due process rights of SES managers who are involuntarily terminated, and to clarify the burden of proof in the hearings held on such appeals. The Rule states,

> "Employees who are separated for failure to perform under senior executive service contracts do not have a right to progressive discipline or to a Board Rule 6-10 [pre-disciplinary] meeting. In such an appeal, the appointing authority must produce evidence that the employee's performance was not satisfactory. The employee shall then have the burden of producing evidence that performance was satisfactory, and shall bear the burden of proof that the appointing authority's decision was arbitrary, capricious, or contrary to rule or law." State Personnel Board Rule 8-53(B), 4 CCR 801.

II. HEARING ISSUES

A. Unsatisfactory Performance

Board Rule 8-53(B) allocates to Respondent the initial burden of going forward, to "produce evidence that the employee's performance was not satisfactory." As indicated above, all provisions of the State Personnel Board Rules apply to SES managers, unless specifically noted otherwise. Director's Procedure 2-12. Therefore, Board Rule 6-12, which defines the reasons for discipline, applies herein.

Board Rule 6-12(3) defines "reasons for discipline" to include "false statements of fact during the application process for a state position."[1] Respondent met its burden of producing evidence that Complainant made false statements of fact during the application process for the DEM Director position. On June 27, 2007, during the application process, the Governor's Chief Legal Counsel contacted Complainant to ask him questions about two legal issues, as part of the vetting process. When Rogers asked Complainant whether he had been involved in any sex discrimination claims while he was at the Denver Civil Service Commission, Complainant knew the following: CCRD had entered a finding of probable cause against him in the Scott case; Scott had sued Complainant individually and in his official capacity for sex discrimination in federal district court in 2005; Complainant had signed the settlement agreement in the amount of $354,500 in 2006; news coverage had linked the Scott lawsuit against Complainant in Englewood to his position as President of the Denver Civil Service Commission; that coverage had included statements on the record by the Denver City Councilwoman overseeing the Commission, indicating her concern about Complainant's personnel decisions in Englewood and her intention to watch his decision-making on the Commission very closely; Commissioners included the Scott lawsuit and Complainant's leadership as an agenda item at one of their meetings, passing on his fitness to serve; and Complainant informed the Commission Executive Director that he would not seek another term, partly because of the Scott lawsuit and the potential adverse effect on the Commission.

In view of Complainant's undisputed knowledge of these historical events, the preponderance of evidence demonstrates that Complainant gave a false statement of fact to Rogers on June 27, 2007, by stating he did not know what Rogers was talking about, or that he was not aware of anything about that. Complainant's conduct on June 27 therefore constitutes an appropriate basis for disciplinary action under Board Rule 6-12(3). Further, Complainant did not produce evidence to rebut this conclusion that he violated Rule 6-12(3). Rule 8-53(B).

B. Breach of Contract; Fraudulent Inducement; After-Acquired Evidence

Complainant bears the burden to prove that the appointing authority's decision was arbitrary, capricious, or contrary to rule or law. Board Rule 8-53(B), 4 CCR 801.[2] Complainant's first claim is breach of contract. **Where a plaintiff seeks to recover for breach of an employment contract, he or she must first establish a prima facie case for breach of contract:** (1) the existence of a contract; (2) substantial performance of his or part of the contract or a valid excuse for failing to perform; (3) failure to perform the contract by the defendant; and (4) resulting damages to Complainant. *Western Dist. Co. v. Diodosio*, 841 P.2d 1053, 1058 - 59 (Colo. 1992).

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[1] This Rule, promulgated after *Maurello v. Dept. of Corr.*, 804 P.2d 280 (Colo.App. 1990), embodies the Board's policy to treat a prospective employee's statements made during the application process as a proper basis for disciplinary action after the application process is completed and once the employee has commenced employment.

[2] *See also*, § 24-50-103(6), C.R.S. (the Board may reverse or modify an action of the appointing authority if it finds "the action to have been arbitrary, capricious, or contrary to rule or law.")

Complainant has established a prima facie case for breach of contract. The existence of the SES contract is not disputed. Complainant performed his part of the contract (to the extent any performance was required between July 2 and 23, 2007). Respondent terminated the contract. And, Complainant has suffered damages, including the monetary value of the salary during the one-year contract term.

Once the employee has established the elements of the contract claim, the employer bears the burden to prove by preponderant evidence any affirmative defense to the breach of contract claim. *Diodosio*, 841 P.2d at 1059. Respondent asserts the affirmative defense of fraudulent inducement to contract. *Diodosio*, 841 P.2d at 1059; *Trimble v. City and County of Denver*, 697 P.2d 716, 724 (Colo. 1985). A party that has been fraudulently induced to enter into a contract may rescind the contract to restore the status quo. *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540, 547 (Colo. 1997). **A party electing to rescind the contract is limited in remedy to restoration of conditions existing before the agreement was made. *Trimble*, 697 P.2d at 724.**

The Colorado Supreme Court has defined the elements of fraud in two lines of cases, which are easily harmonized. In the *Trimble* line, the elements of fraud are: (1) a false representation of a material existing fact, or a representation as to a material existing fact made with a reckless disregard of its truth or falsity; or a concealment of a material existing fact, that in equity and good conscience should be disclosed; (2) knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose; (3) ignorance on the part of the one to whom representations are made or from whom such fact is concealed, [of] the falsity of the representation or of the existence of the fact concealed; (4) the representation or concealment made or practiced with the intention that it shall be acted upon; (5) action on the representation or concealment resulting in damage. *Trimble*, 697 P.2d at 724.

In *Balkind v. Telluride Mountain Title* Co, 8 P.3d 581 (Colo. 2000) and *M.D.C./Wood Inc. v. Mortimer*, 866 P.2d 1380 (Colo. 1994), the Court defines the elements of fraud as: (1) a fraudulent misrepresentation of material fact was made by defendant; (2) the plaintiff relied on the misrepresentation; (3) the plaintiffs had the right to rely on, or were justified in relying on, the misrepresentation; and (4) the reliance resulted in damages. *Balkind*, 8 P.3d at 587; *M.D.C./Wood*, 866 P.2d at 1383.

Respondent has proven by preponderant evidence that Complainant made a false representation of a material existing fact to Respondent, and that he knew at the time of its falsity and of his duty in equity and good conscience to disclose the truth. On June 27, 2007, the Governor's Chief Legal Counsel contacted Complainant and explained that as part of the vetting process for the DEM Director position, he had two subject matters he needed to discuss with Complainant. The purpose of Rogers' call was to review and potentially eliminate any barriers to employment, by establishing the facts relating to the traffic ticket issue and any sex discrimination claims against Complainant.

Rogers asked Complainant if he had been involved in any gender discrimination claims while he served on the Denver Civil Service Commission. Complainant knew that his involvement as a named defendant in the Scott sex discrimination lawsuit had raised questions in the press and on City Council about his service as President of the Denver Civil Service Commission. He knew that the Commission had addressed the specific question of whether the Scott lawsuit bore on Complainant's ability to serve. This knowledge was such that in equity and good conscience, Complainant should have disclosed the Scott lawsuit, the news coverage, and the Commission's consideration of the issue, to Rogers on June 27. Complainant concealed material existing facts by failing to explain the CCRD charges by Scott, the CCRD finding of probable cause, the federal district court lawsuit naming Complainant individually, the large settlement, the press coverage, and the resulting action by the Denver Civil Service Commission.

Moreover, the circumstances of the June 27 call were such that the materiality of the Scott lawsuit was clear to Complainant. As a visible public figure in the Director of Public Safety role in Englewood for ten years, applying for a higher profile position as state director of emergency services, Complainant knew that the Governor was entitled to a full explanation of the Scott lawsuit and the ensuing adverse publicity on his leadership on the Commission. Nonetheless, Complainant acted with utter indifference to the falsity of his responses to Rogers by denying any knowledge of what he was inquiring about. Respondent has also proven that it relied on Complainant's misrepresentation; the evidence demonstrates that Rogers' investigation was the last piece of information necessary to offer Complainant the Director position.

The next element of fraud requires that Respondent prove ignorance on the part of the one to whom representations are made or from whom such fact is concealed, [of] the falsity of the representation or of the existence of the fact concealed. *Trimble, supra*. Rogers and the Governor were ignorant of the existence of the facts concealed by Complainant. However, Gary Sears had informed Susan Kirkpatrick, DOLA Executive Director, on June 27, of an "EEO" matter involving Complainant that had received press coverage.

The fact that Sears informed Kirkpatrick of an EEO issue when he gave his reference for Complainant is significant. The *M.D.C./Wood* line of cases provides guidance on how to apply the law of fraud to situations wherein the plaintiffs have conflicting material information available to them prior to entering into the contract.

In *M.D.C./Wood*, home buyers alleged fraudulent inducement to contract for their home purchases, based on erroneous statements made to them by the seller's agent as to the location of a future highway. The highway was built 400 feet from their home sites, which was closer than the location provided by the seller's agent. Plaintiffs sought rescission of their contracts and damages. The trial court found that at the time the plaintiffs purchased their homes, the homebuilder had prominently displayed a large aerial photographic map of the entire area in its sales office, with yellow tape accurately depicting the future location of the highway. In addition, the court found that all of the plaintiffs had seen the aerial photograph prior to purchasing their property, and that the aerial photo was "highly visible" and "could not have been overlooked by anyone giving cursory attention to the map." *M.D.C./Wood*, 866 P.2d at 1381.

The trial court concluded from this evidence that by accurately displaying the highway's location in its sales office, the seller did not seek to mislead potential buyers of its property about the location of the highway. It therefore charged the plaintiffs with knowledge of the facts displayed on the aerial photograph and found that the photograph, in addition to other documentary evidence, created a duty for the plaintiffs to inquire further into the location of the highway. The Colorado Supreme Court affirmed the trial court's conclusion that the plaintiffs had not proven that they "had the right to rely on, or were justified in relying on, the [agent's] misrepresentation." *Id*, 866 P.2d at 1382 – 1383.

Complainant, relying on *M.D.C./Wood*, asserts that because Gary Sears put Respondent on notice that Complainant had been involved in an "EEO case" which had received press coverage, Respondent was not justified in relying on Complainant's statements made to Rogers on June 27, 2007. This argument fails for several reasons. First, the information Kirkpatrick received from Sears was almost identical to that provided to Rogers by Kelly Brough: Complainant had been involved in a gender discrimination issue (or EEO issue). The additional information received by Kirkpatrick was that it had received press coverage. If, as in *M.D.C./Wood*, Rogers is charged with the same knowledge that Kirkpatrick had, Rogers' response was consistent with his imputed duty to inquire further. He conducted a Google search for press coverage of Complainant and the issue of discrimination. Finding nothing, he then turned to Complainant for the truth.

Moreover, unlike the *M.D.C./Wood* case, where the seller prominently displayed the exact location of the future highway in its sales office, Complainant has engaged in no such analogous truthful disclosure. Complainant asserts that there is no evidence in the record demonstrating that he intended to conceal the truth, because he listed Sears, Peterson, and others associated with his service on the Commission, as references. He contends that these references establish his expectation that the Scott lawsuit would be disclosed during the vetting process. However, this argument is rebutted by the fact that when Complainant was asked directly asked about a gender discrimination issue and his service on the Commission, he concealed the truth. Thus, while Rogers could have conducted a more thorough follow-up investigation concerning the allegations, he had a right to rely on, and was justified in relying on, Complainant's statements to him under the circumstances presented here.

Lastly, the evidence establishes that Complainant's statements on June 27 were made with the intention that they be acted upon, namely, that they lead to the offer of employment. And, Respondent acted on Complainant's June 27 representation by treating it as the last piece of information needed prior to extending the offer. *Trimble*, 697 P.2d at 724.

Respondent has proven all of the elements of a fraudulent inducement claim. It was therefore entitled to rescind the SES contract with Complainant.

Respondent also asserts an after-acquired evidence defense. This doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about an employee's wrongdoing that would have caused the employer to discharge the employee. *Crawford Rehabilitation Services, Inc.*

v. Weissman, 938 P.2d 540, 547 (Colo. 1997). *Crawford* concerned a case of resume fraud; therefore, it is factually distinguishable from this case. Further, the evidence was not sufficiently developed at hearing to conclude that Respondent has proven an after-acquired evidence defense.

C. Age Discrimination

Complainant asserts that Respondent terminated him on the basis of his age, in violation of the Colorado Anti-Discrimination Act, § 24-34-402(1)(a), C.R.S. (CADA). Complainant bears the burden of proof. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000). To prove intentional discrimination under CADA, Complainant must first establish, by a preponderance of the evidence, a *prima facie* case ("*pfc*") of discrimination.

The elements of a *pfc* of intentional discrimination are: (1) complainant belongs to a protected class; (2) complainant was qualified for the position; (3) complainant suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination. *Bodaghi, supra; Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997).

Once an employee has established a *pfc* of intentional discrimination, he or she has created a presumption that the employer unlawfully discriminated against the complainant. If the employer does not rebut the presumption, the fact finder is required to rule in favor of the complainant. *Id.* The burden next shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *pfc* is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the proffered reasons for termination were in fact a pretext for intentional discrimination. Complainant's *prima facie* case, combined with the fact finder's conclusion that the employer's asserted justification is false or pretextual, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated. *Bodaghi*, 995 P.2d at 298.

Complainant has not established a *prima facie* case of intentional age discrimination. Complainant belongs to a protected class as an individual over age 40; he was qualified for the DEM Director position; and he suffered an adverse employment decision despite his qualifications. However, the circumstances do not give rise to an inference of unlawful discrimination. No evidence in the record supports an inference that Respondent terminated Complainant's SES contract due to his age.

Assuming arguendo that Complainant had established a *pfc* of intentional age discrimination, Respondent has met its burden of articulating a legitimate non-discriminatory reason for terminating Complainant. Specifically, Respondent and the Governor determined that Complainant had concealed material information from Rogers during the vetting process; Kirkpatrick and the Governor had lost trust in Complainant;

and, the Governor determined that Complainant lacked the management judgment and credibility to effectively function as DEM Director.

Complainant next has the burden of demonstrating Respondent's proffered reason for his discharge to be a pretext for age discrimination. Pretext may be proven by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999).

Complainant asserts that there is a material discrepancy between Governor Ritter's reasons for discharging him and those given by Kirkpatrick. The record does not support this contention. Both the Governor and Kirkpatrick concluded after the July 19 meeting that they lacked the requisite trust in Complainant for him to serve in the DEM Director position. They both questioned his veracity and his ability to share information appropriately in a crisis situation. In addition, the Governor, as an attorney with the professional experience to gauge the significance of the Scott settlement amount, concluded that Complainant lacked the required management judgment for the DEM position. The fact that Kirkpatrick lacked this perspective on Complainant's role in the lawsuit does not demonstrate an inconsistency or contradiction, suggesting pretext. It merely reflects the difference in Kirkpatrick's and the Governor's professional backgrounds.

Complainant also contends that Kirkpatrick preferred working with younger workers, and that she had a track record of difficulty managing older workers. Therefore, he asserts, once a question was raised about his candidacy at the July 19 meeting, she used the opportunity to discharge him from the Director position because of his age, not because of the credibility issue.

Complainant failed to produce any evidence at hearing supporting the contention that Kirkpatrick prefers younger workers or has had difficulty managing older workers. Moreover, there is no circumstantial evidence upon which to draw such an inference. If Kirkpatrick had been opposed to hiring Complainant on the basis of his age, she would have used the discussion with Gary Sears on June 27, 2007 as an opportunity to fully develop the negative information he shared with her. Instead, Kirkpatrick ignored two out of three issues adverse to Complainant raised by Sears: the police union "no confidence" votes and the "EEO" matter. Lastly, the evidence demonstrated that the Governor was the primary decision maker on the termination issue; Complainant has neither argued nor produced any evidence that age motivated the Governor's decision.

The "same actor inference" also serves as a bar to a finding of pretext in this case. Under this doctrine, when the same individuals make the decision to hire and fire an individual "within a relatively short time span," there is a "strong inference that the employer's stated reason for acting against the employee is not pretextual." *Antonio v. The Sygma Network, Inc.*, 458 F.3d 1177, 1184 (10th Cir. 2006). In the instant matter, Complainant was 60 years old at the time the Governor and Kirkpatrick decided to hire

him; and, he was still 60 years old when the same two individuals decided to terminate his contract less than one month later. Under these circumstances, no inference of pretext is appropriate. Lastly, the fact that the individual ultimately hired was younger than Complainant also does not establish pretext. *Brawner-Ahlstrom v. Husson*, 969 P.2d 738, 741 – 742 (Colo.App. 1998).

D. Deprivation of Property Without Due Process

Complainant asserts that Respondent has deprived him of his property right to continued employment without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, and analogous provisions of the Colorado Constitution. The Fourteenth Amendment to the United States Constitution mandates that a state may not deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1.

A property interest under both the federal and state constitutions exists only when a public employee has a legitimate claim of entitlement to continued employment under state law. *Holland v. Bd. of County Comm'rs. County of Douglas*, 883 P.2d 500, 504, citing *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Colorado Civil Service Amendment creates a property right to continued employment for classified state employees who have successfully completed probation and are then certified to their positions. Colo. Const. art. XII, Sections 13(8) and (10); *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Board Rule 4-26 clarifies that probation applies only to permanent appointments. SES appointments are not permanent; they are one-year positions. Therefore, SES employees such as Complainant are not eligible to become certified under the Civil Service Amendment.

Additional sources of property interests include statutes, local ordinances, established rules, and mutually explicit understandings, such as express or implied contracts. *Holland*, 883 P.2d at 504. In *Adams County School District No. 50 v. Dickey*, 791 P.2d 688, 695 (Colo. 1990), an employer handbook was found to create an implied contract serving as a legally sufficient basis for a property right to continued employment.

Here we have a written contract fully executed by the parties. In order to determine the intent of a contract, it must be construed as a whole and effect must be given to every provision, if possible. *Holland*, 883 P.2d at 505. It is a basic principle of contract law that specific clauses of a contract control the effect of general clauses. *Id.* In the *Holland* case, several specific contract clauses referred to the employee's "at-will employment status." In addition, the contract stated that Holland's "employment may be terminated at any time with or without cause during the first year of this contract." *Id.* These specific provisions therefore trumped the general provision which stated, "the parties are intending that this contract become a long-term employment relationship." Accordingly, the Colorado Court of Appeals affirmed summary judgment for the employer, finding that the contract did not create a property right to continued employment.

Complainant's SES contract did not create a property interest in continued employment. Paragraph 4 states, "If the Executive Director gives the employee written

notice of non-renewal by May 1, the employee shall either be separated from state service upon expiration of the contract on June 30 or [if previously certified] appointed to a vacant non-senior executive service position for which qualified." Under Paragraph 4, as a non-certified state employee, Complainant was subject to separation from state service upon expiration of the contract on June 30, on receipt of proper notice. Paragraph 7 additionally states, "Employees in the senior executive service have no retention or reemployment rights with respect to any other position in the state personnel system." This provision further vitiates any legitimate claim of entitlement to continued employment. Paragraph 8, which provides a right to appeal a termination during the contract term to the Board, does not override the specific terms of Paragraphs 4 and 7.

The next question, posed by *Dickey* and the federal precedents, is whether other state "rules or mutually explicit understandings" created a "sufficient expectancy of continued employment" to give Complainant a legitimate claim of entitlement to his SES position. *Dickey*, 791 P.2d at 695. The State Personnel Board Rules and Personnel Director's Procedures do not create any expectation of continued employment for SES employees. To the contrary, they clarify that the "department head may decide not to renew the contract for any reason," (Director's Procedure 2-11(C)), and that SES employees waive "retention and reemployment rights with respect to any other position in the personnel system." (Board Rule 2-13).

Finally, Complainant did not possess a property right to one year of employment under the SES contract. Board Rule 8-53(B) allocates the burden of proof to SES employees terminated for cause during the contract period. If the Board had intended to create a property right to SES employment during the contract term, the Board would have allocated the burden of proof to the agency. *See*, *Department of Institutions v. Kinchen*, 866 P.2d 700, 706 (Colo. 1994)(certified employees' property right to employment mandates that the agency bears the burden to prove just cause for disciplinary action). And, further reflecting SES employees' lack of a property right during the contract term, Board Rule 8-53(B) deprives SES employees of the right to progressive discipline and to a pre-disciplinary meeting. These are two hallmarks of the property right to employment.

The regulatory framework governing SES employment does not create a sufficient expectancy of continued employment to confer to Complainant a property right in his SES position. Therefore, in the absence of a property right, Complainant has no claim to a deprivation of due process.[3]

E. Deprivation of Liberty Right to Reputation

Complainant asserts that Respondent has deprived him of his liberty interest in his reputation without due process of law. Complainant must prove four elements to prevail on a liberty interest claim: 1) the state made statements that impugn the good name, reputation, honor, or integrity of the employee; 2) the statements must be false; 3) the statements must occur in the course of terminating the employee or must

[3] It is noted that Complainant received more process than he was due at the July 19 pre-termination meeting. And, he has received a de novo post-deprivation hearing before the Board.

foreclose other employment opportunities; and 4) the statements must be published. *Workman v. Jordan*, 32 F.3d 475, 481 (10th Cir. 1994).

Complainant has not proven any of the elements of a liberty interest claim. Respondent made no statements that directly impugn the good name, reputation, honor, or integrity of Complainant. Respondent made no false statements about Complainant. No statements critical to Complainant were made in the course of terminating Complainant's employment. And, Complainant has failed to demonstrate that employment opportunities have been foreclosed by conduct of Respondent.

F. Arbitrary and Capricious Action

Complainant asserts that Respondent's termination was arbitrary and capricious. In Colorado, arbitrary and capricious agency action is defined as:

> (a) neglecting or refusing 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; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising 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. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant argues that it was arbitrary and capricious for two individuals to make the decision to terminate his employment, because they had two distinct reasons for doing so. The evidence does not support this claim. Both the Governor and Kirkpatrick concluded that they no longer possessed the level of trust in Complainant necessary to permit him to serve in the DEM Director position. The only difference of opinion was the Governor's belief that Complainant lacked the management and leadership skills to serve as a division director, given Complainant's role in the sex discrimination lawsuit that settled for over $350,000. The fact that the Governor reached this additional conclusion does not render the ultimate decision to be arbitrary and capricious.

G. Attorney Fees and Costs

Both parties request an award of attorney fees and costs. Under section 24-50-125.5, C.R.S., the Board is to award attorney fees and costs if the "personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." §24-50-125.5(1), C.R.S. Board Rule 8-38 defines each of these terms.

Complainant is not entitled to attorney fees because he has not prevailed in his appeal.

Respondent is not entitled to attorney fees and costs, as it has not met its burden under the statute or Board Rule 8-38. Board Rule 8-38(A)(1) defines a frivolous action as one wherein "no rational argument based on the evidence or the law is presented." Such is not the case here. A groundless action is one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support" his or her case. Complainant presented competent evidence to support his case.

CONCLUSIONS OF LAW

1. Complainant failed to perform in a satisfactory manner by violating Board Rule 6-12(3);

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;

3. 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 10th day of April, 2008

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

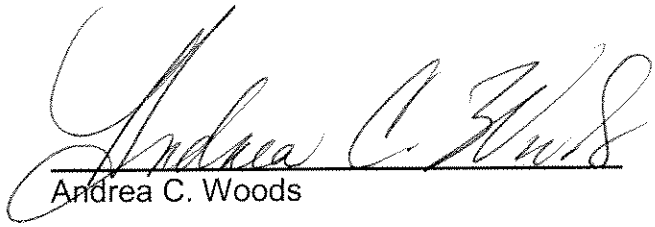
CERTIFICATE OF SERVICE

This is to certify that on the 10th day of April, 2008, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Todd R. Seelman
Leslie E. Miller
Grimshaw & Harring, P.C.
1700 Lincoln Street, Suite 3800
Denver, Colorado 80203

and in the interagency mail, to:

Stacy L. Worthington
Christopher J. Puckett
Assistant Attorneys General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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.