BEFORE THE STATE PERSONNEL BOARD
STATE OF COLORADO

CASE NO. 2003B077

AMENDED INITIAL DECISION

JAMES MASSE,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

This is a disciplinary proceeding before the State Personnel Board ("Personnel Board") as described in Section 24-50-125(3), C.R.S. concerning the Respondent's ("DOC's") termination of Complainant's employment. A hearing in this matter was held before Administrative Law Judge ("ALJ") Stacy Worthington on October 23 and 24, 2003. As described more fully below, ALJ Worthington then recused herself from further participation in the case. ALJ Matthew E. Norwood heard the case then on April 6-9, 2004. At the hearing dates in October 2003 and April 2004, Alan S. Thompson, Esq. appeared on behalf of the Complainant. Assistant Attorneys General Monica Ramunda and Andrew Katarikawe appeared on behalf of DOC.

Pertinent Procedural Background

After hearing the first two days of evidence, ALJ Worthington recused herself November 25, 2003 as she had accepted a position with the Colorado Attorney General's Office, counsel for DOC. On November 26, 2003, a hearing was held before ALJ Mary McClatchey of the Personnel Board. At that hearing, the DOC asked to complete the hearing with the October 23 and 24 testimony submitted. The Complainant on the other hand sought to start the hearing over from the beginning. ALJ McClatchey orally granted Complainant's request. No written order was issued from this hearing.

On December 4, 2003, ALJ McClatchey recused herself from further participation in this case.

On December 16, 2003, this matter was transferred to ALJ Norwood who is employed by the Division of Administrative Hearings as described in Section 24-30-1001, C.R.S. ALJ Worthington was, and ALJ McClatchey is, employed to hear cases for the Personnel Board as described in Section 24-50-103(7), C.R.S.

On January 20, 2004, a conference was held with the parties before ALJ Norwood. At that conference, the parties agreed to new hearing dates of April 6–9, 2004. ALJ Norwood reversed ALJ McClatchey's decision and determined to allow the October testimony to stand submitted. The parties prepared transcripts of the October 23 and 24 hearing dates. Also on January 20, 2004, ALJ Norwood ordered that no discovery into the hiring of ALJ Worthington be permitted.

At the hearing, Complainant objected to the fact that, although ALJ Norwood had read the transcript of the October hearing dates, he had not listened to the audiotape. Counsel for complainant argued that failure to do so denied due process to his client. Complainant was unable to identify any specific portion of the first two days of hearing where the transcript would be inadequate. Counsel argued generally that his cross-examination of DOC witnesses Atherton and Flint should be listened to. The ALJ has reread the cross-examination of these two witnesses. Nothing in these cross-examinations raise issues of credibility whereby listening to the witnesses' voices could possibly affect a finding of fact. Therefore, the ALJ declines to listen to the tapes *in addition* to reading the transcript.

The parties had not ordered transcripts of their opening statements and the ALJ has not listened to the tapes of these. Complainant also argued that not listening to his opening statement deprived him of due process. Complainant did not ask to restate his opening statement at the commencement of the portion of the hearing before ALJ Norwood. As the opening statements are not evidence, as Complainant has filed numerous prehearing statements and a trial brief, as Complainant was permitted a lengthy closing statement, and as Complainant has chosen not to order a transcript of his opening statement, no due process violation exists in not listening to the tape of this portion of the earlier proceedings.

Related to these issues, both parties have asked the ALJ to listen to the tape of the "pretext telephone call" (discussed further below). The ALJ has done so in addition to reading the transcript.

On February 18, 2004, the Complainant filed a Motion to Disqualify the Attorney General as counsel for Complainant based on the Attorney General's hiring of ALJ Worthington. Complainant relied on Colorado Rule of Professional Conduct 1.12. That rule prohibits a lawyer from representing a party in which the lawyer participated as a judge. The rule further requires the lawyer's firm to promptly file a written notice with the tribunal so that it may ascertain compliance with Rule 1.12.

The ALJ denied the motion based on a January 13, 2004 letter from former ALJ (now First Assistant Attorney General) Worthington to the then Acting Director of the Personnel Board setting out information regarding the screening. In denying the motion, the ALJ ordered the Attorney General to employ certain safeguards to prevent

former ALJ Worthington from being involved in the prosecution of this case and any subsequent appeal of this case.

On March 25, 2004, Complainant filed a Fifth Amended Prehearing Statement. On April 1, 2004, DOC filed a Motion in Limine seeking to strike the witnesses endorsed in the Fifth Amended Prehearing Statement. At hearing the ALJ denied the Motion in Limine with the exception of witness David Linam. That one witness had not been endorsed when the hearing commenced in October. His endorsement was to explain that he had been charged with a crime of moral turpitude but had not received any discipline. As is discussed further below, the ALJ has determined that the DOC may not rely on moral turpitude as a basis to discipline in this case. The ALJ granted the Motion in Limine as to Linam per C.R.E. 403 in that any probative value of this testimony would be outweighed by considerations of undue delay and waste of time.

Exhibits

Rulings on the admissibility of exhibits in this matter are complicated and so the ALJ sets out at this point those exhibits admitted and for what purpose. DOC's exhibits 1-8, 10-12, 14-5, 21-23, 25 and 33-37 are admitted. Exhibits 9, 13, 16, 18-20, 26-32 are admitted only to show what the appointing authority Eugene Atherton considered in his decision to terminate the employment of Complainant. They are not to be considered for the truth of the matters asserted in those exhibits. Exhibit 38 was offered but not admitted.

For the Complainant, exhibits A, C, D, E, F1-F2, G1-G13, H2-H6, I, L, M, Q, T, X, Y, CC and FF were admitted. B and DD were admitted only to show what Atherton reviewed and not for the truth.

Issues

The DOC seeks to sustain its decision to terminate Complainant from his job with the Department. As a basis for its discipline, the DOC relies on two events. The first is an altercation that occurred between Complainant and a Kim Boehm in Rooster's Restaurant and Bar in Canon City, Colorado on September 28, 2002. The second is Complainant's alleged attempts to encourage Boehm not to participate in DOC's investigation of this incident. The DOC argues that this alleged conduct constituted willful misconduct and moral turpitude. It relies upon portions of the DOC's "Staff Code of Conduct" or Administrative Regulation 1450-01.

The DOC relies on Complainant's disciplinary history to support its decision to terminate.

In addition to challenging the factual basis for the termination, Complainant argues that DOC failed to follow its own internal investigatory guidelines at Administrative Regulation 1150-04. Per Complainant, this should require DOC to

reverse its action. Complainant challenges as unconstitutional the use of Administrative Regulation 1450-01 in the context of the events at issue.

FINDINGS OF FACT

Based upon the evidence presented at the hearing in October 2003 and April 2004, the ALJ finds as fact:

The Complainant

1. Complainant began his employment at DOC in December of 1986. In January of 2003, he was terminated from employment at DOC leading to this action. At the time of his termination he was a sector manager in the category of General Professional VII. This is a high level supervisory position. As a General Professional VII, Complainant was a certified state employee and was to be afforded the protections of the state personnel system.

2. Complainant was in charge of the Manufacturing Sector of Correctional Industries at DOC. Correctional Industries employs a select group of inmates for 120 to 180 day periods. The Manufacturing Sector has a number of operations such as saddle making, as well as the manufacture of concrete blocks, furniture and license plates. In his position as sector manager, Complainant had little contact with inmates. The Manufacturing Sector sells products to private businesses. Complainant was well regarded by at least one of the private business customers.

3. Over his years of employment with DOC, Complainant performed well and was given increasing responsibilities. Before working in the manufacturing sector, Complainant worked in the Agri-Business sector of Correctional Industries. He was very successful in running the piggery, making it profitable for the first time. He also supervised cattle and dairy operations and the running of a vineyard.

4. Over the years, Complainant has been evaluated by his supervisors using either a three a four or a five level scale. At hearing, Complainant made two charts, F1 and F2, accumulating all his ratings during evaluations over time with the DOC. Complainant superimposed the three level scale on the five level scale. Those charts are attached to this Initial Decision as F1 and F2.

5. Complainant characterizes himself as an “aggressive” personality. He attributes his success at DOC to this characteristic. Complainant believes that this characteristic and his desire to succeed has necessarily required him to make hard decisions and be in conflict with others over his time at DOC.

6. After his dismissal from DOC, Complainant obtained new employment in November of 2003.

The DOC

7. The DOC seeks to have its employees model proper behavior for inmates, both on and off duty. Inmates often learn of socially unacceptable behavior on the part

of DOC employees off duty through a very active inmate rumor mill. Often the rumors are inaccurate. There is no evidence that any DOC inmate ever learned of the incident at Rooster's or of Complainant's alleged interference in the investigation of that incident.

8. The DOC also seeks to have its employees model proper behavior off duty so that the reputation of the Department, a branch of the government financed by taxpayers, remains a good one in the eyes of the public.

9. To further its goal of modeling proper behavior for inmates and maintaining a good public image, the DOC has created a "Staff Code of Conduct," also known as Administrative Regulation ("AR") 1450-01. The Staff Code of Conduct requires DOC employees to comport themselves in an upstanding manner both on and off duty.

10. The parties were in agreement that AR 1450-01 was a rule of the DOC. However, as such a rule does not appear in the Code of Colorado Regulations at 8 CCR 1503, the ALJ finds that it is not a rule of the DOC as a rule is described in Section 24-4-103, C.R.S., but is instead an internal guideline. *See* the DOC's Administrative Regulation Process, AR 100-01, III. B. that describes the Administrative Regulations as documents used to provide specific or general guidelines for DOC policies.

The Incident at Rooster's

11. Complainant had been seeing a woman Chris Smith. Chris Smith and Kim Boehm, the manager at Rooster's, were at odds. In the days prior to the September 28 incident, bad feeling had developed between Boehm and Smith regarding the fact that Smith had become the owner of the bar. Prior to September 28, 2002, Complainant had patronized Rooster's many times and had brought business to the bar.

12. From mid-morning to mid-afternoon on September 28, 2002, Complainant was drinking at Brother's Lounge in Canon City. By his own estimation, Complainant consumed three to four beers and one or two shots. Complainant describes himself as a recovering alcoholic. Also, Sara Hobby, a witness to some of the events at Rooster's that day described Complainant as intoxicated. Based on this, the ALJ finds that Complainant's judgment was affected by his drinking that day.

13. While he was at Brother's that day, Complainant spoke on the telephone to Sara Hobby. In that conversation, he made negative comments about Boehm. Hobby communicated these to Boehm.

14. Boehm became angry and called Complainant at Brother's. She told him he was not allowed into Rooster's. The two argued about this. Boehm challenged Complainant to come to Rooster's and have a personal confrontation.

15. Complainant became angry and decided to go to Rooster's and have this confrontation. He arrived mid-afternoon. At that time the bar was closed to the general public, but "regulars" were permitted in.

16. When Complainant first arrived at Rooster's, the bouncer, Ben Whitcher, told Complainant to leave, but Complainant did not. Complainant then pushed past Whitcher into Boehm's office. Boehm told him he was not allowed "in here," but Complainant did not leave. A scuffle ensued with hitting. The ALJ makes no finding as to who hit whom first. Complainant hit Boehm; she fell back onto the arm of her chair and broke the arm. Boehm hit Complainant in the face and his glasses and cap flew off. At some point in the fracas, Complainant's glasses were broken. Also at some point, Ben Whitcher was pushed back onto a computer table and the computer almost fell over. As a result of this scuffle, Boehm hurt her elbow and received a fat lip.

17. Boehm weighs approximately 240 pounds and has worked at Rooster's as a bouncer. Complainant has average height and weight for an adult man.

18. During the scuffle, Complainant called Boehm a "fat bitch" and also used other obscenities.

19. Complainant then went to the bar portion of Rooster's and asked for his bar tab. He changed his mind and announced that the bar would have to sue him for any money he owed. He then left Rooster's. At some later date Complainant did pay his bar tab.

20. Complainant displayed inappropriate anger in his decision to go to Rooster's and while at Rooster's.

21. Even though the bar was closed to all but regulars and even though there is no evidence that any inmate ever learned of this incident, the ALJ finds as fact that Complainant's conduct at Rooster's on the 28th cast doubt on the integrity of DOC staff and reflected discredit upon Complainant as a correctional staff member. Some of the persons in the bar were aware of Complainant's status as a DOC employee.

22. Irrespective of whether Complainant's conduct actually affected DOC's reputation with the inmates or the community, Complainant's behavior at Rooster's was not consistent with what one should expect from a high level supervisor in a government operation responsible for the incarceration and rehabilitation of prisoners. Correctly or not, such behavior feeds into stereotypes that prison operations are unsafe and that prisons are run by violent and lawless individuals. The DOC is reasonable in expecting its employees, particularly its high level supervisors, to comport themselves in a proper manner off duty. Again, the DOC has expressed this expectation in establishing the Staff Code of Conduct.

23. In the "pretext telephone call" with Boehm discussed below, Complainant acknowledged to Boehm regarding his visit to Rooster's on September 28: "I have always said that I am the one that put myself in that situation. It's not your fault, it's mine. And I have always said that."

24. Complainant's conduct at Rooster's also constituted bad judgment and a lack of sound discretion. As a basis for this finding of fact, the ALJ notes that Complainant should not have responded to Boehm's challenge to come to the bar, that he should have left when Whitcher told him to and that he should not have gone back

into Boehm's office to confront her. Also, he should have left the bar when Boehm told him to upon entering her office.

25. The ALJ further finds as fact that Complainant's decision to go to the bar adversely affected public safety. Under all the circumstances surrounding the incident, including the fact that Complainant had been drinking, Complainant reasonably could have expected a scuffle to occur.

26. After Complainant left the bar, the police were called.

27. The following day at approximately 4:00 a.m., Boehm called Complainant and apologized for the incident. Boehm was drunk and crying during the call.

The Criminal Charges

28. On Wednesday October 2, 2004, Complainant was detained at his workplace by investigators from DOC. A police officer from the Canon City police then arrived and arrested Complainant. Complainant was led out of his office in handcuffs, which was acutely embarrassing for him. The Canon City police issued Complainant a summons and complaint charging him with disorderly conduct, criminal mischief and harassment.

29. That same day, Complainant's supervisor, L.D. Hay, wrote to Complainant and informed him that he was placed on administrative leave pending the outcome of an investigation into his possible violation of AR 1450-01, the Staff Code of Conduct.

30. Complainant met with the Deputy District Attorney David Bergin on October 8, 2002. Bergin told Complainant that if Kim Boehm would contact him and tell him that she would "drop charges" he would dismiss the case against the Complainant. By "dropping charges" Bergin meant stating that she was not interested in pursuing the matter.

31. Complainant asked Boehm to contact Bergin and tell him she was not interested in pursuing the matter. She did so and Bergin had the criminal complaint dismissed. Related to DOC's decision to terminate in this case, Complainant has not been convicted of a felony or other offense of moral turpitude.

The Investigation by the Office of the Inspector General

32. In October of 2002, William Flint, an investigator with the Office of the Inspector General of the DOC, spoke with Boehm. Flint was investigating the incident at Rooster's along with others on behalf of DOC as a personnel matter. He spoke to Boehm as she was a witness to the incident at Rooster's. Flint's investigation was an investigation and an administrative proceeding as those terms are used in Administrative Regulation 1450-01, IV. AA. (See below for further discussion.) Boehm complained to Flint that Complainant was calling her almost daily, that he indicated that Rooster's would lose business if he lost his job with DOC and that loss of his job might affect his custody of his child. Per Boehm, Complainant offered to replace or repair the chair that had been damaged in the scuffle. Boehm also told Flint that Complainant was trying to persuade her to drop the criminal charges.

The Pretext Telephone Call

33. Flint arranged to secretly record a telephone call between Boehm and Complainant. This call, the "pretext telephone call," was made November 1, 2002. Boehm was aware the call was being recorded, but Complainant was not. Flint asked Boehm to cover certain topics that Flint thought important.

34. At the start of the call, Boehm told Complainant that Flint wished to speak to her and was seeking to arrange an interview. Complainant was familiar with Flint's identity and his role as an investigator. Complainant told Boehm not to "perjure" herself during her interview with Flint.

35. Certain passages of the call are significant for this case:

> *Boehm:* I talked to the DA like you wanted; I didn't get any more customers like you promised.
>
> *Complainant:* Well, I have been trying to get them down there. Paul and those guys said they were supposed to be down there last Friday.
>
> …
>
> *Boehm:* What about my chair?
>
> *Complainant:* As soon as I get back to work I have got you a new one. Already set up.
>
> *Boehm:* You've already got it ordered?
>
> *Complainant:* Yep.
>
> *Boehm:* Well, in the meantime, I have one that is falling apart under my fat ass.
>
> *Complainant:* Well, I've got one ready for you as soon as I get back to work. It's ready. I have already talked to Don Willis. It's ready to rock and roll. It's not a $200 chair; it's a $700 chair.
>
> …
>
> *Boehm:* Well, I … you know I told you that I would talk to the DA when he called. I talked to him. I … you know … you got to remember, my Dad worked in the prison too, and even though you told me I don't have to talk to these guys, they're not real law enforcement, my Dad says I have to.
>
> *Complainant:* I don't even have to talk to them. That's the thing. They could just fire me, they can't fire you. You don't have to talk to them, and if you tell them it was just a big misunderstanding and didn't want to press charges, and it's

> over and done with as far as you're concerned. That's kind of the way it is. I mean, that is not telling a lie. Is it?
>
> *Boehm:* No. …
>
> …
>
> *Boehm:* What do you want from me?
>
> *Complainant:* Just to tell them that you don't want to give them a statement. Say it is over and done with, there were no charges filed, I don't want to have anything to do with it.
>
> *Boehm:* But if they are law enforcement and they come in and ask me, I would be perjuring myself.
>
> *Complainant:* No. You are not.
>
> *Boehm:* Why?
>
> *Complainant:* Because that is what you told the DA. You told the DA that you didn't want to file charges.
>
> *Boehm:* But I didn't tell the DA I didn't want to file charges. When he called me, I said I did press charges against Mr. Masse and all, and he said well then we are dropping it.
>
> *Complainant:* And that is what you should tell them. That you didn't press charges, you didn't want … nothing is going on … let me pull this out here. I got this file. And that is what you can tell them. They are not law enforcement officers, they are investigators. The only difference between them and me is that they have a different title. They can't tell anybody they're not. They have no legal right to do it. Because there are no charges. Right here it says "on the grounds of the motion, the people of the court as follows: the victim, Kim Boehm, does not wish to pursue charges." And that is all you have to tell them. Just say hey, I did not want to pursue charges, I am not doing it, it is over and done, it was a misunderstanding and we are going about our own way. And that's all you got to tell them. You don't have to give them a statement. …

36. On November 5 and November 8, 2002, Flint again spoke with Boehm. Both times Boehm told Flint that she feared for her safety if any action was taken against Complainant.

37. Based on Boehm's comments to Flint in October and November and based on the above excerpts from the "pretext telephone call," the ALJ finds as fact that Complainant interfered in a legal investigation or fact-finding process. Complainant also attempted to hinder or influence the testimony or information to be given by a witness or

potential witness in an investigation or administrative proceeding. Complainant knew that Flint was investigating the incident at Rooster's as a personnel matter. The ALJ finds that Complainant attempted to persuade Boehm not to provide information to Flint or any other DOC investigator. Significant for this finding of fact are Complainant's statements in the pretext telephone call: "You don't have to talk to them" and "You don't have to give them a statement."

Also, Complainant implied that persons whom he knew would not patronize Rooster's where Boehm was employed as manager if she cooperated with the investigators and this resulted in his losing his job. He made it clear to her that if she told the investigators that she did not want to pursue the matter, then his friends *would* patronize Rooster's. Complainant further attempted to influence Boehm's level of cooperation with the investigators by indicating that he would be able to replace her chair with a $700 chair if he were allowed to return to work.

38. Flint interviewed Complainant November 12, 2002 regarding the incident at Rooster's. He also asked him questions about the issue of telling Boehm not to cooperate. Flint did not tell Complainant that the November 1 "pretext telephone call" had been recorded, nor did he give Complainant the opportunity to review the tape recording or a transcript of the recording.

39. As part of his investigation, Flint spoke to a number of persons present at the incident at Rooster's. Flint did not speak to Whitcher, although he had an affidavit from him. The evidence does not establish that Flint failed to contact any person whose information was necessary for his investigation of Complainant.

40. At some point in time Flint orally told Complainant that his investigation of the matter was complete.

The R-6-10 Meeting

41. Relative to this case, Eugene E. Atherton is the appointing authority at the DOC as that term is described in Section 24-50-125(1), C.R.S. Atherton is the Assistant Director of Prisons, West Region. Atherton has never worked in the Correctional Industries portion of the DOC.

42. On December 20, 2002, Atherton sent a letter to Complainant telling him that he had "information" regarding the incident at Rooster's as well as possible influencing of witnesses. The letter went on to tell him that an "R-6-10" meeting was planned for January 9, 2003. "R-6-10" refers to that provision of the Rules of the State Board of Personnel. The letter gave notice that Atherton wished to gather information. The letter cited AR 1450-01, the Staff Code of Conduct.

43. On January 9, 2003, Atherton and Complainant had the R-6-10 meeting. Also present was Larry Reid, Warden of the Colorado State Penitentiary. During the meeting, Complainant stated that following the incident at Rooster's, he had ceased drinking and had realized he was an alcoholic in need of treatment. Complainant told Atherton that he was seeing a member of the clergy regarding his problems with alcohol.

44. On January 16, 2003, Atherton sent Complainant another letter telling him that he had determined to terminate his employment with DOC. The letter gave as a reason Complainant's conduct at Rooster's and his attempt to persuade witnesses to not cooperate in the investigation. The letter went on as follows:

> In making my decision, I considered your record of employment. Although you have received commendable evaluations for performance you have been criticized in writing for inappropriate language and behavior over the years. Additionally, you have received extensive training and guidance by employers and the court system in an effort to define to you appropriate conduct. Highlights in that history, and in the current incident, represent a series of corrective and disciplinary actions involving alcohol, overly aggressive, and inappropriate behavior. Whether taken collectively, or individually, the behavior by you in those events must be considered serious and flagrant. In order for the Colorado Department of Corrections to meet its mission of being sensitive to public concern and to provide an atmosphere for inmates to pursue productive, socially acceptable lives, staff must be held to a level of conduct which stands as an appropriate model for citizen behavior. It is particularly important for staff in leadership positions. …

Prior Corrective and Disciplinary Actions

<u>The 1990 Action</u>

45. As to the "series of corrective and disciplinary actions" referenced in Atherton's January 16, 2003 letter, the first of these related to an incident in October 1989. Leading up to that incident, Complainant had been at home off duty and after hours when he was called to a prison farm facility to assist in the birth of a calf. On the way home from this incident, Complainant was stopped for drunk driving.

46. On January 5, 1990, Complainant was given a formal corrective action regarding this incident by his then supervisor Tom G. Crago, Ph.D., the Agri-Business Manager at Juniper Valley Farms. Crago found Complainant's behavior unacceptable in three respects:

> 1. You acknowledge that you returned to prison property after normal work hours after consuming alcohol. The amount of alcohol consumed was, in my opinion, sufficient to inhibit your ability to function in the presence of inmates.
>
> 2. You acknowledge that you have pled guilty to a charge of Driving While Ability Impaired (D.W.A.I.) in connection with a traffic arrest that same day while operating a state vehicle. This arrest occurred while returning to your home from your work site.

> 3. Your behavior has been described by the arresting office as uncooperative at the time of your arrest.

47. The ALJ adopts Crago's three points as findings of fact. As to the third point, the ALJ finds that the arresting officer *described* Complainant's behavior as uncooperative. No finding is made as to whether Complainant was in fact uncooperative.

48. Crago's January 5, 1990 letter suggested that Complainant "pursue the possibility of obtaining counseling on alcohol abuse."

The 1994 Action

49. The second in the "series of corrective and disciplinary actions" identified by Atherton concerned an incident between Complainant and DOC employee Giles Spaulding on April 27, 1994. On May 27, 1994, Crago wrote a letter to Complainant taking disciplinary action against Complainant regarding this incident. Crago reduced Complainant's pay for four months. Per Crago, the specific acts which led to his decision were:

> 1. In the course of a verbal argument with Giles Spaulding, in front of other staff, you threatened to take physical action (i.e., hit his nose, or face) if he did not cease the argument. You admit making this threat.
>
> 2. When Giles did not stop the argument, and did, I believe, challenge you to do just that (i.e., hit him), you did in fact grab him, and push him. Again, you admit grabbing and pushing Giles.
>
> 3. You also admit that at no time did Giles touch you, or commit any physical act against your person. I believe that he did put his face close to yours in response to your threat and say "go ahead." This action by Giles does mitigate, to some extent, your actual grabbing and pushing Giles.

50. Crago went on to state: "While I believe that Giles was imprudent to return your threat with a challenge, I am of the opinion that it was your threat of physical harm to Giles which led to your admitted grabbing and pushing of Giles." The ALJ adopts Crago's description of this incident as well as his opinions and beliefs as findings of fact.

51. Crago's May 27, 1994 letter cited AR 1450-01, at that time called "Ethical Performance Standards." At the time of the 1994 action, Complainant reviewed AR 1450-01. Crago's letter stated that Complainant received training in AR 1450-01 shortly after his original hire, which the ALJ finds as fact.

The 2001 Action

52. The third in the "series of corrective and disciplinary actions" identified by Atherton involved Complainant's guilty plea to third degree assault in February 2001.

The plea arose from an incident where Complainant's daughter came home late from a date with her boyfriend. When confronted by Complainant, Complainant's daughter talked back and Complainant struck her. Complainant was placed on a one-year deferred judgment with the probationary terms of anger management treatment and an alcohol evaluation with any recommended treatment. No treatment was recommended. Complainant successfully completed his probation, including an anger management course, the guilty plea was withdrawn and the case dismissed.

53. Based on this incident with his daughter, Complainant had an R-6-10 meeting with Richard Schweigert, the Director of Correctional Industries at the DOC sometime around February of 2001. Schweigert brought up AR 1450-01, now called the "Staff Code of Conduct." In a letter to Complainant regarding the meeting, Schweigert wrote: "When asked if you thought you had exercised sound judgement in this incident you responded that your actions might have been questionable. I agree with your assessment. The following area needs improvement: control of your temper and learning to assess volatile situations better to avoid outcomes that result in the lapse of the use of sound judgement." The ALJ finds as fact that Complainant's striking of his daughter constituted a lack of sound judgment.

54. As discipline, Complainant was required by DOC to complete the same anger management course required by the court as part of the deferred judgment.

Atherton's Decision to Terminate

55. In making the decision to terminate Complainant, Atherton also relied on comments in Complainant's employee evaluations over the years that Atherton believed showed poor interpersonal relations on Complainant's part. Some of those comments are:

> Jim needs to be more cognizant of his demeanor and speech in front of peers and subordinates, often it is taken the wrong way and leads to negative connotations. This is easily corrected and in the next rating period I don't expect it to be an issue. [L.D. Hay used this same language in October of 2001 and September 2002.]
>
> If Jim needs to improve in an area it is this one, [communication] simply because he has a joking manner and it may, at times, be offensive. I suggest caution in this area. [Note by L.D. Hay, March 2000.]
>
> Jim needs to be attentive to his joking manner as it can be misconstrued and lead to compromising his position. [Note by L.D. Hay, December 1999.]
>
> At his best, there's no one who can top him in creativity, analytical skill, or pure intelligence. At his worst, there is no one who can work with him, since disagreement can't be tolerated. If Jim can find, develop and practice more

> constructive ways of dealing with controversy, he can be an extremely valuable part of the management team. [Note by Tom Crago, January 1996.]

56. Although Atherton relied on these comments, the ALJ finds as fact that they carry very little weight as to propriety of DOC's ultimate decision to terminate in this case. These general comments on poor interpersonal skills have little relationship to the issues he was ultimately fired for: a scuffle in a bar and interference in an investigation.

57. Some of Complainant's evaluations specifically require Complainant to be "aggressive" in establishing new businesses for Correctional Industries. Based on this and Complainant's own testimony, the ALJ finds as fact that Complainant was required to be an aggressive businessman for Correctional Industries. However, the ALJ does not find as fact, as was argued by Complainant, that being an "aggressive" businessman is necessarily the same thing as being "aggressive" in interpersonal relations. The same word means different things in different contexts. The ALJ does not find, as was also argued by Complainant, that DOC essentially sent Complainant mixed messages by encouraging him to be aggressive in his work but to avoid aggression in his relations with others. There is no contradiction in this and the two behaviors are perfectly compatible.

58. In making his decision to terminate employment, Atherton concluded that Complainant was in violation of Personnel Board Rules at R-6-9, 4 CCR 801 at subparts 2. and 5., which read:

> 2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
>
> …
>
> 5. final conviction of a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job …

59. Atherton also determined that Complainant violated three provisions of the Staff Code of Conduct: AR 1450-01, IV., N., AA., HH. and ZZ.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

Due Process Issues Concerning the Investigation

AR 1150-04, Section IV., F. 1 and 2.

1. Complainant challenges DOC's action in this case based on alleged irregularities in DOC's investigation. Complainant relies on Professional Standards Investigations AR 1150-04, Section IV., F. 1 and 2. The Professional Standards for

Investigations, like the Staff Code of Conduct, do not appear in the Code of Colorado Regulations and AR 1150-04 is also not a rule as described in Section 24-4-103, C.R.S. It is rather an internal guideline of the DOC. Per AR 1150-04, its purpose is to establish the office of the Inspector General ("IG") and methods of transmitting and investigating complaints concerning improper staff conduct. That authority provides as follows:

> F. Disposition of Professional Standards Investigation:
>
> 1. When the investigative report is final and given to the Appointing Authority, the staff under investigation shall be advised by the Appointing Authority, or the IG, that the investigation/inquiry has been completed.
>
> 2. Following the meeting with staff, the Appointing Authority shall make a written determination on one of the following:
>
> a. Allegation Sustained: …
>
> b. Allegation Not Sustained, Inconclusive: …
>
> c. Employee Exonerated: …
>
> d. Allegation Unfounded: …
>
> e. Investigation Continued: …

2. Per Complainant, the DOC did not follow these guidelines in its investigation of him. Complainant argues first that he was not informed that the investigation was completed as required by F.1. However, Flint testified that he did make such an advisement and this is found as fact above. Additionally, Atherton's January 16, 2003 letter of disciplinary action, by its very nature of dismissing Complainant, informed him that the investigation was complete. The ALJ concludes that the DOC complied with F.1. in Complainant's case.

3. The DOC also complied with F.2.'s requirement of a written determination as to the outcome of the investigation. Atherton's January 16, 2003 letter states his conclusion that Complainant participated in the behavior described in his earlier December 20, 2002 letter. It is true that the January 16, 2003 letter does not use the word "investigation." However, it is clear that Atherton had "sustained" the "allegation" with his conclusion that Complainant had participated in the behavior identified and that Atherton had therefore determined to terminate Complainant's employment.

4. Complainant argues that F.2. requires a second writing *in addition* to the January 16, 2003 letter with the limited message that the investigation is complete. However, F.2. has no such requirement. Again, the January 16, 2003 letter provided the information required.

<u>AR 1150-04, Section IV., I. 1 and 5.</u>

5. Complainant also relies on Professional Standards Investigations AR 1150-04, Section IV., I. 1. and 5. to challenge the propriety of DOC's investigation of him in this case. Those subsections provide:

> I. Employee Rights
>
> 1. A DOC employee under internal investigation, and when applicable, the Appointing Authority, will be informed of the general nature of the investigation, as soon as practical, after the complaint has been received. This provision will not apply to a complaint or investigation that would be jeopardized or compromised by such notification.
>
> …
>
> 5. DOC employees called for subsequent internal investigation interviews will be afforded the opportunity to review all of his/her previous statements, prior to being re-interviewed.

6. Complainant first argues that the DOC did not comply with I.1.'s requirement to inform the employee of the investigation. The ALJ does not agree. L.D. Hay's October 2, 2002 letter informed Complainant of the existence of an investigation into his possible violation of the Staff Code of Conduct. This was four days after the incident at Rooster's. While this letter did not set out the general nature of the investigation, Atherton's December 20, 2002 letter stated that Atherton had "information" regarding the Rooster's incident and the possible influencing of witnesses. Flint had discussed both of these issues with Complainant in November. The DOC in this case "informed of the general nature of the investigation, as soon as practical" as required by I.1.

7. Complainant also argues that the "pretext telephone call" constituted a previous statement that should have been provided per I. 5. when Flint met with Complainant on November 12, 2002. This argument presupposes that the "pretext telephone call" constituted an initial investigation interview. However, AR 1150-04 deals with formal interviews with the employee. At such interviews the employee is permitted to bring a representative. The taping of Complainant's conversation with Boehm does not constitute an interview in terms of the regulation. A transcript of that tape need not have been provided per I. 5.

8. Even if the DOC failed to comply with provisions of its administrative regulations in the investigation of Complainant, these failures do not rise to the level of a due process violation requiring reversal of the dismissal as is argued for by Complainant. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984) states that the failure to provide a pretermination interview as required by Personnel Board rules is a violation of due process. In that case the error required the awarding of back pay. *See also*, *Shumate v. State Personnel Board*, 34 Colo. App. 393, 528 P.2d 404 (1974).

Here though, there was no deprivation of any Personnel Board process. At most there was a deviation from DOC internal guidelines not formalized as rules. Complainant has established no other prejudice from any failure of DOC to comply with its Administrative Regulations. This is required to establish a due process violation. *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981). Also, to the extent there was any

irregularity in DOC's investigatory process, the hearing process before the Personnel Board provides an opportunity to correct any factual errors made during that investigation.

9. Complainant also argues that Flint's investigation was deficient. However, the evidence does not establish that Flint failed to contact any person whose information was necessary for his investigation. Complainant did call Whitcher as a witness. To the extent that Complainant believed other witnesses had valuable information overlooked by Flint, Complainant could have asked these witnesses to testify at the hearing.

Entrapment

With regard to the "pretext telephone call," Complainant argues that evidence from that call should be excluded per an "entrapment" analysis. However, entrapment is an affirmative defense in a criminal action. Section 18-1-709, C.R.S., *People v. Sprouse*, 983 P.2d 771 (Colo. 1999). It has no application in a Personnel Board action. *Jones v. Civil Service Commission*, 176 Colo. 25, 489 P.2d 320 (1971).

Willful Misconduct and Moral Turpitude

10. In disciplinary hearings before the personnel board, the appointing authority has the burden of proof. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). A person afforded the protections of the state personnel system may be dismissed for "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude." Colo. Const. art. XII, sec. 13(8) and Section 24-50-125(1), C.R.S. These same bases for discipline appear, somewhat modified, in the Personnel Board Rules at R-6-9, 4 CCR 801.

11. The parties treated Atherton's January 16, 2003 letter as the charging document in this case. That letter does not explicitly set forth the portions of art. XII, sec. 13(8), Section 24-50-125(1) or R-6-9 relied upon by the DOC, although it does use the words "willful misconduct" and "acts of moral turpitude." Atherton's letter cites AR 1450-01, the Staff Code of Conduct, but it does not list the particular subsections relied upon. Nevertheless, the parties were in agreement that "willful misconduct" and "acts of moral turpitude" were at issue and that the Staff Code of Conduct at subsections IV., N., HH., AA. and ZZ. were the subsections relied upon by DOC and at issue. The ALJ concludes that the parties tried these issues by consent. *See* C.R.C.P. 15 (b); *Butler v. Behaeghe*, 37 Colo. App. 282, 548 P.2d 934 (1976).

12. DOC's reliance on "acts of moral turpitude" is misplaced. Colo. Const. art. XII, sec. 13(8) and Section 24-50-125(1) and R-6-9 subpart 5. all require final conviction of a felony or other offense of moral turpitude, of which there is no evidence in this case.

13. The "willful misconduct" identified in this case was Complainant's failure to comply with the Staff Code of Conduct at AR 1450-01. Subpart IV., N. reads:

> N. Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls

> into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.

14. As set forth in the findings of fact above, Complainant's conduct at Rooster's on the 28th constituted an action that cast doubt on the staff's integrity. It also constituted bad judgment and a lack of sound discretion. Complainant therefore engaged in "willful misconduct" by not complying with subpart N.

15. AR 1450-01, subpart IV., AA reads:

> AA. Staff shall not interfere with any legal investigation or fact-finding process, nor with the operation of any other work unit of DOC. Staff are prohibited from attempting to hinder or influence, in any manner, the testimony or information to be given by any witness, or potential witness, in an investigation or administrative proceeding.

16. Subpart AA. is broad in that it prohibits the attempt to hinder or influence, "in any manner," the information to be given by a witness or potential witness. Complainant's advice to Boehm, a witness, that she did not have to speak to the investigators was an attempt to hinder or influence her testimony or information. Flint's investigation was an investigation and an administrative proceeding. Complainant violated subpart AA. and thereby committed "willful misconduct."

17. AR 1450-01, subpart IV., HH. reads:

> HH. Staff shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures and administrative instructions. Staff shall not aid, abet, or incite another in the violation of administrative regulations, procedures, operational memorandums, rules, duties, orders, or procedures of the DOC. Failure to obey any lawfully issued order by a supervisor, or any disrespectful, mutinous, insolent, or abusive language or actions toward a supervisor is deemed to be insubordination.

18. The DOC has not made argument as to how HH. applies to this case and the ALJ sees no application. If the DOC is relying on the language "shall … obey all DOC administrative regulation" to argue that a violation of N., AA., or ZZ. is also a violation of HH., the ALJ declines to find such a violation. The violations of subsections N., AA., and ZZ. stand on their own merits and have no additional significance as violations of HH.

19. AR 1450-01, subpart IV., ZZ. reads:

> ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into

> disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

20. As set forth in the findings of fact, Complainant's conduct at Rooster's reflected discredit upon Complainant as correctional staff. Also, the scuffle itself adversely affected public safety in that blows were struck and property damaged. Complainant should have reasonably anticipated such a scuffle knowing that he had had been drinking, was angry and was responding to a challenge. Complainant therefore violated subsection ZZ., this too constitutes "willful misconduct."

Nexus Between Conduct and Job Performance

21. Complainant argues that DOC's discipline in this case is improper because of a lack of nexus between the conduct and job performance. Complainant relies on *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995). That case was not a case before the Personnel Board. In that case, the City of Colorado Springs discharged one of its employees for his conviction of felony incest.

Givan is not applicable to this case in that it concerned whether the City properly considered Givans's felony in terms of its Personnel Policies and Procedures Manual. Without deciding if a nexus between job performance and off-duty conduct needed to be shown, the Court found that there was such a nexus between the off-duty conduct (in the form of the felony) and the City's interests. *Id*. at 760, n. 7.

In the present case there is such a nexus as well. Complainant's failure to comply with the Staff Code of Conduct constitutes "willful misconduct."

Vagueness and Other Constitutional Challenges

22. Complainant challenges the provisions of the Staff Code of Conduct as unconstitutionally vague.

> A statute that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application violates the due process clauses of the fifth amendment to the United States Constitution and article II, section 25 of the Colorado Constitution. [citations omitted] Conversely, a statute satisfies the requirements of due process when it provides fair notice of the conduct that has been determined to be unlawful. [citations omitted].

Smith v. Charnes, 728 P.2d 1287, 1290 (Colo. 1986). A less strict vagueness test is employed in a civil, rather than criminal, case. *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (Colo. 1991), finding the term "pit bull" not unconstitutionally vague.

Words and phrases are to be considered in their generally accepted meaning. *Colorado State Board of Medical Examiners v. Hoffner*, 832 P.2d 1062, 1065 (Colo. App. 1992), finding "habitual intemperance" not an unconstitutionally vague term in the case of discipline of a physician. In *Weissman v. Board of Education*, 190 Colo. 414, 547 P.2d 1267 (1976), "immorality" was determined not an unconstitutionally vague basis for a teacher dismissal, provided that the immorality related to his fitness to teach. In *Kibler v. State*, 718 P.2d 531 (Colo. 1986) discipline of a nurse was permitted for acting "in a manner inconsistent with the health or safety of persons under his care," with failure to meet "generally accepted standards for such nursing services" and in making incorrect record entries in a "repeatedly negligent manner." All these terms were found not unconstitutionally vague. Finally, *Barrett v. University of Colorado*, 851 P.2d 258 (Colo. App. 1993) held that the very term "willful misconduct" in the Personnel Board Rules was not unconstitutionally vague.

Complainant has not identified with specificity which portions of the Staff Code of Conduct he believes are impermissibly vague. Taking AR 1450-01, IV. N., the ALJ concludes that irrespective of whether "good judgment and sound discretion" is vague, the language "casts doubt upon the integrity of the staff" provides fair notice of prohibited conduct to DOC employees. According to *Webster's New Collegiate Dictionary* 600 (1973), "integrity" is defined in part as "firm adherence to a code of especially moral or artistic values: incorruptibility." DOC employees should be able to anticipate that conduct like that of Complainant exhibited at Rooster's would run afoul of subsection N. Subsection N. specifically applies to off-duty conduct.

Similarly, a DOC employee should be able to anticipate that having a fight in a bar is the kind of conduct that "tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff" as set out in Subsection ZZ. Subsection ZZ. as well specifically lists off-duty conduct.

Finally, Subsection AA., with its prohibition on interfering "in any manner" in an ongoing investigation, is sufficiently specific to inform DOC employees of the wrongfulness of telling a witness: "You don't have to talk to them" and "You don't have to give them a statement."

23. In relation to his constitutional challenge, Complainant notes that Atherton in his January 16, 2003 letter identified Complainant's profane speech in Rooster's as a basis for his action. Complainant argues that this is an unconstitutional infringement of his rights under the first amendment to the United States Constitution. However, calling someone a "fat bitch" and using other profane language in a bar fight is not constitutionally protected speech. *See, Barrett v. University of Colorado*, *supra*, where speech that possibly reflects a racial bias in an employee is not protected. "Fighting words" are not constitutionally protected speech. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994).

The Sanction of Dismissal

24. Certified state employees such as Complainant may only be disciplined for "just cause." Colo. Const. art. XII, sec. 13(8); *Kinchen, supra*. Here, such just cause

has been established in that Complainant has engaged in violations of the Staff Code of Conduct constituting "willful misconduct." Once just cause has been established, the ultimate sanction imposed by the appointing authority may be reversed only upon a showing that the action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. R-6-9 B. provides that if the ALJ finds "valid" justification for the imposition of disciplinary action but finds that the actual discipline administered was arbitrary, capricious or contrary to rule or law, the ALJ may modify the discipline.

25. The ALJ has found that negative comments in his reviews about Complainant's interpersonal skills carries little weight. But based on Complainant's three prior corrective and disciplinary actions relied upon by Atherton, the ALJ concludes that the sanction of termination cannot be termed arbitrary or capricious, or contrary to rule or law.

26. That Complainant received favorable reviews in the past is not sufficient to overturn the DOC's decision in light of the legal standard to be applied. Here, Complainant has been disciplined or corrected three times during his employment history. These incidents are related to the incident at Rooster's in that they involve Complainant's use of alcohol and his use of physical force. Based on the 2001 incident, Complainant was required by DOC to complete the anger management course ordered by the Court. Despite his completion of this course, his anger got him into trouble again at Rooster's. Whether or not one considers the criticism of Complainant's interpersonal relations, these three incidents as well as the current willful conduct identified makes unassailable DOC's decision to terminate under an arbitrary and capricious level of review.

INITIAL DECISION

It is therefore the Initial Decision of the Administrative Law Judge to affirm DOC's termination of Complainant's employment.

DONE AND SIGNED

June ___, 2004,
nunc pro tunc May 10, 2004.

_____
MATTHEW E. NORWOOD
Administrative Law Judge

F1

JIM MASSE

COLORADO DEPARTMENT OF CORRECTIONS

PERFORMANCE SUMMARY

RATING PERIOD: 07/01/95 TO 09/30/02 EMPLOYEE STATUS: ☐ PROB ☐ T.S. ☒ CERT

CLASS TITLE: General Professional VII . POS. NO.: 7613 .

AGENCY/FACILITY: Colorado Department of Corrections . WORK UNIT: Correctional Industries .

Level 1 Rating: Needs Improvement – the lowest performance rating denoting unsatisfactory performance. "Failed to meet expectations."

Level 2 Rating: Satisfactory – a performance rating defined as "meets expectations, standards, requirements and objectives."

Level 3 Rating: Commendable – a performance rating defined as "exceeds expectations, standards, requirements and objectives."

Level 4 Rating: Outstanding – the top performance rating defined as "consistently exceeds expectations, standards requirements and objectives."

II. COMPETENCIES (SELECT WITH AN "X" ONE RATING LEVEL FOR EACH COMPETENCY)

A. ACCOUNTABILITY/ORGANIZATIONAL COMMITMENT: Employee's work behaviors demonstrate responsible personal and professional conduct which contributes to the overall goal and objectives of the department and is in accordance with AR 1450-1 Staff Code of Conduct.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
		//	

B. JOB KNOWLEDGE: The employee demonstrates skills in job-specific knowledge by provided the appropriate quantity and quality of work in a timely and efficient manner.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
			//

C. COMMUNICATION: Effectively and courteously communicates by actively listening and sharing verbally and in writing relevant information with others so as to anticipate problems and ensure the effectiveness of the department.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
		//	

D. INTERPERSONAL SKILLS: To the extent the employee maintains pleasant working relations, demonstrates tact and sensitivity in dealing with others; is responsive to questions and concerns; promotes morale and motivation.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
	//		

E. CUSTOMER SERVICE: Works effectively with internal/external customers/clients to achieve the mission and goals of the DOC.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
		//	

F. PERFORMANCE MANAGEMENT: *(Applies to rating supervisor's only)* The degree that the supervisor supports the Performance Management Program.

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
		//	

OVERALL RATING LEVAL (SELECT ONLY ONE)

NEEDS IMPROVEMENT	SATISFACTORY	COMMENDABLE	OUTSTANDING
		//	

F2

JIM MASSE

COLORADO DEPARTMENT OF CORRECTIONS

PERFORMANCE EVALUATION SUMMARY

EMPLOYEE STATUS: ☐ PROB ☐ T.S. ☒ CERT

CLASS TITLE: General Professional VII . POS. NO.: 7613 .

AGENCY/FACILITY: Colorado Department of Corrections . WORK UNIT: Correctional Industries .

Commendation Letters:

IV. EVALUATION FACTORS SELECT ONE RATING LEVEL FOR EACH FACTOR

A. QUALITY OF WORK: The degree to which the employee demonstrates accuracy, thoroughness, neatness, and professionalism, exhibits job knowledge, makes sound decisions, resolves day-to-day problems.

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
		////		///

B. QUANTITY OF WORK: The degree of productivity in meeting accepted work standards, meets schedules/deadlines, demonstrates efficiency in completing assigned duties.

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
		~~////~~ /	/	

C. COMMUNICATION: The degree the employee positively responds to others, keeps others informed by communicating orally and in writing in a well-organized, courteous and effective manner.

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
		~~////~~ /	/	/

D. INTERPERSONAL RELATIONS: The extent the employee maintains pleasant working relations, demonstrates tact and sensitivity in dealing with others; is responsive to questions and concerns; promotes morale and motivation.

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
	/	~~////~~	/	

E. ORGANIZATIONAL COMMITMENT: The degree the employee demonstrates a positive attitude, adaptability to change, promptness, accountability, does not misuse leave, accepts responsibility, and contributes to organization's goals and objectives.

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
	/	////	//	

IPO = Individual Performance Objective (Make IPO's measurable and include as part of Factor Rating.)

OVERALL RATING LEVEL (SELECT ONLY ONE)

NEEDS IMPROVEMENT	COMPETENT			PEAK PERFORMER
		~~////~~ /	/	

KEY TO RATING LEVELS ABOVE

NEEDS IMPROVEMENT Employee failed to meet job expectations and may require more than a normal amount of supervision and direction.

COMPETENT Employee fulfills job expectations with only a normal amount of supervision and direction.

PEAK PEFORMER Employee consistently exceeds job expectations with higher quality, more innovations, and less supervision than typically required..

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. The notice of appeal must be received by the Board no later than the 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.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made 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.
Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 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 2 inch by 11 inch paper only. Rule R-8-64, 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. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the_____ day of **June, 2004,** I placed true copies of the foregoing **AMENDED INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Lohf Shaiman Jacobs Hyman & Feiger, P.C.
Alan S. Thompson, Esq.
Stephen E. Kapnik, Esq.
950 South Cherry Street, Suite 900
Denver, Colorado 80246

And in the interagency mail to:

Andrew Katarikawe
Monica Ramunda
Assistant Attorneys General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____
Andrea C. Woods