STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B004**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GAY LUJAN,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on November 5 and 18, 2008. Closing arguments were presented on November 19, 2008; the record was closed on that date by the ALJ. Assistant Attorneys General Eric Freund and Kathryne Gwinn represented Respondent. Respondent's advisory witness was Anne Freeman, the appointing authority. Complainant was represented by Nora V. Kelly, Esquire.

On January 9, 2009, the parties filed a joint motion to amend the Initial Decision in order to redact the names of the witnesses who alleged sexual harassment by Complainant. The motion had been made orally on the record at the outset of hearing. The motion is granted.

MATTER APPEALED

Complainant, Gay Lujan ("Complainant"), appeals her demotion from Correctional Officer III to Correctional Officer I by Respondent, Department of Human Services, Division of Youth Corrections ("DYC" or "Respondent"). Complainant seeks reinstatement and an award of attorney fees and costs.

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

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

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

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDIJGS OF FACT

General Background

1. Complainant began her career with DYC in June 1997 as a Correctional Officer I.

2. Sol Vista Youth Services Center ("Sol Vista") is a twenty-bed youth facility opened in November 2006. Complainant was hired to work at Sol Vista prior to the time it opened, as a Correctional Officer II, also known as a Colorado Youth Services Officer (CYSO) II.

3. Complainant and several other staff performed the lead work necessary to prepare the facility for opening during the period of September and October 2006.

4. Denesio Gonzales was the Director of Sol Vista. Complainant had a prior working relationship with him when she came to Sol Vista.

5. Complainant is a hard worker. Her tenure with DYC gave her a base level of knowledge concerning facility policies and procedures that was useful in opening the facility.

6. Prior to the time Sol Vista opened for business in November 2006, Gonzales gave Complainant the title and responsibilities of Training and Compliance Officer for Sol Vista. This position empowered Complainant to observe other staff in the performance of their duties, and to approach and correct them if she believed they were in violation of a facility policy. Complainant was responsible for overseeing agency compliance with policy and procedure and assuring that staff met auditing standards.

7. As Training Officer for Sol Vista, Complainant set up the annual training for staff members, and tracked the training for all staff to assure compliance with training requirements for credentialing and regulatory purposes. She also set up training for new employees.

8. Complainant's management style was often overbearing. She sometimes threatened to "write up" other staff if they did not comply with her directives. Other staff perceived that she was very close to Gonzales and his Assistant Director, Ken DeLeon, because she spent a lot of time in their office, and because she had been given the extra authority as Compliance and Training Officer.

9. Complainant often treated her male co-workers and subordinates in a manner they found to be flirtatious and overly sexual.

JG[1]

10. JG, a Youth Services Counselor I, worked at Sol Vista from September 2006 forward. He supervised a team of five CYSO I's and one CYSO II. JG's position was higher on the chain of command than Complainant's.

11. During the two-month period prior to the opening of Sol Vista in the fall of 2006, Complainant followed JG into the restroom. It was a private bathroom for one individual. JG stood in the bathroom and looked at Complainant, and when she did not leave, he said, "You can go now." Complainant then left. JG understood that Complainant was joking, but it made him uncomfortable.

12. Complainant often touched JG on the leg and arms and said to him, "Ooh, look at your arms, you look good in that shirt." JG perceived her conduct to be sexual in nature, and it made him feel uncomfortable. Complainant touched JG and made these comments to him on more than five occasions.

13. On one occasion, Complainant, JG, and DL, another Sol Vista staff member, were in the supervisor's office alone. Complainant stated that she hoped the windows would fog up, because she was the only girl in there and they could do all kinds of crazy things. This made JG feel uncomfortable.

14. Often, when JG approached the area where Complainant was located at work, Complainant said, "Here comes lunch."

15. Although JG was higher in rank than Complainant, he found Complainant's management style as Compliance Officer to be threatening. She made it clear that if he did not perform his job the way she wanted it, he would get written up. He found this to be bad for morale.

16. JG often observed Complainant informing others subordinate to her, "If you don't do [what I have told you], I will write you up."

17. JG noticed that Complainant spent a lot of time in Director Gonzales's office. He did not feel comfortable taking complaints about Complainant to Gonzales.

18. JG did complain about Complainant's inappropriate conduct to his supervisor,

---

1 Names of witnesses who alleged sexual harassment by Complainant were redacted in accordance with a protective order entered at hearing.

Dan Vasquez.

DL

19. In July 2007, Complainant patted DL on the buttocks.

20. DL complained about this to his supervisor, Dan Vasquez.

MG

21. MG was a CYSO I at Sol Vista. Complainant was not MG's supervisor.

22. On January 14, 2008, Complainant was in the supervisor's office with Kathleen Baca, another employee. The office is very small. MG entered the office and the three began to joke around.

23. MG was wearing pants with a zipper to which a two-inch long, thick fabric loop was attached. Complainant, who was sitting behind the desk, leaned over the desk, reached the loop attached to the zipper on MG's trousers, and unzipped his pants.

24. MG became flustered, forgot what he had come to the office to do, and left the office. He was embarrassed.

25. The following morning, MG went to talk to his direct supervisor, Dan Vasquez, about Complainant unzipping his pants. MG informed Vasquez that he wanted to keep the matter confidential. Vasquez told MG that he was required to report it.

26. Vasquez reported the zipper incident to Ken DeLeon, Assistant Director of Sol Vista. At the same time, Vasquez informed DeLeon that JG was bothered by Complainant's comments about his body and his muscles, and by her inappropriate touching of him at work.

27. DeLeon did not follow up on Vasquez's reporting of JG's concerns about Complainant's inappropriate touching or comments.

28. DeLeon did speak with MG. MG confirmed that Baca, Complainant and he were joking around when Complainant unzipped his pants. He informed DeLeon that even with the joking, it did not make her conduct right, and that nothing in their joking had invited her to do so. DeLeon asked MG how he wanted to have the situation handled, and MG stated that he wanted him to talk to Complainant and to maintain a more professional work environment.

29. DeLeon also spoke with Complainant and Baca about what had occurred on January 14, 2008.

30. After speaking with Complainant, Baca and MG about the January 14, 2008 incident, DeLeon decided to treat each of the three employees the same. In late January, DeLeon issued memoranda to each of them, holding them equally accountable for what had occurred.

31. DeLeon's memo to Complainant noted that he had been informed of "an incident where a male staff might have been the victim of an inappropriate act/horseplay, initiated by you, that made him feel very uncomfortable. It was also reported that, on another occasion, another Supervisor had once mentioned that you occasionally put your hands on him (not sexually) in a friendly way but that it made him feel uncomfortable."

32. DeLeon noted that that the victim of the incident (MG) had acknowledged he was "partly to blame in that he engages in horseplay and jokes with others, probably a little too much and states that this was a lesson learned for him. He really felt that the incident was over and done with and was surprised to hear that it had resurfaced; he states that he is satisfied and feels that it was dealt with." He stated, "You state that you have since realized that this type of behavior is not in good character given the status of your position and you acknowledge that it won't happen again." DeLeon also noted that Complainant denied touching the other staff member (JG).

33. After receiving his memo from DeLeon, MG became increasingly upset about the fact he was being held accountable for Complainant having unzipped his pants.

Complainant's Promotion

34. In February 2008, Complainant was promoted to CO III.

NG

35. NG is a CYSO II at Sol Vista. In early 2008, Complainant saw a scratch on his neck, caused by his infant son. She asked if it was a "hickey" and if he had been "fooling around."

36. NG sent an email complaint to DeLeon regarding Complainant's "hickey" comment. He also mentioned that another staff member had complained to him she came up behind him and grabbed him. DeLeon's response to this email did not address the content of NG's email.

37. NG ultimately spoke to a member of the HR staff about Complainant's conduct. He was told he could file a grievance but he decided not to do so.

Complaints about Sol Vista

38. In late 2007, anonymous complaints were called into the Colorado Governor's citizens hotline regarding several problems at Sol Vista. The nature of the

complaints indicated that Sol Vista staff were making the calls.

39. Following these calls, John Gomez, Director of the DYC, Al Estrada, Associate Director of DYC, and Ann Freeman, Southern Region Director for DYC, held a telephone conference to discuss the allegations.

40. On January 21, 2008, Gonzales called Freeman to report that a Sol Vista staff member had reported an incident involving sexual misconduct by Complainant (the January 14 incident). Gonzales indicated that he and DeLeon had thoroughly investigated the allegation, had deemed it to be horseplay, and had issued memoranda of understanding to Complainant and the two others present.

41. Following this report, Freeman conferred again with Estrada. They determined that it was appropriate to retain an outside investigative body to investigate all of the allegations regarding Sol Vista.

Mountain States Employers Council Investigation

42. Estrada retained Mountain States Employers Council (MSEC), which provides human resources services for employers, including consulting, legal services, training, and workplace investigations. Jody Luna was assigned to conduct the Sol Vista investigation.

43. Luna is an attorney with a long career. She has served as a magistrate, as a public defender, as a workplace investigator, and as a trainer in how to conduct workplace investigations.

44. Luna takes contemporaneous notes in first person as she interviews witnesses, resulting in a nearly verbatim account of the witness's statement. Immediately following the interview, she prints the statement, asks the witness to review and edit it, and to sign it.

45. After MSEC was retained, Freeman announced to the entire Sol Vista staff that if they had any concerns which should be covered in the investigation, they could contact Luna directly. Freeman gave the staff her contact information.

46. Luna was asked to investigate a series of grievances by one employee in particular, as well as several other allegations made by staff against each other and against the Sol Vista management.

47. During the course of her investigation, Luna received several complaints about Complainant regarding her management style and her sexual harassment of male staff.

48. JG's signed statement to Luna included the following: "I have personally

heard [Complainant] tell employees that she will write them up if they do not as directed. . . We have Group Life meetings monthly. At those meeting, Gay will say things like, "If I ever see anyone on the internet with a kid, I will write you up." Her tone is kind of condescending. She could just tell employees it is against policy instead."

49. JG also stated, "Gay has made me feel very uncomfortable several times. She touches my arm, or my leg, and she will say, 'Ooh, you look good in that shirt.' She will comment on my physique. Her tone when she makes these comments is clearly sexual. She has done this in front of Administration. I know that on occasion, in front of Ken [DeLeon], Gay has come up to me and squeezed my arm or my shoulder and said, 'Ooh, your arms look good in that shirt.' It makes me feel uncomfortable and disgusted. It has a sexual tone, but regardless of that, I don't like her putting her hands on me in any way."

50. JG continued, "I have not complained about this. I try to ignore it and have just made it clear I would not respond. I know she holds a lot of power in the facility, and I didn't want to make an enemy out of her, because I am fearful of retaliation. She also used to say things like, 'Here comes lunch,' when I approached. She would make comments like this every time she saw me. A former supervisor, DL, witnessed this. [Six employees and] Ken DeLeon and several others have witnessed her do this. She wasn't too shy about it. Gay stopped doing this once MG made his complaint."

51. JG described to Luna the time when Complainant followed him into the restroom. He also stated, "[MG] did tell me that she took things too far by unzipping his pants. He said nothing was done with it, and he felt they were going to sweep it under the rug like they do with everything involving Gay."

52. JG informed Luna, "People are fearful because since the day we opened, Gay has had a lot of authority. Technically, she was in a position that would have been beneath me. Yet she was given authority by Denesio, and seemed like an Assistant Director. While she was in that role, she attempted to write me up. She said, 'Denesio says I am going to have to present you with a memo stating you didn't do as directed.' First, she never gave me that direction. Next, it seemed ridiculous that she would attempt to discipline me when she didn't have the authority." Ultimately, he said, no action was taken against him.

53. Luna also interviewed DeLeon. DeLeon confirmed that Vasquez had informed DeLeon that JG had complained about Complainant's inappropriate behavior at work. DeLeon's signed statement acknowledges, "[Vasquez] also told me that JG told him that Gay has made him uncomfortable in the way she puts her hands on his shoulders." DeLeon confirmed that he never investigated JG's complaint.

54. Luna also investigated the allegation that Complainant had patted DL on the buttocks. DL's signed statement confirmed that it occurred in the summer of 2007, in front of Director Gonzales and Baca. Vasquez also confirmed that DL had reported it to him

personally.

55. Complainant's signed statement for the MSEC investigation included the following statements: "I have told [JG] he has nice muscles. I might have touched his arm. He works out a lot and it is very evident. Others do this to him as well. I have not said anything like this in about a year." She denied ever calling him "lunch" and stated that other staff had done so.

56. Complainant also stated, "And one time I was with Cathy Baca and we were verbally horseplaying with MG. Some things were said that were sexually inappropriate. I don't remember what we said. I touched his clothes. He had something on his pants; I thought it was a loose string. I didn't see it was his zipper. I grabbed it. It was a string that may have been attached to zipper. I think it may have been his zipper. At the time I didn't realize it was his zipper. I let it go and we started laughing. Later, Ken called me and asked me about it, and I told him the behavior was not appropriate and that I should not have even [been] engaging in horseplay. I was written up and I took full accountability. We were all held equally accountable."

57. Complainant's signed statement for MSEC also states, "I have not patted any male staff on the butt. I have never followed any male staff into the restroom. I have not made comments to staff with sexual innuendo. I have not said, "Oh, can you take care of me, too?" to a male staff that resolved a situation. I never made a comment to DL saying, 'I know brothers are packing,' referring to penises. I would question why no one has ever reported these incidents instead of reporting them now."

58. Complainant also stated to Luna, "[NG] had a scratch on his neck, and I did ask him if [it] was a hickey. We all laughed about this. I never alleged it was from Dana. I don't know why [NG] is saying these things, or why a lot of staff are saying the things they are saying."

59. Complainant also stated, "I have never threatened to write staff up. I do everything in my power to not write them up. . . I see that it could be perceived that I address issues I don't need to address, or that I exercise authority I don't have. The other staff doesn't understand that I need to keep Administration informed of the things that are going on in the facility. My roles were separate from the other CYSO II's because they are not coordinators and weren't assigned quality assurance."

60. Luna interviewed approximately 30 Sol Vista staff. She also collected relevant documents. Once she had completed her interviews, she read all of the witness statements and documents. Then, she reviewed the information by listing the allegation, the supporting information, the refuting information, and analyzed the evidence, including the credibility of witnesses. She completed her report with conclusions as to whether the allegations were supported by a preponderance of evidence. Luna attached the signed interview statements to the report.

61. Luna's report totaled nearly eighty pages. She concluded that Complainant's management style was perceived as threatening to some staff, that she engaged in inappropriate sexual innuendo with male staff, that she had unzipped MG's pants, that she had touched and made inappropriate comments about JG's body, that she had followed JG into the restroom, and that she had patted DL on the buttocks.

62. Freeman read the report and all signed statements by the witnesses interviewed. Freeman has spent thirty-five years in the field of youth corrections, twenty-five of those at DYC. She is a member of the Sex Offender Management Board and develops standards governing sex offenders in the state of Colorado. She has served as an expert witness in many courts on the issue of juvenile and adult sex offender conduct.

63. Freeman discussed the report with Estrada and Gomez. She advised them that she was concerned enough about the allegations regarding Complainant that she sought to schedule a pre-disciplinary meeting with her. They agreed.

Sexual Harassment Policy

64. Respondent's Sexual Harassment Policy, Policy 3.22, mandates that "Supervisors and administrators of the Division of Youth Corrections shall take prompt and appropriate action to address, correct and resolve sexual harassment in the workplace."

65. The Policy states in part:

> "While different kinds of comments or conduct may not be offensive to everyone, sexual harassment may occur when an individual finds the behavior and/or attitudes of another individual intimidating, hostile or offensive because of its sexual nature."
>
> "Examples of conduct and/or communication prohibited under the sexual harassment policy include, but are not limited to:
> Conduct that is discomforting or humiliating in nature that includes one or more of the following:
>
> 1. Comments of a sexual nature.
> 2. Sexually demeaning statements, questions, jokes, or anecdotes. . .
> 5. Unnecessary touching, patting, hugging or brushing against a person's body.
> 6. Remarks of a sexual nature about a person's body or clothing.
> 7. Remarks about sexual activity or speculations about sexual experiences.

Pre-Disciplinary Meeting

66. In early June, 2008, Freeman sent Complainant a letter noticing a pre-

disciplinary meeting. In the letter she indicated there was a possible need to administer corrective or disciplinary action based on behavior in violation of DYC's sexual harassment policy. Complainant signed for it on June 14, 2008.

67. During the week of June 17, 2008, Freeman met with Complainant's attorney.

68. On June 23, 2008, Complainant attended the pre-disciplinary meeting, having waived her right to have her attorney present. Freeman attended with Jim Nyland, an HR Specialist, as her representative.

69. At the outset of the meeting, Nyland read State Personnel Board Rules 6-10 (governing predisciplinary meetings), 6-11 (governing corrective actions), and 6-12 (governing disciplinary actions) to Complainant.

70. Freeman asked Complainant, "Did you unzip MG's trousers?" Complainant responded, "No."

71. Freeman asked Complainant if she had admitted in her signed statement for the MSEC investigation to having commented on Justin JG's physique and touched him. Complainant responded that she had made the comment on his physique "because he works out a lot. A lot of people do. They go to him for advice for eating habits, bodybuilding, weight lifting techniques. And the only time I touched him, I admitted in the interview, was on the bicep. I poked him because he was running around flexing, and I was not the only one. I didn't grab him in a sexual manner. I didn't hang on to his arm."

72. Freeman asked Complainant if she had followed JG into the restroom. Complainant denied having done it.

73. Freeman asked Complainant if she had slapped DL on the buttocks. Complainant denied it.

74. Freeman asked Complainant if she had made comments to male staff at Sol Vista with sexual innuendo. Complainant denied it.

75. Freeman asked Complainant if she believed that she was perceived as threatening by the Sol Vista staff. Complainant responded, "Yes." Freeman asked her to explain her answer. Complainant indicated that she learned through the questions asked by Luna that others at Sol Vista found her to be threatening, and that she had not been aware of this prior to the interview.

76. After Freeman indicated that she had asked all the questions she had, Complainant stated, "Is there any way I can find out who has alleged what?" Freeman repeated her questions regarding JG, MG, and DL, and asked Complainant if that answered her question about who had made the allegations against her. Complainant responded, "I guess. So is it JG and DL?" Complainant also stated that there were many

third party rumors at Sol Vista.

77. At the meeting, Complainant stated, "I did confront [JG] – a rumor had had it that, rumor went and got back to Ken that [JG] was saying that I made him feel uncomfortable at one time. I pulled JG aside immediately and asked had I ever said anything, done anything, touch and did anything, anything that made him feel uncomfortable. . . He said, 'Absolutely not, that he never said that – that that was a total lie and that whoever, if we ever found out who said that, he would tell them to their face that that was an absolute lie."

78. At the meeting, Complainant pointed out that she had never received any corrective or disciplinary action during her 12 or 13 year career with DYS.

79. Complainant requested a copy of the MSEC report at the meeting. Freeman responded that she would find out if that was permissible, indicating she did not know.

80. Complainant asked Freeman if anything had been learned about the workplace violence complaint she had filed. Freeman indicated that MSEC was not able to address that issue. Freeman asked what it concerned and whom Complainant had reported it to. Complainant stated that she had recently found feces in her mailbox, and had reported it to Scott Bowers.

81. At the close of the meeting, Complainant informed Freeman that she could not return to Sol Vista because she did not feel safe there. Freeman told Complainant that she had planned to take her off of administrative leave on that day. Nyland asked if Complainant had annual leave she could use, indicating he thought she was taking leave to attend her son's graduation. Complainant stated that she had more than the permitted limit of annual leave accrued, and confirmed that she was scheduled to be on annual leave that week.

82. Freeman asked Complainant what she was considering. Complainant indicated that she was interested in another facility. Nyland stated that nothing was available in the Southern Region where their facility was located, and that he had no control over the northern regions. He said it was up to Complainant and she may have to demote to find an open position.

83. Freeman stated that the decision was up to her and there was nothing she or Nyland could do about it. Nyland said that Complainant could network for a transfer, but if nothing should materialize, her job was at Sol Vista. Freeman and Nyland also told Complainant whom to contact regarding an extension on the annual leave she had requested.

84. Freeman did not provide a copy of the MSEC report to Complainant or her attorney, nor did she permit them to review the report at her office, prior to imposing disciplinary action.

85. Freeman was very concerned about the pattern of Complainant's use of her power at Sol Vista in a sexual, inappropriate manner. Freeman believed that if someone uses their power sexually against someone else only once, it indicates poor judgment. But when there is a pattern of conduct involving the use of power sexually against others, Freeman viewed this pattern to show purpose. In addition, Freeman believed that pattern behavior indicates a higher likelihood to repeat the behavior and to escalate the behavior over time.

86. Freeman concluded that Complainant violated Respondent's sexual harassment policy by making comments of a sexual nature, engaging in conduct that was sexually demeaning, making sexual jokes, and engaging in unnecessary touching and patting of male staff at Sol Vista.

87. The severity of the sexual harassment indicated to Freeman that termination was definitely an option. However, Freeman's review of Complainant's personnel file showed she had done a very good job as a CO I and II in a general sense, with the exception of in the role of supervisor. Freeman concluded that removing Complainant from the role of supervisor and from having authority over other staff would be best for all involved.

88. Freeman recommended to Estrada and Gomez that demotion to CO I was appropriate. They approved the decision.

89. Prior to issuing the disciplinary action letter, Freeman was informed that Complainant had requested a voluntary demotion transfer through HR, and an announcement had been sent to all division directors concerning the request. Freeman asked that the announcement be retracted because of the pendency of the disciplinary process.

90. Prior to issuing her decision, Freeman talked to Human Resources Director Mary Young about the allegations that staff were reporting to her. The allegations were identical to those found in the MSEC report.

91. Freeman concluded that misuse of authority in a sexual manner is evidence of failure to perform competently and willful misconduct.

92. On July 9, 2008, Freeman issued a letter to Complainant imposing a disciplinary demotion and a corrective action. The letter noted that the following facts led her to consider disciplinary action. On or about January 14, 2008, she unzipped MG's trousers at Sol Vista; the signed statements of MG, Baca, and Complainant for the MSEC investigation confirmed that she did so. Complainant had touched JG after making comments about his physique; JG and Complainant's statements for MSEC confirmed this. Complainant followed JG into the bathroom. Complainant patted DL on the buttocks; the signed statement of Daniel Vasquez corroborated this. Thirteen staff members, in signed

statements for MSEC, confirmed that Complainant had made "numerous comments described as sexual innuendo, behave[d] in a flirtatious manner and are 'touchy-feely' with male staff."

93. Freeman also noted that the MSEC investigator concluded it was more likely than not that Sol Vista staff perceived her managerial style as threatening and cannot safely report her conduct to administration.

94. In her letter, Freeman noted that at the pre-disciplinary meeting, Complainant had denied that she unzipped MG's trousers. Freeman stated, "however your signed statement to the Mountain States investigator indicates that you did know that you unzipped Mr. MG's trousers. In your statement to Mountain states you indicated that the behavior was unintentional." Freeman also noted that she had admitted to touching JG and making comments about his physique, but had denied most of the other allegations raised at the meeting.

95. At the close of the letter, Freeman issued a Corrective Action to Complainant, ordering her to attend a sexual harassment training no later than December 31, 2008. Complainant did not appeal the Corrective Action.

96. Freeman concluded that Complainant had failed to perform competently and had engaged in willful misconduct in violation of Policy 3.7, the Code of Ethics, and Policy 3.22, Sexual Harassment. She demoted Complainant from Correctional Officer III to Correctional Officer I, and transferred her to Lookout Mountain Youth Services Center. Freeman had conferred with the Director of Lookout Mountain and confirmed that the transfer would be satisfactory.

97. Freeman noted that Complainant's salary was being reduced only 15%, in recognition of her "years of experience and success in the role of CO I." The salary range for a CO I was $3273 – $4651; Complainant's salary was reduced from $5142 to $4371.

98. In the course of addressing the MSEC investigative report findings, Freeman moved DeLeon to a position away from Sol Vista.

99. Complainant timely appealed her demotion.

100. After the appeal was filed, Complainant obtained a copy of the MSEC investigative report through the discovery process, prior to hearing.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. § 24-50-101, *et seq.*,

Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 706. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

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

Respondent has proven the material facts underlying the disciplinary decision by a preponderance of evidence. Complainant unzipped MG's trousers. She repeatedly touched JG's body and made comments that were sexually suggestive to him as she did so. She followed JG into the restroom. She patted DL on the buttocks. She often made sexually suggestive comments to men at work, including stating, "Here comes lunch" to JG, and "Is that a hickey?" to NG. She joked to JG and DL that they should close the curtains and get crazy. Complainant's conduct constitutes a serious pattern of engaging in sexual harassment towards the male staff she worked with, in violation of the agency's sexual harassment policy. In addition, Complainant's manner of exerting the authority vested in her as Compliance Officer led the Sol Vista staff to fear potential reprisal if they filed formal complaints against her.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

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

Respondent's action was not arbitrary or capricious. When Freeman and the top managers of DYC determined that there were potentially serious problems at Sol Vista, they decided that the most professional and objective means of investigating the allegations was to retain an outside firm that specializes in workplace investigations. Luna proved to be professional, extraordinarily thorough, and objective. No evidence suggested that she was biased or failed to consider important information that would have been mitigating in nature. Further, Freeman assured that the investigation would encompass all potential concerns held by Sol Vista staff, because she provided them all with Luna's contact information.

Complainant argues that it was arbitrary and capricious for Freeman to rely so heavily on the MSEC investigation in reaching her decision. Under some circumstances, it could be arbitrary and capricious for an appointing authority to fail to conduct his or her own investigation. However, in this case, the opposite is true. Luna's credentials were impeccable: she is a workplace investigator by profession. Her 80-page report revealed that she left no stone unturned and that she weighed all conflicting and corroborating evidence available. It was reasonable for Freeman to rely so heavily on Luna's solid and unbiased work in this case.

C. Employee grievances under the sexual harassment policy are not a condition precedent to the discipline.

Complainant asserts that Respondent's sexual harassment policy required employees to report sexual harassment; therefore, it was a violation of the policy to discipline Complainant when none of her accusers utilized the agency's grievance process. However, Board Rule 8-5 states, "Use of the grievance process is not required prior to disciplining an employee based on sexual harassment." This Rule recognizes situations such as the present one, wherein employees are sufficiently intimidated by the alleged harasser to avoid filing a written grievance. Therefore, Complainant's argument fails.

D. Respondent violated Board Rule 6-10.

Complainant asserts that Respondent violated her due process rights under the 14th Amendment of the U.S. Constitution, and State Personnel Board Rule 6-10, 4 CCR 801, by refusing to provide her with a copy of the MSEC investigative report prior to imposing discipline.

Complainant, a certified state employee, had a property interest in her job at DYC. *Kinchen, supra*. Thus, she is entitled to due process before she can be deprived of that property interest. The minimum procedural due process requirements to terminate, or negatively impact, Complainant's property rights in continued employment is a matter of federal constitutional law. *University of Southern Colorado v. State Personnel Board,* 759 P.2d 865, 867 (Colo. App.1998), citing *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487 (1985). *Loudermill* addresses the issue of the pre-termination

process that must be afforded a public employee who can be discharged only for cause. *Id.* An essential principle of due process is that deprivation of such property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Id.* "Such hearing need not definitely resolve the propriety of the discharge but should be an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to serve as a basis for the discharge." *Id.*

The predisciplinary meeting in this case did provide for an initial check against a "mistaken decision," and it enabled Freeman to determine if there were reasonable grounds to demote Complainant. Therefore, the meeting comported with the minimum procedural due process requirements under *Loudermill, supra.*

However, when the state promulgates a regulation that imposes on governmental departments more stringent standards than are constitutionally required, due process of law requires those departments to adhere to those standards in disciplining employees. *Dept. of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984). Rule 6-10 requires, in part, "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision." The State Personnel Board's amendment to Rule 6-10, in which it added the requirement of disclosing the "source" of information, became effective on March 1, 2002. 4 CCR 801 (2002).

Respondent proffers no legal basis for its failure to disclose the sources of the information upon which it might discipline Complainant at the predisciplinary meeting. In addition to the incidents involving JG, MG, and DL, the demotion letter relied on the statements of "thirteen staff members" who relayed Complainant's "numerous comments described as sexual innuendo," and who described Complainant's behavior as "flirtatious" and "touchy-feely with male staff." At the predisciplinary meeting, Freeman did not disclose the identities of these thirteen staff members; nor did she quote the comments containing sexual innuendo Complainant was alleged to have made. Freeman merely asked Complainant, "Have you made comments to male staff at Sol Vista with Sexual innuendo?" Freeman's handling of this portion of the meeting violated Rule 6-10.

Rule 6-10 requires appointing authorities to identify the source, e.g., the identity, of the individuals who have provided the information upon which disciplinary action might be based. Without the identities of her accusers, a state employee is unable to assess the potential motives and address the credibility of those accusers in the predisciplinary meeting. Hence, Respondent violated Rule 6-10.

In order to obtain the source of the information upon which her demotion was based, Complainant had to file the appeal and engage in the discovery process. Only once she had the MSEC report was she able, at the evidentiary hearing, to attack the credibility of the sources of the information against her. Therefore, the Rule 6-10 violation was cured at

hearing.

Accordingly, Complainant is entitled to back pay from the date of her demotion until the last day of hearing on November 18, 2008. *Donahue, supra*. The demotion stands, however, because Respondent has proven that Complainant committed the acts upon which discipline was based. *Kinchen, supra*. Any further remedy would constitute a windfall to which Complainant is not entitled. *Donahue,* 690 P.2d at 250 (awarding back pay to restore the employee "to the position she would have been in if the flawed predisciplinary meeting had never occurred").

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

The disciplinary action imposed in this case was within the range of reasonable alternatives available to the appointing authority. The record demonstrates that Freeman believed that termination was an appropriate remedy in view of the seriousness of Complainant's misconduct; however, Complainant's long employment history with the Division, evincing a strong performance record in non-supervisory positions, served as mitigation. Freeman gave real weight to this employment history by deciding to reduce Complainant's monthly salary by 15%, instead of a far greater rate. This decision appropriately rewarded Complainant for her service as a line worker, while removing her from the supervisory role, which was critical in this situation.

F. Complainant is not entitled to an award of attorney fees and costs.

Complainant requests an award of attorney fees and costs. The Board's enabling act mandates an award of attorney fees and costs upon certain findings. Section 24-50-125.5, C.R.S. It states in part,

> "Upon final resolution of any proceeding related to the provisions of this article, if it is found that 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, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ." (Emphasis added.)

Respondent has prevailed in this case and there is no basis for an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's disciplinary action was not arbitrary or capricious;

3. Respondent violated Rule 6-10;

4. The discipline imposed was within the range of reasonable alternatives;

5. Complainant is not entitled to attorney fees and costs.

ORDER

Respondent's action is **affirmed, in part.** Complainant's demotion stands. However, Respondent shall pay Complainant back pay from June 23, 2008 through November 18, 2008.

Dated this 13 day of January 2009.

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 14th day of Jan., 2009, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly, Esquire

[redacted]

and in the interagency mail, to:

Eric Freund
Kathryne Gwinn

[redacted]

[redacted]

Andrea C. Woods