STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010B027**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN VIDOR,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on April 27, 28, and 29, and May 4, 2010, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case was commenced on the record on February 16, 2010. The record was closed on May 6, 2010, following the presentation of Closing Arguments. Assistant Attorneys General Brooke Meyer and Lacey Scott represented Respondent. Respondent's advisory witness was Barry Pardus, Director of the Division of Adult Parole, Community Corrections and Youth Offender Services (the Division), Colorado Department of Corrections (DOC). Tamara Wayland and Dayna Dowdy, of Frank & Finger, P.C., represented Complainant.

MATTERS APPEALED

Complainant, John Vidor (Complainant or Vidor) appeals his disciplinary termination of employment by Respondent. He asserts that the termination violated the Colorado State Employee Protection Act (whistleblower act), and the Colorado Anti-Discrimination Act.

For the reasons set forth below, Respondent's termination action is **affirmed, and Complainant is awarded back pay from the last day of hearing, May 4, 2010, to the date of termination, and attorney fees and costs.**

ISSUES

1. Whether Complainant committed the actions upon which the disciplinary action was based;

2. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

3. Whether Respondent's action was within the range of reasonable alternatives;

4. Whether Respondent violated the whistleblower act;

5. Whether Respondent violated the Colorado Anti-Discrimination Act;

6. Whether Respondent properly delegated appointing authority to impose the disciplinary action; and

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

FINDINGS OF FACT

General Background

1. Complainant was a certified General Professional (GP) III, Contract Administrator (CA), for Respondent at the time of his termination in August 2009.

2. Complainant was born and raised in Romania. He is of Hungarian descent and grew up speaking both Hungarian and Romanian. He received a degree in engineering with a focus on mathematics, and worked as an engineer prior to moving to the United States at the age of thirty-five. At the time of hearing Complainant was in his mid-seventies.

3. When Complainant arrived in the United States in 1985, he spoke no English. He learned to speak and write English over the course of the next several years, and took business, accounting, and other classes, at Emily Griffith Opportunity School and Barnes Business College in Denver. During this time, he held several positions, including as a mechanical designer at one firm, and as an engineer performing technical writing at another. Complainant speaks English with a heavy accent.

4. In 1997, Complainant was hired as a temporary Contracts Administrator (CA) trainee at in the Division. Roberta Monchak, Assistant Director of the Division, hired Complainant because he had had high math skills, could draft complex spreadsheets, and had received education in contracts.

5. The Division has highly variable populations who receive its services, because the number of offenders receiving residential and non-residential supervisory services in the community at any given time is dependent on multiple factors (judicial orders, community corrections board decisions, parole board decisions, etc.). This variability makes it difficult to track Division resources and expenditures on a month-to-month basis. Approximately 11% of the DOC population is in Community Corrections programs at any given time.

6. Ms. Monchak directed Complainant to create several spreadsheets designed to track Division services and budget line items. Once he created the spreadsheets, every month he entered data on the different prison populations in the community receiving Division services. The spreadsheets in turn generated new projections of how much money Division managers would have available to spend on programs.

7. After six months in the temporary position, Ms. Monchak hired Complainant into an entry-level CA position. She sent Complainant to all available training in contract drafting.

8. In 2002, Ms. Monchak promoted Complainant to a GP III CA position. She drafted Complainant's Position Description Questionnaire (PDQ), executed in November 2002, which divides his position into four equal parts as follows.

A. Contracting. Serves as CA for the Division and must be familiar with services provided in all programs; drafts specialized contracts by using Colorado Contracts Manual and DOC Administrative Regulations (AR's) governing personal and professional services contracts and other AR's; applies business law principles, corporate/private business accounting methods and technical writing skills to contract writing; contacts outside public and private agencies for information gathering and technical documentation for contracts; compares and reviews RFP's (requests for proposal) versus contracts for length of contracts, service descriptions, and rate limits; responsible for contract amount allocations and reallocations, contract amendments, and option letter approvals, in accordance with appropriations by legislature.

B. Contract Utilization Rate. Responsible for gathering, grouping, checking, coding, and approving monthly contracts expenses from DOC vendors for the Divisions; develops spread sheets for all contract appropriations to track allocated utilization rate versus actual projected rate on each individual contract in correlation with the appropriation budgets of each program; issues monthly contract utilization reports for all five programs for Management Team.

C. Cash Funds. Manages the cash funds for offenders; monitors expenditures, group expenditures by appropriation accounts, generates bank reconciliation statements for the DOC accounting office, and instructs DOC personnel on handling emergency cash allocation issues; issues quarterly cash funding expenditure reports by region.

D. General Budgetary Issues. Designs and generates monthly utilization reports of services for Management Team to indicate allocated caseload versus actual participation of offenders in the programs; works with Assistant Director of Administration for the Division to analyze allocated budgets; analyzes and evaluates Division budgetary standing and makes recommendations on solving budgetary issues in emergencies or crises; verifies caseload targets with Division researcher.

9. Complainant monitored an average of 75 to 100 contracts per year for the Division throughout his tenure.

The Contracts Manual

10. In the early 1990's the State Controller's office, in conjunction with members of the Attorney General's office and the CA's, wrote a State Contracting Manual ("contracts manual"). The manual contains the Controller's policies and gives the CA's guidance and direction on the entire contracting process, including vendor selection, procurement, drafting, terms, accurate signatures, revisions, contract monitoring, and termination of contracts.

11. The contracts manual contains form provisions for different types of contracts and complete sample contracts. Use of these forms creates standardization of contracts among departments and helps smaller agencies without staff contract expertise.

12. All CA's are required and expected to use the contracts manual to inform and guide their work.

Contract Drafting Under Ms. Monchak's Supervision

13. Most of the contracts written by Complainant consisted primarily of boilerplate language, with the exception of the Statement of Work, or SOW. The SOW is the heart of the contract because it describes exactly who, what, where, when, why, and how much work is going to be performed by the vendor for the State of Colorado.

14. Ms. Monchak considered drafting of the SOW to be a program manager job and did not expect Complainant to draft this portion of the contracts. Drafting of the SOW requires the author to understand the obligations of the parties to the contract. Much of the language in the SOW is taken from the proposal submitted by the vendor to the Division.

15. It was Ms. Monchak's customary practice to ask program personnel to draft the portions of contracts describing new services to be provided, because they had the necessary substantive knowledge. In those cases, Ms. Monchak oversaw the contract drafting and finalization process. If a contract did not involve new information, Complainant was responsible for all drafting.

16. Ms. Monchak expected Complainant to accurately identify the vendor's correct legal name for inclusion in the contract.

17. Each contract must have a risk assessment form filled out to assess its potential liability to the state. Ms. Monchak filled out these forms by obtaining necessary information directly from field staff.

18. Ms. Monchak rated Complainant at the Commendable level on his annual performance evaluations.

19. Ms. Monchak retired from state employment in early 2007.

20. In April 2007, Complainant received a Commendable overall performance rating on his 2006/2007 evaluation, with Commendable ratings in every category. Division Director Jeaneene Miller and Deputy Director Brian Gomez signed his evaluation.

End of Year

21. The "end of year" period, roughly March through July, is an extremely busy time for state managers and anyone involved in government budgeting issues. The state's fiscal year ends on June 30. The Colorado Legislature's Joint Budget Committee requires spreadsheets for the next fiscal year from all managers in March of every year. CA's must assemble accurate information on what contracts have unspent allocated funds in order to assure that all required funding is spent by June 30. Complainant was intimately involved in the year-end process and it was his busiest time of year, often requiring that he work after normal business hours.

DOC Contract Unit and Keith Nordell

22. The office of the DOC Controller has a Contracts Unit. At all times relevant, Keith Nordell, an attorney, was the Contracts Officer with oversight over the Unit. Mr. Nordell directly supervises four CA's, writes contracts, provides legal advice on contract matters, reviews all contracts submitted by all CA's in DOC, and gives final approval to all contracts executed by DOC. Mr. Nordell reports directly to Dennis Diaz, DOC Controller.

23. Complainant is the only CA in the Division. He does not report to Mr. Nordell, and Mr. Nordell has no direct authority over Complainant. However, because Mr. Nordell is the chief contracts attorney for DOC, Mr. Nordell reviews and gives final approval to every contract drafted by Complainant.

24. Mr. Nordell's responsibility in reviewing contracts sent to him by the CA's, including Complainant, was to determine the legal sufficiency and completeness of the contract; to confirm that correct provisions and forms were used; to assure that the meaning of the contract was clear to all parties; to confirm that the correct documents were attached; and to identify typographical and grammatical errors.

25. Mr. Nordell had the most contact with Complainant during the end-of-year period of April through July. Other times of year their contact was sporadic.

26. Mr. Nordell often found typographical, grammatical, and factual errors in the contracts Complainant sent to him. For example, on June 1, 2003, Mr. Nordell returned three separate contracts to Complainant because Complainant had not correctly identified whether the vendor was a corporation or an LLC (limited liability corporation). The legal status of the business entity affects who can sign contracts on behalf of the

entity. Complainant could have obtained the appropriate legal status of the vendor from the Secretary of State's corporations website. In addition, on one contract, the vendor had made a handwritten change to an attachment, which was not flagged for DOC's signature. According to the contracts manual, a handwritten change is a counteroffer to the terms of the contract and it had to be initialed to be accepted.

27. On November 30, 2006, Mr. Nordell emailed Ms. Monchak concerning the SOW in a contract being insufficient in several ways. First, the SOW did not contain several important provisions from the vendor's contract proposal; second, the contract did not contain an updated "Special Provisions" section in the contract. In mid-October 2006, Mr. Nordell had sent Complainant an updated version of the Special Provisions.

28. Mr. Nordell complained about the errors to Ms. Monchak. He found that she usually did nothing about his complaints.

Mr. Pardus

29. In 2007, Mr. Barry Pardus was promoted from the position of Assistant Director of Clinical Services to Assistant Director of Administration and Finance at the Division. He oversees several functions, including but not limited to information technology, contracting, human resources, planning and reporting, program evaluation and auditing, business management, and all mental health and offender monitoring services. Mr. Pardus reports to Mr. Gomez.

30. When Mr. Pardus started in this position he directly supervised Complainant and had daily contact with him.

31. Complainant made Mr. Pardus aware that he felt he was overloaded with work and needed assistance. Mr. Pardus informed him that no relief was available.

October 2007 Satisfactory Mid-Year Evaluation

32. Mr. Pardus spoke with Mr. Nordell in October 2007 prior to giving Complainant his mid-year evaluation. Mr. Nordell reported that Complainant was congenial to work with and responds in a timely fashion to correspondence. Mr. Nordell stated that Complainant sends him documents containing spelling, grammatical and contract language errors that are obvious and should have been caught. He also stated that when he points out an error in a paragraph, Complainant would often reply he had not read that section. In addition, Complainant sent revised documents back to Mr. Nordell with uncorrected errors.

33. Mr. Nordell gave one specific example of a contract with which Complainant struggled, indicating Complainant did not know how to write the contract despite his assistance. To help out, Mr. Nordell arranged for a peer to redline the contract. Complainant ignored the changes and submitted a contract to Mr. Nordell with minor revisions. Mr. Nordell arranged a meeting with Complainant and the staff member who

redlined the contract; at the meeting, Complainant admitted he had ignored the redlined changes.

34. Mr. Nordell also indicated that Complainant did not use spell check and submitted contracts to him for review with expired contract provisions. He recommended that Mr. Pardus require Complainant to attend CCIT (Colorado Contract Improvement Team) meetings that were held quarterly. Complainant had attended them until Ms. Monchak retired.

35. CCIT is a group of state employees who discuss contract policies and issues, consisting of CA's, members of the Attorney General's office, and staff from the Controller's office.

36. On October 30, 2007, Mr. Pardus gave Complainant a mid-year Level 2, Satisfactory, evaluation. He rated Complainant Level 2 in every category except Customer Service, which was a Level 1. Mr. Pardus noted that while Complainant responds to issues promptly, "Many of his work products, contracts, COFRS requisitions and other documents do not meet his supervisor's expectations when he presents them for his supervisor's review. Spelling, grammatical and contract language errors should not be present in these documents for an employee who is at a GP III and been in the position for a number of years. John will continue to be encouraged to work with Keith Nordell and take additional classes regarding Colorado Contract Writing, Planning, and Processing and continue to implement the Contract Management Plan Checklist and Close-out Report in the executed contract files."

37. Complainant refused to sign this evaluation.

Working Relationship with Ms. Montanez

38. In March 2008, Mr. Pardus hired Sandra Montanez to be a GP IV Work Leader for the Division's Administrative/Financial Services Work Unit. Her position title is Financial and Administrative Services Manager for the Division. The Unit included Complainant, a Program Assistant I (Approved Treatment Provider [APT] Coordinator, and a General Professional II (Planning and Reporting Analyst). Shortly after she started, Mr. Pardus discussed Complainant's performance issues with Ms. Montanez.

39. Ms. Montanez's PDQ contained four duty statements. One half of her job was to direct and control assignment of tasks, monitor progress and work flow, check the work product, schedule work, and establish work standards for unit staff.

40. The remainder of Ms. Montanez's position was dedicated to oversight, compliance, and procedures within the Division. Twenty percent of her job was to coordinate and analyze the Division's strategic and operating/management plans; develop monthly and quarterly reports identifying the Division's accomplishments, opportunities and recommended actions; guide the Division's research and special projects; and guide the direction of "process improvement opportunities within the

division's budget process." Another twenty percent of Ms. Montanez's duties were to conduct annual reviews of the Division's administrative regulations; review and recommend Division policies, rules, handbooks, brochures, etc., to assure compliance with laws, regulations, and accreditation standards; advise management on the budgeting process; develop guidelines to implement auditing standards of the ATP program, including checklists and inspection sheets; and assure compliance with contracts by reviewing professional standards. The last ten percent of Ms. Montanez's position was to work with Complainant and the procurement and purchasing office to improve the Division's compliance with state fiscal rules governing procurement, contracting, interagency agreements, and memos of understanding.

41. During the first few weeks and months on the job, Ms. Montanez had long meetings with the three staff members she oversaw, learning their jobs. She spent a lot of time with Complainant. This was difficult and stressful for Complainant because her arrival coincided with the end-of-year contract season. Complainant felt that he had to repeat things several times due to the complexity of the funding lines, billing issues, and different rates charged to clients.

42. Complainant found the numerous meetings with Ms. Montanez to be unduly demanding of his time, and an imposition.

43. Complainant and Ms. Montanez did not get off on a good footing and they did not have a smooth working relationship.

New Duties

Ms. Montanez asked Complainant to perform some tasks that he had not previously performed. One was to draft the risk assessment document for each state contract; Mr. Pardus made the suggestion that Complainant assume this duty. Ms. Montanez also expected Complainant to draft the entire SOW himself for all contracts.

44. Complainant was not pleased about Ms. Montanez's assignment of new tasks.

April 2008 Satisfactory Annual Evaluation

45. In April 2008, Complainant received a Level 2 overall rating for the period April 2007 through March 2008, with Level 2's in every category. Barry Pardus and Brian Gomez signed the evaluation. In the narrative section, Mr. Pardus made several positive comments regarding Complainant's professionalism, accountability and organizational commitment, strong knowledge of the contracting process, maintaining pleasant relationships with team members, and communication with other management staff. Mr. Pardus believed that Complainant was working hard and was improving in the areas noted in his interim evaluation. He therefore noted that at his mid-year review, "many of his work products were not meeting his supervisor's expectations. John has worked hard and is improving in this area."

April 2008 Performance Plan

46. In April 2008, Mr. Pardus directed Ms. Montanez to draft a Performance Plan for Complainant. The Plan required that he present all contract templates to his supervisor only after he assured they were "grammatically correct and complete in content." It also required him to create a "contracts checklist" to ensure consistency with contract templates, to attend CCIT meetings and special training opportunities, to provide his supervisor with training highlights, and to seek professional development training opportunities.

47. The Performance Plan also required that by the 15th of every month, he provide a monthly report on contract appropriations to track allocated utilization rate versus actual projected rate on every contract.

48. At the meeting where this Performance Plan was presented to him, Complainant objected to the contracts checklist. After some discussion, Ms. Montanez eliminated this requirement. He also objected to the language requiring that contracts be grammatically correct, asking what she meant by that statement.

49. On April 18, 2008, Mr. Nordell found a problem with a contract and brought it to Complainant's attention. The vendor had made a handwritten change to the contract by writing, "No," in the margin next to a provision on all four copies of a contract that Complainant had sent it to execute. Complainant had not flagged it for signature.

50. Complainant responded by email, stating that the vendor made the note because it did not provide that type of service, and that they had agreed to swap the pages. Mr. Nordell gave Complainant the option of swapping out the pages with modified language or including a cover letter alerting DOC to initial the change. After Complainant swapped out the pages and returned the contract to Mr. Nordell, Mr. Nordell discovered that Complainant had identified the Exhibits incorrectly in the table of contents. Complainant apologized and thanked Mr. Nordell for his help.

51. Mr. Nordell asked Ms. Montanez to have someone proofread Complainant's contracts before they were sent to him.

52. It was Ms. Montanez's standard procedure to review every contract drafted by Complainant before it was sent to Mr. Nordell for final review and approval. She found grammatical and drafting errors and provided revisions to Complainant. Sometimes, contracts were also sent to Mr. Pardus for his clearance as well.

Ms. Montanez's Log Notes on Complainant

53. On May 22, 2008, Ms. Montanez started a daily log on Complainant. The first entry is on May 22, 2008. There are five entries in May 2008, one entry in June 2008, four entries in July 2008, four in August 2008, five in September 2008, etc. Ms.

Montanez often used this log to record conversations they had during meetings, and to track his performance on assigned tasks.

54. After year-end in 2008, Ms. Miller came to the Division Business Manager's office and commended Complainant on his handling of the closing of the budget for that fiscal year at the Division.

ATP Agreement Letters; Disputes with Ms. Montanez

55. In August 2008, the Division decided to issue contracts to former ATP Providers who had not responded to a Request for Proposals (RFP). Ms. Montanez ordered Complainant to prepare Letter of Agreements for the five vendors. Complainant informed Ms. Montanez that these documents were not legally appropriate because of the complexity of services and legal issues involved. She responded by becoming upset with him and ordered him to draft and issue the Agreement Letters anyway. Complainant complied with her directive, obtained the vendor signatures, and forwarded them to Mr. Nordell for final review and execution.

56. Upon review of the Agreement Letters, Mr. Nordell agreed that they were not appropriate for this task, and stated that contracts were necessary.

57. Complainant performed unnecessary work on the Agreement Letters and felt that Ms. Montanez was unconcerned about his having to perform extra work for naught. When she sent Complainant the email ordering him to draft the contracts with the effective date of October 1, 2008, he became angry and felt she was unsympathetic with the fact he had fallen behind on his work due to her error. He also resented that he had to explain to the vendors they had to sign a second document.

September 2008 Meeting

58. One of Complainant's duties was to check monthly to assure that each vendor's insurance certificate was current. All state contracts require the vendors to assure a current certificate is filed with the state. His customary practice was to check the dates monthly when he recorded the vendor's monthly expenditures on the contracts. If he noticed a certificate was about to expire he called his contact person at the company to request a new one.

59. On August 7, 2008, Ms. Montanez emailed Complainant to ask when Protocol's insurance certificate expired. Complainant responded it had expired on August 4, 2008, and that he had requested an updated one on August 6, 2008.

60. Ms. Montanez responded by asking what his position's procedure was for tracking the insurance expiration dates. She also asked whether any of the Division's 76 contracts have insurance expiring in August or the next few months. Complainant responded by describing his system and providing her with a list.

61. On August 20, 2008, Ms. Montanez sent an a GroupWise email invitation to Complainant to meet on September 2, 2008 regarding, "Wrap-Around Services contract template." Complainant accepted the invitation on August 20, 2008. Complainant did not obtain a copy of or review the contract proposal prior to the meeting.

62. On September 2, 2008, when Ms. Montanez mentioned the meeting that morning, it became clear that he had forgotten the meeting and/or was not prepared for the meeting. She postponed the meeting to September 5, recorded this in her log notes, and then prepared a "feedback" memo to Complainant reviewing his failure to recall and be prepared for the meeting that day. It concluded, "It is not acceptable for you to be unaware and unprepared for an important meeting directly related to your job duties for which you had almost two weeks to prepare." Ms. Montanez copied Mr. Pardus on her memo.

63. Later that day, Ms. Montanez met with Complainant to review the feedback memo. When she gave him a copy of it, he said he did not agree with it, would dispute it, and said he saw that this was how the "game was going to be played."

64. On September 3, 2008, Complainant sent a memo to Mr. Pardus rebutting the assertions made by Ms. Montanez in her memo. He copied Ms. Montanez and Mr. Nordell. He denied having forgotten about the meeting and stated that he had not been aware she expected him to present a contract draft on September 2, and that after reviewing the proposal, he had identified several complex programmatic issues that would need to be addressed before they met. He asked Mr. Pardus to direct Ms. Montanez to "be careful with her statements regarding my work ethic. I've been doing this job for almost 11 years, and I always strived for the success of this Division. During these 11 years, we successfully implemented hundreds of service contracts that have had serious impact on our Division's functionality."

65. On September 3, 2008, Complainant said he felt badly about what had happened the day before.

66. On September 3, 2008, Mr. Pardus responded to Complainant's memo with a memo, copying Mr. Gomez and Ms. Montanez. Mr. Pardus noted that Complainant had accepted the meeting on August 20 through GroupWise, and stated that in the future, when Complainant accepts an invitation for a meeting he will clarify his role and responsibilities for the meeting and come prepared with deliverables.

67. On September 22, 2008, the Accounts Payable staff supervisor called Ms. Montanez to inform her that the staff were frustrated with the format of invoices they received monthly from Complainant, and with the difficulty in discussing it with Complainant. They asked to have the contract number listed on the bill. In October 2008, Ms. Montanez met with Complainant about this issue and described ways to implement their suggestions. Complainant became angry during the meeting, so Ms. Montanez left. He was still frustrated with Ms. Montanez about her mistake on the

Agreement Letter issue. When she returned to his office later that day, Complainant stated that he would do what she and Accounts Payable had requested.

October 2008 Mid-Year Needs Improvement Evaluation

68. In October 2008, Complainant received a mid-year performance rating of Level One, Needs Improvement, for the period April 1 through September 30, 2008. He received two Level One's, in Accountability/Organizational Commitment and Customer Service. He received three Level Two's, in Job Knowledge, Communication, and Interpersonal Skills. Mr. Pardus gave greater weight to the first two categories.

69. The Accountability/Organizational Commitment narrative noted that Complainant appears committed to the organization and is willing to work over forty hours when needed. It faulted him for not keeping the contract files organized, not including all pertinent documentation, such as communications with contractors, and not marking the file cabinets containing the contract files. It also faulted him for not assuring that current insurance certificates were on file.

70. One of Complainant's duties was to maintain a file for each of the contracts he oversaw. The official contract files which are audited by the state Auditor's Office are kept in the DOC Controller's office. During the performance period, the Manager of Purchasing had requested a copy of a signed contract from Complainant's contract file and he was unable to locate a copy of it. The Customer Service Section of the mid-year evaluation faulted Complainant for this incident.

71. The evaluation also noted that Complainant had not been prepared for a scheduled meeting with his supervisor, and that he had been counseled on spelling, grammatical, and contract language errors. It further noted, "John sends requests for approval to his supervisor and work leader without providing pertinent information/data that supports his recommendation (e.g. increasing funding lines) or he waits for instructions on what the next steps are."

October 2008 Corrective Action and Performance Improvement Plan

72. In October 2008, Respondent issued a Corrective Action and Performance Improvement Plan (PIP) to Complainant in conjunction with his mid-year review, specifying seven areas of unacceptable performance and specific performance changes to be made, with deadlines. It contained the items listed in his interim evaluation, and provided deadlines for compliance. Complainant was given until April 30, 2009 to submit contract documents and other communications "free of spelling, grammatical and contract language errors" and to ensure all contract files contained current insurance certificates.

73. Mr. Pardus met with Complainant to present the PIP. Complainant agreed to its terms and did not appeal the Corrective Action.

Contract Increase Request

74. On October 14, 2008, Complainant emailed Ms. Montanez stating, "We need to increase immediately" a contract amount because the September invoice was higher than projected. He suggested a $50,000 increase and requested authorization.

75. Ms. Montanez asked Complainant for current funding level and projected amount over budget for the contract. Complainant responded the same day that they started with $8,000 for the entire fiscal year and the July billing was for $400, August was for $4700, and September was for $10,400. He stated the company was the only polygraph service in Region 4.

76. Ms. Montanez responded by asking if the services were being used appropriately and how do we know that. Complainant responded, "They are. In many instances they are charging us $200 instead of $250" per service. Ms. Montanez thanked him for the good information but "just to say we need to increase the contract is not sufficient." She needed the business case to justify the increase - what was the utilization rate in the geographic area last year, and why did it need to increase so dramatically.

77. Complainant responded with totals charged by all providers in the region in the last year, and stated that if services are going to be at $10,000 a month they would need to increase the contract by at last $100,000.

78. Ms. Montanez responded that Complainant needed to obtain more information to find out what is going on and that they could not just increase the contract without looking at the bigger picture.

79. On December 17, 2008, Ms. Montanez informed Complainant that in response to vendors failing to maintain updated insurance certificates, she sought to modify the system of tracking them with Complainant's input. Part of the new procedure required him to send certified letters to vendors. He felt that this formal approach would undermine the good relationships he had with vendors. Complainant became upset and stated that Ms. Montanez was trying to change everything he worked on. She responded that it was a draft procedure. He stated that it was not part of his job to monitor vendors' insurance certificates and vowed to go to Ms. Miller or Mr. Zavaras concerning the issue. Later the same day, Complainant came to Ms. Montanez' office and apologized to Ms. Montanez for his behavior, stated he was embarrassed for how he had acted and had not meant to hurt her feelings, and said there was a lot going on for him at that time.

80. Complainant's wife was in a serious car accident in December 2008, which disabled her. She was no longer able to run her small business, which left Complainant the sole earner in the family. Complainant took her to medical appointments for physical and mental issues. It was a stressful time for him.

81. On February 5, 2009, Complainant violated a directive by Ms. Montanez by sending an email concerning a budget transfer of funds to a budget staffer, copying Mr. Pardus and the Division budget director, and not copying Ms. Montanez. She had directed Complainant to send her his recommendation first; then, after her review and approval, he would send out the final email reflecting their decision. Ms. Montanez informed Mr. Pardus of this fact in an email.

February 2009 Meeting

82. On February 23, 2009, Ms. Montanez emailed Complainant upon review of a contract, correctly noting that the year should have been 2009 instead of 2013. Complainant's first response was that 2013 was correct. He later changed it to 2009.

83. In February 2009, Ms. Montanez and Complainant had a meeting to discuss a contract. At the meeting, it became clear to Complainant that Ms. Montanez had not properly calculated the number of days for a contract, reaching the wrong allocation amount. The correct number of days was 122; she had counted 125. In the course of trying to explain the correct calculation, Complainant showed her the days on the calendar, counting the days. As he did so he stated, "This is fourth grade stuff." Ms. Monchak was insulted and walked out of his office.

84. After this meeting, Complainant apologized many times, and felt that the relationship between them was further damaged.

Appropriation 056

85. All Community Corrections and Youth Offender Services programs are supported through general funds appropriated by the General Assembly in the Long Bill. Appropriation 056 is the code for Parole Contract Services within the Parole Program. Appropriation 056 is required by state statute to be utilized only for contract services within the Parole program. It may not be used for general operating expenses.

86. In March 2009, Mr. Pardus ordered Complainant not to use Appropriation 056 for Parole contract services and to use it for general operating expenses. Complainant objected that this was a violation of the Long Bill. They did not discuss the issue further.

87. Division staff indicated in several budgeting memos that the Controller had the authority to authorize use of Appropriation 056 for operating expenses.

88. Mr. Pardus did use part of Appropriation 056 funds for general operating expenses for the Division. The record does not indicate the date, the amount, or the source of the authority to do so.

April 2009 Corrective Action

89. On March 18, 2009, after a contract had been submitted to the State Controller for signature, Ms. Montanez received a call from the Controller informing her that the attached checklist was out of date. She informed Mr. Pardus of it, and Mr. Pardus emailed Complainant, "This is unacceptable and an embarrassment to our unit. Please review your processes and procedures to ensure that this does not happen again." Complainant responded, "Barry, This was the form that I found on the web side (sic). I loaded it down today before I completed. If Sandy new (sic) where could I locate, she should tell. Why we are a team I guess."

90. In March 2009, Complainant inquired via email of Ms. Montanez as to whether or not he should complete a certain task. She responded that the task was listed in his IPO's and it was his responsibility to follow up. He responded that it was not his responsibility. When Ms. Montanez visited his office to follow up, he stood up and raised his voice and was generally confrontational with her about the issue.

91. On March 31, 2009, Complainant sent an email to Mr. Pardus stating that Ms. Montanez was attacking him with many false accusations and assigning him new duties. He stated that she had sent him an email stating that it was his job to contact vendors regarding services. He had responded that this is Purchasing's job unless they ask him to do it, and "I don't think that she has the authority to assign me new duties."

92. Mr. Pardus did not follow up on this memo from Complainant and did not try to resolve the conflict between Ms. Montanez and Complainant.

93. Ms. Montanez was sufficiently concerned about the March incident that she wrote a memorandum to Mr. Pardus about it on April 7, 2009. The memo also included descriptions of Complainant's hostile response to directives in September, October, and December 2008.

94. In response to Ms. Montanez' memo, on April 10, 2009, Mr. Pardus issued a Corrective Action to Complainant, requiring him to attend Anger Management classes and then write a two-page paper on why it is important and how the class will impact his behavior at work. Complainant was ordered to comply with the Corrective Action by June 30, 2009.

95. Later in April 2009, Complainant sent an email to Mr. Pardus, Ms. Montanez, and Mr. Gomez, apologizing again for his behavior and promising to "make no mistakes and follow your instructions letter by letter." He stated that in December 2008 his wife, who is self-employed, had a bad traffic accident, was under physical and mental therapy, and her future potential to work was limited. He said they had spent their savings and he was under a high level of stress.

96. On April 17, 2009, Complainant filed a grievance of the Corrective Action, in which he presented detailed information about the Letter Agreement mistake made by

Ms. Montanez in September 2009 and how frustrating that experience was for him. He stated that the Corrective Action did not contain any of the mitigating information from Complainant's perspective. In addition, he noted that his primary care physician had conducted lab tests indicating metabolism problems that could provoke angry responses to work situations. He stated he was not by nature an angry person. He did not request any relief.

97. Complainant met with Mr. Pardus to discuss his grievance and did not pursue it further.

98. Complainant attended the four-week anger management course at CSEAP.

April 2009 Level 1 Needs Improvement Annual Evaluation

99. Mr. Pardus requested that Ms. Montanez provide him with written feedback on Complainant's work performance prior to performing his annual evaluation in April 2009. On April 6, 2009, Ms. Montanez gave him a one-page sheet that tracked seven performance objectives. She noted that Complainant's temperament vacillates, and while he could be pleasant to work, there were times when he found it difficult to be professional when he discussed differing viewpoints or refinement of existing procedures. Ms. Montanez stated that Complainant disregarded the chain of command and sent some emails without prior authorization, "even after he agreed not to send them until the team leader had reviewed them." Regarding contract administration, she noted that she often needed to request next steps on projects in order for Complainant to move forward on projects, and that "each contract that John prepared during this rating period required revisions." With regard to insurance certificates, she noted that Complainant often requested them from contracts a few days before or after their expiration dates.

100. On a positive note, Ms. Montanez stated that Complainant had attended all but one monthly CCIT meeting, he had completed two professional development courses in grammar and time management, and he had provided monthly contract expense summary spreadsheets reports each month.

101. On April 23, 2009, Mr. Pardus gave Complainant his annual performance evaluation at a Level 1, Needs Improvement level. Complainant received Level 1 ratings in Accountability/Organizational Commitment, Job Knowledge, Interpersonal Skills, and Customer Service; he received a Level 2 rating in Communication. The Job Knowledge rating was based on Complainant's failure to be proactive in his work. The Interpersonal Skills rating was due to his conduct giving rise to the Corrective Action. The Customer Service rating was due to the fact that each contract he prepared during the rating period "required revisions by either the work leader or Keith Nordell. John used an out-of-date 'Contracts checklist' with the Fremont County Jail Services contract that was submitted to the OSC on March 18, 2009. This not only made the unit look bad, but it also delayed the contract by a week. John has also intermittently submitted

Option Letters to the Accounting and/or Contracts Unit with inaccurate coding, incorrect vendor name, and incorrect contract numbers."

102. The evaluation noted that Complainant would be placed on a performance plan with monthly evaluations for ninety days.

April 2009 Corrective Action and PIP

103. The April 2009 Corrective Action and PIP required that Complainant complete the following by May 31, 2009: allow adequate lead time to ensure all insurance certificates were up to date prior to expiration and document those efforts; provide a list of action items in emails to supervisors, with supporting facts and documentation; and provide a standard list of items supporting his requests for approval of contract funding line increases or decreases. By June 30, 2009 he was required to attend the anger management program at CSEAP (Colorado State Employee Assistance Program).

2009 End of Year Projections

104. On April 2, 2009, Complainant provided his calculations of projected uncommitted amounts for various Appropriation line items in the Division's budget. After that date, he modified one line item from $169,451 to $95,117, and another line item from $128 to negative $1,518,416. On April 7, 2009, Ms. Montanez emailed Complainant in response to the modifications, requesting an update in the form of a "simple list."

105. Complainant responded that day with a modified projection. Ms. Montanez asked in response, "What caused the Division to go from $96 to $76,400 of uncommitted?" and whether it took into account journal vouchering (moving) expenses from one line item to another. Complainant responded that he had considered a journal voucher but they could cover it in another manner. He did not answer her question about what caused the dramatic increase in uncommitted funds. Kevin Johnston, Business Manager for the Division, was copied on these emails.

106. On April 8, 2008, Ms. Montanez also emailed Complainant about a conflict in two spreadsheets provided by Complainant. One listed uncommitted funds for Appropriation P68 at negative $1,518,416; the other listed $732.

May 2009 Assignments

107. On May 7, 2009, Ms. Montanez wrote Mr. Nordell an email detailing the items she found in reviewing an interagency agreement drafted by Complainant. She made a list containing ten items, detailing each problem.

108. On May 8, 2009, Mr. Nordell responded to Ms. Montanez, stating, "Sandy, Your review below is exactly what is needed for John's work before it leaves APCCY.

In the future, feel free to make revisions as you see fit directly to his drafts, and I do not require a run-down of what you found. I will continue to cc you on issues I see upon my review. Thanks, Keith."

109. During the last year of Complainant's employment, Ms. Montanez spent approximately 50% of her time supervising Complainant and editing his contracts prior to submission to Mr. Nordell.

110. On May 15, 2009, Mr. Pardus and Ms. Montanez met to discuss and prioritize Complainant's work projects and finalize a timeline. They determined that the following three projects were due on May 29, 2009: FY10 Contract Encumbrance Project; Rocky Mountain Offender Management Systems (RMOMS) Contract; and the Social Solutions Contract. Complainant completed the first task on time.

RMOMS Contract

111. At the direction of Mr. Pardus, Ms. Montanez assigned the RMOMS contract to Complainant to draft on May 21, 2009. However, at that time the contract had not yet been definitively awarded by the Division, because another vendor had appealed the decision to award it to RMOMS. Complainant felt that because the appeal had not been decided, and the contract had not been officially awarded, he should not be spending time during the extremely busy end-of-year period working on it.

112. RMOMS is the vendor responsible for administering the electronic monitoring of paroled inmates for the State of Colorado. The RMOMS contract is one of the largest and most technical contracts drafted by Complainant; its SOW is thirteen pages long.

113. Complainant had several discussions with Mr. Nordell and Ms. Montanez concerning the main components of the RMOMS contract in May 2009.

114. On June 22, 2009, Complainant sent his draft of the contract to Ms. Montanez for review. On June 24, 2009, Ms. Montanez sent Complainant a three-page Excel spreadsheet containing her detailed revisions, broken down by page, contract section, and detailed description of revision. All of the revisions were for the SOW. On June 24, 2009, Complainant made most of the revisions and then returned the revised contact to Ms. Montanez. Upon review, she made a second, modified list of revisions, which contained a few new items and four of the same revisions that Complainant had not made.

115. In mid-June 2009, Complainant sent the RMOMS final contract to Mr. Nordell to review, indicating he had used the model contract from the State Controller.

116. Mr. Nordell responded with some suggested changes. One of those was the recital for multi-year contracts, which Mr. Nordell had provided to Complainant in 2008.

Social Solutions Contract

117. Ms. Montanez also assigned Complainant the Social Solutions contract on May 21, 2009.

118. Program staff, not Complainant, allowed the Social Solutions contract to expire before a new one was executed on July 31, 2009. This resulted in a statutory violation because services may not be delivered without an executed contract in place. Ms. Montanez was aware that it was not Complainant who was responsible for the statutory violation.

30-Day Review for April 23 through May 31, 2009

119. The thirty-day review for April 23 through May 31, 2009 indicated that Complainant had completed the anger management program. However, the following ongoing problems were noted: he had not ensured that the Division's contract files contained a current insurance certificate; he had not clearly listed his recommendations and issues to be considered or provided sufficient supporting information in his communications to Ms. Montanez and Mr. Pardus; and he was reactive instead of proactive in keeping his projects moving forward, requiring that Ms. Montanez direct him on his tasks. Complainant had done a good job in generating a spreadsheet for ATP contract allocations; however, it contained "several formula errors that were significant." Lastly, he had provided monthly reports on contract appropriations to track allocated versus actual utilization rate on each individual contract; however, one bill was not booked in a timely manner "because of late billings John received." It is not clear whether this bill is related to Complainant's performance.

Contract Management System (CMS)

120. In 2008, the Colorado General Assembly passed legislation, SB 228, signed into law, requiring the creation of a Contract Management System (CMS) by the State Controller's office. CMS centralized all state contracts exceeding $100,000 in one place, required the tracking, monitoring, and evaluation of state-purchased services and products on the database, and permitted members of the public and policymakers to access the data. CMS is user-friendly; however, its implementation required significant time inputting information into the system.

121. The CMS bill carried a fiscal note and the legislature appropriated four new positions to DOC for implementation of CMS. At least one of those positions was to be in the Division, because it handled 50% percent of all DOC contracts. According to the Joint Budget Committee calculations, each contract would require 48 hours of monitoring per contract annually. Complainant monitored an average of approximately 75 – 100 contracts annually for the Division.

122. CMS was required to be implemented on July 1, 2009. Therefore, all contracts effective on that date were required to contain a new standard provision stating that they were subject to CMS tracking. In addition, all contracts and amendments were required to have the CMS tracking number in the upper right corner. This new CMS number replaced the old contract numbers, known as "CLIN" numbers.

123. Due to the hiring freeze in effect in 2009, no new employees were hired at DOC to perform CMS work prior to July 2009.

124. In April 2009, the State Controller's office sent an email to Mr. Nordell and others announcing the training schedule for CMS. Mr. Nordell forwarded the email to Complainant and the other four CA's at DOC, stating, "Please respond directly to Brenda with your preferred schedule" for the training.

125. In late May 2009, Ms. Montanez reminded Complainant that he would be responsible for inputting data regarding Division contracts into CMS and that Mr. Nordell had sent the email on how to register for CMS training.

126. Ms. Montanez attended the CMS training in June 2009. Complainant did not attend.

127. Mr. Nordell attended the CMS training and began to implement it on July 1, 2009. One of his job duties was to monitor the entries in the Contract Unit to assure they were correct.

128. On July 1, 2009, Mr. Nordell forwarded to Complainant a copy of the email announcing the cessation of using CLIN numbers and the commencement of utilizing CMS numbers to track contracts.

129. On July 8, 2009, Mr. Nordell emailed Complainant to inform him that there were no new staff to perform CMS work, so his Division "will need to be handling its own contracts on the CMS site until further notice." Mr. Nordell provided Complainant with his CMS password, informed him how to log in, and noted that he was surprised to learn Complainant had not attended the training, but that perhaps Ms. Montanez could orient him.

130. Complainant did not attend the CMS training. He participated in the self-training exercises on the website.

131. On July 8, 2009, Ms. Montanez sent Mr. Pardus an email regarding Complainant's failure to attend the CMS training, stating that she and Mr. Nordell had "clearly communicated to John that his position was required one of the CMS training sessions. John's performance is unacceptable and will cause additional workload since I will now have to arrange training for him."

Additional End of Year Projections

132. On June 7, 2009, Complainant sent an email to the Accounts Payable (AP) office requesting that four bills be processed for payment. There were insufficient allocated funds by approximately $1,000.00 to pay one of the bills.

133. On June 9, 2009, Accounts Payable sent two emails to Complainant informing him there were insufficient allocated funds to pay two contract bills. Complainant responded the next day with emails directing AP to use part of the uncommitted balance of a line item to pay the bill.

134. On June 17, 2009, Ms. Montanez asked Complainant to provide her with an updated Budget Analysis by Appropriations (aka Contract Encumbrance) Spreadsheet for a program, so she could bring it to a management team meeting. This document is used by the management team to make programming decisions based on available allocated resources. He provided it to her. After reviewing the document, Ms. Montanez went to Complainant's office to ask clarifying questions. The questions prompted Complainant to discover several errors on the spreadsheet, which he corrected as they met. He then sent her the revised document.

135. On June 26, 2009, Complainant emailed Ms. Montanez and Mr. Johnston regarding "expected unspent budget." He listed eleven Appropriations with the amounts totaling $647,737.

136. Mr. Johnston responded to the email, forwarding it to others involved in the budgeting process, including Mr. Pardus. He stated, "These projections were provided only after speaking with John yesterday and questioning his projections. This has been an ongoing problem everyone involved has been trying to resolve. Parole Management are aware of the problems with the figures we are being provided. They are working on resolving these issues. We are having a meeting with the Management Team today to review budgets and talk about these issues."

137. On June 29, 2009, Complainant sent Mr. Pardus the Division's budget analysis, per appropriation, for FY09. Mr. Pardus responded that that was not what he asked for and it was unacceptable. He stated he wanted a written explanation as to the following: "Last month, you reported to us that we would underspent (sic) our contracts by approx. $300,000. You also stated that we had to reduce our monthly capped expenditures regarding ISP [electronic monitoring of parolees]. Operations was given this information and was asked to reduce ISP expenditures. Now the number has changed to $650,000 and it does not appear that we had to reduce ISP expenditures. I need a written explanation describing your justification for the $300,000 under expenditure and what specifically changed to get to $650,000."

138. Complainant responded that he never said that the appropriations would be underspent by $300,000. He stated that the $324,026 figure was "the projected

uncommitted balances on the Divisions 11 appropriations," which was based on the "contract allocations vs. appropriation budget."

139. On July 6, 2009, Complainant sent Mr. Pardus another email indicating 92% of the Division's service contract bills had been received and sent to AP, with the remainder due on July 8. Based on the information from bills received, he reconsidered his projected unexpended amounts by appropriation for a total of $514,897. He also provided a response to the question regarding the difference in his estimates. Regarding Appropriation 056, he projected zero uncommitted balance and the actual unexpended balance was $177,940, because in March he was instructed "not to allocate any budgets for parole contract increases from this appropriation." Regarding Appropriations P48 and P68, in April the ISP field staff were instructed to "go under $90 per parolee per month" on average expenditures for services. The field went too low, to an average of under $75 per parolee in June. Regarding Appropriation 238, three contracts were underspent by a total of $26,775.

140. Mr. Pardus thanked him for the new information and noted it was also concerning because it had changed by over $130,000 in just the past few days. He stated that Complainant had not answered his question.

141. Complainant responded again but did not answer the question.

Option Letter Issue

142. In June 2009 Complainant issued 74 renewal option letters to 74 vendors, renewing the contracts at a new contract amount for the next fiscal year, which was either an increase or decrease over the previous contract amount. Complainant put the correct amounts into the contracts but neglected to include a statement that the amount of the new term increased or decreased the contract by a specific amount. The Accounts Payable staff informed Complainant the option letters needed to be corrected to include that statement.

143. Ultimately, Complainant received permission from the DOC Controller and Mr. Nordell to accept the letters as originally written. Complainant provided the dollar amount of the decrease or increase in each of the email notifications to the vendors.

Turning Point Contract Amendment

144. Complainant sent a draft of the Contract Amendment for the Turning Point contract to Mr. Nordell on June 16, 2009. It was five pages long.

145. By June 22, 2009, Complainant had not heard back from Mr. Nordell, so he emailed him, requesting his review that day or the next day. Mr. Nordell responded that June 16 was "way too late to be touring amendments to contracts which [the Division] expects to become effective on 7/1." Mr. Nordell was concerned because the program staff needed to review the amendment in order to assure that the new

increased prices were included. In addition, Mr. Nordell found three drafting errors in the contract. First, he noted that since the FY-10 contract amount exceeded $100,000, he needed to add the CMS provision. Second, Complainant had included language stating that the contract was funded through 2012; however, the contract was for one-year terms with a renewal option each year. Lastly, Complainant had failed to include language regarding the state hiring freeze and its potential effect on implementation of the contract.

146. Mr. Nordell also stated to Complainant in his June 22, 2009 email that he hoped Complainant had routed an Option Letter extending the contract beyond June 30, 2009 for signature, in order to assure the contract did not lapse if it was not fully executed by June 30, 2009.

147. Complainant made the changes and returned the Contract to Mr. Nordell. Upon review, Mr. Nordell responded that as written it did not become part of the contract because it was not under section 6, Modifications. Mr. Nordell noted that Complainant had made the same mistake with a new provision of another contract recently.

148. In addition, Mr. Nordell commented that Complainant's hiring freeze language should be modified from, "This Contract is exempt of hiring freeze per Section 8.f" to, "This Contract Amendment is exempt under the Hiring Freeze Guidelines per Section 8.f."

149. On June 29, 2009, Mr. Nordell sent Complainant an email indicating that Complainant had routed the contract without the "contract packet documents which are required. Since the policy has not changed, I am curious as to why you are routing incomplete packets." He also requested "the CLIN pages" and the insurance verification certificate.

150. Complainant responded almost immediately that he had given the CLIN sheets to a staffer who delivered the contracts. He also asked if they needed a Contract Summary spreadsheet when no dollar amount was involved.

151. Mr. Nordell responded that the purpose of the Contract Summary Excel spreadsheet was to track increases or decreases of each contract modification, and provided Complainant with the instructions and example he had sent to Complainant in May 2008. Mr. Nordell then explained that the Turning Point Amendment #1, at section 2.1, decreases the contract amount from $520,000 to $450,000 for FY 10, 11, and 12, but Complainant's Summary does not reflect this fact. He explained that Complainant's zero totals for FY 11 and 12 were wrong.

152. Complainant responded that his intent was to show allocations of $450,000 for FY's 10, 11, and 12 with the option to increase or decrease during the fiscal year, and please advise him if that was wrong. Mr. Nordell responded that this

was wrong and he needed to compare section 2.1 of the contract with section 6.b of the amendment.

60-Day Performance Review for April 23 through June 30, 2009

153. This review noted that Complainant's written report on the anger management course was not acceptable and he was given a new deadline. Complainant had submitted a copy of program materials, not his own statement. In addition, it stated that he had improved in the insurance certificate work. With regard to providing supporting documentation for his recommendations, the evaluation indicated that his performance had not improved and may have gotten worse. It indicated that with regard to end of year expenditures, Complainant had estimated the Division would be under-spent by $300,000 in one month. Then, the following month, he modified this figure to $650,000, without supplying Management with the supporting documentation, issues to consider, or a recommended plan of action.

154. The evaluation also indicated that Complainant submitted 74 Option Letters with no increase or decrease amounts listed in the letters. The document faulted Complainant for failing to follow through to assure the Turning Point and BI contract amendments were executed prior to the end of the fiscal year, indicating that Ms. Montanez had done this. It was also noted that Mr. Nordell was becoming increasingly frustrated with Complainant's work product.

CMS Implementation and July 15, 2009 Email from Mr. Nordell to Mr. Pardus and Ms. Montanez

155. On July 15, 2009, Complainant emailed Mr. Nordell indicating that they needed to amend five return to custody contracts. Complainant sent the contract amendment to Mr. Nordell for his review. He noted that he attached the amendment, which deletes section 3.3 on page five of the contract, and a sample contract.

156. On July 15, 2009, Mr. Nordell responded by email with three comments. First, he noted that per an email he had sent Complainant the prior week, they were not using "CLIN" numbers on contracts effective July 1 or after, because the CMS tracking number would be placed in the upper right corner. Mr. Nordell stated that the CMS number would be obtained from the CMS system when the contract amendment information was entered into the CMS system. He stated, "Again, since you failed to attend the CMS training, you need to spend some time on the CMS site and on the [State Controller's] site reading up on the issue so that you know how to process contracts under this new system."

157. Mr. Nordell also stated that changes set out in amendments must be in the present tense, not the future tense. Third, he noted that section 6.b contained no introductory language.

158. On July 15, 2009, Mr. Nordell forwarded his own July 15, 2009 email to Complainant regarding the return to custody contract amendment to Mr. Pardus and Ms. Montanez, with a cover email. He stated he had never written to anyone's supervisor or appointing authority regarding an employee's performance before, but in view of his problems with Complainant's work, "it is incomprehensible to me how this level of work could possibly rise to a satisfactory rating on a performance evaluation. Sorry for the rant, but this is getting really old. And yes, you can quote me."

159. Mr. Nordell copied his supervisor, DOC Controller Dennis Diaz, on his email.

160. On July 16, 2009, Mr. Nordell emailed Complainant about CMS issues. Mr. Nordell had visited the CMS site to confirm that Complainant had entered the contract information on CMS. He found that Complainant had not done so. In addition, he found that Complainant's entries on CMS for a different contract were inaccurate: Complainant had incorrectly answered "no" to the questions of whether there were performance standards in an SOW and whether there were methods to resolve noncompliance in the contracts. In addition, Complainant had characterized a contract as "Electronic Equipment" when it was actually for electronic monitoring services.

161. Mr. Nordell copied Mr. Pardus and Ms. Montanez on this email.

162. Complainant responded on the same day that he had obtained and entered the CMS numbers on the two contracts.

163. On July 17, 2009, Mr. Nordell emailed Complainant regarding two additional erroneous entries in CMS. One listed a contract as emergency sole source, when it was not an emergency. The other listed three renewal periods for a straight four-year contract that actually contained no renewal option.

Protocol Contract Amendment

164. On July 20, 2009, Complainant sent an email to Mr. Nordell, requesting his review of the attached contract amendment for Protocol along with the supporting documents.

165. Upon review of the amendment document, Mr. Nordell discovered several errors, which he outlined in a July 22, 2009 email to Complainant, copying Mr. Pardus and Ms. Montanez. Complainant had failed to provide an introduction in which he listed the amendments, and had failed to separate some parts of the document with punctuation so that the reader knew what language referenced the amendment and what language was the actual new contract term. The section listing new contract terms did not provide a reference to where in the contract one of the new terms was located. Mr. Nordell also stated that the vendor name was incorrect; however, he later learned that it was in fact correct.

166. In addition, Mr. Nordell noted that two of Complainant's CMS entries were incorrect. One was identical to the error the previous week, listing four renewal periods for a straight term contract with no renewal option.

167. On July 27, 2009, Complainant asked if he could send the Protocol amendment to the contractor for signature. Mr. Nordell responded, "You did not request my review of the Protocol amendment in your email of 7/22. I recommend that you route it for signature as written." Complainant had requested his review on July 20, 2009.

BI Contract Amendment

168. On July 15, 2009, Complainant emailed Mr. Pardus and copied Ms. Montanez, regarding Ms. Montanez's request to draft a new contract amendment with BI for electronic monitoring services. He described the purpose of the amendment allocating an additional $200,000 for services, and suggested using the "uncommitted balance" of Appropriation 056 to fund it. He noted the effective date of the Amendment was August 1, 2009, and asked Mr. Pardus if the plan was acceptable.

169. Mr. Pardus did not respond to this email until five days later.

170. July 20, 2009, Complainant emailed the BI contract amendment to Ms. Montanez for review. It took Ms. Montanez two days to get back to Complainant.

171. On July 23, 2009, Complainant emailed the BI contract amendment to Mr. Nordell, requesting his legal review and any suggestions.

172. Mr. Nordell responded on July 27, 2009 that the only change he recommended was a hard start date of July 31, 2009, so that there was no lapse in the contract. He pointed out that they had done this on another recent amendment, so he should have known to do this.

173. On the same day, July 27, 2009, Complainant made the change and returned it to Mr. Nordell, asking if he could email it to BI for signature.

174. On July 29, 2009, Mr. Nordell sent an email to Ms. Montanez, copying Mr. Pardus and Mr. Diaz, DOC Controller, discussing logistics of obtaining all necessary signatures for the BI amendment. Mr. Nordell stated, "Again, John's week delay created a time crunch in getting it signed by 7/31."

175. Ms. Montanez did not inform Mr. Nordell that Mr. Pardus had caused a five-day delay and she had caused a two-day delay in getting the BI amendment completed.

Delegation of Appointing Authority

176. On October 22, 2008, Division Director Miller gave written delegated appointing authority to Deputy Division Director Gomez for all positions that report to him. It also stated he could further delegate appointing authority as he deemed necessary, "but it must be in writing."

177. On September 2, September 12, and October 22, 2008, and August 12, 2009, in four separate documents, Mr. Gomez gave written delegated appointing authority to Mr. Pardus for all positions that report to him. The letters also stated he could further delegate appointing authority as he deemed necessary, in writing.

August 4, 2009 Pre-Disciplinary Meeting

178. On July 22, 2009, Mr. Pardus sent Complainant a letter noticing a predisciplinary meeting on August 4, 2009, pursuant to State Personnel Board Rule 6-10. The letter referenced Mr. Pardus's delegated appointing authority from Mr. Gomez, and stated that the information to be discussed "includes, but is not limited to, your work performance. Additional issues may be addressed if I receive further information prior to the meeting."

179. On August 4, 2009, Complainant attended the predisciplinary meeting with Mr. Pardus and Rick Thompkins, Associate Director of Human Resources at DOC. He chose not to have a representative at the meeting.

180. At the beginning of the meeting, Mr. Pardus reviewed Complainant's recent performance history. He noted that since the Corrective Action Complainant had had no additional anger issues at work. He then explained that what he wanted to discuss during the meeting was only information concerning "the last 30 days. Because we've had the 30 [day review], we've had the 60 [day review]. We've had all those meetings already. I don't want to rehash those issues. "

181. To prepare for the meeting, Mr. Pardus reviewed Complainant's performance over the last sixty days, primarily via documents from and conversations with Mr. Nordell.

182. Mr. Pardus led the meeting by discussing specific performance issues that had been raised in emails by Mr. Nordell.

183. The first was a July 29, 2009 email concerning Complainant's "week delay" in getting the BI contract amendment executed. Mr. Pardus also asked Complainant about comments by Mr. Nordell that this amendment "should have been much easier" because it was the second time he had done such an amendment. Complainant did not provide mitigating information on this issue.

184. The next issue discussed at length was Mr. Pardus's concern that Complainant had not attended CMS training. Complainant stated that he had read the email wrong, had been too busy with year-end duties to attend, and had not had time to take a break. He admitted he was supposed to go to the training and stated he had printed out the Power Point presentation of the training off the website. He indicated, "At this point . . . I am really familiar with CMS. I can perform any" task on it.

185. Mr. Pardus responded that he knew that now. However, he was concerned that Mr. Nordell had had to spend time checking Complainant's work and directing Complainant to errors he had made and where to go to correct them. He stated that he believed Complainant knew how to use CMS now because of Mr. Nordell. Complainant agreed that this was true in part, but pointed out that he had identified one issue that Mr. Nordell had missed, regarding disclosures. Mr. Pardus agreed that was true.

186. Mr. Pardus then reviewed the CMS errors Complainant had made, as outlined in Mr. Nordell's June 22 email. The first was listing a five-year term contract as having renewal options. Complainant attempted to explain that actually, renewal option letters had been sent on those contracts, so Complainant was right. However, the discussion of this issue was muddled. After discussing other issues, Complainant stated that because they had the "possibility to contract for renewal option" he had inputted the renewal option on CMS. Again, later in the conversation, they returned to this issue and Complainant stated, "We have the renewal option in the contract." Mr. Pardus responded, "So you're saying he's wrong?" Complainant responded, yes. Mr. Pardus then asked why he changed it if Mr. Nordell was right. Complainant responded, "Because I didn't want to argue first, and explain to him that we are doing the newer option letters on our five-year state contracts. Because, you know, if this – and he probably knows better than I do . . ." Mr. Pardus stated that if Mr. Nordell was wrong and Complainant changed the CMS entry, Complainant couldn't have it both ways. Complainant then explained his thinking by stating that CMS does not accommodate an entry for five-year contracts for which a renewal option letter has been sent. Complainant also stated at one point, "So tell me what to do now, please, and I will do whatever you want." Mr. Pardus did not conduct any follow-up investigation on this issue to render a conclusion as to whether Complainant was right, or Mr. Nordell was right.

187. They next discussed the 74 option letters. Complainant said that pursuant to the state Controller's policy, there were two ways to draft the option letters, his was correct, and everyone had approved them because of the second communication defining the contract increase or decrease amount. Mr. Pardus reiterated that the letters were not correct on their face because he had had to send additional communication with them.

188. During the meeting, Complainant asked for additional assistance in performing his job. Mr. Pardus responded that they had discussed this issue several times in the past, and that he had no assistance to provide.

189. Mr. Pardus asked Complainant when the last time was that he had sent Mr. Nordell a contract that was perfect. Complainant responded that contracts are like engineering, that there are always other ideas and ways to accomplish the same goal, and that it was impossible to have a contract without any mistakes.

190. Mr. Pardus next asked Complainant about Mr. Nordell's July 17, 2009 email concerning the Social Solutions contract. Complainant had entered it as an emergency sole source contract in CMS; Mr. Nordell indicated that it was not an emergency sole source contract. Complainant agreed that Mr. Nordell was correct and the state controller policy defines emergency sole source contracts. They also discussed the statutory violation caused by the lapse in the contract; Complainant attempted to explain why he was not responsible for this.

191. Mr. Pardus then noted Mr. Nordell's July 16 email indicating that Complainant had failed to perform any CMS entries for two contracts that had been placed in the mail that day. Complainant did eventually enter the two contracts into CMS but did not inform Mr. Pardus of this in the meeting.

192. Mr. Pardus mentioned next the fact that Complainant had missed the March 2009 CCIT meeting at which CMS was discussed. Complainant stated that he had a personal issue to address on that day.

193. After further discussion of CMS training, Mr. Pardus stated that the above issues were all he wanted to discuss. He noted that none of them originated from him [Pardus], one was from Ms. Montanez, and the remainder were from Mr. Nordell. He asked Complainant if there was anything else he wanted to be considered.

194. Complainant stated that his work volume was high, and that options letters were extremely time consuming under the new multi-step procedures. He stated that he was under much closer supervision now than in the past. Mr. Pardus agreed that since an audit, the option letter procedure had changed, but that the volume was the same as prior years.

195. Complainant also pointed out that the contract work was "only a small piece of my work." He discussed the budgeting and billing work he performs, monitoring the individual contracts on a monthly basis, and budgeting so that the Division can pay its bills. He explained that he must verify and scrutinize the appropriateness of each bill received in the Division from vendors, input the billing data into the utilization reports, and then generate reports from that data. Complainant stated that the other CA's do not have the budgeting and billing components in their job.

196. Mr. Thompkins asked Complainant if all of the duties he performed were encompassed within his existing PDQ. Complainant answered yes.

197. Complainant also pointed out that he was personally responsible for CMS entries, while in the past another employee inputted the contract data into COFRS.

198. With regard to Mr. Nordell, Complainant stated that he considered him to be a team member, not a customer, and that the documents sent to Mr. Nordell were not always final products.

199. Mr. Pardus mentioned that Ms. Montanez usually reviews Complainant's contracts before they are sent to Mr. Nordell, and that she often catches grammatical and typographical errors. He stated he had no documentation on those items. Complainant said he knew that he was not perfect in English, noting it was his second language and he had come to this country at age 35.

200. Complainant also stated that he did have problems at home, referring to "my misery at home" and his wife's accident, and added that it probably impacts his work. Mr. Pardus acknowledged that they had discussed that.

201. Mr. Pardus did not inform Complainant at the meeting that his problems with end of year budgeting projections and billing in 2009, or performance issues prior to July 2009, might form the basis for disciplinary action.

202. On August 6, 2009, Complainant provided a document proving that he had named Protocol correctly in the contract.

Termination of Employment

203. On August 19, 2009, Mr. Pardus sent a termination letter to Complainant. It referenced his recent performance history, including his evaluations, corrective actions, PIP's, and his 30- and 60-day follow-up meetings.

204. The termination letter listed the following problems in Complainant's performance during the previous thirty-day period:

- Complainant caused a week delay in getting the BI contract amendment signed;

- According to Mr. Nordell, Complainant had not asked for his review of the Protocol contract amendment on June 22, 2009. Mr. Pardus stated, "You stated that for Keith, Sandy and I, that when you email documents to us that they are intended automatically for our review. You presume that the person who receives a document from you knows the reason why you are sending it to them."

- "During this review period (last 30 days), the work unit experienced a statutory violation regarding the Social Solutions contract. Your lack of communication directly contributed to this violation."

- Complainant had failed to attend CMS training as required.

- Complainant had incorrectly inputted two straight term contracts as having renewal periods. "You stated that Keith was wrong and that we can do a 5 year renewal. I asked you if you changed it to 4 years in CMS and you replied that you did. At this point I was confused and asked you why you changed it after you just stated that Keith was wrong. You replied that you changed it because you did not want to go to the effort to explain to Keith why you thought he was wrong."

- "We discussed the 70+ contract option letters that were incorrect. After a lengthy discussion you did admit that you added missing information (project summary) to the option letter packet that were required by COFRS. You claimed that they changed the procedures in COFRS."

- Complainant had erroneously entered a contract as an emergency sole source in CMS.

- Complainant had failed to enter the Social Solutions and RMOMS contracts in CMS.

- Complainant had attached CLIN sheets to contracts for Mr. Nordell after July 1, 2009, which were no longer being used.

- "We then discussed other issues or information that you wanted me to know before I made my decision. You presented information that detailed a summary of executed contracts by fiscal year. You also handed out a sheet that described the steps for each option letter. You stated that this is a time intensive process and that the volume of work was very high. I stated that you had similar work volumes back in FY05-06 and yet had no issues with regard to your work performance. You stated that the procedure was different and that option letters were automatic back then."

- "You also asked me to consider the billing procedures as part of your job responsibilities. You also stated that Keith is not an external customer of yours. I stated that Keith is part of the DOC team and that you are supplying him with a product that is not acceptable to him. You did supply me with an email from an external customer, Sharon Detter of COMCOR (July 22, 2009) in which she thanked you for your prompt response to a question she had regarding the CRCF contract amendment and renewal. We both agreed that answering customer questions is part of your job responsibility. We also talked about the fact that some of Keith's issues revolved around issues/mistakes that are re-occurring and that he has addressed these with you before. We also discussed the fact that Sandy

reviews the documents before they go to Keith and spends most of her time reviewing for spelling and grammar corrections."

205. Mr. Pardus noted, "the performance issues addressed at the Rule 6-10 meeting only reflect the last 30 days of your work performance. Specifically, other ongoing work performance issues from the 30 and 60 day reviews and the issues addressed after your FY08-09 mid-year review were considered in my decision."

206. Mr. Pardus concluded, "Your overall lack of communication and dedication to the job remain below expectations (Level I). You inability to supply customers with accurate and detailed information continues to be below expected performance levels."

207. The letter concluded, "Since the October 2008 mid-year review, your inability to satisfactorily perform and complete work assignments, without daily supervision, has worsened. When you have completed work assignments, the accuracy and reliability of your work products has also deteriorated. This was particularly evident in your inability to accurately project year-end closing contract budget numbers. Because of your unsatisfactory work performance, you could have potentially placed the State and the Department in a position of liability by not adhering to State procedures with regard to contract monitoring and tracking."

208. Ron Neely was hired as the CA to replace Complainant.

209. After Mr. Neely was hired, James Hakspacher was employed as a CA at the Division in a permanent position, although he left after three months. During his employment, Mr. Hakspacher performed data entry into the CMS system based on information supplied to him on approximately twelve contracts, in order to assist Ron Neely. (Stipulated Fact.)

210. Complainant timely appealed the disciplinary action.

DISCUSSION

I. GENERAL

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

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and

(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Sections 24-50-103(6) and 125.3, and 24-50.5-101 *et seq*, C.R.S.

II. HEARING ISSUES

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

Complainant was terminated for failing to competently perform his job and for continuing to perform at a Needs Improvement level. The preponderance of evidence demonstrates that Complainant did not successfully perform his CA duties for a period of years, and repeated the same mistakes despite managerial attempts to prompt him to improve. As CA for the Division, for example, Complainant should have considered the CMS training to be a given. His failure to attend this training and master the CMS system is symbolic of his failure to take full responsibility for his duties as CA.

Complainant thrived under the supervision of Ms. Monchak, who appears to have worked more as a close team member with Complainant on his CA duties than as a supervisor. Ms. Monchak assumed responsibility for drafting the most important substantive portions of the Division's contracts, such as the SOW, and she also sheparded the contracts through the process of final approval and execution. Once Ms. Monchak left the Division, it was incumbent upon Complainant to step up and perform the full gamut of duties of his CA position. Unfortunately, he was unable or unwilling to do so.

When Mr. Pardus became Complainant's direct supervisor, he soon became aware that Complainant routinely sent contracts to Mr. Nordell with obvious errors in grammar, spelling, contract language, and expired contract provisions. In addition, when Mr. Nordell arranged for a peer to redline a contract in order to train Complainant in contract writing, Complainant ignored the assistance and continued with his old habit of not reading revisions. While Mr. Pardus praised Complainant on his mid-term 2007 evaluation in most areas, he held Complainant accountable for his sloppy and irresponsible work habits. Complainant worked hard to polish his work product after this review, and Mr. Pardus's year-end evaluation reflected this improvement.

Ms. Montanez was hired in part to implement and enforce systems that would assure the Division met its statutory and regulatory requirements. Her attempts to

systematize Complainant's work functions were met with resistance. Moreover, Complainant was reluctant in general to accept her supervision and feedback. Although Ms. Montanez worked hard editing all of Complainant's contracts, the assistance she provided was not sufficient to bring his work product up to a satisfactory level. Up to the very end of his employment, Complainant continued to make serious yet obvious substantive and technical errors in contract drafting. These lapses were inexcusable for an eleven-year CA.

In 2009, Complainant's performance of his contract monitoring and budgeting duties deteriorated significantly. He was unable to provide accurate and consistent information on the reports he had been generating for years. These reports were relied on heavily by Mr. Pardus and the other Division managers to make programmatic decisions. By the end of his employment, Complainant's budget projection work product could not be adequately trusted by Division leaders. This was unacceptable.

It is noted that Respondent did not prove that Complainant caused the statutory violation involving the Social Solutions contract or the week delay in executing the BI contract. However, these issues were minor and do not detract from the good cause shown for Complainant's termination of employment.

Complainant asserted, and proved at hearing, that he was overworked and that the CMS duties would ultimately be assigned to a new position that was funded by HB228. The hiring freeze prevented the Division from filling that position until after Complainant's departure. However, the fact that the legislature appropriated funds for a new position did not vitiate Complainant's duty as CA to become the Division's expert at CMS until a new staff member was hired. In addition, Complainant's poor performance was not born of overwork, but of longstanding problems that he never corrected.

B. The appointing authority's action was arbitrary, capricious and contrary to rule or law.

Respondent violated State Personnel Board Rule 6-10, 4 CCR 801, by informing Complainant at the predisciplinary meeting that they would discuss only the last thirty days of his employment during July 2009, and then basing the termination decision on Complainant's performance from October 2008 through July 2009. Mr. Pardus stated in the termination letter, "the performance issues addressed at the Rule 6-10 meeting only reflect the last 30 days of your work performance. Specifically, other ongoing work performance issues from the 30 and 60 day reviews and the issues addressed after your FY08-09 mid-year review were considered in my decision."

Board Rule 6-10 requires,

> 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.

Mr. Pardus presented detailed information to Complainant about the reason for potential discipline and the source of that information at the meeting. However, it was limited to one month out of the ten-month period of time which formed the basis for his termination decision. Complainant did not have the opportunity to respond to and rebut the conclusions reached in the October 2008 interim review, the April 2009 annual review, or the 30-day and 60-day reviews, at his predisciplinary meeting. In addition, he did not have the chance to address his difficulty in projecting year-end closing contract budget numbers, a significant basis for the termination. Therefore, the purpose of the meeting, "to exchange information before making a final decision," was not achieved. When a state agency promulgates rules governing the discharge of its employees which are more stringent in favor of the employee than due process would require, the agency must strictly comply with those rules. *Dept of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Shumate v. State Personnel Board*, 528 P.2d 404, 407 (Colo. App. 1974)(the predisciplinary meeting "must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself").

As a certified state employee, Complainant had a property interest in his employment at DOC. He was entitled to due process before he could be deprived of that property interest. The minimum procedural due process right 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). In *Cleveland Board of Education v. Loudermill, et al.*, 470 U.S. 532, 105 S.Ct. 1487 (1985), the United States Supreme Court provided, "We have described the 'root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* [emphasis in original] he is deprived of any significant property interest.'" *Loudermill,* 470 U.S. 532 at 542. The Court held that pre-termination due process requires that the employee be given notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story, before the termination decision is made. *Id.* at 546; *see also Bourie v. Dept. of Higher Education*, 929 P.2d 18, 22 (Colo. App. 1996). The Court reasoned that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision," and that "even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id.* at 543.

Although Mr. Pardus opened the predisciplinary meeting by reviewing Complainant's performance history, he expressly limited the discussion to Complainant's July 2009 performance. He discussed none of Complainant's difficulties with year-end budget projections throughout 2009, or the other long-term performance issues that constitute good cause for his termination. Therefore, Complainant had no notice of the full scope of "the charges against him," no explanation of the evidence Mr.

Pardus was going to consider, and no opportunity to present his "side of the story," until his post-termination hearing before the State Personnel Board. *Loudermill, supra.*

The evidentiary hearing was Complainant's first opportunity for due process. Complainant's only full and fair opportunity to adequately respond to DOC's allegations was at the evidentiary hearing held on April 27, 28, 29, and May 4, 2010. Accordingly, Complainant is entitled to back pay from his date of termination until the time he was fully afforded his due process rights, which was the last day of his evidentiary hearing on May 4, 2010. *See, Department of Health v. Donahue,* 690 P.2d 243, 249 (Colo. 1984)(appropriate remedy for procedural due process and predisciplinary rule violation was to reinstate probationary employee from date of termination through remainder of probationary term, placing her "in the same situation she would have occupied if her right to a predisciplinary meeting had not been violated"). Because Respondent proved good cause to terminate Complainant's employment at the evidentiary hearing, to reinstate Complainant to his GP III position would inappropriately result in a windfall. *Id.* Complainant is instead entitled to back pay with interest, minus an offset for any substitute earnings or unemployment compensation received during the time between his termination and May 4, 2010. *Donahue*, 690 P.2d at 250. Complainant is also entitled to an award of attorney fees and costs, as discussed below.

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 procedural due process and Rule 6-10 violation at the predisciplinary meeting was arbitrary and capricious under the first prong set forth in *Lawley*. Mr. Pardus neglected to use reasonable diligence and care to comply with the clear terms of Rule 6-10. In addition, Mr. Pardus neglected to investigate the mitigating information provided by Complainant at the meeting. For example, Mr. Pardus did not follow up on Complainant's denial of any involvement in the statutory violation involving the Social Solutions contract. Had he done so, he would have learned that Complainant did not cause the violation; Ms. Montanez testified to this fact at hearing. Lastly, no reasonable appointing authority would hold a predisciplinary meeting preceding a possible termination and limit the meeting to the last month of employment. *Lawley.*

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

Respondent appropriately utilized the performance management system and progressive discipline with Complainant for a period of years prior to terminating his

employment. Complainant was placed on several performance improvement plans, and was given two needs improvement performance ratings with corrective actions, in an attempt to upgrade his performance. Respondent made it very clear what Complainant needed to do to improve; however, his level of performance remained below acceptable standards. Under these circumstances, termination is a reasonable level of discipline.

D. Respondent did not violate the Colorado State Employee Protection Act.

Complainant asserts that he was terminated in retaliation for objecting to the use of Appropriation 056 for operating expenses. The Colorado State Employee Protection Act, §24-50.5-101, C.R.S., *et seq.* (whistleblower act) protects state employees from retaliation by their appointing authorities or supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985).

The purpose of the Act appears in the Legislative Declaration:

> The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official. Section 24-50.5-101, C.R.S.

In assessing a claim under the whistleblower act, the threshold determination is whether an employee's disclosures fall within the protection of the Act. *Ward*, supra. The Act defines "disclosure of information" as: the "provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S. To be protected under the Act, a disclosure of information must touch on a matter of public concern. *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007). The disclosure may be provided in writing or orally. *Ward, 699* P.2d at 967.

In March 2009, Mr. Pardus ordered Complainant not to use Appropriation 056 for Parole contract services but instead to use it for general operating expenses. Complainant objected to this directive because he believed it violated the Long Bill. They did not discuss the issue again. Ms. Montanez testified at hearing that

Appropriation 056 funds were used for Division operating expenses; no details of the circumstances of this expenditure are in the record.

Complainant's discussion of Appropriation 056 with Mr. Pardus touched on a matter of public concern, namely, the potential misuse of appropriated funds in violation of the Long Bill. Public managers do not have the discretion to violate the appropriations bills passed by the General Assembly; to do so could be a serious abuse of executive authority and mismanagement of a state agency.

The Act also requires, "It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." Section 24-50.5-103(2), C.R.S. The apparent purpose of this provision is to assure that an individual seeking the protection of the Act attempts to resolve the issue internally, prior to "disclosing" it under subsection 102(2). Complainant's brief discussion with his supervisor meets the requirement of subsection 103(2) of the statute. The Act does not clarify whether a discussion with one's supervisor may satisfy both subsection 103(2) and 102(2). Without a second "disclosure" to another individual, Complainant may not have met the disclosure requirements of the Act. Nonetheless, for purposes of this opinion it will be assumed that Complainant has met all disclosure requirements under the Act.

The whistleblower act defines adverse action as "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." Section 24-50.5-102(1), C.R.S. After Complainant's March 2009 discussion of Appropriation 056 with Mr. Pardus, Complainant received corrective actions, unsatisfactory performance evaluations, and was terminated. He has met the adverse action element of a whistleblower claim.

Complainant must next demonstrate that his protected disclosures were "a substantial or motivating factor" in the agency's adverse actions taken against him. *Ward*, 699 P.2d at 968. The timing of actions is the most relevant and compelling indicator of retaliation. Cases implementing the antiretaliation clause of Title VII of the Civil Rights Act of 1964 can provide useful guidance in analyzing causation. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

The causal connection between a protected disclosure and the adverse action may be shown indirectly by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Burrus v. United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982). The inference of retaliation generally requires a close temporal proximity between the protected activity and the subsequent adverse action. Unless the adverse action is "*very closely* connected in time to the protected activity, the plaintiff must rely on

additional evidence beyond temporal proximity to establish causation." *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)(emphasis in original).

After his March 2009 discussion of Appropriation 056 with Mr. Pardus, Complainant received a Corrective Action in April 2009, an annual Needs Improvement evaluation and associated Corrective Action in April 2009, and was terminated in August 2009. These facts meet the temporal proximity standard.

However, the evidence in this case raises no inference of retaliatory motive. The April 2009 Corrective Action was imposed in response to the memo from Ms. Montanez describing Complainant's angry and hostile behavior towards her over a period of several months; it had no relation to Appropriation 056 and was an appropriate response by Mr. Pardus. In addition, the year-end 2009 evaluation of Complainant was supported by ample documentary evidence at hearing and was part of a longstanding process of holding Complainant accountable for a poor work product.

Complainant has not demonstrated that Respondent violated the whistleblower act.

E. Respondent did not discriminate against Complainant.

Complainant asserts that Respondent discriminated against him on the basis of age and national origin in violation of the Colorado Anti-Discrimination Act (CADA). To prove intentional discrimination under section 24-34-402, C.R.S., an employee must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The elements of a *prima facie* case of intentional discrimination are:

a. complainant belongs to a protected class;
b. complainant was qualified for the position;
c. complainant suffered an adverse employment decision despite his or her qualifications; and
d. circumstances give rise to an inference of unlawful discrimination.

Colorado Civil Rights Com'n v. Big O Tires, Inc., 940 P.2d 397, 400 (Colo. 1997). *See also Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

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

The burden then shifts back to the employee to prove that the employer's proffered reasons were in fact a pretext for discrimination. The employee can satisfy this burden of proof through evidence already in the record. *Bodaghi*, 995 P.2d at 298. "Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999).

Complainant has not met his burden of proving a *prima facie* case of age or national origin discrimination. As an individual in his seventies, whose national origin is Hungarian and Romanian, Complainant belongs to two protected classes. Additionally, he was qualified for his position, and he suffered an adverse employment decision. However, there are no circumstances in this case that give rise to an inference of unlawful discrimination.

Complainant presented no evidence at hearing that his age or his national origin were a factor in any of the decisions made with regard to his work performance. Respondent put Complainant on notice in 2007 that he needed to improve his work product and rewarded him when he did so. Unfortunately, Complainant was unable or unwilling to maintain a satisfactory level of work and his performance deteriorated over time.

Even assuming *arguendo* that Complainant had established a *prima facie* case of discrimination, Respondent has presented a legitimate business reason for its termination decision, as established above. Complainant has not shown that Respondent's proffered reasons for his discharge were in fact a pretext for intentional discrimination. There is no indication in the record that Respondent's explanation for Complainant's discharge is unworthy of credence. Respondent's case consisted primarily of uncontested documentary evidence of Complainant's unsatisfactory work product. The preponderance of evidence showed that Complainant repeatedly made the same mistakes in contract drafting, made little effort to improve his work product in late 2008 and 2009, and failed to assume the full mantle of CA for the Division. Therefore, Complainant's discrimination claim fails.

F. Attorney fees are warranted in this action.

Complainant requests an award of attorney fees and costs. Because Complainant's termination of employment is being upheld, the question before the Board is whether Respondent's violation of Complainant's procedural due process rights and Board Rule 6-10 warrants an award of attorney fees and costs.

The Board's enabling act provides for 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.

The Board has implemented the attorney fee statute in Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs bears the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Rule 8-38(B).

Under the Rule, "A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented." A groundless personnel action is defined as one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule 8-38(A).

In this case, there is neither a rational legal argument nor competent evidence supporting Mr. Pardus's decision to limit the predisciplinary meeting to a one-month period, prior to terminating an eleven-year employee. Rule 6-10 is not a complex one. It requires that at the predisciplinary meeting, the appointing authority must "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." Common sense and the clear language of the Rule dictate that prior to terminating a long-term employee, all of the performance issues leading to the termination decision must be discussed at the predisciplinary meeting. An intelligent and seasoned state manager such as Mr. Pardus is reasonably expected to understand this.

Rule 6-10 is one of the cornerstones of fairness of the state personnel system. Strict compliance with this Rule has been the clear expectation of state managers for decades. *See Donahue, supra, and Shumate, supra.*

Under the circumstance presented here, it is found that Respondent's violation of Complainant's fundamental due process right to a fair pre-termination meeting and Board Rule 6-10 was frivolous and groundless. Complainant is entitled to an award of attorney fees and costs.

G. Appointing Authority

Complainant challenges the validity of the delegation of appointing authority for the termination. The Colorado Civil Service Amendment establishes a two-tiered

system of appointing authority which separates gubernatorial appointees at the executive director level from the classified employees in the personnel system. The division directors serve as the buffer in this system, designed to de-politicize the hiring process in state government. Under the Colorado Constitution, article XII, Section 13(7), "The head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department."

Thus, executive directors appoint only the staff in their executive offices and the division directors who serve under them. Section 13(7) continues, "Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions." *See also* C.R.S. § 24-1-108 ("Any provisions of law to the contrary notwithstanding and subject to the provisions of the constitution of the state of Colorado, the head of a principal department shall be appointed by the governor, with the consent of the senate. The head of a principal department shall appoint all subordinate officers and employees of his office and the head of each division under his department, and the head of each division shall appoint all employees in his division").

Under the above authorities, appointing authority for all non-executive level state personnel system appointments resides in the division directors. Ms. Jeaneene Miller is the Division Director in this case.

Colorado State Personnel Director's Procedure (DP) 1-8, 4 CCR 801, permits delegation of appointing authority by the division directors to other managers, and the further delegation by those managers. It states in part, "An appointing authority may delegate in writing any and all human resource functions, including the approval of further delegation beyond the initial designee. In the area of corrective, disciplinary, or other actions that have an adverse effect on base pay, status, or tenure, each department must establish a written document specifying the appointing authority for each individual employee and this information must be made available to the employee."

Ms. Miller delegated appointing to Mr. Gomez on October 22, 2008. Mr. Gomez in turn delegated appointing authority to Mr. Pardus on October 22, 2008 and August 2, 2009. Therefore, Mr. Pardus had the required appointing authority when he imposed disciplinary action on Complainant in this case.

Complainant asserts that under DP 1-8, Respondent was required to possess a separate document containing the appointing authority of Mr. Pardus to impose disciplinary action specifically on Complainant. This argument misconstrues the purpose of the procedure and would impose an unnecessary burden on state managers. The purpose of the procedure is to assure that at any given time, every individual state employee will know which manager possesses written appointing authority over that individual. It is important for state employees to know who their appointing authorities are; they need to know who is responsible for imposing disciplinary action, handling grievances and performance management disputes, etc.

To require state managers to produce a separate piece of paper containing the appointing authority for every single employee would elevate form over substance. The state workforce is subject to constant flux: employees transfer, retire, are hired and promoted on a continual basis. If agencies were required to produce a new document every time there is a change in an employee's position, it would be a cumbersome and meaningless exercise for an already-stretched workforce. Complainant has failed to demonstrate how he was somehow prejudiced by the manner in which appointing authority was delegated in this case. The delegation meets the requirements under law and DP 1-8.

CONCLUSIONS OF LAW

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

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

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

4. Respondent did not discriminate against Complainant.

5. Respondent did not violate the whistleblower act.

6. Respondent's delegation of appointing authority was appropriate.

7. Attorney fees are warranted.

ORDER

Respondent's termination action is **affirmed**. Complainant is not entitled to reinstatement, but is entitled to full back pay and benefits from the date of his termination until the last day of his evidentiary hearing for the reasons set forth above. Attorney fees and costs are awarded to Complainant.

DATED this 21st day
of **June 2010** at
Denver, Colorado.

[redacted]

Mary McClatchey, Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of **June 2010**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION and NOTICE OF APPEAL RIGHTS** as follows:

Tamara Wayland, Esquire
Dayna Dowdy, Esquire
[redacted]

Brooke Meyer
Lacey Scott
[redacted]

[redacted]

Andrea C. Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.