

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2010G005

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RONDA KATZENMEYER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 8, 9, 15, and 16, 2010, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case was commenced on the record on March 23, 2010. The record was closed on October 1, 2010 upon receipt of the parties' written Closing Arguments. Assistant Attorney General Michael Scott represented Respondent. Respondent's advisory witness was Joan Shoemaker, Deputy Director of Prisons, Colorado Department of Corrections (DOC), and Complainant's appointing authority. William S. Finger, of Frank & Finger, P.C., represented Complainant.

MATTERS APPEALED

Complainant appeals Respondent's decisions to place her in a temporary clerical position pending investigation and to refer criminal charges against her to the District Attorney. Complainant asserts these decisions were in violation of the Colorado State Employee Protection Act and requests an award of attorney fees and costs incurred in this proceeding and in defending against the criminal charges, reimbursement of moving expenses, restoration of any lost service credit, and expungement of her personnel record.

For the reasons set forth below, Respondent is found to have violated the Colorado State Employee Protection Act and Complainant is awarded appropriate remedies under the Act.

ISSUES

1. Whether Respondent violated the Colorado State Employee Protection Act; and,
2. What remedies are available to Complainant under the Act.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee who has worked for DOC since 2002.
2. In 1986, Complainant earned her Licensed Practical Nurse (LPN) degree. After working in several hospitals and medical clinics, in 2002, Complainant began working at Sterling Correctional Facility.
3. Complainant's 2002-2003 performance evaluation included Commendable ratings in Organizational Commitment and Job Knowledge, and Satisfactory ratings in Communication, Interpersonal Skills, and Customer Service. The narrative was positive, with a brief mention that Complainant "does need to be aware of her body language and tone of voice which at times appears angry and curt. [She] has been spoken to about this and is improving."
4. Complainant's 2003-2004 performance evaluation was an Overall Commendable, with Outstanding ratings in Organizational Commitment and Communication, and a Commendable rating in Job Knowledge. The narrative comments commended her for developing programs to improve the effectiveness of the clinical department, and noted, "Ronda believes in resolving conflicts, addressing concerns directly with the individual involved. She is sensitive and her approach is to create teamwork and resolve conflict without hard feelings."
5. Complainant's 2004-2005 overall rating was Commendable, with Commendable ratings in all areas, and Outstanding in Job Knowledge. The narrative section stated that Complainant "sets an example to other nurses."
6. In 2005-2006, Complainant received another overall Commendable rating, with a Commendable in Interpersonal skills. The narrative noted that because she has such a high work ethic, she "becomes very frustrated when her peers don't have the same work ethics." It also noted that she does not offend staff but is appropriately assertive. Another 2006 evaluation form noted that occasionally when Complainant is upset her voice can be demeaning and intimidating to some, and that she has improved and continues to improve in this area.

7. In August 2006, Complainant earned her RN degree. Her first evaluation as Nurse I, for the period 2006-2007, was an overall Commendable.

8. In 2007, Complainant transferred to BVCC as a Nurse I. On the new, three-tiered rating system for 2007–2008, she received two Level III's, for consistently exceptional and superior performance, in Organizational Commitment and Customer Service. The remaining ratings were Level II, which encompasses a wide range of successful performance.

9. It is common at BVCC for several members of a family to work in the facility. Complainant's husband, Kirk Katzenmeyer, was a Captain at BVCC at all times relevant.

May 2008 Promotion to Health Professional VI at BVCC

10. In May 2008, the Health Services Administrator (HSA) position at BVCC opened up. Complainant's nursing peers in the medical clinic at BVCC encouraged her to apply. She applied for it and was appointed HSA in May 2008.

11. On April 22, 2008, Joan Shoemaker, DOC Deputy Director of Prisons, Clinical Services, and Complainant's appointing authority, issued a memorandum to Ari Zavaras, Executive Director of DOC, advising him of Complainant's promotion and requesting a salary increase for Complainant. He approved the request.

12. The HSA is the manager over all clinical services at the prison, including the mental health, medical, and dental clinics. Complainant supervised all medical staff, including nurses, physicians, and others.

13. Complainant's reporting chain in Clinical Services consisted of the following: she reported to Patricia Baldwin, Regional HSA, who reported to Cheryl Smith, Chief of Clinical Operations for DOC, who reported to Ms. Shoemaker.

14. Complainant's supervisors understood that as a new HSA, she would need to be mentored in her position.

15. BVCC has a matrix management system, under which Clinical staff must also follow orders and directives of the Warden George Dunbar, and Associate Warden Terri Bartruff.

16. Complainant was a member of the Management Team at BVCC and attended the daily Management meetings with the Warden, Associate Warden, and other top Security management staff.

KM Incident

17. On August 19, 2008, a BVCC inmate, KM, became angry after an adverse ruling on a prison disciplinary case. He flooded his cell with water and urinated on the floor, then attempted suicide by ripping up his boxer shorts and socks and making a noose.

18. Sgt. Adrian Gillespie responded to the scene and escorted KM to the Segregation Unit. KM was placed on Special Controls, a disciplinary status.

19. The DOC regulation governing Special Controls mandates that inmates be placed in a stripped cell with nothing in the room for 72 hours, and that the inmate wear only boxer shorts and socks. The regulation requires that the room be at 68 degrees; correctional staff are required to monitor the room to assure the temperature remains at that level.

20. Inmates who attempt suicide are usually placed on Mental Health Watch, under which they are monitored in a Segregation cell to assure they do not commit suicide. DOC regulations require that inmates on Mental Health Watch be provided a safety smock and safety blanket, which are made of heavy-duty material that cannot be torn and used for suicide. There is no minimum room temperature requirement in this regulation because of the smock and blanket that are issued.

21. When an inmate is placed on Mental Health Watch, the Mental Health orders supercede Special Control orders and all correctional staff are required to adhere to the Mental Health Watch orders.

22. Sgt. Gillespie contacted the Housing Captain who presided over the Segregation Unit, Captain Richard Fisher, by telephone, to advise him that KM had been moved to Segregation.

23. At approximately 4:00 p.m., Captain Fisher arrived in the Segregation unit. Sgt. Gillespie discussed the protocol on how to handle KM with Captain Fisher, asking if KM was to receive a safety smock and safety blanket due to the probable suicide watch, or if he was to receive boxers and socks. Captain Fisher informed Sgt. Gillespie that KM was to be naked in the cell.

24. While Sgt. Gillespie was in Captain Coleman's office with KM, Captain Fisher stepped in and stated to KM that he would be placed in the cell naked. KM responded that he understood.

25. During this time, Sgt. Gillespie also contacted the Mental Health clinic to request a worker to assess KM for suicide watch. Katherine Farrell, a new Mental Health worker in the BVCC clinic, arrived and met with KM and

determined that due to his emotional condition, KM would be placed on a Mental Health Watch.

26. As Ms. Farrell was leaving to write the requisite orders, she encountered Captain Fisher, who appeared angry about KM's behavior. Captain Fisher informed Ms. Farrell that as soon as it was determined that KM was safe to be removed from the Mental Health Watch, his three days on Special Controls would begin, and anything he was given would have to be taken away from KM (including safety smock and safety blanket). Ms. Farrell was not sure what he was intimating. She stated to Captain Fisher that she was having trouble reading between the lines and asked him what he thought should happen. Captain Fisher informed her that KM should be placed on Mental Health Watch, but that KM should be given nothing. He also explained to her that he had informed KM that he would be placed in his cell naked so that he wouldn't lose time on the other end, meaning that he would earn time towards Special Controls while on Mental Health Watch.

27. Ms. Farrell complied with Captain Fisher's directive and wrote the Mental Health Order such that KM would not be given any cover for his body. As she returned to the unit to drop off her orders, she stated to Sgt. Gillespie, with Officer Jack Walker present, "I'm doing this order against my will." Sgt. Gillespie responded that it was not his order, "I was told."

28. Sgt. Gillespie, Officer Jack Walker, another officer, and Captain Fisher, took KM to Cell #2 in a safety smock, then removed the smock, leaving him naked.

29. KM spent twenty-one hours in his cell naked, from 4:45 p.m., August 19, 2008, to 1:39 p.m., August 20, 2008. During this time, the temperature fell below 68 degrees, to 62 – 64 degrees.

30. No inmate at BVCC had previously been placed in a cell without clothing, a safety smock, or safety blanket. All of the correctional officers who had contact with KM over the next twenty-one hours found it strange and unusual that he was naked in his cell. However, because they were accustomed to following Mental Health Watch orders, and were not experts in the mental health field, they did not question the order. At 6:00 a.m. on August 20, 2008, KM requested a blanket. The officer on duty checked the Mental Health orders and found that they stated that KM was to remain in his cell naked. He informed KM of this.

Report of KM Incident

31. On August 20, 2008, early in the morning, Ms. Farrell informed Glinette Smith, the BVCC Mental Health Supervisor, that KM had been left in his cell naked the previous evening. Ms. Farrell stated that she had been pressured by Captain Fisher to leave him naked in his cell, and that she knew in her gut that it

was wrong. Ms. Smith informed her that inmates are never to be left in their cell naked because it is a violation of their human rights. She ordered Ms. Farrell to rewrite the orders and to give KM a safety smock and safety blanket. For unknown reasons, it took Ms. Farrell an additional three or four hours to execute this order.

32. That morning, Ms. Smith saw Captain Fisher in the Mental Health area and she asked to speak with him. He went into her office and, as Ms. Smith started to shake her head, he said, "I know, I know." She stated to him that he knew they could not do that, and that is why they have the safety blanket. Captain Fisher responded, "I know."

33. Captain Fisher then went to Ms. Farrell and stated that he was sorry if he had gotten her in trouble.

34. Glinette Smith then informed Complainant, who was her supervisor, that they had a problem, and explained Ms. Farrell's report on KM. Complainant responded that she would take it from there.

35. Immediately following this briefing from Ms. Smith, Complainant was required to be at the Management team meeting. As the meeting ended, Complainant requested to speak with the Warden and Associate Warden. They agreed, and Major Bill Brunell, BVCC Custody and Control Manager, followed them.

36. Major Brunell was Captain Fisher's direct supervisor.

37. Complainant informed the Warden, Associate Warden, and Major Brunell that she had been informed that KM had been left in the Segregation Unit without clothing or a wrap. The general response was, "that could not happen here." The Warden ordered Major Brunell to check into it, expecting that the Major would verify whether it had occurred, identify who was involved, how it had occurred, and to write and collect incident reports.

38. Following this directive, Major Brunell did not verify whether KM had been left in his cell the previous evening without clothing or safety smock or blanket. Major Brunell did not go to the Segregation Unit on August 20, 2008, and did not investigate how it had occurred.

39. Major Brunell did not talk to Captain Fisher in person or by telephone to discuss what led to KM being placed in the Segregation unit without any covering on his body at any time until Mr. Fisher appeared before the Fact Finding Panel, several weeks later.

40. At hearing, Major Brunell testified that at 9:30 a.m. on August 20, he went to the Operations Office and saw on the video that KM had a security smock on.

Major Brunell's deposition testimony was that he did not check to see whether KM was covered in his cell, on August 20. All of the documentary evidence and eyewitness testimony demonstrates that KM remained in his cell with nothing covering his body until 1:39 p.m. on August 20, 2008. Major Brunell's testimony at hearing was not credible.

41. Major Brunell ordered some staff to write incident reports on their involvement with KM and did not provide deadlines for those reports. Captain Fisher wrote his incident report on August 25, 2008.

Complainant's Follow-up

42. After the meeting with the Warden, Associate Warden, and Major Brunell in the morning of August 20, Complainant immediately attempted to contact Patrice Baldwin and Cheryl Smith but they were unavailable. She left messages for them, and for the heads of Mental Health. Complainant spoke with Glinette Smith several more times and learned that Ms. Farrell had felt intimidated by Captain Fisher to write the order to deny KM any covering for his body.

43. At Glinette Smith's directive, Ms. Farrell wrote an incident report on what had occurred on August 19, 2008, when she wrote the orders. In her report, Ms. Farrell stated that Captain Fisher "said that he thought I should probably put him on MH Watch, but not give him even the safety smock or safety blanket and to leave him as he was [naked] per Special Controls procedure. At the time I felt this action was inappropriate and inhumane and that it seemed wrong to respond to the offender's suicide attempt with what felt, to me, like additional punitive action. Nonetheless, that is how I wrote the orders. The following morning, during a conversation with my supervisor, Ms. Smith, I was informed that we are never to leave someone naked on a MHW. . . Ms. Smith spoke with Captain Fisher and he apologized to me."

44. Complainant met with Ms. Farrell, who explained that she had felt intimidated by Captain Fisher to write the order to keep KM naked in his cell. Complainant counseled her on calling for back-up if she was in a situation where she felt unsure or uncomfortable about what to do.

45. On August 20, 2008, at approximately 1:00 p.m., Complainant informed her husband, the Captain on duty, of the allegation. She asked him to review the Sprite System videotape of Cell #2 with her, in order to see whether KM had been left in his cell naked. He agreed, and they did so, accompanied by Lt. Steven Bates, the only Lieutenant on duty.

46. Complainant viewed the first portion of the video, during which Sgt. Gillespie, Captain Fisher, and others brought KM into Cell #2 in a safety smock, removed the safety smock, and left. She then returned to her duties and told her husband that she would file an incident report.

47. Captain Katzenmeyer remained and watched the entirety of the video in fast motion, which showed KM in Cell #2 for 20 hours and 54 minutes with nothing covering his body. He saw the following, in part: between 1:41 a.m. and 4:30 a.m. on August 20, 2008, KM did not sleep, he jumped up and down trying to stay warm and moved around the cell; at 1:01 p.m. on August 20, Ms. Farrell met with KM; and at 1:39 p.m., KM was given a safety smock.

48. On August 22, 2008, Captain Katzenmeyer wrote an Incident Report including his observations from the video. Under Incident Type, he wrote, "Cruel and Unusual Punishment." Under Incident Summary, he wrote, "Inmate [KM] was placed in a cell for over 20 hours 54 min. naked by Capt. Fisher."

49. On August 22, 2008, Captain Katzenmeyer discussed the incident with Warden Dunbar, and submitted the Incident Report to Chuck Campton, Investigator from the DOC Inspector General's (IG) office, who was assigned to BVCC.

50. Mr. Campton reported to Alex Wold, Chief Investigator for the IG.

51. On August 22, 2008, Complainant gave a copy of Ms. Farrell's incident report to Warden Dunbar.

Fact Finding Panel

52. Warden Dunbar assembled a Fact Finding Panel (Panel) to investigate the KM incident. He assigned Major Walt Ahrens, Administrative Officer at BVCF, to Chair the Panel. He also assigned Major Brunell and Complainant to the Panel.

53. When Complainant learned she was on the Panel, she immediately tried to be removed from it. She felt that due to her and her husband's role in submitting the Incident Reports, and her role as supervisor of Ms. Farrell, she had a conflict of interest. In addition, she feared retaliation by Captain Fisher and others at BVCC for violating the "code of silence" of protecting fellow correctional officers from consequences for rule violations. She asked the Warden, Major Ahrens, and several other high level managers including Cheryl Smith to remove her from the Panel, but was unsuccessful.

54. The Panel reviewed all pertinent documents, including all incident reports written by correctional staff who were involved with KM on August 19-20, 2008, and Ms. Farrell.

55. Captain Fisher's Incident Report stated the following in its entirety:

On 8/19/08 at approximately 1500 hrs, I, CO IV Richard Fisher, was informed that offender [KM] had made a suicide gesture. I was notified that Mental Staff Kathleen Farrell had been notified. I spoke with her in Segregation and told her that offender [KM] had been placed on Special Controls after he flooded his cell and urinated on the tier. I was told that he fashioned a noose out his boxers and socks. I informed MH worker Farrell about this and also told her that we, Segregation would not give him a blanket (since he was on Special Controls). She then said to me, 'I'm trying to read between the lines here.' I told her that we, Segregation, would not give him a blanket. I then left Segregation and went to Lower North. I was not aware that MH would return the offender to his cell naked."

56. Sgt. Gillespie's Incident Report included the following statements:

"At approx. 1600 Hrs. Capt. Fisher arrived at Segregation. I talked with him about the protocol for this situation ie Does [KM] get a safety smock and blanket now that he will be on a Suicide Watch and Special controls or does he get boxers and socks again to this answered no he'll be naked in the cell." (sic)

"Capt. Fisher stepped to the Lt's office door and told [KM] as I had been telling him that he would be placed back in the cell naked offender [KM] said he understood and Capt. Fisher left the area."

57. After reviewing the documents, Major Ahrens set up interviews with all pertinent witnesses.

58. A video was also submitted to the Panel, showing Cell #2 with KM naked. However, the portion at the beginning of the video showing Captain Fisher present in Cell #2 as the safety smock was removed from KM, and then leaving, was missing. When the Panel reviewed the video, Complainant informed Majors Brunell and Ahrens that the video she, her husband, and Lt. Bates had seen showed Captain Fisher present with KM uncovered in his cell.

59. Major Brunell responded that Captain Fisher denied being there and denied having seen KM naked in his cell.

60. Complainant responded that she had seen it on the video with her own eyes, and that this was a "good old boys" situation. She believed at that point that Major Brunell did not want to get to the truth.

61. Captain Fisher was interviewed by the panel. He stated that he was not at Cell #2 in Segregation when KM was placed in the cell. He denied knowing that KM was placed in his cell naked, and stated that no one had informed him that KM was going to be placed in his cell naked.

62. Captain Fisher said that he had informed Ms. Farrell that he was not going to give KM a blanket, and that was the extent of their conversation. He stated that the only conversation he would have had with Sgt. Gillespie would have been about Special Controls still being in effect, but he did not recall any conversation with Gillespie about whether KM should have anything in his cell. He also stated that he did receive a call from Glinette Smith on August 20, during which she told him, "we can't do that; keep a guy in his cell naked, it's cruel and unusual punishment," and that he had said, "Okay." He said he then told Ms. Farrell that if he had said anything to get her into trouble, he was sorry.

63. Captain Fisher also informed the Panel that Segregation normally does not run Special Controls and Mental Health Watches simultaneously, but they did this time to "keep the heat up." He explained that the Special Controls regulation required that staff assure the boiler house maintains the temperature at 68 degrees, but that staff are not required to do this for inmates on Mental Health Watches.

64. Complainant and Major Ahrens determined that Captain Fisher had not been truthful to the Panel. They discussed whether to recall him to testify again. Major Brunell was opposed to recalling Captain Fisher. They decided to call him back, despite Major Brunell's opposition.

65. At his second meeting with the Panel, Captain Fisher was confronted with the evidence contradicting his statements, including Ms. Farrell's and Sgt. Gillespie's written reports. He denied having made the statements recorded in their reports and remained consistent on most issues. However, he acknowledged that he had seen KM naked in his cell before he left, stating, "I guess that's all I can recall, he was in the cell naked, and then I left." He indicated that he did not think of it as being unusual. When asked about the temperature issue, he stated, "It's reasonable to keep the temperature warm down there so an inmate doesn't write a grievance saying he has to wrap his feet in toilet paper just to stay warm, that's reasonable."

66. Captain Fisher stated in this meeting that after his conversation with Ms. Smith in the morning on August 20, he did not go to the Segregation unit to assure that KM was given a blanket or smock.

Fact Finding Report

67. On September 10, 2008, the Panel issued its Fact Finding Report (FF Report), concluding:

- Ms. Farrell erred by not standing up to Captain Fisher and ensuring the correct protocol was put in place;
- Captain Fisher pressured and manipulated Ms. Farrell through unclear language to write the order for no garments;

- Ms. Farrell erred by not immediately notifying her supervisor that she felt uncomfortable with her decision, and by waiting four hours on August 20 to give him a smock, after her conversation with Glinette Smith;
- Captain Fisher failed to communicate in an open and cooperative manner with Farrell, did not use common sense regarding which protocol staff should follow, and failed to pay attention to what was occurring on his unit, if, as he said, he was not aware of the situation until August 20;
- Correctional Officers failed to use common sense to address inappropriate living conditions, and were brainwashed not to question mental health orders;
- “The Panel was uncertain as to whether Captain Fisher . . . was not forthright in his testimony concerning what he could or could not recall or that he truly could not remember due to a personal deficiency.” It noted his testimony conflicted with that provided by Sgt. Gillespie;
- Captain Fisher demonstrated a lack of concern or follow-through to ensure the situation was resolved as quickly as possible following his meeting with Ms. Smith early on August 20, and KM remained naked for an additional four hours.

68. The Panel made several recommendations, many of which concerned training of staff. It recommended progressive discipline for Ms. Farrell and Ms. Smith, which was subject to Complainant’s discretion. It also recommended progressive discipline for Captain Fisher, which was subject to the Warden’s discretion. The Panel further suggested consideration of transferring Captain Fisher “from the complexities of West End supervision.”

69. Complainant issued a performance documentation to Ms. Farrell.

70. Associate Warden Bartruff issued a Corrective Action to Captain Fisher for his involvement in the KM incident.

71. BVCC did not take action against Captain Fisher for lying to the Panel.

Captain Katzenmeyer

72. Prior to the KM incident, Major Brunell had issued a Corrective Action to Captain Katzenmeyer for engaging in prohibited horseplay. The Corrective Action required that Katzenmeyer have regular mentoring meetings with the Major.

73. During the months following the issuance of the FF Report, Major Brunell refused to talk to Captain Katzenmeyer when he requested to meet for their mentoring sessions, and stopped talking to him completely. In addition, Major Brunell, Sgt. Brunell, and Captain Fisher collected negative performance information on Captain Kirk Katzenmeyer. Captain Katzenmeyer attended a predisciplinary meeting, received some type of adverse action, appealed it to the

Board alleging whistleblower retaliation for his Incident Report regarding Captain Fisher and KM, and settled the case.

Mid-Year Evaluation

74. In November 2008, Complainant was given a mid-year, six-month evaluation for the period April through September 2008, at an overall Level II. The evaluation opened by noting that in view of the loss of the physician and several other professional staff, a Nurse III with "an ineffective management style" and a Mental Health Supervisor "who has been less than supportive," "few new HSA's have had to deal with so many challenges at the same time. Ronda has tried to maintain her professionalism, even as she tries to learn her new role. Overall, this has been a tremendous challenge for Ronda and her sheer fortitude in trying to do the right thing is very good. However, Ronda needs to try and keep her emotions out of her decisions. She needs to decide what she is going to do and then stick with it, even if it is not a popular decision or she receives negative feedback.

75. The evaluation continued, "Ronda has tremendous potential as an H.S.A. and if she can hang in there she can be one of the best managers in this state." It also noted, "Ronda has very good interpersonal skills. Most of her staff have told me how much they love having Ronda as their H.S.A. She has had difficulty being accepted by some members of the security staff, but she has worked on improving her communication with the management team and I am seeing slow but steady progress in her relationship with others."

Moltz Contract

76. Following the issuance of the FF Report, the working relationship between Major Brunell and Complainant became strained. Captain Fisher stopped talking to Complainant.

77. Major Brunell often informed Associate Warden Terri Bartruff of problems that he had with Complainant. On one occasion in the late fall of 2008, the procedure for performing lab draws was modified without Complainant's knowledge. Ms. Bartruff "chewed out" Complainant for not having a plan to implement this change. However, at the time, Complainant had not known about the change. On another occasion in late 2008 or early 2009, a Shift Commander ordered a lab technician to come in to work. Major Brunell became angry with Complainant for this occurrence, although she had no role in it.

78. Complainant tried to have a productive working relationship with Major Brunell, but was unsuccessful.

79. Complainant informed Ms. Baldwin and Cheryl Smith of Major Brunell's hostility towards her, and that she felt it stemmed from her involvement in the KM

incident. Complainant also informed Cheryl Smith about the missing footage from the video submitted to the FF Panel.

80. Ms. Baldwin viewed the problems between Complainant and Major Brunell as part of the growing pains for Complainant in her new position. Ms. Baldwin arranged for the hiring of the former BVCC HSA, Jean Moltz, to work on a contract basis for a few months, to mentor Complainant. Ms. Shoemaker approved this contract.

81. Ms. Moltz has a Masters degree in Human Resource Management and Development. She was HSA at BVCC from 1988 through 1995, then worked as HSA at several other prisons. In 1998, she returned to BVCC and remained as HSA until her retirement in 2002. Ms. Moltz has served as a national auditor for the American Correctional Association.

82. Ms. Moltz was close to the Warden, Associate Warden, and other managers at BVCC. She was highly respected and well liked by the Security managers.

83. Ms. Moltz's contract was on a part-time basis from January through April 2008. She started by spending several hours with Complainant, mentoring her in the areas of communication skills, interpersonal skills, organizational culture and management tools. She encouraged Complainant to get out of the Clinical area more and cultivate interpersonal relationships with the other managers at the prison. Complainant did so, and was successful in developing her relationships with management staff. However, she was unable to establish a positive working relationship with Major Brunell.

Problems with Controlled Movement

84. Controlled movement is the process by which inmates move from the living units to other areas of the prison for Clinical visits, meetings with attorneys, personal visits, and disciplinary hearings.

85. Inmates are routinely sent to the Clinical Unit to receive medical treatments, including monthly TB clinic, monthly optometry clinic, psychiatric clinic, weekly blood draws, weekly x-rays, daily sick call, daily treatments, medical trips, and other unscheduled visits.

86. Prior to October 2008, correctional staff had been helpful to Clinical staff by facilitating controlled movement. This process included locating inmates who had appointments.

87. In addition, prior to October 2008, controlled movement had always been overseen and managed at the Shift Commander, or Captain, level.

88. In October 2008, pursuant to a directive of Warden Dunbar, the manner in which BVCC implemented its in-house regulation governing controlled movement changed. Inmates had previously been permitted to use an appointment slip to carry with them to the Clinical Unit, enabling them to arrive five minutes prior to the appointment, and to depart when finished.

89. Under the new implementation practices, by December 2008, controlled movement was limited to a ten-minute period at the beginning of each hour. Once the inmates arrived at the Clinic, they were required to wait in the small waiting room for any appointment within that hour. The Medical security officer stationed in the Clinic was required to sign the passes and move the inmates out within the half hour, if possible.

90. During this period of November – December 2008, Major Brunell withdrew approval from his Shift Commanders to authorize inmate movements to the Clinical unit. Any time an inmate needed to go to the Clinic, Major Brunell, and no one under his supervision, including Captains serving as Shift Commanders, could approve it. If Major Brunell was not available, inmate controlled movement did not occur. In addition, Security staff in Major Brunell's chain of command cancelled medical trips without notice, forcing inmates to move at fewer times during the day for appointments, thus crowding the Clinic.

91.

92. Inmates missed appointments and Controlled Movement became severely disrupted, rendering it difficult to bring inmates to the Unit to receive routine medical treatment.

93. There was no operational reason for Major Brunell to escalate authority over Controlled Movement to the Major level. No one at BVCC ordered or authorized him to do so.

94. During this period, the correctional staff continued to grant passes to inmates to attend visitations, attorney visits, and disciplinary hearings at the prison. The new, restricted implementation of controlled movement applied only to inmate Clinical visits.

95. Complainant informed Ms. Moltz, Ms. Baldwin, and Ms. Cheryl Smith repeatedly that she felt that the Security problems stemming from Major Brunell were due to her involvement in holding Captain Fisher accountable for the KM incident.

96. Ms. Moltz and Complainant had several meetings with Major Brunell to address operational problems between Clinical and Security.

97. Major Brunell made agreements with Ms. Moltz and Complainant at these meetings to establish specific procedures and to have his Captains assure that

things were done at certain times for Clinical Services. When the situation came up, Major Brunell's captains, lieutenants, and shift commanders knew nothing about the agreements he had made.

98. These occurrences were very hard on the BVCC nursing staff and Complainant.

99. Ms. Moltz was very close to Warden Dunbar and during her contract term had weekly meetings with the Warden to give him reports. She informed the Warden that Major Brunell made agreements with her and Complainant which he then breached, and of the significant resulting problems in Clinical operations.

Moltz Reports

100. On January 19, 2009, Ms. Moltz wrote her first report to Ms. Baldwin on the progress of her work with Complainant. Moltz' report summarized a January 16, 2009 meeting with Warden Dunbar, Major Brunell, Complainant, and Ms. Moltz. The Warden set his expectation that Clinical Services and Security needed to work together on a daily basis and requested that all decisions be made at the lowest possible management level, not be elevated to the associate warden or warden's level. At the meeting, it was agreed that Major Brunell would clarify custody's responsibility in finding inmates in order to facilitate their medical appointments.

101. Major Brunell did not follow this directive. Warden Dunbar did not enforce his directive.

102. Ms. Moltz's January 19, 2009 report to Ms. Baldwin also stated:

- "1. In general, the clinical staff are very happy with Ronda's management, they are supportive and respect her position. Ronda has faced some significant challenges with nurses and the lack of providers which adds stress to this situation. She works well within clinical services."
- "2. Many of the facility issues do relate to the interpersonal relationship between Ronda and Major Bill Burnell. The other managers that I have interviewed do not have the same communication and interpersonal issues, that seem to be present between the HSA and the Major. Many operational activities that were generally controlled by the shift commander are now elevated to the Major for a decision. The associate warden is also more involved in daily operational decisions."
- "Inmate 'kites' [requests for medical appointments] are triaged daily and when a nurse needs to add on an inmate to sick call, custody officers refuse to find the inmate and send him. The custody officers have always been helpful to medical and mental health in this way."

103. Cheryl Smith reviewed Ms. Moltz's January 19, 2009 report. In addition, Ms. Moltz and Complainant informed Ms. Baldwin, Ms. Smith, the Associate Warden, and the Warden of Major Brunell's pattern of breaking agreements with Clinical management.

104. The Warden and the Associate Warden did not hold Major Brunell accountable for his conduct and did not correct the operational problems between Clinical and Security.

105. Ms. Moltz' January 30, 2009 report to Ms. Baldwin noted the following:

- "Because of the lack of providers at BVCC, there are many charts that are not signed, medications not renewed, lab reports not reviewed, regress physicals not completed, chronic care incomplete and sick calls unscheduled. The nursing staff have triaged and done nursing sick call on a regular basis, however, many inmates need to see a provider."
- "The current staffing has several vacancies. . . Chronic care has been more like emergency care with the lack of providers."

Clinical Staff; Dee Dee Brunell

106. Complainant recruited and hired Kerri Baroni in the Nurse III position in July 2008. Ms. Baroni's husband was a Case Manager on the correctional staff at BVCC. Ms. Baroni supervised the nursing staff, which included several RN's and one LPN, Dee Dee Brunell.

107. Ms. Brunell was the daughter-in-law of Major Brunell. Her husband, Seth Brunell, was a Sergeant at BVCC.

108. Timi Taylor, an RN, was Ms. Brunell's charge nurse. The two did not get along. Ms. Taylor was concerned about Ms. Brunell practicing beyond the scope of an LPN, and not accepting the mentoring and training offered. The situation became so volatile that Ms. Taylor avoided being in the same room as Ms. Brunell.

109. Ms. Taylor sometimes wrote confirming emails to Ms. Brunell, reviewing what she viewed as performance problems, and copied Complainant.

110. Ms. Brunell sometimes behaved at work in an immature and unprofessional manner. For example, Ms. Brunell wrote an informational report to Complainant on February 23, 2009, reporting that during segregation medication rounds, "I, Nurse Dee Dee Brunell was verbally unprofessional with an offender. I spoke with segregation staff about the incident."

111. In early 2009, Ms. Taylor had a special meeting with Ms. Baldwin and Complainant to discuss Ms. Brunell's performance issues. Ms. Shoemaker was aware of the issues and viewed Ms. Brunell as being "emotional."

112. Complainant asked Ms. Baroni to help train Ms. Brunell to be more professional; she did so.

113. Complainant informed Ms. Baroni about the problems caused by Major Brunell, and that she believed he was retaliating against her because of her involvement in the KM incident, and that Ms. Brunell was actively trying to help Major Brunell undermine her success at BVCC.

114. When Complainant scheduled Ms. Brunell to work on days that she did not want to work, Ms. Brunell complained about this to her husband and other correctional staff, and at least twice to Ms. Baroni. Ms. Baroni informed Complainant of these complaints.

115. Complainant did not modify Ms. Brunell's schedule because to do so would have given her special treatment. She did apprise Ms. Baldwin of the issue.

116. Complainant went out of her way to avoid conflicts with Ms. Brunell, because of her problems with Major Brunell. Complainant feared retaliation from the Brunell family.

June 10, 2009 Mediation

117. Complainant set up a mediation session in response to the work conflicts between Ms. Brunell and Ms. Taylor, and asked Ms. Baldwin to conduct it. She agreed to do so and the mediation was scheduled for June 10, 2009 at 2:00 p.m. Complainant invited Ms. Baroni to attend the mediation as an observer, as a learning experience.

118. Prior to the mediation, Ms. Brunell met with Associate Warden Bartruff and asked her to attend it with her as her representative. Ms. Bartruff declined. During their meeting, Ms. Brunell asked Ms. Bartruff if it was okay to leave if it was not going well; Associate Warden Bartruff said this was acceptable. Ms. Brunell informed Ms. Baroni that the Associate Warden had given her permission to leave the mediation early if it was not going well. Ms. Baroni did not inform Complainant of this.

119. On June 10, Ms. Taylor, Ms. Brunell, Ms. Baroni, Complainant, and Ms. Baldwin all met for the mediation. Complainant had spent over two hours at a very emotional funeral prior to arriving.

120. When Ms. Brunell arrived, she handed an envelope containing several documents to Ms. Baldwin. Ms. Baldwin asked Ms. Brunell what they were and Ms. Brunell did not respond. The documents were incident reports Ms. Brunell had submitted to Shift Commanders, who were not in her chain of command. One concerned the conversation Complainant had had with Ms. Brunell advising her of the mediation. Another concerned an email Ms. Taylor had written to Ms. Brunell which she found offensive. Complainant had never seen copies of the incident reports.

121. Once the mediation got underway, Ms. Taylor and Ms. Brunell soon engaged in a heated verbal exchange, during which Ms. Taylor referred to Ms. Brunell as "little girl," and Ms. Brunell then left the room angry and upset, shaking and pointing her finger at Ms. Taylor.

122. Ms. Baroni left the room to find Ms. Brunell, who was in a small teleconference room.

Teleconference Room Exchange

123. When Ms. Baroni found Ms. Brunell, she was shaking, crying, and having a hard time talking. Ms. Brunell appeared "hysterical" to Ms. Baroni. Ms. Brunell was angry at Ms. Taylor and Complainant, repeatedly stating that she knew that Complainant would not protect her at the mediation.

124. Ms. Baroni attempted to get Ms. Brunell to return to the mediation, but she refused.

125. Complainant waited in the mediation room for ten or fifteen minutes. She was very concerned that the mediation had gone badly, she was understaffed in nursing, and she needed to be able to staff Ms. Taylor and Ms. Brunell on the same shift. In addition, Complainant was very concerned about the fact that she was short-staffed for the diabetes medication line scheduled to occur that afternoon.

126. After approximately ten minutes, Complainant left the mediation room to find the others. She found Ms. Baroni and Ms. Brunell in the teleconference room, and looked through the window. Ms. Baroni waived to her to come in. Complainant entered the room and then leaned back on the door after it closed. As the door closed, it clicked behind her, so she assumed it had locked. She had not intended to lock the door.

127. The other door to the teleconference room was open.

128. Complainant directed Ms. Brunell to return to the mediation. Ms. Brunell stood in front of Complainant, shaking her hand and pointing her finger in

Complainant's face, and said that Complainant had not stuck up for her in the meeting, and she was not going back.

129. Complainant placed one open hand on Ms. Brunell's hand with the pointed finger, and moved her hand away from her in a downward motion. Complainant stated, "Don't point your finger at me."

130. Ms. Baroni moved between them and stated to Complainant, "Don't touch her." Complainant responded, "Don't tell me what to do."

131. Ms. Brunell became more hysterical and yelled, "Let me out!" repeatedly. Complainant responded that there is another door in the room which is open and she could go out that door.

132. Complainant responded to Ms. Brunell's repeated yelling that after Ms. Taylor had made her "little girl" statement, Complainant had counseled her to stop. Ms. Brunell continued to scream repeatedly, "Let me out, I need out of here."

133. Ms. Baroni became emotionally upset as Ms. Brunell escalated, and Ms. Baroni broke out in hives. Ms. Baroni told Complainant that Ms. Brunell was going to have an anxiety attack and to let her get Ms. Brunell out of there. In the meantime, Ms. Brunell was yelling and screaming repeatedly that she was done, she wanted to get out of there.

134. Complainant did not prohibit Ms. Brunell from leaving the room either physically or verbally. Ms. Brunell and Ms. Baroni later informed investigators that Complainant had stated, "you're not going anywhere." However, these statements are given no credence because neither Ms. Brunell nor Ms. Baroni included this alleged fact in their very detailed Incident Reports written on June 10, 2008, which contained numerous quotes of all three women present. In addition, Ms. Brunell did not testify at hearing.

135. Ms. Brunell at all times was free to leave the room by walking out the open door.

136. Ms. Brunell said she was going to call security and she picked up the telephone. Complainant said, "You are not going to call security," quickly walked over and put her hand on top of Ms. Brunell's hand. Ms. Baroni then approached and moved Complainant and Ms. Brunell aside, took the phone from them both, and hung it up. She said to Complainant, "Let her go, you can't touch her."

137. Both Complainant and Ms. Baroni did not want Ms. Brunell to call Security. They did not want to interrupt Security staff. In addition, Complainant was aware that Security staff were in the middle of performing their inmate count and had just responded to a fight situation in the prison.

138. Ms. Brunell then walked out of the room through the other door. Complainant remained in the room for several minutes so that Ms. Brunell did not feel she was following her.

139. This incident took place over a one minute and twenty second period of time, according to the security video in the hall outside the room.

Complainant Placed on Administrative Leave

140. Ms. Baroni was very upset by this incident. She felt Complainant's conduct was aggressive and she was afraid of what Complainant might do to both Ms. Brunell and herself.

141. Ms. Baldwin met with Ms. Baroni and asked her to report on the incident to Cheryl Smith, by speaker phone. She did so. Baldwin also asked Ms. Baroni to write an incident report and permitted her to do it at home. Ms. Baroni went home and wrote her report that evening.

142. Ms. Smith called Ms. Shoemaker to inform her of what had occurred, and Ms. Shoemaker ordered Ms. Smith to place Complainant on administrative leave pending an investigation of the incident. Ms. Shoemaker had been previously aware of the problems between Ms. Brunell and Ms. Taylor, and the fact that Ms. Baldwin was at BVCC that day to conduct the mediation.

143. Ms. Baldwin next met with Complainant, stating to her, "You touched another employee." Complainant was angry and stated that she knew this would happen, she was sick and tired of all the problems with the Brunells and she knew if she stayed at BVCC she would be run out of there. Ms. Baldwin responded, what was she thinking to put her hands on another staff member with all that past history, meaning with Major Brunell.

144. Ms. Baldwin called Ms. Smith and placed her on speakerphone. Ms. Smith put Complainant on administrative leave. Ms. Baldwin ordered Complainant to write her incident report before leaving that day. Complainant's computer was being replaced at the time and she asked to do it at home instead of by hand, after she had calmed down. Ms. Baldwin ordered her to do it at that time. She did so.

145. Complainant's statement indicated the following, "DeeDee was crying and shaking her hands. I took her hand to try and calm her down and she became very anxious and started yelling, 'Let me out.' Kerry went over to DeeDee on the other side of the room and I stayed by the door. DeeDee again yelling that she needed out and said she was going to call the Shift Commander. She picked up the phone on the desk and I walked over & hung up the phone and she left the room and Kerry followed. I waited for her to leave and then left . . ."

146. Ms. Baldwin then walked Complainant out of the facility.

147. That evening, Complainant wrote a second report on her computer at home, which was more detailed, consistent with her first statement. The statement clarified that she hung up the telephone by pressing on the flash button.

Written Statement of Ms. Baroni

148. In her June 10, 2008, written statement of the incident, Ms. Baroni wrote the following narrative:

Immediately after DeeDee and I agreed where she would go Ronda appeared in the door window and came into the office. . . Ronda stated to DeeDee "You need to get back in there. You need to return to the conference room." Dee stated "You didn't stick up for me. I told you I was going to leave". At this point Ronda grabbed Dee Dee's hands and stated "Don't point your finger at me." I moved between them, physically pulling Ronda's hand off of Dee Dee's hands and positioning Dee Dee behind me. I stated to Ronda, "Don't touch her" and Ronda stated "Don't tell me what to do." DeeDee moved by the desk and chair. She was not to my right and Ronda to my left. I positioned myself between them with my left hand physically on Ronda's upper torso. I stated, "Ronda stop". She again replied "Don't tell me what to do." DeeDee stated several times, "Get me out of here, I need to get out of here." I again stated "Ronda Stop. She is going to have an anxiety attack let me get her out of here." Ronda replied "No." at this time I had my left arm out toward Ronda, and my right hand on DeeDee's arm positioning DeeDee behind me. DeeDee then stated "I am going to call for security" and she grabbed the telephone receiver. Ronda stated loudly and angrily, "You are not going to call Security." Ronda quickly lunged in front of me and grabbed the telephone receiver and DeeDee's hand that was on the receiver. Ronda also grabbed DeeDee's other wrist. I then shouted "Let her go, you can't touch her." I physically pulled Ronda's hands off of DeeDee and the receiver. I moved myself between the two of them and placed DeeDee toward another office exit. I was able to place the receiver back on the telephone. DeeDee quickly left the office through the file room exit that connects to the Mental Health waiting room and I followed her.

149. Ms. Brunell's June 10, 2009 incident report stated:

Ronda Katzenmeyer came into the room and pushed the door shut, where I was standing in the corner, Kerry was leaning up against the wall to my left and Ronda turned towards me, words were exchanged that I can not remember the conversation when Ronda grabbed my hands, pushing them down and saying "do not point at me," Ronda had a look in her eye like she was going to kill me and gritted her teeth while she was talking to me, during that time Kerry was trying to get in-between us by putting her arms in the middle, I said, "that I did not point at you" and that "I was putting my hands up because she was getting to close to me" (sic), I did tell Ronda "to get your hands off of me." Kerry was in the

middle of the two of us and her arms were out when Ronda said "don't protect her." At this time Kerry was looking at Ronda telling her to "stop and that she (Dee Dee) is going to have an anxiety attack, just stop, stop." Ronda said that I was "not going anywhere" and I turned around to the phone to call the Shift Commander to let me out and Ronda went through Kerry and grabbed my hands and the phone very forcefully, at that point I was terrified that she was going to hurt me. I back up away fro her. At that point I went out the side door around and behind Kerry by the filing cabinets and left Mental Health and came back to Medical. End of report."

Criminal Investigation by IG Office

150. Ms. Shoemaker directed Ms. Smith to report the incident to the IG's office for investigation.

151. On June 11, 2009, at 11:30 a.m., Ms. Smith contacted IG Investigator David Smith. Ms. Smith informed Chief Investigator Smith that on June 10, there was an incident at BVCC wherein Complainant may have accosted Ms. Brunell, may have falsely imprisoned Mb. Brunell by preventing her from leaving a room and by laying hands on Ms. Brunell to prevent her from leaving. In addition, Complainant may have kept Ms. Brunell from using a telephone to call for security by taking the phone from her.

152. Investigator Smith determined that the incident appeared to be a criminal one and would be investigated as a criminal case. The complaining witness was listed as Cheryl Smith.

153. The case was assigned to Alex Wold, Chief of the IG Criminal Investigations Unit.

154. In addition to the criminal investigation, a Professional Standards investigation was also conducted.

155. Mr. Wold interviewed all witnesses and reviewed all written statements. He also reviewed the videotape taken from the hall outside the teleconference room, which established that Complainant was in the room with Ms. Baroni and Ms. Brunell for one minute and thirty seconds.

156. Mr. Wold was aware of the rift between the Katzenmeyers and the Brunells. He asked Ms. Brunell about it during his meeting with her, and she confirmed the existence of the rift and began to elaborate. Mr. Wold interrupted her and stated that it was not an issue in his investigation. The only individual Mr. Wold interviewed regarding Ms. Brunell's credibility was Ms. Brunell.

157. On June 13, 2009, Mr. Wold requested through Ms. Baldwin to interview Complainant. Complainant responded by requesting that he go through her

attorney, and gave Ms. Baldwin her attorney's telephone number. Soon thereafter, Complainant went on vacation.

158. On July 2, 2009, Complainant emailed Mr. Wold to inform him she had returned from vacation and provided the telephone number of her attorney and her home phone number.

159. On July 5, Mr. Wold responded, "Thank you at this time I have your written statement as to what happened on June 10th, 2009 and that is all I require right now unless you have need to add to your statement. If so submit a written supplement to your supervisor Patrice Baldwin . . ." Complainant responded that she did have a typewritten report dated June 11 which her attorney would forward to him.

160. On July 6, Mr. Wold responded by providing his address, and by stating, "I plan on presenting the case to the District Attorney's Office by the end of the week so if there is anything you want the District Attorney to be aware of it needs to be sent to me in a timely manner. Thank you."

161. On July 7, 2009, Complainant emailed Mr. Wold, stating that she had left a message for her attorney and had not heard back from him. She attached a copy of her June 11 incident report, and asked, "Can you tell me how this can be escalated to the District Attorney's Office without an investigation and talking to the parties involved? Thank you for [your] time. Ronda."

162. On July 8, 2009, Mr. Wold responded that he had attempted to interview her on June 13 but she had "opted not to instead referred me to your attorney without providing contact information. But given the fact I had your written statement which I believe to be in your own handwriting and factually accurate I proceed based on it's contend. Even without an interview with you I can still present a case to the District Attorney for review based on witness accounts of the incident without the suspect's statement being needed. In this case with or with out a statement from you I would still present the case to the DA due to the allegations that have been alleged against you concerning the incident of June 10th are criminal in nature. Be assured that I will also present both of your written statements to the DA to consider as well when I present the case."

163. On July 8, Complainant responded that she had never been informed of a meeting on June 13 and had given Ms. Baldwin the phone number of her attorney, to schedule the interview with Mr. Wold.

164. On July 8, 2009, Complainant's attorney wrote Mr. Wold, explaining that she was interested in meeting with Mr. Wold with her attorney present, and providing him with a copy of Complainant's June 11, 2008 written statement (which he had not formerly received). The letter stated in part, "One reason for having counsel present is that the Katzenmeyers are and will be asserting claims

of whistleblower retaliation by DOC officials and personnel. Mr. and Mrs. Katzenmeyer claim that they have been targeted for taking part in reporting a situation of inmate abuse. The IG's office has information in its possession concerning this reporting by Mr. and Mrs. Katzenmeyer. It is my perception you should become fully knowledgeable concerning what the Katzenmeyers reported and did concerning the situation of abuse to an inmate before you make any hasty decisions to refer the matter to law enforcement or the District Attorney's Office."

165. On July 13, 2009, Mr. Wold responded by letter to Complainant's attorney. He indicated he was very open to conducting an interview with Complainant. He also said, "However, despite any information Ms. Katzenmeyer provides to me during this interview, this is a criminal case that will be presented to the district attorney at the conclusion of my investigation. Should your client choose to meet with me, I will be advising her of her rights under Miranda."

166. In his July 13, 2009 letter to Complainant's attorney, Mr. Wold also stated that any whistleblower complaint against DOC officials "is not relevant to my criminal investigation. My investigation will be narrowly focused on the incident of June 10, 2009 . . ."

167. Complainant's attorney responded on July 14, 2009, stating that Mr. Wold's letter indicated he had he had not looked at the question of motive of the complaining witness to exaggerate facts or events as a form of retaliation. In addition, he stated that since Mr. Wold had already decided to refer the case for criminal prosecution, it would not be in Complainant's interest to have the interview.

168. Mr. Wold did not investigate Complainant's claim that she and her husband had been targeted for taking part in reporting a situation of inmate abuse.

Complainant's Appeal of Referral of Case for Criminal Prosecution

169. On July 17, 2009, Complainant filed the instant appeal with the State Personnel Board, asserting that the referral of criminal charges against her was in violation of the State Employee Protection Act. Complainant's appeal form contained a copy of Mr. Wold's July 8 email to Complainant in which he responded to her request for a meeting, stating he did not need to interview her prior to referring a criminal case against her to the District Attorney for prosecution. Complainant's whistleblower complaint form listed her involvement in the investigation of the KM incident and the FF Report as the protected disclosure of information for which she had been retaliated.

170. Ms. Shoemaker received a copy of Complainant's Board appeal, with attachments, shortly after it was filed. She became aware at this time of

Complainant's whistleblower claim against DOC based on her involvement in the KM incident.

171. Ms. Shoemaker did not investigate Complainant's whistleblower claim and did not order any other DOC official to do so.

Criminal Charges

172. On July 17, 2009, Mr. Wold referred four charges against Complainant to the District Attorney for prosecution:

- False imprisonment, C.R.S. § 18-3-303, is defined as follows: "Any person who knowingly confines or detains another without the other's consent and without proper legal authority commits false imprisonment."
- Harassment, C.R.S. § 18-9-111, is defined as follows: "A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she: (a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact."
- Obstruction of Telephone or Telegraph Service, C.R.S. § 18-9-306.5, is defined as follows: "A person commits obstruction of telephone or telegraph service if the person knowingly prevents, obstructs, or delays, by any means whatsoever, the sending, transmission, conveyance, or delivery in the state of any message, communication, or report by or through any telegraph or telephone line, wire, cable, or other facility or any cordless, wireless, electronic, mechanical, or other device."
- Menacing, § 18-3-206, is defined as follows: "A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury."

173. As a professional investigator and Chief of the Criminal IG unit, Mr. Wold had discretion as to whether to refer criminal charges against Complainant to the DA.

174. Mr. Wold testified at hearing that if he found probable cause for criminal violations against Complainant, he was required to refer the charges to the DA for prosecution. No evidence in the record corroborates this statement. Respondent offered no DOC IG policy mandating the referral of criminal charges against an employee upon a finding of probable cause. Mr. Wold's testimony on his lack of discretion lacks credibility.

Professional Standards Investigation

175. In the meantime, DOC's OIG also conducted a Professional Standards Investigation into whether Complainant's conduct on June 10, 2009 was in violation of DOC's Workplace Violence policy. James Montoya performed the investigation; he interviewed all individuals present on June 10, 2009.

176. Officer Montoya completed his report on August 19, 2009 and forwarded it to Ms. Shoemaker for her review and potential action. The report contained transcripts of the interviews, copies of emails exchanged by Ms. Brunell, her husband Sgt. Brunell, Ms. Taylor, and others, and the completed Criminal Investigative Report with the face page for the DA listing the four charges that were referred for prosecution.

177. Ms. Shoemaker was aware that criminal charges were referred for prosecution in July 2009.

Executive Director Extends Paid Suspension

178. On September 1, 2009, Ms. Shoemaker sent a memo to Mr. Zavaras, entitled, "Ronda Katzenmeyer, Administrative Leave." She stated that due to the pendency of professional standards and criminal investigations being conducted by the IG's office, she was requesting approval for Complainant to remain on leave with pay "until we have notification of the completion of the investigation."

Transfer to Parole

179. In September 2009, Ms. Shoemaker received a telephone call from DOC's Human Resources Director, Richard Thompkins, suggesting that any employees on paid leave be placed in open positions, in order to create vacancy savings for DOC. Ms. Shoemaker discussed Complainant at that time, and they decided to assign Complainant to the Parole Office at DOC's headquarters in Colorado Springs.

180. On September 22, 2009, Ms. Cheryl Smith called Complainant to advise her of the decision to assign her to Parole. Her confirming letter stated, "The investigation regarding your case is ongoing; however, you will be removed from Administrative Leave effective September 24, 2009. You will be assigned to the Parole Board Office in Pueblo on an interim basis. . . . I will advise you of any changes to your work assignment as they occur."

181. In September 2009, Complainant began to perform clerical work in the Parole Office at DOC headquarters in Pueblo, Colorado. She still resided in Buena Vista at the time. She considered this to be demeaning work.

182. At the time of her assignment to the Parole Office, there were several Nurse III and II positions open close to her home, and Complainant could have performed those jobs.

183. Complainant remained in the Parole Office until June 2010, while receiving her pay as an H.S.A.

December 2009 Predisciplinary Meeting

184. In November 2009, Ms. Shoemaker noticed a predisciplinary meeting with Complainant.

185. On December 3, 2009, Ms. Shoemaker, her representative, Sheryl Sandefur, a manager unaffiliated with BVCC, Complainant, and her attorney, met for the predisciplinary meeting. At the meeting, Complainant showed Ms. Shoemaker the videotape demonstrating that her encounter with Ms. Brunell and Ms. Baroni on June 10 had lasted no more than one minute and twenty seconds.

186. Ms. Shoemaker did not make a decision on what, if any, corrective or disciplinary action to impose on Complainant based on the events of June 10, 2009, until September 2, 2010.

Criminal Trial

187. The District Attorney filed criminal charges against Complainant and the case went to trial in April 2010. At the close of the DA's case, the judge dismissed the false imprisonment charge. The jury acquitted Complainant of the remaining charges.

188. Complainant incurred significant attorney fees in defending herself against the criminal charges. Complainant had been informed that the status of her nursing license could be adversely affected in the event a criminal conviction.

June 2010 Assignment to HSA Position in Pueblo

189. On June 15, 2010, Ms. Shoemaker appointed Complainant to a vacant HSA position at La Vista Correctional Facility in Pueblo, Colorado. Complainant remains in this position through the present and has relocated her family to Pueblo. Complainant does not appeal this appointment.

September 2010 Decision Regarding June 10, 2009 Events

190. On September 2, 2010, a few days prior to trial in this matter, Ms. Shoemaker issued a letter decision to take neither corrective nor disciplinary action against Complainant for the events of June 10, 2009. She stated that in this matter, Complainant had allowed her feelings and emotions to take control of

the situation and the matter escalated. She noted that as a current member of her Leadership Team, she expected Complainant to interact professionally with staff. The letter did not reference Respondent's criminal prosecution of Complainant for the events of June 10, 2009.

DISCUSSION

A. Respondent Violated the Colorado State Employee Protection Act

Complainant asserts Respondent violated the Colorado State Employee Protection Act, also known as the Whistleblower Act, by placing her in a clerical Parole position in September 2009 and by referring criminal charges against her to the DA.

The Whistleblower Act protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest. § 24-50.5-103(1), C.R.S.; *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). The burden of proof in a Whistleblower Act case is allocated as follows. The employee must establish that his disclosures fell within the protection of the statute and that they were a substantial or motivating factor in the agency's adverse action taken against the employee. If the employee makes such an initial showing, the employer must establish by a preponderance of evidence that it would have made the same decision even in the absence of the protected conduct. *Id.* If the employer makes this showing, the claim fails.

I. Disclosures

In assessing a Whistleblower Act claim, the threshold determination is whether an employee's disclosures fall within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). Respondent appears to concede that Complainant engaged in conduct protected by the Act, because it does not address this issue in its Closing Argument. Nonetheless, the issue is discussed herein.

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.

The Act also defines "disclosure of information" as the provision of evidence to any person concerning abuse of authority or mismanagement of any state agency. Section 24-50.5-102(2), C.R.S. Therefore, 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, supra*.

Complainant's reporting and investigation of inmate abuse concerned actions of BVCC that were not in the public interest. First, she filed an incident report regarding potential inmate abuse. Then, as a member of the FF Panel, objected to what she viewed as an agency cover-up of the incident by calling attention to the missing portion of the video tape, and by objecting to Captain Fisher's dishonesty in the fact finding process.

When Complainant discovered the missing portion of the video, she immediately became concerned that managerial officials above Captain Fisher on the chain of command were helping to protect him from culpability for inmate abuse. Complainant informed Majors Brunell and Ahrens of the missing footage, and Major Brunell responded by stating that Captain Fisher denied being there and denied having seen KM uncovered in his cell. Complainant then commented that she had seen it on the video with her own eyes, and this was a "good old boys" situation. This statement summarized her opinion that Major Brunell and probably other WRCC leaders had decided to protect Captain Fisher. After Captain Fisher's testimony to the FF Panel appeared false, she held him accountable by insisting that he be recalled, defying Major Brunell again on this issue.

If a state agency appears to be responding to a situation of inmate abuse by protecting the officer responsible for it, this would constitute an abuse of authority and a matter of public concern. Section 24-50.5-102(2), C.R.S.; *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007). DOC may be held legally liable for inmate abuse and Captain Fisher's conduct could have resulted in legal fees and damages being imposed against DOC. The public reasonably expects to rely on prison managers and DOC leaders to respond appropriately to employee misconduct resulting in inmate abuse.

It is notable that Complainant sat on the FF Panel against her will and under the direct orders of the Warden, Ms. Smith, and other DOC managers. She did not "blow the whistle" of her own initiative. Nonetheless, she is still entitled to the protection of the Act. Similarly, the U.S. Supreme Court recently

held that the antiretaliation provision of Title VII of the Civil Rights Act of 1964 extends to employees responding to questions during an employer's internal investigation. There is no requirement that an employee speak out about discrimination on his own initiative to be protected from retaliation. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S.Ct. 846 (2009).

Complainant has engaged in protected conduct under the whistleblower act.

II. Adverse Action

The next inquiry is whether the actions imposed on Complainant constitute disciplinary actions as defined by the Act. The Act defines "disciplinary action" to include:

"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." C.R.S. § 24-50.5-102(1).

Complainant concedes that it is customary personnel practice to place an individual on paid administrative suspension pending investigation into alleged employee wrongdoing. She therefore does not assert that her initial placement on paid suspension was a violation of the Whistleblower Act. Even if she were challenging this decision, she did not appeal it within ten days, as required by the Whistleblower Act. § 24-50.5-104(1), C.R.S. Therefore, the placement of Complainant on paid administrative suspension is not at issue.

Complainant does contend that it was retaliatory for Respondent to place her in a clerical position in the Parole Office in September 2009. Respondent argues that because Complainant did not timely appeal this decision within ten days, the Board lacks jurisdiction over this claim.

The Whistleblower Act requires that employees file a written complaint with the Board "within ten days after the employee knew or should have known of a disciplinary action alleging a violation of section 24-50.5-103. . ." Complainant did not appeal her assignment to the Parole position in Pueblo. Therefore, the Board lacks subject matter jurisdiction over this claim.

Lastly, Complainant asserts that Respondent's referral of a case to the District Attorney for criminal prosecution was a disciplinary action under the Whistleblower Act. When a state agency criminally prosecutes an employee, this constitutes a "direct or indirect form of penalty." Criminal prosecution carries a

significant risk of damage to reputation and harm to future employment prospects. *See, e.g., Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-987 (10th Cir. 1996)(finding retaliatory prosecution by former employer to be adverse action under Title VII's antiretaliation clause).

The Act prohibits an "appointing authority or supervisor" from initiating or administering such retaliatory disciplinary action. § 24-50.5-103(1), C.R.S. It defines "supervisor" as "any board, commission, department head, division head, or other person who supervises or is responsible for the work of one or more employees." § 24-50.5-102(5), C.R.S. Investigator Wold was a supervisor and he initiated the filing of criminal charges against Complainant by referring them to the DA. Ms. Shoemaker, Complainant's appointing authority, initiated the IG investigation, was aware a criminal investigation was pending, received a copy of Mr. Wold's referral of criminal charges against Complainant to the DA in August 2009, and took no action following that referral.

Respondent's referral of criminal charges for prosecution against Complainant constitutes a form of penalty covered under the Whistleblower Act.

III. Substantial or Motivating Factor

Once it is established that protected disclosures occurred, the employee must demonstrate that the adverse action was taken "on account of the employee's disclosure of information." § 24-50-103(1), C.R.S. Under *Ward v. Industrial Comm.*, 699 P.2d 960 (Colo1985), Complainant must demonstrate that her protected disclosures were a substantial or motivating factor for the action taken against her. In other words, she must demonstrate a causal connection between her protected conduct and the adverse action. If she sustains this burden, Respondent then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of Complainant's disclosures. *Ward*, 699 P.2d at 968. This allocation of the burden of proof assures that employees do not abuse the Whistleblower Act to evade appropriate consequences for poor job performance. *Taylor v. Regents of University of Colorado*, 179 P.3d 246, 249 (Colo.App. 2007).

The Colorado case law implementing the Whistleblower Act fails to define the standard by which the causal connection is established. Therefore, case law implementing the antiretaliation provisions of the Colorado Anti-Discrimination Act (CADA) and Title VII (they are identical) provides useful guidance. Under this long line of cases, in antidiscrimination cases involving retaliation claims, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *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 inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action.

Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996). Generally, 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." *Id.* at 328 (citations omitted; emphasis in original).

Complainant's protected disclosures occurred in August through October 2008. Respondent criminally prosecuted Complainant in July 2009. Therefore, Complainant has not established causation through temporal proximity.

When the adverse action occurs long after the protected conduct, but a pattern of retaliation allegedly began soon after the protected conduct occurred, the causal connection can also be inferred under such circumstances. *Marx*, 76 F.3d at 329 (reversing summary judgment on inference of causation based on a pattern of retaliation despite lack of temporal proximity). See also *Wells v. Colorado Department of Transportation*, 325 P.3d 1205 (10th Cir. 2003).

In *Wells*, the Tenth Circuit Court of Appeals found three separate bases supporting the causal connection element of the employee's retaliation claim, despite the passage of nine months between her protected conduct and her termination. First, the same individual named in her discrimination claim was responsible for her termination. Second, the termination was close in time to when this individual learned of the claim, and as soon as he "had a plausible basis for taking action" against her, "he did so immediately." Third, the employer's proffered reason for terminating the employee was so pretextual that it established the causal connection. *Id.*, 325 F.3d at 1217-1218.

In the instant matter, the causal connection is made, in part, by the steady chain of retaliatory events commencing after issuance of the FF Report. After the report was issued, Major Brunell immediately became hostile to Complainant; rescinded his Captains' authority to approve controlled movement of inmates; broke his agreements with Complainant to assure his subordinates cooperated with controlled movement procedures; and caused serious operational problems for Complainant as manager of clinical services at the prison.

The leadership of BVCC, up to the Warden's level, and Complainant's chain of command, up to the level of at least Ms. Smith, DOC Director of Clinical Operations, were aware of Major Brunell's retaliation against Complainant, and did nothing to stop it.

This pattern of retaliation against Complainant establishes an inference of causation in the absence of temporal proximity. *Marx, supra.*

This case is also similar to *Wells* in that it appears there was a rush to punish Complainant as soon as Respondent "had a plausible basis" for doing so. Investigator Wold's decision to criminally prosecute Complainant without meeting with her and her attorney, and his refusal to consider potentially mitigating

information relating to her report of inmate abuse and to Mr. Brunell's credibility, underscore his rush to judgment.

Lastly, Respondent offered no explanation at hearing for why it was appropriate to bypass the progressive discipline process and instead turn to the criminal justice system, to resolve what was clearly a personnel issue. Mr. Wold's testimony that he was somehow "required" to refer a criminal case to the DA against Complainant is implausible and establishes the criminal prosecution to be a pretext for retaliation. *Wells*. Ms. Shoemaker imposed no corrective or disciplinary action against Complainant; if there was no basis for corrective or disciplinary action, it therefore follows that there was no basis for criminal prosecution.

A cursory review of the information available to Mr. Wold demonstrates the baseless nature of the criminal charges. The incident involved Complainant using her hand to remove Ms. Brunell's finger from pointing directly in front of her face, and then removing Ms. Brunell's hand from the telephone. Complainant lost her composure and became angry during this one and a half minute encounter, even causing Ms. Baroni to become frightened. However, Complainant's conduct during this one and a half minute episode was not criminal in nature.

With regard to the obstruction of telephone charge, Complainant was not the only individual present who prevented Ms. Brunell from using the telephone to contact security. Ms. Baroni's testimony at hearing and her June 10 written statement both indicate she intended to prohibit Ms. Brunell from calling security and her belief that it was she, not Complainant, who actually hung up the phone. With regard to the false imprisonment charge, Complainant had clear line authority as Ms. Brunell's supervisor to order her to do and to go wherever she deemed appropriate. Despite this authority, Complainant neither physically nor verbally forced Ms. Brunell to remain in the teleconference room. The other two charges were equally baseless.

Complainant has established that her protected disclosures regarding the KM incident were a substantial and motivating factor in Respondent's decision to criminally prosecute her for the events of June 10, 2009. *Ward*.

The last question to be addressed under the Act and *Ward, supra*, is whether Respondent would have criminally prosecuted Complainant in the absence of her protected conduct.

The State Personnel System Act establishes an efficient administrative process through which state managers utilize progressive discipline and performance management to address performance issues, including violence in the workplace. When a state agency opts to utilize the criminal justice system in

lieu of the personnel system to address employee misconduct, this represents a dramatic departure from established norms.

Respondent failed to prove that it would have criminally prosecuted Complainant in the absence of her reporting and investigation of inmate abuse. The preponderance of evidence demonstrates that but for Complainant's protected conduct, the serious mistakes she made on June 10, 2009 would have been handled in the standard fashion, as a personnel issue, through counseling, corrective, and/or disciplinary action.

Respondent has failed to meet its burden of showing that in the absence of Complainant's protected conduct, it would have criminally prosecuted Complainant for touching Ms. Brunell on June 10.

Respondent argues that there is no direct evidence in the record establishing that Mr. Wold intended to retaliate against Complainant for her protected disclosures. Complainant counters by noting that Investigator Wold knew about the KM incident and the FF Report because he would have reviewed Captain Katzenmeyer's Incident Report when it was filed with his subordinate investigator in August 2008. It is uncontested that Complainant informed Mr. Wold of her retaliation claim prior to July 17, 2009, the date on which Mr. Wold referred the criminal case against her to the DA.

Intent is customarily proven through circumstantial evidence in employment cases. The Colorado Supreme Court expounded at length on this subject in *Bodaghi v. Department of Natural Resources*, 995 P.2d 288 (Colo. 2000): "employees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination . . . There should be 'nothing novel about establishing [intentional discrimination] through the use of circumstantial evidence, for . . . circumstantial evidence is not less probative than direct evidence, and, in some cases is even more reliable.'" *Bodaghi* at 296, citing *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1045 (7th Cir. 2000).

The Court continued, "circumstantial evidence is often particularly helpful when, as here, a case turns on vacillating issues such as motive or intent. As the United States Supreme Court wrote half a century ago: [W]hile objective facts may be provided directly, the state of a man's mind must be inferred from the things he says or does. . . [C]ourts and juries every day pass upon knowledge, belief and intent – the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *Bodaghi* at 296. Respondent's argument regarding retaliatory intent lacks merit.

Respondent also asserts that because the IG office operates independently of the Security and Clinical chains of command, DOC cannot be

held accountable for retaliation. Under State Personnel Director's Procedure 1-11, 4 CCR 801, "All appointing authorities, managers, and supervisors are accountable for compliance with these rules and state and federal law, and for reasonable business decisions, including implementation of other policy directives and executive orders." The Deputy Director of Prisons, Complainant's appointing authority, learned that criminal charges were filed against Complainant, and reviewed Complainant's Whistleblower Act claim when it was filed. Then, she took no action. By allowing the criminal prosecution to proceed, she played a direct role in the actions against Complainant.

It is therefore concluded that Respondent violated the Whistleblower Act.

Remedy.

The Whistleblower Act addresses relief as follows: "If the state personnel board after hearing determines that a violation of section 24-50.5-103 has occurred, the state personnel board shall order . . . the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, and expungement of the records of the employee who disclosed information, and, in addition, . . . shall order that the employee filing the complaint be reimbursed for any costs, including any court costs, and attorney fees, incurred in the proceeding." Section 24-50.5-104(2), C.R.S.

Complainant is entitled to the following relief:

A) Complainant shall be reimbursed for any costs, including all court costs and attorney fees incurred in the proceeding before the Board;

B) Respondent shall expunge Complainant's personnel file and all other DOC files of all documents relating to the criminal investigation and prosecution of Complainant;

C.) Complainant shall be restored any service credit as HSA that she may have lost since her June 11, 2009 placement on administrative leave;

D.) Complainant requests reimbursement for moving expenses incurred as a result of being assigned to Pueblo, Colorado. As noted above, however, Complainant did not timely appeal her assignment to Pueblo in September 2009. In addition, she did not appeal her June 2010 appointment as H.SA in Pueblo. Complainant is therefore not entitled to this relief.

E.) Complainant requests reimbursement for attorney fees and costs incurred as a result of Respondent's referral of charges to the DA for criminal prosecution. Respondent counters that Complainant is not entitled to this relief because the Whistleblower Act's attorney fee provision applies only to those "incurred in the proceeding," and the criminal trial was an unrelated proceeding.

This argument is rejected on the basis of the Act's general mandate that the Board order "appropriate relief" when an agency has violated the Act, and case law interpreting this language to include any unspecified relief necessary to make the employee whole. *Lanes v. State Auditor's Office*, 797 P.2d 764 (Colo.App. 1990).

When the legal injury is of an economic character, compensation should be equal to the injury. *Id.*; *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984). An employee is entitled to receive an amount of damages that will make him whole, and is not entitled to any windfall. *Id.*; *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987).

In *Lanes v. State Auditor's Office*, a state employee who prevailed in a Whistleblower Act claim had been deprived of back pay for seven years. The State Personnel Board ordered the agency to pay interest on the back pay, and the costs the employee had incurred in searching for other employment. There is no specific language in the Act authorizing these remedies. The Court of Appeals affirmed the Board's remedial orders, citing the general language in the Whistleblower Act mandating that the "Board *shall order the appropriate relief, including, but not limited to . . .*" (emphasis in original). *Lanes*, 797 P.2d at 767. In applying the "make whole" standard governing economic injuries, the Court noted that the employee's "expenses would not have been incurred but for the wrongful discharge." *Id.*

But for Respondent's referral of criminal charges to the DA for prosecution, Complainant would not have incurred attorney fees in a criminal trial. The compensation awarded to Complainant should be equal to the injury; otherwise, Complainant will not be made whole. *Lanes, supra*; *Donahue, supra*. Therefore, Complainant is entitled to reimbursement of any costs, including all court costs and attorney fees, incurred in the criminal trial held in April 2010.

B. This case is not reviewable under the Colorado State Personnel Systems Act

The Colorado State Personnel Systems Act, at § 24-50-103(6), C.R.S., confers jurisdiction on the Board to review actions of an appointing authority "which is appealable to the board pursuant to this article or the state constitution." This case was brought under the Whistleblower Act, which is Article 50.5 of the Colorado Revised Statutes. Complainant did not appeal any separate action of her appointing authority under Article 50, which adversely affected Complainant's pay, status, or tenure. § 24-50-125, C.R.S. Therefore, the Board's review in this case is limited to the Whistleblower Act claim above.

CONCLUSIONS OF LAW

1. Respondent violated the Colorado State Employee Protection Act;
2. Complainant is entitled to the remedies mandated by the Act.

ORDER

Respondent is ordered to reimburse Complainant for any costs, including all court costs and attorney fees incurred in the proceeding before the Board and in the criminal trial held in April 2010, to expunge Complainant's personnel file and all other DOC files of all documents relating to the criminal investigation and prosecution of Complainant; and to restore any service credit as H.S.A. that she may have lost since her June 11, 2009 placement on administrative leave.

Dated this 15th day of November, 2010


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

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of Nov., 2010, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Frank & Finger, P.C.



and in the interagency mail, to:

Michael Scott



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.