

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**EDWARD W. GIETL,**  
Complainant,

vs.

**DEPARTMENT OF PUBLIC SAFETY,**  
Respondent.

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Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on June 6 and 7, 2011, at the State Personnel Board, 633 17<sup>th</sup> Street, Denver, Colorado. The record was closed on June 15, 2011, following presentation of the parties' oral Closing Arguments. Senior Assistant Attorney General Diane Dash represented Respondent. Respondent's advisory witness was Kathi Sasak, Deputy Executive Director, Colorado Department of Public Safety (DPS or Respondent), Complainant's appointing authority. Susan Klopman, Esquire, of Brownstein, Hyatt, Farber, Schreck, LLP, represented Complainant.

**MATTER APPEALED**

Complainant Edward Gietl (Complainant or Gietl), former Director of Human Resources, DPS, appeals his disciplinary termination of employment. He seeks reinstatement, back pay, and an award of attorney fees and costs. For the reasons set forth below, Respondent's action is **rescinded**.

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether Respondent engaged in gender discrimination against Complainant;
4. Whether the discipline imposed was within the range of reasonable alternatives; and
5. Whether Complainant is entitled to an award of attorney fees and costs.

**PRELIMINARY MATTERS**

At the end of the hearing, Respondent moved to dismiss Complainant's claim of reverse gender discrimination. The motion was granted for the reasons set forth in the Discussion section.

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## FINDINGS OF FACT

1. Complainant Edward Gietl was hired as Director of Human Resources (HR) for DPS in July of 2007.

2. As HR Director, Complainant was required to provide expert professional HR advice to the Executive Director, Deputy Executive Director, division directors, executive management team, managers and supervisors, human resource staff, and employees of DPS. Complainant was expected to possess a strong working knowledge of all of the human resource requirements for the Department, including recruitment, merit selection, Workers' Compensation, job classification, benefits, personal services contracting, etc.

3. Complainant was also required to "be willing to roll up his sleeves and become a member of the HR Team" and direct the team's efforts in the areas of recruitment, merit selection, job classification, benefits and workers' compensation administration, Federal Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA) administration, grievances, corrective/disciplinary actions, and rules interpretation.

4. DPS' divisions include the Colorado Bureau of Investigation (CBI); the Colorado State Patrol (CSP or Patrol); the Division of Criminal Justice (DCJ); and the Division of Fire Safety.

5. DPS has approximately 1400 employees, of whom approximately 1000 work for the Patrol. The Patrol receives approximately 7,000 applicants for positions annually.

6. Complainant has a long history of HR work. From 2006 to 2007, he was a Senior Human Resource Analyst for the Denver Police Department; from 1999 to 2007, he was a Senior Personnel Analyst for the City and County of Denver; from 1995 to 1998, he was Director of Human Resources for Acme Metals, Inc., in Kansas; from 1988 to 1994 he was Executive Director of the Denver Civil Service Commission.

7. The HR Section is housed in the Executive Director's Office (EDO) of DPS. Kathi Sasak, Deputy Executive Director of DPS, was Complainant's direct supervisor. In July 2007, she was hired by Peter Weir, Executive Director of DPS. Ms. Sasak participated in the interviews of the HR Director candidates and the decision to hire Complainant.

### The Human Resources Section

8. The HR Section (HRS) consists of two units, Selection and Employee Relations. The Selection unit administers all phases of the hiring process. The Employee Relations unit administers all remaining HR functions, including employee leave, employee benefits, FMLA, FLSA, workers' compensation, and long-term disability. The Employee Relations unit also handles payroll, which is unusual for an HR office.

9. Cindy Busby, a General Professional (GP) V, is the Employee Relations Unit Supervisor. She has been in the HR Section for twenty-six years. She had two employees at the time Complainant was hired, Kathy Dameron and Ms. Weismann, who left for health reasons in mid-2009. Ms. Dameron started in the HR Section in February 1997.

10. Carol Pritchard, GP V, is the Supervisor of the Selections Unit. She has been in the HR Section for most of her career with the State of Colorado, over twenty years. Ms.

Pritchard supervised three employees: Sandie Seegmiller, Rhonda Johnson, and one other.

### Complainant's First Six Months

11. Complainant had no previous experience in the state personnel system and therefore faced a steep learning curve despite his HR experience.

12. Complainant's primary goals in the HRS were to modernize systems to make them more efficient and to elevate customer service to the Patrol, the CBI, and the other Divisions in DPS.

13. In 2007, CSP Chief James Wolfenbarger ordered Captain Jon Barba, who was in charge of the Selections system for the Patrol, to make the selection process more efficient for new Patrol Cadets. At that time, it took four to five months to test and hire a new trooper. Complainant was committed to assisting Captain Barba achieve that goal during his tenure.

14. Early in Complainant's tenure, he asked Ms. Prichard to be sure to include female and minority representation in the CSP Major's and Lt. Colonel's test panels. She did not comply with this directive. Complainant was forced to override her on this decision.

15. Complainant informed his staff that he would meet with each of them to learn their jobs. He initially met only with Ms. Pat Snyder. This caused the other staff members to feel undervalued and that he was not invested in the work of the HRS.

16. When Complainant had an HR issue involving a State Personnel Board Rule or Director's Procedure, Complainant often called the rules interpreter at the Colorado Department of Personnel and Administration (DPA), Human Resources Division, or an attorney in the Colorado Attorney General's Office. Complainant knew the Executive Director of DPA and the DPA Director of the Division of Human Resources, Tom Montoya, having worked with both of them in Denver several years ago. Some of Complainant's staff were insulted by his decision not to confer with them regarding all HR issues. They felt that he disrespected them professionally. Ms. Snyder felt strongly that Complainant was not using her to the best of her capacity, that she was being cast aside.

17. Complainant took some early actions that led his staff to believe he did not respect their professional judgment. For example, the Patrol once requested that Complainant arrange for Troopers to receive overtime pay for teaching classes to Division of Fire Safety members. Complainant referred this request to Ms. Dameron, who advised him that it was not permissible under FLSA. Complainant was not satisfied with Ms. Dameron's answer and directed her to contact Ms. Joi Simpson at DPA. Ms. Simpson agreed with Ms. Dameron's professional opinion.

18. Complainant delegated some work formerly performed by his predecessor to his staff. FLSA issues are legally complex and had formerly been handled by the three previous HR Directors. Complainant delegated FLSA issues to Ms. Dameron, who felt this was inappropriate.

19. One of the functions of the HR Division is to process requests by law enforcement agencies for information from former DPS employees' personnel files. The information sought contains documents protected under the Open Records Act, and a waiver is necessary for disclosure of this information. Previous HR Directors had handled these

requests. Complainant also delegated this duty to Ms. Dameron.

20. The HRS has frequent visits from DPS employees with questions or in need of assistance. Previous HR Directors helped to cover the front desk in order to assist with the work of the Section. Complainant did not help to cover the front desk.

#### Early Projects; Communication Center Project

21. One of the first items Complainant requested of his staff was that they compile annual metrics on the work performed in the HRS. The metrics were designed to assist the HRS in identifying potential efficiencies and areas for cross training, to educate EDO senior management about the work of the unit, and to lay the groundwork for hiring new staff. The HRS staff were resistant to this idea. At one early meeting in which the metrics were discussed, Ms. Seegmiller stated to Complainant in front of the other staff present that she thought it was a stupid idea. Complainant diffused the situation.

22. Complainant initiated monthly staff meetings with the entire HR Section staff. At the November 2007 meeting, Complainant asked how the compilation of the metrics was going. One staff member responded that Complainant did not think they worked hard. Complainant responded that that was not true, and explained that he informed others of how hard they work and that he needed the statistics to request additional staff for the HR Section.

23. The most significant early project on which Complainant worked was to upgrade the HRS services provided to the Patrol Communication Center (Center). In August 2007, Complainant met with Major Kris Meredith to discuss problems between the Center and HRS. Complainant then met with Ms. Pritchard and some of her staff to identify ways of addressing those problems.

24. On September 5, 2007, Complainant wrote a three-page follow up memorandum to Major Meredith, copying Ms. Pritchard and Ms. Seegmiller, itemizing each problem area and detailing the specific ways HRS would fix the problems. The areas included: applications are sometimes lost; the Center recruits over the Internet and those who call are told that HR is not accepting applications at this time (Complainant changed the policy so that the Center was open year-round); there are persistent paperwork glitches; there are interpersonal and communication issues between the HRS and Center staff (Complainant committed to discuss this at their next meeting); and, applicants are not being notified of their results or status.

25. In his memo to the Major, Complainant thanked him for his openness and the balanced manner in which he conveyed his suggestions, taking into consideration the positive aspects of HRS service. Complainant stated, "I can speak for the staff in saying that we are committed to working with your staff in a reciprocal relationship to insure that CSP is able to attract and process the 'best and brightest'" applicants, and he looked forward to renewing the communication and effectiveness of their mutual operations.

26. During Complainant's first six months, he designed a sexual harassment training and delivered it to CSP and DCJ managers, and scheduled the CBI managers for early 2008.

27. Complainant also arranged for CSP members to be surveyed about areas for improvement in HRS operations.

## 2007 Evaluation

28. On December 4, 2007, Ms. Sasak emailed Complainant and two other division managers, requesting that they distribute a "Supervisor Performance Input" form to their direct reports. She also requested that they complete their portion of a 360 evaluation form.

29. Complainant responded to this email with a request that he be permitted to meet with Ms. Sasak prior to her and Peter Weir's review of the responses from Ms. Busby and Ms. Pritchard, because "there are some 'cultural' things that I have observed here in HRS that I believe would be helpful for you to know in relation to their responses, whatever that will be."

30. Many of the HR Section staff did not fill out the form. Instead, they requested to meet with Ms. Sasak. Ms. Sasak agreed to meet with Complainant's staff, including not just his two Section supervisors, but their direct reports. Many of the staff informed Ms. Sasak that Complainant did not understand the work of the Section, was not getting up to speed on the state personnel system, was not responsive to their needs, was not listening to them, and was overlooking their expertise.

31. Ms. Johnson did fill out the evaluation of Complainant and rated him "Excellent" in every category, including: being accessible to her; listens to her ideas, issues or concerns; promotes and requires positive communication within the unit; provides appropriate guidance, input, and feedback; develops, positively influences, motivates, and challenges subordinates; and effectively uses resources to accomplish objectives. Ms. Johnson wrote that the other HRS staff were comparing Complainant unfairly to his predecessor, that she enjoyed working with Complainant, and that Complainant had agreed to mentor her towards her goal of becoming an HR Director in the future.

32. Ms. Sasak decided to have weekly Monday morning meetings with Complainant to assist him in managing the HRS. The meetings usually lasted an hour or longer, and she helped to brainstorm how to handle issues in the Section.

33. Complainant was aware that Ms. Sasak had met with his staff to discuss his performance.

34. Complainant submitted a five-page self evaluation to Ms. Sasak in response to her directive. He commented that his staff generally was very resistant to change proposed by the Divisions, and that he had discussed this issue with CSP managers and at least one senior CBI manager as an obstacle to making operational improvements. He noted that this was tempered by the fact that everyone with whom he spoke personally liked the HRS staff. As examples of staff resistance and intransigence, he mentioned overriding the selections supervisor's resistance to assure female and minority representation in the Patrol exams, and another employee's strong resistance to revising the Communication Center application process.

35. Complainant stated that he had encouraged "well-thought out, measured change from day one but it is met with resistance bordering on insubordinate actions and attitudes. I need to know that I have the EDO's full support in my taking the CDPS HR system into the 21<sup>st</sup> century versus providing 1990's style HR services, as is currently the case."

36. Complainant discussed his perception that his staff had been encouraged in the past to view the Divisions not as valued HR customers or allies to be assisted, but rather

“encouraged to resist their requests in defense of the state merit system or some other unknown reasons.” He stated that he supported the merit system but was trying to convey to staff that “we should strive to help our customers innovate while still remaining within the spirit and the letter of the system.” In discussing his staff, Complainant also stated that he had two staff members “actually to be insubordinate regarding [change] on more than one occasion,” and noted that his two supervisors in the Section “have never been confronted or convinced about the need for change and have been allowed to resist past HR Directors’ authority which I believe is the core of the problem. Again if I know that I have the support of the EDO, it will allow me to proceed without the fear of retaliation. I have been assured that CSP senior management will be supportive if needed. My style is slow but steady and I have patience, a forgiving spirit, and ‘thick skin’ regarding their resistance.” He stated that his theme for the next two years was, “08 to Innovate, 09 to Refine.”

37. Complainant specifically noted that his goals were to turn his staff’s “good service” into “great service”; to “fully automate the application selection process which is antiquated and very labor and resource intensive”; to insure that all phone calls to HRS are answered by a live person; to implement SharePoint; and to obtain a scanner. He also requested a monthly publication with employment law updates, studies and changes in HR legislation.

38. He made the following self-critique: “I tend to work very fast and I need to slow down when I’m addressing subordinates to insure they fully understand what I’m conveying and so they don’t feel slighted. My staff does not like me to use email too much as they want more ‘personal visits.’ I explain that email is an efficient tool and oftentimes when I go to their office, they’re outside on a smoke break. I am however, trying to pay more personal visits when time allows.”

39. In January 2008, Ms. Sasak emailed Complainant responding to a previous discussion with him. She said they needed to meet to discuss how to best utilize his expertise and assets and how to match those with the strengths and expertise of his staff. She stated, “After identifying the assets, we can then discuss how your ideas and thoughts for improvement can be incorporated into a management style that will both suit you and the needs of your employees and the department. I believe that you are aware there is some brokenness within the unit.”

40. In February 2008, Ms. Sasak issued Complainant a performance evaluation rating of Successful for the period July 15 through December 31, 2007. Complainant signed the box for “Agree” with the evaluation.

41. Ms. Sasak rated Complainant at a Level 1.8, “Does Not Meet Standards” in the area of Supervision/Management. In the narrative section, she stated that Complainant has a very low-key style that can be a tremendous benefit to him and his unit, and he is very likeable and even-keeled; however, he needed to use those attributes to engage with each member of staff so that he understands the assets they possess, and so that they know he appreciates their experience and knowledge as he learned the state personnel system.

42. Ms. Sasak also indicated that Complainant has good ideas about improvements and innovations that he would like to bring to his unit and the department, but that prior to instituting changes, it was imperative that he build a foundation within his unit first. The two means of building this foundation were: 1) in order to gain the respect of his subordinates, he needed to complete the state certifications in Selection, Job Classification and Personal

Services Contracts; and 2) in the very near future, he should schedule meetings with each member of his team so they can explain their specific job responsibilities. She noted that while he had made some effort to take inventory of the Section, many team members “feel that they have been given mixed messages and they feel somewhat undervalued, perceiving that their extensive knowledge is not fully appreciated.”

43. Ms. Sasak also indicated that while it is important to be connected with DPA and its Division of HR, “it is extremely important to utilize the expertise that we have within our own Department.”

44. Ms. Sasak also noted that he needed to focus not exclusively on the Patrol as a client, but also on the other divisions.

#### Improving the Selection Process at the Patrol

45. At a December 2007 meeting to discuss changes to the Patrol selection process, Ms. Snyder stated to Complainant that she did not want help with her job, and that she saw things as black and white. She complained that she wanted fairness, and that the Patrol always changed its mind on selection decisions and processes. Complainant asked her to be flexible, while remaining within the merit system.

46. In March 2008, Captain Barba emailed Complainant to complain about Ms. Snyder delaying her response to questions regarding Patrol selections. On March 5, 2008, Complainant responded to his email by apologizing, asking him to send future complaints to both himself and Ms. Pritchard, Ms. Snyder’s supervisor, and by stating, “I look forward to keeping the selections initiative going, I really believe that we can realize some efficiencies in the Cadet application process to hopefully reduce the 4 to 5 months required to hire a Cadet. I appreciate your input.” (Emphasis in original.)

47. On March 5, 2008, Complainant emailed Ms. Sasak to inform her of the problem. He stated that at a recent meeting, “it was made clear in no uncertain terms by CSP from the top down, that HRS has to be more efficient and responsive to the Chief’s mandate to the CSP Selections team to speed up and modernize the Cadet hiring process. This is the third instance of CSP personnel (from Sergeant to Lt. Colonel level) advising me of the need for Pat Snyder to be more proactive, pleasant, and cooperative in the selection process.”

48. Complainant indicated that Captain Barba is “under the gun now to provide results to the Chief and it’s coming to a head.”

49. Complainant closed his email by explaining that before he counseled Ms. Snyder on the Patrol Selection issues, he wanted to meet with her. He stated, “While there is a semblance of peace in HRS now, it can be fractured at any time by me having to offer guidance or in some instances correct staff, as diplomatically as I try; this matter with Pat Snyder is a potential case in point. I’m sorry to have to burden you with this but it gets to my basic ability to manage the staff without fear of retribution or concern that you may question my competence in dealing with a very committed but entrenched and self-empowered staff.”

50. Ms. Sasak responded by thanking Complainant for the email and committing to meet.

51. Complainant made it a high priority to build strong relationships with the Patrol

leaders involved in improving the hiring process. For example, on July 16, 2008, he sent a lengthy email to Captain Barba's supervisor, Lt. Colonel M. A. Padilla, praising Captain Barba's "excellent leadership demonstrated" in the recent hire of a Patrol staff person. He stated, "I greatly appreciate the opportunity to work with Captain Barba on the various projects and believe that he is an excellent reflection of the highest caliber and character of" a CSP Captain.

#### Complainant's 2007 Evaluations of Ms. Busby and Ms. Pritchard

52. In March 2008, Complainant gave Ms. Busby her 2007 annual evaluation at an overall Level 2, Successful rating. Her lowest rating, 2.4, was in Supervision/Management. In the narration section, Complainant commented that Ms. Busby should continue to work with and build rapport with DPA/DHR to find solutions and realize efficiencies; work with co-supervisor Carol Pritchard in building HRS team cohesiveness; provide a monthly summary of Workers' Compensation and FML cases to the HR Director; exhibit supervisory support and respect of initiatives of the HR Director; as a member of management will discourage gossip; insure that all front desk calls are answered by "live" HR employees 85% of the time; and advise Complainant when she would be out of the office for over two hours.

53. Complainant also required that Ms. Busby be open to change, scrutiny of her operation along with changes as suggested or required by the HR Director, and, as a supervisor, that she support "Innovate in '08" and work to find efficiencies in her unit.

54. Complainant praised Ms. Busby for being so supportive and empathetic to DPS families involved in injuries, illnesses, and deaths in the family, and for being a "very valuable asset to the HRS."

55. In March 2008, Complainant gave Ms. Pritchard a Level 2, Successful 2007 annual performance rating. In the narrative section, he directed Ms. Pritchard to continue to work with and build rapport with DPA/DHR to find solutions and realize efficiencies; continue to work with co-supervisor Ms. Busby in building HRS team cohesiveness; personally maintain and insure her staff maintains a current accounting of metrics for their individual operations (including job announcement, applications reviewed, exams scored, etc.); use DPA's job analysis model prior to administering all exams; solicit the HR Director's input prior to making major decisions affecting her unit; exhibit supervisory support and respect of initiatives of HR Director particularly in meetings; as a member of management she must discourage gossip; be open to change, scrutiny of her operation along with changes as suggested or required by the HR Director, and, as a supervisor, that she support "Innovate in '08," and work to find efficiencies in her unit.

56. Complainant complimented Ms. Pritchard on being a great asset to the section, the Department, and the State of Colorado.

#### April 2008 Staff Meeting

57. Complainant was absent from work for health reasons at the time of the April 2008 staff meeting. Ms. Sasak filled in to lead the meeting.

58. The following week, Complainant and Ms. Sasak met to debrief on the meeting. At this meeting with Complainant, Ms. Sasak referred to Ms. Seegmiller and Ms. Dameron as "those bitches," due to their unprofessional behavior at the meeting.

### Complainant's Approach to Scheduling

59. On August 19, 2008, Ms. Pritchard informed Complainant that she was having serious problems at home, did not feel well, could not sleep, and was very stressed. She said it was nothing he had done. Complainant offered her flex time, and asked if there was anything he could do to relieve her work situation. She said no, work was fine. He offered to send her home at 12 noon that day, "on him," and to let him know if there was anything he could do to help.

60. Complainant permitted every member of his staff to choose the flex schedule that worked for them, so long as the supervisors assured that the front desk was covered during working hours.

### Staff Unprofessional Conduct and Infighting

61. In September 2008, a Selections staffer under Ms. Pritchard's supervision, accidentally sent an incorrect Cadet applicant score to a Captain for the Patrol. The Captain resolved the issue directly with Ms. Seegmiller, and also emailed Complainant about the issue. Ms. Seegmiller entered Complainant's office and yelled so that everyone in the office could hear her that the Captain was an "A-hole" and had no balls for backdooring her by emailing Complainant and that the Captain could forget about ever getting any assistance from her. She also told Complainant never to do that to her again, although he had done nothing.

62. Complainant told her to calm down and guided the HR Section staff in creating a system to avoid the problem's recurrence.

63. In October 2008, Complainant and Ms. Pritchard, who was mentoring him on learning the selections system, decided that Ms. Johnson would be the HRS contact for CBI selections. On October 9, 2008, Ms. Johnson emailed Complainant to advise him that Ms. Seegmiller had confronted her about being assigned the Position Description Questionnaire (PDQ) Review Project duties for CBI. Ms. Johnson accused Ms. Seegmiller of not knowing how to do her job. She stated, "I feel that Sandie needs to go through anger management class(es). Her behavior is unacceptable! We don't deserve being treated that way. She is out of control and she is not acting like a professional!"

64. On October 23, 2008, Ms. Seegmiller called Complainant very upset that Ms. Pritchard was conducting the Lt. Colonel exam. She stated to Complainant, "You are a hypocrite." He explained the process by which he and Ms. Pritchard had made the decision during her absence on sick leave, and stated that Ms. Pritchard was his mentor for the process of his obtaining the Selection certification. He told her he resented the remark, she needed to calm down, and to never call him that again.

65. Later that day, Complainant directed Ms. Pritchard to counsel Ms. Seegmiller on her repeated verbal outbursts and losing her temper at work, indicating that he would issue a corrective action if she failed to maintain office decorum.

### Staff Tardiness; Coverage of Front Desk and Phones

66. On October 6, 2008, Ms. Dameron and Ms. Busby were both late. After they arrived, all three staff were in Ms. Dameron's office with the door closed, during which time the phone rang four times. Complainant knocked on the door and asked that someone go up front

to answer phones.

67. Ms. Busby became visibly angry with Complainant and said it was a call for her, and that Complainant needed to be checking to see whose phone it was. He responded that he wanted someone up front to answer phones and to handle walk-ins. She angrily closed her door. Five minutes later the meeting ended in her office.

68. Later that day, Complainant met with Ms. Busby about the fact that she and Ms. Dameron had been arriving at work late. Ms. Busby responded, "Are we the only ones who come in late?" She also said, "What time do you come in?" Complainant stated that she was the only supervisor here and she had gone into a closed door meeting with no staff available to answer the phones or cover the front desk.

69. Complainant began to keep notes on his staff's unprofessional conduct at work. In August 2008 he noted repeatedly that Ms. Dameron and Ms. Busby, her supervisor, were late to work and often talked about non-work related matters for long periods of time. He also noted that Ms. Dameron made errors in her work which he corrected, came to a PDQ meeting unprepared, and forgot about a meeting on August 25, 2008.

70. Complainant also made notes about staff leaving en masse for smoking breaks, despite his directive to leave only two at a time.

#### October 2008 Residency Waiver Issue

71. On October 1, 2008, the out-of-state residency waiver for Patrol applicants expired. Ms. Snyder stopped processing the out-of-state applications without informing the Patrol selections team, Complainant, or anyone else.

72. On October 10, 2008, Complainant was advised by the Patrol that Ms. Snyder had stopped accepting the out-of-state applications. Complainant asked Ms. Snyder why she couldn't simply process the applications without hiring any of them until the State Personnel Board had acted on the pending waiver request.

73. Ms. Snyder responded in a loud voice that she would not break the law for Complainant. He indicated that he was not asking her to do that, just to process the applications, because the length of time was usually four months before a hiring decision was made.

74. On October 17, 2008, the waiver request was approved.

75. On November 3, 2008, Ms. Snyder admitted that she should have advised others but she is very "black and white" and was following the rules. Complainant thanked her for being detail oriented and that he was glad to have someone in her position who was a stickler for rules. He indicated because they all work as a team she needed to mention an issue like that to a supervisor next time.

#### Complainant's Meetings with Ms. Sasak in 2008

76. At his weekly meetings with Ms. Sasak, Complainant informed her of many of the performance deficiencies in his staff. She often provided Complainant with positive responses to negative situations. For example, Ms. Pritchard had a habit of swearing at her computer.

Ms. Sasak suggested a “swear jar” on a table.

77. Ms. Sasak also provided the funds for the Myers Briggs team building exercise, to help the staff understand their differences and respect them. She participated in it along with the entire HRS staff.

78. At his August 2008 meeting with Ms. Sasak, Complainant informed her that no one had ever held the HR Section staff accountable, and that the previous director had performed the supervisory work for Ms. Pritchard and Ms. Busby. He stated that there were still fundamental problems with staffing the phones and the front desk, despite his directions to staff. At this meeting, Complainant informed Ms. Sasak he needed her support to allow him to make needed changes in the office.

#### Executive Coaching for Complainant

79. In November 2008, Ms. Sasak emailed Dr. Jon Richard at the Colorado State Employee Assistance Program (CSEAP). She indicated that she had been working with Complainant for approximately ten months to assist him in managing his unit. She stated that Complainant is new to the state system, his staff consists of eight women with “extensive experience in their current positions,” and there are “fairly significant communication and interpersonal relationship issues within the unit – the staff is mostly cohesive, and mostly frustrated with Mr. Gietl (and he with them.) I would very much like to discuss the issues and needs in more detail, with the hope that you would be able to provide some intervention and mediation.”

80. Complainant, Dr. Richard, and Ms. Sasak met in November 2008 to discuss the staff dynamics in the HR Section. On November 21, 2008, Ms. Sasak sent Dr. Richard a follow-up email. She noted issues that caused her concern. First was Complainant’s failure to anticipate that his “rules-oriented employee might have a problem with the expiration of the waiver.” She also expressed concern about his “approach to working with his employees – several times he spoke of his attempts to resolve conflicts by having his employees ‘get to know him,’ or by ‘developing relationships’ with them.” She questioned whether this approach would, given the history and “his overall personality,” “be a barrier to getting his employees to open up, to be candid and honest, and to engage in meaningful conversation.”

81. In late November 2008 Complainant and Dr. Richard negotiated a Coaching Contract, signed by both of them. Complainant’s Primary Goals in the contract were: increase staff responsiveness to direction; increase staff acceptance of changes in processes; and increase staff acceptance of delegation.

82. Complainant’s list of items in support of his Primary Goals were:

1. Your Behaviors as Leader: increased diplomacy; increased motivation and encouragement; providing clear rationale for work assigned to staff; seek guidance from peer/colleague resources [Lt. Colonel] Padilla and [chief] Wolfenbarger prior to 1/9/09; complete certifications in Selections, Personal Service Contracts, and Job classification/evaluation/PDQ’s by 12/31/08.

2. Team Interactions/Team Processes that you wish to implement/develop: obtain feedback from staff, anonymous, through Jon [Richard].

83. Complainant had been assigned to complete the three certifications by July 2009. He completed them by December 2008.

84. In December 2008, Dr. Richard informed Ms. Sasak in an email that he agreed Complainant underestimated the problems in his Section, viewed himself and the unit as having made huge strides and doing very well, and therefore may have a superficial engagement in the coaching process.

85. Complainant participated in three coaching sessions with Dr. Richard.

86. In January 2009, Complainant sent a staff survey document to Ms. Sasak for circulation under her signature, to be used in his evaluation.

87. In March 2009, Dr. Richard sent an email to Complainant and Ms. Sasak responding to separate calls from each of them regarding confusion on how to handle staff feedback, and how Complainant's coaching would impact his upcoming annual performance evaluation meeting. Dr. Richard clarified that he considered coaching to be a tool to support staff development, and that he and Complainant had not worked together long enough for him to have input on Complainant's performance.

88. Dr. Richard invited Complainant and Ms. Sasak to discuss whether the coaching would continue. Complainant opted not to continue and Ms. Sasak never discussed it again with Complainant.

#### January 2009 Email from Patrol to Complainant Regarding Ms. Snyder

89. In January 2009, Sergeant Shawn Dominguez emailed Complainant regarding the problems Patrol Selections staff had working with Ms. Snyder. He stated in part, "I know difficult attitudes and years of never really being supervised have brought us to this point. It never has mattered which was sergeant here at the Selections Unit. Each sergeant has had problems with Pat. . . As we know Pat typically has one way things are done and that is her way."

90. Sgt. Dominguez noted that the new ideas and business practices being implemented at the Patrol were necessary to be on par with other law enforcement agencies. He listed three areas of concern:

- Ms. Snyder needed to make herself available to the Patrol and its applicants; he received complaints from applicants not being able to contact her; he was never able to reach her by phone unless he sent her an email first;
- Ms. Snyder was not consistent in sending background investigations to the Patrol; instead of sending 5 at a time, she sent 24;
- He never knew which Pat Snyder he would get when he worked with her. "Most of the time she is cold and not approachable. Being a team player would be extremely helpful."

#### Complainant's 2008 Annual Evaluation

91. On January 16, 2009, CSP Major Ron Woods sent an email to Ms. Sasak praising Complainant for the level of service he and his staff had provided to the Academy during the past several months. He stated that Complainant had supported their efforts to

streamline hiring, and that Complainant's relationships with staff at DPA had "truly benefitted this endeavor" by increasing the exchange of suggestions for improving efficiency.

92. On January 23, 2009, Ms. Sasak sent an email to the entire HRS section staff requesting input on Complainant's performance as a manager. Most staff preferred to speak with Ms. Sasak in person, and did so.

93. In March 2009, Ms. Sasak gave Complainant a "Successful" overall performance evaluation for calendar year 2008. She rated Complainant Successful in the supervision category. Complainant checked "Agree" on this evaluation.

94. Ms. Sasak wrote a lengthy narrative statement. She noted that in 2008, Complainant was successful in minimizing the confrontation with and among his staff; and, "by more fully understanding the jobs they do, Ed had a more complete knowledge of the work within HR and the individuals who have been performing that work. While improvement has been made, additional work needs to be done."

95. Ms. Sasak listed as continuing concerns that Complainant needed to work on time management; needed to be sensitive to being out of the office for excessive periods and its impact on staff morale; needed to understand that some of his staff members have learned to work around him, rather than going through him; and, building on his work with Dr. Richard, additional team building needed to occur.

96. Ms. Sasak also included a section on Professional Competence in which she acknowledged Complainant's completion of the certificates in HR areas. However, she stated that staff still had concerns that he does not fully grasp the concepts, that he delegates tasks that should be done by him, and that he does not retain information given to him. She indicated that being cognizant of these issues would help him "slow down, focus on the details, take notes as needed."

97. Ms. Sasak also indicated that Complainant had "put forth significant effort to improve on the issues that were brought to his attention," that gradual and continual improvements were made within the HR team, and he had adjusted his perceptions of the team and many team members had adjusted their perceptions of him. She concluded, "He will continue to face both the challenges and benefits of having a very experienced team of strong-willed women. The view toward the future (2009) is much brighter than looking back to the beginning of 2008. Fortunately, Ed has exhibited the desire to make the necessary changes happen."

#### Peer Evaluations of Complainant in July 2009

98. In June 2009, Ms. Sasak sent "Customer/Peer Evaluation" for Complainant to several HRS customers. The form had the following sections: responsive to my needs as they affect my division or area of operation; responsive to my concerns or questions and followed up in an appropriate and timely manner; open to the sharing of opinions and concerns; a good role model of professional behavior, hard working, fair, respectful to others; provides above-average consulting services (HR guidance and support) when requested; provides clear rationale for his decisions, does not impose his will or position on others, open to group consensus when appropriate; and holds sensitive information in confidence.

99. Complainant received "Strongly Agree," the highest rating, on nearly all of the

forms that were submitted.

100. Chris Lobanov-Rostovsky, a unit director at the DCJ, made several comments: "if it is possible to be too much of a team player, Ed might be. Sometimes I would urge Ed to stick to his own beliefs rather than being so deferential to the team and the good of the order"; "He is open to feedback and listens well to others"; "I have also worked with him on some committees and he is always prepared, engaged, thoughtful, and open to feedback."

101. Ron Sloan, CBI Division Director, gave Complainant ratings of Generally Agree and Strongly Agree, stating, "At times there have been slight misunderstandings regarding the expressed needs versus the response"; "Ed is very cooperative and collaborative"; and "Ed always interacts with respect and cooperation."

102. Carl Blesch, DCJ, provided all "Strongly Agree" responses. Leonard Dittman, division unknown, provided "Generally Agree" and "Strongly Agree" responses, stating, "Overall Ed has been very helpful to me in my position."

103. One anonymous responder made several critical comments: "while there has been an improved understanding of my areas of operation in the last six months, it is not to the level of expectation for an HR director with two years' tenure. Therefore, the level of response to my needs is not as expected"; "Ed is good at delegating – sometimes he delegates too much, and not just to the HR staff. There is often a noticeable/visible emphasis on CSP (and to a bit lesser extent CBI) and those needs over the needs of other parts of the department"; "Ed does not seem comfortable with the state personnel rules, benefits, etc., as an HR director in the state system should. The contrast here is with his two predecessors, which I believe is relevant. In my interactions with him, it appears that there is a great deal of reliance on staff or State Personnel [DPA] for information and knowledge that our past HR directors demonstrated. . . [HR consulting] services are average, at best."

104. Major Ron Woods, CSP, provided all "Strongly Agree" responses except in the area of HR guidance and support, which was "Generally Agree."

105. Major Kris Meredith, CSP, rated Complainant as "Strongly Agree" in every category except in the area of HR guidance and support, which was "Generally Agree." He stated that Complainant returns calls immediately, helps him when he drops in unannounced, and "Ed has taken it upon himself to come out to the field and ride with the Troopers and learn some of the area to better understand many of the special needs and requirements of the CSP. From an outside perspective, Ed has been able to change the focus of his employees to being one of customer service and assistance rather than directive with our interactions." He also said, "I have been through three directors of HR in my role of Appointing Authority. In my opinion Ed is the most approachable and willing to adapt of the group. (sic) Ed's only weakness is that he does not always know an immediate answer to the strange state personnel system but he always finds the answer. Otherwise he is a top notch person to deal with on a daily basis . . . he is doing a great job and I applaud his service."

106. CSP Chief Wolfenbarger provided all "Strongly Agree" responses and stated, "I have worked for several HR directors through the years at the CDPS. Ed is the most engaging and reasonable director I have encountered. He is supportive and makes the necessary time to discuss the tough issues and provides his opinion along with sound advice. It appears to me that Ed is working to develop his staff and improve communications with the various divisions . . . Ed has worked very closely, along with his staff, to modify and enhance the efficiency of the

CSP's new recruit hiring process.”

#### 2008 Evaluations of Ms. Busby and Ms. Pritchard

107. Complainant rated Ms. Busby at Exceptional, Level 3, for calendar year 2008. In the narrative section, Complainant reminded Ms. Busby to provide quarterly summaries of Workers' Compensation and FML cases to the HR Director; encourage her employees to work with DPA/DHR to find solutions and realize efficiencies; build camaraderie among her staff; work with Ms. Pritchard to build HR team cohesiveness and discourage gossip; require her staff to be on time and strive for professionalism; and be open to change and scrutiny.

108. Complainant also praised Ms. Busby for making great strides in healing divisions between the two units of HR, “which is greatly appreciated,” and noted her workload had increased exponentially due to Workers' Compensation and FMLA claims.

109. Complainant rated Ms. Pritchard at Exceptional on her 2008 annual evaluation. In the narrative section, he commented that Ms. Pritchard should encourage her employees to continue to work and build rapport with DPA/DHR employees to find solutions and realize efficiencies; attempt to build more camaraderie among her staff and the Employee Relations staff; continue to work with Ms. Busby in building HRS team cohesiveness and discourage gossip; remind her staff of the importance of being punctual in reporting to work; assure a Selections staff member is available from 8:00 a.m. to 5:00 p.m. Monday through Friday; turn in leave slips that are timely and accurate; require her staff to maintain a current accounting of metrics for their individual operations; and encourage her staff to strive for enhanced professionalism.

110. Complainant also wrote that Ms. Pritchard needed to encourage Ms. Snyder to “embrace the changes in the Cadet selection process as initiated by CSP Academy personnel. Pat should be encouraged to consider herself a quasi-member of the Academy's Selection Team as well as HR's and strive to enhance her customer service with her Academy team.”

111. Complainant also required Ms. Prichard to “encourage her staff to be customer focused by asking questions such as, ‘Is this request reasonable; will it improve the service of what we provide, can it be done with little to no additional cost or resources, etc?’”

112. Complainant stated that Ms. Pritchard should continue to solicit the HR Director's input prior to making major decisions affecting her unit, and be open to change and the scrutiny of her operation along with changes suggested or required by DPA or the HR Director.

113. Complainant praised Ms. Pritchard's expertise, stating that she was a great asset to the office and the department and that he felt fortunate to have her in the position. He also stated she had the full support of the HR Director in making any necessary changes to or imposing discipline among her staff if appropriate.

114. In March 2009, Ms. Snyder moved her office to the Patrol Academy in Golden, Colorado. The offer had been made previously, and she had turned it down. However, she so disliked working with Complainant that she accepted the offer at that time.

#### 2009 Stresses to the Employee Relations Unit; New Employee in Employee Relations Unit

115. The early summer of 2009 was a difficult time for Employee Relations unit staff

because of the extended absence and ultimate departure of one of its members. This caused extra work for the others.

116. In addition, there were several deaths of Patrol members. Ms. Dameron in particular was having a difficult time. She spent extra time on the telephone with grieving family members and assisting with all aspects of the HR ramifications of the deaths. This was during a time when her unit was short-staffed.

117. Complainant hired Adrienne Dominguez as an Administrative Assistant in the Employee Relations unit in July 2009. She was certified to her position in July 2010.

#### July 6, 2009 Statement by Ms. Busby to Temporary Worker

118. On July 6, 2009, Ms. Busby told a temporary employee that she would give her a "good swift kick in the ass." The temporary worker was stunned and embarrassed, and quit her job working in the HR Section. A Captain for the Patrol was present during this incident.

119. Complainant spoke to the temporary worker, who stated that at first staff were nice to her, but then they turned on her. She said the personalities in the office were very abrasive and unprofessional, she had never worked in an office like this one, and the tension in the office was unbearable.

120. Ms. Busby admitted to Complainant that she had not adequately trained the temporary worker who had quit. The lack of training, and her departure, caused extra work for the unit.

121. In July 2009, Complainant made notes about how terribly the Employee Relations staff, Ms. Busby and Ms. Dameron, spoke about Ms. Pritchard and Ms. Johnson behind their backs.

#### July 2009 Argument Between Ms. Pritchard and Ms. Dameron

122. During the same week, Ms. Pritchard and Ms. Dameron had an argument outside in the smoking area. Ms. Dameron had just gotten off the telephone with a grieving spouse who had lost her husband who worked at the Patrol. Ms. Dameron was outside smoking a cigarette alone when Ms. Pritchard joined her. Ms. Pritchard accused Ms. Dameron of going to Complainant to complain about Ms. Pritchard taking leave without turning in her leave slip. Ms. Dameron responded angrily.

123. The two engaged in a heated argument during which they both screamed at each other. Other DPS employees walking by the area were troubled by the incident and believed that the fight was about to become physical.

124. On July 14, 2009, Complainant learned that Ms. Dameron had met with Ms. Sasak and then had lunch with her on July 13, 2009. He had not been advised of the meeting or the lunch.

#### July 14, 2009 Meeting with Ms. Pritchard and Ms. Busby

125. On July 14, 2009, Complainant had a meeting with Ms. Prichard and Ms. Busby, who was Ms. Dameron's supervisor. He advised them that the type of conduct shown by Ms.

Prichard and Ms. Dameron was inappropriate for professionals in an office setting, and that they must meet privately to air their differences. He stated that they were to assure this never happened again.

126. During this meeting, Complainant also informed both supervisors that they were responsible for assuring that there was coverage in each unit at 8:00 a.m., instead of 8:30 a.m., in order to be more in line with other offices with an 8:00 to 5:00 operation. Complainant consulted with Ms. Sasak on this issue prior to making the decision.

127. Complainant also discussed the problem with backstabbing and gossiping by HRS staff members against other HRS staffers. He directed the two supervisors to go to the employee with an issue directly instead of going around that person. He stated that it is very unprofessional and it must stop, and that they were to inform their employee that it will stop now. Complainant stated if it continues he would consider training and disciplinary action, because it is a correctable offense.

128. Complainant also noted that due to the poor economy, they may be seeing employees they know lose their jobs to layoffs, and that the HRS needed to be there for their customers. He said that this is the time when HR needs to be a calming yet strong source of information to employees, and internal fighting among HR staff is a bad reflection on the unit.

129. Ms. Busby requested that they examine workload. Ms. Pritchard was open to offering Ms. Snyder to help with Employee Relations work, since there was no January 2010 academy. Complainant directed Ms. Busby to determine a schedule that would work for her needs and Ms. Snyder's availability, and determine how many days and hours per week Ms. Snyder could work for the Employee Relations unit.

130. On July 29, 2009, Complainant and Ms. Sasak met with Ms. Busby and Ms. Dameron to discuss recent events in the unit and workload issues.

#### Mid-Year 2009 Review of Ms. Busby

131. On July 31, 2009, Complainant met with Ms. Busby for her mid-year evaluation. She arrived with no pen and paper to take notes. Complainant asked her how the new 8:00 a.m. start time was going. Ms. Busby responded that she was there at 8:00 a.m. every morning and that she did not care what goes on down there, pointing to the Selections unit.

132. Complainant discussed the project Ms. Busby was working on in the conference room, asked when it would be completed, and asked if it was necessary to close the door while working in there. Ms. Busby responded that it helped them to focus, and stated that he never came in to see what they were doing. Complainant responded that he trusted they were able to correct the problems that had been created by the former temporary worker, who had not been properly trained. This is the same temporary worker to whom Ms. Busby had been rude, causing her to resign.

133. Ms. Busby interrupted Complainant and stated, "I want a meeting with Kathy Sasak."

134. During the meeting, Complainant discussed work load issues and her request to have other HRS members assist her and Ms. Dameron with their work. He indicated that if that was to happen, it was important that she and Ms. Dameron limit their personal conversations at

work because he had previously mentioned that it appeared to detract from their productivity. He stated that he realized some of their work tasks necessitated collaboration, but that they should each strive to work independently, like the remainder of the Section did. He suggested she spend less time talking to Ms. Dameron and that they both spend more time at their desks.

135. Complainant also mentioned that he preferred to have at least one of the Employee Relations staff available for employees who walk in for service. Ms. Busby responded, "That's total crap." Complainant continued to discuss issues, but Ms. Busby interrupted him. She stated that when she was finished with the project in the conference room, she would stay in her office with the door closed and call Ms. Dameron on the phone.

#### August 3, 2009 Meeting with Ms. Sasak

136. At Complainant's meeting with Ms. Sasak on August 3, 2009, he informed her that while her intervention in the HRS was well intended, his staff perceive that they don't have to follow his directives because they can go to Ms. Sasak and she can override him. He gave her examples of his staff informing him that they could not or did not have time to perform tasks he asked them to perform.

#### September 2009 Emails Between Ms. Sasak and Dr. Richard

137. On September 21, 2009, Ms. Sasak emailed Dr. Richard requesting his advice because she and Complainant were "at an impasse as to the next steps." She sought to have a third party mediator work with the HRS employees on problems in the unit. She had discussed her idea with Ms. Pritchard.

138. Ms. Sasak stated, "I understand Ed's concern that members of his staff come to me when an issue becomes a crisis in their minds. I continue to try to help him understand that the last thing that I want is to supervise his unit – rather I am committed to helping him get the unit moving in the right direction under his leadership. Unfortunately, in my view, in his eagerness to succeed, Ed has underestimated the depth of the lingering problems."

139. Ms. Sasak indicated that when she solicited feedback from Complainant's employees for mid-year reviews, Ms. Snyder and Ms. Seegmiller informed her that "they have improved their methods of working around Ed, staying out of his way and off his radar screen. They are not seeing Ed as the leader and manager that both he and I would hope." However, Complainant felt that his working relationships with both of them had improved.

140. Ms. Sasak stated that Complainant opposed any intervention from a third party and sought "one more try" to work through the problems. She said, "He very much wants my support for him to be the supervisor, setting boundaries that would eliminate their outlet for grievances against him, and giving him the authority to impose discipline when needed. I explained to Ed that I would like to build that model for the future, but that I didn't see that as a realistic possibility until the air was cleared in a respectful and meaningful way."

141. Dr. Richard responded that he had thought carefully about the concerns raised by Complainant when they had met, and those she had outlined in her email. He stated, "I think the crux of the matter now is in your comment, in your second paragraph, below: that you and Ed are 'at an impasse.' I do not think the issue is whether [someone should facilitate the group]. It appears to me that the immediate challenge is the wide gap between the perceptions and concerns of two upper level managers, you and Ed, and the resulting impasse as mentioned by

you below and me above.”

142. Dr. Richard concluded, “My recommendation (to both of you) would be to focus first on trying to achieve some better mutual understanding and stronger alliance between the two of you.” He offered to help mediate between Ms. Sasak and Complainant to help them reduce their mutual frustration and “provide a better platform from which the two of you could decide how to address the staff group concerns.”

143. On September 28, 2009, Dr. Richard sent Ms. Sasak another email following a conversation with her. He stated, “You have expressed your concerns about Ed’s performance very clearly, both verbally and in writing. I have shared my perception that Ed’s ability to respond to your concerns might be enhanced if there were a better working alliance between the two of you, and that it might therefore be worthwhile to have some additional dialogue between you.” He then asked how he could help.

#### Denver Health Medical Center Project

144. When Complainant started his position, he learned that after Patrol Cadet candidates underwent four months of testing, they were given a post-offer medical exam which could be signed by their physician, certifying their qualification to be a state trooper. This procedure placed all of the Patrol’s risk in the hands of the applicant’s personal physician. The procedure was out of date and did not comport with current industry standards.

145. In addition, there was a high number of Workers’ Compensation claims arising from CSP cadets’ participation in the Training Academy. The DPA Risk Management (RM) unit decided it was a bad policy to permit Patrol cadets to use their own personal physicians to certify their physical exams.

146. Complainant discussed this issue with Tom Montoya, director of the DPA HR Section. DPA initially planned to partner with a hospital in northern Colorado to conduct the physical exams of Cadet applicants. However, this project fell through and DPA had no funds for the project.

147. Complainant kept in contact with Mr. Montoya regarding this project. After several months, Mr. Montoya informed Complainant that RM had money to pay the cost of the physical exams, to be performed by Denver Health Medical Center.

148. Complainant played a supportive and collaborative role in the development of this pilot project. He was aware that RM would only pay the cost of one year of physical exams, and he hoped that based on the pilot’s success, a second year would also be funded.

#### Cadet Hiring Conflict

149. In the fall of 2009, Ms. Snyder had a serious confrontation with Complainant over a request which she deemed to place the Patrol at legal risk. Major Woods asked Complainant to make three or four additional hires from the current candidate pool.

150. Complainant directed Ms. Snyder on a Thursday to hire the additional three or four individuals as Cadets to start in the Academy on the following Monday. Friday was Ms. Snyder’s day off.

151. It was impossible for Ms. Snyder to comply with this directive and Complainant either knew or should have known this. The additional candidates still had to successfully complete the remaining post-offer testing, which included physical agility, psychological suitability, urinalysis, and medical exams.

152. Ms. Snyder explained that while some items could be handled on a short timeline, it was impossible to schedule physical exams in one day and it often took weeks for the psychological suitability reports to be returned to the Patrol. She informed Complainant that they were creating liability for the Patrol if a new cadet was injured during training and then a pre-existing medical condition was discovered. She stated that she could not make it happen.

153. Complainant ordered her to make it happen and to provide him with a referral list with the new names on it. He said he would handle it. Ms. Snyder offered to come in on Friday, her day off, to handle what she could. Complainant turned down that offer and directed her to give him the referral list at that time. She gave him the referral list.

154. During this discussion, Complainant and Ms. Snyder yelled at each other in the hall, where other employees could hear them.

155. Ms. Snyder was so upset by this situation that she took the key to the file drawer containing the applicants' files with her when she left work. On Friday, Ms. Pritchard called Ms. Snyder to order her to produce the key, under the direction of Complainant. Ms. Snyder came in on Sunday with the key and placed the files on Complainant's desk.

156. Ms. Busby picked up the files and brought them to the academy on Monday for Major Woods, who hired the four individuals without post-offer testing.

157. Complainant instructed Ms. Pritchard to counsel Ms. Snyder for this incident, and she did.

158. No adverse incidents occurred in the hiring or training of these cadets.

### Scantron

159. Scantron was a computerized scanning initiative that arose from Chief Wolfenbarger's directive to Captain Barba to reduce the time needed to test applicants for the Patrol. Scantron would enable the Patrol to immediately score and administer four successive tests to Cadet candidates at the Academy on one day, thus enabling successful testers to proceed to the next stage in the process immediately. Prior to Scantron, the Patrol gave four individual tests on four separate days at locations throughout the state.

160. Complainant worked with Captain Barba, DPA staff, IT staff, and his employees to implement this initiative. By July 2010, DPA, IT, the Patrol, Complainant, and his staff believed that all pieces of the Scantron project were in place for its implementation. ADS, a central computer, and the Scantron systems were "talking" to each other and were up and running.

161. Complainant and the other participants in the project expected to be able to use Scantron in the next exam, which would be given in September or October 2010. However, in August 2010, they learned of a technical glitch: they needed to purchase a specific Scantron score sheet from the Scantron representative. On August 3, 2010, Ms. Snyder sent an email to

Complainant and others involved in the project, reporting that she had chosen a Scantron answer sheet, and once it arrived she would work with DPA to reconfigure the Scantron to the new answer sheet and then they would test the system. Complainant responded by thanking her and asking when it would be fully on-line. She responded perhaps one or two months.

162. Complainant responded that December 31 was the absolute deadline for both the Scantron and the Denver Health medical tests to be fully operational, because he had "committed to too many people based on what I've been told." He noted he would inform Captain Barba that December 31 was the final target date and, "Unfortunately that falls upon you to ensure that it happens for both of the new processes; you'll have to be the driver with DHR and Denver Health on this. Let me know if you have questions or need any assistance or resources but it's up to you now to make it happen."

#### PDQ Review Project

163. Complainant assigned Ms. Pritchard, Ms. Johnson, and Ms. Seegmiller to participate in a review of all PDQ's in the Patrol. This two-year project was designed to correct a longstanding problem with the way project pay was administered at the Patrol. Complainant enlisted the assistance of DPA HR staff to assure that this project comported with all personnel rules and policies, and to assure that no one's pay was incorrectly adjusted through this process.

164. The initiative was completed in 2010 and resulted in significant savings of project pay which was no longer necessary once the jobs were aligned with the work.

#### 2009 Evaluation

165. In February 2010, Ms. Sasak issued Complainant his 2009 final performance evaluation at a Successful level, with 239 points out of 300, his highest yet. Complainant signed "Agree" on this evaluation.

166. Ms. Sasak wrote a short narrative on this evaluation, indicating that Complainant should "build on the successes of 2009" and continue to develop professionally by increasing his understanding of and ability to use rules, policies and procedures. Ms. Sasak noted that Complainant should continue with formal and informal communication techniques with his staff, using open door, drop in conversations and team meetings at least quarterly. She requested that he provide her with the staff meeting schedule so that she could attend if possible or to provide her feedback on the agenda issues via quick report after the meetings. She encouraged him to have a team building exercise or event in 2010.

167. Ms. Sasak noted that Complainant had set an objective to form a CSP HR Committee to address leave accounting, Workers' Compensation reporting and other issues, and requested that he report on this committee at the Executive Team meetings.

168. She also discussed the need to coordinate with OIT on SharePoint, and encouraged him in this initiative.

#### Complainant's 2009 Reviews of his Direct Reports

169. Complainant rated Ms. Prichard at Exceptional for 2009. His narrative complimented her on her work, and was very similar to that from 2008.

170. Complainant rated Ms. Busby at Exceptional for 2009. He noted that she “demonstrates excellent rapport with the CDPS members and their families and has received high marks in that area. This is of special benefit to CDPS in that many of these involve emotional type (sic) of matters regarding injuries, illnesses, deaths in the family, etc. Her forte is communicating with them with empathy while providing very accurate and detailed information.”

171. When Complainant met with Ms. Busby for her final 2009 annual evaluation, he complimented her on how well the Employee Relations unit functioned and noted his concern about the unit being short staffed. He asked that Ms. Busby keep him advised of significant work items involving a Division Director, Major, or Lt. Colonel, because if they call him to discuss a matter with him he often has been left out of the loop and is caught unaware of the situation. He indicated he did not want details or to micromanage, and it was not a criticism. He just needed a heads-up so that he could continue to learn the systems better and enhance the status of the unit.

#### April 2010 Memo to Staff

172. On April 29, 2010, Complainant wrote a memo to his staff re: “HR STAFF MATTERS.” The memo instructed his staff to obtain his approval prior to working from home; to not work at home if calling in sick; to call the supervisor directly, not a coworker, to report taking sick leave; to submit leave slips to the supervisor within five days from the date of leave; to maintain a professional HR operation, be mindful of what they say and how loudly they say it because visitors are within earshot; and to maintain a steady pattern of being on time in order to maintain coverage.

173. In May 2010, Ms. Snyder’s sister became seriously ill and was unable to drive, requiring that Ms. Snyder be available to care for her at home. On May 7, 2010, Complainant sent her an email confirming that because of the unique situation, Complainant would permit her to work at home (while on or not on sick leave). He stated, “I have always had total confidence in your integrity and work ethic and know that you will be forthright in reconciling your hours worked at home. I wish you strength to get through this tough time and that Connie has a speedy and complete recovery.”

#### New GP III Position Funded

174. In 2010, Complainant received approval for a full-time Finance Director at the GP III level, to provide support for both units of the HRS.

175. Some of Complainant’s staff were not pleased about this announcement because they sought to have a GP I hired to provide lower level support.

#### 2010 Audit

176. The state auditors conducted an audit of the use of administrative leave by the department in 2010. Complainant collected most of the information for the audit.

177. Complainant met with members of the auditor’s office and provided them all information he had in his possession.

178. The auditor’s report, which contained findings of noncompliance with the leave

reporting requirements at DPS, was released after Complainant was placed on administrative leave.

179. Complainant did not receive a copy of the report until after his termination of employment.

### SharePoint

180. SharePoint was an initiative of the Patrol that would enable its staff to transmit all HR documents to the HRS electronically. It is a Microsoft software program that costs over \$100,000. CSP Chief Wolfenbarger assigned Major Steve Powell to oversee and report directly to the Chief on the implementation of SharePoint. The Patrol's Business Information Unit (BIU) was responsible for the technical side of the SharePoint project; Sgt. Mark Bonfield was the BIU point of contact for HRS.

181. Major Powell initially approached Complainant to discuss the possibility of using SharePoint for the 2010 PMP (Performance Management Process). Complainant was very interested in collaborating and supporting this initiative. Shortly thereafter, Major Powell and others from the BIU approached Complainant and indicated it was feasible to include all other HR documents in the project. Complainant immediately accepted the offer, as one of his long-term goals for the HRS was to be a near-paperless HR operation.

182. Complainant felt that he was under pressure to launch SharePoint as soon as BIU wanted to do so, because he had been informed that BIU technical staff would be moving on to a different project after launching SharePoint.

183. Complainant, Major Powell, and BIU staff had a preliminary meeting to discuss rollout of the project. Complainant and BIU staff had additional meetings with Ms. Busby, Ms. Dameron, and Ms. Dominguez to plan for SharePoint's implementation.

184. Complainant designated Adrienne Dominguez to be the point person for SharePoint and arranged for her to receive project pay for the assignment. After consulting with BIU, he purchased a new computer for Ms. Dominguez that could handle the SharePoint data, and a second computer monitor so that she could use two monitors simultaneously in processing the documents. In addition, Major Powell offered to send Ms. Dominguez to the expensive Microsoft training-of-trainers in SharePoint, a week-long training. She attended the training.

185. SharePoint was intended to work as follows: Patrol staff would send an electronic document to the HRS via SharePoint; the HR staff would review the document for proper routing to a staffer in the Section, and then direct the document to the proper electronic folder. To do this, the HRS needed to create naming conventions for all HR documents, so they could be properly routed upon receipt. In addition, the HR Section needed to create the e-file folders in which the documents would be retained, two for each employee (one for personnel files and one for confidential medical information). Therefore, a total of nearly 2000 electronic files for the nearly 1000 Patrol employees needed to be created in order to properly store the official employee records.

186. Ms. Busby, Ms. Dameron, and Ms. Dominguez attended two preliminary meetings with BIU staff to discuss the rollout of SharePoint.

187. The planned launch date for SharePoint was September 2010.

July 9, 2010 Letter Requesting Salary Increase

188. On July 9, 2010, Complainant submitted a letter to Peter Weir requesting an “In-Range Salary Movement per Personnel Board Rule 3-18.” In the letter, Complainant noted that it was his third anniversary in his position, and indicated, “I can honestly say that I have totally enjoyed my time in this position.” Complainant referenced an agreement to receive more than the one raise he had received during his tenure, and acknowledged that the poor economy had prevented that from occurring. He also noted that furlough days and the 2.5% redirection of take home pay to the retirement plan necessitated that he have a second job. He said that as a GP VII, he was paid less than nine GP VI's and seven GP V's.

189. Complainant stated, “Upon assuming this position, it became apparent that there was a distinct need to steer the Section in another direction, one more focused on measurable objectives, professionalism and service-level enhancements.”

190. Complainant then reviewed his accomplishments during his tenure as follows:

- A lofty, long-term goal of mine was to turn the HR operation paperless . . . after SharePoint came on the scene, I lobbied CSP BI [Business Intelligence] Unit's Major Steve Powell such that we are literally weeks away from converting CDPS's Performance Management (PMP) and Annual and Sick Leave documents and systems to an electronic format to eventually be used by all CDPS supervisors. When one considers the yearly 27,000 documents alone for just these two HR components that are processed, printed, delivered and hand-entered each year, the gain is beyond dramatic.

- Arranged training with CDPS Purchasing, DPA and HR staff for implementing selected Personal Service Contracts to be processed using the State's new web-based Contract Management System (CMS); we are only the second HR department in the state to do so.

- Near completion of the two year review project of all 1,400 members' PDQ's (we currently have CSP and DCJ's completed) with an August 30<sup>th</sup> completion date.

- Processed and/or strategized with CDPS supervisors and managers in hundreds of corrective and disciplinary matters.

- Working on a very comprehensive Behavioral Study with Chief Wolfenbarger, Director Sloan and C-SEAP for eventual use by all divisions.

- Instrumental in implementing the web-based application project for 5,000 annual CSP Patrol Interns/Cadet applicants greatly enhancing efficiencies and saving significant resources and bringing CSP in league with other jurisdictions utilizing state of the art application systems.

- In conjunction with that, all CSP written examinations are now immediately scored at the test site (via Scantron technology) and subsequent test phases then commence thus saving weeks to the screening process. This was a major complaint and request for change by CSP senior command; Captain Jon Barba and I took the primary leadership roles in leading this initiative.

- By my lobbying efforts of State Risk Management and the Division of Human Resources, CSP will have at least one year of no cost, fully-validated medical examinations to be provided by Denver Health and Hospitals to CSP Cadet finalists (the first group is to be tested in fall 2010 for the January academy class). This will ensure that the applicants are being seen by an objective physician, using CSP medical standards . . . , thus hopefully reducing the spiraling number of Workers' Compensation injuries and associated costs we are currently experiencing with new academy recruits.

- DH& H is also (at no cost) validating a revised physical ability test for entry-level Cadets. This too was done by Captain Barba's and my lobbying efforts and working with Risk Management via the recently-formed CDPS Safety Committee. [As Executive Director of the Denver Civil Service Commission, I contracted for this same test for Denver police for \$98,000; we are getting it at no cost.]

- Role in Employee Partnership issues including serving as a member of the Employee Partnership Committee. Department's point person for furlough and potential layoff issues.

- Successfully represented the department to enhance communication to DPA in HR-related matters, other department's HR Directors, State Personnel Board, local community, etc.

- Secured DPA Personnel Certifications in Selection, Job Evaluation and Personal Services Contracts within an 18 month period.

191. Complainant attached a chart listing all of the DPS GP V, GP VI, and GP VII employees with their salaries, compared to his. He did not provide any information concerning length of time in position, despite the fact that State Personnel Board Rule 3-18(A) indicates that salary range compression increases are used "where longer-term or more experienced employees are paid lower in the range for the class than new hires or less experienced employees . . . resulting in documented ongoing retention difficulties."

192. Complainant used as a model the letter of another DPS manager who successfully obtained a raise from Mr. Weir.

193. Ms. Sasak and Mr. Weir discussed Complainant's request and granted him the 10% raise he requested.

194. Complainant was aware that his staff would have access to his July 9, 2010 letter and would read it.

#### Initial Launch of SharePoint for 2010 PMP Use

195. On July 14, 2010, Complainant sent an email to all CSP staff announcing that performance evaluation forms would be processed via SharePoint. He stated that the HR Section "is very pleased to announce that by utilizing SharePoint and with the assistance and expertise of the BIU, we are now 'going paperless' with our annual performance evaluation form. . . . This will eventually be extended to the other CDPS divisions as well." Complainant walked recipients through the steps for using the system and thanked Major Powell and the BIU

team.

196. At the time Complainant sent this email, he was aware that the performance documents would not be processed until March 2011.

197. Complainant then sent an email to Executive Director Weir and Ms. Sasak, stating, "I want to share a significant moment in CDPS HR's history with you. Due to SharePoint, we are now going to process all PMP [evaluation] forms electronically. You've heard me talk . . . about the 11,000 PMP documents that descend on HR every March to be processed, hand-filed, etc. This represents a huge first step in our being able to realize the goal of a virtual, paperless HR file room. . . Yesterday Major Powell advised me and the Chief that we may be only two to three weeks away from disseminating an electronic leave form which again I've told you generates nearly 15,000 documents each year."

198. In his email, Complainant informed the directors that as soon as SharePoint was up and running at CSP, they could extend its use to the remaining divisions. He closed, "Hat's off to the State Patrol's BIU but also to Cindy Busby, Kathy Dameron and Adrienne Dominguez in their roles of advising the BIU of HR's needs in the designing of the various forms and processes."

#### Premature July 14, 2010 Launch of SharePoint for All HR Documents by Major Powell

199. After the two emails from Complainant, on July 14, 2010, Major Powell sent a third email to the entire CSP staff, informing them that in addition to the PMP library announced by Complainant, "there is an inbox for HR that can be used immediately to route all other types of documents to CDPS HRS. Examples include compliment letters, leave forms, corrective and disciplinary actions etc." He directed recipients how to use it.

200. Major Powell closed with, "Please name the file in a way that identifies the affected member and the type of document being submitted."

201. Major Powell did not coordinate with Complainant or inform Complainant regarding the launching of SharePoint. He lacked an understanding of the importance of naming conventions and having pre-established e-files for the documents, and did not anticipate the impact his email would have on the HRS.

202. Complainant and the entire HR Section staff were taken by surprise when they learned of Major Powell's email. They were not ready for SharePoint to launch. The HR Section had not yet created naming conventions for HR documents, and had not yet created the 2000 personnel and confidential medical e-folders.

203. In July 2010, Ms. Busby informed Complainant that from a legal standpoint, it was unwise to launch SharePoint before the medical electronic files had been created. She did not want to risk any confidential medical information getting into the wrong hands. Complainant understood that only HRS employees would have access to the employee records and therefore was not concerned about this issue.

204. In addition, Ms. Busby and Ms. Dominguez informed Complainant that the unit was not ready for SharePoint to launch because of the workload that would be created in the absence of pre-established naming conventions for the records and e-folders in which to store them.

205. Complainant responded that he had been given this gift, it was a great system, and that corporations don't always get the kinks worked out prior to launching a new program. He indicated that they could handle it and that he would hire a temporary worker to help build e-files and name the documents. Complainant feared that if he put a halt to SharePoint at that time, he might lose the opportunity.

206. Complainant immediately hired a temporary worker to assist with the naming conventions and creation of e-files. This individual did poor quality work, resulting in improper leave calculations and other problems for HRS.

207. On August 5, 2010, Complainant and his Employee Relations staff were to meet with Sgt. Mark Bonfield, to discuss SharePoint issues. Prior to the meeting, Complainant sent a proposed agenda with a draft of naming conventions to Sgt. Bonfield, copying Ms. Busby, Ms. Dameron, and Ms. Dominguez. He also listed as agenda items: electronic signature, "CSP SharePoint policies – at a future date?" "review of personnel file by background investigators issue," and "Accessible by all in CSP?" Complainant intended in the meeting to draft a second email for Major Powell's signature which would outline the naming conventions to be used for SharePoint.

208. In his August 5 email, Complainant also stated, "Mark – please look this over and let me know if you agree with the 'Actions' and if it works for the memo going out from Major Powell. On that note, once he sends it we'll get deluged the next day; I'm wondering if it would be best to wait for Kim & Adrienne to create the files so we have somewhere to place the documents once they hit the HR Dump. Your thoughts?" Sgt. Bonfield's response to this email is not in the record.

209. CSP employees did not immediately start to use SharePoint in large numbers after receiving Major Powell's July 14, 2010 email because they were not sufficiently trained in it. This bought the HR Section some time. Complainant worked with Major Powell on a second email, with better directions on how to use it.

210. Several HRS staff testified at trial that they were inundated with fifty "HR dumps" per day after Major Powell's July 14 email. This testimony is rejected as being an exaggeration for two reasons: none of the staff made this assertion to Agent Micciche in their interviews with him; and, the August 5 email from Complainant rebuts that testimony.

211. SharePoint's premature launch did cause a crisis in the HR Section. Ms. Dominguez received some "HR dumps" from the Patrol, including leave documents, secondary employment requests, payroll actions, letters of commendation, corrective and disciplinary action notices, workers' compensation documents, and FMLA documents. She was unable to use SharePoint. Therefore, she opened each document to review it, determined which HR Division staff member to forward it to, and forwarded it. Then, the HR staff discussed what each document should be named, determined where each document should be stored, and decided what follow-up should occur.

212. Eventually, the e-folders were created.

#### Request for Personnel Information on GR

213. The HR Section routinely handled requests for personnel documents on former

employees. If the former employee signs a waiver for the Patrol, the HR Section typically sends all information from the employee's former personnel file to the requesting agency. If there is no waiver, the Section will send a neutral letter containing dates of service and other objective information.

214. In August 2010 Complainant received a waiver and request for personnel information from the Nevada State Patrol concerning a former Patrol employee, GR. Complainant pulled the personnel file and reviewed the settlement agreement governing a personnel case involving GR. On August 26, 2010, Complainant emailed the Assistant Attorney General concerning the matter, informing her that he was fine providing a neutral job reference per specific paragraphs of the settlement agreement, but noting that HR had not received the letter of resignation from the former employee yet. He asked for guidance on whether he should wait to provide the neutral job reference. He also stated he would wait to receive the resignation letter prior to removing the disciplinary action letter and related documents from the personnel file.

215. The Assistant Attorney General advised Complainant to hold off until she had received all relevant documents, copying Lt. Colonel Eicher on her email.

216. On August 31, 2010, Complainant emailed his counsel again, noting that GR had dated his letter April instead of August 22, and seeking clearance nonetheless to issue the neutral reference. Counsel responded that the date was fine, because it was the date of the original termination, again copying Lt. Colonel Eicher.

217. Complainant sent the neutral reference for GR to the Nevada State Patrol. Complainant did not release the entire personnel file, despite the fact he had a release to do so.

#### Colorado Civil Rights Division Letter

218. On August 11, 2010, the Colorado Division of Civil Rights sent a letter and attached Request for Information on a pending matter to the Patrol. The letter required the Patrol to respond within thirty days. The letter was forwarded to HRS for response. Complainant did not respond to this letter prior to his placement on administrative leave.

#### Ms. Snyder Corrective Action

219. On August 23, 2010, Ms. Snyder participated in a prank on Complainant by sending him a memo on whether an intern should be referred for hire at the Patrol. The memo was drafted by someone at the Patrol. She received a corrective action for this incident, which Complainant addressed to her sister by mistake. Ms. Sasak later amended the corrective action and added a provision that it would be removed after one year.

#### Ms. Busby's Discussions with Lt. Colonel Hernandez

220. After the launch of SharePoint, Ms. Busby discussed the difficulties it posed for the HRS with the Patrol's HR liaison, Lt. Colonel Hernandez, several times. She also discussed it with Lt. Colonel Eicher.

221. Lt. Colonel Scott Hernandez told Ms. Busby that he would shut SharePoint down because of the problems it had caused. Ms. Busby said that she would support Complainant in its launch, and that he should not shut it down.

222. In the course of discussing problems in the HR Section with Lt. Colonel Eicher, Ms. Busby informed him that she was thinking about leaving the unit. He later returned to tell her he needed to pass on her feelings to Ms. Sasak. Ms. Busby was adamant in opposing this idea.

223. After Ms. Busby informed Complainant about her conversations with Lt. Colonel Hernandez, Complainant became angry. On August 12, 2010, he emailed Lt. Colonel Hernandez, copying Major Powell and Sgt. Bonfield, stating,

Scott – I was just advised by Cindy Busby that she spoke to you yesterday and expressed reservations about the roll out of SharePoint and how it impacts HR. I want you to know that she shared that without advising me that she was going to do so and it is diametrically opposed to my position. I have instructed/cajoled/encouraged my staff and there is always a fear of the unknown especially as it affects business practices that have been in place for decades. Moreover, I told them there are always bugs that need to be worked out of any new system, that we are extremely fortunate to have SharePoint and any problems will be short-lived and ultimately it will make our operation highly professional and efficient.

We have met several times with the BIU and by this time next week we will have all 1400 personnel and 1400 employee medical files created and can begin to begin processing electronic data as submitted to us by CSP members via SharePoint and I would hate to lose that momentum at this time. It is my strong position that we continue full speed ahead with the implementation . . . and I stand ready to assist in any way necessary to facilitate it.”

224. Ms. Sasak was contacted by Lt. Colonel Eicher soon after the above events, in August 2010. Lt. Colonel Eicher had been informed by Ms. Busby's husband that she was having a difficult time in her position and was considering resignation.

225. Lt. Colonel Eicher said to Ms. Sasak, “Have you seen Cindy Busby lately?” After speaking with him for five minutes, she went to the HR Section to speak with Ms. Busby, who was not present. Ms. Sasak instead asked Ms. Dameron how things were going in the section. Ms. Dameron informed Ms. Sasak of the problems in HRS caused by the premature launch of SharePoint, and stated that many of the claims in Complainant's July 9, 2010 letter requesting a raise in pay were not true and that she thought he did not deserve the raise he received.

#### Administrative Leave Letter

226. Ms. Sasak decided to place Complainant on administrative leave so that an investigation could be conducted into the situation in the HRS. She had a meeting with her division directors to solicit ideas on whom to conduct the investigation. She decided on a CBI criminal investigator who had a reputation for being evenhanded and fair, Agent-in-Charge Marc Micciche.

227. On August 31, 2010, Ms. Sasak sent Complainant a letter placing him on administrative leave, stating, “allegations that cause serious concern have been brought to my attention. Your behavior may have created a work environment that involves workplace harassment and/or unprofessional conduct, and may include a violation of one or more policies,

directives or executive orders.”

228. Ms. Sasak assigned Kevin Klein, Director of the Division of Fire Safety, to be interim HR Director. Mr. Klein escorted Complainant out of his office on the day he was placed on leave. At that time, he found Complainant’s notes on staff problem behaviors in his desk, and permitted Complainant to copy them prior to his departure. Among these papers were Complainant’s general notes on staff, without names, regarding personal traits (such as education, marital status, overweight, depression, bitterness, etc), which he had prepared for the coaching sessions with Dr. Richard.

### Investigation

229. Agent-in-Charge Marc Micciche interviewed all HRS staff and a few others.

230. Major Powell informed Agent Micciche that he attended one SharePoint planning meeting with Complainant and that Sgt. Bonfield was in at least two meetings with Complainant. He said the BIU staff were the most knowledgeable regarding the design of SharePoint. He stated that he was unaware that the HRS had not created naming conventions or destination e-folders prior to his July 2010 launching of SharePoint. The Major noted that the HRS later created subfolders for each employee to satisfy HR requirements for separate or secure storage of certain types of documents.

231. Agent Micciche’s report states, “Major Powell voiced his respect for Mr. Gietl and Gietl’s willingness to move forward. Major Powell expressed disdain for the long-standing HRS staff, calling them historically slow and error-prone.”

232. Captain Barba praised Complainant for his involvement in SharePoint and Scantron. He stated that Scantron shortened the time-to-hire period and saved the Patrol money. Captain Barba confirmed that the entire team working on Scantron thought it was ready to launch several times, only to find technical stumbling blocks such as the need to order different “bubble” sheets for grading the tests. He stated no one dropped the ball on the project, but it was dragged out due to unforeseen technical problems. Captain Barba also stated that Complainant asked him to keep him updated on the Scantron project because Ms. Snyder was not sharing information with him, and that it was well known that Complainant and his staff had strained relationships.

233. Regarding the Denver Health Medical Center project, Captain Barba stated that Complainant attended one meeting and he was late. They discussed costs, vision, and hearing standards at that meeting. He felt Complainant knew RM was paying the cost of the pilot project. He also recalled that Complainant was ready to send applicants out for medical exams, but Barba said, “Time out. We need to think this through,” in terms of industry standards, human performance measures, and reporting.

234. Mr. Klein stated that the HRS staff displayed a lack of trust in each other, which he attributed to perceived special treatment afforded to Ms. Johnson by Complainant; a lack of trust in DPS taking into consideration HRS interests in the SharePoint, Scantron and other projects underway; and a lack of trust in executive management for not having “addressed previous (2007-2008) concerns brought forth by staff regarding Mr. Gietl’s competence.”

235. Mr. Klein believed SharePoint had caused more work, not less, for HRS, and that if Complainant had involved his staff more in the development process, some problems could

have been avoided.

236. Mr. Klein also indicated that the Legislative Audit on administrative leave returned thirteen findings of DPS failing to meet DPA reporting deadlines. He had provided sufficient documentation to answer some of the findings and believed that it should have done prior to the audit. He also said that he found requests from the CCRD for information that had been unanswered. He also mentioned a layoff matrix sent by Complainant to division directors that contained a math error; someone had given Complainant the corrected formula.

237. Ms. Busby stated that Complainant had failed to provide direction to her and her staff on creating the e-files to prepare for SharePoint. She stated that she and Ms. Dameron liked the SharePoint idea and wanted to leverage the technology, but that they needed a "time out." She said she expressed concern to Complainant that BIU unit database designers may have access to confidential medical employee files, but he responded that it was not a concern. She said there were many issues she raised that Complainant did not regard or was not receptive to.

238. Ms. Busby stated that problems with the submission of electronic documents to HRS continue, because Troopers send documents in multiple formats (email, fax, SharePoint). She stated there was an "impending 'order' coming for CSP to submit electronically," and that there were unresolved policy issues with the legality of electronic signatures. She stated that there was still no process in place to guide her in processing all of the documents.

239. Ms. Busby said that she thinks Complainant favors Ms. Johnson over her unit and that he spends long periods of time in his office talking to her. She also indicated that she had overheard Complainant giving poor HR advice and had corrected him on it; she gave examples of his having memory problems; and she stated that he had made false statements about unfinished projects in his July 9, 2010 letter requesting a pay increase. She stated that the new GP III position in the unit was at too high a level and that it demonstrated Complainant's deference to those with advanced degrees and elevated titles.

240. Ms. Busby indicated Complainant unfairly required her unit to cover the front desk, and did not require it of Selections, and delegated tasks to her that he should have completed himself. She stated that Complainant declined to remove pages in compliance with a settlement agreement in an employee's personnel file, instead flagging the file with a sticky note. She also stated that he had insisted that she release confidential FML-protected information to CSP Internal Affairs for an investigation; after she conferred with a DPA staffer, he backed off the request.

241. Ms. Dominguez stated that she had observed both Ms. Busby and Ms. Dameron to be extremely overworked and overwhelmed. Regarding SharePoint, she stated that Complainant's push to move forward on SharePoint led to delayed processing or misplacement of leave slips; that the process was not properly vetted by Complainant for its impact on HRS; and that standard operating procedures were not in place.

242. Ms. Dominguez stated the need to all pull together as a team "including him." She noted staff fear of intimidation by Complainant but did not offer specifics. She also indicated that on the positive side, Complainant accommodated flexible time off needs, ability to share personal difficulties with him, and his basic recognition of good work. She said that Complainant has problems with communication, remembering what he has told staff, and asking for and considering staff input.

243. In order to correct the working environment, Ms. Dominguez stated that Complainant needs to pitch in and break down the barriers or separation he has created between him and staff.

244. Ms. Dameron stated that Complainant had "extreme memory issues," did not recall things she had told him multiple times, and that she had witnessed him giving incorrect information to a Major in the Patrol on an issue she had briefed him on several times. She noted that while Complainant had been on ride-alongs with the Patrol, he had not yet made time to meet with her to discuss workload issues, as she had requested. She complained about being second-guessed by Complainant on her answers to questions, when he referred her to DPA if he did not like her answer. She mentioned having to correct his mistakes and receiving no gratitude for it.

245. Ms. Dameron also described a situation in November 2009, when a payroll change prompted Ms. Dameron to determine that the existing list of "Essential" personnel was probably out of date. She suggested to Complainant that he discuss with the other Division Directors how to update their lists of "Essential" personnel. Complainant sent a list to each Division Director of every current employee in each Division, with a Y (yes) and N (no) to check. Complainant sent the Division Directors no rule or statute defining "essential personnel" for guidance. Therefore, in Ms. Dameron's opinion, the information gathered was useless.

246. Ms. Pritchard informed Agent Micciche that Complainant nitpicked her and her staff by asking questions such as, "Did you notify the applicants?" She said she once told Complainant that he did not take the time to know their jobs, and he responded that he didn't need to know her job. She noted an instance when Complainant told a manager that she had to accept a transfer of a problem employee from another location; however, this was incorrect and she informed the parties that under the personnel rule she did not have to accept the transfer.

247. Ms. Pritchard also mentioned Complainant's "fixation with high-ranking figures," and that he trivialized the bulk of Ms. Seegmiller's work while insisting on being involved in and present for high level promotional tests and ceremonies. She said, "He could care less about the front-line or first-line staff. He always wanted to hobnob with the division and department heads."

248. Ms. Seegmiller agreed with Ms. Pritchard that Complainant "wanted to be involved with anything that empowered him with CSP higher ups." She also complained about Complainant removing duties from her for which she received project pay and for which she felt she had been promised a future compression adjustment in pay. Ms. Seegmiller mentioned Complainant's memory problems.

249. Ms. Snyder stated that it took most of a morning to meet with Complainant to review the CSP Cadet hiring process, and that he took notes but was bored and checked his watch during this meeting. She felt he was not interested in her work and said he does not use HR terms.

250. Ms. Snyder also discussed an April 10, 2008 "Army Pays" memo Captain Barba and Sgt. Shawn Dominguez sent to Complainant seeking clarification of issues in the "Army Pays" contract. Army Pays was a program designed to recruit outgoing members of the military to the Patrol. One of the issues concerned a potential conflict with the veterans' preference points mandated under the Colorado Civil Service Amendment governing the personnel system.

The officers made several attempts to obtain answers from Complainant. On June 22, 2009, Complainant assigned the memo to Ms. Snyder to respond to. She called the Army contact, explained how the preference points work, and arranged by agreement to have the contract modified in order to comport with the personnel system. Ms. Snyder was troubled by the fact that it took Complainant fourteen months to handle a simple question which took her one week to resolve.

251. Ms. Snyder felt during Complainant's entire tenure that he never learned the State Personnel Board Rules or the State Personnel Director's Procedures. She referenced several instances when she had conflicts with him over rules and procedures, referencing some of the events noted above in the Findings of Fact.

252. Ms. Johnson informed Agent Micciche that she recognized she was the sole member of the entire HRS who was able to get along with Complainant. She indicated he listened to her input and generally acted on her advice. She stated that she believed this was because she was more laid back than her coworkers, who were more emotional and intense.

253. According to Agent Micciche's report, "Ms. Johnson concurred with her coworkers that Mr. Gietl lacks basic job knowledge and needs direction from the Executive Director's Office. She stated he does not know the state (Personnel) rules like his predecessors."

254. Ms. Johnson later contacted Agent Micciche to request that she add more information. She indicated that because she was the last staff person to be interviewed, she felt her statements would not carry much weight. Ms. Johnson stated that she does not trust any of her coworkers, she does not confide in her coworkers, and it had been that way for several years.

255. She also stated that one of Complainant's biggest mistakes when he first came to DPS was "not immediately dealing with situations" such as laxity of work hours, and that when he did demand accountability, "we didn't like it or accept it. We did what we wanted to do." She stated that the laxity regarding work hours continues to this day when no supervision is directly in the office.

256. Ms. Johnson also stated that Complainant did not like the profane language used in the office by Ms. Pritchard and Ms. Dameron, and she didn't either, but she did not want to make a big deal of it. The profanity was not directed at anyone in particular, but created an unprofessional atmosphere, she stated. Ms. Johnson is African American.

#### Predisciplinary meeting.

257. On November 1, 2010, Ms. Sasak sent a notice of predisciplinary meeting under State Personnel Board Rule 6-10 to Complainant, to discuss "findings relative to the initial allegations, [and] the investigation [findings of] lack of leadership, a lack of knowledge required of your position as CDPS HR Director, and a failure to plan, manage and implement improvements you claimed to have made within" the HRS. She enclosed a copy of Rule 6-10.

258. On November 11, 2010, Complainant's attorney wrote Ms. Sasak noting that during his visit to her office on November 8, 2010, he had been denied a copy of the investigative report, which was 25 pages, single spaced. He objected to this decision, as it deprived him of the ability to prepare for the predisciplinary meeting with his client, and hence,

due process. In addition, he requested written documentation of specific violations or accusations being made against Mr. Gietl.

259. Complainant's attorney stated that he had learned that Ms. Sasak had refused to provide support for Complainant in disciplining his supervisees, had called into question his management style and personality, and had even invited herself to his staff meetings. He indicated that her conduct towards his client indicates a predisposition to blame him for the misconduct and nonperformance of his staff. He stated that due to her apparent bias, he was requesting a neutral third party to engage in the predisciplinary process.

260. Ms. Sasak did not respond to this letter.

261. Complainant and his attorney visited Ms. Sasak's office again on the day prior to the predisciplinary meeting and obtained a copy of the investigative report. An administrative assistant gave them a copy of it by mistake.

262. On November 17, 2010, Complainant, his attorney, Ms. Sasak, and her attorney, met for the predisciplinary meeting held under State Personnel Board Rule 6-10. Complainant's attorney asserted again that Respondent's failure to provide a copy of the investigative report until one day prior to the meeting was a violation of Complainant's due process rights.

263. Complainant's counsel discussed the July 2009 peer evaluation of Complainant written by CSP Chief Wolfenbarger, rating Complainant at the top of the scale on each category. He also requested that the reference letters from Mr. Montoya and DPA Executive Director Rich Gonzales be part of the record.

264. Ms. Sasak then stated that the purpose of the meeting was to discuss the information contained in the investigative report, lack of leadership, lack of knowledge required for his position as HR Director, and Complainant's failure to plan, manage and implement improvements he claimed to have made in his July 9, 2010 letter to Mr. Weir.

265. Ms. Sasak read the portion of the July 9 letter discussing Scantron, questioning Complainant's claim that he had taken a primary leadership role in that Initiative and that the project was complete.

266. Complainant discussed at length the history of the initiative; whom he worked with from DPA, IT, and the Patrol; its purpose; and the fact that in July 2010 he and the others involved thought that it was a "go" because it was ready to be utilized. He explained that in August 2010 they all learned that they needed to purchase a piece of equipment that would enable the printing of a Scantron sheet.

267. Ms. Sasak questioned why Complainant did not know that this Scantron sheet was necessary at the time he wrote the July 9 letter to Mr. Weir, if he was the leader of the project. Complainant responded that he worked with Captain Barba, IT, DPA, and his staff, and they all believed it was ready.

268. Ms. Sasak also asked Complainant why he stated in the July 9 letter that "they are immediately scored at the test site," if the project was not actually ready to go at that time. Complainant responded that at the time he wrote the letter, the test would not be given until the next Cadet testing which was at some time in the future. However, the premise among him, IT, DPA and all others who had signed off on it was that everything was ready to go, "we're live."

269. Ms. Sasak challenged Complainant's assertion he was a leader on this project. He responded that while it was clearly a Patrol initiative, it would not have occurred but for his involvement and coordinating role with IT, DPA, and his own staff. He had stepped in to assist and took it on because it was "tremendous in terms of efficiencies" in reducing the time to hire Cadets.

270. Ms. Sasak next discussed the Denver Health initiative and questioned whether he had actually lobbied RM and DHR for the program. Complainant responded that the idea originated in RM, and that he participated in initial meetings with RM, Pinnacol insurance, and division staff. Initially the project was to be housed at UNC or CSU, then RM indicated the project was not going to happen. Complainant stated that his lobbying efforts consisted of his continuing to ask Mr. Montoya and Brenda Hardwick at DPA, this is such a good thing, is there any way we can keep the project alive, over a period of months. After several months, Mr. Montoya said that it was back on. He also stated it was an incredible accomplishment for DPS to have RM pay for the exams. He also noted that it was his suggestion to send new Cadets to Denver Health for a dry run, learn the logistics, so they were ready to go in January.

271. Ms. Sasak next raised the agility test which Complainant claimed in his July 9 letter that Denver Health was conducting at no cost, due to his lobbying efforts with Captain Barba and working with RM. He responded that that is exactly what had occurred. She quoted from Complainant's August 3 email to Ms. Snyder requiring that the Scantron and Denver Health projects be completed by December 31, 2010. She said, "It sounds in this, you just assigned this responsibility to Pat Snyder." Complainant explained that he had had difficulty with Ms. Snyder not keeping him in the loop and had therefore instituted monthly meetings with her on this and other projects.

272. Ms. Sasak continued to question Complainant on his July 9 letter. He and his attorney then made it clear he did not have a copy of his letter. They took a break to give Complainant the letter.

273. Ms. Sasak then discussed the SharePoint project and discussed the July 14, 2010 emails. Complainant and his attorney said they did not have those documents.

274. Complainant informed Ms. Sasak his role in this initiative was to provide leadership, foresight, and technological vision as a manager. He indicated that Major Powell owned up to his mistake of prematurely launching SharePoint, and said that "fortunately most of the Sergeants and the Captains didn't really start doing what the Major had said. So we were not inundated."

275. Regarding the impact on staff, Complainant stated, "This is overwhelming, but here is our opportunity, staff. We have to rise to the occasion. We've got to do this. We've got to make this happen. This offer has been provided to us. We can't let this slip away. And that's why there was . . . we didn't have the luxury of having more time. We had to move on it quickly. . . ." He also stated that he assured his staff, "there would be some speed bumps, what have you. But we could do this. I think they . . . overreacted, really and truly."

276. Complainant acknowledged his staff had raised concerns about not being ready. He said they were resolved. When asked why they had to move quickly, he explained that BIU had to redirect their resources out to the field in other areas.

277. Ms. Sasak asked Complainant what policies and procedures he was considering to make sure everything was submitted in a format that could be identified and processed correctly. He responded that they created 1400 medical files and 1400 personnel files and the documents would be stored accordingly. He indicated he had not set a deadline after which all files must be sent electronically to HRS.

278. Ms. Sasak asked about staff efficiencies achieved by SharePoint. Complainant explained that paper files involved staff pulling the employee's file, two-hole punching it, placing it in the file, returning the file, thousands of times a year. He explained that with two monitors Ms. Dominguez would be able to take data from the SharePoint document and log it in Lotus Notes for leave tracking.

279. Ms. Sasak asked Complainant if he had experience designing business process systems in the past. He responded, "Not to this degree. No."

280. Ms. Sasak asked Complainant about the GR release request, and informed him it was a total embarrassment to the Department because a call came in asking, "What is going on in your Department? We give you everything you're supposed to have [including a release] and you send us back name, rank and serial number? What are you guys up to?"

281. Complainant stated he had to look at the settlement agreement documents to answer and did not have them. He recalled working with the AAG.

282. Ms. Sasak asked Complainant about his notes on staff personal traits (such as education, marital status, overweight, depression, bitterness, etc) which he had prepared for the coaching sessions with Dr. Richard. Complainant responded that he shared the psychology of some of his staff and their general "profiles" to give Dr. Richard as much information about them as possible to help him adopt an effective management style. He stated that one employee had informed him that she had a hard time with men because her father had been abusive.

283. When Ms. Sasak raised the issue of low staff morale, Complainant responded that he had spent several hours thinking and reflecting on this issue. He said that he was moved by many of the statements his staff made, which he perceived to be accurate and correct. He said he understands them better now, and how they got that perception of him, watching him meet with every Patrol member that came to visit. He said how they feel is real, to use an old HR adage.

284. Complainant stated that if reinstated to the position, he fully believed he could wipe the slate clean and start from scratch, rebuild the relationships, be more attuned and sensitive to their perceived issues. He suggested a Performance Improvement Plan. He stated it is a meat grinder down there, trying to service 1400 employees and their families and the thousands of applicants is brutal. He said he would slow it down to talk with staff more often.

285. Ms. Sasak pointed out that many of the staff issues were historic in nature and had been addressed with Dr. Richard and herself. If matters had gotten worse, how would Complainant respond to that?

286. He responded that it had not gotten worse in the last two years, as his evaluations reflected, and that he thought it had gotten better. He saw peaks and valleys.

287. When asked what he would change specifically about his interaction with staff based upon what he knew, Complainant stated, "I would apologize right out of the chute . . . I don't take myself too seriously." He said he would tell staff they knew each other well, they had personality issues and problems, he respected them for the quality and quantity of work that they do, and he wanted to address the problems.

288. Returning to his July 9 letter to Mr. Weir, Ms. Sasak asked Complainant what performance had to do with an in-range salary movement under Rule 3-18. He responded technically, nothing, but he used the opportunity to review his accomplishments.

289. At the close of the meeting, Ms. Sasak agreed to give Complainant time to submit written supplemental information. After the predisciplinary meeting, Ms. Sasak was encouraged by Complainant's tone of contrition and his willingness to try to rebuild bridges with his staff.

#### December 1, 2010 Letter to Ms. Sasak Regarding Predisciplinary Meeting

290. On December 1, 2010, Mr. Gietl sent Ms. Sasak two separate letters under his own signature. The first contained "Additions and Clarifications of Issues Raised in R 6-10 Meeting" and was 8 pages, single spaced. The second contained his "Response to Reports from Agent-In-Charge Marc Micciche" and was 10 pages, single spaced.

291. Audit. In the letter addressing the predisciplinary meeting, Complainant noted that he had still not received a copy of the audit report. He stated that there were several instances of the Patrol returning a member to his or her job and not notifying the HR section, resulting in a delay in reporting to DPA. He asked, "Did the auditors request additional names for which I am unaware? Initially they requested certain names then modified their request to exclude some but include new, additional names." He indicated that DPA initially requested one final summary letter on administrative leave for each employee, then changed back to the current procedure of two letters, one at the 20-day mark, and one at the end. He concluded, "Without having access to the report and the specifics, I am unable to defend my actions and the process."

292. GR. Complainant noted that it was difficult to recall what occurred on this matter, particularly without any documents to refer to. He recalled that they did not have the letter of resignation from GR at first; there was a question of whether to send a neutral or full disclosure report to the police department in question; he had worked closely with the Assistant Attorney General; and he is certain that he followed her instructions. He pointed out that he had initiated a department-wide reference check policy with Chief Wolfenbarger and CBI Director Sloan to bring uniformity and diminish the department's liability. He concluded, "Because of the length of time involved and no access to my records, it is impossible for me to accurately account for what happened."

293. He also noted that his July 9, 2010 letter to Director Weir had contained a list of fourteen successful projects he had completed within his tenure; however, there had been no acknowledgement of those successes at the meeting.

294. Mr. Gietl also noted that in June/July 2009 nearly all of the peer evaluations had been extremely positive, and CSP Chief Wolfenbarger had given him a perfect score, writing, "I have worked for several HR directors thought the years at the CDPS. Ed is the most engaging and reasonable director I have encountered." He questioned why the peers whom he had

provided advice and guidance for the last three years were not interviewed.

295. Complainant pointed out that the HR staff had a history predating his tenure of being insubordinate, intransigent, and dysfunctional. He stated that in his meeting with Agent-In-Charge Micciche, Micciche had characterized the staff as being “dysfunctional and rough around the edges.”

296. Complainant also stated that Ms. Sasak in her 2009 annual evaluation of Complainant had stated, “It appears that Ed’s efforts to build and support his team have paid off – the HR staff as a whole had another successful year.” She had also stated, “For 2010 Ed should build on the successes of 2009, while identifying areas in need of additional work and improvement.”

#### December 1, 2010 Letter to Ms. Sasak Regarding Investigative Report

297. In his December 1, 2010 letter to Ms. Sasak responding to the Micciche report, Complainant indicated that he felt that his administrative leave had been prompted by some staff apprehension to the SharePoint project, his pay increase, his issuance of the corrective action to Ms. Snyder, and his performance observations in the 2010 mid-year evaluations of the two supervisors.

298. Complainant stated that five of the eight members of his staff had proven to be “very challenging to supervise due to their refusal to abide by standards expected of all state employees; the remaining three have responded normally in my dealings with them as a supervisor.”

299. Complainant stated that his tenure was marked by a strong commitment to prompt customer service and continuous improvement initiatives for the HR system at DPS. He noted that he completed the PDQ Review Project in two years, as promised.

300. Ms. Sasak reviewed the letters provided by Complainant and his attorney. She was very concerned about the negative tone used by Complainant in discussing the deficiencies of his staff. His negative tone led her to believe that the relationships were not salvageable.

301. Ms. Sasak concluded that her only option was to terminate Complainant’s employment.

302. Ms. Sasak reviewed several DPS policies and procedures, including the following:

- DPS Policy Manual, Chapter 1, Section 1, Title 2 “Integrity in Government” I.A. “Members will serve the public and other employees with respect, concern, courtesy, and responsiveness”; I.B. “Members will demonstrate the highest standards of personal integrity, truthfulness, and honesty and will, through personal conduct, inspire public confidence and trust in government”;

- DPA Universal State Personnel System Policy, Non-Discrimination Policy, “Generally: The state values the individual diversity of all employees, applicants, volunteers, and citizens. Differences in age, ancestry, color, marital status, disability, national origin, race, religion, veteran status, or sexual orientation or any number of other distinguishing factors provide experiences, viewpoints, and ideas that can strengthen and enrich our work

environment. Our goal is to create an environment that is inclusive, respectful, and equitable, and to employ the talents of people with different backgrounds, experiences, and perspectives to accomplish the various missions of State government”;

- DPS Rules:
  - #3 – Truthfulness. “Members will be truthful in matters associated with departmental responsibilities”
  - #4 – Respect of others. “Members treat others courteously, with fairness and respect”
  - #9 – Conduct. “Members use reasonable judgment and refrain from conduct which reflects unfavorably on the department. This type of conduct includes that which . . . (c) tends to impair the operation, effectiveness or efficiency of the department or its members.”

303. January 7, 2010, Ms. Sasak sent a termination letter to Complainant. She cited him for violating all of the above policies, regulations, and standards, as well as State Personnel Board Rule 6-12, Failure to Perform Competently.

304. Ms. Sasak indicated that the basis for the decision to terminate Complainant’s employment was his “on-going failure to perform competently as a leader, manager and supervisor as Director of Human Resources, including but not limited to your creation of a work environment for the employees of your unit that was unhealthy and unproductive; your acceptance of technologic (sic) changes to business practices within the HR unit without adequately planning for the impacts on the records and the staff; your failure to competently respond to inquiries and to maintain records; your claims to have personally accomplished goals that were not actually completed; your lack of awareness of your deficiencies; and your lack of personal accountability for the failures, mistakes, problems and issues.”

305. Complainant timely appealed his termination of employment.

## DISCUSSION

### **I. GENERAL**

#### **A. Burden of Proof**

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

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

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

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

## II. HEARING ISSUES

### A. Complainant did not commit most of the acts for which he was disciplined.

Respondent has proven by preponderant evidence that Complainant committed only a few of the acts for which he was disciplinarily terminated. Respondent based its termination decision on Complainant's "on-going failure to perform competently as a leader, manager and supervisor as Director of Human Resources."

#### Leadership

The weight of the evidence demonstrates that Complainant exhibited some leadership skills in his position. From the outset, Complainant established strong collaborative relationships with his partners in the Patrol and CBI. These relationships were based on an open exchange of information, acceptance of responsibility for his Section's role in a history of problems, and a willingness to change and improve entrenched practices.

In 2007, Complainant initiated a customer service survey of Patrol members to assess their view of the services provided by HRS. This action illustrates that Complainant sought not to take the easy route of maintaining the status quo, but to identify and work on problems that existed in his Section. Complainant also initiated a two-year PDQ review process in order to address project pay inefficiencies at the Patrol. He engaged DPA in this process in order to assure that no errors were made in updating the PDQ's and in terminating many of the inappropriate project pay arrangements.

In addition, in 2007, Complainant worked closely with Major Meredith to ferret out the precise problems that the Patrol Communication Center experienced in its dealings with HRS. After close consultation with the Major and his own staff, Complainant collaboratively identified and implemented solutions to the problems on a going-forward basis, as evidenced by his September 2007 memo to the Major.

Over the next three years, Complainant seized opportunities that were presented to him to upgrade HRS services. The Scantron project significantly decreased the time and human resources necessary to conduct Patrol testing. Prior to Scantron, HRS and the Patrol had to administer several tests at several sites throughout the state. After each test, they had to be graded and the applicants had to be notified of their scores and whether they would return for the next test. After Scantron, several levels of testing occurred at one central site, the grading occurred while the applicants remained on site, and those who passed were able to immediately proceed to the next level.

Complainant did not have a duty to collaborate with the Scantron project. However,

because of his mission and vision of establishing 21<sup>st</sup> century HR systems, he supported the project and helped it reach fruition. The same is true of the Denver Health medical and physical ability exam project. While Complainant was not required to participate in this pilot, he embraced the opportunity and helped assure that it occurred.

### Management and Supervision

Complainant's record as a manager and supervisor was mixed. Respondent proved by preponderant evidence that Complainant had early problems in competently supervising his staff. Ms. Sasak correctly identified Complainant's failures as a supervisor in his 2007 evaluation. She directed Complainant to immediately improve his professional competency in state personnel rules and procedures and obtain his certifications as soon as possible, so that his staff could respect him as a leader and expert in HR issues. She also directed him to meet with each one of his staff to learn their jobs, be open to and utilize their expertise, and eliminate the barriers that he had created through his supervisory style.

During 2008 and 2009, Complainant's evaluations demonstrate that he was meeting the objectives established by Ms. Sasak. In her 2008 evaluation of him, Ms. Sasak indicated that he was successful in minimizing problems with his staff, and, "by more fully understanding the jobs they do, Ed had a more complete knowledge of the work within HR and the individuals who have been performing that work." Complainant did increasingly rely on his staff for their expertise, as evidenced by his use of Ms. Pritchard as his mentor in learning the selection process. In addition, he worked closely and successfully with Ms. Johnson, mentoring her in HR practice, and giving her opportunities to grow in her position as the point of contact for the CBI. He completed his certificates in HR six months ahead of schedule, which increased his professional competence in state personnel rules and procedures.

In 2009, Complainant received a very favorable review from Ms. Sasak, who stated on this evaluation that Complainant should build on the successes of 2009 in 2010. In addition, Complainant's July 2009 peer reviews provide concrete evidence that his initiatives, strong relationships, and collaborations on various projects were deeply appreciated by HRS clients.

In 2010, the evidence demonstrates that most of the projects Complainant had been working on would soon come to fruition. His detailed reviews of his line supervisors indicate that they were responding to his directives to minimize staff infighting and turf battles, resulting in more harmony in the Section. The HRS appeared to be running on an even keel.

It is within this context of two years of success that the SharePoint problems must be viewed. SharePoint presented an extraordinary opportunity that Complainant appropriately embraced. Unfortunately, Complainant did not manage this project in the manner he should have as HR Director. Complainant did not take the lead in drafting a written timeline containing all of the tasks that had to occur prior to launch. Had he done so, it would have been clear once Major Powell erroneously launched the project that it had to be stopped immediately. Complainant should have called Major Powell as soon as he received the July 14, 2010 email, explained that his Section was not ready to launch, and directed Major Powell to rescind the email until HRS was ready.

Complainant's failure to call Major Powell immediately and to properly manage the SharePoint project was significant. It caused unnecessary stress and workload issues in his Section, and it led to a short-term crisis. HR dumps trickled into the unit even though no naming protocols had been established and no e-files existed to store the documents.

In addition, as a general matter, Complainant missed an opportunity to build good will with his staff by helping at the front desk occasionally. Had he done so, he would have sent a clear signal that he did not consider himself to be above the fray.

Complainant's management style, however, does not constitute grounds for disciplinary action. Ms. Sasak did not articulate performance standards governing Complainant's management style in 2008 or 2009. Had she done so, and had he violated them, he would be appropriately subject to discipline. That did not occur.

In further mitigation, the competent evidence demonstrates that several members of Complainant's staff would be difficult for any manager to effectively supervise. Ms. Snyder, Ms. Busby, Ms. Seegmiller, and Ms. Dameron exhibited a lack of professionalism and insubordination on occasion that is appalling. Even Ms. Sasak commented on this to Complainant in April 2008.

The second mitigating factor in Complainant's difficulties as a supervisor was articulated best by Dr. Richard in his emails to Ms. Sasak in September 2009. He stated, "My recommendation would be to focus first on trying to achieve some better mutual understanding and stronger alliance between the two of you." He informed her that he viewed the crux of the problem as the "impasse" she felt between herself and Complainant, noting, "I do not think the issue is whether [someone should facilitate the group.] It appears to me that the immediate challenge is the wide gap between the perceptions and concerns of two upper level managers, you and Ed, and the resulting impasse."

Ms. Sasak appears not to have responded to this message. Therefore, in a second email, Dr. Richard reiterated, "Ed's ability to respond to your concerns might be enhanced if there were a better working alliance between the two of you."

Ms. Sasak never created a working alliance with Complainant. Her regular meetings with Complainant's direct reports, and their supervisees, undermined his authority in HRS and fed the discontent, for which she provided a ready venue. As late as September 2009, over two years into Complainant's tenure, Ms. Sasak was not prepared to "give him the authority to impose discipline when needed" and felt that this was a "model for the future." This situation created an untenable environment in which to effectively supervise his difficult staff.

#### Unhealthy and Unproductive Work Environment

The termination letter also cited several general areas of concern in Complainant's performance. Each of those is addressed below.

The letter stated that Complainant created "a work environment for the employees of your unit that was unhealthy and unproductive." Respondent did not prove this assertion at hearing. The HRS was extremely productive. In the long term, Scantron and SharePoint are going to save HRS significant time and human resources.

Complainant did not create a work environment that was unhealthy. Ms. Busby and Ms. Pritchard, as the line supervisors in the Section, variably perpetuated and permitted a work environment that was rife with gossip and turf battles. Complainant appropriately held them accountable for that environment in his meetings with them and in their performance

evaluations. He also encouraged them to share their staff resources with each other across units, and provided helpful guidelines for doing so. Given Ms. Sasak's tight grip on Complainant's ability to impose any further consequences for unhealthy behaviors in the workplace, he took the strongest steps available to him within the limitations imposed.

#### Failure to Competently Respond to Inquiries and Maintain Records

Complainant was also terminated for his failure to "competently respond to inquiries and to maintain records." Complainant did make a mistake by not providing the entire personnel file for GR to the Nevada State Patrol. He had a waiver and the standard response was to send the file, instead of just a neutral reference. However, the settlement agreement did call for a neutral reference. And, Complainant was working closely with counsel on this matter; therefore, he appropriately relied on her guidance, which did not include a directive to send the entire file.

With regard to the audit of administrative leave, Respondent did not prove by preponderant evidence that Complainant failed to competently respond to this inquiry. He gathered all available records tracking administrative leave at DPS. He first complied with DPA's directive to give one summary letter at the end of leave, then modified his procedure after DPA decided to have two letters, one after twenty days and one at the end of any extended period. If Respondent is asserting that Complainant should have established better or different internal procedures for tracking administrative leave, it did not terminate him for that failure, nor did it prove that at hearing. Notably, Respondent never provided Complainant or his attorney a copy of the audit report prior to termination. Therefore, it was impossible for Complainant to defend himself on this claim in the predisciplinary process.

The only other area of record responses covered by Respondent at hearing concerned a letter from CCRD requesting information and Complainant's purported failure to timely respond. However, the letter was generated on August 11, 2010, and the response was due within thirty days, after Complainant was placed on administrative leave on August 31, 2010.

#### Lack of Awareness of Deficiencies and Accountability for Failures, Mistakes, Problems, and Issues

The termination letter also cited Complainant for his "lack of awareness of your deficiencies and your lack of personal accountability for the failures, mistakes, problems and issues." This issue is so amorphous as to be nearly impossible to address.

Complainant was an individual determined to bring his employees out of their normal standard operating procedures in significant but appropriate ways. This was an ambitious objective, particularly for a unit consisting of so many veteran employees. Complainant was hampered in his goals by his own unfamiliarity with the state personnel system; he addressed this by obtaining the required certifications earlier than required. He also underestimated the importance of establishing early and close alliances with his own staff. Over time, however, he believed that he had overcome this deficit and that his Section was running smoothly. Ms. Sasak's performance evaluations of him in 2009 and 2010 recognized his work on this problem and confirmed his assumption that he was supervising and managing the HRS in a satisfactory manner. Under these circumstances, it does not appear that there were failures, mistakes, or problems of which he should have been aware.

Additionally, as discussed above, Complainant actively sought out and was uniquely open to criticism of the HRS and its systems, and he was personally dedicated to addressing

those problems, issues, and failures as identified.

Therefore, Respondent has not shown by a preponderance of evidence that Complainant failed to hold himself accountable for failures, mistakes, problems, and issues during his tenure as HR Director.

### DPS Policies and Procedures

Turning to the policies and procedures on which Respondent relied in terminating Complainant's employment, Respondent has demonstrated that Complainant did violate one of the standards governing employee conduct. However, his overall performance demonstrated general compliance with policies and procedures.

In his mishandling of the SharePoint crisis caused by Major Powell's premature launch of the system, Complainant's managerial failures did temporarily impair the operation, effectiveness, and efficiency of his Section, in violation of DPS Policy # 9 – Conduct. This policy states, "Members use reasonable judgment and refrain from conduct which reflects unfavorably on the department. This type of conduct includes that which . . . (c) tends to impair the operation, effectiveness or efficiency of the department or its members." Complainant exhibited poor judgment in this crisis situation.

Respondent also relied on the DPA Universal State Personnel System Policy, Non-Discrimination Policy in terminating Complainant's employment. That policy states, "Generally: The state values the individual diversity of all employees, applicants, volunteers, and citizens. Differences in age, ancestry, color, marital status, disability, national origin, race, religion, veteran status, or sexual orientation or any number of other distinguishing factors provide experiences, viewpoints, and ideas that can strengthen and enrich our work environment. Our goal is to create an environment that is inclusive, respectful, and equitable, and to employ the talents of people with different backgrounds, experiences, and perspectives to accomplish the various missions of State government." Respondent did not prove that Complainant violated either the spirit or the letter of this policy. Instead, the evidence leads to the opposite conclusion. Complainant mentored the African American staffer in the office, Ms. Johnson, hired the first Hispanic staffer, Ms. Dominguez, and insisted that hiring panels include minority and female representation.

Respondent argues that Complainant exhibited a lack of integrity and truthfulness in his July 9, 2010 letter to Mr. Weir. DPS' policy, "Integrity in Government," provides, "Members will serve the public and other employees with respect, concern, courtesy, and responsiveness," and, "Members will demonstrate the highest standards of personal integrity, truthfulness, and honesty and will, through personal conduct, inspire public confidence and trust in government." DPS Policy #3 states, "Members will be truthful in matters associated with departmental responsibilities."

The preponderance of evidence demonstrates that Complainant exhibited integrity, truthfulness and respect for others in all of his dealings with others as HR Director, including in his July 9, 2010 letter to Mr. Weir.

Regarding SharePoint, Complainant stated in the letter, "after SharePoint came on the scene, I lobbied CSP BI Unit's Major Steve Powell such that we are literally weeks away from converting CDPS's Performance Management (PMP) and Annual and Sick Leave documents and systems to an electronic format to eventually be used by all CDPS supervisors." At the time

Complainant wrote that statement, he and the others involved in SharePoint planned to launch the PMP portion of SharePoint in July 2010 and the remainder in September 2010. Therefore, this statement was accurate at the time it was made. Regarding his claim of "lobbying" Major Powell, as soon Complainant learned of the potential to implement SharePoint at HRS, Complainant jumped on the opportunity and never let it go. His statement was accurate.

Complainant also stated in his letter, "In conjunction with that, all CSP written examinations are now immediately scored at the test site (via Scantron technology) and subsequent test phases then commence thus saving weeks to the screening process. This was a major complaint and request for change by CSP senior command; Captain Jon Barba and I took the primary leadership roles in leading this initiative." Captain Barba confirmed to Agent Micciche that Scantron was on line and ready to go at the time Complainant wrote the July 9 letter, and that the August 2010 news that they needed to purchase a new test sheet printer was a surprise to all of them. With regard to the claim that "examinations are now immediately scored at the test site (via Scantron)," the next set of testing was not due to occur until September or October 2010. It was reasonable for Complainant to assume that no additional technical glitches would occur between July and September. Therefore, while Complainant should not have used the present tense to describe Scantron use, he had a good faith belief that it was, on July 9, 2010, ready for use.

Respondent also asserted that Complainant was untruthful about his involvement in the Denver Health projects. He stated, "By my lobbying efforts of State Risk Management and the Division of Human Resources, CSP will have at least one year of no cost, fully-validated medical examinations to be provided by Denver Health and Hospitals to CSP Cadet finalists (the first group is to be tested in fall 2010 for the January academy class)." He also stated, "DH& H is also (at no cost) validating a revised physical ability test for entry-level Cadets. This too was done by Captain Barba's and my lobbying efforts and working with Risk Management via the recently-formed CDPS Safety Committee."

While Complainant was not the instigator of these projects, he did play a significant role in both of them. After the projects stalled, he continued to check in with Mr. Montoya at DHS on the possibility of moving them forward, keeping the idea alive. In his view, this constituted "lobbying" of DHS and RM. Once the project was a "go," Complainant remained focused on it and dedicated staff resources to it to assure it was implemented. Complainant was not untruthful in the July 9 letter regarding these projects.

In summary, the weight of evidence demonstrates that Complainant exhibited strengths and weaknesses as Director of HR. His lack of experience in state personnel systems was a deficit from which he had to recover. In addition, his ambitious plans to modernize the HRS faced serious obstacles in the form of staff resistance to scrutiny and change. Complainant did have some difficulty supervising and managing his employees. However, many of the difficulties were imposed on him by two uncooperative direct report line supervisors; in addition, his own supervisor unwittingly undermined his authority in the HRS. Complainant committed very few of the actions upon which discipline was based.

**B. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.**

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion

vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

State Personnel Board Rule 6-9, 4 CCR 801, requires, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Respondent failed to give candid and honest consideration to several of the criteria in Rule 6-9. Specifically, Respondent did not consider the mitigating information presented by Complainant and other individuals interviewed for the investigation. As Complainant pointed out, several leaders at the Patrol, DPS' largest consumer of HRS services, gave Complainant rave reviews on his peer evaluations. Chief Wolfenbarger summarized the Patrol's experience with Complainant and his Section by stating, "Ed is the most engaging and reasonable director I have encountered. He is supportive and makes the necessary time to discuss the tough issues and provides his opinion along with sound advice. It appears to me that Ed is working to develop his staff and improve communications with the various divisions . . . Ed has worked very closely, along with this staff, to modify and enhance the efficiency of the CSP's new recruit hiring process."

Ms. Sasak gave this customer feedback, and the entire set of peer reviews completed in July 2009, insufficient weight in making her decision.

Respondent also failed to appropriately consider the "nature, extent, seriousness, and effect" of Complainant's performance problems with SharePoint within the context of his overall performance. The SharePoint crisis could and should have been avoided by Complainant through enhanced and proactive leadership and management on his part. It was a temporary setback for HRS. However, in the large scheme of things, this project represents an enormous step forward for HRS and the Patrol, and ultimately for DPS.

Respondent also ignored the positive aspects of Complainant's involvement in Scantron and the Denver Health projects. The preponderance of evidence demonstrates that Ms. Sasak considered these projects only in the context of whether Complainant somehow overstated or "fudged" his role in the projects in his July 9 letter, rather than focusing on Complainant's accomplishments achieved through those collaborations. The July 9 letter was a distraction from the substantive accomplishments Respondent should have been considering.

With regard to the "type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions," Respondent also failed to consider this factor in rendering its decision. Ms. Sasak acutely identified performance issues in Complainant's 2007 evaluation. Her 2008 evaluation noted that he had worked on the issues identified, he was on the right course, and he needed to build on his efforts. Ms. Sasak's 2009 evaluation contained no indication that there was any problem with Complainant's performance. With this record in mind, Ms. Sasak failed to recognize that since 2008, Complainant had not evidenced any unsatisfactory performance.

Based on the above, Respondent failed to give candid and honest consideration to the evidence demonstrating that Complainant was, on the whole, an innovative HR Director who overcame significant obstacles to achieve real goals during his short tenure. Under the circumstances of this case, a reasonable manager would not have reached the extreme decision to terminate Complainant's employment. Therefore, Respondent's action was arbitrary and capricious and in violation of Board Rule 6-9.

State Personnel Board Rule 6-2, 4 CCR 801, states, "A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination."

The hallmark of progressive discipline is fairness. It ensures that certified employees receive fair warning of performance deficiencies prior to the imposition of consequences in the form of a pay reduction, demotion, suspension, or loss of employment. Respondent argues that Complainant had fair warning of performance problems in his early evaluation and in the form of the meetings with Ms. Sasak and coaching sessions with Dr. Richard in 2008. This argument ignores the absence of any additional warnings or written notice of a problem given to Complainant after that initial period of adjustment to his new position.

No one could have predicted that Major Powell would prematurely launch SharePoint on July 14, 2010. In fact, the evidence demonstrates that Complainant and the others involved in the project expected to launch it on the broader scale in September, two months later. Complainant knew on July 14 that his staff were not ready for SharePoint to launch. He failed to exert the necessary leadership to stand up to Major Powell. And, the crisis illuminated his previous failure to competently manage the project and plan for its implementation with a written timeline.

However, Complainant's failure to effectively manage the crisis caused by Major Powell's premature launch of SharePoint was not so flagrant or serious as to warrant immediate discipline. Therefore, Respondent violated Rule 6-2 by imposing discipline on Complainant prior to issuing a corrective action.

**C. The discipline imposed was not within the range of reasonable alternatives.**

The discussion above makes it clear that no disciplinary action was warranted in this case. Even assuming for the sake of argument that some small level of discipline were warranted, termination was not within the range of reasonable alternatives.

**D. Respondent did not discriminate against Complainant.**

Complainant asserts that Respondent discriminated against him on the basis of his gender. The Colorado Anti-Discrimination Act, § 24-34-402, C.R.S. (CADA), prohibits discrimination on the basis of gender. In 1997, the Colorado Supreme Court adopted the U.S. Supreme Court's shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny, finding it "represents a clear and thorough analytical framework for evaluating claims of employment discrimination." *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997). See also *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the plaintiff bears the initial burden of establishing a *prima facie* case of sex discrimination, whereupon the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge, and then back to the plaintiff to show that the stated reason is pretextual. To establish a *prima facie* case, a plaintiff ordinarily must show "that (1) the plaintiff belongs to some protected class, (2) the plaintiff was qualified for the position or benefit at issue, (3) the plaintiff suffered an adverse employment action, and (4) the plaintiff was treated less favorably than others. *Argo v. Blue Cross and Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1201 (10<sup>th</sup> Cir. 2006). The Supreme Court has held that such a *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors." *Id.*, quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). For most plaintiffs, establishing a *prima facie* case is perfunctory, and liability turns on whether the defendant's stated explanation for the adverse employment action is pretextual. *Id.*

In a reverse discrimination case, however, a *prima facie* case of discrimination requires a stronger showing. A plaintiff alleging reverse discrimination "must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Argo v. Blue Cross and Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1201 (10<sup>th</sup> Cir. 2006). A plaintiff may produce facts "sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.*

Complainant has not shown any circumstances that might justify a presumption of reverse sex discrimination. He did not introduce any evidence that men suffered adverse treatment as a class in the workforce at DPS. DPS appears to be a department populated and led predominantly by men. There is no evidence in this record demonstrating that DPS is the unusual employer that discriminates against the majority. Therefore, Complainant has not met the first element of a reverse discrimination claim.

Complainant clearly established the second and third elements of the *prima facie* case of discrimination. He was qualified for the position and he suffered an adverse employment action. However, as to the fourth element, no evidence in the record shows that Complainant was treated less favorably than his comparators, namely, women. In fact, there is no evidence at all as to how comparators were treated under similar circumstances. Complainant's reverse gender discrimination claim fails.

#### **E. Complainant is not entitled to an award of attorney fees and costs.**

Complainant requests an award of attorney fees and costs. The Board's enabling act mandates an award of attorney fees and costs upon findings that the personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. The State Personnel Board has promulgated rules interpreting this statutory provision. Board Rule 8-38(A), 4 CCR 801. The Rule defines a frivolous personnel action as one "in which it is found that no rational argument based on the evidence or the law is presented." A personnel action taken in bad faith, maliciously, or as a means of harassment, is defined as one "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth." Lastly, a groundless personnel action

is defined as one in which “despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.” Rule 8-38(A).

Complainant’s request for attorney fees must be viewed from the perspective of Ms. Sasak. Ms. Sasak spent an enormous amount of time with Complainant in the first year of his tenure, attempting to mentor and guide Complainant as he grew into his position. In 2010, when a significant issue appeared to arise, her response was to view Complainant’s overall performance through the lens of his initial communication problems with his supervisees. Ms. Sasak therefore concluded that there was no way to salvage Complainant as a manager. While the evidence demonstrates that Ms. Sasak’s perspective was erroneously narrow and reactive, as discussed above, it does not suggest that she acted in bad faith, maliciously, or to harass Complainant.

Nor does the evidence show that Ms. Sasak’s decision to take some action against Complainant was groundless. To conclude that Respondent’s action was groundless, it must be determined that Respondent failed to “produce any competent evidence to support” its action. Rule 3-38(A). *See also Hartley v. Dept. of Corrections*, 937 P.2d 913 (Colo.App. 1997) and *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo.App. 1993). Respondent produced competent evidence to support taking some action against Complainant. His failure to proactively manage SharePoint, and to address the crisis created by its premature launch, was significant. Therefore, Respondent’s action was not groundless. Complainant is not entitled to an award of attorney fees and costs.

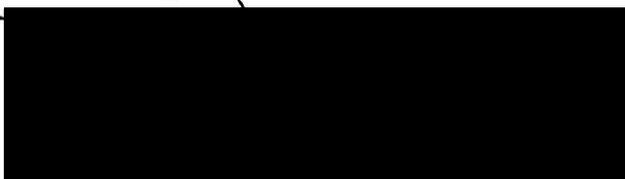
#### **CONCLUSIONS OF LAW**

1. Complainant did not commit most of the acts for which he was disciplined.
2. Respondent’s action was arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Respondent did not discriminate against Complainant.
5. Complainant is not entitled to an award of attorney fees and costs.

#### **ORDER**

Respondent’s action is **rescinded**. Complainant is reinstated to his position with back pay and interest, minus any alternate sources of income he has earned since his termination.

Dated this 1<sup>st</sup> day  
of August, 2011 at  
Denver, Colorado.

  
Mary S. McClatchey  
Administrative Law Judge  
State Personnel Board  
633 – 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202-3640  
(303) 866-3300

**CERTIFICATE OF MAILING**

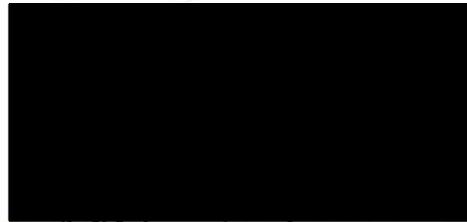
This is to certify that on the 2<sup>nd</sup> day of August, 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS**, addressed as follows:

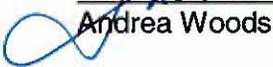
Susan P. Klopman Esq.



and

Diane Dash



  
Andrea Woods

## NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
1. 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.
2. 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 electronic record on appeal in this case is \$5.00. 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.