STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2011B100**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD RILEY,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge (ALJ) Robert R. Gunning held the hearing in this matter on February 9, March 21-22 and April 10-12, 2012, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on February 9, 2012. The record was closed on May 31, 2012, upon receipt of the parties' written Closing Arguments. Assistant Attorneys General Micah Payton and Heather Smith represented Respondent. Respondent's advisory witness was Larry Reid, Department of Corrections, Deputy Director of Prisons. Richard Radabaugh, Esquire, represented Complainant.

MATTERS APPEALED

Complainant was a certified Community Parole Officer (CPO) employed by the Colorado Department of Corrections (DOC) prior to his disciplinary termination of employment. Complainant appeals his termination, arguing that he did not commit the acts for which he was disciplined; that Respondent's action was arbitrary, capricious, and contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives.

Through this appeal, Complainant seeks reinstatement to his position at DOC as a CPO and back pay. Respondent requests that the State Personnel Board (Board) affirm the action of the appointing authority and dismiss Complainant's appeal with prejudice.

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

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; and

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

PROCEDURAL HISTORY

Complainant filed a timely notice of appeal on June 1, 2011. A copy of the notice of appeal was sent to First Assistant Attorney General Vincent Morscher on June 2, 2011. However, through inadvertent clerical error, a Notice of Hearing was not promptly sent to the parties. On October 21, 2011, Complainant's counsel notified the Board that Complainant's appeal had not been timely set for hearing, and requested that the Board provide Complainant with the status of the appeal. Following receipt of this notice, the ALJ immediately issued a Notice of Hearing and Prehearing Order, setting the matter for hearing on January 20, 2012.

On November 9, 2011, Respondent filed a Motion to Dismiss Appeal with Prejudice for Lack of Jurisdiction (Respondent's Motion to Dismiss). Complainant did not file a response to Respondent's Motion to Dismiss. On December 9, 2011, the ALJ issued an Order Denying Respondent's Motion to Dismiss. The Order concluded that Complainant had timely filed his notice of appeal with the Board, and that the 90-day deadline in §§ 24-50-125(4) and 24-50-125.4, C.R.S. for the Board to commence hearings is directory, but not jurisdictional, in nature. Respondent's Motion to Dismiss therefore was denied.

On January 5, 2012, the ALJ granted Respondent's Unopposed Motion to Commence and Continue the Evidentiary Hearing. This Order continued the commencement date to February 9, 2012, and set a four-day evidentiary hearing. On January 20, 2012, Complainant filed a Motion to Dismiss and to Grant the Relief Requested in the Appeal (Complainant's Motion to Dismiss). Respondent filed a response opposing this motion. On February 8, 2012, the ALJ issued an Order Denying Complainant's Motion to Dismiss. The Order denied this motion on the basis articulated in the Order Denying Respondent's Motion to Dismiss, and on the additional basis that Complainant would not be entitled to the relief requested if the Board lacked jurisdiction over his appeal.

The hearing commenced on February 9, 2012. The evidentiary portion of the hearing was then conducted on March 21-22, 2012, and April 10-12, 2012. At the conclusion of the April 12, 2012 hearing, the parties agreed to present closing arguments in person on May 2, 2012. Due to Complainant's counsel's health emergency, however, the May 2 closing argument date was vacated. Thereafter, the parties' counsel were presented with six dates for closing argument, but were unable to agree on any of the dates. The ALJ therefore issued an Order Requiring Written Closing Arguments. Counsel timely submitted written closing arguments on May 31, 2012. Thereafter, the ALJ issued an Order confirming that the evidentiary record was closed on May 31, 2012.

FINDINGS OF FACT

General Background

1. Complainant served as a CPO with the DOC, Division of Adult Parole, Community Corrections and Youthful Offender System (Adult Parole Division) from December 1, 1998 to May 23, 2011. At the time of his termination, Complainant was a CPO III.

2. Complainant's appointing authority was Kelly Messamore, DOC Assistant Director of Adult Parole. Ms. Messamore supervises a staff of approximately 80 parole officers and supervisors. However, as set forth below, Ms. Messamore recused herself during the disciplinary process, and the appointing authority was delegated to Larry Reid, DOC, Deputy Director of Prisons.

3. As of July 2009, Complainant's direct supervisor was Wendy Kendall, Community Parole Supervisor.

4. Throughout his career, Complainant consistently received meets expectations and exceeds expectations performance evaluations. He received several commendations over the years. By all accounts, before the incidents which formed the basis for his termination, Complainant was a very good CPO.

5. Complainant received his only corrective action in June 2004. The corrective action was issued for failing to accurately document interactions with offenders on his caseload, in accordance with DOC Administrative Regulation (AR) 250-26. He also received a Performance Improvement Plan in July 2004 relating to this issue. Prior to the subject action, Complainant had not received any disciplinary actions.

CPO Duties and Responsibilities

6. DOC is responsible for operating and managing the state's correctional facilities as well as overseeing offenders placed in the community corrections program and offenders released on parole. DOC operates 21 correctional facilities and 16 parole offices throughout Colorado. DOC's Mission Statement is "[t]o protect the citizens of Colorado by holding offenders accountable and engaging them in opportunities to make positive behavioral changes and become law abiding, productive citizens."

7. The Adult Parole Division is primarily responsible for the supervision of inmates and parolees paroled from Colorado correctional facilities. Adult Parole's principal goal is to enhance public safety by managing offenders through supervision standards and community-based program services that assist each offender transitioning to the community.

8. CPOs manage and supervise offenders on a 24 hours per day, 7 days per week, 365 days per year basis to provide public safety and opportunities for successful re-entry of offenders returning to community placement in the Adult Parole Division.

9. A CPO is a statutorily defined Peace Officer that performs a broad range of law enforcement duties, including search and seizure, and the arrest and transport of offenders. A CPO also assists other law enforcement agencies. As a certified Peace Officer, a CPO holds a position of trust.

10. A CPO is authorized to carry a DOC issued concealed weapon and possesses arrest powers. CPOs are authorized to arrest DOC parolees without a warrant, but generally require an arrest warrant to arrest a non-offender.

11. Each CPO has a case load of offenders. CPOs are responsible for assessing offenders, performing intake interviews, regularly meeting with offenders, counseling offenders, creating supervision and treatment plans, investigating alleged parole violations, and implementing general mandates of the Parole Board.

12. CPOs meet with offenders either at the DOC offices or at offenders' sites. CPOs are authorized to search parolees' residences without a search warrant. Performing home visits is the most dangerous activity that CPOs engage in.

13. The DOC issues BlackBerries to CPOs so that they can regularly communicate their whereabouts and activity.

14. CPOs have the authority to recommend changed parole conditions and early release of parolees.

15. Credibility and relationship with the community play a significant role in a CPO's execution of job duties, and lack of credibility can result in a tangible impact on public safety and the public's perception of DOC.

16. A CPO serves as a liaison with federal (FBI), state (CBI), and municipal law enforcement agencies (local police departments) by coordinating law enforcement/investigative efforts.

Complainant's Duties and Responsibilities

17. Complainant regularly worked with the Colorado Springs Police Department (CSPD) by providing information about offenders including home locations, profile sheets, and other information from DOC's database. Complainant assisted CSPD in investigations and worked with CSPD in a gang task force.

18. Complainant served as a liaison with parolees' sponsors, parolees' employers, treatment providers, the El Paso County District Attorney's Office, and other DOC Divisions.

19. Complainant served as a Field Training Officer for the Adult Parole Division. In this role, Complainant provided instruction to new CPOs in performing duties including conducting offender home visits, adhering to DOC Administrative Regulations, and preparing written documentation for caseload supervision.

20. As part of his job duties, Complainant alleged parole violations, presented cases, and testified at Parole Board Revocation Hearings. In this capacity, Complainant testified and made recommendations to the Parole Board as to whether a parolee was in violation of his parole requirements and/or should be referred back to treatment. Complainant participated in approximately fifty Parole Board Revocation Hearings each year.

21. According to Complainant's Position Description Questionnaire (PDQ), Complainant acted as an official representative of DOC when testifying at hearings.

22. As a CPO, Complainant had a high degree of authority and control over parolees through the Parole Board process. Hearing officers usually give significant weight to CPO testimony, and generally accepted Complainant's recommendations for parolees. The Parole Board relied on Complainant to provide accurate and truthful information.

23. Honesty and integrity are essential qualities for a CPO, and as a CPO, Complainant was held to the highest standard of ethics.

24. Complainant was required to maintain accurate chronological records regarding his interactions with parolees on his caseload. These records were to be made in DOC's C-WISE database, which is a web-based reporting system. Complainant was expected to make C-WISE entries as close to real time as possible, and at the outset, on the same day as the activity being reported. CPOs may make entries in this system through their office computers, BlackBerries, or by calling an operator while out in the field. In the event a CPO is in a remote part of the state without cell phone coverage, the CPO is permitted to make the entries the following day. C-WISE entries form the basis for information provided to D.A.'s offices and the Parole Board.

Relevant DOC Regulations, Policies, and Procedures

25. DOC AR 1450-1 sets forth the DOC's Code of Conduct, and is covered in basic training. The Executive Department Code of Ethics (Executive Order D 001 99) is attached to DOC AR 1450-1. All DOC employees are required to annually sign and attest that they have reviewed and will abide by DOC AR 1450-1 and the Code of Ethics. Complainant signed and affirmed that he was familiar with and would follow both DOC AR 1450-1 and the Code of Ethics on June 22, 2009.

26. Under DOC AR 1450-1, § IV(N), DOC employees must exercise good judgment and sound discretion, and may not perform any actions that jeopardize the integrity or security of the Department.

27. Under DOC AR 1450-01, § IV(X), DOC employees shall not willingly depart from the truth in either giving testimony or in connection with any official investigation.

28. Under DOC AR 1450-1, § IV(SS), DOC employees are required to immediately report allegations of sexual misconduct to their supervisors. Complainant attended Prison Rape Elimination Act training on January 30, 2009, at which CPOs were informed that criminal charges are filed if there are credible allegations of sexual relations with offenders. Complainant acknowledged that he was aware of this regulation and policy.

29. Under DOC AR 1450-01, § IV(ZZ), any act of a DOC employee that affects job performance and that tends to bring the DOC into disrepute, or tends to adversely affect public safety, is prohibited.

30. Under DOC AR 250-26 (Offender Case Recording), CPOs are required to make accurate and timely chronological records in the C-WISE system using the prescribed C-WISE codes. In accordance with section IV(A), the "chronological record will reflect all contacts pertinent to the offender's supervision." Section IV(A) also states that "to provide up-to-date and accurate information on every offender, it is critical that entries are made as soon as possible after the contact. Personal contacts with the offender shall be made immediately after the contact was made, except under extenuating circumstances." These chronological record

requirements were also set forth in Complainant's performance plan. Complainant received four hours of C-WISE training on October 16, 2008.

31. Under the February 1, 2009 version of DOC AR 250-45 (Safety Procedures During Home Contacts), CPOs are required to record all offender contacts, or attempted contacts, in the chronological record during, or immediately following, the contact. Under section IV(b) of this regulation, CPOs "should always consider requesting another CPO or a local law enforcement officer assist as back-up during the house contact." Subsection IV(C) states that CPOs "should" also notify the Adult Parole Division and contact law enforcement regarding the CPO's location during field work.

32. Complainant's performance plan, effective April 2009, identified use of a State Patrol radio while in the field as a supervisor-defined individual performance objective (IPO) in the accountability competency.

33. The DOC's policies regarding the use of State Patrol radios and officer back-up for field visits have evolved with amendments to the ARs. Previously, the use of radios and back-up was more discretionary. For instance, it used to be more common for CPOs to conduct field visits alone and without a supervisor's knowledge. By April 2008, the CPO performance plan stated that "field work should be conducted utilizing a police radio. If an officer is in the field without a radio, home visits shall be conducted in the company of another CPO or other Law Enforcement Officer."

July 4, 2009 (Offender K.J. Allegations)

34. On July 4, 2009, K.J.,[1] a parolee under Complainant's supervision, was taken to a hospital due to a cocaine overdose. At this time, K.J. made allegations of sexual assault against Complainant to the CSPD. K.J. reported that she and Complainant had two incidents of sexual contact while she was under his supervision. Complainant had served as K.J.'s parole officer for about 2-3 years.

35. K.J. alleged that in June 2008, Complainant arrived at her residence to perform a parole check. Complainant was not accompanied by another parole officer. She alleged that during this encounter, she performed oral sex on Complainant and engaged in sexual intercourse with Complainant.

36. K.J. also alleged that she had a second sexual contact with Complainant in January or February 2009. She reported that Complainant performed a parole check at her place of employment and then told her to call him after she left work. K.J. alleged that she telephoned Complainant after she left work that day and that Complainant told her to meet him at the Cameron Motel at the corner of I-25 and Evans Avenue. She further alleged that she and Complainant had sexual intercourse at the motel.

37. K.J. did not report these incidents to the CSPD until July 4, 2009. Due to the amount of time that had passed since the sexual acts allegedly occurred, Detective Jeff Huddleston, CSPD, Adult Sexual Assault Unit, arranged for K.J. to make a "pre-text" telephone call to Complainant. In a pre-text phone call, the alleged victim guides the conversation to see if the accused makes an incriminating statement. The phone call is recorded in a controlled

[1] In accordance with the Protective Order issued February 6, 2012, all references to this non-party parolee are by initials only.

environment. Pre-text phone calls are typically made in situations where there is no direct evidence, such as DNA.

July 15, 2009 (Pre-Text Phone Calls)

38. On July 15, 2009, K.J. conducted five pre-text telephone calls with Complainant. She made these calls while at the CSPD with Detective Huddleston. K.J. used her personal cell phone to make the calls.

39. The first telephone call took place at 10:09 a.m. Complainant did not answer. K.J. left a voicemail message on his work cell phone, requesting that he return her call.

40. K.J. made the second call about five minutes later. Complainant answered, but told K.J. that he was at Parole Board hearings that morning, and would have to call her back later in the day.

41. K.J. made the third call at 2:41 p.m. Complainant was in his DOC office. He told K.J. that he would call her back in about five minutes.

42. At approximately 3:00 p.m., Complainant called K.J. on her cell phone. In this call, K.J. made the first statement about an alleged sexual relationship. Complainant asked her what she was talking about. K.J. said she was talking about their sexual relationship. Complainant asked her where she was, and she said she was at her new apartment. Complainant stated that he did not want to discuss it over the telephone, and said that they should discuss the issues in his DOC office or in person. He asked K.J. twice whether she was trying to set him up. Complainant did not explicitly reference a sexual relationship during this telephone call. In particular, Complainant did not mention the words "sex," "sexual," or "relationship" during the call.

43. In response to one of the allegations during the fourth telephone call, Complainant stated that "there is nothing that's goin' on about anything." In response to another allegation, he said "We haven't started anything. We haven't started anything."

44. After the fourth telephone call, Complainant reviewed the C-WISE system to determine K.J.'s new address, and to see what had transpired since his last contact with her. He then went to his car. When he left the office, he did not sign the in/out board. K.J.'s apartment was a 6-minute drive from the DOC offices. Complainant went to her apartment based on the content of the phone call.

45. At 3:20 p.m., K.J. made a final pre-text telephone call to Complainant. The following is an excerpt of the conversation, from a transcript prepared by the CSPD.

K.J.: Hello? Hey, did you just call me back?
Complainant: Yeah…Step out in the hallway.
K.J.: Huh?
Complainant: Step out in the hall.
K.J.: Step out in the hall?
Complainant: That's right.
K.J.: Huh?
Complainant: Hello? Hello?
K.J.: Are you at the right place? Are you in the right building?

Complainant: Are you at the front door?
K.J.: Yeah.
Complainant: No you're not. On the third floor, 312 . . . Okay, I see you're ...You're not even out of there, so...? Anyway...Walk down by the pool.
K.J.: Okay. All right.
Complainant: Bye.
K.J.: Bye.

46. Complainant went to K.J.'s residence after the fourth pre-text telephone call, and was at her residence during the fifth pre-text telephone call. Complainant did not have a State Patrol radio with him during this attempted home contact. Complainant was unaccompanied during the incident, and did not notify anyone of his location. He requested K.J. to step out of her apartment and come into a public area for officer safety reasons.

47. Complainant had some trouble hearing K.J. on the pre-text phone calls because they were muffled.

48. K.J. was scheduled for a parole visit with Complainant, at Complainant's DOC office, the following day.

49. Complainant understood that during the pre-text calls, K.J. was referring to a sexual relationship between herself and Complainant. At the conclusion of the calls, he understood that K.J. was specifically accusing him of sexual misconduct. Complainant acknowledged this awareness during his hearing testimony.

50. However, the following day of hearing, Complainant changed his testimony and testified that at the conclusion of the pre-text phone calls he was not certain that K.J. was accusing him of a sexual relationship. Complainant was then successfully impeached with his deposition transcript, which showed that during his deposition, he testified that "she had mentioned us having sex" in the afternoon pre-text phone calls, and that he was shocked by the allegations. Complainant also testified that although he was not certain about the content of the allegations, he "heard the basis."

51. Complainant was shocked by K.J.'s allegations against him in the pre-text phone calls.

52. Following the visit to K.J.'s residence, Complainant returned to his DOC office. He did not notify his supervisor or anyone else at the Adult Parole Division that he was the subject of a sexual misconduct allegation, or that he had sought to visit K.J. within minutes of being accused of having a sexual relationship with her.

53. While at his office that afternoon, Complainant entered a C-WISE chronological record regarding his contact with K.J. Specifically, Complainant wrote:

> Code 1:004-Offender Phone Contact
> Notes: Subject contacted CPO Riley ref. issues she was having with him and parole....Subject was advised to come into the office to talk. She advised she did not want to talk about it in the office. Subject was reminded she had a parole visit on 07/16/09 tomorrow and issues can be discussed. Subject has experience some issue on parole but continues to progress. CPO Riley will talk to subject on 07/16/09 during visit.

54. This C-WISE chronological record omitted the number of telephone conversations Complainant had with K.J.; that Complainant attempted to visit K.J. at her residence and that K.J. did not appear when he knocked on her door; and that K.J. had made sexual misconduct allegations against Complainant. The entry did not report that K.J. lied about her location, and that Complainant was unsure of her location. The statement in the C-WISE system about "issues she was having with him and parole" was intended to refer to the sexual misconduct accusation made by K.J.

55. Instead of using both the "phone contact" and "attempted home contact" C-WISE entry codes as required, Complainant only used the phone contact code. He knew that more than one code was to be used, when appropriate. Complainant was aware of, and previously used, the attempted contact code.

56. It is important for CPOs to accurately document interactions with offenders in C-WISE because the information in the database can be used for Parole Board Hearings leading to parole revocations, district attorney offices have requested information in the C-WISE records, and the records can impact employment opportunities for offenders.

57. After making his C-WISE entry, Complainant left the DOC offices for the day at about 4:30 p.m.

58. CSPD Detective Huddleston contacted Ms. Messamore and DOC Inspector General Investigator Craig Shepherd late in the day to advise them about the CSPD investigation of Complainant for sexual assault against K.J.

July 16, 2009 (CSPD Interview)

59. Detective Huddleston met with Ms. Messamore at about 7 a.m. on July 16 to review the pre-text phone calls and to request that Ms. Messamore review Complainant's C-WISE entries for July 15.

60. Later that morning, Detective Huddleston telephoned Complainant and requested that he come to the CSPD office to be interviewed regarding a parolee on his caseload. Complainant was not aware that he was the subject of the investigation. When he arrived at the CSPD lobby about 1:30 p.m., he was required to remove his firearm, and was taken to an interrogation room.

61. CSPD Detective John O'Brien met Complainant in the interrogation room. Detective Huddleston, Ms. Messamore, and Mr. Shepherd witnessed the interview through a television monitor in another room at CSPD. Detective Huddleston's supervisors had invited the DOC representatives to watch the interview. Detective Huddleston had never previously seen the CSPD invite a suspect's employer to observe a police interview.

62. Prior to beginning the interview, Detective O'Brien advised Complainant as to why CSPD had requested the interview, that Complainant was free to leave at any time, and that he did not intend to arrest Complainant unless Complainant confessed to sexual assault. Complainant remained and participated in the interview voluntarily. Detective O'Brien read *Miranda* warnings to Complainant, which included Complainant's right to refuse to make any statements and the right to refuse to answer any questions. Complainant then called Wendy

Kendall, his supervisor, to advise her of the situation and to report the allegations of sexual misconduct.

63. During the interview, Detective O'Brien stated that, according to the C-WISE entries, he knew that Complainant had a conversation with K.J. the previous day. Detective O'Brien asked Complainant about the nature of the conversation. Complainant responded that K.J. had "called basically reporting the allegations." Detective O'Brien inquired about the allegations. Complainant answered, "These allegations that we are talking about today. Talking about that we shouldn't be having sex."

64. During the interview, Complainant denied having sexual contact with K.J., and said that he believed she was accusing him of sexual misconduct to avoid parole revocation.

65. Later in the interview, Detective O'Brien asked Complainant, "Did you attempt to see her at all yesterday after having that conversation?" Complainant answered, "No, other than telling her to come to the office." Detective O'Brien then said, "You are telling me you did not go down to her residence at all." Complainant responded, "No. I was on the phone, actually I told her that I was down there, but I didn't, I was actually still at the office."

66. Complainant's statements to Detective O'Brien about not going to K.J.'s residence were untruthful statements to a law enforcement officer.

67. Complainant also told Detective O'Brien that he was not required to immediately report the sexual misconduct allegations to his supervisor, but rather to report it within a reasonable amount of time. He said he intended to bring a supervisor into the meeting scheduled with K.J. at the DOC offices on July 16, 2009.

68. Complainant told Detective O'Brien that he logged the conversation with K.J. in C-WISE because she reported some form of allegation against him.

69. During the interview, Detective O'Brien intentionally lied to Complainant, such as telling him that the CSPD had evidence that Complainant had been in a motel with K.J. According to Detective Huddleston, it is not uncommon for investigators to lie to suspects in an effort to solicit the truth.

70. Detective Huddleston does not want to work with Complainant in the future because Complainant lied during an investigation.

Placement on Administrative Leave and Initial Board Rule 6-10 Meeting

71. Based on the information obtained from the pre-text telephone calls, K.J.'s statements, and Complainant's interview with Detective O'Brien, Ms. Messamore issued a letter to Complainant on July 16, 2009, informing him that he was being placed on administrative leave with pay so that an investigation could be conducted. The letter stated that due to the seriousness of the allegations, a professional standards investigation would be conducted under DOC AR 1150-04.

72. On July 30, 2009, Detective Huddleston obtained a court order to review Complainant's cell phone records and approximate locations of cell phone calls made and received on July 15, 2009. The location of the cell tower which conducted the transmission of Complainant's fifth pre-text call was immediately southwest of the apartment complex where

K.J. resided. This cell phone record contradicts Complainant's statement to Detective O'Brien that he was in his office during the call.

73. Effective August 12, 2009, the Adult Parole Division Director, Jeaneene E. Miller, delegated appointing authority to Tim Hand, Deputy Director of the Adult Parole Division. That same day, Mr. Hand delegated appointing authority to Ms. Messamore.

74. On September 24, 2009, Ms. Messamore and Complainant met to conduct a pre-disciplinary, information gathering meeting in accordance with Board Rule 6-10. Complainant attended the meeting with his attorneys. Ms. Messamore was present with her representative, Rick Thompkins, Associate Director of Human Resources, DOC.

75. Because criminal charges were pending against Complainant and the professional standards investigation had not been completed, Complainant and his counsel elected not to provide additional information at the Rule 6-10 meeting and requested that the meeting be suspended until more information could be gathered. Ms. Messamore suspended the meeting and placed Complainant on indefinite suspension without pay effective September 24, 2009, pending the outcome of Complainant's criminal case.

Professional Standards Investigation

76. DOC Investigator Shepherd led a professional standards investigation of Complainant. The investigation commenced in July 2009. The first professional standards report was issued on October 8, 2009.

77. Mr. Shepherd then interviewed Complainant on December 1, 2009. Complainant's counsel was present during this interview. The interview was recorded and partially transcribed. Before the interview began, Complainant received and signed a DOC *Garrity* advisement statement. The *Garrity* statement advised Complainant that he was being interviewed as part of an official investigation of the DOC, that he was entitled to all rights and privileges guaranteed by law, "including the right not to be compelled to incriminate yourself." The notice further stated that if he refused to answer questions or did not answer them fully and truthfully relating to the performance of his official duties or fitness for duty, he was subject to departmental charges which could result in corrective or disciplinary action including dismissal from the DOC. The advisement stated that neither his "statements nor any information or evidence which is gained by reason of such statements may be used against you in any subsequent criminal proceeding." Lastly, the advisement stated that the statements could, however, "be used against you in relation to subsequent departmental charges."

78. Complainant offered to take a polygraph examination. It was scheduled, but when Complainant showed up to take the examination several days later, Complainant was told that the polygraph examination had been canceled.

79. During the interview, Mr. Shepherd advised Complainant that CSPD had obtained Complainant's cell phone records, which showed that he was in the area of K.J.'s residence on July 15, 2009, rather than at his office as Complainant had previously stated to Detective O'Brien. Complainant told Investigator Shepherd that he did in fact go to K.J.'s residence, and that he had misunderstood the questions asked by Detective O'Brien regarding being at K.J.'s residence.

80. During the December 1 interview, Complainant told Mr. Shepherd that he couldn't hear much of the pre-text phone conversation because K.J. was coming through very muffled.

81. As part of the investigation, Mr. Shepherd also reviewed the CSPD reports, including the audio recording and transcript of the July 16 pre-text telephone calls, Complainant's cell phone records, and K.J.'s parole chronological record. Mr. Shepherd did not interview K.J., Complainant's peers, or Complainant's supervisors in the course of his investigation. He then prepared and submitted a supplemental professional standards report on December 20, 2009. The reports were routed to the appointing authority.

82. The El Paso County District Attorney's Office requested a copy of Mr. Shepherd's professional standards reports. They were provided to the D.A.'s office. According to Mr. Shepherd, this was the only time in his career when he provided a *Garrity* advisement and then turned the records over to a D.A. or prosecuting attorney.

83. The professional standards reports were suppressed by the El Paso County District Court based on *Garrity*.

84. The continuation of the Board Rule 6-10 meeting occurred on April 29, 2010. At that time, criminal charges were still pending against Complainant. The meeting was suspended again, until the conclusion of Complainant's criminal trial.

The Cameron Motel

85. K.J. alleged that she had sexual relations with Complainant at the Cameron Motel in Denver in January or February 2009. A significant portion of the Shepherd professional standards investigation centered on whether Complainant visited the motel. The issue was later discussed at length in the April 2011 Board Rule 6-10 proceeding, and the parties offered extensive testimony regarding the motel at hearing.

86. Ultimately, however, Mr. Reid did not rely on the allegations that Complainant met K.J. at the motel in making his decision to terminate Complainant's employment.

87. As relevant here, Respondent did not prove that Complainant stayed at the Cameron Motel. During the CSPD interview, the Shepherd interview, the Board Rule 6-10 meetings, and at hearing, Complainant consistently denied that he was ever at the Cameron Motel. The December 22, 2008 receipt that Mr. Shepherd allegedly located at the motel on December 10, 2009 was not date/time stamped as were other receipts, the motel desk clerk who allegedly signed the receipt at 5 p.m. did not arrive at work that day until 11 p.m., and the signature on the receipt did not exactly match Complainant's signature. The date of the receipt did not coincide with the date on which K.J. alleged she met Complainant. No other December 2008 receipts were located. There was however, a receipt from January 2009 which showed that K.J.'s fiancé stayed at the motel in January 2009. Further, the copy of Complainant's driver's license attached to the December 22, 2008 receipt was a copy of a prior license which contained an address at which Complainant had not lived for six years. Complainant's DOC vehicle was broken into in April 2008, and his driver's license was stolen at that time.

88. The exculpatory information regarding the Cameron Motel was presented to Mr. Reid during the April 2011 Board Rule 6-10 meeting.

Criminal Proceedings/Shepherd Supplemental Investigation

89. Complainant's criminal matter went to a jury trial in December 2010. The prosecution contended that Complainant violated the Prison Rape Elimination Act by having sexual relations with K.J. Complainant was acquitted of all criminal charges against him on December 14, 2010.

90. At the request of Complainant's attorneys, the criminal records were sealed by the El Paso County District Court. The records remained sealed until Complainant's counsel, Mr. Radabaugh, filed a motion to unseal the records on March 16, 2012. The records were not timely disclosed to Respondent, and were not offered or admitted into evidence at the hearing.

91. Following the criminal trial, Investigator Shepherd prepared a supplemental professional standards report. The report did not include any exculpatory information regarding the Cameron Motel.

92. During his supplemental investigation, Mr. Shepherd did not interview Complainant. However, in early 2011, Mr. Shepherd called Complainant's wife's employer and asked for personal information about Ms. Riley, such as her social security number, birth date, and employment dates. It is unclear why Mr. Shepherd solicited such information.

93. At hearing, Mr. Shepherd denied that he solicited this personal information. The testimony of Ms. Riley's co-workers to the contrary was more credible than was Mr. Shepherd's.

Subsequent Board Rule 6-10 Meetings

94. Following Complainant's acquittal, on December 25, 2010, Complainant's counsel sent a letter to Ms. Messamore requesting a Board Rule 6-10 meeting. Mr. Radabaugh stated that because Ms. Messamore testified against Complainant during the criminal trial, Ms. Messamore may have a conflict of interest as Complainant's appointing authority.

95. Ms. Messamore rescinded her appointing authority on December 28, 2010, as it related to determining whether to administer any corrective or disciplinary action against Complainant. Prior to receiving the letter requesting recusal, she had decided that recusal and rescission of her appointing authority was appropriate. She felt that she could not be objective, and it would be a fairer process if she delegated the appointing authority to another individual.

96. On January 5, 2011, Adult Parole Division Director Miller delegated appointing authority to Mr. Reid for all matters related to Complainant. She provided him with a packet of information regarding the matter. The packet included Complainant's personnel file and the professional standards investigation reports.

97. Mr. Reid has served as the Deputy Director, Prisons for about two years. He currently supervises seven prison wardens. He has served in over ten correctional facilities throughout his 24-year tenure with DOC. Mr. Reid has 16 years of experience as a supervisor, and about 11 years of experience as an appointing authority. He has not served as a parole officer or worked in the Adult Parole Division, nor has he previously served as an appointing authority for a CPO.

98. Following the delegation of appointing authority, in a phone conversation, Mr. Reid asked Ms. Messamore for her view on relevant policies, and why they were significant. He

had never reviewed CPO-related ARs before this matter. Mr. Reid contacted Ms. Messamore because she was the prior appointing authority and she was an Assistant Director in the Adult Parole Division. He also asked her about the duties of a CPO. Additionally, later in the decision-making process, Ms. Messamore saw Mr. Reid in the parking lot. Ms. Messamore expressed to Mr. Reid her opinion that Complainant's employment should be terminated.

99. On February 23, 2011, Mr. Reid and Complainant met to conduct a Board Rule 6-10 meeting. Complainant attended the meeting with counsel and Mr. Reid was present with his representative, Pam Ploughe, Warden of Colorado Territorial Correctional Facility. Prior to the meeting, Mr. Reid spent several weeks reviewing ARs and the professional standards investigation. In particular, Mr. Reid reviewed DOC AR 1450-01, 250-26, 250-27, and 250-45.

100. During this Rule 6-10 meeting, Complainant advised Mr. Reid that he had been acquitted of the criminal charges brought against him. Mr. Reid removed Complainant from his suspension without pay status, awarded back pay and benefits retroactive to September 24, 2009, and placed Complainant on suspension with pay effective February 23, 2011.

101. During the Rule 6-10 meeting, Mr. Reid read applicable portions of the ARs and followed an outline he had previously prepared. Mr. Reid identified the specific AR sub-parts that he believed were relevant. He discussed the allegations that had been made against Complainant. Complainant stated that he did not feel prepared for the meeting, as he had not been provided with specific information regarding the allegations and potential violations. He requested additional time to review the relevant ARs and the professional standards investigation reports, which were provided to him for the first time at the meeting. Mr. Reid granted this request and the meeting was suspended to provide Complainant the opportunity to review the documentation and ARs.

102. The Rule 6-10 meeting reconvened on April 4, 2011. Complainant attended the meeting with counsel and Mr. Reid was present with his representative, Ms. Ploughe. During the meeting, the parties discussed the pre-text telephone calls, including the transcript of the calls. The audio of the pre-text phone calls was not available or reviewed. Complainant told Mr. Reid that the calls contained a lot of static and that he was not sure if the calls concerned K.J.'s recent drug use, boyfriend problems, or her concern about returning to DOC. He told Mr. Reid that he was not sure if K.J. was accusing him of having sex with her. He said he was confused by the call and went to K.J.'s residence because he wanted to clarify what K.J. was saying. In response to a question from Warden Ploughe as to what possessed him to go to K.J.'s residence, Complainant said it was just a reaction on his part, and that in hindsight, he would not have gone.

103. Complainant stated that he did not know that K.J. was making sexual allegations against him. However, he also said that he was "shocked because I wasn't really sure what I was hearing, what she was talking about." He said the call was cutting out and there was noise in the background. Complainant also told Mr. Reid that he was "totally thrown off" by the allegations, that he could not believe what was happening to him, and that the situation was surreal.

104. Complainant admitted to Mr. Reid that he went to K.J.'s residence on July 15, 2009 to speak to her about the telephone calls.

105. When asked about the C-WISE entry not containing the details of the pretext telephone calls, Complainant stated, "I didn't chron part of that day. I was just stacked and

busy."

106. Home visit policy was also discussed. Complainant said that he was aware of the written policy, but felt he had leeway about going on home visits by himself, without a radio, because he was a veteran officer. It was the first time Mr. Reid had heard an employee say that he had discretion whether or not to follow policies because of tenure.

107. Complainant typically conducted his home visits without other law enforcement officers. He was never disciplined for going on solo home visits and not reporting his location.

108. The parties also discussed Complainant's failure to immediately notify his supervisor about K.J.'s allegations. Complainant told Mr. Reid that he intended to get a supervisor involved when K.J. arrived at the office for her scheduled appointment on July 16.

109. At the meeting, Mr. Reid asked Complainant to provide him with any additional information that Complainant wanted him to consider. Complainant provided Mr. Reid with the names of three CPOs who would support him, and asked Mr. Reid to contact them. Complainant and his counsel requested an opportunity to provide additional exculpatory information from the criminal trial. Complainant mentioned that he would like to provide transcripts of the criminal trial, but that they were expensive (about $1,500-2,000) and time consuming (about 6 to 8 weeks) to obtain. No deadline was set for submittal of information.

The Helton Report

110. As of May 2, 2011, Mr. Reid had not received any additional documentation. He issued a letter to Complainant by mail, stating that he had been given ample opportunity to provide additional information and documentation under Board Rule 6-9, and that Mr. Reid was going to proceed with the conclusion of the Rule 6-10 meeting and base his decision on the information he possessed.

111. That same day, Complainant sent a report to Mr. Reid. The report was prepared by Hunter Helton, an investigator for the El Paso County District Attorney's Office, as part of his investigation in the criminal matter. The report was in the custody of the El Paso County D.A.'s office.

112. The Helton report was hand delivered before Complainant received Mr. Reid's letter. Mr. Reid did not consider or review the Helton report before making his decision to terminate Complainant's employment.

113. The Helton report included brief summaries of interviews Mr. Helton conducted with Amy Mollenberg, CPO; David Green (owner of K.J.'s residence); K.J.; Robert McDonald (Complainant's former supervisor); Kylie Burwell (a work colleague of K.J.); K.J.'s fiancé's ex-wife; and Mr. Shepherd. The Helton report did not address or reference Complainant's interview with CSPD or Complainant's actions on July 15 and 16, 2009, relating to the pre-text phone calls and allegations made by K.J. Rather, the report related to K.J.'s credibility and the Cameron Motel issue. The report revealed significant, adverse issues relating to K.J.'s credibility.

Termination Decision

114. It took Mr. Reid about three additional weeks to review the information and make

his decision regarding disciplinary action. In the decision-making process, Mr. Reid reviewed the audio of the Rule 6-10 meeting about 8 to 10 times, ARs, the professional standards reports, the transcript of the pre-text phone calls, Complainant's personnel file, the 2004 corrective action, and Complainant's training history. Mr. Reid did not have in his possession or review the video recording of the July 16, 2009 CSPD interview with Complainant or the audio of the pre-text phone calls.

115. Mr. Reid spoke with the 3 CPOs Complainant had asked him to interview (Officers Mollenberg, Sheridan, and Roberts). They were not aware of the Rule 6-10 meeting, but were confident that Complainant was following policies. They informed Mr. Reid that Complainant's interactions with offenders was always professional, that he got along well with co-workers, and that they had never witnessed any inappropriate behavior. It was also during this time period that Mr. Reid spoke with Ms. Messamore in the parking lot regarding her opinion of the matter. Mr. Reid also conferred with Warden Ploughe, who had also attended the Rule 6-10 meeting. Mr. Reid did not confer with Wendy Kendall, Complainant's supervisor.

116. It was the most complex Rule 6-10 process Mr. Reid was ever involved with. He has participated in approximately 60 – 100 Rule 6-10 meetings over the course of his career.

117. As mitigating information, Mr. Reid considered Complainant's personnel file and performance evaluations (generally satisfactory with some exceptional categories), and issues Complainant raised regarding K.J.'s credibility, information about her boyfriend staying at the Cameron Motel, and issues regarding Investigator Shepherd's report and credibility. Mr. Reid concluded that this information generally was not relevant in determining whether Complainant violated DOC policies.

118. Complainant had requested that Mr. Reid obtain a copy of the DOC report regarding the break-in of his DOC vehicle to verify that his driver's license had been stolen. Mr. Reid did not follow up with DOC about this issue.

119. Mr. Reid concluded that Complainant's story evolved as to the pre-text phone calls, home visits, lack of C-WISE documentation, and failure to notify his supervisor regarding the allegations. He believed that Complainant knew of K.J.'s allegations against him after the pre-text phone calls. Mr. Reid concluded that Complainant was elusive and untruthful throughout the investigatory process, and that his response to the allegations against him was troubling. He felt that Complainant showed a lack of integrity through his actions.

120. Based on the information he reviewed, Mr. Reid concluded that Complainant's C-WISE chronological record entry did not reflect that Complainant went to K.J.'s residence on July 15, 2009 in an attempt to make contact with her. He also concluded that the entry did not mention the allegation of sexual misconduct. In Mr. Reid's experience, DOC officers accused of sexual misconduct immediately report the allegations to their supervisors.

121. Mr. Reid also concluded that Complainant did not report the allegations of sexual misconduct by K.J. immediately to his supervisor and that Complainant had not provided truthful information to Detective O'Brien regarding his location during the pre-text telephone call.

122. Mr. Reid considered alternatives to termination, including a suspension, pay reduction, and demotion. Based on the totality of the circumstances, he ultimately concluded that Complainant could no longer effectively perform his duties. In particular, he concluded that Complainant had lied to CSPD, and that he would have credibility issues before the Parole

Board which could have a detrimental impact on public safety. Further, Mr. Reid was concerned regarding what he described as Complainant's cavalier attitude reflected by his belief that he had discretion to follow DOC policies based on his tenure as a CPO.

123. In the May 23, 2011 termination notice, Mr. Reid stated that integrity, ethical conduct, and the exercise of good judgment were paramount characteristics for DOC employees. He concluded that Complainant violated the fundamental values of the DOC, and DOC AR 1450-01, when he lied during the CSPD investigation, failed to immediately report the sexual misconduct allegation to his supervisor or appointing authority, and omitted the allegation of sexual misconduct from the C-WISE chronological record.

124. The termination notice stated that Complainant had violated the following four subsections of DOC AR 1450-01:

> IV. N. "Any action on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of DOC employees, contract workers, and volunteers, is prohibited. DOC employees, contract workers, and volunteers will exercise good judgment and sound discretion."
>
> IV. X. "DOC employees, contract workers, and volunteers shall neither falsify any documents nor willingly depart from the truth, in either giving testimony or in connection with any official investigation."
>
> IV. SS. "DOC employees, contract workers, and volunteers who receive any information, from any source, concerning sexual misconduct or who observe incidents of sexual misconduct, are required and have a duty to immediately report the information or incident directly to the appropriate appointing authority. The appointing authority will report it immediately to the Office of the Inspector General."
>
> IV. ZZ. "Any act or conduct on or off duty that affects job performance and that tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer or tends to adversely affect public safety is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

125. Mr. Reid concluded that Complainant's conduct constituted willful misconduct and had brought into question Complainant's ability to perform his duties as a parole officer. He concluded that Complainant's actions violated Board Rule 6-12 and DOC AR 1450-01, and therefore terminated Complainant's employment effective May 23, 2011.

126. Complainant filed a timely notice of appeal with the Board on June 1, 2011.

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. XII, §§ 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 the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. In the termination letter, Mr. Reid found that Complainant's conduct constituted willful misconduct that brought into question his ability to perform his duties as a parole officer. In support of this finding, Mr. Reid concluded that Complainant violated the following four portions of DOC AR 1450-01: IV(N), IV(X), IV(SS), and IV(ZZ).

Based on the Rule 6-10 investigation, the appointing authority found that Complainant (1) provided untruthful information during the CSPD interview on July 16, 2009; (2) did not report the sexual relations allegations made by K.J. immediately to his supervisor; and (3) the July 15, 2009 C-WISE entry pertaining to K.J. omitted the fact that Complainant went to her residence and that she had made a sexual misconduct allegation against him.

Respondent did not base the termination decision on Complainant's alleged stay at the Cameron Motel. Further, despite the fact that DOC ARs 250-26 and 250-45 were discussed in the February 2011 and April 2011 Rule 6-10 meetings, Mr. Reid did not cite these regulations in reaching his decision to terminate Complainant's employment.

1. Complainant departed from the truth during the CSPD interview.

It is undisputed that Complainant lied to Detective O'Brien during the July 16, 2009

interrogation. At the outset of the interview, Detective O'Brien read Complainant his *Miranda* rights, and Complainant stated that he understood them. Complainant was also advised that he was free to leave at any time, and that his participation in the interview was voluntary.

During that interview, Complainant told Detective O'Brien twice that he was in his DOC office the previous afternoon during the pre-text phone calls with K.J. Detective O'Brien asked him whether he attempted to see her during the conversation. Complainant answered, "No, other than telling her to come to the office." Detective O'Brien then said, "You are telling me you did not go down to her residence at all." Complainant responded, "No. I was on the phone, actually I told her that I was down there, but I didn't, I was actually still at the office."

Complainant did, however, go to K.J.'s residence in an effort to speak with her in person during the afternoon of July 15. He acknowledged that he went to K.J.'s apartment building during his December 1, 2009 interview with Mr. Shepherd, at the April 2011 Rule 6-10 meeting, and at hearing. Complainant admitted that he lied to Detective O'Brien about not attempting to meet with K.J. The interview with Detective O'Brien was an official CSPD investigation.

a. Reverse *Garrity* Defense

In defense, Complainant argues that his statements to Detective O'Brien should not be used against him in this proceeding under what he terms a "reverse *Garrity*" argument. Complainant argues that based on *Garrity v. New Jersey*, 385 U.S. 493 (1967), the fact that he misrepresented the truth during the investigation may not be used against him in this employment proceeding because the statement was made during an official police investigation against him. At the time, Complainant asserts that he was a suspect in a criminal investigation, rather than a CPO conducting an investigation or providing testimony under oath.

Complainant's reliance on *Garrity* is unavailing. In *Garrity*, the New Jersey police officers were questioned during the course of a state investigation concerning alleged traffic ticket fixing. Before questioning, the officers were warned that (1) anything they said could be used against them in state criminal proceedings; (2) they had the privilege to refuse to answer if the disclosure tended to incriminate them; and (3) if they refused to answer, they would be subject to removal from office. The officers cooperated with the investigation, but when prosecuted they moved to suppress their statements as involuntary. The evidence was not suppressed, and the officers were convicted. On appeal, the officers argued that their statements to investigators were coerced because if they refused to answer, they could lose their positions with the police department. *Id.* at 496-98.

The U.S. Supreme Court agreed with the officers, and held that the choice imposed on them was one between self-incrimination and job forfeiture, and therefore the statements were coerced and violated the Fourteenth Amendment. *Id.* at 496-97. Therefore, under *Garrity*, during a *police or criminal investigation*, a suspect may not be threatened with employment termination for refusing to answer the interrogator's questions.

Garrity does not, however, prohibit the use of statements made during a police investigation in a subsequent civil proceeding, such as an administrative appeal challenging a termination. Complainant fails to cite legal authority to support his argument that the *Garrity* rule works in reverse. Further, the ALJ is unaware of any such authority. *See, e.g., People v. Sapp*, 934 P.2d 1367, 1373 (Colo. 1997) (holding that in a criminal action, under *Garrity*, statements are compelled by threat of discharge from employment where (1) a person subjectively believes that he will be fired for asserting the Fifth Amendment privilege, and (2) that belief is objectively

reasonable under the circumstances).

Moreover, U.S. Supreme Court authority holds that while employees may refuse to answer questions or incriminate themselves, an employee may be sanctioned for making false statements regarding employment related conduct. In *Lachance v. Erickson*, 522 U.S. 262, 266 (1998), the U.S. Supreme Court held that the Due Process Clause does not include "a right to make false statements with respect to the charged conduct." If answering an agency's investigatory question could expose an employee to a criminal prosecution, the employee may exercise his or her Fifth Amendment right to remain silent. *Id.* at 267. However, that right does not include the right to lie or misrepresent facts in an investigation. *Id.* at 266; *see also Bryson v. United States*, 396 U.S. 64, 72 (1969) ("Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood"); *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) ("When a person does not invoke the right against self-incrimination and chooses to answer questions, "his choice is considered voluntary since he was free to claim the privilege and would suffer no penalty as a result of his decision to do so").

Under *Garrity*, this would be a different situation had Detective O'Brien informed Complainant that his refusal to answer questions would be used as a basis to terminate his employment. Instead, Detective O'Brien provided Complainant with his *Miranda* rights, and Complainant stated that he understood that he was under no compulsion to answer Detective O'Brien's questions. During that interview, Complainant twice knowingly misrepresented his location during the pre-text phone calls to Detective O'Brien.

Therefore, Respondent proved that Complainant willingly departed from the truth during an official investigation, in violation of DOC AR 1450-01(IV)(X). Neither the Fifth Amendment nor *Garrity* insulates Complainant under these circumstances.

2. Complainant failed to immediately report K.J.'s allegations to his supervisor.

As a CPO, Complainant was obligated to report allegations of sexual misconduct "immediately" to a supervisor or his appointing authority. DOC AR 1450-01(IV)(SS). At the time of the July 15 pre-text phone calls, Ms. Messamore was Complainant's appointing authority.

Complainant contends that he was not certain that K.J. was accusing him of having a sexual relationship with him at the conclusion of the pre-text phone calls. The quality of the pre-text phone calls was somewhat unclear. Complainant's responses during the calls reveal that he was not hearing every word K.J. said. He asserts that it was not until the interview with Detective O'Brien the following day that he was certain about K.J.'s allegations. Once he was sure, he made a phone call to Ms. Kendall, his supervisor, during the interview.

Respondent proved that Complainant knew of and was aware that K.J. was accusing him of having an unlawful sexual relationship on July 15, 2009. First, and most critically, at hearing, Complainant admitted several times that he understood the nature of K.J.'s allegations during the pre-text phone calls. Second, although Complainant attempted to change his testimony and testified that he was "uncertain" about the content of the allegations, he acknowledged he "heard the basis" for the allegations. Third, Complainant stated in the Rule 6-10 investigation and at hearing that he was shocked by the allegations. The fact that he was shocked by the allegations reveals that he knew what the allegations pertained to. Fourth, after

the fourth pre-text call, in which K.J. made several accusations of sexual misconduct, Complainant went to K.J.'s apartment to personally discuss the issues. At hearing, he testified that he went to her apartment because of the content of the allegations. Fifth, Complainant asked K.J. whether she was trying to set him up. At hearing, Complainant acknowledged that he understood that K.J. was accusing him of doing something illegal. Sixth, Complainant responded to one of the allegations in the pre-text phone call by stating "We haven't started anything." Seventh, in the interview with Detective O'Brien, Complainant said that the "issues with parole" in his C-WISE entry for July 15 referred to K.J.'s allegations of a sexual relationship. These actions and statements reveal that Complainant heard the allegations made by K.J. well enough to understand that she was accusing him of having a sexual relationship with her.

Upon his return from K.J.'s residence, Complainant made a C-WISE entry regarding his phone calls. He did not report K.J.'s allegations in the C-WISE system. Complainant did not tell a supervisor or Ms. Messamore about the serious allegations. He left for the day about 4:30 p.m. When he returned to work the following day, he did not tell anyone at DOC about K.J.'s allegations. Accordingly, Respondent proved that Complainant failed to immediately report sexual misconduct allegations against him, in violation of DOC AR 1450-01(IV)(SS).

3. Complainant did not accurately report the July 15 communication with K.J. in the C-WISE system.

The C-WISE system has various offender contact codes. CPOs are instructed to use multiple codes, when appropriate. Complainant had previously used multiple codes. On July 15, 2009, Complainant made an attempted home contact of K.J. However, in the C-WISE entry, Complainant only noted the telephone calls with K.J. In not reporting that he went to K.J.'s residence and that she was not there as she had told him over the phone, Complainant failed to report an attempted home contact.

Moreover, the narrative for the entry does not mention that K.J. accused Complainant of a sexual relationship. Instead, the narrative only states that K.J. contacted him regarding issues she was having with him and parole. The C-WISE entry therefore fails to accurately report or summarize the serious allegations made by K.J.

4. Complainant violated DOC AR 1450-01(IV)(N)&(ZZ).

DOC AR 1450-01(IV)(N) requires CPOs to exercise sound judgment and discretion and to avoid any activities that call into question the employee's ability to efficiently perform his or her job. Subpart (IV)(ZZ) prohibits any act that may jeopardize public safety or call the integrity of the DOC into dispute.

At hearing, Respondent argued that Complainant's actions cannot be viewed in isolation, but rather, must be seen in the aggregate. Based on the totality of the circumstances, Respondent proved that Complainant's actions on July 15-16, 2009 lacked sound judgment and discretion, and potentially jeopardized public safety. Complainant was accused of having an unlawful sexual relationship with a parolee under his supervision. Instead of immediately reporting the allegation to his supervisors, Complainant went to K.J.'s apartment by himself to discuss the allegations. He then did not report that she was not there, and failed to record the allegations in the C-WISE system. The following day, during the CSPD investigation, Complainant knowingly and intentionally departed from the truth about his location during the final pre-text phone call.

Respondent therefore proved that Complainant violated DOC AR 1450-01(IV)(N)&(ZZ).

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 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).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

Complainant argues that the appointing authority's decision was arbitrary and capricious because Mr. Shepherd's professional standards reports were one-sided, and did not include exculpatory information that came out at the criminal trial. Following the criminal trial, Mr. Shepherd did not re-interview Complainant, nor did he include mitigating information in his supplemental professional standards report. For instance, the reports did not include the exculpatory information relating to the Cameron Motel.

While Mr. Shepherd's failure to include this information in his supplemental report is troubling, it does not automatically render Mr. Reid's decision arbitrary and capricious. The exculpatory information produced at hearing related to the Cameron Motel. Mr. Reid's decision was not based on Complainant's alleged stay at the Cameron Motel. There is no evidence that the mitigating information addressed Complainant's factual misrepresentation to the CSPD or Complainant's failure to notify his supervisor or otherwise document K.J.'s allegations against him. Moreover, during the Board Rule 6-10 process, Complainant and his counsel orally provided a summary of the exculpatory information to Mr. Reid for his consideration.

Complainant also argues that Mr. Reid's decision was arbitrary and capricious or contrary to rule or law because Mr. Reid did not consider the Helton report. At the April 4, 2011 Rule 6-10 meeting, Complainant and his counsel stated that the criminal trial transcript and other documentation from the criminal proceedings provided relevant information, and requested time to provide this information. Mr. Reid agreed, but did not set a deadline for the documentation. After waiting several weeks for the information, Mr. Reid concluded that Complainant had sufficient time. On May 2, 2011, he issued written notice that he was concluding the investigation. That same day, Mr. Reid received the Helton report from Complainant. Mr. Reid did not consider this information, even though his decision was not finalized and issued until May 23, 2011.

While the far better practice would have been to review and consider this documentation, Respondent's decision was not rendered arbitrary or capricious or contrary to rule or law by Mr. Reid's failure to review the documentation. The Helton report provided brief

witness summaries which addressed the Cameron Motel and K.J.'s credibility. It did not address Complainant's statements to the CSPD or his failure to notify his supervisors about the allegations. In short, the report which Mr. Reid failed to review did not provide information relevant to the acts for which Complainant was actually disciplined. Accordingly, Mr. Reid's failure to review the information was harmless error.

Overall, Respondent met its burden to establish that it did not act arbitrarily or capriciously in making the decision to discipline Complainant. Complainant violated several critical DOC Regulations and policies. Mr. Reid testified that in making the decision to impose discipline, he reviewed the totality of the circumstances. In his opinion, the evidence showed a serious lack of judgment and discretion. Based on the evidence presented at hearing, Mr. Reid's decision to impose discipline was not arbitrary or capricious.

Nor was the decision contrary to rule or law. The DOC conducted the first Board Rule 6-10 meeting in September 2009. Due to the pending criminal charges, Respondent continued the meeting pending the outcome of Complainant's criminal trial. A second Board Rule 6-10 meeting was held and continued in April 2010. Upon Complainant's acquittal in December 2010, Ms. Messamore, who testified at the criminal trial, recused herself from the administrative proceedings, and the appointing authority was delegated to Mr. Reid.

Because Ms. Messamore was recused as the appointing authority, she should not have expressed her opinion as to the appropriate action to take to Mr. Reid. However, there is no evidence that the termination decision was actually made by Ms. Messamore. Mr. Reid, who is not in the same DOC Division as Ms. Messamore, conducted the Board Rule 6-10 meetings after the criminal case concluded. He conducted a Rule 6-10 meeting in February 2011. In that meeting, he agreed to provide Complainant with back pay for the period he had been on administrative leave. At Complainant's request, Mr. Reid continued the meeting again to provide Complainant with additional time to review the professional standards investigation reports and applicable ARs, and to better prepare for the meeting.

Complainant and Mr. Reid then met for another Rule 6-10 meeting in April 2011, at which time Complainant was afforded the opportunity to provide any information he wanted Respondent to consider. The meeting lasted over two hours, and Complainant presented mitigating and exculpatory information. Complainant was then provided with several weeks to produce additional information in his defense. Based on the information presented, Mr. Reid made the ultimate decision to discipline Complainant.

Overall, Mr. Reid gave full and fair consideration to the evidence before him through the Rule 6-10 process. Prior to conducting the Rule 6-10 meetings, Mr. Reid spent considerable time reviewing the professional standards investigation reports and the applicable ARs. In making the decision to impose discipline, Mr. Reid listened to the Rule 6-10 meeting audio 8 to 10 times. He interviewed numerous people, including the three CPOs to whom Complainant requested he speak, and reviewed extensive documentation. The decision was issued more than six weeks after the fourth and final Rule 6-10 meeting. Overall, Respondent's decision-making process complied with Chapter 6 of the Board Rules.

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

A certified state employee may be involuntarily dismissed if he fails to comply with standards of efficient service or competence, and for willful misconduct. § 24-50-125(1), C.R.S. Under Board Rule 6-12, 4 CCR 801, disciplinary actions may include dismissal for willful

misconduct or violation of rules or law that affect the ability to perform the job. The decision to take disciplinary action must be based on the nature, extent, seriousness, and effect, of the act, 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. Board Rule 6-9, 4 CCR 801. Under the state's progressive discipline system, a certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. Board Rule 6-2, 4 CCR 801.

Here, Complainant received a corrective action in June 2004 for failing to accurately document interactions with offenders on his caseload. This issue is related to the allegations which formed the basis for the disciplinary action in this case, as one of the bases is Complainant's failure to record the attempted home contact and K.J.'s allegations in C-WISE. However, the corrective action was issued approximately five years before the subject incidents, and there is no evidence that Complainant continued to have chronological recording issues after the issuance of the June 2004 corrective action. Complainant received no other disciplinary actions or corrective actions. He received average to above average annual performance evaluations, and was generally well respected among his peers and by his supervisors. Therefore, in determining whether the discipline imposed was within the range of reasonable alternatives, the issue is whether the actions were flagrant or serious enough to warrant immediate termination.

Complainant's conduct was serious. A parole officer is a Peace Officer charged with performing a broad range of law enforcement duties, and therefore holds a position of trust. In particular, Complainant was responsible for meeting with offenders, counseling offenders, creating supervision and treatment plans, investigating alleged parole violations, testifying at Parole Board hearings, and working as a liaison with the CSPD and other law enforcement agencies. CPOs have substantial control over offenders' lives. As a CPO, Complainant was held to the highest standard of trust.

As support for the decision to terminate Complainant's employment based on the July 2009 events, Respondent relied on the nature and seriousness of Complainant's actions. Mr. Reid concluded that Complainant's actions jeopardized the integrity and security of the DOC, and called into question Complainant's integrity as an officer. For instance, CSPD Detective Huddleston testified that he would no longer want to work with Complainant due to the fact that he misrepresented the truth during an official police investigation. Ms. Messamore testified that Complainant's actions not only affect Complainant's individual credibility for future testimony, but also DOC's collective credibility in the community. Mr. Reid therefore concluded that Complainant's actions were flagrant and serious enough to constitute willful misconduct to justify termination.

In making the decision to terminate Complainant's employment, Respondent considered Complainant's solid performance history prior to July 2009 as a mitigating factor. However, the appointing authority concluded that despite Complainant's historical performance, his actions and decisions in the summer of 2009 led him to conclude that termination was the appropriate disciplinary action given the role CPOs play in the criminal justice system.

In reviewing an appointing authority's decision, the issue is not whether the disciplinary action selected was the most appropriate, but rather, whether the discipline imposed was within the range of reasonable alternatives. Here, for the reasons set forth above, Respondent satisfied its burden to establish that the appointing authority's decision to terminate

Complainant's employment was within the range of reasonable alternatives. In particular, Mr. Reid concluded that as a CPO, Complainant was entrusted to uphold the public trust and swore to ensure public safety, and that he did not meet those expectations based on his actions. Lesser discipline, such as a demotion or suspension, would not adequately address this issue.

Case law supports Respondent's decision to terminate Complainant's employment for willful misconduct by providing untruthful statements during an investigation. For instance, in *Valio v. Board of Fire and Police Commr's of Village of Itasca*, 724 N.E.2d 1024, 1032 (Ill. App. 2000), the Illinois Court of Appeals held:

> The failure of an officer to provide truthful statements during a department investigation could impair the department's ability to properly and fully investigate violations of departmental regulations. Such a failure could impugn the integrity of the investigation and the department and adversely affect the department's ability to provide efficient service to the community. A police department must be able to conduct accurate investigations of its officers engaged in questionable police conduct.

See also Puzick v. City of Colorado Springs, 680 P.2d 1283, 1286-87 (Colo. App. 1983) ("if a police officer's conduct has the effect of impairing the operation or efficiency of the department, and such a result is reasonably foreseeable, that conduct may be subject to discipline").

Accordingly, given the position of trust CPOs hold in the justice system, Respondent's decision to terminate Complainant's employment for willful misconduct is not outside the range of reasonable alternatives.

CONCLUSIONS OF LAW

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

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

ORDER

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 12th day
of July, 2012 at
Denver, Colorado.

[redacted]

Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 13th day of July, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Richard D. Radabaugh Esq.
[redacted]

Micah R. Payton A.A.G.
Heather J. Smith A.A.G.
[redacted]

[redacted]

Woods, Andrea

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

The cost to prepare the 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.