STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012B018**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT CROUSE,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on February 28 and 29, 2012 at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on December 6, 2011. The record was closed on March 5, 2012 following the parties' oral closing arguments. Senior Assistant Attorney General Diane Marie Dash represented Respondent. Respondent's advisory witness was Major Kristen Meredith, Complainant's appointing authority. Brian Bradford, Esquire, Frank & Finger P.C., represented Complainant.

MATTERS APPEALED

Complainant, a certified Colorado State Trooper employed by the Department of Public Safety, Colorado State Patrol (Respondent, Patrol, or CSP) appeals his disciplinary termination of employment, arguing that Respondent has not proven that he committed the acts upon which discipline was based. Complainant requests that the disciplinary action be modified to a corrective action.

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.

FINDINGS OF FACT

1. Complainant was a certified Colorado State Trooper for CSP. He graduated from the Patrol Academy as a new Trooper in August 2006.

2. Complainant received an overall rating of Exceptional on his annual performance evaluation for 2007. The narrative stated that he was an extremely hard worker and had excelled in all areas; Complainant arrested 45 DUI (Driving Under the Influence) drivers that

year, 26 more than the Troop average; he was ranked #2 in the Troop for DUI arrests and #39 in the entire state; and, the same was generally true of his seatbelt and other citations. The evaluation also referenced several phone calls and letters from citizens thanking him for his professional and courteous work.

3. In 2008, Complainant received another Exceptional overall evaluation. The narrative noted that Complainant is an extremely hard worker who goes above and beyond what is expected of him on a daily basis. Complainant's 2009 overall evaluation was also at the Exceptional level.

4. Complainant received an Acceptable overall evaluation for 2010, with no narrative section attached.

5. Complainant had no corrective or disciplinary actions at the time of his termination.

Probable Cause for a DUI Arrest

6. Complainant received training in conducting DUI stops and arrests in the training academy at the outset of his employment with CSP. Part of this training focused on how to establish probable cause for a DUI arrest.

7. To initiate a traffic stop or a contact with a citizen for a potential DUI violation, the Trooper must first establish probable cause. One of the elements of driving under the influence of alcohol is that the individual had control over the vehicle. This element is usually established through evidence that the keys were in the ignition of the vehicle.

8. In 2010, Complainant's direct supervisor, Sergeant Bart Trippel, nominated Complainant for a special program entitled Drug Recognition Expert (DRE) training. This was an honor for Complainant. Complainant completed the intensive training throughout 2010 and was certified as a DRE expert in March 2011. The training rendered Complainant a specialist in identifying motorists who were driving while impaired as a result of any foreign substance, including drugs and alcohol.

June 26, 2010 Arrest

9. In June 2010, Complainant's sister-in-law had a life-threatening heart attack. Complainant and his wife spent a lot of time caring for her and running her business in her absence. He was under significant stress during this time.

10. On June 26, 2010, Complainant was working in Wellington, Colorado. He had previously made a DUI arrest during his shift and would be getting off duty soon.

11. Complainant was at a Come N' Go gas station with Trooper Gregory Moses when he noticed an individual across the street at the Loaf N' Jug fuel station who appeared to be either having trouble or intoxicated. Complainant drove across the street to the Loaf N' Jug and approached the individual, Mr. Beau Garton, who was intoxicated. Mr. Garton was near his motorcycle at the time of contact.

12. Shortly after Complainant made contact with Mr. Garton, Complainant waved to Trooper Moses to come over. Trooper Moses immediately drove over to the location of

Complainant and Mr. Garton.

13. Neither Complainant nor Trooper Moses saw Mr. Garton drive his motorcycle into the Loaf 'N Jug.

14. Neither Complainant nor Trooper Moses saw Mr. Garton attempt to put gas in his motorcycle. Mr. Garton did not attempt to put gas in his motorcycle at the Loaf N' Jug.

15. Neither Complainant nor Trooper Moses saw Mr. Garton with keys to the motorcycle. The keys to the motorcycle were not present at the scene.

16. Because it was near the end of his shift and he lacked sufficient time to perform all of the work entailed in a DUI arrest, Complainant asked Trooper Moses to handle the arrest. Trooper Moses agreed to do so.

17. From that point forward, Trooper Moses was the lead, or arresting, officer on the case. Complainant became the back-up officer, and as such, he removed himself from the situation. He sat inside his vehicle where he could not hear Mr. Garton and Trooper Moses, and his role was limited to assuring Trooper Moses was safe.

18. As he approached Mr. Garton, Trooper Moses noticed that he was sitting on his motorcycle and the kickstand was not down. Moses also saw Mr. Garton slumping and falling over toward the gas pump. Mr. Garton then walked away from Trooper Moses. He stumbled and his speech was very slurred, slowed, and at points inaudible.

19. Trooper Moses spoke with Mr. Garton, who was belligerent and repeatedly insisted that he had not been driving drunk. Trooper Moses requested that Mr. Garton perform roadside tests, which he refused. He then asked that he submit to a blood alcohol test, which Mr. Garton refused. Trooper Moses then placed Mr. Garton under arrest, charged him with DUI, and drove him to jail.

20. Mr. Garton's motorcycle was impounded and towed away.

Trooper Reports

21. Complainant wrote a Supplemental Report consisting of two paragraphs. It contained no information regarding the keys, filling the motorcycle with gas, or other facts demonstrating Mr. Garton's exercise of control over the motorcycle.

22. Complainant stated in part, "I observed a male party wearing a ball cap and black jacket remove himself from a white custom chopper motorcycle. I observed that person stumble when dismounting and use the vehicle to support himself. I observed the subject reach for the trash can and stumble. The subject appeared disoriented. I asked the subject if he was OK. He stated that he was fine."

23. Complainant's report continued, "The subject stated that he drove to the gas station from the T-Bar down the street and he was getting gas so he could drive home to Laramie, Wyoming. The subject had a strong odor of an unknown alcoholic beverage coming from his breath. He had slurred speech and slow hand movements. The subject stated that he had a shit load to drink . . . At this time the investigation was turned over to Trooper Moses."

24. The T-Bar is .2 miles down the street from the Loaf N'Jug.

25. Trooper Moses' report stated in part, "The suspect appeared highly intoxicated, slumped over on the seat of the motorcycle, fumbling through his pockets and wallet and when dismounting the motorcycle fell towards the pumps, using the vehicle for support and unable to maintain balance without support. At this time the investigation was turned over to me from Trooper Crouse."

26. The report prepared by Trooper Moses quoted Mr. Garton as stating, "Why you guys stopping me I haven't been driving . . . I'm just standing here not doing nothing. . . you can't do this . . . don't I have rights. . ." After requesting that Mr. Garton perform roadside maneuvers, Trooper Moses' report indicates that Mr. Garton stated, "No. Why, I haven't been driving. . . I wasn't drinking. It's not my bike. Someone else was driving and they're on their way here now. I don't know, they're on their way. . . ." The report says that Trooper Moses then placed him under arrest.

27. The reports listing Mr. Garton's belongings at the time of arrest do not refer to keys. Mr. Garton did not have keys to the motorcycle in his possession at the time of arrest.

28. Sgt. Bart Trippel, Complainant's supervisor, approved and signed off on Moses' and Complainant's reports.

Complainant's Testimony at Department of Revenue (DOR) Hearing on Driver's License Revocation

29. On August 26, 2010, the DOR hearing was held to determine whether Mr. Garton's license to drive in Colorado would be subject to revocation for one year. Trooper Crouse was the only officer subpoenaed to the hearing because his contact with Mr. Garton formed the legal basis for the stop and his arrest. Mr. Garton appeared with an attorney to contest the charges against him.

30. The hearing officer opened the hearing by stating that the sole issue to be decided was whether Mr. Garton drove a motor vehicle in connection with his arrest after he refused Trooper Moses' request to take a chemical test of his blood alcohol level. The hearing officer then placed Complainant under oath and noted that he was the contacting officer until such time as he transferred custody of Mr. Garton to another Trooper, who then completed the affidavit of revocation.

31. Complainant testified that on June 26, 2010, he had witnessed Mr. Garton attempting to fill his motorcycle with gas and that the keys were in the motorcycle during his contact. Specifically, the following exchange occurred while Complainant was testifying under oath:

Hearing Officer: Go ahead.

Complainant: On June 26, 2010, . . . I observed a person on a light chopper motorcycle dismount himself from the vehicle. He was stumbling towards a trash can and was attempting to fill the vehicle up with gasoline. I contacted him. He said he was okay. I was in uniform. I was in marked patrol car. I asked him where he was going tonight and he said he was going to Laramie. He said he had been drinking at the T-Bar in Wellington. He had a strong odor of an

unknown alcoholic beverage coming from his breath. He stated that he was going to drive to Laramie. He stated that he drove there from the T-Bar. Pretty much at that time, the investigation was turned over to Trooper Moses. He was clearly intoxicated.

Hearing Officer: So you say it was – when you first saw him was he on the motorcycle?

Complainant: He was on the motorcycle.

Hearing Officer: Okay. And was it running?

Complainant: It was not running.

Hearing Officer: Okay. Were the keys in the - -

Complainant: Yeah.

Hearing Officer: --in the motorcycle? Okay.

. . .

Complainant: He got off of the motorcycle and there's a trash can in the center island and stumbled towards that, held himself up on the trash can and then went over to the gas pump and just appeared disoriented and highly intoxicated at that time.

Hearing Officer: Okay. Okay. Counsel? And so he was trying to pour gas into a can?

Complainant: Into his bike.

Hearing Officer: Oh, into the bike, okay.

32. Mr. Garton's attorney then questioned Complainant under oath, as follows:

Counsel: He stumbled toward the trash can and was the fuel nozzle from the gas pump in the motorcycle?

Complainant: Not at that time.

Counsel: Did you observe him try to put gas in it?

Complainant: Yes.

Counsel: And what else did you then see?

Complainant: He got back on the bike. It appeared like he was texting or something then I just was talking to him at that time.

Counsel: Okay. How long did you think you saw him from the moment your

attention was drawn to him to the moment you started talking to him?

Complainant: I – I don't – I don't know what you mean. I saw – I was across the street and saw that. Drove over was washing my windshield and I talked to him.

Counsel: Okay. So the things that you were testifying to that you observed were from across the street of the gas station?

Complainant: Yes.

. . .

Counsel: Did he ever finish fueling the vehicle?

Complainant: No.

Counsel: How did the gas pump get out of the motorcycle and back to the pump?

Complainant: He put it back.

. . .

Counsel: And it's your testimony today that the keys were in the motorcycle?

Complainant: Yes.

Counsel: So you're certain of that?

Complainant: Yes.

33. Complainant also testified that he did not feel the motorcycle to see if it was hot, and that once Trooper Moses took over the contact, Complainant did not hear his conversation with Mr. Garton.

Criminal Case: Suppression Hearings

34. The criminal case against Mr. Garton went forward in Larimer County Court. In early December 2010, Mr. Garton filed a motion to suppress statements made by the Defendant, asserting that Complainant and Trooper Moses lacked both reasonable suspicion to stop, and probable cause to arrest, Mr. Garton because he had no keys to the motorcycle. The motion was set for hearing on December 16 and Complainant was subpoenaed to appear.

35. On December 13, 2010, Complainant made two phone calls to the Larimer County District Attorney's (DA) office. Complainant claims that he informed an attorney in the DA's office that his memory of events surrounding the contact with Mr. Garton had become more focused and was different; and, he planned to modify his testimony regarding the keys to clarify that he never saw them. Complainant also testified at this hearing that after he spoke to the DA's office, he talked to Sgt. Trippel, who advised him that no keys were necessary to operate some motorcycles. Complainant claims that he then called the DA's office back and advised them that Garton did not need keys to drive the motorcycle.

36. Complainant's testimony regarding his phone calls on December 13 is found not to be credible. Complainant could not name the prosecutor with whom he spoke. None of the prosecutors involved in the Garton case recalled receiving a phone call from Complainant to discuss his anticipated change of testimony. In his numerous contacts with prosecutors during the remainder of December and in January 2011, Complainant never discussed his intention to change his testimony, and never referred back to a purported December 13, 2010 conversation regarding his intent to modify his testimony.

37. On December 16, 2010, the suppression hearing was vacated and re-set for December 23, 2010.

38. Deputy DA Dawn Downs was lead counsel on the Garton case. She learned of the defense's claim that Mr. Garton had no keys to his motorcycle at the suppression hearing on December 16, and immediately emailed an office investigator to establish whether Mr. Garton's motorcycle could be started without keys.

39. On December 22, 2010, the investigator emailed Ms. Downs that Mr. Garton's motorcycle was a custom one built by Thunder Mountain Harley-Davidson in Loveland, Colorado, that could be turned on and driven without a key as long as the ignition was unlocked. On December 23, 2010, the DA endorsed a salesman from Thunder Mountain Harley-Davidson to testify at Mr. Garton's DUI trial that his motorcycle could be turned on and driven without a key.

40. At the December 23, 2010 suppression hearing, Complainant and Trooper Moses testified on behalf of the prosecution. Complainant did not testify that Mr. Garton had the keys to his motorcycle or that he had filled his motorcycle with gas. The motion to suppress was denied and the case was set for trial on January 12, 2011.

Ms. Downs' December 23, 2010 Meeting with Complainant, Trooper Moses and Sgt. Trippel After Suppression Hearing

41. After the suppression hearing, Deputy DA Downs met with Complainant, Trooper Moses, and Sgt. Trippel, Complainant's supervisor, to discuss how to handle the defense tactic of proving there were no keys in the motorcycle. The purpose of this meeting was to prepare Complainant and Trooper Moses for trial.

42. During this meeting, Complainant did not disclose that his memory had changed and that he had previously testified at the DOR hearing that Mr. Garton's keys were in the motorcycle. Nor did Complainant mention that he had called the DA's office previously and spoken to someone in the office about his intention to change his testimony regarding Mr. Garton's keys.

43. After this meeting, Ms. Downs believed that she had fully resolved the issue of establishing the element of physical control of the motorcycle in the DUI case against Mr. Garton.

January 12, 2011 Criminal Trial Against Mr. Garton

44. The criminal case against Mr. Garton proceeded to trial on January 12, 2011. After receiving the subpoena, signed by Deputy DA Laura Robilotta, on January 10, 2011, Complainant emailed her to confirm whether it was going to trial. Ms. Robilotta immediately

responded that it was proceeding to trial, and stated that she had copied the two attorneys trying the case, Ms. Kristi Glawe and Ms. Downs, on her response.

45. On the day of trial, Complainant did not try to speak with the prosecuting attorneys about his testimony prior to taking the stand. There were several opportunities to talk to the prosecuting attorneys before Complainant testified, due to breaks in the proceedings before, during, and after jury selection.

46. At trial, Ms. Downs sat at counsel table while Ms. Glawe conducted Complainant's direct examination. Complainant testified as follows:

> Prosecutor: When you first saw the Defendant, when you were still at the Come N'Go, did you observe anything unusual?
>
> Complainant: Just that, I watched him dismount from the motorcycle and he was very unsteady, he stumbled, used the vehicle for support. I observed the person reach for a trash can that was on the island and he stumbled and held himself up on the trash can. And then he got back on the motorcycle.
>
> Prosecutor: Okay. So he was sitting on the motorcycle?
>
> Complainant: Yes.
>
> Prosecutor: Okay. At this point, how did the Defendant appear?
>
> Complainant: From – he just appeared like disoriented.

47. Complainant testified that he drove his Patrol car to the Loaf 'N Jug, pulled over to the other side of the gas pump from Mr. Garton, and asked him if he was okay. He further testified that Mr. Garton responded that he had just driven there from the T-Bar and was going to get some gas and drive home.

48. Complainant then testified that he did not see the motorcycle pull up to the gas station, and he did not recall if Mr. Garton had a helmet with him.

49. The prosecutor asked Complainant:

> Prosecutor: Throughout your contact with the Defendant, did you see his keys?
>
> Complainant: I don't recall.

50. During the course of his testimony on direct examination, Complainant did not make any statements concerning his memory of events having changed, the modification of his testimony, or why he was changing his testimony on the issues of the keys and putting gas in the motorcycle.

Impeachment of Complainant

51. Mr. Garton's attorney at trial was the same one who had appeared at the DOR hearing. This attorney had a transcript of Complainant's testimony from the DOR hearing prepared, so that he could use it to impeach.

52. Mr. Garton's attorney impeached Complainant on cross examination as follows:

Lawyer: And your testimony is that he admitted driving?

Complainant: Yes.

Lawyer: And you're certain of that?

Complainant: That's what he told me.

Lawyer: And you're certain of that?

Complainant: Yes.

Lawyer: Now, Mr. Garton was not filling the vehicle with gas, was he?

Complainant: No.

Lawyer: And that would be a pretty important fact, would it not?

Complainant: If he was filling it?

Lawyer: Yes.

Complainant: Yeah.

Lawyer: That would demonstrate that he has the intent to drive it to Laramie as you were saying?

Complainant: Yes.

Lawyer: Now, do you remember previously testifying in this case that he actually was filling the vehicle with gas?

Complainant: I don't recall. He actually got up and you know, he like leaned against the gas pump. I believe maybe he was going to fill it with gas. And then when I contacted him, he was seated on the motorcycle.

Lawyer: Well do you remember testifying in a hearing on August the 25th in front of a hearing officer, Ross James?

Complainant: Yes.

. . .

Lawyer: And that was a hearing to determine whether Mr. Garton's license would be taken away from him. Do you recall that?

Complainant: Yes.

Lawyer: And do you recall in that hearing that you testified that he was trying to pour gas into his bike?

Complainant: It appeared like he was going to, yes.

Lawyer: Yeah, but that's close to what you said. But you said, do you recall testifying in that hearing, under oath, that he was trying to pour gas into his bike?

Complainant: I don't recall.

Lawyer: If I showed you the transcript of that hearing, would that refresh your recollection?

Complainant: Yes.

Lawyer: Okay. Would you agree with me that on page 6, line 14, the hearing officer said, "Okay, okay, Counsel. And so he was trying to pour gas into a can?" The witness, "Into his bike." Does that accurately reflect the hearing officer's question and your answer back in August?

Complainant: Yes.

Lawyer: Okay. And do you recall the hearing officer asking you, "Did you observe him trying to put gas in it?" And your answer being, "Yes."

Complainant: May I explain?

Lawyer: Later. Now you've also testified that there was (sic) no keys in the vehicle, correct?

Complainant: Yes.

Lawyer: And you've learned that to be a very critical part of this case, correct?

Complainant: What do you mean?

Lawyer: Well, at the DMV hearing, you remember that the discussion was centered around whether there was keys in the vehicle or not, correct?

Complainant: Yes.

Lawyer: All right. And you've learned that from the District Attorney, I would presume, that this case is proceeding on whether there were keys to this vehicle or not, correct?

Complainant: Correct.

Lawyer: And you've said that there were no keys to this vehicle, correct?

Complainant: I don't recall keys for the vehicle.

Lawyer: Do you previously remember testifying under oath that there [were] keys at the vehicle?

Complainant: I thought there were keys. But I can't – I did not inventory keys.

Lawyer: All right. And you've testified under oath, a couple of times with the District Attorney and with this Judge present saying there were no keys with the vehicle, correct?

Complainant: Correct.

Lawyer: And you have previously testified, under oath, that there were, in fact, keys in the vehicle in a very super critical hearing. Do you recall that?

Complainant: I do.

Lawyer: And do you recall also answering that you were certain of that?

Complainant: Yes.

53. The prosecuting attorney attempted to rehabilitate Complainant's testimony on re-direct examination. She asked Complainant, "Did you at any point actually see him filling up with gas?" Complainant responded, "He never filled up with gas." She said, "No." He responded, "Never."

54. The prosecuting attorney then asked Complainant about the keys:

Prosecutor: And as far as the keys are concerned, Defense Counsel pointed out that you again testified at a previous hearing about the keys and that you thought that he did have keys in his possession?

Complainant: Yes.

Prosecutor: And do you know whether he did or not have keys?

Complainant: No.

Prosecutor: And how do you know that now?

Complainant: I know that now because you informed me that there was no keys. And --

Prosecutor: Did – Trooper Crouse, how many people would you say you contact on a daily basis through work?

55. After the trial, Complainant did not advise Sgt. Trippel, his supervisor, about the impeachment of his testimony.

DA Follow-up on Complainant's Impeachment

56. Deputy DA Downs was shocked when she heard the impeachment of

Complainant. She had had no advance notice of his prior inconsistent testimony at the DOR hearing regarding Mr. Garton's keys or filling his motorcycle with gas.

57. The jury returned a verdict of Not Guilty in the trial.

58. Ms. Downs believed Complainant to lack credibility because at some point, either at the DOR hearing or at the criminal trial, he did not tell the truth while testifying under oath. She spoke to her supervising attorney, Chief Deputy DA Humphrey, about Complainant's impeachment at trial. Ms. Humphrey asked her to obtain a copy of the DOR hearing transcript from defense counsel. She did so and gave it to Ms. Humphrey.

59. Ms. Downs was so troubled by the conflicting sworn testimony provided by Complainant that she felt she would not be comfortable calling him as a witness in the future without a video or other direct evidence to corroborate his testimony. Ms. Downs determined that Complainant's lack of credibility was serious enough to warrant mandatory disclosure to defense counsel on any case for which Complainant would be a witness; she felt she had an ethical duty as a licensed attorney to make that disclosure.

Complainant's Credibility

60. Complainant testified at the Board hearing that at the DUI trial, he hoped that his testimony would be to Mr. Garton's benefit and that it was his intention to "come clean with the truth." He further testified that his memory of the June 26, 2010 contact with Mr. Garton changed over time, he was concerned about his prior testimony at the DOR hearing being inaccurate, and he therefore sought to "do justice" on January 12, 2011.

61. However, Complainant's testimony on cross examination does not reveal an attempt to come clean and do justice for Mr. Garton. When confronted with his prior inconsistent testimony regarding Mr. Garton putting gas in the motorcycle, Complainant responded, "I don't recall." He then testified, "It appeared like he was going to, yes." Under additional questioning by Garton's attorney, Complainant then testified, "Yes, I felt that he was going to." In addition, when cross examined regarding his prior testimony that he was certain there were keys in the vehicle, Complainant testified, "I don't recall keys for the vehicle," and, "I thought there were keys. But I can't – I did not inventory keys."

62. Complainant's testimony at the Garton trial was designed to protect himself, not to benefit Mr. Garton.

Investigation by Sgt. Trippel

63. Ms. Humphrey reviewed the transcript of Complainant's testimony at the DOR hearing. She then listened to Complainant's testimony at the criminal trial. After confirming the discrepancy in testimony, she called CSP Captain Marone, Sgt. Trippel's supervisor, to inform him of the credibility issue. She then sent Captain Marone the transcript and the compact disc of the jury trial testimony she had listened to.

64. Upon receipt of the information, Captain Marone forwarded it to Sgt. Trippel for investigation by placing it in his "In" box. After reviewing the available information, Sgt. Trippel was unclear on his role. He felt uncomfortable investigating the issue because of his position as Complainant's supervisor, and he believed that an objective third party ought to conduct the investigation.

65. In late May, Sgt. Trippel, Captain Marone, and Patrol District Commander Major Kris Meredith met to discuss the information. Major Meredith was concerned about the gravity of having a complaint regarding a Trooper's credibility generated by the DA's office, and about the apparently serious nature of Complainant's conflicting testimony. Therefore, he decided to refer the matter to the Patrol's internal affairs unit, the Professional Standards (PS) Division, for investigation. The Major was required to obtain approval from his supervisor to make this referral, and he did so.

Investigation by Professional Standards Division; Interview of Ms. Downs

66. In June 2011, Sgt. John Burt, an Investigator in the PS Division of the Patrol, opened an investigation into Complainant's conflicting testimony. He began by reviewing the transcript of the DOR hearing testimony of Complainant, then listened to the audio file of Complainant's testimony at the Garton trial and part of Trooper Moses' testimony at that trial. Sgt. Burt did not listen to the suppression hearing transcript of Complainant's testimony.

67. Sgt. Burt created a document consisting of two sections, one containing verbatim quotations of Complainant's testimony at the DOR hearing regarding the keys, and the other containing verbatim quotations of his Garton trial testimony regarding the keys.

68. Sgt. Burt interviewed Ms. Downs. She informed him she had been "pretty shocked" when Complainant was impeached at trial because she had met with him after the suppression hearing to discuss the defense case. She stated that they had discussed the keys "at length" at that meeting, and that Complainant had not informed her or anyone at that meeting that he had previously testified to having seen Mr. Garton's keys. Ms. Downs also informed Sgt. Burt that she had told Complainant she was obtaining an expert from the dealership that made Mr. Garton's particular motorcycle to testify that the bike could be started without a key. Ms. Downs also stated that when she reviewed the DOR transcript of Complainant's testimony regarding the keys, it was "kind of a big deal, because it wasn't like a woops."

69. Ms. Downs discussed the reasons for the jury's decision to acquit Mr. Garton. Her statements gave Sgt. Burt the impression she had spoken to them directly. In fact, a third party had spoken to one juror and then reported that information to Ms. Downs.

70. Sgt. Burt asked Ms. Downs what she thought should happen to Complainant. Ms. Downs responded that she did not want him to get into trouble, and she did not think he should be terminated; however, he would benefit from more training. She then volunteered the following statements: she had heard of another prosecutor having a hearing with Complainant and she thought to herself, "well good luck, who the hell knows what's gonna happen," and that it "puts you in a tough position as a prosecutor."

Sgt. Burt's Interview of Complainant

71. Sgt. Burt interviewed Complainant next. Complainant confirmed that despite his testimony at the DOR hearing, Mr. Garton had never filled the motorcycle with gas. He also admitted that he never checked to see if there were keys in Garton's motorcycle.

72. Sgt. Burt discussed the fact that Complainant's Supplemental Report contained many detailed quotations of Mr. Garton, which he apparently recalled clearly; however, in

contrast, Complainant's memory was poor on the issues of the keys being in the vehicle and Mr. Garton putting gas in the vehicle. Sgt. Burt asked him to explain this discrepancy in his ability to recall specific details of the contact with Mr. Garton.

73. Complainant explained that he was driving over to the Loaf N'Jug at the time he was trying to see whether Mr. Garton was attempting to put fuel in his motorcycle. And, regarding the keys, he stated, "the key issue I, you know, I thought, I assumed that they were there, I thought they were there after it became an issue I thought about it, I didn't note it, shame on me I shouldn't have said what I said. It wasn't a lie though, I just I thought they were there, I didn't have time to prepare for DOR."

74. When asked why he had inadequate preparation time prior to the DOR hearing, Complainant stated that his sister-in-law had had heart failure and he had helped take care of her.

75. After comparing Complainant's conflicting testimony from the DOR and trial transcripts, Sgt. Burt asked Complainant what his thoughts were on how that looked. Complainant stated, "I see how it looks but, because I said that the keys were there in DOR and then after I had time and I talked to the DA's about it, and I even told the DA's I says you know, I know that in DOR I said this, but now, I, I don't know, I don't know if they were there. . . I talked to them about it and they said ok, we'll, we'll deal with that you know and I says, I'm not trying to hide anything I just, I don't know now." He stated that he had this conversation with the DA's office prior to the suppression hearing.

76. Sgt. Burt then discussed Mr. Garton's defense case, which was that he had pushed the motorcycle from the bar to the gas station because his friends had taken his keys and given them to the bartender. He asked Complainant whether he knew that the revocation of Mr. Garton's driver's license had fallen solely on Complainant's shoulders, because Mr. Garton had refused the roadside and chemical tests. He asked Complainant if he knew whether his driver's license had been revoked. Complainant responded that he did not know, then said that at trial Mr. Garton's attorney had stated he was revoked.

77. Sgt. Burt asked Complainant what he had learned from the experience. Complainant responded that if he ever came across another case like this one, he would be sure to see the bike run, and know where the keys were. Sgt. Burt then noted that if Mr. Garton had in fact pushed his motorcycle to the gas station, his civil liberties had been taken away and it had been a wrongful arrest; therefore, he would have spent a night in jail in violation of his Fourth Amendment rights. Complainant stated that he had not thought of that.

78. After a break, Sgt. Burt informed Complainant that after thinking about the case, he had developed a theory about what had actually occurred at the DOR hearing. He posited that Complainant showed up, found that his report contained almost no information, and, when asked the typical questions about whether there were keys in the motorcycle, Complainant gave his "natural response," which was that there must have been keys in it. Then, Sgt. Burt stated, at the suppression hearing, Complainant learned that this particular motorcycle didn't need a key to start it. At that point, Complainant realized, "You know what, I don't think there [were] keys."

79. Complainant agreed with this, stating that he didn't even know where the keys would go in that particular bike. He then stated, "But God as my witness, I did not intentionally lie. Did not do that, I, it sounds like it, but. . . ."

Sgt. Burt's PS Report

80. In his July 6, 2011 report, Sgt. Burt noted that at the DOR hearing, Complainant had confirmed under oath that Mr. Garton was fueling the motorcycle at least four times. He also noted that Complainant had testified twice that he saw the keys to the motorcycle. Sgt. Burt then recounted Complainant's testimony on cross examination four months later at the criminal trial, at which Complainant "testified that Garton had not filled the motorcycle with gas and that there were no keys in the motorcycle."

81. In the Investigative Findings section of his report, Sgt. Burt found that Complainant may have violated the following state laws and Patrol General Orders: "General orders: 1. Members will obey the law; 2. Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules procedures, goals, mission and vision statements; 3. Members will be truthful and complete in their accounts and reports; 5. Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately; 6. Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession; 7. Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect." Sgt. Burt also listed the following state laws: "18-8-502 Perjury in the first degree. (1) A person commits perjury in the first degree if in any official proceeding he knowingly makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law. 18-8-501 Definitions (1) 'Materially false statement' means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function."

Predisciplinary Meeting

82. Major Meredith, Complainant's appointing authority, reviewed Sgt. Burt's report and the summary of verbatim quotes from Complainant's testimony at the DOR hearing and Garton trial regarding the keys. He also reviewed the transcript of the DOR hearing testimony of Complainant, the Supplemental Report prepared by Complainant, and the Report prepared by Trooper Moses.

83. Major Meredith listened to the interview between Sgt. Burt and Complainant. He did not listen to Sgt. Burt's interviews of Ms. Downs or Trooper Moses. He did not review written transcripts of the interviews by Sgt. Burt with Ms. Downs, Trooper Moses, or Complainant.

84. Major Meredith was very concerned that Complainant had testified in two different ways on the central issue in the Garton criminal trial. He concluded on a preliminary basis that Complainant's credibility was in serious question.

85. On July 15, 2011, Major Meredith sent Complainant a letter scheduling a predisciplinary meeting to discuss his testimony at the DOR hearing and the Garton trial. The letter advised Complainant of his right to have a representative present and to provide written and oral information for him to consider. In addition, the Major attached the State Personnel Board Rules governing corrective and disciplinary actions.

86. On July 28, 2011, Complainant attended a predisciplinary meeting with Major Meredith. Neither had a representative present.

87. Major Meredith informed Complainant that he was very familiar with the facts regarding Complainant's conflicting testimony at the DOR hearing and the criminal trial, and that he did not plan to review those facts again. He stated that he wanted to hear from Complainant regarding his thoughts about what had occurred and mitigating circumstances.

88. Complainant explained that prior to the DOR hearing, he didn't think about the keys issue at all, and had in many ways washed his hands of the case because Trooper Moses had been the lead and arresting officer. He stated that he had a lot going on in his personal life at the time because his sister-in-law had nearly died, he was taking care of her business, and he had a heavy case load at the time. He said, "I messed up. So I went to the district attorney you know before the case, cause I, I didn't, I knew that I testified this, and I'm, I told them I said, I can't, I testified to this, but looking back I'm not gonna perjure myself, on, in court just to cover up something else, you know, cause I didn't feel comfortable, I wasn't 100% sure that they [the keys] were there. So then this, they said, aw that's alright, you know, and then they got this expert witness to say that you don't even need the keys." He stated that he had been unaware of that possibility with a motorcycle.

89. Complainant stated, "the core of my values is to tell the truth, and I made a mistake. I was not intentionally lying."

90. Major Meredith explained that the part that bothered him the most was that at the DOR hearing, the attorney asked Complainant if the keys were in the ignition, and he said yes; then the lawyer followed up with are you sure about that, and Complainant said yes. Major Meredith asked, "Tell me how you got there?"

91. Complainant responded that he had contacted a lot of vehicles and he thought he could picture them during the DOR hearing. However, after the hearing, he realized that he had not checked to see whether the keys were there. Complainant said that he was wondering why he was even at the DOR hearing because he had not made the arrest and had handed off the case to Trooper Moses.

92. Major Meredith asked, "So just to make sure that I'm clear, . . . it would be your testimony here today that you honestly believed at the moment that you answered that question in DOR, that the keys were in the ignition on it?" Complainant replied that at the hearing was the first time he thought about it.

93. Major Meredith explained that as he reviewed the situation, it appeared to him as though Complainant had also prepared a report of low quality, and that he had possibly not prepared for the DOR hearing. The Major noted that Garton was Complainant's first jury trial, and asked how many DOR hearings he had testified at prior to this one. Complainant stated, at least five or six. Complainant acknowledged that he was not prepared when he arrived for the DOR hearing.

94. Major Meredith asked Complainant what he thought he (the Major) should do as the individual charged with looking out for the good of the Patrol and the judicial system, and with protecting the credibility of the Patrol and Complainant. Complainant asked if the Major was obligated to provide a resolution to the DA. The Major responded that he did not have to take any specific action, but he would have to talk with them and get their perspective. He

stated he had had other similar situations in the past involving "ugly allegations" made against Troopers, but he had been able to prove they were not accurate; nonetheless, because the reputation of the officer had been so diminished he had moved the officer to a different judicial district.

95. Major Meredith explained that if a Trooper can't prosecute a case, that Trooper has no value to the Patrol. He asked Complainant for his thoughts.

96. Complainant responded by discussing at length his poor work environment and his bad working relationship with Sergeant Trippel. He stated that there was no communication, he felt underappreciated, and he had been subjected to humiliating treatment in front of others. He said that he would like a new start at the Patrol, and suggested that the Major tell the DA that he was a great trooper who made a mistake and did the right thing.

97. The Major discussed the critical importance of, when balancing people's constitutional rights, refraining from making an arrest if he was not 100% "where he needed to be." He stated that what the case was really about, and the one thing the Patrol stands for more than anything, is "the credibility of ourselves and the agency." The Major said this means needing to do good reports and making sure that if they don't have answers to questions, they say "we don't know." He said that they are paid to be "the uninvolved witness" and sometimes this means talking to a citizen and giving them a ride instead of making an arrest, so long as public safety is protected.

98. Complainant responded by providing a recent example of having done that, and receiving a thank-you call the next day.

99. The Major informed Complainant he would need to discuss the case with the DA, his Lt. Colonel, and other majors. He said this was not an easy case.

100. The Major next turned his attention to Complainant's concerns regarding his working relationship with Sgt. Trippel. He expressed his concern about Complainant not feeling appreciated, and asked Complainant what he believed would be the best way to address their poor working relationship. They discussed this issue. The meeting was then adjourned.

101. After the meeting with Complainant, Major Meredith called Ms. Humphrey in the DA's office to check on the status of their plans regarding Complainant. They had not yet made a decision.

102. The Major concluded that Complainant's testimony at the DOR hearing was not truthful, and that his testimony at the suppression hearing and the trial was truthful. He was concerned that Complainant had never informed anyone at the Patrol that he had concerns about his DOR testimony and planned to change it at the upcoming DUI trial. In addition, he believed Complainant had a duty to advise supervisors at the Patrol of his damaging impeachment and the acquittal at the Garton trial. Major Meredith felt that if Complainant had come forward with these issues earlier in the process, as the events unfolded, he would have bolstered his credibility.

103. The Major had testified multiple times at DOR hearings and at DUI trials as a Trooper and knew well the importance of proving control over the vehicle as an element in a DUI charge. In his experience, this element was established easily if the keys were in the vehicle.

104. The Major was very concerned that Complainant was the sole representative of the Patrol at the DOR hearing, and concluded that Complainant had violated Patrol policies requiring that Troopers be truthful and accurate in all reports and actions taken in the scope of their duties.

105. Major Meredith also determined that Complainant's Supplemental Report was of poor quality, as it was missing normal details expected such as: what Complainant was doing at the time he made contact with the suspect; facts about the suspect; how he came into contact with the suspect; and specifics of his observations of the suspect as he approached him and through the end of the interaction.

106. The Major met with other majors to discuss his decision. At this point he was planning to move Complainant to another judicial district in order to give him a fresh start with the DA's office and with his own supervision.

Brady Letter

107. The Larimer County DA's office received a copy of the PS Report on Complainant and determined that it had a legal duty to disclose the existence of this report to the defense in any case for which he may be called as a witness.

108. On August 2, 2011, Larry Abrahamson, the elected District Attorney in Larimer County, sent a letter to Major Meredith. The letter stated in part, "Unfortunately, it has come to my attention that an issue as to the credibility of one of your Troopers, specifically Trooper Crouse, has been identified. Pursuant to U.S. Supreme Court case *Brady v. Maryland* and the ethical obligations of my office, I am required to send out notification of this concern in any pending and future cases in which Trooper Crouse is a witness. I am enclosing a copy of the notice we intend to use in situations involving officer credibility."

109. Mr. Abrahamson attached a form "Brady letter" on District Attorney letterhead, that stated the following:

> Colorado State Trooper Robert Course is a listed witness in case No. *. It has been brought to our attention that there was an internal affairs investigation on Trooper Crouse. The District Attorney's Office has been advised that this investigation may reveal issues regarding Trooper Crouse's credibility. This is in reference to case number 10T2217 and agency number 3C101181. If you want to inquire further into this case please specifically request this information from the deputy assigned to the case. Our office is not in possession of the internal affairs investigations conducted by law enforcement agencies.

110. Since the issuance of the Brady letter the Larimer County DA's office has moved to dismiss cases on which Complainant was a witness.

Decision

111. After the Larimer DA issued the Brady letter on Complainant, Major Meredith decided learned that this was the first time a Trooper had been the subject of a Brady letter. Because this was a unique and new situation for the Patrol to address, Major Meredith felt that consulting with leadership was critical to his decision making process. He decided to meet with

two Lt. Colonels, the Chief of the Patrol, the Patrol's legal advisor, and several other Majors.

112. Before those meetings, Meredith reviewed Complainant's personnel file, re-read the transcript of Sgt. Burt's interview of Complainant, and listened to the tape recording of his predisciplinary meeting with Complainant, several times.

113. Major Meredith learned through his consultation with Patrol leadership and legal counsel that under the law, the Patrol had a duty to disclose the Brady issue to the defense in any judicial district in Colorado in which Complainant might be listed as a witness for the Patrol. Therefore, transfer to a different Trooper position in another judicial district was not an option. Because of Complainant's strong performance history, the Major also discussed the possibility of transferring Complainant to a non-enforcement Trooper position with the Patrol. However, no such positions exist.

114. Major Meredith concluded that the only option was to terminate Complainant's employment with the Patrol.

Termination Letter

115. On August 16, 2011, Major Meredith met with Complainant in person for the purpose of giving him the termination letter. The letter recounted Complainant's involvement in the events of June 26, 2010, erroneously stating that Complainant had arrested Mr. Garton and turned him over to Trooper Moses for processing. The letter continued, "You wrote a very minimal report which was not sufficient for any type of recollection of facts or successful prosecution. On August 25, 2010, 'two months later,' you testified under oath that Mr. Garton was filling his motorcycle with gas and that the keys were in the motorcycle. When asked if you were sure you replied that you were. 'This is a material issue in the case.' At a later point in time you decided that you hadn't observed the keys and told the D.A. assigned to the case. During the criminal trial you testified that the keys were not in the motorcycle and he was not filling it with gas. Ultimately, Mr. Garton was acquitted of the charges and when the jurors were polled by the A.A. they stated the verdict was based on you not being credible. During the internal investigation and subsequent meeting with me you agreed that you were not prepared to testify initially at DOR and your report was not sufficient. As a result of your conflicting testimony the Larimer County District Attorney's Office has chosen to write a letter to me stating that your credibility is in question and notifying me that all future cases of yours will require notice to all defendants that information may exist that could have an impact on your credibility."

116. The letter acknowledged that Complainant had no previous corrective or disciplinary actions. It concluded that Complainant had violated General Orders 1, 2, 3, 5, 6, and 7. In addition, the letter stated that Complainant "may have violated" C.R.S. § 18-8-502, Perjury in the first degree, defined as: "(1) A person commits perjury in the first degree if in any official proceeding he knowingly makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law." The letter also cited the definition of "materially false statement" under C.R.S. 18-8-501, "any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function."

117. Complainant timely filed an appeal of his termination.

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 upon which discipline was based.

The Supplemental Report. Complainant's Supplemental Report formed the basis for the contact with Mr. Garton. Therefore, the report should have included a description of what Complainant saw in Mr. Garton's actions which established the element of control over the motorcycle. As Major Meredith concluded, Complainant's written report was minimal and insufficient in forming the basis for a recollection of facts leading to a successful prosecution.

In mitigation, Sgt. Trippel found no problem with this report and approved it. Further, the contact with Mr. Garton was an unusual one in DUI law enforcement (contrasted with pulling a driver over while driving); therefore, it presented unique challenges to Complainant.

The poor quality of Complainant's Supplemental Report does not constitute an independent basis for disciplinary action, because its shortcomings were neither flagrant or serious. See, Board Rule 6-2, 4 CCR 801, requiring corrective action unless action is so flagrant or serious that discipline is proper. However, the report's omissions were part of the chain of events leading to Complainant's difficulty encountered at the DOR hearing. Therefore, Respondent appropriately considered the report as an aggravating factor in the decision to discipline Complainant.

Poor Preparation for DOR Hearing; Testifying Untruthfully at the DOR Hearing. Complainant did not review his Supplemental Report prior to testifying at the DOR hearing. Therefore, when he arrived, he was unfamiliar with the facts of the case at the time he was sworn in to testify.

At the outset of the hearing, the hearing officer made it clear that the sole issue to be addressed was whether Mr. Garton had control over the motorcycle at the time of arrest for DUI. The preponderance of evidence demonstrates that Complainant decided to testify in whatever manner was necessary to establish the element of control over the vehicle, so that Mr. Garton's license would be revoked.

Complainant understood that he had to confirm there were keys to the motorcycle; in addition, testifying that Mr. Garton had filled the motorcycle with gas would establish his present intent to drive it to Laramie. Despite having either no clear memory of the events, or in spite of his memory to the contrary, Complainant testified untruthfully that the keys were in the motorcycle and that Mr. Garton attempted to fill it with gas. Even when pressed about whether he was "certain" the keys were in it, Complainant dug in and stated under oath that he was. Complainant was not certain of his testimony when he stated under oath that he was.

Since August 26, 2010, Complainant has treated his DOR testimony not as a mistake to correct, but as a lie to be hidden. When Complainant learned in December 2010 that Mr. Garton had no keys, he took no action to correct the record. At the Garton trial, he attempted to minimize his change of testimony and protect himself under cross examination.

Further damaging Complainant's credibility with regard to his DOR testimony is his untruthful testimony at this hearing. Most of the salient points of Complainant's testimony were contradicted by other evidence in the record. Complainant's testimony about having alerted the DA's office to his impending change in testimony on December 13, 2010 has been found not to be credible. Complainant's testimony that that his goal at the Garton trial was to come clean and do justice was equally lacking in veracity.

Complainant also testified in this hearing that he called the DA's office to advise them no keys were needed for Garton's motorcycle, after learning of this fact from Sgt. Trippel. Neither Sgt. Trippel, who was a sympathetic witness for Complainant, nor Ms. Downs corroborated this story.

Complainant violated General Orders 3, 5, 6, and 7. As the sole representative of the Patrol on August 26, 2010, Complainant knowingly made materially false statements regarding Garton's control of the motorcycle in the DOR hearing which affected the outcome of the proceeding, resulting in the revocation of his driver's license. Complainant's conduct violated the public trust and brought discredit upon and undermined his own credibility and that of the Patrol. His conduct therefore constituted a serious abuse of his authority.

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).

I. The Brady Rule.

In *Brady v. Maryland*, 373 U.S. 83, (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request" violates the Due Process Clause of the Fourteenth Amendment "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87 (involving the prosecution's inadvertent failure to disclose a confession of murder by a co-conspirator). In *Giglio v. United States*, 405 U.S. 150 (1972), the U.S Supreme Court expanded the Brady rule to evidence affecting the credibility or reliability of a witness. *Giglio*, 405 U.S. at 154. In that case, evidence of the prosecution's promise of immunity to the key trial witness in exchange for his testimony was inadvertently withheld from the defense. Noting that the prosecution "depended almost entirely" on that witness's testimony, the Court held that due process required a new trial. Addressing the question of intent, it stated, "Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." *Id.*

By 1985, the U.S. Supreme Court expanded the Brady rule to require mandatory disclosure by the prosecution, whether requested or not by the defense, of any favorable evidence that is material, i.e., "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Court emphasized that the standard of materiality is not preponderance of the evidence; instead, it is whether in its absence, the defendant received a fair trial, which is one resulting in a verdict worthy of confidence. *Id.*

The duty to disclose exculpatory material evidence extends to prosecutors, police, and other government investigators. *Kyles v. Whitley*, 514 U.S. 419, 437 – 438 (1995). A defendant may base a Brady claim on a government investigator's failure to disclose evidence material to guilt or punishment, even when the prosecutor personally did not know of that evidence. *Id.; United States v. Velarde*, 485 F.3d 553, 559 (10th Cir. 2007). Brady evidence includes information relating to the reliability and credibility of witnesses. *Giglio*, 405 U.S. at 154.

Accordingly, the DA's office and the Patrol are required by Brady and its progeny to disclose information relating to Complainant's credibility to any defendant in a case for which Complainant is a witness.

II. The Decision was not Arbitrary, Capricious, or Contrary to Rule or Law.

Mr. Abrahamson's August 2, 2011 Brady letter disclosing the existence of the internal affairs investigation into Complainant's credibility comported appropriately with his Office's legal duty to disclose potentially exculpatory information to the defense in any criminal matter. Evidence of a credibility problem with the State's key witness in cases arising out of State Trooper traffic stops is material. *Giglio*. The Patrol is also required by *Brady*, *Giglio*, and *Kyles* to disclose the existence of the PS report on Complainant. If either government entity failed to

comply with Brady rule in this manner, any case in which Complainant is listed as a witness would be subject to a motion for new trial, which would in all likelihood be granted.

Complainant asserts that Respondent failed to use reasonable diligence to assure that all pertinent information was considered prior to making a decision. Specifically, he claims that Major Meredith made several factual errors in his decision making process: 1) he erroneously assumed Complainant had made the arrest of Garton; and 2) he erred in concluding that Ms. Downs had actually polled the jury herself (this error was first made by Sgt. Burt in his interview of Ms. Downs).

These errors on Major Meredith's part were potentially significant; however, in this case, they have no bearing on the essential facts: Complainant lied at the DOR hearing about material facts; the PS Report found the complaint regarding Complainant's lack of credibility to be founded; and, the Brady rule requires disclosure of the PS Report to the defense in all criminal cases on which Complainant is a witness.

Complainant also argues that because there is no Patrol policy or procedure governing Troopers who determine the need to change their anticipated testimony, it is unfair to discipline Complainant. The Patrol's General Orders establish generally accepted standards of conduct for Troopers requiring that they be truthful and act with integrity in executing the public trust. Under § 24-50-116, C.R.S. classified state employees must perform their duties in compliance with generally accepted standards unique to their employer. Moreover, discipline need not be based on violations of specific agency rules or procedures. *Barrett v. University of Colorado*, 851 P.2d 258 (Colo.App. 1993).

The investigation conducted by Respondent was thorough, notwithstanding the minor factual errors referenced above. Major Meredith took his role as appointing authority very seriously, consulting with the top leadership of the Patrol prior to making a decision on this new and unique situation. Therefore, Respondent's decision was not arbitrary, capricious, or contrary to rule or law.

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

Complainant argues that under Board Rule 6-2, the Patrol should impose a corrective action in this case, instead of escalating to discipline immediately. However, Complainant's conduct was serious, because it constituted a breach of the public trust that will have a permanent impact on his ability to prosecute a case on behalf of the Patrol. Major Meredith informed Complainant at the predisciplinary meeting that a Trooper who cannot prosecute a case is of no use to the Patrol. This assessment was correct. Troopers must be able to support their citations for violations of state law by testifying at trial; otherwise, their work is in vain. A Trooper with a PS Report subject to Brady disclosure is not sufficiently reliable to withstand scrutiny at trial. As Ms. Downs stated, it would be too risky to base a case on Complainant's testimony without corroborating evidence. Because Troopers most often work independently, there is usually no corroborating evidence available at trial. Therefore, Complainant will be unable to prosecute a case for the Patrol.

The Major inquired as to whether it was possible to transfer Complainant to a Trooper position that did not involve law enforcement. No such position exists. Therefore, the termination in this case was appropriate and within 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 18th day of April, 2012 at Denver, Colorado.

[redacted]

Mary S. McClatchey
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 19th day of April 2012, ~~20__~~, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Brian Bradford
[redacted]

Diane Dash A.A.G.
[redacted]

[redacted]

Andrea Woods

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

The cost to prepare the 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.