STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2015B092**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID R. MARTINEZ,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, ARKANSAS VALLEY CORRECTIONAL FACILITY,
Respondent.

Administrative Law Judge ("ALJ") Keith A. Shandalow held the hearing in this matter on September 29, 2015 at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The case commenced on the record on September 29, 2015 and the record was closed on October 20, 2015 after the submission and acceptance of the original of one of Respondent's exhibits. Senior Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Warden Randy Lind, Complainant's appointing authority. Complainant appeared and represented himself.

MATTERS APPEALED

Complainant, David R. Martinez ("Complainant") appeals the termination of his employment by Respondent, Colorado Department of Corrections ("Respondent" or "CDOC"). Complainant alleges that he did not commit the acts and omissions for which he was disciplined, that the termination was arbitrary, capricious or contrary to rule or law, and that his termination was not within the reasonable range of alternatives available to the appointing authority. Complainant also alleges that he was the victim of age discrimination.[1] Complainant seeks reinstatement to his position as a Correctional Officer II, as well as back pay and benefits.

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 actions were arbitrary, capricious, or contrary to rule or law.

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

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[1] On the form that initiated Complainant's appeal to the Board, Complainant also checked boxes indicating he was alleging discrimination based on race/color and disability. He voluntarily dropped those claims at the start of the evidentiary hearing. With respect to his possible claim of disability discrimination, Complainant was not under a doctor's care for alcoholism, and did not request any accommodation arising from his abuse of alcohol. Accordingly, even if Complainant had maintained his disability claim, it would not have succeeded.

4. Whether the discipline imposed was a result of unlawful discrimination based on age.

FINDINGS OF FACT

Background

1. Complainant was hired as a Correctional Officer at the Colorado State Penitentiary effective October 1, 1997. At all times relevant to this matter, he was a certified state employee.

2. On November 1, 2013, Complainant was promoted to Sergeant/Correctional Officer II at the Arkansas Valley Correctional Facility ("AVCF").

3. Complainant always received satisfactory performance evaluations while employed by Respondent at AVCF.

4. Complainant was 44 years old when his employment with Respondent was terminated.

The November 6, 2014 Incident

5. On November 6, 2014, at approximately 2:53 a.m., Complainant was driving his car very slowly in Pueblo, Colorado when he was observed by a Pueblo Police Department officer, Brian Laut.

6. Officer Laut then observed that Complainant stopped his car approximately three feet from the curb while still in the lane of traffic.

7. Officer Laut approached the car and noted that the vehicle was running and Complainant was falling in and out of sleep.

8. Another police officer, Aaron Ordway, who also approached Complainant's automobile, observed several cans of beer in the car, both open and closed.

9. Complainant voluntarily submitted to a series of roadside maneuvers, which Complainant was unable to perform satisfactorily.

10. Complainant was placed under arrest and given a breath test, which revealed a blood alcohol count of .195, well above the minimum threshold for a charge of driving under the influence of alcohol ("DUI").

11. Complainant was charged with Impeding Traffic and DUI.

12. On November 7, 2014, pursuant to CDOC regulations, Complainant phoned his supervisor, Lieutenant James Salazar, to inform him that Complainant had been arrested on November 6, 2014 at 2:53 a.m. for DUI by the Pueblo Police Department, and that he had a 60-day driving permit.

13. On November 7, 2014, Lt. Salazar advised Rodney Davidson, an Investigator with the CDOC Office of the Inspector General, that Complainant had contacted Lt. Salazar by telephone and told him that Complainant had been arrested on November 6, 2014 for DUI in

Pueblo, Colorado. Lt. Salazar also told Inspector Davidson that Complainant told him that he has a 60-day driving permit.

14. On November 8, 2014, Complainant drafted, signed and submitted an Incident Report about his arrest on November 6, 2014. In his report, Complainant wrote, in pertinent part, that "ON 11-6-2014 AT APPROXIMATELY 0253 HRS I WAS ARRESTED FOR DUI BY PUEBLO PD. I WAS VERY INTOXICATED AND ASLEEP IN MY CAR MY BAC WAS .195...."

15. On November 10, 2014, Investigator Davidson obtained a record of the arrest from the Pueblo Police Department, reviewed it and noted that Complainant was charged with DUI and impeding the normal flow of traffic. Investigator Davidson provided a copy of the police report to the Warden and Associate Warden at AVCF.

The January 2015 Urinalysis

16. On January 18, 2015, Complainant provided a urine sample to the Nextep Community Supervision Program ("Nextep"). Complainant was required to submit to random urinalysis ("UA") testing as part of his bail bond terms and conditions. The specimen tested positive for alcohol.

Complainant's Arrest in February 2015

17. A warrant for Complainant's arrest was issued by a Pueblo County Court Judge on February 17, 2015. The warrant indicated that Complainant was in contempt of court.

18. On February 24, 2015, Complainant was informed by a staff member at Nextep that there was a warrant out for his arrest. Complainant voluntarily went to the Pueblo County Sheriff's Department and was arrested on a charge of Contempt of Court.

19. Complainant did not inform his supervisor or anyone else in his chain of command of either the arrest warrant or his February 24, 2015 arrest.

20. On March 12, 2015, Investigator Davidson was contacted by Betty Cordova of the CDOC Background Investigations Unit, who asked him if he was aware that Complainant had been arrested on February 24, 2015, by the Pueblo County Sheriff's Department. He replied that he was not aware of that.

21. Investigator Davidson then sent an email to Warden Lind and Associate Warden Colin Carson and asked them if they knew about Complainant's arrest. They responded that they did not know about the arrest.

22. On March 13, 2015, Investigator Davidson spoke with clerks in the Pueblo County Sheriff's Office and was told that a warrant had been issued for Complainant's arrest for contempt of court and that Complainant had turned himself in on February 24, 2015.

Appointing Authority

23. On March 4, 2015, Steven T. Hager, Director of Prisons, delegated appointing authority in writing to Frances Falk, Deputy Director, Prison Operations, for all positions reporting to her. On the same day, Ms. Falk delegated appointing authority in writing to Randy Lind, Warden of the AVCF, for all positions reporting to him.

Notice of and Preparation for Predisciplinary Meeting

24. By letter dated March 17, 2015, Warden Lind gave notice to Complainant of a predisciplinary, or State Personnel Board Rule 6-10, meeting scheduled for April 1, 2015. In the letter, Warden Lind referenced Complainant's DUI arrest and his arrest for failure to appear at a court hearing.

25. Major Robert Houston, the AVCF Custody & Control Manager, reviewed Complainant's personnel file and the reports prepared by Investigator Davidson regarding Complainant's arrests. Major Houston summarized his findings in a memorandum to Warden Randy Lind dated March 19, 2015. In that memorandum, Major Houston wrote: "After reviewing the investigation reports submitted by the Office of Inspector General related to Sergeant David Martinez, I believe this employee has demonstrated work behaviors that indicate a failure to comply with the ***rules and standards governing her [sic] conduct as a correctional professional.***" (Emphasis in original.) Major Houston listed the CDOC Administrative Regulations he believed Complainant violated: Administrative Regulation ("AR") 100-18, Mission Statement, Attachment A and various provisions of AR 1450-1, Staff Code of Conduct.

Rule 6-10 Meeting

26. Warden Lind and Complainant met for a Rule 6-10 meeting on April 1, 2015. Complainant was accompanied by his representative, Captain James Quintana. Warden Lind was accompanied by his representative, Major Houston.

27. At the Rule 6-10 meeting, Warden Lind raised the issues of Complainant's DUI arrest on November 6, 2014 and Complainant's arrest on a warrant for failure to appear in court.

28. Major Houston reviewed the allegations of Complainant's two arrests and the fact that he did not notify his supervisor about his February 2015 arrest. Major Houston indicated that it appeared that Complainant was in violation of Administrative Regulation 100-18 (Mission Statement), Attachment A, value 2: "We support a professional, empowered workforce that embodies honesty, integrity, and ethical behavior."

29. Major Houston also stated that Complainant appeared to be in violation of several provisions of AR 1450-01 (Code of Conduct), specifically 1450-01 (III)(B), 1450-01 (IV)(N), AR 1450-01 (IV)(U), AR 1450-01 (IV)(X), AR 1450-01 (IV)(ZZ).

30. AR 1450-01 (III)(B) defines Conduct Unbecoming as "any act or conduct either on or off duty that negatively impacts job performance, not specifically mentioned in administrative regulations. The act or conduct tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer."

31. AR 1450-01 (IV)(N) provides that "[a]ny 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."

32. AR 1450-01 (IV)(U) provides that "[w]hen a DOC employee, contract worker, or volunteer is the subject of an external investigation; has been arrested for, charged with, or

convicted of any crime or misdemeanor (except minor traffic violations); or is required to appear as a defendant in any criminal court, he/she will immediately inform and provide a written report to his/her appointing authority who shall inform the IG's Office."

33. AR 1450-01 (IV)(X) provides that "DOC employees, contract workers, and volunteers shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation."

34. AR 1450-01 (IV)(ZZ) provides that "[a]ny 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."

35. When asked about the November 6, 2014 arrest, Complainant said that "It happened." Complainant admitted that "things got out of control." He explained that he was looking for his wife and had pulled over to call her, was not in the lane of traffic, when the police appeared.

36. When asked about the arrest on February 24, 2015, Complainant said that he was told by someone at Nextep that there was a warrant for his arrest. He stated that he went down to the County jail and was told by his attorney that the warrant was for a failure to appear, but that he had made all his court appearances and the matter would be cleared up. He also said that his attorney told him not to tell anyone about the matter.

37. Warden Lind asked Complainant if there were any similar issues in his past while employed by Respondent. Complainant responded that he was charged with DUI 12 years ago. He explained that he was in front of his house, cleaning his car, with the car running with the keys in the ignition, and had been drinking and had an open beer can. He was moving his car back and forth.

38. Warden Lind pointed out that the records indicate that in the 2003 incident, he received a corrective action and a disciplinary action and the police report indicated that he was driving drunk, that he was charged with DUI, hit and run and careless driving. Complainant responded that it was not a hit and run, he was on his own property, and the charges were dropped to careless driving.

39. Warden Lind also pointed out that in January 2001, he came to work with the smell of alcohol on his breath, and tests indicated that he was under the influence of alcohol, despite Complainant's allegation that he had used an inhaler and that was the reason for the smell. Complainant stated that he had not been drinking, that when tested at CCOM "it showed up" but the machine was not calibrated.

40. Towards the end of the Rule 6-10 meeting, Warden Lind asked Complainant if he had any additional information that he would like Warden Lind to consider in making his decision to impose disciplinary action or not. Complainant responded by stating that he knew that he has a problem with alcohol but that he was seeing a counselor for the grief that he was experiencing arising from his mother's death a year and a half ago. He was also going to meetings, speaking with his priest, and was getting a lot of help. He alleged that he had been sober for the last 5 months.

41. Complainant also stated that his sentencing would occur on May 12, 2015, and that the charges were going to be dropped to a moving violation. Complainant indicated that he expected he would be on home detention for 30 days with an ankle bracelet that would monitor his alcohol level. He added that that he would be able to go to work, but would need to wear the ankle bracelet.

42. Warden Lind stated that he was concerned about the pattern of alcohol abuse evidenced by his 2001 corrective action, his 2003 corrective and disciplinary action, and his recent DUI arrest.

The Termination of Complainant's Employment

43. Subsequent to the April 1, 2015 Rule 6-10 meeting, Warden Lind spoke with Complainant's supervisor, reviewed Complainant's personnel record, reviewed the records of Complainant's 2001 and 2003 alcohol-related incidents, and took into consideration Complainant's personnel record and the mitigating information provided by Complainant during the Rule 6-10 meeting before making his decision.

44. By letter dated April 5, 2014, and handed to Complainant on April 7, 2015, Warden Lind terminated Complainant's employment, effective April 10, 2014.

45. Warden Lind based his decision to terminate Complainant's employment primarily on three factors: (1) Complainant's DUI charge on November 6, 2014; (2) his failure to inform his supervisor of his arrest on February 24, 2015; and (3) his lack of credibility in describing the alcohol-related events of 2001 and 2003 and certain details of his November 6, 2014 arrest.

46. Warden Lind concluded that Complainant drove his personal automobile while he was under the influence of alcohol while being employed by the DOC, a violation of state statute and CDOC's AR 1450-01(IV)(U).

47. Warden Lind also concluded that Complainant failed to inform his supervisor or anyone else in his chain of command of his February 24, 2015 arrest, in violation of CDOC regulations.

48. Warden Lind also concluded that Complainant was inconsistent, deflective of his own personal action during the Rule 6-10 meeting, and that Complainant's version of events brought his honesty, integrity and ethical behavior into question. Specifically, Warden Lind noted that Complainant's description of his 2001 and 2003 alcohol-related incidents during the Rule 6-10 meeting tended to minimize Complainant's culpability and was contradicted by the documentation of those incidents that led to a corrective action in 2001 and a corrective action and a disciplinary action in 2003. Warden Lind also noted that Complainant's statement that he had parked his car and was not in the lane of traffic when arrested on November 6, 2014 was contradicted by the police report. In his disciplinary letter, Warden Lind referenced violations of CDOC's Administrative Regulation 100-18 (Mission Statement) and Administrative Regulation 1450-01 (Code of Conduct), discussed above, in addition to the Code of Ethics, and State Personnel Board Rule 6-12.

49. The Code of Ethics, an attachment to AR 1450-01, provides, in pertinent part, as follows:

I. Declaration

Public confidence in the integrity of state government demands that public officials demonstrate the highest ethical standards at all times. Those who serve the people of the State of Colorado as public officials should do so with integrity and honesty, and should discharge their duties in an independent and impartial manner. At the same time, qualified individuals should be encouraged to serve in state government and have reasonable opportunities with all citizens to develop private economic and social interests.

When the voters passed Amendment 41, now Article XXIX of the Colorado Constitution, they sent a clear message that they want their public officials and government employees to meet a high ethical standard. The touchstone of Amendment 41 was that public officials and government employees must not violate the public trust for private gain.
Governor Bill Ritter, Jr.

Executive Order D 021 09

II. Ethics in Government

Article XXIX of the Colorado Constitution states:

Section 1. Purposes and findings.

A. The people of the state of Colorado hereby find and declare that:

1. The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
2. They shall carry out their duties for the benefit of the people of the state;
3. They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
4. Any effort to realize personal financial gain through public office, other than compensation provided by law, is a violation of that trust; and
5. To ensure propriety and to preserve public confidence, they must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.

B. The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be borne by the state or local government.

III. Code of Conduct

All employees, contract workers, and volunteers of the Colorado Department of Corrections:

A. Shall serve the public with respect, concern, courtesy, and responsiveness;
B. Shall demonstrate the highest standards of personal integrity, truthfulness, and honesty and shall, through personal conduct, inspire public confidence and trust in government;
C. Shall not use public office to bestow any preferential benefit on anyone related to the officer, appointee, or employee by family, business, or social relationship;
D. Shall not disclose or use or allow others to use confidential information acquired by virtue of state employment for private gain;
E. Shall not accept any compensation, gift, payment of expenses, or any other thing of value which would influence him or her to depart from the faithful and impartial discharge of his or her duties;
F. Shall not accept any compensation, gift, payment of expenses, or any other thing of value as a reward for official action taken;
G. Shall not engage in outside employment unless: (1) the outside employment is disclosed to the Governor or, in the case of an employee, the employee's immediate supervisor; and (2) the outside employment does not interfere with the performance of state duties;
H. Shall not use state time, property, equipment of supplies for private gain;
I. Shall not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government;
J. Shall carry out all duties as a public servant by exposing corruption or impropriety in government whenever discovered;
K. Shall support equal access and employment opportunities in state government for all of the State of Colorado;
L. Shall comply at all times with the standards of conduct set forth in title 24, article 18 of the Colorado Revised Statutes and Article XXIX of the Colorado Constitution.

50. Board Rule 6-12 provides, in pertinent part, as follows:

Disciplinary actions may include, but are not limited to: an adjustment of base pay to a lower rate in the pay grade; base pay below the grade minimum for a specified period not to exceed 12 months; prohibitions of promotions or transfers for a specified period of time; demotion; dismissal; and suspension without pay, subject to FLSA provisions. Administrative leave during a period of investigation is not a disciplinary action. At the conclusion of discipline involving temporary reductions in base pay, it shall be restored as if the discipline had not occurred. Reasons for discipline include:

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;
5. final conviction of a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if employment is continued. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court; and,
6. final conviction of an offense of a Department of Human Services' employee subject to the provisions of §27-1-110, C.R.S. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court.

51. Warden Lind concluded that, "Your conduct reflects not only a violation of Department Regulations, but also an inability to meet the responsibilities inherent to the position of a Correctional Officer II. I have determined that your conduct has negatively impacted the mission of the Colorado Department of Corrections and Arkansas Valley Correctional Facility, placing members of the public and staff at risk, and betraying public trust. Your actions reflect poorly upon your credibility, integrity, and honesty and are not in line with the standard that is expected by the Colorado Department of Corrections. It is essential to be able to trust the integrity of Correctional personnel. Your willful choice to violate department policy and willfully depart from the truth has damages your credibility and integrity."

52. Warden Lind also indicated that Complainant's demonstrated lack of honesty and integrity would negatively impact his ability to testify in any court proceeding: "The CDOC is a Criminal Justice agency and as such has adopted high standards for employment. The nature of the work in Corrections may require an individual to appear in court should he or she become involved in a criminal or civil case. Witnesses in criminal and civil prosecutions may come under intense scrutiny by the defense or the complainant. Therefore, it becomes critical that an individual's integrity be able to withstand the intensity of that scrutiny. If it can be shown that an individual departed from the truth during the formal completion of his or her job duties, the defense or complainant has sufficient information to case doubt about the credibility of the witness and the Department."

Board Appeals and Process

53. Complainant filed a timely appeal of the termination of his employment with the Board on April 15, 2015.

DISCUSSION

I. GENERAL

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, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this de novo disciplinary proceeding, the agency has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 707-8. 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.

Complainant bears the burden of proof on his discrimination claim. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001); *Bodaghi v. Department of Human Resources*, 995 P.2d 288, 300 (Colo. 2000)

II. HEARING ISSUES

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

Complainant's employment was terminated because he was arrested for DUI on November 6, 2014, and because of his subsequent arrest on February 24, 2015, which was thought at the time to be for contempt of court for failing to appear for a court hearing. It was discovered later that the arrest warrant was issued after Complainant failed a UA test that was part of the terms and conditions of his bail bond. He was also terminated because he failed to inform his supervisor of his arrest on February 24, 2015 in violation of department regulations, and because he was found to have misrepresented the details of his alcohol-related incidents in 2001 and 2003, as well as his arrest on November 6, 2014. Warden Lind concluded that Complainant had violated the following Department Regulations: Administrative Regulation 100-18 (Mission Statement), Administrative Regulation 1450-01 (Code of Conduct and the Code of Ethics), and State Personnel Board Rule 6-12.

Respondent has proven, by a preponderance of the evidence, that Complainant was arrested for DUI on November 6, 2014; that he had been drinking and driving; that an arrest warrant was issued for Complainant's arrest and Complainant was arrested on February 24, 2015; that he failed to inform his supervisor or anyone in his chain of command of his February 24, 2015 arrest in violation of CDOC regulations; that he misrepresented the facts of his 2001 corrective action arising from his reporting to work with alcohol on his breath and a BAC of .058; that he misrepresented the facts of his 2003 DUI arrest; that he misrepresented the facts of his November 6, 2014 arrest. In addition, Respondent established that Complainant's declaration during his Rule 6-10 meeting that he had been sober for 5 months was false, given his UA results in January 2015 that led to an issuance of an arrest warrant for violating the terms and conditions of his bail. At hearing, Complainant admitted that his declaration of sobriety was false. Respondent has proven that Complainant violated the following Department Regulations:

Administrative Regulation 100-18 (Mission Statement), Administrative Regulation 1450-01 (Code of Conduct), the Code of Ethics, and State Personnel Board Rule 6-12.

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).

Warden Lind's decision was neither arbitrary or capricious, or contrary to rule or law. Warden Lind gave appropriate notice to Complainant of the Rule 6-10 meeting and the primary subjects to be discussed. He conducted the Rule 6-10 meeting appropriately, provided the information that was the basis for the meeting and the possibility of disciplinary action, and allowed Complainant to tell his side of the story and to provide any additional information that might be relevant to Warden Lind's ultimate decision. Prior to making the decision to terminate Complainant's employment, Warden Lind reviewed Complainant's personnel file, reviewed the records of Complainant's arrests, spoke with Complainant's supervisor, and considered the version of events provided by Complainant. He also reviewed pertinent Administrative Regulations and department policies, as well as the impact of his findings on Complainant's ability to testify in future court matters. There was no evidence presented that Warden Lind failed to give candid and honest consideration of the evidence he reviewed. There is no indication that Warden Lind exercised his discretion in such manner after a consideration of evidence before him as clearly to indicate that his decision to terminate Complainant's employment was based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions.

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

Complainant's acts and omissions for which he was disciplined were serious, especially given his position as a Correctional Officer in a law enforcement agency. Arguably, Complainant's arrest for DUI in November 2014 may not have been enough to justify the discipline imposed, although such a serious criminal violation for a law enforcement officer is not an insignificant event. However, his misrepresentation of some of the facts of that incident, his failure to inform his chain of command of his arrest in February 2015, and his misrepresentations about previous alcohol-related incidents made during his Rule 6-10 meeting, create the appearance of a pattern of lack of truthfulness and integrity that is violative of pertinent CDOC Administrative Regulations. The impact of Warden Lind's findings that Complainant's credibility, integrity and honesty were questionable was potentially significant, given the fact that these findings could significantly interfere with Complainant's ability to testify in any court proceeding. Complainant's violations of the law regarding drinking and driving, the lack of credibility he displayed in the statements he made during the Rule 6-10 meeting, and the higher standards of honesty and integrity that are required of law enforcement employees justify the discipline imposed.

D. Respondent did not discriminate against Complainant on the basis of age.

Complainant alleges age discrimination in violation of the Colorado Anti–Discrimination Act ("CADA") and Board Rule 9-3. CADA provides, in pertinent part, that "[i]t shall be a discriminatory or unfair employment practice . . . [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of . . . age . . ." § 24-34-402(1)(a), C.R.S. CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. Interpretations of the analogous federal statute, the Age Discrimination in Employment Act ("ADEA"), constitute persuasive authority for understanding what actions constitute unlawful age discrimination under CADA. *See e.g. George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997); see also Board Rule 9-4 ("Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred").

A plaintiff suing under the ADEA must prove that the challenged employment action was motivated, at least in part, by his age. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000). The plaintiff may carry this burden either by presenting direct evidence of the employer's discriminatory intent or by presenting circumstantial evidence creating an inference of a discriminatory motive using the tripartite *McDonnell Douglas* burden-shifting analysis. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *see Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1165 (10th Cir. 2000) (applying the *McDonnell Douglas* framework to an ADEA claim).

Pursuant to cases in which an employee alleges age discrimination in disciplinary actions, the requirements of a prima facie claim of disparate treatment require a complainant to produce evidence establishing that complainant (1) was a member of a protected class, (2) was disciplined, and (3) was treated differently than similarly-situated substantially younger employees for the same or similar conduct. *See, e.g., Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *EEOC v. Flasher Co.*, 986 F.2d 1312, 1316 (10th Cir. 1992); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (comparator may be a member of the protected class as long as he or she is substantially younger than plaintiff). If the complainant establishes a *prima facie* case of discrimination, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the [complainant's] rejection." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Once the employer meets its burden, the complainant must then "be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a ... discriminatory decision." *Id.* at 805.

At the hearing of this matter, Complainant's only statements regarding his age discrimination claim were that, at his age (44) it would be difficult to find another job, and that other, younger employees, were treated better and less harshly than he was. Complainant failed to provide specific information about the younger employees who were treated less harshly, who they were, what they were accused of, what consequences they were given, and whether or not they were similarly situated.

Complainant's testimony on this issue is insufficient to state a prima facie case of age discrimination. In addition, Respondent has provided legitimate, nondiscriminatory reasons for its actions. Complainant failed to offer any evidence that these reasons were a pretext for age discrimination. Therefore, Complainant's age discrimination claim must fail.

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.

4. Respondent's actions did not constitute unlawful discrimination on the basis of age.

ORDER

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

Dated this 4th day
of December, 2015,
Denver, Colorado.

Keith A. Shandalow
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 4th day of December, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

David R. Martinez

Eric Freund
Senior Assistant Attorney General
Employment Unit
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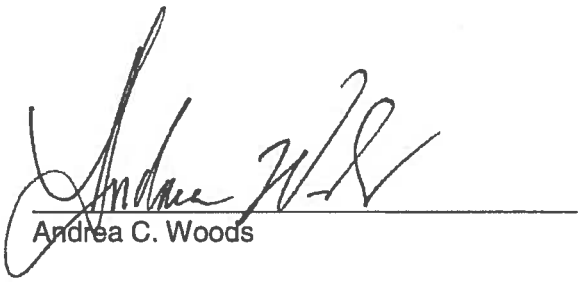

Andrea C. Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 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 8-65, 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 8-63, 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 8-64, 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 8-67, 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 8-70, 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 8-60, 4 CCR 801.