STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2011G028**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRETT L. WILLIAMS,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on April 16, 18, 23, 24, and 25, 2012 at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on August 15, 2011. The record was closed on May 30, 2012 upon receipt of the parties' written Closing Arguments. Senior Assistant Attorneys General Diane Marie Dash and Kathleen Spalding represented Respondent. Respondent's advisory witness was Lt. Colonel Scott Hernandez. Keith Shandalow, Esquire, represented Complainant.

MATTER APPEALED

Complainant Brett Williams, an applicant for reinstatement to the Colorado State Patrol, Department of Public Safety (Patrol, CSP, Respondent), appeals Respondent's decision to deny reinstatement, arguing that the decision was arbitrary, capricious, and contrary to rule or law, and discriminatory on the basis of sexual orientation. Complainant requests that the decision be rescinded and an award of front pay and attorney fees. Respondent requests that its decision be affirmed and that the appeal be dismissed with prejudice.

For the reasons set forth below, the decision of the Respondent is **rescinded**.

PROCEDURAL BACKGROUND

Complainant filed a petition for hearing on November 9, 2010, challenging the denial of his application for reinstatement with the Patrol. Respondent took the position Complainant had no right to appeal the decision. The matter was set for preliminary review. The ALJ issued a Preliminary Recommendation granting a hearing. On April 26, 2011, the State Personnel Board (Board) adopted the Preliminary Recommendation.

This case has a lengthy record. Two motions to compel discovery were granted and resulted in the imposition of sanctions against Respondent. The discovery litigation caused two continuances of the evidentiary hearing.

Complainant moved to close the hearing and seal the record in order to preserve his privacy. The ALJ ordered the parties to also brief the issue of Complainant proceeding under a pseudonym. The ALJ denied the motion to close the hearing and seal the record, and concluded that despite there being legal support to proceed under a pseudonym, it was too late

in the litigation to permit Complainant to do so.

Respondent asserted in its Supplemental Prehearing Statement that the hearing should be limited to the issue of Complainant's discrimination claim, and that the Board lacked jurisdiction over the claim that Respondent's action was arbitrary or capricious. Complainant filed a motion in limine seeking a ruling on this issue. On April 5, 2012, the ALJ issued an order clarifying that the Board possesses jurisdiction over both claims.

Respondent filed a motion for summary judgment on the sexual orientation discrimination claim ten days before hearing. On good cause shown, Complainant received an extension of time to respond. Respondent filed a reply. The ALJ denied the motion for summary judgment.

At hearing, a protective order was entered placing several exhibits consisting of polygraph exam reports and pre-test interview tape recordings under seal. In addition, the affidavits of Respondent's polygraphers filed in response to those exhibits have been placed under seal.

At the close of Complainant's evidence, Respondent moved for a directed verdict on the sexual orientation discrimination claim. The ALJ denied the motion.

Admissibility of Polygraph Evidence

One central issue in this case involves a polygraph examination administered to Complainant as part of the pre-employment background investigation. Respondent based its decision to deny reinstatement either wholly or in part on the results of the polygraph examination. On January 17, 2012, the ALJ ordered the parties to file trial briefs addressing the admissibility of polygraph evidence in Colorado. Following the parties' submission of briefs, on March 2, 2012, Complainant filed a motion in limine to exclude polygraph evidence. Respondent responded.

On March 22, 2012, the ALJ issued an Order Granting Complainant's Motion in Limine, In Part (Polygraph Order). Under Colorado law, evidence of polygraph test results and the testimony of polygraph examiners are per se inadmissible in both criminal and civil trials. *People ex rel. M.M.*, 215 P.3d 1237, 1248 (Colo.App. 2009)(civil case); *People v. Anderson*, 637 P.2d 354, 362 (Colo. 1981)(criminal case); *In re Marriage of McCaulley-Effert*, 70 P.3d 590, 594 (Colo.App. 2003)(dissolution of marriage).

In *People v. Anderson*, 637 P.2d 354 (Colo. 1981), the Colorado Supreme Court held, "Because of the lack of any standards for qualification of polygraph examiners, the unreliability of the polygraph technique, and the potential prejudice to the jury process, we conclude that polygraph evidence is not competent and must therefore be excluded." *Id.* at 362. The record in *Anderson* contained three different results reached by three different polygraph examiners regarding the defendant's truthfulness. *Id.* at 361. The *Anderson* Court noted, "It is not the act of lying per se which causes physiological changes, but the physiological stress created by lying which causes the autonomic nervous system to respond involuntarily. The physiological changes are identical to those which result from the exposure of an individual to a novel situation, or from emotional strain due to fear, anger, elation, excitement, anguish, or other emotion. [citations omitted] Therefore, by attaching mechanical devices to a subject's body, a polygraph does not 'detect' lies, but only monitors and measures certain physiological functions of the subject." *Id*, 637 P.2d at 356.

The Colorado Court of Appeals extended *Anderson* to civil cases in *Valley Nat. Bank of Cortez v. Chaffin*, 718 P.2d 259 (Colo.App. 1986), holding that it was error for the trial court to admit polygraph evidence to bolster witness credibility. *Id.* at 262. Three factors drove this decision: the scientific theory or technique of the polygraph is not sufficiently advanced to make its use competent at trial; the court is unable to ascertain the competence of polygraph examiners or account for the lack of standards for polygraph examiners; and the admission of polygraph evidence at trial seriously interferes with and is a potential prejudice to the trier of fact's evaluation of the demeanor and credibility of witnesses and their testimony. *Id.*

In *People v. Wallace*, 97 P.3d 262, 267 (Colo.App. 2004), the Colorado Court of Appeals upheld the trial judge's denial of a motion to admit polygraph evidence to bolster the credibility of the defendant, holding, "We believe that the reasoning in *Anderson* is still viable. . . ." *Id.* at 268. In addition, the *Wallace* Court excluded the polygraph result evidence under C.R.E. 608, reasoning, "The expert's testimony that no deception was indicated by defendant's test results was tantamount to an expert opinion on defendant's truthfulness on a specific occasion and was thus inadmissible under C.R.E. 608(a)." *Id.*

The case most analogous to the instant one is *People ex rel. M.M.*, 215 P.3d 1237 (Colo.App. 2009), which involved proceedings to terminate a father's parental rights. At hearing, the trial judge admitted two polygraph exams of the father over objection for the purpose of showing "the therapeutic reasoning for why reunification [with the children] was not possible in April, 2007, as well as now." *Id.* at 1241. Despite the purportedly limited scope of its admission, the polygraph evidence dominated the trial and formed the foundation for all three experts' opinions that led to termination of the father's parental rights. The Colorado Court of Appeals held it was reversible error to admit the polygraph test results and any expert testimony based on those results. *Id.*, 215 P.3d at 1249.

The fact that an individual took and either passed or failed a polygraph test may be narrowly admissible not for credibility purposes but as part of the "operative facts" of a case under *Haldeman v. Total Petroleum, Inc.*, 376 N.W.2d 98, 101 (Iowa 1985). In *Haldeman,* a wrongful discharge case, the employer informed the cashier that if she took and passed a lie detector test, she would be reinstated to her position. She took and passed the test and was then terminated from her position. The Iowa Supreme Court affirmed the admission of the polygraph test because it was not offered for credibility purposes, but instead was part of the "operative facts" of the cashier's claim that the company intentionally caused her emotional distress and acted with malice when they communicated her discharge to others. *Haldeman*, 376 N.W.2d at 101.

In summary, polygraph examination evidence is per se inadmissible in Colorado, is "not accepted as reliable by the courts," and any expert testimony based on polygraph results is inadmissible for credibility purposes or to show deceit or wrongdoing. *People ex rel. M.M.*, 215 P.3d at 1250; C.R.E. 608(b).

Based on the above authorities, the Polygraph Order excluded the machine results of Complainant's polygraph and any consideration of Complainant's test results as evidence of credibility, deception, untruthfulness, or attempt to hide wrongdoing. C.R.E. 608(b); *Wallace*, 97 P.3d at 268. The Order further excluded expert testimony based on Complainant's test results and expert testimony concerning the reliability, validity, accuracy, or scientific value of polygraph tests. *People ex rel. M.M.,* 215 P.3d at 1249.

However, the Order permitted evidence that the Patrol required Complainant to take the polygraph test prior to reinstatement and that his generic response to one portion of the test constituted a "significant reaction." This evidence is part of the operative facts of the case. Without it, Respondent would not be able to proffer a legitimate non-discriminatory business reason for its decision and the Board would lack evidence necessary to a determination of whether Respondent's action was arbitrary or capricious. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

The Polygraph Order did not exclude Complainant's statements made during the polygraph examination. *People v. District Court In and For First Judicial Dist., Jefferson County, Colo.,* 785 P.2d 141 (Colo. 1990)("the factors that make the results of polygraph examinations unreliable and inadmissible do not necessarily apply to statements made to a polygraph technician during pre-examination interviews.") *Id.*, 785 P.2d at 145. Complainant had not moved for their exclusion.

In addition, evidence regarding professional standards in law enforcement governing the administration and utilization of polygraph test results in the pre-employment screening and decisionmaking process, and Respondent's compliance therewith, was deemed admissible.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether Respondent discriminated against Complainant on the basis of sexual orientation;

3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Brett Williams moved to Colorado from Hawaii in 1994.

2. In July 1994, Complainant was hired as a reserve police officer in the Silt, Colorado Police Department. He soon became a full-time police officer and during his tenure was promoted to Sergeant and Acting Chief of Police in the Chief's absence.

Complainant's Career at the Patrol

3. In July 1998, Complainant was hired as a Trooper for the Patrol in the Glenwood Springs Troop. He served there for approximately three and a half years. During this time, he became a Field Training Officer, a Background Investigator, a Motorcycle Officer, and an Accident Reconstructionist. All of these duties required extra training and certification.

4. As a Background Investigator for new hires at the Patrol, Complainant was trained to oversee and conduct background investigations for applicants for Trooper positions at the Patrol. Complainant conducted several background investigations for the Patrol in Glenwood Springs, Denver, and Summit County.

5. In March 2002, Complainant was promoted to Corporal and transferred to the Frisco Troop. He supervised seven or eight Troopers. While in Frisco, Complainant was chosen to be Acting Sergeant, with Sergeant-level pay.

6. In March 2003, Complainant was promoted to Sergeant in charge of the Motorcycle Operations Unit and transferred to Patrol Headquarters in Golden.

7. In May 2005, Complainant was promoted to the rank of Captain and transferred to Troop 4B in Craig, Colorado. He oversaw all Patrol operations, personnel, and fleet in five counties, and managed five Trooper posts. He interacted often with local sheriffs and Chiefs of Police.

8. As Captain, Complainant continued to work the roads in his Patrol car, writing tickets, making arrests, and performing roadside assists. He enjoyed this part of the job.

9. Complainant attended Officers Candidate School and received a week of training on human resources issues, including how to treat people, issue corrective actions, and handle discrimination issues in the workplace, focusing on women and minorities.

10. Complainant's annual performance ratings at the Patrol through 2006 were all in the "Frequently Exceeds Expectations" category. These evaluations note that Williams balanced a heavy supervisory work load and still led the team in aggressive driving citations and team operations. In addition, the narrative sections highlighted his strengths in leading by example and motivating his team to perform better.

11. From 2006 forward, all of Complainant's evaluations were Level 3, Consistently Exceeds Expectations, the highest level possible.

12. In 2008, Complainant requested and received a transfer to command Troop 1B, Adams County, one of the busiest in the state.

13. The August 2008 narrative on Complainant's performance evaluation noted the following:

    - Troop 4B is experiencing an explosion in the volume of commercial traffic and is second in the state in the number of special event permits.

    - "He has done such an outstanding job that companies that are not required to have a CSP escort are requesting one to make the trip safer."

    - "He travels in uniform so that he can make an impact on traffic, and has written more citations than the other captains in the district."

    - "He leads by example and participates in all activities within his troop. Captain Williams varies his shifts to work both days and nights, covers holidays so that members with families can spend time at home, and at times covers the road to ensure road coverage."

    - "Additionally, there were several instances throughout this evaluation period where Captain Williams took proactive steps to impact the negative performance of troopers under his command. He set a high standard and ensured that they all knew the expectations he set for the troop."

14. Complainant's 2009 evaluation narrative stated, "Your performance to date has been exemplary. I appreciate your timeliness, accuracy of information, and willingness to take on tasks without being asked. The performance of your troop in our effort to meet statewide objectives is excellent and your efforts to organize office tasks and procedures have had a positive effect. You are always first to respond to my requests and your attitude is always positive and willing to do whatever it takes to get the job done."

Complainant's Sexual Orientation and Experience of Anti-Gay Bias in the Patrol

15. Complainant is a gay male and has been private about his sexual orientation his entire life. He has never disclosed his sexual orientation to his parents or in a professional setting, including the Patrol.

16. There are no openly gay men in the Patrol. Complainant knows several other gay men in the Patrol, none of whom is willing to reveal his sexual orientation at work.

17. Complainant observed anti-gay bias in the Patrol and an atmosphere that was not accepting of gay males throughout his tenure. He often witnessed anti-gay jokes and comments by Patrol members up to the rank of Captain, often about "faggots," such as, "You're not a fag are ya?" Sgt. Scott Elliott, a ten-year veteran of the Patrol, has also witnessed an anti-gay culture permeating the Patrol throughout his tenure, marked by anti-gay derogatory slurs by staff at all levels.

18. It was also Complainant's experience that lesbian Patrol members were somewhat more accepted than gay men because lesbians were viewed as being masculine, although they were made fun of at times. Complainant observed that the homophobia against gay men in the Patrol was based primarily on a perception of them as being feminine.

19. In 2008, at the annual Captains' in-service training at the Patrol Training Academy at headquarters, Complainant witnessed a public anti-gay incident. Captain Martin entered the classroom of Captains, put on a riot helmet with bunny ears taped to it, put on a tiger-print Speedo swimsuit over his pants, filled the crotch area with a rag, put a loufa on his buttocks as a tail, and pranced around the room lisping, mimicking a flamboyant gay male.

20. Captain Barba, Director of the Patrol Training Academy, was present and did nothing to stop this incident. Lt. Colonel Padilla entered the classroom and also thought it was funny.

21. Complainant found this incident to be unprofessional and personally insulting. Complainant discussed his concerns afterwards with Captain Barba, who asked Complainant to submit his complaint in writing. He did so and did not hear about the outcome of any investigation. Shortly thereafter, Captain Martin was promoted to Major.

22. Patrol Chief Trostel learned of the incident and thereafter sent an email directing all Captains to be professional at all in-services at the Academy.

23. Complainant was terrified about his sexual orientation being revealed in the Patrol. He believed the anti-gay bias would prevent him from having a successful career. Complainant pretended to be heterosexual, often discussing women he dated with others at work, and placing a photograph of his purported girlfriend on his desk.

24. Complainant's biggest fear was that if other Troopers learned of his sexual orientation, it would change how others perceived and treated him, potentially creating a personal safety hazard. Complainant feared that if it were known he is gay, some, or many, of the other Troopers would be less inclined to respond to calls for back-up in emergency situations on the road. Troopers deal with angry and intoxicated citizens and dangerous traffic emergencies. Failure to receive necessary back-up could create a personally and professionally hazardous situation for Complainant.

25. The Patrol conducts diversity training for its members. None of these trainings has ever included sexual orientation. The Patrol does not teach its members that gay individuals are a protected class under the anti-discrimination policy or state law.

Complainant's Handling of Rumors

26. Complainant heard that rumors were circulating in the Adams County Troop that he was gay. During a March 2009 meeting with his Troop, he announced that he would not tolerate Trooper discussion of any other Patrol members' private sex lives at work. He made it clear that any Trooper discussing another's private sex life would be reported to the Major and would be sent to the Internal Affairs (IA) Unit, also known as the Professional Standards Unit, for investigation.

27. During this meeting, Complainant stated that he was not gay, and that even if he were gay, it would not be appropriate or professional for Troopers to discuss his or anyone else's personal life at work.

April 22, 2009 Comments by Master Sergeant Brown

28. On April 22, 2009, Sgt. Pat Mullenburg and Corporal Shawn Wykoff, both of whom were in Complainant's Troop, attended a supervisors' training at the Academy. During the lunch break, a Master Sergeant from another Troop, DJ Brown, approached Sgt. Mullenburg and asked him how things were going under Captain Williams. Sgt. Brown knew from previous conversations with Sgt. Mullenburg that when Captain Williams started in Adams County, Sgt. Mullenburg had found it difficult to adjust to his management style, which was very different from that of his predecessor.

29. Sgt. Mullenburger informed Sgt. Brown that after the initial period of adjustment, he had developed an excellent working relationship with Captain Williams. They discussed Captain Williams' management style as they walked down the hall, entered a classroom, and sat down. Corporal Wykoff entered the room, turned to leave, and Sgt. Brown waved him to join their conversation.

30. Sgt. Brown then stated to Sgt. Mullenburger and Corporal Wykoff, either, "If Captain Williams doesn't have his personal life in order, then he can't lead a Troop," or, "I've always believed someone who can't get in touch with their sexual identity can't run a Troop," or words to that effect.

31. Sgt. Mullenburger and Corporal Wykoff knew that Sgt. Brown was questioning Captain Williams' ability to lead based on Brown's belief he was gay. Sgt. Mullenburger responded by informing Brown that they were forbidden from discussing people's sexual orientation, or words to that effect, making it clear to Brown that he did not want to

discuss this subject. Sgt. Brown responded, "I said it once, and I'll say it again, if you don't have your personal life in order, how can you lead a Troop?" or words to that effect.

32. Sgt. Brown then stated that he had learned from a dispatcher that Williams was gay and was dating a young man who works at the Lotus Kitchen restaurant.

33. Both Sgt. Mullenburger and Corporal Wykoff had eaten at the Lotus Kitchen several times with Captain Williams. They knew from personal experience that the entire family who ran the restaurant were close personal friends of Williams, the family frequently had dinner at Williams' home, and Williams often drove as the designated driver when their son, Johnny, in his early 20's, went out with his friends.

34. Sgt. Mullenburger and Corporal Wykoff informed Sgt. Brown that Captain Williams was a close friend of the family. As they were talking, Sgt. Mason entered the room. The conversation soon ended.

35. That evening, Corporal Wykoff called Sgt. Mullenburg to suggest that he inform Captain Williams of the conversation, because he might learn of it from Sgt. Mason. Corporal Wykoff was fearful of getting in trouble with Captain Williams because he had been a member of a conversation involving discussion of Williams' sexual orientation. Sgt. Mullenburg said he would think about it.

April 23, 2009 Report to Williams

36. The next day, Sgt. Mullenburg and Captain Williams attended a meeting together with a Trooper to address a performance issue. After the meeting, as they were sitting together talking, Captain Williams made a comment about Sgt. Brown. Sgt. Mullenburg responded by casually informing Captain Williams of Sgt. Brown's comments about him.

37. Captain Williams was concerned about Sgt. Brown, who held the rank of Master Sergeant, stating to other supervisors that a Captain could not do his job because of his sexual orientation. Master Sergeants are expected to reflect the best character of the Patrol.

38. Complainant reported the event to Major Powell, who reported it to Sgt. Brown's Captain and Major. Complainant met with Master Sergeant Brown's supervisors, Captain Madsen and Major Meredith, to inform them of the incident. They responded that Sgt. Brown's conduct was unacceptable and due to its severity the matter would be referred as a Level 1 complaint to Chief Wolfinbarger. The matter was referred to IA for an investigation.

Patrol Anti-Discrimination Policy

39. Patrol Policy 202.01, Discrimination and Harassment, defines discrimination as to "discriminate in employment opportunities, benefits or privileges, or to create discriminatory work conditions or use discriminatory work conditions or evaluative standards if the basis of the discrimination is the member's race, color, ancestry, ... sexual orientation."

40. Policy 202.01 defines "Unlawful Harassment" as "to harass a member based on . . .

sexual orientation. Harassment may be verbal, visual, physical, or threats and demands. Harassment in violation of this Policy may take many forms, including, but not limited to the following: Slurs, jokes, statements, gestures, pictures or cartoons regarding a member's . . . sexual orientation. Verbal conduct such as epithets, derogatory or obscene comments, slurs and jokes, propositions for sexual favors, suggestive, insulting or obscene gestures, or other verbal abuse of a similar nature."

Investigation of Sgt. Brown by Sgt. Keeton and Captain Elder

41. IA Investigator Sergeant Tim Keeton was assigned to investigate Master Sgt. Brown's disparaging remarks about Complainant. He conducted interviews of Wykoff, Mullenburg, and Mason on April 30, 2009, and of Brown on May 1, 2009. Sgt. Mason had nothing relevant to report.

42. Corporal Wykoff and Sgt. Mullenburg recited the events as stated above and their reports were consistent in all material respects. The only difference in their statements was that Corporal Wykoff reported having heard Sgt. Mullenburg say something like, "Have you seen how he [Williams] looks at him [Johnny]?" implying he might be gay, during the April 22 conversation. Sgt. Mullenburg denied having said this and insisted that he had instead noted how Captain Williams greets Johnny by bumping knuckles because they were such good friends.

43. Sgt. Brown's version of events was completely different from that of Corporal Wykoff and Sgt. Mullenburg. He denied making the reported statements about Captain Williams and said that Mullenburg and Wykoff had spoken negatively about Williams until he re-directed the conversation. He denied mentioning Captain Williams' sexual orientation or Johnny at the Lotus Restaurant.

44. Captain Dan Elder, commander of the IA Unit and Sgt. Keeton's direct supervisor, conducted follow-up interviews of Corporal Wykoff and Sgt. Mullenburg.

45. Captain Elder informed both of the complaining witnesses that there was a discrepancy in the reports and he wanted to try to clear it up. The Captain focused primarily on their motive and intent in making the report.

46. Both Corporal Wykoff and Sgt. Mullenburg confirmed to Captain Elder that Corporal Wykoff had said nothing negative about Captain Williams during the brief conversation on April 22 with Sgts. Brown and Mason.

47. Sgt. Mullenburg informed Captain Elder the only potentially negative thing he may have said about Captain Williams on April 22 was that he was a micromanager.

48. Captain Elder asked Sgt. Mullenburg if he was sure Sgt. Brown had made a negative reference to Complainant's sexual orientation in saying he couldn't run a troop if his personal life wasn't in order. Sgt. Mullenburg responded, "Guaranteed." Captain Elder informed Sgt. Mullenburg, "Were things said in a sexual manner? Probably, yes. In my mind do I think it was out of this world bad? No."

49. Captain Elder asked Corporal Wykoff if he would have been offended by Sgt. Brown's statement. Corporal Wykoff responded, ""Yes, I would have been offended. If someone said I don't have my personal life in order, and I can't lead because I'm gay, yes I'd be

offended."

50. During Captain Elder's interrogations of Corporal Wykoff and Sgt. Mullenburg, the Captain informed each of them that if he had been in the same situation, he would not have reported Sgt. Brown's statements to Captain Williams.

51. Captain Elder stated to Corporal Wykoff, "If I'm in that situation, personally, and I didn't say anything [negative about Captain Williams], I wouldn't have gone to Williams." During this conversation, Corporal Wykoff told Captain Elder, "I know you don't like me. I'm okay with that."

52. Captain Elder stated to Sgt. Mullenburg, "I don't know that I buy that. You know where this is going [to IA]. Looking back on this do you think what was said is a huge deal? Would it have been better to not say anything?"

53. Sgt. Mullenburg responded by explaining that after working with Captain Williams for six to eight months, he had built trust and admiration for him and can have two-hour-long casual conversations with Captain Williams.

54. Both Corporal Wykoff and Sgt. Mullenburg made it clear to Captain Elder that they were very loyal to Captain Williams and believed that Sgt. Brown's statements had been inappropriate.

55. At the end of both interviews, Captain Elder asked Sgt. Mullenburg and Corporal Wykoff if they thought Captain Williams was gay.

56. Corporal Wykoff responded, "I really don't know and I really don't care. I think he is doing a swell job."

57. Sgt. Mullenburg responded, "No." Captain Elder asked, "Why?" Sgt. Mullenburg responded that Captain Williams has a girlfriend and even has her picture on his desk. He also stated, "It doesn't matter. Even if he was gay I could care [less]."

June 9, 2009 IA Report

58. The IA Report found the harassment complaint to be "not sustained," concluding: "In conclusion, all three members, Wykoff, Mullenburg, and Brown, said things that the others in the conversation would have perceived as inappropriate toward Williams. No member of the group is willing to say they were the one who initially brought up Williams' sexual preference in the conversation. Each member of the group claims they were the one attempting to stand up for Williams and tell the other members to stop talking about his sexual orientation."

59. The Report was sent to Lt. Colonel Scott Hernandez as the final reviewing authority over IA, copied to Chief James Wolfinbarger, Lt. Colonel Anthony Padilla, and Major Steve Powell. Lt. Colonel Hernandez signed the report on June 20, 2009.

60. After the investigation concluded, Major Meredith informed Complainant that the IA investigation had concluded that Complainant's troopers were more at fault than Sgt. Brown.

61. Both Sgt. Mullenburg and Corporal Wykoff informed Complainant that they felt they had been treated by Sgt. Keeton and Captain Elder as if they were being investigated for wrongdoing, instead of Sgt. Brown. They indicated they would never do the right thing again, or words to that effect.

2009 Appointment to Operational Development Section by Chief Wolfinbarger

62. In late February 2009, James Wolfinbarger became Chief of the Patrol. Soon after his appointment, the Chief determined he needed fresh leadership in the Operational Development Section (ODS) at Headquarters. The ODS Captain performed a political, strategic, and policy role for the Patrol, working closely with the Chief, Lt. Colonels, other command staff, the Governor's Office, and the Joint Budget Committee.

63. In April or May 2009, Chief Wolfinbarger appointed Complainant to command ODS because he felt Complainant possessed the leadership skills for the position. Complainant did not want to work in ODS because he enjoyed the law enforcement role of being a "road commander." He nonetheless accepted the appointment, in which he directed the work of five uniformed and two civilian staff.

64. Complainant assumed his new position as the commander of ODS on July 1, 2009.

65. During Captain Williams' tenure at ODS, he initiated a support group for women in the Patrol. He was concerned there was no such group for gay Patrol members, but did not initiate one because it would have potentially drawn attention to his own status.

66. In 2009, a gay rights organization in Colorado Springs presented a law enforcement forum. The local chiefs of police, sheriffs, and others in law enforcement were invited and did attend. Captain Williams received the invitation as ODS commander, and asked his supervising Major, James Colley, if he or another Patrol representative could attend. Recently, a Patrol member's treatment of a gay traffic offender had resulted in a bias complaint. Major Colley said no, it was a trap and the group wanted to corner or entrap the Patrol into making a statement about the incident. Complainant met with the Major in his office and informed him that he could easily avoid discussion of the bias complaint, and Sgt. Stevenson said he would go. Major Colley said no. After Complainant declined the invitation, the group asked again. He asked Major Colley again, but the request was denied.

Complainant's Decision to Leave the Patrol

67. Complainant has had a life-long dream of becoming a helicopter pilot. As he became increasingly unhappy in the ODS commander position because he missed the law enforcement aspect of the Patrol, he focused more on pursuing his interest in flying.

68. One of Complainant's tasks in ODS was to oversee the implementation of the furlough process at the Patrol. At a Captains' breakfast at which the captains were expressing their frustration over the furlough process, Complainant corrected a misunderstanding about furloughs that had apparently originated through a statement of a Lt. Colonel.

69. After that meeting, one of the Captains informed the Lt. Colonel about Complainant's statement. The Lt. Colonel then confronted Complainant angrily about it in front of Major Colley.

70. Complainant asked the Chief to transfer him back to a road commander position. The Chief asked Complainant to meet with him over coffee and apologized on behalf of the Lt. Colonel who had yelled at Complainant. During this meeting, the Chief denied Complainant's request for a transfer.

71. Soon thereafter, Complainant made arrangements to attend helicopter flight training school, and decided to leave the Patrol.

72. Major Colley and Lt. Colonel Scott Hernandez signed Complainant's last evaluation at the Patrol in February 2010. The narrative section states, "Captain Williams was asked to transfer into the Operational Development Section as a result of some organizational structure and leadership changes within the Patrol. Due to his past experience with field command as well as specialty expertise, Executive Command level staff felt he would complement and enhance the Operational Development Section's goals while providing new leadership philosophy. During his short tenure in ODS, Williams has adjusted well to the vast challenges of taking command of such a critical operation."

73. The narrative continues, "Captain Williams has proven to be a valuable leader as a Troop Section Commander and has demonstrated his commitment through his high quality of work product and results achieved within ODS. While it was a significant adjustment for Captain Williams, he was able to quickly gain the knowledge and skills to be successful in a very challenging time in the agency. Captain Williams assisted in making the leadership change within ODS more seamless during his time in the section. One of his strongest attributes is the ability to confront personnel when needed and to address any challenges head on. Regularly demonstrating a 'no nonsense' approach to personnel management, Williams continues to excel in maintaining accountability and expectations of personnel under his command."

74. The narrative concluded, "Captain Willliams has had a remarkable career thus far but has chosen to pursue another occupation, something he has desired for some time now. He will be missed and I am confident he will continue to be successful in his future endeavors."

75. The day before Complainant submitted his written resignation letter, he spoke with his direct supervisor, Major Colley. They discussed the fact that he was no longer working in a law enforcement role and was not happy in his new role.

76. Complainant and Major Colley discussed Complainant's career with the Patrol, and the Major bet Complainant $100 he would be back at the Patrol within three months. They discussed the process of reinstatement, and the Major stated that it would be a streamlined process involving no background investigation or polygraph, just paperwork.

77. Major Colley informed Complainant that if he returned it would probably be as a Trooper, not a Captain.

78. Majors are the delegated appointing authorities who customarily exercise authority over hiring and firing.

79. Based on this information from Major Colley, Complainant believed that it would be easy to return to the Patrol if he sought reinstatement as a Trooper. Complainant was

unaware that the Chief has sole discretion over reinstatement decisions and that Majors derive their appointing authority from the Chief via delegation.

80. On December 3, 2009, Complainant gave written notice of his intent to resign from the Patrol. Chief Wolfinbarger asked Complainant to remain on duty during the transition to a new Captain of ODS, and Complainant agreed to do so. Complainant spent at least a month training his replacement.

81. At the exit interview with Major Colley, the Major repeated his statement that Complainant could reinstate without a background investigation or polygraph, and informed Complainant that that he was eligible for reinstatement.

82. On the Resignation Interview Form, Complainant stated that he would consider applying for reinstatement to the Patrol in the future, and that he was not leaving the Patrol because of a loss of desire to do law enforcement work.

83. The Patrol threw a party for Complainant in recognition of his contributions to the Patrol. A party of this type is unusual for the departure of a captain. At the party, Chief Wolfinbarger gave a speech praising Complainant's distinctive service for the Patrol.

84. Complainant was universally regarded at the Patrol as having high moral and ethical standards.

85. Complainant's last day at the Patrol was February 12, 2010.

86. Complainant attended flight training school. After successfully passing the background investigation, which included a polygraph examination, Complainant became a Reserve Police Officer in Brighton, Colorado.

Patrol Reinstatement Policy

87. Patrol Policy 208.03, Reinstatement: Uniformed and Civilian Members, effective January 1, 2010, establishes the following administrative procedures for consideration of reinstatement candidates:

- Former employee submits a letter to the Chief requesting reinstatement;
- Former employee receives application packet, completes and returns to Human Resource Services (HRS);
- HRS reviews request, verifies eligibility for reinstatement, arranges polygraph and background investigation, forwards completed polygraph and background to Chief;
- Chief or designee reviews former employee's request, application packet, polygraph and background, personnel records, and may conduct a personal interview;
- The Chief's decision to reinstate or deny reinstatement is final.

Complainant's Application for Reinstatement

88. Complainant missed the work and camaraderie of the Patrol. On April 26, 2010, he sent an email and attached letter requesting reinstatement to Chief Wolfinbarger.

Complainant stated in his email, in part, "It was a hard decision to make to leave the department after 12 years, and has been harder after being separated. While the opportunity has given me the ability to progress much quicker in my flight training it quickly became evident how much the Patrol is part of my life. I greatly miss being part of this organization and am asking for the opportunity to come back onto the Patrol and be part of this department."

89. Chief Wolfinbarger called Complainant to discuss his request for reinstatement and they met for thirty minutes. The Chief informed Complainant he would reinstate as a Trooper, not a Captain, he would be paid at the maximum, and would have to go through the typical background investigation, including the polygraph exam. Complainant responded that Major Colley had informed him that reinstatements after such a short absence do not have to go through the background check. The Chief responded that he would check with Major Colley on that and get back to him.

90. Major Colley informed Lt. Colonel Hernandez that Complainant was questioning whether he needed to undergo the background investigation and polygraph, and requested to know the Chief's policy on this issue. Lt. Colonel Hernandez discussed the issue with the Chief and confirmed that it was the Chief's position that the Patrol would require a full background investigation with polygraph of all reinstatement candidates. This policy was a departure from the previous Chief's policy.

91. On April 30, 2010, Chief Wolfinbarger sent Complainant a letter stating in part, "Pursuant to successfully passing a background check and polygraph, it is my decision that you be reinstated as a State Patrol Trooper. However, the effective date of your return will be determined after successfully passing the background and polygraph. As soon as I receive word that you have passed the background and polygraph, I will send you a letter with your report in location, date, and salary. Please note that all reinstated employees will be subject to a one-year probationary period beginning with their report in date. If you should have any questions, please contact Ed Gietl, Human Resource Services Director" of the Patrol.

Background Investigation; Self-Certification Form

92. The IA conducts the background investigation of all candidates for employment with the Patrol, which includes a routine reference and criminal background check, a Self-Certification Form, a background interview, and the polygraph examination.

93. Complainant filled out the Self-Certification Form, which contains detailed questions regarding illegal substance abuse, driving history, employment history, and criminal history.

94. When Complainant read one of the questions, he remembered having inadvertently seen a pop-up video of a young couple having sex. The question read, "Since the age of eighteen, have you ever been involved in the making, viewing, possessing, marketing, or distributing of child pornography in any form?" Approximately two years prior to that time, Complainant was viewing pornography on the internet at home on a website consisting of uploaded videos created by viewers. When Complainant came across a video of a young couple engaged in sex, he felt that they looked underage. After a few seconds he closed the video and flagged it on the website as being a violation of the site policies. Complainant believed that he may have inadvertently viewed child

pornography in this instance, even if just for a few seconds.

95. When Complainant handed in his background forms to HRS, Ms. Carol Pritchard, Selections Manager, commented to Major Colley that Mr. Williams should not have to go through the background because it had not been done in the past. Major Colley responded, "new Chief."

96. Complainant informed Major Colley he had a concern he was not sure how to handle. He then relayed the information regarding the pop-up video. He asked if he should check the answer as "yes." Major Colley said he should check "yes," just be honest and it shouldn't be a big deal if it was an inadvertent and isolated incident. Complainant checked "yes" on the question.

Background Interview

97. IA Trooper Terri Herwig performed the customary background check on Complainant, which included criminal history. She checked Complainant's references at the Brighton Police Department, which were excellent.

98. Trooper Herwig knew Complainant's superb reputation at the Patrol and had worked with him on an investigation when he worked in Frisco. To complete her background investigation, she walked through the Patrol Headquarters cafeteria and conversed with several Patrol members who had worked with Complainant. Everyone she spoke with said he had an excellent reputation and had made a very positive impact on the Patrol.

99. On May 19, 2010, Complainant participated in the Background Investigation Interview with Trooper Herwig. During this interview, he informed her that he had been in helicopter flight training school to obtain his commercial and instructor helicopter flight certifications, his training was geared to law enforcement, and he would ultimately be teaching flight students. He said he planned to continue flying after being reinstated to the Patrol, because working four ten-hour shifts a week would accommodate that plan.

100. Complainant explained that he loved the flying but had been surprised by how much he missed being a Trooper. He stated, "I still got to chase my dream. I did it, I went for it and I found out that I really love it and that I really missed who I was as a Trooper."

101. Trooper Herwig asked Complainant to tell her about answering "yes" to the question about child pornography. He stated it was an embarrassing situation, and he had told Major Colley he didn't know for sure if he did or didn't, but he felt that the couple didn't look old enough, and maybe it was because he was getting older and people are looking younger to him. He said he had informed Major Colley, "To answer this question honestly I would say, in my mind I believe I saw in this one incident, this. You know nothing confirmed it. I didn't seek it out. I didn't intentionally look for it. I stumbled upon it, which I know other buddies of mine have said, oh yeah, I've clicked on here and it's like holy crap that's not what I was going for. I watched it for like ten seconds and then my brain is like, oh god."

102. He explained that when he read that question on the Self-Certification, "I got to that and then my brain just automatically snapped to that one instance two years ago and I remember the site name." He said he had flagged it for removal and two hours later it had been removed from the site for violation of their terms and conditions. He explained

that the site was like YouTube or Facebook, where people download their own videos, but "apparently they don't check it before, because boom, it's there." Complainant also explained that he had learned some of the law governing child pornography as a city police officer.

103. Trooper Herwig observed no deception in Complainant as he spoke to her. During their discussion, she mentioned that many applicants had seen child pornography pop-ups. She mentioned that one individual passed the polygraph test at the Patrol and was later found to have serious theft issues.

Description of a Polygraph Examination

104. Polygraph examinations consist of three distinct parts: the pre-test interview; the instrument portion, in which physiological changes are measured; and the post-test interview. A typical polygraph exam takes two hours. The majority of the time is spent in the pre-test interview.

105. Pre-test Interview. The purpose of the pre-test interview is two-fold: 1) to identify disqualifying acts that will eliminate the candidate from consideration for a Patrol position; and 2) to review and discuss past actions before the instrument portion, in order to help the examinee pass the test.

106. During the pre-test interview, the examiner explains how the machine works, discusses countermeasures, and reviews the exact questions to be asked in the four subject areas to be covered: criminal activity; drug use; unlawful sexual conduct; and truthfulness in the application materials.

107. The pre-test interview consists primarily of a candid, exhaustive, and detailed discussion of the examinee's personal history in the four categories. Examinees discuss illegal acts in nearly every pre-test interview. Most illegal acts revealed in these discussions, such as traffic violations, drug use early in life, small thefts early in life, and prostitution in other countries where it is legal, are not "disqualifying" conduct that would eliminate the examinee from consideration for a Patrol position.

108. Disqualifying acts consist primarily of serious crimes such as felonies or misdemeanors which preclude an individual from carrying a firearm, and other serious crimes that impact the character of the individual. Domestic violence is a disqualifying offense.

109. Instrument Portion. In May 2010, the Patrol changed the type of polygraph test it used to the "directed lie" test. After the examinee is connected to the monitors, the polygrapher directs the examinee to lie, in order to test the equipment. Then, the actual questioning begins in the four areas, with each question being asked three times. A sample is, "Are you now concealing unlawful sexual activity?" Polygraphers have the discretion to modify the questions to account for pre-test admissions, as follows, "Other than what we have discussed today, are you now concealing unlawful sexual activity?"

110. The instrument portion of the polygraph can produce three possible results: no significant response; inconclusive; and significant response. The only result deemed to be a "failure" is a significant response (sometimes called deception indicated). An inconclusive result is deemed to be a "pass."

111. Post-Test Interview. The post-test interview occurs when an examinee has a significant response to the instrument portion of the test.

112. If an examinee makes a new admission in the post-test interview and it is a disqualifying admission, the examinee is not hired.

113. If an examinee makes a non-disqualifying admission in the post-test interview, the credibility of the examinee has been called into question. The examiner has discretion to ask a revised question (breakdown test) if deemed appropriate.

114. If the examinee does not make new disclosures in the post-test interview after showing a significant reaction, it is impermissible not to hire that examinee based on the significant reaction alone. There are no conflicting answers upon which an employment decision could be based.

Discretion of Polygraphers to Perform Breakdown Tests

115. In May 2010, Patrol polygraphers possessed and had previously exercised the discretion to modify a question and ask the revised "breakdown" question if an examinee had a significant reaction.

Recent Failed Polygraph Tests and Hiring Decisions

116. As commander of IA, Captain Elder supervises the polygraphy unit and all polygraphers, and is responsible for directly informing the Chief of all results of polygraphs and background investigations. Captain Elder is not trained to administer polygraphs and is not a polygrapher.

117. In spring 2010, Sgt. Keeton was the senior polygrapher at the Patrol.

118. On February 3, 2009, Patrol Sgt. Tobias conducted a pre-employment polygraph exam on a new-hire Trooper Cadet candidate. The candidate had a deception indicated result on the polygraph. The Patrol hired that candidate.

119. On February 19, 2010, Sgt. Dean Paxton conducted a pre-employment polygraph exam on a new-hire candidate for a Homeland Security Civilian position. The candidate had a significant reaction to the polygraph test. The Patrol hired that individual.

120. On February 24, 2010, Sgt. Keeton conducted a polygraph exam on a Trooper reinstatement candidate. The former Trooper had a significant reaction to the polygraph test. The Patrol hired that candidate.

121. None of the above candidates was identified as being gay.

122. The majority of Patrol candidates who failed the polygraph exam during 2009 and 2010 were not hired.

Law Enforcement Hiring Standards Governing Use of Polygraphs

123. All Patrol polygraphers attend the Texas Department of Public Safety Polygraph School, including Sgt. Paxton and Sgt. Keeton, who administered and scored Complainant's

polygraph. At the Texas Polygraph School they learn the standards that govern law enforcement utilization of polygraph test results in hiring decisions. Those standards include the following:

- A polygraph is "an instrument that records certain physiological changes in a person undergoing questioning in an effort to determine truth or deception. A polygraph simultaneously records a minimum of respiratory activity, galvanic skin resistance or conductivity, and cardiovascular activity."

- Polygraph examinations shall not be used as the sole determinant of suitability for employment;

- Polygraph examinations or other instruments for the detection of deception should be used only as an investigation aid, if at all. (International Association of Chiefs of Police (IACP) Law Enforcement Policy Center's Model Policy on Polygraph Examinations and Commission on Accreditation for Law Enforcement Agencies, Section 32.2.6);

- Polygrapher opinions concerning test results of significant reaction or deception indicated are only an opinion of a physiological response on the examinee's part and nothing more. If there is a post-test admission that conflicts with previous statements of the examinee, then the hiring authority may have reason to be concerned about the truthfulness, honesty, and character of the examinee warranting further investigation.

124. Complainant's expert witness in law enforcement hiring practices, including the use of polygraphs, Dan Montgomery, verified that the above standards govern the use of polygraph test results in law enforcement hiring decisions. Mr. Montgomery was credible and persuasive. He has a fifty-year career in law enforcement, twenty-five of which was in the position of hiring authority as Chief of Police in Westminster, Colorado. Mr. Montgomery holds an M.S. Degree in Criminal Justice Administration from the University of Colorado, Denver and is past President of the Colorado Association of Chiefs of Police and the Denver Metropolitan Association of Chiefs of Police.

Patrol Polygraph Policy

125. The Patrol Polygraph Examination Operational Procedures Policy 210.01, in effect in 2010, stated:

- Patrol polygraphers must become a member of a nationally recognized polygraph examiners association and are "required to adhere to standards and bylaws established by the American Association of Police Polygraphists (AAPP)."

- "Examination Purpose: A polygraph examination is an aid to, but not a substitute for, an investigation. Results may be used to verify the accuracy of statements or to obtain additional facts concerning an investigation."

- "The examiner will be responsible for preparing all questions used in the examination. Prior to the examination, each test question will be reviewed with the person being tested."

- "The following issues are not to be used as a sole basis of an investigation; therefore, no questions are to be formulated or asked pertaining to these issues unless so directed by the court or the State's Attorney General's Office.

    - Religious beliefs or affiliations
    - Beliefs or opinions regarding racial matters
    - Political beliefs or affiliations
    - Beliefs regarding union or labor organizations
    - Sexual preferences."

- Pre-employment Examination – Guidelines. "A pre-employment polygraph examination is required of any applicant being considered for a full-time, permanent part-time, temporary or a former member returning to duty following a formal separation, such as resignation, retirement or reinstatement." "All pre-employment polygraph examination results are confidential and will be maintained in the subject's application file in Human Resource Services (HRS)."

Complainant's May 26, 2010 Polygraph Exam: Pre-Test Interview

126. On May 26, 2010, Complainant attended the polygraph exam, administered by Sgt. Paxton.

127. It was not unusual for one other polygraph examiner to observe the polygraph exam on a short-circuit television screen in the Observation Room. Sgt. Keeton observed the polygraph exam of Complainant.

128. Captain Elder also observed the polygraph exam of Complainant with Sgt. Keeton. During his tenure in IA, he observed no more than five polygraph exams.

129. This was the first and only time that Sgt. Keeton and Captain Elder jointly observed a polygraph. Complainant was unaware of their presence.

130. Prior to Complainant's polygraph, Major Colley informed Captain Elder that Complainant had discussed the child pornography issue with him and that it was an issue to address at the polygraph. Captain Elder informed Sgt. Paxton of this.

131. Sgt. Paxton started by indicating they would cover four main topics: criminal activity; drug use; unlawful sexual conduct; and whether Complainant was truthful on the application. He informed Complainant that all he needed to do to pass was provide 100% truth and 100% cooperation. He described the form of the questions during the instrument portion of the test as, "Are you now concealing any unlawful . . . .?"

132. After discussing countermeasures and other preliminary issues, Sgt. Paxton had Complainant sign the Polygraph Consent Form and Notice of Disqualification Criteria. The Form stated in part that the results of the polygraph exam "will typically be disclosed to Human Resource Services, the Appointing Authority, and the Patrol background investigators." It also stated that the candidate will be disqualified if he refuses to answer oral or written questions posed by the polygrapher, unless such questions are contrary to rule or law.

133. Sgt. Paxton stated to Complainant, "Human Resources, the Major, and the Background Investigator are the only ones that are privy to this information."

134. Sgt. Paxton began the substantive discussion by stating that everyone who takes a polygraph exam has that one issue they don't want to have to talk about, that is embarrassing. He asked, "What is that thing for you?" Complainant responded, "The thing for me is what Terry [Herwig] and I covered with that second- or third-to-last question on the self-assessment thing about viewing, distributing, blah-blah-blah the child pornography stuff. She asked me about, it, which, that was greatly embarrassing. It's like talking to my mother about it. Basically, online, on the internet, about two years ago, went to a site. It's called Xtube.com. Clicked on a video, they didn't say really what the video – it's a site where people upload their own stuff. So it's not, like, commercial stuff. People load it, and, apparently, the site doesn't really check what they load on there. So I clicked on it, watched it for about ten seconds, and nothing said that they were underage. But, in my mind, they looked probably, I'd say 14, 15 years old. So clicked off it, flagged it. Later on, it was taken off the site as a violation of terms and conditions and such."

135. Sgt. Paxton asked for all of the details, the whole story. Complainant reiterated it was Xtube.com and that he was embarrassed talking to Trooper Herwig about viewing pornography. Paxton asked why. Complainant said because she was female and older and "I looked at her more as a mother figure." He also explained that now that he had told her, the polygrapher would know, Captain Elder would know, Major Colley would know, "I know they all know that guys probably look at porn in some time in their life." Sgt. Paxton responded, "Absolutely."

136. Complainant continued, "And I know a lot of buddies who've clicked on stuff, had stuff popped up that they didn't think was legal. They're like, holy crap, and they shut it down. I know I'm not a rarity." Sgt. Paxton said, "Absolutely."

137. Complainant continued, "But, still, I see myself as such a vanilla person. It's like, oh. And next time I see the Chief, it's like, 'Oh, you pervert, sitting at home with your cats looking at porn or whatever,' so . . ." Sgt. Paxton responded, "Okay. Well, all I got to say is the Chief had to do a polygraph, too. . . He has the utmost respect for anybody that's willing to go through the process."

138. Sgt. Paxton also stated, "Yeah, absolutely, everybody has seen porn . . . no problem."

139. Complainant explained that he had told Major Colley about it, maybe he was just "over thinking," but they looked too young. He said that although nothing on the website said they were under age, in his mind they looked too young and when he saw the question about "viewing" child pornography it immediately came to mind. He said, "I was like, yeah. I think I did. . . . It wasn't intentional. I wasn't searching for a word . . . . It just popped up and I shut it down and flagged the thing." He explained that he had gone to the main page where the newest videos are and clicked on whatever caught his eye.

140. Sgt. Paxton asked, "On a scale of one to 100, how sure are you that they were underage?" Complainant responded, "Well, I'd say 100 percent, because that's the only reason I'm bringing it up. Because when I was filling out that [Self-Certification form] at home, I thought about it, thought about it, thought about it. It's like, maybe I can convince myself that they were 18. But I'm playing it back in my mind. I'm like, no, God

dang. That's why I'm sticking on this question. That's why it's bothering me, because my mind believes it is. So I would say 100 percent, so much to where I flagged the thing."

141. Sgt. Paxton asked what he meant by "flagging" it. Complainant explained that at the bottom of the screen he made a comment to alert whoever runs or oversees the site that the video had violated the terms and conditions of Xtube. He had seen other videos flagged in this manner on the site.

142. Complainant stated that he was so concerned about just having inadvertently seen the video that he feared someone could track it. He cleared his internet search history and cleared the cookies. Sgt. Paxton asked if he reported it to any authorities and he said no, and in his experience as a local police officer there was nothing to report. He also discussed how the law had changed regarding the number of downloaded child pornography items that were illegal, "You can have, like, one kiddy porn thing on your hard drive. It's like, no, illegal's illegal, whether it's three or one."

143. Sgt. Paxton then asked, "Do you have any child porn at all, in your possession, or have you ever had child porn in your possession?" Complainant responded, "No, not at all. And that computer, I scrubbed it clean so much that I think I killed it."

144. Sgt. Paxton then asked Complainant what else he was concerned about. Complainant responded, "The only other concern I had was, and it didn't pop up on the questions, about, have you ever been a pimp? Have you ever been a prostitute, stuff like that? In Thailand, I was with somebody during massage that ended in sexual contact." Sgt. Paxton responded, "Okay. The proverbial happy ending?" Complainant said yes, "It didn't start out to be that way. It was just a regular two-hour massage. So there was no money discussed. There was nothing like that, until, at the end, and then I just gave the person a good tip."

145. Complainant explained that he goes to Thailand once a year or every other year to get away from the cold and has one or two massages a day because it is so cheap. Complainant had spent long periods of his childhood in Asia. He said, "Never had any issues before, anybody trying anything. This one was about 10:00 at night, right across from the hotel. My buddy was hanging out at the hotel. He wasn't feeling good. And I said, hey, I'm going to run across the street, get a good massage. Ninety-nine Baht for an hour, which is $2.80. Yeah, you got to get it in while you can, because it's so cheap." He continued, "Just doing the whole massage, front, back, and then, embarrassingly, it turned into masturbation." Sgt. Paxton responded, "Okay." Complainant said, "Yeah."

146. Sgt. Paxton then asked, "Okay, a female, male?" Complainant responded, "Male." Sgt. Paxton said, "Masseuse?" Complainant responded, "Yeah." Sgt. Paxton asked, "What was his part? So, you said you were masturbating?" Complainant responded, "No, he was masturbating me." Sgt. Paxton confirmed, "So he was giving you a hand job?" Complainant said, "Yeah." Paxton said, "Got it," and explained at first it had sounded like Complainant was masturbating while he got the massage. Sgt. Paxton then said, "I'm like, okay. Hey, there's no judgments in this room."

147. Complainant felt he had to answer the question about the gender of the masseuse because the Polygraph Consent Form required him to answer all questions asked.

148. Sgt. Paxton had never asked an examinee the gender of a sex partner during a polygraph. Sgt. Keeton has never asked the gender of a sex partner while administering a polygraph examination for the Patrol.

149. When Sgt. Keeton heard Complainant answer the question about his masseuse being male, he concluded that Complainant was gay. Captain Elder confirmed his suspicion that Complainant was gay.

150. When Complainant truthfully answered the question about the masseuse being male, he felt he was disclosing his sexual orientation to the Patrol for the first time after keeping it private for twelve years. This disclosure under duress made him feel exposed, vulnerable, and frightened because he believed his sexual orientation would become public knowledge at the Patrol, and nothing is confidential at the Patrol. He also feared negative repercussions because of the bias against gays he had experienced at the Patrol.

151. Complainant then discussed prostitution in Thailand. He stated that he did not believe the sex with the masseuse was prostitution because they did not discuss money. He said, "But once we were all done, I gave him $1,000 Baht tip, which is equivalent to, I think, $25 U.S." Sgt. Paxton said, "Okay." After questioning, Complainant stated that nothing was agreed upon before it occurred, and that the reason the masseuse knew it was okay to masturbate him was because Complainant didn't tell him to stop. He said, "I could have stopped him. It's kind of the heat of the moment kind of thing. It's like here we are and I know this is okay over here and never done this. So, get the full experience, I guess."

152. Sgt. Paxton responded, "Excellent, yeah. And there's obviously going to be – the question on the test is going to be, are you now concealing any unlawful sexual behavior?" Complainant said, "Right." Sgt. Paxton then said, "Now, obviously, prostitution's unlawful here, so . . ." Complainant said, "Right." Sgt. Paxton said, "Whether you're in Thailand or not, you're doing the exact right thing of discussing those things ahead of time. That would be, you're not concealing." Complainant said, "All right, but that question is still no, because it wasn't unlawful." Paxton responded, "Right. It wasn't unlawful there. And that's my point. So then, I want you to be 100 percent sure that you're not concealing anything."

153. Sgt. Paxton then asked Complainant if he was sure it's not illegal in Thailand. Complainant said he was absolutely certain, it was "just a run of the mill massage place" across the street from his hotel, a couple of miles from the red light district. Sgt. Paxton clarified whether it was just one time. Complainant said yes, about four years ago.

154. Sgt. Paxton said he had seen something on cable television about child pornography in Thailand and asked Complainant if he had ever had sex with children. He answered no.

155. Sgt. Paxton and Complainant then discussed the other areas on the test, during which Complainant admitted to having stolen $5.00 from his employer at the age of twelve, to having tried marijuana once on his 18th birthday, and to having kept a Patrol hat after resigning with the knowledge of his supervisor.

156. As Sgt. Paxton summarized the information discussed during the pre-test interview with Complainant, they had the following exchange. Sgt. Paxton: "Xtube.com, you came

across a video that you are 100-percent sure was child pornography?" Complainant, "Yeah." Sgt. Paxton: "A couple kids, under 18, engaged in sex, or sex acts, whatever, we didn't – talk about what it was, but it doesn't matter." Complainant, "Yeah, it was sexual intercourse." Paxton: "Marijuana, last time was your 18th birthday?" Complainant: "um-hmm" Paxton: "Went to Thailand, ended up participating in prostitution, which is legal?" Complainant, "Right." Paxton: "And that was four years ago, maybe October/February, between '05 and 06?" Complainant, "Yeah." Paxton: "And nothing since then, no prostitution in the States?" Complainant, "Oh god no."

157. Complainant did not make disqualifying admissions during his pre-test interview.

158. Prostitution was not illegal in Thailand in 2006 unless it was done "in a promiscuous manner," meaning it is acceptable in a private setting. Solicitation of a prostitute was illegal only if done openly and "shamelessly" in public, or causing a nuisance to the public. The Colorado counterpart law in effect in 2006, patronizing of a prostitute, C.R.S. § 18-7-205, was a Class 1 petty offense for which the statute of limitations was six months. Complainant did not violate either of these laws.

Instrument Examination

159. Sgt. Paxton connected the polygraph instrument monitors to Complainant. The "directed lie" type of polygraph examination was new to the Patrol as of May 2010. When Sgt. Paxton performed the "directed lie" portions of the exam on Complainant, Complainant became confused at times.

160. Sgt. Paxton did not modify the unlawful sexual conduct question for Complainant by asking, "Other than what we have discussed here today, are you now concealing any unlawful sexual conduct?" When Complainant was asked the question, he thought about the fact that he had just revealed a sexual encounter with another man and he had concealed his true sexual orientation from the Patrol for over twelve years. Complainant decided he was unwilling to make any additional statements about his sexual orientation that would enable Sgt. Paxton to tell others he had "admitted to being gay" during the polygraph test. Complainant had a significant reaction to this question, which, like all of the questions, was asked three times.

161. Complainant's significant reaction to the polygraph does not indicate deception, untruthfulness or an attempt to conceal information regarding illegal sexual conduct.[1]

Post-Test Interview

162. Immediately after the test was completed, Sgt. Paxton stated, "All right, how was that?" Complainant responded, "All right, when you asked the sex question, I still feel that internal zing." Sgt. Paxton responded, "Yeah, you definitely did. I was curious if you could feel that." Complainant said, "Oh yeah, because just every time you asked I was like, all right, dummy. You know the answer to this. It's like, why is it bothering you? Oh, yeah. I felt it inside, just a little zing to the chest area."

163. Sgt. Paxton said, "There has to be something that you're worried about that you didn't tell me about," and asked what it was. Complainant said, "No, because I don't have a

[1] See Admissibility of Polygraph Evidence in Procedural Background section above.

problem throwing it all out on the table." Complainant explained that he was "relating that question back to the internet thing. Am I not thinking about the right thing when you're asking that question?" Sgt. Paxton responded, "I don't know." They continued to discuss what had occurred.

164. During the post-polygraph interview, Sgt. Paxton stated to Complainant, "So let me ask you this. First of all, a failed polygraph doesn't disqualify you immediately. But there has to be an explanation for why you failed, and why I'm seeing a significant reaction. So, what did you think about when I asked you the question, are you now concealing any unlawful sexual conduct." Complainant explained that even though he knew he had no intent to view child pornography, it was illegal and he was worried about it.

165. Sgt. Paxton asked Complainant if there was anything else he could have done to help him pass the polygraph, and Complainant said there was not. He was having an internal dialogue about not wanting to disclose his homosexuality and have it circulated throughout the Patrol.

Polygraph Report

166. After the polygraph exam ended, neither Sgt. Keeton nor Captain Elder discussed with Sgt. Paxton his apparent violation of Patrol Polygraph Policy 210.01, which prohibits questions pertaining to sexual preference. Neither of them counseled or held Sgt. Paxton accountable for his error.

167. Captain Elder, Sgt. Keeton, and Sgt. Paxton did not explore or consider whether Complainant's truthful answer revealing a homosexual sexual encounter may have affected Complainant's significant reaction.

168. Sgt. Paxton issued a one-page Report of the Polygraph Examiner stating in part:

- Observations: Williams arrived an hour early for his polygraph exam and wore a suit. His demeanor was friendly, talkative, and overly nervous.

- Pre-Test Interview: Williams admitted to viewing child pornography one time, unintentionally, approximately two years ago. He told me he was 100% sure it was child pornography. Williams admitted that he received sex during a massage in Thailand. He claimed that it was one time approximately 4 years ago. He denied requesting sex prior to the massage but paid a very large tip after the massage. Williams told me that prostitution is legal in Thailand. Williams admitted to keeping his hat after he resigned and told me that he did not have explicit permission but that he had told his supervision. (sic) Williams told me that he tried marijuana one time on his 18th birthday and that the last time he was around any illegal drugs, other than for law enforcement purposes, was 1994.

- Examiner's Findings: The applicant showed Significant Reactions (SR) to the relevant questions on the polygraph examination.

- Post-Test Interview: Williams made no significant admissions or changes. He claimed that he was thinking about the child pornography that he had already

disclosed.

169. Sgt. Keeton performed the quality control test on Sgt. Paxton's scoring of Complainant's polygraph test to assure the scoring of the significant reaction was accurate. Sgt. Keeton verified the significant reaction.

Herwig IA Background Investigation Report

170. Trooper Herwig was not asked to follow up on any issues covered in Complainant's polygraph exam.

171. On Thursday, May 27, 2010, Trooper Herwig issued a short memo to Chief Wolfinbarger summarizing the IA background investigation of Complainant. In the "POSITIVE" section she stated that Mr. Williams was a hard working, dedicated employee for the Patrol for over eleven years; he is self-motivated, knowledgeable and was instrumental in developing and implementing policies and procedures for the Patrol; he has excellent communication skills, received above standard reviews throughout his career with the Patrol, and was recommended for rehire on his Resignation Interview document completed by Major James Colley on February 10, 2010.

172. In the "NEGATIVE" section, Trooper Herwig stated that Complainant showed a Significant Reaction on his polygraph test, he answered yes to the Self-Certification question on child pornography, and he had explained to her that "he was viewing pornography on the internet and came across a video that appeared to have at least one young girl in the video that he believed was not an adult. Mr. Williams told me that he not only stopped viewing that video, but he also 'flagged' the video for its content. Mr. Williams told me that the video was later removed from the site."

173. Trooper Herwig continued her report by indicating that Sgt. Paxton's polygraph report "states that Mr. Williams disclosed the same unintentional viewing of child pornography two years ago to Sgt. Paxton. The polygrapher's report also states that Mr. Williams disclosed receiving sex in Thailand during a massage four years ago. Mr. Williams told Sgt. Paxton that prostitution is not illegal in Thailand. Sgt. Paxton noted that Mr. Williams made no significant admissions or changes during the post-interview portion of the polygraph session. Mr. Williams claimed that he was thinking about the child pornography that he had already disclosed to Sgt. Paxton."

174. In the "SUMMARY" section, Trooper Herwig stated, "Mr. Williams was an exemplary Trooper for his twelve year career with the Colorado State Patrol. Mr. Williams told me that it became evident to him that he can easily manage both his passion for flying and be a dedicated State Trooper at the same time. Mr. Williams told me that being a Trooper is in his blood, it is a part of his being. Mr. Williams is excited to get back on the Patrol and has made his reinstatement his priority."

Follow-up on Polygraph

175. Major Colley called Chief Wolfinbarger on his cell phone on the way home from work on May 26, 2010, to inform him of the results of Complainant's polygraph exam, including his admissions regarding the Thai masseuse and having inadvertently viewed child pornography on the internet. The Chief stated that he was not as concerned about the internet activity because it was self-reported and that it would be difficult to prove any

wrongdoing.

176. The Chief met with Captain Elder and Sgt. Paxton. They informed the Chief that Complainant had had the highest significant reaction to the illegal sexual conduct question that Sgt. Paxton had ever seen on the directed lie polygraph test. They stated that it was so substantial that they both felt, in spite of Complainant providing only minimal admissions, he was holding much more back.

177. Chief Wolfinbarger ordered Captain Elder to find out if it was acceptable to deny reinstatement based solely on the machine results of the polygraph test, on an expedited basis.

178. Captain Elder then ordered Sgt. Keeton to research on an expedited basis whether it was acceptable to deny reinstatement based only on a failed polygraph test.

179. Sgt. Keeton informed Sgt. Paxton that Captain Elder had ordered him to research whether the Patrol could deny Complainant reinstatement based solely on the machine results of the polygraph exam. Sgt. Paxton responded by reminding him that it was the best practice to not base hiring decisions solely on polygraph test results. Sgt. Keeton agreed, as he had received the same training at the Texas Polygraph School.

180. Sgt. Keeton did not obtain copies of or refer to the written policies that govern the Patrol and other law enforcement agencies' use of polygraph test results in hiring decisions, such as those of the American Association of Police Polygraphers (AAPP) or the International Association of Chiefs of Police (IACP).

181. Using Google as his search engine, Sgt. Keeton found the Los Angeles and Austin, Texas Police Department guidelines on use of polygraph test results in hiring decisions. Neither of these policies permits denial of hiring based solely on polygraph machine test results. Sgt. Keeton printed these two policies but did not give them to Captain Elder.

182. Sgt. Keeton found an Americans for Effective Law Enforcement (AELE) website and printed a six-page document containing old case summaries on polygraph examinations. The sections were: cases upholding mandatory use; cases rejecting mandatory use; admissibility of polygraph evidence; duty to bargain with union; other legal issues; other references. Sgt. Keeton printed this document but did not provide it to Captain Elder.

183. Sgt. Keeton found a 1996 Colorado El Paso County District Court opinion, *Law v. City of Colorado Springs*, in which the machine test results of the polygraph were used as the basis for denying an application for a Colorado Springs Police Officer position. The opinion upheld the failure to hire based on the polygraph test results.

184. On June 2, 2010, Sgt. Keeton called the attorney on the *Law* case in Colorado Springs, who agreed to speak with him. Sgt. Keeton informed the attorney that he worked for the Patrol and had been asked to find authority supporting a denial of reinstatement based solely on the machine polygraph test results. The attorney purportedly informed Sgt. Keeton that the unpublished trial court decision would support denial of reinstatement. The attorney faxed Sgt. Keeton a copy of the decision at approximately 10:00 a.m. on Tuesday, June 2, 2010.

185. Once Sgt. Keeton found the *Law* case, he stopped looking for additional authority.

186. Sgt. Keeton did not contact an attorney representing the Colorado State Patrol, the Colorado Attorney General's office, or the DPS Human Resources Section to obtain legal advice or guidance for his research.

187. Sgt. Keeton did not make notes on his research.

Sgt. Keeton Report to Captain Elder

188. On June 2, 2010, Sgt. Keeton called Captain Elder and informed him by telephone that his research indicated it was okay to not reinstate based solely on the results of a polygraph exam. Sgt. Keeton mentioned the *Law v. Colorado Springs* case and may have discussed his understanding of the case. He did not provide Captain Elder with any other information, written or oral.

189. Sgt. Keeton did not inform Captain Elder that the governing standard he and Sgt. Paxton learned at the Texas Polygraph School was to not deny reinstatement based solely on polygraph test results. He did not inform the Captain of the governing law enforcement standards and policies prohibiting denial of reinstatement based solely on polygraph results, or any contrary authority.

190. Captain Elder did not ask questions, did not request any notes or written material from Sgt. Keeton, and did not review any documents. Captain Elder did not inquire about the written standards of the Patrol, IAEA, AAPP, or other entities that govern polygraph administration and use of polygraph test results in law enforcement reinstatement decisions. Captain Elder did not consult an attorney for the Patrol or the Attorney General's Office.

191. Captain Elder was aware that this was the only time a reinstatement candidate at the Patrol was being denied employment based solely on the machine results of the polygraph test.

Captain Elder Report to the Chief

192. Captain Elder informed the Chief and Lt. Colonel Hernandez that it was permissible to deny reinstatement based solely on a failed polygraph exam.

193. The Chief did not direct anyone at the Patrol to visit Xtube or perform an investigation of Xtube in an attempt to verify or rebut Complainant's description of the site and what had occurred on the site.

194. Lt. Colonel Hernandez testified that he performed cursory research on the internet on the legality of prostitution in Thailand and determined that it was not legal. He did not describe the information reviewed and did not introduce the information as evidence at hearing. This issue was not mentioned in the June 2, 2010 call to Complainant advising him of the basis for denying reinstatement. Lt. Colonel Hernandez's testimony on this issue is given little weight.

195. Lt. Colonel Hernandez also testified that he called a former police officer in the Thai embassy in Washington, D.C., who informed him that "prostitution is illegal in Thailand." Mr. Hernandez did not identify the individual, did not indicate what Mr. Hernandez told

this individual about Complainant's conduct, and did not state whether the individual opined on the legality of Complainant's conduct.

196. No one at the Patrol requested or reviewed documents containing the actual Thai law defining prostitution in 2006.

Chief Wolfinbarger Decision

197. Chief Wolfinbarger made the decision to deny reinstatement to Complainant after he learned from Lt. Colonel Hernandez that it was permissible to deny reinstatement based solely on a failed polygraph examination.

198. The Chief's administrative assistant drafted the denial letter for his signature. The Chief then spoke to Lt. Colonel Hernandez and they decided that he should sign the letter.

199. Prior to denying reinstatement to Complainant, the Chief and Lt. Colonel Hernandez did not consult Patrol policies governing polygraphs and reinstatements, written standards on use of polygraph results in law enforcement hiring decisions, HR staff, or legal counsel.

June 2, 2010 Major Colley Call to Complainant

200. Complainant took the polygraph exam on Wednesday, May 26, 2010. Friday, May 28, 2010, was a furlough day. Monday, May 31, 2010, was the Memorial Day Holiday.

201. On Tuesday, June 2, 2010, Major Colley called Complainant at home to advise him that the Chief had decided not to reinstate him to the Patrol. The conversation consisted largely of the following exchange:

- Colley: The Chief asked him to call to advise him that the Chief had "made a decision based on the background and polygraph results that he is not going to reinstate you;"
- Complainant asked why;
- Colley: "You didn't pass the poly. I think the polygraph examiner was pretty clear with you on that."
- Complainant: "He was. But I was insistent on, that there was nothing I was being deceptive about."
- Colley: "Actually, there was. I think he told you that you failed the one question.
- Complainant: "Yeah."
- Colley: "That's the whole point. I'm not going to get into the details of it, but as far as the preconditional offer. Basically, in order to get reinstated you had to successfully pass the background check and polygraph. And until you were able to come back the letter stated very clearly that you had to successfully pass the background and polygraph. And once he received word that you had those then he would let you know on the reinstatement. And, because you didn't pass the polygraph, you know, they had not only the polygraph examiner, but they had a quality control check on it and there wasn't any question that there was something there in addition to what you had disclosed. . . . That's basically where it's at. It's up to the Chief, he doesn't have to reinstate anybody."
- Complainant: "I guess I'm just angry because I was not deceptive in any way. I

was so forthcoming I mean, on everything, to the point of embarrassment, revealing stuff that wasn't illegal and such. I think you guys know me well enough and that's not my character. If there's something out there, I throw it out there and that's what it is."

- Colley: "Well Brett if that was the only thing on your mind. I know enough about polygraph examinations to know, the training they undergo, and the fact is that had there not been something else that you didn't disclose, then you wouldn't have responded significantly the way you did after the disclosures that in fact you made. This isn't just a matter of 'Well I was thinking about this' and therefore you react. That's not the way it works. The bottom line is it's not whether or not . . . the issue is that you didn't pass the poly." "It's not a court situation, it's a matter of what's required as far as, just like anybody else that applies for the State Patrol. If there is something they're not disclosing, then there's an evaluation that occurs."
- Colley: "I've reviewed this myself, the Chief made the sole decision on this. But the bottom line is there's gotta be something there and I don't think anybody disagrees with that. You may not agree with that but that's his decision." "If you had passed that then that would have been fine. But he was pretty clear that you didn't pass."
- Complainant: "He was very clear. I explained I put everything out on the table, this is it, this is straight up, it's embarrassing but it's the truth."
- Complainant: "What recourse do I have?
- Colley: "You really don't have any recourse. There is no recourse for this process. There is no appeals process for a reinstatement."
- Complainant: "That's not right." [Major Colley said if he had rescinded his resignation he could have come back.]
- Complainant: "What was the change, what happened to where you and I talked, [you said] one year, no poly, no background, no nothing and all that happy stuff. And all of a sudden the winds changed."
- Colley: "What are you talking about?"
- Complainant: "The conversation I had at my separation meeting where you said yeah, I could come back in a year, there was no . . ."
- Colley, interrupting: "No, no, no, no. That's not the case. Any time you come back it's the Chief's discretion. In the past it was up to the Chief whether to put you through whatever." "Everyone that's come back goes through it with this new chief." "They've been doing at least some kind of a streamlined background." "The big question here is on the polygraph. It's a full blown polygraph just like any other preemployment. That's what they're doing now."
- Complainant: "I didn't mind the polygraph because I didn't have any concerns on it."
- Colley indicated the Patrol re-polygraphed all applicants after the hiring freeze was lifted and several applicants were not appointed based on behavior during the gap period.
- Complainant: "At the same time the Patrol admits that polygraphs aren't accurate. Both Sgt. Paxton and Terri [Herwig] both said people have gone through the polygraph showing no deception and . . ."
- Colley, interrupting: "I'm not going to go down that road with you."
- Colley: "But the bottom line is that he has chosen not to reinstate you based on the fact that you didn't successfully pass the background and the polygraph which he told you very clearly in his conditional letter which had to occur before

you would be reinstated. . . . He's pretty much got sole discretion when it comes to that."

202. During his conversation with Complainant on June 2, 2010, Major Colley did not mention any other reason for the decision not to reinstate Complainant to the Patrol.

203. On June 2, 2010, Lt. Colonel Hernandez signed and sent the letter to Complainant denying reinstatement. The letter stated, "Based upon your failure of the Colorado State Patrol reemployment background, it is my decision to not grant you your request to be reinstated to the Colorado State Patrol. I know leaving the Patrol was a difficult situation for you and that my decision will be disappointing. Yet I hope you will find another career path that will bring you personal satisfaction and reward."

204. Chief Wolfinbarger and Lt. Colonel Hernandez testified at this hearing that there were several reasons in addition to the polygraph test results for the decision not to reinstate Complainant. These include "the totality of circumstances," which encompasses his hesitation to take the polygraph; his participation in illegal prostitution; his admission of viewing child pornography; and his violation of the core values of the Patrol, "duty, honor, and respect." Their testimony regarding additional reasons lacks credibility as it conflicts with their early sworn discovery responses and Major Colley's statements to Complainant on June 2, 2010, the day the decision was made. They also testified that because Complainant admitted to inadvertent viewing of child pornography and had a significant reaction on the illegal sexual conduct question, they feared placing Complainant on the road alone with the public. This testimony lacks credibility because they failed to conduct an investigation into this issue prior to denying reinstatement.

Major Colley Consultation with Human Resources Director

205. After Complainant was denied reinstatement, Major Colley called Mr. Ed Geitl, HR Director, to request a meeting. The Major was concerned about any exposure he may have regarding Complainant's assertion that he had promised him reinstatement within a year without a background or polygraph, and sought Mr. Geitl's opinion. Mr. Geitl explained that the statement would not be unusual, and he had never heard of an employer being forced to hire a candidate based on a random statement. Mr. Geitl said that the Major should be okay.

Correspondence by Complainant to Patrol; Follow-up

206. On June 11, 2010, Complainant's attorney sent a letter to Lt. Colonel Hernandez asserting that the decision to deny reinstatement was due to illegal discrimination based on sexual orientation. The Chief and the Department Executive Director were copied on the letter.

207. Lt. Colonel Hernandez learned from Captain Elder that a question had been asked during the polygraph exam that may be the subject of the allegation in the attorney's letter. Lt. Colonel Hernandez listened to the audio recording of the polygraph exam and heard the question regarding the gender of the masseuse.

208. Lt. Colonel Hernandez did not consult the Patrol polygraph policy, anyone in IA, or the Patrol's attorney about whether the question regarding the gender of the masseuse violated Patrol polygraph policy. He did not consider whether the question may have

had an effect on Complainant's response to the polygraph test.

209. No one at the Patrol discussed the possibility of giving Complainant a breakdown test or re-test of the polygraph exam.

210. On request, Trooper Herwig wrote a memo to Captain Jon Barba on June 16, 2010, regarding whether Complainant's sexual orientation had been discussed during her background investigation. Her memo indicated that it had not come up, and that while Complainant was waiting for his interview, a Trooper had offered to introduce Complainant to a friend of his wife's. She concluded, "Mr. Williams is an average heterosexual male."

July 30, 2010 Letter to Chief Wolfinbarger

211. On July 30, 2010, Complainant sent a personal letter to Chief Wolfinbarger requesting reconsideration of the decision. In the lengthy letter, Complainant stated, "You and I have spoken on several occasions where you have commented that you value my honesty, integrity, and desire to do the right thing. Even with what has been done to me in this process, I still hold respect for you, with a belief that you may not be aware of the exact details of what has truly been transpiring. Out of this respect I will give you some details of these facts, which will allow you to ask specific people about these incidents, which will contradict the response of denial of Patrol actions from Mrs. Dash."

212. Complainant explained several factors he thought the Chief should consider. Among them were the following:

- At his exit interview, Major Colley "clearly and repeatedly stated that if I returned to the Colorado State Patrol within one year's time that I would not be required to complete the hiring process, the background, or the polygraph examination. There was no mistaking what he was telling me. He went further to make a monetary bet for one hundred dollars that I would be back to the CSP within three months time." Major Colley repeated the reinstatement comments in general conversation before he left the Patrol, and informed Complainant that he would probably return at the rank of Trooper instead of Captain. On April 26, 2010, during the meeting with the Chief to discuss his reinstatement, Complainant reminded the Chief of Major Colley's promise of not undergoing the background process and the Chief said he would look into it and get back to him.

- On May 14, 2010, when Complainant submitted the completed background packet to Human Resources, Carol Pritchard looked "perplexed and asked myself and Major Colley how long I had been gone, to which I responded almost three months. She asked myself and Major Colley why I was having to go through a background investigation and polygraph examination. Mrs. Pritchard told Major Colley that this is not what has been done in the past and that I do not need to go through all of this to be reinstated. Major Colley just responded, 'new chief.' "

- On May 26, 2010, Complainant took the polygraph after signing the document stating that any failure to answer any question would be an immediate failure of the polygraph process. "During the polygraph interview I was asked directly if my sexual activities were with a man or a woman. I was forced to answer this as

was directed to me by the form I had to sign before the start of the interview, even though I did not want to. I answered honestly as I did with all questions asked although this made me very nervous and uncomfortable for the rest of the interview and polygraph. There was no other justifiable reason to ask this question in this process except to verify sexual orientation. A later question asked if I was intentionally concealing any sexual activities. Having spent my years with the CSP attempting to conceal my sexual orientation, even during documented hostile work environment situations and denial of gay community law enforcement activities by the Patrol, my response was highly nervous and uncomfortable and showed "deception," thus the failure of the polygraph examination." This question was "in clear violation of the ethics and standards set by the Colorado Polygraph Examiners Association and the national polygraph standards that the Colorado State Patrol is to adhere to."

- On May 27, 2010, Sgt. Keeton and others were "tasked and directed, 'by the chief', to research and find specifically a way not to reinstate me based solely off of the polygraph. This is clearly above and beyond the normal efforts to not reinstate or hire an applicant as these members had to be specifically assigned to this task to justify the refusal of reinstatement."

- On May 28, 2010, Major Colley called Complainant and informed him he was not being reinstated because he had "failed" the polygraph. "I told him that this was false and not accurate and that I had been more than forthcoming and honest in this process." When Complainant asked what recourse he had, Major Colley said it was final and there was no recourse, and denied having informed Complainant he would not have to undergo the background investigation.

- Complainant was informed by Captain John Goodwin that Professional Standards Branch Patrol members informed Goodwin that during the polygraph examination it was revealed that Complainant had received "money under the table" after he left the Patrol. "It is highly unethical and illegal for any member of the Professional Standards Branch to release any information about my background, polygraph examination, or final reason for refusal to reinstate. . . the release of any information [by the PS Branch] is a gross violation, is intentionally targeted at harming me and causing me personal discredit, and confirmation of the low ethical standards and adherence to policies and laws by this branch and the Patrol in this matter. Again, witnesses have come forward on this fact and are willing to testify against the Patrol in this matter."

- "During my time with the Operational Development Section I was contacted by a gay and lesbian group out of Colorado Springs. They wanted me and my staff to be part of a forum that was being participated in by heads of other law enforcement agencies. . . this forum was to help those in the gay and lesbian community understand law enforcement, process, and procedures to assist them in working and dealing with law enforcement." Major Colley denied Complainant's request to attend. "The Patrol preaches diversity, but makes no effort to become diverse or seek out opportunities. . . a stark comparison to the failure of the Patrol to be diverse is to look at the Denver Police Department's website, where they have a page dedicated to all of the officer diversity programs, links, services, outreaches and support."

213. Complainant did not request a re-test of the polygraph exam in his July 30, 2010 letter.

Patrol Response to Correspondence

214. After receiving Complainant's letters, the Chief arranged a meeting in his office with Lt. Colonels Hernandez, Padilla, and Eicher, Major Colley, Captain Elder, and Sergeant Paxton. They discussed the major issues of the case and agreed that they would not take any different action on Complainant's application for reinstatement.

215. The Chief asked if anyone had been denied employment at the Patrol prior to this instance as a result of a failed polygraph. The discussion revealed a Trooper reinstatement candidate who had failed the polygraph test for drug use in February 2010 but had been reinstated anyway.

216. The Chief ordered that this Trooper be re-polygraphed.

217. The Chief did not order that Complainant be re-polygraphed.

218. The Chief did not respond to Complainant's July 30, 2010 letter.

Expert Witnesses

219. As noted above, Complainant's expert witness, Mr. Montgomery, was persuasive and credible. He answered all questions in a forthright manner and did not attempt to tailor his testimony to serve either party in the case. At the outset of his testimony, he clarified one portion of his expert report in a manner that was adverse to Complainant. Mr. Montgomery has previously been certified as an expert in eight cases involving the Patrol as a party; in seven of those cases he defended the Patrol.

220. Respondent's expert witness, Raymond Nelson, was not persuasive or credible. He avoided answering questions that would be helpful to Complainant and he made general statements on issues for which he was not endorsed as an expert that were designed to aid the Respondent in this case. For example, he testified repeatedly that in the law enforcement community, "no one cares" about the sexual orientation of law enforcement officers, and there is no longer any discrimination against men on the basis of sexual orientation. These statements were non-responsive to the questions posed to him and outside the areas in which he was certified as an expert. Captain Elder's May 2009 questioning of Corporal Wykoff and Sgt. Mullenburg as to whether Complainant was gay directly rebuts Mr. Nelson's testimony.

221. Mr. Nelson testified at hearing and stated in his written report that Sgt. Paxton's pre-test interview question to Complainant about the gender of the masseuse was divided into two separate parts, caused by a pause by Complainant. This testimony is incorrect and Mr. Nelson admitted that it was incorrect on cross examination. Mr. Nelson also admitted in cross examination that the question about the gender of the masseuse was not necessary to the pre-test interview.

222. Mr. Nelson testified and stated in his report that with regard to Sgt. Paxton's question on the gender of the masseuse, "It is not reasonable to reach conclusions about this inquiry as indicative of Mr. Williams sexual orientation, and there is no indication in the recorded

interview or written report that this occurred." Mr. Nelson's opinion that Mr. Williams' truthful answer regarding the Thai masseuse did not reveal his sexual orientation lacks credibility and was outside the area of his certified expertise. Mr. Nelson was not certified to testify as an expert in whether one consensual homosexual encounter is indicative of sexual orientation. Mr. Williams explained to Sgt. Paxton that he could have stopped the masseuse as soon as the masturbation began but did not do so. Mr. Williams did not inform Sgt. Paxton that this was an isolated incident and an inaccurate reflection of his sexual orientation. A reasonable person listening to Mr. Williams describe this sexual encounter could conclude that Mr. Williams is a homosexual. Several of Respondent's witnesses testified consistent with Mr. Nelson on this issue. Their testimony also lacks credibility and was self-serving.

Credibility of Sgt. Keeton

223. Sgt. Keeton lacked credibility. Sgt. Keeton testified in this hearing that Captain Elder ordered him to research the general issue of how polygraph results can be used in law enforcement hiring decisions. Captain Elder directly contradicted this testimony by testifying in this hearing that he ordered Sgt. Keeton to learn if the Patrol could deny reinstatement based solely on a failed polygraph test.

224. Sgt. Keeton's testimony at hearing was materially different than his testimony in deposition. At hearing, upon learning of Captain Elder's testimony, Sgt. Keeton testified that he informed Captain Elder the Patrol could deny Complainant reinstatement based solely on the polygraph results. In deposition, Sgt. Keeton testified, "I don't think we talked about that."

225. Sgt. Keeton also testified in this hearing that he was actually researching whether the pre-test admissions, polygraph instrument exam, and post-test admissions could be the basis for denial of reinstatement. On further questioning, Sgt. Keeton admitted that his task had been only to research how the polygraph monitor test results could be used to deny reinstatement.

Treatment of Complainant Since Denial of Reinstatement

226. Since being denied reinstatement at the Patrol, Complainant and Sgt. Elliott have heard from several different sources that the rumor at the Patrol is that Complainant was denied reinstatement because he engaged in child molestation in Thailand. Complainant has been shunned by his former supervisee Troopers and dropped as a friend on Facebook by Patrol members. When Complainant had lunch with a retired Patrol Major at a restaurant in Adams County, he greeted two of his former Troopers in the restaurant as he entered. The Troopers refused to acknowledge or speak to him.

227. In spring 2012, Complainant attended a rifle re-certification course at the Patrol training site. He saw several of his former Troopers with whom he used to have lunch; they walked past him without acknowledging him. Sgt. Eldridge spoke with him briefly.

228. Complainant believes that because of the rumors about him at the Patrol, and because of his known status as a gay male, he would have to watch his back constantly if reinstated as a Trooper. He believes that it is possible or likely that some Troopers would not help him out if he needed it on the road, placing him into situations where he is truly in danger. Complainant also believes that if reinstated as a Trooper he would be

vulnerable to anti-gay hostility from peers, sergeants, and whatever captain commands the troop.

229. Captains set the tone for each individual troop. Captains generally possess the power and authority to establish and enforce a culture of acceptance of sexual orientation, or a culture of intolerance.

230. Complainant believes that if reinstated as a Captain for the Patrol he could work more safely and effectively, although it would be very uncomfortable with peer captains and majors because they would know he is gay.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this *de novo* appeal of a discretionary decision, Complainant bears the burden to prove that Respondent's decision not to reinstate him to the Patrol was arbitrary, capricious, or contrary to rule or law. *Lawley v. Department of Higher Education,* 36 P.3d at 1252; § 24-50-103(6), C.R.S. Complainant also bears the burden of proof on his discrimination claim. *Id.*; *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

Former Personnel Director's Administrative Procedure 4-11, 4 CCR 801 (2010), in effect in 2010, provided, "Reinstatement is a discretionary appointment of a former or current employee to a class in which the person was certified and either resigned or voluntarily demoted in good standing. The person may be reinstated to a related class with the same or lower grade maximum than the previously certified class."

II. HEARING ISSUES

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

In determining whether agency action 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,* 36 P.3d at 1252.

In *Ehrle v. Department of Admin.*, 844 P.2d 1267, 1270 (Colo.App. 1992), the Colorado Court of Appeals affirmed a Board order finding denial of reinstatement of a former employee to be arbitrary and capricious and awarding attorney fees based on bad faith. The Court started with the same premise that we start with herein: "Reinstatement is left to the discretion of the appointing authority." *Id.*; Director's Procedure 4-11. And, it noted that the reinstatement procedure "may not require an appointing authority to reinstate former employees." *Id.* However, the Court held that "the Department acted arbitrarily and capriciously in failing

genuinely to consider reinstating Ehrle after representing to him that it would do so." *Id.* Additional evidence cited by the Court included the following: it "deceived Ehrle and merely purported to consider reinstating him," and it "conducted a sham interview." *Id.*

The Patrol's decision to deny reinstatement to Complainant was similarly arbitrary and capricious under *Ehrle* and the *Lawley* standard. The preponderance of evidence shows that the Patrol failed genuinely to consider reinstating Complainant at every stage in the decisionmaking process. The decision was made in a rushed manner characterized by a conscious disregard of the relevant evidence that should have guided its decision. A reasonable state agency fairly and honestly considering Complainant for reinstatement would not have acted in the manner Respondent did.

Sgt. Keeton knew it was a violation of law enforcement hiring standards to deny reinstatement to Complainant based solely on polygraph machine results; he and Sgt. Paxton had learned those standards at the Texas Polygraph School. Sgt. Keeton did not obtain copies of any of these governing standards in performing his research for Captain Elder. Sgt. Keeton also knew from personal experience that the Patrol had recently hired two applicants new to the Patrol, one for a Trooper Cadet position and one for a Homeland Security position, both of whom had failed the polygraph exam, and had reinstated a Trooper after a failed polygraph. In contravention of known standards and Patrol hiring practices, Sgt. Keeton conducted a sham investigation and gave Captain Elder an incomplete and inaccurate report that he knew would serve as a core basis for denying reinstatement. Sgt. Keeton's actions were arbitrary and capricious under *Ehrle* and *Lawley*.

Sgt. Keeton's untruthful testimony at hearing regarding his investigation for Captain Elder underscores his awareness of his investigation's lack of authenticity. In deposition, when asked whether he had informed Captain Elder the Patrol could deny Complainant reinstatement based solely on the polygraph test results, Sgt. Keeton testified, "I don't think we talked about that." At hearing, Sgt. Keeton testified initially that Captain Elder had ordered him to learn generally about the standards governing use of all three phases of the polygraph (the pre-test interview, the machine results, and the post-test interview) in hiring decisions. Only when confronted did Sgt. Keeton ultimately admit that his prior testimony was not accurate.

Captain Elder neglected and refused to use reasonable diligence and care in exercising his pivotal role in the denial of reinstatement to Complainant. Captain Elder knew that the Patrol had never previously denied reinstatement based on a failed polygraph. As commander of IA, he knew that in February 2010, the Patrol had reinstated a Trooper who failed the drug portion of the polygraph and had hired a new Trooper and a Homeland Security employee who had significant reactions to the test.

Captain Elder had command authority for compliance with and enforcement of all standards governing use of polygraph tests results in Patrol hiring decisions. He was required to perform a balanced, thorough assessment of Complainant's request for reinstatement. With knowledge that the Patrol was deviating from standard hiring practices, and that Complainant had revealed his sexual orientation during the polygraph exam, Captain Elder ordered Sgt. Keeton to obtain support for denying Complainant's request for reinstatement based solely on the test results, on an expedited basis. Such an investigation was unprecedented. A reasonable IA commander considering the reinstatement of a former Captain with the distinctive record held by Complainant would not so flagrantly disregard Patrol hiring practices and governing hiring standards.

In summary, by avoiding documentary evidence, Patrol practices, and any information that was contrary to their position, Sgt. Keeton and Captain Elder failed to genuinely consider reinstating Complainant. Their actions and omissions were arbitrary and capricious. *Ehrle, supra; Lawley, supra.*

The same analysis holds true for Chief Wolfinbarger and Lt. Colonel Hernandez. Complainant's career at the Patrol was exemplary. Roughly ten weeks before considering Complainant's reinstatement request, Chief Wolfinbarger had publically commended Complainant's distinguished career at his going-away party, having just hand-picked Complainant as his ODS commander in 2009. The unique nature of that relationship, and of Complainant's career, were such that after a failed polygraph, a reasonable Chief in his position would have immediately scheduled a face-to-face meeting with Complainant to discuss it. Patrol Policy 208.03, Reinstatement, provides that upon receipt of the background and polygraph information from IA, the "Chief or designee reviews former employee's request, application packet, polygraph and background, personnel records, and may conduct a personal interview." Respondent presented no explanation for the Chief's rush to judgment without the benefit of such a personal interview. The failure to conduct a personal interview of Complainant demonstrates the Chief's failure to genuinely consider reinstating Complainant and the arbitrary and capricious nature of the process.

The Chief and Mr. Hernandez testified at this hearing that they were deeply concerned about the pre-test admissions made by Complainant in the same subject area he had had the significant reaction, illegal sexual conduct. They indicated a high level of apprehension about the possibility Complainant had concealed illegal sexual conduct and that he might present a danger to innocent citizens on the road. This testimony lacked credibility because they did nothing to investigate the issue prior to denying reinstatement, and because the Chief's early sworn discovery response indicates he was not concerned about this issue because Complainant had self-disclosed it.

Assuming *arguendo* that the inadvertent viewing of the Xtube video was a legitimate basis for the decision to deny reinstatement, Respondent's failure to conduct a meaningful investigation of the Xtube issue was arbitrary and capricious. No one ordered IA or an internet professional to research or access the website and Complainant's home computer in order to verify whether Complainant's statements about it were credible. This failure was arbitrary and capricious under *Lawley* because without any investigation, their fears were not reasonably based upon evidence they should and could have obtained.

The Chief and Lt. Colonel also testified at this hearing that they based their decision to deny reinstatement in part on Complainant having engaged in illegal prostitution in Thailand. Lt. Colonel Hernandez testified that he learned it was illegal through a telephone conversation with a former Thai embassy police officer in Washington, D.C. and based on a cursory internet search. This testimony was given little credence. More importantly, assuming the Thai massage incident did form a partial basis for denying reinstatement, none of the decisionmakers performed or arranged for the performance of a reliable, credible investigation of this issue. Such an investigation would have documented the actual Thai law in effect in 2006 and how it was enforced. No such investigation occurred. Rather, a snap decision was made on the basis of unreliable information in the span of just two business days.

After the Chief received the report that he could deny reinstatement based solely on the polygraph test, neither the Chief nor Lt. Colonel Hernandez requested or reviewed written reports or documents from Captain Elder or his IA staff; they did not consult anyone in HR or in

the Colorado Attorney General's office; they did not review the Patrol reinstatement or polygraph policies; and, they did not review any policies or standards governing law enforcement use of polygraph results in hiring decisions. Their decision was made in an informational vacuum, demonstrating no genuine intent to consider reinstating Complainant.

Respondent presented no evidence explaining why the decision to deny reinstatement had to be made so quickly and without any supporting documentation. In the absence of a justification, the myopic rush to judgment in two working days was arbitrary and capricious under *Lawley* and *Ehrle*. A reasonable hiring authority honestly considering a reinstatement candidate of Complainant's stature would not have acted in such a manner.

B. Respondent discriminated against Complainant on the basis of sexual orientation.

Complainant asserts that the decision to deny his request for reinstatement to the Patrol violated the Colorado Anti-Discrimination Act (CADA), § 24-34-402, C.R.S., and Board Rule 9-3, 4 CCR 801. Both of these provisions prohibit Colorado state agencies from refusing to hire any person because of his or her sexual orientation.

In enforcing the CADA, Colorado courts utilize the shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997). *See also Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000) and Board Rule 9-4, 4 CCR 801, "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."

To prove intentional discrimination under the CADA, an employee must establish, by a preponderance of the evidence, a prima facie case of discrimination. The elements of a prima facie case of intentional discrimination are: a) complainant belongs to a protected class; b) complainant was qualified for the position; c) complainant suffered an adverse employment decision despite his or her qualifications; and d) the circumstances give rise to an inference of unlawful discrimination. *Big O Tires*, 940 P.2d at 400; *Bodaghi,* 995 P.2d at 300.

Once the employee has established a prima facie case of intentional discrimination, he has created a presumption that the employer unlawfully discriminated against him. If the employer does not rebut the presumption, the factfinder is required to rule in favor of the employee. *Id.*

The burden next shifts to the employer "to articulate some legitimate, non-discriminatory reason for the [Claimant's] rejection." *Big O Tires*, 940 P.2d at 400. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the prima facie case is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the employer's proffered reason was not the true reason for the employment decision and instead was a pretext for intentional discrimination. *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1095 (1981); *Big O. Tires, Inc.*, 940 P.2d at 401. Pretext may be proven indirectly "by showing that the employer's proffered explanation is unworthy of credence." *Id.*

Prima Facie Case

Complainant is a gay male and therefore belongs to a protected class under the CADA and Board Rule 9-3. He was qualified for reinstatement to the Patrol, and he has suffered an adverse action in being denied reinstatement. He has therefore established the first three elements of a prima facie case of discrimination. *Id.*

With regard to the fourth element, the critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination. *Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005). There must simply be a logical connection between each element of the prima facie case and the inference of discrimination. *Id.* There is no unbending or rigid rule about what circumstances allow an inference of discrimination. *Id.* Courts have enumerated a variety of circumstances that can give rise to an inference of discriminatory motive, including "actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus . . ., preferential treatment given to employees outside the protected class . . . or, more generally, upon the timing or sequence of events leading to" the adverse action. *Id.*

Complainant had an exceptional career at the Patrol culminating in his appointment to command its policy office. As Captain of ODS, Williams was the face of the Patrol for the Governor's Office and the Joint Budget Committee. Few Patrol members achieve such a dramatic rise in prominence. Williams was therefore a presumptive shoe-in for reinstatement.

Three of the individuals most closely involved in the denial of reinstatement had reason to believe that Complainant was gay as of June 2009, the time the IA Report on Sgt. Brown's anti-gay statements about Complainant was issued. Sgt. Keeton and Captain Elder conducted that investigation. Captain Elder made it clear to both of Complainant's supervisees who reported the anti-gay slurs that he disapproved of their having reported Sgt. Brown's anti-gay remarks. He stated, "Were things said in a sexual manner? Probably, yes. In my mind do I think it was out of this world bad? No." In addition, Captain Elder asked Corporal Wykoff and Sgt. Mullenburg if they thought Complainant was gay. The IA Report on the incident was sent to and signed by Lt. Colonel Hernandez, thereby placing him on notice that Complainant was very likely a closeted gay Captain in the Patrol.

Less than one year later, Complainant applied for reinstatement to the Patrol and was asked an improper question during the polygraph that revealed a sex partner to be male. Captain Elder and Sgt. Keeton witnessed the disclosure. Then, instead of treating Complainant's reinstatement request with the deference it was due, Captain Elder and Sgt. Keeton engaged in an expedited, streamlined effort to deny reinstatement in a manner that violated governing law enforcement hiring standards and departed from recent Patrol hiring practice. The Chief directed this effort.

The anti-gay culture in the Patrol is well documented in this case. There are no openly gay members of the Patrol. The Training Academy incident involving a Captain making fun of homosexuals by using an offensive stereotype evinces the depth of anti-gay culture permeating the organization at the command level. The clear presumption of all Captains and others in the training was that it was acceptable to publically denigrate homosexuality at the highest level of the organization. The then-Chief responded to the incident by issuing a memo reminding captains to be professional at all times. However, the appropriate response would have been to address the behavior specifically, requiring training at all levels in prevention of a hostile work

environment for gay members, and stating his zero tolerance for violations of the Patrol policy and state law barring discrimination on the basis of sexual orientation.

The Patrol has never educated its members or leaders through training or otherwise of the prohibition on sexual orientation discrimination in its written policy or state statute; further, it has not enforced that policy. Complainant made two separate complaints about the anti-gay culture at the Patrol during his tenure – one regarding the captains' in-service and one involving Sgt. Brown's remarks. Neither of them resulted in an institutional response demonstrating zero tolerance of anti-gay conduct.

In summary, Complainant's stellar career at the Patrol, the anti-gay culture of the Patrol, the timing and sequence of the decision, and the disparate treatment given to Complainant's request for reinstatement, establish an inference of discrimination against Complainant based on his sexual orientation. Therefore, Complainant has met his burden of proving a prima facie case of discrimination.

Legitimate Business Reason for Denial of Reinstatement

If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support that legitimate purpose, the presumption of the prima facie case is rebutted, and "drops from the case." *Bodaghi*, 995 P.2d at 298, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

Respondent has provided some evidence to support a legitimate purpose for denying Complainant's request for reinstatement. Complainant had a significant reaction to the polygraph question regarding illegal sexual conduct and admitted in the pre-test interview to having inadvertently seen child pornography for a few seconds on the internet at home. In addition, he had a massage that ended in a sexual encounter in a foreign country. Respondent contends that this information drove its decision to deny reinstatement. Without passing on the weight given to this evidence, Respondent has met its burden of production and the burden next shifts to Complainant to show that Respondent's reasons are a pretext for intentional discrimination. *Plotke*, 405 F.3d at 1102.

Pretext

Complainant bears the full burden to show that Respondent discriminated on the basis of sexual orientation. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Cir. 2007). An employee may do so by showing that the proffered reason is a pretext for illegal discrimination. *Id.* A showing of pretext does not require a plaintiff to offer any direct evidence of actual discrimination. *Id.* An employee may show pretext based on "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's claimed legitimate reasons that a rational trier of fact could find the reason(s) unworthy of belief." *Id.*

Disturbing Procedural Irregularities. Disturbing procedural irregularities, such as violation of the employer's written policies and evidence that the employer acted contrary to an unwritten policy or company practice, provide a common basis for finding pretext. *Plotke*, 405 F.3d at 1102. In this case, Respondent violated its written polygraph policy and deviated from past practice in handling Complainant's polygraph test result.

The polygraph test itself was procedurally irregular in several material respects. The attendance of Captain Elder and Sgt. Keeton at the same polygraph exam was unprecedented.

Their joint attendance raises a question as to whether they attended out of concern about and/or to learn Complainant's sexual orientation. Then, at the exam, Sgt. Paxton asked a question that revealed Complainant's sexual orientation, a clear violation of Patrol Polygraph Policy 210.01, also unprecedented.

These two disturbing procedural irregularities and the Patrol's response to them are at the heart of this case and demonstrate pretext. Neither Sgt. Keeton, the senior polygrapher, nor Captain Elder, the commander of the polygraph unit, responded appropriately to the violation of a written Patrol policy. They should have questioned Sgt. Paxton about the error and considered imposing corrective action for this serious infraction. And, aware of Complainant's complaint against Sgt. Brown one year ago, they should have given serious thought to whether the question and the answer it elicited may have caused the significant reaction for Complainant.

Having just witnessed a clear violation of hiring guidelines prohibiting questions relating to protected status, Captain Elder not only failed to cure the violation but then advised the Chief and Lt. Colonel Hernandez that Complainant's failing score had been the worst Sgt. Paxton had ever seen. He and Sgt. Paxton omitted the fact that the Patrol had only been using the "directed lie" polygraph test for one month; therefore, there were few other tests with which to compare Complainant's results. Based on this information, the Chief ordered Captain Elder to conduct an expedited, special investigation to find grounds for denial of reinstatement to Complainant. Captain Elder knew that the Patrol had never denied reinstatement based solely on the polygraph test results, and that other candidates who failed the polygraph test had recently been hired. Nonetheless, he informed the Chief that it was acceptable to deny reinstatement on this sole basis. This unprecedented, known deviation from Patrol hiring practices also demonstrates pretext. *Plotke*, 405 F.3d at 1103.

Post-Hoc Justifications. In *Plotke*, the Tenth Circuit found post-hoc justifications for the discharge to be persuasive evidence of pretext. The employee was terminated for reasons about which she had never been counseled previously. *Id.* In addition, the decisionmaker failed to consult her immediate supervisor, who would have recommended that her employment continue, prior to firing her. *Id.* After the termination, the decisionmaker "subsequently enhanced his reasons for terminating" the plaintiff with new justifications. The Tenth Circuit held that the employer's "post-hoc reasons for Dr. Plotke's termination . . . constitute evidence of pretext." *Id.*

In the instant matter, Respondent similarly failed to consult any sources of potentially mitigating information and produced post-hoc reasons for its decision, demonstrating pretext. Chief Wolfinbarger and Lt. Colonel Hernandez testified at this hearing that because of Complainant's admissions about Xtube, they feared that if left alone in a Patrol car he might engage in illegal sexual acts with the public. As discussed above, this testimony is not credible. Complainant disclosed the Xtube incident himself before the polygraph and had an unblemished reputation for the highest of moral and ethical standards; these mitigating factors mandated a bona fide investigation of any concern and a personal meeting with Complainant to explore it further. This implausible post-hoc justification for denying reinstatement is a pretext for intentional discrimination. *Timmerman*, 483 F.3d at 1113.

Lt. Colonel Hernandez also testified at hearing that the Patrol denied reinstatement to Complainant in part because of his hesitance to take the polygraph. The preponderance of evidence demonstrates that Major Colley informed Complainant repeatedly that he would bypass the background and polygraph if reinstated. Complainant was not "hesitant" to take the

polygraph; he merely sought to avoid the inconvenience based on the Major's promise, having just taken and passed the polygraph in Brighton three months earlier. This proffered reason is another post-hoc justification demonstrating pretext.

Lt. Colonel Hernandez further testified that Complainant's pre-test admission regarding prostitution led him to conclude that Complainant lacked the core values of the Patrol. Complainant's admission of sexual contact with a masseuse on one occasion does not demonstrate a lack of core values, particularly when viewed objectively in the context of his twelve-year career at the Patrol. Complainant credibly stated to Sgt. Paxton that he had not violated the law in Thailand, the incident was not a planned one, and it was a one-time occurrence. Respondent's reliance on a phone call, the details of which are unknown, and an internet search for which no information or documents exist, to justify its erroneous conclusion that Complainant engaged in prostitution, demonstrate pretext. *Plotke*, 405 F.3d at 1103

Timing and Sequence. The timing and sequence of events leading to the adverse decision here also demonstrate pretext. *Plotke,* 405 F.3d at 1104. In *Plotke*, the employee was performing project work in Haiti of "excellent" caliber when she was "suddenly" and "hastily" reassigned to another office. The decisionmaker claimed there was an "urgent" need to transfer Dr. Plotke from Haiti to the other location. However, at trial, the decisionmaker admitted that there was no exigency and that he transferred her only after being informed that her one-year probationary period was nearing its completion. *Id.* The decisionmaker also conceded at trial that he would have to certify Dr. Plotke if she remained in Haiti beyond the expiration of her probation. The Tenth Circuit found the timing and sequence of events involving this "hasty reassignment" immediately preceding her termination to be evidence of pretext.

Similarly, immediately following Complainant's May 26, 2010 polygraph test, the Chief ordered Captain Elder to obtain support for a denial of reinstatement on an expedited basis. The decision was made in two business days. Much like the *Plotke* case, Respondent sought and considered no mitigating information, conducted no authentic investigation into the pre-test admission issues about which it purportedly was concerned, consulted no HR or legal staff, reviewed no written policies or standards, and hastily denied Complainant reinstatement without a personal interview. At hearing, Respondent offered no explanation for expediting the process of denying reinstatement to Complainant. The absence of exigent circumstances demonstrates that Complainant's confirmed gay status caused the hasty timing and sequence of events, revealing Respondent's proffered reasons to be pretextual.

Disparate Treatment; Policy and Practice. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is instructive here because it involved an employer's refusal to rehire a former employee against a backdrop of historic discrimination. In that case, an African American mechanic sought reinstatement following a layoff; the employer cited the plaintiff's participation in an illegal one-hour "stall-in" during rush hour with other civil rights activists as its reason for denying reinstatement; and, the plaintiff claimed that this reason was a pretext for race discrimination. In addressing the plaintiff's burden of proving pretext on remand, the U.S. Supreme Court stated:

> Especially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (CA10 1970). . . In short, on the retrial, respondent must 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 racially discriminatory decision." *Id.*, 411 U.S. at 804 – 805.

McDonnell Douglas first cites disparate treatment as an evidentiary basis for pretext. *See also Big O Tires, supra*, (disparate treatment of black and white employees who committed similar work infractions was evidence of pretext). In this case, the record is unrefuted that in February 2009, Respondent hired a new Trooper Cadet candidate who had deception indicated on his polygraph, and in February 2010 it hired a Homeland Security Civilian candidate who had a significant reaction on the polygraph test. These individuals were new hires with no twelve-year history of proven achievement and trustworthiness at the Patrol. These candidates were not identified as gay. Respondent's disparate treatment of the failed polygraph test results of these unknown candidates is compelling evidence of pretext.

Additionally, when the Chief learned in July 2010 that a Trooper had been reinstated after failing the drug portion of the polygraph in February 2010, he permitted that Trooper to re-take the polygraph, despite the absence of a post-test admission warranting the re-test. By contrast, the Chief did not permit Complainant to re-take the polygraph after receiving his July 30, 2010 letter, despite his knowledge that Complainant had been asked a question revealing his sexual orientation in violation of Patrol polygraph policy, and that Complainant indicated his significant reaction was attributable to his truthful answer. The Chief's disparate treatment of the reinstated Trooper, who was not gay, and Complainant, whom the Chief then knew to be gay, demonstrates pretext.

The next question raised by *McDonnell Douglas* is whether the evidence in this case reveals that Respondent's denial of reinstatement to Complainant conformed to a general pattern of discrimination against homosexuals, thus demonstrating pretext. 411 U.S. at 804 – 805. The Patrol condones routine use of anti-gay slurs such as "faggot." It has never trained its line or command members on sexual orientation discrimination; the subject remains taboo. Through its failure to decisively enforce its anti-discrimination policy, it has condoned anti-gay comments and behavior by Master Sergeant Brown and then-Captain Martin.

Statistics reflecting a general pattern and practice of discrimination are relevant to the pretext determination. *McDonnell Douglas*, 411 U.S. at 804. However, statistical evidence on its own will rarely suffice to show pretext, and, at the very least, to create an inference of pretext, a plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals. *Timmerman*, 483 F.3d at 1114 – 1115. *See also Risch v. Royal Oak Police Dept.*, 581 F.3d 383, 393 - 394 (6th Cir. 2009)(finding pretext in light of evidence of a discriminatory atmosphere in the Department, the lack of women in command positions at the Department, and the evidence that Risch was arguably better qualified than the two male candidates

promoted); and *Plotke*, 405 F.3d at 1108 ("In the context of this case it is also relevant that Dr. Plotke was the first and only woman ever employed as an historian at Fort Leavenworth").

In the context of this case, it is relevant that there are no openly gay male members of the Patrol and never have been. Complainant would therefore be the first and only known gay male employed at the State Patrol. This bare statistic reflects a general policy and practice with respect to minority (here, gay) employment as one of silence and exclusion. Therefore, the statistical evidence and the Patrol's discriminatory atmosphere toward gay men support the inference of pretext.

Subordinate Bias Liability. Respondent is also liable under the subordinate bias doctrine, also known as the "cat's paw" or "rubber stamp" theory of liability, endorsed by the Tenth Circuit in *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 485 (10th Cir. 2006). To recover under this theory, "the plaintiff must show 'that the decisionmaker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *Id.* Discussing the genesis of the theory, the Court stated,

> Holding employers accountable for the actions of biased subordinates also advances the purposes of Title VII. It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process. [Internal citations omitted] A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations." *Id.*, 450 F.3d at 486.

To establish subordinate bias liability, the plaintiff must establish that the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. *Id.* at 488. To defeat liability, the employer must only conduct an independent investigation of the allegations against an employee. *Id.* Thus, "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory. Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class." *Id.* (internal citations omitted).

In *EEOC*, the biased subordinate provided all of the information to the decisionmaker who terminated the plaintiff; and, it was undisputed that the decisionmaker did not know the race of the plaintiff. However, the Tenth Circuit held the employer liable under the subordinate bias doctrine because the decisionmaker "conducted no independent inquiry into the events that took place that Friday, and failed to take even the basic step-cited by this Court in *Kendrick*, 220 F.2d at 1231-32-of asking Mr. Peters for his side of the story." *Id.* at 491. In *English v. Colo. Dept. of Corrs.*, 248 F.3d 1002 (10th Cir. 2001), the Tenth Circuit rejected the cat's paw doctrine where the decisionmaker "met twice with the employee and his attorney, and specifically asked for evidence rebutting or mitigating the findings of the allegedly biased subordinates." *Id.* at 1011, cited in *E.E.O.C.*, 450 F.3d at 485.

The Chief and Lt. Colonel deny having known Complainant was gay at the time they denied his request for reinstatement. However, they are liable for sexual orientation

discrimination against Complainant in this case because they relied on Captain Elder's biased and inaccurate report that they could deny reinstatement on the narrow ground of polygraph test scores; then, they conducted no independent inquiry into the reliability or veracity of that report, failed to consult HR or legal counsel or any written documentation of any kind, and failed to take even the basic step of asking Complainant for his side of the story. *EEOC*, 450 F.3d at 491.

C. Remedy

Front Pay. The purpose of equitable remedies in discrimination cases is to make the claimant whole within a particular setting, i.e., to place the claimant in the position he would have been in but for the discriminatory conduct. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1175 (Colo. 2000); *Ward v. Department of Natural Resources*, 216 P.3d 84, 96-97 (Colo.App. 2008). In cases of discrimination, the CADA expands the remedies otherwise available to the Board to include equitable remedies to make the employee whole, including front pay and other corrective orders. *Ward,* 216 P.2d at 96, citing *Conners,* 993 P.2d at 1175; § 24-34-405, C.R.S. Under Board Rule 9-6, 4 CCR 801, if the Board finds discrimination has occurred, it may order: cease and desist orders; hiring, reinstatement, or upgrading of employees, with or without back pay and compensation, referral of applicants for employment; admission or continuation of enrollment in on-the-job training; posting of notices and issuing orders as to the manner of compliance and corrective and/or disciplinary actions, as required; and, altering the terms and conditions of employment as appropriate.

Complainant requests front pay in lieu of reinstatement; or, if reinstatement is ordered, to return to the Patrol as a Captain in order to safeguard him from potentially dangerous situations as a known gay male Trooper reputed to be a child molester.

Front pay is a substitute for reinstatement and is a necessary part of the "make whole" relief mandated by the anti-discrimination laws and the U.S. Supreme Court. *Pollard v. E.I. Du Pont De Nemours & Co.*, 532 U.S. 843, 850 (2001); *Abuan v. Level 3 Commun., Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003). Reinstatement is the preferred remedy in discrimination cases and should be ordered whenever it is appropriate. *Abuan,* 353 F.3d at 1176; *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1989); *Pollard*, 532 U.S. at 846. Before awarding front pay, the court must first consider whether reinstatement is viable. *Id.*

Front pay may be appropriate when an employer's extreme hostility renders a productive and amicable working relationship impossible or if the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit. Reinstatement is not appropriate if the employer's persistent animosity towards the plaintiff has destroyed the employee's ability to be an effective member of the employer's workforce. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1157-1158 (10th Cir. 1990). In the absence of front pay, "an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return." *Abuan,* 353 F.3d at 1176. In determining whether front pay is appropriate, the court must attempt to make the plaintiff whole, yet avoid granting the plaintiff a windfall. *Id.*

The standard policy at the Patrol is to reinstate all former officers at the Trooper level. To do otherwise would reward officers who leave and undermine the morale of Sergeants waiting to promote to Captain. This policy is a sound one and the evidence demonstrates that but for the discrimination against Complainant based on sexual orientation, he would have reinstated as a Trooper.

Reinstatement as a Trooper is not a viable option. The goal is to place Complainant in the position he would have been in, *within the particular setting* of the Patrol, but for the discriminatory conduct. *City of Colorado Springs v. Conners*, 993 P.2d at 1175. The setting of the Patrol, a paramilitary organization in which Troopers carry weapons and effectuate arrests on the highways, is unique. Troopers encounter dangerous, angry, and intoxicated individuals. They respond to accidents involving injury and/or death. To perform effectively, Troopers must be able to rely on each other for emergency back-up in difficult situations. The Patrol has not trained its members to treat gay men with respect and dignity; it has not enforced its anti-discrimination policy in relation to gay men; and, its actions in this case suggest it is not yet ready to embrace a known gay male among its ranks. Complainant testified credibly that he believes some Troopers would hesitate to assist another Trooper known to be a gay male. There is no way to separate those who would assist from those who would not. Returning Complainant as a Trooper would render him vulnerable to an unacceptable level of personal and professional risk as a result of his protected status. Therefore, it would not serve the remedial purpose of the Act.

Additionally, the Patrol's handling of Complainant's reinstatement candidacy resulted in rumors that he engaged in child prostitution, child molestation, and taking money under the table. Complainant testified that he has been shunned by most former subordinate officers he has seen since his reinstatement request was denied. This fact, in addition to the homophobic culture of the Patrol, could create a hostile work environment where Complainant is unable to be an effective member of a team at the Trooper level. Further, the leadership has permitted this culture to persist unchecked. Under these circumstances, Complainant's ability to perform the Trooper job effectively and safely has been severely undermined.

There is evidence in the record supporting Complainant's reinstatement as a Captain. His performance history demonstrates he has never been reluctant to hold others accountable for meeting his expectations, and that he would earn the trust and respect of his troop. However, reinstatement as Captain would arguably constitute a windfall for Complainant, in violation of *Abuan*, 353 F.3d at 1176, and *Department of Health v. Donahue*, 690 P. 243 (Colo. 1984)(remedy for wrongful discharge cannot bestow upon a public employee an economic windfall vastly disproportionate to the legal wrong that he has sustained).

Complainant did not choose to reveal his sexual orientation. Had the Patrol not deviated from its polygraph policy, Complainant's personal life would have remained private and he would have reinstated as a Trooper. Under these circumstances, front pay is an appropriate remedy.

Additional Corrective Remedies. The next question is whether additional remedial orders are appropriate. In *Cunningham v. Department of Highways*, 832 P.2d 1377 (Colo.App. 1991), the Board found racial discrimination in the hiring process and issued two remedial orders: one, appointment to the position; and two, the elimination of "all discriminatory practices and activities" and "elimination of the adverse impact on black persons" in the department's selection and appointment policies and procedures. The Court of Appeals affirmed the order that the plaintiff be appointed to the position, finding it was the only effective remedy. *Id.* at 1384. However, regarding the latter order, the Court of Appeals found that the record did not identify any "practices and activities" or "policies and procedures" that had resulted in discrimination against blacks in general. Further, the Court held that the corrective order "gives no guidance to the department in determining the nature of the actions required by the board's order." *Id.*

The record in this case identifies two specific actions that may begin to remediate the discrimination against homosexuals. The first is to incorporate sexual orientation into all existing diversity trainings. The second is to designate a command-level point of contact for gay Patrol members who will function in a support and resource role for all gay members. Complainant testified that as ODS commander, he initiated a support program for women in the Patrol, but did not do so for gay members out of fear he would reveal his own sexual orientation. A support system for gay Patrol members is needed.

D. Attorney Fees.

Complainant requests an award of attorney fees and costs. Attorney fees and other costs may be awarded against a department if it is found that the personal action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5(1), C.R.S.

Board Rule 8-38, 4 CCR 801, implements the attorney fee statute. The party seeking an award of attorney fees and costs bears the burden of proof. Board Rule 8-38(B). The Rule defines a frivolous personnel action as one "in which it is found that no rational argument based on the evidence or the law is presented." Board Rule 8-38(A)(1). A personnel action made in bad faith, maliciously, or as a means of harassment is defined as one "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth." Board Rule 8-38(A)(2). A groundless personnel action is defined as one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule 8-38(A)(3).

Board Rule 8-38 essentially codifies Colorado case law. In *Mayberry v. University of Colorado Health Sciences Center*, 737 P.2d 427 (Colo.App. 1987), the Colorado Court of Appeals noted that bad faith as a basis for awarding attorney fees has been defined as conduct which is arbitrary, vexatious, abusive, stubbornly litigious, or disrespectful of truth and accuracy. *Id.* at 430. In *Mayberry,* the Court of Appeals reinstated the ALJ's attorney fee award based on bad faith where the agency chose, on advice of counsel, to violate a Board rule and a Colorado Court of Appeals recently-published case interpreting the Rule. The Court held, "as a matter of law, the University's deliberate disregard of a State Personnel Board Rule as approved by this court constituted bad faith," and "willful disregard of the law is bad faith per se." *Id. See also Renteria v. Department of Labor and Employment*, 907 P.2d 619, 621 (Colo.App. 1994)(affirming attorney fee award based on bad faith where the agency subjected plaintiff to a "pretextual discipline demotion" in the form of a downward reallocation and knew or should have known that it created hostile working conditions for plaintiff).

In *Ehrle v. Department of Admin.*, 844 P.2d at 1270, the Colorado Court of Appeals affirmed an award of attorney fees based on bad faith involving the denial of reinstatement of a formerly laid off employee. Evidence of bad faith included the agency's manipulation of funding for the position to delay filling it, resulting in the elimination of the plaintiff from consideration. *Id.* at 1269. In addition, the Court cited evidence that the agency "deceived Ehrle and merely purported to consider reinstating him, and that it conducted a sham interview," and that "it never genuinely considered reinstating him." *Id.*

In *Ward,* 216 P.3d at 97, the Colorado Court of Appeals affirmed the Board's award of attorney fees and costs based on bad faith. The Court based its decision on the agency's pattern of bad faith in failing to advise the employee of his rights and the agency's responsibilities under the Americans with Disabilities Act (ADA) and agency policy, failing to

engage in the interactive process regarding an accommodation with the employee in violation of the ADA and agency policy, and failing to conduct a vacant job search as required under agency policy. *Id.* The Court also cited the agency's requirement that the employee work in excess of his work restrictions, causing him to re-injure himself, as evidence of bad faith. *Id.*

By contrast, in *Halverstadt v. Department of Corrections*, 911 P.2d 654, 660 (Colo.App. 1995), the Colorado Court of Appeals affirmed the Board's reversal of the ALJ's order of attorney fees predicated on bad faith. A reduction-in-force case, the facts demonstrated that the agency knew prior to separating the plaintiff that he met the minimum qualifications for the position, and that two other employees who retained their positions were not minimally qualified for the position. However, the Court found that the ultimate conclusion of bad faith "ignores the reason that DOC took these actions. DOC . . . predicated those actions upon its interpretation of the State Personnel Rules at issue here, together with its interpretation of several additional statutes which, it contends, were applicable. . . . Such an interpretation, while not the one the ALJ adopted, had a reasonable basis." *Id.* at 660. *See also Sutton v. University of Southern Colorado*, 870 P.2d 650, 655 (Colo.App. 1994)(affirming no award of fees because "before contracting with the private security firm, the University's president asked for and received an opinion from the Attorney General that such action would not be improper").

Here, unlike in *Halverstadt* and *Sutton*, where the decisionmakers consulted the governing policies, sought legal counsel from the Office of the Attorney General, and reasonably relied on those authorities in making its decisions, the Patrol took none of those actions. The decision was made with no reference to written policies, standards, or advice of agency counsel. Additionally, the decision violated governing law enforcement hiring standards and deviated from recent Patrol hiring practices. Hence, it lacked any reasonable basis and was made in bad faith.

As in *Ehrle*, where the agency conducted a sham interview of the employee and failed to genuinely consider him for reinstatement, here the Patrol engaged in a sham decisionmaking process and never actually considered reinstating Complainant. Complainant was uniquely overqualified for his presumed reinstatement as a Trooper. Much like the pretextual disciplinary demotion in *Renteria*, the record shows Respondent's proffered reasons for denial to be a pretext for intentional discrimination based on Complainant's sexual orientation. The Patrol hired two new, unknown candidates in 2009 and 2010 who failed the polygraph. By contrast, without conducting a legitimate investigation of its concerns, it summarily denied reinstatement to Complainant, who had a twelve-year track record of demonstrated moral character and outstanding performance. The Patrol's actions were disrespectful of truth and accuracy. *Mayberry*, 737 P.2d at 430; Board Rule 8-38(A)(2).

Therefore, Complainant is entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, or contrary to rule or law.

2. Respondent discriminated against Complainant on the basis of sexual orientation.

3. Complainant is awarded attorney fees and costs.

ORDER

Respondent's action is **rescinded**. Complainant is awarded front pay. A hearing will be necessary to determine the appropriate amount thereof; however, such hearing will not be set until and unless the Board affirms the front pay order on review. The Patrol will immediately incorporate sexual orientation into all existing diversity training programs. The Patrol will immediately designate a command-level point-of-contact for gay Patrol members.

Dated this 16th day of July, 2012 at Denver, Colorado.

Mary S. McClatchey
State Personnel Board
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 16th day of July, 2012, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS**, addressed as follows:

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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.