COLORADO COURT OF APPEALS **101 West Colfax Avenue, Suite 800** **Denver, Colorado 80202**	
State Personnel Board **Case No. 2009B038**	
Complainant-Appellant: **MARCUS UMSTEAD** **Agency-Appellee:** **COLORADO STATE PERSONNEL BOARD** **and** **Respondent Agency-Appellee:** **COLORADO DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL**	**▲COURT USE ONLY ▲**
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REPLY BRIEF	

Comes now, Appellant Marcus Umstead and replies to the Colorado State Patrol's Amended Answer Brief as follows:

I. Due Process Required the State Patrol to Follow State Personnel Board Rules Requiring Meaningful Notice and an Evidentiary Hearing, Not Merely the Minimum Due Process Required by the Constitution

When a state agency drafts rules requiring more process than the Constitution requires, it must strictly comply with those rules. *Hopwood v. Boulder County Dept. of Social Servs.*, 613 P.2d 346, 348 (Colo. Ct. App. 1980). Simply put, when an agency drafts such rules, the bare requirements of notice and an opportunity to be heard no longer form completely the ground upon which an agency can terminate its employees' employment. *Id.* Such is the case here. The State of Colorado chose to adopt extensive rules regulating the manner in which one of its employees' employment could be terminated. Once it lawfully promulgated those rules, simple notice and an opportunity to be heard (as argued by the State Patrol) no longer formed the contours of process owed to each employee prior to the termination of their employment. Instead, strict compliance to State Personnel Board rules became the standard by which due process is judged. *Id.* Because the State Patrol did not strictly comply with the standards and notice requirements set forth by Board rules, by failing to give proper written notice of the pending charges and changing and confusing the charges at hearing, the State Patrol violated Trooper Umstead's due process rights when it terminated his employment.

II. The State Patrol, Not the Administrative Law Judge, is Responsible for Determining Grounds for Discipline

The State Patrol's position, that an Administrative Law Judge's ("ALJ") determination of grounds for discipline is an evidentiary fact which cannot be set aside (Answer Br. at 11), is contrary to State policy and Personnel Board Rules, and simply does not comport with common sense.

A) An ALJ Lacks the Authority to Determine the Grounds for Discipline

Colo. Rev. Stat. § 24-4-105(15)(b) and Colorado case law, *see, e.g.*, *Stamm v. City and County of Denver*, 856 P.2d 54, 58 (Colo. Ct. App. 1993), require that findings of evidentiary fact shall not be set aside on review, unless the findings are contrary to the weight of the evidence. The obvious purpose of that principle is to allow an ALJ to find facts regarding the underlying incident, and avoid the retrying of those facts at the appellate level – not to allow the ALJ to determine what charges are pending against a disciplined employee. That is, and always has been, the sole province of the employer in state personnel matters. Personnel Bd. R. 6-14.

Personnel Board Rule 6-14 explicitly dictates that "[t]he person conducting the [R 6-10] meeting is responsible for the decision to take disciplinary action." The Rule grants no authority or discretion in the ALJ

to determine what charges to levy against a disciplined employee, nor does any other rule or statute.

Colo. Rev. Stat. § 24-4-105(4), however, specifically lists the limited authority granted to an ALJ presiding over a Personnel Board hearing. Not once in the recitation of granted authority did the State Legislature ever grant an ALJ the authority to determine which charges are, were, or should be pending against a disciplined employee. The authority of an ALJ to determine charges, therefore, does not exist. *See Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) (describing the principle of *expressio unius exclusio alterius*).

Accordingly, because the ALJ possessed no authority to determine the charges pending against a state employee, the ALJ's finding of charges against Trooper Umstead is not binding at this, or any other level of appellate review.

B) The ALJ's Finding of Charges Levied Against Trooper Umstead is Contrary to the Weight of the Evidence

Even assuming the judge's determination of charges pending against Trooper Umstead could be considered a binding finding of fact, it is entitled to deference only if is not contrary to the weight of the evidence. § 24-4-105(15)(b). Major Meredith, the individual charged with authority under Rule 6-14 to determine and levy charges, testified at hearing that he did not

remember which charges he sustained against Trooper Umstead. (R. at 1287:21-23 ("Q: . . . did you sustain a violation of law violation against Trooper Umstead? A: I can't recall.").) Then Major Meredith testified that the charges listed in the Member Conduct Complaint, notably different from those listed in Trooper Umstead's termination letter, were the charges he sustained against Trooper Umstead. (R. at 1289:25 – 1290:4 (Q: Okay. So, you determined that three different things were sustained. That is, according to that definition, the facts show the allegations to be true. A: Correct.").)

Meredith also testified, contrary to Umstead's termination letter, that he did not classify anything under "member arrested or charged or specific law violation." (R. at 1288:9-11.) While he later testified that the form on which he noted violations was only used to track complaints, he never contradicted his prior testimony by testifying that the charges listed were not the charges he found to be sustained, and to be the basis of discipline. (R. at 1308:20-22.)

Accordingly, if the judge's finding of charges could be considered a finding of fact, that finding is contrary to the weight of the evidence. Major Meredith, the only individual who could testify regarding the charges levied against Trooper Umstead, testified that the charges listed in the termination letter were not the charges he actually sustained against Trooper Umstead.

Thus, because the judge's determination is directly contradicted by Meredith's testimony, the determination is contrary to the weight of the evidence. Therefore, even if it could be considered a finding of fact, it is not entitled to any deference in this appeal, and Trooper Umstead's appeal should be determined on its merits, not an inapposite finding of fact that the State Patrol claims is binding.

III. At Best, Major Meredith Utterly Confused the Grounds for Discipline, and At Worst, Changed the Grounds for Discipline Sometime Before or During the Hearing

The confusion and change at hearing presented Trooper Umstead with a moving target and deprived him of a fundamentally fair proceeding. *See In re Green*, 11 P.3d 1078, 1088 (Colo. 2000). The State confronts that fact simply by noting that Major Meredith claimed the charges listed in the Member Conduct Complaint were irrelevant to the Rule 6-10 meeting and subsequent discipline. (Answer Br. at 9-10.) But Meredith also testified that the charges listed in that document, (R. at 460), were the very charges upon which he based his discipline.[1] (R. at 1288 - 1290.) In fact, he specifically

[1] The State Patrol asserts, for the first time, that the Member Conduct Complaint was drafted when the Arvada Police Department filed a "complaint" against Trooper Umstead. There is nothing in the record to indicate that the Arvada Police Department ever filed a "complaint" regarding the incident at issue in this appeal. Instead, at most, an Arvada Police Officer called to ascertain the ownership of the vehicle driven by Trooper Umstead (R. at 782), and Arvada may have forwarded the results of its investigation to the State Patrol (R. at 788).

testified in regard to that document that "then I place that disposition on there as to my opinion of anything that was violated." (R. at 1289:20-22.) At a minimum, Major Meredith's testimony represented absolute confusion regarding what charges he sustained against Trooper Umstead – charges of which Trooper Umstead was required to have notice. Meredith's testimony also confirmed that the charges against which Trooper Umstead was prepared to defend himself at hearing were not the same charges that Meredith was prepared to support. That confusion leads to the only conclusion that Trooper Umstead simply had no meaningful notice of the charges against which he was defending himself. *See Green*, 11 P.3d at 1088.

IV. The Existence of Confusion or Amalgamating Charges Precluded Trooper Umstead's Opportunity for Any Meaningful Process

The simple act of providing process does not equate to providing due process as required under the United States Constitution. *First Bank v. State*, 852 P.2d 1345, 1351 (Colo. Ct. App. 1993) (recognizing that a post-deprivation hearing does not always satisfy the requirements of due process). In order to satisfy due process, the process provided must allow for an

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The State Patrol also asserts that the Complaint (R. at 460) was based solely on information received prior to the State Patrol's internal investigation. However, it is important to note that Major Meredith signed the Complaint on October 23, 2008, two days after Major Meredith hand-delivered Trooper Umstead's notice of termination. (R. at 23.)

opportunity to respond to the charges in a meaningful manner. *Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003). Process which affords unbridled discretion to the State Patrol regarding what notice to provide and when to provide it is meaningless process that simply does not comport with the requirements of the Constitution. *See Forbes v. Poudre Sch. Dist. R-1*, 791 P.2d 675, 679 (Colo. 1990).

Confusion, masquerading as reason for Trooper Umstead's termination, deprived Trooper Umstead of any constitutional notice of the specific charges he was required to defend against, as called for by Rule 6-15, and created a fundamentally unfair proceeding. That lack of fairness deprived Umstead of due process of law, and requires that his termination be reversed.

CONCLUSION

The changing of charges against Trooper Umstead at hearing violated Trooper Umstead's administrative and constitutional rights to meaningfully respond to the purported grounds for his discipline, which led to the termination of his constitutionally-protected employment. Because the procedures used to terminate his employment violated the requirements of due process, the termination of Trooper Umstead's employment must be

overturned and Trooper Umstead returned to his position with the Colorado State Patrol.

Dated this 27th day of August, 2010.

Respectfully Submitted,

BRUNO, COLIN, JEWELL & LOWE, P.C.

(*Original Signature on File*)

by: *s/Sean T. Olson*
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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **COMPLAINANT-APPELLANT'S REPLY BRIEF**, together with Certificate of Compliance, was electronically filed and served via LexisNexis File and Serve on the 27th day of August, 2010, addressed to the following:

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