

<b>COLORADO COURT OF APPEALS</b> <b>101 West Colfax Avenue, Suite 800</b> <b>Denver, Colorado 80202</b>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> <b>Court of Appeals Case No.:</b> <b>2010CA56</b>
<b>Complainant-Appellant:</b>  <b>MARCUS UMSTEAD</b>  <b>Agency-Appellee:</b>  <b>COLORADO STATE PERSONNEL BOARD</b>  <b>and</b>  <b>Respondent Agency-Appellee:</b>  <b>COLORADO DEPARTMENT OF PUBLIC SAFETY,</b> <b>COLORADO STATE PATROL</b>	
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<b>OPENING BRIEF</b>	

Comes now, Appellant Marcus Umstead and appeals the decision of the Colorado State Personnel Board (case # 2009B038), pursuant to Colo. Rev. Stat. §§ 24-50-125.4(3) & 24-4-106(4), and states as follows:

**ISSUE PRESENTED**

- I. Did the Colorado Department of Public Safety and the Colorado State Patrol (Appellees) deprive Colorado State Trooper Marcus Umstead (Appellant) of

his due process rights under the United States Constitution when it failed to provide meaningful notice of the charges pending against Trooper Umstead prior to terminating Trooper Umstead's employment?

### **STATEMENT OF THE CASE**

After an off-duty incident, the Colorado State Patrol ("Respondent") terminated State Patrol Trooper Marcus Umstead ("Appellant") without the notice and procedures required by the State Personnel Board Rules and the United States Constitution. Trooper Umstead's superior officers failed to provide written notice to Trooper Umstead of the specific charges responsible for the termination of his employment, or provide any meaningful notice at all, when they changed the charges pending against Trooper Umstead and failed to notify him of the actual pending charges until the parties were at hearing. Such failures on the part of the State Patrol violated Trooper Umstead's substantive and procedural right to due process of law under the United States Constitution. His termination, therefore, must be overturned.

### **UNDISPUTED FACTS**

#### **I. The August 28, 2008, Incident**

On August 28, 2008, Colorado State Patrol Trooper Marcus Umstead finished his on-duty shift at approximately 11:00 p.m. (R. at 33, *Initial Decision of the Administrative Law Judge* at 2, ¶ 5, hereinafter *Decision*.) As Trooper

Umstead was driving home that night in his personal automobile, a truck driving behind Trooper Umstead followed him closely and threw a bottle at Umstead's car while stopped at a stoplight. (R. at 34, *Decision* at 3.) Trooper Umstead had apparently, and unknowingly, cut the truck off while exiting the highway. (R. at 33, *Decision* at 2.) After hearing the bottle hit his car, Trooper Umstead, fearing for his safety, exited his automobile and confronted the occupants of the vehicle behind him. (R. at 34, *Decision* at 3.) At some point during the confrontation, Trooper Umstead drew his firearm. (R. at 34, *Decision* at 3.) No one was injured during the incident.

The occupants of the other vehicle reported the incident to the Arvada Police Department. (R. at 35, *Decision* at 4.) Trooper Umstead, because of the late hour during which the incident occurred, waited until morning to report the incident to his supervisors. (R. at 36, *Decision* at 5.)

## **II. Colorado State Patrol's Investigation and Discipline**

Colorado State Patrol's Internal Affairs Department investigated the incident. Sergeant Dana Reynolds led the investigation and ultimately drafted a report which was sent to Trooper Umstead's supervisors.

On September 22, 2008, Major Kris Meredith sent Trooper Umstead a notice of a meeting, pursuant to Personnel Board Rule 6-10<sup>1</sup>, to discuss the facts of the

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<sup>1</sup> State Personnel Board Rule 6-10 is appended hereto.

incident. (See R. at 430, *Correspondence from Major Kris Meredith to Marcus A. Umstead*, dated Sept. 22, 2008.) Although Major Meredith indicated that there was “a possible need to administer corrective or disciplinary action,” he made no mention of specific charges that he was considering against Trooper Umstead. (R. at 430.)

During the course of the Rule 6-10 meeting, Major Meredith again declined to cite any specific charges he was contemplating against Trooper Umstead. (R. at 1272, *Hrg. Transcript, Day 3* at 96:21-23, (“Q. Did you tell Trooper Umstead any specific charges you were contemplating against him? A. No.”).)

After the Rule 6-10 meeting, Major Meredith issued a letter to Trooper Umstead indicating that Trooper Umstead’s employment with the Colorado State Patrol was terminated. In support of his decision, Major Meredith indicated that Trooper Umstead violated the following General Orders:

1. Members will obey the law.
3. Members will be truthful and complete in their accounts and reports.
5. Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.
6. Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
7. Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
8. Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those

specialized tasks for which they are authorized and properly trained, or certified.

(*See R. at 433, Correspondence from Major Kris Meredith to Marcus A. Umstead, dated Oct. 21, 2008.*) Trooper Umstead disagreed with Major Meredith's conclusions and appealed his termination.

### **III. Trooper Umstead's Appeal Hearing**

Administrative Law Judge Hollyce Farrell presided over Trooper Umstead's appeal hearing which started February 17, 2009. During the third day of the hearing, Major Meredith was no longer clear regarding what conduct or violations caused him to terminate Trooper Umstead's employment. (*See generally R. at 1260, Hrg. Transcript, Day 3 at 84:7-114:4.*) Major Meredith instead stated, "Well, I didn't fire him for any one specific reason. I fired him for the total - - the total event including what went up through and was included during the investigation." (*R. at 1260, Hrg. Transcript, Day 3 at 84:9-12; see also R. at 1277, Hrg. Transcript, Day 3 at 101:21-24.*) He testified that he was unable to make any finding regarding whether or not Trooper Umstead tapped on the window with a gun or whether he was truthful about that fact during his internal affairs interview. (*R. at 1235-37, Hrg. Transcript, Day 3 at 59:11 – 61:5.*) Notably, Trooper Umstead was led to believe, at least in part, that the charge of law violation, listed in the October 21, 2008, letter, purportedly stemmed from the alleged fact that Trooper Umstead tapped his gun on the driver's side window.

Meredith further testified that he did not terminate Trooper Umstead for the infractions listed in his October 21, 2008, letter. Instead, he testified that he terminated Trooper Umstead for three other violations that he listed in the Member Conduct Complaint. (*Hrg. Transcript, Day 3* at 112:6-22, R. at 1288.) Notably, he signed that document two days after sending Trooper Umstead's termination letter. The newly-alleged violations included:

1. Abuse of Authority/Power
2. Off Duty Misconduct
3. Improper Use of Weapon

(R. at 460, *Member Conduct Complaint*.)

Despite Major Meredith's testimony that he did not, in fact, terminate Trooper Umstead for the violations listed in his termination letter, Judge Farrell nonetheless found that the Colorado State Patrol satisfied its burden of proving that Trooper Umstead violated four of the six General Orders listed in Meredith's October 21, 2008, letter. (R at 45.) She failed to address any of the alleged violations for which Major Meredith testified he actually terminated Trooper Umstead's employment.

Trooper Umstead appealed the findings of Judge Farrell to the State Personnel Board. In affirming the judge's decision, the Board simply stated "that the findings of fact and conclusions of law in the Initial Decision of the

Administrative Law Judge are adopted, and that the Initial Decision of the Administrative Law Judge is adopted and made an Order of the Board.” (R. at 1951, Order of the State Personnel Board.) Trooper Umstead now appeals the Order of the State Personnel Board.

### **ARGUMENT**

By changing the charges pending against Trooper Umstead from those listed in his termination letter, and not informing him of the charges until the third day of his appeal hearing, the State Patrol deprived Trooper Umstead of any meaningful notice of the charges pending against him. Because he received no meaningful notice, Trooper Umstead was unable to effectively present a meaningful defense to the charges prior to being deprived of his property right in his continued employment. Because the State Patrol deprived Trooper Umstead of his ability to mount a meaningful defense to the charges, it deprived Trooper Umstead of the protections of due process of law.

#### **I. Standard of Review**

Pursuant to Colo. Rev. Stat. § 24-4-106(7) the court of appeals may reverse the findings of the State Personnel Board if the court finds that the Board “acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority.” *Lawley v. Dept. of Higher Educ.*, 36 P.3d 1239, 1247 (Colo. 2001). Therefore, if the Court finds that

the Board acted contrary to Mr. Umstead's constitutional rights, as it did in this case, then it "shall hold unlawful and set aside the agency action." § 24-4-106(7).

The facts as found by the hearing officer are binding in this appeal. *See Stamm v. City and County of Denver*, 856 P.2d 54, 58 (Colo. Ct. App. 1993).

## **II. The State Patrol Deprived Trooper Umstead of Due Process of Law**

The procedures used to terminate Trooper Umstead's employment with the Colorado State Patrol violated Umstead's constitutional rights to due process by depriving him of fundamental fairness in the proceedings used against him. A State Trooper's property interest in his employment may not be deprived without due process of law. *Kinchen v. Dept. of Insts., Div. for Dev. Disabilities, Wheat Ridge Reg'l Ctr.*, 867 P.2d 8, 11 (Colo. Ct. App. 1993). The touchstone of due process is "fundamental fairness." *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 765 P.2d 1015, 1025 (Colo. 1988). It requires that prior to terminating a state trooper's employment, the State must provide a trooper, like Trooper Umstead, with "a fair opportunity to mount a meaningful defense to the proposed deprivation of [his employment]." *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). It further requires that, at a minimum, a Trooper is entitled to notice of the charges against him, an explanation of the State's evidence against him, and an opportunity to present the

Trooper's side of the story. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

“[W]hen a state agency promulgates regulations governing the manner of discharge of employees more stringent than due process would require, it must strictly comply with those rules.” *Hopwood v. Boulder County Dept. of Social Servs.*, 613 P.2d 346, 348 (Colo. Ct. App. 1980). Due process therefore dictates that after a pre-termination meeting, the State Patrol must provide a terminated Trooper with notice of the discipline, including the specific charges sustained against the Trooper forming the basis for discipline, in order that he can prepare for and present a meaningful defense to the charges pending against him. Personnel Bd. R. 6-15<sup>2</sup>.

Once at the hearing, due process requires that a terminated employee not be presented with a “moving target.” *See State v. Wilcox*, 808 P.2d 1028, 1035 (Utah 1991) (Stewart, J., dissenting). It prohibits the State Patrol from changing the charges pending against the Trooper or adding charges not contemplated in the notice of discipline. *See McDaniel v. Princeton City Sch. Dist. Bd. of Educ.*, 72 F. Supp. 2d 874, 881 (S.D. Ohio 1999). Allowing the State Patrol to change the pending charges negates the opportunity for a trooper to be heard in any sort of meaningful manner, because an employee not provided notice of the reasons for

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<sup>2</sup> State Personnel Board Rule 6-15 is appended hereto.

his termination is not able to effectively participate in his own defense. *Matthews*, 424 U.S. at 319; *see also Ellis v. City of Lakewood*, 789 P.2d 449, 453 (Colo. Ct. App. 1989) (finding that due process requires an opportunity to effectively participate in termination procedures).

The procedures offered by the State Patrol in this case violated Trooper Umstead's right to due process of law. While Trooper Umstead was aware of the general factual allegations of the incident for which he was being investigated, at the time of his Rule 6-10 meeting, when he would have had an opportunity to respond to the charges, he was not aware of any formal charges under which the State Patrol was considering disciplining him. (R. at 1272, *Hrg. Transcript, Day 3* at 96:21-23.) He was ultimately made aware of the purported charges against him after his Rule 6-10 meeting, via a written notice of discipline, pursuant to Rule 6-15. Trooper Umstead appealed those charges. However, Trooper Umstead did not discover until the middle of his appeal hearing that those charges were not the purported reason for his termination. Instead, the State Patrol terminated Umstead's employment based upon the "total event" and/or three charges not listed in Trooper Umstead's termination letter or otherwise communicated to him prior to hearing. (R. at 1288, *Hrg. Transcript, Day 3* at 112:6-22.)

**A) Trooper Umstead Received No Written Notice of the Charges Sustained Against Him in Violation of Personnel Bd. Rule 6-15**

Trooper Umstead received no notice of the specific charges pending against him either before or during his Rule 6-10 meeting. Personnel Board Rule 6-15 requires at a minimum, however, that after a Rule 6-10 meeting, written notice of the specific charges and discipline resulting from the charges be delivered to the Trooper's last known address. Personnel Bd. R. 6-15. Due process requires that the Colorado State Patrol strictly comply with that rule when terminating a Trooper's employment. *Hopwood*, 613 P.2d at 348.

While the termination letter sent to Trooper Umstead cited several specific charges allegedly sustained against Trooper Umstead, none of the listed charges were the charges actually sustained against him. Instead, as Major Meredith testified at hearing, Trooper Umstead was either terminated for the "total event" or for the three specific charges listed in the Member Conduct Complaint. (R. at 460.)

Notably, the "total event" is not a specific charge which could have been sustained against Trooper Umstead. Even if it were, it was not listed as a cause for Trooper Umstead's termination in his termination letter, thus violating the notice provision, and the written requirement therein, of Rule 6-15.

The State Patrol also failed to cite in Trooper Umstead's termination letter the three specific charges Major Meredith claims he sustained against Trooper

Umstead as the basis for Umstead's termination. One of the purposes of the letter was to purportedly provide notice to Trooper Umstead of the charges he would have to defend against should he appeal his termination. Because the letter sent to Trooper Umstead did not contain the appropriate list of sustained charges, Trooper Umstead received no meaningful notice prior to his hearing. Rule 6-15 and due process of law, however, required that he receive such notice prior to his hearing in order that he be able to participate in a meaningful defense against those charges. *Matthews*, 424 U.S. at 319. Because he did not receive any notice of those charges, the State Patrol deprived Trooper Umstead of his right to due process of law.

While Trooper Umstead ultimately learned, at hearing, of the three charges actually sustained by Major Meredith, such notice did not constitute the written notice contemplated by Rule 6-15. At most, it was verbal notice, provided long after Trooper Umstead's hearing had been underway.

Because Trooper Umstead received no prior notice, and the only notice provided to him was verbal, not written, the proceedings against him violated both Rule 6-15 and Trooper Umstead's due process rights. *Hopwood*, 613 P.2d at 348.

**B) The “Moving Target” Created by the Procedures Instituted Against Trooper Umstead Violated the Tenets of Fundamental Fairness and Due Process of Law**

The State Patrol’s lack of conformance with Rule 6-15, along with its verbal announcement, mid-hearing, of the actual charges sustained against Trooper Umstead caused enough confusion that not even the hearing officer was able to recognize what charges were actually pending against Trooper Umstead and which were not. Judge Farrell based her decision on the charges originally listed in Trooper Umstead’s termination letter. (R. at 45.) She made no mention in her Decision, however, regarding the three new charges that Major Meredith testified were the actual reason for Trooper Umstead’s discharge.

The hearing itself, therefore, created nothing more than a moving target for Trooper Umstead. He, apparently like Judge Farrell, was unaware of what charges he needed to defend against. When counsel for Trooper Umstead attempted to inquire about Colorado’s Menacing statute, presumably the foundation for the listed charge of “Members Will Obey the Law,” counsel for the State Patrol objected, claiming there was no proof that menacing was involved. (R. at 1287, *Hrg. Transcript, Day 3* at 111:14-18.) Major Meredith at that time was unable to remember whether he had even sustained a charge of law violation against Trooper Umstead. (R. at 1287, *Hrg. Transcript, Day 3* at 111:21-23.) Meredith furthermore claimed that he did not sustain a charge for untruthfulness as

originally stated in Umstead's termination letter. (R. at 1290, *Hrg. Transcript, Day 3* at 114:5-16.) In fact, it was not until that exchange that Trooper Umstead learned of the three other charges that Meredith had ostensibly used to fire Trooper Umstead.

That moving target inherently prejudiced Trooper Umstead's ability to defend against the charges which purportedly formed the basis for his termination. He had no actual notice of the charges sustained against him as required by Personnel Bd. R. 6-15. Moreover, the notice he did finally receive was not in writing as required by Personnel Bd. R. 6-15, but was instead verbal notice issued by Major Meredith during cross-examination at Trooper Umstead's hearing. Both of those violations individually constituted violations of the Fourteenth Amendment's guarantee of due process. *Hopwood*, 613 P.2d at 348. In tandem, the violations violated due process by depriving Trooper Umstead of any meaningful opportunity to challenge his termination, because Trooper Umstead simply had no notice of what he was specifically defending against. *Matthews*, 424 U.S. at 333. He, like the hearing officer, was forced to guess what charges he was defending against, thus impairing his ability to present any sort of meaningful argument. Such procedure was fundamentally unfair, and therefore violated Trooper Umstead's substantive and procedural right to due process of law.

## CONCLUSION

The procedures provided to Trooper Umstead were inherently flawed. They violated the State's own rules and Trooper Umstead's substantive and procedural right to due process of law. The State Patrol therefore deprived Trooper Umstead of his property right in continued employment in violation of the United States Constitution. Accordingly, the decision of the hearing officer should be reversed and Trooper Umstead's employment reinstated.

Trooper Umstead requests oral argument for all issues presented in this Appeal.

Dated this 19<sup>th</sup> day of May, 2010.

Respectfully Submitted,

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

*Original Signature on File)*

by: s/Sean T. Olson

Sean T. Olson

Douglas Jewell

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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 OPENING BRIEF**, together with Certificate of Compliance, was electronically filed and served via LexisNexis File and Serve on the 19<sup>th</sup> day of May, 2010, addressed to the following:

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