

<p>COURT OF APPEALS STATE OF COLORADO</p> <p>101 West Colfax Avenue, Suite 800 Denver, CO 80202</p> <hr/> <p>STATE PERSONNEL BOARD Case No. 2009B038</p> <hr/> <p>MARCUS UMSTEAD,</p> <p>COMPLAINANT-APPELLANT,</p> <p>v.</p> <p>COLORADO DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,</p> <p>RESPONDENT-APPELLEE,</p> <p>And</p> <p>COLORADO STATE PERSONNEL BOARD, APPELLEE.</p>	<p><a href="#">EFILED Document</a> <a href="#">CO Court of Appeals</a> <a href="#">10CA0056</a> <a href="#">Filing Date: Jul 6 2010 10:41AM MDT</a> <a href="#">Transaction ID: 31975241</a></p> <p><b>▲ COURT USE ONLY ▲</b></p>
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<p><b>AMENDED ANSWER BRIEF OF COLORADO STATE PATROL</b></p>	

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

- It contains \_\_\_\_\_ words.
- It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p. ), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Respondent/Appellee, Department of Public Safety, Colorado State Patrol (“State Patrol”), through the undersigned Senior Assistant Attorney General, submits its Answer Brief in support of the Order of the State Personnel Board.

### **ISSUE PRESENTED**

Whether the State Personnel Board’s Order affirming the State Patrol’s disciplinary termination of Marcus Umstead (“Umstead”) was arbitrary or capricious, unsupported by the record, based upon an erroneous interpretation of law, or in excess of its authority.

### **STATEMENT OF THE CASE**

#### **I. Nature of the case, course of the proceedings, and disposition below.**

This case is an appeal, filed by former state employee Umstead, of the Order of the State Personnel Board affirming Umstead’s disciplinary termination by his former employer, the State Patrol.

As a certified state employee, Umstead petitioned the Colorado State Personnel Board (“Personnel Board”) for a hearing to review his discharge by the State Patrol. An Administrative Law Judge (“ALJ”)

conducted a hearing for the Personnel Board and rendered an Initial Decision of the Administrative Law Judge (“Initial Decision”) (v. I, pp. 32-49) in Marcus Umstead v. Department of Public Safety, Colorado State Patrol, Case No. 2009B038. The Initial Decision affirmed the State Patrol’s disciplinary termination of Umstead.

Umstead appealed to the Personnel Board for modification of the Initial Decision. On November 17, 2009, at its regularly scheduled public session, the Personnel Board reviewed and considered the record on appeal and issued its written Order on November 23, 2009 adopting the findings of fact and conclusions of law in the Initial Decision and adopted the Initial Decision and made it an Order of the Board (v. IV, pp. 1941-1942).

## **II. Statement of the relevant facts.**

Just before midnight on August 28, 2009, Trooper Umstead was speeding in his own vehicle on Interstate 70 and nearly side swiped a full-sized pickup truck. (v. I, p.12 ¶ 7) Shortly thereafter, both vehicles left the highway at the same exit, with the truck behind Umstead. (v. I, p. 13 ¶ 8) Both vehicles were stopped by a red traffic light and,

irritated by Umstead's actions, the passenger in the truck threw a plastic Mountain Dew bottle, not more than one quarter full of liquid, at Umstead's car. (v.I, p.13 ¶ 9) Umstead immediately jumped out of his car, drew his weapon, and walked toward the driver's window with his gun pointed at the windshield. (v.I, p.13 ¶ 11) When he arrived at the window, Umstead got very angry because he thought the driver was disrespecting him by smiling. (v.I, p.13 ¶ 13) Umstead was holding the gun straight out in front of him with his elbows locked. (v.I, p.13 ¶ 13) When the driver rolled down the window, Umstead asked why they threw the bottle. (v. I, p.13 ¶ 14) Umstead no longer feared for his safety but he remained very angry. (v. I, p.13 ¶ 14) Umstead told the two men in the truck that they were lucky to have thrown the bottle at a police officer instead of a gang member or someone else who may have reacted differently. (v. I, pp.13-14 ¶ 15) Umstead did not identify himself by name or provide the driver with a card. (v. I, p.14 ¶ 15) Umstead put his gun back in his holster and, as he was walking back to his car, picked up the Mountain Dew bottle and threw it at the truck, hitting the windshield. (v. I, p.14 ¶ 15) After Umstead drove away, the

truck stayed at the intersection because both the driver and the passenger were nervous about having a gun pointed at them. (v. I, p.14 ¶ 16) The truck passenger, concerned that Umstead was not actually a police officer because he was in his personal vehicle and not a patrol car, called 911 to report the incident, giving the dispatcher Umstead's license plate number. (v. I, p.14 ¶ 18) The Arvada Police Department took the 911 call and did an initial investigation into the incident by talking with the occupants of the truck and with Umstead. (v.I, pp.14-15 ¶ ¶ 19-21) The Arvada Police Department declined to file felony menacing charges against Umstead but did file a complaint with the State Patrol's internal affairs department. (v. I, p.15 ¶ 22)

The Arvada PD complaint was recorded on CSP Form 158, Member Conduct Complaint, Other Agency, as a Level 1 complaint which generated an internal investigation. (v. II, p. 460)

After completion of the internal investigation, the report and case file were given to the State Patrol Chief, Lieutenant Colonel, and to Major Meredith, the appointing authority. (v. I, p.19 ¶ 57) Major Meredith reviewed the report and case file and then sent a notice of a

Board Rule 6-10 meeting to Umstead. (v. I, p.20 ¶ 58) Major Meredith held the Rule 6-10 meeting with Umstead on October 7, 2008 and explained to Umstead that it was an opportunity for Umstead to hear the major's concerns and to add anything he wanted. (v. I, p.20 ¶ 60) Following the meeting and after extensive thought and review, Major Meredith concluded that Umstead had violated six (6) State Patrol General Orders. (v. I, p.22 ¶ 74) Ultimately, Major Meredith concluded that Umstead could not be employed as an officer based on his conduct and that the appropriate action was termination based on the totality of the circumstances including the incident and Umstead's statements after the incident. (v. I, pp.22-23 ¶ 77) Major Meredith prepared a letter of termination and hand delivered it to Umstead, effective October 21, 2008. (v. I, p.23 ¶ 79)

### **SUMMARY OF THE ARGUMENT**

The appointing authority strictly complied with all required State Personnel Board rules and provided Umstead with notice and an opportunity to be heard. The disciplinary termination was based on

violations stated in the letter of termination and not based upon notations entered on the Member Conduct Complaint form reflecting the Arvada Police Department's complaint against Umstead. The action of the Personnel Board Order affirming the disciplinary termination must be upheld because there is sufficient evidence in the record to support it.

## **ARGUMENT**

### **I. Standard of review C.A.R. 28(k)**

The State Patrol concurs that the standard of review of the decision of an administrative agency is governed by Section § 24-4-106(7), C.R.S., which provides that a reviewing court may reverse the decision of an administrative agency if the court finds that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority, Lawley v. Department of Higher Education, 36 P.3d 1239, 1247 (Colo.2001).

Further, the State Personnel Board is a constitutionally created state agency with considerable expertise in personnel matters and, as

such, its decisions are to be given deference by the courts, Koinis v. Colorado Dept. of Public Safety, 97 P.3d 193, 195 (Colo.App.2003), *cert.denied*.

**II. The state patrol's strict compliance with personnel board rules provided umstead with all due process rights.**

Procedural due process requires notice and an opportunity to be heard. People in the Interest of D.G., 733 P.2d 1199 (Colo.1987). These principles apply to administrative proceedings. Electric Power Research Institute, Inc. v. City & County of Denver, 737 P.2d 822 (Colo.1987).

The Colorado Constitution and the State Personnel Board Rules guarantee due process rights to certified State of Colorado employees. Due process requires that the employer comply with these rules. See Department of Health v. Donahue, 690 P.2d 243 (Colo.1984); Shaball v. State Compensation Insurance Authority, 799 P.2d 399 (Colo.1990). Bourie v. Department of Higher Education, 929 P.2d 18 (Ct.App.1996).

Personnel Board Rule 6-10 requires an appointing authority to meet with an employee when considering disciplinary action. The

meeting is an opportunity for the appointing authority to present his or her concerns to the employee and to allow the employee to address those concerns and provided any other relevant information.

Neither the Administrative Law Judge nor the Personnel Board found that Umstead was not given notice or an opportunity to be heard. Major Meredith stated in the written Notice of Rule 6-10 meeting that the purpose was to address “an incident which happened on August 28, 2008 involving a traffic altercation while you were off duty but still dressed in a CSP uniform.” (v. II, p. 430) Umstead was present during the incident and was interviewed about the incident by the Arvada Police Department and the State Patrol internal affairs unit. The requirement of “notice” was fully met.

The Rule 6-10 pre-termination meeting was Umstead’s opportunity to be heard and, as shown by the transcript of the Rule 6-10 meeting, Umstead availed himself of the opportunity. (v. II, pp. 436-455) Following the meeting and after further review, Major Meredith gave Umstead the required written notice ( Board Rule 6-15) of Umstead’s policy violations, the conduct upon which those violations

were based, and the decision to impose a disciplinary termination. (v. II, pp. 433-434)

Umstead argues in his Opening Brief that the “real charges” were not given to Umstead until several days into the evidentiary hearing and even the Administrative Law Judge was confused because “she didn’t even mention it in the Initial Decision.”

Umstead’s argument incorrectly characterizes the Member Conduct Complaint, CSP Form 158, which was filled when the Arvada Police Department filed its complaint against Umstead. It was based solely on information initially received from the Arvada PD and was prior to the internal investigation and interviews. It is an internal form used to track complaints received by the internal affairs unit.

However, contrary to Umstead’s argument, the Member Conduct Complaint dispositions were not the basis of his termination. At hearing, Major Meredith clarified the formal disciplinary process from the Member Conduct Complaint.

Q: (by counsel for CSP) Now, you answered a number of questions regarding the member conduct complaint form, how

does that particular form compare with the actual state personnel board process of 6-10 meetings and disciplinary action?

A: (by Major Meredith) It has no direct relevance. It's an internal forum (sic) used to track the complaints that come in on our members.

Q: So would there be any connection between sustained, unsustained or not sustained, unfounded in all of those versus taking disciplinary action or corrective action?

A: No.

(v. III, pp.1308-1309)

### **III. Sufficient evidence in the record exists to uphold the personnel board's order**

There is no support in the record for Mr. Umstead's argument that the State Patrol failed to provide notice of the real reasons for his termination. The Findings of Fact state that the grounds for termination were violations of State Patrol General Orders (v. I, p.43) and that Major Meredith "did not decide to terminate Complainant based on any one act, but the totality of the circumstances including the incident and Complainant's statements after the incident." (v.I, pp.43-44). The Findings of Fact make no mention of the Member Conduct Complaint or any confusion over the grounds for termination.

The Court must affirm the decisions of the Personnel Board unless it “acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority.” Aragon v. Department of Corrections, 140 P.3d 278, 280 (Ct.App.2006) Here, the record clearly supports the Initial Decision and the Personnel Board Order and the disciplinary termination must be affirmed.

Determination of the grounds for disciplinary action is an evidentiary fact which may not be set aside unless contrary to the weight of the evidence. The findings of fact, upon which the Personnel Board Order is based, are supported by the weight of the evidence.

## **CONCLUSION**

Former trooper Umstead was afforded his full due process rights of notice and an opportunity to be heard that are guaranteed by the Colorado Constitution and the State Personnel Board rules. Pursuant to Board Rule 6-10, the State Patrol provided Umstead with notice of the potential grounds for disciplinary action and gave him an

opportunity to be heard during a meeting with the appointing authority lasting 1 ½ hours. These evidentiary facts, determined by the trier of fact (ALJ), as set forth in the Initial Decision, are based upon testimony provided during multiple days of hearing and the admission of voluminous exhibits and electronic recordings. These evidentiary facts are supported by the clear weight of the evidence and may not be set aside. Accordingly, the Order of the Personnel Board, adopting the Initial Decision and affirming the actions of the State Patrol, must be upheld.

RESPECTFULLY submitted, this 6<sup>th</sup> day of July 2010.

JOHN W. SUTHERS  
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s/ Diane Marie Dash

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **AMENDED ANSWER BRIEF OF COLORADO STATE PATROL** upon all parties herein by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 6<sup>th</sup> day of JULY 2010 addressed as follows:

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