

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011216

EDGARDO L. GIERBOLINI,	)	Case No. 1938-2005
	)	
Charging Party,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
CORRECTIONS CORPORATION	)	
OF AMERICA,	)	
	)	
Respondent.	)	

**I. PROCEDURE AND PRELIMINARY MATTERS**

Edgardo Gierbolini (“Gierbolini”) filed an original complaint with the Department of Labor and Industry on September 9, 2004, thereafter filing an amended complaint on September 29, 2004. He alleged that Corrections Corporation of America (“CCA”) discriminated against him because of marital status (married) when it discharged him from his position as Assistant Warden on or before June 21, 2004. The department gave notice on March 25, 2005, that Gierbolini’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties subsequently stipulated to extend department jurisdiction beyond 12 months after complaint filing.

The contested case hearing proceeded on December 13-16, 2005, and resumed and closed on December 20, 2006. Gierbolini attended with counsel, Timothy J. McKittrick, McKittrick Law Firm, P.C. CCA attended through its designated representative, Warden James MacDonald, with counsel, David M. McLean and Ryan C. Willmore, Browning, Kaleczyc, Berry & Hoven, P.C. The witnesses who testified and the exhibits offered are listed in the accompanying witness and exhibit tables. Gierbolini filed the last post-hearing brief on March 31, 2006. A copy of the Hearings Bureau file docket for this contested case proceeding accompanies this final agency decision.

## II. ISSUES

The issue in this case is whether CCA's decision to discharge Gierbolini resulted from his marital status (recently married to a co-employee). A full statement of the issues presented for the contested case hearing appears in the final prehearing order in this proceeding.

## III. FINDINGS OF FACT

1. Corrections Corporation of America is a publicly traded corporation, with its headquarters in Tennessee, that operates 63 private correctional facilities, for profit, incarcerating between 64,000 and 65,000 inmates at various locations throughout the United States. One of CCA's private correctional facilities is located in Shelby, Montana.

2. Edgardo Gierbolini was 50 years old at the time of this hearing. He was born and raised in New York, New York. From 1972 to 1995, Gierbolini served on active duty in the United States Marine Corp. While serving as a Marine, he successfully completed basic training, infantry school, NCO (Non-Commissioned Officers') Leadership Academy, ranger school, scuba school, airborne school, reconnaissance school, Senior NCO Leadership Academy and sniper/scout school.

3. Gierbolini was deployed overseas on four occasions. He served as the Operations Chief for a unit of 783 Marines stationed at four different geographical areas. He had signature authority over a \$27 million dollar annual budget. He coordinated the transportation, lodging, pay, and mission for all Marines under his charge which included deployment overseas and combat locations.

4. Gierbolini received five meritorious promotions while in the United State Marine Corp.<sup>1</sup> Gierbolini developed a curriculum for a highly complex and sophisticated air traffic control system and worked on a multi-national training deployment, certifying over 300 pilots and controllers from 6 countries. He helped develop methodology for training which is now standard throughout the Navy.

5. After his honorable discharge in 1995, Gierbolini worked for the campus police at Rhodes College (Memphis, Tennessee) before beginning his employment for CCA on January 29, 1996, as a correctional officer.

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<sup>1</sup> Marine Corp promotions normally require sufficient time both at current rank and in overall service time. Meritorious promotions waive these requirements, based upon merit.

6. Gierbolini worked in several CCA facilities. CCA promoted Gierbolini throughout his employment, during which he worked as a correctional officer, a training officer, an acting assistant warden and finally as assistant warden of the CCA facility in Shelby, Montana, beginning on August 10, 2001.

7. In 1999, Gierbolini transferred to CCA's facility in Shelby, Montana, when that facility first opened. He was assigned as a training manager. Gierbolini married another CCA employee who became Katherine Gierbolini ("Katherine").

8. Throughout Gierbolini's employment with CCA, he received annual performance appraisals by his immediate supervisors. Employee performance appraisals are an important factor in CCA decisions about promotions and salary increases. The structure of the yearly performance appraisals changed during Gierbolini's tenure at CCA, but the basic definitions of performance level remained the same. Gierbolini consistently averaged between "Exceeds Requirements" and "Far Exceeds Requirements" for his evaluation scores. He never received evaluations which placed his employment or advancement in jeopardy while he worked for CCA.

9. This is not to say that Gierbolini was considered a perfect employee. He had shortcomings in "people skills," perhaps in large part because of his extensive military background. He supervised people as a Marine NCO would do. For the most part, CCA welcomed and approved this approach. Correctional facilities are paramilitary organizations, operating under principles of chain of command and immediate obedience consistent with actual military operations. However, strict military methods and discipline can offend contemporary civilian concepts of proper interpersonal management techniques. For example, CCA's Corporate Compliance Hotline received a complaint on February 3, 2004, that Gierbolini had created a "hostile working environment" at the Shelby facility.

10. Overall, Gierbolini had a successful career with CCA, advancing to the position of Assistant Warden. Although there were no guarantees, CCA appeared to be considering Gierbolini for further advancement.

11. In his last CCA annual evaluation, dated March 5, 2004, his supervisor, Warden James MacDonald, encouraged Gierbolini to focus "on what it takes to assume a Warden's role," suggesting that Gierbolini concentrate on "the area of fiscal management and being able to handle the political area that goes with the job."

12. MacDonald also told Gierbolini, in that same evaluation, that "[w]ith your commitment and leadership drive, you assisted staff to meeting every single

challenge.” He stated that Gierbolini had experienced “significant personal challenges this year” and commended Gierbolini on his “tenacity to overcome and excel.” He wrote that Gierbolini remained “an important asset to C.C.C. [Crossroads Correction Center, the Shelby CCA facility].”

13. On August 28, 2003, Gierbolini accidentally shot himself in the leg while off duty.<sup>2</sup> The injuries he sustained were very serious and disabling. He underwent several surgeries as a result.

14. Gierbolini’s wife Katherine was employed in the mail room by CCA. Gierbolini did not supervise Katherine while they both worked for CCA in Shelby.

15. Gierbolini and Katherine had marital difficulties. Of the several sources of those difficulties, only one (Katherine’s developing friendship with an inmate housed in CCA’s Shelby facility) is relevant to this case.

16. Chief of Security Mike Varnum advised Gierbolini, the Assistant Warden at the time, that Katherine was spending too much time with the particular inmate. Gierbolini and Varnum advised Warden MacDonald of their suspicions that Katherine and the inmate were involved in a relationship which violated CCA policy.

17. Gierbolini confronted Katherine about the relationship and grudgingly accepted her explanation, which he found implausible. As her husband and not her supervisor, Gierbolini did not question her further at that time. A subsequent discovery of photographs again suggested to Gierbolini that Katherine might be in a relationship with the inmate that violated CCA policy. Gierbolini again confronted Katherine, again reluctantly accepted an implausible explanation and did not further pursue the matter.

18. The marital problems between Gierbolini and Katherine continued. The couple mutually agreed to divorce. In January or February 2004, they decided that they would divorce on May 12, 2004. Prior to the decision to get divorced, Gierbolini had purchased tickets for Katherine and her children to go back to Tennessee to visit their family on June 4, 2004. Since they were now divorcing less than a month before that trip, they agreed that they would live in the same house until Katherine and her children went to Tennessee after the divorce.

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<sup>2</sup> Gierbolini was practicing his “fast draw” techniques, in which he sometimes competed with other individuals with similar interests. He had failed to remove the live rounds in his pistol. The pistol discharged during his practice.

19. In late April 2004, the doctor decided that the rod in Gierbolini's leg had failed, necessitating another surgery to (a) remove the rod, (b) insert a plate to straighten the bone and (c) create a bone graft. Gierbolini decided to schedule the surgery after Katherine left for Tennessee, so that she would not feel obligated to take care of him during his rehabilitation.

20. The divorce became final on May 12, 2004. Gierbolini and Katherine were still living in the same house.

21. Early in the morning on May 13, 2004, Gierbolini discovered additional correspondence from the inmate to Katherine, which contained phrases of affection and nicknames that again suggested an improper relationship. Gierbolini called Warden MacDonald and advised him of what he had discovered. MacDonald advised Gierbolini to leave the home immediately and take all firearms with him.

22. Gierbolini called fellow employee and friend Debra Novak ("Novak"<sup>3</sup>). With Novak's approval, Gierbolini went to her home with the firearms.

23. Later in the early morning hours of May 13, 2004, MacDonald drove to Novak's home to talk with Novak and Gierbolini. MacDonald advised that he was going to ask immediately for Katherine's resignation.<sup>4</sup> MacDonald offered to help Gierbolini move his property out of his home and into Novak's home the following morning. MacDonald told Novak to go to work the following morning, then leave work early and meet them at Gierbolini's house at 11:00 a.m. to assist in the move.

24. Gierbolini mentioned to MacDonald that if he was going to stay in Novak's home he should not continue to be her immediate supervisor.

25. On May 13, 2004, MacDonald, Novak and Gierbolini moved three full pick-up loads of Gierbolini's personal possessions to Novak's home. MacDonald understood that Gierbolini would stay in a separate bedroom in Novak's home. During the move, MacDonald told Gierbolini that he would make changes so that Novak would not work directly under Gierbolini's supervision.

26. MacDonald believed, based on his observations and conversations with Gierbolini and Novak, that the two were friends and were not romantically involved.

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<sup>3</sup> For simplicity's sake, Debra Novak will be called "Novak" throughout this decision, even after her marriage to Gierbolini.

<sup>4</sup> At MacDonald's subsequent request, Katherine did resign effective May 12, 2004.

27. After Gierbolini moved into Novak's home, Novak and Gierbolini continued to work at the CCA facility in Shelby. The two car pooled to and from work. MacDonald did not implement any immediate change in the chain of command, so Gierbolini continued to be the direct supervisor of Novak.

28. On or about May 26, 2004, CCA headquarters in Tennessee received another Corporate Compliance Hotline call complaining about Gierbolini. The caller reported that Gierbolini was giving preferential treatment, yelling at employees, impacting morale negatively and being "extremely rude to staff." The complaint was in large part premised upon implications of Gierbolini's divorce and immediate move into the home of a woman under his direct supervision, with whom he spent breaks and to whom he appeared to be showing preference at work. The complaint also criticized Warden MacDonald for failing to address the alleged preference and negative conduct of Gierbolini toward other employees. The complaint directly alleged that married couples who both worked at the facility were treated adversely, while Gierbolini was giving preference to Novak.

29. Mickey Liles, CCA's Division VII Managing Director of Facilities Operations, ordered MacDonald to conduct an investigation concerning the complaint. MacDonald conducted that investigation. In conducting it, he did not question Novak, Gierbolini or Katherine.

30. MacDonald concluded that many of the allegations were unfounded, not supported by the facts, false and misleading. He also concluded that no romantic relationship between Gierbolini and Debra had been established, but intimated that he could not rule out such a relationship.

31. MacDonald concluded that some of the allegations were or might be true. Novak had altered her schedule to accommodate Gierbolini (which he permitted her to do). In one instance, the time sheets suggested (but did not prove) that Gierbolini may have approved, as hours worked, some time Novak spent away from work assisting him. Novak and Gierbolini had bought a vehicle together. MacDonald noted that the depth of the relationship between the two could be questioned given the breaks they were taking together while at the facility.<sup>5</sup> MacDonald questioned whether Gierbolini would be able to make the necessary changes that would be required to remain at the Shelby facility as an assistant warden.

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<sup>5</sup> The Shelby facility was non-smoking. Employees had to leave the premises to take smoke breaks, which involved walking and/or driving. Gierbolini was still on crutches. Taking breaks with Novak or other friends made it easier for him to have a cigarette.

32. MacDonald did not note that although he had told Gierbolini that he would adjust the chain of command to remove Novak from Gierbolini's direct supervision, no such change had been made. MacDonald ultimately concluded that the complaint did not warrant discipline of Gierbolini.

33. MacDonald's investigative report, dated May 27, 2004, was sent to Liles.

34. On June 2, 2004, Gierbolini began his planned vacation from work to have surgery on his leg, scheduled for June 8, 2004.

35. On June 4, 2004, Gierbolini took Katherine to the airport in Great Falls for her flight to Tennessee. He returned to Cut Bank that day and discussed with Novak his upcoming surgery and his need for assistance after the surgery. Both Gierbolini and Novak realized that there would be a long period of convalescence and rehabilitation after the surgery. Gierbolini and Novak discussed Gierbolini's post-surgery needs for a wheelchair for mobility, for railings and other forms of assistance in the bathroom and for more or less continuous personal care assistance.

36. Novak was willing to help Gierbolini, but she only had a week or ten days of "paid time off" (personal leave or vacation time) accumulated. Gierbolini knew that the convalescent period would be much longer.

37. Pursuant to applicable CCA policy an employee could use banked sick time to take care of a family member who was sick or injured and in need of assistance. Novak had a substantial amount of sick time accumulated. At that point, on June 4, 2004, Gierbolini proposed that Novak marry him, so she could use her banked sick time to take care of him after the surgery. Novak accepted his proposal.

38. This was not the first time that Novak had made a serious change in her lifestyle to help a friend in need. Another friend of hers had previously developed a serious blood disease which required daily dialysis. Novak moved her residence to be near him, learned how to give him dialysis and treated him for a year until he died. Another friend of Novak's was concerned that he was going to lose his job. He asked Novak if she would ask her former employer to hire the friend. The former employer agreed to hire the friend if Novak would also come back to her former job. Novak quit her job and went back to her former employer so that her friend could secure employment. Of course, she had not previously married any friends to assist them.

39. After accepting Gierbolini's proposal, Novak verified that immediate marriage would require obtaining a marriage certificate and having the marriage

officiated by a judge or justice of the peace. Gierbolini and Novak went directly to the county courthouse on June 4, 2004, and got married.

40. After their marriage, Gierbolini and Novak left the Courthouse and drove past Katherine's house. Several employees had agreed to help move Katherine's property and store it in another employee's garage, to be shipped to Tennessee later. Gierbolini and Novak stopped to thank the people for helping them move.

41. Gierbolini and Novak then went directly to CCA to participate in a highly promoted job fair going on at the facility. Upon their arrival Gierbolini and Novak notified MacDonald that they had just gotten married. Gierbolini gave the human resource person a copy of the marriage certificate. Once again, Gierbolini and MacDonald had a brief discussion concerning the work arrangement between the now married couple. Gierbolini suggested that Novak could resign from her position at CCA to alleviate the appearance of impropriety or conflict of interest.

42. After advising MacDonald and the human resource people that they were married, Gierbolini and Debra left the CCA facility. Neither was due to return to work until Gierbolini's scheduled return date of June 21, 2004. CCA had no notice from Gierbolini that his relationship with Novak was anything other than friendship until the notification on June 4, 2004, that the two were married and would both be off work during his recovery.

43. MacDonald reported the marriage of Gierbolini and Novak to Liles and reopened his investigation of the May 26, 2004, complaint.

44. MacDonald, Liles and apparently large numbers of CCA employees at the Shelby facility concluded that Gierbolini and Novak had been romantically involved before their marriage and probably before Gierbolini's divorce.

45. The unexplained departure of Katherine from employment also fueled speculation among the employees at the CCA Shelby facility about what had transpired between Gierbolini and his past and present wives in the months leading up to and including his divorce, vacation and marriage.

46. On June 8, 2004, the facility chaplain at the C.C.A. Shelby facility, Charles Clifton, told MacDonald that the security and administrative employees were talking extensively about Gierbolini and Novak's marriage. Clifton told MacDonald

47. that the employees were “pretty upset.” MacDonald as yet had not made any change in the Organizational Chart to remove Novak from Gierbolini’s direct supervision.

48. On June 8, 2004, Gierbolini had surgery on his leg. He was scheduled to return to work on June 21, 2004.

49. On June 9, 2004, MacDonald told employees attending a staff meeting that “the rumors were true” that Gierbolini and Novak were married. In his addendum to his investigative report on the May 26, 2004, complaint he indicated that he also told the employees at the staff meeting that “there will be ‘adjustments’ in the future, and left it at that.”

50. Later on June 9, 2004,<sup>6</sup> Chief of Security Varnum told MacDonald that Gierbolini had cursed, threatened and intimidated his wife, Allison Varnum (also a CCA employee at the Shelby facility). Varnum told MacDonald that 20 to 50 of the employees had been talking about Gierbolini and Novak. Varnum also said that MacDonald’s job would be in jeopardy if he did not handle the situation properly.

51. MacDonald reported all of Varnum’s statements, together with similar statements he attributed to 2 other employees, Cess Simons and Kari Kinyon, to Liles in the addendum to the investigative report. The addendum, taken as a whole, portrayed a facility in which substantial numbers of the employees were complaining about Gierbolini’s marriage, divorce, alleged hostile treatment of some employees and alleged preferential treatment of Novak and some other “favored” employees.

52. MacDonald did not talk to Gierbolini, Novak or Katherine about the accusations and allegations.

53. Liles was scheduled to make his first visit to the facility in Montana in June 2004 as part of his duties as the newly appointed managing director. Liles began his corrections employment in 1973, and had served in numerous capacities. Prior to becoming managing director, he had worked as both an assistant warden and a warden. Liles was the first warden at the CCA facility in Shelby. He had worked with Gierbolini at that time. He knew many of the other employees. Liles reviewed pursue the investigation of Gierbolini during his visit.

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<sup>6</sup> The timing of these conversations between Varnum and MacDonald is taken from the order in which MacDonald reported them to Liles in his “addendum” to his original May 27, 2004, investigative report on the May 26, 2004, complaint.

54. On June 16, 2004, Liles' first day at the facility, employee Kelly Van Tine approached him to discuss "issues" at the facility, specifically Gierbolini. She reported that Gierbolini said to her that "if I wanted to keep my fucking job I would shut the fuck up." She also reported that employees were scared of Gierbolini and that his demeanor became more harsh once Gierbolini became the assistant warden.

55. Word spread among the employees that Liles was listening to complaints about Gierbolini. Several employees responded by seeking Liles out to share their own grievances and their understanding (based on rumor and gossip) of what Gierbolini had done to other employees.

56. As Liles talked to more employees at the facility during his visit, he concluded that morale at the facility was low because of Gierbolini's conduct as the assistant warden. He gave credence to reports that Gierbolini threw his crutches at Chief of Security Varnum.<sup>7</sup> He decided that there existed a wide-spread perception that Gierbolini gave Novak preferential treatment. He accepted at face value reports of Gierbolini swearing at and otherwise verbally abusing employees, of Gierbolini throwing objects at and threatening employees and of Gierbolini praising employees privately and castigating them in front of other employees, inmates and third parties.

57. Liles also gave weight to complaints that Gierbolini did not create a team atmosphere and was not able to motivate employees positively. Liles noted assertions that Gierbolini attempted improperly to influence disciplinary hearing officers in the conduct of their duties and accusations that Gierbolini had physically assaulted an employee. Liles also noted that Gierbolini had questioned that same employee regarding possible drug trafficking into the facility, and had never subsequently apologized to the employee when he was cleared of any wrongdoing.

58. From the evidence adduced, the hearing examiner finds that the nature of correctional facilities makes them potential hotbeds for gossip and rumors. The manner in which CCA undertook its investigation of Gierbolini assured that the investigation would gather large quantities of complaints and accusations, ranging from accurate accounts of incidents to completely false distortions of ordinary interactions between Gierbolini and other employees.

59. After collecting the assorted accusations, complaints and stories about Gierbolini, Liles did not talk with Gierbolini about any of the information. CCA did

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<sup>7</sup> Testimony at hearing about the "incident" indicated that it started as a misperception and grew as garbled accounts of what supposedly had happened spread among the employees.

not give Gierbolini notice of the on-going investigation and did not give him any chance to respond to the negative information gathered.<sup>8</sup>

60. Liles shared with his supervisor, Vice President of Operations Jimmy Turner, the information that he had gathered at the facility and the information provided by MacDonald. Turner made a decision to fire Gierbolini.<sup>9</sup>

61. Neither MacDonald nor Liles recommended to Turner that Gierbolini be discharged. Both MacDonald and Liles reasonably knew that Gierbolini's medical and marital problems had strained his ability to perform his duties both before and after his last annual evaluation, causing or contributing to greater harshness in Gierbolini's military style of supervision. Both also knew or should have known that the sudden marriage to Novak on the heels of the divorce and departure of Katherine from the Shelby facility had sparked speculation, rumor and gossip about Gierbolini. Nevertheless, neither MacDonald nor Liles felt any need to defend Gierbolini or extend the investigation to determine whether any of the accusations were untrue, exaggerated or motivated by personal animosity or outside issues.

62. The surprising one-sidedness of the investigation and the swift decision to fire Gierbolini resulted from Liles and MacDonald both concluding that Gierbolini had withheld from CCA information about a developing romance with Novak. Blaming Gierbolini for both bad judgment and dishonesty by omission, his superiors allowed the investigation to proceed and conclude without any input from Gierbolini. But for his marriage to Novak, Gierbolini would not have been subjected to such hostile scrutiny by CCA management.

63. On June 21, 2004, Gierbolini returned to work at the Shelby facility. He asked if MacDonald would now be supervising Novak, and got an equivocal answer. Later that morning, MacDonald told Gierbolini there would be a conference call with Turner regarding Gierbolini and Novak and that Gierbolini would not be included in the conference call. Shortly thereafter, MacDonald directed Gierbolini to come to MacDonald's office at 10:00 a.m. for the conference call.

64. MacDonald and Gierbolini were in the warden's office at 10:00 a.m., with Turner and Liles on the phone. Turner shared CCA's conclusions about Gierbolini's

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<sup>8</sup> Liles met with Gierbolini while in Shelby, but did not discuss the investigation.

<sup>9</sup> The conduct of the June 21, 2004, telephone conference during which Gierbolini's employment was terminated established that Turner had made the decision to fire Gierbolini prior to the call, and the hearing examiner so finds.

inappropriate treatment of staff. Turner also told Gierbolini that CCA believed the divorce had created divisiveness in the facility.<sup>10</sup> He also told Gierbolini that marrying Novak without prior disclosure to CCA of a romantic relationship between the two was improper.

65. Gierbolini protested that he had not been given any opportunity to respond to the allegations of mistreatment of subordinates and the alleged failure to disclose a romantic relationship with Novak prior to the marriage (which he denied). Nevertheless, CCA terminated his employment during the telephone conference on June 21, 2004.

66. But for Gierbolini's marriage to Novak, CCA would not have terminated his employment on June 21, 2004.

67. Had CCA retained Gierbolini as an employee and allowed him adequate opportunity to respond to the charges of misconduct first presented to him during the June 21, 2004, phone call, CCA might have concluded that a transfer of Gierbolini to another CCA facility was necessary. Given the substance of the allegations of mistreatment of subordinates and the poor judgment Gierbolini showed by not giving CCA prior notice before marrying Novak, who was still under his direct command at the Shelby facility, such a conclusion would have been reasonable. With or without such a transfer, the problems resulting from Gierbolini's conduct (aside from his marital status *per se*) would have reduced his chances of advancing further in or even sustaining his career with CCA. Thus, any earning loss more than 24 months after his discharge and any earning loss based upon salary and benefit increases within the 24 months, is speculative. Gierbolini's gross earning losses because of his discharge consist of what he would have earned from the date of his discharge through the following 24 months, at his current entitlements as of the date of his discharge, without deferring or discounting the very limited portion of that 24 month period which is still in the future.

68. Based upon the expert testimony of Joseph Kasperick, Gierbolini's gross earning losses for the last 6.3 months of 2004 after his discharge totaled \$28,620.00. \$28,620.00 divided by 6.3 times 24 equals \$109,028.64, at \$4,542.86 per month.

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<sup>10</sup> CCA could not reasonably blame Gierbolini for "divisiveness" resulting from his divorce from Katherine. There is no evidence that the divorce resulted from any work-related inappropriate conduct on Gierbolini's part. CCA's inclusion of this reason as justification for discharging Gierbolini was entirely pretextual.

69. Gierbolini's ability to seek work after his discharge was limited in part by his gunshot wound and resulting physical problems. There is no evidence that he would have faced such limitations in earning capacity had he still been employed by CCA. Thus, although CCA's discrimination was unrelated to the physical problems resulting from the gunshot wound, Gierbolini's lost earning capacity, in its entirety, following his discharge did result from CCA's discriminatory act. Although Gierbolini did suffer compensable emotional distress (discussed in later findings), he did not establish that his emotional distress (given his military and other employment history, and his demonstrable drive to succeed) interfered with employment seeking. It is possible for a person suffering serious emotional distress nonetheless to continue to seek and find gainful employment. Given his strong personality, Gierbolini more likely than not had the capacity, with his qualifications and despite his physical problems and his emotional distress, to earn \$24,000.00 per year over the same 2 years. It is more likely than not, given the limited employment market in the area of his residence, that his earning capacity would not include benefits within those 2 years.

70. \$109,028.64 minus \$48,000.00 is \$61,028.64, the total earning loss Gierbolini suffered as a result of the illegal discrimination.

71. Prejudgment interest on that earning loss, based upon \$2,542.86 in losses per month, totals \$5,636.67 through the date of this decision [ $\$2,542.86 \times 0.10$  divided by 12, times 266 months cumulated<sup>11</sup>].

72. Gierbolini was already suffering emotional distress as a result of both his physical problems and his marital problems and divorce from Katherine, before CCA discharged him. His testimony did establish that his emotional distress increased after the discharge, due to embarrassment, outrage, decreased emotional stability to weather the pre-existing and continuing physical problems and loss of self-esteem and a sense of competence and fitness. The amount necessary to compensate Gierbolini for the emotional distress caused by CCA's discriminatory discharge is \$25,000.00.<sup>12</sup>

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<sup>11</sup> 23 months of interest on the lost earnings for June 21-July 20, 2004, plus 22 months of interest on the lost earnings for July 21-August 20, 2004, etc., through interest on the lost earnings for late April through late May 2006, totals 266 months of interest.

<sup>12</sup> Gierbolini argued that a separate category of harm for which he should receive an award was loss of enjoyment of life due to reduced financial means. Gierbolini failed to prove any such loss outside of emotional distress due to reduced circumstances, which is included herein.

#### IV. OPINION<sup>13</sup>

Montana law prohibits discrimination in employment based upon marital status. Mont. Code Ann. § 49-2-303(1)(a). Such discrimination is only permitted when the reasonable demands of the job require it. *Id.* The “reasonable demands” defense is a strictly construed affirmative defense, which is not relevant in this case, because CCA did not interpose it.

In this case there was substantial and persuasive direct evidence that CCA discharged Gierbolini because of his marital status, in MacDonald’s report with its addendum, in MacDonald’s memorandum of the June 21, 2004, telephone conference, in the testimony of MacDonald, Liles and Turner, and in the discharge letter CCA gave to Gierbolini. The course and conduct of the investigation triggered initially by the anonymous call of May 26, 2004, and fueled and expanded by notice of Gierbolini’s marriage to Novak, also provided direct evidence of discriminatory animus toward Gierbolini because he married Novak.<sup>14</sup>

Once Gierbolini proved his *prima facie* case with direct evidence, CCA had the burden to prove “that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief.” Admin. R. Mont. 24.9.610(5); *see also* *Laudert v. Richland County Sheriff’s Department*, ¶¶24-27, 2000 MT 218, 301 Mont. 114, 7 P.3d 386.

CCA failed to meet its burden of proof. Its unlawful motive clearly did play a role in the decision to fire Gierbolini, and the direct evidence of that motive, largely appearing in the statements and actions of CCA’s management personnel, was credible and worthy of belief.

The department may order any reasonable measure to rectify harm Gierbolini suffered because of the illegal discrimination. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages in an employment discrimination case is to make the victim whole. *E.g.*, *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also* *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

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<sup>13</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

<sup>14</sup> Marital status discrimination under the Montana Human Rights Act includes disparate treatment by the employer because of the identity of the spouse. *Thompson v. Harlem S.D. No. 12*, (1981), 192 Mont. 266, 270, 627 P.2d 1229, 1231.

By proving discrimination, Gierbolini established a presumptive entitlement to lost earnings (including benefits). *Albermarle Paper Co.*, *supra*, 422 U.S. at 417-23. He must prove the amount of earnings he lost, but not with unrealistic exactitude. *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that lost earnings are difficult to calculate does not justify denying award).

Speculation cannot be the basis for an award—Gierbolini still has the burden by a preponderance of the evidence that he suffered the particular losses claimed—and therein lies a problem for the substantial recovery he sought. Hostility toward Gierbolini among the employees he supervised came to light before CCA decided to fire him. MacDonald, before learning of Gierbolini's marriage to Novak, commented in his initial report to Liles that Gierbolini might not be able to make the changes required to stay at the Shelby facility. Thus, Gierbolini's future with CCA was no longer so bright, even before his marriage to Novak triggered the discriminatory animus. Gierbolini's entitlement to economic damages extends to earnings he lost because of the discriminatory act. *Beardsley v. Hays-Lodge Pole S. D. No. 50* (1996), HR No. 9401005996 (facts did not support a finding that the charging party would continue in his position more than another year, given the increasing hostility, for nondiscriminatory reasons, toward renewal of his contract). The hearing examiner cannot speculate that Gierbolini's career with CCA would have continued, let alone led to further advancement, for more than 2 years beyond the date of his illegally discriminatory termination. Thus, lost earnings are only awarded for 2 years.

It is also reasonable, on this record, to find that Gierbolini had a substantial residual earning capacity, given his many skills and abilities. The limited employment market around his home, with CCA not available as an employment prospect, reduced that earning capacity, but not to minimum wage. Thus, the hearing examiner found that Gierbolini retained the ability to find and hold jobs that would pay \$2,000.00 per month.

Pre-judgment interest on lost earnings is a proper part of the department's award of damages. *P. W. Berry, Inc.*, *op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Calculation of prejudgment interest is proper for the elapsed time without the lost earnings, multiplied by the appropriate rate of interest applied over the same elapsed time. *E.g.*, *Reed v. Mineta* (10<sup>th</sup> Cir. 2006), 438 F.3d 1063. Ten percent per annum simple interest is appropriate, as applicable to tort losses capable of being made certain by calculation. Mont. Code Ann. § 27-1-210. Thus, the appropriate calculation of prejudgment interest is based upon the sum of

the number of months without each month's lost earnings between discharge and the date of decision, times 0.10 divided by 12, times one month's lost earnings (see Finding No. 70).

Emotional distress damages are within the scope of the statutory power to require any reasonable measure to rectify "any harm, pecuniary or otherwise" suffered because of the discrimination. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601.

Emotional distress recoveries for illegal discrimination under the Montana Human Rights Act are governed by *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. Montana law expressly recognizes freedom from unlawful discrimination as a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; *cited in Vortex at* ¶33, *supra*; *Vainio, supra*; *see also Campbell v. Choteau Bar & Steak Hse.* (1993), HR No. 8901003828.

Gierbolini suffered emotional distress when his career employer, CCA, ended his career because he married a woman he supervised without first telling CCA what he intended to do. After a life in which he had overcome personal hardships to excel in both military and civilian life, Gierbolini suddenly found himself not only physically dependent upon his new wife, but financially dependent as well—unable, for the first time in his adult life readily to support himself. The evidence of his emotional distress was sufficient to merit an award of \$25,000.00.

In *Vortex*, the Court affirmed an award of \$2,500.00 for emotional distress damages resulting from Ben Foss' loss of his job. Much of that emotional distress stemmed from financial problems due to loss of an existing income. Thus, the "loss of enjoyment of life" claim asserted by Gierbolini is within his emotional distress recovery, not another separate damage item.

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a).

Finally, because Gierbolini has prevailed, his motion to exclude after acquired evidence is moot, and is not addressed in this decision.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7) MCA.

2. Corrections Corporation of American unlawfully discriminated against Edgardo Gierbolini because of his marital status when it discharged him from his position as Assistant Warden of the Crossroads Correction Center, Shelby, Montana, on June 21, 2004. Mont. Code Ann. § 49-2-303(1)(a).

3. Gierbolini suffered harm as a result of the unlawful discrimination, due to loss of earnings (including benefits) of \$4,542.86 per month for 24 months, less his residual earning capacity of \$2,000.00 per month, plus prejudgment interest on his lost earnings in the amount of \$5,636.67 from the date of discharge to the date of this decision, and further suffered emotional distress, for which he is entitled to recover an additional \$25,000.00. Mont. Code Ann. § 49-2-506(1)(b).

4. As a matter of law, the department must order Corrections Corporation of America to refrain from engaging in such discriminatory conduct and may prescribe conditions on the corporation's future conduct relevant to this discriminatory practice and require the corporation to report on its compliance with this order. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

## VI. ORDER

1. Judgment is found in favor of Edgardo Gierbolini and against Corrections Corporation of America on the charge of illegal discrimination in employment because of marital status when the reasonable demands of Gierbolini's position did not require a marital status distinction.

2. The department awards to Edgardo Gierbolini and requires Corrections Corporation of America to pay to him \$91,665.31 (with interest accruing as a matter of law from the date of this order) to rectify the harm he suffered as a result of the illegal discrimination.

3. The department permanently enjoins Corrections Corporation of America, in its business operations in Montana, from taking adverse actions against its

employees based upon their marital status unless the reasonable demands of the particular position require a particular marital status.

4. The department enjoins and requires Corrections Corporation of American, within 60 days after this decision becomes final:

(A) to submit to the Human Rights Bureau proposed or existing policies that comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them and

(B) to arrange and finance training on marital status discrimination (law and appropriate practice) for Mickey Liles, Jimmy Turner and James MacDonald (unless any of these individuals are no longer employees), for 4 hours each, with the prior approval of the Human Rights Bureau for the particular trainings, and document to the Human Rights Bureau completion of the trainings.

Dated: May 19, 2006.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry