

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015452:

LISA BOYINGTON,	)	Case No. 775-2013
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
MONTANA DEPARTMENT OF	)	ADMINISTRATIVE DECISION
CORRECTIONS – PROBATION AND	)	
PAROLE,	)	
	)	
Respondent.	)	

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Effective May 27, 2014, the name of what previously was the department’s Hearings Bureau has been changed to the “Office of Administrative Hearings” (“OAH”). Contact information regarding OAH and its employees are unchanged, except replacement of “Hearings Bureau” with “Office of Administrative Hearings.”

I. Procedure and Preliminary Matters

Lisa Boyington filed a complaint with the Department of Labor and Industry’s Human Rights Bureau (“HRB”) on April 9, 2012. She alleged that the Department of Corrections – Probation and Parole (“DOC”) subjected to her to disability discrimination in employment, and retaliated against her for resisting and opposing illegal discrimination and for participating in an investigation into a Human Rights Act complaint against DOC. On November 16, 2012, the Hearings Bureau gave notice that Boyington’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing was held June 17-21, 2013, in Missoula, Montana. Boyington attended with her attorneys, David L. Vicevich and Dolphy O. Pohlman, Vicevich Law Firm. DOC’s designated representative, Kathleen Beccari, attended, with its attorney, Katherine J. Orr, Special Assistant Attorney General, DOC Agency Legal Counsel. Another attorney for DOC, McKenzie Hannah, also attended, with notice that she might be called to testify. Counsel for Boyington confirmed that if a problem regarding that dual status should arise, notice would immediately be given.

The Hearing Officer admitted into evidence Exhibits 1-5, 7-9, 11-29, 33-36, 101, 102 (subparts 102a through 102g), 103, 104 (subparts a through m), 106-112, 113 subparts a through h), 114 (subparts a through i), 115-121, 123 (subparts a through m), and 124-135 (there were no Exhibits 105 or 122). Exhibit 39 was offered and refused.

Boyington, Hon. Ed McLean, Janet Ullom, Charles Hill, Pete Woods, Jamie Granger, Landee Holloway, Patty Wolfe, Patrick Kross, Chris Helms, Robert Bristol, Melissa Strecker, Brett Gordon, Jay Childless and Sandra Fairbank Gall testified under oath in Boyington's case in chief. Boyington, Beccari, [CM], Ron Alsbury, Kim Lahiff, [JM], Cathy Gordon (by telephone), McKenzie Hannan, Heather Smith, Michelle Puerner (by telephone) and Andrea Bethel testified under oath in DOC's case in chief. Tanner Gentry's video deposition was submitted by DOC as part of evidence in the record, and was viewed and heard in its entirety by the Hearing Officer. There was no rebuttal evidence offered.

## II. Issues

The issues for this decision are as follows. Did DOC illegally retaliate against Boyington for engaging in protected activity? Did DOC illegally discriminate against Boyington in employment because of disability when her supervisor refused to grant an accommodation (sick leave)? If DOC illegally retaliated against or refused to accommodate Boyington, what harm if any did she sustain as a result and what reasonable measures should the department order to rectify such harm? If DOC illegally retaliated against or refused to accommodate Boyington, in addition to an order to refrain from such conduct, what (if anything) should the department require to correct and prevent similar discriminatory or retaliatory practices? A necessary additional issue is the precise extent of sealed testimony and sealed exhibits, and the extent to which they can be unsealed or must remain sealed, which is addressed in a separate sealing order issuing at the same time as this decision.

## III. Findings of Fact

### A. Background

1. The Montana Department of Corrections ("DOC") is an executive branch public agency. Its Adult Community Corrections Division includes the Adult Probation and Parole Bureau ("P&P"). At all relevant times, Mike Ferriter served as the Director of DOC, and Ron Alsbury served as the Bureau Chief of P&P. DOC is a paramilitary organization within the ranks of the officers responsible for providing security, safety and rehabilitation opportunities to the offenders within its custody.

2. P&P's direct supervision of felony offenders is carried out by employees in the employment position of State Probation and Parole Officer, a "PO," supervised by a State Probation and Parole Officer II, a "POII." P&P divides Montana into a number of geographic regions, within each of which POs and POIIs are supervised by a Regional Administrator, or "RA." The RAs throughout the state are supervised by the Bureau Chief of P&P. P&P was and is responsible for the statewide supervision and rehabilitation of approximately 6,500 offenders on parole.

3. DOC has a position description for the PO position. Ex. 124. According to that position description, a PO's primary job duty (75% of the duties) is supervision and case management of felony offenders<sup>1</sup> released to the community. This supervisory duty included counseling, investigating and supervising probation and parole offenders and inmates, referring them to appropriate resources or programs using DOC's prescribed supervision standards and knowledge of state and community resources. POs performed all their duties with minimum supervision.

4. The position description indicated that the PO's role, no matter where assigned, included offender/victim counseling, coordinating treatment and rehabilitation/programming services and monitoring offenders in the community. The stated goal for the close monitoring and supervision of offenders was to ensure public safety by successfully reintegrating the offenders into society one by one.

5. The PO's case management work is described in the position description, and includes "gauging compliance with court ordered restrictions, observing the effectiveness of treatment and rehabilitation programs, identifying evidence of relapse behavior and evaluating the offender's progress and encouraging the offender to progress toward reintegration into society." Ex. 124. The position description also identifies a number of skills required to perform the job, such as the ability to determine which of various available methods and program options are best suited for both the rehabilitation of the offender and the safety of the community. Other "skills" include the abilities (a) to discern the best method to provide the least level of supervision to the offender while protecting public safety; (b) to determine the needs of offenders and their families; (c) to decide how to ensure public safety and (d) to provide effective offender treatment program. Another specific skill was excellent verbal communication skills, necessary to develop a positive regard and

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<sup>1</sup> The parties agreed to identify the felony offenders whose supervision was at issue in this case by initials only – i.e., "XY," "WZ," etc. No objection to this procedure has been received in OAH, and it is followed in this decision. Counsel and the parties know the identities of the offenders, and exhibits and portions of the Transcript containing their names are currently sealed. The sealing order gives the parties an opportunity to redact the names and replace them with the initials before those portions of the Transcript are placed in the public record.

working rapport with offenders, especially when recommending rehabilitative services to offenders, as well as for communicating effectively while testifying in court or administrative hearings. Another skill specifically mentioned was the ability to de-escalate highly charged situations with offenders, their families and victims.

6. According to the position description, POs were also responsible for understanding the due process' rights of offenders and their liberty interest. POs had to understand that inappropriate or inaccurate decisions could jeopardize the offender, the offender's liberty interests, the offender's family, the victim, the general public's safety and P&P's credibility. In addition, the position description noted that making mistakes in decisions to arrest, to violate or to release offenders might expose P&P to lawsuits.

7. According to the position description, the PO may recommend an administrative hearing, through which an offender can be subject to up to 30 days in county jail, in lieu of a formal probation violation filed with the court.

8. The position description also recites that POs are to "provide and gather information, counsel, advise, persuade, make arrangements, monitor, evaluate progress, mediate disputes, resolve issues, negotiate, persuade, defuse hostility, elicit cooperation, develop rapport." POs carry and use firearms. Regional Administrators are supposed "to consult, seek advice, provide and gather information, persuade, elicit and provide cooperation."

9. P&P's Mission Statement says, "The Bureau maintains the supervision of offenders in the community to enhance the public safety in the communities of the state of Montana. The Bureau employs best practices and professional staff that hold offenders accountable through restorative justice, effective communication and treatment, which inspires the habilitation/rehabilitation of each offender based on their needs." Ex. 129. P&P's Vision Statement says, "We are the best at safely maintaining offenders in the community by inspiring positive change."

10. POs exercise a great deal of discretion in how they exercise their job duties. This includes whether to grant permission to travel or pass-time, how strictly to enforce payment of fees and fines, and how strictly to enforce restitution and education requirements. This also includes the application of rules that are unique to individual officers. Each offender and each officer is unique; POs have different ways of supervising based on individual experience. Court judgments for individual offenders frequently contain language granting POs discretion whether or not to grant a privilege or require conditions (See, Exs. 109-113).

11. To exercise this discretion POs rely on observation data obtained through home visits, meetings with offenders, contacts with offenders family and treatment

providers and other agencies such as DOC's restitution unit. According to an experienced officer and former supervisor, Landee Holloway, this means that the PO rather than the PO's supervisors are in the best position to exercise discretion in the supervision of offenders. Supervisors are not in a position to collect observation data through personal meetings, home visits and case management of individual offenders.

12. P&P supervises offenders that have been convicted of a felony offense. By virtue of a felony conviction, offenders lose their firearm rights and travel becomes a privilege instead of a right. They are subject to search without warrant; they are restricted from certain employment; and they generally have lifelong consequences that follow from their conviction.

13. Many offenders have drug and alcohol dependencies and exhibit manipulative behavior which includes a tendency to complain about POs and efforts to split or triangulate between POs, supervisors, and collateral sources such as treatment providers. Complaints against POs are common, particularly from offenders not in compliance with the terms of their probation.

14. Offenders are subject to the rules of P&P, the terms of their individual court judgment(s), and the expectations and standards of their individual officers. The relationship of the conditions to the nature of their specific offenses is significant and prioritizes the needs of and requirements for offenders. For example, anger management counseling may be a priority for a violent offender and chemical dependency counseling a priority for a drug offender.

15. Of primary concern to POs is enforcement of the criminal sentencing policy of Montana to hold offenders accountable, to protect the public, to reduce crime, to increase the public's sense of safety, to provide restitution and reparation to victims, and to rehabilitate and to reintegrate offenders into the community. Mont. Code Ann. §46-18-101.

16. This constant concern for public safety and victims renders the duties of a PO and the corresponding exercise of discretion exceedingly difficult. Consequences of a PO's decisions can be severe, such as the failure of putting an offender on an ankle monitor allowing the offender to commit rape.

17. DOC hired Charging Party Lisa Boyington, on October 29, 2004, as a PO in P&P. Boyington's educational background included an undergraduate degree (B.S.) in Criminal Justice from the Metropolitan State College of Denver, received on September 8, 2002. Boyington successfully completed her probationary period prior to any of the events relevant to the charges in this case.

18. Boyington started out as a PO in Kalispell, Montana. While she worked in Kalispell, Boyington received two performance evaluations from DOC. In June 2005, her supervisor in Kalispell prepared both a “Competency Assessment Record” and a “Performance Assessment Record,” each on the appropriate DOC form, for Boyington’s new employee six-month review as a PO. Boyington and her supervisor, David Castro, signed both documents on July 19, 2005. Ex. 1, p. 11 and pp. 12-13.<sup>2</sup> The Competency Assessment Record reflected that Boyington met standards for her competency in “decision making, problem solving, and personal influence,” “communication” and “leadership and teamwork,” and met most standards for her competency in “public safety” and “commitment.” Ex. 1, p. 11. The Performance Assessment Record reflected that Boyington met all standards. Ex. 1, pp. 12-13.

19. In December 2005, Castro prepared both a “Competency Assessment Record” and a “Performance Assessment Record,” each on the appropriate DOC form, for Boyington’s new employee annual review as a PO. Boyington and Castro signed both documents on January 6, 2006, and the initials of the Bureau Chief also appear on both documents. Ex. 1, p. 8 and pp. 9-10. The Competency Assessment Record reflected that Boyington met standards for her competency in all areas except “commitment,” and met most standards for her competency in that area. Ex. 1, p. 8. The Performance Assessment Record reflected that Boyington met all standards. Ex. 1, pp. 9-10.

20. Shortly after being hired by DOC in Fall 2004, Boyington attended the Law Enforcement Academy for training. While she was at the academy, Boyington and Tom Forsyth, RA for the region including Kalispell, clashed repeatedly. Boyington believed she had been subjected to unfair treatment, which she felt was because of her gender or perhaps her marital status (married but pursuing a divorce). The record does not reflect that in 2004 she filed any grievance or complaint regarding Forsyth's actions.

21. Boyington continued to clash with Forsyth in 2005 and 2006. One area of conflict was her secondary employment. Boyington’s personnel file reflects that she requested permission to obtain secondary employment in Fall 2005, having been offered a part-time position with Bed Bath and Beyond, working her “days off” (Saturday, Sunday and Monday) for approximately 24 hours a week in what had to be a day or evening shift in a retail store. Forsythe approved this application the same day it was submitted. Ex. 103, September 12, 2005 letter, second document

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<sup>2</sup> Another set of initials appears at the bottom of both signature pages. Based upon the later version of the “Performance Assessment Record” used in 2008, these would seem to be initials of P&P’s Bureau Chief.

above Boyington's application for employment (no Bates numbering of pages). In mid-March of the following year, she submitted a new letter request for permission to obtain secondary employment outside of DOC, this time to work at the Flathead Attention Youth facility, on her "days off" as a PO (Saturday, Sunday and Monday). Ex. 8, p. 329, letter dated March 16, 2006.<sup>3</sup> On the exhibit is a handwritten inquiry by Forsyth, dated "3-27" that asks, "Lisa – How many hours are you requesting to work on this 2<sup>nd</sup> job?"

22. Chronologically, the next document in the exhibit is a note authored by Boyington, addressed informally to Bureau Chief Ron Alsbury, pursuing the question of secondary employment, in which she stated that "In speaking to Tom Forsyth yesterday (4-5-06)" Boyington found out that Forsyth and Alsbury both had a concern about her secondary employment, which she understood to be "level of alertness or possible liability risk." Ex. 8, p. 325. The note further explained that her schedule at Flathead Attention youth facility, where apparently she was now working, was "1030-0800 Friday, Saturday, and Sunday." From the context she clearly meant "2230-0800," or 10:30 p.m. to 8:00 a.m. She went on to explain, in the same note, that her Kalispell P&P schedule was Tuesday through Friday, 7:00 a.m. to 6:00 p.m., leaving her 3 and ½ hours for sleep after PO work on Fridays, followed by a 9 ½ hour shift at Flathead Attention Center, after which she had 14 ½ hours to catch up on sleep before the Saturday night shift, the same hours off on Sunday, the same shift on Sunday night, and then all day and all night Monday to adjust her sleep cycle for her PO day shifts on Tuesday through Friday. She also reported that she intended to maintain the secondary employment until November 2006, when she expected to have paid off some bills so that working the second job would no longer be necessary.

23. There are no documents in evidence to show whether or when, prior to her April 2006 note, Boyington responded to or even received Forsyth's question in March 2006 about how many hours Boyington intended to work at Flathead Attention Center. There are also no documents in evidence to show that Forsyth at any time authorized her to start the proposed secondary employment at Flathead Attention Center.

24. Chronologically, the next document in Ex. 8 appears at pp. 327-28, and is a May 23, 2006, letter, Forsyth to Boyington, referencing her "request to obtain secondary employment dated 5-19-06." There is no document of that date in Ex. 8 (or elsewhere in the record, as far as the Hearing Officer can tell) containing such a request from Boyington for such approval. In his May 23 letter, Forsyth wrote that

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<sup>3</sup> Exhibit 8 contains documents, some but perhaps not all of which appear to be a package of documents sent by Boyington to P&P Bureau Chief Ron Alsbury in 2007.

Boyington's May 19, 2006 request stated, "On May 11, 2006, you [Forsyth] informed me that I will no longer be approved to work the twenty-eight (28) hours on Fridays, Saturdays and Sundays," to which Forsyth's response (in his May 23 letter) was that "I never gave you approval of any kind to work this secondary employment, so your statement that you would no longer be approved is not accurate." Ex. 8, p. 327. Forsyth went on to add that Boyington's May 19 request stated "This position will not conflict with the interests of my primary employment with the State of Montana." Id. He responded at length:

I don't think you can say this secondary employment will not conflict with the interests of your primary employment (State of Montana), because it most certainly could and in all likelihood will. I know you are not "on call", however all Probation/Parole Officers receive after hour calls from clients, supervisors, dispatch personnel and law enforcement officers which require you at a minimum to make a decision over the phone and/or up to the Probation/Parole officer having to physically respond to a crime scene, police department or Probation Office. In fact, this is the reason you are provided with a State vehicle and are compensated when these situations occur.

Id.

25. Forsyth's letter went on to state that if Boyington was working weekend nights, "these calls will have to be passed on to supervisors or fellow Probation/Parole officers to handle in your stead." Id. The following paragraph expressed what Forsyth called his "biggest concern," a safety concern about Boyington being "up all night" both Saturday and Sunday working her secondary employment, and then being confronted with a deadly force situation on Monday at work as a PO, and not being adequately "prepared physically and mentally." Id. Forsyth's letter concluded by offering to approve one of the two weekend nights only,<sup>4</sup> Ex. 8, pp. 327-28, and then stating, "However you decide, I want you to know that I value you as a Probation/Parole officer, and I appreciate the good work you do for us. I believe you have a long and successful career ahead of you with this Department, and I wish you the best." Ex. 8, p. 328.

26. The evidence in the present case indicates that Boyington felt that Forsyth treated her unfairly, with regard to some of her secondary employments while working for DOC in Kalispell, as well as in other instances of conflict with Forsyth of

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<sup>4</sup> "One of the two weekend shifts" is ambiguous with three consecutive night shifts, on Friday through Sunday nights, requested.



record. The Flathead Attention Center job was one such instance. Shortly thereafter, Boyington apparently found different secondary employment rather than accept Forsyth's offer to authorize a single shift per week at the Flathead Attention Center. She began work at "Bed and Bath," and, once again, conflict between Boyington and Forsyth developed regarding this new secondary employment, as a result of a visit by Forsyth to that workplace.

27. Boyington sought and got a transfer to Missoula, in Region 1, in June 2006, beginning June 13, 2006. Ex. 103, June 1, 2006, letter, third document above Boyington's application for employment. This apparently made Boyington's conflicts with Forsyth largely moot, and the evidence suggests that with her transfer she ceased complaints or reports to DOC regarding Forsyth until sometime the last half of 2007.

28. At all times relevant to this matter, POs in Missoula supervised between seventy to one hundred felony offenders, with convictions ranging from writing bad checks to homicide, and thus were extremely busy. When Boyington started in Missoula, in June 2006, the RA for Region 1 was Sam Lemaich. He was later replaced by RA David McCarthy. Sometime in the second half of 2008, Amy Gault became the RA for Region 1. Boyington was initially supervised in Missoula by POII Jan Ullom and then POII Chuck Hill.

29. Ullom described Boyington as an above-average officer who was very good. Ullom's supervisory experience with her indicated that Boyington knew policy and procedure and was respectful to offenders – her performance was above average. Ullom did not find that Boyington played favorites with offenders or retaliated against them. Ullom testified that Boyington did not abuse her power with offenders.

30. Chuck Hill, Boyington's second immediate supervisor in Missoula, described her as "pretty on the ball. She knew her clients. She was pretty on top of her caseload." Tr. II, p. 418, lines 11-13. Hill believed Boyington did not retaliate against offenders or treat them inhumanely.

31. Another supervisor, Landee Holloway, a POII at that time, testified that Boyington was always on top of policy and that Holloway received no complaints about her. Holloway had no information that Boyington abused or treated offenders inhumanely.

32. Some co-workers (POs) considered Boyington knowledgeable, considerate, deliberate, professional, thoughtful, stern, fair, consistent, client driven, and policy driven. Melissa Strecker, for example, whose office was adjacent to Boyington's, only heard Boyington raise her voice once in a year-and-a-half. Strecker thought Boyington was firm and consistent with offenders.

33. In June 2007, Boyington heard that Forsyth might be transferring to the Missoula office. She contacted Kelly Speer at DOC, Helena, to ascertain what supervisory role Forsyth might have over her if he transferred to Missoula, expressing her fear that further problems would result from Forsyth being back in her chain of supervision. Boyington's concerns resulted in a request from DOC for a written description of the conflicts with Forsyth while Boyington was employed in Kalispell. Boyington reluctantly submitted this to P&P Bureau Chief Ron Alsbury, expressing fear of retribution and concern for her future with DOC because she was submitting the written description. Ex. 8, pp. 320-24. Ken McElroy, DOC Human Resources Bureau Chief, interviewed Boyington, Forsyth and Ed Duelfer (who was with Forsyth on his visit to Boyington's place of secondary employment, Bed and Bath, back in May 2006), prepared an investigative report and when he filed the report with Alsbury, notified Boyington by e-mail that his investigation had yielded "conflicting reports" from Boyington and Forsyth. Ex. 8, p. 319, dated January 17, 2008. He went on to state that "given the timing and context" of Boyington's reports regarding the "two primary events" (interactions between Forsyth and Boyington at the Law Academy in Fall 2004 and the visit to Bed and Bath by Forsyth and Duelfer), he found Forsyth's account "to be more credible" than Boyington's. He added that he did "fully understand that your perception of the events was most likely genuinely articulated to me," but then added that "There is not sufficient evidence, however, to make a finding of wrongdoing on Mr. Forsyth's part." Id.

34. Because of the remoteness in time of the alleged harassment in 2004-06 from the investigative conclusion of McElroy (as reported in his e-mail to Boyington), and the remoteness of the January 2008 e-mail exchange regarding McElroy's investigative conclusion from this decision, let alone with this present case, this Hearing Officer makes no findings regarding what actually happened between Forsyth and Boyington in those earlier events. The credible evidence of record does support findings that Boyington experienced DOC's response to her 2007 written description of the conflicts she had with Forsyth as a rejection of her assertions that he had harassed her, a failure of her employer to take her as seriously as she believed she should have been taken, and a confirmation of her fears that DOC did not give the same weight to what she said in her interview as it gave to what Forsyth said in his interview. She responded to McElroy's e-mail report of his investigative findings with a question that on its face indicated that she distrusted the fairness and thoroughness of his investigation – "Just so I understand. You only interviewed Tom, right?" Id. McElroy responded, "Actually I interviewed you, Tom and Ed Duelfer." Id. McElroy's first e-mail to her stated that he had interviewed her as well as Forsyth. Id. Boyington's question seemed to suggest that McElroy had not interviewed her.

35. In July 2007, Boyington was interviewed by a DOC investigator about an incident involving another P&P employee. Although the evidence of record is limited, a fair reading of that evidence is that Boyington attempted to protect the subject of the investigation by withholding information about the incident during her initial interview during the “official investigation.” In a subsequent interview, Boyington admitted withholding information in the initial interview. DOC then began an investigation of Boyington’s conduct. Apparently, Boyington did not recant admission of dishonesty, asserting instead that she only made the admission in the second interview because the investigator assured her that no disciplinary action would result against her. Bureau Chief Alsbury told Boyington, during his “pre-disciplinary meeting” with her, that the investigator categorically denied offering Boyington immunity from discipline; Boyington “continued steadfast” in such allegations, and her union representative characterized the situation as a “he said, she said” scenario, according to Alsbury’s e-mail to her. Ex. 103, print out of Dave McCarthy’s copy of Alsbury’s e-mail to Boyington, dated 11-16-07, fourth document above Boyington’s application for employment. DOC gave Boyington a reprimand by letter of warning in December 2007 for not telling the truth to the investigator. Ex. 11, pp. 346-47. That letter noted that after Alsbury’s request for any additional information, in his 11-16-07 e-mail to her, Boyington had responded by e-mail on November 26, 2007, and had “indicated a very strong level of culpability and responsibility for this misdeed.” Ex. 346. The evidence reflects that both before and after this reprimand, Boyington continued to perform her job to the satisfaction of DOC, and to receive positive evaluations from her supervisors. The reprimand should have been removed from her personnel file in June 2009, eighteen months after it was issued, after which it could not be used to support further disciplinary action, pursuant to the applicable Collective Bargaining Agreement.

36. Another supervisor, Kim Lahiff, f/k/a Christensen, apparently supervised Boyington in 2007 and/or 2008. In June 2008, Lahiff prepared both a “Competency Assessment Record” and a “Performance Assessment Record,” each on the appropriate DOC form, for Boyington’s annual review as a PO. Boyington signed the Competency Assessment Record on June 25, 2008 and the Performance Assessment Record on June 23, 2008. Lahiff signed both documents on June 23, 2008. Ex. 1, p. 5 and pp. 6-7. RA David McCarthy signed both documents on July 24, 2008, and the initials of P&P’s Bureau Chief appear below the signatures on both documents. The Competency Assessment Record reflected that Boyington met standards for her competency in all areas except “commitment,” and met most standards for her competency in that area. Ex. 1, p. 8. The Performance Assessment Record reflected that Boyington met all standards. Ex. 1, pp. 9-10. Lahiff testified that her supervision of Boyington went fine and that Lahiff had no complaints about her.

Lahiff did not recommend any corrective action during Boyington's case audits. Lahiff observed no inhumane or inappropriate treatment of offenders by Boyington.

37. Between March and June 2010 Boyington was supervised by POII Tanner Gentry. Tanner Gentry started with DOC as PO in Bozeman, Montana, where he worked between May 2008 and December 2009. In December 2009, DOC promoted him to a State Probation and Parole Officer Supervisor ("POII") and assigned him to the Missoula Office. Gentry was advancing rapidly through DOC ranks, and had unusually limited experience for a POII.

38. In June 2010, POII Gentry was supervising the Intensive Supervision Program (ISP) POs in Missoula. Boyington was one of the POs on the "ISP team." The ISP program was an increased and more active level of supervision by the offenders' POs, with increased treatment, more drug and alcohol testing, more home visits by the POs, and higher accountability for the offenders. An offender could be placed on ISP by the sentencing court or as a result of a court order for a DOC commitment following placement through a screening committee. This kind of ISP was labeled "Traditional ISP." An offender could also be placed on ISP as a sanction for not complying with the terms and conditions of standard probation following a disciplinary, on-site, or intervention hearing administered by DOC. This kind of ISP was labeled "Sanction ISP." Traditional ISP was a more restrictive placement reserved for high-risk offenders, while Sanction ISP was an option for disciplining any non-compliant offender. Tr. I, pp. 54-55, Ex. 9, pp. 336-39.

39. On June 17, 2010, Gentry, with twenty-five months total experience in Corrections including just three months experience as a supervisor, acting as a relatively new supervisor to the Missoula Office's ISP team, sent an e-mail to the team directing them to place standard probationers into the Traditional ISP program following an intervention hearing until the "ISP Sanction Group" (which he stated would be "starting in a few months") was organized. Ex. 9, p. 332, last paragraph. His e-mail closed with "If you have any questions please let me know." Ex. 9, P. 10, first paragraph. Just over an hour later, Boyington responded by e-mail, "Tanner – you are asking us to violate both policy and the law." She copied this email to Kathleen Beccari, another POII in the office, and RA Amy Gault as well as the rest of the members of the ISP team. Ex. 9, p. 331, Boyington to Gentry, June 17, 2010, 3:49 p.m. Gentry's response, at 3:51 p.m., read: "Lisa. This is not the case. Please come talk to me if you have any concerns." Ex. 9, p. 331. Instead, Boyington obtained the pertinent policy provisions from another POII and sent Gentry another e-mail five minutes later, stating, "For policy refer to 150.1 of the Community Correction Program pages 9 & 10 and pages 2 & 3 of the ISP Officer Handbook 150.1." Ex. 9, p. 334, top of page.

40. Later that same afternoon, Gentry came to Boyington's office and talked with her regarding assignment to Traditional ISP through an intervention hearing. Ex. 128, pp. 1-3. Gentry called Boyington "emotional" during the meeting. Tr. I, p. 56, lines 5-12; Gentry Depo., pp. 108-109, Ex. 128, pp. 1-3. PO Michelle Puerner was present during the first part of this confrontation. She thought that it was not appropriate for Gentry to call Boyington "emotional" but she also thought the remark had not come out as Gentry intended it. Ex. 128, p. 3. Puerner later reported to DOC's internal investigator that she left the office where Gentry and Boyington were in conflict because she did not want to listen to them yelling at each other. Gentry came to Boyington's office again on June 21, 2010, regarding the same issue, and again called her "emotional." Ex. 128, pp. 1-2.

41. After the confrontations between Boyington and Gentry, Boyington went to RA Gault, regarding Gentry calling her "emotional." Boyington also reported to the union shop steward, Brett Gordon, that Gentry had called her "emotional" twice, that she found it "highly degrading," and that she had just asked Gentry to transfer her out of the ISP program. Ex. 9, p. 340 (June 21, 2010). Gentry testified that he independently reported calling Boyington "emotional" to RA Gault. Gault reported Gentry's remarks (calling Boyington "emotional" twice) to DOC Human Resources. McKenzie Hannan conducted an investigation into whether Gentry's treatment of Boyington was discriminatory, which did not address Gentry's order to the ISP officers under his supervision to place offenders on Traditional ISP through intervention hearings. Assigning offenders to Traditional ISP through intervention hearings was not specifically authorized in then-current DOC policy, but a DOC Human Resources investigation into possible inappropriate conduct (Gentry's treatment of Boyington) would not ordinarily include inquiry into a command issue like Gentry's order to his ISP team to assign offenders subject to discipline through intervention hearings to Traditional ISP.

42. For the duration of the investigation, Gentry was ordered not to talk to Boyington except in the presence of another DOC employee. Supervision of Boyington was transferred to Beccari by the end of June 2010, before resolution of Boyington's complaints, consistent with her request to leave the ISP team.

43. On July 14, 2010, Gentry countermanded his original direction and instructed the ISP officers under his supervision in Missoula to place offenders on Sanctions ISP through an intervention hearing, in conformity with applicable DOC policies. His entire e-mail to the "ISP Team" follows, below. A fair reading of this e-mail is that Boyington was right and Gentry was wrong about being able to use an intervention hearing to place an offender on Traditional ISP, at least until applicable

policy provided for it, but that his e-mail was as far as Gentry was willing to go towards admitting that he had been wrong. Ex. 9, p. 342.

I spoke to Mike Aldrich today and he said that he would like to arrange for a time to get the ISP supervisors together to work a few items that are not consistent throughout the state. He thought that we would have to wait until the end of the summer to work with schedules. If you have any items that you would like me to bring up in this meeting please let me know.

While talking with Mike we discussed putting offenders on Traditional ISP through an Intervention Hearing. While we agreed that legally we can do these, the policy currently does not include this method. Mike asked that we wait until it is clarified in policy that offenders can be placed on Traditional ISP through an Intervention Hearing. I apologize that we are going back and forth on this.

So for clarification all offenders placed on ISP as a result of an Intervention Hearing will be signing the Sanction Program Contract until further notice. These offenders will continue to be 6 month sanctions and placed on the EM.

If you have any questions please ask.

44. Hannan finished her investigation into Gentry's remarks on July 30, 2010 (Ex. 128), and concluded that Gentry's remarks were not discriminatory.

45. Beccari was added in the e-mail chain and received copies of at least some of the dialogue between Gentry and Boyington regarding ISP placements. She began supervising Boyington at the end of June 2010 following Boyington's complaint regarding Gentry. She was aware of Boyington's complaint against Gentry and also aware of the 2010 investigation. Ron Alsbury also testified that he was aware of Boyington's complaint about Gentry at the time Boyington was terminated.

46. Beginning in June 2010, Boyington participated as a witness identified by Patrick Kross, another DOC PO stationed in Missoula, in the investigation of a discrimination claim under Montana law filed by Kross. This investigation continued through at least December 2010 and Boyington was interviewed by a Department of Labor and Industry Human Rights Bureau investigator twice.

47. Before coming to work for DOC in Montana in August 2008, Kross had been an employee of the Alaska Department of Corrections. Beccari was Kross' initial supervisor, followed by Chuck Hill, and then by Tanner Gentry, during Kross'

last year of employment with Montana DOC. During his previous employment in Alaska, Kross had filed and pursued an illegal discrimination lawsuit against his Alaska employer.

48. Beccari admitted in her testimony at the hearing in this case that she had told other staff that she did not like or trust Kross and that she had told other DOC personnel, including DOC management, that Kross' employment should be ended, all because of his human rights complaint against his Alaska employer, and because of her feeling that he would eventually make a claim against Montana DOC as well. She characterized these statements of hers as "mistakes." Beccari found out about Kross' Alaska complaint through some of the offenders Kross supervisor, who reported that they had found the information "on line" and who then shared it with other P & P employees in the Missoula Corrections Office.

49. Gentry testified that he became aware that Boyington had participated in Kross' Montana Human Rights Bureau complaint when he was told by the Human Rights Bureau investigator that Boyington was a witness for Kross. This may have occurred in June 2010, while Gentry was still Boyington's immediate supervisor, but it probably did not occur any earlier. In any event, there is no credible evidence that the June 2010 conflict between Gentry and Boyington was fueled by anything other than personality conflicts and disagreement about how to read ISP policy.

50. In May 2011, DOC again promoted Gentry to Regional Administrator of Region I which included Missoula. As previously found, Tanner Gentry had unusually limited experience for the supervisory position of POII, and he had remarkably limited experience for the supervisory position of RA. The evidence is clear that some of the employees he supervised at DOC did not like him and did not trust him, at least in part because of his unusually limited time with DOC.

51. As the Missoula Region RA, Gentry relied heavily on DOC Human Resources to assist him, perhaps due to lack of experience with personnel issues in a unique agency like DOC. Gentry was still RA of Region I when DOC terminated Boyington's employment in November 2011.

52. Boyington received her annual performance evaluation in June 2011 (Ex. 1, pp. 1-4), a year after Beccari became her supervisor. This evaluation was dated to cover the time since her most recent previous evaluation, which had been given to her in June 2008. Ex. 1, pp. 5-10. Beccari signed Boyington's June 2011 evaluation as immediate supervisor and Gentry signed it as reviewing manager (RA), a position he had held for around one month. In that evaluation Boyington received overall ratings of 75.6% for her behavior competencies and 83.6% for her knowledge, skills and abilities. A score of 70% on the evaluation is "Above Standard" and a score

of 90% is “Outstanding.” It is fair to characterize this evaluation as being better than the prior evaluations of her, which had all been generally positive. However, Beccari credibly testified that in the course of meeting with Boyington and giving her the evaluation, she had discussed with her that there was some concern that when Boyington got angry with an offender, she might treat that offender a little differently. Beccari asked Boyington to “please watch that behavior because that's not something that is appropriate in a probation and parole officer.” Tr. IV, p. 786, line 18 through 787, line 12.

53. The Prison Rape Elimination Act (“PREA”) is a federal law establishing that an offender in custody of law enforcement cannot consent to any sexual activity, and prohibiting inappropriate behavior between someone in authority and an inmate. The second part of PREA involves the creation of a grievance procedure for inmates and notifying the inmates that if an offender feels an officer is treating them unfairly, they can file a grievance. Beccari testified credibly that she reminded Boyington, again, in discussing the June 2011 performance evaluation, that PREA grievance procedure “talks about the idea that an officer cannot retaliate against an offender if they have reported some negative activity to a supervisor” (Tr. IV, p. 787, line 24 through p. 788, line 8, quotation at lines 4-7). Asked why she reminded Boyington of this “no retaliation” rule, Beccari responded, “Because I felt that that was a possible future concern given her past. It was a reminder. She knew about it. She had been trained on PREA.” Tr. IV, p. 788, lines 10-12.

54. In her testimony, Beccari credibly summarized the purposes of her conversation with Boyington about the June 2011 performance evaluation (Ex. 1, pp. 1-4). Tr. IV, p. 788, line 24 through p. 790, line 4:

Q. And was there a purpose in the meeting or not to make clear to her that you wanted her to treat all of them equally?

.....

THE WITNESS: When we finish a performance evaluation, we go over it with the employee and we discuss the various notations in there and the scores.

During my conversation with Lisa when we were reviewing the performance evaluation, I was giving her compliments, deserved compliments on very good case management of many offenders. And I wanted her to know -- and that's why I was doing this in particular is that this was what we wanted out of an officer, how she was doing with these other



offenders. And I'm sure I didn't name them by name because there was [sic] many. And she did very well with that.

At the same time, I talked about some of the offenders I knew that I felt there was some retaliation, some inappropriate withholding of privileges and some resentment.

So I was complimenting her on what I liked and what I expected and what she did well at, and bringing up the other ones so she knew what was expected, what was -- what warranted the positive points on that evaluation and what warranted some concerns.

55. During Boyington's seven-year career her supervisors conducted a total of twenty-eight case audits related to specific offenders she supervised. Ex. 2, pp. 14-41. Not one of these twenty-eight audits described any inappropriate conduct by Boyington or any notion of inhumane or abusive treatment of offenders. Generally, these audits can be described like her performance evaluations – she received guidance on details of case management of offenders more frequently at the beginning of her career and the need for this guidance decreased as she gained experience. The general trend as time passed was also that the number of notations about Boyington's excellent work with offenders increased.

56. Her final supervising POII, Beccari, described Boyington as the most well versed officer on policy that she had ever encountered. She described Boyington as accurate, attentive to detail, great at time management, a PO who saw her people like clockwork, excelled with many offenders, and was reliable and willing to learn from mistakes. In Boyington's June 2011 evaluation, Beccari stated, "Lisa has been employed as a Probation/Parole Officer with the DOC for nearly 7 years. She exhibits excellent organizational and time management skills. Lisa is a self-motivated officer with a good grasp of the Department's mission and vision. The offenders on her caseload are her priority as is the safety of the community. Since she is dedicated to her work I have confidence she will work on the areas noted in this evaluation. I believe Lisa has grown professionally as well as personally this past year." (Ex.1, p. 4)

57. Boyington had appeared in a number of proceedings involving her offenders before Montana Fourth Judicial District Court Judge, Hon. Ed McLean. Judge McLean testified that Boyington's testimony and her reports that were submitted to him were accurate, and that her allegations regarding violations were well-supported. Judge McLean's testimony verified that offenders complained frequently about their POs. He also testified that Boyington was very professional and that he had not been presented with any evidence or allegations regarding abuse, retaliation, disdain or disrespect by Boyington towards the offenders she supervised.

Judge McLean did not observe Boyington being unwilling to take responsibility for mistakes. Judge McLean also testified that if any of the offenders before his court thought that Boyington had an axe to grind, he would have heard about it in court. He saw only a small percentage of Boyington's offenders, but he saw the difficult ones, "her problem children." Tr. II, 374, lines 4-10.

#### B. Termination of Boyington's Employment with DOC

58. DOC discharged Boyington on November 29, 2011 (Ex. 23), five months and one day after she and Beccari had signed her June 2011 performance evaluation. At the time, her immediate supervisor was still Beccari. Gentry had been the RA for Missoula for almost seven months, and Ron Alsbury was still P&P's Bureau Chief.

59. The day she was fired, Boyington was called into a meeting, and provided with a pre-termination letter. Dated November 29, 2011, indicating that DOC was considering firing her. Two versions of this pre-termination letter are in the record. Ex. 22. At the conclusion of the meeting, DOC presented Boyington with a termination letter on November 29, 2011, stating that DOC was terminating her employment because of violations of DOC's code of ethics. Ex. 23, Ex. 103. The termination letter, and both versions of the pre-termination letter of the same date (Ex. 22), cited DOC 1.3.2, Guidelines for Employee Performance and Conduct: Montana Department of Corrections Code of Ethics, #1 ("I shall perform my duties with high standards of honesty, integrity and impartiality, free from personal considerations, favoritism, and partisan demands. I shall be courteous, considerate, and prompt when serving the public") and #4 ("I shall provide offenders with humane custody and care, void of retribution, harassment, abuse or mistreatment. I shall maintain confidentiality of information that has been entrusted to me and designated as such, I will not incur any personal obligation that could lead any person to expect official favors"). The termination letter stated that "[t]he details of these violations were specifically outlined in your pre-termination letter dated November 29, 2011." Ex. 22, Ex.23 and Ex. 103. The termination letter goes on to state that, in general, the reasons for her termination were, "Your actions continue to demonstrate your unfair treatment and retaliation toward offenders. . . . You have repeatedly put up barriers for the offenders you supervise and have restricted them from achieving positive goals." Ex. 23, Ex. 103. Both versions of the pre-termination letter gave five reasons for the firing, listed below in roughly chronological order, and then separately considered in Sub-Sections B(1) through B(5):

- (1) 2007 discipline – lack of honesty with DOC investigator;
- (2) Supervision of offender DC in 2010;
- (3) Supervision of offender AB in 2010;
- (4) Supervision of offender CM in 2011; and
- (5) Supervision of offender JM, in 2011.

### B(1). 2007 Discipline of Boyington

60. The 2007 discipline of Boyington, cited as a basis for her discharge in both versions of the “pre-termination” letter (Ex. 22), was not a valid basis for discharge. At the time the 2007 discipline was imposed, it was proper discipline for Boyington’s admitted failure to be honest with a DOC investigator. However, the Collective Bargaining Agreement (CBA) that governed Boyington’s employment with DOC prohibited the use of discipline more than eighteen months prior to current discipline as a basis for current discipline. Thus, the 2007 discipline was simply not available as a proper basis for disciplinary action against Boyington in 2011.

61. According to some of DOC’s evidence, the 2007 discipline was only included in the pre-termination letter as background or context. Such evidence was not credible. In the “pre-termination” letter, the 2007 discipline was not listed as background or context, but was specifically cited (together with Gentry’s Formal Written Warning regarding Boyington’s supervision of CM in October 2011), as evidence of violations of DOC 1.3.2, Guidelines for Employee Performance and Conduct. one of the two bases for her potential discharge. Ex. 22. The termination letter cited the “pre-termination” letter for the bases for her actual termination. Ex. 23. Using the 2007 disciplinary action to support firing Boyington in late 2011 was improper. The substantial and credible evidence of record supports a finding that offering the 2007 disciplinary action as a basis for firing her (which is what DOC did in the termination and pre-termination letters) was the proffer of a false reason, a pretext, in justification of its adverse action.

### B(2). Boyington’s Supervision of DC

62. On March 17, 2010, Boyington began to supervise offender DC due to his assignment to the ISP program. On July 11, 2006, DC had pleaded guilty to felony Criminal Possession of Dangerous Drugs and misdemeanor Criminal Possession of Drug Paraphernalia. He was sentenced to a three-year deferred sentence and placed on felony probation. Ex. 111, pp. 1-8. On March 6, 2009 (just months before the end of his probation), CM was arrested for DUI – a breath test showed a .118 BAC. Ex. 15, p. 388. On March 10, 2009, DC admitted using marijuana on the day of the DUI arrest and was placed in ESP for ninety days, with an ROV filed. Id. On August 31, 2009, DC was convicted of the DUI offense. Ex. 15, p. 386. On November 24, 2009 a confidential informant informed PO Jay Childress that DC was using meth, and a drug test on the same day confirmed his use. Id. DC admitted he had been using meth daily for three weeks and was jailed by Childress. On March 23, 2010, his sentence was revoked for violations of its terms and conditions, and the Montana Fourth Judicial District Court imposed upon DC a five-year sentence to the ISP program. Ex. 111, pp. 9-13. The sentencing judge stated, in

bold typeface, “THIS IS A ZERO TOLERANCE JUDGMENT, ANY VIOLATION(S) WILL RESULT IN AT LEAST A 72-HOUR HOLD IN DETENTION.” Ex. 111, p. 10 [original capitalization]. The judgment gave the authority to require any counseling, including mental health counseling, to the PO. Ex. 111, p. 4.

63. On March 30, 2010, DC told Boyington that he had information about another offender using drugs and stealing, but would not provide the information unless his sentence was reduced or he was paid money. One of the conditions of his probation was that he not associate with probationers, parolees, prison inmates, or persons in the custody of law enforcement without prior approval of his PO. It is likely that he was violating this term of his probation in obtaining the information. On May 11, 2010, Boyington noted that because DC was earning his living buying and selling at garage sales and on E-bay, she needed him to check in by phone calls or messages when he was out working garage sales and requested that he carry a phone so that she could find him. On June 8, 2010, DC reported that he was cited for speeding before he was in ISP and had to go to court for the ticket. DC stated that the ticket was not for speeding itself, but for taking the wrong route. Boyington referred him to a criminal thinking course, a justifiable response after (1) his attempt to sell his PO information in exchange for time off his sentence or cash, (2) his likely violation of his non-association requirement, and (3) his bogus justification for his speeding ticket.

64. On July 13, 2010, Boyington’s chronological notes reflect that DC became argumentative, combative and disrespectful, and his attitude was “so bad” that she directed him to sit in the lobby of the probation office until he could calm down and speak to her appropriately. Ex. 15, p. 382, July 13, 2010. An hour and half later DC came back to Boyington’s office and apologized. Boyington requested that DC find at least a part-time job because he needed structure and accountability and because she was having difficulty finding him at garage sales and since he did attend them according to his ISP schedule, she was responsible to verify his attendance as scheduled. *Id.*, Tr. I, p. 86, line 4 through p. 87, line 6. DC told Boyington that the criminal thinking instructor did not know what she [Boyington] was talking about.

65. On July 16, 2010, Gentry received a call from an individual who wanted to ask some anonymous questions about ISP. Gentry tried to answer the questions, about Phase and employment requirements under ISP, but had to explain that some answers depended upon the specifics of the situation, and could not be answered without those specifics. DC then identified himself as the caller, and began to list his complaints about Boyington. Gentry referred his complaints to Beccari, after telling DC that someone would look into the matter and that Kathleen Beccari would be

back in touch with him. Ex. 102(a), p. 1. There is no evidence indicating that Gentry's response to the situation was out of line with usual practice for a POII taking a telephone call that turned out to be an offender with a complaint about a PO that the POII did not supervise.

66. On July 20, 2010, DC reported again to Boyington and, according to her notes, was again aggressive and argumentative. He brought a doctors' note stating that he was limited in working (or even in searching for work) to not more than twenty minutes standing, sitting or walking. DC, however, requested five hours of time on his schedule to go to garage sales and stated he was working in a tattoo shop. When questioned about how he could work in a tattoo shop considering his doctor's note, DC stated that he could do tattoos, but nothing else. DC demanded to see POII Gentry and said that Gentry told him that he didn't need to work if he had medical documents. Ex. 15, p. 382, July 20, 2010, entry. At this time, Boyington was not supervised directly by Gentry, but he was still in a position of authority over her in the office. Tr. II, p. 283, line 8 through p. 284, line 21. Boyington put DC in the lobby again, to wait. Ex. 15, op. cit. While on "time out," DC engineered a conversation with Gentry, to reiterate his complaints anew. Gentry heard him out, then told him he would need to speak to Beccari (who was out of the office at the moment) and gave DC a grievance packet. When Beccari returned to the office that afternoon, Gentry filled her in about DC and Beccari told him she would address it. Ex. 102(a), pp. 1-2.

67. Also in July 2010, Boyington denied permission for DC to go to Salmon Lake, because she deemed it impossible to supervise an ISP offender at a public recreation site some distance from Missoula. Tr. I, p. 85, line p. 15 through p. 86, line 3, Ex. 15, p. 382. DC was not on an ankle monitor. Tr. II, p. 289, lines 15-18. Boyington testified that ISP policy required her to know at all times where DC was and what he was doing and that she could not do so when he was on or near a lake an hour's drive away. Tr. I, id., and II, p. 288, line 23 through p. 289, line 14. Boyington's refusal to grant permission was a sore point with DC because he believed other offenders on ISP were being allowed by their POs to go to Salmon Lake. Tr. I, p. 84, line 25 through p. 85, line 14. By July 27, 2010, DC was transferred to a different PO because Boyington left the ISP program and she did not find out whether DC had received permission from someone else to go to Salmon Lake, did not see DC again, and did not take any further action on his case. Tr. II, p. 294, lines 11-20, Ex. 15, p. 381.

68. Former DOC POII Chuck Hill testified, based on his twenty-two years' experience in probation work including ISP supervision, that he would never allow recreational travel for an offender on ISP. Tr. II, p. 419, line 1 through p. 420,

line 1. His reasoning was that it would be impossible for intensive supervision of high-risk clientele while they traveled. *Id.* He specifically testified that Salmon Lake was no exception to this rule and that travel for ISP offenders was limited to major emergencies. *Id.* DC did not request a travel permit, but was seeking approval to travel on his pass-time as an ISP offender. DOC witness Michelle Puerner testified that offender travel is a discretionary decision for that offender's ISP PO. Tr. V, p. 1241, line 22 through p. 1242, line 17. Denial or approval of pass-time travel to Salmon Lake for DC was within Boyington's discretion.

69. It is a stretch to argue, as Boyington does, that the only adverse action she ever took against DC was her denial of pass-time travel to Salmon Lake. Boyington threatened to disapprove DC's garage sale business and directed him to find at least a regular part time job, attempting to force him into a more restrictive job, so that she could keep better track of where he was. She questioned his medical restrictions, and questioned how he could work a tattoo job but not other kinds of work. Boyington was tightening up the limits to DC's freedom and he was trying to preserve the range of activities he was currently enjoying and to expand that range to include recreational travel. As DC's PO, Boyington wielded substantial discretionary power over his life and over what freedom he had. An unfair or abusive threat should not require that the offender wait until the actual unfair or abusive punishment is imposed before protesting it. What Boyington threatened to do and suggested that DC might have to do, as well as what Boyington did do, could all count as adverse actions, given the inherent disparities in power between offender and PO. With the considerable power entrusted to POs over their offenders, the threat of action is a powerful tool to shape offenders' behavior.

70. That being said, Boyington was justified in both threatening to take actions to impose further restrictions on DC and in restricting him from pass-time travel to Salmon Lake. DC had a poor track record under supervision and had been revoked by a District Court shortly before Boyington began supervising him. On several occasions he did exhibit criminal thinking, in ways such as requesting money for information on other offenders. Boyington did have a difficult time verifying his location, but sometimes had verified that he was not where his agenda said he was required to be when he was required to be there. Boyington could see that having him use a cell phone to call in with his changes was not working out. Introducing more structure in DC's life by pressuring him towards more traditional employment would facilitate her supervision of him and could have been beneficial to DC by providing a more consistent structure for DC to follow. Boyington's last supervisory encounters with DC did not result in disciplinary action against her by DOC until sixteen months later when her supervision of DC was cited as one reason for firing her. Her alleged mistreatment of DC occurred before her last performance evaluation

in June 2011, in which her new supervisor, Beccari, gave Boyington a positive evaluation, but Beccari also credibly testified that she expressed concerns to Boyington about retaliating against offenders, and cautioned Boyington not to treat an offender more harshly because she was angry with that offender.

71. DC was clearly still a high-risk offender. DOC could not reasonably characterize Boyington's supervision of DC in July 2010 as retaliatory, inhumane, overly heavy-handed or abusive. The preponderance of credible evidence of record does not support a finding that Boyington retaliated against DC at that time, sought to put up barriers to his progress or tried to keep him from succeeding. The substantial and credible evidence of record did not establish that Boyington's treatment of DC was a legitimate basis, in whole or in part, for termination of her employment almost a year and a half later. Gentry's involvement in scrutinizing Boyington's supervision of DC, while Boyington's internal harassment complaint still pending regarding Gentry, is suggestive, but there is no evidence that Gentry took any adverse action towards Boyington vis-a-vis DC. DC's complaints, properly forwarded to Beccari by Gentry, did provide a reasonable basis for Beccari to look more carefully at how Boyington was supervising the offenders assigned to her, to assure that she was not abusing her power, to check and find out whether offenders who displeased her were then being treated more harshly. Boyington's supervision of DC was not a valid basis for discipline against her at any time.

### B(3) Boyington's Supervision of AB

72. Boyington began her supervision of AB, a Level I offender (highest risk), on August 10, 2010. He had been supervised by another Missoula PO, his second PO, Sandra Fairbank (later known as Sandra Fairbank Gall) for around a month or more after his most recent sentencing before Boyington was assigned to supervise him. Ex. 14, p. 372.

73. On January 30, 2009, offender AB was convicted of six felony Criminal Endangerment counts, one count of obstructing a Peace Officer or Other Public Servant, and two traffic offenses. Tr. I, p. 69, line 21 through p. 70, line 6, Ex. 110, pp. 1-10. He was sentenced to ten years in Montana State Prison and this sentence was suspended, placing AB on felony probation. *Id.* Sharon Banda was his first PO. Barely three months after his conviction, Banda scheduled an intervention hearing for AB due to his failure to pay fines, fees, and restitution, and noted that AB had an excuse for everything. At the hearing AB was informed that he needed to go to treatment, get full-time employment, and that probation would have no tolerance for failure to pay supervision fees or restitution. A month later, AB told Banda that he did not need chemical dependency treatment even though he had a positive urine test for alcohol, stating that his test was positive because there was wine in the chicken

cordon bleu he ate in church. Banda submitted an ROV and requested a warrant for AB's arrest.

74. Two months later, Banda gave him two weeks to get employment or she would require him to report six employment contacts per day to her. Ex. 14, p. 375. Two months after that, AB reported that he was hired for employment at Lolo Hot Springs. Within a week, Banda refused to sign paperwork allowing AB to collect food stamps because he was not in compliance with the terms of his probation.

75. A couple of weeks later, AB reported that he got a promotion at Lolo Hot Springs, but within two more weeks, Banda called Lolo Hot Springs and learned that AB had applied for a position, but had never been hired. She discovered that same day that AB had moved from his residence without notifying her and discovered that AB's garage contained several empty cases of beer. AB failed to appear at his probation meeting on October 9, 2009. Banda requested a warrant and AB was arrested on November 4, 2009. Around this time AB pled guilty to a charge of Theft. In December, AB was released from detention because of concern for his safety as a witness in a homicide case and he was instructed to report to Banda. He did not report to her. Just days later, on December 11, 2009 AB's mother-in-law reported that AB burglarized her house. On December 13, 2009 AB was arrested in Mason City, Iowa. He refused to waive extradition to Montana, so Montana authorities obtained a governor's warrant. AB appeared in Montana court on March 24, 2010, and denied that he violated any terms of probation. On April 1, 2010 another probationer reported to Banda that AB was starting fights in the jail and telling other inmates that he was going to get his PO one way or another and would get her fired. On April 8, 2010, Montana Child Support Enforcement contacted Banda to see if they had found AB. On June 30, 2010, the Montana Fourth Judicial District revoked AB's sentence and reinstated his terms of probation for ten years.

76. Fairbank began supervising AB after his new sentence, and granted AB travel permits for Spokane, Washington, in part because of his homeless status and because he had family in Washington. Fairbank also began the process of applying for an interstate transfer for AB to Washington. In July AB moved into Victory House, a homeless shelter, and was volunteering in a bike shop. Clearly, Fairbank was not requiring AB to clean up all the messes he had just made, before she would let him travel out of state, and she was trying to get him an opportunity to move out of state despite his poor performance on probation.

77. When Boyington began supervising AB in August 2010, she learned he had been "kicked out" of Victory House, and was staying at the Lolo RV park in a tent. Ex. 14, p. 371, notes for 8/10/10. He was now married (notes for 8/10 include multiple references to "his wife" who had previously been his "fiancé"). AB's request



for an interstate transfer to Washington was denied on August 30, 2010, because his mother-in-law did not want him residing with her. She did not have the means to support him and she could not put him on her lease due to his criminal convictions. On September 7, 2010, AB missed an appointment with Boyington. AB came to the probation office September 8, 2010, and Boyington told him to wait until she could see him between scheduled appointments that morning. AB instead went to Beccari, then left the office. On Friday, September 10, 2010, Beccari granted AB a travel permit for Spokane, Washington, covering September 12 through 19, 2010. Ex. 14, p. 371, notes for 8/30, 9/7 and 9/10, 2010. Boyington did not work on Fridays.

78. On Tuesday, September 21, 2010, AB, back from Washington, called Boyington and left a voice message asking that she prepare another request for his interstate transfer to Washington. Boyington immediately reviewed his fines, fees and restitution and noted the amounts still due. Boyington discussed the case with Beccari that same day, September 21, 2010, and expressed concern over the interstate request because AB was not compliant with his conditions regarding payment of fees, restitution, fines, reporting to Boyington, or employment. Beccari told Boyington she wanted the interstate done and Boyington indicated she would comply with Beccari's order regarding reapplying for the interstate transfer. Ex. 14, p. 371, 9/21/10 entries.

79. On Thursday, September 23, 2010, AB left Boyington a 7:38 a.m. message stating that he wanted to pick up a travel permit for Spokane that day. Ex. 14, p. 370. AB then left Beccari a voice message within two hours stating that he could not get hold of Boyington and needed a travel permit. Boyington discussed the matter with Beccari on that day and again told her that she was uncomfortable with the interstate transfer (two days after she had been told to, and had agreed to, proceed to process that transfer request) and uncomfortable as well as with any travel permits because AB was not in compliance with the terms of his probation. Boyington returned AB's phone call by early afternoon that day. These events occurred less than two months after Boyington's complaint about Gentry led to an internal investigation of him, and less than two months after Boyington was identified as a witness on behalf of Kross in his human rights complaint against DOC.

80. AB came to the probation office at approximately 10:00 a.m. on Monday, September 27, 2010, and asked Boyington for a travel permit. She informed him that he needed to make a restitution payment and submit a travel agenda and reminded him of her rule that travel permits needed to be submitted three of her business days before the travel. Tr. I, p. 73, lines 11-20. AB acknowledged that Beccari had informed him of this as well during the prior week. AB stated that he would get a restitution payment and schedule for travel to Boyington later that day.

AB stated the purpose of his travel was to look for employment in Washington. Tr. I, id., Ex. 14, p. 370, 9/27/2010 entries. Of course, Washington was the location to which the interstate transfer was to be requested, as Boyington was well aware.

81. As of September 27, 2010, AB had made one ten dollar payment towards restitution since his conviction and that was only after his former PO had held an intervention hearing in April 2009 and AB was told that there would be no tolerance of failure to make restitution payments. Ex. 13, p. 357, Ex. 14, p. 367-68, 370 (various entries). He had not been employed (as required) since his conviction. Id. He obtained a chemical dependency evaluation after his first judgment, but the Court judgment following his revocation repeated the requirement, and Boyington interpreted this to mean he needed to obtain another chemical dependency evaluation. His original chemical dependency evaluation had also recommended a mental health assessment, which had not yet been done. AB had absconded twice during probation, and the travel permit he sought involved staying with a known alcoholic. Tr. I, p. 65, line 20, through p. 74, line 7, Ex. 13, p. 357, Ex. 14, p. 367-68, 370. Also, AB had returned from his last travel permit only eight days before. Tr. IV, p. 916, line 4 through p. 918, line 4., Ex. 14, p. 370. AB's January 2009 Judgment provided the following pertinent terms and conditions of probation, Ex. 110, pp. 6-8:

3. The Defendant shall not leave the assigned district without first obtaining written permission from the Probation & Parole Officer.

....

5. The Defendant will personally report to the Probation/Parole Officer as directed . . . . .

....

7. . . . . Defendant's financial priorities shall be restitution, child support, fines and fees.

....

12. Defendant shall pay restitution in the amount of \$500.00. The Defendant will pay court ordered victim restitution in a timely fashion. . . . . The Defendant will continue to make monthly restitution payments until they [sic] have paid full restitution . . . . .

....

14. The Defendant shall pay supervision fees pursuant to Section 46-23-1031, M.C.A., of no less than \$252.00 and no more than \$360.00 per year, at no less than \$21.00 per month for the number of months under supervision. . . . .

15. The Defendant shall obtain a chemical dependency evaluation by a state approved treatment provider/facility, at his own expense, and follow all recommendations of said evaluation.

....

17. The Defendant shall participate in any counseling, at state expense, as recommended by Probation/Parole Officer, to include Mental Health counseling.

82. On the other hand, being unemployed and homeless, with no family nearby, AB could not pay any of his fines and fees, and had nothing of substance going right in his life. Beccari was trying to arrange a transfer for AB to a place where he had family and friends and job prospects and where he might have some chance to begin living a productive life within the law. Despite clear direction from Beccari to work on getting AB the transfer to Washington, Boyington was focusing on AB's failures to comply with his probation conditions in his current relatively hopeless situation as a basis to deny a travel permit and she also was continuing to argue with Beccari about the interstate transfer. Based upon AB's track record under supervision (cf. Finding Nos. 72 through 81), continuing to supervise him tightly, as he had been previously supervised, was certainly within Boyington's normal discretion and would be consistent with holding him accountable. But continuing to tighten supervision was also quite likely to result in AB becoming increasingly frustrated, disappointed and hopeless. Bereft of options, AB was then at greater risk to engage in further criminal behavior, be apprehended and jailed, probably go to prison and have an even more reduced chance of any rehabilitation. This likely chain of events would not effectively protect the public, would not reduce crime, would not increase the public's sense of safety and would not provide restitution and reparation to victims, but it would torpedo the chances for rehabilitation and reintegration of this offender into any community but the prison community. Nonetheless, on September 27, 2010, Boyington was resisting her supervisor's efforts to give AB a better chance to look for work in Washington and to build a better case for his interstate transfer to Washington.

83. On the afternoon of September 27, 2010, Beccari came into Boyington's office, slammed the door, yelled and pointed at her and (allegedly) made Boyington fearful that Beccari was going to strike her. Ex. 13, p. 357. Beccari's behavior was so loud that PO Patrick Kross drew his service weapon and proceeded in tactical fashion to see what the disturbance was. Tr. III, p. 544, line 13 through p. 545, line 10. Beccari gave Boyington an emphatic direct order to issue the travel permit to AB regardless of his compliance status and regardless of the timing of his request. Tr. I, p. 74, lines 6-8, Ex 14, p. 370.

84. Boyington did not comply with this direct order from her immediate superior. Instead, she contacted Cathy Gordon, Interstate Compact Administrator, seeking “confirmation” that AB needed to be in substantial compliance with the conditions of his probation to receive an interstate transfer. The credible and substantial evidence of record supports a finding that Boyington was planning to disobey Beccari’s order. To that end, she told Gordon that she did not want to lose her job and was in a lose/lose situation because she would violate policy no matter what she did (Ex. 13, p. 359).<sup>5</sup> Around 4:00 p.m., AB came back to the office and requested the permit from Boyington (Ex. 13, p. 363). Boyington had been able to get Gordon to agree at least agree that taking more time to process the request might allow an opportunity for more consideration of what might be appropriate. Boyington told AB that “interstate” had issues with the permit and told him that there would not be an answer until the following afternoon. “Interstate” only had issues because Boyington had given Gordon an incomplete and skewed account of the situation, hoping to get something that might give her some at least plausible justification for defying Beccari’s direct order. She got Gordon’s agreement on taking more time, and used it in exactly that fashion.

85. Beccari had briefed POII Heather Smith about AB’s situation, expecting that Boyington might (as she did) refuse AB’s request, in direct violation of Beccari’s order. Smith issued a permit for AB at 5:01 p.m. and provided AB with paperwork to file a grievance against Boyington. Ex. 14, p. 370. Under the facts established by the credible evidence in this hearing, Boyington could not reasonably have feared being fired for following the direct order Beccari had given her. Boyington’s failure and refusal to follow that direct order thus was not justified by any reasonable fear of discharge. She failed and refused to follow that order because she disagreed with it and didn’t like being told to do something other than what she herself had decided should be done with AB. Her resistance was only intensified by the increasingly imperative way in which the directions were given to her. Assuming for the sake of analysis that she genuinely and reasonably feared discharge, following Beccari’s direct order while documenting how it had come about would have been the reasonable course of action to take. Boyington did document how she claimed it had happened, but then she still disobeyed the direct order.

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<sup>5</sup> In September 2010, Boyington was only in her third month under Beccari’s supervision. Gentry’s presence in the office still seemed to be a problem for Boyington. Beccari had been very vocal in the office about the need for DOC to fire Kross because he had filed a discrimination complaint against Alaska’s Department of Corrections while working there. Gentry knew that Boyington was a witness for Kross. See, *supra*, p. 14-15, Findings 46-49. Boyington may have believed that Beccari knew it, too. It was possible Boyington feared being “set up,” but a more realistic fear would have been that disobedience of a direct order, not obedience to that order, would result in discipline.

86. DOC policy required offenders to be “demonstrating compliance with their supervision requirements” to receive a travel permit (Gentry Depo., pp. 170-71, Ex. 35, p. 843). Policy further required an officer to review chronological notes, file materials, court-ordered conditions and probation office rule conditions to consider granting a travel permit (Id.) If an offender was in compliance, an officer could, in his or her discretion, grant the permit. Tr. III, p. 474, line 5 through p. 475, line 9, p. 500, line 20 through p. 502, line 23, p. 758, lines 8-15, p. 824, line 3 through 825, line 11, Ex. 35, p. 843, Ex. 124, pp. 6-7. It was rare for supervisors to grant travel permits, but with Boyington and Beccari actively working for opposite goals, this was far from the usual situation.

87. Boyington’s refusal to provide the travel permit to AB despite the direct order from Beccari was a adverse action against an offender who went over her head to her supervisors – and Boyington had taken the specific negative action that Beccari’s direct order had effectively forbidden her to take. Boyington now went over Beccari’s head to RA Gault regarding the request for interstate transfer for AB, the transfer that Boyington had told Beccari she would go ahead and process, but Gault supported Beccari. Ex. 14, p. 369, Boyington entry for 10/13/10:

I sought direction on being ordered to submit this interstate as S<sup>6</sup> is not in compliance with his probation. Amy wrote the following:

“I have reviewed the entire file and do not believe the offender in question is in ¿ [sic] substantial non-compliance ¿ [sic] that would prevent his travel to Washington. In fact, I support his travel there, as well as pursuing an interstate compact.”

88. Boyington was not the only officer to use the “three of my working days” rule for travel permits. Jan Ullom and Patty Wolfe both imposed the same rule for similar reasons. Wolfe testified that she was never criticized for imposing the rule and clarified that it means three days during which the officer is at work, not simply three business days. Beccari testified that she was familiar with the rule and understood the reasoning behind it, but disagreed with the way Boyington applied it. Her disagreement was reasonable. Travel permits are a privilege and not a right due to the felony conviction of the offender, but granting or denying them should be based on the mission goals of DOC with offenders, not justified with a “three day rule” but actually based upon personal pique with an offender, and certainly not

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<sup>6</sup> Standard DOC usage appears to be calling offenders “S” (presumably for “subject” rather than “suspect,” since these are convicted offenders).

based upon taking out on the offender the PO's hostility towards a supervisor who was countermanding the PO's choices about supervision of that offender.

89. DOC policy requires that offenders be in substantial compliance with the terms and conditions of probation in order to apply for an interstate transfer (Ex. 35, p. 852). Travel permits for offenders potentially seeking interstate transfer can be problematic and may necessitate the involvement of the Interstate Office. If an offender obtains employment out-of-state before a transfer is approved, it can cause problems with the State to which the offender is transferring, so normally granting a travel permit to another state to look for work before getting the interstate transfer approved is a dubious proposition. But again, security, safety and rehabilitation are the essential goals. Getting even with an offender for going around the PO to get a prior permit is not a proper supervision goal. Punishing an offender because a superior officer ordered the PO to grant the offender's travel permit request and process the offender's interstate transfer request is never a proper supervision goal. It remains improper even if the PO doesn't like being overruled, and is now angry and frustrated.

90. AB had a poor history of supervision and was revoked by a District Court prior to Boyington's supervision of him. Boyington denied his request for a travel permit, and she could, and did try to cite some of the same compliance issues that had caused PO Sharon Banda to hold an intervention hearing and threaten AB with revocation seventeen months earlier. Seventeen months later AB was not doing any better on his compliance. Ordinarily, it would be difficult to find DOC's position that Boyington was retaliating against AB credible, when Banda took much more severe measures against him over the same issues earlier in his supervision. Banda sanctioned him and threatened revocation; Boyington denied a privilege. But Boyington was disciplined for denying that privilege to AB because she did so in disobedience to Beccari's direct order. Beginning October 14, 2010, DOC properly suspended Boyington without pay for three days for disobeying Beccari's September 27, 2010, order. Ex. 12, p. 348. Beccari testified that AB did not complain of retaliation by Boyington. Tr. IV, p. 914, line 24, through p. 915, line 12. Indeed, the record does not reflect that AB filed a grievance against Boyington even though he was given the paperwork to do so.

91. Contrary to Boyington's fear of being "set up" and fired, the punishment she received for disobeying an immediate superior's direct order was reasonable. It was proportionate to the offense, evidencing no discriminatory animosity towards Boyington. Boyington was clearly insubordinate, had worked hard on justifying her insubordination, and had ultimately intransigently remained insubordinate. Had Beccari not alerted another POII to watch for any problem with AB getting his travel

permit on September 27, 2010, Boyington would have succeeded in preventing AB from traveling, by her deliberate and total disobedience to a direct order from Beccari.

92. Boyington's refusal to provide this travel permit, had it been done absent Beccari's direct order to issue the permit, might not have been so clearly retaliatory, inhumane, overly heavy-handed or abusive. Beccari, in the face of Boyington's intransigence, treated Boyington as an employee who required correction in order to lead her to modify her behavior, not as an employee Beccari wanted to fire out of retaliatory animus. Boyington's blatantly insubordinate withholding of AB's requested travel permit raised questions for Beccari about whether Boyington was beginning to take out on her supervisees her displeasure with her superiors.

93. Based upon the credible evidence of record it is more likely than not that Boyington's obdurate refusal to do what Beccari clearly directed her to do with AB was the *causa sine qua non*<sup>7</sup> for Beccari's imposition of disciplinary action. When she became Boyington's supervisor, Beccari already knew of Boyington's cooperation by being a witness for then PO Kross in the investigation by another agency's Human Rights Bureau into the Human Rights complaint of Kross (whom Beccari had wanted DOC to fire). She also knew of Boyington's internal complaint about Gentry, which led in part to Boyington being transferred to her supervision. Nonetheless, the compelling evidence is that Boyington's insubordinate harshness towards AB, and not any retaliatory motive on the part of Beccari, led to Boyington's suspension. The fact that Beccari sought and that DOC imposed the suspension, with no effort made to discharge Boyington at this point, effectively negates any argument for a finding of retaliatory motive for this adverse action. Standing alone, Boyington's disobedience and resistance was not a sufficient basis to fire her, and DOC did not consider or attempt her discharge. It was a sufficient basis for a suspension, which was what Boyington got.

#### B.4. Boyington's Supervision of CM

94. CM transferred to the Missoula probation office and reported to Boyington for the first time on June 27, 2011. In November 2010, in the Idaho Fourth Judicial District Court, CM pled guilty to a crime roughly equivalent to felony aggravated assault under the Montana Criminal Code (20 year maximum sentence), for allegedly wielding an axe and threatening to use it on his girl friend. CM was sentenced to 4 years on felony probation. He testified at hearing that he was drinking alcohol during these events.

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<sup>7</sup> Latin phrase, literally, "cause without which not," meaning an indispensable condition or prerequisite for a subsequent event.

95. Almost immediately after his sentencing, CM moved out of Idaho and into Montana, under Interstate Compact provisions for transfer of jurisdiction between the states. Within two months after his guilty plea in Idaho, Gina Rasmussen, CM's first Montana PO (in Helena where he then resided), received reports from CM's girlfriend's "ex" that CM was threatening him and was drinking (in bars and perhaps also at home), in Missoula as well as in Helena. Within another month, CM also repeatedly lied to Rasmussen in the contexts of travel and work, and delayed admitting to Rasmussen that he had actually been fired from his work.

96. Within another month (only four months after his conviction), CM became the subject of an investigation into a hit-and-run incident in Helena, Montana. When investigating officers found him at his home later on the same day as the incident, he was drinking. CM initially refused a breath test, contrary to the terms of his probation. The officers called Rasmussen, who required CM to take the test, which demonstrated a .165 BAC. Ex. 123(i). CM was cited for Careless Driving, Leaving the Scene of an Accident, and Failure to Report an Accident to Police, and was arrested on a no bond warrant from Rasmussen the next day. Ex. 19, p. 420, Ex. 132, p. 4. He was not cited for DUI. His Helena PO released him from jail 17 days later, scheduled an intervention hearing for three days thereafter, and required CM to breath test daily until that hearing. Ex. 19, p. 420.

97. Rasmussen stopped CM's potential transfer to Missoula for school because she considered him in violation. She recommended that he be required to complete the Enhanced Supervision Program (ESP) at the pre-release center, and told him to get back in anger management counseling. Ex. 19, p. 419. The intervention hearing was held on March 24, 2011, and addressed all three Helena citations as well as the violation of the no drinking provision of his probation. CM was required to do ninety days of the ESP program and complete anger management counseling. *Id.* The ESP program is similar to ISP requiring the offender to be ankle-monitored and on a higher level of supervision, but is for a shorter time than ISP. April 12, 2011, CM requested a travel permit to Butte for Easter. Rasmussen staffed this with her supervisor, Letexier, who indicated that CM could go if Rasmussen thought he deserved it. She granted him the travel permit for Butte, but told him she would not authorize any more travel until he completed ESP. CM did not make the trip to Butte. On May 9, 2011, he began anger management counseling in Helena. Rasmussen warned him that he might not be able to transfer to Missoula if he was in the middle of anger or chemical dependency counseling. On May 23, 2011, CM requested that he be allowed out of the ESP program early after disagreeing with staff at the pre-release center about his completion. Rasmussen denied his request. She eventually approved a travel permit to Missoula at the point when after the permit,



CM would be transferred to Missoula (so he would have some time to seek work and make appointments before the transfer). Ex. 19, p. 418, 6/22/2011.

98. Boyington first met with CM on June 27, 2011. Ex. 19, p. 418, 6/27/2011. She noted that CM was referred to anger management counseling in Missoula by Rasmussen. She also issued him travel permits for Boise, Idaho, for July 19-20, 2011, and August 5, 2011. Boyington attempted a home visit with CM on July 11, 2011, and found that he was not home. Boyington conducted a home visit on July 28, 2011, and found no violations. Id., pp. 417-18.

99. CM was arrested by the Missoula Police Department following a domestic disturbance call at his residence on August 14, 2011, regarding reports of a screaming female. The officers were told the “screaming female” was actually the yelling of children, and no altercation at all. CM submitted to a breath test, which he had no choice but to do, and the test indicated a .163 BAC. Boyington issued a warrant for CM. CM admitted the violation. Boyington had requested and had received a copy of the Missoula Police Department report by August 16, 2011 and submitted a report of violation (“ROV”) to DOC’s Interstate Office on August 17, 2011, because CM had come to Montana on an interstate transfer from Idaho.

100. The ROV Boyington initially submitted in CM’s case contained five current alleged violations by CM of his conditions of probation. Tr. I, p. 120, line 25 through p. 121, line 15, Ex. 18, pp. 401-403, Ex. 123(f). The first violation consisted of the three traffic tickets in Helena on 3/8/11 – leaving the scene of an accident, careless driving and failure to report an accident – all misdemeanors, and all violations of the requirement that he remain a law-abiding citizen. The second violation consisted of his .165 BAC later on 3/8/11, a violation of the requirement that he not consume any alcoholic beverages. The third violation consisted of his .163 BAC on 8/15/11 at his residence in Missoula, another violation of the requirement that he not consume any alcoholic beverages. The fourth violation consisted of his failure and refusal to complete (as of 8/16/2011, the date of the ROV) the 40-hour Montana Anger Management Program, despite repeated directions to do so from his POs. The fifth violation was his discharge from his employment in Helena on 1/24/2011, with no subsequent employment, a violation of the requirement that he become and remain fully employed or enrolled in as a full-time student and not terminate employment without securing other employment. It appeared he had not worked since late January 2011, and was not yet enrolled in current classes. Ex. 18, p. 402.

101. With respect to the March 8, 2011, tickets and incident in Helena and the high BAC in Clancy at his home later that same day, Boyington deduced that CM had been drinking and driving. CM had not been charged with drinking and

driving. Boyington had no DUI to report as a current violation of his probation. Nonetheless, she stated in the initial ROV she sent to Idaho, "In March he was drunk and driving in Helena, Montana and involved in a hit and run accident. Those charges are still pending." Ex. 18, p. 403; Ex. 123(f), p. 3. This statement appeared in the "details of the current violation(s)" section of the ROV sent to Idaho.

102. Based on his overall performance on probation, the violent nature of his original offense, his continued drinking, his contact with law enforcement including "serious traffic citations," his failure to be honest with his POs, his failure to complete anger management counseling and his failures to abide by his other court-ordered conditions, CM appeared to Boyington to be "a threat to this community," and she reported him as such in the original ROV. Tr. I, p. 115, lines 7-25, Ex. 18, p. 403, Ex. 123(f). This statement was not inhumane treatment of CM nor was it abusive behavior towards him. CM's behavior in both Helena and Missoula warranted the conclusion that he was a threat to both communities.

103. On the other hand, including in the original ROV, which was being forwarded to Idaho, where his offenses were committed and his conviction obtained, the allegation that he was "drunk and driving in Helena, Montana and involved in a hit and run accident" was unreasonable and abusive. This statement in the ROV described conduct that always constituted a major threat to the community, the kind of threat that law enforcement and courts always found deeply concerning. CM had not been charged with DUI, and probably could not have been successfully prosecuted for it, given the time and distance that elapsed that day between the accident investigation and the later BAC testing. Nonetheless, Boyington put that statement in the ROV. Slipping it into the details of the current violations was unprofessional and at least bordered on dishonesty.

104. CM remained in jail. After Boyington discussed the case with Beccari, CM was afforded an on-site intervention hearing on August 24, 2011, and Beccari presided as hearings officer. At this intervention hearing, CM admitted both the March 2011 drinking violation and the August 2011 drinking violation. CM claimed that he was a full-time student and that this satisfied his employment conditions, but this was arguably false at the time. CM had enrolled for the Fall of 2011 but had not yet begun school. CM also claimed that he had arranged to resume and complete anger management counseling. This appeared to have been false, rather than merely not substantiated, at the time of the intervention hearing. On August 24, 2011, the anger management counselor verified via e-mail that CM had not contacted him on June 22, 2011 (when CM told Boyington he would), and appears to have stated, according to an incomplete final message in the string posted in the chronological notes by Boyington, that he had no record or memory of CM contacting him at all.

Ex. 19, 8/24/2011 top entry of two entries at 4:54 P.M. The violation Boyington alleged was a failure to complete anger management counseling. The evidence of record is clear that CM had not completed anger management counseling as of August 24, 2011.

105. The intervention hearing resulted in a cause finding. Ex. 19, p. 416, 8/24/2011, bottom entry of two entries at 4:54 P.M. Beccari found probable cause on four of five of the specific violations alleged by Boyington, recommending CM's return to Idaho for court revocation proceedings. She did not find probable cause on the first alleged violation because the traffic tickets in Helena were still pending. The ROV was then submitted to the Interstate Office, to provide to Idaho for warrant. CM remained in custody while the Interstate Office awaited instructions from Idaho.

106. A few days later, Boyington memorialized a further e-mail message in the string with the anger management counselor, which was now the top line on the string, missing its top data info (from, sent, to, subject). The counselor reported that he now had found CM's message to him from July 20, 2011, and that the counselor had returned the call and left CM a message that same day. Ex. 19, p. 415, Boyington entry dated August 29, 2011, 11:22 A.M.

107. In the meantime, RA Gentry had become involved in CM's case and status when CM's girlfriend called DOC on September 9, 2011. Gentry spoke with her, and recorded the contact in chronological notes for CM, but he did not talk with Boyington about it. She did not know that he would continue to monitor the case.

108. CM was released from jail to go to Helena for the resolution of the three tickets. On October 12, 2011, CM came back to Missoula from Helena and reported that the Helena tickets had been dismissed.<sup>8</sup> CM's jubilation peeks through Boyington's chronological notes for October 12, 2011. Ex. 19, p. 412, 10/12/2011 9:35 A.M.

S stated that the charges were dropped in Lewis and Clark. Informed him I was contacting Interstate and will find out when he needs to report to Idaho. He stated he is not going back to Idaho. Stated that he doesn't know who Im [sic] talking to but he stated he talked to the Idaho PO and they are mad and he is not going back for one drinking violation stated that it was misrepresented [sic] that he never drank and hit cars and ran from

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<sup>8</sup> CM had insisted all along that there was no damage to his car because he had not been the driver involved in the hit and run accident in Helena.

the scene. Stated that he is going to get his attorney to call my supervisor. Gave him Kathleen's number. . . .

109. Boyington verified CM's report that the tickets were dismissed and relayed the information to the Interstate Officer, who in turn relayed the information to Idaho. Idaho responded the next day, requesting verification of the dismissal and also requesting that CM be detained until Idaho made a decision. Boyington ordered CM to report back to the jail in Missoula, which he did. At this time, the "drunk and driving in Helena, Montana and involved in a hit and run accident" language in the description of the current violations still remained in the original ROV.

110. On October 14, 2011, Gentry spoke to Alsbury regarding CM and began an investigation of CM's case because of a complaint from CM's father. CM's fiancé (earlier references called her his girlfriend) as well as CM's father believed the ROV exaggerated his violations. Gentry spoke with both family members and prepared a "list of concerns" from what they told him regarding CM's original Idaho offenses as well as the Montana violations. Gentry provided Beccari with his "list of concerns," and asked her to meet with Boyington and obtain an explanation of why the case was handled as it was. The "list of concerns" is Ex. 102(d), addressed from Gentry to Beccari, and Gentry provided the list to Beccari on Tuesday, October 18, 2011. According to Gentry, Beccari finally was able to talk with Boyington about the "list of concerns" by telephone on Friday, October 21, 2011. Ex. 102(e), first page. There is no evidence regarding whether this would be standard operating procedure for an RA getting complaints from family about treatment of an offender by a PO in the RA's region.

111. Beccari, on vacation out-of-state, told Boyington, during what was apparently another telephone conversation, this one during the weekend of October 22-23, 2011, that a Montana Supreme Court decision<sup>9</sup> applied to Interstate Compact offenders as well as to offenders under supervision on Montana crimes. Martinez did not allow violations already addressed in a past intervention hearing to be listed, and punished, as current offenses. The clear holding of Martinez, and the multiple cases following it, was that the state cannot hold an intervention hearing and impose punishment for an offender's failure to comply with conditions of probation, and then seek to punish the offender a second time through a revocation proceeding that relied upon any of the conduct already punished. Doing so would subject the offender to double jeopardy. Neither Beccari nor Boyington had understood that this Montana case applied to interstate cases, Idaho or otherwise, but it did. The application of Martinez to this case meant that the four violations of

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<sup>9</sup> State v. Martinez, 2008 MT 233, 344 Mont. 394, 188 P.3d 1034,

March 8, 2011 – alcohol consumption and the three traffic tickets – could not be current violations for a proposed revocation of CM’s probation and his return to Idaho, because the March 2010 intervention hearing in Helena had already addressed these violations. Ex. 123(i). The record does not establish who told Beccari about the application of Martinez.

112. On Monday, October 24, 2011, Boyington changed the ROV to be compliant with the Martinez case regarding the list of current violations involved. She did not submit the revised ROV until some days later, due to complications beyond her control that came after that Monday.

113. On Tuesday, October 25, 2011, Beccari e-mailed to Gentry answers to his questions regarding his “list of concerns.” Gentry then required Boyington to provide the revised ROV (with her revisions to comply with Martinez already included), for his review. Upon that review, he directed some additional changes he felt were necessary to conform the substance of the revised ROV with the matters in his updated “list of concerns.” According to his notes and Boyington’s testimony, Gentry met with Boyington repeatedly, over October 25-26, 2011, requiring her to make these additional changes to the revised ROV, which resulted in multiple revisions beyond the changes she had already made after being told that Martinez applied. Tr. I, p. 120, line 1 through p. 121, line 19, Ex. 18, pp. 401-408, Ex. 102(e), first three pages, Ex. 123(f), first four pages.

114. Testimony addressing the changes dictated by Gentry and unwillingly made by Boyington appear in the transcript. One entire exchange is included here, to give the reader a better sense of the flavor of this testimony. Tr. II, p. 344, line 9 through p. 345, line 16:

Q. Did you try to – you, yourself, try to alter the ROV so it reflected correctly what was going on?

A. The ROV had already been submitted. After the ROV is submitted, any updates, as they told me to inform them, were forwarded to Interstate Compact.

Q. Tanner asked you to redo that ROV, didn't he?

A. Yes.

Q. And you were pretty angry about that, weren't you?

A. No. I was frustrated with the way that Tanner was treating me, and it took two days of him in my office nonstop.

Q. And you wrote an e-mail to Kathleen Beccari saying this isn't even my ROV. I can't – I can't could do this process, or something like that. Do you remember that?

A. I said that this is not my ROV. I don't know why my name is at the bottom of it.

Q. And you said that because why, it had changed so much as far as what it said?

A. Yes.

115. Boyington completed the final revised ROV on October 26, 2011 and the report was submitted to the Interstate Office to be sent to Idaho. Two identical copies of the final revised ROV, as it was finally sent to Idaho, are in evidence. Ex. 18, pp. 405-8 and Ex. 123(d). Two identical copies of the original ROV, sent to Idaho on August 16, 2011, are in evidence. Ex. 18, pp. 401-404 and Ex. 123(f).

116. Boyington testified that she felt the final report was inaccurate because it underplayed the significance she attached to CM's failure to complete his anger management counseling and eliminated the reason she first gave as to why CM was unemployed. Tr. II, p. 345, line 20 through p. 346, line 20.

117. Gentry and Boyington, and Boyington and the anger management counselor, had gone around and around about the number of hours of anger management counseling that CM had actually completed. Ex. 19, p. 411, Ex. 123(e), p. 3. E-mails copied by Boyington into CM's chronological notes indicate that on October 25, 2011, she was still desperately trying to placate Gentry by confirming the exact amounts of anger management counseling completed by CM elsewhere, to credit in Missoula, to no avail (Ex. 19, p. 411). DOC and Boyington both knew that CM, a violent offender, had failed to complete, within nine months, a counseling requirement inherently related to his convictions. Boyington's original ROV of August 16, 2011, had correctly stated this fact. Ex. 18, p. 402, Ex. 123(f)). At Gentry's insistence, Boyington mentioned that CM claimed more credits for anger management counseling than Boyington had been able to verify through the anger management program at that time (it appears from the record that CM did properly state the credits he had already earned). Why this difference mattered so much to Gentry and to Boyington, that they would battle at such length about it, says more about the personality conflict between them than it says about the scope of CM's noncompliance regarding anger management.

118. Boyington was also forced to change the ROV to indicate that CM's lack of employment for eight months was because he was receiving unemployment insurance benefits. Tr. II, p. 345, line 20 through p. 346, line 3, Ex. 18, p. 405, Ex. 123(e), p. 2. In both the original ROV and the final revised ROV, CM's "Employment Status" was stated as "Unemployed," which was true. In the original ROV, the reason given for unemployment by Boyington was "won't look." Ex. 18, p. 401, Ex. 123(f) first page. The final revised ROV showed the reason for his unemployment was "collecting unemployment." Ex. 18, p. 405. Boyington wanted the focus to be upon CM's failure to find employment, his disobedience to what she

was telling him to do. She resisted offering his receipt of unemployment insurance as a softer reason for his failure. However, the conditions for receiving unemployment insurance include reporting a required regular number of efforts to obtain work. The crux of the conflict was that Gentry insisted that the report acknowledge that CM was qualified for UI benefits (showing his compliance with UI requirements regarding job-hunting), while Boyington wanted to blame CM for not finding and getting a job, as she had ordered him to do. Again, the conflict appears to show more about the two persons in conflict than about CM.

119. Gentry not only required Boyington to redraft the ROV multiple times, after the Martinez issue was resolved, he also required her to write CM a letter explaining the changes to CM, then told her not to send it, after he subsequently discovered it was unnecessary. Gentry Depo., pp. 221-3, Ex. 18, pp. 394-7, Ex. 102(e), p. 3. The unnecessary effort Boyington was forced to put into drafting a letter to CM explaining the changes to the original ROV was at least as likely to have resulted from Gentry's inexperience with the process as from animosity he held toward Boyington, but it certainly increased Boyington's anger at Gentry.

120. It was in the context of all this turmoil and conflict on October 26, 2011, that Interstate Officer Cathy Gordon told Gentry that a copy of the "adjusted report" needed to be delivered to CM (back in jail for the last 13 days), and the changes needed to be explained to him. Gentry immediately ordered Boyington to do so. Boyington by this time was furious at Gentry, despite her denials (e.g., above, Finding No. 114, pp. 37-38). She refused to deliver the report to CM and explain the changes to him, saying that, due to a migraine headache that had already lasted for two days, she had to get medication and treatment immediately. Another confrontation between them resulted, but Gentry eventually relented. Insisting that she would have to produce medical verification of her condition,<sup>10</sup> he allowed her to leave, and assigned to someone else the task of delivering the "adjusted report" to CM. It certainly appeared that providing CM with a copy and an explanation of the changes was what the Interstate Office needed, not necessarily Boyington in particular delivering the copy and explanation to CM.

121. The following week, Gentry continued to pursue this medical leave issue with Boyington personally, instead of turning it over to Beccari, who had returned from her vacation. He followed up directly with Boyington when she returned to work, demanding the medical verification. Gentry certainly had the right to do this – Boyington needed to follow the chain of command upwards, and not skip over her

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<sup>10</sup> Cf., *infra*, "D. Failure to Accommodate Boyington's Disability," pp. 62-64, Findings 170-177.

immediate supervisor to talk first with a higher-up, but the RA had the right to talk to Boyington directly and Boyington could not insist that Gentry had to go through her immediate supervisor, as Boyington tried to do, to avoid talking to Gentry. Beccari ended up instructing Boyington that her superiors could all come and talk to her directly and she could not refer them to Beccari and refuse to talk to them. But even though Gentry did have the right to pursue this matter directly with Boyington, he knew or reasonably should have known that doing so would lead to increased conflict. Gentry nevertheless chose to pursue Boyington directly. More likely than not, this evidenced that the conflict with Boyington had become a personal matter for Gentry. It had already been personal for Boyington for a long time.<sup>11</sup>

122. Beccari still appeared to believe, or at least to hope, that CM would be revoked in Idaho and taken away from Missoula, even with all of the revisions to the ROV. Boyington testified that CM's violations after Gentry's revisions raised sufficient concern (in her opinion) to send CM back to Idaho. Gentry testified that he could not speculate if the changes in the ROV made any difference in Idaho (Gentry Depo., p. 71). Gentry also testified that CM had violated the terms of his probation with respect to drinking and failing to complete anger management counseling and that Beccari agreed. CM admitted at the hearing in this present case that the drinking violations and the failures to complete anger management counseling alleged by Boyington had merit. Tr. IV, p. 905, line 10 through p. 906, line 4.

123. Idaho subsequently requested the release of CM from jail in Missoula, leaving him still under supervision in Montana for his Idaho crimes, thus showing that Idaho deemed his fifty-seven days in jail to be sufficient punishment for his actual current violations.

124. In the "pre-termination letter" of November 29, 2011, DOC faulted Boyington for errors in the ROV regarding CM, alleging that these errors negatively impacted CM (Ex. 22, p. 431). Setting aside for the moment the "drunk and driving" statement, which Boyington had no business putting in the ROV, a detailed review of the record in this matter concerning CM does not support a finding that errors in the ROV prejudiced CM. Boyington, Beccari, and Gentry each ultimately

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<sup>11</sup> The record abounds with anecdotal evidence that Boyington disliked Gentry even before she met him, based upon his lack of experience. It also teems with testimony that any time he gave her supervisory direction with which she disagreed, or which was inconsistent with her view of how something should be done, whether it happened when he was her immediate supervisor, or when he was a POII in the Missoula office who no longer directly supervised her, or when he was the RA for Region I, Boyington confronted him at her first opportunity to tell him that he was wrong and that she was right, and why.



agreed (or failed to disagree when given the chance) that the remainder of the “errors” may have had no impact on CM whatsoever. The other “errors” also appear to have been investigated and addressed by Boyington in as prompt and reasonable a fashion as possible, given that her immediate supervisor and her RA both allowed her to include as present violations matters precluded by Martinez. Gentry disciplined Beccari for the failure to apply Martinez to the original ROV. Beccari disciplined Boyington for the mistakes in the original ROV. Gentry apparently was watching them both from the sidelines, without intervening until after they had done it. The record does not address whether DOC disciplined Gentry regarding the ROV. The evidence does not disclose who brought the application of Martinez to the ROV to Beccari’s attention. What is clear is that Gentry might have discovered the failure to apply Martinez to the ROV by two subordinates in his region, Beccari and Boyington, at least by October 14, 2011 (when he talked to Alsbury and began his “investigation”), if not after September 9, 2011 (when he first began to look into the supervision of CM). Whether he did discover it (as opposed to someone else pointing it out to him) and when he actually did acquire knowledge about it (however he acquired that knowledge) are matters that remain unclear in this record.

125. With regard to the “drunk and driving” sentence, nobody testified under oath at the hearing about whether it had any impact on what Idaho did. The only credible evidence to support it having an actual negative impact upon CM appears in Boyington’s chronological notes on October 12, 2011, and it is the reported statement of CM to Boyington about what the Idaho PO said to him. It is in the record, but it is simply not reliable enough to support a finding of fact that it actually harmed CM, aside from being part of what kept him in jail for almost 60 days, total. Whether or not it “harmed” CM, the substantial and credible evidence of record supports a finding that Boyington put the “drunk and driving” sentence in the ROV, in a profoundly improper effort to assure that Idaho would take CM back. Whether or not she actually harmed him, her intention to do so was manifest in her drafting and including that unsupportable statement, beyond actual charges and violations and never proved, that CM was “drunk and driving in Helena, Montana and involved in a hit and run accident.”

126. CM was accused of a violent offense and alcohol played a role in his felonious conduct. His record of untruthfulness with POs, continued drinking violations, failure to complete anger management counseling and failure to abide by the terms of his probation all supported the conclusion that Boyington drew in her first ROV on CM (in August 2011) that CM was a threat to the community. Any impact to CM that resulted from that conclusion was necessary to protect public safety in accord with the sentencing policy of the State of Montana and the mission and vision statements of DOC (again, except for the unfair and unprovable statement

about “drunk and driving”). However, the substantial and credible evidence of record supports a finding that Boyington retaliated against CM, sought to erect barriers to his progress and attempted to keep him from succeeding, by, among other ways, including in the original ROV that CM was ““drunk and driving in Helena, Montana and involved in a hit and run accident.” The substantial and credible evidence of record supports the finding that this was a legitimate basis for questioning Boyington’s reliability and willingness to accept and complete tasks as ordered as a PO, and an entirely legitimate basis for imposing discipline on Boyington.

#### B.5. Boyington’s Supervision of JM

127. On November 9, 2010, offender JM was convicted of Accountability for Distribution of Dangerous Drugs and Unlawful Use/Possession of Property Subject to Criminal Forfeiture (Ex. 109). The convictions stemmed from him brokering a marijuana deal and possessing cash proceeds of the sale (Tr. V, p. 1132, lines 4-5, p. 1158, lines 3-13). A deferred sentence was imposed and he was placed on felony probation for a period of six years (Ex. 109, p. 2). JM was already a student at the time of his conviction and continued to pursue his studies thereafter. Ex. 24, p. 446, Dec. 7, 2010, Boyington note: “School finals are coming up. Stated he is doing very well in school is getting A’s.”

128. JM reported to Boyington to begin his supervision on the same day that he was convicted (Ex. 24, p. 447). At that time Boyington went over details of requirements for travel permits. (Tr. I, p. 105, lines 17-19, Ex. 24, p. 447). On the day Boyington granted him a travel permit for Wenatchee, Washington (Ex. 24, p. 447), she also received a report that he was not in compliance with chemical treatment because he owed money and that he was not attending IOP sessions (Ex. 24, p. 447). JM corrected his behavior with respect to chemical dependency treatment and Boyington gave him a travel permit for Wenatchee, Washington on December 16, 2010, for a ten day period to see family over Christmas. Ex. 24, p. 446. Even though JM missed a meeting with Boyington on January 4, 2011, Boyington gave him a travel permit on January 18, 2011 for Herriman, Utah, to visit his son (Ex. 24, p. 446). Many of JM’s travel permits involved his son, born July 17, 2010, who lived with the son’s mother. During his February 1, 2011, visit, JM told Boyington that he had just had a couple of rough months, but would get caught up on his payments (Ex. 24, p. 445). He also told her he wanted to travel to Texas for his brother’s wedding and to Big Sky for a music festival. (Ex. 24, p. 445-46). On February 15, 2011, Boyington told JM that these would be his last travel permits unless he made the promised payments. (Tr. I, 106, lines 7-16, Ex. 24, p. 445). Boyington granted JM a travel permit for Bozeman, Montana on February 17, 2011.

(Ex. 24, p. 445). On March 1, 2011, Boyington granted JM a travel permit to attend his brother's wedding in Texas (Ex. 24, p. 445). Boyington granted JM a travel permit for Bozeman, Montana on April 21, 2011. (Ex. 24, p. 445).

129. On May 16, 2011, JM requested to travel to South Dakota to work at a music festival. (Ex. 24, p. 443). Boyington noted that JM had made no restitution payments, no fine payments and was delinquent on supervision fees (Tr. I, p. 107, lines 4-24, Ex. 24, p. 443). She communicated this to JM via e-mail, stating, "If you are able to catch up your payments, I will issue a travel permit, however perhaps this week that you have off may be a great opportunity for you to look for work." (Ex. 24, p. 442-43). On May 18, 2011, Boyington granted him a travel permit to South Dakota (Ex. 24, p. 442). On June 9, 2011, Beccari issued a travel permit for JM to go to Wallace, Idaho (Ex. 24, p. 441). On July 8, 2011, Gentry issued a travel permit for JM to go to Livingston, Montana. (Ex. 24, p. 441). On August 10, 2011, Boyington issued JM another travel permit to go to Livingston. (Ex. 24, p. 440). On August 31, 2011, Ashley McAlmond issued a travel permit for JM to go to Livingston (Ex. 24, p. 440). Boyington noted on a couple of occasions between May and September 2011 that JM was making his payments. (Ex. 24, p. 440-41).

130. On September 12, 2011, Boyington noted that JM had made his September payments. Ex. 24, 440. The next day, JM reported that he was registered again as a full-time (16 credit) student pursuing a degree, and that his parents would be "meeting his son" in a couple of weeks. *Id.* JM had told Boyington in early August that he would return to school (for the Fall term) in a month. Ex. 24, p. 441, Aug. 2, 2011, entry.

131. On September 23, 2011 Ashley McAlmond, the receptionist at the Missoula Probation Center, issued JM another travel permit to go to Livingston. Ex. 24, p. 440. JM used that travel permit to see his son. Monday, September 26, 2011, JM sent an e-mail to Boyington, noting, "My son and I had a great time". Ex. 24, p. 440.

132. On Tuesday, September 27, 2011, Boyington replied to JM's Monday e-mail, at 2:04 p.m. and reminded JM that he needed to "come fill out the travel permit request forms and they must be submitted 3 business days prior to travel." She added that he needed to have his payments made, and needed to honor the terms of the permits themselves – JM had notified Boyington by voice mail that he had not stayed at the location that he had provided to Beccari. Tr. I, p. 99, line 8 through p. 100, line 3, Ex. 24, p. 440, 9-27-11 note.

133. JM e-mailed Boyington late on the afternoon of September 27, 2011, at 6:42 p.m., that he wanted to visit his son that weekend in Livingston with his

parents, and that his parents' travel plans from Washington state had just been finalized. He noted that he was current on his payments. Ex. 24, p. 440. Boyington replied at 8:24 a.m. the next morning, Wednesday, September 28, 2011, "This is not 3 business days in advance." Id. Ten minutes later, she sent him another e-mail noting that "you also need to follow instructions by filling out a travel permit request as we have already discussed when requesting travel permits." Ex. 24, p. 439. JM submitted the forms later that morning, and at 10:06 a.m., September 28, 2011, Boyington noted that she was not approving the travel permit, because "he had been informed numerous times how the TP process works. He just had a permit issued last week. He did not stay where he told Kathleen he was staying last week. It is not 3 business days notice." Ex. 24, p. 439. Apparently she did not notify JM of the denial at that time. About seven and a half hours later, at the very end of her workday, 5:30 p.m., Wednesday, September 28, 2011, Boyington phoned JM and told him his travel permit request was not approved for that weekend, and "informed him that if he does [sic] not comply with the requirements for obtaining a travel permit they will not be issued." Ex. 24, p. 439.<sup>12</sup>

134. On Friday, September 30, 2011, JM came to the Missoula Office and asked for a travel permit. Administrative Support Ashley McAlmond had previously provided travel permits to JM under similar circumstances, but this time she noted that JM was asking for a permit that Boyington had already denied earlier in the week. When she refused to give him the permit JM asked to speak to a supervisor. Gentry was contacted because Beccari was out sick that day.

135. On Thursday, September 29, 2011, at a management meeting, Gentry heard Beccari complain that she was "having issues" with Boyington again, that Boyington had denied another travel permit under her "three day rule" after the offender requested the permit on Tuesday, September 27, 2011. Beccari was not happy that Boyington viewed Monday as the latest business day that an offender could seek a travel pass for the coming weekend. Gentry assumed that JM was the offender about whom Beccari was talking. He met with JM, and confirmed that JM had provided Boyington with all of the information necessary to get a travel permit. Then, Gentry looked at the recent chronological notes about JM not staying where he had told Beccari he would stay on the previous travel permit. He asked JM about it, and JM explained that he was a college student and couldn't always afford hotels, so he sometimes camped. Gentry had previously issued a permit to JM for a travel permit when JM was going to be camping, so he understood the situation. JM went on to explain to Gentry that it had been too cold for camping, so he had called and

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<sup>12</sup> Cf. Finding No. 130, p. 43, for evidence that the parents' visit to meet JM's son had been arranged and that Boyington knew about it.

left a message for Boyington explaining the circumstances and identifying where he was staying.

136. Given the opportunity to vent his concerns to a supervisor, JM went on to tell Gentry that he was “not sure why Lisa does not like him and that it appears that she has something personal against him.” Ex. 102(c), first page, last paragraph. JM proceeded to tell Gentry about trying to get the travel pass to visit his son, with his parents coming to meet his son for the first time. JM explained that he had told Boyington about this first meeting between his parents and his son, and that he had requested the specific travel permit as soon as his parents confirmed that they would be coming and provided him with their travel plans. He explained that Boyington had called him at the end of the day on Wednesday, September 28, 2011, to tell him that she was denying his request. He told Gentry that he told Boyington about the problems and she told him to see if his parents could come the following weekend instead, and that she would give him a travel permit then if he asked the requisite three days in advance. He told Gentry that he did call his parents, that they could not reschedule, and that he called Boyington the 29<sup>th</sup> and left a message that his parents could not rearrange schedules to come the following weekend, but she never returned his call. Tr., p. 1155, line 5 through p. 1156, line 22.

137. After talking with JM, Gentry tried to reach Beccari and failed, and then granted the travel permit, admonishing JM that after this he would have to meet with Boyington and ensure that he understood her expectations for the future. Gentry sent an e-mail to Boyington explaining that he had issued the travel permit and would like to discuss the case further with Beccari and Boyington. Ex. 24, p. 439, Ex. 102(c). The credible evidence of record supports findings that JM came in on Friday, September 30, 2011, in a last ditch effort to make it possible for him to take his parents, who had traveled from Washington state for this, to meet his fourteen-month old son, as had been planned for over a month, all of which Boyington knew. He hoped to achieve that result by explaining the situation to Beccari (or to some other supervisor, such as Gentry, as might be necessary) and appealing for compassionate relief from Boyington’s adamant refusal to issue the travel permit. From the evidence of record, Gentry’s decision to overrule Boyington on issuance of the travel permit was within his authority as RA acting in the absence of Beccari and was reasonable under the circumstances.

138. Efforts by Beccari to arrange the meeting with Boyington that Gentry had requested on Tuesday, October 4, 2011, were entirely unsuccessful, and Gentry did not have a chance to visit with Boyington until October 5, 2011. In the meantime, on Tuesday, October 4, 2011, Boyington met with JM and reviewed his file and his status in exacting detail. She testified at hearing that this was because Beccari had

instructed her to do this with four or five offenders for the benefit of interns in the office (Tr. II, p. 329, line 13 through 330, line 4, Ex. 24, p.439). Even if Beccari had given Boyington that direction, it was not credible that Boyington's motivation for the way in which she treated JM on October 4, 2011, had to do with training interns. She required another urine sample (which tested negative). She went over, at length, all the ways that JM was not in strict compliance with all of his conditions of probation. The list was long. Most of it did not involve new failures to comply with conditions, but continuing shortcomings in compliance, that now were all being emphasized. In addition, Boyington was commenting on JM's "bad attitude" and documenting that she was confronting him about getting travel permits from others on Fridays – travel permits that he knew she had or would deny – and including a specific note that she was concerned that JM had manipulated Gentry the previous Friday, September 30, 2011, into issuing a travel permit. Ex. 24, p. 439, Oct. 4, 2011 (quoted in toto in the next finding).

139. JM characterized Boyington at October 4, 2011, meeting as, "stern, not aggressive. Stern." Tr. V, p. 1145, line 25, through p. 1146, line 15. He had not been paying much attention to many of the conditions of his probation, because Boyington hadn't been mentioning all of them regularly until now and had not taken action against him regarding some of the conditions she had been mentioning regularly. He had been able to expand his travel beyond what Boyington herself had approved by seeking out others in the Missoula office who would provide travel permits in Boyington's absence. Now Boyington sounded like she was going to enforce all conditions strictly at all times. Boyington's October 4, 2011, chronological note reads, in its entirety [dashes added for ease in reading], at Ex. 24, p. 439:

S in – has numerous judgment violations of his judgment. Addressed that he has not been attending aftercare as ordered in his judgment. He must attend aftercare through the entirety of his probation. Asked whether he would rather attend with a counsel or substitute with SH [self help] groups – S chose SH – gave him AA log with min of 3 x week. S has also not been paying his OPD [Office of Public Defender] fees. S claims [sic] no knowledge of any of this. Asked S if he reads his judgment or rules and explained that he is responsible for these. Tried to go over the judgment with him. He did not want to and had a bad attitude. He claims that he has them at home – touched on prescriptions, dr's [sic] and notifying them. He has not been informing me of filling his prescriptions – curry heath center he does not know his name. He will call me with his name. Stated

he does not have a dentist. S has not been informing me of the prscriptions [sic] he has been filling. He is also required to give me name and address. S then stated he does get his teeth cleaned but he did not think that was a dentist does not the neame [sic] starts with an "o." S stated he also gets his prescriptions there. He also has not informed his dr, dentist of his convictions or addictions as court ordered. S will be reading over his judgment and rules tomorrow. Went over policy on travel permist [sic] again with him. This has been gone over approx every month since he was sentenced in 11/10. Went over MR [monthly report] needing to be filled out completly [sic] not left blank and ? marks. S has not worked at all since being sentenced and has come in friday [sic] manipulating TP's [travel permits] when I am gone to do under the table flyers in other states. S continues to show manipulative bx [behaviors] which is consistent with his past. S also did not make his payments before manipulating the TP that was denied by me from RA last week. Next OC 11/ @ 0815 hrs.

140. Kim Lahiff testified that she had reviewed JM's judgment, and saw that it did indicate a concern on the part of the sentencing judge about a pharmaceutical addiction problem. Tr. V, p. 1098, line 22 through p. 1099, line 1. She also testified that splitting or "triangulating" between different people is an indication of addictive behavior.<sup>13</sup> Tr. V, p. 1100, line 9, through p. 1101, line 3. Lahiff also testified that not staying at a location approved in a prior permit would raise the level of scrutiny on a new travel permit. Tr. V, p. 1101, lines 4-21.

141. JM's Judgment provided a number of pertinent terms and conditions, which appear in the record. Ex. 109, pp. 3-6. Those conditions included attendance at Twelve Step or other self-help groups, at the discretion of JM's PO. Boyington exercised that discretion on October 4, 2011, to require JM now to attend such meetings through the entire remainder of his probation, even though she had been supervising him for almost eleven months and had not previously required attendance

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<sup>13</sup> "Triangulating" does not necessarily apply to every instance in which an offender with substance abuse problems ("addictive behavior") seeks review of his PO's decision regarding his supervision. Obviously, POII's and RA's have the right and the duty to inquire into and evaluate the PO's supervision of an offender when that offender presents information that suggests there might be a problem. The credible evidence regarding the events of late September and early October 2011 regarding Boyington, JM and Gentry does not support a finding that JM "triangulated," in the sense of telling different stories to different people to gain some advantage.

as such meetings.<sup>14</sup> JM was required to get written permission to travel outside the district from her PO, but on its face this would include getting such written permission from others in the office when his PO was not available, which was what he had just done, and for which he was accused of “manipulative behavior consistent with his past.” JM was also required to seek and maintain employment or a program approved by DOC, which he had done with his current full-time school attendance, but now, after he enrolled again as a full-time student, Boyington was faulting him for past unemployment, and was getting far more strict about his payments of fines and fees, etc. Likewise, she was now getting far more strict about notifications to health care providers of drug related convictions. She was now getting far more strict about JM keeping her current about the identities of his health care professionals, about his prescriptions, and about who was writing his prescriptions.

142. All this increased scrutiny of JM came immediately after JM went to Boyington’s RA to get a travel permit. Gentry, her RA, was also Boyington’s former supervisor, against whom she had filed an unsuccessful internal sex discrimination complaint. JM was frightened. He was not an experienced offender – this was his first encounter with the criminal justice system’s treatment of a felon. He began to think about all the ways that his PO could make his life miserable, by stacking his conditions of conduct to favor failure, by preventing or at least substantially delaying his education, and by making it far more likely that he would face imprisonment or longer supervision because his PO strictly enforced his conditions of probation and referred his violations for prosecution.<sup>15</sup>

143. On October 5, 2011, Gentry and Beccari finally met with Boyington, and a union representative that she requested be present, to discuss JM’s supervision. The meeting occurred that day because Gentry insisted upon it and Beccari eventually overcame Boyington’s dogged resistance. The union representative attending with Boyington was new in her job and immediately asked for some

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<sup>14</sup> Counsel for Boyington did an excellent job in this case, including catching Beccari in some inconsistencies (such as the requirement in JM’s judgment for attendance at 12-Step meetings at the discretion of the PO – cf. Tr. IV, p. 852, line 17 through p. 852, line 8). Over the course of the hearing, however, even though Boyington established a prima facie case of retaliation, based on earlier actions and events, DOC’s counsel presented substantial and credible evidence supporting the propriety of the later actions taken regarding Boyington. Boyington exercised her discretion suddenly to require JM, part-way through his supervision, to commence regular attendance at self-help meetings, at the same time that several other requirements previously disregarded also suddenly became vital. Why this happened when it happened was a critical point in this particular instance.

<sup>15</sup> Cf. Finding No. 151, p. 53 – the content of the grievance that JM later prepared and submitted illustrates his thinking and the fear that plagued him after Boyington tightened her supervision of him. Ex. 115, second and third pages.



background about the meeting and the case. Boyington jumped in and stated that she had denied a travel permit for JM and then JM had come in on Friday and “Tanner overrode my decision and gave him a permit” (Gentry’s characterization of what Boyington said, Ex. 102(c)). Boyington continued to answer the union representative’s questions about the case, giving her version of why she was right and her supervisors were wrong. *Id.* Boyington used the union representative to state her position and feelings about the situation before Gentry had a chance to address what the meeting that he had requested was meant to accomplish.

144. After Boyington finished answering the union representative’s questions with a defense of her decisions in supervising JM and criticism of her supervisors’ decisions and conduct regarding JM, Gentry stated that he had wanted to meet to discuss why he gave JM the travel permit and to discuss the case further. Boyington immediately stated that JM was “a manipulator and that he came in Friday to manipulate a supervisor into giving him a permit.” Ex. 102(c).

145. Gentry then went on to state that, according to Boyington’s chronological notes, she had denied JM’s travel permit because he did not stay where he was supposed to stay on the previous permit and did not give her three business days’ notice on the permit. Boyington retorted that there were additional concerns that she had not felt the need to put in the notes. *Id.* Gentry then asked her if JM had told her why he had not stayed where he was supposed to stay. She responded that JM had finally told her that he was cold when she confronted him about it. Beccari asked how she had known (to confront him she had to already have known) that he had not stayed where he had indicated he would be staying. She responded that JM had left her a phone message that he was changing where he was staying, and told her where he would be staying, but that the message had not explained why. *Id.*

146. Gentry then asked her about the three days’ notice, because JM’s initial e-mail request for the permit had been made on Tuesday, September 27, 2011. She first told him that the e-mail was sent after she had finished work that day (which was true). He pointed out that the request was for permission to travel starting on Saturday, October 1, 2011, so that it still was three business days (Wednesday, Thursday and Friday) before travel. Boyington replied that she required notice be given to her at least three of her business days prior to travel, and she did not work on Fridays. *Id.*

147. Gentry had supervised Boyington until just a few months before this meeting. He knew this was her practice. He also knew that her immediate supervisor, Beccari, was unhappy with Boyington’s practice of requiring three of Boyington’s business days’ notice to accommodate that work schedule. Having obtained Boyington’s admission that, indeed, it still was her practice, he made one of

the three points he clearly wanted to make to Boyington during the meeting. He told her that her “three of my working days” rule on travel permits was not within policy, and that “three working days” meant exactly that, including Fridays. *Id.* She responded, obviously sarcastically, that she “would just issue travel permits to all the offenders when they ask” (Gentry’s characterization of her comment), and he responded that was not what he intended, that he “was simply asking her to be reasonable and not put up barriers for the offenders.” *Id.*

148. Boyington also raised the issue that JM had not made his payments (fines, fees, etc.), and Gentry pointed out that her chronological notes indicated JM had made his September payments. Boyington responded that the travel permit involved travel entirely in October, starting October 1, and that JM had not made his October payments. Gentry specifically told her that it was unreasonable to deny an offender’s request for a travel permit in the current month because that offender’s fines and fees in the current (travel) month had not yet been paid. Gentry said this was simply not fair, since the payments were not overdue until the month ended. Tr. II, p. 319, line 5 through p. 320, line 19, Ex. 22, p. 432, Ex. 102(c) third and fourth pages, Ex. 102(g) second page. Gentry’s testimony regarding this point is quite clear. Gentry Depo., p. 43, line 19 through p. 44, line 20.

Q. [Ms. Orr] And there was a discussion, was there not, around the timing of making restitution payments?

A. There was. After we talked about the first couple of reasons for the denial -- those were the ones that were listed -- Lisa had mentioned that there was additional reasons, but she didn't feel like she needed to explain all of those in the notes. Of course, I wanted to know more about that, what those reasons were.

One of the things that she said was that he hadn't made his payments, financial payments. I referred to the chronological notes that were entered by Lisa that mentioned that he had made them for September, and her response was that the day that he was wanting to travel, that Saturday was actually October 1st, and that he hadn't made one for October 1st.

And again, I thought that was way out of line. An offender that was making payments regularly -- that's not how we collect payments, that if you traveled on one day in October, that you would deny it. So again, I explained that that wasn't appropriate, that if someone was going to be making payments for the month, they had the entire month, and that he wasn't violated for that.

The substantial and credible evidence of record supports the finding that Boyington's RA, in the presence of Boyington's POII and union representative, directed Boyington to stop requiring offenders to have monthly fines and fees paid for the month during which the travel permit would be effective before allowing them travel permits, since doing so was unreasonably putting up barriers for the offenders. This was the second specific point that Gentry clearly wanted to make to Boyington during this meeting. In her testimony at hearing, Boyington tried to avoid admitting that Gentry had given her this direction (Tr. p. 317, line 15 through p. 319, line 4):

Q. And Tanner told you – so were you faulting him for not making a payment in October in the middle of the month?

A. He was informed in order to obtain a travel permit, he had to make his payments prior to any travel for that month.

Q. And Tanner told you specifically not to do that, didn't he?

A. In the discussion after – Tanner and Kathleen, they told me the first of the month. The first travel permit I denied on the 28th was – he didn't like that.

Q. He met with you on the 5th, didn't he?

A. I don't know the date, but –

Q. He and Kathleen -- hold on. On the 5th -- this is reflected in DOC's Exhibit 102c, if you could turn to that. This is written by Tanner. Have you seen this?

A. I don't recall right at this moment.

Q. At the bottom of the third page, if you could turn to that, this is a meeting on October 5<sup>th</sup>, Tanner says, "During our meeting we –" and then that's a little mistake in the typing "-- and Lisa mentioned [JM] had violated other conditions. One that Lisa mentioned was that [JM] had not paid his fines, fees. I showed Lisa a copy of her chronological note that stated that [JM] had made his payments for September." You replied that "the permit I issued for [JM] was for October 1st, and that he had not made his payments for October." I explained to Lisa this is unreasonable to require an offender to have all his October payments completed before he can travel on October 1st. I explained to Lisa that an offender who is current through September should be allowed to travel in October." He's directly telling you that if he's current in September, he should be allowed to travel in October there; right?

A. I did not author this.

149. Boyington told Gentry and Beccari during the October 5, 2011, meeting, that JM had been drinking while on a travel permit in Livingston. Ex. 102(c), last page. Gentry responded that Boyington had required a urine alcohol test from JM that was negative. Boyington replied that the test was negative, but that it had been administered a few weeks after he was reportedly seen by an MPRC staff member drinking in Livingston. Beccari asked if the MPRC staff member reported actually seeing JM drinking and Boyington said yes. Id. Gentry recalled something about that from the chronological notes, and the discussion moved on. After the meeting, Beccari and Gentry checked the notes, which did not indicate that the staff member had seen JM drinking, only that the staff member had called to report that he was told by the mother of JM's son that she had seen JM in Livingston and he appeared to be under the influence. This report was noted on April 27, 2011, so it was not recent, was not first hand, and came from a source with an ongoing conflict with JM. Ex. 24, p. 444. Gentry Depo., p. 45, lines 10-20. More importantly, Boyington's statement to her supervisors that the MPRC staff member had reported that he saw JM drinking was not true.

150. The last three paragraphs of Gentry's notes regarding the October 5 meeting read as follows [emphasis added]:

Throughout our meeting I explained to Lisa that I was concerned that she was putting up barriers for offenders and she was keeping them from succeeding. I also repeatedly stated that I felt she was having power and control issues with offenders, and was not following the mission and vision of the Department by inspiring positive change. I let Lisa know that this type case management is not acceptable and will not be tolerated.<sup>16</sup>

Lisa stated that I was the one that has power issues and now that I am in a place of power I am taking it out on her. Lisa also stated repeatedly that [JM] is manipulative and that I have been manipulated by him.

After I completed coaching Lisa on the needed improvements I excused her and [the union representative].

151. On October 13, 2011, JM filed a two-page typed grievance against Boyington (Ex. 115, second and third pages). He signed a DOC grievance form (Ex. 115, p. 1) but did not date his signature, so the entire substance of his grievance is the two-page letter. The basic thrust of the grievance is that JM feared that Boyington would "rather observe me fail than succeed." Ex. 115, third page ("Page 2

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<sup>16</sup> This was the third point that Gentry wanted to make to Boyington during the meeting.

of 2" of JM's typed grievance). Beccari saw the grievance the next day, October 14, 2011.

152. On Monday, October 17, 2011, JM requested a travel permit from Boyington. She responded by e-mail that he had not made October payments for restitution, fines, and fees and had not submitted the AA log or aftercare verification discussed on October 4, 2011 (Ex. 24, p. 438). She stated, "Submit documentation that you have complied with your court ordered conditions and it will be approved." (Ex. 24, p. 438). Within two weeks of the meeting with Gentry and Beccari, Boyington was once again, contrary to Gentry's direct orders during that meeting, requiring an offender to have monthly fines and fees paid for the month during which the travel permit would be effective, as a precondition of obtaining the travel permit.

153. Within a short time after Boyington learned that JM had gone to her supervisors to seek relief from some of her negative actions towards him, Boyington repeatedly abused her discretion, by:

- (a) Denying his requests and justifications, on September 27-28, 2011, for a travel pass beginning on October 1, 2011;
- (b) Substantially heightening her scrutiny of his conduct beginning on October 4, 2011 and imposing stricter conduct requirements, which reasonably could have interfered with his on-going educational efforts<sup>17</sup>; and
- (c) Denying his October 17, 2011, request for a travel pass, unless he met requirements that her RA had specifically told her not to require for travel permits, in a meeting regarding this same offender.

154. The substantial and credible evidence of record supports a finding that Boyington retaliated against JM, sought to erect barriers to his progress and tried to keep him from succeeding. The substantial and credible evidence of record supports a finding that this was a legitimate basis for questioning Boyington's reliability and willingness to accept and complete tasks as ordered as a PO, and together with her conduct toward CM, a sufficient basis for further disciplinary action against her.

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<sup>17</sup> See, e.g., Ex. 115, third page ("Page 2 of 2" of JM's typed grievance), "Lisa is requiring me to do three treatment meetings a week. I believe she is requiring me to do these meetings as punishment for going to her supervisor for my travel permit. I have graduated from a treatment program months ago and require no more treatment. My treatment discharge papers that Lisa is in possession of state the same thing. Lisa knows that I am currently going to school with a 16 credit load as required by my scholarships. I hold a 3.9 GPA and would like to push it up to 4.0 but find it increasingly difficult with the added credits, work, new weekend visitations with my son and now unplanned treatment meetings. This situation alone is disturbing to my studies."

C. Events Occurring Apart from or After  
the Events Constituting the Five Justifications for Discharge

155. On November 7, 2011, Beccari gave Boyington a written notice that “due to ongoing issues and most recently” the ROV submitted to Idaho on CM, she would be reviewing Boyington’s next ten ROVs at least 48 hours before the statutory deadline to submit them to the court in probation cases, and at least the same amount of time before the hearing for internal reports leading to On-Site Hearings. Ex. 21. This letter included the statement, “By reviewing your ROVs I hope to improve your report writing skills and insure accuracy in these reports.” Id. This document constituted a performance plan, a tool DOC used to try to train and develop or return a problem employee to being a contributing and successful employee. Gentry Depo., p. 82.

156. On November 8, 2011, Beccari gave Boyington a formal written warning for two matters. First, the formal written warning was for Boyington’s failure to make arrangements to arrange an extension of a furlough for one of the offenders she supervised (initials WW). The furlough needed to be renewed at the time when Boyington was absent due to her migraine headaches, and Boyington had taken no action to alert anyone else to handle the extension. Second, the formal written warning was also for the multiple errors in the CM ROV, “including but not limited to” using violations already sanctioned in a previous Intervention Hearing (the Martinez problem) and for “other inaccurate or incomplete information.” A formal written warning has a line after the supervisor’s signature for the disciplined employee’s signature, to acknowledge the chance to review and comment on the written warning, without agreeing with content of the written warning. On this line, Boyington wrote, in very large letters, “Received DO NOT agree will respond,” followed by her signature. Ex. 16. DOC did not identify the failure to arrange for a furlough extension as one of the bases for discharging Boyington, but the CM ROV was one of the five reasons given for the subsequent discharge, and had now been the basis for two adverse employment actions before being cited as one justification for discharge.

157. Beccari and Gentry both testified that they were not thinking of firing Boyington when the November 7 and 8, 2011 letters were given to her. Tr. IV, p. 743, lines 12-15; Gentry Depo. pp. 81-82. Management was considering placing Boyington into a three-year position as an evidence technician. Tr. IV, 784-85. Beccari testified that although the November 7 written notice and the November 8 formal written warning were performance improvement tools, Boyington was not thereafter given a chance to improve upon her performance. Boyington had not engaged in any further inappropriate conduct after these documents were given to

her. Instead, what happened was that Beccari completed her report of Boyington's supervision of JM, and that led to a decision to fire Boyington. Beccari's testimony appears at Tr. IV, p. 845, line 12 through p. 847, line 5:

Q. Now, she was given a warning in November that said, if you do this again you'll be terminated. But she wasn't given a chance to improve her performance over that warning from the time of her warning on that letter of violation.

A. Yeah.

Q. Why was that?

A. The warning letter had to do with the [WW] furlough and the [CM] false statements in the report of violation. There wasn't time given to her because what happened then is when I finished my investigation on the [JM] grievance and that went up through the chain of command and then Helena got – you know, was reading that and all of us keeping in mind all the previous situations we had with her and concerns we had with her, it became apparent that the pattern of retaliation that came to fruition with the [JM] case was the final straw.

And that, from knowing what she did in that case, could we ever trust her again, no. So, we didn't give time for her to do it again.

Q. And is that because they were different policy issues –

A. Yes, they were different.

Q. – at issue?

A. They were different sets of circumstances, too. Not paying attention to your job duties in a furlough and having false information in a report of violation can be things that you can work on as an officer and you can maybe get some additional training on.

But the other issues, the underlying issues of dishonesty, mistreatment of offenders, lack of trust that a supervisor, POII, can have on an officer and letting her continue to carry, you know, all of these cases and supervise them, it wasn't worth the risk.

So they were two different things. But all in conjunction with each other, it was something that we felt was severe enough that we couldn't allow her to continue working within the Department when we had no reason to believe that her behavior would change.

158. Beccari testified credibly that in the middle of November 2011, there was a teleconference among various members of management in DOC about Boyington. Part of that discussion involved whether further action should be taken immediately. Beccari had written up a report regarding Boyington, in mid-October 2011, which was shared with DOC management. The November 7, 2011, requirement that Beccari review the next ten ROVs Boyington composed was in place. The November 8, 2011, written warning was in place. In context of whether DOC needed to do more to address Boyington's status, Beccari, Boyington's immediate supervisor, summarized, during that telephone conference, her current concerns that Boyington was retaliating against offenders and that Beccari could not trust Boyington. Tr. IV, p. 760, line 20 through p. 766, line 12.

159. Included in that testimony are the following series of questions and answers regarding the management teleconference about Boyington in the middle of November 2011. Tr. IV, p. 763, line 23 through p. 766, line 8.

Q. (By Ms. Orr) Was there a discussion of whether or not she could be coached in the future so as to avoid severing her employment from the Department?

A. Yes. Mr. Alsbury asked me if I felt that I was very clear with Lisa in previous conversations and coaching sessions, in the suspension that occurred a few months earlier. If I was clear with her – if I felt I was being clear with her in those situations, that further incident [sic] of misbehavior was not going to be tolerated.

And I told him I believed I was very clear and that she understood what we expected out of her.

Q. Was the word “salvageable” brought up?

A. At the end of – the end of my discussion about that portion, Mr. Alsbury said, Kathleen, is this officer salvageable to the point where we can make a difference with her and she can be the officer that we want her to be. And I paused and I thought about it for a brief period of time.

And I answered Mr. Alsbury with, no, I do not believe that we can make this officer conform to what I've asked of her.

Q. Why did you say that?

A. Because I have had several meetings with her, coaching sessions, the suspension, of course, where I've gone over with Lisa my expectations, following the Department's wishes, mission and vision, and never during any of my conversations



with Lisa did she acknowledge that there was anything that she had done [that] was wrong.

And I knew that. She never took accountability. She continued to argue with me every fact that was brought up. With what I felt were retaliatory behaviors on her part, she came up with answers for them.

Her answers that I didn't feel were – again, conformed to what I expected of her. She never once took accountability for her wrong behavior. And I did not believe that she ever would.

Q. There is a line in the termination letter, "in each instance you offer rationalizations for your harsh treatment of these offenders, which when scrutinized are frequently shown to be inaccurate, patently unfair, or simply untrue."

Did you write that?

A. I did.

Q. Is that another way of saying what you just said?

A. Yes, I think so. Yes.

Q. So in this discussion, did it come up, well, let's keep her on and let's help her?

A. No. After Mr. Alsbury asked my opinion if Lisa was salvageable and could become, through more coaching, the officer we needed her to be, there was no more discussion.

160. Both Gentry and Beccari recommended that an outside investigator be brought in to consider their findings with respect to JM and Boyington. Ex. 102(g), last page, Ex. 33, p. 782. DOC decided in November that, because Beccari was so familiar with the circumstances surrounding JM, DOC would rely on her and not an outside investigator. Tr. IV, p. 742, line 3, p. 743, line 5, Gentry Depo., pp. 62-63. Beccari testified that she took JM's word over Boyington's (Tr. IV, p. 972, line 10 through p. 973, line 2), because Beccari by this time "had many instances where Lisa was dishonest with me, dishonest with other things, and causing problems with offenders because of retaliation. So by the time I read this and by the time I terminated her, I did have some doubts on her integrity and honesty." Counsel for Boyington pursued the question, with both witness and counsel talking, Tr. IV, p. 972, line 20 through p. 973, line 2:

Q. So, yes, you believed –

A. Yes.

Q. – the offender –

A. I –

Q. – over Lisa?

A. Yes, I gave him probably more credibility than I would have if there were no problems in her history.

161. The decision not to involve an outside investigator led DOC to rely on Beccari for the underlying facts, and Beccari gave JM more credibility than she would have but for the problems she saw in Boyington’s supervision of a handful of the offenders she was supervising. Not having an outside investigator resulted in little new and independent investigation, because Beccari was so closely involved in most of the recent Boyington conflicts. However, what she already knew was substantial.

162. In her testimony about the June 2011 evaluation of Boyington,<sup>18</sup> Beccari went on to agree that the evaluation was a “positive” evaluation, and answer some questions about an October 2010 chronological notes entry regarding the “reprimand” (actually a suspension for insubordination) Boyington had received in September of 2010. Some procedural questions and answers, related to involving having two copies of June 2011 evaluation in two different places in the exhibits, is omitted from the quotations for an easier read. The evaluation being discussed can be found as at Exhibit 1, pp. 1-4. It also appears in Exhibit 103, but that exhibit is Boyington’s personnel file, and is not Bates numbered, so the document is more easily found in Exhibit 1.

Q. (By Ms. Orr) Now, this performance evaluation was quite positive, was it not?

A. I thought it was positive, yes.

Tr. IV, p. 790, lines 5-7. After helping the Hearing Officer find the performance evaluation under discussion, the questioning resumed. Tr. IV, p. 791, line 16 through p. 793, line 20.

Q. (By Ms. Orr) In your comment section you referred to October 10<sup>th</sup>. You say -- of 2010.

You say in October 2010, “Lisa was reprimanded after failing to obey a direct order by her supervisor.” And then you go on to say that she's more cooperative with her supervisor.

Do you see that?

A. Yes, I do.

Q. Was the 2010 incident, was that in reference to [AB]?

A. It was.

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<sup>18</sup> Discussed previously in Finding Nos. 52-56 pp. 15-17.

Q. And did you feel that that infraction of failing to -- well, let me start with this.

You felt that very strongly about her not following your order obviously, right?

A. Yes, I did.

Q. And you gave her a suspension for that?

A. I did.

Q. And was that a theme in the termination as well, that your backdrop of her having failed to follow an order before as far as accountability to management?

A. Well, that came into play because I felt that it was made very clear to Lisa my expectations of her as an officer, and when further incidents happened after I was very clear with her on the [AB] situation, yes. So that's how it came into play. I thought she should have got it loud and clear that that was not going to be tolerated anymore.

Q. And what --

A. Not just disobeying an order, but putting up barriers to offenders and possibly retaliating against them.

So when it occurred again, and I knew about other incidences, I knew that she had not learned from that incident, from that discipline.

Q. Now, here it says, item No. 2, and she got a 4 on this, which is a high rating, correct?

A. Yes, that's right.

Q. "Is willing to recognize and learn from mistakes." Why did you give her a 4 there?

A. This evaluation, the date of it, was in June of --

Q. '11.

A. So from the -- from previous to June 12 2011 and after the suspension in 2010 in October, Lisa, I felt -- you know, I didn't have complaints that warranted investigation or discipline. And I thought Lisa was -- had improved in that area.

Q. When you discussed retaliatory behavior, did Lisa tell you whether she was -- she thought she was retaliating at that time?

A. She denied that she was retaliating every time.

163. DOC violated several provisions of the collective bargaining agreement with respect to Boyington's employment. Performance evaluations were not

conducted by DOC of Boyington annually as required by the agreement. Ex. 4, pp. 78, 104, Ex. 1, Ex. 103. Boyington had four evaluations in seven years. Ex. 1, Ex. 103. Negative personnel information was left in Boyington's personnel file even though she had properly requested that it be destroyed in a timely fashion pursuant to the agreement. Ex. 4, pp. 78, 104, Ex. 26, pp. 451-453A. Of less significance, disciplinary letters written to Boyington and placed in her personnel file were not signed by either the employee or employer or both as required by the agreement.<sup>19</sup> Ex. 4 pp. 78, 104, Ex. 11, p. 347, Ex. 21, p. 430, Ex. 22, p. 433, Ex. 23, p. 436, Ex. 103.

164. Formal discipline more than eighteen month's old was used as a basis for termination, as noted earlier. Ex. 4, pp. 78, 104, Ex. 22 p. 431. It is not proper for DOC to claim it has terminated an employee for legitimate purposes, using in part "stale discipline" excluded by the CBA. DOC fired Boyington on November 29, 2011, and used the 2007 incident, which could not be used.

165. One document in the file appears to have been changed after Boyington's discharge and before the hearing. Ex. 25, p. 450, an edited version of Boyington's chronological notes for JM on October 17, 2011 was allegedly provided to Boyington by DOC in discovery. DOC has offered no explanation of the modified document, and has not effectively denied providing the document to Boyington during her deposition in this case. No reasonable explanation has been offered for this. DOC alleges that Boyington denied a travel permit for JM on October 17, 2011, Boyington alleges that she actually did not deny the permit, but only conditioned issuance of the permit on additional requirements. However the original document is just as devastating as the modified document to the merits of Boyington's assertion that she actually "only" conditioned issuance of the permit on additional requirements.

166. The last line of Boyington's October 17, 2011, note to JM (the one missing from the modified version) read "Submit documentation that you have complied with your court ordered conditions and it will be approved." This was a sly attempt by Boyington to disobey Gentry's direct prohibition against requiring offenders to have paid the current month's fines, fees, etc., before allowing travel in the current month. Beccari as well as Gentry had told Boyington not to require that the current month's payments be made in full before allowing an offender to travel. The line omitted from the modified note was very strong evidence that Boyington was both insubordinate and retaliatory in withholding the requested travel permit under these circumstances. She was seeking to prevent JM from traveling because he

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<sup>19</sup> This is less significant because there is no dispute of substance, in fact or law, that hangs upon this technical failure to follow the CBA.

had not yet made his current month's payment, against orders prohibiting her from conditioning travel permits on completion of such payments.

167. The November 29, 2011 termination letter was drafted before Boyington's due process termination hearing on that same day (Tr. 774-77, 848, Gentry Depo., p. 241, Ex. 23), and the notice letter and the termination letter were given to Boyington at the beginning and end of a process that was finished in less than half a day. This method seems designed to satisfy any due process hearing requirement while offering virtually no opportunity for the employee to participate in any meaningful sense by responding to the reasons given for the termination in the first place and raises doubt over whether DOC was willing to consider Boyington's position. At the termination hearing Boyington and her union representative requested time to respond in writing to DOC's alleged basis for her termination (Tr. 137- 142, 605-06, Ex. 104(i)). This request was denied and she was told that she could only speak to management on that day so they could determine if she had anything new that they had not heard before (Id.) The complexity of the issues involved in Boyington's termination and the resulting length of these findings demonstrate the difficulty in giving an adequate verbal response in a short time to DOC's allegations.

168. However, DOC had reasonably concluded that Boyington had retaliated against JM for going over her head on travel permits. DOC had appropriately considered the implications of that conduct, in light of Boyington's previous efforts to retaliate against CM with, among other things, the statement in the original ROV that CM was "drunk and driving in Helena, Montana and involved in a hit and run accident." DOC had also looked back again at Beccari's conflicts with Boyington about supervision of AB, with regard to travel permits and interstate transfer, in light of Boyington's more recent conduct with JM and CM. Beginning with DC, towards whom Boyington's conduct, while not retaliatory, justified continuing to watch her, moving on to Boyington's increasingly transparent efforts, with CM, to block the progress of offenders who went over her head, and finally seeing how she treated JM, DOC had a reasonably compelling case for discharging her.

169. Gentry may have been motivated, at times, by hostility towards Boyington, in his willingness to scrutinize her conduct closely. However, the credible and substantial evidence of record does not tie that hostility to Boyington's 2010 internal complaint against Gentry. Boyington and Gentry clashed repeatedly, while he was her supervising POII, and thereafter before he was her RA and thereafter when he was her RA. His hostility was far more clearly tied to her "in your face" rejection of his directions and supervision than to her 2010 internal complaint.

170. But it was not Gentry, it was Beccari, in her role as Boyington's current supervising POII, to whom DOC management turned, in that mid-November phone call, to make the call about whether Boyington, in essence, was still trainable. Boyington's attitudes toward DOC and towards her supervisors seemed to be deteriorating. DOC had already put in place a training method and a disciplinary warning. The P & P Bureau Chief wanted to know if there was a good prospect of getting Boyington back on the right track. Boyington had years of solid performance as a PO. Even her old nemesis from Kalispell, Tom Forsythe, back in 2006, while battling with Boyington over secondary employment, had written to Boyington that she could have "a long and successful career ahead of you with this Department." Finding No. 25, p. 8. If now, in November 2011, she was still "salvageable," more work on her would still be good investment. Beccari was the POII who had wanted DOC to fire Kross, because of his discrimination complaint against his Alaska employer. But, even if Beccari did know about Boyington's interviews in Kross' Montana case (about which Beccari denied knowledge), her supervisory conduct towards Boyington, and her testimony and her demeanor at hearing, provided substantial and credible evidence that Beccari did not want Boyington to fail – she wanted her to succeed. Only when her boss, the Bureau Chief, put her directly on the spot, did Beccari consider, and decide, that it was too late to try to salvage Boyington. The substantial and credible evidence of record supports a finding that Beccari made an honest call about Boyington, based upon legitimate concerns about Boyington's mistreatment of specific offenders. Beccari did not make a retaliatory call nor a pretextual call about whether Boyington was "salvageable," and was not trying to punish Boyington for any kind of protected activity.

#### D. Failure to Accommodate Boyington's Disability

171. Boyington had suffered from migraine headaches since 2005. She was involved in a car accident in 2005 and another car accident in 2006, she was assaulted by an offender in 2007 and she had another car accident in a state car in 2010. Her migraines typically occur several times a week and sometimes subside for long periods. At their most severe, the migraines can occur daily. Boyington's migraines were occurring every day in the fall of 2011.

172. On October 26, 2011, Boyington was suffering from a migraine that had lasted for two days. She had gone home earlier during the day to get some of her migraine medication. She was extremely ill. Gentry directed that she take a revised ROV (Report of Violation) to one of the offenders she supervised, CM, in the Missoula County jail, and explain the changes in the ROV to him. She informed him that she could not do that and that she had to go home. Gentry repeatedly refused to let her go home. When Boyington asked Gentry if he was denying her medical

treatment he allowed her to go. Boyington went to her office to retrieve her purse and Gentry pursued her down the hallway and demanded that she bring back documentation of her medical condition. She went to a treatment provider and received an injection for the migraine. When she woke the following morning she was still ill and contacted POII Heather Smith to let her know she would not be in that day.

173. Gentry also requested that she provide medical verification for that following day, October 27, 2011. Boyington provided the documentation. Gentry did no more investigation into the matter. Gentry did not believe Boyington's medical issue was sincere, but he had little basis for this suspicion, other than animus towards her because she kept challenging him. Boyington applied for Family Medical Leave Act certification and received it from Nurse Practitioner Jamie Granger on November 17, 2011. Granger reported that Boyington should not be placed on call and might require time off for medical appointments one or two times a week. Ex. 3 pp. 52, 56. Gentry testified that Boyington was on a list to receive a letter indicating that if on-call duties could not be performed, POs could be let go for not being able to perform essential job duties. Boyington's employment was terminated before this additional issue came to a head.

174. Nurse Practitioner Granger testified that Boyington's migraines were more severe than normal headaches. Work was among the stressors that triggered Boyington's migraines. Boyington reported work-related stress to Granger in 2011. Twice in November 2011, on November 3 and 17, 2011, Granger had lengthy counseling sessions with Boyington, referred Boyington to a counselor, noted sleep issues and increased depression and medicated her for her symptoms. Ex. 101.

175. The reasonableness of Gentry's repeated refusals, before finally agreeing, to permit Boyington to leave work on October 26, 2011, and specifically his insistence upon provision of medical verification of her illness, depended entirely upon whether Gentry knew that Boyington had need for an accommodation (and that she had received the slight accommodations necessary) from DOC for her migraines. Boyington had notified Beccari about her migraine problem and her "most recent regression" (Ex. 7, p. 294), which was happening still on October 25-27, 2011, according to her testimony. There is no specific evidence that Boyington ever advised Gentry, when he was supervising her as her POII, or at any other time, about her migraines. But there is evidence (Ex. 7, p. 294) that the office was aware of her migraines, and the medical evidence of record, together with Boyington's testimony, established that her migraines were a physical impairment that substantially limited her in the major life activities of working, driving and sleeping, by requiring her to seek time off work when the migraines regressed to daily occurrence and maximum

intensity, and that she was an otherwise qualified person with a physical disability. Gentry, as her former supervisor and current RA, reasonably knew or should have known that her migraine problem was real and was documented.

176. In addition, Beccari later denied Boyington's grievance about Gentry's actions regarding her request for sick leave, not because Gentry was unaware of her migraine problems, but because he "had good and sufficient reason to suspect sick leave abuse due to the timing of your claim coming precisely after you had been given a directive to deliver your revised report of violation to [CM]." Ex. 7, p. 278. Boyington, already angry with Gentry even before his directive to take the revised ROV to CM and explain it to him, was not about to explain her migraine history to him on the spot. Based upon witnesses accounts of how these two interacted in other conflict situations, they were more likely than not shouting at each other during the confrontation on October 26, 2011, which could not have been conducive to enduring a migraine headache. Since DOC did not deny the grievance based upon Gentry's ignorance of the condition, but instead on the "possible sick leave abuse" policy, that silence about his knowledge was a negative pregnant. It provided more credible and sufficient evidence that Gentry did know about Boyington's history of migraines and her occasional need for limited accommodations.

177. Despite knowledge of her migraine problems, Gentry refused her initial requests to take sick leave and insisted that first she must run the errand of delivering the revised ROV to CM and explaining to him the changes. He finally relented and released her to seek medical care, but then he shouted after her to demand that she bring a medical excuse upon her return to work. This kind of childish bullying, while perhaps an understandable response to the childish conduct of Boyington in resisting Gentry's efforts to clean up the ROV, was inappropriate conduct for an RA, under circumstances where the paramilitary nature of "chain of command" for DOC did not justify the bullying in the least. That Boyington would tell Gentry that she needed sick leave for her migraine, given how very difficult it must have been for her to show any kind of weakness to him, speaks volumes about how severe her pain must have been. His initial insistence that she run the errand first, and then his insistence upon a medical excuse, indicated a callous disregard for an employee's entitlement to accommodation for a documented pain disability resulting at least in part from injuries sustained on duty.

#### E. Statute of Limitation Facts and Boyington's Related Grievances

178. On August 5, 2007, Boyington, under pressure from DOC management, filed what might be characterized as a "grievance," although it did not follow the CBA procedures for same, regarding her treatment by Tom Forsythe while she was at the Law Enforcement Academy and thereafter while she was assigned to Kalispell.



Ex. 8, pp. 320-24. The final action on this “grievance” was taken on or about January 17, 2008, at the time when Ken McElroy, DOC Human Resources Bureau Chief, sent an e-mail to Boyington, summarizing the outcome of his investigation. Ex. 8, p. 319. Boyington’s complaint of discrimination was filed on April 9, 2012, 534 days after final action on the grievance, and at least 2090 days after the effective date of Boyington’s transfer to Missoula. Any claim of retaliation or discrimination arising out of the 2007 events was untimely. For purposes of the timely claims, the conduct of DOC during the Forsythe interactions with Boyington that were the subject of this grievance could shed light upon whether its later conduct on her timely claims might be a continuing course of retaliatory or discriminatory conduct, but the substantial and credible evidence of record did not support a finding that its later conduct on her timely claims was retaliatory or discriminatory.

179. On or about October 14, 2010, Boyington filed a grievance regarding her three-day suspension without pay for disobeying Beccari’s September 27, 2010, order to issue a travel permit to AB. Ex. 7, pp. 314-317. On November 26, 2010, her grievance was denied at Step 3 by DOC Director Mike Ferriter. Ex. 7, p. 308. Boyington’s complaint of discrimination was filed on April 9, 2012, 500 days after final action on the grievance, and approximately 543 days after the effective date of Boyington’s transfer to Missoula. Any claim of retaliation or discrimination arising out of the 2010 events was untimely. For purposes of the timely claims, the conduct of DOC towards Boyington regarding the 3-day suspension could shed light upon whether its later conduct on her timely claims might be a continuing course of retaliatory or discriminatory conduct, but the substantial and credible evidence of record did not support a finding that the conduct of DOC towards Boyington regarding the 3-day suspension was motivated by any retaliatory or discriminatory animus.

180. On November 4, 2011, Boyington filed a grievance regarding Gentry refusing to permit her to take sick leave and then requiring a doctor’s note from her after he did allow her to take sick leave, October 25 or 26, 2011. Ex. 7, pp. 293-297. Since the discrimination complaint was filed timely with regard to the disability discrimination charge (which involved the same transaction as this grievance), there is no need to find whether processing of this grievance extended the claim filing deadline.

181. On November 17, 2011, Boyington filed a grievance regarding both the November 7, 2011, written notice that DOC was placing Boyington on a performance plan of submitting her next ten ROVs to Beccari for review in advance of filing or delivering the ROVs, and the November 8, 2011, formal written warning regarding both Boyington’s failure to make arrangements to arrange an extension of a

furlough for WW and her multiple errors in the CM ROV. Ex. 7, pp. 279-284 (duplicate copy of the same grievance, signed at Step 1 by Boyington, also in Ex. 7, pp. 285-288). Since the discrimination complaint was filed timely with regard to both the written disciplinary actions (of November 7 and November 8, 2011), both of which were also included in DOC's justification of discharge of Boyington, there is no need to find whether processing of this grievance extended the claim filing deadline.

182. On January 3, 2012, Boyington filed a grievance regarding her discharge. Ex. 7, pp. 249-264. Since the discrimination complaint was filed timely with regard to the discharge, there is no need to find whether processing of this grievance extended the claim filing deadline.

#### F. Damages

183. There is no evidence that Boyington suffered any economic damages or expenses from Gentry's initial refusal to allow her sick leave, on October 26, 2011, while insisting that she deliver the revised ROV to CM and explain the changes to him. There is no evidence that Boyington suffered any economic damages or expenses from Gentry's subsequent insistence that Boyington provide medical documentation to prove her illness justified her absence. However, Boyington suffered emotional distress for these additional indignities at the hands of her nemesis, Gentry. This was the only proven illegal discrimination involved here. It came after a series of conflicts between DOC and Boyington, over an extended period of time. By the time it occurred she had been subjected to multiple disciplinary actions, several grievances she submitted had been denied, and she had found little to no support for her resistance to supervision by Beccari, to some extent, and by Gentry, to a much greater extent. Worried about losing her career, forced to deal at length with Gentry, a supervisor she distrusted and disliked, October 26, 2011, Boyington was beset with anger, fear, and insecurity about her future – the emotional turmoil that being “on the brink” at work, in a career she sought out and come to consider fundamental to her life, was substantial.

184. Her significant other was a police officer. A large part of her social community was involved in law enforcement. Her conflicts at work were casting huge shadows across her life. Put in that context, and focusing upon the illegality of Gentry's conduct, and the outrage it generated in Boyington, her emotional distress was severe, and was made even more severe by coming at a time when she was already all but overwhelmed by the migraine she was suffering. Boyington is entitled to recover the sum of \$25,000.00 for her emotional distress resulting from the discriminatory conduct of her RA, Gentry, on October 26-27, 2011.

#### IV. Conclusions of Law

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

2. The Montana Department of Corrections – Probation and Parole, did not retaliate against Lisa Boyington for participation in protected activity, during her employment or when firing her from employment, and those charges should be dismissed. Mont. Code Ann. §49-2-301.

3. The Montana Department of Corrections – Probation and Parole, through Regional Administrator Tanner Gentry, did illegally discriminate against Lisa Boyington by refusing her a reasonable accommodation for her migraine headaches, which were a physical disability under Mont. Code Ann. §49-2-101(19), and for which the employer could have and should have provided reasonable accommodation through time off from work on October 26 and 27, 2011, without first attempting to coerce her into additional work and second requiring her to provide medical verification of her need for the time off, even though the employer already had notice and sufficient information regarding her disability so that neither condition upon her time off was reasonable. Mont. Code Ann. §49-2-303(1).

4. The Montana Department of Corrections – Probation and Parole, should be permanently enjoined from disability discrimination in employment by unreasonably denying time off to an employee with a disability who has documented the disability and the need for an accommodation of being allowed to take a reasonably short and defined amount of time off. Mont. Code Ann. §49-2-506(1).

5. The Montana Department of Corrections – Probation and Parole, should be required to prepare draft modifications to its policies and procedures that will detail how the employer will notify employees that this kind of accommodation is available, what the employer will advise employees to do to seek this kind of accommodation and how the employer will receive, process, evaluate and act upon a request for this kind of accommodation. Draft modifications should be submitted for approval to the Human Rights Bureau, Montana Department of Labor and Industry, within 25 working days of the date of issuance of this decision. Upon approval of the proposed modifications, with any changes directed by the Human Rights Bureau, the Montana Department of Corrections – Probation and Parole should forthwith adopt, publish and implement them. Mont. Code Ann. §49-2-506(1)(a) and (b).

6. The Montana Department of Corrections – Probation and Parole, should be required to pay to Lisa Boyington the sum of Twenty-Five Thousand Dollars, to remedy the emotional distress endured from suffering the disability discrimination

described in Conclusion of Law No. 3, due and owing upon the date of this decision. Interest accrues hereafter by law. Mont. Code Ann. §49-2-506(1)(b).

## VI. Order

1. Judgment is found in favor of Lisa Boyington and against the Montana Department of Corrections – Probation and Parole on the charge of disability discrimination in employment, because the Montana Department of Corrections – Probation and Parole, through Regional Administrator Tanner Gentry, did illegally discriminate against Lisa Boyington by refusing her a reasonable accommodation for her migraine headaches, which were a physical disability under Mont. Code Ann. §49-2-101(19), and for which the employer could have and should have provided reasonable accommodation through time off from work on October 26 and 27, 2011, without first attempting to coerce her into additional work and second requiring her to provide medical verification of her need for the time off, even though the employer already had notice and sufficient information regarding her disability so that neither condition upon her time off was reasonable.

2. IT IS HEREBY ORDERED that the Montana Department of Corrections – Probation and Parole is:

a. Permanently enjoined from disability discrimination in employment by unreasonable denial of time off to an employee with a disability who has documented the disability and the need for an accommodation of being allowed to take a reasonably short and defined amount of time off.

b. Ordered to prepare draft modifications to its policies and procedures that detail how the employer notifies employees that such accommodations are available, what employees can do to seek such accommodation and how the employer receives, processes, evaluates and acts upon a request for such accommodation. Draft modifications must be submitted for approval to the Human Rights Bureau, Montana Department of Labor and Industry, within 25 working days of the date of issuance of this decision. Upon approval of proposed modifications, with any changes directed by the Human Rights Bureau, the Montana Department of Corrections – Probation and Parole must forthwith adopt, publish and implement them.

c. Ordered to pay immediately to Lisa Boyington the sum of Twenty-Five Thousand Dollars, to remedy the emotional distress endured from suffering the disability discrimination described in Conclusions of Law Nos. 3 and 6, and in Findings of Fact Nos. 183-84, said sum now being due and owing as of the date of this decision. Interest accrues hereafter by law.

3. Judgment is found in favor of the Montana Department of Corrections – Probation and Parole, and against Lisa Boyington on the charges of illegal retaliation for participation in protected activity, during her employment and when firing her from employment.

4. IT IS HEREBY ORDERED that Lisa Boyington’s charges of illegal retaliation, made against the Montana Department of Corrections – Probation and Parole, under the Montana Human Rights Act, are dismissed.

Dated: July 28, 2014

/s/ TERRY SPEAR

Terry Spear, Hearing Officer  
Office of Administrative Hearings, CSD  
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: David L. Vicevich/Dolphy O. Pohlman, Vicevich Law Firm, attorneys for Lisa Boyington, and Katherine J. Orr, attorney for Montana Department of Corrections – Probation and Parole::

The decision of the Hearing Officer, above, an administrative decision appealable to the Human Rights Commission, issued today. Unless there is a timely appeal to the Human Rights Commission, this decision becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission c/o Marieke Beck  
Human Rights Bureau, Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the

appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The Office of Administrative Hearings' files do not contain Volumes I through V of the original transcript, which the reporting service provided to the party who ordered them. The Office of Administrative Hearings' files do not contain the redacted Volumes (II and IV) of the transcript, which have been retained by the reporting service.

Dated: July 28, 2014.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry