STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2009G006

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

TIMOTHY NAWROCKI,

Complainant,

VS.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Complainant petitions the State Personnel Board ("Board") to grant a discretionary evidentiary hearing to review his claim of retaliation. The question presented for purposes of this preliminary recommendation is whether valid issues exist which merit a full evidentiary hearing. It is the recommendation of the undersigned Administrative Law Judge that a hearing be **granted**.

SUMMARY

Complainant, a State Trooper with the Colorado State Patrol ("CSP"), challenges the upholding of a corrective action, which he requests to have rescinded. He argues that his actions did not violate State Patrol Policies or General Orders and that all of his reports were truthful and accurate. He argues that the final grievance decision is discrimination in the form of retaliation and violates the agency or Board grievance process.

Respondent argues that Complainant presented no evidence that the final grievance decision violated any of his rights under the federal or state constitution, the Colorado Anti-Discrimination Act, the Colorado State Employee Protection ("Whistleblower") Act, or the grievance procedures of the CSP or the Board. In summary, Respondent states that Complainant failed to raise issues over which the Board has subject matter jurisdiction.

UNCONTROVERTED FACTS

The following facts were either included in both parties' information sheets, were contained in exhibits that were not disputed by either party, or were not controverted by either party:

1. Chapter 308.01(XXV) of CSP Operations and Administrative Procedures states:

XXV. TROOP/SECTION COMMANDER OR SUPERVISOR DESIGNEE

- A. Accompanies the evidence custodian and monitors the destruction of any unclaimed, non-salable, or contraband items of evidence and initials witnessed by block under the disposition section of the hard-card.
- 1. An incinerator will be used to destroy any schedule I-V controlled substances, suspected or counterfeit controlled substances, or prescription and non-prescription drugs.
- 2. CSP is a law enforcement agency responsible for enforcing criminal laws on state highways. During the course of its duties, CSP has lawful authority to seize and store evidence related to criminal conduct.
 - 3. Complainant is a master sergeant assigned to CSP Pueblo Troop 2-D.
- 4. On October 4, 2007, following a hearing, the Administrative Law Judge issued the Initial Decision of the Administrative Law Judge in which she upheld Respondent's decision to disciplinarily demote Complainant, but rescinded Respondent's decision to transfer Complainant from CSP's Pueblo Office. (Nawrocki v. Department of Public Safety, State Personnel Board case number 2007B097.)
- 5. On November 2, 2007, Complainant had a check-in meeting with his supervisor, Captain Scott Copley, Troop Commander, Troop 2-D, CSP, upon his return to the Pueblo Office.
- 6. On December 5, 2007, Complainant was the supervisor present during an evidence burn and signed all forms indicating evidence was properly destroyed.
- 7. On March 27, 2008, Captain Copley removed Complainant from his role as evidence custodian.
- 8. On June 4, 2008, Complainant was issued a corrective action relating to an investigation into his alleged failure to follow CSP orders, policies, procedures, and rules regarding evidence control.
- 9. In the corrective action, Captain Copley determined that Complainant's conduct violated CSP General Orders #2, 3, and 6 and CSP Policy 308.1 Evidence Control "as it relates to evidence destruction procedures."
 - 10. The corrective action stated as follows:

When conducting any function related to the collections, storage, or destruction of evidence, you will ensure you follow all policies, rules, and procedures. You will also adhere to all General Orders listed above. All reports and statements made during an investigation will be accurate and truthful to the best of your ability.

- 11. On June 16, 2008, Complainant grieved this corrective action to Major Hal Butts, District II Commander, CSP, stating in pertinent part:
 - "I in fact discovered the marijuana that was not destroyed. . . . It is ludicrous for me to be corrected for discovering the problem."
 - "I made no inaccurate statements either verbally or written. All of the statements were based upon my recollections."
 - "It is unfair for that information to be included in my 2008 performance evaluation."
 - "I believe this action is harassing and retaliatory against me for returning to Troop 2-D as a result of my demotion last year. I have been given contradictory directives and expectations of my responsibilities and duties. This action does nothing to provide me an environment to succeed as I was assured of by my chain of command upon my return."
 - "I will also add to the evidence of a hostile work environment towards me is that Trooper Kennerson, the individual responsible to the accounting of the destroyed evidence, did not receive any action against him. I am being singled out for my minor participation, which was within CSP policy."
- 12. On June 27, 2008, following a meeting with Captain Copley and Complainant, Major Butts sustained the corrective action, "after reviewing all of the documentation provided to me by you and Captain Copley, and statements made by you and Captain Copley at this meeting."
- 13. On July 7, 2008, Complainant filed a petition for hearing, challenging the upholding of the corrective action in the final grievance decision and alleging retaliation.
- 14. Complainant waived an investigation into his allegation of retaliation by the Colorado Civil Rights Division.
- 15. The matter was set for preliminary review, and the parties filed information sheets.

COMPLAINANT'S CONTENTIONS

As relief, Complainant requests that a hearing be granted. If the hearing is granted, Complainant offers to prove the following allegations:

- 1. Complainant is seeking a review by the Board in that the corrective action is arbitrary and capricious for the following reasons:
 - His actions did not violate any General Orders or policies of CSP;
 - There were violations of the CSP Policies by other members of the CSP during the same incident(s) for which they were not corrected nor disciplined;
 - Complainant was truthful, accurate and complete in all his reports and accounts;
 - Mitigating circumstances and information from Complainant were not considered in the decision, thus violating Board Rule 6-9;
 - The action was not timely, thus not corrective in nature, in violation of Board Rule 6-11:
 - The action was not corrective but punitive in violation of Board Rule 6-11;
 - The punitive nature of this action is retaliatory because of Complainant's prevailing in an appeal of a previous disciplinary action issued by the appointing authority. This is in violation of Board Rules 9-3 and 9-5.
- 2. Complainant seeks rescission of the corrective action and any reference to it or the situation in his performance evaluation or future actions.
- 3. On December 5, 2007, Complainant assisted Trooper Brad Kennerson in destroying accumulated evidence. The destruction was carried out at Rocky Mountain Steel Mills in Pueblo, which has a very large incinerator used in its manufacturing process that it periodically makes available to CSP to quickly and efficiently destroy large quantities of evidence. On this day, Complainant and Trooper Kennerson filled a full-size pickup truck with evidence to be destroyed. There were well over one hundred pieces of evidence to be destroyed; some small size, others much larger.
- 4. As the evidence custodian for Troop 2-D, Trooper Kennerson would receive destruction orders from the court and would remove the items from their storage location and, depending upon the size of an item, it would be placed in a large bin or set aside until a sufficient quantity was accumulated to make the time appropriate to take the material to the mill for destruction. The destruction orders would come in on a regular basis and typically six months or more of destructions orders would accumulate enough evidence to make the destruction appropriate.
- 5. At the conclusion of the December 5, 2007 burn, Trooper Kennerson handed Complainant a very large stack of evidence papers and asked if Complainant would initial next to his that the burn had been carried out that day. Complainant did so.
- 6. The evidence destruction section of Chapter 308.01 of CSP Operations and Administrative Procedures specifies five tasks to be carried out when destroying evidence. The evidence custodian has three tasks; the troop commander has one or two tasks, depending if he accompanies the evidence custodian and, if not, then a

supervisor designee has one task. On December 5, 2007, Complainant acted in compliance with the above policy. The "supervisor designee" has no further requirements in the destruction of evidence section of policy. There is no language in CSP Policy, nor was Complainant ever given any written or verbal directives to do anything in addition to or outside this policy.

- 7. The corrective action states that Complainant "failed to ensure all evidence set for destruction was accurately accounted for prior to burning a large amount of contraband." Chapter 308.01 clearly places this responsibility to accurately account for items upon the evidence custodian. The corrective action also states: "You also failed to ensure the Troop Commander was notified prior to the destruction of evidence per policy." This responsibility is specifically directed to the evidence custodian, not a supervisor designee. There is no directive either written or verbal that requires that Complainant was to question and ensure the evidence custodian was in compliance with policy. Trooper Kennerson was an experienced evidence custodian and had his own chain of command to report to.
- 8. Captain Copley and Major Butts specifically directed Complainant verbally on November 2, 2007, that he would not directly supervise any members of Troop 2-D. Complainant believes if he decided to exceed policy and question Trooper Kennerson on his compliance with policy, he would have been violating direct orders from his commanders.
- 9. This situation would not have come to light had Complainant not conducted a thorough evidence inventory, according to Policy 308.01 Periodic Inventory, when he was assigned evidence custodian duties in January of 2008.
- 10. The last sentence of the specific violations states, "There was also evidence in the Walsenburg office dated back to December 2007." As Complainant stated in his memo of April 14, 2008, the evidence remained in Walsenburg because it was not packaged and documented according to Chapter 308.01 and Complainant was in compliance with 308.01 (II)(3) by leaving it in the lockers until it was in compliance. The memo of April 14, 2008, details Complainant's attempts to get the evidence into compliance by the violating Troopers and their supervisor.
- 11. There were violations of CSP Policies by other members of the CSP during the same incidents.
- 12. Complainant does not believe any members of Troop 2-D should receive any actions in relation to the circumstances he is appealing.
- 13. As evidence custodian, Trooper Kennerson was the individual who violated Chapter 308.01 in the December 2007 situation. He received no corrective or disciplinary actions.

- 14. As evidence custodian at the time, Complainant advised the Troopers who violated Chapter 308.01, in regards to the Walsenburg items left in evidence, of what they needed to do to come into compliance. When they failed to comply, Complainant advised them again and their supervisor by email. The specifics of Complainant's actions are detailed in his memo of April 14, 2008. None of those policy violations resulted in any investigations or corrective or disciplinary actions.
- 15. The corrective action states, "During the same investigation in March, 2008, you made inaccurate verbal and written statements when recapping your involvement in evidence collection from Trinidad. You stated all evidence was transported from the Trinidad office in a timely manner. I discovered evidence in the evidence storage locker placed there before your last visit after you assured me all evidence had been removed from that location." However, Complainant was truthful and accurate in all his reports, and his memo of April 14, 2008, details his explanation of the situation and timelines.
- During an interview Captain Copley conducted with Complainant on April 16. 14, 2008, he asked about Complainant's picking up evidence in Trinidad. Complainant attempted to explain his process, and Captain Copley cut Complainant off and demanded that he answer yes or no to the question: "Is there any evidence in the Trinidad office?" Because Complainant was not allowed to qualify the situation and was ordered to answer either affirmatively or negatively, he stated there was no evidence in the Trinidad storage lockers. Complainant knew that the last time he looked there was none, and he explained that in his memo. Complainant was not being untruthful as he answered what he was aware of. Complainant could not answer there was evidence present, as he did not see it. Captain Copley apparently went to the Trinidad office and he said he found a piece of evidence that was dated March 9th. Complainant was not provided with any information of who entered the evidence and what specific date it was actually placed in the locker. In the corrective action, it is stated only that evidence was found after the alleged date he last checked the locker. If Complainant in fact overlooked a piece of evidence, he was not being untruthful in his reports: he simply made a mistake. There is no rational reason he would tell Captain Copley there was no evidence in the locker in Trinidad if he knew there was.
- 17. In the corrective action Complainant received, it reads in part "... All reports and statements made during an investigation will be accurate and truthful to the best of your ability (emphasis added)." The statements Complainant made during the investigation were to the best of his ability and recollection; he could have done nothing different.
- 18. During the initial informational meeting with Captain Copley, on April 14, 2008, Complainant was unable to fully explain his activities and rationale for checking the Trinidad evidence lockers. Complainant was forced into a simple yes or no answer and no other answer was acceptable to Captain Copley. This forcing of an answer did not clearly take in any mitigating circumstances or sufficient information from Complainant when considering the action.

- 19. In his written appeal to Major Butts and in the meeting of June 24, 2008, Complainant provided ample and specific information, both written and verbal, describing the arbitrary and capricious nature of this action. Captain Copley's responses to Complainant during the meeting, in which he focused on Complainant's "hostile work environment" comments and on Captain Copley's previous tenure as Troop Commander shows a definite failure on his part to consider information and mitigating circumstances about the issues at hand.
- 20. The action was not timely, thus not corrective in nature, in violation of Board Rule 6-11.
- On April 16, 2008, Complainant spoke with Captain Copley about this 21. investigation. Captain Copley told Complainant he was going on leave from April 17, 2008, to May 2, 2008. He told Complainant that he had submitted all the reports from the investigation to Major Butts and believed Major Butts would be in contact with Complainant sometime during the two weeks of his leave and would advise Complainant of the results and disposition. Complainant never heard from Major Butts. When Captain Copley returned, Complainant advised Captain Copley that he had not heard anything and he expressed frustration that nothing had been settled. Captain Copley told Complainant that he would check again. A week or two went by and Captain Copley told Complainant he still had not received a decision from Major Butts and he would ask again during their Troop meeting on May 16, 2008. Complainant did not hear anything until June 4, 2008, when Captain Copley informed Complainant he would be issuing Complainant a corrective letter. There were no further investigations or interviews, nor requests for further information after Complainant's last memo of April 14, 2008. There was no reason given for the length of time it took to bring this situation to a resolution. Additionally, the corrective action specifically details how Complainant is to behave in relation to evidence functions even though he had been removed from the evidence custodian role two and a half months earlier.
- 22. Board Rule 6-11 specifies in part that a "Corrective action is intended to correct and improve performance or behavior..." On March 27, 2008, Complainant was removed by Captain Copley as evidence custodian. The removal was punitive and Complainant was given no opportunity to improve his performance or an explanation of what he needed to do to improve. He simply was removed. He explained to Captain Copley on numerous occasions that there were many issues with the evidence room and the local processes and it would take a great deal of time to correct and improve them. Complainant was not given any specific timelines on when all improvements were to be complete, nor was he given any specific directions that he subsequently failed to follow. By Captain Copley continuing to further investigate and then issue corrective action after Complainant had been removed as evidence custodian, without being given the opportunity to improve his performance, is clearly indicative of the punitive nature of this action.

- 23. The corrective action in part states, "These issues will be taken into consideration when completing your next performance evaluation." Complainant has already received his evaluation for 2007. To now take a situation from 2007 and include it in Complainant's 2008 evaluation clearly indicates the punitive intent of this corrective action.
- 24. The punitive nature of this corrective action is retaliatory because of Complainant's prevailing in an appeal of a previous disciplinary action issued by the appointing authority. This is in violation of Board Rules 9-3 and 9-5.
- 25. Due to the length of time it took to issue the corrective action, the fact that the corrective action was issued after Complainant was removed from the role of evidence custodian, the fact that Complainant did not violate any CSP Policies, the fact that no other employee involved in the situation was corrected or disciplined for failing to follow policy, and the fact that the 2007 situation would be reflected on his 2008 evaluation show that this corrective action is clearly arbitrary and capricious.
- 26. It is Complainant's conclusion that the punitive nature of this corrective action is a desire to begin building a pattern of actions to once again attempt to remove Complainant from the Pueblo office.
- 27. In October of 2007, Complainant prevailed in an appeals hearing stemming from a disciplinary action issued by Major Butts in May of 2007. His discipline involved demoting Complainant from Captain and transferring Complainant to Denver Headquarters. Complainant prevailed in rescinding the transfer from Denver, and CSP was ordered by the Administrative Law judge to reinstate Complainant back to the Pueblo office. During Complainant's check-in meeting on November 2, 2007, Major Butts offered Complainant the opportunity to transfer to the Colorado Springs office, even though he had just won the right to return to Pueblo. A few months later, Captain Copley verbally made the transfer offer to Colorado Springs to Complainant, stating that Major Butts had reoffered it. During Complainant's meeting with Major Butts and Captain Copley on June 24, 2008, when they were discussing this appeal, Major Butts again made Complainant the offer to transfer to Colorado Springs. Although Complainant has never expressed a desire to transfer to the Colorado Springs office, every time a transfer offer was made, Major Butts said that he was doing it out of concern for Complainant.
- 28. In the appeal ruling of Complainant's disciplinary action, the Administrative Law Judge clearly states the arbitrary and capricious nature of the forced transfer to Denver that Major Butts imposed, as follows: "The Major (Butts) failed to take into consideration any of the personal consequences..." By repeatedly making these transfer offers, after having the disciplinary transfer rescinded, Major Butts shows an obvious desire to not have Complainant work in the Pueblo office.
- 29. In August of 2007, during Complainant's appeal of the disciplinary action, his attorney at the time, Michael Lowe, informed Complainant that he had been in

- contact with Diane Dash of the Colorado Attorney General's office. Ms. Dash was representing Major Butts and CSP in Complainant's disciplinary appeal. Mr. Lowe informed Complainant that Ms. Dash had stated that if Complainant did not drop his appeal at that time, Major Butts would commence an investigation and conduct a meeting with Complainant pursuant to Board Rule 6-10 into Complainant's actions regarding evidence practices in Troop 2-D, a travel budget question, and the computer user accounts of the Troopers in Troop 2-D. Complainant told Mr. Lowe to advise Ms. Dash that he would not drop his appeal. Complainant was not made aware of any investigations into the above stated situations and was not called in for a 6-10 meeting.
- 30. During the meeting of June 24, 2008, Major Butts questioned Complainant regarding his opinion as to his performance as the former troop commander. Major Butts asked Complainant if he believed that his responsibilities as previous troop commander were a potential reason for some of the current evidence discrepancies. Complainant chose not to answer his questions based on the irrelevance of the questioning, since the corrective action Complainant is appealing concerns his current status as a master sergeant and not as troop commander a year ago.
- 31. In the corrective action that was issued here, there were no allegations or evidence to support that Complainant's previous tenure as troop commander contributed in any way to the situation that brought about this investigation.
- 32. As relief, Complainant believes the above-stated issues merit a full hearing by the Board. The arbitrary and capricious nature of this corrective action clearly shows the retaliatory and punitive attempt by Major Butts, through Captain Copley, to once again remove Complainant from the Pueblo office.

RESPONDENT'S CONTENTIONS

As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed. Respondent offers to prove the following factual allegations at hearing:

1. The conduct upon which Complainant's corrective action was based does not meet the requirements of prohibited retaliation set forth in C.R.S. 24-50.5-101, et seq. Specifically, state employees are protected from retaliation when disciplinary action is based upon an employee's "disclosure of information," as defined below.

Disclosure of information means the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.

C.R.S. 24-50.0-102 (2).

- 2. Following the evidence burn in December 2007, during a subsequent investigation, it was discovered that approximately 38 pounds of marijuana was not properly destroyed as Complainant had indicated, that Complainant failed to ensure all evidence was accurately accounted for prior to destruction, that he failed to notify the Troop Commander prior to the burn, and that he had made inaccurate verbal and written statements when recapping his involvement in evidence collected from the Trinidad, Colorado CSP office.
- 3. After Complainant filed a grievance of his corrective action, Major Butts conducted a meeting with Complainant and Captain Copley, considered all statements made during the meeting, and reviewed all documentation provided to him regarding the subject matter of the corrective action.
- 4. Complainant has presented no evidence that the final CSP grievance action violated any of his rights under the federal or state constitution, the Colorado Anti-Discrimination Act, the Colorado State Employee Protection Act, or the grievance procedures of the CSP or the Board.
- 5. Complainant has failed to raise issues over which the Board has subject matter jurisdiction.
- 6. As relief, Respondent requests that Complainant's petition for hearing be denied for failure to raise issues over which the Board has subject matter jurisdiction, as set forth above.

DISCUSSION

Under Board Rule 8-46, the Board may exercise its discretion to grant a hearing in cases where an employee does not have a right to a hearing, appeal, or review by law or rule. The standard for granting a discretionary hearing is whether valid issues exist which merit a full hearing. Complainant has the burden to establish that valid issues exist which merit a Board hearing. Board Rule 8-50(G).

The Board's jurisdiction to hear grievance appeals, such as described by Complainant, has been limited by statute. "The board may grant the petition [for review of a final agency grievance decision] only when it appears that the decision of the appointing authority violates an employee's rights under the federal or state constitution, part 4 of article 34 of this title [the State Employee Protection Act], article 50.5 of this title [The Colorado Anti-Discrimination Act], or the grievance procedures adopted pursuant to subsection (1) of this section." C.R.S. § 24-50-123(3). The grievance procedures referenced in that last clause refers to the Board rules adopting "uniform procedures to be used by all principal departments and institutions of higher education in developing grievance processed for all grievances..." C.R.S. § 24-50-123(1).

As one of his grounds for appeal, Complainant alleges that the June 4, 2008 corrective action based upon his actions related to an evidence burn which occurred in

December of 2007 was the product of retaliation for his prior appeal to the Board which resulted in the reversal of his transfer.

In support of this allegation, Complainant alleges that his attorney for that prior appeal was told in August of 2007 by Respondent's counsel that, if Complainant did not agree to drop his appeal to the Board that "Major Butts would commence an investigation and conduct a meeting with Complainant ... regarding evidence practices in [Complainant's former command] Troop 2-D, a travel budget question, and the computer user accounts of Troopers in Troop 2-D."

Complainant also contends that the correction active imposed in this matter improperly assessed responsibility to him for the December 2007 evidence burn, when the regulations provide that the responsible party was the evidence custodian, Trooper Kennerson. Complainant also alleges that Trooper Kennerson received no corrective or disciplinary action for his role in the December 2007 evidence burning, and that troopers who were also not in compliance with the evidence collections policies had not been corrected or disciplined. Additionally, Complainant contends that his reports and statements concerning the evidence collection procedures, including his memo of April 14, 2008, do not provide a basis to find that he had made "inaccurate verbal and written statements" when describing his knowledge of evidence collection during the investigation into the December 2007 evidence burn.

Under the state constitution, Complainant had a right to appeal his prior disciplinary matter to the Board. See Colorado Const. Art. XII, Sec. 13(8)(describing the authority of appointing authorities to discipline certified employees, and stating that "any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, Complainant's prior appeal to the Board, therefore, was the exercise of Complainant's constitutional right and a protected activity under the state constitution. Any action taken by Respondent to retaliate against or punish Complainant for that exercise of his rights under the state constitution would also be "a violation of an employee's rights under the...state constitution" as described by C.R.S. § 24-50-123(1). Cf. Teigen v. Department of Corrections, State Personnel Board case number 2003B127, Initial Decision, January 31, 2005, at pp. 16-17 (discussing how a departmental policy which required employees to drop their Board appeals of a layoff prior to receiving a re-appointment or re-instatement constituted arbitrary and capricious agency retaliation against employees who have exercised appeal rights "that are the foundation of the personnel system").

Complainant's contention that the June 4, 2008 corrective action was issued in retaliation for his participation, and success, in a prior appeal to the Board, therefore, describes the type of appeal over which the Board has jurisdiction under C.R.S. § 24-50-123(1).¹ The next question, then, is whether Complainant has provided sufficient

Complainant argues in his Information Sheet that the retaliation he alleges is a violation of Board Rule 9-3 and 9-5. These rules, however, implement some of the provisions of the Colorado Anti-

support for his allegation of retaliation to warrant the grant of a hearing.

Complainant contends that he was told during the course of his prior appeal to the Board that he should drop that appeal or there would be an investigation in to evidence handling procedures by his troop, Troop 2-D. He did not drop the appeal and, in fact, prevailed at least in part in that appeal by October 2007. There was a subsequent investigation into the December 2007 evidence handling procedures by Troop 2-D, and Complainant was held to be responsible for errors in that procedure. Complainant provides specific reasons to doubt the department's conclusion that any defects in the handling of that evidence had been assessed as his responsibility because he played only a minor role in the process, while the individual who held the responsibility for the handling of the evidence, the evidence custodian, was not given a corrective or disciplinary action. Finally, Complainant provides sufficiently specific reasons to question the factual conclusion drawn by his command that he had been untruthful in the course of the investigation into the handling of the evidence.

Under such circumstances, Complainant has met his burden under Board Rule 8-50(G) to demonstrate "the existence of valid issues which merit a hearing by showing that there an evidentiary and legal basis that would support a finding that the action was arbitrary, capricious, or contrary to rule or law, and that the relief requested by complainant is within the Board's statutory authority."²

RECOMMENDATION

For the foregoing reasons, it is the preliminary recommendation of the undersigned administrative law judge that Complainant's petition for hearing be **granted.**

Discrimination Act ("CADA"). CADA addresses only discrimination on the basis of race, sex, age, religion and other similar characteristics as unlawful discrimination, and is not a statute which makes any and all types of discrimination and retaliation unlawful. See C.R.S. § 24-34-402(1)(a). Complainant does not allege that he was discriminated against on the basis of any of the characteristics protected by CADA or Board Rule 9-3. Complainant's reliance upon discrimination as a ground upon which the Board should assert jurisdiction, therefore, is misplaced.

² Complainant also checked the box on his appeal form that there has been a violation of grievance procedures in this matter. Complainant's Information Sheet, however, does not identify any violation in the manner in which Respondent handled his grievance other than to contest the outcome of the process as unfair, punitive, retaliatory, and not grounded in fact. Therefore, Complainant has not demonstrated that violation of the grievance process would be an independent grounds upon which the Board should grant a hearing.

Dated this 9th day of October, 2008, at Denver, Colorado.

Denise DeForest, Administrative Law Judge State Personnel Board 633 17th St., Suite 1320 Denver, Colorado 80202-3604 (303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the day of October, 2008, I placed true copies of the foregoing PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Timothy C. Nawrocki 1922 North Grand Avenue Pueblo, Colorado 81003

And in the inter-office mail for

Diane Marie Dash, Assistant Attorney General Public Safety Unit/Criminal Justice Section 1525 Sherman Street, 5th Floor

Denver, Colorado 80203

Andrea C. Woods