BEFORE THE STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2011G049

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

CASEY ATCHISON,

Complainant,

٧.

GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY.

Respondent.

Complainant petitions the State Personnel Board to grant a discretionary, evidentiary hearing to review a final grievance decision by Respondent in response to several grievances. It is the recommendation of the Administrative Law Judge that a hearing be **granted**.

SUMMARY

Complainant Casey Atchison (Complainant), a certified Information Technology (IT) Professional IV employed by Respondent, the Governor's Office of Information Technology (OIT), filed a request for Board review of Respondent's December 30, 2010 final grievance decision concerning several consolidated grievances. Complainant argues that the grievance decision fails to give complete relief; the decision retains references to the Colorado State Employee Assistance Program (CSEAP) and a workplace violence evaluation in Complainant's personnel file; and the decision maintains Complainant in a chain of command that is hostile.

Respondent OIT argues that Complainant's allegations do not state a basis for granting a discretionary hearing.

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. Complainant worked under the direct supervision of David Growley. In 2010, Complainant came to believe his wife had had an affair with Growley. Complainant asked his second level supervisor, Phil Green, to transfer him to another

group in light of the personal issue with Mr. Growley. Mr. Green refused to move him to another supervisor.

- 2. In the course of seeking counseling from a CSEAP counselor, Complainant made a statement about Growley. The counselor reported the statement to Respondent.
- 3. On September 23, 2010, Respondent placed Complainant on administrative leave. The letter states in part:

The purpose of this letter is to advise you that I am placing you on paid Administrative Leave effective immediately until further notice. Administrative Leave is being granted pending completion of an assessment regarding your fitness for duty. Placing you on Administrative Leave during this time is in the best interest of all involved and for your own well being. You will remain on paid leave until further notice.

OIT has a violence prevention policy which requires that in certain circumstances an employee be referred for a Psychological Fitness for Duty (PFFD) evaluation (at the State's expense; there will be no monetary cost to you). The Colorado State Employee Assistance Program (CSEAP) will coordinate the evaluation, although CSEAP will not be providing the evaluation itself. The evaluation will be provided by an independent expert of OIT's choosing.

Under State policy, failure to cooperate with this assessment process will be the basis for corrective or disciplinary action. After OIT has received the independent assessment report, we will review the findings and determine whether you are able to perform the functions of your job safely.

determine whether you are able to perform the functions of your job safely.4. The letter placing Complainant on administrative leave is in Complainant's

personnel file.

- 5. On September 23, 2010, Complainant filed a grievance requesting to be returned to full duty; an immediate transfer to a new supervisor; removal of references of being a danger or threat from his personnel records; and attorney fees and costs.
- 6. The Technical Guide for PFFD Referrals to CSEAP sets forth the procedures to be followed in making a referral for the evaluation, conducting the evaluation, and following up on the evaluation. There are three outcomes to an evaluation: Fit for Duty; Fit for Duty Provisional; and Not Fit for Duty.

- 7. If a PFFD evaluation results in a Fit for Duty Provisional determination, CSEAP is to monitor and support the employee as he or she complies with the identified provisions, such as additional therapy. Once the employee "has successfully fulfilled the recommendations for treatment," CSEAP notifies the appointing authority or designee. CSEAP then "closes the case when appropriate."
- 8. The Technical Guide for PFFD Referrals provides, "CSEAP shall also assume responsibility for maintaining and storing the medical records acquired through PFFD evaluations, in accordance with federal and state confidentiality laws. Medical records acquired through PFFD evaluations shall be filed separately from all other CSEAP client records."
- 9. The Technical Guide also states, "CSEAP provides the 'Evaluator's PFFD Executive Summary' to the AA [appointing authority]/designee and HR. This summary includes the PFFD determination and corresponding recommendations. The Department should regard this report as confidential and store it separately from the employee's personnel file with limited access."
- 10. Complainant agreed to participate in the PFFD evaluation, which occurred in October 2010.
- 11. The PFFD evaluation resulted in a determination that Complainant was "Fit for Duty Provisional" upon completing additional therapy. The entire evaluation was never provided to Respondent or to Complainant.
- 12. A one-page Executive Summary of the PFFD evaluation was provided to Respondent. It contains the employee name, job title, department, date of evaluation, and a section with several boxes, with the boxes, "Fit for Duty Provisional" and "Treatment" checked.
- 13. The Executive Summary has been removed from Complainant's official personnel file.
- 14. Respondent returned Complainant to full duty and transferred him to a different office at a different physical location, with a new direct supervisor. It also required that Complainant sign a Work Agreement, which contained two sections that were objectionable to Complainant: language requiring that Complainant read and sign for compliance with violence in the workplace policies (he had already done so); and reference to an incident on September 22, 2010 which implied he had engaged in wrongful conduct.
- 15. Complainant grieved the Work Agreement and filed two additional grievances in December 2010. The four pending grievances were consolidated. Together, the grievances request the following relief:

- Removal of the objectionable language in the Work Agreement;
- Removal of all references to Complainant being a danger or threat from his personnel file;
- All references to his placement on administrative leave be sealed and not part of his personnel file;
- Access to all reports and material given to the Department by CSEAP;
- A copy of the PFFD evaluation;
- Mr. Green be removed from his chain of command;
- An end to the reputational assault;
- Payment of attorney fees and costs;
- An end to the hostile work environment.
- 16. On December 17, 2010, the Chief Technical Officer in OIT, Kelley Eich, emailed Human Resources staffers regarding Complainant. The email discusses Complainant's grievances, her plan to communicate directly with Complainant and not his attorney, and her thoughts on his request to amend the Work Agreement. She states in part, "I refuse to back down on this case. We need a regroup to discuss the CSEAP PFFD. His return to work was Provisional, I am not inclined to remove any of this. There is NO detail in this document that would indicate any psychological issues, however he continues to bring them up."
- 17. The December 17, 2010 email from Ms. Eich to HR staff is in Complainant's personnel file.
- 18. On December 30, 2010, Respondent issued its final grievance response to the four pending grievances. Respondent made the following decisions:
 - Granted Complainant's request to remove objectionable language in the Work Agreement;
 - Granted Complainant's request to remove the Executive Summary of the PFFD evaluation from his personnel file; in fact, pursuant to policy, the document was treated as confidential information and kept separate from the official personnel file with limited access;
 - Denied Complainant's request to remove the administrative leave letter from his personnel file;
 - Denied Complainant's request to see all reports and material given to Respondent by CSEAP, because he had been provided all such reports and material;
 - Denied Complainant's request to view the PFFD evaluation, because Respondent had never received a copy;
 - Denied his request that Mr. Green be removed as his second level supervisor, because Green is the Director for Network, Communications

and Agency Security Operations. So long as Complainant seeks to perform those functions for any of the Executive Branch agencies, he would need to remain in Green's chain of command.

- Denied his request for attorney fees and costs;
- The decision noted that Complainant's disability discrimination claim had been referred to the agency's Americans with Disabilities Act coordinator for action.
- 19. Complainant timely appealed the final grievance decision.
- 20. On January 3, 2011, Complainant signed the amended Work Agreement and checked the "Agree" box.
- 21. The documents remaining in Complainant's personnel file which are the subject of Complainant's grievances are:
 - the administrative leave letter;
 - the December 17, 2010 email discussing the Work Agreement and the Provisional nature of the Fit for Duty PFFD determination;
 - Complainant's grievances, with a December 16, 2010 email from Ms. Eich to Complainant attached, which discusses the Restraining Order between Complainant and Mr. Growley, and Complainant's transfer to another office location;
 - A January 3, 2011 email from Complainant to the OIT HR Director, discussing contents of the Work Agreement which had been removed, and the Executive Summary, which had been removed from his personnel file.
 - 22. Both parties timely filed information sheets; Complainant filed a Reply.

COMPLAINANT'S CONTENTIONS

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

- 1. Complainant is a member of the Colorado classified personnel system and has full rights and protections under the system, Colorado statute and the Colorado Constitution.
- 2. Complainant began employment with the Department of Labor & Employment (DLE) on July 22, 2002. Complainant currently holds the position of IT Professional IV, in the Network Services Group at the Department of Revenue (DOR), which comes under the umbrella of OIT. Complainant is a certified employee.

- 3. On September 23, 2010, Complainant was placed on paid administrative leave effective immediately for alleged violation of the workplace violence policy. The letter placing him on administrative leave indicated that his psychological fitness was being questioned and he was being required to undergo a psychological evaluation regarding his fitness for duty. Complainant was required to attend a pre-evaluation appointment with C-SEAP prior to his being returned to work. The letter placing him on administrative leave appears to have labeled Complainant as a person with a perceived disability.
- 4. Prior to September 23, 2010, Complainant believed and suspected that his direct supervisor, David Growley, had a relationship with his wife, either sexual or romantic.
- 5. Complainant's belief occurred because he learned that approximately six months earlier when his wife left him, she was with Mr. Growley.
- 6. Mr. Growley and Complainant had been close personal friends. However, Mr. Growley never mentioned to Complainant that his wife had spent time with him when she left Complainant for a period of time.
- 7. It was over six months later that Complainant's wife told him that she spent time with Mr. Growley when she left Complainant. Mr. Growley's wife was out of town during that time.
- 8. Upon review of telephone records of his wife's cell phone, Complainant learned that Mr. Growley and his wife had numerous telephone conversations prior to and after the time his wife left Complainant.
- 9. Complainant became very stressed and upset after learning about his wife and Mr. Growley's relationship. This stress was increased because Complainant worked under Mr. Growley, who was his direct supervisor.
- 10. Complainant immediately requested to be moved to another group in light of the personal issue with his supervisor, Mr. Growley. Complainant discussed this request with Phil Green, the supervisor above Mr. Growley. Mr. Green and OIT refused to move Complainant.
 - 11. Mr. Green and OIT referred Complainant to CSEAP.
- 12. Complainant began seeing a therapist at CSEAP relating to the stress of working under someone who he believed to have had relations with his wife and the hostile and negative work environment he was experiencing.

- 13. Complainant continued working in this hostile, negative, and stressful environment, but continued to seek to be moved outside of Mr. Growley's chain of command.
- 14. At no time did Complainant take action to harm anyone or threaten anyone directly while he was in this stressful, hostile, and negative work environment. Complainant exhibited no violent behavior in his actions towards Mr. Growley or anyone else in OIT.
- 15. However, on September 23, 2010, he was placed on administrative leave for allegations of being violent and psychologically unfit for duty. The letter placing Complainant on administrative leave required him to undergo a psychological assessment prior to being allowed to return to work or being allowed back on state premises. This letter sets forth that OIT perceived Complainant to be a person with a disability who should not be allowed at work as a result of this perceived disability. This labeling is discriminatory and illegal.
- 16. On September 23, 2010, Dara Hessee e-mailed staff that Complainant was out of the office on administrative leave and was not to be on state premises or to contact state employees in any manner until further notice. Although Marie Langhorn sent a responsive e-mail on January 3, 2011, and asked Ms. Hessee to retract the email, the labeling of Complainant had already caused damage to his reputation.
- 17. It appears that the reasoning for labeling Complainant as a violent and dangerous person was a result of a breach of the psychologist/therapist patient privilege of one of Complainant's CSEAP therapists. This breach of confidentiality has caused Complainant to no longer have trust in CSEAP and its providers.
- 18. On September 23, 2010, Complainant filed an internal grievance, claiming he was being forced to work in a hostile and improper work environment, and was being improperly stigmatized by being placed on administrative leave and being ordered to be evaluated by C-SEAP. The hostile and improper work environment resulted from being supervised by Mr. Growley, who Complainant believed had some sort of relationship with his wife, causing Complainant and his wife to attend marital counseling. For relief, Complainant asked that he be returned to full duty; that he be transferred to a new supervisor or some other accommodation that would result in his not being with Mr. Growley; that the requirement for C-SEAP assessment be rescinded; that any references of being a danger or threat be removed from his personnel records; and that his attorney fees and costs be paid.
- 19. Complainant underwent the ordered psychological assessment. He was found not to be violent, a danger, or a threat. The recommendation was to return Complainant to work.

- 20. On December 1, 2010, Complainant was allowed to return to work to a new location, DOR in Lakewood, and was given a new Position Description Questionnaire (PDQ), Performance Plan and a Work Assignment document concerning the conditions for his return to employment. Complainant was transferred to a different supervisor, Patti Duncan. Mr. Green is still in his chain of command.
- 21. While OIT's returning Complainant to full duty and transferring him to a different supervisor granted part of Complainant's requested relief, the remaining requested relief removal of all references to being a danger or threat in his personnel files or records and of payment of attorney fees and costs was not granted.
- 22. By refusing to remove all references to Complainant's being a danger or threat, OIT improperly labels Complainant as a violent and dangerous person, which is untrue. A psychological treatment provider has made the determination that Complainant is not violent or dangerous; yet OIT refuses to remove this incorrect information from his personnel file.
- 23. Complainant's grievances were consolidated at Step II with Marie Langhorn. Ms. Langhorn issued her Step II Decision on December 30, 2010, without any meeting or verbal communications regarding the grievances.
- 24. The response by Ms. Langhorn fails to provide the specific relief of separating the medical/psychological information from Complainant's personnel file, taking out all the information wrongfully labeling him as a violent and dangerous person with a disability, transferring Complainant to another 2nd level supervisory individual, and paying his attorney fees and costs.

LEGAL ARGUMENT

- 25. Colo. Const. Article XII, Section 14(1) creates the State Personnel Board and enumerates the powers of that Board and right to adopt rules and governance of the state personnel system. Article XII, Section 14(4) creates the Department of Personnel as a principal department of state government with the head of that department being the Personnel Director with responsibility for administration of the personnel system under the state constitution's laws enacted pursuant to the powers of the legislature and also pursuant to rules adopted by the Board. Article XII, Section 13 creates the state personnel system.
- 26. The Board may grant a hearing in matters that include a violation of federal or state constitutional rights and an adverse written decision from the highest level of a department's grievance process. Board Rule 8-46. What is present here is a violation of Complainant's federal and state rights relating to his being labeled as a person with a mental illness and his rights relating to privacy of protected medical/psychological information. An adverse written decision from Marie Langhorn

exists with respect to the issues relating to Complainant's being perceived as a person who is dangerous, violent, and mentally ill and the resulting documentation that is being kept in his personnel file regarding such. Additionally, Complainant is seeking to be moved outside the chain of command of one of the supervisors that has been involved with this discriminatory and improper conduct. Ms. Langhorn's denial of Complainant's requested relief was contrary to rule and law, and the relief requested by Complainant is within the Board's statutory authority set forth at C.R.S. §§ 24-50-123 & 24-50-125.5.

- 27. Under the Americans with Disabilities Act (ADA), an individual who is regarded by the employer as having a mental impairment that substantially limits his major life activities is considered a person with a disability, even if that person does not have such impairment. See 42 USC § 12102(1)&(3). OIT clearly has perceived Complainant as a person having a mental impairment, being dangerous, violent, and psychologically unstable, although untrue. OIT has required Complainant to undergo psychological evaluations and treatment based on this perceived disability and labeling of Complainant as a person with a mental illness.
- 28. As a person with a perceived disability under the ADA, Complainant is entitled to not be discriminated against for such perceived disability. See 42 USC § 12102 (3) & 42 USC § 12112(a). This discrimination includes classifying Complainant as a dangerous and violent person, which information is clearly present in Complainant's personnel file for any superiors, including his new supervisor Patti Duncan to see, and requiring him to undergo a psychological evaluation and sign a Work Assignment document that contained improper material relating to this perceived disability and treatment. See 42 USC § 12112(b). Complainant is being treated in a way that classifies him differently and uses different criteria and standards than persons who are not labeled as mentally unstable and perceived as disabled. Additionally, Complainant's second line supervisor, Phil Green, has shown bias to Complainant by refusing to remove information regarding Complainant being a danger or violent in Complainant's personnel file and by issuing a performance evaluation with Level I's relating to this perceived disability of Complainant being mentally unstable, a danger, and/or violent.
- 29. OIT's refusal to remove any and all information from his personnel file relating to Complainant's being violent and dangerous, along with the information relating in any way to his mental health treatment and information regarding such is improper. Under the ADA, information obtained regarding the medical condition or history of an employee must be maintained in a separate file and treated as a confidential medical record. See 42 USC §12112(d). That has not been done. The medical and psychological history of Complainant is in his personnel file and is not being treated as a confidential medical record. Rather, the administrative separation letter regarding his psychological fitness and evaluation and the Return to Work Assignment setting forth psychological issues and treatment are in his regular personnel file. Because his personnel file is not treated as a confidential medical record, like that

of a medical file, OIT is violating federal law by refusing to move any and all references to Complainant's being dangerous, violent, or psychologically unfit out of his personnel file and into his medical file only.

- 30. It is clear from state statutes that personnel files are not contemplated to house information like that Complainant sought to have removed in personnel files. The Colorado Revised Statutes (C.R.S.) defines a personnel file as follows: "Personnel files" means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship. *See* C.R.S. § 24-72-202(4.5). No reference is made to medical and/or psychological information, including treatment requirements, being included in personnel files because medical and psychological information should not be put in personnel files. Rather, such information relating to medical and psychological conditions, including perceived disabilities of being violent, dangerous, and psychologically unstable, and treatment requirements regarding such should be housed in its own separate file that is treated like a confidential medical record. OIT is failing to do such, and when requested to do so by Complainant in his grievances, it refused to do so.
- 31. Additionally, pursuant to Board Rule 1-24, any medical information on the employee shall be maintained in a separate, confidential medical file with limited access in accordance with law. A perceived disability and psychological treatment information qualify as medical information. As such, references to Complainant's being violent and dangerous, which is untrue, and references to psychological evaluations and treatment must be maintained in a separate, confidential medical file. OIT's refusal to do so clearly violates federal law, state law, and the Board rules. The Step II grievance decision is, therefore, contrary to rule and law.
 - 32. As witnesses, Complainant would call the following:
 - A. Casey Atchison will testify about learning that his supervisor and his wife had, or were having, a relationship; his counseling, both individual and marital; being placed on paid administrative leave; his interactions with OIT management relating to the Work Assignment document; his interactions with CSEAP; his interactions with Dave Growley; his interactions with Phil Green and OIT management; and other relevant matters.
 - B. Dave Growley, OIT, may testify about his interactions with Complainant and Complainant's wife; his supervision of Complainant; his interactions with OIT management relating to Complainant; and other relevant matters.
 - C. Phil Green, OIT, may testify as to his interactions with Complainant; his supervision of Complainant; his interactions with Dave Growley and OIT management; and other relevant matters.

- D. Kelley Eich, OIT, may testify relating to her interactions with Complainant; the preparation of the Work Assignment; her interactions with Heather Perdue, Director of Human Resources (HR), and OIT management; and other relevant matters.
- E. Heather Perdue, OIT, may testify relating to her interactions with Complainant and Phil Green; her knowledge of the situation between Complainant and Dave Growley; the Work Assignment prepared for Complainant's return to work; and other relevant matters.
- F. Marie Langhorn, OIT, may testify relating to her review of the internal grievances filed by Complainant; actions she took to investigate the events; Complainant's paid administrative leave; and other relevant matters.
- G. Jon Richard, Psy.D., Administrator, State Employee Mediation Program, will testify relating to his psychological fitness to return to work evaluation of Complainant; his recommendations for treatment; and other related matters.
- H. Patti Duncan, OIT, will testify to being Complainant's new supervisor and information she may have received regarding Complainant's being a danger, violent, or mentally unstable.

33. The following list of exhibits will support the allegations of fact:

No.	Date	Description	Bate Stamp No.
A	9-23-10	Letter from Marie Langhorn, placing Mr. Atchison on paid administrative leave	Atchison-00001
В	9-23-10	Step I Grievance by Mr. Atchison	Atchison-00002-03
С	9-24-10	Technical Guide for Psychological Fitness for Duty	Atchison-00004-017
D	9-29-10	Step II of 9-23-10 grievance to Marie Langhorn	Atchison-00018-019
E	9-30-10	Letter from Heather Perdue, HR Director	Atchison-00020-021
F	10-27-10	Executive Summary for Psychological Fitness for duty	Atchison-00022
G	11-16-10	E-mail chain between Casey Atchison and Dr. Jon Richard, re: request for copy of assessment evaluation	Atchison-00023- Atchison-00024
Н	11-16-10	Letter to H. Perdue from W. S. Finger, re: C. Atchison	Atchison-00025
1	11-22-10	E-mail from Marie Langhorn to Casey Atchison, subject: Fitness for duty assessment update	Atchison-00026
J	12-1-10	Step I Grievance by Casey Atchison	Atchison-00027-029

K	12-9-10	E-mail from Eich, subject C.Atchison Grievance - 12/01/20	Atchison-00030
L	12-10-10	E-mail chain between Kelley and Atchison, subject: Follow-up – C. Atchison Work Assignment - 12-01-2010	Atchison-00031- Atchison-00035
М	12-1-10	Original Work Assignment document	Atchison-00036-038
N	12-10-10	Revised Work Assignment signed by Heather Perdue and Marie Langhorn	Atchison-00039- Atchison-00041
0	12-14-10	Revised Work Assignment signed by Casey Atchison	Atchison-00042-043
Р	12-16-10	Step I grievance response by Phil Green, w/attachments	Atchison-00044-046
Q	12-16-10	E-mail, at 4:33 p.m. firm Kelley Eich to Casey Atchison, subject: Follow-up to 12-14-2010	Atchison-00047
R	12-16-10	E-mail, at 4:40 p.m., from Kelley Eich to Casey Atchison, subject: Fw:,	Atchison-00048- Atchison-00052
S	12-16-10	Work Assignment signed by Casey Atchison.	Atchison-00053-055
T	12-17-10	Letter to Langhorn re: Request for Review of Evaluation	Atchison-00056
U	12-17-10	Step I grievance to Marie Langhorn	Atchison-00057-060
٧	12-20-10	Letter from W.S. Finger to Eich, re: Casey Atchison	Atchison-00061-062
W	12-23-10	Letter to Marie Langhorn from William S. Finger, Re: Casey Atchison – Grievances	Atchison-00063- Atchison-00065
Х	12-30-10	Response from Langhorn to grievances #1, #2 & #3.	Atchison-00066-093
Υ	1-3-11	E-mail chain between Marie Langhorn and Dara Hessee, re: IMPORTANT Notice to Employees	Atchison-00094- Atchison-00095
Z	1-3-11	E-mail from Casey Atchison to Marie Langhorn, re: Response to Atchison grievances	Atchison-00096- Atchison-00100
AA	12-09-10	Performance Evaluation for period 4-01-010 to 3/31/11	Atchison-00101-122
ВВ	12-09-10	Performance Evaluation Narrative with associated Performance Improvement Plan for 4-1-10 to 11-30-10	Atchison-00123- Atchison-00127
CC	11-29-10	Performance Evaluation for period 12-01-10 to 3-31-11	Atchison-00128-0137
DD	1-12-10	Performance Evaluation for period 11/1/09-3/31/10	Atchison-00138-0151
EE	7-30-09	Performance Evaluation for period 7/01/09	Atchison-00152
FF	6-16-98	Performance Evaluation for period 10/01/08 to 3/31/09	Atchison-00153-0161
GG	11/3/08	Performance Review for period 4/01/08 to 10/31/08	Atchison-00162-0171
нн	5/06/08	Performance Review for period 4/01/07 to 3/31/08	Atchison-00172-0179
II	5-8-07	Performance Review for period 4/01/06 to 3/31/07	Atchison-00180-0189

JJ	4-26-06	Performance Review for period 4/1/05 to 3/31/06	Atchison-00190-0193
кк	4-28-05	Performance Review for period 4/1/04 to 3/31/05	Atchison-00194-0197
LL	3/31/04	Performance Review for period 4/1/03 to 3/31/04	Atchison-00198-0201
мм	5-22-03	Performance Review for period 4/1/03 to 3/31/04	Atchison-00202-0211
NN		PDQ for position# EGB 03949, IT Professional IV,	Atchison-00212-0223
00	10-7-09	Executive Order D 023 09	Atchison-00224-0227
PP	9-2009	Telephone bills for 720-334-5784	Atchison-00228-0237
QQ	10-2009	Telephone bills for 720-334-5784	Atchison-00238-0243
RR	11-2009	Telephone bills for 720-334-5784	Atchison-00244-0253
SS	4-2010	Telephone bills for 720-334-5784	Atchison-00254-0263
тт	5-2010	Telephone bills for 720-334-5784	Atchison-00264-0275
UU		Tape recording of December 14, 2010 Step I Grievance w/Phil Green	Atchison-00276

34. Complainant requests the following relief:

- (1) removal of all references that he is a dangerous and/or violent person, as this is untrue, including references to such in the 9-23-10 letter placing him on administrative leave for psychological instability and violence, from his personnel file;
- (2) removal of all references to his psychological treatment, condition, evaluations or mandates to seek psychological review, including any references to it, from his personnel file to a confidential medical file;
- (3) removal from the chain of command of Phil Green; and
- (4) other appropriate relief the Board deems proper and just.
- (5) Complainant also requests attorney fees and costs. Attorney fees and costs are warranted because OIT has engaged in wrongful actions of an intentional and malicious nature and it has engaged in other acts that would justify it under Board Rule 8-38.

RESPONDENT'S CONTENTIONS

As relief, Respondent requests that Complainant's petition for hearing be denied as Complainant has failed to establish grounds that merit a full hearing. Respondent offers to prove the following allegations at hearing:

1. Complainant, during a counseling session, made a statement that prompted a CSEAP counselor, Jon Richard, to follow his statutory duty to warn Complainant's supervisor, Dave Growley, that Complainant had made a threat to kill Mr. Growley with his fist because Complainant believed his wife had an affair with Mr.

Growley. This threat was conveyed to Heather Perdue, HR Director, on September 22, 2010. (Note: Dr. Richard is not an OIT employee). On September 23, 2010, Complainant was placed on paid administrative leave. He was required to attend a psychological evaluation for the purpose of obtaining a PFFD evaluation due to the threat that was reported. This threat seemed plausible as Complainant had expressed suspicion that his wife had in the past been interested in Mr. Growley.

- 2. Ultimately, Mr. Growley obtained a restraining order against Complainant in Arapahoe County Court case number CO 712010C 100845.
- 3. OIT was never provided the full PFFD evaluation. It was only provided an executive summary for PFFD by the Evaluator, which pronounced him provisionally Fit for Duty, provided he attend treatment. ¹
- 4. Because of the possible danger of Complainant's working with Mr. Growley, Complainant's request for a transfer, and the executive summary containing Complainant's counselor's recommendation, upon return from administrative leave, Complainant was transferred and removed from Mr. Growley's supervision. This transfer required a new Work Assignment. The original Work Assignment presented to Complainant, dated December 1, 2010, contained his primary duties, the specific objectives of the job and the requirements of the position. It referred to the reported threat of September 22 and his counselor's PFFD evaluation, and required Complainant to read and commit to Executive Order D 023 09 regarding workplace violence, agree to treatment as provided for in the evaluation, and allow communication between C-SEAP and OIT regarding his treatment. Complainant provided a counter proposal.
- 5. Ultimately, as a result of the grievance process, all language pertaining to the executive summary requirement to attend treatment was removed from the Work Assignment and Complainant signed it as being in full agreement with its language and terms.
- 6. In all, Complainant filed four grievances. They will be referred to as Grievance 1, Grievance 2, Grievance 3 and Grievance 4. Upon Complainant's request, all grievances were consolidated. A final agency decision on all pending matters was issued on December 30, 2010.

LEGAL ARGUMENT

COMPLAINANT'S ALLEGATIONS DO NOT STATE A BASIS FOR GRANTING OF A DISCRETIONARY HEARING.

7. It is within the Board's discretion to either grant or deny a hearing. The standard is whether there appears to have been a violation of the employee's rights under the federal or state Constitution, a violation of civil rights as set forth in Part 4 of Article 34 of the Colorado Revised Statutes (the Colorado Civil Rights Act), a violation of

The executive summary is not in Complainant's personnel file, and is not a subject of this dispute.

the Whistleblower Statute or violation of grievance procedures. (See 24-50-123(3), C.R.S.)

- 8. The only applicable allegation Complainant has made in his petition for hearing is that documents have been placed in his file and he has been subjected to unidentified threats based on a disability or perception that he is disabled.
- 9. To establish a *prima facie* case of discrimination under the ADA, he must first establish that [he] is 'disabled' within the meaning of the statute." *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1239 (10th Cir.2001). "Disability" is statutorily defined or established by showing: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* (relying on 42 U.S.C. § 12102(2)) (alteration in original). A "major life activity" is a "basic activity that the average person in the general population can perform with little or no difficulty," and includes walking, standing, sitting, lifting and working. *Doyal*, 213 F.3d at 495-96 (quotation marks and citation omitted). In order for the impairment to be substantially limiting, the individual must be:
 - (1) [u]nable to perform a major life activity that the average person in the general population can perform; or (2) [is] significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. at 496 (quoting 29 C.F.R. § 1630.2(j)(1)). Burns v. Snow, 2005 WL 1140742 (10th Cir. 2005)

- 10. Complainant was not discriminated against due to a perceived disability.
- Complainant's Information Sheet attempts to minimize matters because he didn't threaten anyone "directly." Even if OIT did perceive Complainant as having a disability, it is not a reasonable accommodation to ask OIT to cleanse documentation of his admitted indirect threat. Anthony v. City of Clinton, 185 F.3d 873 (10th Cir. 1999) holds that, in order to prove harassment based on a perceived disability, the Plaintiff must prove that the conduct was both subjectively and objectively abusive. Factors to be considered include whether it is severe, physically threatening or humiliating or unreasonably interferes with the employee's work performance. Maintenance of Complainant's grievance documents in his file comes nowhere near failing these tests. In Fenton v. Pritchard Corp., 926 F. Supp. 1437 (D. Kan. 1996), the Plaintiff alleged a perceived disability because the employer acted on reported threats. explained that persons who are perceived to have common personality traits such as a quick temper are not thereby entitled to protection under the ADA. Additionally, OIT returned Complainant to work, in a Work Assignment OIT and Complainant agree upon. All OIT responses have been triggered by Complainant's admitted indirect threat, and

consequent requirements of the executive order, the universal policy, the technical guide and Board Rule 1-23.

- 12. Section 13-21-117, C.R.S. holds a mental health professional, such as Dr. Richard, liable if a patient makes a serious threat of imminent physical harm to another person and the mental health professional fails to make timely and reasonable effort to warn such potential victim. Based on information from Dr. Richard about Complainant's indirect threat, OIT warned Mr. Growley. It is unfortunate if Complainant's wife had an affair with Mr. Growley, or that Complainant suspects her, whichever is the case. It is unfortunate that Complainant said something that prompted CSEAP to feel legally bound to warn Mr. Growley of imminent harm.
- 13. It is not unfortunate that OIT has decided to monitor this extremely volatile situation involving two of its employees. Nor is it discriminatory.
- 14. Board Rule 1-23 requires certain documents to be retained in an employee's personnel file until 10 years after separation from employment.² These include "grievance and other dispute information." All disputed documents in Complainant's personnel file fall within this category. The grievances themselves, the correspondence from Complainant's counsel and the email from Complainant were indisputably submitted by Complainant as "grievance[s] and other dispute information." The December 17 email from Ms. Eich is information regarding the subject of dispute. It is not discriminatory to maintain documents in a personnel file as required by rule.
- 15. The executive order, section I., requires state employers to take necessary steps to provide a violence-free workplace and to address issues concerning violence in the workplace. Section II., A. includes within the definition of violent behavior any threat of physical aggression. The executive order, at section III., B., requires all threats from any source to be taken seriously and addressed appropriately. The universal policy reaffirms the definitions and principles in the executive order. Paragraph 12., under Duties and Responsibilities, requires each department's HR unit to "maintain documentation of all reports of workplace violence."
- 16. The technical guide establishes a mechanism for evaluating situations where "an employee <u>may</u> pose a direct threat..." (emphasis added) and to determine an employee's fitness to perform his essential job functions. The technical guide's flow

There are a small number of documents in Complainant's personnel file that reference C-SEAP or the workplace evaluation. With the exception of the December 17 email from Eich to Perdue and Langhorn, all other documents are in the file because they were submitted by Complainant either as grievances or in relation to his grievances. These documents are: Grievance 2; email, dated December 17, 2010, from Eich to Perdue and Langhorn, requesting a discussion regarding the provisional nature of the executive summary; December 23, 2010 letter from Frank & Finger, P.C. to Langhorn; Grievance 3, with the December 16, 2010 email from Eich to Atchison that Atchison attached to his grievance; Grievance 4, with the December 16, 2010 email from Eich to Atchison that Atchison attached to his grievance; and email, dated January 3, 2011, from Atchison to Perdue, in which Complainant discusses both the contents of prior Work Assignments that held information to which he objected and the executive summary, both which had already been removed from his personnel file.

chart was systematically followed. There is a reasonable belief, based on Complainant's circumstances, that his continued service may be a direct threat to the safety of another employee. The circumstances run deeper than just Dr. Richard's report of a threat. Complainant's anger spills out in every direction. He is still angry at Mr. Growley. He is angry at Dr. Richard for reporting his anger at Mr. Growley. This situation requires monitoring.

- 17. He was removed from the job pending a PFFD evaluation. A formal referral was made to C-SEAP, and C-SEAP coordinated the referral to an evaluator to determine psychological fitness to return. C-SEAP provided OIT the evaluator's executive summary, containing the recommendation that Complainant be allowed to return to work, provisional on continued treatment. OIT has agreed to maintain the executive summary separate from Complainant's personnel file. OIT prepared an RTW plan. It included the transfer to the Lakewood office and a description of the corresponding job duties, his schedule, and his job assignment and performance expectations. While there were initially some disagreements as to certain details, the grievance process worked and the parties ultimately agreed on the Work Assignment contents.
- 18. The technical guide allows Complainant's fitness for duty to be contingent on the provisional recommendation that Complainant continue treatment.
- 19. There is nothing in the executive order, the universal policy or the technical guide that requires documentation of this continuing process to be hidden in a cave, or for OIT HR to cover their eyes to the provisional nature of his fitness to return, or the circumstances which show that Complainant "may" pose a threat.
- 20. As to Complainant's vague allegations that Mr. Green should not have supervisory authority over him, he provided no instances of behavior or conduct during the grievance process to support his claim that Mr. Green has discriminated against him. Board Rule 8-8, A., 4. is clear that "Only the issues set forth in the written grievance shall be considered thereafter." His only concrete allegation was that Mr. Green did not transfer him from Mr. Growley's supervision prior to his placement on administrative leave due to the reported threat against Mr. Growley. Therefore, the denial of transfer occurred before Mr. Green would have had any basis to perceive Complainant as psychologically disabled. When he returned from administrative leave he was transferred out of Mr. Growley's supervision.
- 21. A federal agency's termination of an employee did not violate Title VII, despite the employee's speculation as to reasons her co-workers did not want to work with her, absent evidence that the agency's actions were motivated by discriminatory animus. Brazil v. Department of Veteran Affairs, 2003 WL 713310 (10th Cir. 2003). Civil rights claims cannot be based on mere speculation and conjecture. Twilley v. Integris Baptist Medical Center, Inc., 2001 WL 901102 (10th Cir. 2001). Mere suspicion is insufficient to state a claim for relief. Durre v. Dempsey, 869 F.2d 543 (10th Cir.)

22. As witnesses, OIT would call the following:

- A. Heather Perdue would testify as to the phone call from Dr. Richard and the discussions and negotiations concerning the contents of the Work Assignment;
- B. Marie Langhorn would testify about the decision to place Complainant on paid administrative leave, her investigation and response to Grievances 1, 2, 3 and 4 and Complainant's request that they be consolidated;
- C. Phil Green would testify about his investigation and response to the Grievance 1 Step I Grievance;
- Kelley Eich would testify about the discussions and negotiations concerning the contents of the Work Assignment and the response to the Grievance 1 Step I Grievance;
- E. Dave Growley would testify about his obtainment of a restraining order against Complainant.

23. The following are exhibits which OIT would proffer at hearing:

- 1. Letter from State of Colorado OIT to Atchison, dated December 30, 2010 (consolidated grievances response);
- 2. Email, dated September 22, 2010;
- 3. Letter from State of Colorado OIT to Atchison, dated September 23, 2010:
- 4. Grievance 1;
- 5. Grievance 1 response;
- 6. Executive Summary for PFFD, dated October 27, 2010;
- 7. Original Work Assignment, dated December 1, 2010;
- 8. FAX cover with attached Work Assignment with Complainant's requested changes;
- 9. Grievance 2:
- 10. Emails, dated December 9 and 10, 2010;
- 11. Work Assignment signed by Ms. Perdue and Ms. Langhorn on December 10, 2010;
- 12. Work Assignment with Complainant's December 14, 2010 alterations and signature;
- 13. Email, dated December 16, 2010;
- 14. Memorandum, dated December 16, 2010;
- 15. Work Assignment with Complainant's December 16, 2010 alterations and signature;
- 16. Grievance 3, with Complainant's attachments;
- 17. Grievance 4, with Complainant's attachments;

- 18. Letter from Frank & Finger, P.C. to Ms. Langhorn, Deputy Chief Technical Officer, OIT, dated December 23, 2010;
- 19. Work Assignment signed by Complainant on January 3, 2010;
- 20. Executive Order D 023 09:
- 21. Universal policy;
- 22. Technical guide;
- 23. Email, dated December 17, 2010.
- 24. As relief, OIT requests that Complainant's petition for hearing and motion for attorney fees be denied and dismissed.

DISCUSSION

The State Personnel Board may use its discretion to grant a hearing for actions that do not adversely affect a certified employee's current base pay, status, or tenure, and where the employee does not have a right to a hearing, appeal, or review by law or rule. State Personnel Rule 8-46, 4 CCR 801.

Under Board Rule 8-50(G), 4 CCR 801, Complainant has "the burden of demonstrating whether valid issues exist which merit a hearing by showing that there is 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."

A. Right to Privacy

Complainant asserts that Respondent has violated his right to privacy. He argues that he has a right to have medical and psychological information remain private, and that placing any information regarding the psychological fitness for duty evaluation in his personnel file is a violation of his privacy right. Complainant cites no constitutional law governing the right to privacy in his information sheet.

Instead, Complainant relies chiefly on three sources. First, he notes that the Open Records Act defines personnel files narrowly, to include "home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship. . . " § 24-72-202(4.5), C.R.S. However, the Open Records Act does not bind agencies on the contents of employee personnel files; it defines public access to government documents.

In addition, Complainant cites Board Rule 1-24, which requires, "Any medical information on the employee or a family member shall be maintained in a separate, confidential medical file with limited access in accordance with law." This Rule is a clear expression of the Board's policy of requiring that state agencies retain employees' private medical information, including mental health information, in a separate medical file, not the personnel file.

Lastly, Complainant points out that the Technical Guide for PFFD Referrals requires that all information gathered in the evaluation process be treated as confidential and kept separately from employee personnel files. The Guide provides, "CSEAP shall also assume responsibility for maintaining and storing the medical records acquired through PFFD evaluations, in accordance with federal and state confidentiality laws. Medical records acquired through PFFD evaluations shall be filed separately from all other CSEAP client records." The Technical Guide also requires that state agencies regard the PFFD Executive Summary containing "the PFFD determination and corresponding recommendations" "as confidential and store it separately from the employee's personnel file with limited access."

The right to privacy is guaranteed by the due process clause of the Fourteenth Amendment and other provisions of the U.S. Constitution. *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980). This right to privacy protects "the individual interest in avoiding disclosure of personal matters." *Id.* (citations omitted). Medical information, including mental health information, is subject to the right to privacy. Board Rule 1-24 recognizes this right to privacy by requiring that medical information not be maintained in employee personnel files where state managers and potential future employers would have easy access to such information. Similarly, the Technical Guide governing the PFFD evaluation process requires that all information pertaining to the psychological evaluation be treated as "confidential" personal information, to be stored "separately from the employee's personnel file.

This case raises the issue of how to treat non-medical records that contain overt references to private medical information. The December 17, 2010 email from Ms. Eich states that Complainant received a Fit for Duty - Provisional PFFD evaluation determination. This is the same information contained in the Executive Summary, which the Technical Guide requires to be treated "as confidential" and to be stored "separately from the employee's personnel file with limited access." The issue therefore arises as to whether the December 17, 2010 email should be treated in the same confidential manner as the Executive Summary. The same reasoning might apply to the September 2010 letter placing Complainant on administrative leave because he is being referred for the PFFD evaluation. At issue is whether the constitutional right to privacy requires that all documents referring to the PFFD evaluation, including all of the ensuing documents executing its outcome, be treated as confidential personal medical information.

From the agency's perspective, it is critical that a process be in place whereby state managers and Human Resources professionals will be fully empowered to monitor and track the progress of all employees referred for PFFD evaluation. One question is whether a medical file, separate from the personnel file, can serve that purpose. If a PFFD case is closed and there is no issue requiring corrective or disciplinary action resulting from the PFFD process, the file could remain in place permanently, but separate from the personnel file, while serving the needs of the agency.

Ultimately, there must be a balancing of the privacy interest of the employee with the employer's critically important duty to maintain a safe workplace. Neither the Board Rules nor the Technical Guide provide guidance on how to handle the documents associated with the PFFD evaluation process. Clarity and consistency in the treatment of these documents is important to all parties involved. Therefore, Complainant is entitled to a Board hearing to resolve the question of how non-medical records containing private medical information and references to the PFFD evaluation process should be handled.

B. <u>Disability Discrimination – Hostile Work Environment</u>

Complainant also asserts that Respondent has discriminated against him in violation of the Colorado Anti-Discrimination Act (CADA), § 24-34-402(1)(a), C.R.S., et seq, and the Americans with Disabilities Act (ADA) by treating him as though he has a disability. Under these laws, it is a discriminatory or unfair employment practice to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability. § 24-34-402(1)(a), C.R.S. Because the state and federal anti-discrimination acts share similar language, federal case law will be referenced in determining if discrimination has occurred. State Personnel Board Rule 9-4, 4 CCR 801.

The Tenth Circuit has recently held that a hostile work environment claim is actionable under the ADA. *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1156 (10th Cir. 2004). To state a claim of disability discrimination, one must establish: (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, that is, able to perform the essential functions of the job with or without reasonable accommodation; and (3) his employer discriminated against him in its employment decision because of his alleged disability. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1304 (10th Cir. 1999).

Complainant must first establish that he is a disabled person within the meaning of the ADA. The Act defines disability as, "a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." §§ 24-34-301(2.5)(a) and (b), C.R.S. See also 42 U.S.C. § 12102(2).

Complainant asserts that he is disabled because Respondent "regards" him as having a mental disability. A person is regarded as disabled when (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *Lanman*, 166 F.3d at 1156. "In creating this category of disability, Congress recognized that 'society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.*

As in *Lanman*, Complainant herein asserts that he does not have any actual impairment. Therefore, he must establish that Respondent mistakenly perceived him as

being impaired, and mistakenly believed the perceived impairment substantially limited at least one major life activity. *Lanman*, 166 F.3d at 1156-67.

Complainant asserts that Respondent's order to take a fitness for duty exam shows that he was perceived as mentally impaired. However, *Lanman* finds that this is not the case, citing a specific provision of the ADA, 42 U.S.C. § 12112(d)(4)(A)(employer may order a medical exam when it is "shown to be jobrelated and consistent with business necessity"). The Tenth Circuit noted that employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims. *Id.* at 1157.

Lanman was ultimately determined on the Court's conclusion that the plaintiff failed to demonstrate that her employer believed the perceived mental impairment substantially limited her in at least one major life activity. Complainant herein has failed to even allege what major life activity Respondent believes is substantially limited by his mental impairment. Although Respondent removed Complainant from the workplace on a temporary basis in order to conduct the fitness for duty exam, it returned him to work upon completion of the evaluation. Therefore, the record does not support a claim that Respondent considered him to be impaired in the major life activity of working. He has therefore failed to meet his burden of showing that Respondent regards him as being mentally impaired.

Complainant is not entitled to a hearing on his disability discrimination claim based on hostile work environment because he has failed to show he is disabled as defined by law. It is noted that this claim is the only basis upon which the Board could base an order of relief removing his second level supervisor, Mr. Green, from his chain of command. That claim of relief is therefore not available to him.

C. <u>Disability Discrimination - Failure to Treat Records as Confidential</u>

Complainant asserts that Respondent has committed a facial violation of the ADA's requirement that information obtained regarding the medical condition or history of an employee must be maintained in a separate file and treated as a confidential medical record. He cites 42 U.S.C. § 12112(d). However, this provision applies only to "employment entrance examinations" required "after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant." *Id.* Therefore, this provision is not applicable herein.

RECOMMENDATION

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

Dated this day of 2011, at Denver, Colorado.

Mary S. McClatchey, Administrative Law Judge State Personnel Board

State Personnel Board 633 17th St., Suite 1320

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CERTIFICATE OF MAILING

This is to certify that on the day of April, 2011, I electronically served true copies of the foregoing PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE, addressed as follows:

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