**STATE PERSONNEL BOARD, STATE OF COLORADO**
Case No. **2006B053**

## INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**RUDOLPH SALAZAR,**

Complainant,

vs.

**COLORADO STATE UNIVERSITY AT PUEBLO,**

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on September 12, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Complainant appeared through counsel, James R. Koncilja, of Koncilja & Koncilja, P.C. Assistant Attorney General Vincent Morscher represented Respondent.

## MATTER APPEALED

Complainant, Rudolph Salazar ("Complainant" or "Salazar") appeals his administrative termination by Respondent, Colorado State University at Pueblo ("CSU" or "Respondent"). Complainant asserts that Respondent discriminated against him on the basis of disability, age, race, and national origin. Complainant seeks reinstatement. Respondent seeks affirmance of Complainant's termination.

For the reasons set forth below, Respondent's action is **rescinded**.

## ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether Respondent discriminated against Complainant on the basis of age, disability, race or national origin.

## FINDINGS OF FACT

1. Respondent hired Complainant as a Custodian I on June 1, 1993 at the CSU Pueblo campus.

2. Complainant was born on June 30, 1946 and is currently 60 years of age. (Stipulated Fact.)

3. Complainant is Hispanic.

4. The Custodian I position is rated as a "Heavy" job in terms of its physical demands on the Position Description Questionnaire. "Heavy" jobs require the exertion of up to 100 pounds of force occasionally, and/or up to 50 lbs of force frequently, and/or up to 20 lbs of force constantly to move objects.

**Employment History; Previous Health Issues**

5. In the year 2001, Complainant suffered from a slipped disk, and recovered. In the year 2003, Complainant developed a brain tumor; it was successfully removed through surgery.

**April 2005 Injury and Modified Duty**

6. On April 27, 2005, Complainant suffered a work related injury to his back. He filed a workers compensation claim and was seen by the physician for State of Colorado insurer, Pinnacol Assurance.

7. On April 28, 2005, the Pinnacol physician, Dr. Olson, gave Complainant a diagnosis of "Lumbar Strain with history of chronic back pain," and established temporary work restrictions of 10 pounds for lifting, pushing, pulling, and carrying, through May 9, 2005.

8. On May 2, 2005, Ken Nufer, CSU Pueblo Director of Human Resources, issued a memo to Complainant setting forth his Modified Work Duties. The memo contained an attached list of specific duties he would be required to perform while on modified duty, which met the work restrictions.

9. Mr. Nufer copied Complainant's direct supervisor, Al Deherrera, Custodian III, and Complainant's work leader, on the Modified Work Duties memo.

10. On May 18, 2005, the Pinnacol physician, Dr. Olson, placed Complainant on temporary work restrictions of 60 pounds for lifting, pushing, and pulling, and to avoid prolonged bending at the waist, through June 15, 2005.

11. Mr. Nufer then issued a memo to Complainant indicating, "These restrictions do not limit your regular work duties. As such, you are authorized to return to a normal work schedule and duties." The memo directed him not to lift over 60 pounds and to "seek assistance if there is a need to do so."

12. On June 15, 2005, Dr. Olson issued a report placing Complainant on Maximum Medical Improvement. He checked the box, "Injured Worker has reached MMI." He checked the box, "No permanent impairment." He nonetheless listed work restrictions of 60 pounds on lifting, pushing, and pulling.

13. Complainant was able to perform his Custodian I duties without assistance while under the 60-pound restriction.

**October 18, 2005 Injury**

14. On October 18, 2005, Complainant bent over to pick up some dirt while on duty and injured his lower back. In his injury report, he noted that in his opinion, "A long handle dust pan will prevent me from getting injured" in the future.

15. Mr. Nufer was concerned about the fact that Complainant injured his back while performing a light duty.

16. Complainant's appointment with Dr. Olson on October 19, 2005, lasted an hour and ten minutes. On that date, Dr. Olson placed him on work restrictions of 35 pounds lifting and 40 pounds pushing and pulling, through October 26, 2005. The October 19, 2006 report listed his injury as, "low back strain."

17. On October 20, 2005, Mr. Nufer sent a memo to Complainant outlining his Modified Work Duties from October 20 through 26, 2005. The memo stated, "These restrictions [do] not appear to impact your ability to do your job but do require that you use proper equipment and body mechanics. Attached is a specific list of duties you will be required to perform during this transitional period."

18. The attached list stated, "You will be able to perform the full range of Custodian I duties to include the following Specific Duties . . ." The list set forth all job duties for Complainant. Those duties he could perform without modification included cleaning and sanitizing of bathrooms; using a brush extender to avoid stooping; refilling soap and paper towel dispensers; sweeping up dust and dirt, utilizing the long handled dust pan; cleaning chalkboards, whiteboards, glass on entry doors, drinking fountains and windows; wet mopping floors utilizing a micro-mop bucket combo set; replacing lights; vacuuming with a household vacuum cleaner instead of an industrial vacuum cleaner; cleaning entry ways and ash trays outside assigned buildings.

19. Complainant could not perform carpet extraction under his work restrictions. The record does not reveal how often carpet extraction was performed, other than on an as-needed, discretionary basis.

20. Complainant was able to perform floor buffing because a buffer that was smaller than the industrial sized one was available for Complainant's use, within his restrictions.

21. If trash bins contained more than 35 pounds, Complainant would not have been able to empty them, under his restrictions. The record does not reveal how often this was the case.

22. Complainant was unable to move most furniture alone. The Custodial staff moved most furniture on a team basis; most of the furniture movement was performed during the summer months.

**Functional Capacity Evaluations (FCE's)**

23. An FCE is an objective assessment of an injured employee's physical ability to perform the essential functions of his or her job, at the point where he or she has reached Maximum Medical Improvement (MMI).

24. The FCE is a 90–120 minute series of tests of an individual's ability to perform specific physical tasks. It utilizes protocols designed to accurately measure the maximum amount of weight an individual can safely lift, push, and pull, within a range.

25. Pinnacol Assurance, the State of Colorado insurance provider for Workers Compensation injuries, will, at the request of a state agency employer, or at its own discretion, refer patients for an FCE, prior to issuing a finding of MMI. When a state agency or Pinnacol requests the FCE, Pinnacol covers the cost.

**December 6, 2005 Physical Exam and Closing Report**

26. On December 6, 2005, Complainant attended an appointment with Dr. Olson. The appointment lasted sixteen minutes. During the appointment, Dr. Olson performed some perfunctory tests on Complainant's ability to perform a few physical tasks.

27. Dr. Olson did not perform tests to measure Complainant's ability to lift, push, pull, bend, or flex.

28. Based on this brief exam, Dr. Olson issued a "Closing" report on Complainant on December 6, 2005. The report listed Complainant's work restrictions as 35 pounds lifting and 40 pounds pushing and pulling. The

record does not reveal the factual basis for Dr. Olson's work restrictions issued on this date.

29. When Dr. Olson handed the closing report to Complainant, he was shocked, and informed Dr. Olson that he could lift more than 35 pounds. Dr. Olson stated that he would not modify the restrictions.

30. Dr. Olson made several material omissions on the closing report.

31. There are two boxes to check regarding the work restrictions: "permanent restrictions" or "temporary restrictions." Dr. Olson checked neither of these boxes.

32. Dr. Olson did check the box, "No permanent impairment."

33. Under the section for MMI, Dr. Olson did not check the box, "Injured Worker has reached Maximum Medical Improvement." Dr. Olson did enter the date next to that box. In addition, under "Maintenance care after MMI required?," he checked the box, "yes," and wrote, "meds."

34. The December 6, 2005 report is a one-page document. It contains no medical information describing Complainant's physical examination, testing, or medical condition on that date (or any previous date). It contains no accompanying documentation, such as medical records or an FCE.

35. No FCE accompanied the document.

**Mr. Nufer's Handling of the Closing Report**

36. When Mr. Nufer received the December 6, 2005 closing report from Dr. Olson, the lack of an FCE accompanying the MMI determination struck him as strange. In addition, he was unclear as to whether the work restrictions were temporary or permanent.

37. Mr. Nufer directed Sue Benesch, his staff member responsible for Workers Compensation claims, to contact the medical office where Dr. Olson practices, the Colorado Center for Occupational Medicine (CCOM), to find out if the work restrictions were permanent.

38. The identity and position title of the CCOM staff person whom Ms. Benesch contacted are unknown. The contents of the conversation between Ms. Benesch and the CCOM staffer are unknown.

39. Based on the information Mr. Nufer received from Ms. Benesch, Mr. Nufer concluded that Complainant's work restrictions were permanent.

40. Mr. Nufer contacted the case manager for Complainant at CCOM by telephone, and asked why no FCE had been performed on Complainant prior to issuance of the MMI report on December 6, 2005. He was informed that those work restrictions were not the result of Complainant's October 2005 injury, but were from a previous injury, and "there was no reason to re-open the previous case." The identity and medical position of the case manager are unknown.

41. Mr. Nufer did not follow up on this ambiguous information. He did not direct CCOM to have the FCE performed on Complainant, at Pinnacol's expense.

42. Neither Mr. Nufer, nor any of his staff, had any direct contact with Dr. Olson to clarify the basis for the December 6 closing report, to learn how the determination had been made that Complainant's current condition was based on a prior injury, what injury that was, or why the doctor was certain that Complainant's condition was already permanent.

43. Mr. Nufer requested no additional medical information on Complainant.

44. Mr. Nufer did not inform Complainant that the basis for the permanent restrictions was a previous injury.

**December 14, 2005 Meeting**

45. On December 14, 2005, Nufer called a meeting with Complainant, Mr. Herrera, his supervisor, and Susan Benesch, worker's compensation Coordinator. The purpose of the meeting was to discuss what portions of the Custodian I job Complainant could and could not perform.

46. At the meeting, Complainant explained that he could perform his job, had been exercising on the machines at CCOM in order to increase his strength, and that he was able to lift 95 pounds during those workouts. He requested an FCE to confirm his actual ability to perform the essential functions of his position.

47. Mr. Nufer denied Complainant's request for an FCE and informed him that he could pay for it himself.[1]

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[1] At hearing, Respondent provided legal authority for the fact that Complainant had the right to obtain an independent medical examination free of charge. However, there is no evidence Complainant knew about this legal right. In fact, in his December 15 letter to Complainant, Mr. Nufer followed up by stating, "I also explained that you could request a functional capacity exam at your own expense if you believed these restrictions were inaccurate. Subsequently, I spoke with the CCOM representative who indicated that they could not perform a functional capacity exam unless it was approved by Pinnacol Assurance." Exhibit M.

48. Mr. Nufer asked Complainant to explain to him how he would perform the most difficult parts of his job, including moving lab tables, moving furniture, moving supplies, emptying trash, stripping floors, and using the carpet extractors. Complainant responded that he would seek assistance from other staff, and that he would use a dolly to make extra trips to move items that exceeded his restrictions. He also indicated that he would use mop buckets with less water.

49. One item in Complainant's job description that he was unable to perform was running the carpet extractor, which contains 35 gallons of water. When asked how he would perform this job, he had no response. This is not a daily part of the job and is performed at the discretion of the custodian on an as-needed basis.

**Complainant's Work Restrictions were not Permanent**

50. Complainant's work restrictions were not permanent. This finding is made on the basis of the following: a) Dr. Olson performed no lifting, pushing, or pulling tests on Complainant on December 6, 2005; b) on December 14, 2005, Complainant was able to lift 95 pounds; c) the double or triple hearsay evidence provided by Mr. Nufer on this issue contains no identity of the source, no detail as to what was said, and is therefore inherently unreliable and not credible; d) Mr. Al Dehererra, Custodian III, Complainant's supervisor, believed that Complainant's work restrictions were temporary, not permanent; and e) no FCE was performed on Complainant. In summary, there is no competent evidence in the record demonstrating that his condition was permanent.

**Complainant's Job Performance Under the Work Restrictions**

51. Complainant was able to perform nearly all of the essential functions of his position in December 2005, with only minor assistance. The only accommodations he needed were to have another employee perform occasional carpet extraction in his two buildings, dispose of trash cans that exceeded 35 pounds, and to continue to move furniture on a team basis.

52. CSU custodial staff move furniture for cleaning of floor surfaces rarely; they move all furniture every summer for deep cleaning. The custodians perform furniture moving duties in teams of two or more people.

53. While Complainant worked under his restrictions, other staff occasionally left buildings to assist him with some tasks. There is no evidence in the record as to how many staff assisted Complainant, how often, precisely what tasks were performed, or for what periods of time other staff assisted Complainant.

54. There is little evidence in the record concerning the issue of whether permitting Complainant to work under his restrictions, with some staff assistance, imposed any hardship on Respondent. The only evidence on this issue was Mr. Dehererra's belief that to require another Custodian I to "go across campus" to assist Complainant was not reasonable. No evidence was offered regarding how often this occurred, for what period of time, what the actual distance was, or how long it took another Custodian I to travel from one job site to that of Complainant.

**Administrative Leave with Pay**

55. On December 14, 2005, Respondent removed Complainant from his position and placed him on paid administrative leave.

56. On December 14, 2005, Joanne Ballard, Vice President of Administration and Finance, sent Complainant a memo placing him on paid administrative leave. The memo stated in part, "We are in receipt of your Physician's Report of Worker's Compensation Injury dated December 6, 2005 indicating that you have reached Maximum Medical Improvement (MMI). This report indicates the need for permanent work restrictions. As such, I have asked Ken Nufer, Director of Human Resources to evaluate the limitations and their impact on your ability to perform the essential functions of your job."

**December 15, 2005 Memo from Mr. Nufer to Ms. Ballard Recommending Termination**

57. Complainant had exhausted all paid sick leave by December 2005.

58. On December 15, 2005, Nufer wrote a memo to Ballard, the appointing authority, regarding his review of the situation and his recommendation to administratively terminate Complainant's employment at CSU. He reviewed the facts as follows: Complainant has permanent work restrictions of no lifting more than 35 pounds and no pushing or pulling of more than 40 pounds; he is required to move furniture as part of his job, "including lab tables with rock tops, supplies, and equipment. . . his duties require he perform the full range of custodial duties utilizing standard custodial equipment. His duties, like that of all Custodian I's, is to move furniture for deep cleaning."

59. Mr. Nufer concluded by giving Ms. Ballard two options: "1. Hire additional personnel in order to complete all tasks that have the lifting and push/pull requirements and restructure his position to either make it a .5 FTE position or add new duties to ensure it is a 1.0 FTE. 2. Immediate administrative discharge of Mr. Salazar on the basis that he is unable to

perform the essential functions of his position and the alternatives are not financially or operationally feasible or reasonable."

60. Mr. Nufer continued, "It is my recommendation that we pursue option 2 in this situation. We have worked with the employee over the past 7½ months by allowing him to return on light duty in order to assist his recovery. We attempted to work with his restrictions and have evaluated all possible options. Additionally, we have communicated with the attending physician regarding these restrictions and whether the employee was expected to improve, which he is not."

61. According to Mr. Dehererra, Complainant's supervisor, it is impossible for any individual to move a lab top table alone; custodians move the lab tables and all furniture very seldom, primarily in the summer months, and it is always done in teams of more than one person; employees are encouraged to use dollies to move heavy items in order to avoid back injuries; dollies are available in every building; and there is no requirement to carry mop buckets because each building has a floor-level drain.

62. At the time Mr. Nufer wrote the December 15, 2005 memo to Ms. Ballard, he knew that Complainant's duties did not require him to perform his job "utilizing standard custodial equipment." Mr. Nufer was aware that Complainant could fulfill many of his job duties by using a dolly, a light-weight vacuum cleaner, a light-weight mop, and a long-handled dust pan.

63. At the time Mr. Nufer wrote the December 15 memo to Ms. Ballard, neither he nor any member of his staff he had communicated with Complainant's attending physician regarding Complainant's work restrictions and whether he was expected to improve. Ms. Benesch had spoken with an unidentified staff person in Dr. Olson's office, and Mr. Nufer had spoken with the case manager for Complainant's case.

64. There is no evidence as to what the "possible options" were which Mr. Nufer or anyone at CSU Pueblo evaluated in terms of working with Complainant's restrictions. (There is general evidence that other custodians assisted Complainant, with no quantification.)

65. There is no evidence in the record indicating that Complainant could work only half-time in fulfilling his duties under the work restrictions, thereby necessitating that another staff person be hired.

66. In his December 15, 2005 memo to Ms. Ballard, Mr. Nufer informed her that Complainant believed he could complete his duties as Custodian I. Mr. Nufer did not report that Complainant had stated on December 14 that he was able to lift 95 pounds during workouts at CCOM.

67. Mr. Nufer performed a search for other positions Complainant was qualified to perform, and found none. He informed Ms. Ballard of this in the memo.

68. Mr. Nufer met with Ms. Ballard and presented her with the December 6, 2005 report by Dr. Olson.

69. Ms. Ballard did not confirm the accuracy or reliability of the December 6, 2005 work restrictions prior to making her decision to terminate Complainant. She did not request additional information.

70. Ms. Ballard and Mr. Nufer met with Complainant prior to terminating his employment.

71. On December 19, 2005, Ms. Ballard sent Complainant a termination letter. It stated in part:

> After considering the information included in the final disposition report from Dr. Olson and the information you provided to Ken Nufer, Director of Human Resources, on December 14, 2005, I have decided to administratively discharge you effective December 19, 2005 pursuant to Director's Administrative Procedures 5-10 and 5-34. This procedure allows an appointing authority to administratively discharge an employee who is unable to perform the essential functions of the job and no reasonable accommodation exists.

72. Mr. Nufer's testimony was not credible.

73. Complainant timely appealed his termination.

## DISCUSSION

In this *de novo* proceeding, Complainant bears the burden of proving that Respondent's administrative termination of his employment was arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). In addition, Complainant bears the burden of proof in his claims of discrimination on the basis of disability, age, and national origin and race. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288 (Colo. 2000).

Respondent based its termination of Complainant on State Personnel Director's Procedure 5-10, which provides:

> If an employee has exhausted all credited paid leave, unpaid leave may be granted or the employee may be administratively separated by written notice after pre-separation communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively separated if FML or short-term disability leave (includes the 30-day waiting period) apply or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been separated under this rule and subsequently recovers, a certified employee has reinstatement privileges.[2]

## A. Respondent's actions were arbitrary and capricious

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant has met his burden of proving that Respondent's actions were arbitrary and capricious under *Lawley*. Respondent neglected and refused to use reasonable diligence and care to procure the evidence that was essential to its decision to terminate Complainant based on work restrictions. First, and most importantly, at the December 14 meeting with Mr. Nufer, Complainant reported that he could lift 95 pounds and, therefore, the work restrictions were inaccurate. Ninety-five pounds is nearly three times the amount of the lifting restriction of thirty-five pounds imposed by Dr. Olson. The dramatic difference between what Complainant reported and the restriction imposed by Dr. Olson, was sufficient to impose a duty on Mr. Nufer to procure more evidence on Complainant's actual physical capabilities. For example, Mr. Nufer made no inquiry of Complainant or Dr. Olson as to what tests the doctor had performed as a basis for imposing the work restrictions. Had he so inquired, he would have learned that Dr. Olson had failed to perform any lifting, pulling, or pushing tests on December 6, 2005. Mr. Nufer ignored Complainant's statement about lifting 95 pounds in violation of *Lawley*.

Second, when Complainant made a reasonable request to have an FCE performed, Respondent declined to exercise its discretion to obtain the FCE.

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[2] While the appointing authority also referenced State Personnel Director's Procedure 5-34, that procedure relates only to Family Medical Leave Act, which is not at issue herein.

The evidence showed that the routine protocol for Respondent, upon closing a Workers Compensation case, was to have an FCE in hand which established what, if any, essential functions of the position the employee could perform. In this case, Respondent broke with protocol by electing not to obtain an FCE. Mr. Nufer testified that the reason no FCE was performed was because the permanent injury was related to a prior injury. However, this purported explanation does not answer the question as to why no FCE was performed; in fact, it has no relation to the purpose of the FCE. The purpose of the FCE is to provide state employers with a medically based, objective test of an employee's ability to perform the essential functions of his or her position. Mr. Nufer's decision not to obtain this standard test, which would provide the information essential to making an informed decision on Complainant's future employment with Respondent, was arbitrary and capricious. *Lawley, supra*.

Respondent's reliance on the December 6, 2005 closing report, written by Dr. Olson, was also arbitrary and capricious under *Lawley*. The report was ambiguous on its face and inherently unreliable. Dr. Olson checked the box, "No permanent impairment," and did not check the box for "permanent restrictions." He failed to check the box, "Injured Worker has reached Maximum Medical Improvement." He provided no discussion of Complainant's condition, gave no indication any tests had been performed, and spent only sixteen minutes with him on December 6. The call by Mr. Nufer's assistant to CCOM served only to corroborate the report, not to question or explore its accuracy. In the face of such untrustworthy documentation, and after receiving Complainant's report that he was able to lift three times the weight of the work restriction, no reasonable administrator would have relied on Dr. Olson's report. *Lawley, supra*.

In summary, *Lawley* required that Respondent obtain accurate, objective, and reliable information about Complainant's ability to perform the essential functions of his position, prior to making a decision to terminate Complainant's employment. Respondent's failure to do so was arbitrary and capricious.

Respondent also acted in an arbitrary and capricious manner by removing Complainant from his Custodian I duties on December 14, 2005, and then terminating him from the position on December 19, when, according to its own Modified Work Duties memorandum authored by Mr. Nufer on October 20, 2005, "These restrictions [35 pounds lifting and 40 pounds pushing/pulling] do not appear to impact your ability to do your job but do require that you use proper equipment and body mechanics." By Respondent's own admission, Complainant was fully capable of performing the essential functions of his job under these restrictions. As the Findings of Fact illustrate, Complainant needed only minor assistance in performing a few portions of the Custodian I job.

Respondent argues that this case is identical to State Personnel Board Case Number 2005B059, *Montoya v. CSU at Pueblo*. However, that case was materially different in several respects. Mr. Montoya did not challenge the

legitimacy of his permanent work restrictions. He challenged only his ability to perform the Custodian I job within those restrictions. Therefore, the majority of evidence at hearing addressed a different issue. Moreover, a review of the *Montoya* MMI determination underscores why the work restrictions were challenged in this case. The physician's report containing Mr. Montoya's MMI determination was an exhaustive, thorough narrative description of Mr. Montoya's physical condition and his prospects for improvement. It defines the terms utilized, and instills the reader with confidence in its medical soundness and objectivity. That MMI determination stands in stark contrast to the one-page report by Dr. Olson herein, which contains several material omissions, internal inconsistencies, no medical information concerning Complainant's condition, and no discussion regarding his future prospects for improvement.

In addition, in the *Montoya* case, Mr. Nufer granted Mr. Montoya approximately one month of leave without pay, in order to enable him to improve, prior to bringing him back to work. This action, permitted under Director's Procedure 5-10, demonstrates a commitment by the employer to help the employee improve, prior to reaching a decision point regarding possible termination. By contrast, in this case, Mr. Nufer offered Complainant no leave without pay, and elected to deviate from standard protocol in bypassing the FCE. Hence, the evidence presented in the two cases was different.

**B. Complainant is not a disabled individual under the Colorado Anti-Discrimination Act or the Americans with Disabilities Act**

Complainant asserts that he was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("CADA"). Under the Act,

> "It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

<u>Complainant does not have a disability under the Act.</u>

Disability under the Act "means a physical 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." Section 24-34-301(2.5)(a), C.R.S. The Colorado Civil Rights Commission ("the Commission") has promulgated rules in which it interprets the Act as being "substantially equivalent to Federal law, as set forth in the Americans with

Disabilities Act," 42 U.S.C. Sections 12101 - 12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act "shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.*

Under state and federal rules, "A major life activity is a basic activity that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.* In determining whether an individual is substantially limited in a major life activity, "three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2).

It has been found that Complainant's work restrictions were not permanent. See, Finding of Fact #50. Because Complainant's condition was not of a long-term or permanent nature, he was not disabled under the Act. *Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 198 (2002).

The next question is whether Complainant was "regarded as having such an impairment." Section 24-34-301(2.5)(a), C.R.S. To state a claim under this provision, Complainant must demonstrate that Respondent mistakenly believed that Complainant's actual, nonlimiting impairment substantially limits him in one or more major life activities. Complainant's impairment was chronic back strain. The question is whether Respondent believed that this condition substantially limited him in the major life activity of working. To meet this burden, it must be proven that Respondent believed him to be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.*, citing 29 CFR §1630.2(j)(3)(i).

Complainant did not prove that Respondent believed his condition would significantly restrict him in the ability to perform a class of jobs or a broad range of jobs in various classes. Moreover, there is no evidence in the record that the work restrictions imposed by Dr. Olson would have restricted Complainant from performing a broad class of jobs. Therefore, Complainant has failed to establish a disability claim under CADA or the ADA.

**C. Respondent discriminated against Complainant on the basis of age.**

Complainant asserts that Respondent discriminated against him on the basis of age, in violation of the CADA. He was 59 at the time of termination. The

CADA prohibits discrimination on the basis of age. Section 24-34-402(1)(a), C.R.S.

In 1997, the Colorado Supreme Court adopted the U.S. Supreme Court's shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny, finding it "represents a clear and thorough analytical framework for evaluating claims of employment discrimination." *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997). *See also, Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

To prove intentional discrimination under section 24-34-402(1)(a), C.R, C.R.S., an employee must establish, by a preponderance of the evidence, a *prima facie case* ("*pfc*") of discrimination. The elements of a *pfc* of intentional discrimination are:

a. complainant belongs to a protected class;
b. complainant was qualified for the position;
c. complainant suffered an adverse employment decision despite his or her qualifications; and
d. circumstances give rise to an inference of unlawful discrimination.

*Big O Tires*, 940 P.2d at 400; *Bodaghi,* 995 P.2d at 300.

Complainant has established a *prima facie* case of age discrimination. He was fifty-nine years of age, he was qualified for his Custodian I position[3], he was terminated despite the deficiency of evidence that his work restrictions were actually permanent, and the circumstances give rise to an inference that Respondent terminated him based on age. This inference is drawn because Complainant did suffer several physical problems over the course of a six-year period, and the evidence demonstrated that Respondent viewed him as an aging individual who would be a continuing drain on the agency.

The burden next shifts to Respondent to articulate a legitimate, non-discriminatory reason for the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *prima facie* case is rebutted and drops from the case. *Bodaghi, supra.* While Respondent's evidence that Complainant's work restrictions were in fact permanent was weak, it has nonetheless met its burden of articulating a legitimate, non-discriminatory reason for terminating Complainant.

[3] Respondent informed Complainant on October 20, 2005, in Exhibit J, "These restrictions do not appear to impact your ability to do your job but do require that you use proper equipment and body mechanics."

The burden then shifts back to the employee to prove that the employer's proffered reasons were in fact a pretext for age discrimination. *Bodaghi, supra.* Complainant's *prima facie* case, combined with the fact finder's conclusion that the employer's asserted justification is false or pretextual, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated. *Bodaghi*, 995 P.2d at 298.

"Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999). Pretext may be proven indirectly by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Bullington, supra*.

Complainant has proven by preponderant evidence that age discrimination more likely than not motivated Respondent to separate Complainant from state service. In addition, much of the proffered basis for Mr. Nufer's actions was implausible and unworthy of credence. Mr. Nufer testified that the reason no FCE was obtained was due to Complainant's condition having arisen from an old injury. This purported reason bares no relation to the agency's need for an accurate assessment of Complainant's ability to perform the essential functions of his position. Mr. Nufer's decision to remain in the dark as to Complainant's actual physical condition in December 2006 leads directly to the inference that he was motivated by a desire to terminate Complainant based on his age. Mr. Nufer misled Complainant about not being able to obtain an FCE unless Complainant paid for it; this breach of trust also leads to an inference of discriminatory intent by Mr. Nufer. Lastly, Mr. Nufer omitted material information and exaggerated Complainant's inability to perform the Custodian I position in his December 15, 2005 letter to Ms. Ballard.

**D. Respondent did not discriminate against Complainant on the basis of race or national origin.**

Complainant also raised claims of discrimination based on race and national origin. He presented no evidence on these claims at hearing, and failed to establish a *prima facie* case on these claims in his case-in-chief. Therefore, those two claims were dismissed on Respondent's motion at the close of Complainant's evidence.

Complainant did not request an order for attorney fees and costs, as required by State Personnel Board Rule 8-38(B)(1), 4 CCR 801. Therefore, this issue is not before the Board.

## E. Remedy

Complainant requested reimbursement of all medical expenses he has incurred since his administrative termination. However, Complainant did not accept the COBRA continuation of health insurance benefits offered to him by Respondent upon his separation. Because Complainant did not mitigate his damages on this issue, he is not entitled to reimbursement of costs incurred due to lack of insurance.

## CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law;

2. Respondent did not discriminate against Complainant on the basis of disability, race, or national origin;

3. Respondent discriminated against Complainant on the basis of age.

## ORDER

Respondent's action is **rescinded**. Complainant is reinstated to his Custodian I position with full back pay and benefits.

Dated this 24th day of October, 2006.

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 320
Denver, CO 80202
303-866-3300

## NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

### ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

## CERTIFICATE OF SERVICE

This is to certify that on the 25th day of Oct. 2006, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, to the following addresses:

James R. Koncilja
Koncilja & Kancilja, P.C.
125 West "B" Street
Pueblo, Colorado 81003

**And via interoffice courier:**

Vincent Morscher
Assistant Attorney General
Employment Section
1525 Sherman St., 5th Fl.
Denver, CO 80203

Andrea C. Woods