STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B090**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

NORMA SMITH,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DISABILITY DETERMINATION SERVICES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on October 2, 2007, and supplemental evidence was taken on November 20, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed by written order after the conclusion of the supplemental evidence hearing. Assistant Attorney General Brooke Meyer represented Respondent. Respondent's advisory witness was Vicki L. Johnson, the appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Norma Smith ("Complainant") appeals her termination by Respondent, Department of Human Services, Disability Determination Services ("Respondent" or "DDS"). Complainant seeks reinstatement.

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

PROCEDURAL ISSUE

Complainant asserted a claim of discrimination based upon disability and age as part of her appeal of her termination from employment.

After Complainant rested her presentation of evidence on October 2, 2007, Respondent moved for dismissal of the discrimination claim on the grounds that Complainant had failed to make a *prima facie* showing of either age or disability discrimination. The motion was granted on the record and the discrimination claims were

dismissed.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

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

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

FINDINGS OF FACT

General Background

1. Complainant was certified to a Technician III position for Respondent. In this position, Complainant assisted professional staff in determining medical and vocational eligibility for disability benefits for Colorado residents. DDS is funded through the federal Social Security program and must comply with the Social Security disability rules and regulations.

2. Complainant held the position of Disability Examiner with DDS prior to November 1, 2001. Prior to holding the position of Disability Examiner, Complainant had been employed with DDS as a temporary employee and then had been promoted up through the ranks to Examiner.

The Work of a Technician III

3. DDS serves two categories of individuals. There are claimants who are filing for disability benefits and require that a decision be made as to their eligibility for benefits. There are also individuals who are receiving benefits but who require a continuing disability review ("CDR") in order to maintain their eligibility for benefits.

4. Disability decisions are made by employees who hold Examiner positions. Technicians are the workers who initially receive the claim or CDR request in the office, examine the forms, determine what sources of information are relevant to the issues raised by the claim or CDR, make a decision on whether a consulting examination ("CE") would be necessary to evaluate the issues presented, generate the forms to be sent to the individual or sources of information, and schedule examinations to be performed.

5. Technicians are responsible for processing cases in a timely manner and for sending out notices with sufficient time to meet statutory and rule requirements. A

technician might, for example, send out a notice for an exam to a benefit recipient. This action would also require that the examining doctor receive a scheduling notice. These notices would be generated by the computer, then folded for mailing and sent out in a timely fashion so that the benefit recipient and the doctor both would receive timely notices. Requests for additional information would also need to be processed quickly so that the determination of the disability issue was not delayed awaiting case information.

6. Complainant's unit has been supervised by Marvin McCarl since February of 2005. Mr. McCarl supervised six other employees in addition to Complainant. Complainant's unit primarily handled CDR cases. There was some overlap between the units, and Complainant's unit would handle claimants in addition to CDR cases at times.

7. Complainant's position as a Technician III included several specialized duties. Complainant was one of only four or so employees in the office who spoke Spanish, and she would handle calls from Spanish-speaking claimants and others. Complainant's position as a Technician III also meant that she was responsible for making some less complicated disability determinations. Complainant was also called upon to handle overflow of technician work from another unit which was responsible for facilitating benefits reviews by an outside contractor.

DDS Office Policies and Practices

8. DDS enforced a leave policy that requires that each employee maintain a total of 24 hours of leave. This leave can be sick leave or annual leave or a combination of the two types of leave. The policy provides that no annual leave requests be approved that would reduce the amount of available leave below 24 hours, and that leave without pay would not be approved unless covered by the Family Medical Leave Act.

9. Complainant had a history of back issues which eventually required serious back surgery. Some of the time that she took as leave without pay or sick leave at DDS was covered by the Family Medical Leave Act ("FMLA").

10. DDS also had an attendance policy and practice which allowed employees to set their morning start times within a range of options. Once an employee set that start time, the employee was expected to maintain that start time. The policy and practice provided that a 15 minute grace period could be utilized on occasion, and that late arrivals beyond the 15 minute period required a call to a supervisor.

11. In November or December of 2005, Complainant's appointing authority, Vicki Johnson, told Complainant that there was a security issue developing and that Complainant should take care. At about the same time, there were extra security

guards added at the office and new security routines established at DDS. These measures resulted in such visible signs as an increased presence of security guards in the building and the fact that managers were walked to their vehicles by security personnel. Ms. Johnson called Complainant into the office on more than one occasion to ask her if she was afraid of two former co-workers, and Complainant told Ms. Johnson that she was not afraid of them. Ms. Johnson did not explain to Complainant, however, what the problem was or what information DDS had which suggested that Complainant need to take special care.

12. The information provided to Complainant resulted in Complainant becoming very frightened and nervous. Complainant had recently been widowed at the time the security information was provided to her. After she was told by Ms. Johnson to take care, Complainant had her home boarded up, became afraid to be at her house by herself, would call her son to come over the house in the middle of the night because she was afraid, lost a significant amount of weight, and eventually had to consult a mental health professional because of the stress.

Respondent's Performance Review System for Technicians

13. Respondent created a performance review system which covers all of the Technicians. These performance review documents were then supplemented in the individual employees' Performance Management And Pay ("PMAP") paperwork with an addendum to describe any differences between the general application of the performance review and a Technician's specific job duties.

14. The PMAP performance review for Technicians weighted 6 different competency areas by assigning various weights of the measured competency areas to the final total score. Job Knowledge accounted for 53% of the total score, Accountability was weighted at 20% of the total score, Customer Service accounted for 15% of the total score, Communication and Interpersonal Skills were weighted at 5% each, and Equity was accorded a 2 % weight.

15. Each competency area was scored on a scale of 1.0 through 5.0. A score below 2.0 represented a "Needs Improvement" score. A score of 2.0 or above represented a Good performance level. Scores of 3.0 to 4.0 represented a Commendable performance level. A score of 4.0 or above represented Peak Performer status.

16. The total overall score in this performance review system was generated by multiplying the percentage amount assigned to that area by 100 and then by the competency area 1.0 – 5.0 score. The resulting points for each competency score were then added up and compared to a conversion chart. If a Technician received a score of Good, or 2.0, on each competency area, then the total score would be calculated from the result of the following formula: [(.53 x 100) x 2] + [(.20 x 100) x

2.0] + [(.15 x 100) x 2.0] + [(.05 x 100) x 2.0] + [(0.05 x. 100) x 2.0] + [(0.02 x 100) x 2.0] = 200 total points.

17. The Technician PMAP conversion chart provided that, in order to score above the Needs Improvement level for purposes of the overall rating, a Technician had to score above a total of 259 points. A score between 260 and 359 was rated as Fully Competent. A score of 360 – 459 represented a Commendable overall level, while 460 – 500 points was rated as an Outstanding overall rating.

Production and Quality Quotas For Technicians

18. The primary measurement for performance for Technicians lies in the core competency of Job Knowledge.

19. Job Knowledge was divided into three sub-categories: Quality, Productivity, and Mean Processing Time.

Quality:

20. Quality was measured by calculating the percentage of cases reviewed by the quality assurance team that contained significant errors by the Technician. Errors were first noted by the quality assurance review. These notations were then reviewed by a supervisor for significance. If the error was significant, then the case would be counted as having a quality issue. PMAP quality levels required that a Technician maintain at least a 93% quality level, meaning that 93% of the cases reviewed for the year should be found to not have significant quality issues associated with them. A quality rating of 93% to 95% would place the Technician at a Good level (level 2). A quality rating of 95.1% to 97% would place the Technician at the Commendable level (level 3).

Productivity:

21. DDS uses its computer system to evaluate the productivity of a Technician. When a Technician opens and closes a case development file, the computer notes such activity as one case that has been developed. Technicians who open and close a case many times in a day are given credit by the computer for only one case development. If, however, the Technician opens and closes the file on two different days, the computer reports that action as two case developments. While many case developments are completed in a day, and therefore a Technician will receive only one case development credit by the computer for that case, it is not unusual for a Technician to open and close a case file on different days. It is often necessary to reopen a case file to add a vendor name, for example, or to add information when a claimant calls in with new sources.

22. Technicians were also given case development credit for other activities. Technicians who scheduled a consultive exam (CE) as part of a case development were given credit for the case development and a credit for a CE. Technicians who had the authority to conduct limited disability reviews were given extra case development credit for each disability determination they made.

23. For purposes of a review of productivity, Technicians were given case development scores for the relevant time period, and the average number of cases development credits per day would be calculated. Technicians needed to have a productivity level of 12 – 13.99 case development credits per day to obtain a Good rating. For a Commendable performance rating, Technicians needed to have between 14 and 15.99 case development credits per day.

Mean Processing Time:

24. For the 2006-2007 review period, Technicians were also rated under Job Knowledge on the Mean Processing Time for case development. A Good rating required that mean processing time be within 2 – 3 days, while Commendable performance levels required a mean processing time of 1 to 2 days.

25. There was no system in place to evaluate Complainant's mean processing times.

June 2006 Review and Corrective Action

26. On June 26, 2006, Complainant received a performance review for the quarter beginning April 11, 2006.

27. The overall performance rating for this June 2006 review scored Complainant at a total of 149.5 points, which equated to a Needs Improvement rating. Complainant needed to obtain at least 260 points to be rated as Good.1

28. Complainant scored above 2.0 in Customer Service, Communication, Interpersonal Skills and Equity. The Needs Improvement rating was caused because of Complainant's low scores in the two competency areas which accounted for 73% of the weight in the total score.

29. Complainant was given only a 1.0 out of 5.0 for Job Knowledge. Complainant's Job Knowledge score was low because because Mr. McCarl found that Complainant's case development production was only at a 10.73 cases per day level, even when using computer-generated case development credits. Mr. McCarl informally tracked Complainant's production of cases for a portion of the quarter and

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1 The PMAP form used for this review referred to the first category of acceptable work performance as "Proficient."

determined that her actual production rate was even lower than the computer figures indicated.

30. Mr. McCarl also provided Complainant with a score of 1.3 for Accountability. The issues that Mr. McCarl found in Complainant's work in this regard included the fact that Complainant was not adhering to her chosen work start time, had dropped below the 24 hour leave bank requirement, and was visiting quite a bit in the morning and spending time on personal e-mails rather than working

31. Mr. McCarl also noted that Complainant was experiencing customer service issues in that she was not adequately tracking the letters that she needed to send out in order to fully develop a case. Mr. McCarl provided Complainant with multiple examples of cases in which letters were not generated or had not been sent out in a timely manner. Finally, Mr. McCarl also noted that Complaint's quality had dropped and that her accuracy rate was only at a 79% level.

32. Complainant's low scores in the Accountability and Job Knowledge areas provided only 79 points toward her total overall score. With a sub-total of only 79 points for those two competency areas, Complainant could not have scored high enough in the remaining areas to create a passing overall score.

33. By letter dated June 23, 2006, Complainant was given a corrective action by Mr. McCarl. The June 23, 2006 Corrective Action cited a need to improve in such areas as adherence to the work schedule, the timely generation and mailing of letters at the end of case development activities, and correction of errors concerning the issuance and mailing of letters.

Performance Under the June 2006 Corrective Action

34. By memo dated October 12, 2006, Mr. McCarl recommended that Complainant be released from the terms of the June 2006 Corrective Action. This recommendation was made on the grounds that Complainant's work production had risen to acceptable levels, that she had worked hard enough to make up the deficiency created in the first months of the year, that the quality of Complainant's work had improved to an acceptable level, and that her attendance had improved.

January 2007 Corrective Action

35. By early January, 2007, however, Complainant's work had again slipped in some areas. Complainant's quality and production levels were at sufficient levels. The figures that Mr. McCarl gathered as of January 3, 2007, showed that Complainant's quality level was at 94.5% and that the work production level was at 13.02 case developments per day.

36. Complainant's work schedule, however, had again fallen below standards. Complainant had worked seventeen days between November 27, 2006 and January 3, 2007 and arrived at work by the scheduled start time on only two of those days. On two of those seventeen days, Complainant was more than 15 minutes late and had not called in. Mr. Carl was also concerned that Complaint's leave usage had again brought her into conflict with the DDS policy requiring a leave bank of 24 hours to be maintained at all time.

37. Mr. McCarl had also audited Complainant's desk on at least two days in the previous quarter, and had found a number of examples of letters which had been generated and not mailed in a timely fashion.

38. The January 2007 Corrective Action required that Complainant adhere to the conditions set forth in the June 2006 Corrective Action with regard to the mailing of letters on the day that the letters were generated. Mr. McCarl set the date for another performance review for March 31, 2007.

39. Mr. McCarl limited Complainant's work during the fourth quarter of the 2006-2007 review period because he felt that Complainant was falling behind again in her production. He also believed that a number of letters and case documents were slipping between the cracks when Complainant was inundated with files, so he intercepted the work Complainant was expected to handle and provided files to Complainant at a rate of 12 per day. In this manner, Mr. McCarl attempted to keep Complainant's desk from having growing stacks of files and paperwork.

Performance Under the January 2007 Corrective Action

40. Mr. McCarl formally documented his performance review for Complainant's fourth quarter performance in a letter dated April 5, 2007.

41. On the issue of timely attendance, Mr. McCarl found that Complainant had exceeded the 15 minute grace period for clocking in two times during the week of January 16, 2007, and one additional time in early March 2007. Complaint did call in on the dates she was going to be arriving beyond the 15 minute grace period. Complainant had also been late, but within the grace period, on five days in that quarter. Mr. Carl concluded that Complainant had complied with the attendance portion of the January 2007 Corrective Action.

42. Mr. McCarl found that, as of April 4, 2007, Complainant's leave time accrual showed that Complainant had 15.85 hours of annual leave and 6.70 hours of sick leave accrued, but that this total did not include two sick days that Complainant had used in the early portion of the month. Mr. McCarl concluded that Complainant had failed to maintain the 24 hour minimum balance of leave accrual for the period.

43. Mr. McCarl also found that customer service, desk management and work efficiency were all issues in the quarterly performance.

44. Mr. McCarl found that Complainant had not complied with the Corrective Action directive that Complainant was to stop case development early enough each day to get mail printed and folded for mailing before she left for the day. He checked Complainant's desk on ten dates and on each occasion found multiple pieces of unfolded mail and/or case documentation indicating that cases had been developed but that letters were not mailed out at the same time.

Complainant's Annual Review for the 2006 – 2007 Review Period

45. Complainant received her 2006-2007 annual review from Mr. McCarl on April 9, 2007.

46. The 2006-2007 competency summary indicated that Complainant had earned the following scores on a scale of 1.0 - 5.0 in the six competency areas evaluated:

Job Knowledge	2.1
Customer Service	2.5
Accountability	2.5
Communication	3.0
Interpersonal Skills	2.6
Equity	3.5

2006 – 2007 Ratings for the Competency Area of Job Knowledge

Quality:

47. For the 2006 – 2007 rating period, Complainant's work was reviewed 310 times by quality assessment, and a total of 48 errors were assessed against her quality level by Mr. McCarl. This resulted in a yearly Quality score of 85%. Complainant was given a 1.0 rating in this sub-category as a result of that score.

Productivity:

48. During the 2006-2007 review period, Mr. McCarl became concerned that the computer system for awarding case development credits was not providing accurate results for Complainant's case developments because Complainant would often go into a file after it had been closed to correct a mistake or to make the file more complete. In the third quarter of the review period, Mr. McCarl hand-counted Complainant's case developments and compared that figure to the computer credits for case development. He found that Complainant had developed 590 cases according to his hand-count of the cases, but that the computer showed 785 cases

developed for that same period.

49. As a result of Mr. McCarl's decision that the computer generated figures did not track Complainant's actual case developments, Mr. McCarl decided to hand count Complainant's case developments for the fourth quarter of the review period and to disregard the computer count of case developments for that quarter. Mr. McCarl also assigned Complainant 12 cases per day to develop. Using this hand-count system, Mr. McCarl found that Complainant had developed 590 cases during the fourth quarter, for a quarterly average of 11.56 cases per day.

50. Mr. McCarl calculated Complainant's overall production totals for the review period to be 12.79 cases per day. This calculation used the computer-generated case developments credits for the first two quarters of the review period, and the hand-counted case development credits for the second two quarters of that period.

51. Mr. McCarl did not provide Complainant with case development credit for organizing consultive exams (CE).

52. Mr. McCarl also made a determination at the end of the second quarter that Complainant should not be given assignments for medical disability determinations because the process of having Complainant make the determinations was time-consuming for both Complainant and for him. As a result, Complainant was not able to obtain any extra case development credits in the second half of the year for making medical disability determinations.

53. Although Complainant's PMAP called for her production quota levels to be adjusted downward to account for her other duties, such as time spent helping Spanish speaking claimants, scheduling consultive exams for cases other than the ones Complainant developed, and assisting a co-worker in preparing CDR cases to be sent to other agencies assisting DDS, Complainant's production quota levels for the 2006-2007 review were not lowered from the level required of all Technicians, as they had been for the 2005-2006 review period.

54. In the 2005-2006 review period, the normal Technician production standards of 12 – 13.99 cases per day for a Good performance and 14 – 15.99 cases per day for Commendable performance were each lowered by 2 cases per day to account for Complainant's other duties. In the 2006-2007 review period, Mr. McCarl used the normal production standards for Technicians for Complainant's review. Rather than reduce the production numbers, Mr. McCarl instead moved to a system of subtracting the time that Complainant logged as time spent on other functions other than case development from the time for which she had to account for case development.

Mean Processing Time:

55. There was no available method for evaluating Complainant's Mean Processing Time. Mr. McCarl assigned that sub-category a score of 2.6.

Competency Score Calculation for Job Knowledge:

56. In figuring the score to be assessed for the competency of Job Knowledge, Mr. McCarl took the scores from the three sub-categories and divided the total of those scores by three. Complainant's sub-category scores total 6.4, which under Mr. Mc Carl's method of dividing the total by three should have provided her with a 2.13 score for the competency area of Job Knowledge. Mr. McCarl gave Complainant a Job Knowledge competency score of 2.10.

57. This discrepancy in the calculation of the Job Knowledge competency score did not significantly affect Complainant's overall scoring, given that it resulted in a loss of only 1.6 total points.

Sub-area Scoring For Other Competency Areas in the 2006-2007 Review:

58. In his evaluation of Complainant's Customer Service, Mr. McCarl noted that the year had begun with major case delays, that the delays had improved under the June 2006 corrective action, but then had relapsed. Mr. McCarl attributed most of the case development delays to a messy desk and office where cases and letters were lost. Mr. McCarl rated Complainant in the sub-category of taking prompt and appropriate case actions at a 2.4 level, and in the sub-category of handling mail and phone calls appropriately at 2.6. The rating for the core competency of customer service was at a 2.5 level.

59. Mr. McCarl noted that one of Complainant's strong points had been her communication with clients, and that she was patient with even the most difficult clients and accommodated their requests. This communication style garnered Complainant a Commendable (3.0) rating in the core competency of Communication.

60. In the competency area of Accountability, Mr. McCarl noted that Complainant's performance in adhering to her selected work start time was inconsistent, that her work production fluctuated widely, and that her organization was inconsistent and often poor. For the sub-category of appropriate and effective use of available resources, Mr. McCarl rated Complainant at a 2.6. Mr. McCarl rated Complainant at a 2.4 in the sub-category of demonstrating specific skills, such as case management, analytical skill, organization, processing and problem solving.

Overall Comments:

61. Mr. McCarl noted in the general comment section that he had taken the mail association duties from Complainant, even though her PMAP notes that her position includes such a function, because Complainant was expected to meet the same production standards as the other Technicians and the other Technicians did not have mail association responsibilities.

62. Mr. McCarl also noted in the review that Complainant had not been able to maintain agency standards for accrued sick and annual leave. Mr. McCarl also noted that Complainant had been granted Family Medical Leave Act ("FMLA") leave during the review period.

Overall Rating:

63. When the point scores for each Competency area were totaled after the application of the weighting criteria, Complainant's total score was 233.8 points. The PMAP form included a conversation table; the conversion table translates 233 points to an overall rating of Needs Improvement.

64. Complainant was given an overall rating of Needs Improvement. Complainant signed that she agreed with the rating on April 12, 2007.

Board Rule 6-10 Meeting and Disciplinary Action

53. Complainant's appointing authority, Vicki Johnson, scheduled a pre-disciplinary Rule 6-10 meeting with Complainant for April 19, 2007. The April 12, 2007 notice for the meeting referred to the reason for the meeting as "performance issues documented in the April 5, 2007 evaluation following your corrective action period (which ended on March 31, 2007)." Linda Rutter attended the Rule 6-10 meeting with Complainant as the representative of Human Resources. Complainant appeared at the meeting without a representative.

65. At the Rule 6-10 meeting, Complainant and Ms. Johnson discussed Complainant's performance issues documented by Mr. McCarl. Complainant asked Ms. Johnson to evaluate her quality and production in the previous few weeks and include that information in her evaluation of Complaint's work.

66. Ms. Johnson reviewed the statistics for Complaint's quality and production levels, and she did not find that these figures had improved considerably from the levels documented by Mr. McCarl.

67. Ms. Johnson also reviewed Complainant's personnel file. She was concerned that she could see that issues such as timely attendance, production numbers and

quality issues were repeatedly discussed in performance documentation with Complainant.

68. Ms. Johnson considered that Mr. McCarl was doing a great deal of work in trying to organize Complainant, in marshalling her work so that she would not be inundated with cases, in monitoring her performance, and that the time spent on supervisory functions was not resulting in an overall change in Complainant's performance.

69. Ms. Johnson believed that termination was the appropriate remedy because other supervisory strategies had been applied without resulting in a long-lasting change in Complainant's performance in terms of quality, production, and attendance.

70. By letter dated April 30, 2007, Ms. Johnson terminated Complainant's employment. The grounds for termination were that, for the evaluation period of April 1, 2006 through March 31, 2007, Complainant was "rated at needs improvement for the final six months of the evaluation period in the following areas: Job Knowledge, Customer Service, and Accountability and received an overall needs improvement rating."

71. Ms. Johnson indicated that she had reviewed Complainant's disciplinary and corrective action history and found that Complainant had "received numerous memos documenting performance issues; ten performance evaluations in which you were rated "needs improvement" in one or more factors; six performance evaluations in which you were rated "needs improvement" overall; seven performance improvement plans/corrective actions (with several of those additionally extended); you accepted a voluntary demotion in lieu of a disciplinary demotion, and you received a disciplinary action of a decrease in salary."

72. The performance and disciplinary history that Ms. Johnson referred to in the termination letter occurred over two distinct time periods.

73. Prior to November 1, 2001, Complainant was working as a Disability Examiner. After not being able to meet performance and quality goals for that position over an extended period of time, Complainant agreed to accept a voluntary demotion to Technician III. Many of the performance documents mentioned by Ms. Johnson in her discussion of Complainant's work history refer to the time while Complainant was a Disability Examiner.

74. For the period after November 1, 2001, Complainant received four memos or notes on various performance aspects, including an April 2003 written reprimand on leave usage, a February 2004 memo on a lack of timely mail association, a July 2004 memo on several issues such as failing to submit a sufficient number of stickers documenting work and failing to maintain the approved work schedule, and a July 2006 e-mail concerning a failure to timely mail letters. Complainant was also placed on a performance plan in August of 2004 to correct deficiencies in a previous quarter's performance. She was also issued two corrective actions in the period after November 1, 2001: the June 23, 2006 and January 5, 2007 Corrective Actions.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant did not present evidence of intentional discrimination or a *prima facie* showing of discrimination:

At the time she appealed her termination to the Board, Complainant also asserted claims of discrimination on the basis of age and disability. At the close of Complainant's

evidence, however, Respondent moved to dismiss the matter for failure to present sufficient evidence.

C.R.C.P. Rule 41(b)(1) provides that: "[a]fter a plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the fact and the law the plaintiff has shown no right to relief." In a case with a shifting burden of production, a claimant is required to make a *prima facie* showing in order to withstand a Rule 41(b) motion to dismiss. See *Public Service Co. v. Board of Water Works of Pueblo*, 831 P.2d 470, 479-80 (Colo. 1992). Given that a burden shifting analysis applies to claims under Colorado's Anti-Discrimination statute, *see Lawley v. Department of Higher Education,* 36 P.3d 1239, 1247-48 (Colo. 2001), the issue to be decided was whether Complainant has produced a *prima facie* showing of discrimination under either of her theories.

Complainant did not specify which statutory basis for her discrimination claims that she wished to assert. Given that the outcome of the Rule 41(b) does not change according to which of the available discrimination statutes are applied2, however, the matter will be analyzed using Colorado's Anti-Discrimination Act.

Section 24-34-402, C.R.S., provides, in relevant part:

> It shall be a discriminatory or unfair employment practice... [f]or an employer ... to discharge ... any person otherwise qualified because of disability, race, creed, color, sex, age, national origin, or ancestry.

In order to prove a violation of C.R.S. § 24-34-402, a claimant may prove intentional discrimination either directly or indirectly. *George v. Ute Water Conservancy District,* 950 P.2d 1195, 1197 (Colo.App. 1997). Complainant did not produce any direct evidence of discrimination.

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2 The federal Age Discrimination in Employment Act of 1967 ("ADEA") has a slightly different set of elements for a *prima facie* showing of age discrimination, as opposed to the Colorado Anti-Discrimination Act: (1) the complainant was within the protected age group; (2) the complainant was doing satisfactory work; (3) the complainant was discharged despite the adequacy of this work; and (4) a younger person replaced the complainant. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo.App. 1997). In order to prevail on a federal Americans With Disability Act claim, Complainant must demonstrate: (1) she is disabled within the meaning of the Americans with Disabilities Act; (2) she is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held; and (3) she was discriminated against because of her disability. *Mason v, Avaye Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004). The limited information that Complainant offered at hearing as to either age or disability would necessitate a finding that Complainant had failed to present a *prima facie* case even if the standards for the federal statutes were utilized.

Intentional discrimination may demonstrated indirectly by the establishment of a *prima face* case which shows: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the job at issue; (3) that, despite her other qualifications, the complainant suffered an adverse employment decision; and (4) that the circumstances give rise to an inference of unlawful discrimination. *Colorado Civil Rights Commission v. Big O Tires, Inc.* 940 P.2d 397, 400 (Colo. 1997). Intentional discrimination is presumed if a plaintiff proves a *prima face* case unrebutted by an employer's offer of a nondiscriminatory reason for an adverse job action. Once such a reason is provided, however, the presumption of discrimination drops from the case and the trier of fact must decide the ultimate question of whether the employer intentionally discrimination against the claimant.

In this case, Complainant did not present sufficient evidence to warrant a finding that she had made a *prima facie* showing of unlawful discrimination on either an age or disability basis.

Complainant presented no information at hearing as to her age or that she should be considered to be in a protected class because of her age. She also did not produce any evidence of circumstances suggesting that age was taken into account in her termination. Without such evidence, Complainant cannot prevail on an age discrimination claim.

As for Complainant's disability claim, Complainant presented testimony that she had been having medical issues, that she had been taking leave for those issues, that she had been granted leave under the Family Medical Leave Act, and that some of her co-workers had had problems obtaining the forms and information necessary to request FMLA leave. This evidence was not sufficient to show that Complainant had a disability or that the circumstances of her termination suggest that there was unlawful discrimination on the basis of disability.

Accordingly, Respondent's motion to dismiss the disability claims was granted at hearing, and the discrimination claims were dismissed from the case.

B. Complainant committed the many, although not all, of the acts for which she was disciplined.

1. Respondent established by a preponderance of the evidence that Complainant had failed to perform competently under the January 2007 Corrective Act and had only a Needs Improvement rating for the quality of her work in the 2006-2007 review period:

The persuasive evidence in this case demonstrated that Complainant had not fully complied with the requirements of her January 2007 Corrective Action. The evidence fully supports Respondent's conclusion that Complainant was not adequately handling

the need to issue letters in a timely manner as a part of case development. Complainant's ability to efficiently manage her desk appears to be at the heart of this issue, and actions by Mr. McCarl to assist Complainant in addressing this issue were not successful in ending the problems.

The persuasive and competent evidence in this case also demonstrated that Complainant had an on-going difficulty in meeting the quality standards for her work, and that her rating of Needs Improvement (level 1) on her 2006-2007 review for the sub-category of quality was reasonably based.

2. Respondent did not demonstrate by a preponderance of the evidence that Complainant's overall performance for purposes of the 2006 – 2007 review period was at an overall "Needs Improvement" level.

The second basis for Respondent's termination of Complainant's employment was that Complainant's performance for the 2006-2007 review period was at an overall Needs Improvement level. Respondent's contention, however, was not supported by a preponderance of the evidence. This finding is warranted by at least two issues concerning the way in which the annual evaluation was conducted.

First, while the performance review documented that Complainant's performance needed improvement in a couple of areas, these deficiencies did not result in Complainant receiving less than a Good performance rating in each of the six core competency areas. The evaluation system was set to take the results of the evaluation of the six core competency areas and to convert that result to an overall rating. The conversion table, however, was set so that something more than just Good performance ratings would be required to obtain a passing overall rating. This system is internally inconsistent and illogical in the way it defines the critical difference between a Needs Improvement overall performance and the acceptable Good overall performance

Second, the rating system was designed to make Job Knowledge the key concern for Technicians, and Job Knowledge was determined in substantial part by the case development productivity figures. The case development figures were recorded by the computer system for the other Technicians at DDS. In the case of Complainant's production figures, however, Mr. McCarl moved from a computer-generated accounting to a hand count of cases. At the same time, he used the production figures applicable to all Technicians, which meant that he was comparing Complainant's actual case development production figures with computer production figures which allowed for at least some duplication of case production credits. The use of a production standard for computer-generated case production figures for Complainant's case development production created a disadvantage for Complainant, and nothing in the record suggested that the effect of this disadvantage was taken into account in any way. Additionally, Mr. McCarl did not credit Complainant's production for her CE examinations, and other Technicians were given that credit in their case development credits.

It is also of some concern that Complainant's production level was set at the level required of all Technicians and not according to the way that Complainant's production figures were to be set according to Complainant's PMAP addendum. Complainant had a special addendum to her PMAP which lowered the production quota figures for her because she had other duties which time away from her case development time, such as working with Spanish-speaking claimants. Mr. McCarl did attempt to take the other duties into account using a time log to subtract the time spent on other duties form the time to which production quotas were applied, but the adequacy of that method in creating a fair and equitable result was not demonstrated at the hearing. The fact that Mr. McCarl also set Complainant's Mean Processing Time score at 2.6 because there was no measurement of that criteria also causes concerns about the legitimacy of the Job Knowledge figure assigned to Complainant. In a review system driven so completely by a numerical count, such as the Technician PMAP, there must be some performance basis upon which a value is assigned or the entire result is in jeopardy.

As a result, the 2006-2007 review was not sufficient to establish by a preponderance of the evidence that Complainant's overall performance level for that period was at Needs Improvement. The disciplinary action taken in this matter will need to be justified by the performance issues documented by the 2007 Corrective Action results and the quality issues, and not on the basis that there was an overall Needs Improvement performance level for the 2006-2007 review period.

3. Respondent demonstrated by a preponderance of the evidence that Complainant had violated the DDS policy requiring maintenance of 24 hours of leave:

The preponderance of the evidence established that Complainant's use of leave dropped her leave balance below a combined total of 24 hours. For the reasons discussed below, however, a violation of DDS sick leave policy requiring the maintenance of a 24 hour balance cannot be used to support a disciplinary action.

B. The Appointing Authority's action in assessing discipline was not arbitrary, capricious, or contrary to rule or law.

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,* 36 P.3d at 1252.

The evidence of this case demonstrates that Respondent used reasonable diligence to investigate and document whether Complainant was performing her work according to agency standards. Mr. McCarl was diligent in recording his observations about quantity and quality concerns with Complainant's case development. Those observations were considered by Respondent in making the decision to discipline Complainant for not fully complying with the terms of her January 2007 Corrective Action and with regard to the quality issues observed in Complainant's work.

There are two smaller issues raised in this matter, however, for which issuance of discipline would be arbitrary, capricious or contrary to rule or law.

One of the performance issues raised in Complainant's termination concerned Complainant's use of sick leave brought her in violation of DDs leave policies. It is policy requirement at DDS that employees are to maintain either sick or personal leave level, or a combination of the two types of leave, so that their available total is at least 24 hours.

The effect of Respondent's policy is that Respondent has given state employees under the policy only two choices in using 24 hours of their earned leave: not attempt to use the leave, or use the leave and potentially be disciplined for falling below the leave bank requirement. On a practical basis, therefore, Respondent is denying employees the benefit of leave that those employees have accrued. Respondent's policy also does not deny leave based upon a particular situation or a particular leave request, but constitutes a blanket denial to use a certain amount of earned leave.

Under such circumstances, Respondent's 24 hour leave bank policy is contrary to the Board's rules concerning employee leave. Earned leave is precisely what it says – it is leave that has been earned by an employee. Personal leave is a benefit provided to state workers. Leave is accrued on a monthly basis, and under the rules "is available for use on the first day of the next month." Board Rule 5-11, General Provisions, 4 CCR 801. While agencies have the discretion under the rules to place some controls on leave usage, such as to deny a request for annual leave on the grounds of business necessity, there is no provision in the rules which permits an agency to simply prevent the use of earned leave under a blanket provision. *See e.g.* Board Rule 5-4 ("Annual leave is provided for an employee's personal needs. Use is subject to the approval of the appointing authority who may establish periods when annual leave will not be allowed, or must be taken, based on business necessity"), 4 CCR 801.

As a result, Respondent may not lawfully base a disciplinary action upon a violation of their leave policy requiring the maintenance of 24 hours of leave, and the review of the reasonableness of Respondent's choice of discipline must be made without considering a leave policy violation.

Additionally, as already explained in the preceding analysis, Complainant's overall

Needs Improvement rating in her 2006-2007 review has not been upheld. The review of the reasonableness of Respondent's choice of discipline must also be made without considering that overall rating.

C. The discipline imposed was within the range of reasonable alternatives

The final question, and the one raised most completely by Complaint at hearing, is the question of whether termination was the appropriate remedy in this case.

The question before the Board is not one of what discipline would the Board impose under these circumstances. The question is one of whether the level of discipline imposed is product of consideration of the relevant factors and whether reasonable men fairly and honestly considering the evidence would reach a contrary conclusion that the offense at issue is good cause for termination. *See Lawley*, 36 P.3d at 1252. Under the Board's analysis, that standard is couched in terms of whether the chosen level of discipline is within the range of reasonable alternatives for the appointing authority.

It is true that Complainant had difficulties associated with working at DDS which were caused by the security issues. The link between the security issues and Complainant's performance troubles, however, was not made clear at hearing. While these issues may be a mitigating factor for Complainant in a general way, these concerns do not explain the performance issues.

It is also true that Ms. Johnson considered a number of prior disciplinary and performance issues which had to do with Complainant's unsuccessful effort at performing the Examiner position. From the record assembled at the hearing, these pre-November 1, 2001 performance issues appear to be related to quality and production issues at the Examiner level, and not to overarching work issues. Under such circumstances, it is not reasonable to consider these prior performance issues as evidence of current performance issues.

Notwithstanding Ms. Johnson's consideration of pre-November 2001 performance issues, Respondent did fully consider Complainant's performance after November1, 2001. The issues regarding the timely issuance of letters, the quality levels of the work, and the need to abide by the agreed-upon start time were all issues that were addressed several times with Complainant in a formal way. In this case, the appointing authority had good cause to conclude that the performance issues present in April of 2007 were core performance issues and issues which had already appeared previously and been addressed with other, lesser forms of correction. The evidence was also that Mr. McCarl was trying to help Complainant find a way to be more proficient with the quality of her work and the ability to get the letters out the door in time, and that those efforts were being made without any clear improvement.

Overall, the credible evidence demonstrates that the appointing authority pursued

her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, Board Rule 6-9, 4 CCR 801, and reached a decision on the level of discipline which was within the range of reasonable alternatives in this case.

CONCLUSIONS OF LAW

1. Complainant committed many of the acts for which she was disciplined.

2. Respondent's action was arbitrary or capricious as to the assignment of discipline for leave usage and an overall Needs Improvement rating for the 2006-2007 review period, but not arbitrary, capricious or contrary to rule or law for the remainder of the causes for discipline

3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's action is **affirmed**. Attorney fees and costs are not awarded.

Dated this 7th day of December, 2007.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

2007B090

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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 7 day of December, 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Norma Smith
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and

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