STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013G025

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RENEE RYAN,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT FORT LOGAN,
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on June 12, June 28, July 12, and July 17, 2013, at the State Personnel Board, 633 17th Street, Denver, Colorado. The record was closed on July 29, 2013, after the record had been reviewed for the inclusion of patient names and redacted of personal information. Joseph F. Haughain, Senior Assistant Attorney General, represented Respondent. Respondent's advisory witness was Nancy Kehiayan, the Director of Nursing and Complainant's appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant appeals the termination of her probationary employment as a Nurse I on the grounds that the decision was a violation of the State Employee Protection Act (Whistleblower Act) after Complainant raised her objection to various procedures as violations of patient rights or otherwise not authorized by best medical practices. Complainant asks for reinstatement to her position, back pay, and other relief as determined by the ALJ.

The Department of Human Services, Colorado Mental Health Institute at Fort Logan (Respondent or Ft. Logan) argues that the termination was properly imposed after Complainant objected inappropriately to administering emergency or involuntary medications and failed to work collaboratively with the staff. Respondent asks that the discipline be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's termination of Complainant's employment is **affirmed**.

ISSUE

1. Whether termination of Complainant's employment was a violation of the State Employee Protection Act.

FINDINGS OF FACT

Background:

1. Complainant has been a licensed nurse in Colorado since 2009. On December 5, 2011, Complainant began work as a Nurse I (RN I) at the Colorado Mental Health Institute at Fort Logan (Ft. Logan). Complainant's probationary period was to be one year.

2. Prior to her hiring by Ft. Logan, Complainant had approximately two years of experience as a nurse working in an emergency room setting in the Denver metro area. Complainant had no experience as a psychiatric nurse in a long-term care setting.

3. Ft. Logan is a state-run residential psychiatric care facility. Ft. Logan provides psychiatric treatment services to a population of chronically mentally ill patients.

4. Complainant was assigned to the evening shift on Adult Unit 3. Unit 3 is a 25-bed in-patient, locked, psychiatric unit. Complainant was assigned as part of Team 3.

5. Complainant's direct supervisor was Elaine Bailey, RN III. Complainant's second-level supervisor was the nurse manager for Team 3. Until the end of July 2012, the nurse manager was Virginia Martinez, RN IV. Beginning in August of 2012, Penny Carter, RN IV, served as the interim nurse manager for Team 3.

6. Complainant's appointing authority was the Director of Nursing for Ft. Logan, Nancy Kehiayan, RN VI.

Emergency and Involuntary Medication Orders:

7. Psychiatric patients, on occasion, require the administration of involuntary psychiatric medications. Involuntary medications are administered without the patient's consent.

8. The state rules that govern the administration of involuntary medications have been passed by the Department of Human Services for use at the two DHS mental health institutes that provide inpatient psychiatric care: Ft. Logan and the Colorado Mental Health Institute at Pueblo (CMHIP). State rules allow for two types of involuntary medication orders: "emergency medication" orders and "involuntary medication" orders. "Emergency medication" orders are intended to be short-term treatment solutions when a staff psychiatrist determines that a psychiatric emergency exists. The term "involuntary medication" orders refer to the procedure for administering court-ordered medications.

9. The state rules in effect during Complainant's employment at Ft. Logan permitted the following with regard to administration of emergency medications:

> **19.421.1 Psychiatric Emergency Conditions**
>
> A. Persons who are detained pursuant to Sections 27-10-105, 106, 107, 108 or 109, C.R.S., and refuse psychiatric medication may be administered psychiatric medication(s) ordered up to 24 hours without consent under a psychiatric emergency condition.

B. An emergency condition exists if:

> The person is determined to be in imminent danger of hurting herself/himself or others, as evidenced by symptoms which have in the past reliably predicted imminent dangerousness in that particular person; or,
>
> By a recent overt act, including, but not limited to, a credible threat of bodily harm, an assault on another person, or self-destructive behavior.

C. A reasonable attempt to obtain voluntary acceptance of psychiatric medication shall be made prior to the use of involuntary medication.

10. Emergency medication administration poses a difficult problem for both patients and staff. When a mental illness is strongest in a patient, the patient is often least able to recognize that there is a problem. The administration of emergency medications is generally performed over the objection of the patient, and the process can require physical restraint of the patient.

11. The DHS rules on the administration of emergency medicines were examined by the Office of the State Auditor in a May 2011 audit report entitled "Psychiatric Medication Practices for Adult Civil Patients." The audit team reviewed patient files and policies at both Ft. Logan and CMHIP. The audit team issued recommendations on multiple aspects of the provision of care, including recommendations relating to the administration of emergency and involuntary medications.

12. The audit recognized that emergency medicines were of substantial value in appropriate cases. The report also noted that, "[o]verall, [the audit team] found no overt or systemic problems with medication monitoring or management practice warranting immediate intervention." The audit report did recommend several changes with regard to oversight by DHS. The report also recommended one change to the rule governing the decision to administer emergency medicines:

> State rules [2 CCR 502-1, Section 19.421.1] allow psychiatrists to use "symptoms which have in the past reliably predicted imminent dangerousness" as evidence of a psychiatric emergency. However, the rules provide no specificity regarding the types of symptoms or how recently those symptoms must have occurred to be considered when assessing imminent dangerousness. The [audit team] found that knowing these parameters could be beneficial, especially in those cases where the basis for the decision to use an emergency medication order is not always clear.

13. In its response to the May 2011 audit report, DHS agreed with this audit recommendation. DHS agreed that the two mental health institutes would begin to develop standardized policies and procedures about the clinical use of emergency and involuntary medications, including associated documentation. DHS also agreed that it would increase its monitoring of emergency and involuntary medication orders. DHS additionally agreed that the two institutes would perform quarterly cross-institute peer reviews to evaluate the clinical basis

used in emergency and involuntary medication orders and the completeness of the related clinical documentation.

Ft. Logan Policies on Emergency Medications:

14. Ft. Logan Policy 26.27, "Refusal of Prescribed Medication" (Revised September 28, 1999) was in effect at the time of Complainant's employment at Ft. Logan.

15. Policy 26.27 sets out the basic policy that "[a]ny patient for whom medication is prescribed has the right to refuse to take the medication." Policy 26.27 (Policy 1). If a patient refused the medication, the allowable response by Ft. Logan staff varied according to the patient status.

16. If the patient was a voluntary patient, the patient could be discharged for refusing to take the prescribed medication. Policy 26.27 (Policy 2). Voluntary patients who refuse prescribed medication and for whom no alternative treatment was available, "may, under certain circumstances, be handled under the emergency procedure of Colorado Revised Statute 27-10-107, and so come under the procedures applicable for involuntary patients who refuse medications." Policy 26.27 (Policy 3).

17. The policy provides that "[a]n involuntary patient who refuses prescribed medication may, when certain procedures are followed, be administered the medication despite his/her refusal." Policy 26.27 (Policy 4).

18. Policy 26.27 also sets out the Ft. Logan standard for the administration of emergency medications, and places the primary responsibility for determining the need to administer such medications on the judgment of the treating physician:

> In an emergency, when it is the treating physician's judgment that a clear and immediate danger to the life of the patient or the lives of others exists if the administration of the medication is delayed, the treating physician may administer the medication against the patient's will. In such cases, the procedure described in Fort Logan's Procedure 26.27 must be strictly adhered to during the time medications are administered without a patient's consent.

Policy 26.27 (Policy 6).

Nurse Refusals To Administer the Medications:

19. Ft. Logan also permits the nursing staff to withhold prescribed medications in order to prevent incorrect or inaccurate dosages from being administered to patients, and to affirm that nurses may withhold medication based upon nursing judgment.

20. Policy 28.12 provides that "[t]he act of withholding a dose/doses of medication on the basis of nursing judgment is within the scope of practice for RN's." The policy lists seven reasons that could support a decision not to administer a prescribed medication, such as the patient is exhibiting the effects of over dosage or symptoms of toxic effects of the medication.

21. Policy 28.12 also lists as ground for refusal that "[p]atient's behavior does not meet the criteria: 1) for administering the medication when the patient refuses or 2) for initialing emergency medications, the criteria for which are defined in Policy and Procedure 26.27."

22. The implementing procedure for Policy 28.12 requires that a nurse who is acting under Policy 28.12 take several actions if a prescribed medication is not going to be administered by the nurse. The nurse is expected to make the judgment to withhold the prescribed medication and notify the treating or covering physician that the medication was being withheld and to explain the reason. This notification would permit the physician to modify the order, given the new information provided by the nurse. If there was a conflict as to whether or not a medication should be withheld, the nurse is to notify any one or more of the nursing and medical staff supervisors for consultation and resolution. The nurse is also to document in the record that the medication was not administered, and to initial that entry. The nurse is additionally expected to enter into the progress notes that the medication was not administered, explain why it was not administered, identify the individuals notified of the non-administration of the medication, and record any actions planned. Ft. Logan Procedure 28.12.

23. At least one member of the nursing staff at Ft. Logan, Michael McMillan, has asked a supervisor to provide an emergency medication that he was uncomfortable about giving to a patient. Mr. McMillian was not disciplined for making this request.

July 6, 2012, Incident with E.M.:

24. On July 6, 2012, Complainant came on duty during a period in which patient E.M. had been having difficulties. E.M. had been at Ft. Logan for several weeks. E.M. had borderline personality disorder, self-harm issues, and mood disorder. She entered Ft. Logan after she had tried to commit suicide when released from another program. E.M. was being treated for suicidal tendencies while at Ft. Logan.

25. E.M. was upset on July 6 because she had been expecting family and friends to visit her, and the visits had not occurred.

26. The Ft. Logan psychiatrist for Team 3, Dr. Marla Barnes, was treating E.M. on July 6, 2012. Dr. Barnes knew that E.M. had generally been agitated and argumentative the night before. When Dr. Barnes spoke with E.M. during the morning of July 6, E.M. was demanding to be discharged. Dr. Barnes told E.M. that she was experiencing mania, and she had proposed changes to E.M.'s medications to reduce the mania. E.M. did not want the new treatment.

27. E.M. had also verbalized a wish to die and had recently harmed herself by gouging her arm after promising not to harm herself. E.M. had additionally threatened to assault staff so she could go to jail.

28. Dr. Barnes was concerned that E.M.'s pattern was to harm herself when she was angry, manic or depressed.

29. Dr. Barnes made the decision, based upon E.M.'s statements and actions that day as well as E.M.'s history of behavior, that E.M. was imminently dangerous and required the administration of emergency medicines. Dr. Barnes discussed the matter with the Team 3 social worker and the nurse manager, and both agreed that E.M. required emergency medications. Dr. Barnes issued a verbal order for medications to be given to E.M.

30. Complainant's shift on July 6 began in the afternoon, and she was not present for the contacts that E.M. had with Dr. Barnes and other Team 3 staff. Complainant was aware that Dr. Barnes had issued a verbal order for emergency medications. Once Complainant learned of the order for emergency medication, Complainant talked with E.M. She worked with E.M. to use breathing exercises, and she engaged E.M. in a sympathetic discussion about being disappointed that her family and friends had failed to visit. During the conversation with Complainant, E.M. was screaming and agitated, but she was not harming herself or anyone else. E.M. continued to insist that she was not going to take the medications prescribed by Dr. Barnes. E.M. told Complainant that no one cared about her. Ruth Schaffer, a nursing supervisor for Team 3, was also present while Complainant was speaking with E.M. Complainant asked Ms. Schaffer to continue working with E.M. on deep breathing.

31. Complainant returned to the nurse's station and announced, in a loud voice, that E.M. was calm that she was not going to give E.M. an injection. Complainant stated that she did not know who was going to give the injection, but that it would not be Complainant. Complainant did not consult with her direct supervisor, Ms. Bailey, or her nurse manager, Ms. Martinez, prior to making this statement. Complainant did not explain her reasons for refusing the medication.

32. Dr. Barnes was at the nursing station at the time writing medication orders. Dr. Barnes asked Ms. Martinez whether the nursing staff was going to follow her medication orders.

33. Ms. Martinez took the medications out to E.M. and spoke with E.M. E.M. eventually agreed to take the medications without the need to administer them over her objection. No written order for emergency medications was issued because E.M. had agreed to take the medication.

34. Dr. Barnes had several concerns about Complainant's response to her emergency medication order. She was concerned that Complainant was expressing a philosophical objection to providing emergency medications. She felt that Complainant was challenging her judgment as a treating psychiatrist.

35. Dr. Barnes also was concerned that Complainant's refusal to administer the medications was the product of "splitting." Splitting is a maladaptive behavior developed by a patient to manipulate staff in an attempt to increase dissention among the staff. Dr. Barnes also felt that Complainant's refusal to provide the prescribed medication would encourage E.M. to resist treatment. When a patient is ambivalent about treatment, the disagreement of a team member about treatment introduces doubt for the patient about whether treatment is necessary.

36. Dr. Barnes raised her concerns about Complainant's response to her medication order with Ms. Martinez and with Ms. Kehiayan.

July 11, 2012, Meeting with Ms. Martinez:

37. Ms. Martinez met with Complainant on July 11, 2012, to discuss the events of July 6, 2012. Complainant's direct supervisor, Ms. Bailey, also attended the meeting.

38. Ms. Martinez was concerned about the events of July 6, 2012, because she had already had a discussion with Complainant about the administration of emergency medications.

39. Earlier in the year, Complainant had been reluctant to provide emergency medications to a patient because she believed the patient was calm and that emergency medications were not warranted. Complainant spoke with the evening nursing supervisor on that occasion, and she did eventually provide the medications to the patient as prescribed.

40. After this earlier event, Ms. Martinez discussed emergency medications with Complainant. Ms. Martinez had learned that Complainant was using her experience as an emergency room nurse as her guide for when emergency medications were to be provided at Ft. Logan. Ms. Martinez had explained during this earlier meeting with Complainant that emergency room psychiatric mediations were administered to treat patient behaviors. In the residential psychiatric treatment setting at Ft. Logan, however, psychiatric medications served a broader purpose than in the emergency room. Ms. Martinez realized at the time of the earlier meeting that Complainant had been skeptical that emergency medications could legitimately be used on patients who appeared to be calm. She encouraged Complainant to talk with her or Ms. Bailey when Complainant was unsure about the use of emergency medications or court ordered medications.

41. With the events of July 6, 2013, however, Ms. Martinez realized that Complainant was continuing to use the practices she learned in an emergency room setting when instructed to administer emergency medications at Ft. Logan.

42. During the meeting on July 11, 2012, Complainant told Ms. Martinez that she did not have to follow a physician's order. Ms. Martinez agreed that, under some circumstances, a medication order did not need to be followed. She explained that the circumstances that would justify a refusal would include an order that would harm the patient. Ms. Martinez explained to Complainant that she could not refuse an order because she believed it would escalate the patient.

43. Ms. Martinez reiterated to Complainant that the expectation was that she would follow a physician's medication order unless it could do harm to the patient and, even then, Complainant would need to discuss the matter with a supervisor before she declined to provide the medication.

44. Complainant agreed during the meeting that she should have not have refused Dr. Barnes' order so publically, and that it was disrespectful to Dr. Barnes to have done so. Complainant agreed to speak with Dr. Barnes about the issue.

Complainant's Involvement with the Recovery Committee:

45. While Complainant was employed at Ft. Logan, the staff was moving its traditional medical treatment model toward the principles of the Recovery model of treatment. The Recovery model is founded upon the expectation that individuals with mental illness can, and do, recover from those illnesses. The model relies upon helping individuals with mental illness understand strategies to handle problems, explore behaviors that are not helpful, and replace those unhelpful behaviors with stronger strategies. Patients are encouraged to be active in their own recovery process, and to provide input into their care decisions.

46. Ft. Logan has a group dedicated to implementing the principles of the Recovery model at Ft. Logan. The Recovery Committee was made up of staff members at Ft. Logan from different teams and positions.

47. Ft. Logan was also adopting the Trauma Informed Care model as part of its treatment model during the time that Complainant was employed at Ft. Logan. Trauma Informed Care involves being aware of what patients bring into treatment from their past, particularly past traumatic events, and working with patients with that knowledge of past traumas in mind.

48. Ms. Kehiayan and Team 3 Senior Social Worker, April O'Dell, were the co-chairs of the Recovery Committee. When Complainant arrived at Ft. Logan, she was told about the activities of the Recovery Committee. Complainant was very interested in the Recovery model of care and Trauma Informed Care, and she asked Ms. Kehiayan if she could attend the meetings of the committee.

49. Ms. Kehiayan agreed that Complainant could attend the Recovery Committee meetings. Complainant attended her first meeting of the Recovery Committee on March 7, 2012.

50. The Recovery Committee was supporting a series of actions designed to introduce staff to various training opportunities and programs to assist Ft. Logan in reducing its use of seclusion and restraint. The committee was involved in trying to create culture change at Ft. Logan. In March of 2012, the committee decided that it would support such change by supporting the implementation of Trauma Informed Care, the use of the Wellness Recovery Action Plan (WRAP) program, and the use of verbal judo.

51. In March of 2012, the Substance Abuse and Mental Health Services Administration (SAMHSA) conducted a Trauma Informed Care System Implementation Kick-off training at Ft. Logan. This training was open to Ft. Logan's community partners, and involved an additional day of activities just for Ft. Logan staff.

52. In June 2012, the Recovery Committee supported a requirement that all staff view a video addressing Trauma Informed Care, entitled "Healing Neen: Where There's Breath There's Hope."

53. The Recovery Committee also took steps to adopt a Ft. Logan version of WRAP. WRAP is a copyrighted program that involves a cost to obtain the programming materials. The Recovery Committee decided to start its own version. At the June 6, 2012 meeting, the committee named the Ft. Logan version the "Safety Treatment and Recovery Plan" (STAR Plan). By early July, a working group was forming to implement the STAR Plan.

54. In early July of 2012, Pat Kisner became the Interim Director of Ft. Logan. Complainant voiced her concerns that the Recovery Committee was not sufficiently moving toward the goals of Trauma Informed Care to Ms. Kisner shortly after Ms. Kisner became the Interim Director.

55. On July 18, 2012, Complainant sent an email to the Recovery Committee, including Ms. Kehiayan, suggesting some modifications to the committee's charter document. In this email, Complainant proposed that they plead with Ft. Logan for "the real WRAP" rather than create their own version of the program.

August 1, 2012 Recovery Committee Meeting:

56. Complainant attended the meeting of the Recovery Committee on August 1, 2012. Ms. Kehiayan was present at the meeting as well.

57. The committee members were discussing the implementation of the STAR Plan. During this meeting Complainant made it clear that she considered the STAR Plan to be a watered-down version of WRAP. Complainant's comments and tone made other committee members uncomfortable and defensive. Several of the committee members came away from the discussion with the distinct impression that Complainant thought she knew better than anyone else on the committee.

58. Ms. Kehiayan was also concerned about Complainant's demeanor at the meeting. She had found Complainant's attitude to be abrupt and disrespectful to the group.

August 3, 2012 Incident with J.S.:

59. Complainant worked the evening shift on August 3, 2012. Complainant was assigned as the medication nurse for the unit.

60. J.S. was on a court-ordered medication at the time. J.S. objected to this medication. Usually, this medication would arrive on the unit in the morning, and the day shift medication nurse, Tracey Hampton, would administer it to J.S. On August 3, 2012, however, the medication for patient J.S. did not arrive on the unit until about 2:30 P.M. The late arrival of the medication meant that it arrived shortly before the change of shift for the unit.

61. When Complainant arrived to start her shift as the medication nurse, Ms. Hampton asked Complainant to administer J.S's medication while Ms. Hampton finished some other medication issues and the charting for her shift.

62. Complainant did not want to give the medication to J.S. because she did not want the issue to interfere with her good relationship with J.S. Complainant told Ms. Hampton that she had developed a good therapeutic relationship with J.S. and did not want to jeopardize it.

63. Ms. Hampton told Complainant that her unwillingness to give medications put a burden on other nursing staff. Ms. Hampton began yelling at Complainant during this conversation. Complainant was not yelling back.

64. Penny Carter had taken over Ms. Martinez's duties for Team 3 as the interim nurse manager. When the discussion between Ms. Hampton and Complainant became heated, staff found Ms. Carter in a meeting and alerted her to the issue. Ms. Carter left her meeting and located Ms. Hampton and Complainant. She listened while Ms. Hampton complained that Complainant was not doing her job, and while Complainant told her that she did not want to jeopardize her therapeutic relationship with J.S.

65. Ms. Carter instructed Complainant to administer the medication. Ms. Carter told Complainant that it was possible that J.S. would benefit from receiving the medication from a nurse with whom she had a therapeutic relationship. Complainant told Ms. Carter that she would see that the medication was administered.

66. Complainant did not administer the medication. Instead, Complainant asked the nurse supervisor for the evening shift, Ruth Schaffer, to provide J.S. with the injection. Ms. Schaffer administered the medication to J.S.

67. Ms. Carter and Complainant talked later that day about the incident. During that discussion, Complainant complained to Ms. Carter that the team did not practice the Recovery

model of care. She asked Ms. Carter why team members were not being disciplined for the way they spoke to patients. She asked Ms. Carter why she was being singled out because of what she believed about medications.

Complainant's Interaction with J.S.'s Discharge Plan:

68. During the summer of 2012, Complainant was also assigned to the treatment team who was planning J.S.'s release in a discharge plan. The release of a patient is a multiple-step process requiring that Ft. Logan create a discharge plan meeting the requirements of the local Mental Health Center who will be providing the community support for the patient.

69. J.S. had been evaluated on an independent living scale that measures cognitive abilities. The result of that evaluation was that J.S. was not found to be ready for independent living. The treatment team's first proposal was that J.S. move to a locked-ward nursing home. After consultation, that plan was modified to permit J.S. to move to an unlocked nursing home with a move into assisted living once J.S. was ready for such a move.

70. J.S. had been complaining that she wanted to learn to cook and clean so she could live on her own in an apartment, rather than live in a nursing home or in assisted living.

71. Complainant went to a Colorado disability organization website and found some cooking classes designed for individuals with severe mental disabilities. Complainant provided this information to J.S. without asking the treatment team how it might fit within the discharge plan for J.S.

72. J.S. was delighted with the information. It encouraged her to think that she could be living independently in her own apartment.

73. The Team 3 lead clinical worker, April O'Dell, objected that Complainant was proposing activities to a patient that were contrary to the treatment plan being developed for J.S. Ms. O'Dell complained about Complainant's actions to Ms. Kehiayan.

74. Complainant believed that J.S. had a right to the information about the cooking class and that trying to keep information from her violated J.S.'s rights.

August 8, 2012 meeting with Ms. Kehiayan:

75. On August 7, 2012, Ms. Kehiayan emailed Complainant and asked to meet with her about the August 1, 2012 Recovery Committee meeting. Complainant and Ms. Kehiayan arranged to meet the next day, August 8, 2012.

76. During the meeting on August 8, Ms. Kehiayan told Complainant that Complainant appeared to be frustrated with the way that Ft. Logan was progressing in implementing the Recovery model of treatment. Ms. Kehiayan told Complainant that she had much to offer the Recovery Committee, but that her contributions became lost when her behavior and tone in the meeting were disrespectful to the group. Ms. Kehiayan told Complainant that Complainant had been critical of the WRAP project without knowing, or asking, what had been done so far, such as the trainings and meetings supported by the committee.

77. Complainant told Ms. Kehiayan that she had done a great deal of reading about WRAP, taken an online course, and had a much better understanding of WRAP than anyone on the committee.

78. Ms. Kehiayan asked Complainant what she thought would be helpful to change the culture at Ft. Logan. Complainant replied that she believed that it required that all of the staff be brought into a room and told they need to practice differently and that they needed to use Recovery Principles. Ms. Kehiayan told Complainant that culture change was not that easy to accomplish.

79. During the August 8, 2012 meeting, Complainant told Ms. Kehiayan that she had seen social workers fold back the treatment form where the patient was to sign that he or she had seen the treatment plan, tell the patient that it was an attendance sheet, and have the patient sign the form. Complainant also told Ms. Kehiayan that she did not believe that the treatment teams were designing individualized treatment plans for patients.

80. At the time of her meeting with Ms. Kehiayan, Complainant was aware that Ft. Logan had recently been the subject of an audit in which improvements of the treatment plans were required of the facility. Ft. Logan treatment plan staff, including Complainant, signed off on an agreement in May of 2012 that stated:

> By signing this form, I acknowledge that I am aware that all objectives in the Treatment/Recovery Plan must be reviewed, discontinued and/or amended on an ongoing basis. Additionally, all objectives must be discontinued if they have not been met within six months, and a new objective written into the treatment plan is indicated.

81. Complainant told Ms. Kehiayan that she had seen staff not respecting patients. Ms. Kehiayan told Complainant that a lack of respect would not be tolerated and asked Complainant for incidents that she had witnessed. Complainant did not offer any examples. Complainant additionally told Ms. Kehiayan that there were not enough activities being planned for patients.

August 14, 2012 Meeting with Ms. Carter:

82. Complainant met with Ms. Carter on or about August 14, 2012, because Ms. Carter had learned that Complainant had not administered the medication to J.S. on August 3, 2012, but had given the job to Ms. Schaffer. Ms. Carter considered this to be a violation of her directive to Complainant to provide J.S. with the prescribed medications.

83. Complainant confirmed for Ms. Carter that she had not consulted with Ms. Bailey prior to deciding she would not administer the medication to J.S. because she knew that Ms. Bailey would want her to give the medication.

84. During this meeting, Complainant informed Ms. Carter of many of the same allegations she had told Ms. Kehiayan on August 8, 2012. She told Ms. Carter than she had seen a lot of abuse to patients, that the staff was not using a Recovery model, that the treatment was not patient driven, and that there were no individualized treatment plans.

Complainant's Complaint of Work Place Violence:

85. On August 16, 2012, Complainant contacted the DHS Work Place Violence Tipline, and had a discussion with the DHS staff member who handles work place violence complaints on August 17, 2012.

86. Complainant filed a written complaint on August 27, 2012, alleging workplace violence in the manner in which Ms. Hampton had yelled at her during the August 3, 2012 incident and the manner in which Ms. Kehiayan had leaned forward in her chair, raised her voice, and pointed her finger at Complainant during the August 8, 2012 meeting with Complainant.

Decision to Place Complainant on Administrative Leave Pending an Investigation:

87. During 2012, Ms. Kehiayan held weekly meetings with the nurse managers who reported to her. In May or June of 2012, Ms. Martinez had expressed some concern to Ms. Kehiayan that Complainant was not adjusting as well as hoped. Ms. Kehiayan knew that Ms. Martinez had used her first discussion with Complainant concerning the administration of emergency medications as a teaching opportunity for Complainant.

88. Ms. Martinez also informed Ms. Kehiayan of her discussion with Complainant after the July 6, 2012 medication issue. Ms. Kehiayan agreed with Ms. Martinez's directive to Complainant that, before she refused to administer a prescribed medication, Complainant had to consult with a supervisor.

89. When Ms. Kehiayan learned of the third medication issue from Ms. Carter, she decided to place Complainant on leave pending an inquiry into the issues raised by Ms. Carter and other staff.

90. Complainant met with Ms. Kehiayan and Ms. Carter on the afternoon of August 17, 2012. Complainant told Ms. Carter and Ms. Kehiayan that she was not comfortable being in a room with them without a witness. Ms. Schaffer, the evening shift nurse supervisor, came into the meeting as a witness.

91. Complainant was placed on paid administrative leave pending Ms. Kehiayan's investigation into information about a failure to follow hospital policies and procedures, standards of practice and standards of care. Complainant was provided with a written notice of administrative leave during the meeting.

Ms. Kehiayan's Inquiry and Deliberation:

92. After Complainant was placed on administrative leave, Ms. Kehiayan conducted her own inquiry into the allegations she had received.

93. Ms. Kehiayan was aware that Complainant's supervisors felt that Complainant could work well with patients, and that she would use a low tone of voice to present a soothing and calm demeanor. Ms. Kehiayan also knew that Complainant's supervisors believed that Complainant was generally providing good medical care to her patients. Her focus during the inquiry was on the specific incidents that had been reported to her.

94. On August 21, 2012, Ms. Kehiayan interviewed Dr. Barnes about the July 6 medication incident involving Complainant. Dr. Barnes reported to Ms. Kehiayan that Complainant

appeared to think that she knew better than the rest of the treatment team what should be occurring, and that she was resistant to discussing her concerns or to exchanging ideas as a member of the team.

95. On August 22, 2012, Ms. Kehiayan met with Dr. David Graybill, another attending psychiatrist for Team 3.

96. Dr. Graybill had worked with Complainant during an extended incident involving patient C.B. in May of 2012. C.B. had been suicidal, and had indicated that she would use clothing to hang herself. C.B. had then retreated into her bedroom. The staff followed her into the bedroom, took her clothing from her, and had restrained her. Dr. Graybill had prescribed emergency medications for C.B. Complainant had administered the prescribed medications after some hesitation. It had been a very difficult and emotional experience, and Complainant had been quite upset by the process. Dr. Graybill did not believe that it was a problem that Complainant had been upset by the issue. He was concerned, however, that Complainant did not seem to be interested in hearing the perspective of some of the more experienced practitioners.

97. Dr. Graybill also expressed concerns to Ms. Kehiayan that Complainant was not open to feedback, even through she was new and still learning. He remarked that it appeared that Complainant was on a crusade to end some injustice, rather than a member of a treatment team.

98. On August 23, 2012, Ms. Kehiayan interviewed April O'Dell, the social work clinical lead for Team 3. Ms. Kehiayan was already aware that Ms. O'Dell had concerns about Complainant participating with the Recovery Committee. Ms. Kehiayan also knew that two other Recovery Committee team members, Larry Marsh and Donna Trowbridge, had also expressed their concerns that Complainant was acting as if she was better than the rest of the committee, and that her attitude made the committee members defensive and uncomfortable.

99. Ms. O'Dell also told Ms. Kehiayan that Complainant provided information to patient J.S. outside of the treatment team plan. Ms. Kehiayan evaluated the problem as one of Complainant not working well with a treatment team approach to patient care. Ms. Kehiayan was concerned that Complainant did not seem to understand that, by providing her information directly to patient J.S. and suggesting that J.S. could indeed live independently as J.S. desired, Complainant was making herself look good to J.S. while making the rest of the team look bad.

100. Ms. Kehiayan also contacted Anna Lewis for information about Complainant's performance. Ms. Lewis was the supervisor of Ft. Logan's Team 2. During the summer of 2012, Complainant had applied to transfer to Team 2 and had interviewed with Ms. Lewis. Ms. Lewis told Ms. Kehiayan that Complainant had been quite upset with her colleagues on Team 3 and had told Ms. Lewis that she didn't agree with the approaches taken by the team members. Ms. Lewis had told Complainant to talk with her supervisor to address her concerns.

101. Ms. Kehiayan prepared three questions for Complainant to answer, and emailed those questions to Complainant on August 23, 2012. The three questions for Complainant were:

> 1) There was a situation on July 6th in which Dr. Barnes was discussing ordering Emergency medications for a patient and you expressed some concerns. Can you tell me about the situation? What were your concerns? Did

you discuss those concerns with Dr. Barnes and/or the staff, and if so, please describe.

2) What is your understanding about 27-65 laws regarding Emergency medications and specifically, please describe the following: Under what conditions can the physician order Emergency Medications? What if any, concerns do you have about implementing and administering Emergency Medications or Involuntary Medications?

3) When you and I met earlier this month, you told me that you were frustrated that we don't provide the skills or skill-building activities that would help patients live more independently in the community. Please describe the situation or situations in which this issue has come up.

102. Complainant sent her responses by email to Ms. Kehiayan on August 24, 2012.

103. In Complainant's August 24, 2013 email, Complainant's response to the first question was that she had an ethical requirement to assess the patient who was to be given the Emergency Medications, and that she had to attempt low-level interventions. After the patient had refused the medications and was doing deep breathing with Ruth Schaffer, Complainant had reported to Dr. Barnes "that the patient was calming and doing deep breathing exercises..." Complainant reported that she was told that the injection would be ordered. "I felt that I had voiced my concerns about the patient being calm and I felt at that point I was being forced into doing something I didn't think was right. I stated that I wasn't going to give the injection. I advised that someone else would have to do the injection if it was going to be done."

104. Complainant discussed her concerns about the injection order:

> In the end, I didn't see the benefit of approaching a calm patient to do a forced injection with the possibility of escalating the patient and ending up in a situation where we had to use restraints. The patient had a history of PTSD and takes medication for nightmares due to her trauma history. The hospital has a goal of delivering trauma informed care that included avoiding retraumatization of the patient and also taking their trauma history into account when considering a course of action. The hospital also has a goal of reducing the use of restraints. In addition I believe that approaching a calm patient and forcibly administering an "emergency" injection against their will when there was no emergency at the time could be considered assault and I could be held liable.

105. In answer to the part of the question concerning whether Complainant had discussed her concerns with Dr. Barnes, Complainant acknowledged that she did not discuss her concerns at the time. She wrote that, "[t]here was a general air of impatience and I felt my concerns were more of a nuisance than anything." Complainant also answered that she had approached Dr. Barnes that evening to "clear the air" in the hopes that they would remain on professional terms.

106. Complainant defined the conditions under which a physician can order Emergency Medication as "[a] situation requiring immediate intervention to avoid imminent danger to the patient or others. We are also obligated to use the least restrictive means possible."

107. In answer to the question about her concerns over implementing and administering Emergency Medications or Involuntary Medications, Complainant wrote, "[i]f a patient is an

immediate imminent danger to themselves or others I will take whatever steps necessary, within my scope of practice, to keep the patient and others safe up to and including administering emergency injections against the patient's will."

108. In answer to the final question about when the lack of skill-building activities has come up for Complainant, Complainant provided a general answer. She answered that patients have told her they want help and staff have said that they desire to be helpful, "yet patients are jaded and staff are burnt out." Complainant argues that individual treatment planning is the solution to this burn out. She says that she feels that person-centered treatment planning where "the patient is the main designer and the staff contribute support, encouragement, and have freedom to come with out of the box ideas feels light years away."

109. As part of her review, Ms. Kehiayan reviewed the records of the incidents in which Complainant had voiced issues regarding her duty to administer an emergency or involuntary medication. She reviewed the records to determine if there was any patient harm created by a failure for a patient to receive prescribed medication. Ms. Kehiayan determined that there had been no patient harmed in these incidents by Complainant's reluctance to administer a prescribed medication.

110. Ms. Kehiayan also recognized that there had been no written order given on July 6 for emergency medications. She considered the issue in that incident to be the manner in which Complainant spoke to Dr. Barnes, and that Complainant's tone and lack of communication at that point represented an inability to problem solve in a stressful situation. Ms. Kehiayan understood that Dr. Barnes was still in the process of weighing the options for J.S. at the time of her interaction with Complainant. Complainant's flat refusal to administer the medication shut down any discussion that could have occurred.

111. Ms. Kehiayan understood that Complainant did not administer the injection to J.S. on August 3 because Complainant had a therapeutic relationship with J.S. and did not want to affect that relationship. Ms. Kehiayan found that this reason was not a legitimate reason to fail to provide a medication.

112. Ms. Kehiayan could see from Complainant's answers to her questions that Complainant was not acknowledging the correct standard for determining whether an emergency exists. Complainant did not take into account that the finding of an emergency could be predicated upon symptoms that have reliably predicted imminent dangerousness in the past. Ms. Kehiayan determined that Complainant's perspective from her emergency room experiences was fueling the difficulty Complainant was experiencing at Ft. Logan with regard to the administration of emergency or involuntary medicines.

113. Ms. Kehiayan asked Ms. Martinez, Ms. Carter, and Ms. Odell for their notes regarding the meetings or conversations they had held with Complainant. She reviewed the notes as part of her review of the issues.

114. Ms. Kehiayan considered that Complainant's actions with regard to patient J.S.'s discharge plan and her provision of information outside of the treatment team to J.S. was an example of Complainant not working collaboratively. Ms. Kehiayan knew that Complainant had been concerned that the treatment plan for J.S. had not included skill-building, and that Complainant provided the cooking class information as a way for J.S. to build skills. Ms. Kehiayan also learned from the testing done as part of the discharge planning process that J.S.'s functional level meant that she was not yet ready for that skill-building step or for

independent living. Additionally, Ms. Kehiayan was concerned that Complainant's way of expressing her opinion as to what should happen with J.S. was to work around the team rather than to work within the team. She was concerned that the result of Complainant's actions was that the treatment team could not, and did not, present a consistent message to J.S.

115. In the end, Ms. Kehiayan decided to terminate Complainant's employment at Ft. Logan because Complainant had not been working collaboratively.

116. Ms. Kehiayan decided to speak with Complainant by phone about her decision, rather than in a face-to-face meeting, because Complainant had been uncomfortable meeting with her in person. At the time of her decision, Ms. Kehiayan knew that Complainant had already told DHS that she was going to file a workplace violence complaint about the August 8 meeting in Ms. Kehiayan's office.

117. Ms. Kehiayan set up a phone call with Complainant for the afternoon of August 30, 2012. During that phone call, Ms. Kehiayan informed Complainant that she was terminating Complainant's employment because she had determined that Complainant was not a good fit at Ft. Logan.

118. Ms. Kehiayan sent Complainant a letter informing her of the termination, and providing Complainant with a statement of her appeal rights and other details. Complainant received the letter on September 1, 2013.

119. At the time of the termination of Complainant's employment, Complainant was still a probationary employee.

120. Complainant filed a timely appeal of the termination of her employment with the Board.

DISCUSSION

I. CLAIMS AND BURDEN OF PROOF

Complainant was a probationary employee at the time of the termination of her employment. Probationary employees are entitled to an opportunity to challenge disciplinary actions, including termination for failing to comply with standards of efficient service or an inability to perform duties, before the Board. *See* C.R.S. § 24-50-125(5)("A probationary employee shall be entitled to all the same rights to hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee").

While Complainant has no right to Board review of a disciplinary action, she is able to bring other types of claims before the Board. *See Williams v. Colorado Department of Corrections*, 926 P.2d 110, 113 (Colo.App. 1996)(holding that a probationary employee could bring a discrimination claim before the Board, but that the Board did not have the jurisdiction to decide if the employee's termination from employment was arbitrary or capricious).

In this case, Complainant has alleged a violation of the State Employee Protection Act (Whistleblower Act).

As the proponent of the order in this matter, Complainant bears the burden of proof on

her Whistleblower Act claim. C.R.S. § 24-4-105(7). *See also Ward v. Industrial Commission*, 699 P.2d 960, 968 (Colo. 1985)(holding that the burden of proof in Whistleblower Act claims follows the burden of proof in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). If Complainant is successful on her claim, Respondent is then provided with an opportunity to prove by a preponderance of the evidence that it would have "reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968.

The Board may reverse or modify Respondent's decision if the action is found to be contrary to law. C.R.S. § 24-50-103(6). In this case, the only question to be decided is whether Complainant's employment was terminated in violation of the Whistleblower Act.

II. HEARING ISSUES

A. Whistleblower Act standards:

The purpose of the State Employee Protection Act (Whistleblower Act), C.R.S. § 24-50.5-101 *et seq.,* set forth in the legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." C.R.S. § 24-50.5-101; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo.App. 1987).

The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward*, 699 P.2d at 966.

In determining whether there has been a violation of the Whistleblower Act, "[i]t must be initially determined whether the claimant's disclosures fell within the protection of the 'whistle-blower' statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant's evidence etablishes that his expression was protected by the 'whistle-blower' statute, then the [reviewing adjudicator] must determine whether [the agency's] evidence established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968 (adopting the procedure in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

B. Complainant presented a case of violation of the Whistleblower Act:

The first question, therefore, is whether Complainant has proven by a preponderance of the evidence that her disclosures "fell within the protection of the whistle-blower statute" and that her disclosures "were a substantial or motivating factor" in the decision to terminate her employment. *Ward*, 699 P.2d at 968.

1. Complainant's showing of protected disclosures:

In order to show that her disclosures fall within the protection of the Whistleblower Act, Complainant must be able to prove that: 1) she made a disclosure of information, as that term is defined in C.R.S. § 24-50-102(2) and applicable caselaw; and 2) that Complainant has made a "good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." C.R.S. § 24-50.5-103(2). Additionally, in order for Complainant's disclosures to be protected, the exemptions from the Act's protections listed at C.R.S. § 24-50.5-103(1)(a) – (1)(c) cannot be applicable to remove the dislcosures from protection.

a) *Did Complainant make one or more disclosures of information to any person?*

(1) Defining the parameters of a "disclosure" -

The Whistleblower Act defines "disclosure of information" as the provision of evidence "regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." C.R.S. § 24-50.5-102(2). "[D]isclosures that do not concern matters in the public interest, or are not of 'public concern', do not invoke this statute." *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007).

First Amendment protections also depend, in part, upon the analysis as to whether statements were of "public concern." First Amendment precedent, therefore, is helpful in understanding the contours of such a requirement. *See Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis).

The Supreme Court has characterized a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)(defining public concern for purposes of First Amendment protection). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690, quoted in *Rankin v. McPherson*, 483 U.S. 378, 385, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987).

The statements also do not need to be made in public in order to warrant a finding that the statements were of public concern. *See Handy-Clay v. City of Memphis, TN*, 695 F.3d 531,544 (6th Cir. 2012).

On the other hand, statements which have "the ring of internal office politics" do not present matters of public concern. *Handy-Clay*, 695 F.3d at 543. "While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." *Gardetto v. Mason*,100 F.3d 803, 812 (10th Cir. 1996)(internal citations and quotation omitted).

Additionally, the disclosure of information may be made to "any person." C.R.S. § 24-50-102(2). Disclosures may be presented in writing or offered orally. *Ward*, 699 P.2d at 967.

(2) *Application to Complainant's statements -*

Complainant's contentions that Ft. Logan staff was not appropriately applying Recovery Model principles in their treatment of patients constituted statements which questioned the quality of the psychiatric treatment services provided by Ft. Logan. These were not statements concerning Complainant's own personnel issues or complaints of internal office politics. As such, these statements would qualify as statements of "public concern" made to "any person."

Complainant made such disclosures in early July 2012 when she complained to Pat Kisner about the lack of Recovery Model treatment at Ft. Logan.

Complainant's discussions with Ms. Kehiayan on August 8, 2012, concerning the lack of an effective WRAP program, inadequacies in treatment plans, and the lack of activity planning for patients also qualify as statements on matters of public concern. Complainant's discussion with Ms. Carter on August 14, 2012, on similar issues also would constitute a disclosure of information. Additionally, Complainant's statements in her August 24, 2012 written response in which she tells Ms. Kehiayan about treatment deficits that she believes exist at Ft. Logan would also constitute a disclosure of information, even though these statements were made in the course of a personnel investigation.

Complainant also made a disclosure of information to the Recovery Committee in her email of July 18 asking for "the real WRAP." She also spoke about the same issue, and the lack of Recovery Method treatment, during the August 1, 2012 Recovery Committee meeting. These statements are matters of public concern and qualify as disclosures of information under the Act.

Several other actions taken by Complainant, however, do not qualify as disclosures of information and are not subject to the protections of the Act.

Complainant's statements on July 6 with regard to her decision not to provide emergency medication cannot be fairly construed as a statement on a matter of public concern, but were merely Complainant's announcement of her personal decision not to provide medications. Additionally, Complainant's conduct in loudly announcing her decision and then not providing the prescribed medication on that date is also not protected by the Whistleblower Act because it was not a disclosure; that is, it was not a "provision of evidence" as required under the Whistleblower Act for a disclosure. C.R.S. § 24-50.5-102(2).

Complainant's actions and statements on August 3 concerning her decision not to upset J.S. by providing a prescribed medication are also not protected by the Whistleblower Act for similar reasons.

Finally, Complainant's statements to J.S. concerning the availability of cooking classes, and her actions in not informing the treatment team of that information and allowing the treatment team to control the decision whether to offer such information to J.S. are also not protected by the Whistleblower Act for similar reasons.

b) *Did Complainant provide her disclosure to an appropriate person?*

The Whistleblower Act requires that an employee who wishes to disclose information must "make a good faith effort to provide to his supervisor or appointing authority, or member of the general assembly the information to be disclosed prior to the time of its disclosure." C.R.S. § 24-50.5-103(2). This requirement, as well as the requirement for a disclosure of information, has been met when an employee discloses information meeting the test for a disclosure of information under the Act to his or her supervisor, and does not necessarily require two separate disclosures of information. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D.Colo. 2004).

It was undisputed at hearing that Complainant had complained to her second-level supervisor, Ms. Carter, to the Interim Director of Ft. Logan, and to (or in the presence of) her appointing authority, Ms. Kehiayan. These disclosures, therefore, have been provided to her "supervisor or appointing authority or member of the general assembly." C.R.S. § 24-50.5-

103(2). *See also* C.R.S. § 24-50.5-102(5)(defining "supervisor" to include "any ... department head, division head, or other person who supervises or is responsible for the work of one or more employees"). Therefore, Complainant's disclosures of information meet this requirement. *See Gansert*, 348 F. Supp.2d at 1226-28.

c) *Do any of the exemptions from protection apply?*

The Whistleblower Act also withholds the protection of the Act under three circumstances.

> This section shall not apply to:
>
> (a) An employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof;
> (b) An employee who discloses information from public records which are closed to public inspection pursuant to section 24-72-204;
> (c) An employee who discloses information which is confidential under any other provision of law.

C.R.S. § 24-50.5-103(1).

Complainant's disclosures in this case have to do with her evaluation of the quality of care provided by Ft. Logan, and the deficits that she had seen in applying the treatment standards that Ft. Logan had said it was adopting. There was no indication in the record that Complainant's statements were false or were made with disregard for the truth or falsity. There is, additionally, no indication that Complainant's disclosures violated the confidentiality requirements in C.R.S. § 24-72-204, or were otherwise confidential.

As a result, the exemptions from protection of the Whistleblower Act do not apply in this case.

2. Complainant's showing that disclosures were a substantial or motivating factor in the imposition of discipline:

a) *Was Complainant the subject of discipline?*

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." C.R.S. § 24-50.5-103(1). "Disciplinary action" is construed broadly in the Act, and includes "any direct or indirect form of discipline or penalty" including termination of employment, withholding of work, unsatisfactory or below standard performance evaluations or the "threat of any such discipline or penalty." C.R.S. § 24-50.5-102(1).

Termination of employment is explicitly listed as an example of a disciplinary action under the Whistleblower Act. Complainant has clearly met this portion of the test for Whistleblower Act protection.

b) *Did Complainant show that her disclosures were a substantial or motivating factor in the imposition of discipline?*

Evidence of a causal connection between a disclosure and the imposition of discipline

requires proof that the person imposing disciplinary action knew of the employee's disclosure of information. See *Maestas v. Segura*, 416 F.3d 1182, 1189 (10th Cir. 2005).

Beyond that threshold factual issue, the question of causation may also be established through temporal proximity, or temporal proximity combined with other evidence such as opposition to the disclosure of information:

> Adverse action in close proximity to protected speech may warrant an inference of retaliatory motive. But temporal proximity is insufficient, without more, to establish such speech as a substantial motivating factor in an adverse employment decision. An employer's knowledge of the protected speech, together with close temporal proximity between the speech and challenged action, may be sufficiently probative of causation to withstand summary judgment. Other evidence of causation may include evidence that the employer expressed opposition to the employee's speech, or evidence that the speech implicated the employer in serious misconduct or wrongdoing. On the other hand, evidence such as a long delay between the employee's speech and challenged conduct, or evidence of intervening events, tend to undermine any inference of retaliatory motive and weaken the causal link.

Maestas, 416 F.3d at 1189.

In this case, Complainant was called into a meeting to discuss her statements during the August 1, 2012 Recovery Committee meeting, and she was faulted by Ms. Kehiayan for her attitude during that meeting. Complainant then made additional disclosures concerning her objections to the quality of care offered by Ft. Logan on August 14 and 24, 2012. The evidence was also clear that Complainant was terminated on August 30, 2012, for not working collaboratively. Complainant was able to show at hearing that her complaints about the quality of the care offered at Ft. Logan were a significant part of the reason that the staff at Ft. Logan and her appointing authority thought that she was not working collaboratively. Complainant has, therefore, demonstrated that her objections and complaints about the quality of the treatment provided by Ft. Logan was a substantial or motivating factor in her termination.

As a result, Complainant has met her burden to demonstrate that there was a violation of the Whistleblower Act in this matter.

C. Respondent has proven that it would have terminated Complainant's employment even in the absence of Complainant's protected disclosures:

The inquiry does not end with Complainant's showing, however. As the U.S. Supreme Court described in *Mt. Healthy*, there is good cause to continue the inquiry to determine whether the result would have been the same even without the protected disclosures:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been

> reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not be able, by engaging in such conduct, to prevent his employer from reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 285-86, 97 S.Ct. 568.

The same rationale applies to Whistleblower Act protections. *Taylor v. Regents of the University of Colorado*, 179 P.2d 246, 248-49 (Colo.App. 2007).

The final question, therefore, is whether Respondent has proven that Complainant would have been terminated from her probationary employment even in the absence of her protected disclosures.

The evidence at hearing provided ample support for the proposition that Complainant was struggling with several important aspects of her job.

One aspect was the need for the medication nurse to be willing to follow the orders of a prescribing psychiatrist, under the parameters of Ft. Logan policies. The administration of emergency or involuntary medications is a critical, and often difficult, part of a nurse's job at Ft. Logan. It was clear from the testimony that Complainant did not believe that emergency mediations should be given if the patient was not physically out of control at the moment of the administration of the medication. This was not the lawful standard for such medications, however, and not the standard that Ft. Logan psychiatrists were using. As a result, Complainant created a problem for herself, Dr. Barnes, and the nursing staff by refusing Dr. Barnes' verbal emergency medication order on July 6, 2012. The testimony at hearing also demonstrated that Complainant did not want to run the risk of interfering with her good relationship with patient J.S. through the administration of an unwelcome medication on August 3, 2012. This stance was also contrary to Ft. Logan policies on the administration of emergency or involuntary medications. Complainant, in fact, had been explicitly told by Ms. Martinez on July 11, 2012, that she could not refuse to administer a medication because she thought the administration might escalate the patient. During this incident, Complainant also demonstrated that she was willing to ignore a direct instruction from her supervisor to provide the medication. These types of issues alone would warrant the termination of a probationary nurse.

Complainant was also not working well as a member of a treatment team for J.S., and she showed no acknowledgment that her actions in providing J.S. with information undermined the treatment team and J.S.'s treatment.

Finally, the record established that Complainant has been willing to complain about the treatment provided by Team 3 during an interview with the supervisor of Team 2. Complainant had also left the impression on several occasions with multiple members of the Ft. Logan staff that she had no intention of taking the perspectives of others into account in her statements and manner in which she presented her arguments.

When all of these factors are taken into account, it is clear that Respondent has successfully proven that Ms. Kehiayan's decision would have been the same even in the absence of Complainant's protected disclosures of information.

CONCLUSIONS OF LAW

1. Respondent's termination of Complainant's employement was not a violation of the State Employee Protection Act.

ORDER

The termination of Complainant's employment is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 12th day of September, 2013 at Denver, Colorado.

[redacted]

Denise DeForest
Senior Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 13 day of September, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Renee Ryan
[redacted]

Joseph Haughain
[redacted]

[redacted]

Andrea Woods

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 electronic record on appeal in this case is $5.00. 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.