STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2016G011(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA BLOEM,
Complainant,

v.

DEPARTMENT OF HEALTH CARE POLICY & FINANCING,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on June 23, 2017, and the evidentiary hearing on December 4-8, 2017, and January 8-12, 2018, in this matter at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. The parties gave closing arguments on January 24, 2018, and the record was closed that same day. Throughout the evidentiary hearing, Complainant represented herself. Respondent was represented by Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness was Paul Ritzma, Complainant's Appointing Authority.

MATTERS APPEALED

Complainant, a certified employee, appeals Respondent's termination of her employment on January 4, 2017. Complainant argues that this termination decision was arbitrary and capricious, was not properly based on the factors enumerated in Board Rule 6-9, and was contrary to rule and law. Complainant also alleges that she was subjected to disability discrimination and retaliation.

Prior to the termination of Complainant's employment, Complainant filed the following five Petitions for Review:

(1) Petition for Review of Respondent's July 8, 2015 denial of a grievance concerning her requested restructuring of her work assignments, alleging disability discrimination, retaliation and a failure to follow grievance procedures.
(2) Petition for Review of Respondent's September 18, 2015 "Corrective Action Plan," alleging disability discrimination, retaliation and a failure to follow grievance procedures.
(3) Petition for Review of Respondent's denial of a grievance concerning Respondent's September 18, 2015 "Corrective Action Plan," alleging disability discrimination, retaliation and a failure to follow grievance procedures.
(4) Petition for Review of Respondent's denial of four grievances concerning (a) her March 31, 2016 Performance Evaluation; (b) improper disclosure of confidential medical information to her supervisor, failure to properly inform her supervisor of accommodations and restrictions, and delays in processing her request for reasonable accommodations; (c) failure of her performance plan to meet agency Performance Management Plan requirements; and (d) imposition of unreasonable assignment requirements and discriminatory treatment by her supervisor. Again, this Petition

alleged disability discrimination, retaliation and a failure to follow grievance procedures.

(5) Petition for Review of Respondent's denial of a grievance concerning Respondent's July 28, 2016 written warnings, alleging disability discrimination, retaliation and a failure to follow grievance procedures.

These five Petitions for Review were consolidated with Complainant's appeal of Respondent's termination of her employment.

Complainant seeks rescission of the disciplinary termination, corrective actions and written warnings administered by Respondent; reinstatement to her prior position; an award of back pay and benefits; reimbursement of attorney fees and costs; and an order that Respondent cease and desist from engaging in discriminatory and retaliatory acts.

Respondent denies all allegations of discrimination and retaliation, and contends that it properly reviewed and responded to Complainant's grievances pursuant to Board Rules. Respondent argues that its decision to terminate Complainant's employment was a proper progressive disciplinary action based on the factors set forth in Board Rule 6-9. Respondent seeks affirmance of its decision to terminate Complainant's employment; denial of Complainant's claims of discrimination, retaliation and failure to follow the grievance procedure; denial of all relief requested by Complainant, and dismissal of Complainant's appeal with prejudice.

The following exhibits were admitted into evidence: Complainant's Exhibits F, I, J, L, N, O, Z (pp. 15-24, 31-27, 121-127), EE (pp. 4-5), GG (pp. 10-26, 65-66, 68, 81-83), NN, PP, QQ, TT, WW, XX, YY, AAA – III, LLL (pp. 4-11), RRR, SSS (pp. 1-26, 28-45), ZZZ, AAAA-EEEE, and Respondent's Exhibits 1-15, 17-23, 29-39, 45-47, 49, 56, 59, 63, 65, 67, 73, 74, 76, 78, 83, 84, 89-92, 99, 100, 103-105, 112-114, 116, 121, 129-131, 134, 137, 140, 144, 146-148, 150, 151, 155, 157, 158, 164, 165, 167, 170, 176, 177, 208, 219, 229, 231-233, 235, 238, 242, 246, 250, 252-254, 256, 257, 261, 262. In addition, the following exhibits were admitted into evidence and, pursuant to the Protective Order issued October 13, 2017, placed in the record under seal: Complainant's Exhibits C, D, U, V, and Respondent's Exhibits 24-28, 85, 109, 115, 212, 247, 251, 255. The following exhibits were offered but not admitted into evidence: Complainant's Exhibits K, Z (pp. 1-14, 25-30), KKK, YYY, GGGG, IIII, and Respondent's Exhibits 101,102, 258.

For the reasons discussed below, Respondent's decision to discipline Complainant is **affirmed.** Because the Rule 6-10 process was flawed and deprived Complainant of a full and fair review of the factors enumerated in Board Rule 6-9, Complainant is awarded back pay, with interest, and restoration of benefits through January 24, 2018, the date the evidentiary record in this case was closed.

ISSUES

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

2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of reasonable alternatives;

4. Whether Respondent discriminated against Complainant on the basis of disability;

5. Whether Respondent retaliated against Complainant for engaging in protected activity;

6. Whether Respondent failed to follow applicable grievance procedures, and

7. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant was a certified state employee with the Colorado Department of Health Care Policy and Financing (HCPF or Respondent).

2. Complainant worked for HCPF from January 2, 2001 through January 4, 2017. (Stipulated Fact[1])

3. Complainant was a General Professional IV (changed to Administrator IV) from 2006 through January 4, 2017. (Stipulated Fact)

4. At all relevant times herein, Sue Birch was Respondent's Executive Director.

5. At all relevant times herein, Tom Massey was Respondent's Deputy Executive Director.

6. At all relevant times herein, Joi Simpson was Respondent's Human Resources Director.

7. From April or May 2009 through April 2016, Robert Douglas was Legal Director of HCPF and Complainant's immediate supervisor.

8. In May 2016, Paul Ritzma replaced Mr. Douglas as Respondent's Legal Division Director, and continued to serve in that position through the dates of the evidentiary hearing in this case.

9. Effective May 8, 2016, Mr. Massey delegated appointing authority powers to Mr. Ritzma for Legal Division employees, including Complainant.

Respondent's Accommodations of Complainant's Disability

10. Complainant has a chronic disabling condition. In January 2011, Respondent agreed to the following accommodations:

> (a) The majority of [Complainant's] job can be performed at home without causing significant difficulty or expenses to the department.
> (b) By 10 a.m. of each work day, [Complainant] shall report to her [supervisor] ... whether she will be working from home or will be requesting sick leave if she is not physically present at her workspace.
> (c) [Complainant] is expected to attend in-person monthly division meetings

[1] The parties stipulated to a number of facts, which are identified with parenthetical notes.

and weekly 1:1s with her [supervisor]. During her weekly 1:1s with her [supervisor] ... [Complainant] is required to provide [her supervisor] with a status report on all of her projects and activities performed at home that relate to her performance of her job duties and responsibilities.

(d) For any scheduled meetings that require [Complainant's] physical presence related to her job duties and responsibilities, [Complainant] is required to attend in-person or sufficiently give enough advance notice to participants of her need to reschedule the meetings with internal and external stakeholders.

(e) All materials for any meetings that require [Complainant's] physical presence shall be submitted to and cleared by her [supervisor] one week in advance of the scheduled meeting.

11. In April 2015, Respondent agreed to Complainant's request that she be permitted to attend department meetings via teleconference, "with the expectation that [Complainant] give prior notice that she would like to attend a conference via teleconference if the meeting is not already set up to attend in this manner."

12. In May 2015, at Complainant's request, Mr. Douglas increased his meeting time with Complainant from half an hour to one hour, to allow her sufficient time to communicate clearly.

13. In June 2015, Respondent agreed to Complainant's request for a Dell tablet and accessories, as she was no longer able to use the lap top previously provided by Respondent. In addition, Mr. Douglas agreed to increase his weekly meetings with Complainant from half an hour to one hour, to allow her sufficient time to communicate clearly.

14. In June 2016, Mr. Ritzma agreed to Complainant's request that mandatory in-person meetings be scheduled after 10 a.m.

15. All of the above accommodations remained in place through the termination of Complainant's employment in January 2017.

Complainant's Employment History

16. Prior to March 2012, Complainant worked in Respondent's Medical Assistance Office. From January 2, 2001 through March 31, 2006, Complainant was rated as a "Peak Performer," the highest performance rating available. From April 1, 2006 through March 31, 2007, Complainant was rated "Above Standard." From April 1, 2007 through March 31, 2012, Complainant received consistently "Successful" performance ratings.

17. In March 2012, Complainant moved to the Legal Division and started working under Mr. Douglas. From April 1, 2012 through March 31, 2014, Complainant continued to receive "Successful" performance ratings.

18. When she began working under Mr. Douglas, Complainant was responsible for the "population spectrum program." This program involved serving as a liaison with different community groups, and developing and delivering training to Respondent's employees to help improve delivery of benefits and other services to persons from diverse populations, including those who had mobility issues.

19. Mr. Douglas subsequently asked Complainant to work with him to bring HCPF into compliance with ADA requirements concerning delivery of its services to disabled persons. Because a substantial percentage of HCPF's budget comes from federal grants, HCPF has to comply with federal regulations. Mr. Douglas also wanted to work with HCPF's agency partners, including the Department of Human Services (DHS) and the Department of Public Health and Environment (DPHE), to bring them into compliance with federal regulations.

20. Initially, Complainant enthusiastically joined Mr. Douglas in this endeavor. She worked with the federal Office of Civil Rights (OCR) to develop trainings for HCPF that would meet federal regulations. Mr. Douglas put Complainant's population spectrum trainings on hold.

21. In addition to developing ADA training for its employees, OCR advised Respondent to identify a person to investigate ADA complaints by the public concerning HCPF's delivery of services, and to make decisions and recommendations concerning such complaints.

22. In January 2014, Mr. Douglas, with Complainant's assistance, hired Emilie Esquivel to perform these duties as its ADA Coordinator, and to take over the ADA training developed by Complainant.

23. Mr. Douglas and Complainant served as Ms. Esquivel's mentors. Initially, Ms. Esquivel assisted Complainant with ADA trainings. Complainant believed that she was informally serving as Ms. Esquivel's supervisor.

24. Mr. Douglas asked Complainant to work on strategies for bringing HCPF into compliance with federal regulations concerning accessible websites and electronic documents. A team of employee representatives from each division was assembled to be trained by, and to work with, Complainant on this project.

25. From April 1, 2014 through March 31, 2015, Mr. Douglas gave Complainant an "Exceptional" performance rating. He commented:

> [Complainant's] knowledge of the ADA, Sections 504 and 508 of the federal anti-discrimination statute coupled with her highly sophisticated computer skills makes her the most formidable authority on disability law in the Dept. Her first phase implementation of our ADA SOP, her trainings to Dept staff, and her ability to converse toe-to-toe with OCR subject matter experts has given the Department much needed credibility with our federal oversight entity – OCR. Due mostly to [Complainant's] efforts the OCR has allowed the Department to achieve compliance in the face of certain ADA accommodation compliants [sic] that could have easily resulted in the Department facing more serious and punative [sic] action. [Complainant] is an excellent teacher and I have learned a tremendous amount of ADA law and application from my one on ones with her. The achievement is not just in knowing the "law," but in [Complainant's] grasp of how to create an ADA compliance structure within the Department. There is much left to accomplish, but I am struck by the outstanding progress achieved to date.

<u>The 2015 ADA Coordinator Controversy (Complainant's Petition #1)</u>

26. In December 2014, Ms. Esquivel went on maternity leave. Mr. Douglas asked Complainant to temporarily cover the ADA Coordinator's duties until Ms. Esquivel returned.

27. When Ms. Esquivel returned from maternity leave in April 2015, Mr. Douglas

wanted her to take over the ADA trainings, so that Complainant could focus on working with HCPF's sister agencies to bring them into ADA compliance. He asked Complainant to begin by reviewing other agencies' websites to identify accessibility issues. He also asked Complainant to return to the population spectrum trainings she previously provided.

28. In the spring of 2015, Ms. Birch asked Mr. Douglas for a budget analysis of Legal Division work for fiscal year 2015-2016.

29. Sometime in May 2015, Complainant submitted a proposed budget request to Mr. Douglas concerning her ADA compliance work. Mr. Douglas did not approve Complainant's proposed budget request.

30. Complainant was upset by Mr. Douglas' rejection of her proposed budget request, interpreting it as a devaluation and rejection of her "loyalty, expertise and honest hard work." On May 29, 2015, Complainant initiated a grievance concerning Mr. Douglas' decision regarding her budget request.

31. Complainant asked Ms. Esquivel to join her grievance against Mr. Douglas. Ms. Esquivel refused.

32. On June 1, 2015, Complainant met with Mr. Douglas to discuss her grievance on her budget proposal. On June 2, 2015, Complainant submitted a revised proposal to reorganize the ADA work, and create a civil rights unit, in HCPF. In this proposal, Complainant states that her productivity "could substantially increase if I had staff that I could supervise and assign work to," including Ms. Esquivel and an administrative "intern."

33. On June 2, 2015, Complainant also sent Mr. Douglas a "Confidential Memorandum" describing "issues" she had with Ms. Esquivel's "productivity." This Memorandum alleged that Ms. Esquivel was not working a full-time schedule, and was spending too much time on personal matters during "scheduled time," spending too much time "socializing," and taking too long to perform simple tasks.

34. Mr. Douglas met with Complainant on June 5, 2015, to further discuss her grievance, her proposal and her concerns regarding Ms. Esquivel. He informed Complainant that she was not Ms. Esquivel's supervisor, rejected Complainant's proposal and denied her grievance.

35. Complainant was upset by Mr. Douglas' response. Shortly after their June 5, 2015 meeting, Complainant removed Mr. Douglas' and Ms. Esquivel's access to ADA training materials on the department intranet. Because Ms. Esquivel no longer had access to these training materials, a June 11, 2015 ADA training session for Respondent's employees was cancelled.

36. Mr. Douglas instructed Complainant to restore access to the ADA training materials. Complainant refused to do so. Over the next few months, Mr. Douglas repeated his requests to Complainant to restore access to these materials. Complainant refused to do so.

37. Because Complainant refused to restore access to the ADA training materials, the missing materials had to be recreated, which took about three months. During this time, Ms. Esquivel was unable to provide ADA training to Respondent's employees that was required by the federal government.

38. Complainant appealed her grievance concerning her rejected proposal concerning restructuring of her ADA work to the second step, requesting that the ADA Coordinator work be assigned to her. On July 7, 2015, Mr. Massey discussed Complainant's grievance with her. He also interviewed Mr. Douglas and Ms. Esquivel.

39. On July 8, 2015, Mr. Massey denied Complainant's grievance. He informed Complainant that there was no evidence supporting her claim that she was acting as Ms. Esquivel's supervisor and that evaluation of Ms. Esquivel's performance was Mr. Douglas' responsibility. Mr. Massey confirmed that Ms. Esquivel was hired to be the ADA Coordinator, and it was not appropriate to transfer her duties to Complainant.

40. Complainant filed a timely petition for review of Mr. Massey's Step II grievance decision.

<u>September 18, 2015 Midyear Performance Evaluation and "Corrective Action Plan" (Petitions # 2 and 3)</u>

41. Following her June 5, 2015 meeting with Mr. Douglas, Complainant stopped coming into the office for meetings and avoided Mr. Douglas' telephone calls. Mr. Douglas discussed this situation with Ms. Birch. Ms. Birch found Complainant's actions were 'very inappropriate" and "verged on insubordination," and she was concerned about how Complainant was spending her time during work hours. However, she urged Mr. Douglas to be compassionate about Complainant's disabling condition.

42. Mr. Douglas completed a Midyear Evaluation of Complainant's performance and shared it with her in a telephone conversation on September 18, 2015.

43. After talking with Complainant on September 18, 2015, Mr. Douglas sent Complainant an email with the subject "Corrective Action Plan." In this email, Mr. Douglas stated that Complainant had not been honest about, and refused to take responsibility for, removing ADA training materials from the department intranet. Mr. Douglas warned Complainant against taking "actions to thwart the operation of Legal Division programs and trainings." Mr. Douglas also stated that Complainant repeatedly refused to sign her performance evaluation and failed to move forward with any of her assigned projects since May 2015. He concluded: "I actually do not understand from our many conversations what exactly you have been working on for these past 4 months."

44. In his September 18th email, Mr. Douglas instructed Complainant to: (1) execute her performance plan by 5:00 p.m. that day; (2) keep a written log describing the time she puts in on the assignments listed in her performance plan, and provide that log to Mr. Douglas by 5:00 p.m. on Friday each week; and (3) request sick leave when she is unable to work due to illness, and enter her sick leave in the timekeeping system either before or on the day she takes such leave.

45. Complainant grieved Mr. Douglas' September 18th "Corrective Action Plan," and filed a second petition for review concerning this "Plan."

46. After attempting to meet with Complainant to discuss her grievance at the first step on September 24 and 25, and October 8, 9, 15 and 16, 2015, Mr. Douglas finally met with Complainant on October 29, 2015. Mr. Douglas denied Complainant's grievance and Complainant appealed to the second step.

47. On December 4, 2015, Complainant went on extended leave.

48. On December 11, 2015, Mr. Massey denied Complainant's grievance and instructed her to comply with Mr. Douglas' directives. He explained that Mr. Douglas had appropriately changed Complainant's job duties and that, as her supervisor, it was within his authority to make those changes. Mr. Massey further stated:

> Mr. Douglas has provided evidence that you removed access to the ADA Coordinator and himself that resulted in a disruption to Department trainings for two months. I find that under those circumstances Mr. Douglas appropriately spelled out in his September 18 email directive what you needed to do as part of the expectations in the performance of your job.
>
> As a side note, you are required to follow directives that you receive from your supervisor, including providing work products in the timeframes that have been requested. You may not always agree with the direction but your supervisor has the authority to determine what is appropriate work and deadlines for work product.

49. Complainant timely filed a third petition for review of this grievance decision.

March 31, 2016 Annual Performance Evaluation and Complainant's Return to Work in June 2016 (Complainant's Petition # 4)

50. On March 31, 2016, Mr. Douglas completed an evaluation of Complainant's performance for the prior year, up to Complainant's departure on leave. Mr. Douglas gave Complainant an overall rating of "1" or "Needs Improvement," based on the following specific job duty and core competency assessments:

> Job Duty 1 - Goal: Create and hold trainings for Department staff designed to improve sensitivity and improve communication skills to achieve the goals of the Population Spectrum Program.
>
> Supervisor Comments: Although [Complainant] was requested to develop and implement these trainings she failed to follow through with this job duty.
>
> Job Duty 2 - Goal: Based on research and communications from other ADA Title II agencies in the state executive branch, form an assessment of the status of executive branch ADA Section 504 compliance.
>
> Supervisor Comments: [Complainant] refused to perform this job duty and made no effort to work with me or the other executive branch agencies to explore the formation of a multi-department workgroup for ADA compliance.
>
> Core Competency – Communication: [Complainant] repeatedly thwarted my attempts to meet with her to discuss her job performance at midyear. She was permitted to work from home but was often not answering her telephone or available to discuss her performance issues with me despite repeated efforts.
>
> Core Competency – Interpersonal Relations: I do not feel [Complainant] took

responsibility for her words or actions because of the incident where she admitted to me that she reset her one-drive shared account to prevent access by me and the ADA Coordinator as outlined in my midyear evaluation.

Core Competency – Customer Service: I am aware of one incident where it was reported to me that a sister-state agency asked for [Complainant's] assistance in evaluating their ADA/504 policies and [Complainant] refused.

Core Competency – Accountability: [Complainant's] job performance failed to display loyalty, honesty, integrity an [sic] support regarding her work and section objectives as outlined in her midyear evaluation.

Core Competency – Job Knowledge: [Complainant] ... failed to provide consistent, timely, high quality work.

51. In May 2016, Mr. Ritzma replaced Mr. Douglas as HCPF's Legal Director.

52. On June 6, 2016, Complainant returned to work on a reduced schedule of four hours per day. She requested the following additional accommodations: "Modification of leave policies to allow for liberal use of leave, annual leave, sick leave, paid leave or unpaid leave, with or without FMLA protections, when needed to manage [her] condition and continue to perform the duties of [her] position" and "Modification to leave policies to allow [her] to make up time in place of taking leave."

53. On June 22, 2016, Complainant filed a grievance protesting Mr. Douglas' March 2016 performance evaluation.

54. As Complainant's new supervisor, Mr. Ritzma was informed of Complainant's work restrictions and accommodations upon her return to work. He prepared a "Temporary Work from Home Agreement," which Complainant signed on June 15, 2016. In this Agreement, Mr. Ritzma confirmed Complainant's previously approved accommodation that "the essential functions of [her] position may be completed from an alternative work space," and advised Complainant of the "following expectations":

- Working from home requires a timely response to all requests from their manager and is expected to respond within 30 minutes of receipt of the communication unless they are unavailable as documented through their calendar. The employee's calendar is required to be up to date so the manager knows when they are available for meetings and to respond to communications.

- Acknowledge all other emails within at least 48 hours.

- Meet all outlined deadlines or communicate with manager proactively if the deadline will not be met.

- Be accessible by phone, email, and Skype during working hours.

- Account for time on a daily basis in the HR system (this includes actual work time and 4 hours per day of unpaid leave).

55. On June 21, 2016, Ms. Simpson informed Complainant that her request for modification of leave policies was denied, explaining that Respondent was "not at liberty to change State policy on leave nor can the Department grant unlimited leave paid or unpaid."

56. On July 1, 2016, Complainant filed a grievance alleging improper disclosure of confidential information concerning Complainant's reasonable accommodation request to Mr. Ritzma, failure to properly inform Mr. Ritzma of her accommodations and restrictions, and delays in processing her request for reasonable accommodation.

57. On July 5, 2016, Complainant returned to a regular eight hour per day schedule. That same day, Complainant filed a grievance arguing that a performance plan issued by her new supervisor, Mr. Ritzma, did not conform to HCPF Performance Management Plan requirements.

58. On July 8, 2016, Complainant filed a grievance alleging that Mr. Ritzma imposed unreasonable requirements on her in violation of her accommodations, and that Mr. Ritzma subjected her to discriminatory treatment.

59. In early August 2016, Mr. Massey reviewed Complainant's four grievances at the first step of the grievance process: (1) alleged inaccuracies in Mr. Douglas's March 2016 performance evaluation, (2) alleged communication of confidential medical information to Mr. Ritzma, (3) Mr. Ritzma's alleged creation of a performance plan that did not conform to state or agency policies, and (4) alleged unreasonable work assignments from Mr. Ritzma.

60. Mr. Massey allowed Complainant time to produce evidence of work she performed from April 1, 2015 through December 4, 2015, when she went on extended leave. Despite providing Complainant several extensions of time, Mr. Massey never received this evidence from Complainant. He denied Complainant's grievance concerning Mr. Douglas's March 2016 performance evaluation.

61. Mr. Massey determined that there was no communication of confidential medical information to Mr. Ritzma. Instead, Ms. Simpson informed Mr. Ritzma of Complainant's accommodations, which was essential information for a supervisor. Therefore, Mr. Massey denied this grievance.

62. Mr. Massey asked Mr. Ritzma to meet with Complainant to revise her performance plan to satisfy Complainant's request for clearly defined goals and expectations. Mr. Massey confirmed that these meetings were ongoing.

63. Mr. Massey reviewed relevant email exchanges between Complainant and Mr. Ritzma. He determined that Mr. Ritzma made appropriate assignments and was not discourteous to Complainant. Therefore, Mr. Massey denied this grievance.

64. Complainant appealed Mr. Massey's first step grievance decisions.

65. Because Mr. Ritzma was unable to provide a performance plan that satisfied Complainant, he decided to reinstate her prior performance plan created by Mr. Douglas.

66. On August 19, 2016, Ms. Birch met with Complainant to discuss her four grievances described above. Ms. Birch's meeting with Complainant was rescheduled a number of times to accommodate Complainant. When they eventually met on August 19th, Ms. Birch listened to Complainant's concerns and allowed her to work with Ms. Birch's executive assistant

for a couple of hours to print out additional materials for Ms. Birch to review.

67. Ms. Birch reviewed all of Complainant's materials provided in support of her four grievances. On September 7, 2016, Ms. Birch issued a Step II grievance decision denying Complainant's grievances. Ms. Birch encouraged Complainant to focus her energies on performing her job and producing requested deliverables.

68. On September 16, 2017, Complainant timely filed a fourth petition to review Ms. Birch's Step II grievance decision.

July 28, 2016 Written Warnings (Complainant's Petition #5)

69. Complainant received two written warnings dated July 28, 2016 from Mr. Ritzma in a meeting. (Stipulated Fact)

70. One of the written warnings addressed Complainant's "performance issues." Mr. Ritzma concluded that, since Complainant's return to work on June 6, 2016 until their meeting on July 28, 2016,

> ...the sum total of your substantive work product has been: (1) the GAP analysis template and documents related to your prior assignment in this area, (2) the untimely final report, (3) a proposed schedule of trainings we discussed, and (4) the memo regarding the department's diversity training efforts. You also, during the last seven weeks, responded to one simple and brief question from a program regarding 508 compliance.
>
> As a long-tenured Colorado State employee designated as a staff authority in a professional position you are expected to consistently deliver high quality work in an appropriate quantity. In addition, the work you produce need [sic] to be delivered in a timely manner. In fact, [sic] should be providing expert-level work product at a rate that far exceeds a simple report on a program, a write-up of trainings that you have already planned and held, an [sic] a simple proposed schedule of future training over the course of one hundred and seventy-six (176) hours of work.

71. In this first written warning, Mr. Ritzma provided Complainant with the following "immediate and ongoing expectations":

- By close of business July 29, 2016 you will provide a full accounting [sic] how long it actually took you to produce (1) the GAP analysis template and documents related to your prior assignment in this area, (2) the untimely final report, (3) a proposed schedule of the trainings we discussed, and (4) the memo regarding the department's diversity training efforts.

- By close of business July 29, 2016 you will provide a full accounting of the total number of work hours you spent on any matter unrelated to (1) the GAP analysis template and documents related to your prior assignment in this area, (2) the untimely final report, (3) a proposed schedule of the trainings we discussed, and (4) the memo regarding the department's diversity training efforts.

- Going forward you are expected to meet deadlines. If there are matters of clarification, you should be providing draft product to evaluate for minor correction and/or guidance.

72. During Mr. Ritzma's meeting with Complainant on July 28, 2016, Complainant requested more time to complete the requested accountings. Mr. Ritzma changed the July 29, 2016 deadlines to August 1, 2016.

73. Mr. Ritzma issued a second written warning concerning an email Complainant sent to Mr. Massey that was "rude, unprofessional and bordering on insubordinate," and informed Complainant that she had exhibited a similar attitude in communicating with him. Mr. Ritzma instructed Complainant that her communications should remain "professional, respectful, and accepting of the authority of supervisors and executive level officers," as well as "polite, courteous, and appropriate."

74. Complainant grieved both written warnings. She met with Mr. Ritzma on September 1, 2016 to discuss her grievance. On September 8, 2016, Mr. Ritzma issued a decision upholding the warnings. He commented that he believed that his meeting with Complainant was "productive" and that Complainant understood the issues addressed by the written warnings. Mr. Ritzma further stated:

> Regarding the written warning concerning your communication style / behavior... As I explained, the written warning was given to correct your communication style / behavior that is combative and inappropriate. A manager / supervisor / senior executive should not have every action or decision challenged and every comment questioned by an employee nor should a manager / supervisor / senior executive feel like they are being asked to justify or explain every action, decision or comment. As I also explained, the written warning was just that, a warning and if there are no further significant issues, then the subject of the warning is resolved.
>
> Regarding the written warning concerning your work productivity, I also believe that our discussion was productive and, at the conclusion, you now understand fully the issue / problem as I see it. I think that we came up with a way to make sure that I have a full understanding of what you are working on and more effective way for me to communicate to you what matters I need you to work on [sic] expectations – a one-on-one weekly meeting. Just as stated above ... if there are no further significant issues after having established [sic] regular meeting schedule to discuss your future work productivity, then the subject of the warning is resolved.

75. Complainant appealed her grievance to Step II. Mr. Massey met with Complainant to discuss her grievance on September 29, 2016. Complainant informed Mr. Massey she could provide evidence that the facts described in Mr. Ritzma's written warning concerning failure to provide timely work product were inaccurate. Mr. Massey gave her until October 3, 2016 to provide that evidence. On October 3, 2016, Complainant emailed Mr. Massey that she would provide that evidence by October 5, 2016. On October 6, 2016, Complainant emailed Mr. Massey that she would provide that evidence by October 7, 2016.

76. Mr. Massey did not receive any evidence from Complainant. He found that Mr. Ritzma's written warnings were justified and denied Complainant's Step II grievance on October

11, 2016.

77. Complainant timely filed a petition for hearing of Mr. Massey's Step II decision.

Work Assignments August – October, 2016

78. On August 17, 2016, Mr. Ritzma emailed Complainant the following instructions:

> I have an urgent work assignment for you that is a 508 matter. The forms (I have provided the links to [sic] below) need to be put into fill-in form for accessibility. This is an urgent matter and I need you to devote your fulltime efforts to this project – put everything else aside. The text of the forms do not need to be update [sic] or changed at this time – although that is a future project – HCPF need [sic] to have them in a fill-in form that can be put back on our external website so people can fill them in on-line and print the final version for signature. The timeline on this project is August 2 completed. If you have any questions, please contact me as soon [sic] possible.

79. Eleven minutes after sending the above email, Mr. Ritzma sent Complainant the following clarification: "Correction – September 2, 2016 is the due date."

80. On August 22, 2016, Mr. Ritzma, in another email to Complainant, requested confirmation that she was working on the assignment conveyed on August 17, 2016. Two minutes later, Complainant responded: "confirmed."

81. On September 2, 2016, Complainant sent Mr. Ritzma the following update on this project: "Complete. Just uploaded last form. Give it a few minutes to update and should be good to use. Let me know of questions or issues. Thanks."

82. At 7:18 a.m. on September 6, 2016, Mr. Ritzma emailed Complainant: "Where was it uploaded to? Nothing attached to email." At 8:13 a.m., Complainant responded, "the website." At 8:39 a.m., Mr. Ritzma replied:

> Thank you. A couple of things, first I was planning on reviewing them prior [sic] uploading on website. I looked on web sites and could only find 3 of 4. The one for BenCord is missing. Also, I gave specific instructions to have them in fill-in form so they could be printed for signature. The current version that you uploaded prior to my review have [sic] an electronic signature. We cannot have electronic signatures for such documents. Please take them off the site immediately. This is a big deal for HCPF we can't have electronic signatures for these forms. PLEASE LET ME KNOW THAT THEY HAVE BEEN REMOVED FROM THE WEBSITE ASAP. (Capitalization in the original.)

83. At 8:43 a.m. on September 6, 2016, Complainant sent Mr. Ritzma the following email:

> Paul, i [sic] set these up so that a signature could not be added electronically. While a placeholder exists for signature, one should not be able to sign it electronically. I will verify this was done correctly. Also, I am verifying all four forms have been uploaded correctly (again). will circle back shortly. thank you.

84. At 9:22 a.m. on September 6, 2016, Complainant sent Mr. Ritzma the following email:

> I have removed the placeholders to avoid any confusion. I have one form to upload that is giving me a little trouble (third party rep) but expect it to be resolved shortly and then will be finished. if you have any forms open, please close it [sic] and reopen to view the change. let me know if you need anything else. thanks.

85. At 9:25 a.m. on September 6, 2016, Mr. Ritzma asked Complainant: "What do you mean by placeholders? Please explain!" At 9:26 a.m., Complainant responded: "A disabled field." At 9:28 a.m., Mr. Ritzma sent Complainant the following email:

> Sorry – I do not understand! What do you mean by placeholder? I have checked the forms and they have electronic signature fields – how did they get them in the first place and are you considering that as a placeholder – please explain!

86. At 9:36 a.m. on September 6, 2016, Complainant emailed Mr. Ritzma:

> the only form that i am still trying to upload is the third party rep form. the other three forms do not have any field next to signature. you should only see a blank line. i am having a little trouble with the third party rep form. while it does not have a field for signature on page 2, it does have one on page 4.

87. At 9:44 a.m. on September 6, 2016, Mr. Ritzma emailed Complainant:

> I am trying not to make a big deal out of this and I understand that you are having difficulty with the third-party rep form but – (1) why were these uploaded prior to my review? (2) Why did the uploaded versions contain an electronic signature field when my instructions said that they were to be fill-in up to the point of printing for signature? (3) What did you mean by placeholder?

88. At 9:46 a.m. on September 6, 2016, Complainant responded: "My mistake. I apologize. it wont happen again."

89. In addition to revising these forms, Mr. Ritzma also asked Complainant to prepare a draft of a GAP analysis survey for Respondent's Medical Services Board (MSB), with a cover letter. A GAP analysis survey is "designed to compare the gap between" each organization's actual and desired performance. This initial survey would serve as a template that could be adapted for other departments to assess compliance with federal regulations.

90. Prior to her extended leave that began in December 2015, Complainant had been working on a self-evaluation project for Mr. Douglas that was similar to the GAP analysis requested by Mr. Ritzma. Complainant had located a sample self-evaluation developed by the City of San Francisco, as well as a survey developed by San Diego. Complainant spent several weeks working on an 8 page draft survey adapted from these examples.

October 31, 2016 Corrective Action

91. Complainant received a Corrective Action on October 31, 2016, in a meeting with Mr. Ritzma. (Stipulated Fact)

92. Mr. Ritzma issued the Corrective Action to Complainant due to a continuing "problem with your ability to produce substantive work within a reasonable period of time." Mr. Ritzma explained, "it is inconceivable that in a three month period of time, the only substantive work you have produced is the revision of four forms, a draft of a simple letter, and the adaptation of a survey from an existing one."

93. In the Corrective Action, Mr. Ritzma gave Complainant the following directives:

> Effective immediately, you will attend all scheduled meetings. You will send in an email at the beginning of your workday to note the time that your workday starts. At the end of every workday you will provide an accounting of your activities (including breaks, time off for lunch, and all activities directly related to your work for the Department). By November 1, 2016 (COB), the GAP Analysis for the MSB will be in final form and submitted to me for review. On November 2, 2016 you will begin working on a similar GAP Analysis for customer service, to be ready for review by November 4, 2016 (COB). Any future work assignment will be given to you in writing with specific deadlines for submission for review or completion. Deadlines must be met and your work produce [sic] must be of the highest possible quality. An accounting for your work with an end-of-day email must be done, no exceptions. You will be held accountable for a full workday, you are expected to be available by phone, skype, and email throughout your workday, no exceptions.

94. Complainant did not file a timely appeal of this Corrective Action.

Work Assignments for November 1 – December 14, 2016

95. After issuing this Corrective Action, Mr. Ritzma gave Complainant two assignments: complete her draft of a GAP analysis survey for MSB, and draft a GAP analysis survey for Respondent's Customer Service department (Customer Service).

96. During a regularly scheduled one-on-one meeting with Mr. Ritzma on November 3, 2016, Complainant provided a draft of the MSB survey. This draft was 8 pages long. Mr. Ritzma approved this draft with a few minor changes, and set November 7, 2016 as the deadline for Complainant to submit the revised MSB survey to him.

97. On November 4, 2016, Complainant submitted a draft GAP analysis survey for Customer Service to Mr. Ritzma. This draft survey was 9 pages long and used many of the same questions as the MSB survey.

98. On November 7, 2016, Complainant submitted a revised MSB survey to Mr. Ritzma.

99. On November 10, 2016, Mr. Ritzma instructed Complainant to contact the Director of Customer Service, Christine Comer, for input concerning the draft Customer Service survey.

100. Complainant conferred with Ms. Comer about the draft survey on November 15, 2016. Ms. Comer asked Complainant to add specific questions that the customer service agents could answer. Complainant told Ms. Comer she would be back in touch with a revised survey. Complainant did not get back in touch with Ms. Comer.

101. On November 16, 2016, Mr. Ritzma emailed Complainant about the status of the Customer Service survey. He also asked his assistant, Meenu Ahuja, to call her. Complainant did not respond.

102. On the morning of November 17, 2016, Complainant sent Mr. Ritzma the following email: "I am still sick." Complainant also informed Mr. Ritzma she was sick on November 18, 2016. Mr. Ritzma instructed Complainant to submit her sick leave requests right away. Complainant submitted her sick leave requests on November 21, 2016.

103. On November 21, 2016, Complainant responded to Mr. Ritzma's query from November 16, 2016, explaining that she was working on Ms. Comer's suggestion to add survey questions for her customer service agents.

104. During the rest of November, Complainant did not provide the revised Customer Service survey or any updates on that work to Mr. Ritzma.

105. On December 1, 2016, Complainant had a weekly staff meeting and an in-person, one-on-one meeting scheduled with Mr. Ritzma at 1:00 p.m. and a weekly staff meeting at 2:00 p.m. At 10:42 a.m. that morning, Ms. Ahuja called Complainant to let her know that the weekly staff meeting was cancelled. Ms. Ahuja instructed Complainant to call Mr. Ritzma "no later than 11:30 a.m." about her one-on-one meeting. Ms. Ahuja followed up this phone call with an email to Complainant, reminding her to call Mr. Ritzma and providing his phone number.

106. Complainant waited until 11:30 a.m. to call Mr. Ritzma. He told her he was expecting her for their one-on-one meeting at 1:00 p.m. Complainant told Mr. Ritzma she could not make it to the office by then, and misunderstood Ms. Ahuja's instructions to mean they would be meeting by telephone instead of in-person. Mr. Ritzma explained that he wanted to review Complainant's work on the Customer Service survey in person. Complainant asked to move the meeting to later in the day, but Mr. Ritzma was not available.

Investigation and Rule 6-10 Meeting

107. On December 1, 2016, Mr. Ritzma sent Complainant a letter scheduling a Rule 6-10 meeting with her on December 6, 2016. In this letter, Mr. Ritzma informed Complainant that he would be presenting information regarding Complainant's "alleged failure to attend regularly scheduled meetings, no call no show on 11/16/16 and failure to comply with corrective action directives." Complainant was informed that this meeting would be an opportunity to exchange information before Mr. Ritzma made any decisions concerning potential discipline, and that Complainant could provide him with any written information she would like him to consider.

108. The Rule 6-10 meeting was rescheduled and took place on December 15, 2016. (Stipulated Fact)

109. Prior to the Rule 6-10 meeting, Complainant did not provide Mr. Ritzma with the revised Customer Service survey.

110. Complainant attended the Rule 6-10 meeting with legal counsel. (Stipulated Fact) Ms. Simpson attended the meeting as Mr. Ritzma's representative.

111. In the Rule 6-10 meeting, Mr. Ritzma took an adversarial approach. He aggressively questioned Complainant and stopped her in the middle of an answer to ask another question.

112. Halfway through the 6-10 meeting, Complainant's counsel, Jamie Wynn, intervened to ask Mr. Ritzma to allow Complainant to provide her explanations. Mr. Ritzma responded: "No, you cannot interrupt. Representatives are not allowed to speak in this meeting."

113. Ms Wynn asked to see the "rule" that supported Mr. Ritzma's position, and explained:

> ... I've attended a number of these, and I've always been entitled to speak, especially when [Complainant is] not given a chance to explain herself and you're cutting her off when you're asking her questions while she's still trying to answer them.

114. Mr. Ritzma responded, "It's my understanding that's the rule." Ms. Simpson clarified that Ms. Wynn could ask questions, but that Complainant was responsible for providing responses to Mr. Ritzma's queries. Ms. Wynn then asked:

> Can [Complainant] have the opportunity to finish her statements when she's trying to explain something, given her due process rights?

115. After the intervention of Ms. Wynn and Ms. Simpson, Mr. Ritzma allowed Complainant to finish her responses.

116. Mr. Ritzma's primary concern at the Rule 6-10 meeting was figuring out how Complainant was spending her time during her reported work hours. According to the daily accounting of her work activities required by the October 2016 Corrective Action, Complainant spent the majority of her time between November 14 and December 14, 2016, working on the GAP analysis survey.

117. Complainant explained that, during November and the first part of December, 2016, she was not only working on revising the Customer Service survey, but was also working on a "global GAP analysis" that required her to research civil rights laws.

118. Complainant told Mr. Ritzma that the revised Customer Service survey was completed, but could not explain why she had not yet provided that survey to him or brought it to the meeting. She asked for the opportunity to provide additional responses to Mr. Ritzma in writing, and was allowed until December 22, 2016 to submit that information.

119. Following the Rule 6-10 meeting, Complainant emailed the revised Customer Service survey to Mr. Ritzma. It was identical to the draft survey provided on November 4, 2016, with the exception of one page of additional questions concerning "Telephone Communication" and "Telephone Systems." Drafting these additional questions should not have taken more than a few hours.

120. Complainant also emailed print-outs of the texts of a number of 23 civil rights laws

to Mr. Ritzma, as evidence of her work on the "global GAP analysis." The majority of these laws did not apply to the services Respondent provides. These laws appeared to have been printed as a group on December 12, 2016. Complainant provided no evidence of how she analyzed these laws or applied them to any work product. Complainant had not been assigned this work.

121. On December 22, 2016, Complainant provided Mr. Ritzma with a 26-page document responding to the concerns Mr. Ritzma raised during the Rule 6-10 meeting. This response included an explanation of being sick on November 16-18, 2016; an explanation of her confusion over the December 1, 2016 one-on-one meeting and why it was difficult for her to arrange for travel to the office on short notice; a rehashing of some of the grievances Complainant previously filed; a description of her qualifications and experiences working in the area of civil rights; and a description of the work Complainant envisioned would be necessary for a "global GAP analysis."

122. In her December 22, 2016 response, Complainant stated that she sometimes had trouble communicating because she suffered from "Aphasia," and provided a brief explanation of that condition.

123. Mr. Ritzma did not seek any additional information about Complainant's claim of "Aphasia" and how it might affect Complainant's ability to perform her work. Instead, he summarily considered it "irrelevant" to his decision to discipline Complainant.

Termination Decision (Complainant's Petition #6)

124. Mr. Ritzma terminated Complainant's employment, effective January 4, 2017. He identified unsatisfactory performance as the primary reason for his decision: "[Y]our ability to produce substantive work, as assigned, within a reasonable period of time, taking into [sic] and accounting for the documented accommodations, is not at a level that is even marginally commensurate with other Administrator IV's within the Legal Division and HCPF."

125. Mr. Ritzma concluded that, since the October 31, 2016 corrective action, Complainant failed to complete an assigned GAP analysis within a reasonable amount of time, and submitted an accounting of her work hours that did not appear credible. In addition to these significant problems, Complainant failed to call or show up for work on November 16, 2016, and missed a scheduled one-on-one meeting on December 1, 2016. He did not find her professed "confusion" over this meeting to be credible.

126. Mr. Ritzma's January 4, 2017 termination letter contained numerous errors concerning dates Complainant had submitted work or met with Mr. Ritzma in November and December, 2016.

127. Mr. Ritzma based his decision to terminate Complainant's performance on "a careful review of all of the information related to your performance over the past six months and compliance with the terms of the corrective action plan issued on October 31, 2016." No mention was made of Complainant's fifteen-year performance history prior to June 2016.

128. Mr. Ritzma's termination letter contained the following footnote:

> In [Complainant's] response she claims that she suffers from "Aphasia" and it is a condition which cause [sic] her communication problems and disabilities. [Complainant's] assertion that the issue of her condition is irrelevant as an

> issue that can be considered in Rule 6-10 proposed disciplinary action because it has not been previously raised as a reason for her performance or communication problems. HCPF has provided [Complainant] with accommodations based on documented requests and those accommodation [sic] have been, as noted, considered in the evaluation of her performance problems.

129. Mr. Ritzma's footnote, which he admitted was "not well worded," was intended to convey that he, not Complainant, felt that her claim of suffering from "Aphasia" was irrelevant to his decision to terminate her employment.

130. Complainant filed a timely appeal of the termination decision on January 17, 2017.

DISCUSSION

I. BURDEN OF PROOF

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.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, and generally includes:

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

Board Rule 6-8 further provides: "An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature."

In this *de novo* disciplinary proceeding, Respondent has the burden to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 706-08. The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

Complainant has the burden to prove by a preponderance of the evidence that she was subjected to disability discrimination and retaliation, and that Respondent did not follow the requisite grievance procedures in addressing her various complaints. *Kinchen*, 886 P.2d at 706-07, interpreting § 24-4-105(7), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH SHE WAS DISCIPLINED.

A preponderance of the evidence establishes that, from November 1 through December 14, 2016, Complainant failed to accurately account for the working hours for which she was paid,

failed to diligently work on the GAP analysis survey for Customer Service assigned by Mr. Ritzma, and failed to produce this survey in a timely manner. Complainant's explanation that she needed a number of weeks to revise this survey is not credible, as the finished product that was finally produced on December 15, 2016 reflected only one page of additional questions that could have been composed in a few hours. Complainant offered no explanation as to why she never provided this revised survey to Ms. Comer for her input or why she waited until after the Rule 6-10 meeting to provide this finished survey to Mr. Ritzma.

Complainant's additional explanation that she was working on a "global GAP analysis" by researching civil rights laws is also not credible. The 26-page document she prepared in response to the concerns raised by Mr. Ritzma in the Rule 6-10 meeting appears to be an attempt to obscure the key issue: Complainant's failure to complete assignments in a timely manner and to account for her work time. Complainant may have been too ill on November 16 to notify Mr. Ritzma she was unable to work that day, and her alleged confusion over their one-on-one meeting on December 1 may also be excusable. However, the preponderance of the evidence indicates that Complainant was resistant to Mr. Ritzma's directives, and preferred to work on her own projects rather than the specific work assigned by Mr. Ritzma.

Complainant's performance in November and December 2016 constitutes either a "failure to perform competently" or a "willful failure to perform," both of which constitute "reasons for discipline" under Board Rule 6-12. Therefore, Respondent has established that Complainant committed the acts for which she was disciplined.

III. WHILE RESPONDENT'S DECISION-MAKING PROCESS VIOLATED RULES 6-9 AND 6-10, A *DE NOVO* REVIEW OF THE EVIDENCE SUPPORTS THE TERMINATION OF COMPLAINANT'S EMPLOYMENT.

In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Board Rule 6-9. An agency's decision to discipline an employee is arbitrary or capricious if 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; or 3) exercised its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Board Rule 6-10 requires that, when an appointing authority is "considering discipline," the appointing authority must hold a meeting with the employee "to exchange information before making a final decision." During the December 15, 2016 meeting in this case, Mr. Ritzma employed an adversarial approach in questioning Complainant. He aggressively cross-examined Complainant as though he was building a case against her, rather than engaging in an exchange of information required by Rule 6-10. It was only after both Ms. Wynn and Ms. Simpson intervened halfway through this meeting that Mr. Ritzma allowed Complainant to finish her answers.

Following the December 15, 2016 meeting, Complainant informed Mr. Ritzma that she suffered from aphasia, which creates communication problems. Mr. Ritzma summarily dismissed

this potential mitigating factor, deeming it "irrelevant" to his decision. He expressly limited his review of Complainant's performance to the last six months of Complainant's employment, and failed to consider Complainant's entire sixteen-year employment history, which reflected consistently satisfactory, and sometimes exceptional, performance ratings prior to June 2015. In addition, Mr. Ritzma's January 4, 2017 termination letter contains numerous errors, suggesting that it was drafted without careful consideration of the facts and available evidence regarding Complainant's performance.

Complainant's claim of aphasia, as well as her excellent work record prior to June 2015, are mitigating factors that should have been considered by Mr. Ritzma under Rule 6-9. Because Mr. Ritzma failed to give any, much less candid and honest, consideration to potential mitigating factors concerning Complainant's performance, and conducted the Rule 6-10 meeting like an adversarial cross-examination, Complainant was deprived of a full and fair review required by the Board Rules.

A *de novo* review of the evidence presented at hearing, however, establishes that the termination of Complainant's employment is justified. Complainant's continued failure to accurately account for the working hours for which she was paid, to meet project deadlines, and to produce substantive work requested by Mr. Ritzma, constitute serious performance problems. Complainant's performance in November 2016 must be considered in light of her prior misbehavior in the workplace, including her improper removal of computer access to crucial training materials and refusal to comply with her supervisor's directives in 2015, as well as her continuing performance issues upon her return to work in June 2016. These prior performance issues are well documented in Complainant's September 2015 "Corrective Action Plan," her unsatisfactory performance evaluation in March 2016, her two written warnings in July 2016, and her Corrective Action in October 2016.

Complainant argued that Mr. Ritzma's directives were unclear or confusing, and that her disabling condition, including aphasia, contributed to these communication issues. However, the preponderance of the evidence established that, prior to the Rule 6-10 meeting, Mr. Ritzma made every effort to clarify his directives and to provide open lines of communication. In contrast, Complainant exhibited a pattern of ignoring, avoiding or continually questioning her supervisor's directives, beginning with her dispute with Mr. Douglas in June 2015. Following Complainant's return to work in June 2016, Complainant created roadblocks to communication with Mr. Ritzma. Her email exchanges with Mr. Ritzma reflect some terse and delayed responses to his queries. Complainant neglected to respond to, or ignored, specific questions from Mr. Ritzma concerning her work. Despite clear instructions to the contrary, Complainant was sometimes unavailable by telephone and was not always logged onto her computer. Complainant's continuing inability to credibly account for the work she performed during the hours for which she was paid, combined with her insubordinate behavior towards her supervisors, is extremely troubling.

The preponderance of the evidence establishes that, despite Complainant's excellent performance record from 2001 through mid-2015, Complainant exhibited serious performance problems during the final year and a half of her employment. Respondent's repeated attempts to correct Complainant's behavior and improve her performance were unsuccessful, and Complainant's performance problems persisted. In light of this history, a lesser disciplinary penalty would not have been effective. A preponderance of the evidence presented in the *de novo* hearing in this case establishes that the termination of Complainant's employment is justified.

While the ALJ finds that termination of Complainant's employment is appropriate, the

flawed process initially followed by Mr. Ritzma cannot be ignored. When a state agency promulgates rules governing the discharge of its employees which are more stringent in favor of employees than due process would require, the agency must strictly comply with those rules. *Dep't of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984).

Mr. Ritzma's express refusal to consider Complainant's claim of aphasia, and his complete disregard for her lengthy, excellent work record prior to June 2015, are blatant violations of Rule 6-9. Because Mr. Ritzma failed to give any, much less candid and honest, consideration to potential mitigating factors concerning Complainant's performance, and conducted the Rule 6-10 meeting like an adversarial cross-examination, Complainant was initially deprived of a full and fair review of her performance required by Board Rules 6-9 and 6-10. Because of these violations, Complainant should be awarded back pay through January 24, 2018, the date the evidentiary record in this case was closed.

IV. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF DISABILITY.

Complainant claimed that the termination of her employment, as well as a number of previous actions by Respondent, constituted discrimination on the basis of disability. The Colorado Anti-Discrimination Act [CADA] provides, in pertinent part: "It shall be a discriminatory or unfair employment practice ... [f]or an employer ... to discharge ... or to discriminate ... against any person otherwise qualified because of disability ..." § 24-34-402(1)(a), C.R.S. To establish a *prima facie* case of discrimination in employment on the basis of disability, Complainant must demonstrate that: (1) she belongs to the protected class, (2) she was qualified for the job at issue, (3) she suffered an adverse employment decision despite her qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (2000), citing *Colorado Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 400-01 (1997).

Complainant established that she is disabled; thus, she belongs to a protected class. Complainant was qualified for the job she held, and Respondent's decision to terminate her employment constitutes an adverse employment action. Thus, Complainant has met the first three elements of a *prima facie* case of discrimination on the basis of disability. *Bodaghi*, 995 P.2d at 297.

To establish the fourth and final element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Id.* Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *George v. Utah Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). As the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. To meet their burden of proof, "employees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis ... In fact, circumstantial evidence is often particularly helpful when ... a case turns on vacillating issues such as motive or intent." *Id.* In the absence of direct evidence, a claimant's burden of proof may be met through "evidence of actions" or "existing conditions from which a fair inference of such discrimination [can] legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to proffer evidence that supports or permits an inference of unlawful discrimination. After a *de novo* review, the ALJ has determined that the termination of Complainant's employment is justified. Therefore, Complainant failed to establish, by a

preponderance of the evidence, that Mr. Ritzma's decision to terminate her employment was motivated by discrimination on the basis of disability.

Similarly, Complainant's other claims of discrimination, raised in her other five petitions for review, are groundless. There is no evidence in the record that Complainant's disability or requests for accommodations motivated Mr. Douglas or Mr. Massey to reject Complainant's proposed restructuring or reassignment of ADA work. There is no evidence in the record that Complainant's disability or requests for accommodations motivated Mr. Douglas to issue a "Corrective Action Plan" in September 2015 or an unsatisfactory performance evaluation in March 2016, or subsequently motivated Mr. Ritzma to issue written warnings, a Corrective Action, and the decision to terminate Complainant's employment. There is no evidence in the record that Complainant's disability or requests for accommodations motivated any of Respondent's managerial employees to deny Complainant's grievances. To the contrary, Respondent's actions demonstrate measured, and even generous, attempts to correct Complainant's persistent performance problems.

Beginning in January 2011, Respondent granted Complainant's requested accommodations, allowing her to work from home and providing special equipment to assist her in doing so. Respondent agreed to additional accommodations, including the provision of a Dell tablet and accessories to use at home, when requested by Complainant. These extensive accommodations, most of which remained in place since January 2011, demonstrate the absence of any discriminatory intent or animus towards Complainant.

The only requested accommodation denied by Respondent was Complainant's request for modification of Respondent's leave policy in June 2016. Ms. Simpson explained to Complainant that, due to business needs, Respondent could not grant unlimited leave, and could not modify existing State leave policies. See *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000) (a request for indefinite leave does not constitute a reasonable accommodation); Complainant did not grieve this denial of her request, but rather complained of a "delay" in responding to her accommodation requests. Complainant did not provide any evidence of any such delay, and the preponderance of the evidence establishes that Respondent was very receptive to Complainant's requests.

The preponderance of the evidence establishes that Complainant's claims of discrimination are without merit.

V. RESPONDENT DID NOT RETALIATE AGAINST COMPLAINANT FOR ENGAGING IN PROTECTED ACTIVITY.

Under CADA, it is a "discriminatory or unfair employment practice . . . [f]or any person, whether or not an employer . . . [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." § 24-34-402(1)(e)(IV), C.R.S. Claims of retaliation under CADA are within the Board's statutory authority. § 24-50-125.3, C.R.S.

Title VII of the Civil Rights Act of 1964 also includes a similar anti-retaliation provision. See 42 U.S.C. § 2000e-3(a)(declaring it to be unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]"). The anti-retaliation provision of CADA parallels that of its counterpart in

Title VII and Title VII case law serves as a guide to CADA. *Big O Tires*, 940 P.2d at 399; *St. Croix v. Univ. of Colo. Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

Federal case law is instructive in assessing claims of retaliation. A *prima facie* case of unlawful retaliation is established when (1) an employee engaged in protected opposition to purported unlawful discrimination; (2) the employee suffered a materially adverse action, *i.e.*, an action sufficient to dissuade a reasonable worker from making his complaint; and (3) a causal connection existed between the protected activity and the materially adverse action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009).

Complainant filed her first grievance alleging discrimination on May 29, 2015, meeting the first element of a *prima facie* case. On September 18, 2015, Mr. Douglas provided Complainant with a "Corrective Action Plan" arising from her failure to follow his directives and do her assigned work. He subsequently gave her an unsatisfactory performance evaluation in March 2016. In July 2016, Mr. Ritzma issued two written warnings, and in October 2016, he issued a corrective action, addressing Complainant's continued performance problems. He ultimately terminated Complainant's employment. While some or all of these actions by Respondent constitute materially adverse actions and meet the second element of a *prima facie* case, Complainant has failed to establish a causal connection between her protected activity and these adverse actions.

The evidence overwhelmingly establishes that, in early June 2015, Complainant improperly removed access to key ADA training materials on a shared drive. Complainant refused to comply with Mr. Douglas' repeated orders to reinstate that access, resulting in the cancellation of crucial training sessions for Respondent's employees. Instead of disciplining Complainant for this misbehavior, Ms. Birch urged "compassion." Mr. Douglas attempted to use corrective measures before Complainant left the workplace on a leave of absence. Rather than exhibiting retaliation, Mr. Douglas and Ms. Birch may have been too lenient in responding to Complainant's misbehavior, considering the serious problems created by her actions. A preponderance of the evidence establishes that Complainant, rather than Respondent, engaged in retaliatory behavior.

Upon Complainant's return to work after her leave of absence, her new supervisor, Mr. Ritzma, informed her that he wanted to start with a "clean slate." When he encountered performance issues, Mr. Ritzma counseled Complainant and explained his expectations. When faced with continuing problems with Complainant's ability to complete assignments and account for her work time, Mr. Ritzma imposed a series of corrective measures. When he issued written warnings to Complainant, Mr. Ritzma informed her that if she improved her performance, they could again move forward with a clean slate. These continued efforts to work with Complainant in the face of documented performance problems reflect a sincere intention to resolve those problems, rather than an intention to retaliate against Complainant for any complaints or grievances she filed.

Mr. Douglas, Ms. Birch, Mr. Ritzma and Mr. Massey all spent many hours meeting with Complainant to discuss her numerous grievances. The recordings of these meetings demonstrate that these managers uniformly exhibited patient and respectful discussions of the many issues raised by Complainant. The preponderance of the evidence establishes that Respondent did not retaliate against Complainant for her engagement in protected activity.

VI. RESPONDENT COMPLIED WITH THE BOARD RULES GOVERNING GRIEVANCES.

Complainant has failed to identify any Board or agency rule that Respondent violated in processing her numerous grievances.

As discussed above, the preponderance of the evidence reflects that Respondent's managerial employees spent an extensive amount of time reviewing and discussing Complainant's numerous grievances, and gave full and fair consideration to each one. For each of Complainant's grievances, Respondent's representatives met with Complainant at both the first and second step of the grievance process, patiently reviewed the various documents submitted by Complainant in support of each grievance, and carefully considered the concerns raised by Complainant. For several of these grievances, Respondent's representatives rescheduled meetings with Complainant at her request and granted extensions, again at her request, to allow Complainant an opportunity to provide additional information in support of her grievances. Thus, the preponderance of the evidence fails to establish any violation of the Board's grievance procedures that denied Complainant a full and fair review of any grievance.

VII. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Section 24-50-125.5(1), C.R.S., provides, in pertinent part:

> Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

Because the ALJ has determined, after a *de novo* review, that termination of Complainant's employment is justified, there are no grounds for an award of attorney fees and costs.

CONCLUSIONS OF LAW

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

2. Respondent's disciplinary decision-making process violated the procedures outlined in Board Rules 6-9 and 6-10.

3. Complainant's termination was within the range of reasonable alternatives.

4. Respondent did not discriminate against Complainant on the basis of disability.

5. Respondent did not retaliate against Complainant.

6. Respondent did not violate the Board rules governing grievances.

7. Complainant is not entitled to an award of attorney fees and costs.

ORDER

The termination of Complainant's employment is **affirmed.** Because the Rule 6-10 process was flawed and deprived Complainant of a full and fair review of the factors enumerated in Board Rule 6-9, Complainant is awarded back pay, with interest, and restoration of benefits through January 24, 2018, the date the evidentiary record in this case was closed.

Dated this 9th day
of March, 2018.

Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 12th day of March, 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and attached **NOTICE OF APPEAL RIGHTS** addressed as follows:

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Angel Fasty

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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.