STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2014B003**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TERRENCE M. SULLIVAN,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge ("ALJ") Tanya T. Light held the hearing in this matter on October 24, 2013 at the State Personnel Board located at 633 17th Street, Denver, Colorado; and on December 6 and 10, 2013, at 1525 Sherman Street, 4th Floor, Denver, Colorado. This case commenced on the record on May 8, 2013. The record closed on January 30, 2014 after the acceptance of post-hearing briefs. Michael A. Sandstrum of Sandstrum Law, LLC, represented Terry Sullivan ("Complainant"). Assistant Attorney General Heather J. Smith represented the Colorado Department of Transportation ("Respondent" or "CDOT").

Respondent's advisory witness was Mr. Len Kiziuk, of CDOT's Employee Relations/Legal department.

MATTERS APPEALED

Complainant worked for CDOT for 20 years prior to being administratively discharged on June 25, 2013. Complainant appeals his discharge, arguing that he was discriminated against on the basis of his disability, Parkinson's disease, in violation of the Colorado Anti-Discrimination Act ("CADA"). Complainant further contends that Respondent violated the Americans with Disabilities Act ("ADA") by failing to engage in the interactive process with him and failing to reasonably accommodate his disability, and retaliated against him for his legal use of approved medical leave in violation of the Family and Medical Leave Act ("FMLA"). Complainant also argues that CDOT failed to give him reasonable notice of critical deadlines, including his deadline to apply for short term disability ("STD") leave protection, which he subsequently missed.

CDOT counters that it did not discriminate against Complainant, that it properly engaged in the interactive process and reasonably accommodated Complainant's disability, and that it did not retaliate against him. Further, Respondent states that it provided Complainant proper notice of all leave exhaustion deadlines, and that CDOT's administrative discharge of Complainant was lawful pursuant to State Personnel Board ("Board") Rule 5-10 (which is now enumerated Rule 5-6), and was in full compliance with CADA, the ADA, and FMLA.

Through this appeal, Complainant seeks reinstatement to his former position, back pay, fringe benefits, health insurance, attorney's fees, and front pay for five years if reinstatement is not possible.

Respondent requests the Board affirm its administrative discharge of Complainant and deny all his requested relief.

For the reasons set forth below, Respondent's termination of Complainant is **reversed**. Issues of back pay, fringe benefits, attorney's fees, and other relief are addressed below.

ISSUES PRESENTED

1. Was Respondent's termination of Complainant's employment arbitrary, capricious or contrary to rule or law?

2. Is Complainant entitled to an award of attorney fees?

FINDINGS OF FACT

Background and Complainant's Employment at CDOT

1. Complainant was a Tech III Permit Writer for CDOT. He began his CDOT employment on March 1, 1993. At the time of his June 25, 2013 discharge, he had worked for CDOT for over 20 years.

2. Complainant never received corrective or disciplinary actions during his 20 year tenure at CDOT.

3. Complainant turned 59 on November 5, 2013, and lives alone.

4. Complainant suffers from Parkinson's disease. At all times relevant to this case, Complainant was a "qualified person with a disability" under the ADA and according to CDOT's internal guidelines. (Stipulated fact).

5. Complainant's CDOT duties included reviewing applications and issuing permits for oversized trucking loads that exceed Colorado's legal size and weight limits.

6. Complainant reviewed the routes truck drivers would be taking to ensure there would be no problems with the height or weight of the trucks.

7. Danny Wells was, at all pertinent times, the manager of CDOT's Extra-Legal Permits Office and Complainant's immediate supervisor.

8. Mr. Wells became the manager of the Extra-Legal Permits Office on July 1, 2010, and supervises nine full time equivalents ("FTEs"), four to six of whom at any given time are permit writers like Complainant.

9. Mr. Wells' unit receives 50,000-60,000 permit applications annually, and each permit writer processes approximately 10,000 permits per year.

10. The Legal Permits Office is busy, and Mr. Wells needs his permit writers to be in the office and processing applications in order for the unit to function properly.

11. Permit writers process annual permit applications, "LVC," or longer vehicle permit applications, single load permit applications, and "superload" applications.

12. Superload applications are fairly complex and require the permit writer to be able to analyze complex data, including copies of safety regulations, the driver's qualifications, and "egress letters," which allow trucks to exit at certain locations.

13. From April 1, 2012 through March 31, 2013, Complainant processed the second most applications of all of the permit writers in the office, and had a low 2% error rate.

14. The winter season is the slowest time for the Extra-Legal Permits Office because it receives fewer applications due to inclement weather. Mid-to-late spring though late fall is the busiest time for the office, when the most applications are received.

15. For the time period of April 1, 2012 through March 31, 2013, Complainant received a level 2, or "successful" review from Mr. Wells. Complainant's review was dated March 11, 2013.

16. In the "supervisor comments" section of Complainant's March 11, 2013 review, Mr. Wells stated the following:

> Terry, I know you are going though personal challenges that have resulted in a great deal of leave being used throughout the year, but I can say that when you are here, I have largely seen improvement in your performance compared to last year. Strictly in terms of production, you ranked second in total permits issued and single trip permits issued. I believe that having you devote your attention primarily to web applications has been a success. In looking at quality issues, your random error rate has been reduced to 2%. Even though we have documented quality issues such as those mentioned in the attached PDF, you have displayed improvement.

17. Complainant received one "Performance Documentation Form" ("PDF") in the March 11, 2013 review. A PDF is a form supervisors use to document instances of positive or negative employee performance issues during a rating period. Complainant's PDF was negative, and it concerned permit applications that were not processed correctly. PDFs are not considered corrective or disciplinary actions.

Complainant's Parkinson's Disease Diagnosis and Deteriorating Health

18. Complainant first began experiencing symptoms of Parkinson's disease in late 2011. He experienced tremors and a shuffling gait, but did not immediately seek medical attention.

19. February of 2012 is the first time Complainant sought medical help concerning his symptoms, when he saw a Kaiser physician, Dr. Mark Trubowitz, D.O.

20. Dr. Trubowitz referred Complainant to a Kaiser neurologist, Dr. Linsee Hudson-Lang, whom Complainant saw in February or March of 2012.

21. Between the time Complainant saw Dr. Trubowitz and Dr. Hudson-Lang, his tremors worsened. He had cognitive concerns, but those were not as severe as the physical symptoms he was experiencing. Dr. Trubowitz instructed Complainant to take five to six weeks off work during this time, until his health could be stabilized. Complainant applied for and received approved Family Medical Leave ("FML") for the five to six weeks he was off work in February and March of 2012.

22. Dr. Hudson-Lang tested Complainant for coordination and cognitive issues, and determined he had early stage Parkinson's disease. She confirmed Complainant's Parkinson's diagnosis in May of 2012.

23. In early 2012 Complainant also suffered from hypothyroidism, high blood pressure, insomnia, and extreme fatigue primarily manifested as weakness in his legs. These were all side effects of the Parkinson's disease.

24. By December of 2012 Complainant's insomnia was worsening to the point where Complainant was getting only three to four hours of sleep per night, down from five to six hours of sleep when the insomnia first began.

25. Complainant's insomnia increased into the spring and early summer of 2013, and the resulting fatigue depleted his leg strength. By the beginning of May 2013, Complainant could only walk short distances. By the end of May 2013, Complainant could no longer stand because his leg muscles had atrophied, and he did not have enough strength to support his legs.

26. By the end of May 2013 Complainant could no longer walk or drive, and was effectively immobilized.

27. In spring of 2013, in order to combat his chronic insomnia, Complainant drank whiskey before going to bed, which helped him fall asleep, but also resulted in the acceleration of his Parkinson's symptoms.

28. On May 28, 2013, Complainant's health was so poor that he checked into Denver Health Medical Center and spent one night there. He was admitted for acute alcohol abuse. The staff advised him to check into a rehabilitation center, which he did the next day, May 29, 2013, when he checked into the Life Care Center ("LCC") of Westminster. LCC provides long term nursing care as well as short term rehabilitation services.

29. On June 17, 2013, Complainant was released from LCC.

30. On June 25, 2013, CDOT administratively discharged Complainant because all of his annual, sick, and FML unpaid leave were exhausted.

CDOT's Procedural Directive 600.2

31. CDOT's current Procedural Directive ("PD") 600.2 was enacted by CDOT Executive Director Russell George on January 26, 2009, and superseded an earlier version that had been enacted by then-Executive Director Thomas E. Norton on October 3, 2002. The PD is an outline of the internal procedures CDOT must follow when addressing issues of an employee with disabilities, and it was in effect at all times relevant.

32. The purpose of PD 600.2, by its own terms, is:

> To determine a CDOT employee's ability to perform the essential functions of his/her job, with or without reasonable accommodation(s), and to ensure CDOT's consistent compliance with the requirements of the Americans with Disabilities Act (ADA) and any amendments.

33. PD 600.2 defines key terms used by the ADA, and sets forth seven steps that must be taken once a CDOT employee "experiences an injury or other event . . . such as an illness . . . that he/she believes substantially affects his/her physical or mental ability to perform the essential functions of his/her job."

34. The seven steps are:

Step 1: Initiate the interactive process.
Step 2: Formal Communication/Request for Documents.
Step 3: Identify essential functions of the position.
Step 4: Determine eligibility to return to work.
Step 5: Identify reasonable accommodation.
Step 6: Search for a Vacant Position (if applicable).

Step 7: Separation from State Service (if applicable).

35. A detailed explanation follows each step, as well as an express statement of the responsibilities of the affected employee, his or her supervisor, the ADA coordinator, and any other necessary CDOT personnel.

36. Some of the steps require the employee to complete and return certain forms, such as medical release forms, as well as provide documentation and/or submit applications. Many of the requirements have deadlines attached to them.

37. Fred Longs was CDOT's ADA Coordinator at all relevant times. PD 600.2 defines Mr. Longs' role as "[t]he person designated within CDOT Headquarters to take the lead role in ADA policy development, interpretation of ADA requirements, and implementation of ADA requirements."

38. PD 600.2 defines "Interactive Process" as: "A process that involves communication and discussion between an employer and a person who may have a disability to clarify what the individual needs and, to identify the appropriate reasonable accommodation when a reasonable accommodation is possible and required under the ADA."

39. "Disability" is defined as "A physical or mental impairment that substantially limits one or more major life activities; a person with a record of such an impairment; or a person who is regarded as having such an impairment."

40. PD 600.2 defines "Qualified person with a disability" as "An individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or some vacant position at a comparable salary and level of responsibility, and who, with or without reasonable accommodation, can perform the essential functions of such position."

41. Some requirements of PD 600.2 include (quoted verbatim):

- Supervisor provides notice (when employee does not). Within three (3) work days of acquiring the knowledge that an employee may have an impairment that may affect the employee's ability to perform the essential functions of the job, notify the appropriate Region/HQ Civil Rights Office.

- The ADA representative shall initiate contact with the employee to begin an interactive process and perform the actions described in A2 and 3 above. In situations where notice about the employee was provided by the supervisor to the Civil Rights staff person, a two (2) work day time frame shall apply to the action described in A 2 above.

- Each time that any CDOT staff member receives additional information relating to the employee's condition, he/she shall provide an update to the ADA Coordinator, HQ/Region Civil Rights Office and Risk Management (when appropriate) by confidential e-mail within five (5) days of receiving the new information.

- Within three (3) workdays of being designated, the ADA Representative shall communicate with the supervisor, the appointing authority, and the employee to continue the interactive process. The focus of this communication shall be to explain steps that will be taken to evaluate the employee's ability to perform the essential functions of his or her job.

- STEP 2: Formal Communication/Request for Documents. The ADA representative will send to the employee a certified letter (with release forms) that specifies that no further steps will be taken until the employee submits the following within seven (7) workdays of the date of the letter.

- Without the [Employee Statement of Impairment's Effects] statement, the appointing authority and ADA Representative will base decisions on other available related information.

- STEP 3: Identify essential functions of the position. ADA representative and supervisor will review the PDQ to verify that the described essential functions remain accurate.

- In consultation with the ADA Representative, the appointing authority shall determine if and when the employee can return to work and perform the essential functions of the job with or without a reasonable accommodation.

- If unable to make a determination if the employee can return to work with or without an accommodation in a non-Worker's Compensation case, the ADA representative will request clarification from the employee's medical provider or the employee and continue to attempt to make this determination each time that medical provider submits additional documentation.

- STEP 5: Identify reasonable accommodation. Within five (5) days of notice of stable medical condition, the ADA representative shall work with the appointing authority or designee, the supervisor and the employee to identify the reasonable accommodation(s) that will enable the affected employee to perform the essential functions of the position. The accommodation must take affect [sic] as soon as is reasonably possible. The ADA representative is responsible for communicating the appointing authority's authorization for accommodation to the ADA Coordinator.

- STEP 6: Search for a Vacant Position (if applicable). If the employee cannot perform the essential functions of his/her current job with or without a reasonable accommodation, the Regional ADA Representative may conduct a Regional vacancy search in accordance with the sub-sections below as applicable.

- If the Region ADA Representative is unable to identify a vacant position within the Region that the employee can perform with or without reasonable accommodations, the ADA Coordinator shall coordinate a state-wide search for a vacant position with comparable compensation and level of responsibility for which the employee is qualified.

- If separation from state service is contemplated based on the inability to accommodate the employee in the current or comparable jobs, the ADA representative or appointing authority shall consult with the Office of the Attorney General.

42. Ben Cordova was CDOT's ADA Coordinator prior to Mr. Longs. Mr. Cordova prepared a document entitled "Frequently Asked Questions about the ADA" in the format of questions and answers.

43. Question number four on that document asks and answers: "What form is required to initiate consideration for eligibility under the ADA? Answer: None, members of the Leave Coordination Committee provide information to the Center for Equal Opportunity to assist in making the determination. Other sources of information include managers, supervisors, and the employee who may be affected."

44. Question number five asks and answers: "Why doesn't CDOT require a specific form under PD 600.2 and the ADA? Answer: Courts and the EEOC have determined that no specific type of request is required. Also, CDOT's primary funding source (FHWA) takes a very proactive approach to disability rights and has delegated

its responsibility of disability rights enforcement to the CDOT Center for Equal Opportunity."

45. Question number six states: "Under the ADA, can a supervisor terminate an employee who has used up all personal leave and benefits? Answer: Not always. The employee may still have rights under the ADA. The protections provided to an employee under the ADA take precedence over any state personnel rule."

The Events of 2012: Danny Wells, Fred Longs, and the 2012 ADA Interactive Process and Reasonable Accommodation

46. In February 2012, Complainant had his first conversation with his immediate supervisor, Mr. Wells, about his health problems. Prior to February 2012, Mr. Wells had received ADA training.

47. On February 15, 2012, Mr. Wells sent an email to Mr. Longs telling him:

> Mr. Longs, I have been advised by Len Kiziuk to inform you of the status of one of my employees. Terrence Sullivan (#2240), has been on continuous leave since 1/26/12. (Terry worked 1.5 hrs on the 26th). Terry has returned FML documentation to Len which indicates that terry [sic] cannot be released to return to work at this time. Terry informed me this morning that he will not be released at least until further testing is performed 3/5/12, but did indicate that he is having some degree of trouble with walking and writing. Mr. Sullivan exhausted all leave yesterday, 2/14/12.

48. Mr. Longs emailed Mr. Wells back and stated that he, Mr. Longs, could not begin the ADA process at that time because Complainant was not at work. Mr. Longs instructed Mr. Wells that he should review PD 600.2 with Complainant when he returned to work.

49. On March 19, 2012, Mr. Wells met with Complainant to review PD 600.2. He told Complainant to contact Mr. Longs because Mr. Longs would make the decisions concerning reasonable accommodations for Complainant. Complainant, however, told Mr. Wells that he did not think he needed any assistance from the ADA Coordinator at that time. In response, Mr. Wells told Complainant that he, Complainant, had to initiate the ADA conversation because CDOT could not read his mind.

50. During the March 19, 2012 meeting, Complainant told Mr. Wells that he had begun undergoing testing for Parkinson's disease on March 5, 2012. It was not until July 11, 2012, however, that Mr. Wells learned that Complainant had been officially diagnosed with Parkinson's disease.

51. On December 1, 2012, Mr. Wells again met with Complainant, this time to explore the possibility of altering his job duties to accommodate his Parkinson's

symptoms. Mr. Wells initiated this meeting because he had noticed that Complainant had hand tremors, and that one hand had gotten noticeably worse.

52. The accommodations included having Complainant sit in a wheelchair while he worked, process the less complex single load permits, and review and process the applications submitted on the CDOT website because those applications required little data entry.

53. Mr. Wells also asked Complainant if he would be willing to field more telephone calls from the public, which would take pressure off the employees who were processing the more complicated permit applications.

54. Complainant agreed, and thought all of the changes were a good idea.

55. These accommodations remained in place from December 1, 2012 until Complainant was discharged.

56. In 2012, Mr. Longs became CDOT's new ADA Coordinator, after working for seven years as a CDOT ADA representative.

57. Mr. Longs received extensive ADA training.

58. Mr. Longs testified that he retired in November of 2013 due to a stroke or a series of strokes that occurred approximately 12 to 18 months prior to Complainant's discharge. He further testified that the strokes adversely affected his memory and reading comprehension, and caused confusion.

59. Complainant did not contact Mr. Longs at any time in 2012 concerning his disability.

60. Mr. Wells did not inform Mr. Longs of Complainant's Parkinson's diagnosis at any time in 2012.

61. Mr. Longs did not contact Complainant at any point in 2012, despite receiving Mr. Wells' February 15, 2012 email informing him of Complainant's extended work absences and difficulties walking and writing. Mr. Longs felt he could only contact employees if they gave him "permission" to do so through submission of a certain form. Complainant did not submit this form to Mr. Longs in 2012.

62. Mr. Longs understands that requests for reasonable accommodations are not required to be written. Despite this fact, he claims that he needed something in writing from an employee in order to know that the employee wanted a reasonable accommodation or wanted to begin the interactive process.

63. Mr. Longs knew that unpaid leave can be a form of reasonable accommodation.

64. Mr. Wells is the only CDOT employee who engaged in the interactive process with Complainant in 2012, which resulted in a reasonable accommodation that was successful for Complainant and for the Extra-Legal Permit Office during the time it was in place.

Deb Haglund and Complainant's 2012 FML

65. Deb Haglund is a CDOT Tech IV supporting the CDOT Human Resources ("HR") department. Her duties include coordinating and tracking FML leave, and inputting employees' time when they are out on FML.

66. Ms. Haglund has received ADA training, but her job responsibilities do not include any ADA-related activities.

67. Ms. Haglund was Complainant's FML liaison in 2012.

68. On February 10, 2012, Dr. Trubowitz signed and completed a "State of Colorado Medical Certification Form" ("Medical Certification Form") that is used by CDOT in processing FML requests. This was the first Medical Certification Form Complainant submitted to CDOT.

69. Next to "Serious Health Condition," Dr. Trubowitz wrote:

> hospitalized continuously from 2/1/2012 to 2/11/2012 for severe depression, alcohol dependency, hypothyroidism, and what may be early stages of Parkinson's Disease with interference with motor function and cognitive slowing. And high blood pressure. Symptoms began in October 2011 but worsened and acute by mid January 2012. Would expect depression and hypothyroidism to improve over the next 4-5 weeks. If he has Parkinson's Disease this can be a chronic condition but often manageable with medications.

70. Dr. Trubowitz further explained "At the present time patient's cognitive and motor function prevent him from performing his duties in an effective and timely manner."

71. On July 18, 2012, Complainant provided a second Medical Certification Form to CDOT, which was signed by Dr. Terry K. Schultz, M.D. on July 18, 2012. Dr. Schultz listed "alcohol dependence" as the serious health condition.

72. Complainant used approved FML in 2012 when he was dealing with his Parkinson's diagnosis and symptoms.

Complainant's 2012 Short Term Disability Benefits

73. On March 15, 2012 Complainant received a letter from The Standard Insurance Company ("The Standard"), Colorado's contracted short term disability insurance provider, informing him that he had been approved for STD monetary and leave protection benefits for part of 2012.

The Events of 2013: FML, ADA, and STD

74. On January 30, 2013, Mr. Wells emailed Ms. Haglund the following:

> Deb, This was the last correspondence I can find regarding Terry Sullivan and FML. I do not know why he was not designated eligible, but I wonder if we should not visit the potential again. Terry has not missed three consecutive days, but he has missed a significant amount of time and once again finds himself near running out of leave. I've been led to believe that the absences are related to med regulation used for treatment of Parkinsons. Many times Terry comes in after lunch after reporting insomnia during med regulation. Is it possible/prudent under the circumstances described to deliver another FML packet to Terry?

75. On January 31, 2013, Ms. Haglund sent an email to Mr. Wells and Len Kiziuk, CDOT's FML subject matter expert ("SME") and a member of CDOT's Employee Relations/Legal department, stating:

> Hi Danny, While Terry's Medical Certificate *did* document a health reason, it stated that **no leave would be needed** for that health reason. Thus, no FML job protection can be granted for absences which should not be occurring. Len, Does this become a performance issue, or should we request a new Medical Certificate? He used 153.75 of SL & AL July 2012-January 2013, of which 63 hours were used in January. (Emphasis in original).

76. On February 6, 2013, Mr. Kiziuk met with Complainant to review Complainant's rights and job protection benefits related to FML, STD, and the ADA. Complainant only remembers their discussion concerning FML, and he never understood that he had a narrow window to apply for STD job protection benefits, or what his deadlines were to apply for those benefits.

77. On March 12, 2013, Mr. Wells sent an email to Coleen Newman, the Extra-legal Permits Office's Lead Permit Writer, asking "I see Mr. Sullivan made it in. What did he have to say?"

78. Ms. Newman answered, informing Mr. Wells that "He said he called his doctor. He can't get in for a couple of months but he told her what was going on and

she tweeked him [sic] medicine again and told him he needed to exercise. He said fatigue and insomnia are two of the bigger issues with Parkinson disease. He said he just can't sleep."

79. Neither Mr. Wells nor Complainant informed Mr. Longs of this information.

80. Also on March 12, 2013, Complainant signed and sent to Ms. Haglund a completed Medical Certification Form, his third completed form for use in processing FML. She received the form on March 14, 2013.

81. Dr. Hudson-Lang completed the form and explained that Complainant may not be able to work "If having a flare up or with increased tremors." She stated that Complainant's serious health condition was Parkinson's disease and a Depressive Disorder. She further explained that his symptoms had begun in January of 2012, were confirmed to be Parkinson's disease on July 5, 2012, and that the probable duration of the condition was "lifetime."

82. On March 13, 2013, Ms. Haglund mailed a letter to Complainant's home that explained the short term disability monetary and leave protection benefits as well as the deadlines for applying. Although this letter explained the window of time to apply for STD leave protection, it did not specify the actual date by which Complainant had to apply. Complainant does not remember receiving this letter.

83. In April, May, and June of 2013, Complainant missed an extensive amount of work, either by missing whole days or by coming in to the office between 3:00 and 4:00 PM and working only one to two hours. The missed work or partial days were due to his Parkinson's symptoms, especially the insomnia.

84. Complainant made a good faith effort to keep Mr. Wells apprised of his situation as it pertained to his job on an almost daily basis through telephone calls and voicemail messages.

85. The following is a list of dates and times that Complainant contacted Mr. Wells as confirmed by emails Mr. Wells subsequently sent to other CDOT personnel. This is most likely not a complete list given the fact that Mr. Wells testified that Complainant left him messages almost daily during this time:

- On April 30, 2013, Complainant left Mr. Wells a message prior to at 8:25 AM that he would not be coming in to work that day.

- On May 2, 2013, Complainant called Mr. Wells prior to 7:49 AM to inform him that he would not be coming in.

- On May 15, 2013, Complainant called Mr. Wells prior to 7:48 AM to inform him that he would not be coming into work.

- On May 29, 2013, Complainant contacted Mr. Wells prior to 7:42 AM and informed him that he had been hospitalized and would be calling later in the day.

- On June 3, 2013, Complainant called Mr. Wells prior to 7:56 AM to inform him he would not be in.

- On June 13, 2013, Complainant left Mr. Wells a message prior to 7:53 AM informing him he would not be to work that day.

86. April 25, 2013 was the last day Complainant was physically at work at CDOT.

87. On May 1, 2013, Complainant's annual and sick leave were exhausted. On June 14, 2013, his FML expired.

88. Complainant received Leave Without Pay ("LWOP") on the following dates: all of May 2013 while he was on FML; June 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, and 28.

May 15, 2013 Correspondence

89. On May 15, 2013, there were a series of internal CDOT emails concerning Complainant's situation. At 7:49 AM on the 15th, Mr. Wells emailed Mr. Kiziuk the following: "Len, I did get a chance to look yesterday and the last time terry [sic] was in the office was 4/25/13 for 1.5 hrs."

90. At 9:23 AM, Mr. Kiziuk emailed Ms. Haglund, Mr. Longs, Mr. Wells, and Sabrina Hicks, another member of the Employee Relations/Legal department, asking: "Fred: Is this sufficient for you to initiate the ADA inquiry? Deb: Please email a request for an updated med cert." (Emphasis in original).

91. At 9:37 AM, Mr. Kiziuk emailed Mr. Longs: "I know. Its Danny Wells statement that he has not worked since 4/25/13. This far exceeds his current FML designation." Mr. Kiziuk was responding to an earlier email from Mr. Longs, the text of which was not provided in the exhibit.

92. At 11:24 AM on May 15, 2013, Ms. Hicks sent Mr. Kiziuk, Ms. Haglund, Mr. Longs, and Mr. Wells an email stating that "we should begin the ADA communications asap."

93. Later that day Mr. Longs mailed a letter to Complainant by certified mail that informed him that he may be eligible for reasonable accommodations under the ADA. The letter instructed Complainant that if he decided to request an accommodation under the ADA, he needed to follow the steps outlined in PD 600.2, a copy of which was included with the letter.

94. Mr. Longs also included with the letter two copies of "Authorization to Release or Obtain Information" forms for Complainant to sign and return, which would give Mr. Longs permission to speak with Complainant's physicians. He also included an "Employment Application and Employee Statement of Impairment and Effects" form.

95. Mr. Longs concluded the May 15, 2013 letter by stating that all of the forms needed to be returned to Mr. Longs within 10 days of the date of the letter.

96. When Mr. Longs wrote this letter, he used the outdated October 3, 2002 version of PD 600.2 as his guide. He was not aware of the 2009 version or that the 2009 version required the materials to be submitted within seven days, not ten days.

97. The 2009 PD 600.2 required language to the effect that if the forms were not returned to Mr. Longs within seven days, CDOT would not take any further action concerning reasonable accommodations, thereby alerting the employee of the importance of timely completing and returning the forms. Mr. Longs' letter did not include that language.

98. The May 15, 2013 letter marked the first time Mr. Longs ever attempted to interact with Complainant.

99. Complainant never received Mr. Longs' letter, which was returned to CDOT with a yellow sticker that stated "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD RETURN TO SENDER" (emphasis in original).

100. No one at CDOT informed Mr. Longs that the May 15, 2013 letter was returned to CDOT. If he had known, he would have telephoned Complainant or otherwise tried to personally contact him to discuss possible reasonable accommodations.

101. Because Complainant did not receive the letter, Mr. Longs never received the requisite forms.

102. Around this same time, Mr. Longs asked to see Complainant's "PDQ," which stands for Position Description Questionnaire, and is the document used to determine an employee's job duties. He needed the PDQ in order to identify the essential functions of Complainant's position in accordance with Step 3 of PD 600.2.

103. Mr. Longs was not provided with Complainant's PDQ, and instead of continuing to ask for it or finding it on his own, he dropped the matter.

104. On May 17, 2013, Ms. Haglund emailed Complainant at his CDOT email another letter concerning his FML. She reminded him that he had been absent from work since April 26, 2013, and that his current medical certificate did not support that absence. She attached to the email all the documents he would need to reapply for

FML. She also emailed him a copy of the March 13, 2013 STD letter that she had previously mailed him.

105. In addition to emailing Complainant this letter and documents, she mailed them by certified mail to his home.

106. On May 13, 2013, Ms. Haglund sent Mr. Wells and Mr. Kiziuk an email informing them that, "After this month, Terry only has 73.5 hours of FML job protection. I mailed an STD information letter to him today."

107. Complainant did not receive Ms. Haglund's May 17, 2013 email because he was not at work, does not own a computer, and due to this health, could not drive in order to access a computer. He also did not receive the certified letter.

108. At some point in early 2013, prior to May 17, 2013, Ms. Haglund met with Complainant personally and explained the FML and STD requirements to him.

109. On May 13, 2013, Mr. Kiziuk sent Complainant an email to his CDOT address stating: "Hi Terry, When you are back at work, I would like to meet with you concerning FML and your leave situation. Thanks." Complainant did not receive that email because he was off work and did not have a computer.

110. Complainant left his home and checked into LCC on May 29, 2013. His neighbor gathered his mail for him while he was gone and left it on his kitchen table. He was not able to review his mail until he returned home from LCC on June 17, 2013.

111. On June 4, 2013, a form letter was sent to Complainant specifically concerning The Standard Insurance's Company's STD benefits. The first paragraph stated "Our office has received information indicating that you have an illness or injury which either requires a continuous period of absence with an uncertain return to work date, or that limits you to working 20 hours or less per week. If you are unable to return to work full-time, you are encouraged to apply for Short-Term Disability (STD)."

112. The letter went on to explain that:

> Permanent employees with at least one (1) year of State Service are eligible for STD leave, which is a type of **unpaid leave** of up to six (6) months while either State or PERA STD benefit payments are being made. To be eligible for the job protection of STD leave, an STD application must be submitted to Standard within 30 calendar days of the beginning of the absence, or at least 30 calendar days prior to exhaustion of all accrued leave.

113. The letter was addressed to "Terry Sullivan Hand Delivered" with no street address listed. Complainant did not receive this letter by hand delivery, or by any means, on June 4, 2013.

114. On June 4, 2013 at 2:58 PM, Mr. Wells emailed Mr. Kiziuk, Mr. Longs, and Ms. Hicks, explaining "FYI Terry Sullivan just called to fill me in on what's going on with him. He discussed the limited use of his lower limbs and the use of a wheelchair....I did inform Terry that he had approximately 57.5 hours of FML remaining after today and encouraged him to get advice from the facility staff concerning actions he should take concerning his job."

115. At 3:26 PM on June 4, 2013, an email was sent from Shawn Eberly, one of CDOT's Benefits Administrators to a number of people, including Mr. Wells, Ms. Haglund, and Mr. Kiziuk. It stated that, "Employee Relations/Legal has received notification from Standard indicating the above referenced employee [Complainant] has applied for Short Term Disability. This is the initial notice only and the claim has just begun the review process. As I receive status updates from Standard I will let you know."

June 6, 2013 Meeting with Complainant

116. On June 6, 2013, Mr. Kiziuk and Mr. Longs drove to LCC to have an in-person meeting with him about his employment. At the time of this meeting, Complainant had already missed his deadline to apply for STD leave protection; his annual and sick leave were exhausted, and his FML was about to expire.

117. One of the reasons for this meeting was that Mr. Kiziuk and Mr. Longs were hoping to help Complainant apply for and receive STD monetary benefits, as well as discuss his retirement options with him.

118. Mr. Longs wanted to attend the meeting because he had never received the completed ADA forms back from Complainant that he had mailed him on May 15, 2013.

119. The June 6, 2013 meeting with Complainant lasted approximately one and a half hours, with Mr. Kiziuk doing most of the talking. Mr. Longs spoke for only about 15 minutes. After the meeting, Mr. Kiziuk commented that Complainant was the most alert and articulate he had seen in a long time.

120. At the June 6, 2013 meeting, Mr. Kiziuk reviewed an "Employee status meeting" report with Complainant, which included the dates all of his various forms of leave had exhausted or were going to expire. The report included a statement that said Complainant must "apply for STD by 6/11/13. Potential eligibility for monetary benefit, but no leave protection." Complainant signed the report after reviewing it with Mr. Kiziuk, but did not understand what he signed.

121. Someone also wrote on the report:

> Reasonable Accommodations (ADA)? Accommodations included processing of only applications received on the web so that data

entry would be limited. Processing of annual permits, which require the least amount of technical knowledge. No special permit application processing which are the most complex and require higher level analytics. Phone duty replaced entry of complex permits.

122. At the June 6, 2013 meeting, Complainant informed Mr. Kiziuk and Mr. Longs that he wanted to return to work at CDOT.

123. Despite hearing that fact, Mr. Longs did not ask what reasonable accommodations Complainant would need in order to be able to return to work.

124. Complainant also raised the issues of how he planned on traveling to work, as well as wheelchair accommodation for him for when he returned.

125. At the meeting, Mr. Kiziuk explained to Complainant that he had missed the deadline to apply for STD leave protection. Complainant never knew the deadline date, but would have timely applied had he known. Mr. Kiziuk gave Complainant paperwork to apply for STD monetary benefits at the meeting, as well as FML forms.

126. Complainant signed another FML medical certification at the June 6, 2013 meeting.

127. Mr. Longs gave either Complainant or one of the LCC social workers ADA forms to be completed and returned.

128. Mr. Kiziuk and Mr. Longs explained to Complainant that most of his leave was exhausted, that all of his leave would be exhausted soon, and that he should look into disability retirement options. Neither Mr. Kiziuk nor Mr. Longs, however, informed Complainant that unpaid leave is a common form of reasonable accommodation under the ADA.

129. Two LCC social workers were present at this meeting, Denise Ramunda and Jenny Abel. Ms. Abel recalls that during the meeting the issue of Complainant going back to work was discussed.

130. Ms. Abel told Mr. Kiziuk during the meeting that LCC personnel were hopeful that Complainant could return to work on June 12, 2013.

131. Ms. Abel observed that Complainant was alert, oriented, and aware of his surroundings during his LCC stay. She also observed that he worked hard in therapy because he was very motivated to return to his job at CDOT. She heard Complainant practicing his speech therapy every night very loudly.

132. Ms. Abel and Ms. Ramunda told Mr. Kiziuk and Mr. Longs that Complainant's therapy was going well.

133. Dr. Melany Allison Higgins, MD, completed the medical certification form and indicated that Complainant would need time off from work for a neurology appointment every six months, and for substance abuse counseling every two weeks.

134. Mr. Wells was keeping notes concerning Complainant and his status throughout May and June of 2013. After the June 6, 2013 meeting, Mr. Wells made the following entries:

- 6/7/2013: Returned call to Len Kiziuk. Len filled me in on June 6 meeting with Terry. Relevant detail to me was that Len was encouraged by the social worker's desire to get Terry back into the workplace. Len informed me that Terry my [sic] be returning the following Wednesday (6-12-2013), would most likely be in a wheelchair and there would be some communication issues. I informed Len that the wheelchair would not be an issue, especially since our office is not on the first floor near the main entrance, but if the communication issue was that Terry would not be able to speak with customers on the phone an issue would be created as the issue was that Terry would not be able to speak with our customers via telephone conversations.

- 6/21/2013: Terry called to inform me that he could be returning to work July 1. I did remind Terry that he was in fact told in a June 6 meeting with Len K. and Fred L. that this was coming and reminded him that he had signed the document. Terry mentioned that he had completed STD. I reminded him that the STD carried no job protection. I inquired as to whether or not he had contacted PERA concerning a disability retirement. He said no and I encouraged him to do so. He asked if he was still employed so I informed him that that the discussions concerning an administrative separation had already begun with the appointing authority Scott McDaniel. Terry asked if he could speak with Len, so I suggested that this would be a good idea, but any discussions couldn't wait. They needed to be had today.

135. After the June 6, 2013 meeting, no one from CDOT ever called Complainant again.

136. Mr. Longs did not receive the ADA forms back from Complainant or his social workers after the meeting. He did not call Complainant or the social workers to check on the status of the forms.

137. While at LCC, Complainant received intense therapy, including physical, speech, and occupational therapy.

138. Complainant received physical therapy five days per week for one hour per day. He did stretching exercises, followed by limited walking around the facility with a walker, then with a cane. He also worked on stair climbing and balance.

139. LCC therapists were attempting to retrain Complainant's brain to use different parts in order to help him regain the ability to walk. The brain retraining required intense mental and physical effort.

140. By the second week of Complainant's stay at LCC, his speech had improved significantly.

141. On June 9, 2013, Complainant's STD monetary benefits were approved starting that day and running through November 5, 2013. Shawn Eberle sent an email to all of the CDOT personnel involved in Complainant's case informing them of this fact.

142. On June 14, 2013, while Complainant was still at LCC, he called Mr. Wells prior to 7:07 AM and left him a voicemail informing him that he would not be coming in to work that day.

143. At 7:07 AM on June 14, 2013, Mr. Wells sent an email to Mr. Kiziuk that explained:

> According to the last FML figures that we had, Terry only has 1.5 hours of FML protection today and he has called in to inform us that he will not be coming in. What is the plan? Is there anything I should be doing? By the way, in every daily voicemail he has left me lately, he still believes it is May. Don't know if this bears any relevance, but thought I would let you know.

144. On June 14, 2013, Complainant's FML leave protection ran out at 9:00 AM.

145. On that same day, Mr. Wells sent an email to Ms. Hicks informing her of that fact and then asking: "If FML protection has expired, would approving LWOP beyond 9am this morning, still allow CDOT to administratively discharge Terry?"

Complainant's Discharge from LCC and the Fit-To-Return Certificate

146. LCC staff review each patient's case at weekly Thursday evening meetings. After Complainant's second Thursday night, LCC staff determined he had improved enough to be discharged, and he was discharged on June 17, 2013.

147. As of the time of his discharge, Complainant was speaking and communicating well.

148. After his discharge, a visiting nurse provided physical therapy for two weeks which consisted of one hour per day, three times a week.

149. On June 20, 2013, Dr. Juarntino Saavadro, M.D. completed and signed a "State of Colorado Fitness-To-Return Certification" form indicating that Complainant would be fit to return to work at CDOT on July 1, 2013.

150. Mr. Longs never saw this fit-to-return certificate.

151. On June 20, 2013, Complainant called Mr. Wells to inform him of his intent to return to work on July 1, 2013. He also told Mr. Wells that he had the necessary medical forms filled out clearing him to return to work. Mr. Wells told him that his job was in jeopardy and that his job security had been exhausted with the exhaustion of his FML leave.

152. Mr. Wells did not inform Mr. Longs that Complainant had been medically cleared to return to work on July 1, 2013. Complainant did not inform Mr. Longs of this fact either.

Complainant's June 25, 2013 Discharge

153. On June 21, 2103, a Friday, Complainant called Mr. Kiziuk to tell him that he had a fit-to-return form that cleared him to return to CDOT on July 1, 2013, and to ask him if he still had a job. Mr. Kiziuk informed Complainant that Scott McDaniel, CDOT's Director of Staff Branches and Complainant's appointing authority, had already asked Mr. Kiziuk to prepare an administrative discharge letter in accordance with Rule 5-10. Complainant asked Mr. Kiziuk if he had any recourse, to which Mr. Kiziuk replied that he would have to call Mr. McDaniel, and provided him Mr. McDaniel's phone number.

154. Complainant next called Mr. McDaniel. Mr. McDaniel verified that he had instructed Mr. Kiziuk to draft a separation letter and reminded Complainant that he had exhausted all of his leave. Complainant told Mr. McDaniel that he was trying to get back to work and told him that he was cleared to return to work on July 1, 2013. However, Mr. McDaniel did not understand that Complainant had an actual form clearing him to return to work on July 1, 2013. Mr. McDaniel asked Complainant to look into his options for retirement.

155. When the conversation ended, Mr. McDaniel thought there was an agreement that the two would talk again the following Monday, June 24, 2013. Complainant does not remember such an agreement.

156. On Monday, June 24, 2013, Complainant did not call Mr. McDaniel. Mr. McDaniel interpreted Complainant's failure to call as a lack of initiative on Complainant's part. Mr. McDaniel testified that, "In my position if I ask for a response I expect one."

157. Mr. McDaniel further stated that there were a couple of instances when Complainant did not show up for work and did not call, which caused Mr. McDaniel to question Complainant's dedication to his job. However, Mr. McDaniel thought it was odd that Complainant did not call him on the 24th, because he remembered that Complainant had told him on June 21 that he wanted to return to work.

158. That perceived lack of initiative, coupled with Complainant's exhaustion of leave, prompted Mr. McDaniel's final decision to administratively discharge Complainant.

159. On June 25, 2013, Mr. Kiziuk finalized and mailed the administrative discharge letter to Complainant.

160. The discharge letter cited the fact that all of Complainant's leave had expired and that Complainant had not contacted Mr. Longs "for further consideration under the ADAAA" (the ADAAA is the amended version of the ADA).

161. Mr. McDaniel had limited knowledge concerning Complainant's health when he discharged him. He was aware Complainant might need a wheelchair, but he was not aware of Complainant's most recent hospitalization at LCC.

162. Mr. McDaniel has discretion concerning whether or not to administratively discharge an employee. He chose to discharge Complainant in part because no one gave him evidence of any extenuating circumstances in Complainant's case that would have made him change his mind.

163. Mr. McDaniel did not contact Mr. Wells to discuss Complainant's initiative or lack thereof prior to discharging him. Mr. Wells likewise did not contact Mr. McDaniel to inform him that Complainant had called Mr. Wells almost daily during April, May, and June of 2013 to update him on his status.

164. Mr. McDaniel did not contact Mr. Longs to discuss Complainant's ADA status with him prior to sending this letter. He was informed by Mr. Kiziuk that the ADA requirements had been met concerning Complainant, and he trusted Mr. Kiziuk and Mr. Longs to have properly done their jobs.

165. Around this time, Mr. McDaniel made a comment to the effect that if Complainant worked in the business world or private sector he would have been fired by then due to his absences.

166. Mr. Wells reluctantly admitted that he would not rehire Complainant if given a choice because of all of his absences, and because Mr. Wells' office is very busy and he needs people there and working.

167. Steps 3, 5, 6, and 7 of PD 600.2 were not performed prior to Complainant's administrative discharge. Mr. Longs did not finish the steps because he

had not been given the permission from Complainant that he believed he needed in order to proceed, and because he had not received the necessary ADA documents back from Complainant.

168. Ms. Abel and Ms. Ramunda had the ADA documents in their possession as late as the hearing in this matter, and had not sent them to CDOT "because no one asked for them."

169. Mr. Longs testified that he did not contact Complainant after the June 6 meeting to follow up on the ADA documents because he trusted Complainant's two social workers to properly handle the documents for Complainant.

170. After Complainant's discharge, Mr. Wells' office had three vacancies. He hired one temporary worker, and hired Complainant's replacement on October 1, 2013.

171. Mr. Wells did not see Complainant's name on a reinstatement list when he was filling his vacancies in summer and fall of 2013.

DISCUSSION

I. GENERAL

Certified state employees have a property interested in their positions. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). In this appeal of Complainant's administrative discharge, Complainant has the burden to prove by a preponderance of the evidence that his termination was arbitrary, capricious, or contrary to rule or law. *Velasquez v. Dept. of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2004). Complainant also has the burden to prove by a preponderance of evidence that he was discriminated against on the basis of his disability. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997).

II. HEARING ISSUES

A. Respondent's discharge of Complaint was arbitrary, capricious, and in violation of rule or law.

Complainant's contentions at hearing included a series of distinct legal claims relating to allegations that Respondent violated the requirements of the ADA, failed to meet the requirements of the applicable CDOT procedure relating to Complainant's employment, violated CADA, and was arbitrary and capricious in the manner in which Respondent made the decision to terminate Complainant's employment. Each one of these contentions requires a different legal analysis and will be analyzed separately.

1. Respondent violated the ADA requirement to hold an interactive process with Complainant to discuss his ability to perform his job with or without reasonable accommodation.

Complainant is a qualified individual with a disability, which places his situation squarely under the ADA. Employers subject to the ADA "shall make reasonable accommodation to the known physical limitations of an otherwise qualified disabled applicant or employee unless the [employer] can demonstrate the accommodation would pose an undue hardship or that it would require any additional expense that would otherwise not be incurred." Commission Rule 60.2(C)(1). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004). An individual is "otherwise qualified" under the ADA if he or she can perform the essential functions of a position held or desired. *Smith v. Midland Brake*, 180 F.3d 1154, 1159 (10th Cir. 1999).

Implementation of the reasonable accommodation aspect of the ADA is an interactive process that requires participation of both parties. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (19th Cir. 1998). The interactive process begins with the employee providing enough information about his limitations and desires to convey the employee's desire to remain with the employer despite his disability and limitations. Midland Brake, 180 F.3d at 1172. To trigger the interactive process, no magic words are necessary. *Id.* "To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'" *Id.*

Concerning reasonable accommodations, the federal Equal Employment Opportunity Commission's ("EEOC") guidelines and caselaw make clear that unpaid leave is an acceptable and common form of reasonable accommodation. The EEOC's "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," number 915.002, states the following:

> Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave.
>
> Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a

> disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.
>
> As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).
>
> If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Courts have held that unpaid leaves of absences are reasonable accommodations. *See, e.g., Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 171-72 (1st Cir. 1998) (employee took 52 weeks of leave and the employer refused to grant him four additional weeks unpaid leave; the First Circuit held that the additional four-week accommodation "strikes us as eminently reasonable; so reasonable, in fact, that we are puzzled that [the employer] has drawn a line in the sand at this point"); *see also Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006) (the court explained that "[m]ost ... circuits and the [EEOC] have concluded that, in some circumstances, an unpaid leave of absence can be a reasonable accommodation"), *and see Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004) (the court stated "[T]he federal courts that have permitted a leave of absence as a reasonable accommodation under the ADA have reasoned ... that applying such a reasonable accommodation at the present time would enable the employee to perform his essential job functions in the near future").

Here, it is undisputed that Complainant expressly stated that he did not believe he needed help from the ADA Coordinator in 2012. Despite that fact, CDOT's PD 600.2 required Mr. Wells to inform Mr. Longs of Complainant's official Parkinson's diagnosis in the summer of 2012, which he failed to do. Had Mr. Longs been made aware of the diagnosis, he may have begun his involvement with Complainant sooner, which may have led to a different outcome. In any event, while CDOT violated its own procedural directive in 2012, it did not violate the ADA that year because Mr. Wells took on the duties of the ADA Coordinator himself. He engaged in the interactive process with Complainant when he met with him to discuss reasonable accommodations, and then he successfully implemented those reasonable accommodations with Complainant by rearranging some of the job duties within the Extra-Legal Permits Office.

In 2013 however, CDOT failed to engage in the interactive process with Complainant and failed to reasonably accommodate him in violation of CADA, the ADA,

and CDOT's own PD 600.2. It is true that Complainant did not return the necessary ADA forms to Mr. Longs which would have triggered the interactive process, despite the forms being mailed to him in May of 2013, and hand-delivered to him at LCC on June 6, 2013. However, in both instances, other persons or circumstances contributed to Complainant's failure to return the documents. The mailed ADA documents were returned to CDOT as being undeliverable. The envelope clearly stated in large letters on a bright yellow sticker that the letter was unable to be delivered. Yet no one at CDOT took it upon themselves to determine what was in the returned letter or who should be notified that the letter had been returned. Hence, Complainant never knew he was being charged with a 10-day deadline to return the enclosed ADA forms, and Mr. Longs never knew that Complainant did not receive the forms in the first place. This communication failure should be construed against CDOT since someone at CDOT saw that the letter had been returned, and Complainant had no way of knowing that he had not received something he was supposed to receive.

Likewise, the hand-delivered ADA documents were not returned in part because of the actions of others. Mr. Longs likely gave those documents to Complainant's social workers, since they still had the documents in their possession as of the day of hearing. Complainant put his trust in his social workers to help him to do whatever he needed to do to return to work. That was the point of all of his therapy, and he and the social workers all knew that fact. Thus, it is understandable if Complainant further trusted his social workers to correctly handle the ADA forms. Unfortunately for Complainant, the social workers were waiting to hear back from Mr. Longs about what to do with the documents, and Mr. Longs was waiting to hear back from the social workers.

Even if Complainant should have been more aggressive in ensuring that the ADA documents were timely returned to Mr. Longs, thus triggering the interactive process and reasonable accommodations, Mr. Longs knew as of June 6, 2013 that Complainant wished to return to work, that his social workers believed he could return to work on June 12, 2013, and that Complainant was asking whether or not he could use a wheelchair when he came back to work. Mr. Longs' knowledge of these facts should have triggered the start of the interactive process and a discussion with Complainant about reasonable accommodations when he was able to return to work. This fact is especially true considering that Mr. Longs testified that he knows that requests for reasonable accommodations are not required to be in writing. Mr. Longs instead adhered to a very technical interpretation of the ADA and would not proactively initiate the interactive process or discuss accommodations unless and until he received those ADA forms back from Complainant.

Moreover, Mr. Longs testified that he knows that unpaid leave can be a form of reasonable accommodation. At the June 6 meeting, Mr. Longs heard Mr. Kiziuk explain to Complainant how all of his leave had either already expired or was about to. As stated above, he also heard Complainant expressly state his desire to return to work. For some unknown reason, it did not seem to occur to Mr. Longs to explain to Complainant that if he was cleared to return to work and could perform the essential functions of his job, but exhausted all of his leave prior to the date upon which he could

return, that a reasonable accommodation would be to grant him unpaid leave until that date. In this case, there were only six days between the date that Complainant was discharged for exhaustion of all of his leave, June 25, 2013, and the date that his physician cleared him to return to work, July 1, 2013. CDOT is a large agency with a large budget, and it seems reasonable on its face to expect that CDOT could have held Complainant's position open for six additional days.

Respondent may argue that it was not aware that Complainant was cleared to return to work on July 1, 2013 when it discharged Complainant, but the evidence at hearing proved that Complainant told everyone he spoke with on June 21, 2013 – Mr. Wells, Mr. Kiziuk, and Mr. McDaniel – that he had been cleared to return on that date. Even if CDOT did not physically see the signed fit-to-return form before discharging Complainant, they were on notice that such a form existed, and thus they should have at least investigated this fact prior to his discharge. Through all of these actions, Respondent failed to engage in the interactive process with Complainant in violation of the ADA.

Finally, because CDOT failed to engage in the interactive process with Complainant after his discharge from LCC, CDOT did not know if Complainant could perform the essential functions of his job. Complainant believed he could perform the essential functions, because he had successfully performed his duties when Mr. Wells had accommodated him in 2012. Despite his belief, CDOT had an independent duty, both pursuant to the ADA and under its own PD 600.2, to evaluate whether Complainant could perform his old job duties, and if not, then CDOT had an additional duty to conduct a regional and state-wide job search for a position that would accommodate Complainant's disability. CDOT's duties to accommodate Complainant's disability stopped only if and when CDOT could show that accommodating Complainant in any job would cause an undue hardship to CDOT. CDOT never made this showing because it stopped the interactive process with Complainant in June of 2013 when he failed to return the ADA forms.

All of the above actions demonstrate that CDOT failed to engage in the interactive process with Complainant, failed to reasonably accommodate him by not granting him six additional unpaid days of leave, and failed to reasonably accommodate him by not determining whether he could perform the essential functions of his job, and if not, to conduct a job search for him. These failures violate the basic provisions of the ADA.

2. Respondent violated its own internal procedures for addressing the needs of a disabled employee.

CDOT's PD 600.2 sets forth seven steps that must be taken when dealing with a disabled employee, and generally mirrors the ADA's requirements. By way of reminder, the seven steps are:

Step 1: Initiate the interactive process.

Step 2: Formal Communication/Request for Documents.
Step 3: Identify essential functions of the position.
Step 4: Determine eligibility to return to work.
Step 5: Identify reasonable accommodation.
Step 6: Search for a Vacant Position (if applicable).
Step 7: Separation from State Service (if applicable).

CDOT complied with the first two steps when Mr. Wells met with Complainant on December 1, 2012 to discuss altering his job duties to accommodate his Parkinson's symptoms, and when Mr. Longs mailed Complainant the ADA letter with the requisite forms in 2013, and hand delivered the forms to him at LCC. Respondent failed to conduct Steps 3 through 7. Mr. Longs began Step 3 when he requested Complainant's PDQ. However, when none of the personnel involved provided him with the PDQ, he did not pursue the issue, thus failing to finish Step 3. Concerning Step 4, at no point did anyone at CDOT try to determine if Complainant was eligible to return to work following his stay at LCC. Even after Complainant told Mr. Wells, Mr. Kiziuk, and Mr. McDaniel on June 21, 2013 that he had received a fit to return certificate filled out by his physician that cleared him to return to work on July 1, 2013, none of these men attempted to confirm this information, and instead seemed to act like the information was too late or otherwise did not matter.

Steps 5, 6, and 7 were simply not done, and the explanation for this failure appears to be that Mr. Longs never received completed ADA forms back from Complainant. This explanation does not comport with the "very proactive approach to disability rights" taken by CDOT's primary funding source, the FHWA (the Federal Highway Administration).

3. Respondent's decision to terminate Complainant's employment after he had contacted Respondent with his anticipated return date was an arbitrary and capricious decision.

In Colorado, arbitrary and capricious agency action is defined as:

> (a) Neglecting or refusing 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; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Complainant clearly informed his appointing authority on June 21, 2013 that he wanted to return to work, and also indicated that he had been cleared to return to work on July 1, 2013. Despite this information, the appointing authority did not speak with

Mr. Longs to ensure that CDOT was properly complying with the ADA. The appointing authority did not speak with Mr. Longs (or Mr. Kiziuk) because he testified that he relied on them to do their jobs properly. However, he alone would decide the fate of a disabled employee with 20 years' tenure at CDOT, and therefore he had an independent duty to ensure CDOT's compliance with the ADA.

The appointing authority also did not speak with Complainant's supervisor, Mr. Wells, to determine if in fact Complainant showed no initiative concerning returning to CDOT. Had he spoken with Mr. Wells, he would have discovered that Complainant demonstrated abundant initiative through his daily phone calls to Mr. Wells in April, May, and June of 2013, despite his increasingly debilitating condition and hospitalization.

The appointing authority testified that one of the factors that went into his decision to discharge Complainant was that no one gave him any evidence of any extenuating circumstances. However, if extenuating circumstances were important enough to be a factor in Complainant's discharge, then the appointing authority should have taken initiative to ask relevant personnel if any extenuating circumstances existed. Had he done so, he may have discovered, for example, that the reason Complainant failed to return the ADA documents was because the documents had been returned to CDOT as undeliverable.

The appointing authority also placed an arbitrary expectation on Complainant by requiring Complainant to call him back on Monday, June 25, and he arbitrarily gave this expectation a considerable amount of weight when it was not met – when Complainant failed to call him. At hearing, the appointing authority testified that he and Complainant had agreed "they would talk again" on Monday. Notably, he did not testify that they agreed that Complainant would call him, only that they agreed that "they would talk again." His own testimony was vague concerning who was supposed to call whom.

Moreover, the appointing authority's testimony made clear that Complainant's failure to call him back that Monday was a significant factor in favor of his decision to discharge Complainant, as evidenced by the appointing authority's testimony that "In my position if I ask for a response I expect one."

The appointing authority also seemed troubled by Complainant's use of leave, as evidenced by his comment that if Complainant were in the private sector, he would have been fired by then. That perception is not accurate given the fact that the ADA applies to private companies that are the size of CDOT.

The examples above demonstrate that the appointing authority failed to use reasonable diligence to procure appropriate evidence about Complainant's situation, and acted arbitrarily and capriciously when he decided to administratively discharge Complainant.

4. Respondent's decision not to complete the interactive process with Complainant and to terminate his employment instead was an act of unlawful discrimination under the ADA and CADA.

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

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

The Colorado Civil Rights Commission ("the Commission") has promulgated rules to implement CADA, in which it interprets CADA as being "substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act," 42 U.S.C. Sections 12101-12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of CADA "shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.* Furthermore, Board Rule 9-4, 4 CCR 801, provides that "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

The ADA prohibits discrimination against qualified individuals with a disability because of the disability. To establish a *prima facie* case of discrimination under the ADA, an employee must show: (1) he is disabled within the meaning of the act; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) he was discriminated against because of his disability. *Mason v. Avaya Communications, Inc.*, 357 F.2d 1114, 1118 (10th Cir. 2004).

Concerning the first prong of the *prima facie* case, Respondent stipulated that Complainant was disabled under the ADA, and the evidence at hearing supports this stipulation. Complainant's Parkinson's disease and its symptoms debilitated him to the point where he could not walk or drive, had to re-train his brain in order to learn to walk again, and had to participate in intensive speech, physical, and occupational therapy. Although there was very little testimony or evidence presented at hearing that Complainant also suffered from alcoholism, various physicians noted on his medical certification forms that he did suffer to some degree with alcohol abuse. However, that fact does not disqualify Complainant as disabled, due to the fact that alcoholism can also be considered a disability under the ADA.

Concerning the second prong, Complainant has met his burden of demonstrating that he was qualified with or without reasonable accommodations to perform the essential functions of his position. Most importantly, he produced Dr. Saavadro's July 1, 2013 fit-to-return certificate, which is sufficient evidence standing alone to find that Complainant was qualified. There was additional evidence, however, that Complainant was qualified, including his LCC social workers' testimony that Complainant was doing very well at the time of his discharge, and Mr. Wells "successful" rating of Complainant's April 1, 2012 through March 31, 2013 job performance when he was utilizing reasonable accommodations of sitting in a wheelchair while working, processing the least complex permit applications, and handling telephone calls from the public in order to free up the other permit writers' time to process the more complex applications. Complainant's reasonable accommodations were so successful that he processed the second most permits in his department with only a 2% error rate. He processed the second most permit applications despite missing work due to his Parkinson's disease.

The third prong – that Complainant was discriminated against because of his disability – was met as well. At the critical time after all of Complainant's leave had been exhausted but before his July 1, 2013 return to work date, there were six days that CDOT had to make a decision about. CDOT could choose to hold Complainant's job open for those six days and provide him with six days of unpaid leave, or CDOT could choose to administratively discharge Complainant pursuant to Rule 5-10. CDOT knew, through Mr. Longs, that unpaid leave is a form of reasonable accommodation. CDOT knew that Complainant had worked for 20 years without receiving corrective or disciplinary action. CDOT knew that Complainant wanted to return to work, he was cleared to return to work, and that he could successfully perform his job duties with reasonable accommodations. Despite this knowledge, CDOT chose to discharge Complainant just a few days before July 1, 2013. That decision does not make sense unless it is seen as Respondent's attempt to be rid of a problem employee, whose problem was missing too much work because of his disability. These actions amount to discrimination on account of a disability. Mr. McDaniel's comment that Complainant would have been fired already if he worked in the private sector, and Mr. Wells' reluctant admission that he would not rehire Complainant due to his absences, support this conclusion.

B. Complainant is not entitled to attorneys fees.

Complainant requests an award of attorney fees and costs. Attorney fees and other costs may be awarded against a department if it is found that the personal action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5(1), C.R.S. Board Rule 8-38, 4 CCR 801, implements the attorney fee statute. The party seeking an award of attorney fees and costs bears the burden of proof. Board Rule 8-38(B). The Rule defines a frivolous personnel action as one "in which it is found that no rational argument based on the evidence or the law is presented." Board Rule 8-38(A)(1). A personnel action made in bad faith, maliciously, or as a means of harassment is defined as one "pursued to annoy or harass, was made to be abusive, was stubbornly litigious,

or was disrespectful of the truth." Board Rule 8-38(A)(2). A groundless personnel action is defined as one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule 8-38(A)(3).

Respondent's actions in discharging Complainant were arbitrary and capricious and in violation of their own internal procedures. CDOT personnel made significant mistakes and errors in judgment. However, Complainant failed to put on evidence sufficient to show that these actions were more than mistakes, that the actions were "instituted frivolously, in bad faith, maliciously, or as a means of harassment." Without that evidence, attorneys fees are not warranted.

C. Complainant's remedy requires an award of back pay, as well as that Respondent complete the interactive process prior to deciding if and how to reinstate Complainant.

The goal of any remedy is to place an employee into the same position he would be in if Respondent had not taken the wrongful actions. In this case, Respondent's termination of Complainant's employment is reversed, and Complainant is awarded back pay, as well as statutory interest, for the period of time since he was discharged. Respondent must also reimburse Complainant for his payments of the entirety of his health insurance premiums under COBRA during this same time period. The award of back pay must take into account the appropriate setoffs for any state payments Complainant has received in the interim, such as the short term disability payments.

An order of back pay is typically accompanied by an order for reinstatement of the employee. In this case, any order for reinstatement must take into account a complicated situation. The process of determining whether reinstatement can occur in this case will require the completion of the interactive process with Complainant, including consideration of other vacant CDOT positions statewide that he may be able to fill if he cannot, at this point, return to his previous position.

ORDER

Respondent's discharge of Complainant is **reversed**. Respondent shall pay Complainant full back pay from the date of his discharge, including statutory interest, and including reimbursement of the portion of Complainant's health insurance premiums he was required to pay under COBRA, offset by any state short term disability payments or any other state monetary benefits received by Complainant during the same time period. Respondent shall complete the interactive process and shall complete Steps 3 through 7 of PD 600.2. Respondent shall continue to pay Complainant until the date the interactive process and Steps 3 through 7 are completed.

DATED this 17th day of **March, 2014,** at Denver, Colorado.

[redacted]

Tanya T. Light
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor

CERTIFICATE OF MAILING

This is to certify that on the 18th day of March, 2014, I electronically served a true copy of the foregoing **INITIAL DECISION** as follows:

Michael Sandstrum
[redacted]

Heather Smith A.A.G.
[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 8-62, 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.