STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2014B097**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID S. TURNER,
Complainant,

vs.

DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on December 9, 2014, and the evidentiary hearing on January 8 and 9, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on January 28, 2015, after receipt of both parties' post-hearing briefs, and the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared *pro se*; his advisory witness was his spouse, Lori Turner. Respondent was represented by Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness was Andrew Gale, Human Resources Director, Colorado Department of Revenue.

MATTER APPEALED

Complainant, David S. Turner, worked for the Department of Revenue (DOR), Division of Motor Vehicles (DMV), for over 26 years prior to being administratively discharged effective at the close of business on April 23, 2014. He received written notice of his administrative separation on April 23, 2015, and appealed his discharge on May 2, 2014, claiming that he was discriminated against on the basis of his disability, resulting from an on-the-job traumatic brain injury, in violation of the Colorado Anti-Discrimination Act (CADA). Complainant further contends that Respondent violated the Americans with Disabilities Act (ADA), as well as Director's Procedure 5-6 (Rule 5-6), by failing to engage in an interactive process with him to determine whether Respondent could reasonably accommodate his disability. Complainant requests that his administrative separation be rescinded. He further requests that Respondent be ordered to participate in the interactive process to either allow him to return to his position as an Air Environmental Systems Technician I with the Emissions section of the DOR with accommodations as needed, or to identify a position within the DOR for which he is qualified, with or without accommodation.

Respondent counters that it did not discriminate against Complainant, and that its administrative discharge of Complainant for exhaustion of his accrued leave complied with Rule 5-6, as well as CADA and ADA requirements. Respondent requests that the Board affirm its administrative discharge of Complainant and deny his requested relief.

For the reasons discussed below, Complainant's administrative separation from employment by Respondent is **rescinded.**

ISSUES

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

2. Did Respondent discriminate against Complainant on the basis of disability?

FINDINGS OF FACT

Background and Complainant's Employment with DOR

1. Complainant worked for the DOR as an Air Environmental Systems Technician I (AES Tech I) from July 13, 1987, until his administrative separation from employment on April 23, 2014, except for seven months during which he worked as a trainer in the DOR's Office of Human Resources. He became a certified state employee in 1988.

2. The DOR's Emissions Program oversees the daily operations of the State's automobile inspection and repair program, licenses all inspection stations and emissions inspectors/mechanics who perform emission tests, and audits all emission test facilities located along the Front Range to ensure proper operation and consumer service.

3. Complainant never received corrective or disciplinary action, or a "needs improvement" evaluation, during his lengthy employment with DOR.

4. At the time of his administrative separation on April 23, 2015, Complainant was the employee with the most service in the Emissions section of the DOR, except for Operations Manager Laurie Benallo.

5. Complainant's appointing authority was Laurie Benallo, Operations Manager, Emissions Section, Colorado DMV. His supervisor was Rob Dawson.

6. Kirsten Moore, Risk Coordinator, DOR, was responsible for coordinating employees' leave and workers' compensation claims. Complainant's workers' compensation benefits were administered by Broadspire. His Broadspire Medical Case Manager was Marianne Pullam.

Complainant's July 23, 2013 Injury and Treatment

7. On July 23, 2013, at approximately 10:00 a.m., Complainant was filling his work vehicle with fuel at a gas station. He had to look at his odometer reading in order to enter it into a key pad on the gas pump. As Complainant was coming out of his vehicle, he hit his head on something and was in a great deal of pain. His wife, Lori Turner, called him while he was at the gas station and he told her what happened.

8. Approximately one hour later, Ms. Turner called Complainant again and found him to be very disoriented. He was standing in their garage at home; he told her he recognized the car but not the garage. Complainant was panicked and said his head really hurt, and he didn't know where he was. Ms. Turner instructed Complainant to go into the house, and then she called some neighbors to help. He was taken to the hospital, where Ms. Turner joined him.

9. Complainant was diagnosed with a traumatic brain injury and post-concussion

syndrome. For the first month after his injury, Complainant required a great deal of rest and could not be left alone. He had severe headaches for over a year, and suffered sensitivity to light and vertigo. He had difficulty with his short-term memory, and lost any memories from the week preceding his injury.

10. During the months following his injury, Complainant participated in various physical and cognitive therapies. Complainant eventually took back responsibility for paying bills and balancing the checkbook. He also started working on cars, maintained an appointment calendar and engaged in other activities to improve his brain functions.

11. Following his July 23, 2013 injury, Complainant's workers' compensation medical provider, Dr. David Reinhard, reported that Complainant was unable to work from July 26, 2013, through January 17, 2014.

12. Complainant's last day of work was July 23, 2013. He filed a workers' compensation claim; the State accepted liability for his on-the-job injury.

Respondent's January 14, 2014 Meeting with Complainant

13. On January 14, 2014, Complainant and his spouse attended a meeting with Andrew Gale and Kirsten Moore.

14. At the beginning of the January 14, 2014 meeting, Complainant was provided with an ADA packet. Mr. Gale told Complainant he did not need to fill out and submit the ADA packet, and that he probably wouldn't need it. Complainant never submitted any forms from this ADA packet.

15. Complainant and his spouse asked for clarification of Complainant's remaining leave balances. Ms. Moore was unable to provide those specific balances, but said she would forward an updated calendar she was preparing to track all of Complainant's leave. Complainant never received this updated calendar.

16. Complainant expressed his desire to return to work, and anticipated that he would have some restrictions.

Complainant's Work Restrictions

17. In an email dated January 17, 2014, at 2:11 p.m., Ms. Pullam advised Ms. Moore that she talked with Complainant about returning to work, and that would be "one of the main points of conversation with Dr. Reinhard" at Complainant's next appointment "on Monday." She asked Ms. Moore: "Please advise if there is any modified work or part time work which may be available so that I can inform the doctor."

18. In a subsequent email dated January 17, 2014, at 2:45 p.m., Ms. Moore responded: "I will check with David's Appointing Authority to ask if there might be a modified duty position available for him to work if he is still unable to return to his current position. ... If there is a modified duty assignment that might be available for David, I will try and have it ready in time for Monday afternoon's appointment."

19. On January 20, 2014, Dr. Reinhard imposed the following restrictions on Complainant: No commercial driving, limit work to 4 hours a day, lifting maximum 20 lbs., repetitive lifting

maximum 10 lbs., carrying maximum 20 lbs., pushing/pulling maximum 20 lbs., and no climbing.

20. In an email to Ms. Moore dated January 21, 2014, at 8:43 a.m., Ms. Pullam shared Complainant's "work status" with Ms. Moore, based upon his January 20, 2014 examination by Dr. Reinhard, and asked, "Please advise if his restrictions can be accommodated."

21. In an email dated January 21, 2014, at 9:41 a.m., Ms. Moore advised Ms. Benallo that Complainant "has been released to work," listed the "temporary restrictions" imposed by Dr. Reinhard, and asked: "Please let us know if you have any work assignments that might be available for [Complainant] that are within the scope of his current restrictions."

22. In an email response dated January 21, 2014, at 1:53 p.m., Ms. Moore advised Ms. Pullam that she would "work with [Complainant's] supervisor and the operations manager to see if there is work available he might be able to do based on his current restrictions and should be able to follow up within a few days."

23. Following an email discussion with Ms. Benallo about Complainant's restrictions and possible return to work, Ms. Moore advised her, in a message dated January 21, 2014, at 4:47 p.m., "If you are concerned about offering an assignment that might not be a good fit, it might be a good idea to call and talk to him about the possible assignment before making a final decision."

24. In an email to Marianne Pullam dated January 21, 2014, at 3:21 p.m., Ms. Moore advised Ms. Pullam that she would "let her know as soon as possible about whether we have work available for [Complainant] based on his current restrictions."

25. On February 20, March 20 and April 16, 2014, Dr. Reinhard continued the following restrictions on Complainant: No commercial driving, limit work to 4 hours a day, lifting maximum 20 lbs., repetitive lifting maximum 10 lbs., carrying maximum 20 lbs., pushing/pulling maximum 20 lbs., and no climbing.

26. On March 20, 2014, Dr. Reinhard completed a medical inquiry form in response to a request from Respondent. This form provides that Complainant's major life activities of working, thinking, learning, lifting, concentrating and balance were affected. This form lists the following limitations "interfering with job performance" as "cognitive fatigue, physical fatigue, dizziness, cognitive dysfunction." This form further indicates that Complainant was having trouble "driving" and performing "activities requiring sustained attention or balancing." Dr. Reinhard states: "The current effects of [Complainant's] brain injury affect too many critical functions for him to be able to work even with accommodations."

27. On March 21, 2014, Ms. Moore sent Ms. Benallo an email stating:

> [Complainant] met with his WC provider yesterday and has been released to return to work with the following temporary restrictions:
>
> - Limit work to max 4 hours per day
> - No commercial driving (no driving as part of the course and scope of his modified duty assignment)
> - Max lifting 20 lbs
> - Max repetitive lifting 10 lbs
> - Max carrying 20 lbs

- Max pushing/pulling 20 lbs
- No climbing at all

These continue to be the same restrictions we were provided with when he was originally released to return to work as of January 20. Please let us know if you have any work assignments that might be available for David that are within the scope of his current restrictions. If David is able to return to work, the restrictions would be in place at least until his next physician appointment which is currently scheduled for April 17.

28. On May 2, 2014, Complainant's new physician, Dr. Brooke Bennis, issued a progress report removing the part time work restriction imposed by Dr. Reinhard and allowing Complainant to return to full time work with the following restrictions: lifting maximum 20 lbs., repetitive lifting maximum 10 lbs., carrying maximum 20 lbs., pushing/pulling maximum 20 lbs., and no climbing.

Respondent's Policy No. DOR-047

29. Respondent's Policy No. DOR-047, "Accomodations [sic] for Persons with Disabilities," was provided to Complainant at the January 14, 2014 meeting as part of an ADA packet.

30. Policy No. DOR-047 provides the following procedure for implementation of "Title I – Employment" of the ADA:

> Individuals seeking accommodation(s) for a disability affecting one or more major life activities shall submit a request for the accommodation to the Americans with Disabilities Act (ADA) coordinator in the Office of Human Resources, [sic] It is also the responsibility of the supervisor to notify the ADA coordinator if an employee has requested an accommodation. Accommodations will not be made for any individual who has or is perceived to have a disability unless the individual specifically asks for an accommodation to be made. The ADA coordinator reviews and approves or denies all requests for accommodations. The ADA coordinator shall consider the type of accommodation necessary, the length of time the accommodation is needed, the essential functions of the position, the cost of the accommodation, if it would cause an undue hardship on the department, and any other factors necessary to determine if the accommodation requested is reasonable.

31. Policy No. DOR-047 further provides, under "Employee Responsibility":

1. An employee requesting accommodation(s) for his or her disability shall have his or her physician complete and submit a Reasonable Accommodation form ... or provide other certifiable proof substantiating the disability and the limitations and/or restrictions he or she may have, within seven business days. The physician or rehabilitation professional may be asked to suggest an effective accommodation.

2. It may be necessary in some situations for the employee to submit a Medical Inquiry form (also due within seven business days). ... In response to an accommodation request completed by the employee's health care provider in

order for the department to determine specific restrictions or clarify the physician's statement. Any additional information requested from a medical or rehabilitation provider must be directly related to the employee's current position and/or access needed. If the employee fails to substantiate the disability, the employer will be released from any liability that may arise due to the accommodation not being provided.

32. Policy No. DOR-047 further provides, under "Supervisor/Appointing Authority Responsibility":

1. The determination about whether to provide an accommodation is made on a case-by-case basis. This is an interactive process through which the department, the individual with a disability and health care or rehabilitation professionals discuss and arrange for the necessary changes. The appointing authority and the ADA coordinator shall review all of the information submitted by the employee and make a determination on whether the requested accommodation can be met. Priority consideration will be given to the employee's preference where reasonable. However, the department has the ultimate discretion to choose between equally effective accommodations.

2. If the supervisor and/or the ADA coordinator determine that additional information is needed before they decide on the employee's request, they may ask the employee to submit a completed Medical Inquiry form.

33. If a disabled employee is unable to return to his or her current position, Policy No. DOR-047, "Inability to Accommodate the Employee's Current Position," outlines a step-by-step process to be followed by the division director and the Human Resources director to "work with" the agency ADA coordinator to find an available job that a disabled employee can perform, with or without accommodation:

1. Where the accommodation cannot be made within the employee's current position, the division director shall be responsible to work with the agency ADA Coordinator to review vacant positions within the division or office to determine if the employee can perform the essential functions of any one of those positions.

2. If there is not a vacant position in the same pay grade within the employee's current division/office for which the individual meets the minimum qualifications and can perform the essential functions of the position with or without reasonable accommodation, the ADA Coordinator will work with the Human Resources director on the process for reasonable accommodation.

3. The ADA Coordinator and Human Resources Director shall first review those positions that are vacant and in the same pay grade the employee presently holds. If there are no vacant positions for which the employee qualifies at the current salary and grade level, they shall review lower-level vacant positions until a position is identified for which the employee qualifies and accommodations can be made. Under no circumstances is movement to a higher-level position considered "reasonable accommodation."

4. If there is more than one available position for the employee, the appointing authority for each division, in which the available positions exist, shall decide which of the positions will be offered to the employee.

5. If there is not a vacant position within the department for which the employee qualifies, or the employee refuses offers of transfer or demotion, the employee shall be administratively separated pursuant to State Personnel Board Rules and Administrative Procedures.

34. Jacqueline Trimble-Brown is Respondent's ADA Coordinator. Respondent never informed Complainant that it had an ADA coordinator, did not advise Complainant to contact Ms. Trimble-Brown and did not have Ms. Trimble-Brown contact Complainant.

35. Neither Andrew Gale nor Laura Benallo worked with Respondent's ADA coordinator to seek reasonable accommodation of Complainant's disability.

Complainant's Attempts to Contact Respondent

36. After January 20, 2014, Complainant understood that he was released to return to work with certain restrictions imposed by Dr. Reinhard. He left messages for Ms. Moore on January 21, January 28 and February 4, 2014, to discuss the status of his leave and his return to work. Ms. Moore never returned his phone calls.

37. When Complainant was unable to reach Ms. Moore, he asked Mariann Pullam, the medical case manager for the workers' compensation carrier, Broadspire, to convey his desire to return to work to Ms. Moore.

38. In an email to Ms. Moore dated March 20, 2014, Ms. Pullam advised Ms. Moore that Complainant was "slowly improving. Still having no luck driving on the highway due to dizziness, fatigue, anxiety..." Ms. Pullam also informed Ms. Moore that Complainant would "very much like to discuss his employment with someone in your department," and asked Ms. Moore to "reach out to him."

39. Mr. Gale contacted Complainant on February 14, 2014, to provide Complainant with information about his leave balances. He did not discuss Complainant's restrictions or possible accommodation of these restrictions with Complainant.

40. Complainant did not receive any further communication from Respondent until he received Ms Benallo's request for a meeting on March 18, 2014.

Complainant's Exhaustion of Leave

41. On July 23, 2013, the day Complainant was injured, Complainant's spouse talked with Kirsten Moore, DOR's Risk Coordinator, about her husband's work-related injury, his anticipated absence from work and the kinds of leave available to him. Ms. Moore told her that the different kinds of leave were very confusing and that state employees have a program called "The Leave Maze" to help them understand how the different types of leave are calculated.

42. At the time of his July 23, 2013 injury, Complainant worked a flex schedule. On October 31, 2013, Mr. Dawson and Ms. Benallo retroactively changed his schedule to a traditional 40-hour work week effective August 5, 2013.

43. Complainant exhausted his 90 days of injury leave on December 3, 2013.

44. Complainant exhausted his 520 hours of Family and Medical Leave (FML) on October 23, 2013, and was provided notice of this FML exhaustion by letter dated October 22, 2013, from FMLA/Leave Coordinator Jessica Cuellar. Ms. Cuellar's October 22, 2013 letter was accompanied by a blank Fitness-to-Return certificate and Complainant's Position Description Questionnaire (PDQ), and instructed Complainant that he was required to submit the completed Fitness-to-Return certificate prior to returning to work. Complainant never submitted a completed Fitness-to-Return certificate to Respondent.

45. Complainant applied for and received short-term disability (STD) benefits. His 180 days of STD leave expired on January 21, 2014.

46. Because Complainant was on paid leave in 2014, he continued to accrue 6.66 hours of sick leave and 14 hours of annual leave prior to the end of each month.

47. Complainant's paid leave was exhausted as of April 11, 2014; he was placed on leave without pay (LWOP) from April 14 through April 23, 2014.

Respondent's April 14, 2014 Meeting with Complainant

48. On March 18, 2014, Ms. Benallo sent Complainant a letter that requested a meeting on March 25, 2015 "to explore options to get you back to work and to identify your needs and ways we may accommodate this happening." Complainant was advised: "This meeting is being held under Board Rule 5-6."

49. In a subsequent email to Complainant dated April 1, 2014, Ms. Benallo clarified: "The purpose of this meeting is to discuss your return to work status."

50. At Complainant's request, the meeting was rescheduled and took place on April 14, 2014.

51. The April 14, 2014 meeting lasted twenty minutes. In addition to Complainant and his lawyer, Ms. Benallo, Mr. Gale and Mr. Dawson attended the meeting.

52. The April 14, 2014 meeting addressed how Complainant was doing and the status of his recovery. During this meeting, Complainant stated that he was still very sensitive to light, and became disoriented during a visit to a hardware store.

53. Complainant restated his desire to return to work during the April 14, 2014 meeting. No one asked him about his specific restrictions or request for accommodation.

Respondent's Attempts to Accommodate Complainant

54. Complainant's job as an AES Tech I involved working in emissions testing facilities that are loud, with multiple vehicles moving around and equipment running. Therefore, technicians need to be aware of their surroundings at all times in the testing stations. Technicians must also be able to identify non-standard work and variances, and be able to accurately document and report findings. Audit work requires the ability to perform a specific set of tasks in a specific order, including the proper connection and calibration of equipment. Driving is required, and the

vehicle that is driven has compressed gas in bottles in the back used with emissions sensing equipment. Improper handling of this compressed gas could pose a safety risk.

55. Based upon the restrictions imposed upon Complainant by Dr. Reinhard from January 20, 2014, through April 17, 2014, Ms. Benallo concluded that Complainant could not safely and effectively perform the essential functions of his position as an AES Tech I with or without reasonable accommodation. This decision was made after the April 14, 2014 meeting with Complainant.

56. Mr. Gale explained that once Ms. Benallo determined that Complainant was unable to return to his AES Tech I position, it was up to him to find a job for which Complainant was qualified. Mr. Gale did not recall seeing any of Dr. Reinhard's reports. He stated that the most important thing is what an employee tells him, not what a doctor tells him; listening to what an employee tells him is an important part of the interactive process. After the April 14, 2014 meeting, Mr. Gale believed that Complainant had issues with thinking, learning and concentrating, coupled with being over-stimulated and becoming exhausted when he tried to drive.

57. Mr. Gale tried to find an available job that Complainant could perform. He considered a job in a driver's license office, a training position like the one Complainant previously held, or an administrative position. Mr. Gale concluded that the stimulus in a driver's license office would prevent Complainant from performing that work, and that his cognitive impairment would prevent Complainant from being a trainer or performing administrative work. He was not aware that Complainant had obtained special glasses that reduced his sensitivity to light and other stimuli.

58. Mr. Gale concluded that Complainant could not perform the essential duties of any other jobs. He did not discuss these duties, or whether Complainant could perform them with or without reasonable accommodation, with Complainant or ADA Coordinator Jacqueline Trimble-Brown.

Respondent's Decision to Administratively Separate Complainant from His Employment

59. Complainant was notified of his administrative separation by letter from Ms. Benallo, dated April 21, 2014, which cited State Personnel Rule 5-6, and stated:

> In our meeting on April 14, 2014 we discussed your current status and whether you were able to return to work with or without accommodations. In terms of leave, you have exhausted your protections under FMLA, injury leave, short-term disability, and make whole; you have also exhausted accumulated sick and annual leave balances. You indicated that your health care provider has not provided a medical release for you to return to work without restrictions. You also indicated that while you are recovering, you do not see your health care provider changing your restrictions in the near future.
>
> At this time I do not have a position available that can accommodate the restrictions identified by your doctor. Andrew Gale, Human Resources Director, was also unable to locate a position within the Department of Revenue for which you are qualified and that could accommodate the restrictions. As a result, I have decided to administratively discharge your employment pursuant to State Personnel Board Rule 5-6 effective close of business April 23, 2014. Should you

recover, you have reinstatement privileges under Rule 5-6(C).

60. Complainant was advised that his final paycheck would be issued within three business days of April 23, 2014.

61. Complainant's final paycheck, dated April 25, 2014, reflected $496.71 gross pay for 12 hours "regular," 1.8 hours "annual leave" and 0.22 hours "sick final."

62. Complainant's former position was posted on September 8, 2014; no one worked in that position until December 1, 2014.

DISCUSSION

I. BURDEN OF PROOF

Complainant bears the burden to prove by a preponderance of the evidence that his administrative separation by Respondent was arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.; *Velasquez v. Department of Higher Education*, 93 P.3d 540, 542 (Colo. App. 2004). Complainant also has the burden to prove by a preponderance of the 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). Board Rule 9-4 provides: "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."

II. RESPONDENT DISCRIMINATED AGAINST COMPLAINANT ON THE BASIS OF DISABILITY WHEN IT FAILED TO ENGAGE COMPLAINANT IN THE INTERACTIVE PROCESS TO DETERMINE HIS RESTRICTIONS AND EXPLORE REASONABLE ACCOMMODATION OF THOSE RESTRICTIONS.

Complainant asserts that Respondent discriminated against him on the basis of disability when it terminated his employment without engaging in an adequate interactive process. To establish a *prima facie* case of disability discrimination, Complainant must establish that (1) he is a disabled person within the meaning of the ADA; (2) he is qualified to perform the essential functions of his job, with or without reasonable accommodation; and (3) he suffered discrimination because of his disability. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1037-38 (10th Cir. 2011). Once this showing has been made, the burden shifts to the employer to prove either undue hardship or that it made an offer of reasonable accommodation. At all times, the employee bears the ultimate burden of persuading the trier of fact that he has been discriminated against because of his disability. *Id.*

A. Complainant Was Disabled.

The ADA defines disability as, *inter alia*, "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 U.S.C. § 12102(1)(A). The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) instructs that this definition "shall be construed in favor of broad coverage," 42 U.S.C. § 12102(4)(A), and states that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing,

learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). The CADA adopts this definition of disability. § 24-34-301(2.5), C.R.S.

Respondent acknowledged that Complainant is disabled within the broad coverage of the ADAAA; therefore, Complainant has met the first element of a *prima facie* disability discrimination claim.

B. Respondent Failed to Adequately Engage in an Interactive Process With Complainant to Determine His Restrictions and Explore Reasonable Accommodation of Those Restrictions.

Failing to reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability constitutes discrimination prohibited by the ADA. 42 U.S.C. § 12112(b)(5)(A); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004). Reasonable accommodation requires an interactive process involving the participation of both parties. *Templeton v. Neodata Services Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). The regulations implementing the ADA and the ADAAA state that this informal, interactive process "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. §1630.2(o)(3). See also 29 C.F.R. pt. 1630 app. 1630.9 appendix, "Process of Determining the Appropriate Reasonable Accommodation."

The duty to explore reasonable accommodation of an employee's disability is triggered by a request for such accommodation by an employee that puts the employer on notice of the employee's disability and any resulting limitations. *England*, 644 F.3d at 1049, citing *Smith v. Midland Brake*, 180 F.3d 1154, 1171 (10th Cir. 1999). For the interactive process to be triggered, an employee "need only inform the employer of the need for an adjustment due to a medical condition." *Id.* The employee only needs to convey his desire to remain with the employer despite his disability and limitations. *Midland Brake*, 180 F.3d at 1172. No magic words are necessary; an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." *Id.*

Beginning in January 2014, Respondent received a series of medical reports from Dr. Reinhard that identified temporary work restrictions imposed on Complainant. These medical reports, combined with Complainant's expressed desire to return to work at the January 14, 2014 meeting and repeated requests by Ms. Pullam to Ms. Moore about possible accommodation of Complainant's restrictions, satisfy this notice requirement. Mr. Gale testified that he knew that Complainant wanted to return to work and began looking for a job he might be able to transfer into. However, neither Mr. Gale nor Ms. Benallo ever discussed this job search, the restrictions imposed by Dr. Reinhard or potential accommodation of those restrictions, with Complainant. As discussed at greater length *infra*, neither Mr. Gale nor Ms. Benallo worked with the DOR's ADA coordinator, as required by Respondent's Policy No. DOR-047, to attempt to accommodate Complainant's restrictions.

Respondent failed to adequately explore potential accommodations of Complainant's restrictions, and failed to adequately consider alternatives such as transfer to another position or unpaid leave. The Equal Employment Opportunity Commission's (EEOC) guidelines state that unpaid leave is an acceptable and common form of reasonable accommodation:

> 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. ... Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. ...
>
> 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 not 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.
>
> EEOC, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act," number 915.002.

In discharging Complainant without exploring reasonable accommodations with him in an interactive process, Respondent violated the ADA.

III. COMPLAINANT'S ADMINISTRATIVE SEPARATION FROM EMPLOYMENT BY RESPONDENT FAILED TO COMPLY WITH RULE 5-6.

A. Rules Governing Administrative Discharge

The rules governing when an employee can be discharged from employment for exhaustion of leave is controlled by Rule 5-6, which states, in relevant part:

> If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.
>
> A. The notice of administrative discharge must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
>
> B. An employee cannot be administratively discharged if FML or short-term disability leave (includes the 30-day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.

Rule 5-6 imposes a series of requirements before an employee can be discharged for exhaustion of leave: (1) the employee must have exhausted all credited paid leave; (2) the employee must be unable to return to work; (3) the employee cannot have the protection of the Family Medical Leave Act or short-term disability leave; (4) the employee cannot be a qualified individual with a disability under the ADA who can be reasonably accommodated; (5) there must be a good faith effort to communicate with the employee concerning his or her work status and plans; and (6) there must be a written notice of the discharge issued after such communication

or good faith communication effort, and this notice must have appeal rights and retirement plan information.

In this case, the parties stipulated that Complainant received written notice of his administrative discharge via letter dated April 21, 2014. This letter clearly contains the requisite appeal rights and retirement plan information, satisfying the sixth requirement. Further, Complainant concedes that he exhausted his FMLA and short-term disability leave prior to his discharge, satisfying the third requirement. The remaining issues are whether Complainant exhausted all credited paid leave before he was administratively discharged, whether he was unable to return to work, whether he was a qualified individual with a disability under the ADA who could be reasonably accommodated, and whether Respondent made a good faith effort to communicate with Complainant concerning his work status and plans before issuing the April 21, 2014 termination letter.

B. Complainant Exhausted All Credited Paid Leave Before He Was Administratively Discharged

Complainant argued that, because his final paycheck included amounts for sick and annual leave, he had not properly exhausted that leave prior to his administrative separation. However, because Complainant was on paid leave in 2014, he continued to accrue 6.66 hours of sick leave and 14 hours of annual leave prior to the end of each month. All of Complainant's credited paid leave was exhausted as of April 11, 2014; he was placed on leave without pay (LWOP) from April 14 through April 23, 2014. Therefore, at the time of his administrative separation on April 23, 2014, Complainant had exhausted his accrued sick and annual leave, and was properly paid for his final accrued leave in his last paycheck issued April 25, 2014.

While the ongoing calculation of Complainant's various leave balances following his injury was not clearly communicated to Complainant prior to the termination of his employment, the unrebutted evidence presented by Respondent concerning the exhaustion of Complainant's leave balances indicates that, at the time of his administrative separation on April 23, 2014, Complainant had exhausted all credited paid leave.

C. Respondent Made a Minimal Good Faith Effort to Communicate with Complainant Concerning His Work Status and Plans Before Issuing the April 21, 2014 Termination Letter.

Ms. Benallo's March 18, 2014 letter requesting a meeting with Complainant to discuss his options to return to work appears to be a good faith effort to communicate with Complainant about his work status and plans. In actuality, this meeting focused on how Complainant was feeling. Complainant described his continued sensitivity to light and a visit to a hardware store where he became overwhelmed. There was no discussion of his specific restrictions or any possible accommodation of those restrictions. While this meeting may constitute "a good faith effort to communicate with the employee concerning his or her work status and plans," it falls far short of the interactive process required by the ADA, as discussed in more detail *supra*.

D. Respondent Failed to Determine Whether Complainant Was Able to Return to Work With Reasonable Accommodations

Rule 5-6 prohibits the administrative separation of an employee who is a "qualified individual with a disability under the ADA who can be reasonably accommodated." Respondent acknowledges that Complainant is disabled; therefore, the question is whether Complainant

could be reasonably accommodated.

Respondent's Policy No. DOR-047 outlines a specific process for implementing the ADA's requirement of reasonable accommodation of disabled employees. While this policy requires an employee to submit a specific request for accommodation to the ADA coordinator, Complainant believed that he did not have to submit such a specific request, as Mr. Gale told him he did not need to fill out the ADA paperwork. Further, such paperwork is not required to trigger an employer's duty to explore reasonable accommodation under the ADA. Rather, an employee only needs to convey his desire to remain with the employer despite his disability and limitations. *Midland Brake*, 180 F.3d at 1172. An individual may use "plain English," and need not mention the ADA or use the phrase "reasonable accommodation." *Id.* The medical reports received by Respondent from Dr. Reinhard that identified temporary work restrictions imposed on Complainant, combined with Complainant's expressed desire to return to work at the January 14, 2014 meeting and repeated requests by Ms. Pullam to Ms. Moore about possible accommodation of Complainant's restrictions, satisfy this notice requirement.

Policy No. DOR-047 notes that a supervisor also has the responsibility "to notify the ADA coordinator if an employee has requested an accommodation." Complainant's requests to return to work under restrictions imposed by Dr. Reinhard were repeatedly communicated, through Ms. Moore, to Ms. Benallo. However, Ms. Benallo made no attempt to involve the ADA coordinator in any discussions concerning Complainant's return to work. Instead of "working with" the ADA coordinator to determine whether Complainant could return to work with reasonable accommodations, Ms. Benallo made that decision on her own.

Similarly, after informing Complainant that he did not need to fill out the ADA paperwork he was given at the January 14, 2014 meeting, Mr. Gale decided to look for jobs that Complainant could perform without involving the ADA coordinator. Respondent's Policy No. DOR-047 lists a series of steps that must be followed to determine whether an available job exists that can be performed by a disabled employee, with or without accommodations. This job search must involve the division director and the Human Resources director working with the ADA coordinator. Instead of following the step-by-step process outlined in Policy No. DOR-047, and utilizing the expertise of the ADA coordinator, Mr. Gale made his own decision about Complainant's inability to perform other available jobs based on the limited information conveyed to him by Complainant during a meeting on April 14, 2014 – one week prior to Complainant's administrative separation.

Rule 5-6 requires Respondent to determine whether an employee's disability can be reasonably accommodated without undue hardship before administratively discharging that employee. Respondent's failure to engage Complainant in an adequate interactive process required by the ADA (discussed *supra*), and its failure to follow Policy No. DOR-047 to determine whether Complainant could return to work with reasonable accommodation, violate Rule 5-6.

IV. THE DECISION TO ADMINISTRATIVELY SEPARATE COMPLAINANT FROM EMPLOYMENT WITHOUT EXPLORING REASONABLE ACCOMMODATION OF HIS DISABILITY THROUGH AN ADEQUATE INTERACTIVE PROCESS WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO RULE OR LAW.

The Colorado Supreme Court has defined the arbitrary and capricious exercise of agency discretion as follows:

(a) By 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) By failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion.
(c) By 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.

Lawley v. Department of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van de Vegt v. Board of Commissioners of Larimer County,* 55 P.2d 703, 705 (Colo. 1936).

As the appointing authority, Ms. Benallo should have engaged Complainant in an interactive process to identify and explore possible accommodation of his disability. Further, Ms. Benallo should have utilized Policy No. DOR-047 to work with the ADA coordinator and Human Resources Director Gale to evaluate any accommodations requested by Complainant in this interactive process. By failing to engage Complainant in an adequate interactive process as required by the ADA, and neglecting to utilize Policy No. DOR-047 to evaluate possible accommodations, Ms. Benallo failed to use reasonable diligence to procure adequate evidence about Complainant's condition and restrictions, and therefore acted arbitrarily and capriciously when she decided to administratively discharge Complainant.

V. REMEDY

CADA authorizes broad relief for discriminatory employment actions, including reinstating employees with or without back pay. § 24-34-405, C.R.S; *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1174 (Colo. 2000). Board-ordered remedies must only make the employee whole and may not result in a windfall. *Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984).

Respondent is required to engage in an interactive process with Complainant to determine whether he needs reasonable accommodation to return to his previous position due to his brain injury. If Respondent determines that such reasonable accommodation poses an undue hardship on the agency, it must follow the steps outlined in Policy No. DOR-047 to determine whether an available job exists that Complainant can perform, with or without accommodation.

At the time he was administratively discharged, Complainant had no paid leave remaining. Therefore, Complainant is entitled to reinstatement to his previous position in the status of leave without pay until completion of the interactive process.

ORDER

Respondent's decision to administratively terminate Complainant's employment is rescinded. Respondent shall reinstate Complainant to his previous position on leave without pay status, shall engage in a complete interactive process with Complainant, and otherwise comply with the ADA, Rule 5-6 and Respondent's Policy No. DOR-047.

Dated this 13th day
of March, 2015.

[redacted]

/Susan J. Tyburski
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 13th day of March, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

David S. Turner
[redacted]

Eric W. Freund
[redacted]

[redacted]

/Jane Sprague