STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2017B053**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD DALE HELMICK,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge Rick Dindinger ("ALJ") held a commencement on July 10, 2017, and an evidentiary hearing from December 11 through 13, 2017. The commencement and the evidentiary hearing were both at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The parties completed their written closing arguments on December 29, 2017. Mark Schwane, Esq., of Schwane Law, LLC, represented Complainant. Molly A. Moats, Esq. (Senior Assistant Attorney General) and Jacob W. Paul, Esq. (Assistant Attorney General) represented Respondent.

MATTER APPEALED

Complainant, a former certified state employee, appeals his dismissal. Complainant asserts the dismissal was arbitrary, capricious, and contrary to rule or law and that it was discriminatory on the basis of disability. Complainant requests that the State Personnel Board reverse the dismissal, award him back pay and lost benefits, award him attorney fees and costs, and award him other damages.

Respondent denies Complainant's allegations and argues that the dismissal was not arbitrary, capricious, contrary to rule or law, or discriminatory. Respondent requests that the Board affirm the dismissal.

For the reasons discussed below, the disciplinary action is **reversed**.

ISSUES

A. Whether Complainant committed the acts that resulted in the disciplinary action;

B. Whether the discipline was arbitrary, capricious, or contrary to rule or law;

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

D. Whether to award Complainant his reasonable attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant Richard Helmick began his employment with Respondent in April 2004. (Stipulated fact.)[1]

2. At the times relevant to this matter, Complainant was an Equipment Operator III. (Stipulated fact.)

3. Complainant's performance history reflects a successful career with Respondent. Complainant's yearly performance evaluations showed that he met or exceeded performance expectations during each evaluation since 2005. (Stipulated fact.)

4. At the times relevant to this matter, Complainant was assigned to work on maintenance Patrol 07. Complainant worked on Patrol 07 with Darrel Maez (Transportation Maintenance II) and Paul Martinez (Transportation Maintenance I). Jacob Ramirez also worked on Patrol 07 for a portion of 2016.

5. At the times relevant to this matter, Mr. Maez was the lead worker for Patrol 07.

6. Complainant, Mr. Maez, and Mr. Martinez all grew up in Center, Colorado.

7. Patrol 07 operated out of the Saguache Barn in Respondent's Region 5.

8. Maintenance Patrol 28 also operated out of the Saguache Barn.

9. At the times relevant to this matter, Cory Avila worked on maintenance Patrol 04 out of Monte Vista.

10. At the times relevant to this matter, Matthew Wacker was a Transportation Maintenance III and Complainant's direct supervisor. Mr. Wacker supervised several maintenance patrols, including Patrol 07. Mr. Wacker was not based out of the Saguache Barn.

11. At the times relevant to this matter, Ross Hamilton was a Labor, Trades, and Crafts Operations I. Mr. Hamilton was Mr. Wacker's direct supervisor.

12. At the times relevant to this matter, Bill Pentek was a Deputy Superintendent for Respondent's Region 5. Mr. Pentek was Mr. Hamilton's direct supervisor.

13. At the times relevant to this matter, David Vialpando was a Transportation Maintenance Superintendent for Respondent's Region 5. Mr. Vialpando was Mr. Pentek's direct supervisor.

14. Michael McVaugh was the Region 5 Transportation Director. Mr. McVaugh was Mr. Vialpando's direct supervisor. Mr. McVaugh has worked for Respondent for 25 years.

15. Mr. McVaugh was Complainant's appointing authority at the time of the Disciplinary Action. (Stipulated fact.)

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

16. At the times relevant to this matter, Pamela Martinez was a Civil Rights Specialist for Respondent's Region 5 Equal Employment Opportunity Office.

17. At the times relevant to this matter, Jason Benally was the Region Civil Rights Manager for Respondent's Region 5. Mr. Benally was Ms. Martinez's immediate supervisor.

Complainant's injury and leave

18. Complainant suffered a traumatic brain injury when two persons assaulted him. The assault happened on January 4, 2015.

19. Following the assault, Complainant was hospitalized for nine days. Additionally, Complainant underwent approximately 30 days of rehabilitation at Craig Hospital. At the time of his discharge, Craig Hospital gave Complainant a Traumatic Brain Injury Handbook.

20. On May 1, 2015, Complainant received clearance to return to work on modified duty.

21. Complainant was on leave from approximately January 4, 2015, until early May 2015.

The light duty and the first ADA interactive process

22. Complainant returned to work in early May 2015.

23. Upon his return, Complainant was not able to perform the duties of the Equipment Operator III position. As an accommodation, Respondent assigned Complainant to "light" duties included filing documents, copying, shredding, and other office tasks.

24. On June 15, 2015, Mr. Benally sent Complainant a letter regarding the interactive process. (Ms. Martinez signed and transmitted the letter on behalf of Mr. Benally.) The letter states:

> You have not yet inquired about a possible accommodation for your employment. The Colorado Department of Transportation (CDOT)'s focus is to provide an inclusive environment for individuals with disabilities. We encourage an interactive process and will be in contact with you to facilitate the exchange of information.
>
> I am the ADA Coordinator handling your inquiry. You may contact me at 970-[REDACTED] any time during this process. If you can provide more details about your disability and what type of accommodation you will need when you are contacted, that will help expedite the process.
>
> To make a decision about a possible accommodation, please forward me any information that may help determine the need and type of accommodation. If more information is needed, you may need to provide follow-up information. Please respond within 10 days of the date of this letter.

Mr. Benally's letter attached an ADA Information Sheet. The instruction on the sheet stated: "[p]lease complete this form with as much information known at this time."

25. Complainant did not call Mr. Benally or complete the ADA Information Sheet.

26. Complainant provided Respondent with a Fitness-To-Return Certification that stated he was "able to work a full, regularly scheduled day with no restrictions beginning 6/15/15." The Fitness-To-Return Certification did not indicate that Complainant had any restrictions.

27. Complainant's Physician Assistant signed the Fitness-To-Return Certification.

28. Respondent returned Complainant to full duties as an Equipment Operator III position on approximately June 22, 2015.

29. Ms. Martinez had a conversation with Complainant on or about July 10, 2015. During the conversation, Ms. Martinez inquired whether Complainant had received the letter regarding the interactive process and talked to him about his rights under the ADA. During the interaction, Complainant informed Ms. Martinez that he did not need to be accommodated.

The second ADA interactive process

30. On November 10, 2015, Complainant was involved in an altercation with Brian Velasquez, one of Respondent's employees.

31. Following that altercation, Mr. Hamilton ordered Complainant to meet with Ms. Martinez about the ADA process.

32. As a result of Mr. Hamilton's order, Complainant met with Ms. Martinez on January 12, 2016. During the meeting, Complainant indicated that he had suffered a traumatic brain injury that affected the major life activities of speech, spelling, and memory. During the meeting, Ms. Martinez gave Complainant a copy of Respondent's ADA Information Form.[2] Ms. Martinez also discussed the ADA interactive process with Complainant. Ms. Martinez then scheduled a follow-up meeting with Complainant to review his position description.

33. Ms. Martinez met with Complainant on January 22, 2016. During the meeting, Complainant expressed that his memory was not as good as it was prior to his injury and also expressed limitations with his speech and spelling. During the meeting, the two discussed Complainant's job description item by item. Complainant indicated that he did not need accommodations to perform any of his duties or job requirements. Complainant told Ms. Martinez that he could do all the duties of his job.

34. During their meeting on January 22, 2016, Complainant gave Ms. Martinez a completed ADA Information Form. Among other things, the form provides as follows:

Questions on the ADA Information Form	**Complainant's Responses**
Date health condition or limitations began.	Jan 6, 2015
What type of accommodation is requested?	None as of know [sic]
With what specific tasks do you need assistance?	None of know [sic]
Reason for Request (How are you functionally limited)	NA

[2] Respondent's ADA Information Sheet and ADA Information Form are slightly different documents but each solicits information to help Respondent understand the nature of an individual's disability and determine whether a reasonable accommodation might enable the individual to perform work functions.

Other job classifications or division in which you are interested?	Steve Johnson

35. Following the meeting, Ms. Martinez sent an email to Mr. Benally on January 22, 2016 with the subject line "Richard Helmick ADA update." Ms. Martinez wrote:

> As required by PD 602.1, ADA Accommodation Procedures, I began the interactive process with Richard on January 12, 2016. Today, Richard and I met and reviewed his PDQ. He feels confident he can perform all job duties and requirements without any accommodation. I told Richard to keep us informed if he identifies a needed accommodation at a later time.

36. During the evidentiary hearing, Complainant testified he could do his job without any help.

37. During the hearing, Complainant's Physician Assistant testified that Complainant's brain injury caused expressive aphasia. The Physician Assistant further testified that the expressive aphasia caused a slight delay in Complainant's ability to verbalize thoughts.

The 2016 Suspension

38. As a result of Complainant's altercation with Mr. Velasquez, Respondent suspended Complainant on January 29, 2016 (the "2016 Suspension"). The 2016 Suspension was a disciplinary action suspending Complainant for 30 days without pay.

39. The 2016 Suspension provides the following description of the facts giving rise to the discipline:

> On January 6, 2016 a Board Rule 6-10 meeting was held to discuss information concerning a physical confrontation and threat you made to Mr. Brian Velasquez on November 10, 2015. At this incident with Mr. Velasquez, you yelled and physically pushed him until other employees had to step in to diffuse the situation. Mr. Velasquez reported that you stated to him, "Fuck you Brian! Fuck you, I'll kick your fucking ass!" At this point, your co-workers, Darrell Maez and Cory Avila, diffused the situation by distancing you from Mr. Velasquez. You returned to your vehicle.

40. The 2016 Suspension provided notice to Complainant of his right to appeal the decision to the State Personnel Board. Complainant did not appeal the 2016 Suspension to the Board.

Mr. Martinez's reports of threats

41. On December 13, 2016, Mr. Martinez met with Ms. Martinez in her office.[3] During that meeting, Mr. Martinez said he felt threatened by Complainant.

42. On that same day, Ms. Martinez sent an email to Mr. Benally discussing her meeting with Mr. Martinez. Ms. Martinez wrote:

> Today at 2:30 pm Paul Martinez came to my office. He said that he feels threatened by Richard Helmick. About 3 weeks ago Richard and Paul were

[3] Paul Martinez and Pamela Martinez are not related.

outside of the Saguache barn when a motor cycle drove by revving its engine. Paul said he heard Richard say that if he (Richard) kills one, he might as well kill ten because he would go to prison for the same amount of time. This comment was not said or made directly to Paul. Richard was referring to the man driving the motorcycle. However, Paul said the comment made him extremely uncomfortable and that he is worried about what Richard might do.

43. Mr. Benally did not take any action upon his receipt of Ms. Martinez's email.

44. On January 11, 2017, Ms. Martinez sent an email to Mr. Wacker asking him to "check in with each individual on Patrol 7 and see how things are going." In response, Mr. Wacker said he had worked with Patrol 07 on January 10, that "Richard seemed ok" and that "Paul didn't say anything was going on."

45. On February 17, 2017, Mr. Martinez sent an email to Mr. Vialpando as follows:

> I would like to inform you of some things that are being said in our patrol.
>
> Richard Helmick has told Darrel and myself (Paul) that he don't [sic] care if he spends the rest of his life in prison and that he would do the same amount of time if he kills one person as if he would kill ten people.
>
> He has told me that he doesn't like me and that I shouldn't be here, I hate when Darrel misses work because when Richard and I are working by ourselves he yells at me and orders me about like I don't know what to do when in fact I always have to help him with work orders and any spelling or any paper work. He always tells me about all the fights he has been in and another one wouldn't matter.
>
> I don't know if I should mention another patrol, but here it goes. He has said many times if he could only catch Cory in a dark ally [sic] he would take care of business.
>
> Darrel and I have talked about this and are a bit worried about the things Richard has told us and we wonder if he might just come in to the barn one day and start shooting to kill, I have even gone as far as to stand at the window and make sure that he doesn't have a gun when he drives into the yard, or gets out of his truck in the morning. We worry about our lives daily when we come to work.
>
> Richard has mentioned many names of people that he would get rid of including some here in the Saguache barn.
>
> Richard makes up stories about Darrel and me all the time to Matt Wacker and we always get told off be [sic] Matt. If we go to Matt and tell him about the things that are going on here he just keeps it to himself and that is why I think you haven't heard about it until now.

46. Later on the same day, Mr. Vialpando forwarded the email to Ms. Martinez and also copied it to Mr. McVaugh and Mr. Benally. Mr. McVaugh then asked Mr. Benally to investigate the allegations.

47. Respondent did not put Complainant on administrative leave pending the investigation.

48. There was no evidence introduced at the hearing of anyone completing Respondent's Form 1277 (Threat/Violence Incident Report).

49. There was no evidence that anyone notified Mr. Avila of any threat.

50. Mr. McVaugh understood ("took it") that Complainant had made the statements around the time of Mr. Martinez's email (February 17, 2017).

The investigation

51. Mr. Benally investigated Complainant's conduct. As part of that investigation, Mr. Benally prepared a questionnaire that he emailed to Mr. Wacker on February 23, 2017, and to Mr. Maez on February 24, 2017.

52. Mr. Benally did not speak to Mr. Martinez as part of his investigation.

53. Mr. Wacker completed the questionnaire and returned it to Mr. Benally. Mr. Wacker's responses reference an incident on December 12, 2016, between Complainant and Mr. Maez. The Disciplinary Action does not reference the incident on December 12, 2016.

54. Mr. Wacker's completed questionnaire also provides the following:

> Has Mr. Helmick been reported to have made direct or indirect or veiled threats while at work?
>
> ° The only thing I have heard was a rumor that Richard had made a threat over a year ago. I will not even write what that rumer [sic] was because no one knew when it was said, where it was said or who it was directed too.

55. Mr. Benally did not speak to Mr. Wacker as part of his investigation.

56. Mr. Maez initially did not complete the questionnaire. Instead, he wrote an email to Mr. Benally stating:

> Jason, Responding to your Questions about Richard, Richard has had a brain injury about 2 years ago. I have witness [sic] him get mad at times, I talk to him then calm down. I went to school with him he was never like that back then. I feel people push his buttons so [sic] see how he responds. I feel he is not a treat [sic] to me.

57. On March 1, 2017, Mr. Benally emailed Mr. Maez to "[p]lease answer the questions as written in the document I have sent you." Mr. Benally also wrote: "I need to remind you that not reporting or fully participating in a workplace violence investigation is not acceptable according to our workplace violence policy and procedural directives."

58. Following receipt of Mr. Benally's email of March 1, 2017, Mr. Maez completed the questionnaire. The completed questionnaire provides the following:

> 1. Has Mr. Helmick made the following claim " . . . that he don't care if he spends the rest of his life in prison and that he would do the same amount of time if he kills one person as if he would kill ten people."
>   - Yes

2. When have you witnessed Mr. Helmick mention fighting or his willingness to fight?
    - Yes

3. What things has Richard said that have worried you?
    - He don't care

4. When has Mr. Helmick made direct or indirect or veiled threats while at work?
    - Yes

5. Have you directly observed Mr. Helmick behaving in a manner that would be unacceptable and in violation of CDOT rule or policy?
    - Yes

6. How have you directed employees to interact with Mr. Helmick when they bring you concerns?
    - Tell Richard you don't to [sic] listen to that and walk away.

7. Have you escalated any reports of Mr. Helmick's behavior to your superiors since February 2016?
    - No

8. Do you have any further information to share?
    - No

59. Upon his receipt of the completed questionnaire, Mr. Benally conferred by telephone with Mr. Maez. Mr. Benally testified that he tried to isolate the timeframe of the threats, but Mr. Maez "was not sure at all."

60. Mr. Benally did not determine when Complainant made the statements.

61. Mr. McVaugh did not engage in any investigation of his own. Mr. McVaugh never spoke to Mr. Maez, Mr. Martinez, Ms. Martinez, or Mr. Wacker about the alleged threats.

The notice of Board Rule 6-10 meeting

62. Respondent issued Complainant a notice of a Board Rule 6-10 meeting. Mr. McVaugh signed the notice on February 24, 2017.

63. Mr. Vialpando hand delivered the notice to Complainant on February 28, 2017.

64. Mr. Vialpando signed the notice when he delivered it to Complainant, but Mr. Vialpando did not date it. The notice's section for the witness signature is as follows:

_____

Witness Name: Date

65. Complainant signed and dated the notice when he received it. Complainant signed the notice in Mr. Vialpando's presence.[4]

66. The notice scheduled the Board Rule 6-10 meeting for March 2, 2017.

67. The notice states: "It has been reported that you may have made indirect and veiled threats to physically harm another person." The notice does not provide any details regarding the reported threats.

The Board Rule 6-10 meeting

68. Respondent conducted a Board Rule 6-10 meeting with Complainant on March 2, 2017. (Stipulated fact.)

69. Mr. McVaugh and Mr. Benally attended the meeting on behalf of Respondent. (Stipulated fact.) Complainant attended the meeting and Mr. Wacker attended as Complainant's representative. (Stipulated fact.)

70. During the Board Rule 6-10 meeting, Complainant stated: "[o]ne of the things with my brain injury is and I can show you in this book right here causes me to say a lot of things that I don't necessarily mean to say." Complainant offered to show the Traumatic Brain Injury Handbook to Mr. McVaugh and Mr. Benally, stating: "I can let you read all of that here when we get done."

71. In the first fifteen minutes of the Board Rule 6-10 meeting, Mr. Wacker asked for the source of the allegations against Complainant. Mr. Wacker was emphatic—"it has to be shared with to Richard." Neither Mr. McVaugh nor Mr. Benally disclosed the source of the accusations.

72. Approximately four minutes later, Mr. Wacker asked for a copy of the statement with the allegations against Complaint. Mr. Wacker's request was polite, but clear: "could Richard have a copy of that, please?"

73. Mr. Benally agreed to provide the statements, but did not do so during the Board Rule 6-10 meeting.

74. During the meeting, Mr. Wacker asked: "what was the date that he made this threat?" Neither Mr. McVaugh nor Mr. Benally provided the date of the alleged threat.

75. During the meeting, Complainant spent measurable time discussing the events that resulted in the 2016 Suspension.

76. The day after the meeting (March 3, 2017), Mr. Benally sent Complainant an email with three statements: (a) Mr. Martinez's email dated February 17, 2017; (b) the questionnaire completed by Mr. Wacker; and (c) the questionnaire completed by Mr. Maez. Mr. Benally also transmitted Respondent's workplace violence policies.

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[4] In total, the notice of the Board Rule 6-10 meeting had three sections for signatures. The first section is the signature block for the notice's author. Here, Mr. McVaugh signed the notice as its author. Additionally, Complainant signed and dated the notice as the recipient and Mr. Vialpando signed (but did not date) the notice as the witness of delivery.

77. While Respondent permitted Complainant to provide additional information, Respondent did not give Complainant an opportunity in a second Board Rule 6-10 meeting with his appointing authority to rebut the statements that Mr. Benally emailed to Complainant.

The Disciplinary Action

78. Mr. McVaugh issued the Disciplinary Action on March 13, 2017.

79. The Disciplinary Letter charges Complainant with the following:

> ° In January 2017, you had said ". . . that you don't care if you spend the rest of your life in prison and that you would do the same amount of time if you kill one person as if you would kill ten people."
>
> ° In the last three months you have stated you are willing to engage in fighting.
>
> ° In November or December 2016, that "if you could catch Cory in a dark alley, you would take care of business."

80. In addition, the Disciplinary Letter states that "[y]ou did admit to losing your temper at work and you sometimes say things that you don't mean to. You admitted that when confronted, 'lots of trash stuff comes out,' and that you have been working to improve how you react in confrontation."

81. The Disciplinary Letter concludes that Complainant violated Respondent's workplace violence policy "by intimidating coworkers with persistent indirect threats."

82. Respondent terminated Complainant's employment on March 13, 2017. (Stipulated fact.)

83. At the time of Complainant's termination, his base rate of pay was $3,685/month. (Stipulated fact.)

Mr. Benally's Email on March 29, 2017

84. Complainant applied for unemployment benefits.

85. In reviewing the unemployment benefits matter, Dorris Wangombe (an employee from Respondent's Employee Relations/Legal section) requested Mr. Benally to provide the date of the "comment about not caring if [Complainant] spent the rest of his life in person [sic]." Specifically, "I must have the date of the actual incident."

86. In response, Mr. Benally wrote Ms. Wangombe an email on March 29, 2017. His email states: "[w]e were unable to confirm which date this actually happened. All witnesses were unsure of the actual date."

Performance Management Plans

87. Respondent issued Complainant annual performance evaluations titled "Performance Management Plans."

88. Respondent issued a 2014 Performance Management Plan finalized in April of 2015. The 2014 evaluation gave Complainant a final rating of 2+ ("Successful, Occasionally Exceeds").

89. Respondent issued a 2015 Performance Management Plan finalized in April of 2016. The 2015 evaluation gave Complainant a final rating of 2 ("Successful, Expected"). Among other things, the 2015 evaluation states: "Richard does his job very well. He is a go-to person because of his knowledge and experience."

90. Respondent issued a 2016 Performance Management Plan finalized in April of 2017, subsequent to Complainant's dismissal. The 2016 evaluation gave Complainant a final rating of 2+ ("Successful, Occasionally Exceeds"). Among other things, the 2016 evaluation states:

> Richards [sic] was terminated from CDOT on 3/13/2017. Until the time of his termination Richard was an above average employee. Richard was always busy and productive. He put CDOTS needs before his own needs. He was a very good equipment operator. He did a very good job when asked to maintain equipment. Richard will be missed and I would re-hire him if the opportunity arose.

Mr. Wacker and Mr. Hamilton approved the 2016 evaluation.

Respondent's Workplace Violence Directive and Form 1277

91. At all times during Complainant's employment with Respondent, Complainant was subject to Respondent's Procedural Directive 10.1 Workplace Violence. (Stipulated fact.) (Herein, the "Workplace Violence Directive.")

92. The Workplace Violence Directive defines "workplace violence" to include "veiled conditional or direct verbal or nonverbal threats, profanity or statements that harm and/or create an intimidating work environment."

93. Among other provisions, the Workplace Violence Directive contains the following reporting requirements:

> A. All threats or acts of violence, whether received or observed, or any event that otherwise places persons or property at risk including domestic violence affecting the workplace are to be reported immediately to: 1. Any supervisor, preferably a supervisor in the line of supervision of the threatening employee, including lead worker; or 2. Higher level manager, up to the appointing authority and/or the Regional Civil Rights Manager or Headquarters, Center for Equal Opportunity; or 3. Director of the Center for Human Resource Management (CHRM) and/or Manager of Employee Relations/Legal Section (ER/L).
>
> . . .
>
> F. Personnel receiving reports of threats or acts of violence must then complete a CDOT Threat/Violence Incident Report form 1277 immediately thereafter. The Incident Report, including notification of protection orders, shall be submitted to the Manager of ER/L within three business days of each incident or notification of protection orders.
>
> . . .

J. Employees failing to report threats or acts of violence that violate the Workplace Violence Policy Directive or place persons or property in the workplace at risk may be subject to performance management review (i.e., considered in the employee's performance rating) and/or subject to corrective/disciplinary action.

94. In turn, Respondent's Form 1277 (Threat/Violence Incident Report) instructs that: "[t]his form is used by CDOT supervisors and managers to record a first report of an incident involving workplace violence . . . Supervisors must submit a copy of this completed form to the appointing authority as soon as possible."

95. Completing Form 1277 is mandatory. Mr. Benally testified that there is no substitute for the form.

Procedural Matters

96. On March 20, 2017, Complainant timely appealed his dismissal to the State Personnel Board.

97. Complainant dismissed his race discrimination claim during the Commencement Hearing held on July 10, 2017.

DISCUSSION

I. THE ACTS UNDERLYING THE DISCIPLINARY ACTION.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII § 13(8); *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994) ("A central feature of the state personnel system is the principle that persons within the system can be subjected to discharge or other discipline only for just cause"); *Colorado Ass'n of Public Employees v. Dep't of Highways*, 809 P.2d 988, 991 (Colo. 1991) ("discharge or other discipline only for just cause"). "Implicit in the requirement that the appointing authority have just cause is that the appointing authority must prove its reasons for [discipline] before a neutral decision-maker." *Kinchen*, 886 P.2d at 708.

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Id.* at 705, 708. At the hearing, "the scales are not weighted in any way by the appointing authority's initial decision to discipline the employee." *Id.* at 706. "The employer must bear the burden of establishing just cause for [discipline] by a preponderance of the evidence at the hearing before the Personnel Board." *Id.* at 708. The judge makes "an independent finding of whether the evidence presented justifies [a disciplinary action] for cause." *Id.* at 706 n.10; *see also* § 24-4-105(14)(a), C.R.S. ("[I]nitial decision shall include a statement of findings and conclusions upon all the material issues of fact . . .").

Reasons for discipline listed in Board Rule 6-12 include:

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a

timely manner, or inability to perform; and

5. final conviction of a felony or any other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if the employment is continued.

See also § 24-50-125(1), C.R.S. (listing reasons for discipline, including failure to comply with standards of efficient service or competence); § 24-50-116, C.R.S. (employees shall perform duties and conduct themselves "in accordance with generally accepted standards").

Respondent made multiple charges against Complainant. These charges alleged that Complainant made "indirect and veiled threats to physically harm another person." As discussed below, Respondent did not establish by a preponderance of the evidence that Complainant committed the acts underlying the Disciplinary Action.

A. Allegation of a veiled threat in January 2017.

The Disciplinary Action asserts: "In January 2017, you had said ' . . . that you don't care if you spend the rest of your life in prison and that you would do the same amount of time if you kill one person as if you would kill ten people.'" The Disciplinary Action does not provide the context of this alleged comment.

The Disciplinary Action's unequivocal reference to January 2017 is unsubstantiated. Mr. Martinez's email did not provide a date of the purported threat. Mr. Martinez testified that Complainant first made this purported statement in "probably 2016, I would say maybe February." Mr. Martinez testified that Complainant made the purported statement a second time in June of 2016. Pamela Martinez's email of December 13, 2016, says that Mr. Martinez reported Complainant made the purported threatening statement "about 3 weeks ago." Under the timeframe in Ms. Martinez's email, the purported threatening statement was made in November 2016. Mr. Benally's email to Ms. Wangombe on March 29, 2017, states: "[w]e were unable to confirm which date this actually happened. All witnesses were unsure of the actual date." Respondent's inability to establish a date undermines the accusation because a statement like the one purportedly made by Complainant would have been highly memorable.

During the evidentiary hearing, Mr. McVaugh testified that he understood ("took it") that Complainant had made the threatening statements around the time of Mr. Martinez's email (February 17, 2017). As a result, Mr. McVaugh issued the Disciplinary Action based upon a mistaken understanding that the purported statements presented an imminent threat.

Whenever Complainant made the purported threatening statement, nobody reported it "immediately" as required by the Workplace Violence Directive. The failure to *immediately* report Complainant's purported statement suggests that not a single person perceived his statements to be threatening. Moreover, nobody completed Respondent's Form 1277 (Threat/Violence Incident Report). Respondent offered no explanation for disregarding this mandatory form. The failure to complete Form 1277 belies the veracity of the assertions against Complainant. It is incongruous for Respondent to terminate Complainant for failing to follow the workplace violence policies when Respondent itself did not follow the policies.

Remarkably, Mr. Benally did nothing when he received Ms. Martinez's email of December 13, 2016. By reminder, Mr. Benally was Respondent's Region 5 Civil Rights Manager. He should have been very familiar with Respondent's Workplace Violence Directive and Respondent's Form 1277. During the hearing, Mr. Benally did not acknowledge any shortcoming in his response to

Ms. Martinez's email. One must conclude that Mr. Benally did not truly believe that the purported statement violated Respondent's workplace violence policies.

Respondent did not put Complainant on administrative leave upon its receipt of Mr. Martinez's email (February 17, 2017). Instead, Respondent permitted Complainant to remain at work until the date of his termination (March 13, 2017). Mr. McVaugh testified he did not think Complainant was a "direct, immediate threat." Respondent's failure to immediately remove Complainant from the workplace supports that Respondent did not really believe the accusations against him.

Mr. Martinez's testimony was not credible. First, he contradicted himself more than once like when he testified that Complainant made the dark alley threat five or ten times but later testified that Complainant made the dark alley threat three times. He also exaggerated, like when he testified that Complainant had physically assaulted him when Complainant squeezed his knees. Second, Mr. Martinez testified that Complainant wanted to "get me fired." Mr. Martinez's sentiment likely tainted his testimony. Third, while Mr. Martinez's email complains about Complainant talking about fights, Mr. Martinez neglected to mention that this was reminiscing among three members of Patrol 07 about their rough childhoods in Central, Colorado. Fourth, Mr. Martinez never completed Respondent's Form 1277. Fifth, Mr. Martinez's testimony about the dates of the purported threat (February and June of 2016) is at odds with Ms. Martinez's email about the date ("about 3 weeks" prior to December 13, 2017). Sixth, Mr. Hamilton testified credibly about Mr. Martinez's character for untruthfulness, including a specific instance when Mr. Martinez was less than forthright. Similarly, Mr. Wacker testified about Mr. Martinez's character for untruthfulness. Mr. Martinez's lack of credibility undermines his denunciations and the Disciplinary Action that flows therefrom.

Mr. Maez's testimony somewhat corroborated the allegations made by Mr. Martinez. Respondent determined that this corroboration supported discipline, but the accord may also support an inference of improper collusion between Mr. Martinez and Mr. Maez. In any event, Mr. Maez wrote Mr. Benally on March 1, 2017, stating: "I feel [Complainant] is not a treat [sic] to me." Mr. Maez's testimony at hearing also indicated he did not believe that Complainant was a threat. Moreover, Mr. Maez never completed Respondent's Form 1277 or any other written complaint. The questionnaire responses that Mr. Maez gave to Mr. Benally were lacking in detail and confusing. Mr. Maez's testimony at the hearing was marked by palpable discomfort; Respondent's attorney suggested treating Mr. Maez as a hostile witness. Perhaps most telling, Mr. McVaugh testified that he disregarded some of Mr. Maez's information because "it was in conflict with some of the other statements he's made."

Mr. Wacker did not have personal knowledge of Complainant making the purported threat. Mr. Wacker knew of some "rumors" but opined that those rumors were not credible.

Complainant denied making this threat. His testimony was consistent with his statements during the Board Rule 6-10 meeting.

A threatening statement like the one purportedly made by Complainant is very troubling. If proven, such a threatening statement would likely support stern discipline. Respondent, however, did not meet its burden of proving this ground for the Disciplinary Action.

B. Allegation that Complainant expressed a willingness to fight.

The Disciplinary Action asserts that in the last three months, "you have stated you are willing to engage in fighting."

The Disciplinary Action's reference to "in the last three months" is unsubstantiated. First, Paul Martinez's email of February 17, 2017, does not provide any dates of the purported threatening statement. Second, none of the three Patrol 07 members provided a timeframe for this allegation.

During the Board Rule 6-10 meeting, Complainant acknowledged fighting 14 to 15 years ago (before he started to work for Respondent). Complainant, however, did not say he was presently willing to engage in fighting. During his testimony at the hearing, Complainant acknowledged talking about "fighting in school when we were younger."

Mr. Martinez's testimony does not support the Disciplinary Action's assertion. Mr. Martinez testified that all three members of Patrol 07 talked about fighting. He elaborated that the conversations related to "growing up in Center." Mr. Martinez described Center as a "rough town" and stated: "[y]ou have to defend yourself and a lot of times it led to a fistfight." On cross examination, Mr. Schwane asked whether "all of you had encounters where you might have gotten in fights." In response, Mr. Martinez answered: "[a]bsolutely." These conversations of shared memories related to a period in time when the three were growing up in a rough town. These conversations can best be described as reminiscing about childhood.

It is evident that if Mr. Benally or Mr. McVaugh had probed the context of Complainant's remarks about fighting, they may not have issued discipline on this basis. Respondent did not meet its burden with respect to this ground for the Disciplinary Action.

C. The allegation that Complainant made threats about Cory Avila.

The Disciplinary Action asserts that in November or December 2016, Complainant stated that if caught Mr. Avila in a "dark alley" he would "take care of business." The Disciplinary Action does not provide the context of this alleged threat.

The Disciplinary Action's reference to "November or December 2016" is unsubstantiated. During direct examination, Mr. Martinez testified that Complainant made the statement about Mr. Avila in the summer of 2016, "could have been June or July." During cross examination, however, Mr. Martinez testified twice that he did not recall the date of the dark alley threat. While Mr. Martinez testified that Complainant made this purported threat more than once, he did not offer testimony of any other dates. There was no testimony by anyone that this purported threat occurred in November or December 2016.

Again, nobody reported this purported threat "immediately" as required by Respondent's Workplace Violence Directive and nobody completed Respondent's Form 1277. Again, Respondent did not place Complainant on immediate administrative leave.

For all the reasons discussed above, Mr. Martinez's testimony about this purported threat lacked credibility. Additionally, it does not appear that Mr. Martinez mentioned this alleged threat when he met with Ms. Martinez on December 13, 2016. Similarly, Mr. Maez's testimony suffered from credibility issues as previously discussed.

Complainant denied making this threat. His testimony was consistent with his statements during the Board Rule 6-10 meeting. Complainant's statement during the Rule 6-10 meeting exhibited a candor and frankness that lends credibility to his denial: "Cory didn't do anything to me. If I would have said something like that, I would have said it about Brian, not Cory, because that's who I got into a scuffle with the last time I was here. I didn't have anything against Cory in any way."

Mr. McVaugh testified he was not aware of whether anyone communicated the purported threat to Mr. Avila. This suggests Respondent did not believe the purported threat against Mr. Avila was credible.

A threatening statement like the one purportedly made by Complainant is very disturbing. Such a threat may very well support severe discipline. Respondent, however, did not meet its burden with respect to this ground for the Disciplinary Action.

D. Complainant's admission that he lost his temper.

The Disciplinary Action asserts: "[y]ou did admit to losing your temper at work and you sometimes say things that you don't mean to say."

During the Board Rule 6-10 meeting, Complainant stated that he sometimes loses his temper. Mr. McVaugh, however, did not ask Complainant for any details and Complainant did not elaborate. In particular, Complainant did not admit to losing his temper at any time subsequent to the 2016 Suspension. It is entirely conceivable that when Complainant admitted to losing his temper, he was referencing the events in November 2015 that resulted in the 2016 Suspension. Alternatively, Complainant might have been referencing the period in mid-2015 when he first returned to work after his injury.

Neither the 2014 nor the 2015 Performance Management Plan reference Complainant losing his temper.

Respondent's Prehearing Statement does not discuss any temper tantrums. In particular, the Prehearing Statement does not describe any particular times when Complainant lost his temper at work. Similarly, the Disciplinary Action does not charge Complainant with any particular instances of losing his temper or of any conduct that exhibited a temper tantrum.

Temper tantrums are never appropriate. Respondent, however, did not meet its burden with respect to this ground for the Disciplinary Action.

E. Complainant's admission that when confronted at work, "lots of trash comes out."

The Disciplinary Action asserts: "[y]ou admitted that when confronted, 'lots of trash stuff comes out.'"

During the Board Rule 6-10 meeting, Complainant stated that "lots of trash stuff comes out." Mr. McVaugh did not explore what Complainant meant and Complainant did not elaborate. In particular, Complainant did not admit that trash came out at work or in any way that was disruptive to work. Complainant did not admit that the trash included profanity, yelling, or threats of violence. Complainant made the "admission" about trash in the context of discussing his brain injury and explaining that he sometimes says things he does not mean to say.

During his testimony during the hearing, Complainant explained that when he got back to work after his injury, "it seemed like the cuss words and stuff that came out of my mouth was really bad." Complainant did not testify that the trash included threats of violence.

Other than the purported threats of violence, Respondent's Prehearing Statement does not discuss any "trash" coming out of Complainant's mouth. In particular, the Prehearing Statement does not allege Complainant yelled, used profanity, insulted co-workers, or was argumentative. Similarly, the Disciplinary Letter does not fault Complainant for yelling, using profanity, insulting co-workers, or being argumentative.

Complainant's "admission" about trash coming out of his mouth does not support the Disciplinary Action. Again, it is entirely conceivable that Complainant was referencing the events in November 2015 that resulted in the 2016 Suspension. Alternatively, Complainant might have been referencing the period in mid-2015 when he returned to work after his injury.

F. Other instances of alleged misconduct.

During the hearing, Respondent introduced evidence of other alleged misconduct. The evidence related to: (a) Complainant bringing a rifle to work that he showed his co-workers; (b) Complainant's brother bringing a gun to the workplace; (c) allegations as to Complainant's angry reaction when someone used his fuel logs; (d) an alleged "road rage" accident that happened in August 2015; (e) an incident with Kenny Lovato in July 2015; (f) Complainant squeezing Mr. Martinez's knee on multiple occasions; and (g) an incident with his co-workers about vehicle sitting arrangements. In general, other instances of misconduct may support the level of discipline administered. *See, e.g.,* Board Rule 6-9 (listing "type and frequency of previous unsatisfactory behavior and acts" as a factor in making the decision whether to take corrective or disciplinary action).

The other instances of alleged misconduct, however, do not support the level of discipline administered here. First, the Disciplinary Action does not mention any of these instances. This indicates that Respondent did not factor these instances when deciding on the level of discipline. Second, there was no discussion of these instances during the Board Rule 6-10 meeting. Third, Respondent's Prehearing Statement does not discuss these other instances of alleged misconduct. To the degree Respondent wished to use these instances to bolster its decision to terminate Complainant, Respondent should have included them in its Prehearing Statement. *See, e.g.,* Board Rule 8-54(B) and (C). Fourth, neither the 2014 Performance Management Plan nor the 2015 Performance Management Plan discusses any of these instances of alleged misconduct. Fifth, Mr. McVaugh testified that other than the matters in Mr. Martinez's email of February 17, 2017, Mr. McVaugh was unware of any documents evidencing that Complainant had conflicts of an aggressive level subsequent to the 2016 Suspension.

While more than one of these instances is alarming, an appointing authority issuing discipline must make written findings of the specific grounds for the discipline. *See* Colo. Const. art. XII, § 13(8) ("A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon *written findings* . . .") (emphasis added); § 24-50-125(2), C.R.S. ("Any certified employee disciplined . . . shall be notified in writing by the appointing authority . . . of the action taken, the *specific charges giving rise to such action*, and the employee's right of appeal to the board") (emphasis added). The Disciplinary Action did not make any written findings or charges about these other instances of alleged misconduct. Therefore, these other instances of alleged misconduct cannot form the basis for the discipline at issue in this appeal.

G. The Disciplinary Action is reversed.

Respondent did not meet its burden of proving the underlying facts as charged in the discipline. Therefore, Respondent has not met its burden of establishing just cause for the discipline and this ALJ finds that the Disciplinary Action is arbitrary, capricious or contrary to rule or law. *See Kinchen*; § 24-50-125(2) and § 24-50-125(3), C.R.S. (hearing relates to the disciplinary action taken and the matters specifically charged); *Reeb v. Civil Serv. Comm'n*, 503 P.2d 629, 631 (Colo. App. 1972) (failure to prove charges set forth in the "bill of particulars" requires reversal of discipline). Therefore, the Disciplinary Action is reversed pursuant to § 24-50-103(6), C.R.S.

II. RESPONDENT VIOLATED BOARD RULE 6-10.

Respondent's actions here were contrary to Board Rule 6-10. In addition, Respondent's actions suffered from a degree of arbitrariness and capriciousness.

A. The notice of the Board Rule 6-10 meeting contravenes the requirements of Board Rule 6-10(A).

Board Rule 6-10(A) requires that the written notice of a meeting be provided to the employee "at least 3 business days prior to the meeting." This language in Rule 6-10(A) is unambiguous. Here, Respondent hand delivered the notice of the Board Rule 6-10 meeting to Complainant on February 28, 2017 (a Tuesday). Respondent held the meeting on March 2, 2017 (a Thursday of the same week). As such, Respondent gave the notice to Complainant only two days prior to the meeting. This violates the requirements of Board Rule 6-10(A).

Board Rule 6-10 meetings are held when appointing authorities are considering discipline. The purpose of Board Rule 6-10 meetings is to exchange information before the appointing authority makes a final decision. Given the serious nature of Board Rule 6-10 meetings, failure to give proper notice is prejudicial. Employees need time in advance of the meeting to prepare for it, review and gather documents, and retain representation. Three business days is the *minimum* amount that appointing authorities must provide to employees prior to the meeting.

The preponderance of the evidence at the hearing established that Respondent hand delivered the notice of the Board Rule 6-10 meeting to Complainant on February 28, 2017. Foremost, at the beginning of the Board Rule 6-10 meeting, Mr. McVaugh stated: "a notice of this meeting was hand delivered to you, Richard, on February 28, 2017." Mr. McVaugh's statement was not an accidental slip of his tongue--the Board Rule 6-10 meeting script specifically says: "[a] notice of this meeting was hand-delivered to you on February 28, 2017." After Mr. McVaugh made this statement during the Board Rule 6-10 meeting, Complainant confirmed it.

Similarly, Mr. Benally read the notice during the Board Rule 6-10 meeting. When he finished reading the notice, Mr. Benally stated: "it looks like it was delivered on February 28 and Dave Vialpando was the witness."

Complainant signed and dated the notice when he received it. While it is difficult to decipher whether the handwritten date is February 25, 26 or 28, this ALJ concludes that the date is February 28. First, Complainant testified at the hearing that the date was February 28. Second, Mr. Vialpando testified that he hand delivered the notice and that Complainant signed it in his presence. Mr. Vialpando's testified that he did not deliver the notice to Complainant during the

weekend: "it was during, between Monday and Friday, nothing on the weekends." Mr. Vialpando's strength of memory on this point was unmistakable. Given that February 25 was a Saturday and February 26 was a Sunday, the only remaining possibility is that Mr. Vialpando hand-delivered the notice to Complainant on February 28 (a Tuesday). Third, as discussed in the paragraphs immediately above, both Mr. McVaugh and Mr. Benally understood that the notice was delivered to Complainant on February 28.

In addition, Board Rule 6-10(A) requires that the written notice of a meeting include "general information about the underlying reasons for scheduling the meeting." The notice here did not provide any information relating to the underlying factual allegations or the date of any alleged misconduct or information about any of the purported threats. The audio of the Rule 6-10 meeting demonstrates that Complainant was unaware of the reason for the meeting being called. Complainant testified he "learned what it was about during the meeting." The notice should have done a better job of providing Complainant with information about the underlying reasons for the meeting.

B. Respondent did not give Complainant a copy of the negative statements from other employees.

Board Rule 6-10 requires appointing authorities "to present information about the reason for potential discipline . . . and give the employee an opportunity to respond."

During the Board Rule 6-10 meeting, Mr. McVaugh referenced negative statements about Complainant but did not provide context for such statements. During the evidentiary hearing, Mr. McVaugh testified that he had at least eleven documents with him during the Rule 6-10 meeting. During the Board Rule 6-10 meeting, Mr. Wacker repeatedly asked for a copy of the statement (or statements) with the allegations against Complaint. While Mr. McVaugh agreed to provide the statements, he did not do so during the Rule 6-10 meeting. Respondent's failure to give Complainant a copy of the negative statements during the course of the meeting runs afoul of Board Rule 6-10.

The day after the meeting, Mr. Benally provided Complainant with three statements. Those statements were: (a) Mr. Martinez's email dated February 17, 2017; (b) the questionnaire completed by Mr. Wacker; and (c) the questionnaire completed by Mr. Maez. This did not cure Respondent's infringement. Mr. McVaugh did not reconvene the meeting after Mr. Benally gave Complainant the three statements. As such, Complainant did not have any opportunity during the Rule 6-10 meeting to respond to the statements. Moreover, neither Mr. Benally nor Mr. McVaugh provided Complainant with copies of the many other documents that Mr. McVaugh apparently considered as part of his decision. As such, Complainant had no opportunity whatsoever to respond to the other instances of alleged misconduct. Issuing discipline based upon these statements without giving Complainant a meaningful opportunity to respond during a meeting with his appointing authority violates Board Rule 6-10.

C. Respondent failed to disclose the source of the information.

Board Rule 6-10 requires appointing authorities to disclose the source of the information behind the allegations for potential discipline (unless prohibited by law).

In the first fifteen minutes of the Board Rule 6-10 meeting, Mr. Wacker asked for the source of the allegations. Mr. Wacker was emphatic—"it has to be shared with Richard." Neither Mr. McVaugh nor Mr. Benally disclosed the source of information. As a result, Complainant did not

have an opportunity to respond meaningfully during the course of the Rule 6-10 meeting with his appointing authority. Without the identities of his accusers, Complainant was unable to assess the potential motives and address the credibility of the accusers. This contravenes Rule 6-10(A).

D. Respondent's actions suffered from other arbitrariness and capriciousness.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, this Board must determine whether: (1) the agency neglected or refused to use reasonable diligence and care to procure evidence to consider in exercising its discretion; (2) the agency failed to give candid and honest consideration of the evidence before it; or (3) reasonable persons fairly and honestly considering the evidence must reach a contrary conclusion. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

Neither Mr. McVaugh nor Mr. Benally spoke to Mr. Martinez as part of the investigation. As such, neither spoke to the key accuser. Given the seriousness of the discipline administered in this case, and given Complainant's denial of the accusations, failing to speak to Mr. Martinez supports the conclusion that Respondent failed to use reasonable diligence to procure evidence. Similarly (although somewhat less troubling), Mr. Benally did not speak to Mr. Wacker as part of the investigation. Mr. McVaugh did not speak to Mr. Maez, Ms. Martinez, or Mr. Wacker. Neither Mr. McVaugh nor Mr. Benally spoke to the employees who worked on Patrol 28, the other maintenance squad that operates out of the Saguache Barn. There was also no evidence that either spoke to Mr. Ramirez, who worked on Patrol 07 for a portion of 2016. These investigative shortcomings support a finding that Respondent neglected or refused to use reasonable diligence to procure evidence.

As discussed above, the Disciplinary Action provides dates for Complainant's purported threatening remarks that are not substantiated. Mr. Benally did not speak to Mr. Martinez about anything, let alone dates. Mr. Benally spoke to Mr. Maez and tried to isolate the timeframe, but Mr. Maez "was not sure at all." During cross examination, Mr. Benally admitted that he did not determine when the events happened. The unequivocal dates in the Disciplinary Letter appear to be invented and demonstrate that Respondent did not give honest consideration to the available evidence.

As discussed above, the Disciplinary Action asserts that in the last three months, "you have stated you are willing to engage in fighting." If Mr. Benally or Mr. McVaugh had fully investigated the accusation, it seems likely they would have excluded this charge. Reasonable persons fairly considering the evidence cannot conclude that Complainant said he was willing to engage in fighting in the three months preceding March 13, 2017.

The Disciplinary Action states that Complainant did not present "any mitigating circumstances" at the Board Rule 6-10 meeting. The evidence does not support that statement. The audio of the Rule 6-10 meeting demonstrates that Complainant referenced his brain injury and discussed his Traumatic Brain Injury Handbook. While Complainant's brain injury does not excuse him from violations of Respondent's workplace violence policies, it is a mitigating circumstance that Complainant presented during the Board Rule 6-10 meeting.

While the Disciplinary Action references Complainant's "employment history with the department," the consideration that Mr. McVaugh gave to Complainant's demonstrated performance is unclear. The Disciplinary Action does not discuss Complainant's 2014 Performance Management Plan or his 2015 Performance Management Plan (issued after the 2016 Suspension). Mr. Benally testified that he did not include these performance evaluations in

his information gathering. The Disciplinary Action does not discuss that Complainant's yearly evaluations showed he met or exceeded performance expectations since 2005. Complainant's documented performance is another mitigating circumstance.

The Disciplinary Action observes that Complainant denied making the purported threats. The Disciplinary Action, however, gives no explanation or analysis as to why Mr. McVaugh determined that those statements lacked credibility.

E. Remedy to Complainant.

The Board may reverse or modify the level of discipline if Respondent's decision is arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. The evidentiary hearing before this ALJ was Complainant's first opportunity for a full and fair opportunity to respond to Respondent's allegations against him. As a result of Respondent's violations of Board Rule 6-10, Complainant is entitled to back pay and benefits with statutory interest from the effective date of the termination (March 13, 2017) until completion of the evidentiary hearing (December 29, 2017). *See Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984) (awarding back pay to restore the employee to "the position she would have been in if the flawed predisciplinary meeting had never occurred."); *see also Shumate v. State Personnel Bd.*, 528 P.2d 404, 407 (Colo. App. 1974) ("Where the procedures for [discipline] of a civil service employee are not strictly followed, the [discipline] is invalid and the employee must be reinstated.")

III. THE DISCRIMINATION CLAIMS.

Complainant's Appeal asserts a claim of disability discrimination. Claims of discrimination fall within the Board's statutory authority under § 24-50-125.3, C.R.S. Under that statute, the type of discrimination claims that this Board may hear are those under the Colorado Anti-Discrimination Act ("CADA"). CADA prohibits discrimination because of a person's disability. § 24-34-402(1)(a), C.R.S. Additionally, Board Rule 9-3 prohibits discrimination because of a person's disability. Under CADA, "[d]isability has the same meaning as set forth in the federal 'Americans with Disabilities Act of 1990', 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations." § 24-34-301(2.5), C.R.S. A person is disabled under CADA if that person: (1) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(1).

The Colorado Civil Rights Division defines "major life activities" to include "neurological and brain functions." Colorado Civil Rights Commission Rule 10.2(V). Further, "mental impairment" means:

> [A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "mental impairment" includes, but is not limited to, such diseases and conditions as the following: emotional illness, anxiety disorders, mood disorders, post-traumatic stress disorder, depression, schizophrenia, and bipolor disorder.

Colorado Civil Rights Commission Rule 10.2(W).

A. The wrongful termination claim.

As an initial step, "a plaintiff must establish, by a preponderance of the evidence, a prima facie case of discrimination." *Lawley*, 36 P.3d at 1247. To establish a *prima facie* case of discrimination in employment based on disability, a Complainant must establish that: (1) he is a disabled person within the meaning of CADA; (2) he is qualified for the job held or desired (that is, he is able to perform the essential functions of the job with or without reasonable accommodation); and (3) he suffered discrimination by an employer or prospective employer because of that disability. *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1037-38 (10th Cir. 2011).[5] Once a complainant establishes a *prima facie* case, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Colorado Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 401 (Colo. 1997). If the employer produces such an explanation, "the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Id.*

As to the first prong of a *prima facie* case of discrimination based on disability, Respondent knew that Complainant's brain injury impacted his speech and memory. Mr. McVaugh testified that he was aware Complainant had suffered a traumatic brain injury. When Complainant returned to work in May 2015, Respondent received several medical documents that discussed the brain injury. Respondent repeatedly communicated with Complainant about accommodating his disability. When Ms. Martinez met Complainant on January 22, 2016, Complainant informed her that his brain injury limited his memory. The Colorado Civil Rights Division has defined "major life activities" to include "neurological and brain functions." Colorado Civil Rights Commission Rule 10.2(V). Therefore, Complainant had a disability under CADA or was regarded as disabled.

As to the second prong of a *prima facie* case, Respondent issued Performance Management Plans to Complainant in April 2015, April 2016, and April 2017 that all reflect successful performance as an Equipment Operator III. Complainant was qualified for his position.

As to the third prong, Respondent terminated Complainant on March 13, 2017. As such, he suffered an adverse action. As discussed above, the Disciplinary Action incorrectly states that Complainant did not present "any mitigating circumstances" at the Board Rule 6-10 meeting even though Complainant talked about his brain injury and referenced his Traumatic Brain Injury Handbook. Given that the burden to demonstrate a *prima facie* case is not onerous, the Disciplinary Action's misstatement is a circumstance that gives rise to an inference of discrimination. Therefore, Complainant meets his burden to demonstrate a *prima facie* case.

Respondent articulated legitimate, nondiscriminatory reasons for the adverse action. Those reasons were set forth in the Disciplinary Action. In short, Mr. McVaugh concluded that Complainant had violated Respondent's workplace violence polices. In turn, Mr. Martinez's email supported the Disciplinary Action. The reasons articulated by Respondent rebut the *prima facie* case of discrimination.

The procedural irregularities with the Board Rule 6-10 meeting (discussed above) support a finding that Respondent's articulated reasons for the adverse action are pretextual. *See, e.g., Whittington v. Nordam Group Inc.*, 429 F.3d 986, 994 (10th Cir. 2005) ("[o]ne indication of pretext is the extent of apparent procedural irregularities").

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[5] Pursuant to Board Rule 9-4, the Board refers to both Colorado and federal case law in interpreting discrimination cases.

Mr. Vialpando's failure to date his delivery of the notice also supports a finding of pretext. First, the notice of the Board Rule 6-10 meeting has a section for the person delivering the notice to sign and date it. This section has a blank line immediately above the words "witness name" and "date." While Mr. Vialpando signed the notice on this line as the witness, he omitted dating it. Second, Mr. Vialpando testified that "usually I put the date" yet he offered no explanation for his failure to date the notice when he delivered it. Third, the notice scheduled a Board Rule 6-10 meeting. Mr. Vialpando should have been highly motivated to establish proper delivery of the notice. Given that Mr. Vialpando delivered the notice with less time than required by Board Rule 6-10(A), his omission obscured Respondent's failure to give Complainant proper notice. Mr. Vialpando's omission is a disturbing irregularity.

As discussed above, the unequivocal dates in the Disciplinary Action appear to be invented. Making up dates on such an important document demonstrates pretext.

Last but far from least, Respondent's articulated reasons are unworthy of belief. As discussed at length above, Respondent failed to prove by a preponderance of the evidence that Complainant made threats of violence. Respondent's failure to prove its proffered reasons supports a finding of pretext. *See St. Croix v. Univ. of Colo. Health Sciences Ctr.,* 166 P.3d 230, 236-37 (Colo. App. 2007) (plaintiffs may demonstrate pretext with evidence that the employer's stated reason for the adverse employment action was false). In particular, Respondent's assertion that Complainant stated that he was "willing to engage in fighting" was so unworthy of credence that it undermines Respondent's other assertions. *See, e.g., Jaramillo v. Colorado Judicial Dep't*, 427 F.3d 1303, 1310-11 (10th Cir. 2005) ("the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons").

Complainant has established pretext for discrimination. Therefore, Complainant has met his burden of proof on this claim.

B. The failure to accommodate claim.

CADA prohibits discrimination based on disability unless "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)(A). Colorado Civil Rights Commission Rule 60.6(A)(1) provides that employers "shall make reasonable accommodation to the known disabilities of an otherwise qualified applicant or employee with a disability unless the [employer] can demonstrate the accommodation would impose an undue hardship or that it would require any additional expense that would not otherwise be incurred."

Even though Complainant did not request an accommodation, the evidence at hearing demonstrated that Respondent accommodated Complainant's disability. First, Respondent gave Complainant more than twelve weeks leave subsequent to his head injury. (The injury happened on January 4, 2015; Complainant did not return to work until early May 2015.) Second, Respondent assigned Complainant to light duties. These light duties started upon Complainant's return to work and continued until Complainant was ready to return to his regular duties as an Equipment Operator III. Respondent's efforts to accommodate Complainant's brain injury undercut his claim.

Ms. Martinez testified credibly of her endeavors to engage in the interactive process with Complainant. Her testimony was consistent with contemporaneous documents that describe numerous interactions with Complainant. Complainant's own testimony also corroborated Ms. Martinez's account. On June 15, 2015, Ms. Martinez signed (on behalf of Mr. Benally) and transmitted a letter to Complainant regarding accommodations and the interactive process. On July 10, 2015, Ms. Martinez had conversation with Complainant. During the conversation, Ms. Martinez inquired whether Complainant had received the letter regarding the interactive process and talked to him about his rights under the ADA. Complainant informed Ms. Martinez that he did not need to be accommodated. On January 12, 2016, Ms. Martinez met with Complainant. During that meeting, Ms. Martinez gave Complainant a copy of Respondent's ADA Information Form and again discussed his rights under the ADA and the interactive process. On January 22, 2016, Ms. Martinez met yet again with Complainant. During the interaction, Complainant expressed that his memory was not as good as it was prior to his injury and also expressed limitations with his speech and spelling. During that interaction, the two discussed Complainant's job description *item by item*. Complainant indicated that he did not need accommodations to perform any of the duties set forth in his job description. Complainant said he could do all the duties of his job.

Complainant provided Respondent with a Fitness-To-Return Certification (signed by his Physician Assistant) that stated Complainant was "able to work a full, regularly scheduled day *with no restrictions* beginning 6/15/15" (emphasis added). The Fitness-To-Return Certification did not indicate that Complainant had any need for an accommodation. From approximately June 22, 2015, until his termination, Complainant worked his regular duties as an Equipment Operator III. During his testimony at hearing, Complainant stated that after he returned to working as an Equipment Operator, he "didn't really need this anymore." The "this" in his testimony referred to the ADA Information Form. During cross examination, Complainant testified he felt he could do his job without any help. There was no evidence that the slight delay in Complainant's speech hindered his job performance; similarly, there was no evidence that Complainant's memory issues prevented him from doing his work. To the contrary, Complainant's Performance Management Plans all reflect that he was a productive and successful employee. Under these circumstances, Respondent did not have an obligation to give Complainant further accommodations or to engage in additional interactions as to possible accommodations.

Undeterred by: (a) the Fitness-To-Return Certification; (b) Complainant's own declarations; and (c) Complainant's successful performance record, Complainant argues that Respondent should have conducted a neuropsychological exam to identify reasonable accommodations Respondent might have provided. Complainant, however, does not cite any legal authority requiring employers to conduct such examinations as part of the ADA interactive process. Moreover, even though Ms. Martinez informed Complainant of his rights under the ADA, he never requested any kind of medical examinations or mental tests. If Respondent had required a medical examination, it risked violation of 42 U.S.C. § 12112(d)(4) (employer's shall not require medical examinations). In any event, medical examinations involve expenses that employers would not otherwise incur. As such, Respondent does not have an obligation under CADA to provide such examinations as part of the interactive process. *See, e.g.,* Colorado Civil Rights Commission Rule 60.6(A)(1) (employers do not need to make a reasonable accommodation if "it would require any additional expense that would not otherwise be incurred").

Complainant also argues that Respondent should have reassigned him to another position. During the interaction on January 22, 2016, Complainant gave Ms. Martinez a completed ADA Information Form. Complainant wrote "Steve Johnson" in response to the question "[o]ther job classifications or divisions in which you are interested?" At the time, Mr. Johnson's position was not vacant. In fact, Complainant's testimony placed Mr. Johnson's

retirement as sometime in early 2017. Reassignment to an occupied position is not a reasonable accommodation. *See, Community Hosp. v. Fail*, 969 P.2d 667, 673 (Colo. 1988) ("[a]n employer is not required to promote a disabled employee, create a new position for that employee, or reassign that employee to an occupied position"). Moreover, there was no evidence that Mr. Johnson's position (or any of Respondent's positions) was an isolated job that involved barely any interaction with other employees. Complainant's argument is groundless.

The Traumatic Brain Injury Handbook indicates that traumatic brain injuries may cause mood disorders, behavior problems, and social difficulties. Respondent, however, has no obligation under CADA to accommodate violence, threats of violence, or fits of rage even if the behavior stems from a mental disability. This is a common sense principle. The case law from other jurisdictions supports this conclusion. *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999) ("threatening other employees disqualifies one from a job"); *Chapa v. Adams*, 168 F.3d 1036, 1039 (7th Cir. 1999) ("people who threaten to kill their supervisors are not 'qualified' for [employment] even if their threats are hollow"); *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944-45 (9th Cir. 2015) ("[a]n employee whose stress leads to serious and credible threats to kill his coworkers is not qualified to work for the employer").

Complainant did not meet his burden of proof on this claim.

C. The harassment claim.

Under CADA, "harass" is defined as creating a hostile work environment based upon an employee's membership in a protected class. § 24-34-402(1)(a), C.R.S. CADA prohibits harassment "during the course of employment." *Id.* Under CADA, "harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate." *Id. But cf.* 3 CCR 708-1-85.1(D).

Other than his allegations in the instant appeal, there is no evidence that Complainant filed any complaints about discriminatory treatment with an appropriate authority at Respondent. To the contrary, Complainant testified that he never complained about harassment. Mr. Benally testified that he was not aware of any harassment complaints from Complainant. Ms. Martinez testified that Complainant did not bring any concerns of harassment to her attention. Mr. Maez (Complainant's lead worker) testified that Complainant never complained to him about harassment. Mr. Wacker (Complainant's direct supervisor) testified that he communicated regularly with Complainant and that "every time" Complainant informed him that things were fine at work. None of Complainant's exhibits at the hearing was a complaint that he had filed with Respondent. Therefore, Complainant does not satisfy CADA's requirements for a harassment claim.

In addition to filing a complaint, a CADA harassment claim requires proof that "[t]he workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Complainant did not testify about hearing any derogatory remarks about disabled individuals, to hearing any insults or slurs like "slow," "stupid," "retarded," or "moron," or to any discriminatory jokes. He did not testify to anyone yelling at him or directing profanity at him. Complainant testified that he felt people were spying on him, but there is more than one legitimate reason for individuals to have kept an eye on him (such as observing whether he might need any help). There was no evidence that Respondent gave Complainant less desirable assignments than it gave to other Equipment

Operator IIIs. There was no evidence that Complainant's work hours or other conditions were disparate from other Equipment Operator IIIs. While Mr. Maez testified that some co-workers laughed at Complainant's head injury and pushed his buttons, there were no details with respect to this misconduct, including dates, frequency, precipitating events, or the identity of the supposed perpetrators. Mr. Maez's testimony may have related to the period when Complainant first returned to his regular duties. Moreover, Mr. Maez's testimony suffered from credibility issues as previously discussed. In any event, Complainant does not appear to have perceived any of the purported misconduct. In conclusion, even if Complainant had properly filed a complaint with an appropriate authority at Respondent, Complainant did not meet his burden of proving that the workplace was permeated with severe intimidation, ridicule, or insult.

D. Front Pay.

Complainant requests front pay. CADA authorizes courts and the Colorado Civil Rights Commission to award front pay. § 24-34-405(2)(a)(II), C.R.S.; *see also* Board Rule 9-6. Nonetheless, "reinstatement is the preferred remedy." *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003). Front pay is used where reinstatement is not feasible. *See Ward v. Dep't of Natural Resources*, 216 P.3d 84, 97 (Colo. App. 2008). Front pay may also be appropriate "where an employer's extreme hostility renders a productive and amicable working relationship impossible." *Abuan*, 353 F.3d at 1176.

Complainant has not demonstrated infeasibility. He testified he is fully capable of performing his job functions as an Equipment Operator III. Complainant also failed to prove his harassment claim, let alone to demonstrate extreme hostility that renders reinstatement impossible.

IV. ATTORNEY FEES.

Section 24-50-125.5, C.R.S., governs Complainant's request for attorney fees. That statute provides for an award of fees and costs: "if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless."

Bad faith may include conduct that is "disrespectful of truth and accuracy." *Mayberry v. Univ. of Colo. Health Sciences Ctr.*, 737 P.2d 427, 430 (Colo. App. 1987) (citation omitted). The unequivocal dates in the Disciplinary Action support a finding that Respondent was disrespectful of truth and accuracy. Respondent's charge that Complainant stated he was "willing to engage in fighting" is so baseless that it also supports a finding of bad faith. Respondent also acted wrongly in failing to comply with Board Rule 6-10. Therefore, Complainant has established grounds for an award of his reasonable attorney fees and costs. Complainant, however, is not entitled to fees related to his failure to accommodate claim and to his harassment claim.

CONCLUSIONS OF LAW

1. Respondent did not meet its burden of proving that Complainant committed the acts underlying the discipline.

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

3. The dismissal should be reversed.

4. Respondent discriminated against Complainant in violation of CADA.

5. Complainant is entitled to reasonable attorney fees and costs.

ORDER

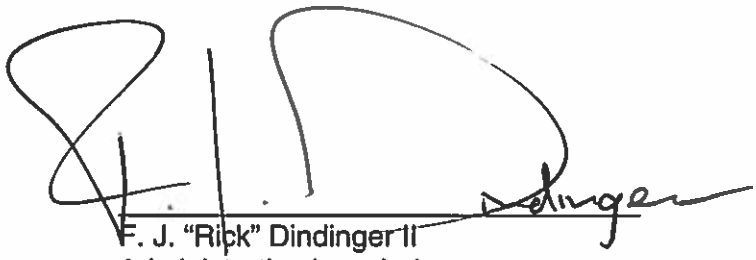
The Disciplinary Action is **reversed**. Complainant's dismissal is **rescinded**. Respondent shall reinstate Complainant.

As a result of the improper and discriminatory dismissal, Respondent shall pay Complainant back pay and concomitant benefits with statutory interest from the effective date of the dismissal (March 13, 2017) until Respondent reinstates Complainant to an Equipment Operator III position. (The benefits shall include but not be limited to PERA contributions, health, life and dental contributions, service credit, and leave that would have accumulated from the date of termination through the date of reinstatement.) The calculation of back pay should include any pay increases adopted by Respondent for the class and normal pay raises given by Respondent to employees meeting expectations during the period covered by the award. The calculation of back pay shall be reduced by any compensation and benefits Complainant has earned from other sources after his termination, including any unemployment benefits.

Independently as a result of Respondent's violations of Board Rule 6-10, Respondent shall pay Complainant back pay and benefits with statutory interest from the effective date of the termination (March 13, 2017) until completion of the evidentiary hearing (December 29, 2017). The amount owed to Complainant as a result of the violations of Board Rule 6-10 is not cumulative to the amount owed to Complainant as a result of the improper dismissal.

Respondent shall pay Complainant his reasonable attorney fees and costs as discussed in Section IV, above.

Dated this 31st day
of January, 2018,
Denver, Colorado.



F. J. "Rick" Dindinger II
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 31st day of January 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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Angel Esper

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 misunderstanding 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.