

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

YI YU,
Complainant,

v.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL, PORT OF ENTRY
BRANCH,**
Respondent.

Administrative Law Judge (“ALJ”) Keith A. Shandalow held the commencement hearing in this matter on August 11, 2017 and the evidentiary hearing on January 3, 2018, at the State Personnel Board (“Board”), 1525 Sherman Street, Courtroom 6, Denver, Colorado. The record was closed on January 8, 2018, after the ALJ ruled on the admissibility of Complainant’s proffered exhibits. Complainant Yi Yu (“Complainant”) represented herself. Stacy Worthington, Senior Assistant Attorney General, represented Respondent, the Colorado Department of Public Safety, Colorado State Patrol, Port of Entry Branch (“Respondent”). Respondent’s advisory witness, and Complainant’s appointing authority, was Kirstie Nixon, Director of the Colorado State Patrol’s Port of Entry Branch.

MATTERS APPEALED

Complainant, formerly a certified Port of Entry Branch officer, appeals her disciplinary termination. Complainant argues that she did not commit the acts for which she was disciplined or, if she did, she was justified in doing so; that Respondent’s decision to terminate her employment was arbitrary, capricious or contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives. Complainant also alleges that Respondent discriminated against her on the basis of disability in violation of the Colorado Anti-Discrimination Act. Complainant seeks placement into a different position within the Colorado State Patrol or payment of all damages she incurred as a result of her employment with Respondent.

For the reasons discussed below, the undersigned ALJ finds that Respondent’s disciplinary action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined.
2. Whether Respondent’s disciplinary action was arbitrary, capricious or contrary to rule or law.
3. Whether the discipline imposed was within the range of reasonable alternatives.
4. Whether Respondent discriminated against Complainant on the basis of disability in violation of the Colorado Anti-Discrimination Act.

FINDINGS OF FACT

1. Complainant began her employment with the Department of Public Safety, Colorado State Patrol ("CSP"), Port of Entry Branch ("POE"), in September 2014. At that time, the POE was part of the CSP's Motor Carrier Safety Section.

2. The POE's mission is to conduct safety inspections of commercial vehicles under federal regulations and to ensure that commercial motor vehicles traveling through Colorado have the correct dimensions to prevent damage to the state's infrastructure. The POE also enforces size and weight regulations of motor vehicles traveling in Colorado.

3. When Complainant was hired, she went through six weeks of training at the CSP academy, followed by four to six weeks of field training.

4. On Friday, January 9, 2015, Complainant was being trained on superload trucks, which are large commercial vehicles weighing 500,000 pounds or more. In order to weigh superload vehicles, POE employees use portable scales, placing them just in front of each of the superload's wheels, and having the driver advance slowly until the scales are under each wheel. The operation requires POE employees to slide under the truck to place the portable scales in front of the wheels and then get out from under the truck before the truck moves forward onto the scales.

5. During one superload weighing operation on January 9, 2015, POE employees yelled "all clear," despite the fact that Complainant was still under the truck.

6. Complainant yelled that she was still under the truck, and the "all clear" directive was immediately rescinded. The truck did not move and Complainant got out from under the truck safely.

7. Complainant was very upset and rattled by this experience.

8. Complainant felt that her field training officer ("FTO"), David Brown, who was responsible for supervising Complainant's training that day, was not paying sufficient attention to her and exacerbated the situation by not properly apologizing to her.

9. On Saturday, January 10, 2015, Complainant emailed the FTO coordinator, Sergeant James Hirth, and told him about the previous day's incident (hereinafter, "the superload incident"). In her email, Complainant requested a transfer out of the POE.

10. On Monday, January 12, 2015, Complainant met with Captain Timothy Hilferty of the CSP's Motor Carrier Safety Section and Kirstie Nixon, the Director of the POE, to discuss the superload incident. Complainant was temporarily reassigned to the Motor Carrier office pending evaluation by a workers' compensation doctor.

11. On January 15, 2015, Complainant was examined by a workers' compensation doctor, who referred her to a psychologist for evaluation.

12. Complainant did not grieve the superload incident.

13. Complainant was given a psychological evaluation on January 28, 2015, and was cleared for duty, with no restrictions and no finding of any psychological disability.

14. After learning that Complainant had been cleared to return to duty on January 28, 2015, Ms. Nixon ordered Complainant to report to work the next day at the POE's Dumont facility.

15. Later that day, Captain Hilferty telephoned Ms. Nixon and told her that Complainant had called him to express concerns about returning to work.

16. Ms. Nixon then called Complainant and told her that she was required to return to work the next day. Complainant asked, "What if I don't report to work?" or words to that effect. Ms. Nixon replied that Complainant was required to report to full duty. When Complainant again asked what would happen if she did not return to work, Ms. Nixon replied that there would be consequences. Unhappy with her conversation with Ms. Nixon, Complainant called Major Jon Barba, who at that time headed the CSP's Motor Carrier Safety Section and was Complainant's appointing authority, and left him a voicemail. Complainant returned to work the next day.

17. On February 4, 2015, at Major Barba's request, Complainant met with Major Barba and the POE's Deputy Director, Trish Aragon. Major Barba told Complainant that it was not appropriate for her to contact him directly because she needed to follow the chain of command. The chain of command required Complainant to first discuss issues with her immediate supervisor, and not bring issues to her supervisor's superior officers. Following the chain of command allows issues to be resolved at the lowest level by supervisors who are knowledgeable about the issues raised by subordinates, and protects upper level command staff officers from receiving complaints and requests that should be addressed and handled by lower level supervisors. Complainant protested that her chain of command below Major Barba was "rotten." When Complainant complained about the superload incident and the POE's subsequent handling of it, Major Barba said he would initiate an Internal Affairs investigation into the incident.

18. While the superload incident was being investigated, FTO Brown, who Complainant blamed for the superload incident, was promoted. Complainant thought the promotion unwarranted and unjust.

19. On or about February 12, 2015, Complainant took the CSP trooper examination. She was notified on March 19, 2015 that she was not selected to transfer to a CSP trooper position. Complainant did not appeal her non-selection.

20. Complainant received a Level 2 (successful) performance rating for the period September 29, 2014 through March 31, 2015. However, in the narrative portion of the evaluation, her supervisor wrote that "your [Complainant's] interpersonal skills with co-workers has been perceived as disrespectful at times. Improving the way you respond to others will improve your working relationship with your co-workers."

21. On April 18, 2015, while traveling to work on Interstate 70, Complainant's personal car was hit by a rock slide and snow pack, incurring some vehicle damage. Complainant had previously asked for that day off, but her supervisor, Dumont District Supervisor Cynthia Jaques, denied the request. Complainant had her automobile towed to her home in Greeley, Colorado at a cost of Six Hundred Dollars. After Complainant arrived at her home, she sent an email to her entire chain of command informing them that she was home in Greeley. Complainant also sent an email to Major Barba stating that she needed him to get her out of the POE. Complainant returned to work on April 23, 2015.

22. Complainant blamed Ms. Jaques for the rock slide and the damage to her car because Ms. Jaques had denied Complainant's request for the day off. However, Complainant did not file a grievance relating to the April 18, 2015 incident.

23. On May 18, 2015, Major Barba met with Complainant and informed her that the Internal Affairs investigation into the superload incident was completed, that appropriate actions had been taken, and that the matter was closed.

24. Complainant became a certified state employee in late September 2015.

25. On December 4, 2015, Complainant sent Major Barba an email about her request to be transferred out of the POE to the CSP. Major Barba responded that the proper procedure was for her to pass the CSP trooper exam. Complainant was not satisfied with Major Barba's response and asked to meet with CSP Chief Scott Hernandez.

26. On December 16, 2015, Complainant met with Chief Hernandez and Lt. Col. Brenda Leffler. Chief Hernandez denied Complainant's request to be transferred to a trooper position in the CSP. Complainant did not grieve this decision.

27. On December 17, 2015, Complainant sent Major Barba a summary of her meeting with Chief Hernandez and Lt. Col. Leffler, and wrote that she was waiting for the CSP to figure out a proper solution for the incident, referring to the superload incident.

28. While assigned to the POE's Dumont facility, Complainant complained about her schedule and felt micromanaged. On December 29, 2015, she communicated concerns about her schedule via email to Major Barba, Lt. Col. Savage, Lt. Col. Leffler, and Chief Hernandez. In that email, Complainant wrote, "I have to constantly deal with supervisors threatening me/ganging up against me." Concerned about Complainant's allegations, Major Barba directed Ms. Aragon to speak with Complainant about her allegations.

29. On January 12, 2016, Ms. Jaques and Senior Port Officer Jones instructed Complainant on the proper chain of command.

30. On January 12, 2016, Ms. Aragon met with Complainant about her allegation that her supervisors were threatening and ganging up against her. Complainant failed to provide Ms. Aragon with any specific examples.

31. On January 14, 2016, Complainant interrupted Ms. Jaques while she was observing a cadet's performance to inform her that Complainant was not going to come to work that evening because snow was expected. Complainant pursued the conversation in a manner that Ms. Jaques thought disrespectful and disruptive. Ms. Jaques directed Complainant to report to work as scheduled. Complainant responded that she would let Ms. Jaques know later if she was coming to work or not. Complainant did not report to work and called in sick.

32. On January 17, 2016, Complainant emailed Chief Hernandez, writing, in pertinent part, as follows:

It has been more than a month since our meeting. May I please have the resolution? The first incident happened on January 9, 2015, another one happened within three months [sic] time frame, yet I am still waiting while the person who got me ran [sic] over ended up having a promotion; the person

who invited me to the promotion ceremony is performing retaliation on me on daily basis along with her crew. Needless to say I will never be able to see the CSP promotion process as it used to be. I wonder if you would ever give me an answer at all. I understand you might or might not like the way I do things; it is your choice, I respect that. However, I highly doubt it [sic] is necessary for you personally against me since you have a whole organization to run; I am just a teeny tiny piece on your board. In deed [sic] it makes me feel like I am the one being punished after two back to back life threatening situations, without a single doubt sacrifice me to save your Port of Entry is not the answer.

33. On January 19, 2016, Complainant submitted a request for leave without pay for the month of February, failing to follow her chain of command in doing so. She alleged that she needed the leave because of "the nature of irreparable damages caused by Colorado State Patrol Port of Entry department from January 9th, 2015 until now." Major Barba forwarded Complainant's request to the Department of Public Safety's Human Resources (HR) Director Adrienne Raiche to investigate Complainant's allegation of "irreparable damages."

34. On January 25, 2016, Ms. Raiche reached out to Complainant via email.

35. On January 26, 2016, Complainant responded to Ms. Raiche via email and wrote, in pertinent part:

As far as irreparable damages concern, I do not wish to recap any event in detail at this point time. From psychological stand point, constantly bringing up the old would makes no difference than spreading the salt on an open wound, too painful, and no offense to you. I hope you would understand. I have had meetings with anywhere from CPT Ansari to Chief Hernandez to address this issues, including but not limited to getting ran over by the truck, getting told to attend to the promotion ceremony (the individual who got me ran over ended up have the promotion, and I had to watch that, really?!), getting hit by the avalanche, getting threatened by the POE management team, getting retaliated by the POE personnel, costing me thousands of dollars to repair the vehicle multiple times, to name a few. All of above caused by CSP Port of Entry that are irreparable and truly no details needed to be repeated. I am glad I am alive.

As far as having an appropriate solution concern, due to those irreparable damages caused by CSP Port of Entry, preferably an administrative allocation is necessary for me. I expressed by desire to Major Barba and Chief Hernandez previously regarding this matter, and I am sure all of your communicate. Therefore, I will leave this to you and your team to determine which position would benefit the agency and me the most based on my unique skill set. I am with open arms to make positive contributions as needed; **I would like the new position have absolutely nothing to do with CSP Port of Entry indefinitely please.** Again, thank you for your follow up.

(Emphasis in original)

36. On February 1, 2016, during a conversation with Ms. Jaques, Complainant said that she would let Ms. Jaques know later whether she report to work the next day. Ms. Jaques asked Complainant not to disrespect her in her communication, to which Complainant replied that

she did not respect Ms. Jaques. On February 2, 2016, Complainant did not report to work as scheduled and called in sick.

37. On February 26, 2016, Complainant sent an email to Major Barba requesting an immediate transfer out of the POE.

38. On March 2, 2016, Ms. Jaques observed that Complainant was not performing her assigned duties and directed her to do so. In her conversation with Ms. Jaques, Complainant was argumentative and resistant. Ms. Jaques considered Complainant's communication with her insubordinate and disrespectful.

39. On March 2, 2016, Complainant walked off the job after telling Ms. Jaques via telephone that, first, she was uncomfortable and wanted to go home, then that she was sick and wanted to go home. Ms. Jaques told Complainant that she did not have any sick leave available. Complainant said she would take leave without pay. Ms. Jaques informed Complainant that leave without pay had to be approved by the appointing authority. Complainant told Ms. Jaques that she was going home and that she should notify the appointing authority about leave without pay. Ms. Jaques considered Complainant's communication disrespectful and insubordinate.

40. On March 3, 2016, at approximately 1:00 p.m., Ms. Aragon hand-delivered a notice of corrective action to Complainant. The notice detailed the incidents on January 12, January 14, and March 2, 2016 involving Complainant's failure to follow the proper chain of command, her disrespectful and disruptive conduct, and her insubordination. The corrective action directed Complainant to "follow the proper channels of the chain of command in all communications both written and verbal," perform her duties as assigned and follow the directions of her supervisor, "speak and treat all you come in contact, with respect, honor and integrity," and "conduct yourself to reflect the highest degree of professionalism and integrity," among other things. The corrective action was to remain in effect through March 3, 2017.

41. Approximately three hours after receiving the notice of corrective action, Complainant sent an email to Chief Hernandez and Lt. Col. Brenda Leffler concerning the corrective action. A little over an hour later, Complainant contacted Chief Hernandez and Lt. Col. Mark Savage on their cell phones to discuss the corrective action. During a phone conversation with Complainant, Lt. Col. Savage told Complainant that she should follow her chain of command.

42. On March 4, 2016, Major Barba responded via email to Complainant's request for an immediate transfer out of the POE to the CSP. Major Barba wrote, in pertinent part, "we will not transfer you to a different position. You are free to apply to any position within the Department or State of Colorado for which you believe you are qualified. In the meantime, you will remain in your position as a Port of Entry officer. You must perform the job duties of that position and meet the expectations of your supervisors."

43. On March 4, 2016, Complainant sent an email to Department of Public Safety Director Stan Hilkey and Deputy Executive Director Rebecca Spiess, and wrote:

My name is Yi Yu. I am the employee from Colorado State Patrol Port of Entry. Last year, during FTO training, I got ran [sic] over by a semi truck due to the FTO left me under the truck. Three months later, I got hit by the avalanche on my way to work. I was not supposed to be there that day. The supervisor made me felt [sic] like I must be there for the enforcement weekend while my roof was leaking water, so I went to work, and then got hit. After the truck incident,

I requested assistance from POE supervisors, no one cared. So I got the CSP Command staff members involved for an IA process. Major Jonathan Barba was the point of contact during the whole IA process.

I am not sure what happened, he promoted the FTO, and my immediate supervisor told me to go to the promotion ceremony (the same person who got me hit by the avalanche). Up until today, I have only received one apology from CSP Chief Scott Hernandez. But no proper resolution was issued to me. I requested to be transferred out of the Port of entry [sic] due to retaliation, no one cared. Ever since the truck incident, I got [sic] retaliated by the POE personnel, including but not limited to the Dumont Supervisor Cynthia Jaques, Deputy Director Trish Aragon, Director Kirsty [sic] Nixon and their fellow members. I brought up the issues to the command staff member multiple times regarding the retaliation issues. On March 3, 2016, the Deputy Director Trish Aragon issued me a corrective action due to my immediate supervisor claimed I did not follow the chain of command. She claimed I was disrespectful to her. They treated me like an animal, and they do not allow me to talk about it.

I went to the proper chain of command right after the incidents, NOBODY cared. Which explains why I went up to the command staff member for assistance. I spoke with Chief Hernandez, he advised me to contact Major Barba. However, Major Barba did not answer or reply to the phone call. So I spoke with his supervisor LTC Mark Savage, he suggested me [sic] to speak with my immediate supervisor. They kicked me everywhere rather than giving me a proper resolution. The CDPS HR director was wish [sic] to meet with me, but due to the scheduling issue, I never had a chance to speak to her. I got isolated by POE. I was the only person who worked the grave yard shifts when HR Director wish [sic] to meet with me.

As of right now, I felt like not only I got [sic] retaliated by POE personnel, but also got retaliated by some of the CSP members. I tried as much as I could for assistance inside of CSP. Nothing happened.

I am kindly asking you for assistance if I may. It have been more than 1 year, I went to the whole chain of command anywhere from my immediate supervisor to Chief. I have never received a single proper resolution towards me at all.

Would you please help? Thank you so much.

44. Complainant timely grieved the March 3, 2016 corrective action. A Step One grievance meeting was held on March 24, 2016 between Complainant and Ms. Aragon. Complainant expressed her disagreement with each of the findings in the corrective action.

45. On March 28, 2016, Ms. Aragon sent Complainant an informal response to Complainant's grievance. Ms. Aragon concluded that "On January 12, 2016, you did not follow the correct chain of command as you sent your request to District Supervisor Jaques, Major Jon Barba, Action OIC Keith Coombes, Director Kirstie Nixon, and me. This is not following the chain of command." Ms. Aragon also concluded that Complainant was disrespectful and insubordinate towards Ms. Jaques on at least three occasions between January 14, 2016 and March 2, 2016. The informal response provided Complainant with her appeal rights. Complainant did not submit a Step Two grievance.

46. On March 31, 2016, Major Barba held a Rule 6-10 meeting with Complainant, which addressed information indicating that Complainant had violated the March 3, 2016 corrective action. Major Barba's representative was Ms. Nixon; Complainant chose not to bring

a representative. During the meeting, Complainant was uncooperative and disruptive. Instead of addressing the issues that were the focus of the Rule 6-10 meeting, Complainant continued to speak about the January 9, 2015 and April 18, 2015 incidents, asserting that she was “run over” by the superload truck on January 9, 2015, and that by denying Complainant’s request for the day off, Ms. Jaques caused her to be caught in an “avalanche.”

47. Complainant's supervisor, Ms. Jaques, gave Complainant a Level 1 performance rating (needs improvement) for the period April 1, 2015 through March 31, 2016. The narrative portion of the evaluation states as follows:

Your written and verbal communication with supervision has been disrespectful and disruptive. On January 14, 2016, during my observation of an intern, you were disruptive and persistent in continuing a conversation even after I had answered your initial statement in regards to reporting to work. Your persistence in continuing to interrupt the evaluation process was disrespectful in regards to your co-worker’s success as well as being disrespectful and insubordinate in your response.

On February 1, 2016, your behavior and actions were disrespectful as you dictated to me whether you would report to work or not. When I asked you to not be disrespectful in your communications with me you stated you did not respect me. Your actions and communication continued to be disrespectful and unprofessional.

On March 2, 2016 your communication was disrespectful. When I inquired why you were not performing your scheduled duties. You stated you were working on documents that were work related. I told you if the document was work related you needed to discuss this with me and you would be afforded the opportunity to work on the document during a scheduled time period. You responded that it didn’t pertain to me and were dismissive of my directive to perform your assigned duties.

You have responded with emails that have been disrespectful and accusatory of illegal actions with scheduling and your military obligation. One example is on July 15, 2015 you sent an email alleging illegal scheduling due to your military leave. Your communication in other emails is dictating and disrespectful.

Your overall communication, especially with supervision, is dictating, disrespectful and unprofessional. Your communication fails to build trust and respect with your co-workers and supervision.

48. A Performance Improvement Plan (PIP) was issued April 26, 2016, and signed by Complainant and Ms. Jacques on May 2, 2016. The PIP required Complainant to improve in the following areas during the next rating period of April 2016 through October 2016:

1. Communication must not be disruptive in the work place.
2. Communication both verbal and written must be respectful.
3. Communicate any other work related tasks outside your scheduled duties to supervision for assigned duty time to complete those tasks.

4. Perform your assigned duties and follow the directions of your immediate supervisor.
5. Follow the chain of command.
6. Cooperate and work toward the common goals of the Colorado State Patrol.
7. Conduct yourself to reflect the highest degree of professionalism and integrity to ensure that every level member is treated with respect, courtesy and fairness.

49. At some time prior to May 2016, Complainant filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), alleging discrimination and retaliation against the POE.

50. On May 3, 2016, Complainant submitted a complaint against Ms. Jaques, alleging that Ms. Jaques "has been constantly against me at work."

51. On May 4, 2016, Ms. Aragon sent Complainant an email requesting a meeting to discuss Complainant's performance evaluation and her complaint against Ms. Jaques.

52. On May 6, 2016, Complainant sent an email to Ms. Raiche and to the Professional Standards office, writing that:

I was informed by Colorado State Patrol Port of Entry Deputy Director Trish Aragon on May 4, 2016 to meet with her regarding the PMP [performance evaluation] issue and the complaint against Dumont Port of Entry District Supervisor Cynthia Jaques' accusatory fabricating facts towards me. They made unjustified and unfair decisions on March 3, 2016 to me (Corrective Actions). The Port of Entry Supervisors have lost their credibility, their integrity, and their professionalism in front of me. Therefore, I regret to inform you that I refuse to meet with Port of Entry Deputy Director Trish Aragon at this time along with the rest of the POE management team. Thank you.

53. On May 7, 2016, Complainant responded to Ms. Aragon via email, writing, "The PMP issue has been fully discussed with the Human Resources Director Adrienne Raiche. Thank you."

54. Major Barba handed Complainant a notice of disciplinary action and transfer on May 11, 2016, informing Complainant of Major Barba's decision to impose a disciplinary action of a 5% reduction in Complainant's base salary for three months. Major Barba determined that Complainant had violated the March 3, 2016 corrective action regarding the issue of following her chain of command almost immediately after receiving it by emailing and telephoning CSP command staff. The notice also informed Complainant that Major Barba was transferring her so that she could have a fresh start at a different POE facility. Complainant did not appeal this disciplinary action.

55. Complainant began working at the Ft. Morgan POE facility on May 17, 2016.

56. On February 1, 2017, Complainant met with Major Barba and requested a transfer out of the POE. On February 16, 2017, Major Barba sent Complainant a memorandum denying Complainant's transfer request. In his email transmitting the memorandum, Major Barba addressed a pending reorganization of the CSP. Major Barba wrote, in pertinent part, "As part of the reorganization, the Port of Entry will no longer be within my span of control. Your Appointing Authority will be Port of Entry Director Kirstie Nixon. I am not your point of contact. Effective

immediately, you are being directed to utilize your appropriate chain of command; it is not acceptable for you to continue to contact me directly, without utilizing your chain of command.”

57. On February 21, 2017, the EEOC investigator informed Complainant that there was insufficient evidence to support her claims of discrimination and retaliation.

58. On March 14, 2017 at 8:03 a.m., Complainant sent Chief Hernandez an email with the subject heading “meeting request,” in which Complainant wrote, “The Governor’s Office referred me to meet with the State HR Director Ms. June Taylor after the EEOC closed the case. I would like to have a conversation with you before I make my determination whether would [sic] I meet with the State HR office or not if I may. Thank you.”

59. At 2:15 p.m. that same day, Complainant again sent Chief Hernandez another email, in which she wrote, in pertinent part, “Please be aware that failure to respond [sic] the above meeting request I would be taking [sic] as you refuse to meet up with me, and it will be taking [sic] as neglect. Your behavior and the way CSP handling [sic] things will be discussed with Ms. June Taylor.”

60. On March 23, 2017 at 12:03 p.m., Complainant sent Chief Hernandez an email in which she wrote the following:

The feedback I have received from the State HR office recommended me to resolve the issues within the Patrol, so I am providing you the feedback. EEOC issued me the right to sue letter on [sic] late February. As I stated previously, the collateral damage would be high, so I made myself crystal clear that it is unnecessary to either made [sic] the case publicly or file a lawsuit against you. And yet I have seen nothing but the Patrol taking advantages of my statements. Chief, that is absolutely not okay. The way you and Maj Barba handled the case was strongly dissatisfying.

1. You owe me two months of 5% paychecks. Like I have mentioned, if it was my fault, I would own it and fix it, but it was not. I should not be paying for CSP lacking of communication and neglect at all. Maj Barba did not deducted [sic] the third month of my 5% after I submitted the email to him. It is still two months short as of right now.

2. I have recently had five surgeries on the same day that last [sic] for more than four hours to fix my eyes. I cried everyday for literally almost two years. It took me more than a year to forgive myself, and it took me a year and a half to forgive Maj Barba. The cost of the surgeries were not cheap either. You will never know what I have experienced after all the ridiculousness that I finally have the guts to tell Maj Barba that I do not hate him; I do not dislike him. When he calms down enough, I am okay to work with him. But he needs to remain calm in order to work with me or I would put him in the “do not work with group” with Deputy Chief Mark Savage.

3. Let alone the vehicle damages, the heartbreaks. The threats I received; the abusive treatments I received, etc. I can not [sic] even put a price tag on it. They are priceless. If I file a lawsuit against you how much can you afford to make me happy? What part of I do not have Stockholm Syndrome you do not understand? It confused me a lot on this topic. I refuse to work in/under or with your Port of Entry. The damages made by them were no less than raping or kidnapping on mentality level. The damages are irreparable and priceless. What are you expecting me to do here-after I got hurt mercilessly and then

forgive and forget? Allow me make [sic] myself clear: I will never forgive them. If you were in my shoe, would you tolerate those? 360 analysis right? It was on my refrigerator.

4. Since when "She is short as hell" became a hiring standard exactly? Did I eat your food to make me this short? I was a legitimate gymnast for a long time; I served in the military for a little more than six years; I am a biologist with actual work; I speak more than four languages fluently; my cousin is currently in business school to gain her MBA degree, so I borrowed her books to read all the text books of MBA; surprisingly I have yet heard [sic] a single person made the statement as "She is short as hell" except in your agency. Then you told me I am not good enough. As humble as I could possibly be, can you find me another 28 year old in your agency that is absolutely better than me from any possible aspects I could think of. I would love to learn from him/her. I am eager to learn from him/her. Don't you think your statement "not good enough" would make a huge impact on me? You are the Chief, all eyes on you. I paid my time when I learn; I studied so hard that I had bleeding nose and fell asleep in the morning shower; I was running around like there was no tomorrow just to learn, and then you told me I am not good enough. I honestly do not know what else I can do to learn more. Since I am not good enough according to you, can you find me a teacher to teach me one thing or two? The whole purpose to learn to become super good is never because I am super smart. With your endless rejections and insults from your people, I would only hope for the best when people like Deputy Chief Mark Savage made immoral and unethical statements to me; I would at least have the courage to let him know I do not like it.

5. What have I done wrong? You promoted the FTO who left me under the superload semi truck!!! You told me you were unaware of it? If you hate me that much, why did you even bother to use all my methodology from the first place, and then passive aggressively pushing me out of your agency? I tried to be as polite as I can, and then I got walked all over leading by you? What went wrong Chief? Am I the "pain in the ass" like your subordinates stated? If I do not stand up for myself, who else would anyways? If you feel the needs [sic] to disrespect a live human being that much, why did you pretend I am dead to you? Or maybe you already have? I do not even want to know. Would that make you feel better or happier? If that is the case, please feel free to dismiss my existence.

Thank you,
Yi Yu

61. On March 31, 2017 at 12:22 p.m., Complainant sent Chief Hernandez an email with the subject line, "Reminder: Administrative action needed." Complainant had developed the belief that an unknown CSP member had broken into her house and left a fingerprint on her refrigerator. In her email, Complainant wrote:

Good Afternoon Chief,

Due to State Human Resources Offices recommended me to contact the Patrol to resolve this issues. This is a reminder for you to take appropriate administrative actions for me. I can not [sic] ask you to do anything to you or other people, but at least for me, please make things right. Also, please explain the following:

1. Whose finger print [sic] was it on my refrigerator? Have I ever provided you any permission to have any individual break into my property without my consent?

2. Is there a particular reason why I heard things coming back to me from a leaking phone call and text messages?

3. Why do you feel appropriate [sic] to support the POE Director who threatened me in person?

4. What was the "protection order" all about?

5. By April 18, 2017, it will be two year mark for me got hit [sic] by the rock slides and snow packs. It has been more than two years for you to do absolutely nothing since I got left under the super load semi truck. When are you planning on resolve [sic] the issues exactly? Per your POE Director, she said she got nothing but time. Well, Chief, I do not. With that, please provide an exact time and date to resolve the issues as soon as possible. What make you think it is okay to gang up against me?

6. I understand you might or might not have the tendency to rationalize the misconduct from your agency. If you are planning on buying me out of your agency, please provide the price.

You owe me an official apology as well. I refuse to take the passive one from you previously.

Thank you,
Yi Yu

62. Complainant received a Level 2 (successful) performance rating for the period April 1, 2016 through March 31, 2017.

63. The CSP was reorganized in April 2017, and thereafter POE was no longer under the Motor Carrier Safety Section. Two consequences of this reorganization were that Major Barba was no longer in Complainant's chain of command, and Ms. Nixon became Complainant's appointing authority.

64. On April 7, 2017, Complainant sent Chief Hernandez an email in which she wrote:

Good morning,
Chief, this is the second reminder for you to make appropriate administrative action. Please be aware that closing the case does not go only into one way direction. You can not [sic] simply close the case without making any appropriate action due to neglect. I understand you are busy; however, pending more than two years of bypassing the issues is called neglect instead of lack of communication.

Thank you.

65. On April 9, 2017, Complainant sent Chief Hernandez an email in which she wrote:

Chief,
Please be aware according to you, you state as [sic] you have no concerns as far as Human Resources processes go. I would like you to have things done as soon as possible. By far I have sent you at least three emails and one phone message to communicate with you after I contacted with the State HR office. You have failed to reply [sic] them all. If should you feel the needs [sic] to buy me out of your agency, I accept check, money order, wire or direct

deposit. When you do so, please make sure the two months of 5% would be included as well. I am sure the HR office have [sic] my information. It is impossible to work at POE after the incidents with threats. CPT Hilferty failed me pretty good. For long period of time, I really thought he was joking. The man had tears in his eyes. I thought he cared. I have provided more than enough oppotunities [sic] for you and your fellow members to clear up all the miscommunications. Nobody cares means nobody cares; although Maj Barba did make a statement as he cares, I am not quite sure about that either. It is way too offensive. I have tried everything to make things right. Rember, [sic] I had picked CSP because I respect human lives too much that I do not wish to become a doctor. Seeing patients dying on the table would be too much to handle. And yet, the way the patrol handling things makes no difference than unplug [sic] a life support. When patients need to breath [sic], without the oxygen tank, what can they do? When people need help, and yet the 911 is malfunction [sic]; what can they do. I am not impressed at all by far. By the way, for your information, you have successfully pushed me out of my apartment due to fingerprint issue. It was your order, wasn't [sic]? I do not believe Maj Barba's rank is high enough to send out a protection order at all. Were you scared or were you cared [sic]? How should I receive this information? I am buying a house just to stay [sic] from it. Thanks.

66. On April 13, 2017, Complainant sent Chief Hernandez an email in which she wrote the following:

Chief,

Please beware [sic] this is your third reminder regarding making appropriate administrative actions. Allow me inform you what I see for more than two years time frame you have done nothing except the following:

You are permitting your fellow employee to left [sic] me under the superload semi truck with no apologies and inappropriate attitude;

You are permitting your fellow employees to threat [sic] me in person;

You are permitting your fellow employees to gang up against me;

You are permitting your fellow employees to isolate me;

You are permitting your fellow employees to make unreasonable, unethical, immoral decisions and offensive remarks; list goes on and on.

Under any circumstances the company culture somehow reflects the highest ranking individual's personal preference one way or another; in this case, it is you. Whether you have made the decisions based upon business reasons or political reasons, I am in no position to evaluate the value, the purpose, or anything beyond of your decisions; however, I do not believe it is necessary to me to send you a weekly Pavlov style email just to remind you [sic] the fact that you have yet done a thing right. More than two years, really?!

Chief, please do your job right when you feel like it ASAP. It is no longer a request anymore. I demand it. I am in absolutely no desire to negotiate with you on this topic. Also, I have noticed another interesting fact that you have been in this industry for roughly three decades. In other word [sic], when you first joined the force, I was not even an embryo. Therefore, based on your tremendous experiences, I do not believe you do not know how to solve the issues. I am sure when you became a Chief not just because you felt like it either. You are fully capable of making things happen. I do not accept neglect from you or your fellow members. Then again, I have absolutely nothing

personal against you by any means. It is all business. YOU OWE ME AN OFFICIAL APOLOGY.
Thank you.

67. On April 15, 2017, Complainant sent Chief Hernandez an email in which she wrote:

Chief,

This is your two week notice for you to make appropriate administrative actions. I am providing you enough time to notify the rest of the related supervisors. By April 18, 2017, it will be the two year mark for the rock slide incident. If you fixed the first incident correctly, the second incident would not occur to me. I was not supposed to be there that day. You are using one mistake to cover another, and then I got hurt over and over. Please be decisive and make appropriate administrative actions by April 30, 2017. You may either buy me out of your agency, or assign me to a different office. I would like to see your administrative actions take effect on May 1, 2017. When you do so, please also make sure the two months of my 5% pay checks directly deposit into my account. I do not recommend you to label your innocent fellow members as they do not [sic] even worth 5% of my pay checks. I refuse to work in your POE department in any form of [sic] manner. I did not sign [sic] the job to get threatened or get verbally attacked by supervisors after I got hurt from the job. Your POE management do [sic] not have an argument at all. If should you feel the needs [sic] to support them, it would make you look like an accessory as well. I live in Greeley, if you decide to kick me out of your agency, please disregard my information; otherwise, I would like the new office location located at approximately within one hour driving time.

Break,

CSP has the tendency to make the case sound like I have flashbacks due to previous life experience based on your Deputy Chief Mark Savage's statement. Do not try to mud [sic] the water and find your easy way out. His excuses do not have an argument in this case. Allow me make this clear: it has nothing to do with that. Please do not be rude. I am sure the purpose for him to carry a head on his shoulders is not to make him simply look taller either. Whether I am being short as hell or not is out of your domain as well. As far as damage control goes, you are very welcome Chief. Then again, I take check, money order, wire, or direct deposit in the event if you need to buy me out.

Thank you,
Yi Yu

68. On April 19, 2017, at 7:24 p.m., Complainant sent Chief Hernandez an email in which she wrote:

Chief,

It appears to me the supervisor has posted the May schedule today, but you and your teams have been extremely rude and disrespectful [sic] to me as a person and as an employee. It has been more than two years of neglect. I am not okay with it at all. I did everything I could to fix the issues, and you never

cared. It does feel like a gang raping. You are leading it and support all the nastyness [sic]. It is so rude. I am not okay with it.

69. Three hours later, Complainant sent a lengthy email message to Chief Hernandez, Deputy Chief Savage, Major Barba and Captain Hilferty, which she sent again on April 20, 2017, at 12:40 a.m., complaining about her treatment by each of those individuals.

70. On April 23, 2107, at 2:12 p.m., Complainant sent Chief Hernandez an email in which she wrote the following:

Chief,

Please beware [sic] the following:

1. By April 30, 2017, in the event if I do not receive the refund of 5% of my pay checks, I would take as [sic] in Chief's order, his members do not [sic] worth 5% of my pay checks. It is not even about the money. I was absolutely beyond disgusted by whoever's order that was. Just so you and I are on the same page, I refuse to pay for your members [sic] poor judgement [sic] and lack of ability to handle things properly. I would take the costs as sunk costs.

2. In the event if without any appropriate administrative actions by April 30, 2017, I would take as [sic] Chief of Colorado State Patrol allows his employee to leave me under the semi truck; Chief of Colorado State Patrol allows his employee to threaten me in person after I got hurt on the job; Chief of Colorado State Patrol allows his employee to not let me eat lunch during lunch hours; Chief of Colorado State Patrol allows his employees to get me hurt on my way to work by rockslide and snowpackes [sic] while I was not even supposed to be there; Chief of Colorado State Patrol does not respect his employee's life; Chief of Colorado State Patrol allows his employees to insult me and hurt me. Chief of Colorado State Patrol allows his employees to isolate me, to treat me differently, to many any inappropriate decisions on me to name a few.

3. I have never provided you any permissions to have anyone break into my apartment under any circumstances. And I have never provided you any permissions to have anyone cheating on my exam.

4. I have provided you more than two years of time frame to do any necessary work to make things right. By April 18, 2017, expiration date exceeded. You have failed as a Chief. I am being very polite to you and your fellow members; however, you and your fellow members treated me as I am already dead by now. It is extremely rude and unprofessional as a Chief.

5. In the event if you are unable to make things right, I am asking you to resign from your Chief position.

6. It is beyond offensive to work at your Port of Entry after I got hurt on the job, and then I got threatened in person. You support all of it.

7. Brought the case up to the State Human Resources office and the Governor's office has already reflected the fact that you have the tendency to rationalize the misconduct in your agency. Your employee has lost the confidence and trust in you as a Chief.

71. Later that day, Chief Scott Hernandez forwarded to Ms. Nixon the emails he received from Complainant on March 14, 23, 31 and April 7, 9, 13, 15, 19, 20, 23, 2017.

72. After forwarding Complainant's emails to Ms. Nixon, Chief Hernandez sent an email to Complainant, with a copy to Ms. Nixon, stating, "I am aware that your previously have

been ordered and are required to follow your chain of command. I am referring you back to Port of Entry Director Nixon, who is your appointing authority and is your appointing authority within your chain of command. I will be forwarding your emails and texts to Director Nixon.”

73. On April 28, 2017, Ft. Morgan District Supervisor April Ely gave Complainant a notice of paid administrative leave and a notice of a Rule 6-10 meeting for May 5, 2017 from Ms. Nixon. In the notice, Ms. Nixon stated, “I have received information that indicates the possible need to administer disciplinary action based on your continued communication with officers outside of your chain of command, which violates previous direction given to you to communicate within your chain of command.” The notice informed Complainant that she was being placed on paid administrative leave and scheduled a Rule 6-10 meeting for May 5, 2017. Complainant promptly told Ms. Ely that she had another appointment on May 5, 2017 and would not be attending the Rule 6-10 meeting.

74. On April 29, 2017, Complainant sent an email to Ms. Raiche, with copies to Lt. Col. Barry Bratt and Chief Hernandez, informing them that she denied the request for a Rule 6-10 meeting on May 5, 2017. She continued:

Port of Entry Director Kirsty [sic] Nixon threatened me in person after the incident happened back in January 2015. She stated as [sic] “Who do you think you are?” “Don’t burn bridges!” “You are not directing this!” Later on she also made the comments as [sic] whatever it takes, she will have me to stay at the port. Also, she asked one of the sergeants in the former Motor Carrier Branch how to have me stay at the port? The sergeant stated as [sic] “Discipline her asses!” Due to previously I have experienced two back to back life threatening incidents, I reported her through the chain-of-command. Also, I made myself crystal clear that I will make absolutely no contact with her to the supervisors, including the Chief. Therefore, I denied her meeting request due to I do not feel safe to make any form of contact with her. In her memorandum, I was informed either contact her or CDPS Human Resources office, so at this point, I am contacting with [sic] the CDPS Human Resources only for communications purposes.

I requested the Chief to make the appropriate administrative actions for me after the two incidents. One, I got left under the superload semi truck; two, I got hit on my way to work by the rockslides and snow packs while I was not supposed to be there that day. The FTO who left me under the supersolad [sic] semi truck got promoted after the incident; I got threatened by the POE Director Kirsty [sic] Nixon; Deputy Director Trish Aragon denied my off duty request which I got hit on my way to work by the rock slides and the snow packs; the Dumont District Supervisor Cynthia Jaques isolated me on the job, and she did not allow me eating lunch during the lunch hours until I demanded it. I got treated horribly by the POE management. When I reported through the chain-of-command, nobody cared. And then when I contacted with the Chief, he referred me back to the POE Director Kirsty [sic] Nixon. I strongly disagree with the Chief’s decision. POE Director Kirsty [sic] Nixon threatened me in person. I am not sure why she still have [sic] a job as of right now? I am not sure why did Chief want [sic] me to contact her either? She harassed me. The referral made by Chief was very immoral and unethical.

75. On May 1, 2017, Chief Hernandez sent Ms. Nixon several text messages that had been sent to him by Complainant, the content of which were in the same vein as the emails Complainant sent to Chief Hernandez.

76. On May 2, 2017, Ms. Nixon sent Complainant a second notice of a Rule 6-10 meeting scheduled for May 11, 2017.

77. The Rule 6-10 meeting was held on May 11, 2017. Ms. Nixon conducted the meeting, with Captain David Aldridge as her representative. Complainant was unaccompanied.

78. At the beginning of the Rule 6-10 meeting, Complainant refused to acknowledge Ms. Nixon or respond to her questions. Finally, in response to Ms. Nixon's request that Complainant state her chain of command, Complainant began a monologue reiterating her complaints about the manner in which she was treated by the POE and the CSP. Complainant did not allow Ms. Nixon to speak. After approximately twenty minutes, Ms. Nixon stated, "Office Yu, I am directing you to allow me to please speak," to which Complainant replied, "No, negative, negative. No. My answer is no. You are not allowed to be in this meeting . . ." Shortly thereafter, Complainant abruptly left the meeting.

79. On May 16, 2017, Ms. Nixon sent Complainant an email reminding Complainant that she had five business days after the Rule 6-10 meeting to provide Ms. Nixon with additional information. Complainant did not provide Ms. Nixon with any additional information.

80. After receiving Ms. Nixon's email, Complainant sent Captain Aldridge an email, in which she wrote:

Sir,

I would like to keep you informed as POE Director repeatedly harass [sic] me after I made myself crystal clear as she is not allowed to contact me in any form of [sic] manner due to she threatened me in person after the life threatening incident. The purpose for forwarding you her email is to ensure the patrol is on the same page since you were her representative at the meeting. I would go public as necessary with no hasitation [sic] in the event if she made unfair decisions. The patrol still owes me two months of my 5% paychecks. I would appreciate your assistance if you or the HR office could send me the results. In the event if the higher-ups decide to terminate me, I will be turning in my gears to the HR office at any time. Under any circumstances, I will absolutely not work at POE. Please do not send anything to my home address. I am in the middle of the moving process. POE director sent the letter to my home address before the meeting. I would take that as harassment as well. I can be reached at [phone number redacted].

Thank you.

81. On May 26, 2017, Ms. Nixon sent Complainant a notice of disciplinary action terminating Complainant's employment effective May 31, 2017. In the notice, Ms. Nixon reviewed Complainant's conduct during the Rule 6-10 meeting, reviewed Complainant's prior corrective and disciplinary actions concerning Complainant's refusal to follow her chain of command in her communications, reviewed Complainant's conduct after February 16, 2017, and concluded that Complainant violated CSP General Orders 2, 3, 6 and 7 (see paragraphs 82-85, below). Ms. Nixon also stated that, in making her determination that disciplinary action was appropriate, she considered the information Complainant provided, as well as the nature, extent, seriousness and

effect of Complainant's conduct, the type and frequency of previously unsatisfactory conduct, the period of time since a prior offense, performance evaluations and mitigating circumstances.

82. General Order 2 provides that, "Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements."

83. General Order 3 provides that, "Members will be truthful and complete in their accounts and reports."

84. General Order 6 provides that, "Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession."

85. General Order 7 provides that, "Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect."

86. Complainant timely appealed her termination to the Board.

DISCUSSION

BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, and generally includes:

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

In this *de novo* disciplinary proceeding, Respondent has the burden of proving by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

Complainant also claims that she was discriminated against on the basis of disability in violation of the Colorado Anti-Discrimination Act. Complainant bears the burden of proof for her unlawful discrimination claim.

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

HEARING ISSUES

I. Complainant Committed the Acts for Which She was Disciplined

Respondent terminated Complainant's employment because of her purported persistent failure to follow her chain of command, her disrespectful, disruptive and insubordinate conduct towards her supervisors, and her behavior during the Rule 6-10 meeting held on May 11, 2017.

Complainant's Violations of the Chain of Command

On February 4, 2015, Major Barba admonished Complainant for contacting him directly and not following the chain of command. In December 2015, Complainant petitioned Chief Hernandez for a transfer, again violating her chain of command. Later that month, Complainant complained about her schedule to Chief Hernandez, Lt. Col. Leffler, Lt. Col. Savage, and Major Barba. Complainant was given a corrective action on March 3, 2016 for not following the chain of command on January 12, 2016 by sending a request to Ms. Jaques, Major Barba, Ms. Nixon, and Ms. Aragon, among other things. The corrective action directed Complainant to "follow the proper channels of the chain of command in all communications both written and verbal," among other things. Less than three hours after receiving the March 3, 2016 corrective action directing her to follow the chain of command, Complainant violated that directive by sending an email to Chief Hernandez and Lt. Col. Leffler, followed by phone calls to Chief Hernandez and Lt. Col. Savage. On May 11, 2016, Major Barba gave Complainant a disciplinary action for violating the March 3, 2016 corrective action almost immediately after receiving it by emailing and telephoning CSP command staff. Between March 4, 2017 and April 29, 2017, Complainant sent no less than twelve emails and several texts to Chief Hernandez and others in violation of the chain of command. Complainant's persistent violation of the chain of command is well-documented.

Complainant argues that the POE's and the CSP's failure to address the two incidents in 2015 that Complainant characterized as life-threatening to Complainant's satisfaction justified Complainant's violation of the chain of command. Complainant viewed her supervisors' failures to "do the right thing" and make amends for the superload and the rock slide incidents as unethical, immoral, and as grounds for Complainant to bypass these individuals and contact the CSP high command, including CSP Chief Hernandez, on a persistent basis.

Complainant's dissatisfaction with the manner in which the POE and CSP handled these matters provides no legitimate justification for Complainant's continual violation of the chain of command. The POE and the CSP had a mechanism in place to address POE officer complaints: the grievance process. Complainant did not fully avail herself of that process, and thereby abandoned the issues she raised in the one grievance she submitted. The CSP did initiate an Internal Affairs investigation into the superload incident, and informed Complainant that the investigation was concluded, that appropriate actions had been taken, and the matter was closed. Complainant was not satisfied, and continued to complain about that incident and the May 2015 rock slide, without justification. At the hearing of this matter, Complainant was unable to cite to any statute, department rule or policy, or any Board rule that would authorize her to violate department policies and supervisory directives simply because she disagreed with her supervisor's and her appointing authority's decisions.

Respondent established by a preponderance of the evidence that Complainant persistently violated the chain of command, which was one category of actions for which she was disciplined. Complainant failed to establish that the acts for which she was disciplined were somehow justified.

Complainant's Disrespectful, Disruptive, Insubordinate Conduct

Complainant received a Level 2 (successful) performance rating for the period September 29, 2014 through March 31, 2015. However, in the narrative portion of the evaluation, it was noted that "your interpersonal skills with co-workers has been perceived as disrespectful at times. Improving the way you respond to others will improve your working relationship with your co-workers."

Complainant received the March 3, 2016 corrective action in part due to her disrespectful, disruptive and insubordinate conduct towards her immediate supervisor, Ms. Jaques, on at least three occasions between January 14, 2016 and March 2, 2016. The corrective action directed Complainant to perform the duties assigned to her, to follow her supervisor's directions and to speak to and treat everyone with respect.

During the March 31, 2016, Rule 6-10 meeting with Major Barba and Ms. Nixon, Complainant was uncooperative and disruptive and refused to address the incidents giving rise to the Rule 6-10 meeting.

Complainant received a Level 1 (needs improvement) performance rating for the period April 1, 2015 through March 31, 2016, and the narrative portion of the evaluation documented several instances of Complainant's disrespectful and disruptive written and verbal communication with supervisors. Her supervisor concluded that "Your overall communication, especially with supervision, is dictating, disrespectful and unprofessional. Your communication fails to build trust and respect with your co-workers and supervision."

As a result of her Level 1 performance rating, Complainant was given a PIP that directed Complainant as follows:

1. Communication must not be disruptive in the work place.
2. Communication both verbal and written must be respectful.
3. Communicate any other work related tasks outside your scheduled duties to supervision for assigned duty time to complete those tasks.
4. Perform your assigned duties and follow the directions of your immediate supervisor.
5. Follow the chain of command.
6. Cooperate and work toward the common goals of the Colorado State Patrol.
7. Conduct yourself to reflect the highest degree of professionalism and integrity to ensure that every level member is treated with respect, courtesy and fairness.

The content of the numerous emails and texts Complainant sent to Chief Hernandez, among others, between March 14, 2017 and April 29, 2017, are illustrative of Complainant's disrespectful and insubordinate attitude.

Complainant's conduct during the Rule 6-10 meeting with Ms. Nixon on May 11, 2017 was highly disrespectful and insubordinate. Complainant did not look at Ms. Nixon, refused to answer any of Ms. Nixon's questions, told Ms. Nixon that she could not speak, and abruptly left the

meeting. Complainant at various times accused Ms. Nixon of threatening her, and of lacking ethical and moral character.

Finally, Complainant's persistent refusal to follow her chain of command, despite multiple verbal warnings, corrective actions, and disciplinary actions, was highly insubordinate.

Complainant's position is that the actions of her POE and CSP superiors justified or excused her conduct. Complainant offered no evidence, however, to support her position and excuse her inappropriate behavior.

Respondent has established by a preponderance of the evidence that Complainant committed the acts for which she was disciplined.

II. The Appointing Authority's Action was not Arbitrary, Capricious, or Contrary to Rule or Law

A. Respondent's decision to impose discipline was not arbitrary or capricious

In determining whether an agency's decision is arbitrary or capricious, the ALJ on behalf of the Board must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner 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). The ALJ on behalf of the Board must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colo. Dep't. of Social Svcs.*, 919 P.2d 942, 947 (Colo. App. 1996).

In determining whether the appointing authority acted in an arbitrary or capricious manner, or contrary to rule or law, the Board's analysis is generally divided into two separate considerations: first, whether the decision to discipline is arbitrary and capricious or contrary to rule or law, and second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

1. POE Director Nixon used reasonable diligence and care to procure such evidence as she was by law authorized to consider in exercising the discretion vested in her

Prior to deciding to terminate Complainant's employment, Ms. Nixon reviewed Complainant's corrective and disciplinary history, reviewed all available documents relating to Complainant's failure to follow her chain of command in her communications with POE and CSP staff, as well as documents relating to her insubordinate and disrespectful communications with her superiors. Ms. Nixon provided Complainant the opportunity to provide information about the allegations giving rise to the Rule 6-10 meeting. Ms. Nixon also gave Complainant an opportunity to provide additional information after the Rule 6-10 meeting. In short, Ms. Nixon appropriately gathered all available evidence that should have been considered prior to making her decision about disciplining Complainant.

2. POE Director Nixon gave candid and honest consideration of the evidence before her on which she was authorized to act in exercising her discretion

At hearing, Respondent established by a preponderance of the evidence that Ms. Nixon honestly and candidly considered the evidence she gathered in making her disciplinary decision. Complainant's persistent flouting of her chain of command, and her insubordinate and disrespectful communication with her superior officers within the POE and the CSP, are voluminously documented. No evidence was offered at the hearing by which Ms. Nixon could have concluded that Complainant's conduct was anything other than inappropriately disrespectful, disruptive, insubordinate, and in violation of multiple directives that she follow the chain of command, and thus deserving of discipline.

3. POE Director Nixon's conclusions after considering the evidence were reasonable and justified

After considering the evidence before her, Ms. Nixon concluded that Complainant's communications in violation of General Orders 2, 3, 6 and 7, warranted the imposition of discipline, and that the appropriate discipline was termination of Complainant's employment. Consideration of the evidence leads to no other conclusion. Despite repeated directives, and corrective and disciplinary actions, Complainant consistently and persistently communicated outside her chain of command, and continued to communicate in an offensive, rude, and insubordinate manner. Her emails and texts to Chief Hernandez are models of insubordination and impropriety. Her conduct during the Rule 6-10 meeting, when she refused to acknowledge or address her appointing authority, and unilaterally declared that Ms. Nixon was not to communicate with her, is worthy of the severest discipline. No evidence was available to Ms. Nixon that would allow her to even consider the possibility that a less severe disciplinary action would effectively serve to correct Complainant's egregious conduct. Ms. Nixon had no reasonable choice other than to terminate Complainant's employment.

B. Respondent's action was not contrary to rule or law

Complainant introduced no evidence at the hearing that Ms. Nixon's actions violated any Board Rule or any applicable law.

Ms. Nixon complied with Board Rule 6-9 by basing her disciplinary decision on the nature, extent, seriousness, and effect of Complainant's conduct, as well as the type and frequency of previous unsatisfactory conduct, Complainant's prior corrective and disciplinary actions, the period of time that had elapsed since a prior offense, previous performance evaluations and mitigating circumstances.

The Rule 6-10 meeting met all the requirements of Board Rule 6-10. Complainant was given the opportunity to provide additional information for consideration, consistent with Rule 6-10. Complainant was given a full opportunity to respond to the allegations of misconduct that gave rise to the Rule 6-10 meeting.

The discipline imposed was in accord with Board Rule 6-12, which outlines some reasons for discipline to include willful misconduct or violation of department rules that affected Complainant's ability to perform her job.

III. The Discipline Imposed Was Within the Range of Reasonable Alternatives

Board Rule 6-9 requires that an appointing authority weigh the facts of the incident giving rise to the discipline as well as an employee's information and performance in making a decision on the level of discipline to impose. See Board Rule 6-9 ("The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances"). Respondent established at the hearing that Ms. Nixon carefully considered all these factors in arriving at her decision to terminate Complainant's employment.

The discipline imposed by Respondent was within the range of reasonable alternatives available to it. Complainant had received a significant number of verbal warnings, and corrective and disciplinary actions, addressing her inappropriate violation of the chain of command, and her disrespectful, disruptive and insubordinate communication with her supervisors and co-workers. She had been on notice for a long time that her conduct was unacceptable; nevertheless, she persisted. Progressive discipline had not improved Complainant's behavior. Ms. Nixon considered lesser discipline, but had no reason to believe that Complainant would be willing or able to conform her conduct to appropriate expectations. Given Complainant's inability or unwillingness to follow her chain of command, to treat her supervisors with respect, to refrain from being disruptive and insubordinate despite multiple prior warnings, directives, and corrective and disciplinary actions, lesser forms of discipline would have been futile.

Under these circumstances, termination of employment was within the range of reasonable alternatives.

IV. Respondent Did Not Discriminate Against Complainant on the Basis of Disability

Complainant alleges that Respondent discriminated against her because Respondent "regarded her" as having a disability.

The Colorado Anti-Discrimination Act ("CADA") provides that it is a "discriminatory or unfair employment practice ... [f]or an employer ... to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability...." § 24-34-402(1)(a), C.R.S.

The Colorado Civil Rights Commission ("CCRC") has promulgated rules to implement CADA, in which it interprets CADA as being "substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as amended...." CCRC Rule 60.1(A), 3 Code of Colorado Regulations (CCR) 708-1.¹ Therefore, interpretations of CADA "shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." CCRC Rule 10.14, 3 CCR 708-1. Furthermore, Board Rule 9-4, 4 CCR 801, provides that "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

¹ The Americans with Disabilities Act was amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which went into effect on January 1, 2009. The statute will be referred to as either the ADA or the ADAAA herein, depending on the context.

The ADAAA prohibits discrimination “against a qualified individual on the basis of disability.” 42 U.S.C. § 12112(a). To establish a prima facie case of discrimination under the ADAAA, a plaintiff must show that (1) she is disabled as defined under the ADAAA; (2) she is qualified, with or without reasonable accommodation by the employer, to perform the essential functions of the job; and (3) she was discriminated against because of her disability. See *Hawkins v. Schwan’s Home Serv., Inc.*, 778 F.3d 877, 883 (10th Cir. 2015).

Under the ADAAA’s amended definition, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment” 42 U.S.C. § 12102(1).

In addition, the ADAAA defines “being regarded as having such an impairment” as follows:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*.

Id. § 12102(3)(A)(emphasis added).

A plaintiff bringing a “regarded as” claim “needs to plead and prove only that she was regarded as having a physical or mental impairment.” Under the ADAAA, for a plaintiff alleging disability discrimination to show that the employer regarded her as having an impairment, the plaintiff must show that (1) she has an actual or perceived impairment, (2) that impairment is neither transitory nor minor, and (3) the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action. *Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016)

CADA adopts the definition of disability set forth in the ADAAA. § 24-34-301(2.5), C.R.S. The ADAAA defines the term disability as “a physical or mental impairment that substantially limits one or more major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A), (B), and (C). Accordingly, to establish that she was disabled within the meaning of the ADAAA, Complainant must show that (1) she has a physical or mental impairment (2) that substantially limits (3) one or more major life activities. *Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 495 (10th Cir. 2000).

The only evidence Complainant offered at hearing to support her contention that Respondent regarded her as having a physical or mental impairment was the workers’ compensation physician’s directive that Complainant undergo a psychological evaluation to determine if she was fit to return to duty after the superload incident. However, the evaluation cleared Complainant to return to duty with no restrictions, and Ms. Nixon promptly directed her to return to work. Rather than regarding her as having a physical or mental impairment, Respondent considered her entirely fit for unrestricted duty. Accordingly, Respondent established by a preponderance of the evidence that Complainant was not regarded as having a physical or mental impairment. Because Complainant did not establish a *prima facie* claim of disability discrimination, her disability discrimination claim fails.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Respondent did not discriminate against Complainant on the basis of disability in violation of the Colorado Anti-Discrimination Act.

ORDER

Respondent's disciplinary action is **affirmed**. Complainant's appeal is **dismissed with prejudice**.

Dated this 22nd day
of February 2018,
at Denver, Colorado



Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of February 2018, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Yi Yu
2240 12th Street Road
Greeley, CO 80631
Yuyi1446@yahoo.com

Stacy Worthington
Senior Assistant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Stacy.Worthington@coag.gov



NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.